

# Drug Truce

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*After enjoying nearly universal support from elected officials for decades, the war on drugs is under attack. Prominent politicians from across the ideological spectrum have started to call for an “end to the war on drugs.” New Jersey’s Republican Governor Chris Christie pledged to “end the failed war on drugs” in his second inaugural address. President Barack Obama’s first drug czar went so far as to claim that the administration had already “certainly ended the drug war.” But what does an “end to the war on drugs” really mean? Although some people might equate it with legalization, both Christie and Obama oppose legalizing even marijuana.*

*Scholars have critiqued specific components of the drug war since it began. There is also a rich literature debating the relative merits of legalization and prohibition. But the question of what separates the drug war from non-war prohibition has been almost completely overlooked. This Article aims to help fill this gap by plotting out a drug war exit strategy.*

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## I. INTRODUCTION

The war on drugs is over, at least according to President Barack Obama's first "Drug Czar,"<sup>1</sup> Gil Kerlikowske. In his first interview after taking office in 2009, Kerlikowske said he thought it was time to retire the drug war concept in favor of a public health approach.<sup>2</sup> In 2011, Kerlikowske described his outlook in even bolder terms, telling a reporter, "We certainly ended the drug war now almost two years ago."<sup>3</sup> Kerlikowske's successor, Michael Botticelli, has taken a similar tack, saying in late 2015 that the drug war "has been all wrong" and expressing his aversion to being referred to as drug czar "[b]ecause I think it connotes this old 'war on drugs' focus to the work that we do."<sup>4</sup>

Despite Kerlikowske's declaration that we have achieved peace already, the federal drug laws and policies in place today are not all that much different than they were twenty or thirty years ago.<sup>5</sup> President Obama's National Drug Control Budgets have largely mirrored those of his predecessors, at least in terms of the overall spending allocations. President George W. Bush's first drug control budget in 2002 put 45.6% toward treatment and prevention programs with 54.4% going to supply reduction measures like domestic law

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<sup>1</sup> Although the official title is Director of the Office of National Drug Control Policy, the position is more commonly referred to as "Drug Czar." DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 280 (3d ed. 1999).

<sup>2</sup> Gary Fields, *White House Calls for End to 'War on Drugs,'* WALL STREET J. (May 14, 2009), <http://www.wsj.com/articles/SB124225891527617397> [<https://perma.cc/Q27F-DJ69>].

<sup>3</sup> Jacob Sullum, *End 'War on Drugs' by Legalizing Drugs,* CHI. SUN-TIMES, June 15, 2011, at C32 (quoting Gil Kerlikowske).

<sup>4</sup> Scott Pelley, *A New Direction on Drugs,* CBS NEWS (Dec. 13, 2015), <http://www.cbsnews.com/news/60-minutes-a-new-direction-on-drugs/> [<https://perma.cc/36FT-JU28>].

<sup>5</sup> Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?,* in 42 *CRIME AND JUSTICE IN AMERICA, 1975–2025*, at 75, 76 (Michael Tonry ed., 2013) ("[T]here has been scarcely any serious policy change beyond a very recent increase in [drug] treatment funding . . .").

enforcement and interdiction.<sup>6</sup> The Obama administration's 2015 budget allocated 43.9% of federal drug control dollars to demand reduction and 56.1% to supply reduction.<sup>7</sup> Meanwhile, federal criminal drug statutes are more or less exactly as they were on the day President Obama took office, with one notable exception—a reduction in the disparity between crack and powder cocaine sentences from 100-1 to 18-to-1 in the Fair Sentencing Act of 2010.<sup>8</sup>

With drug laws and budgets largely unchanged under Obama, Kerlikowske's claim to have "certainly ended the drug war" in 2009<sup>9</sup> evokes of the story of Hiroo Onoda, the Japanese soldier from World War II who spent nearly thirty years in the Philippine jungles after 1945 convinced that the war was still being waged.<sup>10</sup> Only in this case, the drug war marches on while its ostensible commanders labor alone in the belief that hostilities have come to an end.

But while the drug war is not *yet* over, there is a rapidly growing political consensus that the war on drugs *should* end. In his second inaugural address, in 2014, New Jersey's Republican Governor Chris Christie declared: "We will end the failed war on drugs that believes that incarceration is the cure of every

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<sup>6</sup>THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: FY 2009 BUDGET SUMMARY 13 (Feb. 2008), [http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy09budget\\_0.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy09budget_0.pdf) [<https://perma.cc/GTE4-LNTU>].

<sup>7</sup>EXEC. OFFICE OF THE PRESIDENT, FY 2016 BUDGET AND PERFORMANCE SUMMARY: COMPANION TO THE NATIONAL DRUG CONTROL STRATEGY 21 (Nov. 2015), [https://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy\\_2016\\_budget\\_summary.pdf#page=22](https://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy_2016_budget_summary.pdf#page=22) [<https://perma.cc/362M-WK45>]. These numbers may actually overstate the amount of money Obama's budget puts toward demand reduction relative to Bush's. This is because the federal drug control "[b]udget experienced a significant restructuring in FY2012" in which the Office of National Drug Control Policy "reviewed all federal programs with a 'drug control nexus'" and added nineteen programs or agencies to the federal drug budget. LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R41535, REAUTHORIZING THE OFFICE OF NATIONAL DRUG CONTROL POLICY: ISSUES FOR CONSIDERATION 5 (2014). Under the restructuring, the demand reduction budget line nearly doubled, with a more modest increase to the supply reduction line. EXEC. OFFICE OF THE PRESIDENT, FY 2012 BUDGET AND PERFORMANCE SUMMARY: COMPANION TO THE NATIONAL DRUG CONTROL STRATEGY 7 (Apr. 2011), [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/FY2012-Budget-and-Performance-Summary-April-2011.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/FY2012-Budget-and-Performance-Summary-April-2011.pdf) [<https://perma.cc/PS9P-AJXZ>]. As a result, while the previous budget structure would have had 36.7% of the drug control budget going to demand reduction, *id.*, the revised budget structure had demand reduction accounting for 40.7% of the budget, *id.* at 19. This difference was not due to changes in federal spending but to changes in which programs are counted when calculating the drug control budget. *See id.* at 5–7.

<sup>8</sup>Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.); *see also* 21 U.S.C. § 841(b) (2012).

<sup>9</sup>Sullum, *supra* note 3, at C32 (quoting Gil Kerlikowske).

<sup>10</sup>HIROO ONODA, NO SURRENDER: MY THIRTY-YEAR WAR 11–14 (Charles S. Terry trans., 1st ed. 1974).

ill caused by drug abuse.”<sup>11</sup> A few months later, Republican Kentucky Senator Rand Paul said he will “do everything to end the war on drugs.”<sup>12</sup> On the left, New Jersey Senator Cory Booker has called the war on drugs a “tremendous failure.”<sup>13</sup> And California Lieutenant Governor Gavin Newsom’s campaign website features an issues page that begins: “The war on drugs has failed.”<sup>14</sup> With so many elected officials loudly abandoning the drug war, it is hard to believe that as recently as 2008, former Virginia Senator Jim Webb was lamenting the fact that “to be viewed as ‘soft on crime’ is one of the surest career-killers in American politics.”<sup>15</sup>

While interest in “ending the drug war” is undeniable, it is less clear what, exactly, that means or how the goal can be achieved.

Does an end to the drug war mean the legalization of some or even all drugs? Or, is it possible to end the war against drugs while retaining drug prohibition? Certainly, Chris Christie, Gil Kerlikowske, and Michael Botticelli have to believe that it is, since all three remain firmly opposed to legalizing marijuana, let alone other drugs.<sup>16</sup> Indeed, during his 2016 presidential campaign, Christie said that if he were elected President he would try and shutdown state marijuana legalization laws.<sup>17</sup> But if “ending the drug war” does not mean “legalization,” how should we define it? What legal and policy changes would need to occur for us to say that the drug war has truly come to an end?

Thinking about these questions, it does not take long to realize that there is no bright line dividing drug war from drug truce. If you were to ask ten drug war opponents to describe what the drug war is, you would probably get ten different answers. Unlike, say, social security or the Affordable Care Act, the drug war is more a philosophy than it is a readily identifiable set of laws. The drug war manifests itself in the form of high arrest rates, mandatory minimum sentencing laws, the militarization of the police, disproportionate impacts on

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<sup>11</sup> Radley Balko, *Christie: ‘We Will End the Failed War on Drugs,’* WASH. POST (Jan. 21, 2014) (quoting Chris Christie), <https://www.washingtonpost.com/news/opinions/wp/2014/01/21/christie-we-will-end-the-failed-war-on-drugs/> [<https://perma.cc/D3FD-ZYQL>].

<sup>12</sup> Jacob Sullum, *Rand Paul Last Week: ‘I Want to End the War on Drugs,’* REASON: HIT & RUN BLOG (Nov. 18, 2014) (quoting Rand Paul), <http://reason.com/blog/2014/11/18/rand-paul-last-week-i-want-to-end-the-wa> [<https://perma.cc/4M6Y-FAFP>].

<sup>13</sup> Mollie Reilly, *Cory Booker Condemns Drug War as ‘Tremendous Failure,’* HUFFINGTON POST (Aug. 19, 2013) (quoting Cory Booker), [http://www.huffingtonpost.com/2013/08/18/cory-booker-drug-war\\_n\\_3777132.html](http://www.huffingtonpost.com/2013/08/18/cory-booker-drug-war_n_3777132.html) [<https://perma.cc/WJ9C-WEZ8>].

<sup>14</sup> *Rethinking Our Drug Policy*, GAVIN NEWSOM FOR GOVERNOR 2018, <http://www.gavinnewsom.com/issues/drugpolicy/> [<https://perma.cc/ST7T-FAXT>].

<sup>15</sup> JIM WEBB, A TIME TO FIGHT: RECLAIMING A FAIR AND JUST AMERICA 216 (2008).

<sup>16</sup> Eliza Collins, *Chris Christie Doubles Down on Marijuana Comments*, POLITICO (July 29, 2015), <http://www.politico.com/story/2015/07/chris-christie-enforce-marijuana-illegal-2016-120769> [<https://perma.cc/2RVR-LLZ5>]; Fields, *supra* note 2; Pelley, *supra* note 4.

<sup>17</sup> Collins, *supra* note 16.

people of color, and so on. But of course, *any* system of prohibition is going to include at least some arrests and incarcerations.

Complicating matters further, even if we had a clear vision of what it means to “end the drug war,” it would take a lot more than an act of Congress to make it so. Domestic drug law enforcement is highly decentralized. The vast majority of drug enforcement decisions take place at the local level under state law.<sup>18</sup> As a result, the federal government’s influence over drug policy is surprisingly limited, as evidenced by the failure of its decade-plus effort to block the implementation of state-level medical marijuana legalization.<sup>19</sup> On the one hand, this dynamic has done as much as anything to help to fuel reform, with states leading the way on legalizing marijuana, repealing mandatory minimum drug sentencing laws, and increasing the use of deferred-prosecution in drug cases.<sup>20</sup> On the other hand, it makes it that much harder to replace the drug war with a new national policy. Consider this: If federal drug officials were to set a goal like cutting drug arrests in half nationwide, they would be almost entirely dependent on local officials to achieve it.

This Article examines how to begin defining a drug truce and what sorts of changes in law and policy might be required to move toward it. In contrast to the well-worn debate about legalization versus prohibition or focused inquiries into specific drug war-era policies like mandatory minimum sentencing laws, relatively little attention has been paid to these broad questions. My goal here is not to advocate for a specific set of policy proposals or address every aspect of the drug war. Instead, I focus on identifying the qualities that differentiate the modern domestic drug war<sup>21</sup> from standard drug prohibition. I proceed from the premise that, with the exception of marijuana where legalization looks increasingly inevitable, a postwar drug policy will retain drug prohibition. The challenge for the next decade of drug policy will be to more clearly identify the line that separates the drug war and non-war prohibition and to figure out how to get to the other side.

The Article proceeds in three Parts. Part I provides a brief chronological history of the war on drugs. As the discussion will show, the drug war cannot be traced to a single policy development or moment in time. Instead, it

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<sup>18</sup> *E.g.*, Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1036–37 (2013).

<sup>19</sup> See Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, CATO INST. POL’Y ANALYSIS, Dec. 12, 2012, at 19–21.

<sup>20</sup> See generally RAM SUBRAMANIAN & REBECCA MORENO, VERA INST. OF JUSTICE, DRUG WAR DÉTENTE? A REVIEW OF STATE-LEVEL DRUG LAW REFORM, 2009–2013 (Apr. 2014), <http://www.vera.org/sites/default/files/resources/downloads/state-drug-law-reform-review-2009-2013.pdf> [<https://perma.cc/U96M-JG72>] (providing an overview of state-level drug policy reforms since 2009).

<sup>21</sup> This Article does not address international drug control. For a recent treatment of the global war on drugs, see, for example, LSE EXPERT GRP. ON THE ECON. OF DRUG POLICY, ENDING THE DRUG WARS (May 2014), <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/LSE-IDEAS-DRUGS-REPORT-FINAL-WEB01.pdf> [<https://perma.cc/7AW9-5CKN>].

matured over three decades, turning from a rallying cry in the 1970s to an organizing principle for nearly every drug law and enforcement policy in the 1980s and 1990s. Part II builds on this history toward a definition of the war on drugs. At first glance, disentangling the drug war from drug prohibition can seem hopeless. Though I acknowledge the line between the drug war and non-war prohibition is incapable of precise demarcation, I highlight four characteristics that separate the two: ideology, arrest rates, incarceration rates, and racial disparity. Part III, the core of the Article, looks at what sorts of changes to ideology, law, and policy will be needed to move toward an end to the war on drugs. Because drug enforcement is incredibly decentralized, with state and local actors responsible for the bulk of drug enforcement, ending the drug war is much easier said than done. With this in mind, I examine the possibilities and challenges for achieving a drug truce when it comes to arrests, incarceration, and racial disparity. I also propose three principles to guide drug policy in the postwar era. Finally, Part IV concludes.

## II. A BRIEF HISTORY OF THE DRUG WAR

The war on drugs is one of the most familiar public policy ideas of the past four decades<sup>22</sup> but it is also one of the most difficult to define.<sup>23</sup> The guiding tenets of the drug war strategy have been the vision of a “drug free” society and the belief that vigorous enforcement of uncompromising criminal justice measures is the most effective method for realizing it.<sup>24</sup> This philosophy has manifested itself in a focus on supply-side initiatives, on the theory that these efforts will suppress the market for drugs. Policies directly aimed at demand reduction have largely followed a similar rationale by addressing drug use and addiction problems primarily within the criminal justice system.

This sort of description still does not tell us much about what differentiates the drug war from prewar prohibition, however. After all, laws criminalizing drug possession and distribution predate the modern war on drugs by at least half a century.<sup>25</sup> Indeed, there is not even universal agreement about when the

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<sup>22</sup> *E.g.*, ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS 72 (2009) (“[T]he war on drugs resonates at the polls, or in negotiations with Congress, or in claims for public attention.”).

<sup>23</sup> *E.g.*, Nora V. Demleitner, “*Collateral Damage*”: *No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1029 (2002) (“[T]he ‘wars’ on drugs and terrorism appear the most amorphous and ambiguous of all . . .”).

<sup>24</sup> DAVID NUTT, DRUGS WITHOUT THE HOT AIR 268 (2012) (“What Nixon did was take this moralising approach to drugs—that they were inherently evil, and that our aim should be a ‘drug-free world’—and instigate a highly-combative set of policies in order to achieve it.”).

<sup>25</sup> *See generally* Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 CATH. U. L. REV. 586 (1973) (recounting the history of federal drug laws).

war began. Though federal drug prohibition has existed for nearly a century,<sup>26</sup> it was not until forty-five years ago that President Richard Nixon used the phrase “war on drugs” to describe America’s drug strategy.<sup>27</sup> There is a debate, however, about whether to mark the start date for the drug war at Nixon’s statement or by some later development.<sup>28</sup>

Those who believe it is a mistake to label Nixon the author of the modern war on drugs point out that federal drug funding was heavily weighted toward demand reduction during his administration.<sup>29</sup> In the same speech where he described drug abuse as “public enemy number one,” Nixon also proposed a federal drug budget that allocated \$105 million of \$155 million to treatment and rehabilitation.<sup>30</sup> As Michael Massing argued in his book, *The Fix*, although Nixon “had declared war on drugs,” he made “treatment his principal weapon.”<sup>31</sup> Noted drug and alcohol historian David T. Courtwright has even referred to 1971 to 1973 as a “therapeutic golden age”<sup>32</sup> for U.S. drug policy.

Progressive federal drug policy reforms in the early 1970s were not limited to drug treatment. Even as “Nixon’s legislative message gave rhetorical priority to law enforcement,”<sup>33</sup> strict federal mandatory minimum drug penalties that had been enacted in the 1950s<sup>34</sup> were repealed under his

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<sup>26</sup>Federal prohibition of opiates and coca compounds dates back to the Harrison Act of 1914 while the federal marijuana prohibition began in 1937 with the Marihuana Tax Act. *See id.* at 593, 600.

<sup>27</sup>Sources are not in accord even as to the date of Nixon’s declaration. *Compare Timeline: America’s War on Drugs*, NPR (Apr. 2, 2007), <http://www.npr.org/templates/story/story.php?storyId=9252490> [<https://perma.cc/56AG-LVS9>] (identifying June 1971 as the date “Nixon officially declares a ‘war on drugs,’ identifying drug abuse as ‘public enemy No. 1’”), *with* WHITFORD & YATES, *supra* note 22, at 42 (“The first public use of the term ‘war on drugs’ by a president occurred in a speech delivered by Nixon in Laredo, Texas, on September 22, 1972.”).

<sup>28</sup>*Compare* Conor Friedersdorf, *The War on Drugs Turns 40*, ATLANTIC (June 15, 2011), <http://www.theatlantic.com/politics/archive/2011/06/the-war-on-drugs-turns-40/240472/> [<https://perma.cc/GJ4L-SBMA>] (marking 1971 as the start of the war on drugs), *with* RYAN S. KING, THE SENTENCING PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES 2 (May 2008), <http://www.sentencingproject.org/publications/disparity-by-geography-the-war-on-drugs-in-americas-cities/> [<https://perma.cc/XP88-REZU>] (describing 1980 as the “inception of the ‘war on drugs’”).

<sup>29</sup>MICHAEL MASSING, *THE FIX* 273 (1998) (arguing for a return to the “67/33 demand/supply split” in Nixon’s drug budgets).

<sup>30</sup>*Id.* at 112.

<sup>31</sup>*Id.*

<sup>32</sup>DAVID T. COURTWRIGHT, *NO RIGHT TURN: CONSERVATIVE POLITICS IN A LIBERAL AMERICA* 83 (2010).

<sup>33</sup>*Id.* at 81.

<sup>34</sup>*See* RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 206–12 (1974) (describing the passage of federal mandatory minimum drug sentencing provisions in the 1950s).

watch.<sup>35</sup> Interestingly, among the legislators who spoke in favor of eliminating mandatory minimum drug sentences was then-Congressman George H.W. Bush, who argued that the change would “result in better justice and more appropriate sentences.”<sup>36</sup>

On the other hand, the law that continues to serve as the foundation for federal drug policy was signed into law by Nixon. The Comprehensive Drug Abuse Prevention and Control Act of 1970—the same bill that repealed mandatory minimum sentences—also instituted a comprehensive regulatory scheme for federal drug control in the form of the Controlled Substances Act.<sup>37</sup> In the decades following the Harrison Narcotics Tax Act of 1914, Congress had enacted “[a] patchwork of regulatory, revenue, and criminal measures” that featured “contorted presumptions and other awkward devices”<sup>38</sup> (an approach necessitated by the narrow interpretation of the interstate commerce power that held sway at the time).<sup>39</sup> As a result, by the late 1960s, opiates and cocaine were controlled by one law (the 1914 Harrison Act), marijuana by another (the 1937 Marihuana Tax Act), and hallucinogens, stimulants, and depressants by yet a third (the Food, Drug and Cosmetic Act, under amendments passed in 1965).<sup>40</sup> Still more federal drug statutes filled other regulatory gaps.<sup>41</sup>

The 1970 Controlled Substances Act (CSA) cleared away nearly all then-existing federal drug laws in favor of a single comprehensive statutory scheme to criminalize the possession, distribution, and manufacture of all drugs for recreational use.<sup>42</sup> The CSA was designed to prevent the need for piecemeal legislation in the future by granting the U.S. Attorney General rule-making

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<sup>35</sup> It is worth noting that, although Nixon signed off on the reform as part of an overhaul of federal drug laws, it was Congress that initiated the change. *See* COURTWRIGHT, *supra* note 32, at 82 (noting that congressional Democrats added provisions eliminating mandatory minimum sentences to the 1970 Controlled Substances Act). Nixon’s initial version of the bill largely would have “retained the penalty structure of the old laws, and even increased penalties for hallucinogen violations.” BONNIE & WHITEBREAD, *supra* note 34, at 244.

<sup>36</sup> 116 CONG. REC. 33314 (1970) (statement of Rep. George H.W. Bush), *as reprinted in Footnote to History: The 1970 Views of Congressman George Bush on the Wisdom of Mandatory Minimum Sentences*, 3 FED. SENT’G REP. 108, 108 (1990).

<sup>37</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. §§ 801–889 (2012)).

<sup>38</sup> BONNIE & WHITEBREAD, *supra* note 34, at 242.

<sup>39</sup> Quinn & McLaughlin, *supra* note 25, at 593.

<sup>40</sup> *Id.* at 586–605.

<sup>41</sup> *See id.* (describing federal drug laws prior to the 1970 Controlled Substances Act).

<sup>42</sup> *See Nat’l Org. for the Reform of Marijuana Laws (NORML) v. Bell*, 488 F. Supp. 123, 126–28 (1980) (explaining that the CSA “ended the patchwork federal effort against drug abuse and signaled a national commitment to deal with this problem by committing federal funds for rehabilitation programs”).



authority to ban new substances administratively.<sup>43</sup> None of the substances regulated by the CSA can be manufactured, possessed, or distributed for recreational purposes.<sup>44</sup> As a result, the CSA established, for the first time, a standing federal policy of prohibition of the recreational market for all mind-altering substances (with the exception of alcohol and tobacco, which Congress specifically exempted from the CSA).<sup>45</sup>

Nixon also restructured the bureaucracy charged with enforcing federal drug laws by creating the Drug Enforcement Administration (DEA) via Executive Order in 1973.<sup>46</sup> When Nixon took office, federal drug agencies were—much like the drug laws themselves—in a state of disarray.<sup>47</sup> Nixon designed the DEA to be a “superagency to provide the momentum needed to coordinate all federal efforts related to drug enforcement” and to stop ongoing inter- and intra-agency disputes.<sup>48</sup>

As part of this bureaucratic transformation, the federal drug control budget ballooned. In 1967, the primary federal agency tasked with drug control had a budget of only \$3 million.<sup>49</sup> By 1973, the DEA’s primary predecessor agency, the Bureau of Narcotics and Dangerous Drugs (BNDD), was operating on a \$74 million budget.<sup>50</sup> This money was put toward significantly expanding the ranks of drug enforcement agents and their footprint overseas.<sup>51</sup> When Nixon came into office, the 300 federal drug “agents, spread over the nation and ten foreign countries, . . . [was] not much higher than [the number of federal drug agents] in the 1930s.”<sup>52</sup> Between 1969 and 1973 alone, the federal government opened twenty-six new foreign drug enforcement offices<sup>53</sup> and by the time the DEA was established, it inherited 1,470 special agents.<sup>54</sup> During this expansion, the BNDD formed the first multijurisdictional law enforcement

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<sup>43</sup> For an overview of the Controlled Substances Act’s classification scheme, see, for example, GERALD F. UELMEN & ALEX KREIT, *DRUG ABUSE AND THE LAW SOURCEBOOK* §§ 1:1–1:16 (2014–2015 ed.).

<sup>44</sup> See 21 U.S.C. § 841(a)(1) (2012).

<sup>45</sup> *Id.* § 802(6).

<sup>46</sup> Exec. Order No. 11,727, 38 Fed. Reg. 18357 (July 10, 1973).

<sup>47</sup> See, e.g., G. GORDON LIDDY, *WILL 188* (St. Martin’s Paperbacks ed. 1998) (describing how “constant feuding” between Bureau of Narcotics and Dangerous Drugs and Customs agents “actually reached the point of shooting at each other from time to time”).

<sup>48</sup> DRUG ENF’T ADMIN., U.S. DEP’T OF JUSTICE, *DRUG ENFORCEMENT ADMINISTRATION: A TRADITION OF EXCELLENCE 1973–2003*, at 14 (2003).

<sup>49</sup> PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 129 (2006).

<sup>50</sup> *Id.*

<sup>51</sup> ROBERT M. STUTMAN & RICHARD ESPOSITO, *DEAD ON DELIVERY: INSIDE THE DRUG WARS, STRAIGHT FROM THE STREET* 95 (1992). Nixon had given the DEA “a mandate to become narcotics cops for the world.” *Id.* at 91.

<sup>52</sup> MUSTO, *supra* note 1, at 240.

<sup>53</sup> DRUG ENF’T ADMIN., *supra* note 48, at 7.

<sup>54</sup> *Id.* at 4.

task force that pooled federal, state, and local resources in order to encourage increased involvement in drug enforcement at the local level.<sup>55</sup>

It was not until the 1980s, however, that many of the laws and criminal justice outcomes that are most closely associated with the drug war really took shape. During the first few years of Ronald Reagan's presidency, federal funding for drug treatment programs was slashed to less than one-fourth of what it had been under Nixon.<sup>56</sup> Journalist Dan Baum described the impact in stark terms: "With the 1982 budget came the beginning of the end of the federally funded drug treatment network that four drug czars had worked a decade to build."<sup>57</sup> Meanwhile, the federal drug enforcement budget enjoyed a substantial increase.<sup>58</sup> By the time President George H.W. Bush left office, the DEA's budget was more than ten times what it was when Reagan arrived in 1981.<sup>59</sup>

The increase in drug enforcement funding was accompanied by changes to federal drug laws, including the reintroduction of mandatory minimum sentencing. Beginning in 1984, and continuing for the rest of the decade, Congress passed a series of new mandatory minimum sentences for drug offenses.<sup>60</sup> Unlike the mandatory drug sentences of the 1950s, which had been "based upon the type of controlled substance and number of prior drug convictions,"<sup>61</sup> the new provisions mostly pegged minimum sentences to drug quantity.<sup>62</sup> In 1988, Congress expanded the reach of the mandatory minimum provisions to include attempts and conspiracies.<sup>63</sup> The new mandatory

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<sup>55</sup> *Id.* at 8.

<sup>56</sup> MASSING, *supra*, note 29, at 161 ("In real terms, federal spending on treatment was less than one-fourth what it had been in 1974.").

<sup>57</sup> DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 144–45 (1996).

<sup>58</sup> *Id.* at 145.

<sup>59</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49 (rev. ed. 2012).

<sup>60</sup> U.S. SENTENCING COMM'N, *SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* 8–10 (Aug. 1991), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991\\_Mand\\_Min\\_Report.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf) [https://perma.cc/6GX4-P592] [hereinafter *SPECIAL REPORT TO CONGRESS*] ("Beginning in 1984, and every two years thereafter, Congress enacted an array of mandatory minimum penalties specifically targeted at drugs and violent crime.").

<sup>61</sup> William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 *WAKE FOREST L. REV.* 305, 318 (1993).

<sup>62</sup> *See, e.g.*, *United States v. Dossie*, 851 F. Supp. 2d 478, 479–80 (E.D.N.Y. 2012) (describing the passage of the law and the rationale for drug quantity-based sentencing). In addition to drug quantity-based mandatory minimums, federal law provides for mandatory minimum sentences in other circumstances, such as the carrying of a firearm in furtherance of a drug trafficking offense. 18 U.S.C. § 924(c) (2012). For an overview of federal mandatory minimum sentencing generally, see CHARLES DOYLE, *CONG. RESEARCH SERV.*, RL32040, *FEDERAL MANDATORY MINIMUM SENTENCING STATUTES* (2013).

<sup>63</sup> Wilkins et al., *supra* note 61, at 317–18.

minimum statutes led the U.S. Sentencing Commission to “jettison[] its data entirely and ma[k]e the quantity-based sentences...proportionately applicable to every drug trafficking offense.”<sup>64</sup> In a 2004 report, the Sentencing Commission observed that “no other decision of the Commission has had such a profound impact on the federal prison population.”<sup>65</sup> The result was a dramatic rise in the length of federal drug sentences,<sup>66</sup> particularly for low-level offenders. People involved at the periphery of drug operations—like lookouts, couriers, and street dealers—now faced steep sentences based on the type and amount of drugs involved in the offense.<sup>67</sup>

The 1980s also saw the federal government develop incentives to enlist state and local law enforcement agencies in the drug war. As part of the Anti-Drug Abuse Act of 1986, Congress created a new federal grant program to fund state and local drug enforcement efforts,<sup>68</sup> with a significant expansion in 1988.<sup>69</sup> The funds led to the proliferation of the multijurisdictional drug task forces first developed under Nixon.<sup>70</sup> The number of task forces nearly doubled between 1988 and 1991 alone and they accounted for between 220,000 and 280,000 arrests annually during that same period.<sup>71</sup> Similarly, in 1984, the federal government revised its asset forfeiture laws to give “state and local police agencies the lion’s share of seized assets even when federal agents were involved in the arrest.”<sup>72</sup> Because state and local police are responsible for the vast majority of drug arrests, these policies were critical to developing the foot soldiers of the drug war.

As a political issue, enthusiasm for the drug war probably hit its peak in the late 1980s. In 1989, a Gallup poll showed that more than six in ten Americans believed drug abuse to be “the most important problem facing this

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<sup>64</sup>United States v. Diaz, No. 11–CR–00821–2(JG), 2013 WL 322243, at \*6 (E.D.N.Y. Jan. 28, 2013).

<sup>65</sup>U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 49 (Nov. 2004), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf) [<https://perma.cc/V8GS-NHCB>].

<sup>66</sup>*Id.*

<sup>67</sup>Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 106–08 (2003).

<sup>68</sup>DRUG ENF’T ADMIN., *supra* note 48, at 66.

<sup>69</sup>TERENCE DUNWORTH ET AL., NAT’L INST. OF JUSTICE, NATIONAL ASSESSMENT OF THE BYRNE FORMULA GRANT PROGRAM: A POLICY MAKER’S OVERVIEW, REPORT 4, at 1 (Dec. 1996), <https://www.ncjrs.gov/pdffiles1/Digitization/163384NCJRS.pdf> [<https://perma.cc/3L5X-V2HA>].

<sup>70</sup>*See supra* note 55 and accompanying text.

<sup>71</sup>Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 43 (1998); *see also* Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1182–83 (1995) (describing these task forces in greater detail).

<sup>72</sup>Blumenson & Nilsen, *supra* note 71, at 51.

country today.”<sup>73</sup> As the *Los Angeles Times* observed in connection with the poll, “[o]nly wars and economic disasters have registered such a large consensus in the past.”<sup>74</sup> (The *Times* was referring to actual—not metaphorical—wars, of course.) In this environment, politicians were eager to constantly try to one-up each other in their commitment to getting tough on drugs.<sup>75</sup> This led to a host of new war-era drug laws and programs, including the provision of military equipment to local police,<sup>76</sup> the denial of public benefits based on drug convictions,<sup>77</sup> and the widespread adoption of employee drug testing.<sup>78</sup> The one notable exception to the steady stream of increasingly punitive drug policies during this period was the 1994 “safety valve” law, which created an exception to mandatory minimum drug penalties for offenders with very minimal criminal history who also meet a handful of other requirements.<sup>79</sup>

During the mid-to-late-1990s and early 2000s, the war on drugs mostly faded into the political background, continuing to run on its own momentum under the already-established conceptual and legal framework. To be sure, Congress did not stop expanding the reach of federal drug penalties. But these new initiatives were focused at the margins, on issues like denying federal financial aid to students with drug convictions<sup>80</sup> or extending the “Crack House Statute” to include concert promoters who knowingly allow drug use at their events.<sup>81</sup>

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<sup>73</sup>Thomas B. Rosenstiel, *63% Call Drugs Nation’s Biggest Problem: Poll Finds Concern Soaring; Heavy Media Coverage Seen as Factor*, L.A. TIMES (Sept. 14, 1989), [http://articles.latimes.com/1989-09-14/news/mn-278\\_1\\_drug-abuse](http://articles.latimes.com/1989-09-14/news/mn-278_1_drug-abuse) [<https://perma.cc/85LU-Y8NY>].

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

<sup>75</sup>For example, then-Senator Joe Biden’s critique of President George H.W. Bush’s drug policy was that Bush had not “spen[t] *enough* money on law enforcement, wasn’t tough *enough* on those addicted to drugs, [and] didn’t give the military *enough* power and money to fight illegal drugs.” BAUM, *supra* note 57, at 332.

<sup>76</sup>*See, e.g.*, RADLEY BALKO, *RISE OF THE WARRIOR COP* 139–75 (2014) (describing the militarization of domestic drug policing in the 1980s).

<sup>77</sup>*See, e.g.*, Demleitner, *supra* note 23, at 1027.

<sup>78</sup>*See, e.g.*, Robert J. MacCoun, *Testing Drugs Versus Testing for Drug Use: Private Risk Management in the Shadow of Criminal Law*, 56 DEPAUL L. REV. 507, 509 (2007) (“According to the American Management Association, the proportion of its members using drug testing rose from 21% to 81% between 1987 and 1996.”).

<sup>79</sup>18 U.S.C. § 3553(f) (2012).

<sup>80</sup>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) (discussing a 1998 law barring students with drug convictions from receiving federal financial aid).

<sup>81</sup>21 U.S.C. § 856 (2012); *see also* Atossa Katharine Jackson, Note, *Willful Blindness: The Threat to Innocent Property Owners of Recent Federal Drug Law Amendments*, 31 T. JEFFERSON L. REV. 191, 195–98 (2008) (recounting the history of the law’s passage).

As this short history reveals, no single development definitively marks the beginning of the modern drug war. To be sure, there are a few points in time that one could cite for purposes of roughly measuring the drug war's length—Nixon's initial declaration of war or the revival of mandatory minimums under Reagan, for example. But if the focus is on singling out the laws and policies that separate war-style prohibition from what came before, the picture is much more fluid. Nixon dramatically increased treatment funding and signed off on eliminating federal mandatory minimum drug penalties, two developments that would have been almost unthinkable by the mid-1980s. But Nixon also put in place much of the bureaucratic and ideological infrastructure of the drug war and "introduced a standing question into American politics, 'How's the president doing on drugs?'"<sup>82</sup> Reagan and George H.W. Bush made the war on drugs a central focus of their administrations and translated Nixon's rhetorical call to war into law, most notably with punitive federal drug sentencing laws and programs that incentivized local police to focus on drugs.<sup>83</sup> By the time Bill Clinton assumed the presidency in 1992, the legal and bureaucratic architecture for the war on drugs was already firmly in place. Since then, war has continued to march on, less and less a political focal point over time but still an ingrained part of the national political landscape.

### III. THE LINE BETWEEN DRUG WAR AND DRUG TRUCE

An understanding of how the drug war developed over time is only a small step in trying to disentangle the drug war from non-war prohibition. Any attempt to define the drug war must inevitably focus on identifying its distinguishing characteristics. This Part draws out the features that separate the drug war from regular drug prohibition. I begin with the ideology of the drug war, which is distinct from the ideology of standard drug prohibition. I then highlight three concrete measures that have stood out in the drug war-era and that are often the focus of attention from drug war critics: arrests, incarceration, and racial disparities in enforcement. To be clear, this is not meant to be a comprehensive list of all of the drug war's attributes, something that would include a number of other items such as the militarization of domestic policing. Rather, my goal in this Part is to identify the core of what divides between the drug war and prewar prohibition.<sup>84</sup>

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<sup>82</sup>COURTWRIGHT, *supra* note 32, at 161.

<sup>83</sup>KING, *supra* note 28, at 3 ("While President Nixon may have led the effort to prioritize drug enforcement policy nationally, it was the administrations of Presidents Reagan, Bush and Clinton that oversaw a historic redeployment of American law enforcement to target drug offenses.").

<sup>84</sup>Despite the wealth of literature on the war against drugs, the question of how to define the drug war has been largely overlooked. As Corey Rayburn Yung has observed, "There is almost no theoretical work concerning when ordinary law enforcement escalates into a criminal war. While many scholars have written about the War on Drugs, a general war on crime, or other specific criminal wars, the definition of a 'criminal war' has largely

### A. Rhetoric and Ideology

The war on drugs has been held together by rhetoric and ideology as much as anything else.<sup>85</sup> Labeling our drug policy a war has signaled that it is something more than just prohibition for the sake of public health. War is a life and death struggle against an enemy. The only acceptable outcome is defeating the enemy, in this case drugs and drug use.<sup>86</sup> And, because the stakes of war are so high, we must pursue that goal at almost any cost. The war has been waged with a single-minded focus on reducing all illegal drug use, sometimes articulated as an idealized vision of a drug free society.<sup>87</sup> This outlook concerns itself with “the consumption of the prohibited substance rather than any secondary consequences that might” result.<sup>88</sup> Unlike, for example, Britain’s 1980s drug strategies, which focused on goals like reducing the health risks and consequences of drug use, the U.S. drug war always had “one overarching goal—the reduction of drug use.”<sup>89</sup>

Over time, the rhetoric and ideology of war permeated nearly all of our drug laws and enforcement strategies.<sup>90</sup> It drove the adoption of harsh and inflexible policies, like mandatory minimum sentencing laws. But just as important, policy ideas thought to be inconsistent with the drug war’s use reduction goal—like needle exchange or medical marijuana—came to be

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been taken for granted.” Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 437 (2010) (footnotes omitted). Yung proposes the “three essential elements of a criminal war” include “marshalling of resources, myth creation, and exception making.” *Id.* at 440. Yung makes a strong case for these elements as preconditions to a criminal war. Once a criminal war is as far along as the drug war, however, resources, myths, and exceptions have long since given birth to concrete policies, which is the focus of this Part and the next.

<sup>85</sup> See WILLIAM N. ELWOOD, RHETORIC IN THE WAR ON DRUGS 3 (1994) (“[T]he War on Drugs is a rhetorical, multifaceted public relations campaign . . .”).

<sup>86</sup> As President George H.W. Bush put it, “Victory—victory over drugs—is our cause, a just cause. And with your help, we are going to win.” WHITFORD & YATES, *supra* note 22, at 64 (quoting President George H.W. Bush).

<sup>87</sup> Franklin E. Zimring and Gordon Hawkins have described this as a “legalist perspective” in discussing the “powerful role of ideology in drug policy choice in the United States.” FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 4 (1992).

<sup>88</sup> *Id.* at 9.

<sup>89</sup> Jonathan P. Caulkins & Peter Reuter, *Setting Goals for Drug Policy: Harm Reduction or Use Reduction?*, 92 ADDICTION 1143, 1144 (1997) (quoting the Clinton Administration’s drug strategies). For a comparison of drug policy goals and rhetoric in the United States and the United Kingdom, see generally Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261 (2010).

<sup>90</sup> See WHITFORD & YATES, *supra* note 22, at 150 (“[P]residential rhetoric has a positive and significant effect on the percentage of arrests composed of narcotics cases.”).

considered “treason” because they might amount to a sort of concession to the enemy.<sup>91</sup>

Former drug czar William J. Bennett, for example, described the placement of ballot measures “to decrease penalties for possession of marijuana” in early 2000s in Arizona, Nevada, and Ohio as “the drug legalization movement’s advance on the[] home fronts” of those states.<sup>92</sup> “We should not capitulate in our war on drugs any more than we should surrender in our war on terrorism,” Bennett argued.<sup>93</sup> And according to Bennett, “[t]he forms of surrender are manifold.”<sup>94</sup> They include “[b]uzzwords like ‘harm reduction’ [which] crowd[] out clear no-use messages,” allowing for the medicinal use of marijuana, and even the release of the film *Traffic* for having “portrayed the war on drugs as a futile effort.”<sup>95</sup>

If we are fighting a war against drugs, the only acceptable policies are those that further the goal of a drug free society.<sup>96</sup> While it is possible to have drug *prohibition* alongside programs like heroin maintenance or needle exchange, these ideas are incompatible with the drug *war*.<sup>97</sup> This is because the drug war requires a uniformity of purpose that a non-war form of prohibition does not. As Reagan’s Attorney General Edwin Meese told a group of newspaper editors in the 1980s, in the war against drugs “there are no neutrals.”<sup>98</sup>

The war metaphor also signifies the intensity with which we should pursue the goal of reducing all drug use and the sorts of sacrifices or “collateral damage” we should accept.<sup>99</sup> Drug *prohibition* is agnostic on questions like how much punishment drug offenders should receive or how we should rank drug investigations relative to other law enforcement priorities. But in a drug

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<sup>91</sup> See MARK A.R. KLEIMAN ET AL., *DRUGS AND DRUG POLICY* 137 (2011) (stating that the possibility that “some abusable drugs bring benefits” is “treason in the ‘war on drugs’”).

<sup>92</sup> William J. Bennett, *Don’t Put Up with Pot, Ohio*, CIN. POST, Nov. 2, 2002, at 14A.

<sup>93</sup> *Id.*

<sup>94</sup> William J. Bennett, *No Retreat, No Surrender: President Bush Signals a Renewed Offensive on Several Fronts in the Languishing War on Drugs*, SAN DIEGO UNION-TRIB., May 20, 2001, at G1.

<sup>95</sup> *Id.*

<sup>96</sup> Caulkins & Reuter, *supra* note 89, at 1143 (noting that U.S. policy has been focused on use reduction where the “commonly articulated goal has been a ‘Drug Free America’”).

<sup>97</sup> See, e.g., Press Release, John Ashcroft, Senator, to President Clinton, Shalala: No Federal Funds for Needle Exchange (Mar. 31, 1998) (“The Administration’s interest in clean needles is a terrifying indicator of bow [sic] eager it is to surrender in the ‘War on Drugs.’”).

<sup>98</sup> BAUM, *supra* note 57, at 214 (quoting Ed Meese).

<sup>99</sup> Graham Boyd, *Collateral Damage in the War on Drugs*, 47 VILL. L. REV. 839, 839–40 (2002).

war, drug crime is an offense “of the highest order”<sup>100</sup>—“a threat worse than any nuclear warfare or any chemical warfare waged on any battlefield.”<sup>101</sup>

Drug trafficking was officially declared “a threat to national security” by the Reagan Administration in 1986.<sup>102</sup> Cities became drug war “battlefield[s]”<sup>103</sup> to be policed by militaristic equipment and tactics.<sup>104</sup> Exceptions to constitutional protections could be justified on the theory that “all bets are off and government may do whatever is necessary to ensure the nation’s continued prosperity.”<sup>105</sup>

President George H.W. Bush’s first drug czar even went so far as to question the idea of due process for drug offenders, remarking that “[i]t’s a funny war when the ‘enemy’ is entitled to due process of law and a fair trial.”<sup>106</sup> And who is the enemy? “Let me tell you straight out,” Bush said in 1989.<sup>107</sup> “Everyone who uses drugs. Everyone who sells drugs. And everyone who looks the other way.”<sup>108</sup> This is the sort of atmosphere that led Congress to vote to double crack cocaine sentences “simply to symbolize redoubled Congressional seriousness.”<sup>109</sup>

In sum, it is hard to overstate the importance of rhetoric and ideology in driving and defining the war on drugs. This is what made adopting harsh drug policies a political and moral imperative in the 1980s and 1990s, regardless of the public policy merits. For this reason, moving away from the rhetoric and

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<sup>100</sup> *People v. Profit*, 229 Cal. Rptr. 148, 159 (Ct. App. 1986).

<sup>101</sup> BAUM, *supra* note 57, at 231 (quoting Thomas Hartnett, former South Carolina Congressman).

<sup>102</sup> MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD’S GREATEST OUTLAW* 54 (2001) (“In April of 1986, the president had signed National Security Decision Directive 221, which for the first time declared drug trafficking a threat to national security.”).

<sup>103</sup> *See, e.g.*, Joseph B. Treaster, *The 1992 Campaign: Candidates’ Records; Four Years of Bush’s Drug War: New Funds but an Old Strategy*, N.Y. TIMES (July 28, 1992), <http://www.nytimes.com/1992/07/28/us/1992-campaign-candidates-records-four-years-bush-s-drug-war-new-funds-but-old.html?pagewanted=all> [https://perma.cc/2UVR-MYBM] (describing “the impoverished north side of St. Louis” as “one battlefield in what President Bush calls the war on drugs”).

<sup>104</sup> *E.g.*, David B. Kopel, *Militarized Law Enforcement: The Drug War’s Deadly Fruit*, in *AFTER PROHIBITION: AN ADULT APPROACH TO DRUG POLICIES IN THE 21ST CENTURY* 61, 61 (Timothy Lynch ed., 2000).

<sup>105</sup> Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 787 (2002).

<sup>106</sup> RADLEY BALKO, CATO INST., *OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA* 17 (2006) (quoting William J. Bennett, *The Top Drug Warrior Talks Tough*, FORTUNE, Mar. 12, 1990, at 74), [http://object.cato.org/sites/cato.org/files/pubs/pdf/balko\\_whitepaper\\_2006.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/balko_whitepaper_2006.pdf) [https://perma.cc/BZ5P-C8C3].

<sup>107</sup> BAUM, *supra* note 57, at 289 (quoting President George H.W. Bush).

<sup>108</sup> *Id.* (quoting President George H.W. Bush).

<sup>109</sup> *United States v. Clary*, 846 F. Supp. 768, 784 (E.D. Mo.) (quoting testimony of Eric E. Sterling, President, Criminal Justice Policy Foundation) (describing the process in which Congress decided to increase the cocaine to crack sentencing ratio from the proposal of 50:1 to 100:1), *rev’d*, 34 F.3d 709 (8th Cir. 1994).



political posture of war is an important part of achieving a drug truce. This is particularly true in light of the decentralized nature of drug control, which has made the bully pulpit a critical tool for influencing state and local entities to help fight the war.<sup>110</sup> To be sure, a shift in rhetoric alone does nothing to change the observable effects of the drug war (such as arrests, incarceration, and racial disparity). But a drug policy dialogue that takes place using the language of public health and public policy—and not the language of war—is essential to freeing decision makers to rethink laws like mandatory minimums or to consider previously off-limits ideas like heroin assisted treatment.

### B. Arrests

There is perhaps no clearer manifestation of the drug war ideology than the strategy of “seek[ing] out and punish[ing] casual, nonaddicted drug users.”<sup>111</sup> In 1970, when the Controlled Substances Act was passed, there were a little more than 400,000 drug arrests nationwide.<sup>112</sup> This number climbed quickly during the Nixon administration, to over 600,000 by 1974, followed by a period of relative stability until 1980.<sup>113</sup> Then, beginning in 1980, drug arrests rose fairly steadily and dramatically, from 581,000 to a height of almost 1.9 million in 2005.<sup>114</sup> Drug arrests have declined somewhat since, with just over 1.5 million in 2013.<sup>115</sup> But there are still two and a half times as many drug arrests annually today as in 1980.<sup>116</sup>

Drug arrests did not just increase on their own terms but relative to overall arrest numbers. Drug offenses were 5.9% of all arrests in the United States in 1980 and 11.1% of all arrests by 1990.<sup>117</sup> In 2013, 13.3% of all arrests in the United States were for drugs.<sup>118</sup> Some years saw more arrests for drugs than

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<sup>110</sup> See Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 820 (2004) (“The federal government exercises influence over state and local policymaking through a complicated and diffuse set of tools. These tools . . . [include] building public support for drug criminalization and enforcement; . . . [and] signaling federal leadership on drug policy . . .”).

<sup>111</sup> ZIMRING & HAWKINS, *supra* note 87, at 16.

<sup>112</sup> KING, *supra* note 28, at 5.

<sup>113</sup> *Id.* at 4–5.

<sup>114</sup> *Id.* (reporting statistics from 1970 to 2005).

<sup>115</sup> Fed. Bureau of Investigations, U.S. Dep’t of Justice, *Crime in the United States 2013: Table 29: Estimated Number of Arrests*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29> [<https://perma.cc/HB8W-95JR>] [hereinafter *2013 Estimated Arrests*].

<sup>116</sup> Going back further still, in 1960 there were 25.4 state drug prosecutions per 100,000 population. ALFRED R. LINDSMITH, *THE ADDICT AND THE LAW* 107 (1965). Though not an exact comparison, by 1995, there were more than 500 drug arrests per 100,000 population nationwide. ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* 218–19 (2001). For a comparison to drug arrest rates in other countries, see, for example, *id.*

<sup>117</sup> KING, *supra* note 28, at 4.

<sup>118</sup> *2013 Estimated Arrests*, *supra* note 115.

for any other single category of crime—in 2006, for example, arrests for drugs topped all categories at 1,889,810 arrests, with the next closest group, property offenses, at 1,540,297 arrests.<sup>119</sup>

Also notable is that arrests for simple possession—particularly marijuana possession—were chiefly responsible for the rise in drug arrests after 1990. Indeed, arrests for drug sale or manufacture actually *declined* at a slow but fairly steady pace between 1990 and 2010.<sup>120</sup> There were 13% fewer trafficking arrests in 2010 (302,300 arrests) than there were in 1990 (347,900 arrests).<sup>121</sup> In stark contrast, drug possession arrests were about 80% higher during that same period (1,336,530 arrests in 2010 versus 741,600 arrests in 1990).<sup>122</sup> In terms of drug type, marijuana was the main focus. Between 1990 and 2002, marijuana possession was responsible for 78.7% of the 450,000 additional drug arrests.<sup>123</sup> While arrests for all offenses decreased by 3% during that period, marijuana arrests rose by 113%.<sup>124</sup>

### C. Incarceration

As John Pfaff has persuasively argued, the impact of drug enforcement on the U.S. prison population is often overstated.<sup>125</sup> But it is hard to exaggerate the importance of incarceration in distinguishing the drug war era from prewar prohibition. Indeed, the post-1980 increase in drug prisoners is in many ways even more striking than the rise in drug arrests. Between 1980 and 2005, drug

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<sup>119</sup> Fed. Bureau of Investigations, U.S. Dep't of Justice, *Table 29: Estimated Number of Arrests*, CRIME U.S. 2006 (Sept. 2007), [https://www2.fbi.gov/ucr/cius2006/data/table\\_29.html](https://www2.fbi.gov/ucr/cius2006/data/table_29.html) [<https://perma.cc/RGW8-K2GY>]. Though drug arrests topped all other specified categories of crime, it trailed the catchall category of arrests for “all other offenses,” which had a little over four million. *Id.* This category includes arrests for possession of drug paraphernalia. See Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS (Sept. 30, 2014), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/09/30-war-on-drugs-black-social-mobility-rothwell> [<https://perma.cc/6APE-GNWM>].

<sup>120</sup> HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, NCJ 239423, ARREST IN THE UNITED STATES, 1990-2010, at 13 (Oct. 2012), <http://www.bjs.gov/content/pub/pdf/aus9010.pdf> [<https://perma.cc/66E7-UHGP>] (“Although there were fluctuations from year to year, over the period, the arrest rate for drug sale or manufacture gradually declined [between 1990 and 2010].”).

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

<sup>122</sup> *Id.* at 12.

<sup>123</sup> Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 9, 2006, at 3, <http://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-3-6> [<https://perma.cc/VB5U-STVL>].

<sup>124</sup> *Id.* at 4.

<sup>125</sup> John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1272 (2011) (“[I]ncreases in drug incarcerations explain only a fraction of prison growth, so any reduction in drug commitments will have only a moderate effect on prison population size.”).

arrests tripled.<sup>126</sup> During that same period, the number of drug offenders in prisons and jails increased by 1100%, from 41,100 in 1980 to 493,800 in 2005.<sup>127</sup> By the time President Obama took office, the number of Americans incarcerated for drug offenses was larger than the entire United States prison and jail population had been in 1980.<sup>128</sup>

A number of factors appear to have contributed to the rise in drug incarcerations. In addition to the increase in drug arrests, the drug war saw a greater proportion of people convicted of drug offenses receive prison sentences.<sup>129</sup> The average sentence for drug offenders also increased by 17% between 1988 and 2004.<sup>130</sup> Meanwhile, “the expansion of mandatory minimum sentencing and the abolition of parole” meant that people ended up serving a longer portion of those sentences than they might have in the past.<sup>131</sup>

Looking outside the United States helps to highlight the difference between our drug war and non-war drug prohibition when it comes to imprisonment. While drugs are prohibited in nearly every country in the world, “[t]he United States stands out relative to other developed countries for the intensity with which it enforces drug laws.”<sup>132</sup> A 2011 study comparing the criminal justice policies of the United States to five other countries, for example, showed that we have a much higher drug imprisonment rate than the others.<sup>133</sup> At the time of the study, drug offenders accounted for 24% of the United States prison population, compared to 16.8% in England and Wales, 15.2% in Finland, 10% in Australia, and 5.6% in Canada.<sup>134</sup> And, of course, the slice of drug offenders in the United States comes from a bigger pie than in the other nations. At the time of the study, the overall incarceration rate in the United States was five times as high as in England and Wales and eleven times as high as in Finland.<sup>135</sup>

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<sup>126</sup> MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2* (Sept. 2007), [http://www.sentencingproject.org/doc/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf) [https://perma.cc/ND73-N3KN].

<sup>127</sup> *Id.*

<sup>128</sup> Alex Kreit, *Toward a Public Health Approach to Drug Policy*, *ADVANCE*, Spring 2009, at 43 n.5.

<sup>129</sup> MAUER & KING, *supra* note 126, at 7.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> KLEIMAN ET AL., *supra* note 91, at 48.

<sup>133</sup> JUSTICE POLICY INST., *FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 23* (Apr. 2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/finding\\_direction-full\\_report.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/finding_direction-full_report.pdf) [https://perma.cc/9CY2-7RXT].

<sup>134</sup> *Id.* at 26.

<sup>135</sup> *Id.* at 10; *see also, e.g.*, DAVE BEWLEY-TAYLOR ET AL., *THE BECKLEY FOUND., THE INCARCERATION OF DRUG OFFENDERS 4* (Mar. 2009), [http://beckleyfoundation.org/wp-content/uploads/2016/04/BF\\_Report\\_16.pdf](http://beckleyfoundation.org/wp-content/uploads/2016/04/BF_Report_16.pdf) [https://perma.cc/6AZX-SVT8].

### D. Racial Disparities

Race has been closely linked to drug prohibition long before the modern war on drugs. Indeed, many early drug laws were passed expressly for the purpose of discriminating against minority populations. An 1886 court opinion considering the constitutionality of a ban on opium dens, for example, observed that the law “proceeds more from a desire to vex and annoy the ‘Heathen Chinese’ [sic] . . . than to protect the people from the evil habit.”<sup>136</sup> Similarly, a 1929 hearing at the Montana state legislature on marijuana prohibition featured testimony from a doctor who joked that

[w]hen some beet field peon takes a few rares of this stuff, . . . [h]e thinks he has just been elected president of Mexico so he starts out to execute all his political enemies. I understand that over in Butte where the Mexicans often go for the winter they stage imaginary bullfights in the ‘Bower of Roses’ or put on tournaments for the favor of ‘Spanish Rose’ after a couple of whiffs of Marijuana.<sup>137</sup>

Though this sort of overt racism is mostly absent from the modern drug war,<sup>138</sup> the disproportionate impact of drug enforcement on people of color is in many ways just as troubling. About 12.6% of the U.S. population is African-American,<sup>139</sup> and blacks use drugs at about the same rate as whites.<sup>140</sup>

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<sup>136</sup> *Ex parte Yung Jon*, 28 F. 308, 312 (D. Ore. 1886).

<sup>137</sup> Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1014 (1970) (quoting Byron E. Cooney, *Legislative Ground Sluice from Last Chance Gulch*, MONT. STANDARD, Jan. 27, 1929, at 1, 13).

<sup>138</sup> *But see, e.g.*, David A. Graham, *Paul LePage’s Racist Fearmongering on Drugs*, ATLANTIC (Jan. 8, 2016), <http://www.theatlantic.com/politics/archive/2016/01/racial-dogwhistling-with-paul-lepage-still-americas-most-outlandish-governor/423246/> [<https://perma.cc/QP85-RNTU>] (reporting that the governor of Maine described heroin sellers as “guys by the name D-Money, Smoothie, Shifty” who “come from Connecticut and New York” to sell heroin and “half the time they impregnate a young, white girl before they leave” (quoting Governor Paul LePage)). Although race was not publicly cited as a reason to declare war on drugs, the launch of the modern war against drugs was very closely linked to racial politics—specifically, the backlash to the civil rights movement. *See, e.g.*, DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 7 (2007) (“The contemporary war on drugs followed suspiciously close on the heels of the civil rights movement of the 1960s and early 1970s, and, in a certain sense, grew out of it. Fear of urban disorder and rising crime rates were part of the backlash to the civil rights movement that fueled get-tough, ‘law and order’ policies designed to increase incarceration rates for street crime and drugs.”); *see also* ALEXANDER, *supra* note 59, at 40–57 (providing a history of the links between race and the politics of criminal justice following the 1960s).

<sup>139</sup> KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, C2010BR-02, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 tbl.1 (Mar. 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> [<https://perma.cc/VY3G-6EJS>].

We do not have much data on the racial composition of drug dealers, but the evidence that does exist “suggests a racial breakdown among sellers similar to that among users.”<sup>141</sup> And yet, 30.4% of drug arrestees in 2013 were black.<sup>142</sup> The disparity grows even wider when it comes to incarceration. As of 2012, 37.7% of state drug prisoners were black.<sup>143</sup>

A 2013 report by the American Civil Liberties Union examining disparities in arrests for marijuana found that a black person is 3.73 times more likely to be arrested for possession of marijuana than a white person, and that the disparity had increased 32.7% between 2001 and 2010.<sup>144</sup> Indeed, the ACLU found that during this period, the white arrest rate for marijuana possession had “remained constant at around 192 per 100,000, whereas the Black arrest rate has risen from 537 per 100,000 in 2001 . . . to 716 per 100,000 in 2010.”<sup>145</sup> In other words, the increase in marijuana possession arrests between 2001 and 2010 was almost entirely due to an increase in arrests of African-Americans for marijuana.

These data points, which only scratch the surface of disparities in drug enforcement, highlight the central place of race in any description or definition of the drug war. In her book *The New Jim Crow*, Michelle Alexander argues that “[n]othing has contributed more to the systematic mass incarceration of people of color in the United States than the War on Drugs.”<sup>146</sup> Whether or not this is so,<sup>147</sup> there is no doubt that drug laws are not enforced equally and that, for many drug war critics, this is one of the most objectionable aspects of the war on drugs.

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<sup>140</sup> Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 266–67 (2009) (“[B]lack account for 13% of the total who have ever used an illicit drug.”).

<sup>141</sup> *Id.* at 268; *see also, e.g.*, Rothwell, *supra* note 119 (“[A]nalysis of data from the 2012 National Survey on Drug Use and Health shows that 6.6 percent of white adolescents and young adults (aged 12 to 25) sold drugs, compared to just 5.0 percent of blacks (a 32 percent difference).”).

<sup>142</sup> Fed. Bureau of Investigations, U.S. Dep’t of Justice, *Crime in the United States 2013: Table 43: Arrests by Race*, FBI: UCR, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2013/crime-in-the-u.s.-2013/tables/table-43> [<https://perma.cc/6UBU-9DG3>]; *see also* Fellner, *supra* note 140, at 272–73 (2009) (reviewing drug arrest rates by race from 1980 to 2007).

<sup>143</sup> E. ANN CARSON, U.S. DEP’T OF JUSTICE, NCJ 247282, PRISONERS IN 2013, at 16 tbl.14 (Sept. 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<https://perma.cc/R72S-6M4G>].

<sup>144</sup> AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (June 2013), <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf> [<https://perma.cc/SMN5-GBRQ>].

<sup>145</sup> *Id.* at 20.

<sup>146</sup> ALEXANDER, *supra* note 59, at 60.

<sup>147</sup> For an argument that drug incarcerations have only a “minor effect . . . on the racial compositions of prisons,” *see* John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 184 (2015).

## IV. TOWARD A DRUG TRUCE

The discussion so far has attempted to sketch out a line between the drug war and prewar drug prohibition. Admittedly, it is far from a bright line. Perhaps the easiest part of the drug war to pin down is its ideology—the almost single-minded focus on reducing drug availability and use; the vision of “a Drug-Free America.”<sup>148</sup> Over time, this vision produced a wide array of ever tougher laws and policies. The result was a form of drug prohibition that looked noticeably different from drug prohibition in most other countries.<sup>149</sup> The drug war era saw a dramatic jump in drug arrests and incarcerations. And racial disparities in drug enforcement have persisted and in some cases increased, even as it became less and less “socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt.”<sup>150</sup> To be sure, some readers are bound to consider one or more other traits to be as essential as the ones I’ve identified—drug treatment funding or police militarization, for example. But these characteristics—ideology, arrests, incarcerations, and racial disparity—are likely to figure prominently in almost anyone’s definition of the drug war.

With the drug war’s defining features now in sharper focus, this Article turns to the matter of an exit strategy. The next Parts examine the legal and policy reform efforts that are currently underway and their potential to achieve measurable results toward reducing drug arrests and incarcerations, and eliminating racial disparities in drug enforcement. As the discussion will reveal, making progress toward these goals will take more than a few pieces of legislation. Even if there were universal agreement on an objective like cutting drug prisoners by half, working toward it would require the coordinated effort of federal, state, and local officials. The decentralized nature of drug enforcement in the United States means that, much like the rise of the war on drugs, its end will come slowly over time, as a result of a range of national, state, and legal and policy reforms. Beyond measurable characteristics like arrests and incarcerations, there is the question of ideology. Agreement that the drug war should end and that we should reduce drug arrests and incarcerations is not the same thing as agreement about what a postwar drug strategy should look like. Some drug war opponents would like to see all drugs legalized. Others vigorously oppose legalizing even marijuana. Is it possible to identify principles that people in both of these camps can agree on to guide us toward a drug truce?

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<sup>148</sup> See, e.g., ZIMRING & HAWKINS, *supra* note 87, at 15–17 (quoting THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 9 (Sept. 1989)).

<sup>149</sup> See Caulkins & Reuter, *supra* note 89, at 143–44 (comparing the United States’ 1988 drug strategy, which focused exclusively on drug use reduction, to Britain’s, whose goals included “reduc[ing] the health risks and other damage related to drug misuse”).

<sup>150</sup> ALEXANDER, *supra* note 59, at 2 (“Rather than rely on race, we use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind.”).

The remainder of this Article tackles these questions and proceeds as follows. First, I briefly outline the major drug policy reform efforts to date as background for the discussion that follows. Then, I revisit the measurable characteristics identified above (arrests, incarceration, and racial disparities) and consider the challenges and strategies for achieving meaningful reform in each area. Finally, I conclude by proposing three principles to help guide postwar drug policy.

### A. *Current Reform Efforts*

As discussed in the introduction, in less than a decade, the drug war has gone from near universal support among elected officials to near universal condemnation. Prominent leaders from across the ideological spectrum have loudly embraced the goal of ending the drug war. Even drug warriors no longer talk about the war in the present tense. In a recent editorial, two former drug czars called on the country to “[b]ring *back* the war on drugs.”<sup>151</sup>

Notwithstanding the rhetorical shift, federal drug laws and macro-level budget priorities have hardly changed at all over the past few decades.<sup>152</sup> At the state level, however, the picture is much different. Voters began passing state medical marijuana legalization laws in 1996.<sup>153</sup> Today, marijuana is legal for *all* adult use in eight states, with four marijuana legalization ballot measures enacted in November 2016, as this Article was nearing press.<sup>154</sup> These state marijuana laws have generated a great deal of news coverage and political attention. But the state-level drug law reform trend is not limited to marijuana. A Pew Research Center analysis found that “40 states took some

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<sup>151</sup> William J. Bennett & John P. Walters, *Bring Back the War on Drugs*, BOS. GLOBE (Sept. 8, 2015) (emphasis added), <https://www.bostonglobe.com/opinion/editorials/2015/09/08/bring-back-war-drugs/h2wWV7ojkje4P5dwIbmgPK/story.html> [<https://perma.cc/EP7V-U7XY>].

<sup>152</sup> *E.g.*, Reuter, *supra* note 5, at 75 (“Though almost universally criticized as overly punitive, expensive, racially disparate in impact, and ineffective, American drug policy remained largely unchanged from 1980 to 2010.”).

<sup>153</sup> Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 U. PA. L. REV. 1787, 1796–97 (2003) (discussing California’s enactment of the Compassionate Use Act in 1996).

<sup>154</sup> Colorado and Washington were the first states to pass legalization laws, in 2012, with Oregon and Alaska following suit in 2014. COLO. CONST. art. XVIII, § 16; ALASKA STAT. § 17.38.060 (2015) (codifying Ballot Measure No. 2); Initiative 502, 2013 Wash. Sess. Laws 28 (codified as amended in scattered chapters of WASH. REV. CODE §§ 46, 69); Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, H.B. 3400, 78th Legis. Assemb., Reg. Sess. (Or. 2015). California, Maine, Massachusetts, and Nevada all passed ballot measures legalizing marijuana in November 2016. *See* Christopher Ingraham, *Marijuana Wins Big on Election Night*, WASH. POST (Nov. 8, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/08/medical-marijuana-sails-to-victory-in-florida/> [<https://perma.cc/2DEF-MNJF>] (reporting on the election results).

action to ease their drug laws” between 2009 and 2013.<sup>155</sup> These reforms ranged from ameliorating the collateral consequences of a drug conviction to repealing mandatory minimum drug sentencing laws.<sup>156</sup> More recently, a number of states have passed legislative packages to address the spike in opiate use based on a harm reduction model. Vermont, for example, enacted a slate of reforms that included a “good Samaritan law [that] shield[s] heroin users from arrest when they call an ambulance to help someone who’s overdosed.”<sup>157</sup>

At the federal level, the only significant legislative reform thus far has been the Fair Sentencing Act of 2010, which reduced the disparity between federal crack and powder cocaine sentencing provisions from 100-to-1 to 18-to-1.<sup>158</sup> There is more to the story than federal drug statutes, however. In 2014, the United States Sentencing Commission adopted an amendment to the federal drug sentencing guidelines that is anticipated to reduce the average federal drug trafficking sentence by eleven months, or 17.7%.<sup>159</sup> And, over the past three years, the Department of Justice (DOJ) has issued a handful of significant enforcement policies concerning drug laws. The most well known of these was the DOJ’s August 2013 memorandum advising federal prosecutors not to interfere with state marijuana legalization laws.<sup>160</sup> The guidance does not bind federal prosecutors or grant any legally enforceable rights to state-compliant marijuana operators. But, so far, federal officials have

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<sup>155</sup> Drew DeSilver, *Feds May Be Rethinking the Drug War, but States Have Been Leading the Way*, PEW RES. CTR. (Apr. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/04/02/feds-may-be-rethinking-the-drug-war-but-states-have-been-leading-the-way/> [https://perma.cc/64KP-CY9N].

<sup>156</sup> See generally SUBRAMANIAN & MORENO, *supra* note 20 (providing an overview of state-level drug policy reforms since 2009).

<sup>157</sup> Josh Eidelson, *Vermont Quits War on Drugs to Treat Heroin Abuse as Health Issue*, BLOOMBERG (Aug. 22, 2014), <http://www.bloomberg.com/news/articles/2014-08-22/vermont-quits-war-on-drugs-to-treat-heroin-abuse-as-health-issue> [https://perma.cc/4RF4-YUYH].

<sup>158</sup> See Sarah Hyser, Comment, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PA. ST. L. REV. 503, 504 (2012) (discussing the Fair Sentencing Act).

<sup>159</sup> Notice of Submission of Amendments to the Sentencing Guidelines for United States Courts, 79 Fed. Reg. 25996, 26005 (May 6, 2014) (adopted in U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 1B1.10(c) (Nov. 2015)).

<sup>160</sup> Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter Cole Memo], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [https://perma.cc/66CW-254Y] (encouraging prosecutorial discretion against enforcement of federal marijuana prohibitions in states that have legalized marijuana unless the relevant state’s regulatory system inappropriately interferes with certain federal priorities listed in the memorandum).



mostly abided by it.<sup>161</sup> Although it did not receive as much media attention, also in August 2013, the DOJ released a memorandum advising federal prosecutors not to apply mandatory minimum drug sentencing laws in certain cases.<sup>162</sup> In November 2014, the DOJ announced it would stop using “number of arrests” to measure the success of state and local police who have received federal Byrne Justice Assistance Grants.<sup>163</sup> And in January 2015, then-Attorney General Eric Holder issued an order limiting (at least to some extent)<sup>164</sup> the use of federal forfeiture “adoptions,”<sup>165</sup> a procedure often used by state and local police to circumvent stricter state forfeiture laws.<sup>166</sup>

The DOJ’s policies could be rescinded at any time and are, in most cases, only advisory. But a handful of proposals to change federal drug laws have gained traction in Congress, particularly with respect to mandatory minimum sentencing. In 2015, “Congress seemed on the brink of enacting significant limitations on the use of mandatory minimum sentences and of providing the beginnings of a more flexible, generous mechanism for back-end release of federal prisoners.”<sup>167</sup> Bipartisan sentencing reform proposals ranged from the Smarter Sentencing Act, which would have cut many mandatory minimum

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<sup>161</sup> See Alex Kreit, *What Will Federal Marijuana Reform Look Like?*, 65 CASE W. RES. L. REV. 689, 692–93 (2015) (providing an overview of the DOJ’s marijuana nonenforcement policy).

<sup>162</sup> Memorandum from Eric Holder, Att’y Gen., to the U.S. Att’y’s and Assistant Att’y Gen. for the Criminal Div. (Aug. 12, 2013) [hereinafter Holder Memo], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf> [<https://perma.cc/G2JF-YC6B>].

<sup>163</sup> Inimai M. Chettiar & Lauren-Brooke “L.B.” Eisen, *Justice Department Takes Steps to Reform Grant Program Incentives*, BRENNAN CTR. FOR JUST. (Nov. 18, 2014), <http://www.brennancenter.org/blog/justice-department-takes-steps-reform-grant-program-incentives> [<https://perma.cc/L4ZM-LFXG>]; see also Jon Frank, *Justice Department Issues Changes to Largest Criminal Justice Grant*, BRENNAN CTR. FOR JUST. (Jan. 8, 2016), <https://www.brennancenter.org/blog/justice-department-issues-changes-largest-criminal-justice-grant> [<https://perma.cc/4BME-5Z6J>] (discussing additional changes by the Justice Department to its evaluation of Byrne grant recipients).

<sup>164</sup> Radley Balko, *How Much Civil Asset Forfeiture Will Holder’s New Policy Actually Prevent?*, WASH. POST. (Jan. 20, 2015), <http://www.washingtonpost.com/news/the-watch/wp/2015/01/20/how-much-civil-asset-forfeiture-will-holders-new-policy-actually-prevent/> [<https://perma.cc/M6ET-K268>] (“[T]he more scrutiny the policy gets, the less significant it seems to be.”).

<sup>165</sup> OFFICE OF THE ATT’Y GEN., PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (Jan. 16, 2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney\\_general\\_order\\_prohibiting\\_adoptions.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf) [<https://perma.cc/THA2-T3LL>].

<sup>166</sup> MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 25 (Mar. 2010), [https://www.ij.org/images/pdf\\_folder/other\\_publications/assetforfeituretoemail.pdf](https://www.ij.org/images/pdf_folder/other_publications/assetforfeituretoemail.pdf) [<https://perma.cc/YBD8-96KS>] (discussing adoptive forfeiture).

<sup>167</sup> Frank O. Bowman, III, *Good Enough to Be Getting on With? The State of Federal Sentencing Legislation, December 2015*, 28 FED. SENT’G. REP. 105, 105 (2015).

drug penalties in half and relaxed one of the requirements for the safety valve (a provision that allows qualifying defendants to be sentenced below an otherwise applicable mandatory minimum provision),<sup>168</sup> to the Justice Safety Valve Act, which would have given judges the authority to sentence below any mandatory minimum upon a finding that it was warranted by sentencing objectives.<sup>169</sup> Notwithstanding broad bipartisan support for reform, the Chairmen of the Senate and House Judiciary Committees—Charles Grassley (Republican, Iowa) and Bob Goodlatte (Republican, Virginia)—were unwilling to allow any of the original proposals to move through the legislature.<sup>170</sup> At the beginning of 2016 it appeared that a compromise proposal, the Sentencing Reform and Corrections Act,<sup>171</sup> was poised to make its way through Congress.<sup>172</sup> But by late May 2016, a leading sentence reform opponent, Senator Tom Cotton (Republican, Arkansas), pronounced the effort “dead in this year’s Congress.”<sup>173</sup> Nevertheless, with “near universality of support for significant reform”<sup>174</sup> in Congress, it is likely the issue will continue to receive serious consideration. While sentencing reform has enjoyed the most momentum in Congress, legislative proposals to move away from the drug war have extended to other areas as well. The bipartisan Fifth Amendment Integrity Restoration (FAIR) Act, for example, would make a number of substantial reforms to asset forfeiture, including raising the federal government’s burden of proof for seizing assets and redirecting seized assets from the Attorney General’s coffers to the Treasury’s General Fund.<sup>175</sup>

These developments suggest that the rhetoric in favor of “ending the drug war” has already given way to real changes in many states and is slowly starting to result in action at the federal level. But even if Congress were to pass laws to reduce mandatory minimum drug penalties and the use of asset

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<sup>168</sup> Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015); Smarter Sentencing Act of 2015, H.R. 920, 114th Cong. (2015).

<sup>169</sup> Justice Safety Valve Act of 2015, S. 353, 114th Cong. (2015). For an analysis of the major federal sentencing reform proposals introduced in the 114th Congress, see Bowman, *supra* note 167, at 105.

<sup>170</sup> Bowman, *supra* note 167, at 108.

<sup>171</sup> Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015).

<sup>172</sup> See, e.g., Sari Horwitz, *Utah’s Republican Sen. Mike Lee: Criminal Justice Reform Legislation Has Momentum*, WASH. POST (Feb. 10, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/02/10/utahs-republican-sen-mike-lee-criminal-justice-reform-legislation-has-momentum/?utm\\_term=.8c89695125a2](https://www.washingtonpost.com/news/post-nation/wp/2016/02/10/utahs-republican-sen-mike-lee-criminal-justice-reform-legislation-has-momentum/?utm_term=.8c89695125a2) [https://perma.cc/APF7-AZY8].

<sup>173</sup> Andrea Noble, *GOP Lawmaker: Senate’s Criminal-Justice Reform Effort ‘Dead,’* WASH. TIMES (May 19, 2016) (quoting Sen. Tom Cotton), <http://www.washingtontimes.com/news/2016/may/19/sen-tom-cotton-senates-justice-reform-effort-dead/> [https://perma.cc/U74F-NVSP]; see also Adam Brandon & Todd A. Cox, *It’s Time to Vote on Revised Sentencing Reform and Corrections Act*, HILL (May 24, 2016), <http://thehill.com/blogs/congress-blog/judicial/280908-its-time-to-vote-on-revised-sentencing-reform-and-corrections> [https://perma.cc/U46Y-33MM].

<sup>174</sup> Bowman, *supra* note 167, at 107.

<sup>175</sup> Fifth Amendment Integrity Restoration Act of 2015, S. 255, 114th Cong. (2015).

forfeiture, they may only have a modest impact on drug policy nationwide. This is because, although it is often thought of as a national policy, the war on drugs is mostly waged at the state and local levels. Indeed, local control over enforcement (in the form of police and prosecutorial discretion) is such that state-level criminal justice reforms do not always see significant results. As discussed below, the complex relationship between federal, state, and local drug enforcement presents challenges for tackling the key characteristics of the drug war—arrests, incarceration, and racial disparity—in a coordinated way. To be sure, there are strategies for achieving progress in each area. But ending the drug war will take much more than changes to a few federal drug laws.

### B. Arrests

A coordinated effort to reduce drug arrests will be very difficult to put together. Because drug enforcement decisions take place at the local level, the head of the DEA cannot simply adopt a new enforcement initiative that would dramatically cut the number of drug arrests nationwide. The year 2013 saw 1.5 million arrests for drug offenses.<sup>176</sup> That same year, federal prosecutors filed charges in 29,094 drug cases<sup>177</sup>—one-third of the federal criminal docket but a tiny fraction of drug enforcement nationwide. As Keith Humphreys has explained, “arresting drug users is almost entirely a state and local function in the United States” and so “[t]he opinions of mayors and police chiefs in cities such as New York and Los Angeles are much more important drivers of, for example, marijuana possession arrest rates, than are the opinions of a U.S. President.”<sup>178</sup> A 2008 report by Ryan King, *Disparity by Geography: The War on Drugs in America’s Cities*, took an in-depth look at how “local decision making plays a defining role in shaping [drug] arrest patterns.”<sup>179</sup> The study revealed dramatic differences in drug arrest rates from city to city.<sup>180</sup> As an example, drug arrests in Fort Worth rose 81% between 1980 and 2003 but declined by 42% in neighboring Dallas.<sup>181</sup>

Indeed, even state legislatures and state attorneys general have relatively little control over drug arrest rates. New York provides a striking example. Even though the New York legislature decriminalized simple possession of the drug in 1977, the New York City Police Department made over 400,000

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<sup>176</sup> 2013 *Estimated Arrests*, *supra* note 115.

<sup>177</sup> ADMIN. OFFICE OF THE U.S. COURTS, TABLE D-2—U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS COMMENCED, BY OFFENSE—DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2009 THROUGH 2013, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/D02DSep13.pdf> [<https://perma.cc/82JE-NSAM>].

<sup>178</sup> Keith Humphreys, *Will the Obama Administration Implement a More Health-Oriented Approach to Drug Policy?*, J. DRUG POL’Y ANALYSIS, Jan. 2012, at 1, 3.

<sup>179</sup> KING, *supra* note 28, at 2.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

marijuana possession arrests between 2002 and 2011.<sup>182</sup> To accomplish this, New York City police tricked suspects into taking marijuana out of their pockets, allowing them to make arrests for possession of marijuana “open to public view,” which remains a misdemeanor.<sup>183</sup>

Of course, the power of local control works both ways. If states or localities want to reduce or withdraw from drug enforcement, there is little the federal government can do to stop them. There is no better evidence of this than state medical and adult-use marijuana legalization laws, which the federal government was unable to effectively block despite its best efforts.<sup>184</sup> States that have legalized marijuana have, not surprisingly, seen marijuana arrests plummet.<sup>185</sup> With marijuana arrests accounting for about half of all drug arrests every year,<sup>186</sup> the spread of state marijuana legalization laws alone would go a long way toward reducing the drug arrest rate. Legalization is not a viable option for other drugs. But local changes, from diversion programs to a simple reallocation of police department resources, can significantly reduce drug arrests. Indeed, while the number of drug arrests today is striking, it is well off of its peak from 2006.<sup>187</sup>

Achieving sustained progress in reducing drug arrests will require going beyond piecemeal reform, however. Although the vast majority of drug enforcement is in local hands, it is not *entirely* beyond the federal government’s control. Indeed, a key development in the war on drugs was the rise of federal programs designed to enlist state and local police in the fight. In the early 1980s, “[m]any state and local law enforcement officials were less than pleased” with the federal government’s drug war, “viewing [it] as an unwelcome distraction.”<sup>188</sup> In order to “build a consensus among state and local law enforcement agencies that the drug war should be a top priority in

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<sup>182</sup> See Ari Rosmarin, Note, *The Phantom Defense: The Unavailability of the Entrapment Defense in New York City “Plain View” Marijuana Arrests*, 21 J.L. & POL’Y 189, 191–92 (2012).

<sup>183</sup> *Id.* at 190.

<sup>184</sup> 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) (describing how the U.S. federal system allows the states to pursue different drug policies from the federal government, even when those policies conflict with federal policy).

<sup>185</sup> E.g., Christopher Ingraham, *After Legalization, Colorado Pot Arrests Plunge*, WASH. POST (Mar. 26, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/26/after-legalization-colorado-pot-arrests-plunge/> [https://perma.cc/KYL9-NUVZ]; see also DRUG POLICY ALL., STATUS REPORT: MARIJUANA LEGALIZATION IN WASHINGTON AFTER 1 YEAR OF RETAIL SALES AND 2.5 YEARS OF LEGAL POSSESSION (July 2015), [https://www.drugpolicy.org/sites/default/files/Drug\\_Policy\\_Alliance\\_Status\\_Report\\_Marijuana\\_Legalization\\_in\\_Washington\\_July2015.pdf](https://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Status_Report_Marijuana_Legalization_in_Washington_July2015.pdf) [https://perma.cc/EXP3-L999].

<sup>186</sup> AM. CIVIL LIBERTIES UNION, *supra* note 144, at 4.

<sup>187</sup> See SNYDER, *supra* note 120, at 12.

<sup>188</sup> ALEXANDER, *supra* note 59, at 73.

their hometowns,” the federal government provided cash incentives.<sup>189</sup> Specifically, the federal government encourages state and local police to work on drug enforcement through grants, asset forfeiture, and multijurisdictional task forces.<sup>190</sup>

Drug enforcement intensity is particularly susceptible to these sorts of incentives because it is mostly police-driven. Unlike a robbery investigation, which begins when a victim reports the crime, drug investigations almost always start with the police. As one law enforcement textbook puts it, “[f]requently . . . drug enforcement agents must initiate their own cases with few initial leads.”<sup>191</sup> For this reason, decisions like how many officers to assign to a drug task force or whether or not to direct officers to ask for consent to search during a traffic stop play a critical role in drug arrest rates. While local sentiment certainly influences these sorts of law enforcement choices, so do federal incentive programs.

Another reason federal drug enforcement funding can be especially impactful on local arrest numbers relates to the “correctional free lunch” problem described by Franklin Zimring and Gordon Hawkins.<sup>192</sup> While prisons are paid for by state budgets, “prison populations are determined by the number of prisoners referred by local officials.”<sup>193</sup> Because local police and prosecutors “do not contribute to central state correctional budgets, the marginal cost of an extra prisoner may be zero at the local level of government, where the decision to confine is made” even though it could be quite costly to the state.<sup>194</sup> When federal grants and asset forfeiture dollars are added to the equation, local police often get more than just a corrections-free lunch—they are getting paid to eat.

Among federal drug enforcement incentive programs, the Edward Byrne Memorial Justice Assistance Grant program has been particularly influential.<sup>195</sup> The Byrne Grant program, named for a New York City police officer who was murdered while conducting a drug investigation, dates back to

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<sup>189</sup> *Id.*

<sup>190</sup> For an overview of these programs, see, for example, O’Hear, *supra* note 110, at 813–21, and Blumenson & Nilsen, *supra* note 71, at 42–56.

<sup>191</sup> MICHEAL D. LYMAN, PRACTICAL DRUG ENFORCEMENT 2 (3d ed. 2007).

<sup>192</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 211–15 (1991).

<sup>193</sup> *Id.* at 211.

<sup>194</sup> *Id.*; see also W. David Ball, *Why State Prisons?*, 33 YALE L. & POL’Y REV. 75 (2014) (providing a history of the relationship between state-run prisons and locally controlled prosecutions).

<sup>195</sup> See ALEXANDER, *supra* note 59, at 73 (“[I]t is questionable whether any specialized drug enforcement activity would exist in some states without the Byrne program.”); see also INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 3 (2013) (“The Edward Byrne Memorial Justice Assistance Grant (JAG) program is the largest nationwide criminal justice grant program.”).

1988.<sup>196</sup> Congress established the program “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.”<sup>197</sup> Today, the grant program sends between \$300 and \$500 million to state and local law enforcement each year.<sup>198</sup> Though Byrne Grants can be used “to support almost any criminal justice activity,”<sup>199</sup> drug enforcement remains a primary focus, with “money supplement[ing] most police multijurisdictional drug task forces nationwide.”<sup>200</sup>

A 2010 story from Shasta County, California provides a stark example of the sort of enforcement incentives these programs can create. There, federal grants led the county sheriff to reluctantly shift resources toward marijuana investigations.<sup>201</sup> By “step[ping] up his pursuit of marijuana growers,” the sheriff’s department became “eligible for roughly half a million dollars a year in federal anti-drug funding.”<sup>202</sup> At the same time the sheriff was putting more money toward marijuana investigations, however, he was forced to lay off more than 10% of his staff and cut nighttime police patrols in half.<sup>203</sup> “Marijuana may not be the county’s most pressing crime problem, the sheriff says, but ‘it’s where the money is.’”<sup>204</sup>

Not surprisingly, some drug policy reform organizations argue that federal drug enforcement grant funding should be eliminated altogether.<sup>205</sup> Other groups, like the Brennan Center, propose reimagining federal law enforcement grants.<sup>206</sup> The Brennan Center argues that a central flaw of the Byrne Grant program is that its performance measures have asked grant recipients to report

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<sup>196</sup> CHETTIAR ET AL., *supra* note 195, at 18. The program “replaced and expanded a 1968 law that provided funding for local law enforcement.” *Id.*

<sup>197</sup> O’Hear, *supra* note 110, at 814 (emphasis omitted) (quoting 42 U.S.C. § 3751(a) (2000)).

<sup>198</sup> CHETTIAR ET AL., *supra* note 195, at 18.

<sup>199</sup> *Id.* at 20.

<sup>200</sup> *Id.* at 19; *see also id.* at 20 (“In 2012, almost half of state law enforcement JAG funds went to drug and gang enforcement . . .”); JUSTICE POLICY INST., RETHINKING THE BLUES: HOW WE POLICE IN THE U.S. AND AT WHAT COST 15 (May 2012), [http://www.justicepolicy.org/uploads/justicepolicy/documents/rethinkingtheblues\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/rethinkingtheblues_final.pdf) [<https://perma.cc/6BQZ-EP63>] (noting that the program put \$170 million toward drug and gang task forces in FY 2009).

<sup>201</sup> Justin Scheck, *Strapped Police Run on Fumes, and Federal Pot-Fighting Cash*, WALL STREET J. (July 3, 2010), <http://www.wsj.com/articles/SB10001424052748703648304575212382612331758> [<https://perma.cc/5FYZ-4YJR>].

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* (quoting Sheriff Tom Bosenko of Shasta County, California); *see also* AM. CIVIL LIBERTIES UNION, *supra* note 144, at 100–04 (describing the impact of federal grants on marijuana enforcement).

<sup>205</sup> *See, e.g.*, DRUG POLICY ALL., AN EXIT STRATEGY FOR THE FAILED WAR ON DRUGS: A FEDERAL LEGISLATIVE GUIDE 19 (2013) (proposing the elimination of Byrne Grants).

<sup>206</sup> CHETTIAR ET AL., *supra* note 195, at 12.

things like “the number of arrests” and “the amount of cocaine seized,” leading local police to focus on those measures as targets.<sup>207</sup> This practice is not limited to Byrne Grant performance measures. A 2009 DOJ-funded report on evaluating Multijurisdictional Task Forces listed “increases in drug seizures, arrests, etc.” as the first goal of the programs.<sup>208</sup> The Brennan Center proposes moving to what it calls “Success-Oriented Funding” by using measures aimed at incentivizing more efficient law enforcement tactics.<sup>209</sup> Instead of measuring the number of arrests resulting from a grant, for example, recipients might be asked to report on the increase in percent of arrests for violent crime and the decrease in percent of arrests for misdemeanors.<sup>210</sup> This would give recipients an incentive to focus more on solving violent crime investigations and less on arresting low level offenders (or on arrest numbers generally). Notably, in November 2014, the DOJ took a small but important step in this direction by “remov[ing] ‘number of arrests’ from its list of ‘accountability measures.’”<sup>211</sup>

Federal asset forfeiture policies have also played a key role in incentivizing state and local drug arrests.<sup>212</sup> This is so even though every state also has its own drug-related civil asset forfeiture law.<sup>213</sup> To understand why federal asset forfeiture law has been so influential, it is important to keep in mind two frequently criticized aspects of asset forfeiture: the low burden of proof for seizing assets and policies that let the police keep the proceeds from what they seize. The combination of these factors can turn drug enforcement into a revenue generating opportunity, encouraging state and local actors to make more drug arrests than they might otherwise. As discussed below, state-level attempts to address these criticisms have been undercut by federal law, which gives the police a method for side-stepping stricter state asset forfeiture laws.

Congress established the basic structure for modern federal drug-related asset forfeiture in 1970.<sup>214</sup> But it was not until the Comprehensive Crime Control Act of 1984 that the practice became a real force in drug

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<sup>207</sup> *Id.* at 4.

<sup>208</sup> WILLIAM RHODES ET AL., EVALUATION OF THE MULTIJURISDICTIONAL TASK FORCES (MJTFs), PHASE II: MJTF PERFORMANCE MONITORING GUIDE 5 (Dec. 2009).

<sup>209</sup> CHETTIAR ET AL., *supra* note 195, at 4.

<sup>210</sup> NICOLE FORTIER & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, SUCCESS-ORIENTED FUNDING: REFORMING FEDERAL CRIMINAL JUSTICE GRANTS 7 fig.1 (2014).

<sup>211</sup> Chettiar & Eisen, *supra* note 163.

<sup>212</sup> *See, e.g.*, BALKO, *supra* note 76, at 152 (“[I]t is difficult to overstate the effect [the expansion of asset forfeiture in the 1980s] would have on drug policing over the next thirty years.”); BAUM, *supra* note 57, at 241 (describing how the prospect of proceeds from seized assets encouraged otherwise disinterested state highway patrol units to more vigorously enforce drug laws).

<sup>213</sup> For an overview and analysis of state asset forfeiture laws, see WILLIAMS ET AL., *supra* note 166.

<sup>214</sup> Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 276 (1992).

enforcement.<sup>215</sup> Among other features, the 1984 law let federal law enforcement agencies keep the assets they seized.<sup>216</sup> This resulted in an explosion in federal drug forfeitures.<sup>217</sup> The law also created an “Equitable Sharing” program that gives some of the proceeds from seized assets to state and local law enforcement agencies that help the federal government.<sup>218</sup>

Equitable sharing forfeitures come in two forms: “joint investigative” and “adoptive.” Joint investigative forfeitures divide proceeds from joint federal-state/local investigations among the participating agencies based on their “direct participation in the investigation or law enforcement effort resulting in the forfeiture.”<sup>219</sup> This “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.”<sup>220</sup>

Even if no federal agency was involved in an investigation, however, adoptive forfeiture lets state and local agencies turn seized assets over to the federal government to be forfeited.<sup>221</sup> In an adoptive forfeiture, the federal government gets 20% of the take, with the rest going to the state or local agency.<sup>222</sup> Why would state or local police choose to give 20% of seized assets to the federal government? If a state’s asset forfeiture law has a higher burden of proof than the federal government’s preponderance of the evidence standard<sup>223</sup> or limits the amount of money law enforcement groups can keep,<sup>224</sup> an adoptive forfeiture lets state and local agencies circumvent those restrictions.<sup>225</sup>

Recent investigative reports by *The New Yorker* and *The Washington Post* have vividly described how asset forfeiture laws can lead to troubling police

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<sup>215</sup> Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken> [https://perma.cc/R8KB-NNM5] (“[F]orfeiture remained an infrequent resort until 1984, when Congress passed the Comprehensive Crime Control Act.”).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (“At the Justice Department, proceeds from forfeiture soared from twenty-seven million dollars in 1985 to five hundred and fifty-six million in 1993.”).

<sup>218</sup> *Id.*

<sup>219</sup> U.S. DEP’T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 12 (Apr. 2009). Joint investigations can take place in the context of a multijurisdictional task force or “from state or local investigations that are developed into federal cases.” *Id.* at 6.

<sup>220</sup> O’Hear, *supra* note 110, at 817.

<sup>221</sup> WILLIAMS ET AL., *supra* note 166, at 25.

<sup>222</sup> *Id.*

<sup>223</sup> 18 U.S.C. § 983(c) (2012). Some states allow assets to be seized only upon proof by clear and convincing evidence or beyond a reasonable doubt. WILLIAMS ET AL. *supra* note 166, at 22 tbl.2.

<sup>224</sup> WILLIAMS ET AL., *supra* note 166, at 17 tbl.1 (summarizing state laws that place restrictions on sending asset forfeiture proceeds back to the seizing police department).

<sup>225</sup> *Id.* at 25.



practices and distorted incentives. In Philadelphia, for example, police have “routinely seized” people’s homes “for unproved minor drug crimes, often involving children or grandchildren who don’t own the home.”<sup>226</sup> This sort of overreach is almost inevitable when one considers that, nationwide, “210 [drug] task forces have seized the equivalent of 20 percent or more of their annual budgets since 2008.”<sup>227</sup>

Empirical evidence backs up the commonsense notion that asset forfeiture policies influence policing decisions. One analysis in 2000 estimated that laws that let the police keep seized assets are likely to increase drug arrest rates by about 18% and raise drug arrest rates as a portion of all arrests by 20%.<sup>228</sup> As a 2007 study succinctly concluded: “When police are really allowed to keep the assets they seize, they increase anti-drug policing.”<sup>229</sup>

There has been some momentum toward dialing back asset forfeiture in Congress. Kentucky Senator Rand Paul has introduced the Fifth Amendment Integrity Restoration (FAIR) Act, which would make a number of substantial reforms to asset forfeiture, including raising the federal government’s burden of proof for seizing assets and redirecting seized assets from the Attorney General’s coffers to the Treasury’s General Fund.<sup>230</sup> Already, former Attorney General Eric Holder has implemented a more limited reform by issuing an order to prohibit most adoptive forfeitures<sup>231</sup> and even some joint investigative forfeitures.<sup>232</sup>

While it is clear federal programs incentivize state and local drug enforcement, any changes to these programs will only indirectly impact drug

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<sup>226</sup> Stillman, *supra* note 215.

<sup>227</sup> Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/> [<https://perma.cc/BSL8-54ZJ>].

<sup>228</sup> Brent D. Mast et al., *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 301, 303 (2000).

<sup>229</sup> Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007).

<sup>230</sup> Fifth Amendment Integrity Restoration Act of 2015, S. 255, 114th Cong. (2015).

<sup>231</sup> OFFICE OF THE ATT’Y GEN., *supra* note 165.

<sup>232</sup> By its terms, the order does not appear to apply to most joint investigative forfeitures. *Id.* (“This order does not apply to (1) seizures by state and local authorities working together with federal authorities in a joint task force; (2) seizures by state and local authorities that are the result of joint federal-state investigations or that are coordinated with federal authorities as part of ongoing federal investigations; or (3) seizures pursuant to federal seizure warrants, obtained from federal courts to take custody of assets originally seized under state law.”). But a follow-up directive, issued after some voiced concern that the initial order left many loopholes, clarifies that the order prohibits equitable sharing seizures that are “labeled as arising from joint investigations” if there is “no federal involvement until after the fact.” Robert O’Harrow Jr. & Steven Rich, *Justice Clarifies New Limits on Asset Forfeiture Involving Local, State Police*, WASH. POST (Feb. 11, 2015), [https://www.washingtonpost.com/investigations/attorney-general-holders-curbs-on-seizures-did-not-go-far-enough-critics-say/2015/02/11/19ec34b4-a1c0-11e4-903f-9f2fa7cd9fe\\_story.html](https://www.washingtonpost.com/investigations/attorney-general-holders-curbs-on-seizures-did-not-go-far-enough-critics-say/2015/02/11/19ec34b4-a1c0-11e4-903f-9f2fa7cd9fe_story.html) [<https://perma.cc/QVN6-4WFU>].

arrest rates. The two federal reforms that have been implemented so far—modifying the Byrne Grants program by removing number of arrests as a performance measure and restricting adoptive forfeiture—are especially likely to have only a modest effect on drug arrests. The Byrne Grant reform left the rest of the program’s funding structure system intact, and it is hard to say how much state and local agencies that are already accustomed to using the grants for initiatives focused on drug arrests will notice this change. The DOJ’s new forfeiture policy may be more likely to have a noticeable impact—it blocks almost all adoptive forfeitures (which make up about 16% of equitable sharing seizures) as well as “joint investigation” forfeitures that did not have any federal involvement before the seizure.<sup>233</sup> In the future, reforms in these areas should go further by, for example, reserving federal grant money for local programs that aim to address drug use in a nonpunitive manner (such as the Seattle Law Enforcement Assisted Diversion program, discussed below in Part III.E.1). But even sweeping changes to federal grant and asset forfeiture programs can only influence drug enforcement and arrest numbers so much.<sup>234</sup> At the end of the day, local decisions and policies are the biggest drivers of drug enforcement intensity. As a result, while reducing federal incentives will help to address the problem, reforms to federal law alone will not solve it.

### C. Incarceration

Federal law and policy has more influence over drug incarcerations than drug arrests. While the vast majority of drug arrests are made at the local level, federal drug prisoners comprise a healthy percent of the overall drug prison population. As of August 2016, there were 83,982 federal drug prisoners.<sup>235</sup> With 210,200 state drug prisoners in 2012,<sup>236</sup> that makes federal drug prisoners more than one-quarter of the total number of people in prison for drugs nationwide.

It is not just the number of people in federal prison for drugs that is striking, but also the fact that many federal drug prisoners were only low- or mid-level drug operators (such as couriers, street dealers, or lookouts).<sup>237</sup>

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<sup>233</sup> O’Harrow & Rich, *supra* note 232.

<sup>234</sup> Pfaff, *supra* note 147, at 215 (arguing that scaling back federal policies that incentivize the drug war “will not have quite the punch in practice that it might seem on paper”); *see also* CHETTIAR ET AL., *supra* note 195, at 20 (noting that federal grants and forfeitures make up only a small amount of the budget of most recipients).

<sup>235</sup> *Offenses*, FED. BUREAU PRISONS, [http://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) [<https://perma.cc/3EFJ-NVUD>].

<sup>236</sup> CARSON, *supra* note 143, at 16 tbl.14. This number does not include people in jail for drug offenses.

<sup>237</sup> A 2016 congressional task force on federal corrections reported that only 14% of federal drug prisoners were sentenced for being a manager, supervisor, leader, or organizer in the offense, 80% had no serious history of violence, and more than 25% had no prior criminal history at all. CHARLES COLSON TASK FORCE ON FED. CORR., TRANSFORMING PRISONS, RESTORING LIVES 12 (Jan. 2016), <http://colsontaskforce.org/final-recommendatio>

Federal sentencing laws that can leave small-time drug offenders in federal prison for mandatory terms of five or ten years (or longer) have been one of the defining features of the drug war. Under mandatory minimum drug penalty statutes, and the closely linked provisions of the sentencing guidelines, federal drug sentences are determined mostly by the amount and type of drugs involved in an offense, not the offender's role.<sup>238</sup> As a result, "a defendant who does no more than help to unload a truck with a ton of cocaine starts at the same sentence level as those who arranged the shipment or who negotiated the sale or purchase of the drugs."<sup>239</sup> This approach has been criticized as a "kill shot to proportionality"<sup>240</sup> in sentencing that "often punishes more harshly the narcotics crime that indirectly victimizes people (through increased violence, for example) than it does those direct victimizations."<sup>241</sup> Federal judges themselves sometimes say the sentences required by these provisions are far too long, even as they are imposing the punishment.<sup>242</sup> Similarly, one of the DEA agents who helped to bring down the heads of the Arellano Félix Organization recently said of one lengthy federal sentence for a peripherally involved participant: "To me it's like prosecuting the guy at Enron who delivers the mail . . . ."<sup>243</sup>

With this in mind, changes to federal drug sentencing laws could have a real and direct impact on drug incarceration in the United States—both in terms of the number of drug prisoners and the proportionality of drug sentences. To get a sense of the options for withdrawal from the drug war on the incarceration front, a basic understanding of the current system of federal drug sentencing is essential.

Federal drug sentencing involves two interrelated schemes: mandatory minimum penalties and the Sentencing Guidelines. Though Congress first began to revive mandatory minimum drug penalties in 1984, it was not until

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ns/Colson-Task-Force-Final-Recommendations-January-2016.pdf [https://perma.cc/D6DJ-RK2Z].

<sup>238</sup> *United States v. Dossie*, 851 F. Supp. 2d 478, 480 (E.D.N.Y. 2012) (stating that mandatory minimum penalties are "triggered not by role but by drug type and quantity instead").

<sup>239</sup> Weinstein, *supra* note 67, at 107.

<sup>240</sup> Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 130 (2014) (footnote omitted).

<sup>241</sup> Mark Osler, *Amoral Numbers and Narcotics Sentencing*, 47 VAL. U. L. REV. 755, 767 (2013).

<sup>242</sup> See, e.g., Eli Saslow, *Against His Better Judgment*, WASH. POST (June 6, 2015), <http://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/> [https://perma.cc/38FD-YWUL] (reporting on Judge Mark Bennett imposing mandatory minimum drug sentences with which he disagrees).

<sup>243</sup> David Epstein & ProPublica, *How DEA Agents Took Down Mexico's Most Vicious Drug Cartel*, ATLANTIC (Jan./Feb. 2016) (quoting Jack Robertson, DEA agent), <http://www.theatlantic.com/magazine/archive/2016/01/drug-enforcement-agency-mexico-drug-cartel/419100/> [https://perma.cc/BBA6-QSZS].

the Anti-Drug Abuse Act of 1986 that Congress “set up a new regime of non-parolable, mandatory minimum sentences for drug trafficking offenses that tied the minimum penalty to the amount of drugs involved in the offense.”<sup>244</sup> This basic framework remains in place today.

Federal mandatory minimum drug sentences are triggered when a drug trafficking crime (possession with intent to distribute, manufacture, conspiracy, etc.) involves a certain amount of drugs. For example, an offense involving 100 marijuana plants or 100 grams of heroin is subject to a five-year mandatory minimum; 1,000 marijuana plants or one kilogram of heroin means a mandatory ten years.<sup>245</sup> If the defendant has a prior drug felony conviction, federal prosecutors can dramatically increase any applicable mandatory minimum sentence by filing for a recidivist enhancement.<sup>246</sup> When a recidivist enhancement is filed, a single prior drug felony conviction—meaning any prior drug conviction that was punishable by more than one year of imprisonment<sup>247</sup>—doubles an applicable mandatory minimum sentence.<sup>248</sup> Two prior drug felony convictions can increase a ten-year mandatory minimum sentence to a mandatory life sentence.<sup>249</sup>

Not all federal drug crimes carry a mandatory minimum sentence. There is no mandatory minimum for a trafficking offense if the drug amount falls below the statutory threshold—less than 100 marijuana plants or less than 100 grams of heroin, for example.<sup>250</sup> But most federal drug convictions expose the defendant to a mandatory minimum sentence.<sup>251</sup>

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<sup>244</sup> SPECIAL REPORT TO CONGRESS, *supra* note 60, at 10.

<sup>245</sup> 21 U.S.C. § 841(b) (2012); *see also* BRIAN T. YEH, CONG. RESEARCH SERV., RL30722, DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS 1–2 (2015).

<sup>246</sup> *See* 21 U.S.C. § 851(a)(1).

<sup>247</sup> *Id.* § 802(44). Under this definition, an offense that is classified as a misdemeanor under state law can still qualify as a “felony drug offense” for purposes of the recidivist enhancement. *See id.* The provision applies to “all defendants whose prior drug crimes were punishable by more than one year in prison . . . regardless of the punishing jurisdiction’s classification of the offense.” *Burgess v. United States*, 553 U.S. 124, 129 (2008).

<sup>248</sup> 21 U.S.C. § 841(b)(1)(A), (B).

<sup>249</sup> *Id.* For an overview of the federal recidivist enhancement penalty structure, *see* UELMEN & KREIT, *supra* note 43, §§ 15:8–:15.

<sup>250</sup> Some drug offenses are exempt from mandatory minimums entirely, regardless of the drug and quantity. For example, simple possession—even of a very large amount of drugs—does not carry a mandatory minimum. 21 U.S.C. § 844; *see also* OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, DRUG PRIMER 3–4 (Mar. 2013), [http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer\\_Drug.pdf](http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Drug.pdf) [<https://perma.cc/JJL4-33KE>] (providing an overview of federal drug crimes without mandatory minimum penalties and noting they “are often used for plea bargaining”).

<sup>251</sup> *See* SPECIAL REPORT TO CONGRESS, *supra* note 60, at 153. In 2010, for example, about two-thirds (66.1%) of federal drug defendants were convicted of an offense carrying a mandatory minimum sentence. *Id.*

A defendant convicted of a crime carrying a mandatory minimum sentence still has two options to escape the minimum penalty: providing “substantial assistance” to the government,<sup>252</sup> or qualifying for the so-called “safety valve.”<sup>253</sup> To get the benefit of the safety valve, a defendant must meet five requirements, including having a very low criminal history (less than one criminal history point, as determined under the federal sentencing guidelines) and truthfully telling the government all the information she knows related to the offense.<sup>254</sup> A little more than half of federal drug defendants facing a mandatory minimum sentence in 2010 were able to qualify for one or both of these exceptions.<sup>255</sup>

Notwithstanding the “mandatory” label, for a mandatory minimum sentence to apply, the government must allege the mandatory penalty-triggering drug quantity in the indictment and prove that fact to the jury beyond a reasonable doubt.<sup>256</sup> So, for example, if the government finds 150 marijuana plants on Ed’s property and charges Ed with marijuana manufacture, the prosecutor must also allege the number of plants in the indictment in order to trigger the mandatory minimum penalty for 100 marijuana plants or more. If the prosecutor does not allege the number of plants in the indictment against Ed and he is convicted, the mandatory minimum penalty will not apply in his case.

Unlike mandatory minimum penalties, the Sentencing Guidelines apply to all federal felonies and serious misdemeanors.<sup>257</sup> Created in 1984, the Guidelines were intended to promote uniformity in federal criminal sentencing.<sup>258</sup> The United States Sentencing Commission oversees the Guidelines and has the authority to adjust their provisions administratively over time.<sup>259</sup>

At the heart of the Guidelines sentencing system is a grid that specifies a sentencing range based on the severity of the offense of conviction (which can be adjusted up or down based on the application of other guidelines factors) and the criminal history of the defendant.<sup>260</sup> With forty-three offense levels and six criminal history categories, there are 258 possible sentencing ranges.<sup>261</sup> Each sentencing range is expressed in months.<sup>262</sup> For example, an offense level of nineteen and criminal history category of III results in a range

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<sup>252</sup> 18 U.S.C. § 3553(e) (2012).

<sup>253</sup> *Id.* § 3553(f); SPECIAL REPORT TO CONGRESS, *supra* note 60, at 152.

<sup>254</sup> 18 U.S.C. § 3553(f).

<sup>255</sup> SPECIAL REPORT TO CONGRESS, *supra* note 60, at 153, 158.

<sup>256</sup> *See* Alleyne v. United States, 133 S. Ct. 2151, 2155 (2013).

<sup>257</sup> *See* U.S. SENTENCING COMM’N, *supra* note 159, § 1B1.9. The Guidelines do not apply to Class B or C misdemeanors or to infractions. *Id.*

<sup>258</sup> Wilkins et al., *supra* note 61, at 305–06.

<sup>259</sup> *Id.* at 305.

<sup>260</sup> *See id.* at 314 (describing the process of determining a sentencing range under the Guidelines).

<sup>261</sup> U.S. SENTENCING COMM’N, *supra* note 159, ch. 5, pt. A.

<sup>262</sup> *Id.*

of thirty-seven to forty-six months. A drug defendant's base offense level under the Guidelines is pegged to the type and quantity of drugs involved in the offense.<sup>263</sup> Perhaps not surprisingly, the drug type and quantity offense levels under the Guidelines were designed to try and match up with relevant mandatory minimum penalties where possible.<sup>264</sup> Though the Guidelines are only advisory, judges impose a sentence within the applicable range in most cases.<sup>265</sup>

As mentioned above, the Department of Justice and the Sentencing Commission have already taken some steps toward lowering federal drug sentences and dialing back the use of federal mandatory minimums.<sup>266</sup> Pursuant to an August 2013 DOJ memorandum, federal prosecutors have been advised not to include drug type and quantity when drafting indictments for drug defendants who meet a number of criteria (for example, those without significant ties to large drug trafficking organizations and who do not have more than three criminal history points).<sup>267</sup> Because mandatory minimum

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<sup>263</sup> Wilkins et al., *supra* note 61, at 314. Unlike mandatory minimums, the base level offense under the Guidelines is then adjusted up and down to arrive at the ultimate offense level. *Id.* But, because it determines the base offense level, drug type and quantity are still the driving factor in determining a defendant's ultimate offense level under the Guidelines in most cases.

<sup>264</sup> When Congress established the Sentencing Commission in 1984, there were no drug quantity-based mandatory minimums. At the time, the Sentencing Commission (who was tasked with promulgating the relevant sentencing ranges) began crafting drug sentencing provisions based on an empirical assessment of current sentencing practices. *See* Wilkins et al., *supra* note 61, at 319. When Congress enacted drug mandatory minimums in 1986, however, the Sentencing Commission was put in a tricky position. The newly enacted mandatory minimums "substantially exceed[ed]" the penalties "previously meted out." *Id.* Faced with this problem, "the Commission determined that past practice would be of little use in determining appropriate guideline sentences for drug offenses." *Id.* Accordingly, "[i]t jettisoned its data entirely and made quantity-based sentences . . . [from the 1986 mandatory minimum statutes] proportionally applicable to every drug trafficking offense." *United States v. Diaz*, No. 11–CR–00821–2(JG), 2013 WL 322243, at \*6 (E.D.N.Y. Jan. 28, 2013); *see also, e.g.*, Kevin Bennardo, *Decoupling Federal Offense Guidelines from Statutory Limits on Sentencing*, 78 MO. L. REV. 683, 683 (2013) ("[T]he Guidelines must be 'consistent with all pertinent provisions of any Federal statute.'" (quoting 28 U.S.C. § 994(a) (2006))).

<sup>265</sup> *See U.S. Sentencing Commission's 2013 Sourcebook of Federal Sentencing Statistics: Figure G: Comparison of Sentence Imposed and Position of Sentence Relative to the Guideline Range by Year*, U.S. SENT'G COMM'N, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/FigureG.pdf> [<https://perma.cc/3TH8-6WKA>] (reporting that in 2013 only 20.8% of federal criminal cases resulted in non-Guidelines sentences). The Guidelines originally required judges to impose sentences within the specified range. *United States v. Booker*, 543 U.S. 220, 245 (2005). In 2005, however, the Supreme Court held this arrangement violated the Sixth Amendment right to a jury trial. *Id.* To remedy the constitutional defect, the *Booker* Court made the Guidelines system advisory. *Id.*

<sup>266</sup> *See supra* Part IV.A.

<sup>267</sup> Holder Memo, *supra* note 162, at 2.

penalties are only triggered when drug type and quantity is charged in the indictment,<sup>268</sup> the charging policy effectively eliminates mandatory minimum penalties in the cases where it applies. The policy also instructs prosecutors not to file recidivist mandatory minimum enhancements in certain cases.<sup>269</sup> An analysis by the Federal Public Defender in 2013 estimated that 500 defendants annually will receive lower sentences as a result of the guidance.<sup>270</sup> More recent data suggests the policy may be impacting more cases than this: in 2012, 38.5% of all federal drug cases carried no mandatory minimum; in 2015, that number was 53.1%.<sup>271</sup>

Even more significant, the Sentencing Commission amended the drug quantity guidelines in 2014 to reduce the base offense level for most drug types and quantities by two offense levels.<sup>272</sup> The change means that a drug offense previously categorized as a base offense level of fourteen is now a base level of twelve.<sup>273</sup> In practical terms, this is expected to reduce the average federal drug sentence by eleven months (17.7%), resulting in a reduction in the federal prison population of about 6,500 over five years.<sup>274</sup> The Commission also made its amendment retroactive, meaning that federal drug inmates who would have received a lower sentence under the new range can seek a retroactive reduction of their sentence.<sup>275</sup> The Commission estimated that the retroactive application of the amendment will impact nearly half of all federal drug inmates (46,376), lowering their sentences by an average of twenty-five months (18.8%).<sup>276</sup> Already, this one relatively small

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<sup>268</sup> See *Alleyne v. United States*, 133 S. Ct. 2151, 2159 (2013).

<sup>269</sup> Holder Memo, *supra* note 162, at 3.

<sup>270</sup> See Memorandum from Paul J. Hofer, Policy Analyst, on Estimate of Sentencing Effects of Holder Memo on Drug Mandatory Minimums (rev. Sept. 17, 2013), <http://www.fd.org/docs/latest-news/memo-on-holder-memo-impact-final.pdf?sfvrsn=2> [<https://perma.cc/P49R-A2AM>].

<sup>271</sup> Press Release, Dep't of Justice, *New Smart on Crime Data Reveals Federal Prosecutors Are Focused on More Significant Drug Cases and Fewer Mandatory Minimums for Drug Defendants* (Mar. 21, 2016), <https://www.justice.gov/opa/pr/new-smart-crime-data-reveals-federal-prosecutors-are-focused-more-significant-drug-cases-and> [<https://perma.cc/7DTP-R2HR>].

<sup>272</sup> See generally Notice of Submission of Amendments to the Sentencing Guidelines to Congress, 79 Fed. Reg. 25996, 26004–05 (May 6, 2014) (adopted in U.S. SENTENCING COMM'N, *supra* note 159, § 1B1.10(c)).

<sup>273</sup> For an overview of this reform and a chart of the current base level offense ranges, see, for example, UELMEN & KREIT, *supra* note 43, § 15:41.

<sup>274</sup> Notice of Submission of Amendments to the Sentencing Guidelines to Congress, 79 Fed. Reg. 25996, 26005 (adopted in U.S. SENTENCING COMM'N, *supra* note 159, § 1B1.10).

<sup>275</sup> *Id.* at 25996.

<sup>276</sup> Memorandum from the Office of Research & Data, U.S. Sentencing Comm'n, to Chris Saris, Commissioners & Kenneth Cohen, on Summary of Key Data Regarding Retroactive Application of the 2014 Drug Guidelines Amendment (July 25, 2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analysis/drug-guidelines-amendment/20140725-Drug-Retro-Analysis.pdf> [<https://perma.cc/Q4QR-HA99>].

change has yielded notable results. On the first day that inmates with reduced sentences were eligible to be released in November 2015, roughly 6,000 were freed.<sup>277</sup> As discussed above, in addition to these new policies, legislative proposals envision even more far-reaching changes to federal drug sentencing.<sup>278</sup>

Significantly, at the federal level, the post-1998 rise in the number of drug inmates has been due mostly to sentence length. The number of people being sent to federal prison for drug crimes remained relatively steady over this period, hovering in the low 20,000s.<sup>279</sup> Yet, the number of federal drug prisoners went from 60,000 to nearly 100,000.<sup>280</sup> Because drug sentence length has been “a key driver of growth in the federal prison population,”<sup>281</sup> the drug sentence reforms already adopted by the Sentencing Commission and the Department of Justice, along with the mandatory minimum reductions contemplated by proposed mandatory minimum sentencing reform legislation could have a very real impact on the number of federal drug prisoners even if admissions continue at a steady pace.

Of course, even though federal law and policy has a much greater impact on drug incarceration than it does on drug arrest rates, states are still responsible for the lion’s share of drug imprisonment. And when it comes to state incarceration, the federal government has much less influence than it does over state and local arrest decisions. While federal grants and asset forfeiture policies give state and local police an incentive to focus on drug arrests, the federal government does not do much to incentivize particular state drug sentencing policies.<sup>282</sup> To be sure, federal sentencing laws can sometimes indirectly impact state sentencing practices. A state prosecutor may be able to increase “the ‘market rate’ for bargained drug pleas in state court” by threatening to refer the case “to federal authorities for prosecution under

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<sup>277</sup> See Michael S. Schmidt, *U.S. to Release 6,000 Inmates from Prisons*, N.Y. TIMES (Oct. 6, 2015), <http://www.nytimes.com/2015/10/07/us/us-to-release-6000-inmates-under-new-sentencing-guidelines.html> [https://perma.cc/2LK8-39R8]. For more data on resentencing under the amendment, see U.S. SENTENCING COMM’N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT (Apr. 2016), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20160407-Drug-Retro-Analysis.pdf> [https://perma.cc/D8CM-NJPF].

<sup>278</sup> See *supra* Part IV.A.

<sup>279</sup> CHARLES COLSON TASK FORCE ON FED. CORR. & URBAN INST., DRIVERS OF GROWTH IN THE FEDERAL PRISON POPULATION 2 (Mar. 2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000141-Divers-of-Growth-in-the-Federal-Prison-Population.pdf> [https://perma.cc/RE2U-Q4RW].

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> In 1994, the federal government stepped into state sentencing policies by offering \$9 billion in prison construction for states willing to pass laws to severely limit parole eligibility. FORTIER & CHETTIAR, *supra* note 210, at 3. After this federal funding program was put in place, twenty states “enacted or increased laws limiting parole eligibility.” *Id.*



harsher federal law.”<sup>283</sup> It is also possible that federal drug sentencing laws have an anchoring effect on state sentences.<sup>284</sup> For the most part, however, state drug sentences are beyond federal control or influence. This makes it tricky for the federal government to do much to encourage states to reduce drug imprisonment through sentencing reforms.

On the other hand, this also means there are not presently federal policies that incentivize states to maintain harsh drug sentencing laws. In the absence of the sorts of federal incentives that have contributed to high drug arrest rates, many states are well ahead of the federal government when it comes to drug sentencing reform.<sup>285</sup> To be sure, in many instances, state reforms have amounted only to “minor tweaks” but other changes have been much more substantial.<sup>286</sup> Recent state-level drug sentencing reforms include cutting penalties for drug possession, “shortening mandatory minimums or curbing their applicability, removing automatic sentence enhancements, and establishing or extending the jurisdiction of drug courts.”<sup>287</sup>

In addition, efforts to lower drug arrest rates should also pay dividends when it comes to state drug incarcerations. Indeed, to reduce *state* drug incarceration rates, enforcement decisions may be a better area of focus than state sentencing laws. This is because, as John Pfaff has highlighted, state “drug inmates...serve fairly short terms in prison.”<sup>288</sup> As a result, and in contrast to federal drug imprisonment where sentence length is king, Pfaff argues that state drug “sentenc[ing] reduction[s] will have only nominal, direct effects on incarceration in general—and likely on the incarceration of drug offenders alone.”<sup>289</sup> According to Pfaff’s analysis, local prosecutors are “most responsible for determining the scale of incarceration.”<sup>290</sup> As with arrests, federal grants as currently constituted may help to nudge prosecutors to pursue more cases, since one of the two Byrne Grant measures of prosecutor performance is “[n]umber of cases prosecuted.”<sup>291</sup>

In sum, reducing state and federal drug incarcerations will be challenging. As is the case with drug arrests, even if Congress or every state legislature were to agree on a goal—for example, cutting the number of U.S. drug

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<sup>283</sup> O’Hear, *supra* note 110, at 813.

<sup>284</sup> *Cf.* Osler & Bennett, *supra* note 240, at 155–56 (arguing that the anchoring effect of advisory federal sentencing guidelines ranges is likely to influence federal judges).

<sup>285</sup> DeSilver, *supra* note 155.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*; *see also, e.g.*, SUBRAMANIAN & MORENO, *supra* note 20 (providing an overview of state-level drug policy reforms since 2009).

<sup>288</sup> Pfaff, *supra* note 147, at 208.

<sup>289</sup> *Id.* at 210.

<sup>290</sup> *Id.*

<sup>291</sup> CHETTIAR ET AL., *supra* note 195, at 24 fig.4. The impact of federal grants on state prison rates appears to be relatively minimal, however. *See* John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567, 1572 (2015) (“[I]t does not seem as if federal spending is bolstering state spending on incarceration to a significant degree.”).

prisoners in half—there would be no easy way to achieve it. The federal government can, however, do more to directly reduce drug incarcerations than it can to directly reduce drug arrests. Federal drug prisoners are more than one-quarter of the total drug prison population and sentence length is the primary cause of the growth in the number of people in federal prison for drugs.<sup>292</sup> As a result, there are clear steps that can reduce the number of federal drug prisoners. Indeed, the United States Sentencing Commission and the Department of Justice have already enacted relatively minor reforms that nevertheless promise noticeable reductions in the federal drug incarceration rate. Legislative action or additional amendments from the Sentencing Commission could do even more. The story is a bit different at the state level, where more than two-thirds of our nation's drug prisoners are housed.<sup>293</sup> With discretionary decisions by police and prosecutors largely responsible for driving state drug incarceration, any effort to reduce the state drug prison population may have to be focused mostly on local police and prosecutors, where effecting change in a coordinated way will be difficult.<sup>294</sup>

#### D. Racial Disparities

Despite the momentum toward an end to the drug war, there are still plenty of supporters of the status quo (or close to it) for drug arrest and incarceration levels. In contrast, the number of people who publicly disagree with the goal of eliminating racial disparities in drug enforcement is vanishingly small. This might suggest there is greater opportunity for achieving reform in this area than in others. After all, if almost everyone agrees on the issue, it should be easy to pass the necessary reforms.

Unfortunately, attacking racial disparities in drug enforcement may be the most difficult task of all in the effort to achieve a drug truce. This is because, for the most part, today's drug *laws* are entirely neutral when it comes to race.

There are a few notable exceptions, in the form of facially race-neutral laws that are bound to have a disproportionate impact on people of color. The prime example of this is the different sentencing levels for federal crack and powder cocaine offenses. Before 2010, it took 100 times the amount of powder cocaine as crack cocaine to trigger the same mandatory minimum sentence.<sup>295</sup> In 2010, Congress reduced—but did not eliminate—this difference, lowering the ratio to 18-to-1.<sup>296</sup> Because people of color are more likely to use crack

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<sup>292</sup> See *supra* notes 235–36 and accompanying text.

<sup>293</sup> See *supra* notes 235–36 and accompanying text.

<sup>294</sup> For some ideas on what state legislatures might do to gain more control over prosecutorial discretion for drug offenders, see Pfaff, *supra* note 147, at 202–20.

<sup>295</sup> *United States v. Blewett*, 746 F.3d 647, 649 (6th Cir. 2013) (discussing the history of federal sentencing laws for crack and powder cocaine).

<sup>296</sup> *Id.*

cocaine than they are powder cocaine,<sup>297</sup> the sentencing ratio has an inherent racial bias. Likewise, sentencing laws that provide increased punishment for drug violations near schools necessarily have a disproportionate impact on people of color, who are more likely than whites to live in dense urban areas and within 1,000 feet of a school.<sup>298</sup>

Apart from these examples, however, state and federal drug laws are mostly race neutral, at least in theory. After all, blacks and whites use and sell drugs at about the same rates,<sup>299</sup> so it might seem that criminalizing the possession and sale of drugs should result in similar arrest and incarceration rates for both groups.<sup>300</sup> Of course, as we know, that is not the case. The problem is not that we have discriminatory drug laws but that we have race-neutral drug laws that are not being equally enforced.

The distinction between discriminatory laws and discriminatory enforcement explains why it is so difficult to combat racism in the drug war. A discriminatory law can be repealed with a single piece of legislation. Not so in the case of discriminatory enforcement. Racial disparities in drug enforcement result from a number of interrelated causes, “including demographics, the extent of community complaints, police allocation of resources, racial profiling, and the relative ease of making drug arrests.”<sup>301</sup> Most of these factors are highly localized. This means that a single state or local policy is rarely to blame for unequal drug enforcement. Instead, things like differences in local enforcement policies and practices from one jurisdiction to the next, or an individual officer’s (conscious or unconscious) bias are what drive disparities. Disparity results from New York City aggressively policing drug possession through stop-and-frisk,<sup>302</sup> while police officers in the neighboring suburbs regularly let kids found with drugs off with a warning. Or from biases in individual decisions about whether or not to ask for consent to search during a routine traffic stop.<sup>303</sup>

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<sup>297</sup> Whites still make up the majority of crack users, however. *Id.* at 666 (Moore, J., concurring in the judgment).

<sup>298</sup> See, e.g., L. Buckner Inniss, *A Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School Zones*, 8 TEX. F. ON C.L. & C.R. 51, 73–74 (2003).

<sup>299</sup> Fellner, *supra* note 140, at 268; see also, e.g., Rothwell, *supra* note 119 (“[A]nalysis of data from the 2012 National Survey on Drug Use and Health shows that 6.6 percent of white adolescents and young adults (aged 12 to 25) sold drugs, compared to just 5.0 percent of blacks (a 32 percent difference).”).

<sup>300</sup> For an argument that unequal enforcement is a common, and perhaps inherent, quality of vice crimes, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 572–76 (2001).

<sup>301</sup> Fellner, *supra* note 140, at 270 (footnotes omitted).

<sup>302</sup> See ALEXANDER, *supra* note 59, at 134–36.

<sup>303</sup> See *id.* at 133 (reviewing studies that show police “exercise their discretion regarding whom to stop and search in the drug war in a highly discriminatory manner”). A *New York Times* review of traffic stop data found that, in the four states that track the results of consent searches, “officers were more likely to conduct them when the driver was

Because police departments control their own budgets and enforcement tactics, leveling the amount of time and energy different localities put toward drug enforcement is not an option. There is simply no easy way to force Chicago and Evanston to dedicate equal resources to drug investigations. Even if there were, the conspicuousness of drug use and sales in cities relative to suburbs means catching offenders in densely populated areas will always be easier regardless of resource allocation decisions.<sup>304</sup> Similarly, people are more likely to complain to local police and politicians about obvious public drug use and sales, which leads to greater enforcement. When drug activity is well hidden—as it more often is in wealthier neighborhoods—it will not draw reports to the police.<sup>305</sup> For these reasons, even equal enforcement *within* a city is incredibly difficult to achieve. Affluent users and sellers are simply better able to hide their drug exchanges from the police.

This is not to say that nothing can be done to try and make enforcement more equal, of course. Tightening asset forfeiture laws and rethinking federal enforcement grant programs could also help to make some progress on this front.<sup>306</sup> These programs contribute to different levels of drug enforcement between localities. They also incentivize racially driven pretext stops, which officers are more likely to engage in when there is pressure to meet drug arrest quotas or to use drug enforcement as a tool for seizing assets.<sup>307</sup> Ultimately, however, discretionary choices about resource allocation will mean different levels of drug enforcement in different cities, at least so long as we have local police departments rather than a state or national police force.

Reducing drug arrests and incarceration might indirectly ameliorate enforcement disparities. But that is not guaranteed. After all, it is possible for racial disparities to increase even as overall enforcement declines.<sup>308</sup> If

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black.” Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/Q47W-T4TQ>].

<sup>304</sup> See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820 (1998) (“[T]he allocative question for police departments is whether to send officers to places where drug crime is both plentiful and public, or where it is both scarcer and more private.”).

<sup>305</sup> *Id.* at 1804–09.

<sup>306</sup> *E.g.*, AM. CIVIL LIBERTIES UNION, *supra* note 144, at 120 (arguing that the federal government should exclude marijuana possession arrests in its grant performance measures to help reduce disparities in marijuana enforcement); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 357 (2011) (arguing that Congress should impose conditions on federal grant money to encourage states to enact legislation that promotes police accountability).

<sup>307</sup> See Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 745–57 (2016) (discussing the relationship between the war on drugs, pretextual stops, and racial disparities).

<sup>308</sup> See, *e.g.*, Dara Lind, *The Best Hope for Federal Prison Reform: A Bill that Could Disproportionately Help White Prisoners*, VOX, <http://www.vox.com/2015/2/12/8019711/c>

wealthy suburbs dramatically reduced drug enforcement while enforcement in the cities dipped only slightly, people of color might be less likely to face arrest in absolute terms, but disparities would almost surely rise. Similarly, giving federal judges broad sentencing discretion over drug crimes—a goal of many opponents of mandatory minimum sentencing laws—might result in lower sentences overall while also disproportionately decreasing sentences for whites.<sup>309</sup>

Even decriminalization or legalization does not assure even-handed enforcement. After Massachusetts decriminalized marijuana in 2008, the racial disparity in marijuana arrests grew larger.<sup>310</sup> The year before the law took effect, blacks were 3.42 times more likely than whites to be arrested for marijuana.<sup>311</sup> The year after, that number had shot up to 5.34 times more likely.<sup>312</sup> In Colorado, a 2015 report found that “[r]acial disparities in Colorado marijuana arrests persist and have not substantially changed after” legalization in the state.<sup>313</sup> Indeed, *increasing* drug enforcement in places where drug use and sale by whites is common might be as effective (if not more) at reducing disparities than lowering arrests overall. Is there any doubt that if New York City-style “stop-and-frisk”<sup>314</sup> programs were put in place on college campuses, drug arrest rates for white college students would come to mirror the high drug arrest rates in communities of color?<sup>315</sup>

The strategies most likely to reduce racial disparities in drug enforcement may be those limiting the opportunity for police to engage in suspicionless drug searches. Disproportionate enforcement is far less common for other

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rections-act-prison-race [https://perma.cc/E7ZR-QYM9] (last updated Feb. 12, 2015) (arguing that a federal proposal called the CORRECTIONS Act would likely reduce the federal prison population but would disproportionately favor whites).

<sup>309</sup> Indeed, the move toward determinate sentencing laws came about in part because of evidence that under discretionary sentencing laws, “personal factors, such as an offender’s race, gender, and socioeconomic status, impacted sentencing outcomes and accounted for certain disparities.” Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 8.

<sup>310</sup> AM. CIVIL LIBERTIES UNION, *supra* note 144, at 52 n.40.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* The disparity rate decreased in 2010 to 3.87, but remained above the 2008 level. *Id.*

<sup>313</sup> JON GETTMAN, DRUG POLICY ALL., MARIJUANA ARRESTS IN COLORADO AFTER THE PASSAGE OF AMENDMENT 64, at 7 (Mar. 2015), [http://www.drugpolicy.org/sites/default/files/Colorado\\_Marijuana\\_Arrests\\_After\\_Amendment\\_64.pdf](http://www.drugpolicy.org/sites/default/files/Colorado_Marijuana_Arrests_After_Amendment_64.pdf) [https://perma.cc/RBW5-T96K].

<sup>314</sup> See, e.g., Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1511–12 (2014) (discussing the rise in racially disproportionate marijuana arrests under New York City’s stop and frisk program).

<sup>315</sup> Cf. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037–38 (2011) (observing that although the police “consistently stop and search blacks at higher rates than whites,” data shows that “stops and searches of whites are more successful in yielding evidence of criminal activity than stops of blacks, or that the rates are at least equal”).

offenses where investigations are driven by a victim's report. On the other hand, it "can flourish in proactive investigations in which the police scan large numbers of people in search of culprits in crimes that have not been reported."<sup>316</sup>

There are policies that could markedly reduce the discretion police have in selecting people to target for drug searches. In its report on racial disparities in marijuana enforcement, for example, the ACLU proposed that police departments (or state legislatures) adopt rules requiring the police to inform people of their right to refuse a request to search and preventing the police from asking for consent to search without reasonable suspicion.<sup>317</sup> Similarly, state legislatures could pass laws limiting the use of drug-sniffing dogs to circumstances where the police already have reasonable suspicion. These sorts of measures would seek to reduce bias in drug policing by taking away tools that facilitate racial profiling. Requiring police to have a good reason before asking for consent to search would reduce the chance for race to influence an officer's decision to request consent or to make a pretextual stop in the first place. It would also curtail the use of department-wide drug policing tactics like aggressive stop-and-frisk programs.

The trouble is that—thanks to the drug war—these tactics are now deeply ingrained elements of modern policing.<sup>318</sup> As long as uncovering drug possession is considered to be an important mission for the police, it will be very hard to combat invasive and highly discretionary policing.<sup>319</sup> As a result, police departments are exceedingly unlikely to agree to proposals that limit their discretion to gain consent to search for drugs.<sup>320</sup> Although police opposition will make it difficult to enact these types of reforms, they may be necessary if we want to truly address the problem of racial disparities in drug enforcement.

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<sup>316</sup> Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 655 (2002).

<sup>317</sup> AM. CIVIL LIBERTIES UNION, *supra* note 144, at 118.

<sup>318</sup> Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1047 (2010) ("Racial profiling of young African-American and Latino men in traffic stops on the American roads and highways emerged as a central law enforcement tool in the 'war on drugs.'").

<sup>319</sup> See, e.g., Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11, 26–27 (examining why policing drug crimes requires invasive investigative tactics).

<sup>320</sup> For example, New York police vehemently opposed a recent slate of proposals that included limits on requests for consent to search. Michael Gartland, *Cops Livid over Proposed 'Police Reform' Measures*, N.Y. POST (June 29, 2015), <http://nypost.com/2015/06/29/cops-livid-over-proposed-police-reform-measures/> [<https://perma.cc/T44H-BLX9>].

### E. Principles of a Drug Truce

As the discussion so far reveals, ending the drug war will be a complex and lengthy process. With so many moving parts, any single reform can have only a limited impact on drug enforcement nationwide. Even a change to federal drug laws that went much further than the legislative proposals that are being seriously considered today—repealing mandatory minimum drug sentencing laws entirely or removing the federal prohibition on marijuana, for example—would amount to a withdrawal from just one of the drug war’s many battlefields.

Achieving a drug truce will require a sustained and coordinated effort, with federal, state, and local officials from the legislative and executive branches working closely together on the effort. This will also mean thinking beyond the logistics of how to reduce drug arrests and incarcerations or combat racial disparities. In addition to asking how to end the drug war, we need to consider what will replace it. A strong vision of what a drug truce means can help to guide federal, state, and local decision makers. It is also essential to giving meaning and shape to abstract goals like reducing drug arrests.

In some ways, this presents an even trickier challenge than making progress on the drug war’s measurable attributes. On the one hand, there is already fairly broad agreement on the need to end the drug war.<sup>321</sup> But a consensus against the drug war is not the same thing as agreement about what should replace it. Opposition to today’s policies is not a viable strategy for drug policy over the long term. And this is where things become complicated. People who share common ground in opposing the drug war often have dramatically different visions about what should come next. Some picture a total break from the policies that we have today, starting with marijuana legalization. Others favor much more modest changes.

Part of the difficulty is that the post-drug war era is unlikely to revolve around a single goal. War, by its nature, unites people with a shared purpose. Although there can be disagreement about strategy in a war, every tactic will be geared toward defeating the enemy (in this case, illegal drugs and drug use).<sup>322</sup> When drug policy is no longer a war, there is room to consider other goals beyond use reduction. But ending the drug war does not necessarily tell us how to choose among competing goals.

Consider one frequently cited alternative to the drug war: moving toward a public health approach to drugs. For some, treating drug abuse as a public health issue might mean increasing spending on drug treatment while also increasing drug arrests—the public health component would consist of sending

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<sup>321</sup> See *supra* notes 11–14 and accompanying text.

<sup>322</sup> ELWOOD, *supra* note 85, at 5 (“War is a potent condensation symbol that connotes heroes and enemies, battles and battlefields, and war-sized allocation of resources to guarantee ultimate victory over the enemy.” (citations omitted)).

more of the arrestees to criminal drug treatment courts.<sup>323</sup> For others, treating drug abuse as a public health issue starts with reducing drug arrests and perhaps even removing drug use from the criminal justice system entirely. Likewise, the idea of harm reduction as an alternative to the drug war does not necessarily point only in one direction when it comes to law and policy.<sup>324</sup> After all, most drug warriors also believe that their approach best reduces harm.<sup>325</sup>

This Part proposes three principles that I argue can help to crystalize the open-ended concept of a public health-oriented approach to drug policy.

### 1. *The Criminal Justice System Should be a Last Resort for Addressing Drug Use*

In the war on drugs, drug use has been addressed mostly as a criminal justice problem. This has been true for casual users, addicts, and everyone in between.<sup>326</sup> Consistent with this outlook, reforms to date have largely focused on measures to reduce punishments for drug users—making drug possession a misdemeanor instead of a felony, for example.<sup>327</sup> These efforts are worthwhile, but cutting punishments for drug users does not address the core of the problem.

The idea that illegal drug use is blameworthy conduct, deserving of punishment, is deeply ingrained in the drug war.<sup>328</sup> But this attitude is not a necessary part of drug *prohibition*. If drug use is a health concern—like cigarette use or overeating—we should only use the criminal law to address it when there is a very compelling reason. Arresting drug users for possessing drugs simply in order to punish them is incompatible with the idea that drug use is a public health problem. If drug abuse is really a public health issue, the criminal justice system should be a last resort for addressing illegal drug use. Embracing this principle does not inescapably lead to any one policy, but it does mean we should move away from *punishing* drug use as if it were any other crime. There are a number of different policies that would be consistent with taking a nonpunitive approach to addressing drug use. A brief

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<sup>323</sup> Kevin A. Sabet, *A New Direction? Yes. Legalization? No. Drawing on Evidence to Determine Where to Go in Drug Policy*, 91 OR. L. REV. 1153, 1174–77 (2013) (advocating for an increase in the use of drug courts as an alternative to marijuana legalization).

<sup>324</sup> See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 176 (1999) (arguing that both conservatives and progressives are making harm-related arguments on drug policy and that “the harm principle is silent”).

<sup>325</sup> See *id.*

<sup>326</sup> See, e.g., ZIMRING & HAWKINS, *supra* note 87, at 16 (“Another legalist sentiment animates the need to seek out and punish casual, nonaddicted drug users, and this is the most novel element in the *National Drug Control Strategy*.”).

<sup>327</sup> E.g., SUBRAMANIAN & MORENO, *supra* note 20, at 14–15 (summarizing state-level drug reforms that include felony-to-misdemeanor reductions).

<sup>328</sup> See ZIMRING & HAWKINS, *supra* note 87, at 16 (“Whatever else their effects, all illegal drugs are equally illegal and, on that account, are worthy of equivalent treatment.”).



examination of two examples—Portugal’s civil drug court system and Seattle’s Law Enforcement Assisted Diversion program—is instructive.

Portugal’s drug decriminalization law presents perhaps the most far-reaching model for treating drug use as a health concern. In 2001, Portugal removed criminal penalties for the purchase, possession, and cultivation of personal-use quantities of all drugs.<sup>329</sup> The term “civil drug court” might be a better way to describe their policy than decriminalization, however.<sup>330</sup> Instead of imposing a small fine on users—as most decriminalization laws in the United States do<sup>331</sup>—people found in possession of personal-use amounts of drugs in Portugal are given a civil summons to appear before a “dissuasion panel.”<sup>332</sup> The panels are designed to be nonadversarial, and they are made up mostly of medical and social service professionals.<sup>333</sup> If the panel members conclude that the person appearing before them does not have a drug abuse problem, they provide educational information and let the person go without any sanction.<sup>334</sup> In other cases, the panel has a range of options available to it, from ordering check-ins to imposing a ban on visiting certain places to requiring the person to enter a treatment program.<sup>335</sup> Because drug possession is no longer a crime, however, a criminal penalty is never an option, even for those who fail at treatment.<sup>336</sup>

When Portugal first adopted its decriminalization law, the United States and the United Nations were vocal critics, claiming it would lead to drug tourism.<sup>337</sup> Fifteen years later, none of these fears have come to pass and most observers have seen the law as a success.<sup>338</sup> Of course, the point here is not to assess the merits of Portugal’s civil drug court policy relative to all other alternatives. Portugal provides a useful example, however, of a policy option

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<sup>329</sup> See, e.g., Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 326–29 (providing an overview of Portugal’s decriminalization law).

<sup>330</sup> *Id.* at 300.

<sup>331</sup> Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1066 (2015) (describing the difference between marijuana legalization and decriminalization laws). “[D]ozens of states have decriminalized the possession of small amounts of marijuana for personal use by eliminating jail penalties or by reclassifying the offense as a fine-only civil infraction.” *Id.* For an argument that decriminalization laws that operate by reducing penalties “can pose significant threats to the very values it seems to support,” see *id.* at 1077.

<sup>332</sup> Kreit, *supra* note 329, at 326–27.

<sup>333</sup> *Id.* at 327.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 328.

<sup>337</sup> See *Portugal’s Drug Policy: Treating, Not Punishing*, ECONOMIST (Aug. 27, 2009), <http://www.economist.com/node/14309861> [https://perma.cc/6L5P-LRWR] (reporting on some of the early reactions against Portugal’s law).

<sup>338</sup> See, e.g., Kellen Russoniello, *The Devil (and Drugs) in the Details: Portugal’s Focus on Public Health as a Model for Decriminalization of Drugs in Mexico*, 12 YALE J. HEALTH POL’Y L. & ETHICS 371, 391 (2012).

that would be considered completely off-limits in the drug war but that should be given serious consideration in the era of a drug truce.

Seattle's Law Enforcement Assisted Diversion (LEAD) program is another example of a program that puts into practice the principle that the criminal justice system should be a last resort for addressing drug use.<sup>339</sup> LEAD is a pilot program in which police officers divert certain low-level drug and prostitution offenders into treatment and services instead of arresting them.<sup>340</sup> Although drug and prostitution offenses remain a crime in Washington State, the program harnesses enforcement discretion to provide suspects in qualifying cases support through public health programs instead of sending them directly into the criminal justice system.<sup>341</sup> In contrast to criminal drug courts, where treatment occurs as a way to resolve a criminal prosecution, the LEAD program funnels people immediately into treatment and support.<sup>342</sup> The program is still in its infancy. But early data suggests it has dramatically outperformed the "system-as-usual" when it comes to recidivism<sup>343</sup> and achieved significant cost-savings.<sup>344</sup> If the program continues to produce good outcomes without experiencing problems with respect to other factors like equal application of the law,<sup>345</sup> it could become a model for minimizing the role of criminal punishment in drug enforcement, without the need for legislative reform.<sup>346</sup>

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<sup>339</sup> See Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 166–67 (2013) (describing the LEAD program).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 167 ("Rather than acting as the muscular arm of the incarcerating state, police serve as the first screen of an offender's suitability for rehabilitation and community reintegration.")

<sup>342</sup> DRUG POLICY ALL., LAW ENFORCEMENT ASSISTED DIVERSION (LEAD): REDUCING THE ROLE OF CRIMINALIZATION IN LOCAL DRUG CONTROL 2 (Feb. 2016), <http://www.drugpolicy.org/resource/law-enforcement-assisted-diversion-lead-reducing-role-criminalization-local-drug-control> [<https://perma.cc/5YQ7-BLML>] ("In the LEAD model, 'the court is completely taken out of the equation.' Participants are given immediate access to services without displacing voluntary treatment candidates." (footnote omitted)).

<sup>343</sup> SUSAN E. COLLINS ET AL., LEAD PROGRAM EVALUATION: RECIDIVISM REPORT 21 (Mar. 2015), [http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD\\_EVALUATION\\_4-7-15.pdf?token=%2B9Va8LJh0bsk%2B2kXN4604OODjrw%3D](http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf?token=%2B9Va8LJh0bsk%2B2kXN4604OODjrw%3D) [<https://perma.cc/GKW9-PSZC>].

<sup>344</sup> SUSAN E. COLLINS ET AL., LEAD PROGRAM EVALUATION: CRIMINAL JUSTICE AND LEGAL SYSTEM UTILIZATION AND ASSOCIATED COSTS 2, 21–22 (June 2015), <http://static1.1.sqspcdn.com/static/f/1185392/26401889/1437170937787/June+2015+LEAD-Program-Evaluation-Criminal-Justice-and-Legal-System-Utilization-and-Associated-Costs.pdf?token=%2B9Va8LJh0bsk%2B2kXN4604OODjrw%3D> [<https://perma.cc/K2ZE-MHMA>].

<sup>345</sup> This sort of discretionary program raises a number of potential objections. For example, implicit bias might skew decisionmaking and exacerbate disparities. But there may be strategies for addressing these problems. See Fan, *supra* note 339, at 187–205.

<sup>346</sup> DRUG POLICY ALL., *supra* note 342, at 3 ("Numerous other cities around the country—including Atlanta, Buffalo, Houston, Ithaca (NY), Los Angeles, New York City,

Importantly, both LEAD and Portugal's civil drug court system are much truer to a public health model than our own criminal drug court model. Criminal drug courts are often cited as an alternative to incarceration and a public health reform. But they operate firmly within the criminal justice system and have the potential to increase drug arrests<sup>347</sup> and even drug sentences.<sup>348</sup> Most criminal drug courts follow a "punitive, enforcement-oriented approach[]" in which "defendants are subject to mandatory economic sanctions and frequent drug testing" and where those "who fail to meet treatment expectations face incarceration."<sup>349</sup> Indeed, the rise in drug arrests in the 1990s happened side-by-side with the spread of criminal drug courts.<sup>350</sup> This is not to say that all criminal drug court programs are at odds with treating drug use as a public health problem. There are a number of different models for organizing criminal drug courts, and it is possible that some can fit within the vision of a public health approach to drug use. But, at least at some level, there is an inherent tension in using criminal drug courts as a public health strategy because criminal prosecutions are designed to impose punishment. As a result, the notion that we can simply expand our current drug court model as a tactic for ending the war on drugs is misguided, despite its superficial appeal. Instead, a postwar drug policy should look more closely at options like LEAD and civil drug courts. And within the category of criminal drug courts, programs should be oriented away from punishment as much as possible by, for example, following a pre-plea model as opposed to requiring a guilty plea as the price of admission.<sup>351</sup>

## 2. Drug Trafficking Offenses Should be Classified as Nonviolent, Economically Motivated Crimes

Any system of drug prohibition necessarily means addressing drug trafficking (sale, manufacture, etc.) through criminal enforcement. It is possible to identify categories of trafficking offenders for diversion programs—addicts, for example. But short of legalization, an end to the war on drugs will leave laws that criminalize the sale and manufacture of drugs in place. When it comes to trafficking offenses, the focus should be on recalibrating our approach to sentencing and enforcement.

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Philadelphia, Portland (ME) and San Francisco—have expressed interest in replicating LEAD.”).

<sup>347</sup> Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1614–15 (2012) (discussing the “net widening” effect of a therapeutic model of specialized criminal law administration” (footnote omitted)).

<sup>348</sup> Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786 (2008).

<sup>349</sup> O’Hear, *supra* note 110, at 826.

<sup>350</sup> *Id.* at 823–26 (describing the spread of criminal drug courts).

<sup>351</sup> For an overview of the major criminal drug court models, see Kreit, *supra* note 329, at 307–08.

In the drug war, drug trafficking offenses came to be rated as among the most serious crimes. Our sentencing laws treat drug crimes as offenses “of the highest order,”<sup>352</sup> with the potential “to cause grave harm to society.”<sup>353</sup> As Shima Baradaran recently observed, this approach has been fueled in part by the mistaken belief that drugs and violence are intimately linked.<sup>354</sup> In fact, “research shows that there is actually not as much violence as is perceived” in drug trafficking.<sup>355</sup> To be sure, illicit markets always entail a certain degree of violence because disputes cannot be resolved through legal avenues.<sup>356</sup> But much of the drug trade consists of nonviolent transactions between a willing buyer and seller. Public policy may warrant criminalizing this conduct. But it surely falls into the category of *malum prohibitum*, not *malum in se*, crime.<sup>357</sup>

In a post drug-war era, then, we should recalibrate drug penalties and policies to recognize drug trafficking crimes for what they are: nonviolent, economically motivated crimes. To be clear, this principle would not extend to violent crimes committed in the course of the drug trade. But the majority of drug trafficking offenders, who are engaged only in drug sales, smuggling, or manufacture, should not be classified as serious criminals deserving of severe punishment. Instead, they should be regarded as low-level offenders deserving of relatively minor punishment, aimed at decreasing drug availability and not seeking retribution.

In their recent article, *Why Not Treat Drug Crimes as White-Collar Crimes*, Mark Osler and Thea Johnson make the case for adopting this sort of approach for federal drug sentencing.<sup>358</sup> As they argue, “White-collar crimes are driven by the same moral infirmity as drug crimes: a desire to make money without concern for the effect of one’s actions on others or the illegality of what they are doing.”<sup>359</sup> Indeed, the retributive case for punishing nonviolent drug offenders is on shakier ground than even most white-collar crimes. Although “the drug dealer and the fraudster are [both] taking legal and moral

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<sup>352</sup> *People v. Profit*, 229 Cal. Rptr. 148, 159 (Ct. App. 1986).

<sup>353</sup> *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring).

<sup>354</sup> Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 305 (2015) (“Countless U.S. cases and statutes continue to rely on [the] link [between drugs and violence] to justify trumped-up mandatory sentences, presumptions favoring detention of state and federal defendants, and over time disproportionate increases in incarceration for nonviolent defendants who pose little threat to public safety.”).

<sup>355</sup> *Id.* at 281.

<sup>356</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 245 (4th ed. 1992) (“[D]rug traffickers are constrained to use violence to enforce their contracts because they are denied the use of legal remedies.”).

<sup>357</sup> *See State v. Fitzpatrick*, 291 P.3d 1106, 1113 (Mont. 2012) (“[*M*]alum in se crimes such as rape or murder directly affect individuals, whereas *malum prohibitum* crimes generally affect only the administration of public order.”).

<sup>358</sup> *See generally* Mark Osler & Thea Johnson, *Why Not Treat Drug Crimes as White-Collar Crimes?*, 61 WAYNE L. REV. 1 (2015).

<sup>359</sup> *Id.* at 11.

risks to get rich,”<sup>360</sup> drug sales are essentially consensual transactions.<sup>361</sup> To be sure, we might still pass moral (and legal) judgment on someone who would knowingly sell a dangerous product. But it is hard to rate selling a dangerous item to a willing but imprudent buyer as more culpable than defrauding an unwilling victim.

Osler and Johnson build on the idea that drug crimes are economically driven and nonviolent to propose specific changes to federal drug sentencing.<sup>362</sup> For example, they suggest using “the profit taken from the drug business by an individual defendant,” as opposed to the type and quantity of drugs involved in the offense, to “establish culpability.”<sup>363</sup> Of course, this is just one option among many for putting a post-drug war understanding of the severity of drug trafficking offenses into practice. The critical point for present purposes is that achieving an end to the drug war will require more than just reducing drug penalties within the current drug sentencing framework. We must also rethink how we view drug trafficking crimes on the continuum of criminal severity and the goals we are trying to achieve by punishing this conduct.

### 3. *States and Localities Should be Encouraged to Innovate*

Last, ending the drug war will require reconceptualizing the relationship between federal and state drug laws. In the context of the drug war, laws that might undercut the goal of a drug-free society (even in appearance) have been considered a “form[] of surrender.”<sup>364</sup> Consistent with this view, when a handful of states began pursuing policies that were at odds with drug war ideology in the 1990s—most notably, by enacting medical marijuana laws—the federal government went to great lengths to try and stop them, albeit without success.<sup>365</sup> After all, acquiescing to these sorts of reforms would mean “admitting defeat in the power struggle between good and evil that is the essence of [the drug war’s] account of drug use and abuse.”<sup>366</sup>

While a war on drugs requires a uniformity of purpose in federal, state and local policies, a post-drug war prohibition that is focused on public health can allow—and should encourage—diversity and innovation. If we no longer have a national policy fixated on the pursuit of a drug-free society, there is no reason for the federal government to insist that all state and local drug laws be

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<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 12 (“Drug dealers supply a willing and knowing customer, while white-collar criminals (particularly in fraud cases) do not.”).

<sup>362</sup> *Id.* at 23–25.

<sup>363</sup> *Id.* at 24.

<sup>364</sup> William J. Bennett, *The Drug War Worked Once. It Can Again.*, WALL STREET J. (May 15, 2001), <http://www.wsj.com/articles/SB989884118310019941> [<https://perma.cc/Y6ZD-PSNJ>].

<sup>365</sup> See generally Mikos, *supra* note 184.

<sup>366</sup> ZIMRING & HAWKINS, *supra* note 87, at 14.

directed toward use reduction. Instead, the federal government should give state and local lawmakers latitude in deciding how to balance competing goals when setting drug policy. This is because pursuing a public health approach to drug policy means focusing on outcomes and supporting the study and collection of data from a range of policy options.

This principle is already beginning to take hold in the marijuana legalization setting. State laws legalizing marijuana for adult use are perhaps the best tangible evidence that the drug war is truly coming to an end. Once thought impossible, marijuana legalization is now the law in eight states.<sup>367</sup> For years, the federal government fought tooth and nail to block state medical marijuana laws, including during the better part of President Obama's first term in office.<sup>368</sup> After Colorado and Washington passed the first legalization laws in 2012, however, the President and Congress started to come around to the idea of permitting state marijuana reforms to move forward.<sup>369</sup>

In 2013, the Department of Justice issued guidance to federal prosecutors, instructing them to exercise their discretion to avoid targeting people in compliance with state medical and adult-use marijuana laws.<sup>370</sup> Then, in late 2014, Congress passed a federal budget that included an appropriations rider, preventing the Department of Justice from spending money to prevent the implementation of state medical marijuana laws.<sup>371</sup> Though far from a long-term solution to the conflict between state marijuana reforms and federal prohibition,<sup>372</sup> these measures signal a recognition that, as the drug war winds down, federal law may have to grant states room to try out new approaches.

The principle of encouraging diversity and innovation in drug policy has relevance beyond marijuana. Consider, for example, the idea of heroin-assisted treatment (also sometimes called heroin maintenance). Heroin-assisted treatment programs have been implemented in a number of countries, including Switzerland and Canada.<sup>373</sup> Although the specifics vary, these programs allow seriously dependent heroin addicts who have failed at conventional treatment options to receive heroin "under the strict supervision

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<sup>367</sup> See *supra* note 154 and accompanying text. In addition to these states, Washington, D.C. has legalized the possession and personal cultivation, although not the commercial distribution, of marijuana. Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative 2014, 62 D.C. Reg. 880 (Feb. 26, 2015) (codified as amended at D.C. CODE § 48-904.01 (2016)).

<sup>368</sup> Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1036–41 (2012) (providing an overview of federal medical marijuana prosecutions under the Obama Administration).

<sup>369</sup> See generally Kreit, *supra* note 161.

<sup>370</sup> Cole Memo, *supra* note 160.

<sup>371</sup> Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

<sup>372</sup> Kreit, *supra* note 161, at 692–705.

<sup>373</sup> Dan Werb, *Heroin Prescription, HIV, and Drug Policy: Emerging Regulatory Frameworks*, 91 OR. L. REV. 1213, 1221 (2013).

of medical staff in a controlled, sterile environment.”<sup>374</sup> The idea is to reduce health risks to program participants and allow them to lead a more stable life in spite of their addiction. The programs also seek to help users transition off of heroin, where possible.<sup>375</sup>

Results from existing heroin maintenance programs suggest they can be an effective option for treating heroin addicts for whom other treatment options have failed.<sup>376</sup> They are sometimes held out as a model example of putting the theory of harm reduction into practice. But federal drug laws make it impossible for a city or state to implement a heroin-assisted treatment program in the United States, even on a trial basis.<sup>377</sup> This is because distributing heroin, whether on the streets or as part of a local-government run treatment program, is a federal crime. As a result, while the government’s response to the sharp rise in opiate use has largely focused on treatment and not law enforcement,<sup>378</sup> heroin maintenance remains off-limits. Indeed, even a more restricted program like a supervised injection facility—in which intravenous drug users are able to “inject drugs they obtain elsewhere under the supervision of healthcare providers”<sup>379</sup>—are likely untenable under existing federal law. When the mayor of Ithaca, New York recently expressed interest in establishing a supervised injection facility to help combat overdoses, for example, federal law appears to have quickly made the idea a nonstarter.<sup>380</sup>

Reasonable minds can, of course, disagree about the wisdom of heroin maintenance programs or supervised injection facilities. But the drug war ideology has meant these sorts of ideas are off-limits entirely, because even debating their merits is an admission of defeat. When San Francisco officials

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<sup>374</sup> *Id.* at 1220.

<sup>375</sup> PETER REUTER, CAN HEROIN MAINTENANCE HELP BALTIMORE? 3 (Jan. 2009), [http://www.abell.org/sites/default/files/publications/cja\\_HeroinMaintenance\\_0209.pdf](http://www.abell.org/sites/default/files/publications/cja_HeroinMaintenance_0209.pdf) [https://perma.cc/V6UB-RNS8] (“[H]eroin maintenance is not a *terminal* state, as most critics have (plausibly) alleged . . .”).

<sup>376</sup> *Id.* at 2–3 (reviewing the literature).

<sup>377</sup> *E.g.*, Jessica G. Katz, Note, *Heroin Maintenance Treatment: Its Effectiveness and the Legislative Changes Necessary to Implement It in the U.S.*, 26 J. CONTEMP. HEALTH L. & POL’Y 300, 322–25 (2010).

<sup>378</sup> *E.g.*, Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> [https://perma.cc/GH4A-8TXW] (reporting on how federal, state, and local responses to the “heroin crisis” have focused on treatment rather than punishment). *But see* German Lopez, *Prosecutors Are Charging Heroin Users and Dealers with Murder. That’s a Terrible Idea.*, VOX, <http://www.vox.com/2015/9/29/9417609/heroin-epidemic-murder> [https://perma.cc/Z4U9-4AZL] (last updated Sept. 29, 2015).

<sup>379</sup> Scott Burris et al., *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 ST. LOUIS U. L.J. 1089, 1100 (2009).

<sup>380</sup> Angus Chen, *Ithaca’s Plan to Open a Safe Site for Heroin Users Faces Legal Hurdles*, NPR (Feb. 24, 2016), <http://www.npr.org/sections/health-shots/2016/02/24/467958912/ithacas-plan-to-open-a-safe-site-for-heroin-users-faces-legal-hurdles> [https://perma.cc/T4AU-V3F2].

expressed an interest in supervised injection facilities in 2007, federal drug officials called the idea “a form of giving up.”<sup>381</sup> In a post-drug war era, the federal government should not block state and local reforms simply on the theory that they amount to giving up or surrendering in the drug war. Instead, cities and states should be given room (and, indeed, be encouraged) to try out new policies, even if they are inconsistent with the vision of a drug-free society.

## V. CONCLUSION

President Obama’s first drug czar claimed to have ended the drug war in 2009,<sup>382</sup> and yet federal drug laws are more or less identical to what they were ten or twenty years ago. Many drug war detractors are understandably frustrated that the pace of change has not been quicker.<sup>383</sup> But it would be a mistake to underestimate the significance of the rhetorical shift of the past few years. After all, Nixon’s declaration of a war on drugs predated Reagan’s implementation of the war’s signature laws and policies by more than a decade.<sup>384</sup> And so, while the drug czar’s announcement of a drug truce was in many ways premature, the war really has already ended in an important sense. It is no longer the organizing political principle for U.S. drug policy. The question is what comes next.

Political opposition to the drug war has not yet yielded concrete reform at the federal level. The drug war’s defining features—high arrest and incarceration rates, along with disturbing racial disparities—are also still with us. Making measurable progress in these areas will be incredibly difficult. The war on drugs is much more unwieldy than social security or the Affordable Care Act. It is a mash of federal, state, and local laws and policies developed over the course of four decades. The decentralized nature of drug enforcement means that ending the drug war will not be as simple as getting a package of legislation through Congress.

Defining the principles that should guide a drug truce may be harder still. The drug war was the relentless pursuit of a drug-free America at any cost. Whatever replaces this vision will necessarily be much more nuanced. A public health approach to drug policy requires carefully weighing costs and

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<sup>381</sup> Lisa Leff, *San Francisco Considers Safe-Injection Site for Drug Addicts*, USA TODAY (quoting Bertha Madras, White House Office of National Drug Control Policy), [http://usatoday30.usatoday.com/news/health/2007-10-18-sf-injections\\_N.htm](http://usatoday30.usatoday.com/news/health/2007-10-18-sf-injections_N.htm) [<https://perma.cc/TYZ8-RGF5>] (last updated Oct. 18, 2007).

<sup>382</sup> See *supra* notes 1–3 and accompanying text.

<sup>383</sup> See, e.g., Jacob Sullum, *Obama Ends the War on Drugs . . . Again*, REASON: HIT & RUN BLOG (Apr. 25, 2013), <http://reason.com/blog/2013/04/25/obama-ends-the-drug-waragain> [<https://perma.cc/KW3R-6Z EQ>] (“The White House has been announcing this new direction since 2009, when drug czar Gil Kerlikowske first declared an end to the war on drugs, but in practice it has carried on pretty much as before, in some ways (e.g., Obama’s promise-breaking crackdown on medical marijuana) with even greater zeal.”).

<sup>384</sup> See *supra* notes 27–72 and accompanying text.



benefits and balancing competing goals, not marching in lockstep toward a single objective.

As we move into a new era of drug policy, there will inevitably be sharp disagreements about what an end to the drug war should look like and how to get there. My hope is that this Article will help to inform this important, nascent, and long-overdue discussion.

## VI. POST-SCRIPT

After this Article was accepted for publication and nearing publication, Donald J. Trump surprised most political watchers by winning the presidency. President Trump has not made his views known on many key drug policy questions. As a candidate, Trump spoke of “law and order.”<sup>385</sup> And his nominee for Attorney General, Jeff Sessions, is known as a fierce supporter of mandatory minimum drug sentences and an opponent of marijuana legalization.<sup>386</sup> All of this has raised the question of whether the emerging consensus against the drug war may be reversing itself. At the same time, other signs this past election cycle point toward the drug war’s continued decline. The 2016 election also saw marijuana reform initiatives pass in eight of the nine states where they were on the ballot.<sup>387</sup> President Obama ended his term by granting a historic number of clemency applications for federal drug offenders, without any significant political blowback.<sup>388</sup> Finally, there is speculation that Vice President Mike Pence may support federal mandatory minimum sentencing reform and work to help get it passed.<sup>389</sup> Only time will tell whether the 2016 election marks a turn back toward the drug war. This Article is written in the hope that we will continue on the path toward a drug truce.

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<sup>385</sup> See Yamiche Alcindor, *Minorities Worry What a ‘Law and Order’ Donald Trump Presidency Will Mean* (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/us/politics/minorities-worry-what-a-law-and-order-donald-trump-presidency-will-mean.html> [https://perma.cc/G5FN-PXNT].

<sup>386</sup> See Editorial, *Jeff Sessions as Attorney General: An Insult to Justice* (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/opinion/jeff-sessions-as-attorney-general-an-insult-to-justice.html> [https://perma.cc/4933-KPY2]. In 2010, Sessions was involved in the effort to reduce the disparity in crack and powder cocaine sentencing, however. *Id.*

<sup>387</sup> See Christopher Ingraham, *Marijuana Reform Went 8 for 9 on the Ballot This Week. It Could Be the Tipping Point*. (Nov. 10, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/11/10/marijuana-reform-went-8-for-9-on-the-ballot-this-week-it-could-be-the-tipping-point/?utm\\_term=.a7282f957a2f](https://www.washingtonpost.com/news/wonk/wp/2016/11/10/marijuana-reform-went-8-for-9-on-the-ballot-this-week-it-could-be-the-tipping-point/?utm_term=.a7282f957a2f) [https://perma.cc/68WJ-HCW2].

<sup>388</sup> Jordan Fabian, *Obama Grants Clemency to 231 Inmates in One-Day Record* (Dec. 19, 2016), <http://thehill.com/homenews/administration/311059-obama-commutes-sentence-s-as-time-in-office-dwindles> [https://perma.cc/2YFW-LRPG].

<sup>389</sup> See Christopher Bedford, *Want Drug-Sentencing Reform? Look to Mike Pence, Congressman Says* (Jan. 29 2017), <http://dailycaller.com/2017/01/29/want-drug-sentencing-reform-look-to-mike-pence-congressman-says/> [https://perma.cc/U2N9-R45B].