FEDERAL LAW AND SYRINGE PRESCRIPTION AND DISPENSING

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INTRODUCTION

THIS PAPER ADDRESSES the following two questions:

(1) To what extent do federal controlled substances, food and drug, or paraphernalia laws regulate the individual physician's or pharmacist's discretion to provide sterile injection equipment for injection drug users (IDUs)?; and

(2) How could federal officials use their legal and political authority to discourage physicians or pharmacists from acting?

It concludes that, at present, federal law does not regulate physician prescription or pharmacist dispensing of syringes (pursuant to a valid prescription) to IDUs. Before federal officials could lawfully intervene in this area of medicine, new legislation expressly conferring power on federal authorities to regulate the physician prescription (and pharmacist dispensing) of syringes would need to be enacted. Nonetheless, as physicians in California and Oregon learned in recent years, federal officials might try to intimidate physicians if syringe prescription and dispensing were considered to be at odds with national drug war orthodoxy. The California and Oregon examples, however, also illustrate that when federal officials overstep their

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authority to control the practice of medicine at the state level, this overreaching can be rebuffed.

DISCUSSION

1. The Limits of Federal Law in Proscribing Syringe Prescription

Three bodies of federal statutory law conceivably cover syringe prescribing and dispensing: the Food, Drug and Cosmetic Act (FDCA), the Controlled Substances Act (CSA), and the Federal Mail Order Drug Paraphernalia Control Act ("Paraphernalia Act"). As explained below, none of these reach the physicians who prescribe or pharmacists who dispense syringes. Accordingly, federal law need not pose an obstacle to physician prescribing and pharmacy dispensing of syringes to IDUs.

a. The FDCA

The Federal Food, Drug and Cosmetic Act\(^1\) empowers the Department of Health and Human Services to approve drugs, devices, and cosmetics as safe and effective for medical use, public consumption, and marketing in interstate commerce. Syringes, like most medical devices, are deemed Class II devices by the FDCA—devices that pose some, but not a great risk of harm and which are subject to modest controls "necessary to provide adequate assurance of safety and effectiveness."\(^2\)

The FDCA’s classification scheme, however, aims to regulate the design, manufacturing, labeling, and marketing in interstate commerce of medical devices and products—it does not attempt to regulate medical practice, which is left to the states. Thus, while the FDCA authorizes federal officials to regulate syringe manufacturers to insure that they produce a sound medical device, and that syringe distributors insure proper labeling of their medical products, the FDCA does not authorize federal officials to dictate how syringes that are lawfully produced, packaged, marketed, and distributed are to be used by health professionals in the course of their professional practice.

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b. The CSA

The Controlled Substances Act is an anti-drug abuse law enforcement statute administered by the Attorney General and enforced by the Drug Enforcement Administration (DEA), which is part of the Department of Justice.\(^3\) As its name suggests, the CSA controls the authorized distribution of scheduled drugs, not the distribution of devices. Accordingly, by its terms, the CSA does not purport to regulate access to syringes.

Even if one were to ignore the plain language of the CSA and construe the definition of controlled substances to encompass syringes (and there are several reasons why a court would not permit this to occur), the CSA, like the FDCA, does not regulate the practice of medicine, which is left to the states.\(^4\) Thus, even this implausible reading of the CSA would not authorize DEA officials to second-guess the propriety of a physician's prescription of a syringe to an IDU, or the pharmacist's filling of that prescription. Put differently, while the DEA can sanction physicians who act contrary to the "public interest," outside "the usual course of medical practice," or in the absence of a "legitimate medical purpose,"\(^5\) historically these standards have been established at the state level as opposed the federal level. Thus, the propriety of a physician's prescription practice is an inquiry left traditionally, and almost without exception, to the states and their medical licensing boards. It is not clear that the DEA has ever sanctioned a physician for prescribing a controlled substance or medical device absent a prior finding at the state level that the physician acted improperly or in bad faith.

c. The Paraphernalia Act

The Federal Mail Order Drug Paraphernalia Control Act ("Paraphernalia Act") governs interstate or foreign commerce in equipment intended for drug consumption.\(^6\) The Paraphernalia


\(^{4}\) The sole exception to this general rule is the CSA's prohibition of the prescription of opioids to maintain an opiate addiction. See 21 U.S.C. § 823(g) (1994) (requiring practitioners to annually obtain registration if they are dispensing narcotic drugs for maintenance or detoxification treatments).

\(^{5}\) See, e.g., 21 U.S.C. § 823(f) (1994) (stating that the Attorney General may deny practitioner registration applications if issuance would be inconsistent with the public interest).

\(^{6}\) 21 U.S.C. § 863 (1994). Technically speaking, the Paraphernalia Act is part of the Controlled Substances Act, having been repealed as a free-standing law and
Act ostensibly defines syringes as drug paraphernalia and purports to regulate their distribution.\textsuperscript{7} However, there is a persuasive argument that the Act, by its terms, does not apply to physician-prescribed or pharmacy-dispensed syringes. The Act sets forth various criteria for determining whether an object is drug paraphernalia, and contrasts paraphernalia with objects used by "legitimate suppliers" that have "legitimate uses ... in the community."\textsuperscript{8}

The Act further contemplates reliance on expert testimony about whether the object is drug paraphernalia or something else, such as a medical device.\textsuperscript{9} When applied to the prescribing or dispensing of sterile syringes to IDUs by health professionals, there is a strong argument that these syringes fall outside the Act's definition of paraphernalia and squarely within the category of medical devices, much like the syringes prescribed and/or dispensed to diabetics.

Even if one were to reject this definitional argument, the Paraphernalia Act only regulates equipment that is sold or offered for sale, or transported by the mails, or any other facility of interstate commerce.\textsuperscript{10} Thus, to the extent that a physician issues a prescription for a syringe without use of the mails or other facilities of interstate commerce (e.g., the phone lines), the Act would not reach the physician's conduct. A valid prescription for syringes, in turn, would serve to transform the syringes from drug paraphernalia into a medical device that the pharmacist would be permitted to dispense or sell.

Finally, and perhaps most decisively, subsection (f) of section 863, entitled "Exemptions," states that "[t]his section shall not apply to ... any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items."\textsuperscript{11} The exemption reflects Congress' focus on the commercial head-shop industry, and its intention not to sweep within the paraphernalia law persons who have traditionally used covered items for legitimate purposes. Physicians and pharmacists are explicitly authorized to possess, use, and distribute syringes in

about half the states, and in the remainder have the implicit authorization of their professional status and long-standing practice. The exemption, moreover, applies to the person, not the specific transaction, so that even if it were claimed that the specific provision of the syringe was prohibited by state law, the fact that the provider is generally authorized to possess or distribute the item would be sufficient to trigger the immunity.

In sum, federal law should not pose a bar to syringe prescription.

2. The Limits of Federal Muscle Flexing in Proscribing Syringe Prescription

In light of the politicization of our national drug control policy, it is conceivable that, notwithstanding the above legal analysis, federal authorities might try to discourage physicians from prescribing or pharmacists from dispensing sterile injection equipment to IDUs. Indeed, as this paper goes to press, such a scenario gains plausibility with President-elect George W. Bush's nomination of Senator John Ashcroft of Missouri to be the next Attorney General. Senator Ashcroft has publicly claimed that "[a] government which takes the resources that we would devote toward the interdiction of drugs and converts them to treatment resources . . . and also implements a clean needle program is a government that accommodates us at our lowest and least instead of calls us to our highest and best."12 It is not difficult to imagine parents or religious groups, for example, attempting to mobilize the Justice Department to quash syringe prescription and dispensing to IDUs, claiming that these practices somehow weaken the "Just Say No to Drugs" philosophy which has dominated the federal response to the problem of substance abuse for over twenty years.

Recent precedent is instructive both as to the willingness of federal authorities to exceed their legal authority, as well as the ability of citizens to have federal law enforced. Specifically, in December 1996, the DEA and other federal officials threatened to sanction California physicians who recommended the medical use of marijuana to their patients and other physicians pur-

suant to that State's Compassionate Use Act. In 1997, the DEA threatened to sanction Oregon physicians who prescribed narcotics to hasten their patients' deaths pursuant to Oregon's Death with Dignity Act. Physicians aware of these precedents may be concerned that prescribing syringes could make them a target of similar pressure. Nevertheless, a brief analysis of these events suggests that the ability of the government to actually sanction physicians is remote.

In California, shortly after being threatened with sanctions for recommending medical marijuana to patients, physicians filed a class action suit in federal court against the Administrator of the DEA, the Director of the Office of National Drug Control Policy (the "drug czar"), the Attorney General of the United States, and the Secretary for Health and Human Services. The physicians claimed that the federal threats abridged their First Amendment rights of free speech and unlawfully exceeded the federal government's authority by attempting to regulate medical practice absent express authority to do so by the CSA. Shortly after the suit was filed, a federal trial court issued a preliminary injunction preventing the government from acting upon its threats. In September 2000, the court issued a permanent injunction, finding that the government exceeded its statutory authority under the CSA to threaten doctors with sanctions for having certain discussions with, or making particular medical recommendations to their patients. As part of its analysis, the court emphasized that Congress was silent as to whether it intended the CSA to reach the specific conduct (physicians recommending medical marijuana) that gave rise to the federal threats. As discussed above, the CSA is similarly silent about physicians prescribing or pharmacists dispensing sterile syringes to IDUs.

In Oregon, when the DEA threatened physicians who prescribed narcotics in compliance with that State's Death with Dignity Act, it was pointed out to lawyers for the Department of Justice that, as with the DEA's threats against California doc-

13 CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2000) (giving Californians the right to obtain and use medically prescribed marijuana without fear of criminal prosecution).
16 See Conant v. McCaffrey, 2000 U.S. Dist. LEXIS 13024, at ***33-34
17 See id.
tors, the DEA’s threats against Oregon physicians were made without statutory basis. Attorney General Janet Reno, upon reviewing the Controlled Substances Act and other federal laws agreed. In publicly retracting the DEA’s threats, Attorney General Reno explained:18

There is no evidence that Congress, in the CSA, intended to displace the states as the primary regulators of the medical profession, or to override a state’s determination as to what constitutes legitimate medical practice in the absence of a federal law prohibiting that practice. Indeed, the CSA is essentially silent with regard to regulating the practice of medicine that involves legally available drugs . . . . 19

The Attorney General’s analysis is equally applicable to the practice of medicine that involves the prescription of legally available medical devices such as syringes. As a result, even if politics prompted federal officials to voice opposition to physician prescription and pharmacy dispensing of syringes to IDUs, federal law, as it currently stands, does not authorize the officials to sanction these health care professionals.

CONCLUSION

For the foregoing reasons, it appears that federal law does not regulate physician prescription or pharmacist dispensing of syringes to IDUs. Such regulation would take place at the state level, if at all.

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19 In recognition of the CSA’s general silence when it comes to regulating medical practice, the U.S. House of Representatives passed H.R. 2260, the “Pain Relief Promotion Act of 1999,” which, if signed into law, would give the DEA authority to regulate medical practice in the field of pain management by permitting DEA agents to assess physician intent in prescribing narcotic analgesia to pain patients to determine whether the narcotics were prescribed in order to relieve pain or hasten death. See H.R. 2260, 106th Cong. (2000).
Criminal justice debt has aggressively metastasized throughout the criminal system. A bewildering array of fees, fines, court costs, non-payment penalties, and high interest rates have turned criminal process into a booming revenue center for state courts and corrections. As criminal justice administrative costs have skyrocketed, the burden to fund the system has fallen largely on the system’s users, primarily poor or indigent, who often cannot pay their burden. Unpaid criminal justice debt often leads to actual incarceration or substantial punitive fines, which turns rapidly into “punishment.” Such punishment at the hands of a court, bureaucracy, or private entity compromises the Sixth Amendment right to have all punishment imposed by a jury. This Article explores the netherworld of criminal justice debt and analyzes implications for the Sixth Amendment jury trial right, offering a new way to attack the problem. The specter of “cash-register justice,” which overwhelmingly affects the poor and dispossessed, perpetuates hidden inequities within the criminal justice system. I offer solutions rooted in Sixth Amendment jurisprudence.

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INTRODUCTION

“Cash register justice” likely killed Sandra Bland. Stopped on a road by a Texas State Trooper for rolling through a stop sign and failing to signal, both minor traffic law violations, the encounter escalated until the trooper ultimately arrested Bland on suspicion of assaulting a public servant, a felony. The judge set bail at $5,000, which Bland’s family could not immediately afford, so she was sent to the county jail. Three days later, Bland hanged herself in custody with a plastic bag, her body hanging from a privacy partition.

In this case, a routine stop and arrest turned into tragedy. Although Bland’s interaction with the criminal justice system had many troubling aspects, the role of cash register justice—where only those who can afford the high price of justice will receive it—is undeniable. The crushing burden of criminal justice debt has quietly punished the poor and indigent for over a decade, and Bland’s death exemplifies the problem’s depth.

Several factors pushed Bland’s criminal justice encounter towards fatality. First, Texas has a notoriously high incidence of traffic stops, and the fees and fines this garners helps finance its criminal justice system, necessary in a state without income tax. Accordingly, even minor adverse interactions citizens have with either Texas law enforcement or the courts cost them substantially. Second, once the troopers arrested Bland, the court set her bail fee at $5,000, far more than she or her family could easily afford. The court did not consider her financial circumstances. Like many counties, Waller County, Texas, has a pre-set list of bail amounts applicable for each crime charge, with little discretion given to an offender’s financial status, despite a Texas law that required individual consideration of a pre-trial arrestee’s finances. As partial result, Waller County exhibits one of the highest rates of pre-trial incarceration in Texas,

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1 In Waller County, Texas, where Bland was arrested and imprisoned, an offender would be usually be required to pay 10% of the bond amount set, which in this case was $500. See Leon Nefakh, Why Was Sandra Bland Still in Jail? Our Bail System Puts People Who Can’t Pay Behind Bars, SLATE, July 23, 2015, located at: http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html

2 Of course, Bland’s arrest and death implicate a number of disturbing aspects of the criminal justice system apart from cash register justice, including police brutality, racial profiling, and the justice system’s ongoing failure to regularly indict police officers for crimes against citizens.

3 See Dallas County looks to traffic ticket revenue for budget shortfall, Grits for Breakfast Blog, February 9, 2009, located at: http://gritsforbreakfast.blogspot.com/2009/02/dallas-county-looks-to-traffic-ticket.html. Texas has so vigorously enforced their speeding laws that approximately 10% of Texas citizens have an outstanding arrest warrant pending, primarily for unpaid traffic tickets. See id.

4 This system of frequent traffic stops is used throughout Texas to help fund the criminal justice system, where “the municipal court is their cash cow.” See Byron Harris, Former Judge Says He Quit Because of Speeding Tickets, WFAA-TV, June 3, 2015, located at: http://www.wfaa.com/story/news/local/investigates/2015/06/02/former-judge-says-he-quit-because-of-speeding-ticket-quota/28367771/


6 See Leon Nefakh, Why Was Sandra Bland Still in Jail, supra note __, at id. This automatic setting of bond was despite of the Texas law requiring flexibility in determining bail amounts or issuing personal recognizance bonds. See Texas Code of Crim. Proc., Art. 17.15 (2016).

over 75 percent of charged offenders. Bland’s death illustrates how even a short stay in jail can quickly and tragically unravel the lives of those who cannot afford their criminal justice debt.

In recent years, criminal justice debt has aggressively metastasized throughout the criminal system. Private probation, bail fees, translation fees, indigent representation fees, dismissal fees, high interest rates, jail and prison costs, court fines, and community service charges, among other financial “innovations,” have turned criminal process into a booming source of revenue for state courts and corrections departments. Many citizens, whether or not they are convicted, are saddled with heavy debt and the constant threat of incarceration as a result of their interaction with the criminal courts. At last count, approximately 10 million people owe more than $50 billion in debt as a result of their involvement in the criminal justice system. As officials in Riverside County, California, noted, “You do the crime, you will serve the time, and now you will also pay the dime.”

By imposing fees and fines at every turn, the criminal justice system has mutated into a bewildering labyrinth for the average criminal offender, who must pay onerous “user” fees for every brush with the criminal courts. As criminal justice costs have skyrocketed, the burden to fund the system has fallen largely on the system’s users, primarily the poor or indigent. As a result, funding of the criminal justice system has disproportionately fallen on those least able to pay. What results is a two-tiered system of punitive debt that especially punishes the poor.

Because this criminal justice debt, if left unpaid, has the potential to turn into actual incarceration or substantial fines, these endless fees, fines and cost can add up to much more serious punishment. This violates the Sixth Amendment right to have all punishment decided by a jury. The Supreme Court has repeatedly held that only the jury may impose or increase punishment on offenders. Despite local court practice, there are no Sixth Amendment exceptions permitting the arbitrary determination of punishment by administrative decision-makers, especially when those decision-makers extract financial sanctions from the poor.

This Article explores the netherworld of criminal justice debt and analyzes it through the constitutional lens of the Sixth Amendment jury trial right. Although a small body of literature exists on the negative consequences of harsh monetary sanctions for offenders, this Article is the first to offer a full examination of the philosophical and Sixth Amendment constitutional ramifications, as well as providing a comprehensive taxonomy of the kinds of debt arising from the criminal justice system.

The steamrolling array of fees, fines, court costs, penalties, and additional incarceration both disproportionately affects the poor and routinely violates the community jury trial right. Applying the Sixth Amendment constitutional screen to this growing problem of crushing

9 See Lauren-Brooke Eisen, Curbing Cash Register Style Justice, American Constitution Society Blog, October 26, 2015, located at: https://www.acslaw.org/acslblog/curring-cash-register-style-justice
criminal justice debt offers a new way to attack the problem and provides some useful ideas for community solutions.

Part I of this Article examines the inexorable rise of the financial motive in the criminal justice system. It takes a careful look at such “innovations” as usage fees, which are court-imposed fees levied on arrestees and defendants for their arrest, adjudication, and incarceration. This Part also explores public defender fees, bail fees, booking fees, translation and disability fees, private probation services and associated (and required) fees, assessments, jail and prison fees, criminal restitution, supervision fees, post-conviction fees, community service fees, and fees for expungement. Any interaction with the criminal justice system now inevitably invokes an entire complex universe of economic sanctions.

In Part II, I apply the Sixth Amendment jury trial right to these criminal justice debts, and find that many of these court-imposed, administratively or privately devised fees, fines and strictures violate the right of the community to determine all punishments. The Supreme Court’s continuing fidelity to the Sixth Amendment jury trial right makes clear that these types of financial sanctions may only be imposed by a local community jury, not the bureaucracy of the courts or the corrections system.

Part III tackles the related and important question of when criminal justice debt rises to the level of punishment. In other words, when does the reduction in liberty concomitant on being arrested, indicted or convicted of a crime become punitive? To answer this question, I look to retributive theory as well as a subjective understanding of punishment, drawing on the recent work of Andrew von Hirsch, Doug Husak, Adam Kolber, Dan Kahan, John Bronsteen, and Anthony Duff. The question of when the denial of liberties transmutes into punishment in the carceral realm has been previously raised in the Eighth Amendment context, both under the Excessive Fines Clause and the Cruel and Unusual Punishment Clause. However, it has never been explored from the viewpoint of the Sixth Amendment’s community jury trial right, an analysis I provide.

In Part IV, I offer some partial solutions to the problems caused by the metastasizing growth of criminal justice debt, inspired by the Sixth Amendment mandate of community participation in criminal justice. These solutions include greater community input in community policing, prosecution, and court procedures. Involving the local community provides transparency for the process and may inspire unique and original ideas for what will best serve local neighborhoods. This participation will hopefully also reduce community resentment, anger, and frustration with the criminal justice system. In addition, I explore how community involvement is especially important with indigent defendants, who have no other outside voices to articulate their needs.

Finally, Part V concludes that if we cannot entirely eradicate this proliferation of criminal justice debt from the justice system, minimizing, controlling, and regulating it is the next best option. Using the power of the community to eradicate the most abusive practices will give some protection to offenders, as well as help better reintegrate them back into the community. Courts,

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for-profit corrections, and bureaucracy will not be able to solve this problem; community members must become involved to shine light on these abuses.

This recent explosion of fees, fines and penalties is a disquieting feature of our current criminal justice system. “[At] the bottom of the penal pyramid[,] where offenses are pettiest and defendants are poorest,” there is little fairness or due process. Cash register justice, which overwhelmingly affects the poor and dispossessed, perpetuates the extreme inequities hidden within the criminal justice system.

Part I: Bad Practices, Worse Results: Fee Profusion in the Criminal Justice System

The 21st century criminal justice system features a labyrinth of fees, fines and costs. Criminal courts impose financial sanctions on millions of U.S. residents convicted of felony and misdemeanor crimes each year. Additionally, a public-private criminal justice industry streams through every city jail, rural prison, suburban probation office, and immigration detention center. All of these money-making “innovations,” including usage fees, public defender payments, assessments, private probation and parole, community service fees, and high interest payments, to give a few examples, harshly affect criminal defendants, particularly those near or below the poverty line.

Although standing alone, each individual financial imposition may seem reasonable, in sum they can create devastating results for offenders. Generally speaking, “criminal justice debt” refers to a wide range of financial penalties. The Model Penal Code, in defining criminal justice debt, has delineated roughly six types of economic sanctions: (1) restitution, (2) fines, (3) costs, (4) fees, (5) assessments, and (6) asset forfeiture. Briefly defined, restitution repays victims for losses suffered; fines both punish the offender and deter others from committing the same crimes; costs defray administrative expenses, whether incurred by the offender or not; fees cover services rendered by the court; assessments help repay expenditures discharged during the offender’s interaction with the criminal justice system; and asset forfeiture refers to government seizure of property that was illegally obtained was used in an illegal activity. Additionally, criminal justice debt can also include surcharges, which operate as cost multipliers on top of other penalties.

In many instances, the collected quantity of “administrative” costs, fees, fines, and surcharges exceeds any formally punitive sanctions owed in a defendant’s case. These financial penalties arrive in many guises, including statutory fines, money and property forfeiture, incarceration fees, restitution awards, court costs, public defender fees, probation and parole charges, and various levels of interest when these sanctions are not paid in full.
In other words, the seemingly endless array of fees, costs and charges, although frequently classified as non-punitive, can have a greater negative impact on an individual offender than the actual, official punishment. This is particularly true when the offender ends up arrested, imprisoned, or further surcharged due to inability to pay the original administrative fees. All of this adds up to very real punishment for the offender, who may spend the rest of her life attempting to resolve these debts, both in and out of confinement.

A. The New Debtor’s Prison

When criminal justice debt cannot be paid, imprisonment often looms as punishment. The conditions in these modern debtors’ prisons can be atrocious. As detailed in a brief challenging the incarceration of indebted defendants in Missouri, incarceration for failure to pay criminal justice debts can be literally dangerous:

Once locked in the jails of Ferguson and Jennings, debtors endure grotesque, dungeon-like conditions. Human beings languish in cells covered in blood, mucus, and feces without access to soap, toothbrushes, toothpaste, laundry, medical care, exercise, adequate food, natural light, books, television, or legal materials. They are told that they will be kept in jail indefinitely unless they or their families come up with arbitrary and constantly changing amounts of money to buy their freedom.19

As the lawsuit challenging Ferguson’s practice of jailing for criminal justice debt argues,20 these conditions of confinement would be unconstitutional for even the worst offenders under the Eighth Amendment’s cruel and unusual punishment clause.

Incarcerating the impoverished has a long and unsavory history in this country. Private-prison businessmen have profited since the early 1600s, when English entrepreneurs began shipping convicts to the Virginia settlements and selling them as servants.21 Following the Revolutionary War, debtor’s prisons were quite common, and there were so many imprisoned debtors that they had their own dedicated section of a jail.22

Congress formally abolished federal debtors’ prisons in the 1830s, and a majority of states followed its lead by the 1870s.23 Nonetheless, debtor’s prison still continues informally, because state constitutional and statutory bans on imprisonment for debt usually have a crime exception.24 As a result, most states do not prohibit jail time for noncommercial debts arising

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21 See Ames, Captive Market, supra note __, at 39.
22 See Bruce H. Mann, Republic of Debtors 85 (2009).
24 See id.
from criminal court involvement or failure to pay child support or alimony.\textsuperscript{25}

In \textit{Williams v. Illinois},\textsuperscript{26} the Supreme Court first addressed imprisonment for unpaid criminal justice debt. There, the Court held extending a prison term for an inability to pay criminal justice debt violated the Fourteenth Amendment’s Equal Protection Clause.\textsuperscript{27} A year later, the Court likewise found unconstitutional the “imposition of a fine as a sentence and then automatically [modifying] it into a jail term because the defendant is indigent and cannot forthwith pay the fine in full.”\textsuperscript{28}

In 1983, the Supreme Court finally eliminated debtor’s prison, holding in \textit{Bearden v. Georgia} that imprisoning a probationer who was unable to pay off his legal debts violated the Equal Protection Clause.\textsuperscript{29} The \textit{Bearden} ruling was narrow, however, finding that an offender could be sentenced to imprisonment if she had the money and was “willfully” refusing to pay.\textsuperscript{30} This left the question of an offender’s ability to pay in the hands of judges, with predictably arbitrary results.\textsuperscript{31}

Part of the problem is that many, if not most defendants do not know they may ask for a \textit{Bearden} hearing. A \textit{Bearden} hearing determines an offender’s ability to pay, and is supposed to come with representation of counsel.\textsuperscript{32} Judges rarely inform offenders \textit{sua sponte} about their \textit{Bearden} hearing right,\textsuperscript{33} however, likely because the hearing is time-consuming, slowing down the processing of the case. Instead, some courts have initiated what is called a “fines or time” sentence, which requires defendants to choose between either paying a fine or serving a set time in jail.\textsuperscript{34} If the defendant cannot pay, then she automatically ends up in jail.

Another way that courts avoid \textit{Bearden} hearings is by imposing the payment plan as part of a guilty plea. Since \textit{Bearden} addressed a case where the trial court sentenced the defendant, some courts\textsuperscript{35} have created a \textit{Bearden} “exception” situation where the defendant affirmatively agrees to pay their debt as part of a plea bargain.\textsuperscript{36} In this way, courts can exempt plea bargains from the \textit{Bearden} mandate, since the original \textit{Bearden} defendant went to trial. There is no

\begin{footnotesize}
\begin{enumerate}
  \item See id.
  \item See id.
  \item \textit{Tate v. Short}, 401 U.S. 395, 398 (1971)
  \item See \textit{Bearden}, 461 U.S. at 672-73.
  \item See Shapiro, \textit{Court Fees Rise, supra} note __, at id.
  \item See Joseph Shapiro, \textit{Supreme Court Ruling Not Enough to Prevent Debtors Prisons}, National Public Radio, May 21, 2014, located at: \url{http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons}
  \item See Balaban, \textit{Debtor’s Prison, supra} note __, at 286.
  \item See \textit{U.S. v. Johnson}, 767 F. Supp. 243, 248 (N.D. Ala. 1991) (distinguishing \textit{Bearden} on the grounds that “restitution obligations were carefully bargained for after notice to victims”).
  \item See \textit{Gamble v Commonwealth}, 293 S.W.3d 406, 411-13 (Ky. App. 2009) (distinguishing \textit{Bearden} on the grounds that the “restitution obligations were carefully bargained for after notice to the victims”); \textit{Dickey v. State}, 570 S.E.2d 634, 636 (Ga. App. 2002) (holding that \textit{Bearden} does not apply to plea-bargained probation terms).
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persuasive reason to treat plea-bargained probation terms differently than judge-imposed probation terms, however, particularly since the vast majority of criminal indictments today are disposed of by guilty pleas. Allowing any courts to avoid the Bearden mandate would allow Bearden to be entirely cannibalized by this dubious plea bargain “exception.”

Once a criminal justice debt is imposed, it is difficult for a judge to modify the amount owed, even when the offender cannot pay due to reasons beyond her control. An offender cannot discharge a criminal justice debt through bankruptcy court, nor avoid the potential interest imposed or collection fees for overdue payments. Accordingly, a very real version of debtor’s prison lives on in the 21st century. By attempting to squeeze revenue from the poorest of offenders, our criminal justice system has created, in essence, a new version of imprisonment for debt, with worrisome human costs.

In the shadowy netherworld of cash-register justice, criminal process is greatly detached from our core legitimating precept of community adjudication and punishment—a critical part of our adversarial system and an essential Sixth Amendment right. This distance can be attributed to the “structural erosion” present in many areas of the criminal system, all of which delegitimize the meaning of criminal justice. Such structural erosion occurs both before and after adjudication, and so far has been “radically underdocumented.”

As I detail in Part I.B, this underreported world of abusive fees and fines imposes tremendous costs. This largely unacknowledged area has been so neglected because we tend to overlook any punishment resulting from more minor crimes, focusing instead primarily on major felonies. What follows illustrates, beyond a doubt, that we must take a hard look at every type of punishment imposed in the criminal justice system.

B. The Labyrinth of Criminal Justice Debt

The array of criminal justice costs, fines, fees, restitution, surcharges, and interest can be staggering. It seems that every actor even tangentially related to the criminal justice system has her hand out for recompense. The list of economic sanctions seems both endless and expanding, limited only by the creativity of court officials, judges, correction boards, private probation companies, and legislatures.

38 See Wagner, Spector of Debtors’ Prison, supra note __, at 388.
40 See Stearns, Reducing the Burden, supra note __, at 965.
41 See Balaban, Shining a Light into Dark Corners, supra note __, at 276.
42 See Natapoff, Misdemeanors, supra note __, at 1319. Natapoff makes this point specifically about how misdemeanors are treated in the criminal justice system, but I believe it is more broadly applicable to criminal justice debt in general.
43 Natapoff, Misdemeanors, supra note __, at 1320.
44 Recently there has been increased interest in minor crimes, including work by Josh Bowers, Beth Colgan, Alexandra Natapoff, Issa Kohler-Hausmann, Jenny Roberts, and Jocelyn Simonson. As a whole, however, most of the focus of the criminal justice system, by scholars, practitioners, journalists, and policy-makers, has been on felonies.
A major problem with our regime of financial punishment, as Beth Colgan trenchantly observes, is that these sanctions are frequently imposed with virtually “no attention paid to the defendant’s circumstances, including the extraordinarily severe consequences that often result for individuals, their families, and society at large.”45 Below I provide a detailed taxonomy of the most frequent forms of criminal justice debt imposed by local counties and states.

1. Pre-Trial: Entering the Labyrinth
   a. Booking Fees

   The complex world of financial sanctions begins at the entry to the criminal justice system, the arrest. Often, a request for payment is made shortly following arrest, before even an indictment is obtained.46 These types of “booking fees,” based only on a police finding of probable cause, are typically collected pre-indictment.

   Courts are divided over the constitutionality of booking fees. The Seventh Circuit has found these type of fees constitutional under both procedural and substantive due process, because booking fees are imposed on all arrestees, whether or not the arrest was supported by probable cause.47 A Seventh Circuit dissenter, however, characterized the disputed booking fee as a “criminal fine,”48 despite its modesty (thirty dollars). The dissent argued that the booking fee was facially unconstitutional because it took property from all arrestees, whether found guilty or innocent, without due process of law—in fact, without any criminal procedure at all.49 Specifically, Judge Hamilton contended that under the Mathews v. Eldridge balancing test, any booking fee must await the outcome of a criminal prosecution, because it is a criminal fine, and therefore punishment.50

   Following Judge Hamilton’s logic, then, booking fees are unconstitutional for two reasons. First, an individual’s private interest in his property, including money, is constitutionally protected, even for very small amounts.51 Second, the possibility of mistaken deprivation is quite large, as the arrest is the only decision made that necessitates the fine.52 A substantial percentage of people who are arrested but never charged or convicted are charged criminal fines, with no possibility of having the money returned.53 Such imposition of punishment without process is a constant theme in the world of criminal justice debt.

   In addition, the imposition of booking fees, like the other financial sanctions levied pre-conviction, violates an offender’s basic rights to have her punishment determined by some aspect of the community. Punishment can only be properly determined though criminal process,54 and is not fulfilled by the officer’s mere determination that there is probable cause to arrest. In other

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45 Colgan, Reviving the Excessive Fines Clause, supra note __, at 281.
46 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1178.
47 See Markadonatos v. Village of Woodridge, 739 F.3d 984, 986 (7th Cir. 2014).
48 Markadonatos, 739 F.3d at 993 (Hamilton, J., dissenting).
49 See Markadonatos, 739 F.3d at 993 (Hamilton, J., dissenting).
50 See Markadonatos, 739 F.3d at 994 (Hamilton, J., dissenting).
51 See Markadonatos, 739 F.3d at 994 (Hamilton, J., dissenting).
52 See Markadonatos, 739 F.3d at 994 (Hamilton, J., dissenting).
53 See Markadonatos, 739 F.3d at 997, 998. (Hamilton, J., dissenting).
54 See Markadonatos, 739 F.3d at 996 (Hamilton, J., dissenting).
words, no government entity may impose a criminal fine based only on probable cause, as this imposes the punishment before the verdict.\(^{55}\)

Similar reasoning about the unconstitutionality and punitive nature of booking fees was applied in two recent district court opinions, one from Ohio and one from Illinois. In *Allen v. Leis*,\(^ {56}\) an Ohio district court held that a county jail's policy of appropriating cash for their standard booking fee upon a pre-trial detainee's arrival violated due process.\(^ {57}\) Following state law, Hamilton County charged a small booking fee to every arrested offender detained in county jail.\(^ {58}\) This fee could theoretically be recovered if the criminal charges were dismissed or the offender was acquitted.\(^ {59}\) The Ohio district court, however, found that since every pretrial detainee had to pay with her immediate funds, the county took her currency without proper notice or hearing.\(^ {60}\) Accordingly, the booking fee violated due process.\(^ {61}\)

Likewise, in *Roehl v. City of Naperville*, an Illinois district court held that imposing an administrative fee for processing arrests violated procedural due process.\(^ {62}\) Here, Naperville, IL, charged a fifty-dollar administrative fee for the processing of bail, bond, or any bookable arrest, including any arrest on a warrant.\(^ {63}\) The Illinois district court held that because the Naperville booking fee ordinance failed to provide *any* procedural mechanism addressing the proper imposition of the fee, the sanction violated procedural due process.\(^ {64}\)

Accordingly, we can learn two important lessons in examining booking fees. First, even though these booking fees can be very small, their automatic imposition is unconstitutional for procedural due process reasons. Second, there are very real Sixth Amendment rights invoked as well. Any financial sanction imposed before conviction or the adjudication of punishment cannot stand, as this usurps the role of the jury and community, a role specifically reserved under the Sixth Amendment jury trial right.

**b. Bail “Administrative” Fees**

Several states and local counties have added “administrative” fees to money bail, collecting them from either bail bondsmen or indicted offenders, even following an acquittal.\(^ {65}\) In California, for example, there are numerous fees and payments added on to an offender’s bail amount, including a “penalty assessment” which charges $29.00 for every $10.00 of the base bail amount.\(^ {66}\) In addition to that, California also imposes a 20% State Surcharge imposed on an offender’s base bail or base fine amount.\(^ {67}\) These financial penalties can rapidly compound. Likewise, in Worchester, Massachusetts, all offenders who decide to post bail to be released

\(^{55}\) *Id.* at 997-98.


\(^{57}\) See *Allen*, 213 F. Supp. 2d. at 820.

\(^{58}\) See *id*.

\(^{59}\) See *id.* at 821.

\(^{60}\) See *id.* at 822.

\(^{61}\) See *id*.


\(^{63}\) *Roehl*, 857 F. Supp. 2d at 709.

\(^{64}\) See *Roehl*, 857 F. Supp. 2d at 717.

\(^{65}\) See Wright & Logan, *Mercenary Criminal Justice, supra* note __, at 1188.

\(^{66}\) See CA Penal Code §1464; Government Codes §§ 76000, 70372, 76104.6, 76104.7 & 76000.5 (California 2015).

\(^{67}\) See CA Penal Code §1465.7.
from pre-trial incarceration must also pay a forty-dollar bail “administrative” fee, which is required to be all cash.\textsuperscript{68}

Pre-trial releasees can rack up yet more costs when they are required to fund their own pretrial supervision, whether it is run by the state or by private entities,\textsuperscript{69} as I describe in more details below. Moreover, a majority of states (about two-thirds in all) permit prosecutors to charge suspects while they are being monitored during deferred prosecution programs.\textsuperscript{70}

As Ron Wright and Wayne Logan have argued, these sorts of “demands for payment at a point so early in the process, when institutional oversight is weak, threaten the presumption of innocence….and raise equal justice concerns.”\textsuperscript{71} Of equal concern, these sorts of extremely early compensatory demands also implicate Sixth Amendment jury trial rights, since these financial sanctions are imposed before conviction (which sometimes never comes), thus entirely bypassing the role of the community jury in adjudicating guilt and punishment.

c. Dismissal Fees

Local jurisdictions have begun to permit some minor offenders eliminate their charges by remitting payment to either the police or the courts. This sum results in the dismissal of the charge and prevents any conviction from appearing on the record.\textsuperscript{72} Of course, this practice privileges the rich and disadvantages the poor, who often do not have enough money available to buy off their misstep.

Although there has always been a gulf between justice for the poor and justice for the wealthy, institutionalizing it through allowing the purchasing of a clean record seems deeply unfair. Even more troubling, these pre-trial abatement payments, such as the “post and forfeit” regime used in the District of Columbia, and the “prosecution cost” strategy in Minnesota, might be perceived as government extortion.\textsuperscript{73} There is much that smacks of unsavory behavior in the world of criminal justice debt.

d. Public Defender Application Fees

Once an offender is formally indicted, financial sanctions proceed unabated. One relatively new development in criminal justice debt is public defender application fees, charged for simply \textit{applying} to use a public defender. Somewhat ironically, the fees are charged automatically to indigent criminal defendants despite their proven poverty.\textsuperscript{74} These impecunious offenders are expected to pay as they go, whether or not they are ever convicted of an offense.\textsuperscript{75}


\textsuperscript{69} See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1188.

\textsuperscript{70} See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1187.

\textsuperscript{71} See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1178.

\textsuperscript{72} See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1188.

\textsuperscript{73} See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1211.

\textsuperscript{74} See Wright & Logan, Political Economy of Application Fees, supra note __, at 2046. Although each state which requires an application fee for a public defender permits a court to waive said fees (except Florida), the state is still free to condition appointment of counsel on future payment of the application fee. See id. at 2054.

\textsuperscript{75} See Wright & Logan, Political Economy of Application Fees, supra note __, at 2054.
Currently a variety of states utilize application fees, with costs ranging from $10 to $480.\textsuperscript{76} For example, New Jersey recently quadrupled its public defender application fee from $50 to $200.\textsuperscript{77} Thus impoverished defendants are put in a true bind—either come up, somehow, with the money to pay the fee, or forgo even the possibility of counsel. Although some states have statutorily provided hardship waivers for the application fees, often these waivers are never actually used.\textsuperscript{78}

In addition, if an offender cannot pay her application fee at the end of her case, then several states use “creative” means to extract payment, including garnishing wages, property seizure, impoundment of vehicles, required community service, potential revocation of probation, and potential sentence enhancement.\textsuperscript{79} Thus, these public defender application fees—monies extracted from the very poorest of defendants for entry into the criminal justice system—are a direct repudiation of the spirit of Gideon. Moreover, these assessments provide a terrible message to send to the public about our criminal justice system: that justice can be had, but only for a price.

e. Private Probation

When an offender is indicted, many private actors in the criminal justice system start calculating their profits. Private probation firms make independent government contracts with the government to provide probation services,\textsuperscript{80} which often functions in lieu of sentence for many offenders. In Georgia, for example, numerous private, for-profit companies pile on extra fees such as “enrollment” costs and other surcharges for the privilege of probation. Such fees can be more than the original costs levied on the defendant.\textsuperscript{81}

Likewise, in Alabama and Mississippi, even those offenders who have paid off their original criminal debts are still under threat of jail time, due to fees and interest payments imposed by private, for-profit companies.\textsuperscript{82} These private providers also have been known to game the process to create extra costs, such as insisting that defendants serve their sentences consecutively, not concurrently.\textsuperscript{83}

Private probation firms have a number of ways to extract revenues from released offenders. They provide GPS devices to keep track of both probationers and parolees for a

\begin{footnotes}
\item[76] See Wright & Logan, Political Economy of Application Fees, supra note __, at 2052-53.
\item[77] See E. Tammy Kim, Poor Defendants Pay Fees Just to Apply for a Public Defender, AL JAZEERA AMERICA (Jan. 9, 2015), located at: http://america.aljazeera.com/articles/2015/1/9/poor-defendants-payfeesjusttoapplyforpublicdefender.html
\item[78] See Bannon et. al, Criminal Justice Debt, supra note __, at 12 (discussing the actual practice in Arizona).
\item[79] See Wright & Logan, Political Economy of Application Fees, supra note __, at 2053-54 (discussing practices in Delaware and Minnesota).
\item[80] See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1193, 1214.
\item[81] See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1214.
\item[82] See Nicole Flatow, How Private Companies Are Profiting from Threats to Jail the Poor, THINK PROGRESS, February 6, 2015, located at: http://thinkprogress.org/justice/2014/02/06/3259851/private-probation-firms-leverage-jail-threats-profit-poor/
\item[83] See Nicole Flatow, Georgia’s Top Court Reins in Private Probation Firms that Illegally Extended Thousands of Sentences, THINK PROGRESS, December 12, 2014, located at: http://thinkprogress.org/justice/2014/12/01/3597755/georgias-top-court-reins-in-private-probation-firms-that-illegally-extended-thousands-of-sentences/
\end{footnotes}
contracted fee, payable by the defendant. In addition, such firms help oversee community service requirements and halfway houses, the latter of which often requires purchase of an insurance policy from a private actor for the duration of the defendant’s stay.  

Often counties and states also subcontract the collection of supervision-related tariffs imposed by the courts. This permits the private firms to tack on significant additional levies to the court-imposed fees. Local governments and courts rarely monitor these private firms, making them free to impose fees and fines in a largely unregulated manner.

In the face of potential sentencing reforms on both the state and federal level, which might potentially eat into profit, many private prison companies have diversified into probationary and parole supervision. For example, in 2013, Corrections Corporation of America (CCA) acquired Correctional Alternatives, a company that provides housing and rehabilitative services including work furloughs, residential re-entry programs, and home confinement. Similarly, in 2011 the GEO Group acquired Behavioral Interventions, which is the world’s largest producer of monitoring equipment for people awaiting trial or serving out probation or parole sentences, and in 2009 acquired JustCare, a medical and mental health service provider providing services to government agencies. Clearly the for-profit prison industry has determined that the fees, fines and costs connected to the criminal justice system are a growth industry. So far, they have not been proven wrong.

2. During Adjudication—Getting Lost in the Maze

a. Court Fees

State and local courts have increasingly required payment for the privilege of undergoing criminal process. Since 2010, 48 out of 50 states have increased criminal court fees. These fees range from the petty to the severe, and have had a serious impact on poor defendants.

For example, offenders can be billed for the cost of a public defender in at least 43 states and the District of Columbia. Following conviction, state legislatures reach into the pockets of impoverished defendants by passing recoupment statutes, which recovers part or all of the public defender attorney’s fees from the offenders themselves. These reimbursement fees can have costs that go into the thousands. In other words, an indigent offender is often required to pay

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84 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1193.
85 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1193.
86 See Flatow, Private Companies, supra note __, at id.
88 See Stroud, Private Prison Companies, supra note __, at id.
89 See Shapiro, Court Fees Rise, supra note __, at id.
90 See Shapiro, Court Fees Rise, supra note __, at id.
91 See Wright & Logan, Political Economy of Application Fees, supra note __, at 2046.
92 See Shapiro, Court Fees Rise, supra note __, at id.
back up to the full cost of representation after her case is over. As a result, poor defendants either skip using an attorney, or carry the debt for years.

In addition, local courts have become quite creative in inventing various court fees. One court in Texas charged a $250 “DNA record fee,” the result of which was split between the highway fund and the general fund for criminal justice planning. Although the Texas Supreme Court found this specific fee unconstitutional, repeated usage of very similar fees in various states shows how determined courts can be in extracting money from offenders.

Offenders are charged fees to have their DNA samples collected, and for their own arrest warrants. In Washington State, offenders are even charged a fee for jury trial: a twelve-person jury trial comes to $250, double the charge for a six-person jury. Likewise, in Oklahoma, the fees billed defendants in simple misdemeanor cases can rise as high as $1,000. For an impoverished offender, these simple sums are often simply not repayable, frequently leading to re-incarceration for failure to pay court debt.

Court fees have become so onerous that the Washington State ACLU filed a class-action lawsuit alleging that jailing defendants for failure to pay court fees is unconstitutional. Specifically, the ACLU argued that the “policy disproportionately targets and punishes the poor, creates a revolving door of incarceration and is a violation of the U.S. Constitution.” The suit requested other alternatives besides jail for unpaid court fees, like a community service option, longer extensions for payments, or the waiving of fees altogether. The lawsuit was filed on behalf of three former inmates, all of whom were jailed after failing to make payments during unemployment. Unfortunately, the conditions alleged by the lawsuit are far too common in today’s world of cash register justice; those without ready money are often imprisoned for failure to pay court debt.

b. Disability and Translation Fees

For those who cannot see, hear, speak or otherwise navigate a courthouse, or for those with emotional and cognitive challenges that make it difficult for them to participate in their own cases, access to justice depends on support from the justice system. Many states, however, impose financial demands on disabled defendants in order for them to fully understand their own

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93 See Shapiro, Court Fees Rise, supra note __, at id.
94 See Shapiro, Court Fees Rise, supra note __, at id.
95 See Emily DePrang, Houston Attorney Crusading Against Unconstitutional Court Fees, THE TEXAS OBSERVER, March 4, 2015, located at: http://www.texasobserver.org/houston-attorney-crusading-against-unconstitutional-court-fees/
96 See LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986) (“Nearly all states with similar open courts provisions have held that filing fees that go to fund general welfare programs, and not court-related services, are unconstitutional.”)
97 See Shapiro, Court Fees Rise, supra note __, at id.
98 See Shapiro, Court Fees Rise, supra note __, at id.
100 See Richardson, Unpaid Court Fees, supra note __, at id.
101 See Richardson, Unpaid Court Fees, supra note __, at id.
102 See Richardson, Unpaid Court Fees, supra note __, at id.
legal proceedings. For example, sixteen percent of all states allow courts to charge a deaf or hearing-impaired defendant for the cost of a sign-language interpreter.\textsuperscript{103}

Similarly, individuals with limited English proficiency often have to pay for translators. In North Carolina, for example, indigent defendants are often assessed interpreter fees, which are included in the “court costs.”\textsuperscript{104} This is despite the Department of Justice’s 2010 issuance of a letter requiring interpreters be provided in all court proceedings, at the county’s expense, in courts receiving federal funds.\textsuperscript{105} According to the Department of Justice, any court receiving federal funds needs to provide interpretation free of cost,\textsuperscript{106} Since the Department of Justice’s advisory letter, however, several states have run afoul of this prohibition, including Alaska, Illinois, New Hampshire, Nevada, Oklahoma, South Dakota, Wyoming, Vermont,\textsuperscript{107} and until very recently, California.\textsuperscript{108}

Requiring those with physical disabilities or language impediments to pay for their own court translators is just another way in which the criminal justice system transfers costs to impoverished offenders. To require a defendant to pay in order to simply understand the charges leveled against her is the epitome of cash-register justice.

3. Post-Conviction: Fighting the Minotaur

The fees, fines and costs that have become an integral part of criminal justice do not end upon conviction. In fact, conviction is typically the point at which criminal justice debt really begins to increase. Once an offender is convicted, court systems do not hesitate to impose multiple financial sanctions.

\textit{a. Jail and Prison Fees}

The recent proliferation of jail and prison fees has been a major financial strain on convicted offenders.\textsuperscript{109} In 41 states, inmates are charged room and board fees for both jail and prison stays.\textsuperscript{110} Through “pay-to-stay” programs, offenders incarcerated in state and county jails are financially responsible for their room and board, along with every other possible cost related to their stay.\textsuperscript{111} For example, in Macomb County, Georgia, the county jail bills prisoners for

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\textsuperscript{103} See Disability Assistance, The Justice Index, National Center for the Access to Justice, located at: http://www.justiceindex.org/findings/disability-assistance/ (last visited on September 6, 2015).
\textsuperscript{105} See Letter from DOJ Civil Rights Division to State Courts, August 16, 2010, located at: http://www.lep.gov/final_courts_ltr_081610.pdf
\textsuperscript{106} See id.
\textsuperscript{107} See Justice Index, Language Assistance, State Adoption of Best Practice, located at: http://www.justiceindex.org/findings/language-assistance/
\textsuperscript{108} See California Moves To Provide Free Interpreter Services In All Court Cases, KPIX News, August 16, 2015, located at: http://sanfrancisco.cbslocal.com/2015/08/16/california-court-interpreters-civil-cases/
\textsuperscript{110} See Shapiro, Court Fees Rise, supra note , at id.
\end{footnotesize}
room and board, physicals, dental visits, medication, prescriptions, phone calls, nurse sick calls, hospital medical treatment, and even work-release, often at exorbitant rates.\footnote{112 See Lauren-Brooke Eisen, \textit{Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause}, 15 LOY. J. PUB. INT. L. 319, 319 (2014).}

“Pay-to-stay” programs have colonized prisons and jails, increasing revenues for counties and local governments. Generally speaking, there are three different models of pay-to-stay programs: per-diems, itemized charging, and upgrades.\footnote{113 See Eisen, \textit{Paying for Your Time}, supra note __, at 324-25.} Per-diems are where the state or county charge a daily room-and-board fee, with penalties ranging from $10 to $142.42 per day (the latter more than many local hotels).\footnote{114 See id. at 325.} Itemized charging involves charging inmates for individual necessities such as toilet paper, clothing, meals, and doctor or dental visits, necessities that incarcerated defendants, the ultimate captive audience, obviously cannot provide on their own.\footnote{115 See id. at 325-26.} Upgrades, on the other hand, are usually fancier accommodations for wealthy offenders who do not wish to serve their time within the Spartan confines of the standard county jail.\footnote{116 See id. at 326.} When jails and prisons differentiate between standard and upgraded incarceration, the inmates who can only afford the standard experience often get short shrift by corrections officials, who often focus on the upgraded experience, which raises far more revenue.\footnote{117 See Jennifer Steinhauer, \textit{For $82 a Day, Booking a Stay at a Five-Star Jail}, NEW YORK TIMES, April 29, 2007 (“You have to be in the know to even apply for entry, and even if the court approves your sentence there, jail administrators can operate like bouncers, rejecting anyone they wish.”), located at: http://www.nytimes.com/2007/04/29/us/29jail.html \hspace{1em} See also Claire Groden, \textit{Want a Jail Cell Upgrade? That’ll be $155 a Night}, \textit{TIME MAGAZINE}, July 31, 2013, located at: http://newsfeed.time.com/2013/07/31/want-a-jail-cell-upgrade-thatll-be-155-a-night/}

States and counties have become so aggressive about recouping room and board fees that some have turned to suing released offenders for the estimated cost of their stay. In November 2015, for example, the Illinois Board of Corrections sued a released prisoner for a room and board bill totaling almost $20,000, hoping to recoup his imprisonment costs.\footnote{118 See Steve Mills & Todd Lightly, \textit{State Sues Prisoners to Pay for their Room, Board}, The Chicago Tribune (November 29, 2015), located at: http://www.chicagotribune.com/news/ct-prison-fees-lawsuits-met-20151129-story.html \hspace{1em} See Mills & Lightly, \textit{State Sues Prisoners}, supra note __, at id.} Although some of these corrections-driven recovery lawsuits go after offenders who have committed serious or violent crimes, other suits target those who have come into a modest sum of money, even when convicted of less serious crimes.\footnote{119 See Ames, \textit{Captive Market}, supra note __, at 41.} Such lawsuits make it much harder for parolees to return to a normal life post-prison (and thus avoid recidivism), as they often leave offenders destitute.

But charging for room and board is only the beginning of jail and prison fees. Take prison phone calls as an illustrative example. Prison-phone companies, and the prison-wire-transfer companies that are following suit, garner their revenues directly from inmates and their families—usually charging one dollar per minute for a standard, long-distance phone call.\footnote{116 To qualify for such upgraded accommodations, the crime committed must be minor. \hspace{1em} See id.} Forty to sixty percent of these costs are kicked back to the contracting government agency—and
roughly 85 percent of non-federal jails sign up for such commission-added contracts. Nickel and diming prisoners for their basic communicatory needs may be profitable, but unquestionably increases criminal justice debt.

Thus even serving one’s standard, designated time in a county jail or state prison can lead to an impoverished offender racking up criminal justice debt. The problem of financial debt is so great that sometimes inmates will go without standard hygiene items or even medical treatment to minimize the accrual of financial sanctions.

The imposition of monetary penalties upon jailed offenders for participating in work-release programs is also quite common. Many jurisdictions require inmates permitted to take part in work release (where the offender works during the day, then returns at night to the jail) remit part of their earnings to the jail, to offset costs.

For those inmates who cannot pay as they go, these debts can linger well after the sentence has been served, turning correction officials into bailiffs when they attempt to recover payment. When standard collection fails, states and counties sometimes turn to private collection agencies, and bill the agency usage fee to the defendant, adding the cost to whatever else she owes.

Once an offender is released, her sentencing court is often required or has the option to make reimbursement a condition of supervised release, whether this is parole or probation. This means that if an offender fails to repay her incarceration debt, she can be returned to jail for violating a condition of probation or parole.

At least one federal appellate court has found that these types of inmate financial sanctions are very similar to fines. In Tillman v. Lebanon County Correctional Facility, the Third Circuit found that such fees could be considered fines, which by definition are more punitive in nature. Granted, the Tillman court found that even if treated as a fine, the Pennsylvania Cost Recovery Program at issue was not excessive under the 8th Amendment Excessive Fine Clause, because it was technically not punitive in design; the fees in that particular program were designed to teach financial responsibility. Even so, the Tillman court

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121 See Ames, Captive Market, supra note __, at 41-2.
122 See Pat Nolan, Inmate User Fees: Fiscal Fix or Mirage, CORRECTIONS TODAY, August 1, 2003, located at: http://www.thefreelibrary.com/Inmate+user+fees%3A+fiscal+fix+or+mirage%3F-a0121939154
123 See Plunkett, Captive Markets, supra note __, at 60.
124 See Plunkett, Captive Markets, supra note __, at 76-77. Naturally, the private market has found a way to extract revenue from these programs, with some private companies demanding up to 30% of the offender’s payment to help collect the monies. See id. at 77-78.
125 See Plunkett, Captive Markets, supra note __, at 79.
126 See Plunkett, Captive Markets, supra note __, at 80.
128 See Tillman, 221 F.3d at 420.
129 See id.
acknowledged that their program, and fines like it, could be interpreted as punitive, despite a purely rehabilitative intent on the part of its creators.\textsuperscript{130}

This understanding is important because many of these inmate fee programs are usually partly punitive in intent. The creators of such programs have been upfront about these intents, commenting that the fees teach inmates valuable lessons as part of their punishment.\textsuperscript{131} The lessons taught, however, all too often result in penury and re-incarceration.

\textit{b. Statutory Penalties}

Post conviction, many fines are statutorily based on general categories of crime, with most jurisdictions providing a range of possibilities for the amount of the fine.\textsuperscript{132} A variety of jurisdictions apply surcharges in addition to the fine, either a percentage or a flat fee, thus increasing the fine amount right at the outset.\textsuperscript{133} Other payments are tightly tied to the circumstances of the crime committed or harm suffered by the victim, such as restitution.

Money and property forfeiture comprise a separate category than fines and restitution, and is tied closely to certain crimes or even merely suspected offenses.\textsuperscript{134} Such forfeiture can include not only crime proceeds but also cash or property in which an offender (or someone related to the offender) maintains legitimate ownership interests.\textsuperscript{135}

\textit{c. Post-Conviction Levies}

Following conviction, a majority of courts levy costs against convicted offenders, and a large number of states have legislation mandating assessments after conviction.\textsuperscript{136} These sanctions are usually tied to court system administration, to assist funding the justice, punishment, and collection system.\textsuperscript{137} The post-conviction levies can include repayment for a broad swath of standard criminal justice activities, such as investigations, prosecutor’s trial prep, preparing arrest warrants, and even seating a criminal jury.\textsuperscript{138} Due to difficult financial times, fees have increased dramatically in the past 16 years as a way to literally support the criminal court system. Post-conviction costs can be so all-encompassing that sometimes they exceed the economic sanctions originally tied to the crime.\textsuperscript{139}

As Wright and Logan have detailed, such cost assessments are often combined with other payments required by the government to help fund punitive sanctions. Fees are commonly imposed for incarceration costs both before and after trial.\textsuperscript{140} Costs are charged by most states to

\begin{itemize}
\item \textsuperscript{130}See id.
\item \textsuperscript{131}See Eisen, \textit{Paying for Your Time}, supra note __, at 323.
\item \textsuperscript{132}See Colgan, \textit{Excessive Fines}, supra note __, at 285.
\item \textsuperscript{133}See Colgan, \textit{Excessive Fines}, supra note __, at 285.
\item \textsuperscript{134}See Colgan, \textit{Excessive Fines}, supra note __, at 286.
\item \textsuperscript{135}See Colgan, \textit{Excessive Fines}, supra note __, at 286.
\item \textsuperscript{136}See Wright & Logan, \textit{Mercenary Criminal Justice}, supra note __, at 1190.
\item \textsuperscript{137}See Colgan, \textit{Excessive Fines}, supra note __, at 286.
\item \textsuperscript{138}See Colgan, \textit{Excessive Fines}, supra note __, at 286.
\item \textsuperscript{139}See generally Alicia Bannon et. al., Brennan Ctr. for Justice, \textit{Criminal Justice Debt: A Barrier to Reentry} (2010), located at \url{http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20FINAL.pdf}
\item \textsuperscript{140}See Colgan, \textit{Excessive Fines}, supra note __, at 287.
\end{itemize}
the offender during his registration for convicted sex offender status.141 The laboratory services associated with drug crimes are often levied on offenders.142 And if an offender is unable to pay any of these fees, fines or assessments, often they return to jail, which imposes extra punishment than that envisioned by either the courts, the jury or the legislature.

d. Criminal Restitution

Criminal restitution is also another way to ransack the pockets of offenders. Recently, courts have been ordering defendants to compensate victims for a growing category of losses, including economic, emotional and psychological losses, as well as losses for which the defendant was not even found guilty.143 Criminal restitution, like all of the other fees, fines and costs levied on an offender, is not afforded any constitutional protections.144 In contrast, many courts entirely disavow the punitive nature of criminal restitution, characterizing it instead as “solely compensatory.”145

Understanding restitution as primarily compensatory, not punitive, has persisted. This understanding is despite frequent imposition of punitive criminal restitution, due in large part to the booming victim’s right’s movement.146 As opposed to disgorgement, which requires a defendant’s payment to offset unjust enrichment on the part of the offender, criminal restitution has transformed into a type of punishment imposed as a result of committing a moral wrong, sometimes only loosely tied to the performance of a criminal act.147

The facts for setting the amount of criminal restitution are largely determined by the probation officer. Typically, the presentence report is the sole “evidentiary” source for the restitution order. In the federal system, and in most states, a judge “may accept any undisputed portion of the presentence report as a finding of fact.”148 As Justice Scalia noted in his Booker dissent, trial courts often must adopt “bureaucratically prepared, hearsay-riddled pre-sentence reports.”149

After reviewing the probation officer’s report, the trial court may impose restitution based on the report alone, request additional documentation, or conduct a separate restitution hearing, although the latter two options are rarely invoked. In other words, the court may find facts and impose additional punishment without the imprimatur of the jury. Along with determining the amount of restitution, the court must also create a payment schedule for the defendant. Creating the payment schedule does not require any input from the parties, however. This means that it is possible for the court to impose an impossible or extremely punitive payment schedule on the defendant, thereby increasing her punishment, without any outside input.

141 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1191.
142 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1191.
143 See Courtney Lollar, What is Criminal Restitution, 100 IOWA L. REV. 93, 97 (2014).
144 See Lollar, Criminal Restitution, supra note __, at 95-96.
145 Lollar, Criminal Restitution, supra note __, at 96.
146 See Lollar, Criminal Restitution, supra note __, at 96-97.
147 See Lollar, Criminal Restitution, supra note __, at 97.
Finally, as with other suspended sentences, a court may revoke probation or supervised release upon finding that a defendant has defaulted on restitution.¹⁵⁰ In other words, the court can send a defendant to prison (or back to prison) for debt.

The cavalier way that courts treat the imposition of criminal restitution simply intensifies the problem. Courts routinely order criminal restitution for various types of offender conduct not proven by the government, including acquitted conduct, conduct outside the statute of limitations, and acts involving victims not named in the indictment.¹⁵¹ Criminal restitution is imposed where there is no financial loss to the victim, and where the loss is not specifically attributable to the defendant.¹⁵² Like so many other types of financial punishment, criminal restitution lengthens the time an offender must remain in the purview of the criminal justice system, and fails to consider the financial abilities of the defendant.

Many courts have simply assumed that restitution does not constitute criminal punishment and instead is compensation to the victim. The Supreme Court in Kelly v. Robinson, however, held that restitution constitutes a criminal penalty and not compensation.¹⁵³ Thus, following Supreme Court precedent, when fact-finding is required, the imposition of restitution should always be determined by either a jury or by some facet of the community.

**e. Probation, Parole & Post-Release Supervision Penalties**

Criminal justice debt continues through the end of an offender’s sentence and beyond, including any probation or post-release supervision. Probation and parole are another lucrative area for states and county criminal justice systems. In 44 states and counting, offenders are billed for probation and parole supervision.¹⁵⁴

The rise of supervision fees in the last twenty years,¹⁵⁵ for both parole and probation, has had an undeniably negative effect on offenders. Supervision fee policies focus almost entirely on raising money, giving local officials an immense amount of discretion on how to impose and collect said fees.¹⁵⁶

A few themes emerge across the different districts and counties. In 1990, the National Institute of Justice¹⁵⁷ published an influential study on how to best impose supervisory fees. These included: maximizing correctional agencies’ incentives to collect, since making the corrections institution directly benefit from fees increased revenue collection rates; emphasizing supervision and room & board fees, because they could be applied to a wide swath of offenders; levying fees on large numbers of offenders, while simultaneously making fee waivers extremely difficult to obtain; avoiding low supervision fees, because it costs the same amount to collect any

¹⁵¹ See id. at 98.
¹⁵² See id.
¹⁵³ This was in the context of deciding whether restitution under the VWPA was subject to discharge in bankruptcy. See Kelly v. Robinson, 479 U.S. 36, 52–53 (1986).
¹⁵⁴ See Shapiro, Court Fees Rise, supra note __, at id.
¹⁵⁶ See Peterson, Supervision Fees, supra note __, at 40.
fee; and developing prompt and increasingly severe consequences for collecting criminal debt. Such draconian fee-setting and collection methods were based on an assumption that most offenders on probation can afford basic monthly supervision fees. The underlying principles, adopted by many states, illustrate how easily various supervision fees can be imposed on an offender, and how difficult they are to discharge.

Similarly, courts in many states charge offenders specific fees to help defray the costs of overseeing probation services, entitled “offender-funded” probation. Those offenders who undergo private probation—through no choice of their own, as this is a county or state-wide decision—can be threatened with jail for failing to pay probation fees, and some are imprisoned for their inability to pay. The longer it takes for offenders to pay off their criminal debts, the longer they stay on probation. The longer they stay on probation, the more they pay in supervision fees, and the greater the threat of imprisonment if they default on their payments. It is a Catch-22 that primarily benefits private, for-profit probation companies.

A similar practice is known as “pay-only” probation. Here, when an offender cannot immediately pay his fine, the court places him on a 30-day probation term, supervised by a private company. If the offender cannot pay the weekly probation fees, then the private probation company directs the court to revoke an offender’s liberty and return him to incarceration.

Large numbers of arrest warrants are issued every year for offenders who have failed to fully pay their private probation fees, either to return the offenders to the court for a probation revocation hearing, or to coerce a probationer or her family into paying more of the debt. Although it is technically the court’s job to sign the arrest warrants, often a private probation company employee prepares the warrant and simply hands it to the judge for signature, without review.

Like so many other areas of fee-based criminal justice, however, often the offender ends up paying more in fees than the original fine amount, thus imposing extra punishment. The offender-funded probation model shifts the entire burden of paying for probation onto the offenders themselves, who are overwhelmingly poor, if not entirely destitute.

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158 See id.
159 See Peterson, Supervision Fees, supra note __, at 42.
160 See Peterson, Supervision Fees, supra note __, at 41.
162 See Alban-Lackey, Profiting from Probation, supra note __, at 2.
163 See Alban-Lackey, Profiting from Probation, supra note __, at 3.
164 See Jessica Pistou, Locking Up In a Debtor’s Prison for Being Poor, The Atlantic, February 25, 2015, located at: http://www.theatlantic.com/national/archive/2015/02/locked-up-for-being-poor/386069/
165 See Pistou, Debtor’s Prison, supra note __, at id.
166 See Alban-Lackey, Profiting from Probation, supra note __, at 51.
167 See Alban-Lackey, Profiting from Probation, supra note __, at 58.
168 See Alban-Lackey, Profiting from Probation, supra note __, at 58.
169 See Alban-Lackey, Profiting from Probation, supra note __, at 22.
Moreover, many courts require offenders sentenced to probation to pay for the full costs of GPS monitoring, drug testing, and alcohol monitoring, among other requirements.\textsuperscript{170} Such devices can cost $180 to $360 per month, along with an initial start-up fee in the range of $50-$80.\textsuperscript{171} In the long term, these devices can be extremely pricey, making it even more difficult for low-income probationers to make the payments and stay out of jail.\textsuperscript{172} For example, Augusta, Georgia, uses an ankle bracelet breathalyzer, called SCRAMX (Secure Continuous Remote Alcohol Monitor). SCRAMX, which measures a person’s sweat for evidence of drinking alcohol, comes with a hefty price tag for a would-be user.\textsuperscript{173} The breathalyzer requires a $50 set-up fee, a $39-a-month supervision fee (which goes to the private probation company), and the costs of setting up a landline in an offender’s home so the system can work—totaling over $400 per month.\textsuperscript{174} In addition, when part of an offender’s probation is required participation in drug or alcohol treatment, she may be responsible for the costs.\textsuperscript{175}

Private probation profits are entirely derived from the fees paid by offenders.\textsuperscript{176} Thus the more monies created by exorbitant fees, fines, and surcharges, the better the bottom line for the company itself. This is a classic conflict of interest.\textsuperscript{177} In addition, the probation company’s de facto power to impose imprisonment upon debt-ridden offenders violates the Sixth Amendment right for the jury to determine punishment. Nowhere in the Bill of Rights does it mention the role of a for-profit probation company as arbiter of criminal punishment.

Even when probation is not outsourced to a private company, major fines and fees can still accrue to an offender. When imposed on the poor, a small offense can easily mushroom into a cavalcade of fines, jail stays and fiscal penalties. For example, one Maryland woman’s initial conviction for drunk driving ultimately resulted in the imposition of $25,000 bail, a month in jail, the loss of two jobs, a six-month suspension of her driving license, and the loss of thousands of dollars of fees, legal costs, and wages.\textsuperscript{178}

Donyelle Hall was initially arrested on suspicion of drunk driving. After bail payment and release, Hall pled guilty and was placed on probation, with the possibility to avoid conviction.\textsuperscript{179} At her guilty plea, the judge sentenced Hall to 18 months supervised probation, which would cost her $105 a month for probation and drunken-driving monitoring, along with 26 weeks of alcohol education at $70 a week, and thrice-weekly Alcoholics Anonymous

\textsuperscript{170} See Alban-Lackey, \textit{Profiting from Probation}, supra note __, at 39.
\textsuperscript{171} See Alban-Lackey, \textit{Profiting from Probation}, supra note __, at 33.
\textsuperscript{172} See Alban-Lackey, \textit{Profiting from Probation}, supra note __, at 39.
\textsuperscript{173} See Shapiro, \textit{Punish the Poor}, supra note __, at id.
\textsuperscript{175} See Colgan, \textit{Excessive Fines}, supra note __, at 288.
\textsuperscript{176} See Alban-Lackey, \textit{Profiting from Probation}, supra note __, at 5.
\textsuperscript{177} Id.
\textsuperscript{179} See Dewan, supra note __, at id.
meetings. In all, Hall initially owed $385 per month in fees, along with court costs totaling $252.50, the $2,000 bail bond, and a license suspension of 14 days.

Due to the byzantine rules of her probation agreement, however, Hall soon ran into trouble. Her failure to let the court know and approve of a pending move resulted in a probation violation hearing, which took months to dismiss even though Hall had never ended up moving. Hall’s failure to fully document her attendance at the thrice-weekly AA meetings resulted in a warrant for arrest, for violating probation. Her bond was set at $5,000 cash, meaning no bondsman could be used. Unable to raise the full bond amount, Hall was sentenced to a term of imprisonment in the Baltimore City Detention Center, a notoriously dangerous and unhealthy jail, and stayed there 34 days. Finally, because Hall violated her probation, the drunk-driving conviction, formerly suspended, was imposed, resulting in a six-month suspension of her license. Thus even with the best of intentions, a minor infraction resulting in probation can end up causing devastating consequences for an impoverished offender.

Similar problems dog paroled offenders. Often parole eligibility rests on an offender’s capability to pay processing fees. If an offender cannot pay the fee, she must remain incarcerated. For example, in Pennsylvania, if an offender cannot pay the initial $60 parole fee, she simply is not eligible for parole.

In these ways, the interminable roster of court fees and fines have created a regime where much incarceration does not result from the initial crime, but as punishment for failure to pay the many fines, fees and costs now associated with the criminal justice system.

f. Community Service & Expungement Charges

Even community service has not escaped the inexorable pressure to extract cash from offenders. In Washington State, for example, there is a fee charged to the offender to serve on the country work crew—five dollars per day—even if that community service is an alternative to paying a fee. Likewise, in Multnomah County, Oregon, there is a thirty-five dollar fee to participate in community service if the offender was sentenced to more than 40 hours, although this can be waived for SNAP recipients with proper documentation. California imposes a community service fee, and Florida not only requires a small intake fee to begin community service, but also assesses a $50 fee from the offender if the community service is violated and

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180 See id.
181 See id.
182 See id.
183 See id.
184 See id.
185 See id.
186 See Colgan, Excessive Fines, supra note __, at 287.
187 See Bannon et. al, Criminal Justice Debt, supra note __, at 6.
188 See Joseph Shapiro, As Court Fees Rise, The Poor Are Paying the Price, NATIONAL PUBLIC RADIO, May 19, 2014, located at: http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor
189 See Shapiro, Court Fees Rise, supra note __, at id.
190 See Adult Community Service Fees, Multnomah County, Oregon, located at: https://multco.us/dcj-adult/adult-supervision-fees/adult-community-service-fees
191 See, e.g., Superior Court of California, County of Sacramento, Traffic, FAQs, Fines, located at: https://www.saccourt.ca.gov/traffic/faq.aspx#fines
she is returned to custody. North Carolina is the most draconian of all, requiring a $200 start-up fee to begin a sentence of community service, even when the sentence is court-ordered as part of the punishment.

The demand for payment can continue even after the offender has completed her sentence. For example, many states extend supervision periods as a direct result of failure or inability to pay. This kind of action unquestionably increases an offender’s punishment, especially since these supervision periods, if violated, can result in extra imprisonment.

In the event that an offender is permitted to expunge her record, it, too, arrives with a price. Many states charge an “expungement fee” to facilitate the eradication of the offenses. In Oregon, for example, the court charges a $252 expungement fee to set aside an arrest record or conviction, payable to the state. This fee is not refunded if the expungement fails. It seems there is no aspect of criminal justice too small or too large to forgo cash register justice.

Far too often, the result of these accretive fees, fines and costs is additional denial of the offender’s liberty, whether from revocation of probation, imposition of suspended sentences, inability to afford parole costs (including required residential or out-patient treatment), or imposition of extra incarceration time due to offender’s failure to pay. Moreover, the collateral consequences of these debts can be extremely harsh: those offenders on probation and parole who fail to make payments can be cut off from obtaining Social Security, EBT, Temporary Assistance for Needy Families, Section 8 housing, and the like. Sometimes felons must pay all outstanding debts before their voting rights are restored.

Finally, these financial sanctions and their repayment systems place an added burden onto a class of people—the poor and indigent—who already shoulder an increased load from the stress of poverty. Because scarcity places extra cognitive demands that complicate rational decision-making, dealing with the additional burden of monetary sanctions can adversely affect all of an offender’s decision-making.

In sum, the continual accretion of criminal justice debt can be ruinous, particularly to those living on the margins. The penalties assessed against defendants have continued to balloon, “becoming an engine of economic disadvantage in their own right and leading some to bemoan

192 See, e.g., Orange County, Florida, Client Fees, located at: http://www.orangecountyfl.net/Portals/0/Library/Jail-Judicial/docs/Client%20Fees%20FAQ.pdf
193 See Bannon et. al., Criminal Justice Debt, supra note __, at 15.
194 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1193.
195 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1196.
196 See Jefferson and Crook County Circuit Courts, Oregon Judicial Division, Set Aside Arrest Record or Conviction, located at: http://courts.oregon.gov/Crook/Pages/Expungement.aspx
197 See id.
198 See Colgan, Excessive Fines, supra note __, at 291.
199 See Colgan, Excessive Fines, supra note __, at 293.
200 See Shapiro, Court Fees Rise, supra note __, at id.
the resurrection of debtor's prison." The increasing levels of fines, assessments, interest, and other miscellaneous fees assessed in criminal adjudication, in both misdemeanor and felony convictions, is astounding. The total amounts assessed per conviction, often hard to calculate because they are levied in so many different ways and by so many different actors, are simply out of reach for many offenders.

As a result, state and county jails have been transformed from holding pens to booming revenue centers. Over the past thirty years, the number of annual jail admissions nearly doubled, from six million in 1983 to 11.7 million in 2013. Once incarcerated, jailed offenders spend more time behind bars than ever before; the average length of stay increased from 14 days in 1983 to 23 days in 2013. Many of these admissions are comprised of not-yet-convicted offenders, held primarily because they are too poor to pay the price of release.

These periods of imprisonment, brief or not, can have long-lasting and sometimes devastating consequences on offenders, including increasing the likelihood of receiving a harsher sentence, reducing an offender’s economic viability, promoting their future criminal behavior, and worsening the health of those who enter. Therefore, any financial sanction imposed on offenders ultimately resulting in incarceration can create a cavalcade of long-lasting punishment, punishment that can stretch on for years.

4. Additional Financial Impositions

a. Penalties, Interest and Collection

When criminal justice debt is not paid off on time, there are often multiple harsh penalties and interest imposed. Penalties for non-payment can be either flat-rate or percentages of the original fee(s), and sometimes involve private collection agencies, which, of course, add their own separate charges. Interest rates, which are frequently stacked on top of monetary penalties, surpass ten percent in some jurisdictions.

For example, in Washington State, felony cases accrue a twelve percent interest on any costs, from the moment of judgment until all fines, fees, costs, restitution, and interests are repaid. The average amount of debt in Washington State felony cases is approximately $2500—an impossible amount of money for an impoverished offender to remit.

202 See Natapoff, Misdemeanors, supra note __, at 1326. Natapoff is discussing misdemeanor defendants in particular, but her observation is equally applicable to all criminal offenders, especially the indigent.
203 See Bridget McCormack, Economic Incarceration, 25 WINDSOR YEARBOOK OF ACCESS TO JUST. 223 (2007).
205 See Subramanian et. al, Incarceration’s Front Door, supra note __, at 10.
206 See Subramanian et. al, Incarceration’s Front Door, supra note __, at 2.
207 See Subramanian et. al, Incarceration’s Front Door, supra note __, at 5.
208 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1192.
209 See Colgan, Excessive Fines, supra note __, at 288.
210 See Shapiro, Court Fees Rise, supra note __, at id.
211 See Shapiro, Court Fees Rise, supra note __, at id.
States also impose collection fees when attempting to recoup criminal justice debt. In Florida, for example, private collection agencies can charge individuals up to a 40 percent surcharge on amounts collected, and Illinois law authorizes charging individuals who fall behind on payments with a fee of 30 percent of the delinquent amount. Most states do not evaluate an offender’s ability to pay when imposing these extra sanctions.

When extended payment plans are an option, they come with high minimum payments, with additional penalties if payments are late. In Ferguson, Missouri, for example, the standard court payment plan required payments of $100 per month, which remains a difficult amount for many criminal offenders to routinely produce. Further complicating issues, the Ferguson court treated a single missed, partial, or untimely payment as a missed appearance, which immediately generated an arrest warrant. In fact, Ferguson frequently used its police department as a collection agency for its court. Such a harsh approach to unpaid financial penalties—practiced in a variety of cities and counties—thus not only increases an offender’s debt, but also potentially lands her back into custody.

Adding to the burden, state statutes frequently forbid courts from taking an offender’s indigent status into consideration when punitive fees, interest, and collection costs are imposed. Even when states or counties are permitted to consider financial ability, often they do not.

The long tail of these mercenary punishments can stretch on and on for impoverished offenders—over thirty years, in some cases. In addition to the often-crushing economic load, these financial burdens can negatively affect an offender’s employment, by keeping criminal histories open until the debt is paid. As Colgan points out, the “penalties transform punishment from a temporally limited experience to a long-term status.”

These systems of fines layered upon fines, often resulting in incarceration when enough money is owed or accounts prove delinquent, violates the Sixth Amendment jury trial right. Our current schema of cash register justice means that often unauthorized punishment is doubly

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212 See Colgan, Excessive Fines, supra note __, at 288.
213 See Bannon et. al., Criminal Justice Debt, supra note __, at 17.
214 See Wright & Logan, Mercenary Criminal Justice, supra note __, at 1192.
216 See U.S. Department of Justice, Investigation of the Ferguson Police Department, supra note __, at 53.
217 See Colgan, Excessive Fines, supra note __, at 289.
218 See, e.g., Mo. Rev. Stat. § 560.026, which holds that in determining fine amount and method of payment, a court “shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of an individual.” This directive, however, has been virtually ignored by Ferguson, MO courts. U.S. Department of Justice, Investigation of the Ferguson Police Department, supra note __, at 53.
219 See Shapiro, Court Fees Rise, supra note __, at id.
220 See Colgan, Excessive Fines, supra note __, at 295 (quotations omitted).
imposed, through both punitive monetary sanctions and potential of actual imprisonment. Both levy punishment without the imprimatur of a jury or the community.

b. Child Support Debt

Imprisonment spurs its own cavalcade of criminal debt troubles, including paying child support. In many states, debt from child support orders can accrue at an alarming rate, since an offender’s felon status often prevents him from obtaining a reduced income modification from the court while imprisoned.223 An offender’s inability to earn wages to pay child support is often disingenuously called “voluntary unemployment,” attributing an imprisoned offender’s reduced income as self-created through their criminal acts.224 This makes the child support orders ineligible for modification.225 In other words, classification of incarceration as voluntary unemployment turns the requirement of child support into a “proxy for further punishment.”226

In addition, even in states that allow such imprisonment modifications, offenders still need to immediately petition the family court to temporarily reduce their monthly child support payment orders, or the child support debt becomes unreviewable under the Bradley Amendment.227 Child support review and adjustment is often slow and cumbersome, and responses to inmate requests can be extremely variable.228 As a result, many offenders leave incarceration with more than $20,000 in child support arrears.229

In addition, due to Congressional legislation, parents that miss child support payments face a host of new, aggressive enforcement actions.230 In some states, payment of child support is a parole requirement, with nonpayment potentially leading to the offender’s reincarceration for parole violation.231 Thus child support debt is simply another part of the complex labyrinth of criminal justice debt.

Even if these types of fees and fines are small, they often present an insurmountable hurdle to impoverished defendants. Local courts can be merciless in requiring immediate payment of criminal justice debt, threatening jail for non-payment. Some courts have gone even further in their demands. In Marion, Alabama, for example, a circuit court judge told the defendants in his courtroom that if they could not pay the fines owed, they could either donate blood (and receive a $100 credit towards their fine), or go to jail.232 This literal attempt to wring blood from a stone (or impoverished offender, to be precise) is but an extreme example of courts

225 See Cammett, supra note __, at 385.
226 See Cammett, supra note __, at 385.
228 See Pearson, Building Debt While Doing Time, supra note __, at 7.
229 See Cammett, supra note __, at 385-86.
230 See Pearson, Building Debt While Doing Time, supra note __, at 8.
231 See Pearson, Building Debt While Doing Time, supra note __, at 8.

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and local governments trying to generate revenue by imposing fines, fees, court costs, and interest.\footnote{See id.}

The cycle of excess punishment created by the endless imposition of financial sanctions, interest, collections, and additional incarceration, is largely accretive and without a central driver. This imposition of criminal justice debt comes from all sources and sides, excluding only one: the community, the only actor that is constitutionally permitted to arbitrate or increase an offender’s punishment.

\section*{Part II: Applying the Sixth Amendment to Criminal Justice Debt}

When criminally imposed fines and imprisonment morph from regulatory to punitive, as in the case of criminal justice debt, the Sixth Amendment jury trial right dictates that the community must have a say in the punishment imposed. In the \textit{Apprendi-Blakely} line of cases, the Supreme Court reinvigorated the Sixth Amendment jury right, concentrating on the need for the local community, in the form of the jury, to impose punishment on those found guilty. By focusing on this basic idea—that a valid conviction requires all aspects of a crime be determined by a jury—the Court “provided the basis for [its] . . . decisions interpreting modern criminal statutes and sentencing procedures.”\footnote{United States v. Booker, 543 U.S. 200, 230 (2005).} The ever-increasing list of criminal justice debts imposed by courts, legislatures and private firms is even more dubious when contrasted against the Supreme Court's recent spate of opinions repeatedly highlighting the community’s right to determine all punishment imposed on an offender.

\subsection*{A. Looking at Criminal Punishment Through the Lens of the Sixth Amendment}

Over the past 16 years, the Court has heavily relied on the historical role of the community as an arbiter of punishment, contending that only a jury can find facts that increase a convicted offender's penalty. Specifically, in the \textit{Apprendi-Blakely} line of cases, the Supreme Court reinvigorated the Sixth Amendment jury right, concentrating on the need for the community, as jury, to impose punishment on convicted offenders.

In \textit{Blakely v. Washington}, the Supreme Court fully articulated the community’s historical right to a jury trial. At its narrowest, \textit{Blakely} specifically held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”\footnote{Blakely v. Washington, 542 U.S. 296, 301 (2004).} By holding that a court can only sentence a defendant on facts found by the jury beyond a reasonable doubt or admitted by the defendant himself, the \textit{Blakely} Court eliminated all judge-made enhancement of sentences beyond their maximum.\footnote{Critically, the majority found that “[w]hen the judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.” \textit{Id.} at 304 (internal citation omitted).}

\textit{Blakely}’s holding, however, has proved far more expansive than simply determining which body may find facts that increase an offender’s maximum sentence. In responding to the
slow diminution of the jury right’s traditional and proper scope, the Blakely Court firmly reestablished the paramount territory of the jury in criminal decision-making and punishment. This broad Blakely mandate stems from the importance the Court has invested in the role of the jury, based on its historic and constitutional role in our criminal justice system.

By holding that a court can sentence a defendant only on facts found by the jury beyond a reasonable doubt or admitted by the defendant himself,237 the Blakely Court gave strong support to the idea that the community must have the final word on criminal punishment. Thus, the importance of the community determining criminal punishment is critical to the Court's current understanding of the rights of the jury.

Since deciding Blakely in 2004, the Court has not only reaffirmed the jury’s right to decided all punishment, but has continually applied its rule to new areas, including capital punishment, Ring v. Arizona,238 criminal fines, Southern Union v. United States, 239 and mandatory minimums, Alleyne v. United States,240 to name just a few. This very winter, in fact, the Court once again reaffirmed the importance of the jury’s right to decide every aspect of punishment in Hurst v. Florida, reminding states that the Sixth Amendment requires “a jury, not a judge, each fact necessary to impose a sentence of death.”241

More relevant to our analysis here, however, is the Court’s recent extension of the Apprendi-Blakely reasoning to criminal fines. Southern Union held that the Fifth and Sixth Amendments apply to the imposition of criminal fines as well as to other criminal penalties. This represents a dramatic change from what many courts have assumed over the years, particularly that most impositions of a criminal fine are punitive.

The Southern Union Court held unequivocally for the first time that Apprendi applies to the imposition of criminal fines. The Court explained that it does not – and has never – distinguished one form of penal sanction from another, and thus Apprendi must apply to all criminal sanctions: “Apprendi’s ‘core concern,’ is to reserve to the jury ‘the determination of facts that warrant punishment for a specific statutory offense’ . . . [and] [t]hat concern applies whether the sentence is a criminal fine or imprisonment or death.”242

Ultimately, the Court in Southern Union determined that there is no principled basis for treating fines any differently from other penalties. This is because the Court has “broadly prohibit[ed] judicial fact-finding that increases maximum criminal ‘sentence[s],’ ‘penalties,’ or ‘punishment[s]’ – terms that each undeniably embrace fines.”243 Nomenclature aside, any decision made to increase punishment on an offender can only be made by the jury.

In Southern Union, then, the Court re-affirmed the broadness of Apprendi-Blakely, holding that any punishment rendered by the courts, including criminal fines, should have its

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237 See Booker at 313 (“If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt.” (quoting Ring v. Arizona, 536 U.S. 584, 588-89 (2002))).
242 Southern Union, 132 S. Ct. at 2350.
243 Southern Union, 132 S. Ct. at 2350.
facts determined by a jury, beyond a reasonable doubt. This was because the Court found that criminal fines, although different in type from imprisonment, were not so different in substance. In other words, there was no principled basis to treat the two differently.

The Southern Union Court highlighted that a central concern in criminal justice is the jury’s determination of facts that impose punishment for criminal offenses. This must include criminal fines because, as the Court reasoned, fines are just another form of penalty inflicted by the government for the commission of offenses.

Thus in Southern Union, the Court once again signaled that when it comes to imposing punishment on offenders, no matter what kind of penalty, it is only the province of the jury to judge. Ultimately, Southern Union helps bolster what we have already learned: that the community must adjudicate punishment in all types of criminal procedures, from the front-end to the back-end, in whatever form they arise.

Likewise, any restitution imposed may violate the historical Sixth Amendment jury trial right unless the jury is the one to determine the penalty’s amount. The history of criminal restitution in this country gives weight to this claim. Up until the 19th century, courts usually imposed restitution only when it was based on the facts alleged in the indictment, following a defendant’s conviction. This means that a jury had to specifically find, beyond a reasonable doubt, that goods had been lost and a defendant should be punished for this loss by providing restitution to the victim. Thus, looking at the historical parallels alone, it makes sense that the jury trial right applies to criminal restitution.

Of course, imposing restitution on behalf of sympathetic victims is difficult to oppose. Nonetheless, courts and counties should not simply ignore the Sixth Amendment jury trial right, which quite plainly precludes nonjury fact-finding whenever this increases the defendant’s punishment. Any and all of the restitution procedures that impose punishment upon a defendant without jury input, whether local, state or federal, plainly usurp the community’s rightful role and violate our current understanding of both Apprendi-Blakely and the community jury trial right.

Despite the Court’s recent decisions on requiring the imprimatur of the community in determining criminal punishment, fines and restitution, however, the imposition of criminal justice debt still takes place in the neglected corners of criminal justice. The Court's refusal to cabin the ramifications of Blakely leaves an opening to integrate the community jury right into the realm of criminal justice debt.

The Supreme Court has focused on the jury as a representative of the community, and the only appropriate body to impose punishment on a convicted offender. It is equally important that the community have a say in determining whether punishment is imposed through fees, fines

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244 Southern Union Co. 132 S.Ct. 2344 (2012).
245 Southern Union, slip op. at 4.
and sanctions. The *Apprendi-Blakely* line of decisions, forbidding imposition of punishment until the jury has decided guilt or innocence, must inform our practices governing criminal justice debt, particularly when the endless array of financial sanctions frequently results in additional imprisonment for the offender.

Our failure to regulate this wild west of criminal fees & fines, imposed by a startling variety of different actors, results in the imposition of unjustified punishment, whether financial or incarcercative. Until very recently, these mercenary punishments took place virtually unnoticed and un-remedied. As such, the spirit of the Supreme Court's recent Sixth Amendment jurisprudence should also apply to all sorts of criminal justice debt in a variety of circumstances. Whenever criminally imposed fines and detention turns from regulatory to punitive, the community must have a say in the punishment imposed.

**B. When Civil Sanctions Transform into Criminal Punishment**

Delineating civil sanctions from criminal punishment can be more challenging than it first appears. The Supreme Court has promulgated a lengthy, multi-part test to determine whether a sanction is criminal or civil. For example, in *Kennedy v. Martinez-Mendoza*, the Supreme Court provided seven benchmarks to determine whether a sanction has a punitive purpose or effect. These guideposts are: 1) does the sanction involve an affirmative disability or restraint; 2) has the sanction historically been regarded as a punishment; 3) does the sanction rely on a finding of scienter; 4) will the operation of the sanction promote the traditional aims of punishment, retribution and deterrence; 5) is the behavior to which the sanction applies already criminalized; 6) can an alternative purpose be rationally connected to the sanction; and 7) whether the sanction appears excessive in relation to the alternative sanction assigned. Application to the majority of criminal justice debt, the results seem to be that these sanctions are a restraint on most offenders’ finances; historically, regarded as punishments (as most fines were); often not based on findings of scienter; do not neatly fit into the traditional aims of punishment, retribution and deterrence; can result as a consequence of already criminalized behavior; and impose excessive punishment relative to other potential sanctions.

More recently, the Supreme Court addressed the question of when monetary forfeitures become punishment in *United States v. Bajakajian*. In *Bajakajian*, the Court had to determine, under the Eighth Amendment Excessive Fines Clause, whether forfeitures are fines that are punitive in nature. In its determination, the Court first reminded the government that the Excessive Fines Clause limits governmental power to extract payments, whether in cash or in kind, as punishment for an offense.

The *Bajakajian* Court found that the forfeiture of currency ordered by the contested federal statute constituted punishment, despite the Government’s argument of “remedial purposes,” and made a careful distinction between traditional civil forfeitures and those based on

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250 See *Bajakajian*, 524 U.S. at 328.
This distinction is important, because the Supreme Court classified forfeitures, fees, and fines stemming from the criminal justice system as punitive, despite the government’s attempted re-categorization.

Accordingly, Bajakajian’s holding—that monetary forfeitures are fines under the Eighth Amendment if they constitute punishment for an offense—helps clarify our understanding of fines under the Sixth Amendment. The Court strongly indicated that a criminal offender’s disgorgement of funds is likely to be considered punitive, not remedial. When this interpretation is applied to the vast architecture of criminal justice debt, this means that a large swath of it can be adjudged punishment.

When reviewed as a whole, there is little doubt that for the poor, imposing criminal justice debt results in punishment. Even some of the judges imposing these criminal justice debts have admitted that their nature is punitive, not civil in nature. As District Court Judge Robert Ingverson stated when asked about his practice of jailing offenders with unpaid court fees, “Fines are exactly how they sound—punishment ... They’re given a fine and if they can’t or won’t pay it, there are alternatives.”

Offenders struggling to pay such economic sanctions, fearing high interest rates, forced labor on work crews, or imprisonment due to their inability to pay back their criminal justice debt, would certainly agree.

Part III: What Counts as Punishment?

In legal terms, it seems that the majority of criminal justice debt qualifies as punishment. But what about philosophically? In other words, when does the standard, constitutional reduction in liberties, when arising from criminal justice fines and fees, climb to the level of punishment? When does the basic imposition of criminal justice debt transform into punishment, as understood by criminal theorists?

To answer this question, I look to retributive theory as well as a subjective understanding of punishment, drawing on the work of Adam Kolber, John Bronsteen, Doug Husak, Andrew von Hirsch, and Anthony Duff. The question of when state-denied liberties qualify as punishment has been previously raised in the Eighth Amendment context, both under the Excessive Fines Clause and the Cruel and Unusual Punishment Clause. However, it has never been explored from the viewpoint of the Sixth Amendment’s jury trial right requirement. I seek to determine when the imposition of criminal justice debt rises to punitive levels, thereby triggering the 6th Amendment community jury trial right.

When discussing whether criminal justice fees, fines and penalties are punitive, it is helpful to start at the most basic understanding of what we commonly consider punishment. Of

251 See Bajakajian, 524 U.S. at 332.
252 See Bajakajian, 524 U.S. at 328.
253 See Tyler Richardson, ACLU sues Benton County Over Jail Sentences for Unpaid Court Fees, TRI-CITY HERALD, October 6, 2015, located at: http://www.tri-cityherald.com/news/local/crime/article37968666.html#storylink=cpy
254 See Richardson, Unpaid Court Fees, supra note __, at id.
course, criminal philosophy has long attempted to define and justify “criminal punishment,” a famously open-ended term. The contours of criminal punishment are often nebulous and difficult to delineate.

Most broadly, a state response to conduct does not always qualify as punishment. Following H.L.A. Hart, the state response must meet several requirements: 1) involving “pain or other consequences normally considered unpleasant;” 2) “for an offence against legal rules;” 3) “of an actual or supposed offender for his offence;” 4) “intentionally administered by human beings other than the offender;” and 5) “imposed and administered by an authority constituted by a legal system against which the offence is committed.” Outside this strict taxonomy, however, Hart also appreciated that not all state-imposed sanctions qualify as punitive. Such things as taxes, license revocations, or benefit terminations can be classified as deprivations, but do not rise to the level of punishment.

So when do state-imposed sanctions rise to the level of punishment? Following a definition proposed by John & Ellis McTaggart, punishment is “the infliction of pain on a person because he has done wrong.” John Rawls has explained “a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of the citizen.” More comprehensively, Andrew von Hirsch has argued that “[P]unishing someone consists of visiting a deprivation (hard treatment) on him, because he has committed a wrong, in a manner that expresses disapprobation on the person for his conduct.” All of these definitions would certainly include financial sanctions imposed by the state.

Von Hirsch’s understanding of punishment proves the most useful here. According to von Hirsch, the principal justification for punishment is censure: to import blame or condemnation to those who have committed wrongful acts. This is because censure “is the authentic expression of the condemnor’s ethical judgment.” Von Hirsch concludes that punishment in Western societies involves public denunciation or censure of criminal conduct by the state.

Importantly, von Hirsch includes “hard treatment” in his understanding of punishment, which, as commonly defined, covers fines, probation, community service, home detention curfews, electronic monitoring, compulsory treatment and/or education programs, and imprisonment. All of these forms of “hard treatment” impinge on an individual’s liberty and

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256 See Alice Ristroph, How (Not) to Think like a Punisher, 61 Fla. L. REV. 727, 738-9 (2009).
259 See JOHN MCTAGGART & ELLIS MCTAGGART, STUDIES IN HEGELIAN COSMOLOGY 137 (1918).
260 John Rawls, Two Concepts of Rules, 64 Phil. REV. 3, 10 (1955).
262 See generally ANDREW VON HIRSCH, CENSURE AND SANCTIONS (Oxford 1996).
263 VON HIRSCH, CENSURE AND SANCTIONS, supra note __, at 25.
264 See VON HIRSCH, CENSURE AND SANCTIONS, supra note __, 12-13.
265 See VON HIRSCH, CENSURE AND SANCTIONS, supra note __, at ___ (chap. 7).
266 See PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 12 (Oxford 2010).
personal autonomy to various extents. Equally important, however, is the message of blame that such hard treatment is supposed to convey. In von Hirsch’s view, the messages of censure and crime control are closely intertwined, in that hard treatment both communicates censure and provides motivation to follow the law.

Likewise, Joel Feinberg contends that “condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former.” Thus in accepting that many, if not most, of these financial penalties levied on offenders qualify as hard treatment, we must also accept that a certain level of condemnation, or punitive expression, attaches to their imposition, whether intentional or not. The state cannot use its lack of intent as an excuse to impose financial punishment when that punishment causes true suffering.

Adam Kolber also gives careful consideration to harsh treatment, arguing that the suffering it creates should be given some recognition in the criminal law and sentencing context. Although Kolber is specifically discussing whether pretrial detention should be considered punishment (answering in the negative), he classifies pretrial detention as harsh treatment, which he defines as the creation of suffering or deprivation even when not intentionally done as a matter of punishment.

Most importantly for our purposes, Kolber acknowledges that pretrial detention is not only harsh treatment, but should also make an offender less deserving of additional harsh treatment. This last insight is particularly applicable to the criminal justice debt discussed in Part I. Since these financial sanctions are themselves harsh treatment, allowing various public and private institutions to increase the penalties through additional harsh treatment, whether additional charges, interest, or actual imprisonment, seems excessively punitive.

Perhaps most expansively, theorist Nigel Walker defines punishment as inflicting something unwelcome to the recipient: “the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or, in extreme cases death.” Criminal justice debt can be easily added to this definition, especially when it spirals into increased payments, interest charges, and additional incarceration for the offender.

All of the hard treatment created by criminal justice debt qualifies as punishment, because it interferes with “important interests,” ones that include the basic liberties we take for granted as free citizens. Imprisonment's effect on freedom of movement and privacy, for example, makes it a severe sanction. Similar reasoning should be applicable to these non-custodial sanctions that impose extreme hardship on indigent offenders. Ultimately, “[t]he

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267 See ROBERTS & ZUCKERMAN, CRIMINAL EVIDENCE, supra note __, at 12.
268 See VON HIRSCH, CENSURE AND SANCTIONS, supra note __, passim.
269 See VON HIRSCH, CENSURE AND SANCTIONS, supra note __, 12-13.
272 See Kolber, Against Proportional Punishment, supra note __, at 1155.
273 See Kolber, Against Proportional Punishment, supra note __, at 1155.
275 See id.
censure in punishment is expressed through the imposition of a deprivation (‘hard treatment’) on the offender.”276

In other words, the curtailment of any of these “taxonomy of interests”277 counts as punishment because these hard treatment penalties have a definitive, negative effect on the quality of offenders' lives. Recognizing the punitive effects of these fees and fines goes beyond a narrow focus on physical restrictions to a more expansive view of punishment, in or outside prison walls.

Similarly, Anthony Duff’s understanding of punishment also includes punitive measures other than incarceration. Duff contends that punishment’s aim is to communicate the condemnation of an offender’s conduct, seeking her self-denunciation and modification of her future conduct.278 Certainly the vast web of fees, fines, costs, and penalties imposed upon offenders fit into this conception of punishment, as the extreme hardship imposed by such criminal justice debts is likely to encourage an offender to modify future behavior.

Of course, the imposition of hard treatment necessitates both careful and measured scrutiny before criminal punishment is inflicted.279 Richard Frase has contended that any increase in an offender’s sentence—even through a breach by the offender through failure to pay fines or other minor violations—should be viewed as punishment. With acts of breach, Frase argues “if the offender is now going to be punished more severely than he seemed to deserve at his earlier sentencing, and more severely than authorized by his plea or conviction at the time, criminal trial due process must be observed.”280 If this due process is not followed, Frase contends, “enhancing [an offender’s] prior-crime sentence might violate Blakely requirements.”281 Frase’s argument supports this Article’s primary contention: that criminal justice debt transforms far too easily into repeated imposition of punishment, violating the Sixth Amendment jury trial right.

Other scholars, however, have argued that fines should not be considered punishment. Dan Kahan, for example, contends that alternative sanctions inadequately express the expressive dimension of punishment, and thus do not resonate with the same level of punitive force as does imprisonment.282 Therefore, for Kahan, alternative sanctions, such as fines, probation, and community service, fail to express condemnation as dramatically and unequivocally as imprisonment.283 This is because, as Kahan notes, nothing transmits condemnation quite as much as denial of an offender’s liberty.284 As he argues, when a society “merely fines” an offender for a bad act, “the message is likely to be different: you may do what you have done,

277 VON HIRSCH, CENSURE AND SANCTIONS, supra note __.
278 See ANTONY DUFF, TRIALS AND PUNISHMENT 238 (Cambridge 1986).
279 See Roberts & Zuckerman, Criminal Evidence, supra note __, at 12.
281 Frase, Just Sentencing, supra note __, at 105.
283 See Kahan, Alternative Sanctions, supra note __, at 592.
284 See Kahan, Alternative Sanctions, supra note __, at 593.
but you must pay for the privilege.\textsuperscript{285}

Kahan’s argument about fines’ meager punitive effect, however, only really applies to those offenders who can afford them. As I discussed in Part I, the vast percentage of criminal offenders have difficulty paying even a small fee, fine or sanction, often leading them into financial difficulties that can eventually result in Kahan’s ultimate punishment, imprisonment or deprivation of liberty.

Alternative sanctions like criminal justice debt may not seem as harsh a punishment as incarceration.\textsuperscript{286} Criminal justice debt, however, ends up being enormously punitive for the segment of society processed through the criminal justice system. Even Kahan points out the importance of paying close attention to the social meaning of criminal punishment.\textsuperscript{287} Thus, although a small fine of, say, $300 might signify a minimal punishment—a tap on the wrist—to the average middle-class offender, this same fine would loom large for the poor or indigent offender, potentially imposing punishment well above any assumed level.

In addition, fees, fines, costs, and sanctions tend to be automatically imposed, which fails to account for the offender’s baseline financial position. As Kolber has noted, when we discuss severity of punishment on a defendant, we usually ignore her baseline condition, even though most standard punishments usually do not affect an offender’s situation equally.\textsuperscript{288} Kolber contends that “it is the amount by which we change offenders’ circumstances that determines the severity of their sentences.”\textsuperscript{289} Equally important, Kolber elucidates that we must recognize the comparative nature of punishment to justify some of the harsh treatment we impose on offenders, particularly if we want to stay true to a framework of proportional punishment.\textsuperscript{290}

The true severity of any punishment, of course, depends on the ways in which it negatively affects an offender’s life.\textsuperscript{291} Financial sanctions such as fees, fines and restitution are obvious candidates for analysis under the comparative nature of punishment, because such penalties have a much stronger impact on the poor and indigent, who make up a large percentage of the offenders cycled through the criminal justice system. The severity of the harm—and ultimately, the punishment—is much greater for this group of defendants than the more fiscally comfortable.

When we impose punishment, even financial punishment, we must justify not only the penalty but also the amount of burden that is imposed.\textsuperscript{292} Blindly levying similar monetary penalties on offenders who are equally blameworthy but not equally situated discards any

\textsuperscript{285} Kahan, Alternative Sanctions, supra note __, at 593.

\textsuperscript{286} Indeed, when compared to the threat of initial imprisonment, most offenders would choose fines over incarceration. And certainly imprisonment injures the poor even more severely than the average offender. However, the reality of criminal justice debt is that an offender’s failure to repay it often leads to incarceration anyway, leaving the offender no better off in the long run. Thanks to Curtis Bridgeman for pointing out this issue.

\textsuperscript{287} See Kahan, Alternative Sanctions, supra note __, at 597.


\textsuperscript{289} Kolber, Comparative Nature of Punishment, supra note __, at 1566.

\textsuperscript{290} See Kolber, Comparative Nature of Punishment, supra note __, at 1566.

\textsuperscript{291} See Kolber, id. Kolber makes this argument in regards to imprisonment in particular, but his point is equally applicable—and perhaps even more powerful—to financial sanctions such as criminal justice debt.

\textsuperscript{292} See Kolber, Comparative Nature of Punishment, supra note __, at 1568.
commitment to true equality of punishment.\footnote{See Kolber, \textit{Comparative Nature of Punishment}, supra note \_; at 1569.} The harms that result from the burdens of financial penalties for many defendants result in what Kolber dubs “harm-absent justification,” meaning that there is little justification for the extra harms imposed. Some countries have recognized the variation of subjective experience created by criminal justice debts by providing for fine amounts that are percentages of income, including fines for traffic violations, securities fraud, and shoplifting.\footnote{See Joe Pinsker, \textit{Finland: Home of the $103,000 Speeding Ticket}, THE ATLANTIC, March 12, 2015, located at: http://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/}

All this points to the great need to take an offender’s financial circumstances into account when weighing the experience of criminal punishment. As scholars John Bronsteen, Christopher Buccafusco, and Jonathan Masur have argued in a slightly different context, the criminal justice system should not ignore the effects that punishment has on offenders’ lives when calculating the severity of a chosen punishment.\footnote{See John Bronsteen, Christopher Buccafusco, & Jonathan Masur, \textit{Retribution and the Experience of Punishment}, 98 CAL. L. REV. 1463, 1466 (2010). Like Kolber, the authors focus primarily on the experience of imprisonment on offenders, but their points apply to punitive financial sanctions as well.}\footnote{See Bronstein, Buccafusco, & Masur, \textit{Experience of Punishment}, supra note \_; at 1466.} As these scholars correctly contend, “the state is responsible for the foreseeable, proximately caused effects of punishment—effects that the typical offender will understand to be part of her punishment . . .”\footnote{See Bronstein, Buccafusco, & Masur, \textit{Experience of Punishment}, supra note \_; at 1466.} Impoverished or indigent defendants understand far too well that the additional punishment imposed through the accretive fines, fees, surcharges, and interest is a routine aspect of criminal justice.

Importantly, Bronsteen, Buccafusco, and Masur argue that neither society nor punishment theory should ignore the suffering that punishment is known to cause, even after it has been imposed.\footnote{See Bronstein, Buccafusco, & Masur, \textit{Experience of Punishment}, supra note \_; at 1466.} The authors additionally contend that there is no reason to exclude the acknowledgment of suffering from the framing of punishments in the first place.\footnote{See Bronstein, Buccafusco, & Masur, \textit{Experience of Punishment}, supra note \_; at 1466.} Although the state generally tries to punish serious crimes more severely by imposing a more negative experience for greater offenses,\footnote{See Bronstein, Buccafusco, & Masur, \textit{Experience of Punishment}, supra note \_; at 1466.} this balancing act backfires when it comes to the imposition of cash register justice. Far too often, seemingly minor punishment results in an extremely negative experience, with long-lasting consequences.

Moreover, if retributive theories of punishment truly value proportionality, then a proper accounting of retributive punishment should account for any “expected negative hedonic effects” associated with the given punishment,\footnote{See Bronstein, Buccafusco, & Masur, \textit{Experience of Punishment}, supra note \_; at 1466.} whether those effects are unemployment, bankruptcy, extra imprisonment, or near-total impoverishment. The fact that some of these results were not specifically intended by the state should not matter.\footnote{See Bronstein, Buccafusco, & Masur, \textit{Experience of Punishment}, supra note \_; at 1466.} A state actor cannot simply close her eyes
to the obvious repercussions to avoid responsibility.

The effects of criminal justice debt should be more than reasonably foreseeable to state or local authorities. The harsh effects stemming from criminal justice debt has been readily observable for the past ten years. The numerous studies, journalism, policy reports, and judicial commentary demonstrate the government’s presumed level of knowledge about the devastating effects of criminal justice debt. The question then becomes: how to best attack the problem, given the constraints of the state and local criminal justice system?

Part IV: Community Solutions

As the late Bill Stuntz observed, the county, or local community, still remains the major unit of governing criminal justice. In his last book, Stuntz embraced a form of democratic populism in local justice, envisioning a criminal justice system where the jury system would be used frequently and efficiently, jurors would be defendants’ actual peers and neighbors, and the jury might even be able to determine issues of law as well as fact. Of course, this vision of local criminal justice is unlikely to be fully realized any time soon. But there are ways to make the community more involved in the criminal justice system, as I have discussed in previous work.

One way to properly engage the community in the workings of criminal justice is to involve it in all aspects of criminal process, including the world of criminal justice debt described above. There are a variety of methods to incorporate community decisions and beliefs into our current labyrinth of financial sanctions, some relatively simple, some more complex.

Our current system of criminal debt creates enormous costs for everyone: not simply the individuals ensnared in the criminal justice system, but also states, counties, and local communities as well. The resounding failure of our criminal justice process to solve any of the problems created by such financial penalties points to the need for community sanctions, public involvement, and local interaction. If the imposition of criminal justice debt had more community input, offenders would have a better chance to receive fair and proportional sanctions, because the community would be more familiar with their financial limits. Additionally, community sanctions often provide a measure of restorative justice for both the victims and the community, something that court- or administratively-ordered sanctions fail to provide.

The aggressive debt-collection practices that I have detailed above make criminal justice debt a stumbling block to successful community reintegration after the formal punishment has

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303 See Bronsteen, Buccafuso, & Masur, Experience of Punishment, supra note __, at 1482.
305 See STUNTZ, COLLAPSE OF AMERICAN CRIMINAL JUSTICE, supra note __, at 302-04.
ended.307 As Kevin Reitz points out, “The widespread practice in American law is to impose economic penalties with uncertain chances of collection and with insufficient concern for their long-term impact on offender reintegration and public safety.”308

I have written previously about how reintegrating the offender back into society is best done by involving the community.309 A natural extension of this idea would be to involve community in determining punitive financial sanctions, particularly in the evaluation of whether a particular offender can afford them. I discuss some of the most promising innovations for community participation in criminal justice below.

A. Community Prosecution

Community prosecution gets local citizens directly involved in preventing unnecessary imposition of financial sanctions. Pioneered in Denver, Colorado310 and Milwaukee, Wisconsin,311 community prosecution involves assigning local prosecutors to individual neighborhoods. Within each neighborhood, these prosecutors develop partnerships with neighborhood organizations, working one on one with community members to help create prevention strategies to reduce both crime and arrests. In addition, the community prosecutors, with the help of local citizens and community leaders, are able to identify at-risk individuals, and help keep them out of the criminal justice system if possible. As the Milwaukee community prosecutor’s program explained:

As community prosecutors . . . we are asked to become part of a Milwaukee community, learn that community’s strengths and weaknesses, communicate daily with residents and neighborhood associations and the Milwaukee Police Department, and then formulate appropriate crime prevention strategies. . . . Community prosecutors work closely with the police department, the courts, the Department of Corrections, community based organizations, residents, the City, and the State to improve our criminal justice system by making it cost-effective, fair, evidence-based, and just for the community it serves.312

309 See APPELMAN, DEFENDING THE JURY, supra note __, at 191-209.
310 See Denver’s Community Justice Councils, Center for Court Innovation, located at: http://www.courtinnovation.org/research/denver%E2%80%99s-community-justice-councils. Denver has created community justice councils, with each council consisting of 20 to 35 members who are chosen by community prosecutors, including residents, business leaders, community center directors, faith leaders, school teachers, community police officers, prosecutors and elected city and state representatives. See id.
311 See The Milwaukee Community Prosecution Model, Milwaukee County District Attorney’s Office, located at: http://county.milwaukee.gov/Im&gLibrary/User/jkrueger/Electronic/CP_Program_Description1.pdf One aspect of Milwaukee’s model of community prosecution focuses on how “[e]fficient criminal justice that protects the community to the greatest extent requires thoughtful decisions on how to best use our limited law enforcement and court resources.” Id. at 2.
312 Id. at 2.
Most importantly, community prosecutor programs constantly communicate with local residents, businesses, associations, and community organizations.\footnote{Id. at 3.} There is a lot of communication between citizens and police, both formally and informally.

In addition, community prosecutor programs help smooth an offender’s re-entry into the neighborhood by working closely with community organizations, corrections, and courts, ensuring that released offenders are able to follow the requirements of their post-release conditions, and get the support they need to make recidivism less likely.\footnote{Id. at 3.} These sorts of community efforts help solve the criminal justice debt problem by eliminating its core source—the entry into the criminal justice system into the first place—and help reduce the rate of recidivism.

**B. Community Courts**

Similarly, the establishment of community courts can give the community a way to lessen the punishment imposed by criminal justice debt. In general, community courts tend to be neighborhood-focused courts that use the justice system to address local problems. Their goal is to engage outside stakeholders such as residents, merchants, churches, and schools to bolster public trust in justice.\footnote{See Community Courts, Overview, Center for Court Innovation, located at: http://www.courtinnovation.org/topic/community-court [last visited 12/3/15]} Community courts attempt to innovate new approaches to reduce both crime and incarceration, for the betterment of the general community.\footnote{See Community Courts, Overview, supra note __, at id.}

For example, the neighborhood of Red Hook, in Brooklyn, New York, has run a community justice center for the last 25 years, and has greatly reduced both fines and jail time for offenders.\footnote{See Cynthia G. Lee, F. Cheesman, D. Rottman, R. Swaner, S. Lambson, M. Rempel & R. Curtis, A Community Court Grows in Brooklyn: A Comprehensive Look at the Red Hook Community Justice Center, National Center for State Courts 1 (2013), located at: http://www.courtinnovation.org/sites/default/files/documents/RH%20Evaluation%20Executive%20Summary_Final.pdf [last visited August 20, 2015].} Offenders who are processed through the Red Hook Community Justice Center are given sentences that include drug treatment, job training, and mandatory community service.\footnote{See Tricia L. Naldony, Philadelphia Officials Weighing an Alternative to Regular Criminal Court, The Philadelphia Inquirer, August 13, 2015, located at: http://articles.philly.com/2015-08-13/news/65495030_1_community-court-drug-treatment-ged-classes#ztfY6xdJD4PSzKtS [last visited 12/3/15].} The Red Hook Court hears mostly "quality of life" crimes such as vandalism, drug possession, and trespassing. The majority of sentences combine community service with social services, offering many of these services, such as GED classes and trauma counseling, on-site for better access.\footnote{See Naldony, Philadelphia Weighing an Alternative, supra note __, at id.}

Community courts like Red Hook establish a dialogue with community institutions and residents, and seek community-level outcomes, such as reductions in neighborhood crime or repairing conditions of disorder through community service. These courts also help create a
system where the majority of defendants receive short-term community service or social sanctions, typically five days or fewer.  

When community courts handle the quality of life crimes in a local neighborhood, criminal courts are able to focus their attention on more serious and violent crimes. In turn, the community courts can work with defendants to address some of the root causes of their offenses, which often result from mental illness and substance abuse. In general, community courts are designed to process offenders through the justice system as quickly as possible, minimizing costs in both the short and long run. Although there has not yet been a full-scale study of the long-term results of community courts, one study in San Francisco’s Tenderloin showed a recidivism decline of 8-10%. Using community courts to impose criminal justice debt makes it much more likely that when criminal justice debt is imposed, it would be tied to an offender’s actual financial abilities, thus avoiding some of the myriad additional punishments that unpaid financial sanctions can bring.

C. Community Policing.

The practice of community policing is closely related to community prosecution and community courts. This form of policing tries to address the roots of crime and social disorder through problem-solving strategies and police-community partnerships. Community policing aims to establish partnerships between residents and law enforcement, teach officers about local concerns, and hopefully improve frayed relations with skeptical communities.

Like community prosecution, community policing provides an opportunity to prevent the levying of financial sanctions, by reducing the number of arrests. For example, Rockaway Beach, NY, has implemented a community policing strategy that shrunk the low-level arrests for bicycling, spitting on the sidewalk, and jaywalking. Obviously, lessening the number of the arrests that result in financial sanctions can have a huge impact on reducing the amount of criminal justice debt owed.

Moreover, having the community involved in both policing and the court system helps better interpret and enforce constitutional rights. Given the vast reach of the criminal justice
system, the courts alone cannot effectively regulate the police or ensure that constitutional protections are implemented.\(^\text{327}\) In a system where every arrest harms not only an individual but also, potentially, a community, community policing can be a great help.\(^\text{328}\) Arrests, indictments, convictions, incarceration—all of these actions impose costs, both on the offender and her community. And these costs are unevenly distributed; in many cities, a small subsection of local citizens pay a high price for the costs of ordinary policing.\(^\text{329}\) This is where the local community must come in: to help create a system that determines the best and most appropriate sanctions for offenders and their community at large.

Having a community prosecution program, community policing, or community courts are, of course, more expansive methods of involving local citizens and reducing criminal justice debt. But there are smaller, more directed ways to get the community involved in lightening the burden of these crushing financial sanctions as well.

D. Targeted Strategies: Small Measures, Big Rewards

1. Community Supervision

Community supervision for released offenders is more targeted way to reduce criminal justice debt. For example, the state of Georgia recently implemented an automated reporting system for the roughly 80,000 low-risk probationers under supervision.\(^\text{330}\) Instead of expensive gadgets and probation officer visits, Georgia’s program utilizes a call-in program, where released offenders call an 800 number each month to report their status to an automated system, instead of reporting in person to a probation officer.\(^\text{331}\) This lowered the price tag of probation per offender from $1.68 to $0.45 a day, savings that could be passed on to the released offender.\(^\text{332}\)

Likewise, in Portland, Oregon, development of the Community Probation Program, which partners local community members with prosecutors and probation officers, has had positive results.\(^\text{333}\) Believing that neighborhood residents are in the best position to monitor the probationers’ behavior, the Multnomah District Attorney’s office permits some offenders to serve out their probation in the neighborhood where the crime was committed. As the program innovators noted, “[t]his especially is appropriate for those persons convicted of operating a drug house from a home that they own and within which they continue to reside.”\(^\text{334}\) This is an excellent example of how the community can have a direct impact on an offender’s punishment, by not only helping monitor her activities but also reintegrating her back into the neighborhood.


\(^{328}\) See id. at 779.

\(^{329}\) See id. at 812.


\(^{331}\) See Ginn, *Georgia Probation Program*, supra note __, at id.

\(^{332}\) See id.


\(^{334}\) See id. at 55-56.
Similarly, Richmond, Virginia runs a “Day Reporting Center” (DRC), which provides a one-stop non-incarcерative, no-fine, community-based sentencing option. The screened participants remain in the community in lieu of a jail sentence, initially reporting daily to the DRC. Instead of punishment or punitive financial sanctions, the participants receive structured support and classes to address unhealthy behaviors, substance abuse, anger management, education, job readiness, and life skills. Additional support includes relapse prevention, mental health assessments, and family counseling. In addition, the DRC monitors participants with daily check-ins, regular drug and alcohol testing, and intensive case management. Finally, participants are also required to perform community labor as a condition of participation, as a way to reintegrate them back into their own communities.

Perhaps most crucially, the goal of Virginia’s DRC is to help offenders gain structure and stability in their lives and change the way they think and behave—in other words, not merely to punish, but to help reform, all in the bosom of their own neighborhoods. The hope is that participants will learn and practice the skills necessary to live responsible lives and will be ready to obtain gainful employment following their time in the Center.

In sum, community probation programs like those in Georgia, Oregon, and Virginia help increase community participation in imposition of punishment and reduce criminal justice debt in a few ways. First, having community members assist in monitoring probationers allows neighborhood residents to decide what kind of treatment an offender most deserves, whether it is continued probation, re-incarceration, or lessened restrictions on behavior. Additionally, the program’s participants are required to physically and psychologically invest in their community, since, as a condition of their probation, they must attend community meetings, paint homes, remove broken glass from the streets and collect trash. This helps reintegrate offenders into their communities even before they finish serving their sentence, which in turn hopefully reduces the rates of recidivism.

2. Community and City Bail

Community and city bail is another, more intimate way for the local public to get involved in reducing criminal justice debt. In New York, the New York City Council recently earmarked 1.4 million dollars for a city-wide bail fund for low-level offenders. The bail fund requires only minimal supervisory requirements for pre-trial released offenders; the only conditions for release are whatever check-ins required by the provider of the funds. Any added services, like referrals to drug or alcohol rehabilitation, is entirely voluntary on the part of the offender.

336 See Richmond CCJB Biennal Report, supra note __, at 20.
337 See Richmond CCJB Biennal Report, supra note __, at 20.
338 See Community Prosecution, supra note __, at 56.
341 See Peak, Can’t Make Bail, supra note __, at id.
New York City’s new local bail fund follows the lead started by a number of smaller bail funds in the area, the most prominent being the Bronx Freedom Fund, established in 2007 in association with the Bronx Defenders, a New York City public defender organization. The Bronx Freedom Fund is a rotating community criminal bail fund that posts up to $2,000 bail for poor South Bronx residents charged with misdemeanors. The Freedom Fund posts bail for approximately 150 defendants a year, and 97% of their clients return to their scheduled court dates. In addition, since the government returns bail at the close of an offender’s criminal case, the Freedom Fund is able to re-use its funds several times per year, remaining largely self-sustaining.

Equally important, the citizens assisted by the Bronx Freedom fund are not only provided access to cash bail, but also connected to services and support for the duration of their cases. This effort helps ensure that the actions of the Freedom Fund don’t merely provide short-relief, but grants offenders the assistance they might need to stabilize their lives in the long term.

Similarly, a variety of places, including Washington, D.C., Baltimore, Chicago, Charlotte, Phoenix, Kentucky, Arizona, and New Jersey have begun programs that release low-level offenders on bail. In Kentucky, for example, the state has begun a relatively new program that allows for deferred prosecution for those offenders charged with first or second offenses of Possession of a Controlled Substance 1st Degree, a class D felony. If the accused successfully completes the community-based treatment, her charges are dismissed and all records are sealed. Most important, the accused are not required to admit guilt to participate in Deferred Prosecution; it is truly a pre-trial program. Kentucky also has a Monitored Conditional Release program, which tries to reduce unnecessary detention of pretrial offenders. As the Kentucky Department of Justice notes, “Pretrial Services supervision not only provides for safe communities, it allows defendants to become productive citizens because they can return to work, jobs and families as well as seek

344 See The Bronx Freedom Fund, supra note __, at id.
348 See Kim & Denver, Case Study, supra note __, at 14-16.
351 See Pretrial Reform in Kentucky, supra note __, at 8.
352 See Pretrial Reform in Kentucky, supra note __, at 8.
353 See Pretrial Reform in Kentucky, supra note __, at 6.
counseling or treatment.\textsuperscript{354} This ensures that defendants do not get caught in the spiral of debt and destitution that harsh monetary fines and fees can create. Finally, Kentucky also implemented a program that credited each jailed offender $100 per day toward payment of bail for each day the defendant serves in jail prior to trial up to and including the full amount of the bail, thus facilitating the release of the accused from jail.\textsuperscript{355}

One common aspect of all of these bail programs is that released offenders need only to check in occasionally with a supervisor, either through text message, visits with case managers, or other easy check-ins to ensure that these released offenders do not miss their court date.\textsuperscript{356} These minor requirements are far less onerous than either staying in jail due to insufficient funds, or the types of heavy—and costly—supervision usually provided by pretrial supervision services.\textsuperscript{357}

Of course, all of these community and city bail funds primarily post monies for misdemeanor offenders, thus still leaving unrelieved the large contingent of those people arrested for felony offenses. What is needed in tandem with these local bail funds, although admittedly far more difficult to achieve, is pressure on lawmakers to reform the arrest procedure itself.

3. Reforming the Arrest Procedure

Reforming a city or county’s arrest procedure may seem an impossible feat, but the reforms made in Ferguson, Missouri shows one possible way, if used in combination with other tactics. Due in part to the unrelenting community, social, and media pressure on the city, Municipal Court Judge Donald McCullin ordered that all arrest warrants issued in the city before Dec. 31, 2014 be withdrawn.\textsuperscript{358} Judge McCullin also ordered that all defendants would receive new court dates along with options for disposing of their cases, such as payment plans or community service.\textsuperscript{359} Finally, some fines were commuted for indigent offenders.\textsuperscript{360}

In part, this dramatic change can be attributed to the Department of Justice’s damning report, which charged that the police force and court worked together to exploit people in order to raise revenue.\textsuperscript{361} But some of this turn-around in policy\textsuperscript{362} should be credited to the great

\begin{itemize}
\item \textsuperscript{354} Pretrial Reform in Kentucky, supra note __, at 6.
\item \textsuperscript{355} See Pretrial Reform in Kentucky, supra note __, at 14.
\item \textsuperscript{356} See Peak, Can’t Make Bail, supra note __, at id.
\item \textsuperscript{357} See Robyn Steinberg and David Feige, The Problem with New York City’s Bail Reform, The Marshall Project (July 9, 2015), located at: https://www.themarshallproject.org/2015/07/09/the-problem-with-nyc-s-bail-reform (last visited August 26, 2015).
\item \textsuperscript{358} See Greg Botelo and Sara Sidner, Ferguson Judge Withdraws All Arrest Warrants Before 2015, CNN (August 24, 2015), located at: http://www.cnn.com/2015/08/24/us/ferguson-missouri-court-changes/
\item \textsuperscript{359} See Botelo and Sidner, Ferguson Judge, supra note __, at id.
\item \textsuperscript{360} See Botelo and Sidner, Ferguson Judge, supra note __, at id.
\item \textsuperscript{361} See Report on Ferguson, Missouri, U.S. Department of Justice, supra note __, at id.
\item \textsuperscript{362} As of 2/10/16, however, the City of Ferguson rejected the proposed change to their criminal justice system, leading to the Department of Justice’s filing of a civil rights lawsuit. See Matt Apuzzo, Department of Justice Sues Ferguson, Which Reversed Course on Agreement, New York Times, February 20, 2016, located at: http://www.nytimes.com/2016/02/11/us/politics/justice-department-sues-ferguson-over-police-deal.html?ref=collection%2Fsectioncollection%2FUs&action=click&contentCollection=us&region=rank&module=package&version=highlights&contentPlacement=2&pgtype=sectionfront
\end{itemize}
outcry of dismay, in both the local and the wider national community, about the situation in Ferguson over the past few years.

Likewise, some of the public outcry over misdemeanor criminal justice debt has prompted a federal lawsuit that is suing courts nationwide for jailing defendants unable to afford their bail, court fines, and probation fees.363 The non-profit Equal Justice Under Law filed a lawsuit against Rutherford County, Tenn. and Providence Community Corrections (PCC), charging that PCC ran “an extortion scheme” that “conspired to extract as much money as possible” from people who were threatened with jail time if they couldn’t pay court fees and fines.364 In five years, PCC collected over $17 million from probationers in Rutherford County. The lawsuit, brought under RICO, accuses PCC and Rutherford County of running a “racketeering enterprise” that misappropriates “the probation supervision process for profit.”365 Although the outcome of the lawsuit is not yet determined, hopefully the publicity it raises will make other counties more likely to review their imposition of ever-increasing financial sanctions on offenders.

4. Community Support for Modifying Civil Assessments

Unpaid civil assessments can also lead to criminal charges, and there are a few types of community supports to assist offenders in these matters. For example, in Missouri, an offender facing criminal charges for child support delinquency can be referred to Helping Parents Help Children,366 a joint project run by Missouri public defenders, Missouri prosecutors, and the Legal Services of Southern Missouri. The program helps offending parents modify their monthly child support to an affordable level, thus permitting them to meet their obligations without prompting recurring criminal charges and financial penalties.367

Like so many of the possibilities discussed above, these types of local, community-based solutions can help people resolve their crushing criminal justice debt, “saving their money and their dignity while satisfying creditors instead of slipping into a shadowy existence.”368 Although paying child support is an important obligation, criminalizing the failure to pay and imposing incarceration does little to get the necessary funds to the dependent child. Because imprisonment eliminates the offender’s ability to pay, having a more flexible arrangement for child support obligations both reduces the extra charges on an offender as well helps provide more money for dependent children.

363 See Alysta Santo, How to Fight Modern Day Debtors Prison? Sue the Courts, THE MARSHALL PROJECT, October 1, 2015, located at: https://www.themarshallproject.org/2015/10/01/how-to-fight-modern-day-debtors-prisons-sue-the-courts
364 See Santo, Modern Day Debtors Prison, supra note __, at id.
365 See Santo, Modern Day Debtors Prison, supra note __, at id.
368 See Udell, Civil Legal Aid, supra note __, at id.
5. Community Legal Assistance from Non-Lawyers

One final solution is to move some community assistance for offenders out of the legal sphere, allowing non-lawyers to participate as well. To this end, some communities are contemplating permitting non-lawyers to provide a broad range of legal services. Various courts, state bars, legal task forces, and scholars have endorsed new roles for trained community members to provide multiple forms of legal assistance in non-profit and for-profit settings, with and without attorney supervision, in and outside the courtroom.

To fully realize this option, of course, would require an exception to our traditional legal rules prohibiting non-lawyers from practicing law. Nonetheless, several states have begun a process to assist in democratizing criminal justice. For example, Washington State has approved roles for “limited licensed legal technicians.” New York has authorized pilot programs for court based “navigators,” and is considering steps to authorize advocacy roles for court aides in evictions and debt collection proceedings. And California has expressed interest in examining a limited-practice licensing program that would create a new class of special professionals who could give legal advice.

Although not all of these innovations specifically address criminal justice debt, they provide a model for approaches that both involve the local community and think creatively. As former New York Court of Appeals Chief Judge Jonathan Lippman contended, "Even with whatever success we've had with public funding of legal services and pro bono work by lawyers, there is still a gaping hole in our system of providing legal services to the poor and people of limited means." Coming up with innovative solutions involving the community, as I’ve discussed above, may be the most realistic way to combat the specter of cash register justice.

Part V: Conclusion

Rising expense in the criminal justice system and shrinking public budgets have resulted in a cost transfer from state and county courts to those arrested, indicted, and convicted.

370 See Udell, The List, supra note __, at id.
372 See New York City Housing, New York State Courts, located at: http://www.courts.state.ny.us/courts/nyc/housing/rap.shtml
imposing a heavy burden of criminal justice debt on a largely indigent population. In an ideal world, the market pressures forcing indigent defendants to bear the monetary costs would be eradicated by a fresh influx of funds from the state and federal government. In the real world, however, the practice of having offenders funding the court system is unlikely to end any time soon. So what are the best strategies to attack criminal justice debt, solutions that have potential to change practices without shifting the cost structure back onto cash-strapped local and state governments?

There has been some nationwide change. As discussed above, the DOJ’s Civil Rights Division promulgated a lengthy report on Ferguson’s debt imposition, and the Center for Equal Justice has brought lawsuits to force courts to end debtor’s prison. These tactics, however, are not sustainable ways to bring about long-term change. State and local court systems depend on the revenue scraped from the backs of the poor, and it seems unlikely that the work of either the federal government or non-profit advocates like Equal Justice Under Law will be able to force all criminal court system to stop the practice. The change has been slow, even in those cities, like Ferguson, where the problems have been highly publicized. Nor will Justice Department attempts to “incentiviz[e] local jurisdictions to move away from fines and fees that lead to unnecessary incarceration” be likely to work on a long-term basis, given how tight funds are in most justice systems. Indeed, excessive costs were one of the reasons given by the Ferguson city government in its rejection of the proposed DOJ settlement.

Instead, one of the most innovative and cost-effective ways of reforming the current criminal justice system is getting the community involved in criminal process. Whether this is at the beginning, and focused on prevention, like community policing; in the middle, and focused on fairness, like community prosecution; or at the end, and focused on reintegration into the community, having the local public involved in each step of the criminal justice system not only will save money but, more importantly, will also promote more accurate and individualized justice.

Cash register justice, in the form of criminal justice debt, is a stain on the criminal justice system. Only by better involving the community, in ways both large and small, will we be able to eradicate its traces.

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376 The most recent version of the Model Penal Code states categorically that “[n]o convicted offender . . . shall be held responsible for the payment of costs, fees, and assessments.” See Kevin Reitz, The Economic Rehabilitation of Offenders: The Model Penal Code, 99 MINN. L. REV. 1735, 1757 (2014). Sadly, this pronouncement is unlikely to be followed.
379 See Apuzzo, Department of Justice Sues Ferguson, supra note __, at id.
Reflecting on the Latest Drug War Fronts

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After decades in which sentencing reform discussions typically involved laws or proposals to increase prison terms, sentencing discourse recently has been concerned with reducing the size of state and federal prison populations. Recent reform discussions, at the state level and especially among federal officials, have particularly focused on lower-level drug offenders. These developments suggest an emerging consensus among policy makers that it is no longer considered just or effective to impose lengthy prison terms on certain drug offenders. Moreover, as ever more states consider legalizing some marijuana use and as federal authorities seem willing to tolerate this state experimentation, one might perhaps think that, after four decades of pitched battle, the so-called war on drugs is starting to come to an end.

This Issue of FSR explores developments and proposals surrounding the reform of drug sentences, especially concerning federal offenders and federal policies in response to state-level reforms. This Issue reprints recent speeches and related materials coming from the U.S. Department of Justice and the U.S. Sentencing Commission that document various official pronouncements and perspectives on drug law reforms circa 2014. Accompanying these materials are commentaries that address drug sentencing developments and provide a wider and varied perspective on what these developments may mean (and may not mean) for modern mass incarceration. This introductory essay provides some historical context for what follows, in part to temper any optimism that on-going federal sentencing reform discussions will transform national drug policies and in part to highlight how state-level marijuana reforms could have significant transformative potential.

Why Federal Sentencing Reform Suggests Retrenchment, not Retreat, from the Drug War

A criminal justice response to drug use in the United States has a long and dynamic history, and many advocates for significant reform of current drugs laws reasonably suggest that today's criminal laws are comparable to alcohol Prohibition a century ago. The modern era of federal drug prohibition arguably began when President Richard Nixon in the early 1970s first embraced war metaphors and rhetoric to describe and justify domestic policies to combat drug use and abuse. Despite persistent concerns and criticisms about the tone and tactics used in the so-called war on drugs, Presidents Ronald Reagan, George H.W. Bush, and William Clinton all continued, and often escalated, the national drug war campaign through repeated emphasis on social problems created by drug use and through persistent support for extensive criminal justice responses to these problems.

The most tangible and consequential federal facets of the modern drug war find expression in the modern federal sentencing structure for drug crimes. Congress greatly increased the criminal penalties for drug trafficking through the Anti-Drug Abuse Act of 1986 and subsequent legislation; these statutes created severe mandatory minimum drug sentences triggered by the quantity of drugs involved in an offense, and the U.S. Sentencing Commission has built even more severe guideline sentencing provisions atop these statutory minimum prison terms. As a result of these statutory and guideline provisions, the average prison term for every federal drug crime, as well as the total number of federal prisoners incarcerated for drug offenses, increased dramatically.

By at the start of the 21st century, after decades of drug war rhetoric and lengthened prison terms for drug offenses, local and national politicians starting voicing some of the social and economic concerns
long expressed by drug war critics. Barack Obama, for example, in his 2008 presidential campaign, questioned the effectiveness of mandatory minimum sentencing and assailed inequities in the enforcement of drug laws. Most notably, in a major policy speech he delivered at Howard University’s Convocation, then-candidate Obama questioned “the wisdom of locking up some first-time, [nonviolent] drug users for decades” and asserted that as President he would “review these sentences to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of [nonviolent] offenders.”

Now well into its second term, the Obama Administration’s record on drug sentencing reform has been decidedly mixed. President Obama and his appointees have often spoken of the need to place greater emphasis on treatment and less on incarceration in order to approach drug abuse more as a public health issue. President Obama’s Justice Department has advocated for, and succeeded in helping to secure, congressional reform of severe crack sentencing laws that led to the Fair Sentencing Act of 2010; it has also regularly supported and promoted expansion of drug treatment courts. Attorney General Eric Holder in particular has delivered many speeches questioning continued reliance on incarceration for nonviolent drug offenders. Most prominently, in an August 2013 speech at the American Bar Association’s annual meeting, Holder called some federal mandatory minimum prison terms “excessive” and “draconian,” and he lamented that “too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason.” In that speech, Holder also expressed support for statutory sentencing reform proposals then being considered in Congress, and he set forth new Justice Department charging policies to reduce the application of mandatory minimum prison sentences to certain low-level drug offenders.

But despite efforts to ameliorate some federal sentencing realities, President Obama and officials in his administration have not promoted or pursued any truly transformative changes for the federal criminal justice system in general or for drug sentencing in particular. In the main, the Obama Administration’s criminal justice policies have largely followed the “get-tough” script that a generation of Democrats have embraced hoping to thwart “soft on crime” political attacks. On major criminal justice issues ranging from national marijuana policy to federal prosecutorial powers to the clemency process, the Obama Administration has shown limited interest in seizing opportunities to pioneer major reforms that might significantly reorient federal policies and practices concerning drug use and abuse.

The materials concerning federal drug sentencing reform in this Issue reflect these competing dynamics. As detailed in the materials reprinted in this Issue, the United States Sentencing Commission, led now by President Obama’s appointees, has voted to amend its sentencing guidelines to lower the recommended sentences applicable to most federal drug trafficking offenses. Attorney General Holder testified before the Commission to express the Justice Department’s strong support for this amendment. Relatedly, Deputy Attorney General James Cole, in a speech to the New York State Bar Association (which is reprinted in this Issue), spoke about the problem of “lower level drug offenders” taking up scarce federal prison space, and he urged public policy groups and defense attorneys to help the Obama Administration identify still-imprisoned drug offenders who might be good candidates for presidential clemency.

Though these developments will impact a significant number of federal drug defendants, both the chair of the Sentencing Commission and the Attorney General have properly described the guideline amendments as “modest.” Commentary about the amendments in this Issue likewise highlights that the Commission’s step is significant but still limited, and the Commission has itself suggested that it is not even a given that it will vote to make retroactive its “modest” drug guideline reforms. Similarly, even if President Obama were to soon commute the prison sentences of a significant number of “lower level drug offenders” in coming months, tens of thousands of federal offenders would still be serving multiyear prison terms for drug crimes.

Most fundamentally, no policy maker in the federal sentencing system—not the President, nor the Attorney General, nor the Sentencing Commission, nor Congress—has seriously discussed any reforms that would create a real paradigm shift in the federal criminal justice response to drug use and distribution. Even the most significant statutory reforms being considered in Congress and supported by the Attorney General still preserve the fundamental sentencing structure for drug crimes created by the Anti-Drug Abuse Act of 1986 and subsequent legislation. Though data suggests government expenditures on criminalization and repressive measures directed at distributors and consumers of illegal drugs have failed to effectively curtail supply or consumption, few if any participants in the federal system are heard to contend or even consider that criminal justice responses to drug activities might do more harm
than good. Indeed, as highlighted by a letter to Senate Judiciary Committee from the President of National Association of Assistant U.S. Attorneys (which is reprinted in this Issue), there are powerful participants in the federal criminal justice system quick to claim that the structure and severity of federal drug sentences have played an important role in the nationwide reduction of nondrug crimes in recent decades. For all these reasons, drug sentencing reform at the federal level is most sensibly viewed as a retreat, not a retreat, in the waging of the modern drug war.

**Why State Marijuana Legalization Could Dramatically Transform Drug War Battles and Forces**

As reflected in the primary materials reprinted in this Issue, alongside the current debate over modest modifications to federal drug sentencing schemes, federal officials have been forced to confront and respond to much more dramatic drug law reforms taking place in the states. In 2012, voters in Colorado and Washington legalized recreational use and sales of marijuana. These reforms came on the heels of these states and more than a dozen others enacting laws permitting persons to legally obtain marijuana for medicinal purposes under various regulatory schemes. These state-level marijuana law reforms, particularly in the two states in which voter approval of recreational marijuana use required state officials to create and monitor regulatory regimes for marijuana distribution and use, forced the Department of Justice to review and articulate whether and how federal officials would continue to enforce existing federal prohibitions on all marijuana use and distribution in states that had legalized such activity.

Reprinted in this Issue are two documents that reflect the results of the Justice Department’s latest efforts to provide guidance to states that have legalized marijuana use and to actors with those states involved with marijuana-related businesses: (1) an August 2013 memorandum signed by Deputy Attorney General James Cole providing guidance, through the articulation of eight national priorities, for on-going federal marijuana enforcement, and (2) a February 2014 memorandum from the U.S. Department of the Treasury setting out expectations for any financial institutions involved in providing services to marijuana-related businesses. Much might be said concerning the substance and style of those federal policy memos, and it will likely be years before it is clear what concrete impact these statements of federal policies and practices will have on the day-to-day activities of persons working in and around state marijuana industries. But, regardless of exactly how federal policies and practices impact state marijuana regulations and businesses, the new reality that public officials and private actors in a number of states are now working within and around a new legalized marijuana regime could have an extraordinary, transformative potential with respect to the broader drug war.

Unlike sentencing reform, the creation of new state regulatory regimes necessarily and dramatically alters the basic drug war landscape and the basic work of those on the battlefield. As suggested above, even significant drug sentencing reforms do not change the essential terms on which the drug war is fought, nor are they likely to reorient the perspectives and commitments of the traditional combatants in this war. In sharp contrast, new laws legalizing and regulating recreational use of marijuana demand that governmental moneys and energies—which were previously devoted to drug supply reduction strategies, interdictions, and incarceration—are now directed toward new programming and investments intended to ensure safe and limited access to certain drugs along with revised strategies for reducing drug abuse and related harms. Voters in Colorado and Washington have now essentially demanded their governments experiment with new models of legal regulation for marijuana focused primarily on safeguarding the health and security of those citizens who want to use drugs responsibly and those who wish to avoid drug use. With government priorities reoriented in this way, some additional space has been cleared for legitimate and responsible businesses and other private-sector actors to invest in and contribute to creating a legal, regulatory, and social environment in which some responsible drug use is encouraged, and drug abuse is discouraged and treated as a public health problem rather than as a criminal justice concern.

With legal recreational marijuana regulations and realities just starting to emerge in Colorado and Washington, and in light of the varied experiences in states with varied medical marijuana regulatory structures, it is far too early to predict just how and how quickly state-level marijuana reforms can and will transform national policies and perspectives on the drug war more generally. But it is clear that these reforms have already ensured that a new set of policy makers and institutional players are thinking about regulation of drug distribution and use in radical new ways. And once it becomes easier to understand and experience a serious, reasonable alternative to a criminal justice response to at least some drugs, the prospect of a full withdrawal from the drug war, rather than just a limited retrenchment in that war, becomes much more realistic.
Notes


Federal Cocaine Sentencing in Transition

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No issue in the world of federal sentencing has sparked more controversy or engendered more criticism than the punishment scheme for crack and powder cocaine. Congress set forth the basic crack and powder policy more than twenty years ago in a set of mandatory minimum sentencing statutes, producing the now infamous 100-to-1 quantity ratio. The U.S. Supreme Court’s recent Booker decision making the Guidelines “effectively advisory” has added a challenging new set of issues for federal judges: what should district judges and circuit judges do when considering suggested Guideline crack sentences that seem excessive, particularly in relation to suggested sentences for comparable powder cocaine offenses? Booker creates a new urgency for debates about the appropriateness of federal cocaine sentencing policy and the judicial discretion to resist that policy in individual sentencing decisions.

As highlighted in this issue, debates over Booker and sentencing fairness are developing into what may become a “perfect storm” paving the way for meaningful reform a generation after Congress produced the 100-to-1 crack/powder ratio that many now consider deeply misguided. In these Observations, we quickly review the current complicated lay of the land and offer our suggestions for a productive path forward.

I. The Troubled History of Modern Crack Sentencing
Responding to what it perceived as a new drug crisis, Congress hastily passed the crack and powder mandatory minimum sentencing statutes as part of the Anti-Drug Abuse Act of 1986—while the U.S Sentencing Commission was still working on its initial set of sentencing guidelines.1 Unlike the Sentencing Reform Act of 1984, which created the Commission to produce comprehensive guidelines, the mandatory minimums and the underlying congressional policy at the root of the long-standing crack controversy were passed quickly and without much reflection.2 The most renowned and reviled of the drug sentencing statutes passed by a panicked Congress is the five-year mandatory minimum punishment provision for offenders trafficking five grams of crack cocaine or 500 grams of powder cocaine.3 This 100-to-1 quantity ratio also finds expression in a ten-year mandatory minimum punishment level for offenders trafficking in either fifty grams of crack cocaine or five kilograms (5,000 grams) of powder cocaine.

In 1986, the first Sentencing Commission had to consider Congress’s new drug sentencing mandates when trying to finalize its initial set of Federal Sentencing Guidelines. The fledgling and then—politically weak Commission decided that it should follow the statutory mandatory minimum scheme—the 100-to-1 quantity ratio—when setting punishment levels for crack and powder offenses generally.4 That is, the Commission extended the 100-to-1 ratio into the Federal Sentencing Guidelines’ offense level computations for all amounts of crack and powder cocaine.5
In the pre-Booker years of so-called mandatory Guidelines, sentencing courts generally followed—without too much resistance, but with many complaints—the Commission's decision to extend the 100-to-1 quantity ratio to the Guidelines even as the Commission came to acknowledge that crack and powder cocaine "are two forms of the same drug, containing the same active ingredient." Defendants challenged the application of the 100-to-1 quantity ratio in both the statutory mandatory minimums and the Guidelines on various constitutional grounds. This litigation effort was a failure, particularly at the appellate level, as lower courts resisted all arguments that more severe crack sentences were constitutionally problematic. One circuit court stated, for example, that "Congress in its wisdom has chosen to combat the devastating effects of crack cocaine on our society, and we believe the disproportionate sentencing scheme that treats one gram of cocaine base the same as 100 grams of cocaine is rationally related to this purpose." Few outside the Department of Justice supported crack sentencing provisions, but that did not matter much: the Guidelines reflecting the 100-to-1 quantity ratio were found constitutional, repeatedly followed, and simply reviled.

Starting in the mid-1990s, however, the Sentencing Commission began advocating a change of course. In a series of extensive, well-supported reports, the Commission has tried repeatedly to persuade Congress that the 100-to-1 quantity ratio was a mistake and should be modified. In its reports, the Commission stressed (1) that the 100-to-1 crack/powder ratio is disproportionate to the relative harms presented by the two drugs; (2) that some harms associated with crack could and should be addressed by Guideline enhancements that are not drug-specific; and (3) that severe crack penalties fall disproportionately on lower-level offenders, and most significantly on African-Americans. Indeed, in its first major cocaine sentencing report in 1995, the Commission stated clearly that "[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants."

Shortly after issuing its 1995 report, the Commission proposed equalizing completely the Guidelines punishments for crack and powder by changing quantity thresholds for crack sentences to the levels set for powder cocaine sentences. At the same time, the Commission urged Congress to make similar changes to the mandatory minimum sentencing provisions in statutory law. But Congress recoiled: it refused to modify the statutory mandatory minimums and passed legislation formally rejecting the Commission's proposed Guideline changes. The legislation that rebuffed the Commission's equalization efforts made clear that Congress believed that crack sentences should generally be set at levels higher than powder cocaine sentences.

The Sentencing Commission's subsequent cocaine sentencing reports, issued in 1997 and 2002, reached similar conclusions about the realities of powder and crack cocaine and the inappropriateness of the 100-to-1 quantity ratio. The Commission did not, however, formally propose new guidelines again; it merely made suggestions to Congress. In 1997, the Commission suggested a mandatory minimum and Guideline sentencing ratio of basically 5-to-1, which was to be accomplished by increasing the quantity thresholds for crack sentences and lowering the thresholds for powder sentences. In 2002, the Commission suggested a mandatory and Guideline ratio of basically 20-to-1, which was to be accomplished by increasing the thresholds for crack and maintaining the thresholds for powder. Congress did not respond to either report.

II. The Sentencing Commission Takes Another Crack at Crack Reform

After Congress repudiated the Sentencing Commission's 1995 efforts to equalize powder and crack cocaine sentences, the Commission understandably was more circumspect in its crack sentencing reform efforts. In 1997 and 2002, the Commission did not deploy its rule-making authority to try to modify the 100-to-1 ratio still reflected in its Guidelines. Instead, the Commission simply urged Congress to narrow the weight-based punishment differential, and it did not follow up these recommendations with extensive advocacy or other reforms when Congress failed to act.

Earlier this year, however, the Sentencing Commission flexed some of the muscle it still has in this area. In May 2007, the Commission issued another comprehensive report in which it reaffirmed its earlier findings concerning the inappropriateness of the 100-to-1 crack/powder quantity ratio and urged Congress to shrink this ratio by raising the mandatory minimum threshold quantities for crack. And, this time, the Commission also issued proposed Guideline amendments that reduce applicable sentencing ranges for all crack offenses by lowering the base offense level by two levels.

In its latest report, the Sentencing Commission has stressed that its proposed crack guideline modifications are just a small step toward comprehensive reforms, in part because the statutory
mandate minimums still set floors at 500 (and 5,000) grams of powder cocaine and only 5 (and 50) grams of crack cocaine. Still, unless Congress moves to reject the proposed crack guideline amendments, they will take effect on November 1, 2007, and mark the most consequential change in federal cocaine sentencing policy in the last two decades. Significantly, in contrast to 1995, there seems to be no congressional opposition to the Commission’s proposals. Indeed, with the Commission trying to goad Congress into acting,16 the most tangible congressional response to date has been the introduction of various bills seeking to advance different proposals for reforming the statutory mandatory minimums. And, if Congress allows the Commission’s amendments to take effect, there are reasons to believe that the Commission could provide for its new crack guidelines to be given retroactive effect.17

III. What Will the Justices Do?
The Supreme Court’s chosen remedy in Booker (which, interestingly enough, was a crack cocaine case) has offered an opportunity for district judges troubled by the crack guidelines to effectuate their own vision of sentencing justice. Yet, as one of us has explained in more detail elsewhere, Booker has proved to be neither a magic bullet nor a mirage for crack defendants and broader crack-sentencing controversies; rather, Booker has contributed another messy set of debates in what has become a sentencing muddle.18

Since Booker, the lower courts have grappled—sometimes inconsistently and often unconvincingly—to determine exactly what authority the judiciary now has after Booker to disregard the Guidelines based on a disagreement with policy determinations reflected in the Guidelines. Unpacking this critical issue, which is important to post-Booker sentencing dynamics in all cases, becomes especially complicated and convoluted when judges consider the crack guidelines: a tangled web of congressional action, Commission research and recommendations, and pre-Booker judicial rulings upholding the 100-to-1 quantity ratio provide a foundation for an array of potent post-Booker arguments.19

The judiciary’s post-Booker views on this subject have generally fractured along the trial-appellate divide. Several district courts schooled in the Commission’s research view the 100-to-1 quantity ratio in the Guidelines as inappropriate and have charted their own new path—often adopting one of the Commission’s various ratio recommendations (e.g., 1-to-1, 5-to-1, or 20-to-1)—when sentencing crack offenders. But, when taking a new path, district courts have rarely discussed pre-Booker precedents rebuffing challenges to the 100-to-1 quantity ratio. Also, few district courts have thoroughly considered the relationship between the Sentencing Reform Act’s command to avoid “unwarranted” disparity and Congress’s apparent embrace of the 100-to-1 quantity ratio as a warranted disparity. Nor have district courts explored the disparity stemming from the “cliffs” that using one ratio for the mandates and another ratio for the Guidelines could cause.20

Yet the circuit court opinions that have repeatedly reversed efforts by district judges to move away from the crack guidelines have no shortage of their own problems. Appellate courts often rely heavily on pre-Booker precedents rebuffing challenges to the 100-to-1 quantity ratio and thereby treat the now advisory Guidelines a lot like the mandatory dictates they no longer are. Moreover, circuit courts have generally failed to consider the Sentencing Reform Act’s command that district courts impose sentences “not greater than necessary” along with the Commission’s repeated determination that crack sentences are excessively severe. The circuit courts since Booker, and recently the Supreme Court in Rita v. United States, have stressed the special expertise and wisdom of the Commission to support affording the Guidelines a “presumption of reasonableness” on appeal, but these courts have not explained what this should mean for crack cases in which the Commission has repeatedly criticized and urged modification of its own Guidelines.

The Justices will have the opportunity to sort out these issues at the very start of the Supreme Court’s October 2007 Term. In Gall v. United States, the Supreme Court has a case that should allow it to provide guidance for district and appellate courts concerning the justifications for a sentence outside of the advisory Guideline range. And, in Kimbrough v. United States, the Court has a crack case that should allow the Justices to address these matters specifically in the context of cocaine sentencing law and policy. In Kimbrough, the sentencing judge criticized the crack guidelines; determined that the sentencing range recommended by the Guidelines also ignored other important factors, thus making it inconsistent with the Sentencing Reform Act; and exercised his post-Booker discretion to impose a below-Guideline sentence. Derrick Kimbrough was able to get the Justices to
assess his initial sentence after the Fourth Circuit reversed that sentence as unreasonable because the sentencing court expressed general disagreement with the crack guidelines.

In its briefs to the Supreme Court in Gall and Kimbrough, the Government walks a fine line by asserting that only certain types of policy disagreements with the Guidelines can provide a valid basis for a non-Guidelines sentence. Specifically, the Government explains to the Supreme Court that "[a]lthough sentencing courts may impose non-Guidelines sentences based on policy disagreements with the Sentencing Commission, courts may not vary from the Guidelines under Section 3553(a) based on disagreements with policy choices mandated by Congress." The Government thereafter describes any variances based on disagreement with the 100-to-1 crack/powder ratio to be one type of policy disagreements that is off-limits.41

In Kimbrough, the Supreme Court will have to find a way to resolve the tension between binding mandatory minimums and discredited, "effectively advisory" Guidelines. But, with crack guideline changes and congressional reform debates in midstream, it is unlikely that a still-disjointed set of Justices will be able to author an easy, pretty, or perfectly clear new crack sentencing script.22

IV. What Congress Should Do
The problems with federal cocaine sentencing transcend particular Guideline levels and mandatory minimum punishment thresholds for defendants. Consequently, the Commission's proposed amendments alone are unlikely to resolve long-standing debates and can only partially salve long-fester- ing wounds. In fact, cocaine sentencing issues are now much broader than just the question of what is the "right" punishment for violating certain federal drug laws.

The larger problem is one of fairness and justice—both its reality and its perception. Federal cocaine sentencing policy has been so out of balance for so long that it has come to represent—fairly or not—all the worst attributes of federal sentencing for many people.23 For nearly two decades, the crack-powder disparity has been "Exhibit A" for those who believe that the criminal justice system is racially biased. It has been "Exhibit A" for those who believe that the federal justice system is excessively severe. It has been "Exhibit A" for those who believe that Congress does not genuinely care about fairness and justice and would rather cultivate tough-on-crime political rhetoric than confront tough-to-solve sentencing realities. For these and other reasons, current federal cocaine sentencing policy has a corrosive effect on both the American criminal justice system and our society at large. Congress should and must do better, for vital symbolic reasons as well as substantive ones.

We think that the Commission's latest admonitions to Congress are basically on target, and they provide a useful to-do list for our nation's legislature. First, Congress should reduce or eliminate the weight-based punishment disparity between powder and crack cocaine. There are several viable options advanced by the Commission over the years from which Congress can choose, each of which is better than the current policy. Reasonable minds can differ as to which option (e.g., 1-to-1 vs. 5-to-1 vs. 20-to-1) is "right," but there seems to be no sound criminal justice reason to reach the desired ratio by lowering the powder threshold. Each of the Commission's proffered quantity ratios would be an improvement over the current policy and would signal that Congress is engaged and willing to address the disruptive forces it unleashed twenty years ago.24

Second, Congress should also, at a bare minimum, repeal the five-year mandatory minimum for simple possession of at least five grams of crack cocaine. This mandatory minimum exceeds the statutory maximum for simple possession of any amount of powder cocaine.

Finally, Congress could take a bolder, more proactive step and consider evidence-based options for lower-level user-dealers who may respond better to compulsory treatment than to lengthy incar- ceation.25 Although the target defendant population is at times different, some states have used this approach for certain low-level drug offenders with encouraging results. Valuably, the U.S. Sentenc- ing Commission has indicated, through its latest announcement of official priorities, that it will finally begin exploring alternatives to incarceration. Congress should urge the Commission to pur- sue this course vigorously.

Importantly, Congress need not and should not wait for further action by the Commission or for the Supreme Court's ultimate resolution of Kimbrough and Gall. Even if the Supreme Court allows the lower courts to override problematic policies in the Guidelines, Congress still needs to act. It cannot and should not rely on the courts and the Commission to make all the tough calls; it cannot and should not rely on the judiciary to solve a legislatively created problem. Only Congress can really clar- ify the proper relationship between its mandatory minimum laws and sentencing for quantities of cocaine above and below those levels. More importantly, only Congress can send the message that it
cares about the injustices—real and perceived—emanating from its cocaine policy. Only Congress can redress these grievances. This power and this duty rest squarely on the elected branches of government.

Notes
4 Sentencing experts Paul Hofer and Mark Allenbaugh note that the young Commission’s “failure to accommodate the statutory penalties might [have] suggest[ed] to Congress that the Commission’s approach to punishment cannot be trusted. This could [have led] to more mandatory minimums and further diminish the Commission’s role.” Paul J. Hofer & Mark H. Allenbaugh, The Reason behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines, 40 AM. CRIM. L. REV. 19, 34 n.68 (2003).
5 See, e.g., U.S. SENTENCING COMMISSION, GUIDELINES MANUAL §2D1.1(c); United States v. Armstrong, 517 U.S. 456, 478 (1996) (Stevens, J., dissenting) (“The Sentencing Guidelines extend this [100-to-1] ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine.”).
7 See, e.g., id. at 118 (“[A]ll federal circuit courts addressing the constitutionality of crack cocaine penalties have upheld the current federal cocaine sentencing scheme, including the 100-to-1 ratio.”).
8 United States v. Lawrence, 951 F.2d 751, 755 (7th Cir. 1991).
9 Chanenson, supra note 3, at 561.
10 See id.
14 Id. at viii.
16 Cf. id. at 2 (“It is the Commission’s firm desire that this report will facilitate prompt and appropriate legislative action by Congress.”); id. at 1 2 (“Congressional enactment of a uniform remedy to the problems created by the 100-to-1 drug quantity ratio, as opposed to the employment of varied remedies by the courts, would better promote the goals of the Sentencing Reform Act, including avoiding unwarranted sentence disparities among defendants with similar criminal records who have been found guilty of similar criminal conduct.”)
17 The Sentencing Commission has requested comments on whether to make its proposed crack amendments retroactive, and the American Bar Association has recently documented that other changes to drug guidelines have previously been made retroactive. See Douglas A. Berman, ABA Makes Pitch for USSC Crack Amendments to Be Made Retroactive, SENTENCING LAW AND POLICY (Aug. 23, 2007), available at http://sentencing.typepad.com/sentencing_law_and_policy/2007/08/aba-makes-pitch.html.
18 Chanenson, supra note 3, at 553.
19 Id. at 571.
20 Id. at 577.
21 Gall v. United States, No. 06-7949, Brief of the United States at 37, n. 11.
22 The Third Circuit’s recent opinion in United States v. Ricks, Nos. 05-4832, 05-48332007 U.S. App. LEXIS 17258 (3d Cir. 2007), offers one potential approach that may try to bridge the divide. Consistent with the views of some of its sister courts, Ricks prohibited district courts from categorically rejecting the 100-to-1 quantity ratio and replacing it with a ratio of the district court’s choosing. However, it did allow the sentencing judge to consider the Commission’s objections to the current Guidelines “when applying the § 3553(a) factors to a specific case and defendant.” Id. at *26. Whether this fact proves workable in practice or attractive to the Supreme Court remains to be seen.
23 For example, a consortium of advocacy groups—including the Open Society Institute, the ACLU, the Drug Policy Alliance, and the Sentencing Project—recently launched an ad campaign designed to draw attention to the federal crack cocaine sentencing issue titled “It’s Not Fair. It’s Not Working.” See http://www.sentencingproject.org/crackreform.
24 Although more sweeping than anything that we think is likely to pass in the foreseeable future, we believe that Congress should ask the Commission to think outside the box. Specifically, Congress should direct the Commission to consider other mechanisms to assess the culpability of and the harm caused by a defendant who trafficked in narcotics that do not rely so heavily on drug weight. In his commentary in this Issue, Pro-

WHAT WILL FEDERAL MARIJUANA REFORM LOOK LIKE?

Alex Kreit†

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INTRODUCTION

When Californian voters passed the first modern medical marijuana ballot measure in 1996, it was hard to imagine federal law might ever change to accommodate it. At the time, then–drug czar Barry McCaffrey called the law “a cruel hoax that sounds more like something out of a Cheech and Chong show.”1 The Drug Enforcement Administration (DEA) threatened to go after the controlled substances licenses of doctors who recommended medical marijuana,2 and the House of Representatives passed a symbolic “Not Legalizing Marijuana for Medical Use” sense of Congress resolution by a vote of 310 to 93.3

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Even as more and more states followed California’s lead and passed medical marijuana laws of their own, little changed at the federal level. By one estimate, the federal government spent $483 million dollars interfering with state medical marijuana laws between 1996 and 2012, conducting at least 528 raids and dozens of prosecutions of people operating in compliance with state medical marijuana laws.4

By the time Colorado and Washington took state reforms even further in 2012 with laws legalizing marijuana for recreational use, federal marijuana laws and enforcement policies stood in roughly the same place as they had back in 1996. If anything, the Obama administration’s actions on medical marijuana—vigorously raiding and prosecuting state operators despite a 2008 campaign pledge5 and a 2009 Department of Justice memo6 that indicated he would do just the opposite—made the prospect of change at the federal level seem even bleaker.7

Somewhat suddenly, however, the last two years have seen the once-impossible idea of reforming federal marijuana law become seemingly inevitable.8 In late 2013, the Department of Justice announced a new round of marijuana enforcement guidelines.9 The text of the

5. Tim Dickenson, Obama’s War on Pot, ROLLING STONE (Mar. 1, 2012), http://www.rollingstone.com/politics/news/obamas-war-on-pot-2010216 (reporting that as a candidate President Obama said, “I’m not going to be using Justice Department resources to try to circumvent state laws on this issue”).
7. See, e.g., Dickenson, supra note 5 (“O/ver the past year, the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush.”); Alex Kreit, Reflections on State Medical Marijuana Prosecutions and the Duty to Seek Justice, 89 DENVER L. REV. 1027, 1036 41 (2012) (discussing the aftermath of the 2009 Department of Justice memo on federal medical marijuana prosecutions).
DOJ’s 2013 guidance is not all that different from its largely ignored 2009 memorandum. This time, however, federal prosecutors and the DEA have mostly abided by the advice. As a result, stores are selling marijuana in Colorado and Washington as openly as they would any other consumer good. Perhaps even more notable, the 2015 federal budget included an appropriations rider banning the Department of Justice from spending money to block the implementation of state medical marijuana laws.\(^\text{10}\) Taken together, these two developments suggest the executive and legislative branches are finally coming around to the conclusion that enforcing federal marijuana prohibition in states that have enacted reform is simply no longer a viable option.

But if uniformly enforced federal marijuana prohibition is no longer sustainable, what should a new policy look like? Perhaps because the prospect of a move away from federal marijuana prohibition has seemed so remote for so long, there has not been much serious dialogue about the pros and cons of the various alternatives. Marijuana legalization advocates have been focused on lobbying for any politically viable short-term workaround to the conflict between state and federal law, not crafting a policy for the long-term. Prohibitionists, meanwhile, have been sticking with a run-out-the-clock strategy, betting on the hope that the medical and recreational marijuana legalization trend will eventually reverse itself and working to keep federal marijuana laws untouched until that day comes.

So much energy has been directed at the debate about whether to change federal marijuana laws that the question of how to change them has been almost an afterthought. Barring a dramatic political reversal, however, it is no longer a matter of whether but when, and that makes the how of federal marijuana reform increasingly important. Instead of trying to find the best short-term fix to the current state–federal conflict, it is time to start thinking seriously about what federal marijuana policy should look like for the next forty or fifty years. This Article aims to help further the dialogue on this question. My goal is not to advocate for any particular solution or consider any one option in detail, but instead to highlight some of the considerations that might guide the debate and some of the trade-offs different sorts of policies might entail. I argue that the federal

\(^\text{10}\) Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014) (“None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”).
marijuana reform ideas that have generated the most political interest and momentum so far (appropriations provisions and affirmative defense proposals) suffer from serious flaws that make them unlikely to be attractive long-term options. Instead, more sweeping changes to federal law are likely necessary to harmonize state and federal marijuana law. And, though perhaps counterintuitive, there are reasons legalization opponents may also come to reluctantly accept ideas like federal marijuana regulation or state waiver programs as the best option for addressing some of their biggest concerns as legalization moves forward.

This Article proceeds in three parts. Part I briefly lays out the case for why federal law must change to accommodate state marijuana reforms and why, although perhaps not politically viable today, change is nevertheless inevitable and may come much sooner than many think. Part II considers the types of federal marijuana reform proposals that have generated interest and analyzes which is most likely to effectively end the conflict between state and federal marijuana law. Part III looks at the idea of federal marijuana law from the perspective of marijuana legalization opponents and skeptics. Though people in this category might prefer nationwide marijuana prohibition, if that is not a viable option in the long-term, what federal policy would be most likely to effectively address their central concerns about legalization?

I. Why Federal Marijuana Law Reform Is Both Necessary and Inevitable

Walking around Denver, Colorado, or leafing through the Wall Street Journal, it would be easy to forget that federal law still criminalizes the distribution, 11 manufacture, 12 and even simple possession of marijuana. 13 State-legal marijuana stores openly sell millions of dollars’ worth of marijuana in Colorado, 14 seemingly unconcerned by the lengthy federal sentences their operators are risking. 15 Meanwhile, angel investors pump money into marijuana ventures like Eaze, a

12. Id.
13. Id. § 844(a) (“It shall be unlawful for any person knowingly or intentionally to possess a controlled substance.”).
15. See, e.g., 21 U.S.C. § 841(b)(1)(A)(vii) (providing for a mandatory minimum sentence of ten years for the distribution of 1,000 or more marijuana plants or 1,000 kilograms or more of marijuana).
“high-tech pot-delivery service” or, in the eyes of federal drug laws, a sophisticated conspiracy to illegally distribute a controlled substance.

The disconnect between the letter of federal law and the emerging marijuana industry is, in large part, the result of an August 2013 Department of Justice (DOJ) memo advising federal prosecutors not to interfere with state marijuana legalization laws. The memo cautions that it “is intended solely as a guide to the exercise of investigative and prosecutorial discretion” and does not give state-compliant marijuana operators any legally enforceable rights or protection. But enough marijuana operators have put their confidence in the DOJ’s nonbinding guidance that it has proven to be a relatively effective short-term answer to the state-federal marijuana conflict, at least so far. With marijuana businesses operating openly, it is fair to ask whether the state–federal marijuana conflict has already been solved. Does Congress really need to change federal law, or can federal prohibition and state legalization comfortably coexist through an executive nonenforcement policy?

Though the DOJ’s marijuana nonenforcement policy could continue indefinitely in theory, it is not a long-term solution for several reasons. First, prosecutorial guidance is just that—guidance. A new Attorney General could decide to change the policy. If that happens, the people investing in marijuana delivery startups today could be facing federal drug charges tomorrow. Because their actions violate existing federal law, there would be no ex post facto bar to prosecuting marijuana business operators for conduct they undertook while the nonenforcement prosecutorial guidance was in effect. As a result, every Colorado marijuana business owner who employs an


18. Id. at 4.

19. See, e.g., Erwin Chemerinsky et al., Cooperative Federalism and Marijuana Regulation, 62 UCLA L. Rev. 74, 90 (2015) (observing that making a federal nonenforcement policy permanent “cannot be done by executive action alone because enforcement decisions made by one presidential administration could easily be overturned by the next”); Vikas Bajaj, Op-Ed., Will the Next Attorney General Crack Down on Marijuana?, N.Y. TIMES TAKE NOTE BLOG (Jan. 29, 2015), http://mobile.nytimes.com/blogs/takingnote/2015/01/29/will-the-next-attorney-general-crack-down-on-marijuana/ (reporting on the confirmation for Loretta Lynch, President Obama’s nominee to replace Eric Holder as Attorney General, and observing that “Lynch’s statements serve as a reminder that the Obama administration’s policy on marijuana could easily be reversed”).
army security guard could wind up serving an effective life sentence in federal prison when a new President is sworn into office in January 2017, even if they closed their doors in November 2016. Indeed, even while the policy is in place, a disobedient federal prosecutor could simply ignore it. Because the policy is only advisory, it does not give state-legal marijuana operators who rely on it a defense in federal court.

Second, even if the DOJ’s nonenforcement policy could reliably shield marijuana businesses from federal criminal prosecution, it does not solve the conflict between federal prohibition and state legalization entirely. As Erwin Chemerinsky, Jolene Foran, Allen Hopper, and Sam Kamin explain in their recent article Cooperative Federalism and Marijuana Regulation, there are a number of “substantial obstacles to businesses and adults seeking to implement and avail themselves of new state laws authorizing marijuana distribution and use” that cannot be solved by prosecutorial discretion alone. These obstacles include access to banks, which are far less likely to be persuaded by advisory guidance; access to attorneys, who may face ethics charges for facilitating federally illegal drug operations; a “crippling” federal tax penalty for marijuana businesses; and risks to


24. Julie Andersen Hill, Banks, Marijuana, and Federalism, 65 CASE W. RES. L. REV. 597 (2015) (arguing that banking will continue to present “urgent” problems to the marijuana industry because banks do not want to risk noncompliance with federal law).

25. Sam Kamin & Eli Wald, Marijuana Lawyers: Outlaws or Crusaders?, 91 ORT. L. REV. 869 (2013) (discussing how attorneys who represent state-legal marijuana businesses might risk running afoul of ethics laws because all lawyers have a duty to not “knowingly assist criminal conduct”).

26. Chemerinsky et al., supra note 19, at 94; see also, e.g., Benjamin Moses Leff, Tax Planning for Marijuana Dealers, 99 IOWA L. REV. 523 (2014)
users in the form of potential adverse employment, probation and parole, and family law consequences.27 Federal prohibition also leaves marijuana businesses with a great deal of uncertainty when it comes to intellectual property rights,28 the availability of insurance, and even the enforceability of standard business contracts.29 While it is possible some of these hurdles can be overcome in whole or in part without legislative action, others are almost certain to remain.

Third, the continuing nonenforcement of federal drug laws would raise serious concerns about the limits of executive power. In his recent article Enforcement Discretion and Executive Duty, Zachary Price considers the federal government’s response to state marijuana legalization laws.30 Price argues that while “[s]ome degree of top-down direction regarding” Justice Department resources may be appropriate, “a more definite nonenforcement policy . . . would exceed the Executive’s proper role by effectively suspending a federal statute and thus usurping Congress’s constitutional responsibility to set national policy.”31 The longer the federal government goes without prosecuting or otherwise interfering with32 marijuana businesses, the more definite its nonenforcement policy effectively becomes. To be sure, as a matter of legal doctrine on executive discretion, it is quite likely that the DOJ’s marijuana nonenforcement policy could continue

(discussing Internal Revenue Code § 280E, which requires sellers of federally illegal drugs to pay taxes on their gross revenue instead of their net income).

27. See generally Chemerinsky et al., supra note 19, at 90 100 (surveying impediments faced by states seeking to regulate marijuana “due to marijuana’s continuing illegality under federal law”).


29. Chemerinsky et al., supra note 19, at 96 97 (discussing cases in which courts have declined to enforce insurance policies and other contracts for marijuana businesses and concluding that marijuana businesses “cannot rely on the contracts they sign or the insurance they pay for”).


31. Id.

32. Federal law enforcement officials have employed a range of tactics to try to shut down people operating pursuant to state marijuana laws, including asset forfeiture and civil suits. See, e.g., United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483 (2001) (involving a civil suit to enjoin the operation of medical marijuana cooperatives).
indefinitely. And even as a matter of policy, the dividing line between acceptable guidance about how to use limited law enforcement resources and a problematic de facto suspension of federal law by the Executive is open to debate. But, at the very least, a sustained nonenforcement policy presents difficult questions about executive power and the rule of law.

Fourth, applying federal marijuana laws in some states but not others might also be objectionable on the grounds that it is inconsistent with the principle of equal application of the law. Federal drug laws are meant to apply uniformly across the country, at least as they are currently written. Under the DOJ’s nonenforcement policy, however, a person openly selling marijuana in Wyoming continues to risk a lengthy stay in federal prison while a person engaging in the same conduct in Colorado can make millions. This state of affairs has already led at least one federal judge to deviate from the penalties recommended by the federal sentencing guidelines for marijuana. The judge reasoned that “changes in state law and federal enforcement policy regarding marijuana” warranted a reduced sentence, at least for a distribution scheme that “bears some similarity to those marijuana distribution operations in Colorado and Washington that will not be subject to federal prosecution.”

For these reasons, although the DOJ’s nonenforcement policy may work as a temporary fix, legislators should not view it as a long-term solution. Of course, it is also possible for the executive to change marijuana’s status under federal law even without congressional action by administratively reclassifying marijuana under the Controlled Substances Act (CSA). Under the CSA, drugs are divided into five “schedules” based on their potential for abuse, medicinal value,

33. As a recent Congressional Research Service report explained, “courts have been reluctant to withdraw the executive’s discretion to decide whether to initiate a prosecution” in the absence of “clear and unambiguous evidence of Congress’s intent to withdraw traditional prosecutorial discretion.” Todd Garvey, Cong. Research Serv., R43708, The Take Care Clause and Executive Discretion in the Enforcement of Law 14 (2014). The Controlled Substances Act does not contain the sort of express congressional directive that would be likely to constrain prosecutorial discretion under current doctrine. Controlled Substances Act, 21 U.S.C. §§ 801-971 (2012).


35. Id. at 689. Cf. United States v. Irlmeier, 750 F.3d 759, 766-67 (8th Cir. 2014) (Bright, J., dissenting) (“In today’s world where several states in this country have legalized marijuana use for medical purposes and two states have even legalized its recreational use, a hard look should apply to marijuana prosecutions carrying mandatory minimum sentences as in this case.”).
and addictiveness.\textsuperscript{36} The DEA has the power to add a new substance to the schedules, move a substance between schedules, or remove a currently scheduled substance entirely.\textsuperscript{37} Even since the CSA was passed in 1970, marijuana advocates have argued that the drug is improperly categorized in Schedule I, the strictest category, reserved for drugs with a high abuse potential and no currently accepted medical use.\textsuperscript{38} In 2011, the governors of Rhode Island and Washington called for rescheduling and even suggested that the move could harmonize state and federal marijuana laws.\textsuperscript{39}

Whatever the merits of rescheduling, it would not fix the state–federal conflict over marijuana. As an initial matter, so long as marijuana is scheduled, it would be illegal to sell the drug for recreational use—even Schedule V substances can only be sold for medicinal use.\textsuperscript{40} Though the CSA does permit the de-scheduling of drugs, marijuana is exceedingly unlikely to ever qualify for complete removal under the scheduling criteria.\textsuperscript{41} Even if it could, the CSA requires scheduling decisions to meet U.S. treaty obligations, regardless of the criteria.\textsuperscript{42} As a result, the DEA could not remove marijuana from the CSA without a change in the international drug treaties and, very likely, could not move it any lower than Schedule II.\textsuperscript{43} Rescheduling marijuana might help begin to address the conflict between

\begin{itemize}
  \item \textsuperscript{37} The CSA grants rescheduling power to the Attorney General, but the Attorney General has delegated this authority to the head of the Drug Enforcement Administration. See Alex Kreit, Controlled Substances, Uncontrolled Law, 6 ALB. GOV’T L. REV. 332, 336 (2013).
  \item \textsuperscript{38} 21 U.S.C. § 812(b)(1) (providing the criteria for placing a substance in Schedule I).
  \item \textsuperscript{40} 21 U.S.C. § 829(c) (2012) (“No controlled substance in schedule V which is a drug may be distributed or dispensed other than for medical purposes.”).
  \item \textsuperscript{41} For this reason, alcohol and tobacco are both statutorily exempt from regulation under the Controlled Substances Act. 21 U.S.C. § 802(6) (2012).
  \item \textsuperscript{42} Id. § 812(b).
  \item \textsuperscript{43} Nat’l Org. for the Reform of Marijuana Laws v. Drug Enforcement Admin., 559 F.2d 735, 742 (D.C. Cir. 1977) (reporting that the DEA concluded United States treaty commitments would permit marijuana to be moved to Schedule II but not lower). See also Uelmen & Kreit, supra note 36, at § 1:15.
\end{itemize}
federal and state *medical* marijuana laws. But even for state medical marijuana laws, federal rescheduling would raise as many questions as answers. This is because state medical marijuana regimes are far more expansive than federal oversight for Schedule II and III drugs. Indeed, because marijuana does not have FDA approval, it is unclear that marijuana could actually be marketed as a medicine at all even if it were rescheduled.\(^4\)

Of course, not everyone would like to see the federal government accommodate state marijuana reforms. Those who favor marijuana prohibition might be inclined to leave the federal prohibition of marijuana in place (though polling indicates substantial support for deferring to states, even among legalization opponents).\(^5\) If federal marijuana prohibition had been successful at blocking state medical and recreational marijuana laws, federal marijuana prohibition might be a viable long-term option. The trouble for would-be supporters of the status quo is that federal marijuana prohibition has proven itself incapable of stopping state legalization laws.\(^6\)

Between 1996 and 2008, the federal government unambiguously opposed state medical marijuana laws and fought hard to block their implementation.\(^7\) Even as recently as late 2012, a state-legal Montana medical marijuana provider was convicted of federal charges carrying eight decades of mandatory federal prison time.\(^8\) Despite their best efforts, however, federal drug enforcement officials were not able to stop states from passing and implementing medical marijuana laws.

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5. Jacob Sullum, *Poll Finds Most Americans Support Treating Marijuana Like Alcohol; Even More Think the Feds Should Let States Do So*, REASON (Jan. 31, 2013, 12:41 PM), http://reason.com/blog/2013/01/31/poll-finds-most-americans-support-treati (reporting on poll results in which only about half of respondents supported marijuana legalization but 68% said the federal government should not arrest marijuana growers who are in compliance with state law).


To be sure, vigorously enforced federal marijuana prohibition made life more difficult for state-legal marijuana operators, with an unlucky few now serving federal prison sentences. But because the federal government depends almost entirely on state law enforcement resources to enforce drug prohibition laws, it did not have the resources to deter medical marijuana businesses from openly operating.49 As a result, federal marijuana prohibition enforcement efforts served mostly to make state medical marijuana laws less well controlled than they otherwise might have been.50 Though the Supremacy Clause might give a glimmer of hope to federal marijuana prohibition, so far courts have largely rejected the argument that federal law preempts state marijuana laws.51 Unless that changes, whatever one thinks about the merits of state legalization, federal law is powerless to stop it. Nearly two decades of experience point to the almost inescapable conclusion that so long as states continue to pass marijuana legalization laws, nationwide federal prohibition is not a realistic policy option. Perhaps more than anything else, this fact is what makes federal marijuana reform inevitable.

II. PROPOSALS TO SOLVE THE CONFLICT BETWEEN STATE AND FEDERAL MARIJUANA LAWS

Though it is becoming clearer that today's federal marijuana laws are not sustainable—at least not without a dramatic reversal of course at the state level—the dialogue about how to reform them should be done is still in its infancy. To date, most proposals to change federal marijuana law have come from state marijuana legalization supporters and have focused mostly on minimizing or resolving the current state–federal conflict. They fall into roughly four categories: (1) preventing the Department of Justice from spending money to interfere with state marijuana laws; (2) providing an affirmative defense based on compliance with state marijuana laws; (3) letting states opt out of

49. Mikos, supra note 46, at 1463 67 (arguing that the federal government’s limited law enforcement resources mean that it cannot arrest and prosecute more than a small fraction of marijuana offenders).

50. Kreit, supra note 47, at 569 75 (arguing that federal enforcement made it more difficult for states to effectively regulate and control medical marijuana).

51. See, e.g., Beek v. City of Wyo., 495 Mich. 1 (2014) (finding that Michigan’s medical marijuana was not preempted by federal law); Robert A. Mikos, Preemption Under the Controlled Substances Act, 16 J. HEALTH CARE L. & POL’Y 5, 37 (2013) (“[T]he CSA, properly understood, preempts only a handful of the [marijuana] laws now being promulgated throughout the states.”).
federal marijuana prohibition; and (4) ending the federal ban on marijuana and replacing it with some sort of federal regulatory structure.\textsuperscript{52}

To begin to make sense of the different alternatives for federal marijuana law reform, this section considers the benefits and pitfalls of each type of reform based on the goal of minimizing the conflict between state and federal marijuana laws. Though this is a pressing concern, it is hardly the only goal lawmakers might want to pursue in crafting marijuana policy. In the next section, I will consider how legalization opponents might view different options for reform and take up the question of what type of legal structure would give the federal government the most control in shaping and limiting state marijuana laws.

A. Reform Through Appropriations Provisos

The only successful federal marijuana reform proposal to date was focused on spending. In spring 2014, the House of Representatives narrowly passed an appropriations amendment to prevent the Department of Justice from spending any money to block states from implementing their medical marijuana laws. (The amendment does not apply to the legalization laws in Alaska, Colorado, Oregon, and Washington.) The Senate never voted on the provision directly, and, for much of 2014, it seemed unlikely ever to become law. Ultimately, however, it made its way into the final budget for 2015.\textsuperscript{53}

From a political perspective, the development was groundbreaking. It marked the first congressional vote in support of easing federal marijuana law and suggested that Congress and the President are both now (very tentatively) inclined to permit state medical marijuana laws to go forward in some way. It also signaled just how quickly marijuana politics is changing; the last time the amendment came up for a vote, in 2007, it failed, garnering only 165 votes at a time when the Democrats had a majority in the House.\textsuperscript{54}

It is not hard to guess at why addressing the state-federal marijuana conflict through a spending proposal may be more politically appealing than other options. Although polls indicate supporting

\textsuperscript{52} See, e.g., Chemerinsky et al., supra note 19, at 113 14 (summarizing marijuana reform bills that have been introduced in Congress).

\textsuperscript{53} Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014). The appropriations act also limits the use of funds to block industrial hemp research programs. Id. § 539.

marijuana reform is good politics.\textsuperscript{55} many politicians still do not see it that way.\textsuperscript{56} And, for elected officials who came up in the drug war era of the 1980s or 1990s, an appropriations measure almost certainly carries the least risk of giving an opponent fodder for a “soft on crime” type of attack ad. A spending proviso is temporary. It does not change federal law, and it can be easily omitted from the next year’s budget. In addition, it can be framed as a question of allocating federal resources, not necessarily a position on the merits of state marijuana laws. Couching marijuana reform in spending terms may also be more likely to appeal to Republican legislators, particularly those closely aligned with the “tea party” brand. After all, cutting federal spending is at the core of the tea party’s political identity.\textsuperscript{57} Last but not least, an appropriations amendment is much easier to get onto the floor of the House than, say, a bill to remove marijuana from the Controlled Substances Act, which would typically proceed through the usual committee process.

Unfortunately, the politics is not particularly well aligned with policy in this instance. Of all the legislative options for addressing the conflict between state marijuana reforms and federal prohibition, spending restrictions are almost certain to be the least effective.

As an initial matter, the spending restriction in the 2015 budget is not a model of clarity. The provision blocks the Department of Justice from using funds “to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”\textsuperscript{58} It is far from clear that this spending limitation applies to the investigation or prosecution of private parties at all. If the Department of Justice were to use funds to sue a state over its medical marijuana law or to prosecute a state official for issuing a medical marijuana permit, that would surely qualify as preventing the state from “implementing” its law.\textsuperscript{59} But does prose-


\textsuperscript{56} See Nick Wing, \textit{Here Are All the U.S. Senators and Governors Who Support Legalizing Marijuana}, \textit{The Huffington Post} (Oct. 27, 2014, 10:59 AM), http://m.huffpost.com/us/entry/5107508 (reporting that only one sitting United States Senator or Governor has “announced support for full legalization” of marijuana).


\textsuperscript{59} To date, the DOJ has not prosecuted any state or local officials for issuing marijuana permits or sued to block a state’s marijuana law on a
cuting a dispensary operator in San Diego mean that California has been prevented from “implementing” its laws? The brief debate of the amendment on the House floor leaves little doubt that the provision’s backers meant to stop federal prosecutors from going after dispensary owners. And there is a strong argument that the text itself prevents the Department of Justice from prosecuting any state-licensed patient or provider, whether or not the person is in compliance with state law. After all, a medical marijuana dispensary operator whose state-law violation would result in a civil penalty or relatively minor criminal penalty could face years behind bars if prosecuted federally. The state has an interest in implementing its own laws by imposing its own penalties for noncompliance, not just in protecting compliant operators. Still, the scope of the provision is far from certain. Already, a handful of medical marijuana defendants have unsuccessfully argued the provision prevents the federal government from going forward against them. Only time will tell how the preemption theory, so if this is all the provision restricts, it is not particularly far reaching.

60. There is something of a parallel between this scenario and the federal preemption question. State marijuana reforms do not pose an obstacle to implementing federal prohibition because the federal government can continue to enforce its laws criminalizing marijuana they just have to do it without the help of state and local officials. Similarly, one might argue that prosecuting a private party would never prevent the implementation of a state law. The state could still put its own law into effect by issuing permits, regulations, and so forth, even if private parties operating pursuant to the law risk federal prosecution.

61. E.g., 160 Cong. Rec. H4984 (daily ed. May 29, 2014) (statement of Rep. Titus) (explaining that under the appropriations amendment, “[p]hysicians in [medical marijuana] States will not be prosecuted for prescribing the substance, and local businesses will not be shut down for dispensing the same”).


courts interpret and apply the provision and, perhaps more importantly, whether it is renewed in next year’s budget.

Of course, a drafting problem with the 2015 spending amendment does not necessarily mean the idea of updating federal marijuana law through a spending amendment is flawed. But even the most carefully written appropriations amendment would not be a particularly effective solution to the state-federal disconnect.

First, preventing the Department of Justice from spending money to prosecute state-legal marijuana operators would not provide any sort of lasting immunity from prosecution. Congress could decide to lift the spending restriction next year or the year after that. Indeed, in the absence of “futurity” language, an appropriation proviso applies only to the covered fiscal year and must be passed by Congress annually to remain in effect.64 If and when the appropriations restriction were ever lifted, the Department of Justice could presumably prosecute marijuana distributors for acts they committed during the restricted period. Though defense attorneys might litigate the issue, it is hard to imagine courts finding an ex post facto bar to prosecuting people for conduct they engaged in while an appropriation limit was in place. If Congress had intended to make it legal for state-regulated actors to distribute marijuana, it could have amended or repealed the Controlled Substances Act.65 A spending restriction, by contrast, speaks only to Congress’s budget priorities. Congress might decide to temporarily stop the Department of Justice from spending money to investigate a class of cases when money is tight with the hope that prosecutions will resume as soon as resources permit. For this reason, a spending ban does not provide any more long-term protection than the Department of Justice’s own advisory marijuana enforcement memo.

Second, blocking federal law enforcement officials from spending money to pursue state-compliant marijuana cases presents a difficult logistical puzzle. At what point in a particular case does the spending restriction kick in? If the DEA believed a state marijuana licensee was using her permit as a cover for other illegal activity, confirming or disconfirming that suspicion would require it to spend money on an investigation. As a result, it is hard to imagine Congress would stop the Department of Justice from spending money at the investigation

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64. See Auburn Hous. Auth. v. Martinez, 277 F.3d 138, 146 (2d Cir. 2002) (discussing the “presumption that a provision contained in an appropriation act applies only in the applicable fiscal year”).

65. It is unlikely that the inclusion of “futurity” language would change the equation on this point. See Atl. Fish Spotters Ass’n v. Evans, 321 F.3d 220, 225 (1st Cir. 2003) (“We caution, however, that even the presence of [futurity] words will not establish permanence if that construction would render other statutory language meaningless or lead to an absurd result.”).
stage. Even a spending limit that tried to address this issue by, say, allowing for investigations where there was reasonable suspicion that the target was out of compliance with state marijuana laws would tie the Justice Department’s hands in many cases.66

On the other hand, an appropriations restriction that allowed the DEA to investigate marijuana providers in reform states would raise a tricky problem of its own: how would a federal prosecutor’s claim that someone was operating on the wrong side of state law be resolved? The most plausible answer—at a federal criminal trial—would have to overcome the fact that compliance with state marijuana laws is not a defense under the CSA. Ever since the DOJ released its enforcement memo in 2009, federal medical marijuana defendants have argued they should be allowed to introduce evidence of compliance with state law as a defense. But federal courts have uniformly excluded the defense.67

As a result, there has been no avenue to test DOJ claims of noncompliance with state law, even in cases where the evidence of compliance seems to be pretty strong.68 The addition of a spending provision would certainly strengthen the argument that the issue of a federal defendant’s state-law compliance should go to the jury. But without an affirmative defense in the CSA itself, this would still be an awkward solution at best. Ultimately, a federal spending restriction would seem to require choosing between a number of unsatisfactory options: engraving a limited “state compliance” defense onto the federal law, blocking all prosecutions where a defendant merely claimed state compliance, or taking the federal government’s word and leaving federal

66. If the DEA received an anonymous tip that a state marijuana licensee was selling to children or a front for distributing other drugs, for example, it would not have reasonable suspicion and could not spend any money to follow up on the tip. See Florida v. J.L., 529 U.S. 266, 274 (2000) (finding that an anonymous tip standing alone did not give rise to reasonable suspicion). The risk that a pretrial spending restriction would deter legitimate investigations is heightened by the Anti-Deficiency Act, which can result in criminal liability for an official who makes an expenditure that has not been authorized by Congress. 31 U.S.C. § 1341 (2012). See also J. Gregory Sidak, The President’s Power of the Purse, 1989 DUKE L.J. 1162, 1234 (1989) (discussing the Anti-Deficiency Act, “which prohibits any officer or employee of the United States from making expenditures or incurring obligations either in excess of available appropriations or in advance of appropriations, unless he has legal authorization for making them”).


68. For example, federal medical marijuana defendant Charlie Lynch was unable to raise compliance with state law as a defense. At sentencing, however, the judge “talked at length about what he said were Mr. Lynch’s many efforts to follow California’s laws on marijuana dispensaries.” Solomon Moore, Prison Term for a Seller of Medical Marijuana, N.Y. TIMES, June 12, 2009, at A18.
marijuana defendants who claimed to be complying with state law defenseless.

To be sure, Congress could go further and stop the Department of Justice from spending any money on marijuana cases in states with medical marijuana laws. Short of that, however, it might not be possible to completely get around the chicken-and-the-egg problem of preventing federal agents and prosecutors from spending money on some, but not all, medical marijuana investigations.

B. An Affirmative Defense Based on Compliance with State Law

A second group of federal reform proposals would carve out exemptions for state-legal marijuana activity from federal prosecution. The Truth in Trials Act, for example, would create “an affirmative defense to a prosecution or proceeding under any federal law for marijuana-related activities” for a defendant who could establish by a preponderance of the evidence that his “activities comply with State law regarding the medical use of marijuana.”

Other variants do not use affirmative defense language, instead stating that federal marijuana laws simply do not apply to state-compliant activity, potentially requiring the government to prove noncompliance with state law in its case-in-chief. The Respect State Marijuana Laws Act provides that federal marijuana laws “shall not apply to any person acting in compliance with State laws relating to the production, possession, distribution, dispensation, administration, or delivery of marijuana.”

A provision of the States’ Medical Marijuana Patient Protection Act would shield those “authorized by a State or local government, in a State in which the possession and use of marijuana for medical purposes is legal from producing, processing or distributing marijuana for such purposes.”

Unlike an appropriations restriction, these proposals would give marijuana users and providers more than just temporary protection. By amending federal drug laws, these bills would unquestionably apply to any conduct that takes place while they are in place, even if they were later repealed. They would also avoid the cart-before-the-horse problem that comes with spending provisos since there would be a legislatively established process for determining state compliance.

By making federal immunity contingent on compliance with state law, however, these proposals present their own set of challenges. First, they would inevitably spawn difficult litigation over what con-

71. H.R. 689, 113th Cong. (1st Sess. 2013) (exempting from the Controlled Substances Act people who were “obtaining, manufacturing, possessing, or transporting within their State marijuana for medical purposes, provided the activities are authorized under State law”).
stitutes “compliance” with state law (or engaging in activities “authorized” by state law). In the case of users, this may be easy enough to answer. But, in most medical marijuana states, marijuana manufacturers and sellers are subject to a laundry list of state and local regulations. A seller who failed to abide by packaging requirements or who sold marijuana to an underage customer on a single occasion would be out of compliance with state law, at least with respect to the affected sales. Would errors like this leave the seller open to federal prosecution, or would substantial compliance with state law suffice? Would noncompliance infect the legitimacy of a defendant’s entire operation or would the defense apply on a per-transaction basis?

Second, wherever the compliance line was drawn, the federal prosecution of noncompliant state licensees would often be at cross-purposes with state regulations. The risk of severe federal criminal penalties (enacted to enforce marijuana prohibition) would, inevitably, undermine the state’s penalty system (enacted to regulate a legal marketplace). Marijuana operators would have to account for the fact that a misstep could result in a lengthy federal drug sentence. This would interfere with state regulatory efforts by keeping prices artificially high and, more important, making state-level enforcement more difficult. A marijuana business owner who might otherwise be inclined to self-report a regulatory violation if the penalty were a small fine would have a strong incentive to do everything in her power to hide it if there were a chance the penalty would be a federal prison sentence.

C. Letting States Opt Out of Federal Marijuana Laws

The third category of proposals would let states that met certain requirements opt out of federal marijuana prohibition laws through a waiver system. Opt-out proposals have not yet gained momentum in Congress, but a handful of prominent commentators have recently offered the idea as a politically viable middle ground between complete federal legalization and more limited measures like appropriations limits. Mark Kleiman and, separately, Erwin Chemerinsky,


73. See, e.g., Paul J. Larkin Jr., Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law, 42 Hofstra L. Rev. 745, 746 (2014) (arguing against the use of criminal law to enforce a regulatory regime because “[t]he function of the criminal law . . . is to enforce [a] moral code” while “the function of the regulatory system is to efficiently manage components of the . . . economy”).

74. See, e.g., Chemerinsky et al., supra note 19, at 114 (proposing a waiver program as “a more incremental” step “since Congress does not yet appear inclined to completely end or even to significantly curtail the federal prohibition of marijuana”); see also, e.g., Stuart Taylor Jr.,
Jolene Faran, Allen Hopper, and Sam Kamin, have proposed variations on the idea of letting states opt out of a federal marijuana law. Chemerinsky’s group recommends that the federal government adopt “either a permissive or cooperative federalism approach” that would allow “states meeting specified federal criteria to opt out of the CSA provisions relating to marijuana.”75 The permissive federalism version would entail granting states “temporary, revocable waivers” from federal marijuana laws.76 A cooperative federalism scheme would go beyond revocable waivers by letting “state law govern[] marijuana enforcement within opt-out states so long as the states comply with federal guidelines.”77 Kleiman, who was a consultant to Washington State on implementing its legalization law,78 suggests that existing federal law might already allow the Attorney General to enter into contracts that would require “the state and its localities to vigorously enforce[] against [marijuana] exports in return for federal acquiescence in intra-state sales regulated and taxed under state law.”79 He argues, however, that amending federal law to permit state “cannabis policy waivers would be far cleaner conceptually” than contractual agreements that “would leave the activity in state-regulated markets illegal under federal laws, albeit with some assurance that those laws would not be enforced.”80


75. Chemerinsky et al., supra note 19, at 114.
76. Id. at 115.
77. Id. at 116.
79. Mark A.R. Kleiman, Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization, 6 DRUG POL’Y ANALYSIS 1, 4 (2013). See also 21 U.S.C. § 873 (2012) (providing for cooperative enforcement agreements). Though a cooperative enforcement agreement could be drafted to operate to let states opt out of federal enforcement, it could also take a more limited form. For example, the Attorney General could implement a more formalized version of the DOJ’s current prosecutorial guidance for marijuana. See Taylor, supra note 74, at 16 17 (proposing a contractual agreement the would require federal prosecutors “take no enforcement action against any state-licensed marijuana supplier unless the Attorney General (or a high-level designee) personally finds, in writing, that the supplier has violated state as well as federal law and that state and local authorities are unable or unwilling to correct the problem”).
80. Kleiman, supra note 79, at 7.
Crafting a waiver policy would entail a number of “administrative complexities” about the sort of requirements states would have to meet to qualify and what the federal government could do to ensure compliance. Consider the Chemerinsky group’s proposal, for example. It would give states the opportunity to opt out of federal marijuana law by receiving certification from the Attorney General. Certification would be contingent on where state regulations and enforcement are “reasonably able to prevent” a number of problems, including the distribution of marijuana to minors, the diversion of marijuana to prohibition states, and violence in the market for marijuana. Without well-defined measurable targets, however, it would be difficult to effectively cabin the Attorney General’s discretion when determining whether a state has met its obligations. Open-ended goals like limiting the amount of marijuana that finds its way to other states are susceptible to wildly different interpretations. But broad goals might be the only available option since it might not be possible to precisely measure—let alone set targets for—things like the leakage of marijuana from one state to the next or the number of sales to minors.

Dealing with noncompliant states would raise an additional challenge for any waiver policy because the federal government’s only obvious remedy for addressing noncompliance would be far from satisfying. Revoking a waiver from federal marijuana prohibition would simply move things back to square one—a state legalization law that is impossible to reconcile with federal prohibition. This distinguishes marijuana from the other regulatory regimes the Chemerinsky group points to as successful examples of a cooperative federalism. Under the Clean Air and Clean Water Acts, when state pollution plans do not live up to federal standards, the federal government puts its own regulations in place. If a state fails to set up a health care exchange under the Affordable Care Act, the federal government fills the void with its own exchange. If a state failed in its marijuana waiver obligations, however, the federal government would not substitute its own regulatory scheme. Instead, state failure would mean reverting to an essentially unenforceable federal prohibition. To be sure, if the waiver policy uniformly resulted in state compliance, the federal government’s remedy for failure would be a nonissue. But, in the event that a state did fail short, this would be a serious problem.

81. Id.
82. Chemerinsky et al., supra note 19, at 120–21 (2015).
83. Cf. Kleiman, supra note 79, at 7 (observing that “[t]he choice of outcome measures would be especially tricky” in any waiver system).
84. See Chemerinsky et al., supra note 19, at 117–18 (describing the Clean Air and Clean Water Acts as examples of cooperative federalism).
85. Id. at 118 (discussing the cooperative federalism elements of the Affordable Care Act).
Despite these challenges, some form of opt-out policy would create a level of certainty that would not be possible through the use of spending restrictions or affirmative defenses. It would eliminate the problem of trying to reconcile federal prohibition laws with state legalization while giving the federal government at least some measure of control over state marijuana reforms.\(^86\) Perhaps most important, a waiver program would give state marijuana operators certainty that they would not face federal prosecution for conduct they engaged in while the waiver was in effect. State marijuana operators would not have to fear future prosecution for present state-compliant conduct (as in the case of appropriations provisos) or that a minor violation of state law could lead to a lengthy federal prison sentence (as in the case of an affirmative defense based on compliance with state law).

\textbf{D. Federal Marijuana Regulation}

Last but not least, Congress could rethink federal marijuana prohibition and enact its own set of marijuana regulations. If the goal is to eliminate the conflict between state and federal law entirely, removing marijuana from the Controlled Substances Act would be the most straightforward solution. This type of approach could include significant federal regulation of the legal marijuana market or not much regulation at all. Similarly, Congress could conceivably decide to leave federal prohibition in place in states that want it and directly regulate marijuana in states that have legalized. Or it could get rid of federal marijuana prohibition altogether, leaving states that want to ban the drug to do so on their own.

The only comprehensive proposal of this sort has come from Congressman Jared Polis with his Ending Federal Marijuana Prohibition Act.\(^87\) Polis’s bill would enact a range of changes to federal marijuana laws, chief among them being exempting marijuana from the Controlled Substances Act and then transferring enforcement authority over marijuana from the DEA to a newly renamed Bureau of Alcohol, Tobacco, Marijuana, Firearms, and Explosives.\(^88\) Polis’s bill would also add marijuana to two key federal alcohol statutes, the

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86. Kleiman, \textit{supra} note 79, at 8 (“When states exercise their constitutional prerogative to replace their own prohibitions with systems of regulation and taxation (clearly preferable, in terms of the purposes of the CSA and the international treaties, to the outright repeal of all cannabis laws which is the states’ undoubted right), then the federal government would be well advised to cooperate with the inevitable and attempt to manage, rather than trying to squelch, the resulting somewhat paradoxical situation of state-licensed and state-taxed violations of federal law.”).


88. \textit{Id.}
Wilson Act and the Webb-Kenyon Act. Though the federal government would issue permits for people who wanted to operate marijuana businesses under Polis’s proposal, there would be a relatively open process for obtaining them. This would leave most of the details of licensing and regulating marijuana businesses entirely with the states.

This brief overview (which leaves out many elements of Polis’s bill) highlights the range of issues that any proposal for federal marijuana regulation would need to consider. Federal marijuana regulation could look a lot like alcohol regulation, as in Polis’s bill, or it could be much more restrictive or (less likely) more open. As discussed below, the federal government could use its regulations to try to limit the size of marijuana businesses to combat commercialization or to very strictly police sales to minors itself. For purposes of putting state and federal marijuana laws on the same page, however, most of these details are unlikely to matter much. Even a relatively strict federal regulatory regime is likely to most effectively resolve the conflict between state marijuana reforms and federal law. This is because, regardless of the details, replacing federal prohibition with regulation would leave states free to decide to legalize marijuana without having to obtain a federal waiver or leaving state-legal marijuana businesses at risk of federal prosecution. In this sort of system, state legalization laws would not have to operate with federal prohibition lurking in the background.

89.  Id. § 202.
90.  Id. § 302 (describing the permit process).
91.  I leave to the side the very difficult question of how medical marijuana laws should be treated in a federal regulatory scheme. This issue presents its own challenges because medicines are regulated under the Food, Drug, and Cosmetic Act, not just the Controlled Substances Act. Legalizing the drug for recreational purposes at the federal level would not necessarily answer how medical-only state laws should be addressed. Likewise, even if marijuana is legal for recreation, the government may want to specifically regulate the marketing of marijuana as a medicine. This might mean special restrictions or regulations on its sale as a medicine. Or it could mean letting some patients who use marijuana as a medicine receive insurance coverage. All of these are likely to be particularly thorny questions at both the state and federal level going forward since there is not a particularly good precedent for regulating a drug that is legally accepted for both medicine and recreation. See, e.g., Kimani Paul-Emile, Making Sense of Drug Regulation: A Theory of Law for Drug Control Policy, 19 CORNELL J. L. & PUB. POL’Y 691 (2010) (discussing the regulatory dissonance between drugs that are criminalized entirely, accepted as medicines but not for recreation, and accepted as medicines and for recreation).
III. Advertising, Commercialization, and Federal Marijuana Reform

While replacing federal marijuana prohibition with regulation might be the most effective way to bring federal law into line with state reforms, many observers believe this type of fundamental change to federal marijuana law is not politically viable as compared to other options.92 Nor is resolving the conflict between state and federal marijuana law the only goal policymakers should consider when thinking about federal marijuana law. Lawmakers and advocates who are opposed to or have mixed feelings about marijuana legalization are most obviously going to be concerned with more than just how to get out of the way of states that want to legalize the drug. At first glance, people in this camp might seem likely to most strenuously object to sweeping changes to federal marijuana laws. Between federal prohibition and regulation, an affirmative defense seems like an obvious compromise. But would a narrow approach to federal reform actually be in the best interest of marijuana prohibitionists and legalization agnostics?

To date, proposals in the appropriations and affirmative defense categories have enjoyed the most political momentum. This may have to do with the fact that a spending proviso or a limited affirmative defense to federal prosecution would do the least damage to federal marijuana laws. In both scenarios, Congress could leave the Controlled Substances Act and marijuana’s Schedule I status unchanged by adopting limited exceptions. From a drafting perspective, these would be relatively simple changes. And from a political perspective, they might hold some appeal for tentative legislators—they give some measure of protection to state marijuana reforms without necessarily endorsing the idea of legalization. For similar reasons, most observers also view a waiver or opt-out program as more politically promising than a proposal like Polis’s. As Mark Kleiman put it, “[g]ranting the Attorney General the authority to issue conditional and revocable (or renewable) waivers would constitute a far less drastic devolution of power to the states than amending the CSA to give unconditional deference to state marijuana-legalization legislation.”93

In comparison to state waivers, affirmative defenses, and appropriations provisos, a proposal like Polis’s would represent the biggest break from federal marijuana prohibition. Granting waivers would allow for a logistically easy return to nationwide federal marijuana prohibition. By contrast, replacing federal prohibition with a regula-

92. E.g., Chemerinsky et al., supra note 19, at 114 (“Congress does not yet appear inclined to completely end or even to significantly curtail federal prohibition of marijuana.”).

tory system would incorporate the idea of state marijuana legalization into federal law in a way that would make it hard to turn back. In this sense, federal marijuana regulation would be a concession to the idea that existing state-level medical and recreational marijuana laws are not going anywhere and that state marijuana legalization is a legitimate policy option. It is understandable that many prohibitionists might not yet be ready to make this sort of allowance, especially when most elected officials continue to oppose marijuana legalization. But holding onto the hope that political winds will shift—that instead of continuing to pass reforms, states will soon begin repealing existing medical and recreational marijuana laws—is not cost free. If legalization opponents do not constructively engage in the dialogue about how to fix federal marijuana laws, they risk ending up on the sidelines. If legalization opponents were to accept that changing federal law to account for state reforms is inevitable, however, they might find that more comprehensive reform could be in their interest as well. Thinking about what drives opposition to marijuana legalization shows why this might be so.

While legalization skeptics have cited a range of concerns, perhaps chief among them is the specter of a large-scale commercial marijuana industry. Leading marijuana legalization opponent Kevin Sabet, for example, argues that legalization would result in a large commercial marijuana industry that would invest heavily in promoting and advertising marijuana. Sabet envisions a world in which “Big Marijuana” is dedicated to “creating addicts” and “targeting the young.” To be sure, legalization opponents worry about more than just the commercialization of marijuana. Legalization in any form would reduce prices and increase youth access. But commercialization has emerged as the leading argument against legalization. As former Secretary of Health Education and Welfare Joseph A. Califano Jr. put it, “not only would legalized drugs be more openly available . . . but of even greater damage to our children would be the commercial reality that Madison

94. See Wing, supra note 56 (“Out of 50 governors and 100 U.S. Senators only one has announced support for full legalization of marijuana.”).
95. See, e.g., Alex Kreit, The Federal Response to State Marijuana Legalization: Room for Compromise?, 91 OR. L. REV. 1029, 1031 32 (2013) (discussing the argument that legalization marijuana would result in a large commercial marijuana industry).
-is-now-big-business.
98. Sabet, supra note 96, at 1156 57.
Avenue marketers would be free to glamorize substances like marijuana. †99 No doubt, legalization opponents would prefer to return to nationwide marijuana prohibition. But if, as I argue above, 100 that is not a realistic option, federal regulations aimed at limiting commercialization to the extent possible might be their second-best alternative.

Though perhaps counterintuitive, the options for reforming federal marijuana law that seem to be the most prohibition friendly (spending provisos and affirmative defenses) are actually likely to give the federal government less control over marijuana regulation than would a more dramatic move. Preventing the federal government from spending money to prosecute people who comply with state marijuana laws or granting an affirmative defense based on state compliance would effectively cede the details of legalization entirely to the states. Although anyone who ran afoot of state law would risk tough federal criminal penalties, states would have complete control over how much (or how little) to regulate the marijuana market. A state like California, where medical marijuana dispensaries are legal but entirely unregulated at the state level, 101 would enjoy as much freedom as a state with a finely tuned regulatory regime.

By comparison, although a waiver policy would give state legalization laws more legitimacy than an appropriations restriction or affirmative defense law, it would also give the federal government much more control over shaping state law. The federal government could demand state regulations meet certain standards in order to receive a waiver and then make renewals contingent upon satisfactory state-level enforcement. As a result, legalization skeptics would almost certainly find more success in furthering some of their goals through a waiver program than they would if Congress were to adopt yearly hands-off appropriations riders or add a state-law-compliance-based affirmative defense to the federal code.

Federal regulation of the marijuana industry would allow for even more federal control. The federal government could retain federal prohibition in states that want it, while simultaneously granting federal manufacturing and retail licenses in legalization states. Federal licensure would give the federal government a number of possible methods for containing marijuana commercialization. It could limit federal retailers to a single license at a single location so that there is no possibility of a marijuana version of “BevMo.” It could strictly limit

100. See supra Part I.
the amount of marijuana each licensee could produce annually, in
effect resulting in a marijuana market made up exclusively of craft
beer–sized manufacturers.102 On this point, it is worth noting that the
CSA already has a quota system for Schedule I and II substances in
place.103 The existing quota structure is designed to limit drug
production to an amount commensurate with the “medical, scientific,
research, and industrial needs of the United States.”104 But quotas
could also be used to limit the size of commercial entities that sell
marijuana. And, in contrast to a waiver regime, directly regulating
the market would give the federal government enforcement power
over licensees. In sum, if “Big Marijuana” is one’s biggest concern
about state marijuana legalization and if state legalization cannot be
stopped, then federal regulations that would strictly limit the size of
commercial marijuana enterprises might hold a lot of appeal.

While federal regulation or a state waiver policy would give the
federal government much more control over state legalization schemes
than the current unenforceable federal prohibition or a modest affirm-
ative defense statute, advertising is likely to remain a sticking point
for marijuana legalization opponents.105 Federal marijuana prohibition
may not be able to block state legalization laws, effectively ceding all
regulatory decisions to states that decide to legalize. Federal
prohibition does, however, allow for a complete ban on marijuana
advertising because there is no First Amendment right to advertise
the sale of an illegal good. Indeed, federal law actually makes it a
crime to advertise marijuana or any other Schedule I drug.106 To date,
the federal government has not targeted marijuana advertising in its
enforcement efforts in legalization states.107 But so long as marijuana

102. Mark Kleiman described the potential for state quotas to limit the size
of marijuana business in a white paper advising Washington State on its
state marijuana regulations. See Mark A. R. Kleiman, Alternative
Bases for Limiting Cannabis Production 8 (2013).

the total quantity and establish production quotas for each basic class of
controlled substance in schedules I and II . . . to be manufactured each
calendar year to provide for the estimated medical, scientific, research,
and industrial needs of the United States”).

104. Id.

105. Sabet, supra note 96, at 1173 (“In the United States, a country obsessed
with commercialization in the name of the First Amendment, legaliza-
tion is sure to be an even riskier proposition.”).


107. Cf. Benjamin B. Wagner & Jared C. Dolan, Medical Marijuana and
Federal Narcotics Enforcement in the Eastern District of California, 43
McGeorge L. Rev. 109, 110 (2012) (“Businesses now openly sell
marijuana and advertise their services in the newspaper, on the radio
and on television [in California].”).
remains illegal federally, the DOJ could conceivably amend its prosecutorial guidance to advise prosecutors to target marijuana advertising while otherwise permitting state-legal marijuana businesses. Moreover, keeping marijuana illegal at the federal level strengthens the First Amendment case for more rigorously enforced state-level advertising bans where the drug has been legalized, though the issue has not yet been tested in court.

If federal law were to formally recognize state legalization via waivers or affirmative regulation, advertising bans would be on very shaky ground. The framework for addressing commercial advertising restrictions dates back to the Supreme Court’s 1980 Central Hudson decision. Under Central Hudson, the government can ban advertising that is deceptive or that is “related to illegal activity.” Non-misleading advertisements for legal goods can only be prohibited if the government is able to (1) claim a substantial interest in restricting the speech, (2) demonstrate that its restriction directly and materially advances its interest, and (3) show that the restriction is narrowly tailored to that interest. Though early decisions applying Central Hudson indicated that restrictions on vice advertisements—for gambling, alcohol, and so on—might be permitted, the Court has since “rejected the idea that the Central Hudson analysis is more lenient for government regulation of vice product advertising.”

Government restrictions on vice advertisements under Central Hudson typically fail the requirements that the restriction would


109. A group of publishers sued Colorado over its advertising ban but lacked standing to pursue the claim because there was no indication retail marijuana outlets had sought to buy advertising from them. Trans-High Corp. v. Colo., No. 14-cv-00370 MSK, 2014 WL 585367 (D. Colo. Feb. 14, 2014) (denying a motion for preliminary injunction but granting leave to file an amended complaint because “[t]here is no allegation that any advertiser has been discouraged from seeking to place advertisements with either of the Plaintiffs. Thus, as currently drafted, the Complaint does not contain a colorable showing sufficient for the Plaintiffs to pursue the rights of advertisers.”).


111. Id. at 563 64.


actually advance the government’s interest and that there aren’t narrower, non-speech restrictive alternatives. This can be true even where advertisements appear to target an audience that cannot legally buy the product being advertised. A recent Fourth Circuit decision overturning a Virginia ban on advertising alcohol in college student newspapers is instructive. The ads could not be restricted on the theory that they involve illegal activity because “alcohol advertisements—even those that reach a partially underage audience—concern the lawful activity of alcohol consumption.” Though the court granted that the government has a substantial interest in combatting underage drinking, it concluded that the ban was not narrowly tailored because “roughly 60% of the Collegiate Times’s readership is age 21 or older and the Cavalier Daily reaches approximately 10,000 students, nearly 64% of whom are age 21 or older.” Central Hudson leaves room for some limits on advertisements on legal goods, of course. A ban on alcohol advertisements in high school newspapers would likely withstand a First Amendment challenge. But marijuana prohibitionists’ concerns that legalization might mean having to allow a great deal of marijuana advertising are not misplaced.

Of course, there might be creative ways to directly limit some marijuana advertising in the absence of federal prohibition. The federal government could attempt to devise a legal hook for advertising limits by enacting a prohibition that it does not intend to enforce—for example, criminalizing the use of marijuana while licensing its manufacture and sale and allowing its possession. In theory, this may allow for bans on marijuana advertising that promoted use. Or if the federal government legalized only the intrastate sale of marijuana, it could try banning advertisements that crossed state lines. Unless the Supreme Court were to reassess its view of the commercial speech doctrine, however, it may be impossible to put any significant restrict-

115. Id. at 301.
116. Though it is worth noting that, in light of a recent Second Circuit case holding that a prosecution for promoting off-label uses of prescription drugs violates the First Amendment, even long-standing commercial speech regulations are on potentially shaky ground. United States v. Caronia, 703 F.3d 149 (2d Cir. 2012). See also, e.g., Constance E. Bagley et al., Snake Oil Salesmen or Purveyors of Knowledge: Off-Label Promotions and the Commercial Speech Doctrine, 23 CORNELL J. L. & PUB. POL’Y 337, 339 (2013) (“The Second Circuit’s reasoning has the potential to undermine the constitutionality of numerous areas of federal regulation, including regulation of the offer and sale of securities under the Securities Act of 1933; the solicitation of shareholder proxies and the periodic reporting under the Securities Exchange Act of 1934; mandatory labels on food, tobacco, and pesticides; and a wide range of privacy protections.”).
ions on marijuana advertising in the absence of federal marijuana prohibition.

For this reason, First Amendment concerns may lead prohibitionists to view appropriations restrictions as the most acceptable method for reconciling federal and state marijuana laws. Forbidding the executive to spend money interfering with state marijuana reforms would leave federal marijuana prohibition untouched, thereby almost certainly permitting bans on advertising. An affirmative defense based on compliance with state marijuana laws or a state waiver policy might also leave room for advertising bans, though this is less certain. If the federal government continued to ban marijuana sales with an affirmative defense, it is hard to predict whether the activity would still be considered illegal under Central Hudson. Even a federal waiver system might allow for an argument for the constitutionality of advertising bans. Imagine a law that let states opt out of most federal marijuana laws but not the federal law forbidding advertisements. The federal government could also make its waivers contingent on a state-level advertising ban. It is possible that this sort of scheme would be enough to keep marijuana sales in the “illegal activity” category for First Amendment purposes.

Those concerned by the idea of marijuana advertising should not be too quick to discount federal marijuana regulation, however. Though federal marijuana regulations would make it difficult to directly limit marijuana advertising to adults, they might still give prohibitionists the most effective tools for limiting the sort of commercialization that is likely to result in extensive advertising. Indeed, the Supreme Court has cited the availability of “non-speech related” policies similar to the quota options discussed above when striking down advertising restrictions. In finding a Food and Drug Administration ban on advertising compounded drugs unconstitutional, for example, the Court observed that the federal government could limit the incentive to advertise by “capping the amount of any particular compounded drug . . . that a pharmacist or pharmacy may make or sell in a given period of time.”

While marijuana legalization opponents might prefer not to think about how to change marijuana laws, they may soon be forced to. What sort of federal accommodation of state law might best combat marijuana commercialization: a strict federal regulatory scheme or a

117. JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW 155 (2012) (“The extent of advertising would depend in part on whether the legal marijuana industry is dominated by a few large corporations with national advertising budgets.”).


119. Id.
system that would provide for the best chance of constitutionally banning marijuana advertising but leave all other details of marijuana regulation to the states? This is the sort of question prohibitionists should be considering sooner rather than later.

**CONCLUSION**

With most politicians still wary of marijuana reforms, Congress is unlikely to reconsider federal marijuana prohibition this year or the next. But while a change in federal marijuana law may not be imminent, it is almost certainly inevitable. Almost half of the states allow for the medical use of marijuana, and four states have passed laws to legalize the drug entirely. Due to resource constraints, the federal government has proven itself unable to effectively block these state laws by enforcing its own prohibition. As a result, in states that have legalized the drug, federal marijuana prohibition continues in name only. Unless states suddenly reverse course and begin recriminalizing marijuana or the Supreme Court finds that state legalization laws are preempted by the Controlled Substances Act—both exceedingly unlikely events—federal marijuana prohibition’s days are numbered. This Article compares different avenues for reforming federal marijuana laws, with the goal of highlighting some of the considerations that might drive the debate in the coming years.

To date, efforts to reconcile federal marijuana law with state reforms have focused mostly on relatively narrow proposals, like forbidding the DOJ from spending money to interfere with state marijuana laws or establishing a limited affirmative defense to federal marijuana prosecutions based on compliance with state law. At first glance, these proposals might seem most likely to be palatable to legalization opponents since they would do the least cosmetic damage to existing law. But more far-reaching reforms, like a state waiver system or federal marijuana regulation, could actually give the federal government more control in addressing prohibitionists’ primary concern: marijuana commercialization. Meanwhile, legalization supporters will be less likely to settle for half-measures when it comes to federal marijuana reform as their political strength continues to rise.

While legalization opponents may understandably be hesitant to concede ground on scaling back federal prohibition, if they wait too long, they may find themselves on the sidelines, with the content of federal marijuana reforms left almost entirely in the hands of legalization proponents, much like the state legalization laws themselves.