

# Federal Nonenforcement in the Face of State Drug Policy Reforms

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## INTRODUCTION

For nearly a decade now, cannabis has been openly sold to adults for nonmedical use in parts of the United States. In 2013, a little less than one year after Colorado and Washington voters passed the first state cannabis legalization laws, the Department of Justice issued a memorandum advising federal law-enforcement officials not to go after people in compliance with state marijuana laws.<sup>1</sup> Today, nearly half of the states have enacted adult-use cannabis legalization laws, with Ohio becoming the twenty-fourth state to legalize recreational cannabis in November 2023.<sup>2</sup> One industry research firm estimated the value of the legal cannabis market in 2022 at 13.2 billion dollars.<sup>3</sup>

Legal, here, means legal under state law. Every adult-use cannabis business violates multiple federal statutes on a daily basis.<sup>4</sup> Nothing in federal law protects state-legal adult-use cannabis business operators (or even their customers) from potential arrest and prosecution.<sup>5</sup> Even the DOJ's nonenforcement memo that gave

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<sup>1</sup> Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys 1–3 (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/CM2F-Y3MY>].

<sup>2</sup> Azi Paybarah, Ohio Becomes 24th State to Legalize Recreational Marijuana, WASH. POST (Nov. 8, 2023), <https://www.washingtonpost.com/politics/2023/11/08/ohio-recreational-marijuana-legalize/> [<https://perma.cc/Q9FK-C42Q>].

<sup>3</sup> U.S. Cannabis Market Size, Share & Trends Analysis Report By End-use (Medical, Recreational, Industrial), By Source (Marijuana, Hemp), By Derivative (CBD, THC), And Segment Forecasts, 2023–2030, GRAND VIEW RESEARCH (2023), <https://www.grandviewresearch.com/industry-analysis/us-cannabis-market> [<https://perma.cc/FUP9-CS3N>].

<sup>4</sup> E.g., 21 U.S.C. § 844(a) (criminalizing simple possession of a controlled substance); 21 U.S.C. § 841(a)(1) (making it a crime to manufacture, distribute, or possess with the intent to distribute a controlled substance); 21 U.S.C. § 856 (making it a crime to maintain a drug-involved premises); 21 U.S.C. § 846 (making it a crime to attempt or conspire to commit a federal controlled substances offense); 21 U.S.C. § 843(b) (making it a crime to use a “communication facility,” including “mail, telephone, wire, radio, and all other means of communication,” to commit a federal controlled substance felony).

<sup>5</sup> In the case of medical marijuana operators, a federal appropriations rider, in effect since fiscal year 2015, has restricted the Department of Justice from using funds to prosecute people for conduct done in compliance with state law. Although the budget restriction provides a form of legal

state cannabis businesses a measure of comfort when it was issued in 2013 no longer exists. It was rescinded by Attorney General Jeff Sessions in 2018.<sup>6</sup> Sessions's action generated a great deal of news coverage<sup>7</sup> but did not result in any change in federal enforcement practices.<sup>8</sup> And by the time President Biden took office, the fact of federal nonenforcement against state-legal cannabis businesses had become so ingrained that his Attorney General did not bother to re-issue a nonenforcement memo.

The federal government's forbearance with respect to marijuana businesses operating in compliance with state law does not necessarily mean it will give states and localities the same latitude in other areas of drug policy, however. In early 2019, when a nonprofit group named Safehouse began making plans, with the support of city officials, to establish an overdose prevention site in Philadelphia, the United States Attorney for the Eastern District of Pennsylvania sued to block it from opening.<sup>9</sup> Overdose prevention sites—also called safe injection sites or supervised consumption sites, among other names (this article will use these terms interchangeably)—are places where people can self-administer drugs in a controlled environment under medical supervision.<sup>10</sup> The sites are aimed primarily at preventing overdose deaths through the monitoring of users and the provision of medical assistance, including the opioid overdose reversal drug, naloxone, when

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protection in the case of medical marijuana, conduct authorized under state medical marijuana laws remains illegal under federal law and could in theory give rise to a federal prosecution if the appropriations rider is ever removed from the federal budget in the future. See *United States v. Bilodeau*, 24 F.4th 705, 709 (1st Cir. 2022).

<sup>6</sup> Memorandum from Jefferson B. Sessions, III, Att'y Gen., to U.S. Att'ys, (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/J87S-3MAJ>].

<sup>7</sup> E.g., Laura Jarrett, Sessions Nixes Obama-era Rules Leaving States Alone That Legalize Pot, CNN (Jan. 4, 2018), <https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html> [<https://perma.cc/CGF9-BWSJ>]; Charlie Savage & Jack Healy, Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html> [<https://perma.cc/6TLA-2U8B>].

<sup>8</sup> Scott Bloomberg, Frenemy Federalism, 56 U. RICH. L. REV. 367, 392 (2022) (“[E]ven without the express dictates of the Cole Memo, the DOJ has tacitly continued its cooperative policy of nonenforcement.”).

<sup>9</sup> See Bobby Allyn, U.S. Prosecutors Sue to Stop Nation's First Supervised Injection Site for Opioids, NPR (Feb. 6, 2019), <https://www.npr.org/sections/health-shots/2019/02/06/691746907/u-s-prosecutors-sue-to-stop-nation-s-first-supervised-injection-site> [<https://perma.cc/7KFR-QNJ6>] (reporting that the lawsuit was filed “just as Safehouse officials ramp up fundraising efforts and continue to scout a location” and that Safehouse “has the support of top city officials but will not be receiving taxpayer funding”).

<sup>10</sup> See Alex Kreit, Safe Injection Sites and the Federal ‘Crack House’ Statute, 60 B.C. L. REV. 413, 420–23 (2019) (providing an overview of safe injection sites and evidence on their efficacy).

needed.<sup>11</sup> The lawsuit against Safehouse reached the Third Circuit, which sided with the federal government’s argument that a federal law, known as the “crack house statute,” “forbids opening and maintaining any place for visitors to come use drugs.”<sup>12</sup>

Despite its victory in court, the federal government’s current position with respect to overdose prevention sites remains a bit uncertain.<sup>13</sup> The lawsuit against Safehouse, back before the district court after remand, was sent to mediation, a move that some speculated could foreshadow issuance of a federal nonenforcement policy with respect to safe injection sites<sup>14</sup> before the settlement talks stalled.<sup>15</sup> Since late 2021, two safe injection sites—the first sanctioned sites in the United States—have been openly operating in New York City.<sup>16</sup> For nearly two years, federal officials gave no indication that they intended to interfere by bringing a lawsuit (or criminal

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<sup>11</sup> Sharon Otterman, *Federal Officials May Shut Down Overdose Prevention Centers in Manhattan*, N.Y. TIMES (Aug. 8, 2023), <https://www.nytimes.com/2023/08/08/nyregion/drug-overdoses-supervised-consumption-nyc.html> [<https://perma.cc/YX54-DMKW>] (reporting that, at overdose prevention centers in New York City, “[b]ecause they intervene so quickly, staff members are able to handle most overdoses simply by administering oxygen” and that, “[w]hen they do use naloxone, a drug that reverses the effects of opioids, they typically inject a small dose”).

<sup>12</sup> *United States v. Safehouse*, 985 F.3d 225, 243 (3d Cir. 2021). For background on the federal opposition to safe injection sites in the lead up to the lawsuit, see Alex Kreit, *The Opioid Crisis and the Drug War at A Crossroads*, 80 OHIO ST. L.J. 887, 901–04 (2019).

<sup>13</sup> See JOANNA R. LAMPE, CONG. RSCH. SERV., LSB10865, LEGAL SIDEBAR: RECENT DEVELOPMENTS IN OPIOID REGULATION UNDER THE CONTROLLED SUBSTANCES ACT 3–5 (Feb. 3, 2023) (discussing the topic of supervised consumption sites and noting that, “[w]hile DOJ actively opposed the operation of supervised consumption sites under the Trump Administration, to date the Biden Administration has not sought to invoke the CSA against such facilities”).

<sup>14</sup> Kyle Jaeger, *Federal Lawsuit Over Safe Drug Consumption Sites Heads to Mediation to ‘Expedite’ Resolution*, MARIJUANA MOMENT (Jan. 3, 2023), <https://www.marijuanamoment.net/federal-lawsuit-over-safe-drug-consumption-sites-heads-to-mediation-to-expedite-resolution/> [<https://perma.cc/9L9L-E28B>].

<sup>15</sup> Nicole Leonard, *Safehouse Supervised Injection Settlement Talks Fail as the DOJ Pushes to Dismiss Civil Lawsuit*, WHY (Jul. 30, 2023), <https://why.org/articles/safehouse-supervised-injection-suit-department-justice-dismiss/> [<https://perma.cc/4ZGR-8ABW>].

<sup>16</sup> Jeffrey C. Mays & Andy Newman, *Nation’s First Supervised-Drug Injection Sites Open in New York*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/nyregion/supervised-injection-sites-nyc.html> [<https://perma.cc/ND3R-JPLY>]. Unsanctioned safe injection sites had operated in a semi-clandestine and more limited fashion in New York City for years prior to the opening of the sanctioned sites. See Jeneen Interlandi, *One Year Inside a Radical New Approach to America’s Overdose Crisis*, N.Y. TIMES (Feb. 22, 2023), <https://www.nytimes.com/2023/02/22/opinion/drug-crisis-addiction-harm-reduction.html> [<https://perma.cc/B6BC-UW9K>] (reporting that “New York City’s safe consumption program began underground in the 2000s when one syringe exchange known as the Washington Heights Corner Project began modifying its bathrooms so that people who shot heroin there could be monitored for signs of overdose”). Cf. Alex H. Kral & Peter J. Davidson, *Addressing the Nation’s Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 AM. J. PREVENTATIVE MED. 919, 919 (2017) (discussing an unsanctioned site operating in “an undisclosed urban area” in the United States since September 2014).

charges) against the nonprofit that runs the centers, OnPoint NYC. The Department of Justice itself suggested it was considering adoption of a nonenforcement policy in 2022, when it said in a statement in response to an Associated Press inquiry that it was “‘evaluating’ such facilities and talking to regulators about ‘appropriate guardrails.’”<sup>17</sup> Then, in August 2023, the United States Attorney for the Southern District of New York suggested, in response to a request for comment, that his office could move to close the sites. In the statement, issued just as OnPoint announced it had reversed more than 1,000 overdoses at its centers, U.S. Attorney Damian Williams said that the centers violate federal law and warned that his “office is prepared to exercise all options—including enforcement—if this situation does not change in short order.”<sup>18</sup>

As states pursue reforms in other areas of drug policy, the issue of federal enforcement seems destined to continue to arise anew with respect to more and more state policies. The emerging conflict over safe injection sites is the most prominent example, but it is not the only one. In 2020, an Oregon ballot measure legalized psilocybin-assisted therapy. Oregon’s law authorizes the manufacture, distribution and possession of psilocybin—the psychedelic chemical in “magic mushrooms” and a Schedule I substance under federal law<sup>19</sup>—when distributed and used under the guidance of state licensed facilitators.<sup>20</sup> Colorado voters approved a similar law in 2022, and other psychedelics therapy proposals are under consideration in a number of other states.<sup>21</sup> These laws permit conduct that is flatly inconsistent with federal law, and the DOJ has not yet stated a position on the potential enforcement of federal law against people operating in compliance with state laws legalizing the therapeutic use of psychedelic drugs.<sup>22</sup> Federal law could also present potential conflicts for

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<sup>17</sup> Jennifer Peltz & Michael Balsamo, Justice Dept. Signals It May Allow Safe Injection Sites, ASSOCIATED PRESS (Feb. 8, 2022), <https://apnews.com/article/business-health-new-york-c4e6d999583d7b7abce2189fba095011> [<https://perma.cc/ZP48-W87S>].

<sup>18</sup> Otterman, *supra* note 11.

<sup>19</sup> 21 C.F.R. § 1308.11(d)(29) (2023).

<sup>20</sup> See Kathryn L. Tucker et. al., In Search of: A Federal Safe Harbor for State Legalization of Psilocybin, 26 LEWIS & CLARK L. REV. 1203, 1209–10 (2023) (describing Oregon’s psilocybin law).

<sup>21</sup> See Jennifer Brown, Colorado Becomes Second State to Legalize ‘Magic Mushrooms,’ COLORADO SUN (Nov. 9, 2022, 5:52 PM), <https://coloradosun.com/2022/11/09/proposition-122-colorado-results-psilocybin-mushrooms-2/> [<https://perma.cc/FCV9-WVY5>]; Michael Ollove, More States May Legalize Psychedelic Mushrooms, STATELINE (Jul. 15, 2022), <https://stateline.org/2022/07/15/more-states-may-legalize-psychedelic-mushrooms/> [<https://perma.cc/T4N7-CV4B>]; Sam Metz, Red States Join Push to Legalize Magic Mushrooms for Therapy, ASSOCIATED PRESS (Feb. 15, 2023), <https://apnews.com/article/politics-utah-state-government-oregon-01b107bbfb416456539ee2f3371846cf> [<https://perma.cc/LZ27-B4CY>].

<sup>22</sup> See Rob Mikos, We Need a Cole Memorandum for Magic Mushrooms, 2021 U. ILL. L. REV. ONLINE 87 (2021) (discussing the conflict between federal law and Oregon’s measure legalizing psilocybin assisted therapy and arguing for adoption of a federal nonenforcement policy). This conflict might be ameliorated if psilocybin, which was granted breakthrough therapy status in 2019, gains FDA approval and is rescheduled under the Controlled Substances Act. See Mason Marks & I. Glenn

other drug policy measures that states might consider pursuing in the future, such as heroin-assisted treatment.<sup>23</sup>

What principles can and should guide the federal government when it comes to decisions about nonenforcement of federal drug laws in response to state reforms? Much has been written about federalism and state marijuana policy<sup>24</sup> and about the constitutionality of non-enforcement of federal laws by the executive.<sup>25</sup> But the question of whether federal acquiescence to state marijuana legalization should serve as a precedent for federal nonenforcement in the case of other state drug policy reforms has received much less attention.

Resource constraints have been a driving force in the exercise of federal enforcement discretion, both generally and with respect to state marijuana legalization laws. The Department of Justice's 2013 marijuana nonenforcement policy, which was spelled out in a document often referred to as the Cole Memorandum, pointed to the federal government's interest in "using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way" as the basis for the policy.<sup>26</sup> Left unmentioned in the Cole Memorandum, but perhaps equally important in its adoption, was that its release followed more than a decade of federal attempts to stop

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Cohen, Patents on Psychedelics: The Next Legal Battlefield of Drug Development, 135 *HARV. L. REV.* F. 212, 214 (2022) (discussing psilocybin's breakthrough therapy status).

<sup>23</sup> See *BEAU KILMER ET AL., RAND CORP., CONSIDERING HEROIN-ASSISTED TREATMENT AND SUPERVISED DRUG CONSUMPTION SITES IN THE UNITED STATES* (2018).

<sup>24</sup> See, e.g., Bloomberg, *supra* note 8 (analyzing the relationship between the states and the federal government with respect to marijuana policy); Robert A. Mikos, The Evolving Federal Response to State Marijuana Reforms, 26 *WIDENER L. REV.* 1 (2020) (examining how the federal response to state marijuana reforms has evolved over time, "from War, to Partial Truce, and, next (possibly) to Capitulation"); Erwin Chemerinsky et al., Cooperative Federalism and Marijuana Regulation, 62 *UCLA L. REV.* 74 (2015) (arguing in favor of a cooperative federalism approach that would allow states that meet certain criteria "to opt out of the CSA provisions relating to marijuana").

<sup>25</sup> Zachary S. Price, Enforcement Discretion and Executive Duty, 67 *VAND. L. REV.* 671, 676 (2014) (arguing that "[t]he executive branch thus exceeds its proper role, and enters the legislature's domain, if without proper congressional authorization it uses enforcement discretion to categorically suspend enforcement or to license particular violations" of federal law); Peter L. Markowitz, Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty, 97 *B.U. L. REV.* 489, 495 (2017) (arguing "in favor of a conception of the Executive's prosecutorial discretion power that is at its zenith when individuals' physical liberty is at stake"); Sam Kamin, Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle, 14 *OHIO ST. J. CRIM. L.* 183 (2016) (examining federal nonenforcement in the contexts of marijuana and immigration); Robert J. Delahunty & John C. Yoo, Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause, 91 *TX. L. REV.* 781, 784–85 (2013) (arguing that "the deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty").

<sup>26</sup> Memorandum from James M. Cole, *supra* note 1, at 1–3.

the implementation of state medical marijuana laws.<sup>27</sup> That effort had proven unsuccessful precisely because of the federal government's limited resources and the size of the state-legal medical cannabis industry.<sup>28</sup> Because so many people were participating in state-authorized medical marijuana activity, resource constraints meant that the federal government was simply unable to block the implementation of those laws despite its best efforts.

It is not immediately clear how resource constraint concerns should impact the exercise of federal enforcement discretion with respect to other state and local drug policy reforms, however. Consider again state-sanctioned overdose prevention sites.<sup>29</sup> In contrast to state marijuana legalization laws, the federal government does have the ability to block safe injection sites from openly operating. As the continued lack of a safe injection site in Philadelphia attests, the federal government can achieve this result without having to expend significant resources; a single civil suit has been enough to deter any sanctioned safe injection sites from opening in Philadelphia. With this in mind, if the best explanation of federal nonenforcement with respect to state marijuana legalization is that the Department of Justice lacked the resources to block state reforms, then federal nonenforcement with respect to other state drug policy reforms might be difficult to justify. On the other hand, overdose prevention sites do not seem to implicate core federal enforcement concerns. These entities provide services to people from the local community who want to use drugs in a medically supervised setting. They do not manufacture or distribute drugs, or even possess them. Their impact on interstate commerce in illegal drugs borders on nonexistent. From that perspective, it seems strange that the federal government would exercise its enforcement discretion to vigorously interfere

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<sup>27</sup> See AMERICANS FOR SAFE ACCESS, WHAT'S THE COST?: THE FEDERAL WAR ON PATIENTS 3, 37 (2013), <https://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf> [<https://perma.cc/M47T-MST6>] (“Over the past 17 years, the Justice Department has carried out over 500 aggressive SWAT-style raids on medical cannabis patients and providers, arrested nearly 400 people, and prosecuted more than 160 cases.”). The Cole Memorandum was not the first step in cutting back the federal effort to block state medical marijuana laws. The Department of Justice issued memos related to marijuana enforcement in 2009 and 2011, which curtailed federal enforcement in some medical marijuana states, but in other states, enforcement continued more or less as it had before. For a discussion of these memos, see, e.g., Benjamin B. Wagner & Jared C. Dolan, Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California, 43 MCGEORGE L. REV. 109, 115–18 (2012).

<sup>28</sup> Robert A. Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power To Legalize Federal Crime, 62 VAND. L. REV. 1421, 1463–67 (2009) (outlining why the federal government's limited resources limited its ability to prevent the implementation of state medical marijuana laws).

<sup>29</sup> Some of the efforts to establish overdose prevention sites have played out entirely at the local level, while others have sought express authorization for such sites under state law. I use the term state-sanctioned in this context to refer to sites sanctioned under either state law, local law, or both.

with safe injection sites while leaving multimillion dollar marijuana businesses alone.<sup>30</sup>

This article considers and compares different principles that might guide the federal government in deciding whether to adopt nonenforcement policies with respect to state drug policy reforms that authorize conduct that violates federal law. I do not engage the first-order question of whether or not it is appropriate or constitutional for the DOJ to adopt policies pledging the nonenforcement of federal drug laws with respect to designated categories of activity.<sup>31</sup> Instead, I take the longstanding (although now *de facto*) federal nonenforcement policy with respect to state marijuana legalization laws as precedent and ask whether the considerations that underlie that policy should lead the federal government to adopt similar policies with respect to other drug policy reforms. In Part I, I review the relationship between state and federal drug laws, along with the federal government's approach to enforcement in the cases of state marijuana legalization laws, efforts to establish overdose prevention sites, and state psychedelics therapy laws. In Part II, I suggest and evaluate three possible frameworks that might ground nonenforcement: the

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<sup>30</sup> See Kreit, *supra* note 10, at 465–66 (discussing the localized reach of safe injection sites in comparison to marijuana businesses).

<sup>31</sup> For an argument that “executive officials should not understand Congress’s *de facto* delegation of broad nonenforcement power as a license to engage in unrestrained policymaking through selective enforcement,” see Price, *supra* note 25, at 754. The argument that categorical federal nonenforcement policies are unlawful is based on the Constitution’s Take Care Clause. See generally *id.* (discussing the Take Care Clause); Delahunty & Yoo, *supra* note 25 (same). The Take Care Clause provides that the President “shall take Care that the Laws be faithfully executed . . . .” U.S. CONST. art. II, § 3. An attempt to challenge the Cole memorandum’s marijuana nonenforcement policy before its withdrawal failed because of an inability to establish standing. See *West v. Lynch*, 845 F.3d 1228 (D.C. Cir. 2017) (finding the plaintiff did not have standing to challenge the legality of the Cole memo). The Court reasoned, in part, that “even if we were to set aside the Cole Memorandum, we would not and could not compel the Department to alter the enforcement priorities that the memorandum merely documented.” *Id.* at 1237. The fact that the Cole memo was later rescinded by Attorney General Sessions, but federal prosecutions did not resume, underscores the force of the Court’s analysis on that point.

A recent Supreme Court decision in the immigration context appears to create a possibly insurmountable hurdle to litigants who wish to challenge federal nonenforcement policies under the Take Care Clause. In *United States v. Texas*, the Court held that the plaintiffs lacked standing to challenge the Department of Homeland Security’s immigration enforcement guidelines. 599 U.S. 670 (2023). The relevant statutory scheme provided that DHS “shall” make arrests and detentions. *Id.* at 630 (quoting 8 U.S.C. §§ 1226(c) and 1231(a)(2)). Nevertheless, the Court held that Texas and Louisiana did not have standing to litigate the issue, explaining in part that “federal courts are generally not the proper forum for resolving claims that the Executive Branch should make more arrests and bring more prosecutions.” *Id.* at 629. The majority decision held out the possibility that “the standing calculus might change if the Executive Branch wholly abandoned its statutory responsibilities to make arrests or bring prosecutions,” and it cautioned that it was addressing only “the question of reviewability” and not “the question of legality.” *Id.* at 629, 638. Still, the outcome strongly suggests that any targeted nonenforcement policies in the drug enforcement setting would be effectively insulated from constitutional challenges, especially considering that the CSA does not contain an analogous statutory command to make arrests.

traditional federal interests framework, which would focus on core federal enforcement interests and objectives of the CSA's criminal provisions; the feasibility framework, which would make the federal government's ability to block implementation of the state or local reform the primary criterion for nonenforcement; and the federalism framework, under which there would be a presumption in favor of nonenforcement with respect to state-sanctioned conduct on federalism grounds. I discuss how each of these frameworks might apply to existing state reforms and argue that the federalism framework is most consistent with the precedent of nonenforcement with respect to state marijuana legalization and best aligned with the appropriate role for the federal government in a post-drug war era. Part III concludes.

## I. THE RELATIONSHIP BETWEEN FEDERAL LAW AND STATE DRUG POLICY REFORMS

### A. *National drug prohibition's dependence on state enforcement*

In order to appreciate the difficult problems that changes to state drug laws can present for the federal government, it is important to consider the relationship between federal and state drug laws and enforcement efforts. This section provides an overview of the federal government's involvement in drug enforcement, describes some of the issues that arise in the exercise of enforcement discretion when state and federal drug laws are aligned, and explains why state laws that legalize federally prohibited drug activity can present particularly difficult problems for federal enforcement.

Drug policy is often thought of in terms of federal policy. In truth, drug prohibition is enforced primarily at the state and local level. This fact has always raised challenges with respect to the considerations that should guide the exercise of federal enforcement discretion on a case-by-case basis.<sup>32</sup> When states reform their drug laws to permit conduct that is illegal under federal law, federal enforcement decisions take on a new dimension.

The conception of drug policy as primarily a federal matter likely springs from the war on drugs, launched under Presidents Richard Nixon and Ronald Reagan and continued throughout the 1980s and 1990s.<sup>33</sup> During this period, drug policy became increasingly federalized—both in the public mind and in the law. In the early 1970s, Nixon made drug policy a top-tier political issue, declaring “war on drugs” and

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<sup>32</sup> See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997) (examining the exercise of federal prosecutorial discretion when there is overlapping federal and state jurisdiction).

<sup>33</sup> Alex Kreit, *Drug Truce*, 77 OHIO ST. L. J. 1323, 1328–35 (2016) (providing a short history of the drug war and noting disagreement over whether to consider the start date for the war on drugs Nixon's use of the phrase to describe America's drug strategy or developments under the Reagan administration, such as the adoption of lengthy federal mandatory minimum drug penalties).

proclaiming drug abuse to be “public enemy number one.”<sup>34</sup> Reagan and President George H.W. Bush both gave prime-time national addresses on the status of the drug war.<sup>35</sup> The issue was so salient that in 1989 a Gallup poll showed that more than six in ten Americans believed drug abuse to be “the most important problem facing this country today.”<sup>36</sup>

With respect to the federalization of drug laws, in 1970 Congress enacted the Controlled Substances Act (CSA), which replaced a preexisting patchwork of federal drug laws with a comprehensive regulatory and criminal scheme that continues to serve as the foundation for federal drug policy more than fifty years later.<sup>37</sup> Shortly after passage of the federal CSA, the National Conference on Uniform State Laws promulgated a Uniform Controlled Substances Act, modeled closely after the federal law. By the late 1980s, “all but a handful of states and the District of Columbia” had enacted a version of the Uniform Controlled Substances Act.<sup>38</sup> The federal drug control budget also ballooned during the 1970s and 1980s, beginning with an increase from \$3 million to \$74 million in the five years before Nixon established the federal Drug Enforcement Administration (DEA) via an Executive Order in 1973.<sup>39</sup> By the end of George H.W. Bush’s presidency, the DEA’s budget was more than ten times what it was when Reagan assumed office in 1981.<sup>40</sup> Not surprisingly, a dramatic increase in federal drug prosecutions accompanied the rise in federal drug expenditures. Between 1980 and 1992 alone,

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<sup>34</sup> JEFF YATES & ANDREW B. WHITFORD, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS* 42 (2009) (“The first public use of the term ‘war on drugs’ by a President occurred in a speech delivered by Nixon in Laredo, Texas, on September 22, 1972.”); MICHAEL MASSING, *THE FIX* 112 (1998) (discussing Nixon’s speech declaring drug abuse “public enemy number one”).

<sup>35</sup> See YATES & WHITFORD, *supra* note 34, at 89 (discussing President Reagan and Nancy Reagan’s 1986 address to the nation “on their campaign against drug abuse”); *id.* at 63–64 (discussing how George H.W. Bush’s first televised presidential address was focused on his national drug control strategy, during which “he showed a bag of crack, bought near the White House in the DEA sting just a few days before”).

<sup>36</sup> Thomas B. Rosenstiel, 63% Call Drugs Nation’s Biggest Problem: Poll Finds Concern Soaring; Heavy Media Coverage Seen as Factor, *L.A. TIMES* (Sept. 14, 1989), [http://articles.latimes.com/1989-09-14/news/mn-278\\_1\\_drug-abuse](http://articles.latimes.com/1989-09-14/news/mn-278_1_drug-abuse) [<https://perma.cc/85LU-Y8NY>].

<sup>37</sup> The Controlled Substances Act was passed as part of a broader measure, the Comprehensive Drug Abuse Prevention and Control Act. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. §§ 801–89).

<sup>38</sup> *Thomas v. United States*, 650 A.2d 183, 191–92 (D.C. Cir. 1994).

<sup>39</sup> PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 129 (2006). For the executive order establishing the Drug Enforcement Administration, see Exec. Order No. 11727, 38 Fed. Reg. 18,357 (Jul. 10, 1973).

<sup>40</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 49 (rev. ed. 2012) (citing U.S. OFFICE OF THE NATIONAL DRUG CONTROL POLICY, *NATIONAL DRUG CONTROL STRATEGY* (1992)).

the number of drug cases filed in federal courts “roughly quadrupled, from 3,130 cases (6,678 defendants) to 12,833 cases (25,033 defendants).”<sup>41</sup>

Even as the drug war became entrenched in national policy, however, the federal government remained heavily reliant on local authorities operating under state law to wage it.<sup>42</sup> Indeed, incentives to encourage state and local law enforcement agencies to prioritize drug enforcement were a central piece in the development of the war on drugs. In the 1980s, Congress instituted a federal grant program to fund state and local drug enforcement and redesigned asset forfeiture laws to give state and local officials a greater portion of seized assets in joint enforcement efforts.<sup>43</sup> During this same period, the DEA created a training program called “Operation Pipeline” to teach state and local law enforcement “how to lengthen a routine traffic stop and leverage it into a search for drugs by extorting consent or manufacturing probable cause.”<sup>44</sup>

The primacy of states and localities in drug enforcement comes into sharp focus when one compares the number of drug arrests in the United States to the number of federal drug prosecutions. The year 2019 saw an estimated 1.56 million drug arrests in the United States.<sup>45</sup> Federal drug prosecutions number in the thousands, with 21,344 filings involving drug offenses in 2022—just 1.4% of the number of state

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<sup>41</sup> Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits of Federal Criminal Jurisdiction*, 46 *HASTINGS L.J.* 979, 984 (1995). See also Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *HASTINGS L. J.* 1135, 1155–58 (1995) (describing the rise in federal drug prosecutions between the mid-1970s and 1990s).

<sup>42</sup> See Keith Humphreys, *Will the Obama Administration Implement a More Health-Oriented Approach to Drug Policy?*, 5 *J. DRUG POL’Y ANALYSIS* 3, 3 (2012), <http://dx.doi.org/10.1515/1941-2851.1050> [<https://perma.cc/88M4-VDDE>] (noting that “arresting drug users is almost entirely a state and local function in the United States”).

<sup>43</sup> Kreit, *supra* note 33, at 1333 (describing these programs).

<sup>44</sup> Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 *RUTGERS L.J.* 719, 761 (2007). For an overview of Operation Pipeline and its acceptance in court, see generally *id.* at 761–69.

<sup>45</sup> Table 29: Estimated Number of Arrests, Crime in the United States 2019, U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-29/table-29.xls> [<https://perma.cc/2HMX-FUTH>]. Although the FBI has released more recent data, a change in its data collection and reporting “led participation to plummet” for 2021 data. See Priya Krishnakumar, *The FBI Released Its Crime Report for 2021—But It Tells Us Less About the Overall State of Crime in the US Than Ever*, CNN (Oct. 5, 2022), <https://www.cnn.com/2022/10/05/us/fbi-national-crime-report-2021-data/index.html> [<https://perma.cc/WF4H-RK88>]. See also Kyle Jaeger, *New FBI Marijuana Arrest Data Riddled With Inconsistencies as Agency Touts Changes to Reporting System*, MARIJUANA MOMENT (Oct. 5, 2022), <https://www.marijuanamoment.net/new-fbi-marijuana-arrest-data-riddled-with-inconsistencies-as-agency-touts-changes-to-reporting-system/> [<https://perma.cc/XPY8-THC4>] (reporting that “the new data paints an incomplete picture, particularly as it concerns drug arrests across the U.S. over the last year”).

drug arrests.<sup>46</sup> Although measuring federal prosecutions against state arrests is admittedly an apples-to-oranges comparison, there is no question that, apart from specialized areas such as drug enforcement at the international border,<sup>47</sup> the overwhelming majority of drug crime enforcement takes place at the state and local level.<sup>48</sup>

This state of affairs has long raised questions about the exercise of discretion in federal drug enforcement.<sup>49</sup> The prosecution of “run-of-the-mill drug crimes” in federal court has led some to ask why such cases should be “matters of federal concern” at all.<sup>50</sup> In a 1985 opinion affirming a drug conviction, for example, the Second Circuit pointedly observed that “[t]hrough we are urged in other contexts to tolerate missed deadlines because of the enormous burdens placed upon limited

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<sup>46</sup> Federal Judicial Caseload Statistics 2022, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022> [<https://perma.cc/VHT7-FCK4>]. The United States Courts report presents data from the 12-month period ending March 31, 2022, but it refers to its reported data as 2022 data.

<sup>47</sup> Even in the border setting, the federal government leaves some prosecutions to state officials. See Maya Srikrishnan, Prosecutors Are Filing Fewer Cross-Border Drug Cases, Even as More Drugs Cross the Border, VOICE OF SAN DIEGO (Aug. 30, 2018), <https://voiceofsandiego.org/2018/08/30/prosecutors-are-filing-fewer-cross-border-drug-cases-even-as-more-drugs-cross-the-border/> [<https://perma.cc/8SVA-U9AW>] (reporting on the prosecution of cross-border drug cases in state courts and noting that “[i]n the mid-‘90s, the San Diego County district attorney’s office reached an agreement with the U.S. attorney and other federal agencies to prosecute drug cases involving marijuana brought through the point of entry in its South Bay office”); H.G. Reza, Drug Runners Arrested at Border Often Go Free, L.A. TIMES (May 12, 1996), <https://www.latimes.com/archives/la-xpm-1996-05-12-mn-3408-story.html> [<https://perma.cc/S4BT-DQ2G>] (reporting that more than one quarter of people arrested with drugs at the border over the previous year “were simply sent home to Mexico” and that “[t]he threshold for prosecutions, drug agents say, has risen as the government has stepped up narcotics interdiction at border crossings and made more seizures”).

<sup>48</sup> The federal government’s share of drug enforcement appears to have been relatively stable over the past few decades, in the aftermath of the sharp rise in federal drug enforcement that occurred in the 1980s and early 1990s. See Sara Sun Beale, The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization, 54 AM. U. L. REV. 747, 764 (2005) (reporting that, “even in the face of drug offenses—which have been the focus of sustained federal enforcement—less than two percent of those arrested are prosecuted in federal court”).

<sup>49</sup> Problems related to the exercise of federal enforcement discretion are not exclusive to drug enforcement and there are a number of other areas where federal and state criminal laws overlap. See Clymer, *supra* note 32, at 654–65 (observing that “many federal statutes duplicate state laws prohibiting similar conduct,” including in the areas of “firearms offenses, certain forms of theft and embezzlement, arson, fraud committed by mail or telephone, bank fraud, robbery and extension, fraudulent use of credit cards, and auto theft”). But the drug setting has presented particularly tough challenges with respect to federal enforcement discretion because of the breadth and harshness of federal drug statutes, as well as the political importance of the federal war on drugs. See Sara Sun Beale, Too Many Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 HASTINGS L.J. 979, 998 (1995) (noting that “federal law overlaps almost completely with state law” in the case of drug offenses); Clymer, *supra* note 32, at 674 (discussing the severity of federal drug statutes).

<sup>50</sup> Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 HASTINGS L. J. 1135, 1159–61 (1995).

numbers of federal law enforcement personnel. . . there are apparently enough federal prosecutors available with sufficient time to devote to \$30 drug cases that have been developed solely by state law enforcement officers.”<sup>51</sup>

In addition to concerns about the “misallocation of limited resources,”<sup>52</sup> the exercise of discretion in federal drug enforcement presents serious equity questions. This is because “the procedures that apply and the sentences that convicted defendants receive and serve in the federal system are often far different than those encountered in state courts.”<sup>53</sup> Federal law provides for lengthy mandatory minimum sentences for some drug offenses,<sup>54</sup> and base terms under the federal sentencing guidelines are roughly pegged to drug quantities in the mandatory minimum sentencing provisions.<sup>55</sup> As a result, the exercise of federal enforcement discretion can, as Sara Sun Beale put it, seem like “a kind of cruel lottery”<sup>56</sup> in which defendants who are selected for federal prosecution often receive much longer sentences than their similarly situated state-prosecuted counterparts.

Over the years, federal prosecutors have employed a range of approaches to their exercise of this discretion. The 1980s saw a literal lottery in the form of then-United States Attorney Rudy Giuliani’s infamous “federal day,” in which “all drug defendants in cases of concurrent jurisdiction who had the misfortune to be booked on a day chosen at random each week were funneled automatically into the federal system.”<sup>57</sup> At the other end of the spectrum, prosecutorial guidance issued by current Attorney General Merrick Garland in late 2022 broadly seeks to “ameliorat[e] the harshness of the modern-era federal sentencing regime.”<sup>58</sup>

While the exercise of federal drug enforcement discretion raises tricky issues under normal circumstances, federal enforcement in the face of state drug policy reforms presents a distinct problem. When federal and state drug laws are aligned, the central enforcement question is whether a case should be prosecuted in state or

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<sup>51</sup> United States v. Agilar, 779 F.2d 123, 125 (2d Cir. 1985).

<sup>52</sup> Brickey, *supra* note 50, at 1169.

<sup>53</sup> Clymer, *supra* note 32, at 668.

<sup>54</sup> For a recent examination of the development and entrenchment of mandatory minimum drug sentences, see Stephanie Holmes Didwania, *Mandatory Minimum Entrenchment and the Controlled Substances Act*, 18 OHIO ST. J. CRIM. L. 25 (2020).

<sup>55</sup> Kevin Bennardo, *Decoupling Federal Offense Guidelines from Statutory Limits on Sentencing*, 78 MO. L. REV. 683, 691 (2013) (discussing development of federal drug sentencing guidelines and how, “at least for drug offenses, the [Sentencing] Commission elected to use the mandatory minimum as the ‘starting point’ for base offense”).

<sup>56</sup> Sara Sun Beale, *Too Many Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997 (1995).

<sup>57</sup> Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1157 (2004).

<sup>58</sup> Alan Vinegrad & Douglas A. Berman, *More Justice from Justice: The DOJ’s Latest Charging, Plea, and Sentencing Policies*, 35 FED. SENT. R. 153, 153 (2023).

federal court; the practical effect of federal nonenforcement is that enforcement will take place at the state level.<sup>59</sup> In this context, policies on the exercise of federal enforcement discretion will need to consider how to prioritize among potentially competing goals like avoiding unwarranted disparities, targeting limited resources toward conduct that implicates uniquely federal concerns, or maximizing deterrence.<sup>60</sup> By contrast, when a state withdraws from enforcement in an area of drug control—by, for example, legalizing marijuana or licensing overdose prevention sites—the question becomes whether the federal government should seek to block the state reform; the practical effect of federal nonenforcement in this setting will be that the state law will be able to take effect unimpeded.<sup>61</sup>

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<sup>59</sup> Cf. Brickley, *supra* note 50, at 1161 (“If the states are enforcing their laws, and it seems that they are, why are so many small drug cases made matters of federal concern?”).

<sup>60</sup> Cf. David Thacher, *Channeling Police Discretion: The Hidden Potential of Focused Deterrence*, 2016 U. CHI. LEGAL F. 533, 552–53 (discussing the “federal day” policy and noting that, while such a policy “may be effective” with respect to the goal of deterrence, it would still come into conflict with other goals and values because it “deliberately imposes far more severe punishments on some people than others for morally irrelevant reasons”).

<sup>61</sup> This dynamic distinguishes the relationship between federal enforcement and state reforms in the drug policy setting from most other areas where federal and state criminal laws overlap. Although state criminal justice reform efforts have not been limited to drug laws, no state has legalized conduct like arson, wire fraud, or bank robbery; in most areas of criminal law, state reform has meant changes to sentencing laws or perhaps defelonization. Cf. Radley Balko, *Hi! You’ve Been Referred Here Because You Repeated a False Claim About California’s Shoplifting Law*, THE WATCH (May 8, 2023), <https://radleybalko.substack.com/p/hi-youve-been-referred-here-because> [https://perma.cc/4A97-M35C] (debunking the false claim that California “legalized” shoplifting and explaining that California had raised the cut-off for theft to qualify as a felony instead of a misdemeanor from \$400 to \$950).

In the immigration setting, so-called “sanctuary” cities and states might seem, at first glance, to present an analogous situation to state drug policy reforms. But the issues there are much different because the federal government has a legal monopoly over immigration enforcement; states do not have the authority to criminalize immigration on their own or to directly enforce federal immigration laws. See *Arizona v. United States*, 567 U.S. 387, 409–10 (2012) (holding that the immigration “removal process is entrusted to the discretion of the Federal Government” and citing cases holding that immigration authority is vested solely in the federal government). To be sure, the federal government may seek cooperation from state and local governments in some areas of immigration enforcement, and sanctuary policies that withhold active cooperation can make federal immigration enforcement more time-consuming. See Michael Kagan, *What We Talk About When We Talk About Sanctuary Cities*, 52 UC DAVIS L. REV. 391, 393–95 (2018) (discussing how sanctuary policies that “aim to preserve community trust in local police by keeping the police separate from immigration authorities” have been the most controversial because they “prevent[] federal authorities from using local law enforcement to make their own search for deportable non-citizens more efficient”). But the federal government ultimately has sole authority over immigration enforcement, both criminal and civil. As a result, while federal immigration and drug nonenforcement may raise similar questions vis-à-vis the Take Care Clause, the exercise of federal enforcement discretion in the immigration context does not involve the same interplay with state law as in the context of drug policy. For a discussion of immigration and marijuana nonenforcement and the Take Care Clause, see Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183 (2016).

It is worth pausing to note that preemption, the usual tool for achieving nationwide legal uniformity, is of little use to the federal government in the case of drug prohibition. Because of the anti-commandeering principle, Congress cannot use preemption to require a state to retain a prohibition law that it wants to eliminate.<sup>62</sup> In other words, the federal government cannot force a state to criminalize the manufacturing and sale of marijuana. Congress could, in theory, preempt all state criminal drug laws through field preemption. But doing so certainly would not serve the federal government's interest, since, as already discussed, the overwhelming majority of drug prosecutions proceed under state law. Not surprisingly, then, the Controlled Substances Act's preemption provision expressly states that the law is not intended "to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter . . . unless there is a positive conflict between" between state and federal law.<sup>63</sup>

Without preemption as a viable option, if a state elects to legalize conduct that is prohibited under federal drug laws, there is not much that the federal government can do to stop it, apart from the direct enforcement of federal law. But it takes resources to enforce federal law. And, as the experience of state marijuana legalization shows, that can make it nearly impossible to block state drug policy reforms through direct federal enforcement, at least in some circumstances.

#### *B. Federal (non)enforcement and state marijuana reforms*

After a decade of state marijuana legalization laws operating without active federal interference,<sup>64</sup> it can be easy to forget that the DOJ's nonenforcement policy was preceded by more than a decade of vigorous opposition to state medical marijuana laws.

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<sup>62</sup> See Rob Mikos, *The Implications of Murphy v. NCAA for State Marijuana Reforms*, MARIJUANA LAW, POLICY, & AUTHORITY BLOG (May 17, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/05/the-implications-of-murphy-v-ncaa-for-state-marijuana-reforms/> [https://perma.cc/Q5YB-NAAU].

<sup>63</sup> 21 U.S.C. § 903.

<sup>64</sup> Even without active federal interference in the form of federal prosecutions, federal marijuana prohibition continues to present challenges and complications for state legalization in a number of ways. See, e.g., Danny O'Connor, *Declaring Dankruptcy: Exploring Avenues to Relief for Debtors Involved with Cannabis*, 91 U. CIN. L. REV. 541 (2022) (discussing the lack of access to bankruptcy relief for cannabis businesses); Julie Anderson Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. REV. 1043 (2021) (discussing difficulty marijuana businesses face in accessing banking services); Sam Kamin & Viva R. Moffatt, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 219–20 (2016) (discussing how federal prohibition presents barriers to marijuana businesses in obtaining intellectual property protections).

Californians approved the first statewide medical marijuana legalization law via ballot measure in 1996.<sup>65</sup> The federal government was unequivocal in its opposition to California's new law. Then-drug czar Barry McCaffrey called the law "a cruel hoax that sounds more like something out of a Cheech and Chong show."<sup>66</sup> With marijuana already illegal under federal law, there was no need for Congress to pass a new statute in response to California's law. But just in case anyone was uncertain about its view of California's law, the House of Representatives passed a symbolic "Not Legalizing Marijuana for Medical Use" sense of Congress resolution anyway, by a vote of 310 to 93.<sup>67</sup> The DEA, for its part, threatened the controlled substances licenses of doctors who recommended medical marijuana, which would have left affected doctors unable to prescribe controlled substances if the policy had not been enjoined by the Ninth Circuit.<sup>68</sup>

The federal government's clear and forceful opposition to California's law was not enough to stop some medical marijuana advocates from opening dispensaries in the state in the late 1990s. But the DOJ quickly moved to prevent their operation. In early 1998, the federal government filed lawsuits against six medical marijuana cooperatives to enjoin them from manufacturing and distributing medical marijuana.<sup>69</sup> One of the six cases made its way up to the United States Supreme Court on the question of the availability of a medical necessity defense under the Controlled Substances Act, with the Court ruling in the government's favor in 2001.<sup>70</sup> Just four years after that decision, the Supreme Court heard another case involving California's medical marijuana law. Again, the Court ruled for the government, this time on the question of whether the federal government's commerce power allowed it to reach intrastate noncommercial medical marijuana activity.<sup>71</sup>

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<sup>65</sup> See *People v. Mower*, 49 P.3d 1067, 1070 (Cal. 2002) (discussing California's Compassionate Use Act).

<sup>66</sup> PETER HECHT, *WEEDLAND: INSIDE AMERICA'S MARIJUANA EPICENTER AND HOW POT WENT LEGIT* 67 (2014).

<sup>67</sup> See Caroline Herman, *United States v. Oakland Cannabis Buyers' Cooperative: Whatever Happened to Federalism?*, 93 J. CRIM. L. & CRIMINOLOGY 121, 123 n.19 (2002) (discussing the "sense of Congress" vote).

<sup>68</sup> Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997) ("[The] DEA will seek to revoke the DEA registrations of physicians who recommend or prescribe Schedule I controlled substances."). The Ninth Circuit enjoined the plan on First Amendment grounds. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

<sup>69</sup> *United States v. Cannabis Cultivators Club*, 5 F. Supp. 2d 1086, 1092–93 (N.D. Cal. 1998).

<sup>70</sup> *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001).

<sup>71</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

The government's success in court did not translate into success in stopping the spread of state medical marijuana laws and dispensaries, however.<sup>72</sup> After injunctions proved to be an insufficient deterrent, federal prosecutors began bringing criminal charges against state-sanctioned medical marijuana providers.<sup>73</sup> With no viable legal defenses available to most medical marijuana defendants—who were, after all, openly distributing a Schedule I controlled substance, albeit in compliance with state law—prosecutions almost invariably resulted in convictions. Some of these unlucky medical marijuana providers received lengthy mandatory minimum sentences.<sup>74</sup> Nevertheless, despite the ongoing threat of federal prosecution, state-sanctioned medical marijuana providers continued to operate openly. By 2009, one news report estimated that over 700 medical marijuana dispensaries were operating in California alone.<sup>75</sup>

The federal government's inability to stymie state medical marijuana laws in the 2000s was the result of limited resources. In the fight against state medical marijuana laws, the DEA and federal prosecutors had the legal upper hand. Those who were unlucky enough to be prosecuted faced almost certain conviction. But the risk of arrest and prosecution was simply too low to dissuade would-be dispensary operators. As Rob Mikos explained in a 2009 article examining the conflict, “[t]hrough the CSA certainly threatens harsh sanctions, the federal government does not have the resources to impose them frequently enough to make a meaningful impact on proscribed behavior.”<sup>76</sup> In one especially-telling anecdote, a Los Angeles dispensary operator held a press conference in 2008 to announce the installation of

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<sup>72</sup> Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 *CHAPMAN L. REV.* 555, 569–72 (2010) (discussing the expansion of medical marijuana laws during the 2000s in spite of continuing federal enforcement efforts).

<sup>73</sup> See AMERICANS FOR SAFE ACCESS, *WHAT'S THE COST?: THE FEDERAL WAR ON PATIENTS* (2013), <https://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf> [<https://perma.cc/8CEJ-X35M>].

<sup>74</sup> E.g., *id.* at 31 (discussing the case of Bryan Epis, who received a 10-year mandatory minimum sentence). See also Bob Egelko, *He Spent 14 Years in Prison for Medical Marijuana. Is Chance in Federal Law Overdue?*, *S.F. CHRON.* (Feb. 12, 2023) (reporting on the case of Luke Scamazzo who was released from federal prison in 2023 “after serving more than 14 years . . . for helping to run a nonprofit medical marijuana collective”).

<sup>75</sup> Roger Parloff, *How Marijuana Became Legal*, *CNN* (Sept. 18, 2009), [https://money.cnn.com/2009/09/11/magazines/fortune/medical\\_marijuana\\_legalizing.fortune/](https://money.cnn.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/) [<https://perma.cc/L7ZU-5WVF>].

<sup>76</sup> Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 *VAND. L. REV.* 1421, 1464 (2009). See also *id.* at 1468 (“Apart from dramatically increasing the federal law enforcement budget, Congress has few options for giving the CSA some bite.”).

a 24-hour marijuana vending machine.<sup>77</sup> When asked for comment by the press, a DEA agent replied, weakly, “[o]nce we find out where it’s at, we’ll look into it and see if they’re violating laws.”<sup>78</sup> *If they’re violating any laws?* There is, of course, no doubt that operation of a marijuana vending machine violates federal law.<sup>79</sup> But by 2008, the risk of federal prosecution of state-legal medical marijuana activity was so low—low, not because there were no federal prosecutions, but because the number of federal prosecutions paled in comparison to the ever-expanding number of medical marijuana providers—that some medical marijuana operators felt comfortable holding press conferences to announce their violations of federal law.

During President Obama’s first term, the federal government’s posture with respect to state medical marijuana laws changed, at least to a degree. In October 2009, the DOJ issued a memorandum advising federal prosecutors not to focus their resources on “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>80</sup> But a second memorandum, issued in June 2011, walked back the first memo by discussing “large-scale” marijuana operations and advising federal prosecutors that the 2009 memo “was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”<sup>81</sup> Together, the DOJ’s 2009 and 2011 memos seemed to curtail federal enforcement efforts in some states, but in others, enforcement continued more or less as it had before.<sup>82</sup> Indeed, some commentators argued that federal enforcement against people

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<sup>77</sup> Associated Press, *Pot Vending Machines Take Root in Los Angeles*, NBC NEWS (Jan. 30, 2008), <https://www.nbcnews.com/health/health-news/pot-vending-machines-take-root-los-angeles-flna1c9462437> [<https://perma.cc/J7TN-N3LG>].

<sup>78</sup> *Id.*

<sup>79</sup> 21 U.S.C. §§ 846, 841, 844 (criminalizing attempting or conspiring to distribute or to possess a controlled substance).

<sup>80</sup> Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Att’y’s (Oct. 19, 2009), <https://www.justice.gov/archive/opa/documents/medical-marijuana.pdf> [<https://perma.cc/A4Y5-GKAX>].

<sup>81</sup> Memorandum from James Cole, Deputy Att’y Gen., to U.S. Att’y’s (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/4LDJ-YXD7>].

<sup>82</sup> See Christina Cole, *Chew on This: Learning from Colorado’s Edible Marijuana Market*, 11 J. FOOD L. & POL’Y 203, 212 (2015) (arguing that most federal prosecutions in this period “took place in states that did not provide clear and robust regulations” and that “[i]n states with strong regulations, federal enforcement was generally limited to prosecuting individuals breaking the state law and requiring dispensaries to locate further away from schools”); Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 MCGEORGE L. REV. 109, 115–18 (2012) (an article co-authored by then-United States Attorney for the Eastern District of California discussing the memos and noting that, after the memos, federal prosecutors in several states had “initiated criminal cases against persons claiming to promote medical marijuana”); Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869, 881–85 (2013) (describing federal enforcement efforts following issuance of the memos).

operating in apparent compliance with state medical marijuana was even more vigorous during Obama's first term than it had been under Bush.<sup>83</sup>

After Colorado and Washington voters enacted the first adult-use marijuana legalization laws in 2012, many expected the Obama administration to take a more definitive position with respect to federal interference with states' marijuana reforms. This led to the 2013 Cole Memorandum.<sup>84</sup> The DOJ's 2013 guidance was centered around a list of eight "enforcement priorities" that it described as having been "particularly important to the federal government" vis-à-vis state medical marijuana laws.<sup>85</sup> The priorities were:

Preventing the distribution of marijuana to minors; Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; Preventing violence and the use of firearms in the cultivation and distribution of marijuana; Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and Preventing marijuana possession or use on federal property.<sup>86</sup>

The Cole Memorandum advised that these eight enforcement priorities "will continue to guide the Department's enforcement of the CSA against marijuana-related conduct."<sup>87</sup> The memo also reversed course with respect to large-scale operations that had been the subject of the DOJ's 2011 memo, stating that "in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether

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<sup>83</sup> See Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Feb. 16, 2012), <https://www.rollingstone.com/politics/politics-news/obamas-war-on-pot-231820/> [<https://perma.cc/ZL2F-NCE5>] (arguing that "the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush").

<sup>84</sup> Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/CM2F-Y3MY>].

<sup>85</sup> *Id.* at 1.

<sup>86</sup> *Id.* at 1–2.

<sup>87</sup> *Id.* at 2.

marijuana trafficking implicates the Department's enforcement priorities listed above.”<sup>88</sup>

In some ways, the text of the DOJ's 2013 guidance was not terribly different from its 2009 memorandum. Both memos emphasized that they were advisory in nature, created no legal rights, and were intended only to guide the exercise of prosecutorial discretion.<sup>89</sup> The 2009 memo also included a list of factors very similar to those identified in the 2013 memo.<sup>90</sup> Indeed, the text of the 2009 memo was, if anything, more direct in its contemplation of nonenforcement than the 2013 memo. The 2009 memo advised that federal prosecutors “should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>91</sup> The closest the 2013 Cole Memorandum came to such a direct statement was a line advising that, in states that had legalized marijuana and also had “strong and effective regulatory” controls, “conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above.”<sup>92</sup>

Although the text of the 2013 and 2009 DOJ memos were similar to each other, the 2013 guidance marked an unmistakable change with respect to the federal prosecution of people engaging in conduct that was authorized under state marijuana laws.<sup>93</sup> Whereas federal prosecutions of people in apparent compliance with state

<sup>88</sup> Id. at 3.

<sup>89</sup> Id. at 4 (“[T]his memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.”); Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Att’ys 2 (Oct. 19, 2009), <https://www.justice.gov/archive/opa/documents/medical-marijuana.pdf> [<https://perma.cc/2G6V-QR82>] (“[T]his memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.”).

<sup>90</sup> The 2009 memo listed “unlawful possession” or use of firearms, “violence,” “sales to minors,” money laundering or other financial activities inconsistent with compliance with state or local law, amounts of marijuana inconsistent with compliance with state or local law, possession or sale of controlled substances other than marijuana, and “ties to other criminal enterprises.” Id. Though, rather than describing these factors as enforcement priorities, the 2009 list described the factors as “characteristics” that might indicate state-legal marijuana activity would be “of potential federal interest.” Id.

<sup>91</sup> Id. at 1–2.

<sup>92</sup> Memorandum from James M. Cole, *supra* note 1, at 3.

<sup>93</sup> The different outcomes following the 2009 and 2013 memos is most likely explained by more vigorous internal oversight within the DOJ following the 2013 guidance. Put differently, both memos were advisory, but it turned out that the 2013 memo was advice that United States Attorneys were not free to ignore. When the 2013 memo was released, an anonymous DOJ official told a reporter that the guidance was “not optional” for prosecutors. Ryan J. Reilly and Ryan Grim, Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect, *HUFFINGTON POST* (Aug. 29, 2013), [http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj\\_n\\_3837034](http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034) [<https://perma.cc/7EQ3-H8EB>].

In late 2014, Congress added a degree of formal legal protection with respect to medical marijuana by adopting an appropriations rider that prevents the DOJ from spending money to prevent the implementation of state medical marijuana laws. The rider has been included in federal budgets in

medical marijuana laws remained commonplace after the DOJ's 2009 memo, these prosecutions came to an effective halt after 2013. To be sure, there have been occasional federal prosecutions of defendants who have claimed their conduct complied with state law over the past decade.<sup>94</sup> But they are outliers. The days of the DEA and federal prosecutors declining to defer to state legalization laws and instead targeting state-legal marijuana businesses are long gone. Today, it is impossible to imagine a federal prosecutor bragging about having “successfully prosecuted cases in which defendants claimed to be acting in compliance with state law regarding medical marijuana” and listing specific cases where medical marijuana providers received federal prison sentences as long as twenty-two years—as federal prosecutors Benjamin B. Wagner and Jared C. Dolan did in a 2012 law review article.<sup>95</sup>

The DOJ's marijuana nonenforcement policy is so entrenched that it has continued to be reliably followed even after the Cole Memorandum itself was rescinded by Trump's (notoriously anti-marijuana)<sup>96</sup> first Attorney General, Jeff Sessions, in 2018.<sup>97</sup> Sessions's replacement, William Barr, said during his confirmation hearing that he did not plan to interfere with state legalization laws.<sup>98</sup> President Biden's Attorney General, Merrick Garland, has likewise reconfirmed the DOJ's policy of nonenforcement against state-compliant marijuana businesses and has suggested that his office may formally reissue a version of the Cole Memorandum at some point in the future.<sup>99</sup>

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each year since, but it is limited to state medical marijuana laws and does not currently apply to adult-use marijuana. See *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 547–48 (1st Cir. 2022) (describing the appropriations limitation).

<sup>94</sup> *United States v. Trevino*, 7 F.4th 414, 422 (6th Cir. 2021) (rejecting defendant's claim to have been operating in compliance with Michigan's medical marijuana law for purposes of an appropriations rider limitation on DOJ interference with state medical marijuana laws and upholding his conviction and 188-month sentence).

<sup>95</sup> Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 *MCGEORGE L. REV.* 109, 123 (2012); see also *id.* at 109 (“State legislative changes have not altered our mission to enforce the law and defend the interests of the United States.”).

<sup>96</sup> Christopher Ingraham, *Trump's Pick for Attorney General: ‘Good People Don't Smoke Marijuana,’* *WASH. POST.* (Nov. 18, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/18/trumps-pick-for-attorney-general-good-people-dont-smoke-marijuana/> [<https://perma.cc/7FES-L4PB>] (reporting that “Sessions is a vocal opponent of marijuana legalization” who once said at a Senate hearing that “‘good people don't smoke marijuana’”).

<sup>97</sup> Memorandum from Jefferson B. Sessions, III, *supra* note 6.

<sup>98</sup> Brandi Kellam, *Trump's Attorney General Nominee May Shift Policy on Marijuana Enforcement*, *CBS NEWS* (Jan. 18, 2019, 2:25 PM), <https://www.cbsnews.com/news/william-barr-on-marijuana-legalization-attorney-general-nominee> [<https://perma.cc/7BEG-4PMS>].

<sup>99</sup> Ben Adlin, *Biden's Attorney General Says DOJ Is ‘Still Working On’ Federal Marijuana Policy Approach*, *MARIJUANA MOMENT* (March 1, 2023), <https://www.marijuanamoment.net/bidens-attorney-general-says-doj-is-still-working-on-federal-marijuana-policy-approach/>

### C. Federal response to overdose prevention sites

While the conflict over state marijuana legalization laws appears settled, the federal response to state and local efforts to establish overdose prevention sites is very much a live issue, in no small part because state and local support for safe injection sites is a much more recent phenomenon.

Grounded in a harm reduction rationale, overdose prevention sites aim “to reduce morbidity and mortality by providing a safe environment for more hygienic use . . . [and] to reduce drug use in public and improve public amenity in areas surrounding urban drug markets.”<sup>100</sup> Although there are variations in how safe injection sites operate, particularly with respect to the range of services they offer,<sup>101</sup> they all provide a space for people to use drugs that they have obtained elsewhere in a safe environment, with health workers, clean syringes, and the opioid overdose reversal drug, naloxone, on hand.<sup>102</sup>

Safe injection sites have been operating in a number of other countries since the mid-1980s.<sup>103</sup> Over time, a good amount of empirical evidence has been developed in support of them. A 2014 review that examined seventy-five studies of safe injection sites concluded that they “have largely fulfilled their initial objectives without enhancing drug use or drug trafficking.”<sup>104</sup> A 2018 RAND analysis reported that, “[f]or drug consumption that is supervised, [Supervised Consumption Sites (SCSs)] reduce the risk of disease transmission and other harms associated with unhygienic drug use practices,”<sup>105</sup> though it also cautioned that “the scientific

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[<https://perma.cc/F5GW-LVTQ>] (reporting Attorney General Garland’s comments that his office is working on a marijuana enforcement policy memo and “that it will be very close to what was done in the Cole Memorandum”).

<sup>100</sup> European Monitoring Center for Drugs and Drug Addiction, *Drug Consumption Rooms: An Overview of Provision and Evidence 2* (July 31, 2018), [http://www.emcdda.europa.eu/system/files/publications/2734/POD\\_Drug%20consumption%20rooms.pdf](http://www.emcdda.europa.eu/system/files/publications/2734/POD_Drug%20consumption%20rooms.pdf) [<https://perma.cc/DS44-TN4B>].

<sup>101</sup> See Alex Kreit, *Safe Injection Sites and the Federal ‘Crack House’ Statute*, 60 *B.C. L. REV.* 413, 421–22 (2019) (describing different models of safe injection sites).

<sup>102</sup> Alex H. Kral & Peter J. Davidson, *Addressing the Nation’s Opioid Epidemic: Lessons from an Unsanctioned Supervised Injection Site in the U.S.*, 53 *AM. J. PREV. MED.* 919, 919 (2017) (providing an overview of safe injection sites).

<sup>103</sup> Beau Kilmer et al., *Research Report: Considering Heroin-Assisted Treatment and Supervised Consumption Sites in the United States*, RAND CORP., at 30 (2018), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2600/RR2693/RAND\\_RR2693.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2600/RR2693/RAND_RR2693.pdf) [<https://perma.cc/RV8C-YZTY>] (providing a brief history of the development of safe injection sites).

<sup>104</sup> Chloé Potier et al., *Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review*, 145 *DRUG & ALCOHOL DEPENDENCE* 48, 48 (2014).

<sup>105</sup> Kilmer et al., *supra* note 23, at xi.

evidence about the effectiveness of SCSs is limited in quality and the number of locations evaluated.”<sup>106</sup>

Although there has long been interest among drug policy researchers and reform advocates in the possibility of establishing safe injection sites in the United States, it is only in the past five to ten years that they started to become politically viable here. Efforts to generate momentum for safe injection sites in the U.S. in the 2000s failed to gain traction. In 2007, for example, advocates in San Francisco held a symposium on Vancouver’s safe injection site in an attempt to generate interest in the issue among local leaders.<sup>107</sup> Then-Mayor Gavin Newsom—who had not hesitated to embrace medical marijuana as mayor—quickly shot down the effort.<sup>108</sup>

During the mid-2010s, the combination of a mounting opioid epidemic and dwindling support for the war on drugs led some state and local elected officials to become more open to harm reduction measures that had previously been considered politically off-limits, including overdose prevention sites.<sup>109</sup> By 2018, interest in safe injection sites among leaders in Philadelphia became serious enough to attract the attention of federal prosecutors. In January 2018, city officials gave “the green light” to a plan for a non-profit to open a site in Philadelphia.<sup>110</sup> Later that year, advocates incorporated the non-profit organization Safehouse for purposes of opening and operating the planned overdose prevention site.<sup>111</sup>

By that time, Department of Justice officials had already indicated their opposition to safe injection sites in the press. In late 2017 and mid-2018, the United States Attorneys for Vermont and Massachusetts issued statements in opposition to safe injection sites.<sup>112</sup> Most notably, in August 2018, then-Deputy Attorney General

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<sup>106</sup> *Id.* at x.

<sup>107</sup> Lisa Leff, *San Francisco Considers Safe-Injection Site for Drug Addicts*, THE ASSOCIATED PRESS (Oct. 18, 2017), [http://usatoday30.usatoday.com/news/health/2007-10-18-sf-injections\\_N.htm](http://usatoday30.usatoday.com/news/health/2007-10-18-sf-injections_N.htm) [<https://perma.cc/72TA-888Y>].

<sup>108</sup> C.W. Nevius, *Support for Supervised Injection is Growing*, SF GATE (Oct. 15, 2007), <https://www.sfgate.com/bayarea/article/C-W-Nevius-Support-for-supervised-drug-2518428.php> [<https://perma.cc/9949-ZV4V>] (“Asked for a comment from Mayor Gavin Newsom, spokesman Nathan Ballard said, ‘The mayor is not inclined to support this approach, which quite frankly may end up creating more problems than it addresses.’”).

<sup>109</sup> See Alex Kreit, *Safe Injection Sites and the Federal ‘Crack House’ Statute*, 60 B.C. L. REV. 413, 424–27 (2019) (discussing efforts to establish safe injection sites in the United States in the mid-to-late 2010s).

<sup>110</sup> Elana Gordon, *What’s Next for ‘Safe Injection’ Sites In Philadelphia?*, NPR (Jan. 24, 2018), <https://www.npr.org/sections/health-shots/2018/01/24/580255140/whats-next-for-safe-injection-sites-in-philadelphia> [<https://perma.cc/ULC6-QU5N>].

<sup>111</sup> Bobby Allyn, *Former Gov. Ed Rendell Says ‘Arrest Me First’ for Backing Supervised Injection Facility* [Updated], WHYY (Oct. 2, 2018), <https://whyy.org/articles/former-gov-ed-rendell-says-arrest-me-first-for-backing-safe-injection-facility/> [<https://perma.cc/UG8H-KWRH>].

<sup>112</sup> U.S. Attorney’s Office Dist. of Vt., *Statement of the U.S. Attorney’s Office Concerning Proposed Injection Sites* (Dec. 13, 2017), <https://www.justice.gov/usao-vt/pr/statement-us-attorney-s->

Rod Rosenstein penned a New York Times editorial in which he called overdose prevention sites “very dangerous” and pledged that the DOJ would “meet the opening of any injection site with swift and aggressive action.”<sup>113</sup>

Consistent with Rosenstein’s threat, a few months later, the United States Attorney for the Eastern District of Pennsylvania preemptively sued Safehouse to block it from opening a safe injection site.<sup>114</sup> As was the case in early federal medical marijuana litigation, the DOJ decided against filing criminal charges and instead took the somewhat unusual step of filing a civil case to enjoin the alleged criminal conduct. Specifically, in the case of Safehouse, the government “sought a declaratory judgment that Safehouse’s consumption room” would violate a provision of the federal Controlled Substances Act.<sup>115</sup>

As discussed in more detail below, the federal government prevailed against Safehouse in the Third Circuit. But it is fair to say that, in comparison to state-legal marijuana businesses, the DOJ’s opposition to overdose prevention sites is on much shakier legal ground. Marijuana growers and sellers violate core provisions of the federal Controlled Substances Act that prohibit the manufacture and distribution of Schedule I substances like marijuana, except in connection with tightly controlled research.<sup>116</sup> The same is true even of state-sanctioned marijuana users, who commit the federal crime of possession when they buy marijuana from a state-legal store.<sup>117</sup>

Overdose prevention sites, by contrast, do not come into conflict with the CSA’s core provisions. They do not manufacture, sell, or possess illegal drugs. They

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office-concerning-proposed-injection-sites [https://perma.cc/8SFK-JWLA]; Associated Press, Prosecutor: Feds Won’t Recognize Injection Sites in Mass., BOSTON.COM (July 19, 2018), https://www.boston.com/news/local-news/2018/07/19/prosecutor-feds-wont-recognize-injection-sites-in-mass [https://perma.cc/4VN2-ZXVK].

<sup>113</sup> Rod J. Rosenstein, Fight Drug Abuse, Don’t Subsidize It, N.Y. TIMES (Aug. 27, 2018), https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html [https://perma.cc/ALC4-ZMW4].

<sup>114</sup> See *United States v. Safehouse*, 985 F.3d 225, 231–32 (3d Cir. 2021), cert. denied sub nom.; *Safehouse v. Dep’t of Just.*, 142 S. Ct. 345 (2021) (providing a procedural history of the lawsuit).

<sup>115</sup> *Id.* at 231.

<sup>116</sup> Alex Kreit, Federal Marijuana Reform and the Controlled Substances Act, 101 B.U. L. REV. 1231, 1248–49 (2021) (describing difficulty in researching Schedule I substances).

<sup>117</sup> 21 U.S.C. § 844(a). For an analysis of federal sentencing for simple marijuana possession, see Vera M. Kachnowski et al., Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System, U.S. SENTENCING COMMISSION (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2023/20230509\_Marijuana-Possession.pdf [https://perma.cc/XB74-FMRX]. As noted in that report, in October 2022, “President Joseph Biden granted a pardon to current U.S. citizens and lawful permanent residents convicted of the federal offense of simple possession of marijuana.” *Id.* at 1. It is not clear how that action might impact future federal prosecutions of simple marijuana possession, but “the U.S. Department of Justice generally has treated marijuana possession offenses as a low priority in recent years.” *Id.*

provide health services to people who use drugs on their sites, and there is no federal statute that criminalizes providing health services to people who use illegal drugs.

The federal government's opposition to overdose prevention sites has been grounded in the so-called "crack house statute,"<sup>118</sup> an add-on to the CSA that was passed near the height of the drug war in 1986 and is only infrequently employed by federal prosecutors.<sup>119</sup> The crack house statute—which earned its name because it was written to target "'crack-houses,' where 'crack,' cocaine and other drugs are manufactured or used"<sup>120</sup>—criminalizes "maintaining drug-involved premises."<sup>121</sup>

Although there is no doubt that Congress passed the law with "crack houses" in mind and that it "never expected the law to apply to safe-injection sites,"<sup>122</sup> the text of the statute is quite broad. The provision of the crack house statute that arguably comes into conflict with safe injection sites "makes it illegal to 'manage or control' a property and then 'knowingly and intentionally' open it to visitors 'for the purpose of . . . using a controlled substance.'"<sup>123</sup> The argument that this provision applies to overdose prevention sites is relatively straightforward. Overdose prevention sites (or would-be overdose prevention sites like Safehouse) "intentionally open [their] facilit[ies] to visitors [they] know will use drugs there."<sup>124</sup> As a result, the argument goes, site operators would "manage or control a place" and "knowingly . . . make [it] available" to people whose "purpose" is to "use[] a controlled substance."<sup>125</sup>

In the DOJ's lawsuit against Safehouse, the Third Circuit agreed that this is enough to violate the statute.<sup>126</sup> The Third Circuit's opinion was not unanimous; a dissenting judge argued that the statute did not sweep as broadly as the majority found.<sup>127</sup> It is possible that if the DOJ continues to press the issue, a different federal circuit (or the Supreme Court) will come to a different conclusion than the *Safehouse* majority. But, for present purposes, the particulars of the disagreement over the best

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<sup>118</sup> 21 U.S.C. § 856.

<sup>119</sup> See Alex Kreit, *Safe Injection Sites and the Federal 'Crack House' Statute*, 60 B.C. L. REV. 413, 429–34 (2019) (providing an overview of the "crack house" statute and its potential application to safe injection sites).

<sup>120</sup> 132 Cong. Rec. 26,474 (1986) (excerpt of Senate Amendment No. 3034 to H.R. 5484).

<sup>121</sup> 21 U.S.C. § 856.

<sup>122</sup> *United States v. Safehouse*, 985 F.3d 225, 238 (3d Cir. 2021) (stating that it "is true but irrelevant" that Congress never expected the law to apply to safe-injection sites).

<sup>123</sup> *Id.* at 232 (quoting 21 U.S.C. § 856(a)(2)).

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

<sup>125</sup> 21 U.S.C. § 856(a)(2).

<sup>126</sup> *Id.*

<sup>127</sup> See *Safehouse*, 985 F.3d at 243–53 (Roth, J., dissenting).

interpretation of the crack house statute as applied to safe injection sites is beside the point. Whatever the merits of that dispute, if the DOJ wants to continue working to block state-sanctioned safe injection sites, it has a statute that it can rely on to try to do so, at least for now.

Whether or not the DOJ will continue to oppose overdose prevention sites remains to be seen, however. The lawsuit against Safehouse and most public statements in opposition to safe injection sites by DOJ officials came under the Trump administration. It is possible that Biden’s DOJ has decided to adopt a different position *sub silentio*. The lawsuit against Safehouse, on remand following the Third Circuit’s decision, was in mediation for more than a year and a half, with some signs pointing to a possible settlement involving a nonenforcement agreement of some kind<sup>128</sup> before the talks ultimately failed.<sup>129</sup> Two overdose prevention sites that officially opened in New York City in late 2021 have been operating ever since without federal interference<sup>130</sup> and the National Institute on Drug Abuse (NIDA) issued a grant to researchers to study their efficacy in May 2023.<sup>131</sup>

The possibility that the DOJ will move to shut down the New York centers remains, however, and in August 2023, the U.S. Attorney for the Southern District of New York, Damian Williams, issued an “apparent warning” about the sites in response to a request for comment from the New York Times.<sup>132</sup> The statement threatened the possibility of federal “enforcement” against the sites “if this situation does not change in short order.”<sup>133</sup> Although ominous sounding, it was not clear what “situation” the statement was referring to—the absence of state regulations of the sites (though sanctioned by New York City, they have no formal approval or supervision at the state level);<sup>134</sup> reports of “visible drug activity on the block around” one of sites;<sup>135</sup> or something else entirely. And a follow-up story by a local news organization, which emphasized that “the full context around Williams’s

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<sup>128</sup> Kyle Jaeger, *Federal Lawsuit Over Safe Drug Consumption Sites Heads to Mediation to ‘Expedite’ Resolution*, MARIJUANA MOMENT (Jan. 3, 2023), <https://www.marijuanamoment.net/federal-lawsuit-over-safe-drug-consumption-sites-heads-to-mediation-to-expedite-resolution/> [https://perma.cc/3V3F-MGYF].

<sup>129</sup> Leonard, *supra* note 15.

<sup>130</sup> Jeneen Interlandi, *One Year Inside a Radical New Approach to America’s Overdose Crisis*, N.Y. TIMES (Feb. 22, 2023), <https://www.nytimes.com/2023/02/22/opinion/drug-crisis-addiction-harm-reduction.html> [https://perma.cc/GK7E-8GEY].

<sup>131</sup> Carla K. Johnson, *US Backs Study of Safe Injection Sites, Overdose Prevention*, ASSOCIATED PRESS (May 8, 2023), <https://apnews.com/article/safe-injection-sites-opioids-overdose-addiction-d9bcca2500044bfc28f54330bb719ffd> [https://perma.cc/JTN7-UQWP].

<sup>132</sup> Otterman, *supra* note 11.

<sup>133</sup> *Id.*

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

<sup>135</sup> *Id.*

remarks is unknown,” reported that local leaders did not seem “too worried” by the threat.<sup>136</sup> Moreover, comments from a DOJ spokesperson issued shortly after Williams’s statement seemed to suggest that federal nonenforcement might indeed be on the table with respect to safe injection sites. Specifically, the spokesperson “said that supervised consumption sites were being evaluated on a district-by-district basis, in discussion with local leaders, to determine ‘appropriate regulatory guardrails.’”<sup>137</sup>

While there is uncertainty about the federal government’s current position with respect to enforcement against safe injection sites, one thing that is clear is that the issue is only growing in importance as more states and cities have taken steps toward establishing overdose prevention sites. In 2023, Minnesota allocated funds for grants “to establish safe recovery sites that offer harm reduction services and supplies, including . . . safe injection spaces . . .”<sup>138</sup> This made Minnesota the second state to formally sanction safe injection sites. Rhode Island authorized a pilot program to open overdose prevention centers in 2021, although one has yet to open in the state.<sup>139</sup> At the city level, San Francisco’s Board of Supervisors has formally moved to dedicate money from opioid litigation to funding a nonprofit to operate overdose prevention sites, although the effort is currently stalled “over fear of legal ramifications” on the part of the city attorney.<sup>140</sup> With a number of other cities and

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<sup>136</sup> Sahalie Donaldson, *After Damian Williams’ Striking Comments on Supervised Injection Sites, New York Leaders Are Quiet*, CITY & STATE NEW YORK (Aug. 11, 2023), <https://www.cityandstateny.com/politics/2023/08/after-damian-williams-striking-comments-supervised-injection-sites-new-york-leaders-are-quiet/389358/> [<https://perma.cc/2TQJ-M3D3>].

<sup>137</sup> Otterman, *supra* note 11.

<sup>138</sup> 2023 Minn. Sess. Law Serv. Ch. 61 (S.F. 2934); MINN. STAT. § 245B.18(a)(1); see also Kyle Jaeger, *Minnesota Governor Signs Bills to Create Psychedelics Task Force and Allow Safe Drug Consumption Sites*, MARIJUANA MOMENT (May 25, 2023), <https://www.marijuanamoment.net/minnesota-governor-signs-bills-to-create-psychedelics-task-force-and-allow-safe-drug-consumption-sites/> [<https://perma.cc/E27D-YY9V>] (reporting that the bill will provide “more than \$14.5 million in one-time funding that will be distributed annually until 2029, funding grants to create the facilities”).

<sup>139</sup> Jacob Smollen, *Rhode Island Moves Closer to Opening First Overdose Prevention Center*, THE BROWN DAILY HERALD (Feb. 8, 2023), <https://www.browndailyherald.com/article/2023/02/rhode-island-moves-closer-to-opening-first-overdose-prevention-center> [<https://perma.cc/386W-G4X5>].

<sup>140</sup> Nuala Bishari, *Why the Plan to Build New Supervised Consumption Sites in S.F. May Have Just Died in the Water*, S.F. CHRON. (Apr. 11, 2023), <https://www.sfchronicle.com/opinion/article/san-francisco-safe-drug-consumption-site-walgreens-17889354.php> [<https://perma.cc/Z5EG-CZLZ>]. An “unofficial safe consumption site,” the Tenderloin Center, had operated for about one year in San Francisco. *Id.* But it was closed by City officials in late 2022. Tara Campbell, *SF’s Tenderloin Center Closes Sunday, Leaving Most Vulnerable Without Option for Vital Services*, ABC7 NEWS (Dec. 4, 2022), <https://abc7news.com/the-tenderloin-center-san-francisco-homeless-crisis-mayor-london-breed-drugs/12523857/> [<https://perma.cc/4AMB-NGUP>].

states also considering overdose prevention site proposals,<sup>141</sup> it seems like it is only a matter of time before officially-sanctioned sites open outside of New York City.

#### *D. Federal silence and psychedelic-assisted therapy laws*

Psychedelic-assisted therapy laws present the newest theater in the conflict between federal and state drug laws. To date, two states, Oregon and Colorado, have passed laws legalizing psychedelic-assisted therapy.<sup>142</sup> Although similar to state medical marijuana laws in broad strokes, these laws place tighter restrictions on the state-legal distribution and use of psychedelics than most state medical marijuana laws do.

After decades in “scientific limbo,”<sup>143</sup> research into the potential therapeutic benefits of psychedelic drugs is undergoing a renaissance.<sup>144</sup> Studies have suggested there may be a number of potential therapeutic uses for psychedelics—a category that includes psilocybin, LSD, and MDMA, among other substances<sup>145</sup>—including (in the case of psilocybin) the treatment of depression, anxiety disorders, and substance use disorders and (in the case of MDMA) the treatment of post-traumatic stress disorder (PTSD).<sup>146</sup> Research into psilocybin and MDMA has progressed to

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<sup>141</sup> E.g., Jesse Bedayn, States Consider ‘Safe Injection Sites’ to Prevent Overdoses, ASSOCIATED PRESS (Mar. 1, 2023), <https://apnews.com/article/safe-injection-sites-overdose-prevention-60e16e8ff5194c141362d990eee98d3d> [<https://perma.cc/F9BM-AW22>] (reporting that “lawmakers in Colorado, New Mexico, and Nevada” were considering proposals to authorize overdose prevention sites); Somerville Supervised Consumption Site, CITY OF SOMERVILLE, <https://www.somervillema.gov/departments/programs/somerville-supervised-consumption-site> [<https://perma.cc/K7MY-ZRB6>] (Somerville, Massachusetts government website reporting that “[t]he City of Somerville is currently exploring the possibility of opening a local supervised consumption site”).

<sup>142</sup> In addition to these state laws, a number of cities have passed psychedelics decriminalization ordinances. See Patricia J. Zettler, *The FDA’s Power Over Non-Therapeutic Uses of Drugs and Devices*, 78 WASH. & LEE L. REV. 379, 436 (2021) (noting that Ann Arbor, Denver, Oakland, Santa Cruz, and Washington, D.C. had all enacted psychedelic decriminalization policies). Because these local measures do not change state law or legalize distribution, they present a less significant conflict with federal drug laws in comparison with Oregon and Colorado’s state-level psychedelics measures.

<sup>143</sup> DANIELLE GIFFORT, *ACID REVIVAL* 3 (2020).

<sup>144</sup> See Dustin Marlan, *Beyond Cannabis: Psychedelic Decriminalization and Social Justice*, 23 LEWIS & CLARK L. REV. 851, 853–54 (2019) (discussing the “psychedelic renaissance”).

<sup>145</sup> See Mason Marks, *Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 69, 77–78 (2018) (discussing how, although “[t]here is currently no universally agreed upon definition of ‘psychedelics,’” the category has traditionally included psilocybin and LSD); *id.* at 85–86 (discussing MDMA as a psychedelic). Although MDMA is not always classified as one of the “classic psychedelics,” it is “sometimes considered under the broad umbrella of psychedelics.” Marlan, *supra* note 144, at 857 n.33 and accompanying text.

<sup>146</sup> Mason M. Marks, *Controlled Substances Regulation for the COVID-19 Mental Health Crisis*, 72 ADMIN. L. REV. 649, 654 (2020). For a discussion of studies into the potential therapeutic

the point that both drugs are now “making their way through the Food and Drug Administration (FDA) approval pipeline” and both have received breakthrough therapy designation from the FDA.<sup>147</sup> Given the legal barriers to rescheduling marijuana<sup>148</sup> and the political barriers to reforming federal marijuana law in Congress,<sup>149</sup> it now seems possible that MDMA and/or psilocybin will be legally

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uses of LSD, see Juan José Fuentes et al., *Therapeutic Use of LSD in Psychiatry: A Systematic Review of Randomized-Controlled Clinical Trials*, 10 *FRONTIERS IN PSYCHIATRY* 1 (2020).

<sup>147</sup> Mason Marks & I. Glenn Cohen, *Patents on Psychedelics: The Next Legal Battlefield of Drug Development*, 135 *HARV. L. REV. F.* 212, 214 (2022) (discussing the status of MDMA and psilocybin in the FDA process and reporting that MDMA received breakthrough therapy designation for PTSD in 2017 and psilocybin received breakthrough therapy designation for treatment-resistant depression and major depressive disorder in 2018 and 2019).

<sup>148</sup> The DEA is in the process of reviewing marijuana’s scheduling status pursuant to a directive issued by President Biden. Natalie Fertig & Paul Demko, *Slightly Higher Times: Biden Administration Moves to Loosen Weed Restrictions*, *POLITICO* (Aug. 30, 3023). But it may be difficult for the DEA to reschedule marijuana without altering its interpretation of the scheduling criteria. See Alex Kreit, *Federal Marijuana Reform and the Controlled Substances Act*, 101 *B.U. L. REV.* 1232, 1242 (2021) (arguing that, because of the DEA’s requirement that the chemistry of a drug be “known and reproducible” in order to have an accepted medical use under the Controlled Substances Act, “it is difficult to see how the DEA could ever move marijuana from Schedule I to a different schedule under the agency’s prevailing” definition of accepted medical use). For an argument that the DEA has several legal avenues through which it could reschedule marijuana, see Scott Bloomberg, Alexandra Harriman & Shane Pennington, *Re/Descheduling Marijuana Through Administrative Action*, \_\_ *OKLA. L. REV.* \_\_ (forthcoming 2024).

<sup>149</sup> Robert A. Mikos, *Observations on 25 Years of Cannabis Law Reforms and Their Implications for the Psychedelic Renaissance in the United States*, 18 *ANN. REV. L. & SOC. SCI.* 155, 159 (2022) (discussing how efforts to reform federal marijuana law “have repeatedly stalled in Congress”).

sanctioned for medical use under federal law before marijuana is.<sup>150</sup> Some states have decided not to wait for a possible change in federal law, however.<sup>151</sup>

In 2020, Oregon became the first state to legalize the manufacture, distribution, and possession of psilocybin for therapeutic purposes, when voters passed Measure 109, the Oregon Psilocybin Services Act.<sup>152</sup> The law, which is limited to psilocybin and does not address other psychedelics, aims to create a legal market for the guided, therapeutic use of psilocybin by adults.<sup>153</sup> In at least one respect, the law is broader than state medical marijuana laws: although it legalizes psilocybin only for therapeutic purposes, “it does not require users to be diagnosed with a medical condition” to purchase and use psilocybin.<sup>154</sup> But adult access to psilocybin is much more tightly controlled under Oregon’s law than access to marijuana in legalization states. This is because the law only legalizes the possession and use of psilocybin “at a psilocybin service center” and “under the supervision of a psilocybin service facilitator.”<sup>155</sup> As a result of this restriction, the state-legal market in Oregon for

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<sup>150</sup> Sara Reardon, *US Could Soon Approve MDMA Therapy—Opening an ERA of Psychedelic Medicine*, 616 *NATURE* 428 (Apr. 19, 2023). In another sign of the progress of research into medical uses of psychedelics, in June 2023, the FDA issued draft guidance on clinical investigations into psychedelic drugs. See *Psychedelic Drugs: Considerations for Clinical Investigations; Draft Guidance for Industry; Availability*, 88 *Fed. Reg.* 41407, 41407 (June 26, 2023) (“Because interest in the therapeutic potential of psychedelic drugs has been increasing and designing clinical trials to evaluate these compounds presents unique challenges, FDA has developed this draft guidance to present foundational aspects for sponsors to consider.”). Although FDA approval of MDMA or psilocybin would not directly result in a change in their status as Schedule I substances under the CSA, because approval would mean that the substance has a “currently accepted use in treatment in the United States,” it would pave the way for rescheduling under the CSA. 21 U.S.C. § 812(b). See Rebecca S. Eisenberg & Deborah B. Leiderman, *Cannabis for Medical Use: FDA and DEA Regulation in the Hall of Mirrors*, 74 *FOOD & DRUG L.J.* 246, 256 (2019) (discussing the relationship between FDA approval and regulation under the CSA and explaining that while “FDA standards for approving new drugs under the FDCA and DEA standards for rescheduling drugs are not identical,” they are related particularly with respect to determinations of the CSA’s accepted medical use criterion).

<sup>151</sup> Kathryn L. Tucker et al., *In Search Of: A Federal State Harbor for State Legalization of Psilocybin*, 26 *LEWIS & CLARK L. REV.* 1203, 1207 (2023) (“Given the barriers to federal reform, advocates have turned to state and local governments to expand access to psilocybin and other psychedelic treatments.”); Robert A. Mikos, *Observations on 25 Years of Cannabis Law Reforms and Their Implications for the Psychedelic Renaissance in the United States*, 18 *ANN. REV. L. & SOC. SCI.* 155, 160–61 (2022) (discussing why proponents of psychedelics legalization might view states as a more viable path for reform).

<sup>152</sup> Oregon Psilocybin Services Act, 2021 Or. Laws ch. 1, § 33 (Ballot Measure 109) (codified at OR. REV. STAT. §§ 475A.210-722 (2022)). See also Tucker et al., *supra* note 20, at 1209–10 (discussing enactment of the law).

<sup>153</sup> OR. REV. STAT. § 475A.205. See also OR. REV. STAT. § 475A.495 (prohibiting people under 21 years of age from entering or attempting to enter “any portion of” a psilocybin service center).

<sup>154</sup> Mikos, *Observations*, *supra* note 149, at 163.

<sup>155</sup> OR. REV. STAT. § 475A.498 (“A client may purchase, possess, and consume a psilocybin product (1) Only at a psilocybin service center; and (2) Only under the supervision of a psilocybin service facilitator.”). The law also requires a person to attend “a preparation session” before

psilocybin is limited solely to guided, therapeutic use on the premises of a licensed center.<sup>156</sup>

Oregon's ballot measure directed state health officials to craft regulations for the licensing and operation of psilocybin service centers and facilitators,<sup>157</sup> a process that took some time—not a surprise given the absence of precedent from other states.<sup>158</sup> As a result, Oregon did not issue its first psilocybin service center license until May 2023<sup>159</sup> and the law is still in the process of being implemented.<sup>160</sup> Early signs indicate the number of people using psilocybin under the law is likely to be relatively small, at least in the short term. Prospective service providers have told reporters that “their services could cost hundreds to thousands of dollars . . .”<sup>161</sup>

Colorado voters followed in Oregon's footsteps in 2022, with passage of Proposition 122.<sup>162</sup> Colorado's law mirrors Oregon's by restricting the legal marketplace to distribution and use of psilocybin at licensed service centers (labeled

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participating in the “administration session” at which the psilocybin is used. OR. REV. STAT. § 475A.345. See also OR. ADMIN. RULE 333-333-5000 (2022) (providing regulatory requirements for preparation sessions).

<sup>156</sup> Id. In 2020, Oregon voters passed a separate ballot measure decriminalizing the possession of small amounts of drug for personal use. See Cailin Harrington, *After Fifty Years of the War on Drugs, the Nation Looks West: Why Oregon Required the Drug Addiction Treatment and Recovery Act and What We Can Learn from It*, 53 SETON HALL L. REV. 1005 (2023) (providing an overview and analysis of Oregon's drug decriminalization law). As a result, possession of small amounts of psilocybin outside of service centers is decriminalized, although not legal. See id. at 1024 (noting that under Oregon's law “unlawful possession of small amounts of controlled substances is a Class E violation instead of a crime”).

<sup>157</sup> OR. REV. STAT. §§ 475A.305, 475A.325.

<sup>158</sup> See Andrew Jacobs, *Legal Use of Hallucinogenic Mushrooms Begins in Oregon*, N.Y. TIMES (Jan. 3, 2023), <https://www.nytimes.com/2023/01/03/health/psychedelic-drugs-mushrooms-oregon.html> [<https://perma.cc/5U4R-S7J9>] (reporting on the rollout of Oregon's law and noting that “the process has been slow and bumpy at times”).

<sup>159</sup> Ryan Haas, *Oregon Approves Final Link in Legal Psychedelic Mushroom Pipeline*, OREGON PUBLIC BROADCASTING (May 5, 2023), <https://www.opb.org/article/2023/05/05/oregon-approves-final-link-in-legal-psychedelic-mushroom-pipeline/> [<https://perma.cc/59KB-7PL4>].

<sup>160</sup> Id. (reporting that as of early May “the industry remains limited, with approvals for just three growers, a handful of facilitators, a single laboratory and [one service center] to participate in the market”).

<sup>161</sup> Id.; See also Jacobs, *supra* note 158 (reporting that “[a] single session is likely to cost hundreds, if not thousands, of dollars”).

<sup>162</sup> Ben Markus, *Proposition 122, Decriminalizing Psilocybin Mushrooms, Headed to Victory*, COLO. PUB. RADIO NEWS (Nov. 9, 2022), <https://www.cpr.org/2022/11/09/Colorado-proposition-122-psychedelic-mushrooms-decriminalization-results-2022-election/> [<https://perma.cc/9EDX-BEPB>].

“healing centers” under Colorado’s law<sup>163</sup>) under the supervision of a facilitator; retail sales for off-site use will not be allowed. The licensing component of Colorado’s law will not be implemented until sometime in 2024 or 2025, after state officials have drafted implementing regulations and begun to issue licenses.<sup>164</sup> Notably, while Colorado’s law only directly legalizes psilocybin for therapeutic use, it gives state regulators the power to license distribution of three other naturally occurring psychedelics: DMT (dimethyltryptamine), ibogaine, and mescaline (found in peyote).<sup>165</sup>

Although Colorado and Oregon’s psychedelics laws both tightly control the legal commercial market, Colorado’s law is more expansive in one important way. In addition to creating a licensed healing center system, Colorado’s law legalizes the cultivation and sharing “for the purpose of personal use and without remuneration” of psilocybin, DMT, ibogaine, and mescaline.<sup>166</sup> The law does not define personal use by reference to the quantity of a substance, but it does caution that personal use “does not mean the sale of natural medicine or natural medicine product for remuneration [or] the possession, cultivation, or manufacture of natural medicine or natural medicine product with intent to sell the natural medicine or natural medicine product for remuneration . . .”<sup>167</sup> Nevertheless, it appears that a psychedelics “gray market” has begun to emerge in Colorado,<sup>168</sup> as some have started to test the limits of the law’s sharing provision.<sup>169</sup>

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<sup>163</sup> COLO. REV. STAT. § 44-50-103(6) (defining a “healing center” as “a facility where an entity is licensed by the state licensing authority that permits a facilitator to provide and supervise natural medicine services for a participant”).

<sup>164</sup> Andrew Kenney, What to Know About Colorado’s Psychedelic Law, COLORADO PUBLIC RADIO NEWS (June 21, 2023), <https://www.cpr.org/2023/06/21/colorado-psychedelic-law-for-psilocybin-mushrooms/> [<https://perma.cc/4EJR-HKLZ>] (reporting that “[t]he healing centers are still a long way out” and that Colorado will begin “accepting applications for healing centers, cultivators, testing centers and other related businesses” by December 31, 2024).

<sup>165</sup> COLO. REV. STAT. § 44-50-103(13)(b)(i)–(iii).

<sup>166</sup> COLO. REV. STAT. § 18-18-434(5)(a) (“Unless expressly limited by this section, article 170 of title 12, or article 50 of title 44, a person who for the purpose of personal use and without remuneration, possesses, consumes, shares, cultivates, or manufactures natural medicine or natural medicine product, does not violate state law, or county, municipality, or city and county ordinance, rule, or resolution.”); see also COLO. REV. STAT. § 18-18-434(12)(b)(I) (defining “natural medicine” to include DMT, mescaline, ibogaine, psilocybin, and psilocyn).

<sup>167</sup> COLO. REV. STAT. ANN. § 18-18-434(12)(d) (West 2023). The law defines personal use as “the consumption or use of natural medicine or natural medicine product; or the amount of natural medicine or natural medicine product a person may lawfully possess, cultivate, or manufacture that is necessary to share with another person who is twenty-one years of age or older within the context of counseling, spiritual guidance, beneficial community-based use and healing, supported use, or related services.” *Id.*

<sup>168</sup> Kenney, *supra* note 164.

<sup>169</sup> See Ryan Spencer, Dillon Man Accused of Selling Psychedelic ‘Magic Mushrooms’ Claims He Was Gifting Them Under Colorado’s New Proposition, SUMMIT DAILY (May 12, 2023),

State legalization of psychedelics for therapeutic uses seems unlikely to stop with Oregon and Colorado. Although they are currently the only two states that have enacted broad psychedelics legalization measures, others have passed more limited psychedelics reforms<sup>170</sup> and, as of January 2023, lawmakers in at least eleven states were “pursuing psychedelics reform legislation for the 2023 session, with proposals ranging from legalizing psilocybin for therapeutic use to decriminalizing natural plants and fungi across the board.”<sup>171</sup>

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<https://www.summitdaily.com/news/dillon-man-accused-of-selling-psychedelic-magic-mushrooms-claims-he-was-gifting-them-under-colorados-new-proposition/> [<https://perma.cc/K8PF-EY7V>] (reporting on the case of a man accused of illegally selling psilocybin mushrooms who “claim[ed] he was ‘donating,’ not selling, the mushrooms, according to a warrantless arrest probable cause statement”). Although the Colorado psychedelics law does not legalize distribution for remuneration, its definition of personal use expressly permits sharing in connection with other bona fide services, so long as there is no charge for the psychedelics or advertisement of the availability of psychedelics. COLO. REV. STAT. ANN. § 18-18-434(12)(d) (West 2023) (“Nothing in this section precludes remuneration for bona fide harm reduction services or bona fide support services used concurrently with the sharing of natural medicine or natural medicine product, provided that there is no advertisement related to the sharing of natural medicine, natural medicine product, or the services provided, and provided that the individual providing the services informs an individual engaging in the services that the individual is not a licensed facilitator pursuant to article 170 of title 12.”). This bona fide services proviso seems to contemplate the prospect of a health professional giving psilocybin to someone who she is already providing other services to—for example, a psychiatrist giving an existing patient psilocybin—without having to obtain a healing center license. Of course, the statute does not require a preexisting relationship between the service provider and the recipient of the psychedelics. But the prohibition on advertising appears meant to further that end. Banning advertising should, in theory, prevent the sharing provision from being used as a loophole for unlicensed psychedelics healing centers to operate under the guise of giving away psilocybin in combination with the sale of another bona fide service. It remains to be seen how effective the law will be at preventing an unlicensed gray market in practice, however. See Kenney, *supra* note 164 (reporting that “[u]nlicensed ‘guides’ are also running services where they ‘share’ mushrooms and other substances but charge a fee to accompany clients through psychedelic experiences”). Whether enforcement that hinges on proving that a person’s services were not bona fide and/or were illegally advertised will be sufficient to deter people from operating unlicensed psychedelics businesses is an interesting question. But, because the focus of this paper is on federal enforcement against people who are operating in compliance with state law, it is a question we will have to leave for another day.

<sup>170</sup> In 2022, Connecticut passed a law to help facilitate FDA-sanctioned access to psilocybin and MDMA in the state. CONN. GEN. STATS. ANN. § 17a-484g (West 2022) (establishing a pilot program to “provide qualified patients with MDMA-assisted or psilocybin-assisted therapy as part of a research program approved by the federal Food and Drug Administration”). See also Kyle Jaeger, Connecticut Governor Signs Bill Creating Psychedelic Treatment Program, MARIJUANA MOMENT (May 9, 2022), <https://www.marijuanamoment.net/connecticut-governor-signs-bill-creating-psychedelic-treatment-program/> [<https://perma.cc/2PQV-NF5P>] (reporting on passage of the law). In 2023, Minnesota established a task force “to explore legalizing psychedelic drugs” in the state. Jessie Van Berkel & Briana Bierschbach, Minnesota Passes Major Drug Changes, from Psychedelics Task Force to Legalizing Paraphernalia, STAR TRIBUNE (May 30, 2023), <https://www.startribune.com/minnesota-passes-major-drug-changes-from-psychedelics-task-force-to-legalizing-paraphernalia/600278834/> [<https://perma.cc/9GXL-2SAG>].

<sup>171</sup> Kyle Jaeger, Lawmakers Are Already Pursuing Psychedelics Legislation in Nearly a Dozen States for 2023, MARIJUANA MOMENT (Jan. 9, 2023), <https://www.marijuanamoment.net/lawmakers->

As state psychedelics law reform efforts continue to gain momentum, the question of federal enforcement remains. Psilocybin, like marijuana, is currently classified as a Schedule I substance under federal law.<sup>172</sup> Even if psilocybin were to win FDA approval for a specific use in the near future, that would not solve the conflict with state laws like Oregon and Colorado’s. This is because FDA approval and DEA rescheduling would only allow legitimate medical use under federal law, whereas Oregon and Colorado law both legalize broad therapeutic use without the need for a medical diagnosis (and, in the case of Colorado, home cultivation of both psilocybin and other substances).<sup>173</sup> To date, federal officials have made no public statements about their enforcement intentions with respect to Oregon and Colorado’s psychedelics laws. This silence is especially notable now that Oregon has finalized its regulations and begun to issue licenses under its law. Following passage of the first state marijuana legalization laws in Colorado and Washington, the DOJ issued its nonenforcement policy before either state had adopted its implementing regulations, in an apparent effort to provide clarity before the laws actually took effect.<sup>174</sup> The DOJ’s decision not to publicly address Oregon’s psychedelics law on a similar timeline might be due to the law’s relatively limited impact (marijuana is much more widely used than psilocybin)<sup>175</sup> or, perhaps, to a decision to let the continued lack of enforcement in marijuana legalization states speak for itself with respect to the DOJ’s approach to state psychedelics legalization laws. Whatever the

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are-already-pursuing-psychedelics-legislation-in-nearly-a-dozen-states-for-2023/  
[<https://perma.cc/B6MF-V4QK>].

<sup>172</sup> 21 C.F.R. § 1308.11(d)(29)–(30) (2023). DMT, mescaline, and ibogaine are all also Schedule I substances under federal law. See *id.* at § 1308.11(d)(11); § 1308.11(d)(19) (MDMA); § 1308.11(d)(21) (DMT); § 1308.11(d)(21) (ibogaine); § 1308.11(d)(24) (mescaline).

<sup>173</sup> Robert A. Mikos, *Observations on 25 Years of Cannabis Law Reforms and Their Implications for the Psychedelic Renaissance in the United States*, 18 *ANN. REV. L. & SOC. SCI.* 155, 158 (2022) (“[A]lthough moving a Schedule I drug to a lower schedule would enable medical use thereof; it would not permit use for any other purpose.”); see also *id.* at 163 (observing that, “although Oregon’s Measure 109 ostensibly legalizes use of psilocybin only for ‘therapeutic’ purposes, it does not require users to be diagnosed with any medical condition, nor does it require those who administer the drug to be medical professionals”).

<sup>174</sup> John Ingold, *Federal Government Won’t Block Colorado Marijuana Legalization*, *DENVER POST* (Aug. 29, 2013), <https://www.denverpost.com/2013/08/29/federal-government-wont-block-colorado-marijuana-legalization/> [<https://perma.cc/YW2S-LTCH>].

<sup>175</sup> The annual National Survey on Drug Use and Health, conducted by the Substance Abuse and Mental Health Services Administration (SAMHSA), does not report past-year use rates for psilocybin on its own. Instead, it groups several drugs, including psilocybin, in the category of “hallucinogens,” which includes LSD, peyote, mescaline, psilocybin, MDMA, ketamine, DMT, and salvia. The 2021 survey found that 2.6 percent of people over 12 had used hallucinogens in the past year; 18.7 percent had used marijuana in the past year. *SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2021 NATIONAL SURVEY ON DRUG USE AND MENTAL HEALTH 18* (2022). See also *id.* (“Several drugs are grouped under the category of hallucinogens, including LSD, PCP, peyote, mescaline, psilocybin mushrooms, ‘Ecstasy’ (MDMA or ‘Molly’), ketamine, DMT/AMT/‘Foxy,’ and *Salvia divinorum*.”).

explanation, unless and until the DOJ states otherwise, federal prosecution of state-compliant psilocybin producers and providers remains a possibility.

## II. COMPARING FRAMEWORKS FOR NONENFORCEMENT

As the discussion thus far shows, the federal government does not appear to have adopted—and certainly has not articulated—a guiding set of principles for responding to state and local laws that legalize conduct that is prohibited by federal drug laws. The federal government’s approach to state marijuana legalization is now settled on a policy of nonenforcement. But federal enforcement policy with respect to safe injection sites and psychedelics therapy laws remains uncertain. After taking preemptive action to block a safe injection site from opening in Philadelphia,<sup>176</sup> two safe injection sites in New York City have been openly operating for nearly two years without federal interference.<sup>177</sup> It seems likely that the change in presidential administrations has played a part in this—the DOJ’s lawsuit in Philadelphia was filed during the Trump administration, while the New York City safe injection sites opened in 2021. But, although the DOJ has apparently dialed back its efforts to block safe injection sites under President Biden, it has not adopted a nonenforcement policy with respect to them. The DOJ’s lawsuit against Safehouse remains ongoing<sup>178</sup> and, in 2023, the federal prosecutor in New York suggested that enforcement against the New York City injection sites might be a possibility.<sup>179</sup> In the absence of a federal nonenforcement policy, the prospect of federal enforcement has continued to deter cities from opening safe injection sites. In San Francisco, for example, the city attorney has reportedly balked at releasing funding for safe injection sites due to concerns about the prospect of federal enforcement.<sup>180</sup> The federal government’s position with respect to state psychedelics laws is even more of a mystery. Even though Oregon has begun issuing licenses to psilocybin service

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<sup>176</sup> *United States v. Safehouse*, 985 F.3d 225 (3d Cir. 2021).

<sup>177</sup> Otterman, *supra* note 11.

<sup>178</sup> Nicole Leonard, *Safehouse Supervised Injection Settlement Talks Fail as the DOJ Pushes to Dismiss Civil Lawsuit*, WHYY (Jul. 30, 2023), <https://whyy.org/articles/safehouse-supervised-injection-suit-department-justice-dismiss/> [<https://perma.cc/UF2H-ZGDR>].

<sup>179</sup> Otterman, *supra* note 11.

<sup>180</sup> Nuala Bishari, *Why the Plan to Build New Supervised Consumption Sites in S.F. May Have Just Died in the Water*, S.F. CHRON. (Apr. 11, 2023), <https://www.sfchronicle.com/opinion/article/san-francisco-safe-drug-consumption-site-walgreens-17889354.php> [<https://perma.cc/4B4U-AVZ7>] (reporting that the San Francisco City Attorney was blocking the release of funds approved by the Board of Supervisors to fund overdose prevention centers in the city). In New York City, although two safe injection sites are operating, Governor Kathy Hochul rejected a proposal to support the centers with opioid settlement money, in part on the ground that the centers violate federal law. Scott Heins, *Hochul Says No to Funding Overdose Prevention Centers with Opioid Settlement Dollars*, GOTHAMIST (Dec. 6, 2022), <https://gothamist.com/news/hochul-says-no-to-funding-overdose-prevention-centers-with-opioid-settlement-dollars> [<https://perma.cc/94GJ-3W29>].

center operators, the DOJ has yet to issue so much as a statement about Oregon's law.

This section examines some of the principles that might guide the federal government in developing enforcement policies in response to state drug policy reforms. Before proceeding, it is helpful to briefly revisit the significance of resource constraints to federal nonenforcement policies. As discussed above, states and localities have always played the predominant role in drug enforcement.<sup>181</sup> The federal government prosecutes only a small fraction of drug offenses in comparison to states, and it does not have the resources (or the street-level policing presence) to substantially increase drug prosecutions—at least, not without deprioritizing the enforcement of other federal criminal laws. In normal circumstances, when federal and state drug laws are aligned, federal officials might consider objectives like avoiding unwarranted disparities or maximizing deterrence of specific conduct when assessing their enforcement practices. But when a state legalizes drug-related conduct that is federally prohibited, federal officials have to decide whether to use their limited enforcement resources to try to block implementation of the state law. When the DOJ adopted its final marijuana nonenforcement policy in 2013, it expressly cited the need for the Department to “use[] its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.”<sup>182</sup>

Resource constraints may explain the need for federal officials to adopt enforcement policies. But the fact that the federal government “lacks the resources to arrest and prosecute every violator of every law”<sup>183</sup> is not very helpful in deciding when the federal government should refrain from enforcement—particularly in the face of a conflict with state law. By the time Colorado and Washington passed marijuana legalization laws in 2012, it was clear that federal efforts to block state medical marijuana laws had not succeeded and that a lack of resources was to blame.<sup>184</sup> But that does not mean the DOJ's only option for responding to state recreational marijuana legalization was to adopt a policy of nonenforcement. The DOJ could have decided, instead, that the best way to use its “limited investigative and prosecutorial resources”<sup>185</sup> would be to halt all other drug enforcement in legalization states (on the theory that the states could take up the enforcement

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<sup>181</sup> See *supra* Section II.A.

<sup>182</sup> Cole Memorandum, *supra* note 1, at 1.

<sup>183</sup> *United States v. Texas*, 599 U.S. 670 (2023) (observing in the context of immigration enforcement that the federal government “must prioritize its enforcement efforts” because “the Executive Branch invariably (i) lacks the resources to arrest and prosecute every violator of every law and (ii) must constantly react and adjust to the ever-shifting public-safety and public-welfare needs of the American people.”).

<sup>184</sup> See *supra* Section II.B.

<sup>185</sup> Cole Memorandum, *supra* note 1, at 1.

slack)<sup>186</sup> and reallocate the resources to marijuana enforcement. To be clear, I do not believe that such a policy would have been the most rational way to use limited federal enforcement resources. The point here is that resource constraints are best seen as a necessary, but not sufficient, condition for adoption of a federal nonenforcement policy.

Nor does the DOJ's now decade-long nonenforcement policy with respect to state marijuana legalization laws necessarily mean that the only consistent, principled federal response to other state drug policy reforms is also nonenforcement. The federal government could distinguish a different state reform on the ground that it presents a greater threat to federal interests than state marijuana legalization, or that it would take fewer resources to block than state marijuana legalization.

This section aims to tease out the different considerations that might justify a decision to not enforce federal law in response to state drug policy reforms—or, put differently, to let the state reform take effect without interference. I do not wade into the debate over the propriety of nonenforcement policies.<sup>187</sup> Instead, I take the DOJ's marijuana enforcement policy as a precedential starting point. Of course, it would be naïve to be blind to the possibility that decisions about how to approach state drug policy reforms might be based on purely political calculations. Marijuana legalization has broad popular support,<sup>188</sup> multimillion dollar businesses, and important political backers; after Attorney General Sessions rescinded the 2013 Cole Memo, a Republican Senator from Colorado “threatened to hold up Department of Justice nominations”<sup>189</sup> in response. Safe injection sites are more politically controversial,<sup>190</sup> with a much smaller base of political support. The DOJ's decision

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<sup>186</sup> Cf. Brickey, *supra* note 41, at 1161 (observing that states vigorously enforce their own drug laws and asking “[w]hy is the federal government duplicating state drug enforcement efforts, inundating federal courts with cases that could (and should) be tried in state courts?”).

<sup>187</sup> For discussion of this question, see sources cited *supra* note 31.

<sup>188</sup> Ted Van Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Medical or Recreational Use*, PEW RESEARCH CTR. (Nov. 22, 2022), <https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/> [https://perma.cc/R94Y-5D3F].

<sup>189</sup> Camila Domonoske, *Colorado Sen. Cory Gardner Continues His Standoff with Sessions Over Marijuana*, NPR (Jan. 10, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/10/577103864/colorado-sen-cory-gardner-continues-his-standoff-with-jeff-sessions-over-marijua> [https://perma.cc/96GY-W74G]. Gardner only lifted his “blockade” of DOJ nominees three months later, after receiving assurances from Donald Trump that the “rescission of the Cole memo will not impact Colorado’s marijuana industry.” Seung Min Kim, *Trump, Gardner Strike Deal on Legalized Marijuana, Ending Standoff Over Justice Nominees*, WASH. POST (Apr. 13, 2018), [https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800\\_story.html](https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html) [https://perma.cc/WGK9-ZNBA].

<sup>190</sup> See Kelly M. Socia et al., *Focus on Prevention: The Public is More Supportive of “Overdose Prevention Sites” Than They Are of “Safe Injection Facilities,”* 20 *CRIMINOLOGY & PUB. POL’Y* 729,

to come out aggressively against safe injection sites in 2019 while continuing to leave state marijuana legalization laws alone might simply be a product of that political reality. But, to extent that enforcement decisions are being driven by policy considerations, the discussion that follows aims to illuminate the terrain.

I suggest three possible frameworks that could justify the federal marijuana nonenforcement policy and help guide decisions about whether to adopt a similar policy with respect to other state drug policy reforms. First, the marijuana nonenforcement policy might be justified by citing traditional federal enforcement interests; I call this the traditional enforcement interests framework. Second, under a feasibility framework, nonenforcement might be justified if the federal government finds itself unable to block implementation of the state reform without an impractical reallocation of enforcement resources. Third, under the federalism framework, the federal government's traditionally limited role in drug enforcement might justify nonenforcement when it would prevent a state from pursuing its own policy choice. In the pages that follow, I describe each framework and consider how it would apply to the three state drug policy reforms discussed in this article: marijuana legalization, safe injection sites, and psychedelics therapy.

#### *A. The traditional federal enforcement interests framework*

In determining whether or not resource constraints might weigh in favor of a federal nonenforcement policy in response to a state drug policy reform, traditional federal enforcement interests are an obvious potential North Star. The DOJ's official manual for United States Attorneys<sup>191</sup> has long instructed federal prosecutors to consider if prosecution would serve a "substantial federal interest" when deciding whether or not to initiate charges in an individual case.<sup>192</sup> Focusing on traditional

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744 (2021) (conducting a study into public opinion on safe injection sites and observing that the "results suggest that support for these facilities, at both the general U.S. and local neighborhood levels, is driven primarily by the label used to refer to the facilities" and that support was higher when they were labeled overdose prevention sites rather than safe injection facilities).

<sup>191</sup> This DOJ document, which is currently titled the Justice Manual, "was previously known as the United States Attorneys' Manual (USAM)" until 2018. U.S. DEP'T OF JUST., Just. Manual (2018), <https://www.justice.gov/jm/justice-manual> [<https://perma.cc/4X87-P54Y>].

<sup>192</sup> In its present form, the manual advises federal prosecutors to bring charges in cases where there will probably be sufficient evidence to sustain a conviction "unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution." U.S. DEP'T OF JUST., Just. Manual (2018), § 9-27-220, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27-220> [<https://perma.cc/X6H6-D74N>]. For a discussion of previous versions, see Andrew J. LeVay, Urgent Compassion: Medical Marijuana, Prosecutorial Discretion and the Medical Necessity Defense, 41 B.C. L. REV. 699, 737-38 (2000) (discussing the 1997 version of the USAM and reporting that it "instructs federal prosecutors to commence with prosecution when a federal offense is violated and there is evidence to convict, unless no 'substantial federal interest' is served by the prosecution"). See also Nicole T. Amsler, Leveling the Playing Field: Applying Federal Corporate

federal enforcement interests when deciding how to respond to state drug policy reforms could be seen as a natural extension of that broader guidance.

It is not surprising, then, that this was the primary justification cited in the 2013 Cole Memorandum, which suggested that prosecuting state-compliant marijuana businesses was simply not within the traditional enforcement priorities of the DOJ. The memo expressly referred to the importance of federal enforcement interests and priorities throughout. After stating the DOJ's commitment to "using its limited . . . resources to address the most significant threats in the most effective, consistent, and rational way," the core of the 2013 memo set out eight "enforcement priorities that are particularly important to the federal government."<sup>193</sup> These priorities included preventing the distribution of marijuana to minors, preventing marijuana sales revenue "from going to criminal enterprises," and preventing driving while under the influence.<sup>194</sup> The memo later emphasized that, in making prosecutorial decisions, "[t]he primary question in all cases—and in all jurisdictions—should be whether the conduct at issue implicates one or more of the enforcement priorities listed above."<sup>195</sup>

The importance of traditional federal enforcement interests also featured in the nonenforcement policy's discussion of state marijuana legalization laws. Referring again to the eight enforcement priorities, the memo claimed that, "[o]utside of these enforcement priorities, the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotic laws."<sup>196</sup> In something of an understatement, the memo continued that state marijuana legalization "affects this traditional joint federal-state approach to narcotics enforcement."<sup>197</sup> The memo then went on to discuss the importance of robust regulations to state marijuana legalization laws in relation to the DOJ's previously stated concerns about large-scale marijuana businesses<sup>198</sup> and its traditional enforcement priorities. Specifically, the policy advised federal prosecutors that they "should not consider the size or commercial nature of a marijuana operation alone" in exercising their discretion, because "the existence of a strong and effective state regulatory system, and an operation's compliance with

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Charing Considerations to Individuals, 66 DUKE L.J. 169, 187–89 (2016) (providing a brief history and overview of the USAM).

<sup>193</sup> Cole Memorandum, *supra* note 1, at 1.

<sup>194</sup> *Id.* at 1–2.

<sup>195</sup> *Id.* at 3.

<sup>196</sup> *Id.* at 2.

<sup>197</sup> *Id.*

<sup>198</sup> See Cole Memorandum (2011), *supra* note 81, at 2 (observing that some planned state medical marijuana "facilities have revenue projections in the millions of dollars" and stating that "[t]he Ogdon Memorandum was never intended to shield such activities from federal enforcement action and prosecution").

such a system, may allay the threat that an operation's size poses to federal enforcement interests."<sup>199</sup>

If the 2013 Cole Memo's stated justification were to serve as the guiding light for responding to other state drug policy reforms, the DOJ would follow a framework based on core federal drug enforcement priorities. Under such a framework, if a state were to legalize conduct prohibited by federal drug laws, a federal nonenforcement policy would be warranted if the conduct authorized by the state law did not pose a threat "to federal enforcement interests."<sup>200</sup>

City-sanctioned safe injection sites and state psychedelic therapy laws would be very well-positioned under such a framework. Under a framework based on traditional federal drug enforcement priorities, the case for nonenforcement would be stronger—arguably, much stronger—with respect to both of those reforms than it is for state marijuana legalization laws. Overdose prevention sites, in particular, would seem to be a quintessential local concern.<sup>201</sup> Overdose prevention sites do not manufacture or distribute controlled substances, or even possess them. No one seriously claims that they directly contribute to the market for illegal drugs.<sup>202</sup> Opponents of overdose prevention sites have argued that the sites could indirectly increase drug use by creating a culture of permissiveness.<sup>203</sup> There does not appear to be any empirical evidence backing this theory; in contrast, there is some evidence to suggest safe injection sites (which often offer drug treatment resources to clients) might increase participation in drug treatment.<sup>204</sup> In any event, even if concerns about normalization of drug use were to prove correct, any conceivable impact in this regard would be quite localized.

The only federal statute the DOJ has alleged that safe injection site operators might violate, the crack house statute, was enacted to target a very different and specific concern: run-down, often abandoned houses or apartments that are used to sell or consume drugs.<sup>205</sup> Although the Third Circuit has held that the crack house

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<sup>199</sup> Cole Memorandum, *supra* note 1, at 3.

<sup>200</sup> *Id.*

<sup>201</sup> Kreit, *supra* note 10, at 465–66 (discussing federal enforcement interests and safe injection sites).

<sup>202</sup> Because overdose prevention sites do not provide drugs, they would not be a draw for drug "tourists" coming from out of town in order to obtain drugs. If local police were to allow illegal drug sellers to operate unimpeded near sanctioned safe injection sites, that could attract non-locals to the area to purchase drugs. There is no indication any city is contemplating such a policy, however.

<sup>203</sup> Rosenstein, *supra* note 113 (arguing that safe injection sites would "normalize drug use and facilitate addiction by sending a powerful message to teenagers that the government thinks illegal drugs can be used safely").

<sup>204</sup> Mary Clare Kennedy et al., Health Impacts of a Scale-Up of Supervised Injection Services in a Canadian Setting: An Interrupted Time Series Analysis, 117 *ADDICTION* 986, 992–93 (2022).

<sup>205</sup> See 132 *CONG. REC.* 18 (daily ed. Sep. 26, 1986) (excerpt of Senate Amendment No. 3034 to H.R. 5484) (referencing concerns about "so-called 'crack-houses,' where 'crack', cocaine and other

statute's text is broad enough to encompass safe injection sites, no other circuit court has addressed the issue, the opinion was not unanimous, and the majority itself acknowledged that Congress "never expected the law would apply to safe-injection sites."<sup>206</sup> Even with respect to its intended targets, the crack house statute is used incredibly rarely. It was the primary offense of conviction for just twenty-two defendants who received federal sentences in 2022, according to sentencing guidelines applications.<sup>207</sup>

In sum, if the DOJ were to let traditional federal enforcement interests drive its decisions about nonenforcement with respect to state drug policy reforms, it is hard to imagine a better candidate for nonenforcement than safe injection sites. To be sure, they may be of national interest inasmuch as they are new to the United States and their establishment here seems to signal a change in view about the relative merits of harm reduction in comparison to the war on drugs. These features have made safe injection sites newsworthy. But their tangible impact outside of the cities in which they operate is likely to be negligible, bordering on nonexistent. Moreover, the only federal offense that might apply to safe injection site operators is a very infrequently employed statute that all agree was enacted to target much different conduct—and whether even that statute covers safe injection sites is an open question, having been tested in only one federal circuit court.

State psychedelic therapy laws have a more plausible effect on the interstate market for illegal drugs than safe injection sites. Still, the two state psychedelics legalization laws that have been enacted to date do not seem to implicate substantial federal enforcement interests. Both Oregon's and Colorado's laws legalize the manufacture and sale of psilocybin. But both laws also require onsite use within the licensed distribution system; sales for use off-site are not permitted.<sup>208</sup> As a result, there is no reason to think that either law will feed psilocybin into the interstate market—at least, not with respect to psilocybin that is legally manufactured and sold by licensees acting in compliance with those laws.<sup>209</sup> To be sure, the laws could have

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drugs are manufactured or used"); *United States v. Safehouse*, 985 F.3d 225, 230 (3d Cir. 2021) (discussing the crack house statute's enactment).

<sup>206</sup> *Id.* at 238.

<sup>207</sup> U.S. SENT'G COMM'N, 2022 SOURCEBOOK OF FED. SENT'G STAT., 109 tbl.D-1 (2022) (reporting that the sentencing guideline for renting or managing a drug establishment, U.S.S.G. § 2D1.8, was the primary guideline in 22 cases in fiscal year 2022). See also *id.* at 70 tbl.20 (reporting that the guideline was applied in a total of 71 cases in fiscal year 2022).

<sup>208</sup> See *supra* note 19 and accompanying text.

<sup>209</sup> As discussed above, there are signs that Colorado's legalization of home cultivation for personal use could be contributing to a gray market under state law. Kenney, *supra* note 164. It is possible that illegal psilocybin growers could use the state's homegrown provision to try to insulate themselves from discovery and prosecution with respect to the interstate shipment of psilocybin. Cf. Alex Kreit, *Marijuana Legalization and Nosy Neighbor States*, 58 B.C. L. REV. 1059, 1078–83 (2017) (discussing evidence that state laws permitting the home cultivation of marijuana for personal use could contribute to interstate diversion of marijuana). Although an interesting issue in its own right, federal

other effects on interstate drug activity. Out-of-staters might travel to Oregon or Colorado for psilocybin therapy sessions, for example.<sup>210</sup> But any possible effect on federal enforcement concerns from laws like Oregon and Colorado's would pale in comparison to state marijuana legalization laws, which allow for off-site sales of a much more widely used substance, making it easy for legal buyers to illegally take marijuana across state lines into a prohibition state.<sup>211</sup>

All of this might seem to make the federal enforcement interests framework an appealing one, especially for advocates of drug policy reform. There is a significant impediment to making federal enforcement interests the guiding light in the exercise of discretion with respect to state drug policy reforms, however. Notwithstanding the DOJ's stated rationale for its marijuana nonenforcement policy, from the perspective of traditional federal drug enforcement concerns, it is actually quite difficult to justify letting states legalize the widespread commercial manufacture and sale of marijuana. The federal enforcement interest with respect to drugs has always included those engaged in "large-scale drug trafficking"<sup>212</sup>—so-called kingpins who control large quantities of drugs and make significant amounts of money in personal profits from sales. Indeed, most criticisms of federal drug enforcement policies have centered on the argument that low-level offenders, rather than kingpins, are too-often the target of federal prosecution.<sup>213</sup> To be sure, state legalization laws do not authorize international or direct interstate shipments of marijuana (at least, not yet).<sup>214</sup> But large-scale, sophisticated drug operations have always been of federal interest, even if they do not ship across state lines.<sup>215</sup> And, although the scope of

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enforcement policies with respect to people who are operating in direct violation of state law presents a distinct problem from the focus of this article, which is on enforcement against people who are in compliance with state law.

<sup>210</sup> Cf. Debra Kamin, *The Rise of Psychedelic Retreats*, N.Y. TIMES (Nov. 25, 2021), <https://www.nytimes.com/2021/11/25/travel/psychedelic-retreat-ayahuasca.html> [https://perma.cc/XCE4-DYER].

<sup>211</sup> Chad DeVeaux & Anne Mostad-Jensen, *Fear and Loathing in Colorado: Invoking the Supreme Court's State-Controversy Jurisdiction to Challenge the Marijuana-Legalization Experiment*, 56 B.C. L. REV. 1829, 1850–59 (2015) (discussing the diversion of marijuana that was legally grown under Colorado law to other states).

<sup>212</sup> Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 24 (2012).

<sup>213</sup> See Brickey, *supra* note 41, at 1159 (criticizing the federal prosecution of "run-of-the-mill" drug crimes).

<sup>214</sup> See Scott Bloomberg & Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 49 PEPP. L. REV. 839 (2022) (discussing why state restrictions on interstate marijuana commerce, including the out-of-state shipment of marijuana, may violate the Dormant Commerce Clause and arguing that Congress should expressly permit states to restrict interstate commerce in marijuana).

<sup>215</sup> Ogden Memorandum, *supra* note 80, at 1 ("The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking

spillover effects of legalization into other states is debatable, it is undeniable that at least some marijuana that is legally purchased in legalization states makes its way into prohibition states.<sup>216</sup>

With this in mind, reconsider the 2013 Cole Memorandum. The 2013 nonenforcement policy expressly rested on the premise that the most “rational” use of “limited investigative and prosecutorial resources” would be for federal prosecutors to focus on eight stated enforcement priorities that had “in recent years,” the memo said, already been the DOJ’s focus with respect to marijuana.<sup>217</sup> But the 2013 Cole Memorandum’s stated enforcement priorities only make sense in a world where one assumes the legitimacy of state-legal marijuana. Each of the priorities is oriented toward reducing a possible impact of state legalization (e.g., “[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states” or “[p]reventing the distribution of marijuana to minors”).<sup>218</sup> Take the second priority listed in the memo: “Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels.”<sup>219</sup> This sounds nice and sensible. But remember, under the letter of federal law *every* seller of marijuana is engaged in a criminal enterprise. The enforcement priority of preventing revenue from going to criminal enterprises, like most others in the memo, rests on the implicit premise that entities operating under state law are not criminal enterprises in the eyes of the DOJ.

If the DOJ’s marijuana nonenforcement policy had truly rested on the ground that state legalization laws do not implicate traditional enforcement interests, its starting point would have been those traditional interests. But, instead of describing and then applying longstanding DOJ enforcement priorities to state marijuana legalization, the 2013 Cole Memorandum painted the federal government’s concerns about state legalization laws as its longstanding priorities with respect to marijuana enforcement more generally. It stated, for example, that “[o]utside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement

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networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed toward these objectives.”).

<sup>216</sup> See Jessica Berch, *Weed Wars: Winning the Fight Against Marijuana Spillover from Neighboring States*, 19 NEV. L.J. 1, 4 (2018) (discussing spillover effects of marijuana legalization into other states).

<sup>217</sup> Cole Memorandum, *supra* note 1, at 1. See also *id.* at 2 (“[T]his memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.”).

<sup>218</sup> *Id.* at 1–2.

<sup>219</sup> *Id.*

of their own narcotics laws.”<sup>220</sup> The point about reliance on state enforcement is true as far as it goes, but it obscures the federal government’s actual historical role in drug enforcement with respect to the memo’s stated priorities. Contrary to the implication in the memo, the federal government has never had much direct involvement in a number of the enforcement priorities listed in the memo; one of the priorities—preventing drugged driving—is not even a federal offense.<sup>221</sup> Meanwhile, areas that the federal government has historically focused on, like “[l]arge-scale marijuana production and trafficking,”<sup>222</sup> were not listed among the memo’s enforcement priorities. Nor did the memo ever attempt a direct explanation of exactly why the open operation of multimillion dollar marijuana businesses does not implicate core federal concerns if the businesses are state-sanctioned.<sup>223</sup>

This is not intended as a critique of the DOJ’s decision to adopt its marijuana nonenforcement policy or of the policy’s parameters. The point here is that a policy of federal nonenforcement with respect to state marijuana legalization laws does not fit comfortably within the traditional enforcement interests framework, notwithstanding the Cole memo’s stated rationale.

#### B. *The feasibility framework*

Under a feasibility framework, a federal nonenforcement policy in response to a state drug policy reform that legalized federally prohibited conduct would be justified if the federal government were unable to block implementation of the state reform. This would effectively make nonenforcement a policy of absolute last resort. Only if the federal government did not have the resources to entirely prevent or at least substantially impede implementation of the state law would the government accept defeat and formally adopt a policy of nonenforcement. To be clear, preventing implementation of a state drug policy reform is not synonymous with

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<sup>220</sup> *Id.* at 2.

<sup>221</sup> *Id.* at 1–2. Similarly, “the distribution of marijuana to minors” almost always involves the retail sale of very small amounts of marijuana, something the federal government has not traditionally prosecuted frequently. *Id.* at 1. As already discussed, other priorities in the memo, such as preventing diversion of marijuana from where it is legal to states where it is not, have not been traditional enforcement priorities and only make sense if one assumes the legitimacy of state legalization laws.

<sup>222</sup> Wagner & Donal, *supra* note 95, at 126. See also Cole Memorandum (2011) *supra* note 81, at 2 (advising federal prosecutors that “large-scale” marijuana operations may properly be the subject of federal enforcement “even where those activities purport to comply with state law.”).

<sup>223</sup> The memo’s discussion of state marijuana regulations implies that, so long as states sufficiently regulate marijuana businesses, then the implementation of state legalization laws—including the open manufacture and distribution of marijuana by multimillion dollar marijuana businesses—will not “undermine[]” or “implicate one or more of the enforcement priorities” listed in the memo. Cole Memorandum (2011) *supra* note 1, at 3. But the memo does not directly explain why the DOJ enforcement priority of targeting large marijuana businesses no longer encompasses state-sanctioned marijuana businesses.

stamping out all activity that is authorized by the state's law, up to and including simple drug possession. If that were the standard then all federal drug enforcement efforts would fail the feasibility test, since prohibition has never succeeded in achieving a drug-free society. Instead, feasibility would be measured by the federal government's ability to block the open operation of entities licensed under the state law.

The DOJ might have cited its interest in focusing on traditional enforcement priorities to explain its marijuana nonenforcement policy, but feasibility was almost certainly the real driving force behind adoption of the policy. As already discussed, by the time the DOJ announced its marijuana nonenforcement policy in 2013, it had already been clear for quite some time that its enforcement efforts had not prevented states from implementing medical marijuana legalization laws.<sup>224</sup>

Before Colorado and Washington passed the first state recreational legalization laws in 2012, the DEA and federal prosecutors had spent more than a decade going after medical marijuana operators, regardless of whether or not their conduct was legal under state law. Just one year before release of the 2013 Cole Memorandum, two prosecutors from the Eastern District of California described their enforcement efforts against medical marijuana operators in a law review article, writing that "our commitment to enforce federal law by combating significant cultivation or trafficking of marijuana has been consistent. State legislative changes have not altered our mission to enforce the law and defend the interests of the United States."<sup>225</sup> But these federal enforcement efforts did not stop state-sanctioned medical marijuana providers from openly operating. Resource constraints on federal enforcement meant that the risk of arrest and federal prosecution for any one person openly manufacturing or selling medical marijuana under state law was quite low.<sup>226</sup> And, of course, as more and more state-legal medical marijuana businesses opened, the risk of federal prosecution for each individual business shrank smaller and smaller.

This backdrop to the 2013 Cole Memorandum suggests that the current federal nonenforcement policy with respect to state legalization laws was one of grudging resignation. If the federal government could have stopped states from passing and implementing marijuana legalization laws, it would have. But, despite devoting a relatively significant amount of time and resources to enforcement (and subjecting a number of medical marijuana providers to federal prison terms in the process),<sup>227</sup>

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<sup>224</sup> See *supra* notes 211–16 and accompanying text.

<sup>225</sup> Wagner & Dolan, *supra* note 95, at 109.

<sup>226</sup> See Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029, 1036–37 (2013) (discussing the low risk of federal prosecution and noting that while there were just thirty-nine federal marijuana prosecutions in the federal district that includes Los Angeles in 2011, there were an estimated 500 dispensaries operating in Los Angeles in 2012).

<sup>227</sup> See Americans for Safe Access, *What's the Co\$t?: The Federal War on Patients* (2013), <https://assets.nationbuilder.com/americansforsafeaccess/pages/13421/attachments/original/16823504>

marijuana businesses continued to operate openly and were steadily expanding throughout the 2000s. Without an unusually large commitment of new resources from Congress, or a disruptive reallocation of existing resources (such as dropping all other drug enforcement to focus exclusively on state-legal marijuana operators), enforcement efforts would only have become increasingly futile.<sup>228</sup> Rather than continue to tilt at windmills, then, the DOJ decided to acknowledge the obvious and adopt a nonenforcement policy following passage of legalization laws in Colorado in Washington in 2012.

The history of the federal government's failed effort to block state medical marijuana laws suggests a potential policy basis for letting feasibility drive decisions about whether to adopt nonenforcement policies in response to state drug policy reforms. When the federal government is unable to stop implementation of a state reform like marijuana legalization, enforcement results in especially striking disparate outcomes. If state and federal drug laws are aligned, a defendant who loses the "cruel lottery"<sup>229</sup> of federal enforcement might receive a longer sentence than she would have in state court, but she risks criminal prosecution either way. If a state has legalized drug activity and the federal government does not have the resources to block implementation of the law, the stakes of the lottery become much higher. In the late 2000s and early 2010s, for example, the unlucky few who were federally prosecuted faced years in federal prison, while the great majority of state-legal medical marijuana providers were able to openly violate federal law with impunity, sometimes making significant sums of money while doing so.<sup>230</sup>

In addition, when the federal government is unable to impede implementation of a state drug policy reform, enforcement becomes a pointless exercise. Indeed, federal prosecution in these circumstances is not just wasteful, it can be counterproductive. This is because the risk of federal prosecution of state-legal actors disincentivizes states from closely regulating licensees and makes it more difficult for states to implement the regulations that they do adopt.<sup>231</sup> Before issuance

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89/ASA\_Archive\_2013-Whatsthecost.pdf?1682350489 [https://perma.cc/G4WL-LA5X] (estimating federal expenditures on efforts to block state medical marijuana laws).

<sup>228</sup> Mikos, *supra* note 28, at 1468 ("Simply put, without a substantial increase in federal law enforcement resources, the campaign against marijuana growers would likely be futile.").

<sup>229</sup> Beale, *supra* note 56, at 997.

<sup>230</sup> See Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 D.U. L. REV. 1027, 1033–41 (2012) (discussing ethical challenges in federal medical marijuana prosecutions prior to issuance of the 2013 Cole memo).

<sup>231</sup> See Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 5–7 (2020) (arguing states may have refrained from adopting now-common regulations of marijuana businesses in the 2000s because of the prospect of federal enforcement); Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAPMAN L. REV. 555, 574 (2010) (arguing that "states and localities are likely to refrain from physically inspecting [medical marijuana] collectives . . . or testing medical marijuana to guard against adulterants . . . out of concern that doing so would run afoul of federal law").

of the 2013 Cole Memorandum, states had been hesitant to enact now-common regulatory measures like inventory tracking that would have made licensees “an easy target for DOJ.”<sup>232</sup> While this approach made it harder for the federal government to “try to exploit state regulations for its own ends,”<sup>233</sup> it also left the state-legal regime less regulated and more open to abuse. The risk of federal prosecution similarly provides perverse incentives at the individual level. The existence of any risk of federal prosecution, however slight, will not deter everyone, but it could very well be enough to dissuade meticulous rule-followers from entering the industry, ceding the ground to operators who are less likely to abide by regulations.

With all this in mind, we can see a rationale for the feasibility framework. Shutting down state drug policy reforms might be the DOJ’s first choice and an option that it might even be willing to devote significant resources to achieve. But if the DOJ finds that it is not able to block or at least substantially disrupt the state reform, it might conclude that nonenforcement is the lesser of two evils—better to let the state law go forward than continue to spend money on futile and likely even counterproductive enforcement efforts.

Although the federal government’s marijuana legalization nonenforcement policy is easily justified under a feasibility framework, the feasibility framework would be unlikely to result in nonenforcement policies with respect to many (if any) other state drug laws that legalize federally prohibited conduct. The case for federal nonenforcement with respect to both safe injection sites and psychedelic therapy laws would seem to be quite weak under a feasibility framework. With respect to the former, the DOJ can almost certainly block state and locally approved overdose prevention sites from operating, and it can do so without expending significant resources. In comparison to the market for medical marijuana, which supported hundreds of dispensaries in California alone in the 2000s,<sup>234</sup> the potential user base for safe injection sites is quite small—in Canada, which allows safe injection sites, there are currently just 39 operating nationwide.<sup>235</sup> Given that a large city might have at most a handful of overdose prevention sites, a preemptory civil lawsuit or a clear and credible threat of criminal prosecution would almost surely prevent their operation. The lawsuit against Safehouse and the continued lack of a sanctioned safe injection site in Philadelphia is evidence of this. With the support of city officials, safe injection site proponents have been seriously working to open a safe injection

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<sup>232</sup> Mikos, *supra* note 22, at 90.

<sup>233</sup> *Id.*

<sup>234</sup> Parloff, *supra* note 75 (estimating that there were over 700 medical marijuana dispensaries operating in California in 2009).

<sup>235</sup> GOV’T OF CANADA DATA BLOG, Canadian Supervised Consumption Site Statistics (Oct. 6, 2023), <https://health-infobase.canada.ca/datalab/supervised-consumption-sites-blog.html#https://perma.cc/V5MC-AFQC>.

site in Philadelphia since 2018.<sup>236</sup> But a single civil lawsuit from the DOJ has been sufficient to block the effort. Indeed, the DOJ's action in Philadelphia seems to have deterred efforts around safe injection sites in other cities as well. Concerns about federal interference have reportedly dissuaded San Francisco's city attorney from releasing funds that were allocated for overdose prevention sites, despite the fact that there has been no reported threat of federal prosecution against San Francisco.<sup>237</sup> Although two overdose prevention centers are currently operating in New York City, the DOJ could almost certainly shut them down—and deter the city from sanctioning others—by suing to enjoin their operation or making a clear and direct threat of criminal prosecution. In short, if the DOJ were to view nonenforcement as a last-resort option, to employ only if it is unable to block a state reform, then it would be unlikely to adopt one with respect to safe injection sites.

It would also be difficult under a feasibility framework to justify a nonenforcement policy for state psychedelic therapy laws. In comparison to safe injection sites, it would be a bit trickier and more expensive for the federal government to block state psychedelic therapy laws through enforcement. But it seems very likely that the government could do so if it wanted to put modest resources toward the goal and was willing to seek prison sentences for psilocybin healing center operators. Although psychedelic therapy laws are similar in concept to state medical marijuana laws, both Oregon and Colorado have much more strictly limited access to psychedelics; in both states, use of legally sold psilocybin must take place at licensed facilities under the supervision of a guide. Perhaps more importantly, the base of prospective psychedelics users is significantly smaller than for marijuana—both because there are far fewer existing psychedelics users than marijuana users<sup>238</sup> and because of estimates that a state-licensed psilocybin session will cost hundreds or thousands of dollars.<sup>239</sup> Because the market is only likely to be large enough to support a small number of licensed manufacturers and facilitators, both areas present “vulnerable choke points the DOJ could target in any crackdown.”<sup>240</sup> By targeting these choke points, the DOJ might be able to effectively

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<sup>236</sup> See Bobby Allyn, ‘Come and Arrest Me’: Former Pa. Governor Defies Justice Department on Safe Injection, NPR (Oct. 10, 2018), <https://www.npr.org/sections/health-shots/2018/10/10/656268815/come-and-arrest-me-former-pa-governor-defies-justice-department-on-safe-injection> [https://perma.cc/E3PB-SYX4]; Bobby Allyn, Rendell Says Philly Group Near Deal on Home for Supervised Injection Site, WHYY (Mar. 21, 2019), <https://whyy.org/articles/rendell-safefhouse-offered-building-for-injection-site-for-1-by-developer-whose-son-died-of-an-overdose/> [https://perma.cc/3B6X-DPSB].

<sup>237</sup> Bishari, *supra* note 180.

<sup>238</sup> For a comparison of use rates for hallucinogens and marijuana, see *supra* note 175.

<sup>239</sup> Jacobs, *supra* note 158.

<sup>240</sup> Robert A. Mikos, Observations on 25 Years of Cannabis Law Reforms and Their Implications for the Psychedelic Renaissance in the United States, 18 ANN. REV. L. & SOC. SCI. 155, 162 (2022).

block the laws through civil lawsuits and threats of criminal prosecution alone. To be sure, the DOJ employed a similar strategy in response to state medical marijuana laws in the late 1990s, and it soon turned into a losing game of whack-a-mole. But because of the much smaller market for psychedelics, and particularly for guided psychedelic therapy, it seems unlikely that the same would happen in the case of state psychedelics therapy laws.

The feasibility framework seems likely to hold appeal for anti-drug hardliners, whose top policy priority is pursuing a uniformly followed and unforgiving form of drug prohibition. But, short of adopting a war-on-drugs lens, it is difficult to justify a framework that would place adherence to federal drug laws above all other policy considerations. A regime in which state reforms with greater impacts on national drug markets are more likely candidates for nonenforcement also exacerbates the perverse incentive for states to pass broad laws and shun regulation that, as discussed above, is attendant to federal enforcement more generally. In the case of psychedelic therapy laws, for example, if the federal government were able to block the closely regulated laws in Oregon and Colorado, the states might respond by loosening the laws—by, for example, licensing sale for offsite use—in order to make it harder for the DOJ to stop them from being implemented. The federal government’s successful blockade of sanctioned safe injection sites may have already led San Francisco to give wink-and-nod permission to an unregulated safe injection site; although a regulated and sanctioned safe injection site has yet to open in San Francisco, city officials allowed a site, where, reportedly, they “ha[d] long known that supervised drug consumption was taking place,” to operate for a significant period of time.<sup>241</sup>

More broadly, if nonenforcement were a policy of last resort, the federal government would block narrower, more localized state reforms while permitting exceedingly broad state laws to go forward without interference. The incoherence of threatening nonprofit overdose prevention operators with federal prosecution while turning a blind eye to multimillion dollar marijuana businesses seems self-evident. As discussed in the previous section, as judged by its traditional enforcement practices and priorities, the DOJ has a negligible interest in prosecuting safe injection sites, and any interest it might have in them pales in comparison to its interest in prosecuting multimillion dollar drug operations (like some state-legal marijuana businesses). But the feasibility framework would make shutting down state-sanctioned safe injection sites a priority while justifying nonenforcement with respect to state-legal marijuana businesses.

### *C. The federalism framework*

A third possible guiding principle for weighing federal nonenforcement in response to a state drug policy reform would be to focus on the traditional allocation

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<sup>241</sup> Joe Eskenazi, *SF Cuts and Runs in the Tenderloin—and on Safe-Consumption Sites*, MISSION LOCAL (Dec. 12, 2022), <https://missionlocal.org/2022/12/san-francisco-fentanyl-tenderloin-safe-injection-drugs-crackhouse-statute/> [https://perma.cc/QD4D-MMHR].

of drug enforcement between the federal government and the states. Under this approach, which I will call the federalism framework, decisions about how to respond to state drug reforms that legalize federally criminalized conduct would be grounded in the federal government's history of relying on states and localities as the principal enforcers of most drug laws.

A federalism framework for nonenforcement policies would begin from the premise that states and localities have always had the primary responsibility for drug enforcement. With the exception of a few specific matters, like international drug control or drug interdiction at the border, the federal government has always played a limited role in drug enforcement relative to the states, acting mainly as a supporter and coordinator of state efforts. When state and federal drug laws are aligned, the federal role has been primarily to tackle enforcement problems that states may have difficulty addressing on their own by, for example, bringing federal prosecutions against "significant traffickers of illegal drugs"<sup>242</sup> or organizing multijurisdictional drug task forces. But, when state and federal drug laws are not aligned, the federal government's supporting role should weigh in favor of deferring to states by allowing them to diverge from federal criminal law within reasonable limits.

Portions of the 2013 Cole Memorandum suggest some openness to this sort of a guiding principle for nonenforcement. The memo notes, for example, that "the Department has left . . . lower-level or localized activity to state and local authorities" and acknowledges that state legalization laws "affect[] this traditional joint federal-state approach to narcotics enforcement."<sup>243</sup> Later, the memo advises that if a state's regulatory regime for marijuana adequately addresses the DOJ's stated concerns, "consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."<sup>244</sup>

The substance of the DOJ's marijuana nonenforcement policy also seems to fit within the federalism framework. The 2013 Cole Memorandum might have been a product of capitulation to the inability to block state medical marijuana laws, and its stated rationale seemed to focus more on traditional federal enforcement interests. But the memo's stated enforcement priorities seem designed with the traditional roles of the state and federal government in mind, rather than with the federal government's traditional practices. The enforcement goal of "[p]reventing revenue from the sale of marijuana from going to criminal enterprises"<sup>245</sup> does not make much sense when viewed through the lens of the DOJ's usual enforcement practices, under which large-scale drug distributors have always been a significant federal

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<sup>242</sup> Cole Memorandum (2011), *supra* note 81, at 1.

<sup>243</sup> Cole Memorandum (2013), *supra* note 1, at 2.

<sup>244</sup> *Id.* at 3 (emphasis added).

<sup>245</sup> *Id.* at 1.

concern. But this goal makes a great deal of sense if the federal government's focus is on minimizing the potential spillover effects of state legalization laws. Likewise, the priorities of "[p]reventing the diversion of marijuana from states where it is legal" into other states and "[p]reventing state-authorized marijuana activity from being used as a cover or pretext"<sup>246</sup> for other illegal activity both speak to the federal government's role in drug enforcement relative to the states. In the absence of state legalization laws, there is no such thing as "diversion" of legal marijuana and it would not make sense for someone to engage in marijuana activity as a "cover" for committing other crimes. But when states have legalized marijuana, the federal government's supportive role in suppressing the interstate market for drugs shifts to focus on these sorts of priorities, which are aimed at reducing the effects of legalization on neighboring states and other core federal concerns.

Under the federalism framework, nonenforcement in response to a state law that legalized federally prohibited conduct would be the rule rather than the exception. To be clear, this framework would not compel blind deference to state and local officials. The federal government might seek to block aspects of a state law under this framework if the law does not adequately guard against spillover effects or if a state has not adopted sufficiently robust controls to address widely shared public policy goals. The enforcement priorities in the 2013 Cole Memorandum provide an example of this in action—each of the priorities are oriented either toward limiting the effects of legalization in prohibition states or toward encouraging states to tightly control things like the distribution of marijuana to minors or driving under the influence.<sup>247</sup> But where a state drug policy reform provides sufficient controls, the federalism framework would make deference to states the default enforcement position.

This approach would avoid the incongruous results of the feasibility framework and would fit better with the federal government's marijuana legalization nonenforcement policy than a framework based on traditional enforcement priorities. It is also consistent with a federalist structure, in which the norm is to "leave[] states with substantial latitude to enact laws and regulations that conform with the needs and preferences of their citizens, thereby accounting for the diversity of views and preferences across the country."<sup>248</sup> Unless the federal government has occupied an entire field of regulation, states usually have a good deal of leeway in policymaking, particularly with respect to criminal law. This furthers "[o]ne of federalism's chief virtues," which is to "promote[] innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1–2.

<sup>248</sup> JONATHAN H. ADLER, Introduction: Our Federalism on Drugs in *MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE* (Jonathan H. Adler, ed., Brookings Institution Press 2020).

of the country.”<sup>249</sup> A framework that errs on the side of deferring to states when deciding how to allocate limited enforcement resources is consistent with this structure.

A framework that makes deferring to states the default is also well suited to a post-war-on-drugs approach to drug policy. One of the defining features of the war on drugs—a feature that set U.S.-style drug prohibition apart from drug prohibition in many other countries—was the view that any policy short of relentless criminalization was a form of “surrender” and therefore unacceptable on that basis alone.<sup>250</sup> In the era of the drug war, the federal government and states marched in lockstep toward the goal of a drug-free America. But over the past 15 years, politicians from across the political spectrum have labeled the drug war a failure.<sup>251</sup> This shift in outlook is, of course, one of the things that has led states and localities to pursue policies like safe injection sites, psychedelic therapy laws, and marijuana legalization. To be sure, the rhetorical move away from the drug war does not mean the drug war has ended—there is an argument that it has merely been retooled,<sup>252</sup> and some politicians have indicated interest in an express revival of the war on drugs strategy.<sup>253</sup> But, if the federal government is truly interested in adopting a public health approach to drug policy, it should embrace state and local attempts to innovate in the drug policy sphere, rather than discourage them.<sup>254</sup>

Critics of the federalism framework might object that making deference to states the rule, rather than the exception, would undermine the rule of law. If there is force in this criticism, it would seem to go to the propriety of federal nonenforcement policies as a whole, however, rather than to the federalism framework specifically. There is an important and engaging scholarly debate on the constitutionality and desirability of federal nonenforcement policies<sup>255</sup> but on that issue, this paper is agnostic. Instead, this paper takes the federal government’s longstanding nonenforcement policy with respect to marijuana legalization as its starting point and considers principles that might guide the DOJ when deciding whether or not to adopt a similar policy in response to other state drug laws. To the

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<sup>249</sup> *Gonzales v. Raich*, 545 U.S. 1, 42 (O’Connor, J., dissenting).

<sup>250</sup> Kreit, *Drug Truce*, *supra* note 33, at 1337 (quoting William J. Bennett, *No Retreat, No Surrender: President Bush Signals a Renewed Offensive on Several Fronts in the Languishing War on Drugs*, *SAN DIEGO UNION-TRIB.*, May 20, 2001, at G1.)

<sup>251</sup> *Id.* at 1324–26.

<sup>252</sup> See Jennifer D. Oliva & Taled El-Sabawi, *The ‘New’ Drug War*, 110 *VA. L. REV.* (forthcoming 2024).

<sup>253</sup> Dustin Jones & Devin Speak, *Trump Wants the Death Penalty for Drug Dealers. Here’s Why that Probably Won’t Happen*, NPR (May 10, 2023), <https://www.npr.org/2023/05/10/1152847242/trump-campaign-execute-drug-dealers-smugglers-traffickers-death-row> [https://perma.cc/F4J6-FLZJ].

<sup>254</sup> Kreit, *supra* note 250, at 1375–78.

<sup>255</sup> See sources cited *supra* note 31.

extent the rule of law concerns might weigh on individual nonenforcement policies, they would seem to have more bite with respect to nonenforcement policies that apply to broad categories of conduct (like the marijuana legalization nonenforcement policy) than to nonenforcement policies with respect to narrower state drug policy reforms.

#### CONCLUSION

For a decade now, the Department of Justice has followed a policy of nonenforcement of federal drug laws with respect to conduct sanctioned by state marijuana legalization laws. In recent years, states and localities have begun to explore drug policy reforms that conflict with federal drug prohibitions in other areas, including the legalization of safe injection sites and psychedelic assisted therapy. The DOJ has not yet taken a clear position with respect to these state policies. After initially moving to block safe injection sites under the Trump administration, the federal government has allowed two safe injection sites to operate in New York City for nearly two years. The federal government does not appear to have made any public statements about its intentions with respect to state psychedelics laws, even though Oregon has begun to implement its psilocybin therapy law.

This paper identifies and considers three principles that might guide the exercise of federal enforcement discretion in response to state drug laws that legalize federally prohibited conduct. The traditional enforcement interests framework would focus on the extent to which the conduct authorized by the state law implicates traditional federal enforcement priorities by, for example, authorizing large-scale drug trafficking or the shipment of drugs across state lines. The DOJ's existing marijuana legalization nonenforcement policy would be difficult to justify under this framework, although the framework would counsel in favor of nonenforcement with respect to state psychedelic therapy laws and, especially, overdose prevention sites. Under the feasibility framework, the federal government would adopt a nonenforcement policy only as a last resort, if it is unable to substantially impede implementation of a state law. This framework might best explain the DOJ's marijuana nonenforcement policy as a historical matter—the decision to allow Colorado and Washington to implement their marijuana legalization laws without interference came after more than a decade of failed efforts to block state medical marijuana laws. But the feasibility framework would not support a similar approach to safe injection sites or existing state psychedelic therapy laws, as the DOJ likely has sufficient resources to effectively block the implementations of both of these reforms. Finally, under the federalism framework, the DOJ would defer to states that want to diverge from federal drug law so long as there were reasonable guardrails to address potential spillover effects and other substantial federal policy concerns.

Although I argue that the federalism framework is preferable to letting feasibility or traditional enforcement interests guide the federal response to state

drug policy reforms, the primary goal of this paper has not been to persuade the reader in favor of that position. My aim has instead been to illuminate the ground in this area by situating the question of nonenforcement within the broader relationship between federal and state drug laws and identifying some of the competing principles that could guide decisions about whether to adopt a nonenforcement policy with respect to the state legalization of federally prohibited conduct.

During its briefly held aggressive opposition to safe injection sites, the DOJ offered no explanation for why it was treating them differently from state marijuana legalization laws. The DOJ has since appeared to retreat from this approach, but without offering a public explanation of its current position. Meanwhile, the DOJ has met state psychedelics laws with complete silence. Whatever approach the federal government ultimately takes to these state and local drug policy measures, it should clearly state its rationale and articulate its approach to nonenforcement policies more generally.

