

# Propping up California's Prop 64: A Mini-War on Drugs?

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Many observers have declared California's experiment with legalizing recreational marijuana to be a failure. For example, the Los Angeles Times has published a series of articles highlighting the law's many failures, including encouraging corruption and incentivizing illegal marketeers.<sup>1</sup>

No doubt, many policy wonks or other participants in the process are claiming, "we told you so."<sup>2</sup> Drafters of Proposition 64, California's initiative that legalized recreational marijuana, brought many stakeholders to the table and bargained for their support, or at least for their agreement to sit on the sidelines rather than opposing the initiative.<sup>3</sup> That allowed the drafters and backers of Proposition 64 to

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<sup>1</sup> Patrick McGreevy, Inside California's Pot Legalization Failures: Corporate Influence, Ignored Warnings, LOS ANGELES TIMES (Sept. 22, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-09-22/california-legal-pot-measure-has-not-met-expectations> [https://perma.cc/WPV8-NLVA]; Los Angeles Times Staff, Legal Weed, Broken Promises: A Times Series on the Fallout of Legal Pot in California, LOS ANGELES TIMES (Sept. 8, 2022), <https://www.latimes.com/california/story/2022-09-08/a-series-on-the-fallout-of-legal-weed-in-california> [https://perma.cc/5JKT-7Z2V]; Adam Elmahrek, et al., Why Legal Weed is Failing in One of California's Legendary Pot-growing Regions, LOS ANGELES TIMES (Dec. 9, 2022), <https://www.latimes.com/california/story/2022-12-09/legal-weed-failing-california-county> [https://perma.cc/P8A8-Z9EK]; Paige St. John, The Reality of Legal Weed in California: Huge Illegal Grows, Violence, Worker Exploitation, and Deaths, LOS ANGELES TIMES (Sept. 8, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-09-08/reality-of-legal-weed-in-california-illegal-grows-deaths> [https://perma.cc/Q27A-9ZW6].

<sup>2</sup> In 2016, many marijuana legalization initiatives were circulated in California but the clear front-runner to reach the ballot was the Adult Use of Marijuana Act. Proposed ballot measures that were not on a ballot, BALLOTEDIA, [https://ballotpedia.org/Proposed\\_ballot\\_measures\\_that\\_were\\_not\\_on\\_a\\_ballot#2016](https://ballotpedia.org/Proposed_ballot_measures_that_were_not_on_a_ballot#2016) (last visited Feb. 11, 2023) [https://perma.cc/C9AD-BM9P].

<sup>3</sup> Proposition 64 received support from California Governor Gavin Newsom, the United Farm Workers union, Equality California, ACLU of California, and other large stakeholders. California

get their initiative to the front of the line, supplanting other proposals.<sup>4</sup> As developed in Part I, the need to bring such diverse stakeholders to the table helps explain some ways in which the law fails to achieve some of its hoped-for goals.<sup>5</sup>

Especially in light of recent headlines, policy makers are now mulling over solutions to Proposition 64's failures. Among those proposals is increased participation by law enforcement.<sup>6</sup> The argument seems to be that the only way to eradicate bad actors and to ease the transition to a regulated market is to ramp up enforcement of the law and to increase criminal punishments.<sup>7</sup> Such calls for aggressive law enforcement actions have an all too familiar ring to them. Think back to the Reagan era War on Drugs. Aggressive policing and ramped-up criminal sentences were supposed to eradicate marijuana and other drug usage.<sup>8</sup>

While commentators debate whether the War on Drugs reduced drug consumption, a broad coalition of Americans now realize that the cost of the War on Drugs was unjustified at so many levels.<sup>9</sup> It helped fuel mass incarceration; at times, it led to grotesquely long prison sentences that were an embarrassment at the time,

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Proposition 64, Marijuana Legalization (2016), BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_64,\\_Marijuana\\_Legalization\\_\(2016\)](https://ballotpedia.org/California_Proposition_64,_Marijuana_Legalization_(2016)) (last visited Feb. 11, 2023) [<https://perma.cc/J7G3-JB2R>]. (last visited Feb. 11, 2023).

<sup>4</sup> The California Marijuana and Hemp Legalization Initiative and the California Marijuana Legalization with Local Regulation Initiative were some of the other initiatives regarding the legalization of marijuana that did not make the ballot. BALLOTPEDIA, *supra* note 2.

<sup>5</sup> See discussion *infra* Part I.

<sup>6</sup> A proposal in action is Governor Newsom directing the creation of a new multi-agency, cross-jurisdictional taskforce of enforcement agencies designed to combat illegal cannabis operations. California Department of Fish and Wildlife, California Takes Action to Combat Illicit Cannabis Grows and Transnational Criminal Organizations, CA.GOV (Oct. 5, 2022), <https://wildlife.ca.gov/News/california-takes-action-to-combat-illicit-cannabis-grows-and-transnational-criminal-organizations#gsc.tab=0> [<https://perma.cc/479K-E9ZQ>].

<sup>7</sup> *Id.*

<sup>8</sup> The War on Drugs was a government-led initiative aimed to stop illegal drug use, distribution, and trade by dramatically increasing prison sentences for both drug dealers and users. As noted, this initiative has been deemed a failure by “voters of all stripes.” War on Drugs, HISTORY.COM (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [<https://perma.cc/M64F-6K3R>]; Taylor Pendergrass, The War on Drugs Failed – Lawmakers Must Meet the Fentanyl Crisis with New Solutions, ACLU (Mar. 11, 2022), <https://www.aclu.org/news/smart-justice/the-war-on-drugs-failed-lawmakers-must-meet-the-fentanyl-crisis-with-new-solutions> [<https://perma.cc/AUM3-WYAB>].

<sup>9</sup> Eighty-three percent of individuals who responded to ACLU's poll say the war on drugs failed and sixty-one percent of voters support reducing the sentences of people incarcerated for drugs. On 50<sup>th</sup> Anniversary of “War on Drugs,” Poll Shows Majority of Voters Support Ending Criminal Penalties for Drug Possession, Think Drug War is a Failure, ACLU (Jun. 9, 2021, 9:30 AM), <https://www.aclu.org/press-releases/50th-anniversary-war-drugs-poll-shows-majority-voters-support-ending-criminal> [<https://perma.cc/U7Q3-M5PV>].

even more so in retrospect.<sup>10</sup> It helped shrink Fourth Amendment protections for Americans, especially for members of minority communities.<sup>11</sup> At a time when many policy makers are urging a rethinking of the national approach to drug policy,<sup>12</sup> surely California cannot “lead” the nation backwards to a new War on Drugs. And yet, that is a risk created by the failures of Proposition 64.<sup>13</sup>

Often, the call for draconian penalties for drug offenses have resulted from moral panic, moments when headlines have led legislators to overreact to perceived harms.<sup>14</sup> Calls for increased police involvement in California present the same risk. Aggressive law enforcement often produces bad results.<sup>15</sup> Part II of this article focuses on two cases involving Empyreal Enterprises, LLC. Empyreal is a cash-in-transit company doing business in 28 states.<sup>16</sup> Empyreal’s clients are marijuana businesses in states where state law allows medical marijuana or both recreational and medical marijuana to be sold. Because of banking restrictions, such companies need cash-carrying services.<sup>17</sup> Law enforcement agencies in Kansas and California have targeted Empyreal trucks carrying cash and have attempted to forfeit the cash.<sup>18</sup>

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<sup>10</sup> With the proliferation of mandatory minimum sentences during the War on Drugs, sentences for drug offenses could be 10, 20, 30 years, or even life imprisonment. Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CENTER FOR JUSTICE (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs#:~:text=Shockingly%20severe%20sentences%20for%20drug,our%20society's%20standard%20of%20decency> [https://perma.cc/M6BW-3Z89].

<sup>11</sup> Michael Vitiello, *The End of the War on Drugs, the Peace Dividend and the Renewed Fourth Amendment?*, 73 OKLA. L. REV. 285, 287 (2021).

<sup>12</sup> See *White House Releases 2022 National Drug Control Strategy that Outlines Comprehensive Path Forward*, THE WHITE HOUSE (Apr. 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/21/fact-sheet-white-house-releases-2022-national-drug-control-strategy-that-outlines-comprehensive-path-forward-to-address-addiction-and-the-overdose-epidemic/> [https://perma.cc/TX7J-DC85].

<sup>13</sup> See discussion *infra*.

<sup>14</sup> Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 CLEV. ST. L. REV. 441, 452 (2021).

<sup>15</sup> See discussion *infra* Part II.

<sup>16</sup> Andrew Wimer, *Highway Robbery: Armored Car Company Sues Federal Law Enforcement and a California Sheriff After Series of Illegal Roadside Seizures*, INSTITUTE OF JUSTICE (Jan. 18, 2022), <https://ij.org/press-release/highway-robbery-armored-car-company-sues-federal-law-enforcement-and-a-california-sheriff-after-series-of-illegal-roadside-seizures/#:~:text=Empyreal%20is%20a%20fintech%20and,Empyreal%20never%20transports%20cannabis%20products> [https://perma.cc/6279-GWNR].

<sup>17</sup> See discussion *infra* Part II.

<sup>18</sup> *Id.*

As argued below, these kinds of law enforcement interventions are unwarranted for many reasons.<sup>19</sup>

Part III explores lessons that one can take from the *Empyrean* litigation.<sup>20</sup> Similar to a carpenter with a hammer in hand who sees everything as a nail, many law enforcement agents see those involved in illegal drug activity as bad actors, deserving of punishment.<sup>21</sup> Importantly, therefore, as California tries to assure greater compliance with its marijuana laws, inviting unregulated involvement from law enforcement risks problems created by the War on Drugs.<sup>22</sup>

Part IV turns to ways in which California, in cooperation with federal authorities, might be able to achieve better outcomes, including moving California towards a better regulated marijuana market.<sup>23</sup> No doubt, traditional law enforcement efforts against large, organized crime-styled groups have their place.<sup>24</sup> But this section urges that policy makers rethink the approach towards the industry: enforcement agencies should use a traditional white-collar crime approach to actors in the industry.<sup>25</sup> Instead of search warrants and no-knock raids, agents charged with enforcement should use subpoenas and other similar techniques to assure compliance with state marijuana laws.<sup>26</sup> Enlisting landlords, for example, by reminding them of the risk of forfeiture of their property, provides incentives to assure compliance.<sup>27</sup> Along the way, Part IV discusses federal policies, including the Rohrabacher-Farr amendment and the Cole-Ogden memos to suggest that policy makers have demonstrated some willingness to rethink the one-size-fits-all law enforcement efforts against marijuana industry members.<sup>28</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> See discussion *infra* Part III.

<sup>21</sup> *Id.*

<sup>22</sup> For example, the War on Drugs gave police unchecked power to patrol more spaces and take property from people with only a suspicion of drug-related conduct. Policing and the Drug War, DRUG POLICY ALLIANCE (2022), <https://drugpolicy.org/issues/policing> [<https://perma.cc/CB3W-VTC5>].

<sup>23</sup> See discussion *infra* Part IV.

<sup>24</sup> An example where traditional law enforcement efforts were successful was in the case of Mr. Agustin Cruz-Sanchez, who was sentenced to ten years in prison and ordered to pay \$10,000 in restitution to the United States for illegally growing 6,575 marijuana plants in the Shasta-Trinity National Forest. Mexican National Sentenced to 10 Years in Prison for Growing Over 6,500 Marijuana Plants in the Shasta-Trinity National Forest, UNITED STATES ATTORNEY'S OFFICE EASTERN DISTRICT OF CALIFORNIA (Mar. 10, 2023), <https://www.justice.gov/usao-edca/pr/mexican-national-sentenced-10-years-prison-growing-over-6500-marijuana-plants-shasta> [<https://perma.cc/Z6DG-YWW4>].

<sup>25</sup> See discussion *infra* Part IV.

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

The Conclusion offers some concluding thoughts about whether such a policy shift might make a meaningful difference. No Pollyanna solution, the shift to a white-collar crime approach at least offers California the chance to move closer to fulfillment of competing goals inherent in Proposition 64 without starting a new mini-War on Drugs.<sup>29</sup>

#### I. PART I: PROPOSITION 64'S CREATION AND IMPLEMENTATION

California's first efforts to legalize the recreational use of marijuana failed in 2010.<sup>30</sup> Two years later, Colorado and then Washington legalized recreational use of marijuana through their initiative processes.<sup>31</sup> Proponents of legalization in California learned a great deal from the experience in those states.

One lesson from the experiences in Colorado and Washington was to qualify the initiative process during a presidential election year to ensure that younger voters participated in the process.<sup>32</sup> More relevant to this paper were lessons learned about securing buy-in from various organizations. Proposition 19, the 2010 initiative, left too many questions unanswered.<sup>33</sup> Its drafters failed to do basic coalition building. For example, many Californians interested in seeing the illegal market taxed to pay for costs associated with marijuana use could not tell whether the initiative allowed the state, as opposed to local governmental entities, to tax marijuana businesses.<sup>34</sup>

Fast-forward to renewed efforts to qualify an initiative for the 2016 election cycle. Attorney Richard Miadich led efforts to draft a proposition that would secure support of many stakeholders or at least to get those organizations to remain on the sidelines.<sup>35</sup> Among the groups courted by the initiative's drafters were

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<sup>29</sup> See discussion *infra* Conclusion.

<sup>30</sup> California Proposition 19, Marijuana Legalization Initiative, BALLOTPEDIA, [https://ballotpedia.org/California\\_Proposition\\_19\\_Marijuana\\_Legalization\\_Initiative\\_\(2010\)](https://ballotpedia.org/California_Proposition_19_Marijuana_Legalization_Initiative_(2010)) (last visited Feb. 11, 2023) [<https://perma.cc/YDZ8-CDBJ>] (last visited Feb. 11, 2023).

<sup>31</sup> Keith Coffman & Nicole Neroulis, Colorado, Washington First States to Legalize Recreational Pot, THOMSON REUTERS (Nov. 6, 2012, 7:53 PM), <https://www.reuters.com/article/us-usa-marijuana-legalization/colorado-washington-first-states-to-legalize-recreational-pot-idUSBRE8A602D20121107> [<https://perma.cc/LZ2N-HLPA>]; Washington Initiative 502 Marijuana Legalization and Regulation, (2012), BALLOTPEDIA, [https://ballotpedia.org/Washington\\_Marijuana\\_Legalization\\_and\\_Regulation,\\_Initiative\\_502\\_\(2012\)](https://ballotpedia.org/Washington_Marijuana_Legalization_and_Regulation,_Initiative_502_(2012)) [<https://perma.cc/MF8B-WYPT>] (last visited Feb. 11, 2023).

<sup>32</sup> Mark Baldassare, California's Marijuana Majority, PPIC (Dec. 16, 2016), <https://www.ppic.org/blog/californias-marijuana-majority/> [<https://perma.cc/7BAA-J6KY>].

<sup>33</sup> Michael Vitiello, Why the Initiative Process Is the Wrong Way to Go: Lessons We Should Have Learned from Proposition 215, 43 MCGEORGE L. REV. 63 (2012).

<sup>34</sup> *Id.* at 85–6.

<sup>35</sup> BALLOTPEDIA, *supra* note 3.

environmental groups, growers' organizations, law enforcement organizations, social equity supporters, and more.<sup>36</sup>

Proposition 64, the ballot initiative that emerged from those efforts, reflected the compromises necessary to get a buy-in from so many groups. Here are a few of the provisions demonstrating that fact: notably, the law cedes control to local governments, allowing them to issue licenses to marijuana dispensaries and growers.<sup>37</sup> The initiative seemed to limit the size of marijuana growing facilities as a way to encourage legacy growers to enter the legal market.<sup>38</sup> It also created an earmark for California public universities to study the effects of legalizing marijuana and then make recommendations for reforms.<sup>39</sup> State agencies are in line to collect funding for costs associated with administering Proposition 64.<sup>40</sup> The initiative guaranteed funding for several years for the California Highway Patrol to develop methods to determine when drivers were under the influence of marijuana.<sup>41</sup> Funding is also earmarked for communities disproportionately impacted by the war on drugs.<sup>42</sup> There was more; for example, the proposition makes funds available for environmental restoration projects and for drug treatment and education for young marijuana users.<sup>43</sup>

Suggesting the potential complexity of California's legalized market, the law created nineteen types of licenses.<sup>44</sup> But even then, with a nod towards small participants, the proposition seemed to cap the size of grow sites.<sup>45</sup>

Perhaps not surprisingly given the efforts to address concerns of so many stakeholders, the proposition received support from many organizations, including the California Medical Association.<sup>46</sup> But could such a goody bag work?

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<sup>36</sup> *Id.*

<sup>37</sup> Cal. Proposition 64 (2016).

<sup>38</sup> Gage Marchini & Brian Parino, Proposition 64: Marijuana Legalization, CAL. INITIATIVE REV. 4, 15, 19 (2016), <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1014&context=california-initiative-review>.

<sup>39</sup> *Id.* at 12.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 12.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.* at 13.

<sup>45</sup> *Id.* at 4, 15, 19.

<sup>46</sup> Ruth Haskins, Physician Voter Guide: California Medical Association's Ballot Measure Positions, CAL. MED. ASS'N (Oct. 28, 2016), <https://www.cmadocs.org/newsroom/news/view/ArticleId/21178/Physician-Voter-Guide-California-Medical-Association-s-Ballot-Measure-Positions> [<https://perma.cc/YU7T-ZAAZ>].

Some supporters voiced concern that proponents were overpromising.<sup>47</sup> How could the state get illegal or gray market players to enter the legal market if the state expected to save significant law enforcement and prison costs?<sup>48</sup> What about promised abatement of environmental harm without maintaining significant law enforcement participation?<sup>49</sup> How could the law give legacy producers preference and make licenses available for minority members who had suffered from the effects of the war on drugs?<sup>50</sup> Could the state keep large corporate players out of the market, or would highly capitalized groups dominate the market?<sup>51</sup>

Early reports raised concerns that the cost of entry was too great. License seekers had to invest significant capital, for example, before knowing if they would get their licenses.<sup>52</sup> Lawyers' fees, licensing fees, and taxes at multiple levels of government suggest that those hoping to play by the rules might not be able to afford compliance, at least not without being tempted to sell some illegal product out the backdoor.<sup>53</sup>

Recently, commentators have weighed in on the successes and failures of California's efforts to create a legal market. The report card does not seem good.<sup>54</sup>

<sup>47</sup> See *infra* notes 48–51.

<sup>48</sup> Mathew Ormseth, Killings, Robberies, and Extortion. California Can't Stop its Booming Illegal Cannabis Stores, *L.A. TIMES* (Sep. 13, 2022, 9:04 AM), <https://www.latimes.com/california/story/2022-09-13/illegal-weed-dispensaries-police-raids-crime> [<https://perma.cc/UEA9-UPP3>]; St. John, *supra* note 1.

<sup>49</sup> Michael Vitiello, Legalizing Marijuana and Abating Environmental Harm: An Overblown Promise?, 50 *U.C. DAVIS L. REV.* 773 (2016).

<sup>50</sup> Marisa Gerber, California Promised 'Social Equity' After Pot Legalization. Those Hit Hardest Feel Betrayed, *L.A. TIMES* (Jan. 27, 2022), <https://www.latimes.com/california/story/2022-01-27/california-pot-industry-social-equity-broken-promises> [<https://perma.cc/M73S-EGTT>].

<sup>51</sup> McGreevy, *supra* note 1.

<sup>52</sup> In states where marijuana is legal, licenses to grow, sell, and process cannabis amount to tens of thousands of dollars collectively. Nadra Nittle, Legalizing pot: Is Prop. 64 really a civil rights issue?, *CAL MATTERS* (Jun. 23, 2020), <https://calmatters.org/politics/election-2016/2016/11/legalizing-pot-is-prop-64-really-a-civil-rights-issue/> [<https://perma.cc/AMY2-JL63>].

<sup>53</sup> Gerber, *supra* note 50.

<sup>54</sup> One success, however, is clearing the records of those convicted of marijuana offenses and reducing the number of people in prison. Although initially slow in expunging the records of those convicted for marijuana offenses, California will likely speed up the process after the passage of A.B. 1706, which requires courts to process all remaining cases for review by March 2023 and for the Department of Justice to update their records by July 2023. A.B. 1706, 2022 Leg., Reg. Sess. (Cal. 2022); Kiera Feldman, After Times Investigation, Law Passed to Force California to Clear Pot Convictions Faster, *L.A. TIMES* (Sept. 22, 2022), <https://www.latimes.com/california/story/2022-09-22/california-to-clear-pot-convictions-faster-after-times-probe> [<https://perma.cc/PYT8-QGYR>]. Moreover, in 2016, cannabis related felonies accounted for almost 8,000 arrests, whereas in 2021, the number decreased markedly to 825; similarly, although there was not a high number of people in custody for cannabis felonies in 2016 (139 total), there was still a substantial decrease through December, 2022 (less than ten total). 2021 Crime in California, CALIFORNIA JUSTICE INFORMATION

State revenue raised by the legal market have been consistent with early projections. For example, since 2020, yearly tax revenue has been over one billion dollars. The state is likely to exceed the one-billion-dollar mark again in 2022.<sup>55</sup> Even that news is mixed. Beginning in 2021, the state suffered declining tax revenue from marijuana sales for several quarters. Whether that trend remains true is unclear.<sup>56</sup>

One can speculate why the state's tax revenue may disappoint over time. In part, the decline may result from the expanded illegal market that has not gone away and may be expanding.<sup>57</sup>

Proposition 64's drafters hoped to protect small, local growers, sometimes called legacy growers.<sup>58</sup> The need to do so was multifaceted but was in part to assure that they had an incentive to enter the legal market.<sup>59</sup> High tax rates, compliance prices, and licensing prices have harmed small producers.<sup>60</sup> Although Governor Newsom's recent suspension of the cultivation tax promises to mildly assuage the situation, problems still abound.<sup>61</sup>

Apart from the overwhelming costs and red tape involved in getting licenses, confusion about Proposition 64 has impaired its implementation. Specifically, the proposal included a measure meant to appease growers who were concerned about big money coming in and taking over the market.<sup>62</sup> This measure limited the area of cultivation licenses to one acre till January 2023 on the theory that small growers

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SERVICES DIVISION, 27, [https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/Crime%20In%20CA%202021\\_0.pdf](https://data-openjustice.doj.ca.gov/sites/default/files/2022-08/Crime%20In%20CA%202021_0.pdf); Offender Data Points, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, 37, [https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/06/DataPoints\\_122016.pdf](https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/06/DataPoints_122016.pdf); Summary of In-Custody Offender Data Points for Month-end December 2022, California Department of Corrections and Rehabilitation, (last accessed November 19, 2022), <https://public.tableau.com/app/profile/cdcr.or/viz/OffenderDataPoints/SummaryInCustodyandParole> [<https://perma.cc/3HGX-8FLZ?type=image>].

<sup>55</sup> California Department of Tax and Fee Administration, Cannabis Tax Revenues, CA.GOV, <https://www.cdtfa.ca.gov/dataportal/charts.htm?url=CannabisTaxRevenues> [<https://perma.cc/C8FL-68Y9>].

<sup>56</sup> Tax revenues have been declining for six quarters straight since the second quarter of 2021. On top of that, Governor Newsom recently signed a bill eliminating the cultivation tax starting in January 2023, which historically has generated between \$25 million and \$43.3 million. California Department of Tax and Fee Administration, *supra* note 55; A.B. 195, 2022 Leg., Reg. Sess. (Cal. 2022).

<sup>57</sup> St. John, *supra* note 1.

<sup>58</sup> McGreevy, *supra* note 51.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> A.B. 195, *supra* note 56.

<sup>62</sup> McGreevy, *supra* note 51.

would be able to establish themselves after five years in the market.<sup>63</sup> However, shortly after Proposition 64 passed, regulators inserted a loophole allowing companies to hold multiple licenses if each was less than one acre.<sup>64</sup> The California Growers Association (“CGA”) filed suit to prevent the regulations from going into effect on the theory that the regulations were inconsistent with the Medical and Adult-Use Cannabis Regulation and Safety Act, but eventually the CGA voluntarily dropped the suit.<sup>65</sup> As it stands, 22% of the state’s licenses are held by ten companies.<sup>66</sup>

Another similar problem is that there is no limit on the number of licenses that municipalities can give out. As one might imagine, this has created a saturated market; licensed grows in the state “could create more than quadruple the state demand.”<sup>67</sup> Some growers report selling a pound of cannabis for \$300, if it sells at all, instead of the \$1,000–\$3,000 they were able to sell a pound before the passage of Proposition 64.<sup>68</sup> These forces, when taken together, encourage growers to go underground rather than comply with costly regulations and taxes. Those that do comply face financial ruin.<sup>69</sup>

Compounding problems with bringing outliers into the legal market is the reduction of penalties currently available under state law. Social justice advocates among others hoped to prevent continued criminalization, especially of members of

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<sup>63</sup> *Id.*; Cal. Bus. and Pro. Code § 26061(a)(8).

<sup>64</sup> McGreevy, *supra* note 51; 4 CCR § 16209. Section 16209 limits the medium sized licenses a person may hold to one but does not place a limit on the number of small licenses a person may hold, allowing persons to hold multiple licenses.

<sup>65</sup> Kate Maxwell, Cannabis Farmers Sue State Over Farm-Size Limits, MENDOCINO VOICE (Jan. 23, 2018), <https://mendovoice.com/2018/01/cga-acreage-suit/> [<https://perma.cc/ESD7-PEXC>]; Scott Rod, Growers Association Drops Lawsuit Against State Over Permitting Large-Scale Cannabis Cultivators, SACRAMENTO BUS. J. (Jan. 22, 2019), <https://www.bizjournals.com/sacramento/news/2019/01/22/growers-association-drops-lawsuit-against-state.html> [<https://perma.cc/77M8-RGNE?type=standard>].

<sup>66</sup> McGreevy, *supra* note 51.

<sup>67</sup> Scott Wilson, The Casualties of California Legalizing Pot: Growers Who Went Legal, THE WASHINGTON POST (Aug. 21, 2022, 12:39 PM), <https://www.washingtonpost.com/nation/2022/08/21/california-marijuana-farms-failing/> [<https://perma.cc/9YRM-PSTG>].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Similar problems exist of individuals hoping to open stores serving the market. They must find a place to open their business before they can qualify for a license. See 4 CCR § 15002. The result is that some potential business owners spend significant capital only to fail to get a license. For example, Ingrid Archie—after serving prison time for a marijuana offense—hoped to open a holistic community center selling edibles, providing mental health services, and holding homeownership seminars, but her dreams were dashed because of the expense of getting into the legal market—even as an equity applicant. Gerber, *supra* note 50.

minority groups, and reduced law enforcement and prison costs.<sup>70</sup> As a result, Proposition 64 reduced penalties for operating outside of the law.<sup>71</sup> For example, possession with intent to sell is now a misdemeanor and a potential wobbler (i.e., punished either as a misdemeanor or felony depending on the circumstances), whereas under the old law it was a felony.<sup>72</sup> Cultivating more than six plants was downgraded to a misdemeanor and potential wobbler as well.<sup>73</sup> Moreover, municipalities that prohibit licenses all-together are not entitled to state funds meant to help with enforcement.<sup>74</sup> Effectively, this creates an environment where operating outside of the law comes with manageable risk of getting caught and, if caught, manageable consequences.<sup>75</sup>

According to the Los Angeles Times reporting, also related to the de-emphasis of enforcement of marijuana laws is encouragement of gangs to “tax” businesses in their territory.<sup>76</sup> A community in East Los Angeles has an underground shop that sells not just cannabis, but also hard drugs and weapons.<sup>77</sup> These types of stores are often subject to paying taxes to gangs or being incentivized to do so through gang violence.<sup>78</sup>

Without rigid enforcement operations, illicit grows are also much more popular; the Los Angeles Times reports that everywhere they have looked, they have

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<sup>70</sup> CA 2016 Voter Guide, ACLU OF NORTHERN CALIFORNIA (Oct. 14, 2016), <https://www.aclunc.org/article/aclu-northern-ca-2016-voter-guide> [<https://perma.cc/4VMM-SKWE>]; Marijuana and the Golden State, DRUG POLICY ALLIANCE, <https://drugpolicy.org/california/marijuana-and-golden-state> (last visited on Feb. 20, 2023) [<https://perma.cc/G4QS-Q2LC>].

<sup>71</sup> J. Richard Couzens & Tricia A. Bigelow, Proposition 64: “Adult Use of Marijuana Act” Resentencing Procedures and Other Selected Provisions (Nov. 2016), <https://www.courts.ca.gov/documents/prop64-Memo-20161110.pdf> [<https://perma.cc/R3JG-JFK7>].

<sup>72</sup> *Id.* at 61.

<sup>73</sup> *Id.* at 62.

<sup>74</sup> Text of Proposition 64, § 34018(f)(3)(C) on p. 203, <https://images.procon.org/wp-content/uploads/sites/16/ca-prop-64-marijuana.pdf> [<https://perma.cc/SN53-BV67>].

<sup>75</sup> Some local communities have faced what commentators compare to whack-a-mole, the problem of citing a business for violations of the law, only to have it pop up elsewhere. Lucas Manfield, Los Angeles Times Investigation Reveals Devastating Consequences of California Weed Rush, CAL. COUNTY NEWS (Oct. 2, 2022, 5:26 PM), <https://www.wweek.com/news/courts/2022/10/02/los-angeles-times-investigation-reveals-devastating-consequences-of-california-weed-rush/> [<https://perma.cc/G4UF-PUFH>].

<sup>76</sup> Mathew Ormseth, Killings, Robberies, and Extortion. California Can’t Stop its Booming Illegal Cannabis Stores, L.A. TIMES (Sep. 13, 2022, 9:04 AM), <https://www.latimes.com/california/story/2022-09-13/illegal-weed-dispensaries-police-raids-crime> [<https://perma.cc/6J9N-6Y5J>].

<sup>77</sup> *Id.*

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

seen a dramatic increase in illegal operations.<sup>79</sup> This adds further strain on local growers and further saturates an already saturated market. Using industry standards and conservative measures, the Los Angeles Times estimates the illegal market in 2021 produced 2.6 million pounds of cannabis, which is enough to supply the entire legal market.<sup>80</sup> And, because all of this is under the table, California is missing out on key revenue opportunities.

Yet other aspects of Proposition 64 have encouraged criminality. As noted above, getting a buy-in from the California League of Cities required a significant concession: granting local municipalities to choose whether to allow marijuana business and, if so, to regulate on their own, marijuana businesses through licensing and the imposition of taxes.<sup>81</sup> Not only does this add to the heavy tax burden already placed on legal operations, but also adds an opportunity for bribery to sneak its way into the market.<sup>82</sup>

According to Los Angeles Times reporting, a number of city officials in Southern California accepted bribes from marijuana companies in exchange for pushing those companies higher up in the permit list.<sup>83</sup> Although this problem may exist even if marijuana were to be regulated at the state level, municipalities lack the ethics oversight committees that the state has and cannot deal with squashing corruption the same way the state can.<sup>84</sup> For this reason, municipalities are much more susceptible to bribery and corruption.

Nor has Proposition 64 delivered on providing equity access, despite efforts by many cities around the state.<sup>85</sup> In 2018, then-Governor Brown signed S.B. 1294, which aimed to promote populations harmed most by marijuana prohibitions through granting equity licenses.<sup>86</sup> The results are mixed at best. Because licenses are granted at the municipal level, equity is granted at the whim of those running any given municipality and, as one might imagine, some municipalities are much more focused on this than others. On a statewide level, regular licenses dwarf equity

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<sup>79</sup> Paige St. John, *Nobody Knows How Widespread Illegal Cannabis Grows Are in California. So We Mapped Them*, L.A. TIMES (Sep. 8, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-09-08/how-we-mapped-illegal-cannabis-farms-in-california> [https://perma.cc/B4N3-3SGK].

<sup>80</sup> *Id.*

<sup>81</sup> McGreevy, *supra* note 51.

<sup>82</sup> Adam Elmahrek, et al., *\$250,000 Cash in a Brown Paper Bag. How Legal Weed Unleashed Corruption in California*, L.A. TIMES (Sept. 15, 2022), <https://www.latimes.com/california/story/2022-09-15/cannabis-corruption-threats-secret-financial-deals-politicians> [https://perma.cc/7T9S-Y2FH].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Gerber, *supra* note 50.

<sup>86</sup> S.B. 1294, 2018 Leg., Reg. Sess. (Cal. 2018), codified beginning at Bus. and Pro. Code § 26240.

licenses.<sup>87</sup> Lack of access to capital has harmed prospective minority business owners even more than other prospective participants in the industry.<sup>88</sup> Reporters have identified minority community members whose capital have been siphoned off by requirements of having a lease for a storefront property as a condition of receiving a license.<sup>89</sup>

The picture that emerges is not encouraging. The cost of entry into the legal market is too great for most investors, and certainly for uncapitalized groups that may have been harmed by the war on drugs in the past.<sup>90</sup> Weak enforcement and sanctions invite increased illegal trafficking.<sup>91</sup> Reports surface as well that gangsters, including the Russian mob, have gained access to the industry.<sup>92</sup>

On some fronts, largely beyond the scope of this paper, the state has taken steps to repair some flaws in the law. Governor Newsom has signed SB 1326, which created a process for California to enter into agreements with other states to allow cannabis transactions with entities outside California.<sup>93</sup> Moreover, he has signed legislation to provide tax relief to legal cannabis farmers.<sup>94</sup> That law permanently eliminated California's cannabis cultivation tax and guaranteed three years of net tax relief to the cannabis industry as a whole.<sup>95</sup>

Not surprisingly, policymakers and some industry participants are calling for stepped-up law enforcement participation.<sup>96</sup> To some degree, that is occurring. Law enforcement authorities across the country, including the FBI, have cast a wide net

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<sup>87</sup> Through December 2020, 203 equity licenses were issued compared to 2,355 non-equity licenses. Through early January 2022, Oakland, where 186 equity licenses were granted, seems to be one of the only cities with a serious commitment to equity licenses (for reference, San Francisco granted 18 and Sacramento granted 19). Gerber, *supra* note 50.

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

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Ormseth, *supra* note 76.

<sup>92</sup> Mike Baker & William K. Rashbaum, As Russian Money Poured Into Cannabis, Giuliani Allies Scrambled to Partake, *THE N.Y. TIMES* (Oct. 24, 2019), <https://www.nytimes.com/2019/10/23/us/kukushkin-giuliani-russia-cannabis-marijuana.html> [<https://perma.cc/4YC3-6KFH>].

<sup>93</sup> Office of Governor Gavin Newsom, *CA.GOV* (Sep. 18, 2022), <https://www.gov.ca.gov/2022/09/18/governor-newsom-signs-legislation-to-strengthen-californias-cannabis-laws/> [<https://perma.cc/MB4K-RDT6>].

<sup>94</sup> A.B. 195, *supra* note 61.

<sup>95</sup> Isabella Vanderheiden, Governor Newsom Signs Cannabis Tax Reform Initiative Killing Statewide Cultivation Tax, *LOST COAST OUTPOST* (July 1, 2022), <https://lostcoastoutpost.com/2022/jul/1/governor-newsom-signs-cannabis-tax-reform-initiative/> [<https://perma.cc/FJ6B-5WBV>].

<sup>96</sup> Ormseth, *supra* note 76.

in their efforts to root out corruption among local government officials overseeing the marijuana industry.<sup>97</sup> Bribery to get a marijuana license is bribery and does not present any unique law enforcement issues or risks of overenforcement.<sup>98</sup>

The problem with headline reports like those in the Los Angeles Times, with revelations about Proposition 64's failures, have invited greater calls for amped up prosecutions, including at the local level.<sup>99</sup> Governor Newsom has formed the Unified Cannabis Enforcement Task Force to crack down on illegal cannabis operations.<sup>100</sup> On October 4, 2022, the task force conducted an operation in the rural area of Jupiter in Tuolumne County that eradicated 11,260 illegal cannabis plants and destroyed 5,237 pounds of illegally processed cannabis flower, worth an estimated retail value of over \$15 million.<sup>101</sup>

Such calls for stronger enforcement of drug laws may seem necessary to help move California towards a legally regulated market. But this article raises cautionary flags about police involvement. One only has to think back to the War on Drugs when legislators acted out of moral panic and ramped up penalties for drug offenses. As the title of this article suggests, there are risks that policy makers will make the same kinds of mistakes that led to the failed War on Drugs. The next section turns to two cases involving Empyrean Enterprises, LLC. Empyrean is a cash-in-transit company doing business in 28 states.<sup>102</sup> As developed there, companies like Empyrean serve a critical role in assisting legitimate marijuana industry members deal. Attempting to criminalize such businesses only increases incentive to stay in the illegitimate market.<sup>103</sup>

Not only are companies like Empyrean necessary for a transition to a regulated market, but also, law enforcement efforts demonstrate real risks in the call for greater law enforcement involvement in the California market.

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<sup>97</sup> Jeff Smith, Efforts intensify to battle corruption involving local government officials and cannabis industry, *MJBizDaily* (Mar. 2, 2022), <https://mjbizdaily.com/efforts-intensify-to-battle-public-corruption-involving-local-government-officials-and-cannabis-industry/> [https://perma.cc/Z8ET-BQ9H].

<sup>98</sup> 18 U.S.C. § 201 (1962).

<sup>99</sup> Ormseth, *supra* note 76.

<sup>100</sup> Office of Governor Gavin Newsom, Governor Newsom's Cannabis Enforcement Task Force Eradicates Over \$15 Million Worth of Illegal Cannabis, *CA.GOV* (Oct. 13, 2022), <https://www.gov.ca.gov/2022/10/13/governor-newsoms-cannabis-enforcement-task-force-eradicates-over-15-million-worth-of-illegal-cannabis/> [https://perma.cc/X8V6-Y6V4].

<sup>101</sup> *Id.*

<sup>102</sup> Wimer, *supra* note 16.

<sup>103</sup> See discussion *infra* Part II.

## II. PART II: TWO CASE STUDIES

California's difficult transition to a regulated market now seems to reveal the need for some significant involvement of law enforcement agencies.<sup>104</sup> But as indicated, that transition requires smart policing tactics. This section focuses on two examples of bad law enforcement tactics that frustrate efforts of "good" actors to participate in a well-regulated industry. Such efforts reward participants in the illegal market by burdening good citizens.<sup>105</sup>

Banking problems that face the marijuana industry are widely reported, focusing largely on the cash-based nature of the industry.<sup>106</sup> Federal laws, especially those governing money laundering, deter banks from providing ordinary banking services to marijuana businesses.<sup>107</sup> In 2014, the Department of Treasury Financial Crimes Enforcement Network ("FinCEN") issued guidance clarifying the obligations of financial institutions dealing in marijuana-related proceeds.<sup>108</sup> Under the FinCEN guidance, banks are required to conduct "customer due diligence."<sup>109</sup>

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<sup>104</sup> See discussion *supra* Part I.

<sup>105</sup> See discussion *infra*.

<sup>106</sup> Los Angeles Times Editorial Board, Marijuana Businesses are Awash with Cash. California Wants to Help get that Money into Banks, L.A. TIMES (Dec. 4, 2017, 4:00 AM PST), <https://www.latimes.com/opinion/editorials/la-ed-marijuana-cash-20171222-story.html> [<https://perma.cc/JE3E-JWU6>]; Shariq Khan, U.S. Pot Sellers Stash Cash as Banks Leave Them High and Dry, REUTERS (May 23, 2021, 11:17 AM PDT), <https://www.reuters.com/world/us/us-pot-sellers-stash-cash-banks-leave-them-high-dry-2021-05-24/> [<https://perma.cc/CQ2W-MCSY>]; Anh Hatzopoulos, The Cost of Cash for Unbanked Cannabis Businesses, FORBES (Jul. 13, 2020, 8:20 AM EDT), <https://www.forbes.com/sites/forbesfinancecouncil/2020/07/13/the-cost-of-cash-for-unbanked-cannabis-businesses/?sh=65dc1a50f4dd> [<https://perma.cc/N8SR-8LCK>].

<sup>107</sup> See Bank Secrecy Act, H.R. 15073, 91<sup>st</sup> Cong. (1970), codified at 31 U.S.C. § 5311 et seq.

<sup>108</sup> Financial Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Businesses, DEPARTMENT OF THE TREASURY (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf> [<https://perma.cc/X4E6-NHFC>].

<sup>109</sup> *Id.*

The guidelines specify conduct that amounts to due diligence.<sup>110</sup> Further, banks that have marijuana business clients must file suspicious-activity-reports (SARS).<sup>111</sup>

Various members of Congress have proposed legislation to address banking issues.<sup>112</sup> They often are from states with legalized marijuana regimes and recognize the need for access to banking services to help develop a regulated market.<sup>113</sup> To date, those efforts have stalled.<sup>114</sup>

The closest that members of Congress have come to enacting meaningful protections for state marijuana businesses is the on-going rider to the annual budget bill.<sup>115</sup> The Rohrabacher-Farr amendment prohibits federal authorities from spending funds to prosecute private entities that comply with state medical cannabis laws.<sup>116</sup>

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<sup>110</sup> “(i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.” *Id.*

<sup>111</sup> *Id.* The Obama administration began the process of informal accommodation to states with legal marijuana regimes. The Ogden Memorandum (dealing with medical marijuana) and the Cole Memorandum (dealing with recreational marijuana) demonstrated a policy of forbearance if states complied with a set of identified federal policies. See David W. Ogden, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, DEPARTMENT OF JUSTICE (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [<https://perma.cc/RQ7X-H3Y4>]; see also James M. Cole, *Guidance Regarding Marijuana Enforcement*, DEPARTMENT OF JUSTICE (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>112</sup> Lewis Kolski, *The Safe Banking Act: What Is It and Where Does It Stand?*, FORBES (Dec. 3, 2021, 9:33 AM EST), <https://www.forbes.com/sites/lewiskoski/2021/12/03/the-safe-banking-act-what-is-it-and-where-does-it-stand/?sh=6cfe4d412baf> [<https://perma.cc/TP8L-ARXV>].

<sup>113</sup> *Id.*

<sup>114</sup> Morgan Paxhia, *SAFE Banking Act Fails: This Week in Cannabis Investing*, KIPLINGER (Dec. 23, 2022), <https://www.kiplinger.com/investing/stocks/safe-banking-act-fails-this-week-in-cannabis-investing> [<https://perma.cc/NL47-CY4N>].

<sup>115</sup> NORML, *House Appropriations Committee Approves Amendment to Protect Legal State Marijuana Programs*, YES WEEKLY (Jun. 28, 2022), [https://www.yesweekly.com/cannabis/house-appropriations-committee-approves-amendment-to-protect-legal-state-marijuana-programs/article\\_aaed6346-f71e-11ec-995f-8fd6b43b3f.html](https://www.yesweekly.com/cannabis/house-appropriations-committee-approves-amendment-to-protect-legal-state-marijuana-programs/article_aaed6346-f71e-11ec-995f-8fd6b43b3f.html) [<https://perma.cc/RU66-UH4A>].

<sup>116</sup> *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

Whether the Rohrabacher-Farr amendment protects cash-transport and banking businesses that are legal under state law remains unresolved.<sup>117</sup> That is because the amendment refers only to laws that “authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>118</sup> The goal of the amendment is to deny funds to federal prosecutors who might use funds to prevent the implementation of a state’s cannabis laws.<sup>119</sup> In 2020, California adopted legislation to create access to safe banking for the marijuana industry.<sup>120</sup> That law guarantees that financial institutions and companies that transport cash do not commit a crime under California law solely by virtue of dealing in cannabis proceeds, whether medical or recreational.<sup>121</sup> One might argue, therefore, that using funds to prosecute or otherwise interfere with companies that assist moving cash proceeds from state-legal marijuana facilities violates Rohrabacher-Farr.

Enter Empyreal. Empyreal operates in 28 states, including California and Missouri.<sup>122</sup> Empyreal contracts not just with marijuana companies but also with other cash-intensive businesses.<sup>123</sup> Most of the contracts Empyreal has with marijuana businesses are with medically licensed establishments.<sup>124</sup> Furthermore, Empyreal only transports funds of marijuana businesses that have garnered banking relationships with institutions that have anti-money laundering programs pursuant to the 2014 FinCEN Guidance Regarding Marijuana-related Business.<sup>125</sup> Additionally, Empyreal requires MRB’s to verify their licenses before doing business with them, and the banks Empyreal does business with have been audited by the California Department of Financial Protection and Innovation, the National

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<sup>117</sup> Rohrabacher-Farr Amendment Renewed, GREEN LIGHT LAW GROUP (May 4, 2017), <https://greenlightlawgroup.com/blog/rohrabacher-farr-amendment-renewed> [<https://perma.cc/GUK7-SVWT>].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> A.B. 1525, 2020 Leg., Reg. Sess. (Cal. 2020), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB1525](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1525) [<https://perma.cc/BYY7-CYSJ>].

<sup>121</sup> Cal. Bus. and Pro. Code § 26260 (West, 2022).

<sup>122</sup> Petitioner’s Complaint for Declaratory and Injunctive Relief at 6, *Empyreal Enterprises, LLC vs. United States et. al.* (C.D. Cal., filed Jan. 14, 2022) (No. 5:22-cv-00094-JWH-SHK).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 10.

<sup>125</sup> *Id.*

Credit Union Association, and FinCEN.<sup>126</sup> Evidently, Empyrean is a good actor in compliance with state law, but that has not thwarted law enforcement officials.<sup>127</sup>

As indicated, participants in the marijuana industry that want to enter the legal market need companies like Empyrean. Without a way for marijuana businesses to transport their cash from their property to the bank, the safety advantage of banking loses most of its allure; in order for companies to safely deposit their money into banks, they would first need to drive it to a bank, which creates the same concerns as storing cash somewhere other than a bank.<sup>128</sup> Providing safe pathways to transport cash to banks also ensures that more marijuana businesses are subject to the bank's due diligence as well as state and federal regulatory oversight, which in turn promotes the Bank Secrecy Act's anti-money laundering goals.<sup>129</sup> Or so it would seem.

Despite compliance with state law and federal banking requirements, Empyrean vehicles were stopped on five occasions in two states where authorities ultimately seized upwards of \$1.2 million.<sup>130</sup> In both states, state authorities either used adoption or participated in a state-federal joint venture, presumably at least in part to benefit from the higher windfall of federal civil forfeiture claims.<sup>131</sup>

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<sup>126</sup> Letter from David Bass, attorney for Empyrean Enterprises LLC to San Bernardino County Sheriff's Department 2, 5, (Dec. 22, 2021), on file with Ohio State Crim. L. J.

<sup>127</sup> Jo Ellen Nott, Armored Car Company Victim of Multiple 'Highway Robberies' by Cops Files Federal Lawsuit for Recovery of Seized Cash, PRISON LEGAL NEWS (Feb. 26, 2022), <https://www.prisonlegalnews.org/news/2022/feb/26/armored-car-company-victim-multiple-highway-robberies-cops-files-federal-lawsuit-recovery-seized-cash/> [<https://perma.cc/Y376-8GW2>].

<sup>128</sup> Storing cash in the open creates safety and theft concerns, whether in a vehicle or on a company's property. See Anh Hatzopoulos, The Cost of Cash for Unbanked Cannabis Businesses, FORBES (Jul. 13, 2020, 8:20 AM EDT), <https://www.forbes.com/sites/forbesfinancecouncil/2020/07/13/the-cost-of-cash-for-unbanked-cannabis-businesses/?sh=65dc1a50f4dd> [<https://perma.cc/7R5Z-7ULK>]. Evidence of the need for cash-transport companies can also be seen in the fact that the cash logistics market was valued at upwards of \$21 billion in 2021; evidently, several businesses rely on cash-transport companies to safely deposit their cash. Cash Logistics Market Size, Share & Trends Analysis Report, GRAND VIEW RESEARCH (Jun. 2022), <https://www.grandviewresearch.com/industry-analysis/cash-logistics-market> [<https://perma.cc/J2S8-RS3Z>].

<sup>129</sup> Banks are required to vet cannabis companies depositing funds, whereas cannabis companies, in the absence of banks, are left without the oversight that banks are mandated to apply. See Financial Crimes Enforcement Network, *supra* note 108.

<sup>130</sup> Noah Taborda, Company Stopped for Hauling Missouri Marijuana Funds Across Kansas Settles Federal Suit, MISSOURI INDEPENDENT (Apr. 14, 2022, 11:15 AM PDT), <https://missouriindependent.com/2022/04/14/company-missouri-marijuana-kansas-federal-suit/> [<https://perma.cc/24QA-MTVJ>].

<sup>131</sup> *Id.*; Nicole Potter, Lawsuit Between Armored Car Company Transporting Cannabis and San Bernardino County Resolved, HIGH TIMES (May 10, 2022), <https://hightimes.com/news/lawsuit-between-armored-car-company-transporting-cannabis-and-san-bernardino-county-resolved/> [<https://perma.cc/E657-7WW6>].

### A. *Kansas*

On May 17, 2021, a Dickinson County sheriff's deputy saw an Empyrean vehicle traveling on an interstate highway.<sup>132</sup> The deputy pulled over the Empyrean vehicle on the grounds that the license plate tag was partially obscured, although he told dispatchers he believed the van to have Colorado plates.<sup>133</sup> Soon after stopping the vehicle, the deputy asked the driver what was in the vehicle, and the driver answered that she was on the way to Missouri to pick up medical marijuana proceeds and take them to Colorado.<sup>134</sup> This prompted the deputy to call the DEA and the U.S. Attorney's Office.<sup>135</sup>

Captured on the deputy's patrol car dash cam system, a DEA agent told the deputy, "I don't think [what Empyrean is doing] is necessarily illegal. It's just strange as hell."<sup>136</sup> The DEA agent further stated two questionable reasons why Empyrean's business was illegal: medical marijuana proceeds must stay in the state they were earned and Empyrean is a cash smuggling operation.<sup>137</sup> Most damningly, and evidencing anti-cannabis sentiment, the DEA Agent Wheeler and the deputy spoke of "smash[ing] [Empyrean] into submission," "crush[ing] every one of their cars they can identify," and "taking them down all at once."<sup>138</sup>

A day later, on May 18, 2021, after surveilling Empyrean's vehicle pickup cash from medical marijuana dispensaries in Missouri, the deputy stopped the vehicle on its way to Colorado as it passed through Kansas and seized \$165,620.<sup>139</sup> A few months later, the U.S. Attorney's Office filed a federal civil forfeiture claim.<sup>140</sup>

### B. *California*

On November 16, 2022, a San Bernardino County sheriff's deputy pulled an Empyrean vehicle over for following a semi-truck too closely, in violation of

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<sup>132</sup> Taborda, *supra* note 130.

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

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

<sup>135</sup> Duane Schrag, How a Kansas traffic stop led to a federal lawsuit over \$1.2M in seized marijuana profits, KANSAS REFLECTOR (Feb. 6, 2022), <https://kansasreflector.com/2022/02/06/how-a-kansas-traffic-stop-led-to-a-federal-lawsuit-over-1-2m-in-seized-marijuana-profits/> [<https://perma.cc/5F95-26W7>].

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

California Vehicle Code section 21703.<sup>141</sup> The deputy Franco questioned the driver, leading to the driver calling his supervisors so they could describe Empyreal's operations.<sup>142</sup> Empyreal's leadership team explained the origin and destination of the cash in the vehicle, the legitimacy of the businesses it was coming from, and volunteered to provide GPS info to verify what they were saying.<sup>143</sup> Despite this, more officers showed up, covered the vehicle's external cameras, and seized the driver's personal and business phones.<sup>144</sup>

The officers also sought a warrant to search and seize assets in the vehicle on the grounds that the vehicle was transporting cash from at least some illegitimate dispensaries to Empyreal's branch in Las Vegas; that the cash, once deposited, would be turned into cryptocurrency, a common money-laundering technique; and that one of the vehicle's pickup locations was described as heavily guarded.<sup>145</sup> After obtaining a warrant, the officers seized roughly \$700,000 from the vehicle and transferred it to federal authorities.<sup>146</sup> Notably, the officers did not issue a citation for the initial traffic violation that begot the incident.<sup>147</sup>

In November 2021, Empyreal's legal team sent a letter to the San Bernardino County's sheriff's office explaining Empyreal's business operation and compliance with state law.<sup>148</sup> Empyreal did not receive a response.<sup>149</sup>

Shortly thereafter, deputies again stopped the same driver, this time for slightly exceeding the speed limit and prematurely operating his turn signal.<sup>150</sup> After a K9

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<sup>141</sup> Michael Finnegan, FBI and San Bernardino County Sheriff's Department accused of illegally seizing marijuana cash, *LOS ANGELES TIMES* (Jan. 8, 2022, updated 8:14 AM PST), <https://www.latimes.com/california/story/2022-01-28/marijuana-cash-seized-armored-car-fbi-san-bernardino-sheriff> [<https://perma.cc/8BVP-BMUV>]; Plaintiff's Complaint, supra note 122 at 18.

<sup>142</sup> Plaintiff's Complaint, supra note 122, at 18.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 19.

<sup>145</sup> Exhibit A to Supplemental Declaration of David Bass, Empyreal Enterprises, LLC vs. United States et. al (C.D. Cal., filed Jan. 27, 2022) (No. 5:22-cv-00094-JWH-SHK). Empyreal disputed some of the statements in the search warrant affidavit. Namely, Empyreal contended that the deputy was confused about the cryptocurrency allegation and that all the companies Empyreal was carrying cash for were licensed under state law. These contentions were made in a federal court filing that the judge declined to consider because it was filed late. Michael Finnegan, Judge Declines to Block Seizures of Pot Store Cash from Armored Cars, *LOS ANGELES TIMES* (Jan. 31, 2022 6:36 PM PST), <https://www.latimes.com/california/story/2022-01-31/marijuana-cash-armored-cars-judge-ruling> [<https://perma.cc/8ZPA-Z3BK>].

<sup>146</sup> Plaintiff's Complaint, supra note 122, at 19.

<sup>147</sup> *Id.* at 20.

<sup>148</sup> *Id.* at 21.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 22.

alerted the vehicle for marijuana, the deputies covered the exterior and interior video cameras of the vehicle and began questioning the driver.<sup>151</sup> The driver explained that the money in the vehicle was picked up from licensed medical marijuana establishments.<sup>152</sup>

While questioning the driver, the deputies said, “If I stop you, I have the right to open the safe” and, “I do have the right to take the money.”<sup>153</sup> After denying the driver’s offer to call the CEO of Empyreal, the deputies searched the safes and seized \$350,000 in cash.<sup>154</sup> One of the deputies said, “That’s it? You set the bar too high.”<sup>155</sup> The deputies then let the driver go without issuing a traffic citation.<sup>156</sup> On January 10, 2022, Empyreal received a letter from the FBI indicating the seized cash was transferred to the FBI for forfeiture.<sup>157</sup>

Not stopping there, San Bernardino County sheriff’s deputies stopped an Empyreal vehicle one more time on January 6, 2022.<sup>158</sup> However, Empyreal had since told its drivers to stop transporting marijuana proceeds through San Bernardino County and the vehicle in this stop was not carrying anything connected to marijuana, so the deputies let the vehicle go.<sup>159</sup> Before letting the vehicle go, though, a deputy told the driver—in response to the driver asking why Empyreal vehicles were being stopped—that it was political, without explaining further.<sup>160</sup>

As one can see, the sheriff’s department kept going after Empyreal even after Empyreal made it clear that they were operating within the bounds of state law and that the banks they were transporting cash to were abiding by federal guidance.

### C. *Empyreal Strikes Back*

In response to the California and Kansas stops, Empyreal filed suit against the San Bernardino County Sheriff and numerous federal authorities.<sup>161</sup> The crux of Empyreal’s argument was a combination of state and federal law. Empyreal pointed to two state statutes: B&PC section 26260, which expressly states that it is not a

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<sup>151</sup> Id. at 23.

<sup>152</sup> Id. at 22.

<sup>153</sup> Id. at 23.

<sup>154</sup> Id. at 24.

<sup>155</sup> Id.

<sup>156</sup> Id. at 25.

<sup>157</sup> Id.

<sup>158</sup> Id. at 26.

<sup>159</sup> Id. at 27.

<sup>160</sup> Id.

<sup>161</sup> Nott, *supra* note 127.

crime under California law to transport or bank cash from licensed cannabis businesses;<sup>162</sup> and H&SC section 11471.2, which prohibits state authorities from participating in adoption.<sup>163</sup> Empyrean also relied on the Rohrabacher-Farr amendment, emphasizing that federal authorities are prohibited from using funds to prosecute licensed medical marijuana businesses.<sup>164</sup> This means that no matter what occurred—adoption or a state-federal joint venture—the seizures were not justified, as long as the Rohrabacher-Farr amendment applied to bar federal participation.

As noted above, there is some doubt as to whether the Rohrabacher-Farr amendment applies to banking and cash transport laws, but in pursuing its civil forfeiture claim in Kansas, the U.S. Attorney's Office argued along different lines: the amendment does not apply to marijuana proceeds taken from a medical state into a non-legal state.<sup>165</sup> After all, so the argument goes, in what way does harassing Empyrean in Kansas have anything to do with Missouri's enforcement of laws that authorize the use, distribution, possession, and cultivation of medical marijuana?<sup>166</sup> One might answer with an analogy to gambling: some states criminalize gambling and gambling proceeds, does that mean proceeds from a legal state become illegal in a state that prohibits gambling? Of course, the difference is that federal law does not outright prohibit gambling, whereas it does prohibit cannabis.<sup>167</sup>

As is the case with most lawsuits, Empyrean and the federal defendants settled the lawsuit filed in California.<sup>168</sup> Under the terms of the agreement, the federal defendants would not pursue forfeiture claims over Empyrean's seized cash in exchange for Empyrean dropping the suit.<sup>169</sup> Notably, the agreement left undisturbed

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<sup>162</sup> Plaintiff's Complaint, *supra* note 122, at 40; CAL. BUS. AND PROF. CODE § 26260 (West, 2021).

<sup>163</sup> Plaintiff's Complaint, *supra* note 122, at 31; CAL. HEALTH & SAFETY CODE § 11471.2(a) (West, 2017).

<sup>164</sup> Plaintiff's Complaint, *supra* 122, at 43.

<sup>165</sup> Plaintiff's Motion for Partial Summary Judgment as to Forfeitability and as to Claimant's Affirmative Defense of Rohrabacher-Farr Amendment at 7–9, *United States v. Empyrean Enterprises, LLC* (D. Kan., filed June 13, 2022) (No. 21-1215-HLTKGG).

<sup>166</sup> *Id.*

<sup>167</sup> 21 U.S.C. § 812 (1970).

<sup>168</sup> Tony Lange, Justice Department to Return \$1.1M in Cannabis-Related Cash to Armored Vehicle Company, CANNABIS BUSINESS TIMES (Apr. 14, 2022), <https://www.cannabisbusinesstimes.com/news/doj-feds-return-million-cash-empyrean-armored-vehicle/> [<https://perma.cc/T2RX-D2QR>].

<sup>169</sup> Settlement Agreement, *Empyrean Enterprises, LLC vs. United States et. al.* (C.D. Cal., filed April 13, 2022) (No. 5:22-cv-00094-JWH-SHK), <https://ij.org/wp-content/uploads/2021/11/Empyrean-Settlement-Agreement.pdf>

the forfeiture case in Kansas as well as Emyreal's case against the San Bernardino County Sheriff's department.<sup>170</sup>

In May 2022, Emyreal reached an agreement with the sheriff's department.<sup>171</sup> The parties released a joint statement wherein the sheriff's office recognized that Emyreal is part of the solution geared towards promoting the legal cannabis market and rooting out illegal cannabis operations.<sup>172</sup> Interestingly, Emyreal and the Sheriff's department agreed to a "non-financial settlement," which suggests Emyreal held out for something other than money.<sup>173</sup>

Finally, in November 2022, the U.S. Attorney's Office filed a dismissal motion in the Kansas forfeiture case indicating it was no longer pursuing forfeiture of the seized funds.<sup>174</sup> The motion was granted, and the U.S. Attorney's office declined to comment.<sup>175</sup>

A fair-minded critic might find some of the arguments made by the government implausible, some issues in the dispute between the parties are debatable.<sup>176</sup> Attorneys practicing marijuana law know that they are often asked legal questions where there is simply no answer. For example, one such argument is the U.S. Attorney's argument that the Rohrabacher-Farr amendment does not apply to the Kansas or California seizures by virtue of Kansas prohibiting cannabis and by virtue of the ambiguity surrounding federal cannabis banking.<sup>177</sup>

That Emyreal settled its lawsuits on what seem to be favorable terms is small comfort. Unlike many players in the industry, Emyreal has resources to hire skilled

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<sup>170</sup> *Id.*

<sup>171</sup> Nicole Potter, *Lawsuit Between Armored Car Company Transporting Cannabis and San Bernardino County Resolved*, HIGH TIMES (May 10, 2022), <https://hightimes.com/news/lawsuit-between-armored-car-company-transporting-cannabis-and-san-bernardino-county-resolved/>.

<sup>172</sup> San Bernardino Sheriff's Department, *San Bernardino County Sheriff's Department and Emyreal Resolve Case* (May 6, 2022), <https://local.nixle.com/alert/9405655/?fbclid=IwAR2l9cpDjic6cQzBbbzhD4X-Un8LkI8V70acBRohOy5CP7a5Mx0AZC9dl3M>.

<sup>173</sup> *Id.*

<sup>174</sup> Dan Margolies, *Feds Abruptly Drop Effort To Seize Legal Weed Profits Being Transported From Kansas City*, NPR (Nov. 16, 2022, 3:11 PM CST), <https://www.kcur.org/news/2022-11-16/feds-abruptly-drop-effort-to-seize-legal-weed-profits-being-transported-from-kansas-city> [<https://perma.cc/23X8-H3FK>].

<sup>175</sup> *Id.*

<sup>176</sup> See *supra* discussion accompanying notes 165–167.

<sup>177</sup> United States Motion for Partial Summary Judgment as to Forfeitability and as to Claimant's Affirmative Defense of Rohrabacher-Farr Amendment, *supra* note 165, at 7–9; Rohrabacher-Farr Amendment Renewed, *supra* note 117.

counsel.<sup>178</sup> At stake were significant sums as well as important legal principles, justifying aggressive countermeasures against the government actors. Heavy-handed police tactics against employees also harken back to early strong-arm tactics against good faith actors. For example, in the days shortly after California adopted Proposition 215, creating the California medical marijuana industry.<sup>179</sup>

Importantly for this article, the actions in Kansas and California demonstrate questionable police actions against a company whose business appears to be a legitimate part of the marijuana industry. Anecdotally at least, one reads about other law enforcement efforts aimed at marijuana businesses who hardly seem like bad actors within the marijuana industry.<sup>180</sup> Aggressive policing raises the risks and costs of doing business. It increases the chances that individuals and businesses attempting to comply with state regulations will be driven out of the industry or will be driven underground, into the illegal market. Think back to California's dilemma: to fulfill its goal of developing a successful legal market, policymakers are urging a greater role for law enforcement.<sup>181</sup> But that invites a closer look at risks associated with vigorous enforcement of marijuana laws. Will the police get it right?

### III. PART III: WHERE'S THE LOVE?

One might ask whether members of law enforcement who went after Empyreal were renegades or whether they represent typical law enforcement agents in their attitudes about the war on drugs. This question matters because of the need to increase efforts to bring illegal actors in the marijuana field to the bar. Making the work of actors like those involved in a company like Empyreal more difficult and more expensive will frustrate a smoother transition to a well-regulated market.<sup>182</sup>

This section explores the challenge that policymakers will have in overcoming inherent biases among law enforcement agents, including prosecutors. Initially, this section explores how law enforcement agents' attitudes differ from other citizens.<sup>183</sup>

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<sup>178</sup> Empyreal hired Koeller, Nebeker, Carlson, and Haluck LLP as well as the Institute for Justice. Plaintiff's Complaint, *supra* note 122, at 1.

<sup>179</sup> California Proposition 215, Medical Marijuana Initiative, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_215\\_Medical\\_Marijuana\\_Initiative\\_\(1996\)](https://ballotpedia.org/California_Proposition_215_Medical_Marijuana_Initiative_(1996)) [<https://perma.cc/KHJ7-VYH2>] (last visited Apr. 12, 2023).

<sup>180</sup> See discussion *supra* Part I.

<sup>181</sup> Governor Newsom's Cannabis Enforcement Task Force Eradicates Over \$15 Million Worth of Illegal Cannabis, OFFICE OF GOVERNOR GAVIN NEWSOM (Oct. 13, 2022), <https://www.gov.ca.gov/2022/10/13/governor-newsoms-cannabis-enforcement-task-force-eradicates-over-15-million-worth-of-illegal-cannabis/> [<https://perma.cc/PDF4-A5S4>].

<sup>182</sup> See Alexander Nieves, California's legal weed industry can't compete with illicit market, POLITICO (Oct. 23, 2021, 7:00 AM), <https://www.politico.com/news/2021/10/23/california-legal-illicit-weed-market-516868>.

<sup>183</sup> See discussion *infra* Part III.

This data suggests that reorienting law enforcement attitudes will require considerable efforts.<sup>184</sup> It also focuses on how asset forfeiture has motivated police conduct<sup>185</sup> and how police are motivated by clearance rates, giving incentive to go after relatively safe targets like Emphyreal.<sup>186</sup>

Thereafter, this section explores risks to police investigatory powers.<sup>187</sup> Notably, during the height of the War on Drugs, the Supreme Court shrunk the Fourth Amendment to expand police power to search and seize illegal drugs, most frequently marijuana.<sup>188</sup> Even before widespread state legislation efforts took hold, the courts, including the Supreme Court, seemed to recognize the failure of the War on Drugs.<sup>189</sup> As developed below, state courts have now begun to curtail the ability of the police to search based on their discovery that a suspect possesses marijuana in states where marijuana possession does not violate state law.<sup>190</sup> Faced with the potential loss of a powerful investigatory tool, police have an incentive to frustrate the development of a well-regulated market.<sup>191</sup>

#### A. *Law enforcement attitudes*

Public opinion surveys routinely find increasing percentages of Americans in support of legalizing marijuana, including for recreational use.<sup>192</sup> Polling at the end of 2022 indicated that about 60% of Americans support legalization of recreational marijuana, with another 30% agreeing that marijuana should be legal for medical purposes.<sup>193</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Michael Vitiello, *The End of the War on Drugs, the Peace Dividend and the Renewed Fourth Amendment?* 73 OKLAHOMA L. REV. 285, 286 (2020).

<sup>189</sup> As I have argued elsewhere, since wholesale recognition that the War on Drugs has been an expensive failure, courts have begun to breathe some life back into the Fourth Amendment. *Id.* at 288-89.

<sup>190</sup> See discussion *infra* Part III.

<sup>191</sup> *Id.*

<sup>192</sup> Ted Van Green, *Americans overwhelmingly say marijuana should be legal for medical or recreational use*, PEW RESEARCH CENTER (Nov. 22, 2022), <https://www.pewresearch.org/fact-tank/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/> [https://perma.cc/RY3G-CEBF].

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

Police officers generally do not share similar views about legalizing marijuana. Some of the studies cited below were conducted almost a decade ago.<sup>194</sup> But other more recent studies suggest that police attitudes have changed little.<sup>195</sup>

One expansive study conducted by Louisiana State University and Police tested police attitudes towards marijuana use and enforcement.<sup>196</sup> About a third of the officers worked in states where recreational marijuana was legal.<sup>197</sup> Even though officers did not believe that incarceration was effective in reducing marijuana use, 52% of those surveyed believed that marijuana should not be decriminalized.<sup>198</sup> That may be because over three quarters of officers surveyed believe that marijuana is a gateway drug.<sup>199</sup>

Another survey of officers collected data from a large metropolitan area in the south.<sup>200</sup> Most of the officers were white males.<sup>201</sup> They displayed punitive attitudes towards drug offenses and believed that more should be done to control drug activity.<sup>202</sup> Forty-four percent of the officers indicated that they became more punitive towards drugs after they became police officers.<sup>203</sup> Despite recognizing that illicit drug trafficking will always exist, about two-thirds of respondents agreed that tougher laws to fight drugs are needed.<sup>204</sup> Even though officers agreed that sanctions for selling drugs should be more severe than for using, 85% thought that some sort

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<sup>194</sup> For example, the study that collected responses from 1,000 drug interdiction officers at all levels of law enforcement was conducted by Trish Oberweis and others in 2013. Matthew Petrocelli et al., *Assessing Police Attitudes Toward Drugs and Drug Enforcement*, 39 *AMERICAN JOURNAL OF CRIMINAL JUSTICE* 22 (2014), 10.1007/s12103-013-9200-z.

<sup>195</sup> See discussion *infra* Part III.

<sup>196</sup> Cole Zercoe, *Policing in an Era of Legal Marijuana: Cops' opinions on decriminalization, incarceration, & more*, POLICE1 (Oct. 3, 2020), <https://www.police1.com/policing-era-legal-marijuana/articles/policing-in-an-era-of-legal-marijuana-cops-opinions-on-decriminalization-incarceration-more-8vSbJb8RGKEihkFG/> [https://perma.cc/T6CC-TUPE].

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

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* Many Americans believe marijuana is a gateway drug, but are far more likely to support legalization of marijuana than officers. *Marijuana is a gateway drug. Do you agree or disagree?*, POLICE1 (Oct. 30, 2020), <https://www.police1.com/polls/marijuana-is-a-gateway-drug-do-you-agree-or-disagree-AUUtVfb4aiDSgNsL/> [https://perma.cc/A9D3-YCFM].

<sup>200</sup> Cody Jorgensen, *Badges and Bong: Police Officers' Attitudes Toward Drugs*, SAGE JOURNALS (Oct. 4, 2018), <https://journals.sagepub.com/doi/full/10.1177/2158244018805357>.

<sup>201</sup> *Id.*

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

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

<sup>204</sup> *Id.*

of sanction needed to be in place for using marijuana.<sup>205</sup> In the minds of many officers, drug users are lazy.<sup>206</sup>

Yet another study points in the same direction: police officers are out of step with most Americans on marijuana legalization. That study collected responses from 1,000 drug interdiction officers at all levels of law enforcement.<sup>207</sup> Except for laws dealing with steroids, over half of the officers believed that possession laws were strict enough.<sup>208</sup> Even though many officers believed that marijuana was one of the least dangerous drugs, over two-thirds disagreed that marijuana should be decriminalized and 77% said that marijuana should not be legalized.<sup>209</sup>

Commentators speculate that police attitudes may reflect various pragmatic considerations.<sup>210</sup> During the height of the War on Drugs, states and the federal government made grant money available to police departments.<sup>211</sup> Among relevant criteria was a showing of how many drug arrests the department seeking funding had made.<sup>212</sup>

Similarly, legalization of marijuana deprives police departments of another controversial source of funding: asset forfeiture.<sup>213</sup> No doubt, self-interest has influenced officers' attitudes towards drugs, including marijuana, the most common drug in use and involved in arrests.<sup>214</sup>

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<sup>205</sup> *Id.*

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

<sup>207</sup> Matthew Petrocelli et al., *Assessing Police Attitudes Toward Drugs and Drug Enforcement*, 39 *AMERICAN JOURNAL OF CRIMINAL JUSTICE* 22 (2014), 10.1007/s12103-013-9200-z.

<sup>208</sup> *Id.* at 28.

<sup>209</sup> *Id.* One study of former officers and military personnel rallied support for South Dakota's recreational marijuana legalization initiative. They argued that pursuing marijuana offenses is a distraction for the police; instead, the argument went, police resources should be directed to fighting real crime. Bridget Bennett, *Former police officers support legalizing marijuana*, KELOLAND LOCAL NEWS (Nov. 4, 2022), <https://www.keloland.com/news/local-news/former-police-officers-support-legalizing-marijuana/>.

<sup>210</sup> German Lopez, *The twisted financial incentives behind the war on drugs*, VOX (Apr.14, 2015), <https://www.vox.com/2014/8/29/6075527/how-the-war-on-drugs-led-to-institutional-racism> [<https://perma.cc/DE9S-RMAT>].

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

<sup>212</sup> *Id.*

<sup>213</sup> Bill Chappell, *Side Effect of Legal Pot: Police Budgets Take a Hit*, WFSU PUBLIC MEDIA (Jan. 13, 2014), <https://news.wfsu.org/2014-01-13/side-effect-of-legal-pot-police-budgets-take-a-hit> [<https://perma.cc/S2K9-KRZX>].

<sup>214</sup> Some police raids, designed to secure forfeiture of property, went awry. Some particularly egregious cases that made headlines soured many of forfeiture. See Sarah Stillman, *Taken*, *THE NEW YORKER* (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken>. The changing attitude towards forfeiture may be reflected in the Supreme Court's holding that the excessive fines clause in the Eighth Amendment applies to the states. See *Timbs v. Indiana*, 139 S.Ct. 682, 690 (2019).

Officers also view drug dealers and even drug users as bad people.<sup>215</sup> That attitude undoubtedly influences their view of marijuana and other drugs. Police attitudes towards criminals, like many prison guards' attitudes towards prisoners,<sup>216</sup> reflect a similar view of good and evil.<sup>217</sup> Such a view, almost a form of dualism, is consistent with studies about personality types drawn to police work.<sup>218</sup> They tend to be more authoritarian and hierarchical than members of the population generally.<sup>219</sup> Authoritarianism suggests that such individuals are in judgment of others, consistent with the view that those willing to violate the law are bad.<sup>220</sup>

Almost certainly, at least some officers see drug offenders through a racial lens.<sup>221</sup> Commentators identify multiple factors that may explain racial disparity in the number of arrests.<sup>222</sup> Parsing out how often pure racism explains that disparity, one would be hard-pressed to deny that racism is at play for some officers.<sup>223</sup>

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That case involved Indiana law enforcement's seizure of Timbs' vehicle because it was used in connection with Timbs' sale of drugs to undercover agents. *Id.* at 686. On remand, Timbs prevailed in the state court on the grounds that forfeiture of his vehicle was an excessive fine. *State v. Timbs*, 134 N.E.3d 12, 23 (Ind. 2019).

<sup>215</sup> See Jorgensen, *supra* note 200.

<sup>216</sup> See Ellen Kjelsberg, et al., Attitudes towards prisoners, as reported by prison inmates, prison employees, and college students, *BMC PUBLIC HEALTH* (May 4, 2007), <https://bmcpublihealth.biomedcentral.com/articles/10.1186/1471-2458-7-71> [<https://perma.cc/VL8F-RC2U>].

<sup>217</sup> Olga Soares Cunha, et al., Attitudes of Police Recruits Toward Offenders: The Impact of the Police Training on Attitudinal Change, 37 *JOURNAL OF POLICE AND CRIMINAL PSYCHOLOGY* 162 (2022), <https://link.springer.com/article/10.1007/s11896-021-09484-5> [<https://perma.cc/PTJ9-M2GY>].

<sup>218</sup> Type A personalities are common in law enforcement. Type A personalities prefer rules and regulations, desire continuity, and like to get things done correctly over creatively. Megan Wells, Why do so many LEOS have a "Type A" personality?, *POLICE1* (Jun. 22, 2016), <https://www.police1.com/entertainment/articles/why-do-so-many-leos-have-a-type-a-personality-d1gPgDIGVML1WQ3k/> [<https://perma.cc/QS5M-XFYG>]; Characteristics that have been defined as common for police officers are courage, authoritarianism, cynicism, and aggression. SOLVEIG ABRAHAMSEN, *POLICE PERSONALITY* 14 (2006), <https://phs.brage.unit.no/phs-xmlui/bitstream/handle/11250/175038/police%2520personality%2520m%2520omslag.pdf?sequence=1&isAllowed=y> [<https://perma.cc/QE7T-YJ4P>].

<sup>219</sup> See SOLVEIG ABRAHAMSEN, *POLICE PERSONALITY* 14 (2006).

<sup>220</sup> See Race, Drugs, and Law Enforcement in the United States, *HUMAN RIGHTS WATCH* (Jun. 19, 2009), [https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states#\\_Part\\_I:\\_Race](https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states#_Part_I:_Race) [<https://perma.cc/6HGT-VEMN>].

<sup>221</sup> *Id.*

<sup>222</sup> Some of these factors are individual, home, school, and community characteristics. Lauren Gase, et al., Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School, and Community Characteristics, 8 *RACE AND SOCIAL PROBLEMS* 296–312 (2016).

<sup>223</sup> See *HUMAN RIGHTS WATCH*, *supra* note 210; In fact, one of former President Nixon's top advisers said the war on drugs was created as a political tool to fight blacks and hippies. Tom LoBianco, Report: Aide says Nixon's war on drugs targeted blacks, hippies, *CNN* (Mar. 24, 2016),

A few studies of prosecutors' attitudes concerning legalization of marijuana have been published.<sup>224</sup> Some evidence suggests that they are not as accepting of marijuana legalization as members of the public. In April 2017, the National District Attorney Association ("NDAA"), a non-partisan non-profit membership association that provides training and services to prosecutors around the country, voiced its position on marijuana.<sup>225</sup> First, the NDAA argued the federal drug enforcement policy regarding the manufacture, importation, possession, use, and distribution of marijuana should be applied consistently across the nation.<sup>226</sup> Second, the NDAA supported continued research on the medicinal uses of marijuana and its derivatives.<sup>227</sup> At first blush, the organization's views seem more moderate than those of police officers. But the NDAA suggested more research should be focused on two issues relating to marijuana use: impaired driving and children's access to marijuana.<sup>228</sup> Also, the call for consistency may mask a pro-prosecution position: district attorneys and their organizations may favor more prosecutions nationwide to achieve uniformity.<sup>229</sup>

Yet another explanation for why law enforcement might go after actors like Emphyreal is pressure to demonstrate results. Often, funds are available for police departments based on arrest and clearance rates, adding to the social costs of vigorous drug enforcement.<sup>230</sup> Going after actors who function in the quasi-legal market has advantages for law enforcement: such actors do not create a great risk to law enforcement, making police actions against them safer for officers than going

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<https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html> [<https://perma.cc/397V-VA3E>].

<sup>224</sup> See, e.g., Erin J. Farley & Stan Orchowsky, *Measuring the Criminal Justice System Impacts of Marijuana Legalization and Decriminalization Using State Data*, U.S. DEP'T. OF JUSTICE (Sept. 2019), <https://www.ojp.gov/pdffiles1/nij/grants/253137.pdf>. [<https://perma.cc/6285-VY2T>].

<sup>225</sup> *Marijuana Policy: The State and Local Prosecutors' Perspective*, NATIONAL DISTRICT ATTORNEY ASS'N. (Apr. 20, 2017), <https://ndaa.org/wp-content/uploads/NDAA-White-Paper-on-Marijuana.pdf?click=%2520Marijuana%2520Policy:%2520The%2520State%2520and%2520Local%2520Prosecutors%25E2%2580%2599%2520Perspective> [<https://perma.cc/49T2-H6AJ>].

<sup>226</sup> *Id.* at 4.

<sup>227</sup> *Id.* at 7.

<sup>228</sup> *Id.* at 7-11.

<sup>229</sup> *Id.* at 11.

<sup>230</sup> For example, many municipalities across the country rely heavily on ticket revenue and court fees to pay for government services. Mike McIntire & Michael Keller, *The Demand for Money Behind Many Police Traffic Stops*, THE N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html> [<https://perma.cc/6MFP-7U6J>].

after true outlaws.<sup>231</sup> Such actions also add to the police department's scorecard, by allowing it to list another arrest or step towards forfeiture of assets.<sup>232</sup>

The next section picks up one other important reason that police may disfavor reforming marijuana laws: the War on Drugs expanded police power as the Supreme Court shrank the Fourth Amendment.<sup>233</sup> Thus, apart from financial incentives for police departments and personality traits of officers, as argued below, they may see legalization of marijuana as putting their ability to do their jobs at risk.

### *B. The War on Drugs and the Expansion of Police Power*

Many scholars and some courts have recognized that the Fourth Amendment was a victim of the War on Drugs.<sup>234</sup> D.C. Circuit Court of Appeals Judge Harry T. Edwards summed it up when he stated his “growing concern about the degree to which individual rights and liberties appear to be falling victim to the Government's ‘War on Drugs.’”<sup>235</sup> Starting after the end of the Warren Court, the Court expanded police power in one case after another, allowing police almost unchecked power to intrude of suspects' privacy and property interests.<sup>236</sup>

A few examples demonstrate the scope of the Court's grant of “war powers.” Police began using drug sniffing dogs routinely to signal the presence of drugs.<sup>237</sup> If that was a search, police needed probable cause and, perhaps, a warrant to justify exposing luggage or vehicles to K-9 units. Conveniently, according to the Court, a drug sniffing dog reveals only the presence of contraband. Because an individual has no right to possess contraband, a dog sniff is “sui generis,” and is not a search.<sup>238</sup>

Towards the end of the Warren Court, the Court reformulated the definition of a Fourth Amendment search, moving from a property analysis to a privacy analysis.<sup>239</sup> That seemingly welcomed in a new era. While one might have no

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<sup>231</sup> See Amanda Lewis, *The Half-Legal Cannabis Trap*, POLITICO (Feb. 9, 2021, 4:30 AM EST), <https://www.politico.com/news/magazine/2021/02/09/los-angeles-legalization-cannabis-criminalization-467572> [<https://perma.cc/YEK6-LJUC>].

<sup>232</sup> *Id.*

<sup>233</sup> See discussion *infra* Part III.

<sup>234</sup> See Vitiello, *supra* note 188.

<sup>235</sup> *Id.* at 285.

<sup>236</sup> See *Id.* at 312.

<sup>237</sup> *United States v. Place*, 462 U.S. 696 (1983); *Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>238</sup> *Place*, 462 U.S. at 707 (explaining investigative procedures employed in a dog sniff are unique in that “no other investigative procedure . . . is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure”).

<sup>239</sup> *Katz v. United States*, 389 U.S. 347 (1967) (expanding the Fourth Amendment's protection beyond its traditional realm of only physically trespassory police action to include any government

sufficient property interest in an “open” field<sup>240</sup> to prevent police from entering the land to look for evidence of crime, the Court’s privacy test, (are police entering an area where a suspect might have a reasonable expectation of privacy?) might have changed the analysis adopted by the Court in the 1920s.<sup>241</sup> When the Court addressed that question in 1984, the offenders were growing marijuana on rural land, well off traveled roadways, seemingly protected by fences and No Trespassing signs.<sup>242</sup> According to the Burger Court, the open fields doctrine remained intact.<sup>243</sup>

What about the increasingly common use of helicopters or small planes to fly over suspects’ property to see if officers can see marijuana grows? Surely, flying over a person’s property, especially if in a helicopter, allowed officers to view into the curtilage surrounding an offender’s home. Might that not be a search? No, at least not if police observed minimal standards to protect the homeowner.<sup>244</sup>

Towards the end of the Warren Court, police faced some limitations on stopping vehicles and searching for contraband.<sup>245</sup> The Burger and Rehnquist Courts unraveled those protections. Imagine a family heading off on a vacation in a station wagon filled with their luggage. An officer motivated by racial animosity decides to stop the vehicle and to search its contents. Can the officer do so? If by some miracle, the driver fails to violate a traffic offense, perhaps the officer would be unable to stop the vehicle.<sup>246</sup> But as soon as the officer sees a traffic violation, the Fourth

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violation of a subjective expectation of privacy that society is prepared to recognize as objectively reasonable).

<sup>240</sup> The field in no meaningful sense might be open. That is, it might be surrounded by fences and be far from public right of ways. As long as the property is not within the curtilage, an area near the home, the property is within the open field doctrine.

<sup>241</sup> The Sixth Circuit of the United States Court of Appeals affirmed the District Court’s decision in *United States v. Oliver*, holding the landowner had a subjective expectation of privacy in his field and such expectation was objectively reasonable. *United States v. Oliver*, 657 F.2d 85 (6th Cir. 1981). In 1984, the United States Supreme Court reversed.

<sup>242</sup> *Oliver v. United States*, 466 U.S. 170, 179 (1984) (holding a bright line existed between open fields (no reasonable expectation of privacy) and the curtilage of a house (reasonable expectation of privacy)).

<sup>243</sup> *Id.*

<sup>244</sup> *Florida v. Riley*, 488 U.S. 445, 451–52 (1989) (holding since the sides and roof of the greenhouse were partially uncovered, defendant did not have a reasonable expectation that the area could not be seen by the aircraft); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (holding the defendant’s expectation of privacy was not reasonable because the officers could observe the yard with the naked eye from public airspace).

<sup>245</sup> For example, as the dissent mentions in *Atwater v. City of Lago Vista*, the United State Supreme Court has had rare occasions to contemplate the constitutionality of a warrantless arrest for an offense punishable only by fine, but when it has, the Court has indicated disapproval. See *Gustafson v. Florida*, 414 U.S. 260, 266–267 (1973).

<sup>246</sup> Often times, a traffic stop is the pretext. Once stopped, the officers have the opportunity to contact the driver, peer inside the car in the hope of finding incriminating evidence, and perhaps find a

Amendment provides little protection to the driver and passengers of the vehicle. If the law allows the officer to make a custodial arrest or the officer is reasonably mistaken about whether the law does so, she may make a search incident to the arrest.<sup>247</sup> Depending on where the arrestee is standing, the officer may be able to search the entire passenger compartment, including property owned by passengers.<sup>248</sup> If the officer finds contraband and the state prosecutes the driver, the driver might want to inquire into the officer's racial motivation for making the stop. Unequivocally, such an inquiry is out of bounds.<sup>249</sup>

Not only did the War on Drugs erode Fourth Amendment protection for Americans generally, but it led to instances of clear racial bias in the enforcement of drug laws.<sup>250</sup>

The list goes on and on.<sup>251</sup>

As I have argued elsewhere, a broad consensus of policymakers concluded that the War on Drugs was a failure.<sup>252</sup> Indeed, lower courts, including several state courts, and the United States Supreme Court seem to concur. In *The End of the War on Drugs, the Peace Dividend and the Renewed Fourth Amendment?*, I explored several areas where courts were rethinking the Fourth Amendment, with modest instances of renewed protections.<sup>253</sup> Even so, after decades of expanded police authority unchecked by the Fourth Amendment, police retain substantial power. Officers committed to getting bad guys off the street no doubt believe that the diminished Fourth Amendment is a social good.<sup>254</sup>

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way to negotiate consent to search the car. JOSHUA DRESSLER, *CRIMINAL PROCEDURE INVESTIGATING CRIME* 300 (2020).

<sup>247</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (upholding custodial arrest instigated by minor traffic violation without any other criminal evidence); *Virginia v. Moore*, 553 U.S. 164, 178 (2008) (holding that a custodial arrest based on probable cause, although in violation of state law, is nonetheless lawful for purposes of the Fourth Amendment).

<sup>248</sup> Initially, in *NY v. Belton*, 453 U.S. 454 (1981), the Court allowed the full search of the vehicle as long as the officer had arrested a recent occupant of the vehicle. In *Arizona v. Gant*, 556 U.S. 332, 338 (2009), the Court cut back somewhat on the scope of the search-incident-to-lawful arrest.

<sup>249</sup> *Whren v. United States*, 517 U.S. 806, 814–15 (1996).

<sup>250</sup> See Graham Boyd, *The Drug War is the New Jim Crow*, ACLU (Aug. 2021), <https://www.aclu.org/other/drug-war-new-jim-crow> [https://perma.cc/Z954-JXRP].

<sup>251</sup> To continue, the United States Supreme Court has upheld police practices that seem inherently coercive in situations where suspects in police-dominated settings “freely” consented to be searched, leading to their convictions for drug offenses. See *United States v. Mendenhall*, 446 U.S. 544, 548–49 (1980).

<sup>252</sup> Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CAP (Jun. 27, 2018), <https://www.americanprogress.org/article/ending-war-drugs-numbers/> [https://perma.cc/HP98-Y749].

<sup>253</sup> Vitiello, *supra* note 188.

<sup>254</sup> Officers often see the Fourth Amendment as a limitation on their ability to get “bad guys” off the street. See Jonathan Blanks, *Outrunning the Fourth Amendment*, CLAUSE 40 FOUNDATION (Apr.

Enter the legalization of marijuana initially for medical purposes and then for recreational use. Prior to legalization, as summarized by one legal scholar,

[A]t least at the Supreme Court level, marijuana has played a central role in cases where probable cause or reasonable suspicion was based at least in part on an officer's "plain smell." And lower court cases show that officers continue to find it easy to detect the presence of marijuana while engaged in other lawful investigative enterprises. Police in search-and-seizure cases claim to have smelled burned or burning marijuana, unburned marijuana, and the odor of marijuana lingering on a subject's clothing.<sup>255</sup>

Defendants in marijuana cases argued that the relevance of marijuana should change once a state had legalized it for either medical or recreational use.<sup>256</sup>

Most of the early cases, post-legalization, rejected its relevance in assessing probable cause.<sup>257</sup> Even in California, the leader in the medical marijuana movement, appellate courts were unsympathetic to claims by defendants that the assessment of probable cause changed.<sup>258</sup> Cases involved officers who smelled marijuana at some point during their interactions with defendants.<sup>259</sup> Often, the interactions would escalate to full-blown searches that uncovered large quantities of marijuana consistent with drug dealing or other drugs.<sup>260</sup>

Given that the Supreme Court has defined probable cause as a low standard, well-below probability,<sup>261</sup> those courts could argue that the chances that a person possessed marijuana unlawfully was sufficient to justify police intervention. As the

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21, 2021), <https://clause40.org/blog/f/outrunning-the-fourth-amendment> [<https://perma.cc/6SVZ-J5NL>].

<sup>255</sup> Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking of the Fourth Amendment*, 43 *MCGEORGE L. REV.* 23, 39–41 (2012).

<sup>256</sup> For example, in *People v. Stribling*, 2022 IL App (3d) 210098, the defendant argued based on recent legalization of the possession of cannabis, the odor of cannabis should be insufficient to search a vehicle. The Third District of the Illinois Court of Appeals held the legalization of the possession of a small quantity of marijuana has not changed the rule that the odor of burnt cannabis emanating from a vehicle provides an officer probable cause to search the vehicle.

<sup>257</sup> *People v. Strasburg*, 56 Cal.Rptr.3d 306, 308 (Ct. App. 2007) (holding once an officer smells marijuana coming from a car that officer can search the car for marijuana).

<sup>258</sup> *Id.*

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

<sup>260</sup> *Id.*

<sup>261</sup> As the Supreme Court noted in *Illinois v. Gates*, 462 U.S. 213, 241 (1983), "probable cause deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Vermont Supreme Court stated, the odds that the “odor of fresh marijuana” may be coming from legally possessed medical marijuana was a “small possibility,” insufficient to “negate the State’s probable cause to search.”<sup>262</sup> Other courts agreed.<sup>263</sup>

More recent case law has produced mixed results. Some state courts where marijuana is lawful for recreational use have, in effect, followed Massachusetts’ lead. *People v. Lee*, a California appellate court decision, reflects the more pro-defendant approach:

[T]here must be evidence--that is, additional evidence beyond the mere possession of a legal amount--that would cause a reasonable person to believe the defendant has more marijuana. And it would be incorrect to say that California’s legalization of marijuana is of no relevance in assessing whether there is probable cause to search a vehicle in which police find a small and legal amount of the drug. To understand the significance of California’s legalization of marijuana to the suppression motion here, we must construe the relevant cases in their historical context.<sup>264</sup>

Consistent with *Lee*, an officer’s knowledge that a suspect has marijuana may be relevant. But unlike earlier cases, it does not alone create probable cause.<sup>265</sup> Some other courts agree with that approach.<sup>266</sup> Whether those courts have it right is open to debate.<sup>267</sup>

Most importantly, as it relates to my thesis, is this: officers no doubt recognize that legalization of marijuana may reduce their ability to arrest or search many suspects. That loss of authority no doubt rankles many officers and at least some

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<sup>262</sup> *State v. Senna*, 79 A.3d 45, 50 (Vt. 2013).

<sup>263</sup> See, e.g., *State v. Sisco*, 373 P.3d 549, 553 (Ariz. 2016) (emphasizing the fact that its medical marijuana law “did not decriminalize the possession or use of marijuana generally” and instead “makes marijuana legal in only limited circumstances.”); see also *People v. Brown*, 825 N.W.2d 91, 94 (Mich. Ct. App. 2012) (holding its state’s medical marijuana law was a “very limited, highly restricted exception to the statutory proscription against the manufacture and use of marijuana in Michigan.”). During this time, Massachusetts was the outlier.

<sup>264</sup> 253 Cal.Rptr.3d 512, 519–20 (Cal. App. 4th Dist. 2019) (explaining that the legalization of marijuana affects the court’s analysis of whether there was probable cause to search defendant’s vehicle).

<sup>265</sup> *Id.*

<sup>266</sup> See, e.g., *Commonwealth v. Barr*, 266 A.3d 25, 43 (Pa. 2021) (finding that the odor of marijuana emanating from a vehicle without more did not create probable cause to search the vehicle).

<sup>267</sup> Depending on how widely available legally possessed marijuana is, one might argue that an officer lacks sufficient evidence of illegal conduct. There are two counterarguments that suggest the mere observation of a person with marijuana does create probable cause. First, the Supreme Court’s definition of marijuana suggests that the standard is quite low. Also, even in California, the illegal market still dominates the marijuana industry.

prosecutors.<sup>268</sup> Officers' resistance to the loss of authority may be especially strong among officers and police departments that want to keep arrest rates high. Where that occurs, police are likely to be frustrated by the loss of a significant investigation tool.<sup>269</sup>

Given police attitudes towards drugs generally and even marijuana, cases like *Empyreal* make more sense. For observers interested in seeing the legitimate market succeed and the illegal market fail, such efforts by the police and other law enforcement players are troubling. Thus, as policymakers in California look for ways to address the failures of Proposition 64, including greater participation by law enforcement, they ought to ask, what can be done? That is the topic of the next section.<sup>270</sup>

#### IV. PART IV: WHAT CAN BE DONE?

Part II laid out a grim picture of California's efforts to make a transition to a legal market for marijuana.<sup>271</sup> But there are things that policymakers can do to help the transition to a stable legal market. The challenge will be for policy makers to avoid the one-size-fits-all temptation to go back to failed policies. Or as suggested in the title to this article, how can California avoid defaulting to a mini-War on Drugs?

It will take a broad range of measures, however, including a role for state and federal law enforcement agencies.<sup>272</sup> But the challenge will be how to avoid the overly aggressive involvement of law enforcement agents and increased punitive sanctions. This section considers several related policy initiatives, including a suggestion that policy makers rethink drug enforcement from a blue-collar to a white-collar approach to regulating the industry.<sup>273</sup> Such an approach allows the state to determine if businesses are complying with regulations needed to move towards a regulated market without the overly invasive effects of traditional police practices, like raids and extensive searches.<sup>274</sup>

First, however, this section considers the easiest solution, an act of Congress that would create a national market in marijuana. One might ask about congressional

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<sup>268</sup> See discussion *supra* Part III.

<sup>269</sup> *Id.*

<sup>270</sup> See discussion *infra* Part IV.

<sup>271</sup> See discussion *supra* Part II.

<sup>272</sup> Some efforts are already underway in California. See Office of Governor Gavin Newsom, *supra* note 100.

<sup>273</sup> See discussion *infra* Part IV.

<sup>274</sup> For an extreme example, consider no-knock warrants served at night that can result in tragedy. See Breonna Taylor: US police charged over shooting death, BBC NEWS (Aug. 5, 2022), <https://www.bbc.com/news/world-us-canada-62427546> [<https://perma.cc/AS6Z-LD8D>].

action to achieve a national solution to the current patchwork around the country. After all, most Americans live in states where marijuana is available either for medical or medical and recreational purposes.<sup>275</sup> Some members of Congress have advanced legislation that would do just that.<sup>276</sup> But any hopes of such legislation passing in the near term seem remote at best.<sup>277</sup> In the recent past, Congress seems more than dysfunctional.<sup>278</sup>

President Biden's pronouncement about rescheduling marijuana suggests that at least some Democrats are interested in piecemeal legislation or executive action aimed at improving the state of the law.<sup>279</sup> Some modest legislative reforms might be possible, but one ought to be agnostic whether such proposals will become law anytime soon.<sup>280</sup> For example, observers often suggest that two fixes to the current law are within reach: One recommendation would be to reform banking laws to make access to full banking services easier for marijuana businesses.<sup>281</sup> The other

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<sup>275</sup> Will Yakowicz, *Where Is Cannabis Legal? A Guide to All 50 States*, FORBES (Jan. 6, 2023, 6:00 AM EST), <https://www.forbes.com/sites/willyakowicz/2023/01/06/where-is-cannabis-legal-a-guide-to-all-50-states/?sh=24a9cedb1619> [<https://perma.cc/UGX4-WWD3>].

<sup>276</sup> Secure and Fair Enforcement (SAFE) Act, H.R. 1996, 117<sup>th</sup> Cong. (2021) (failed to pass the Senate); Climate Resilience Workforce Act, H.R. 6492, 117<sup>th</sup> Cong. (2022) (included language prohibiting federal drug testing for cannabis that is stricter than what the locality or state requires; died in committee); Preparing Regulators Effectively for a Post-Prohibition Adult-Use Regulated Environment Act (PREPARE) Act, H.R. 7513, 117<sup>th</sup> Cong. (2022) (died in committee); Cannabis Administration and Opportunity Act (CAOA), S. 4591, 117<sup>th</sup> Cong. (2022) (would have recognized state legalization; died in committee); Small and Homestead Independent Producers Act, H.R. 8825, 117<sup>th</sup> Cong. (2022) (would have allowed small cultivators of marijuana and small manufacturers of marijuana products to ship and sell the marijuana or marijuana products using the U.S. Postal Service or a private or commercial interstate carrier; died in committee).

<sup>277</sup> Hayes Brown, *Chuck Schumer's Marijuana Bill is Looking Like a Pipe Dream*, MSNBC (Apr. 20, 2022, 9:58 AM PDT), <https://www.msnbc.com/opinion/msnbc-opinion/why-democrats-marijuana-legislation-going-smoke-n1294596> [<https://perma.cc/Q3LT-AA8C>]; Nicholas Wu and Natalie Fertig, *Senate Democrats Split Over Legalizing Weed*, POLITICO (Apr. 20, 2021, 7:30 PM), <https://www.politico.com/news/2021/04/20/senate-democrats-weed-legalization-schumer-483747> [<https://perma.cc/WN7M-45V6>].

<sup>278</sup> Jacob Bronther and Guha Krishnamurthi, *Congress is Dysfunctional, History Shows It Won't Change Anytime Soon*, WASHINGTON POST (Feb. 9, 2023, 7:00 AM EST), <https://www.washingtonpost.com/made-by-history/2023/02/09/congress-dysfunction-polarization-gridlock/> [<https://perma.cc/EVM4-6KC7>].

<sup>279</sup> Statement from President Biden on Marijuana Reform, THE WHITE HOUSE (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/> [<https://perma.cc/LA35-WXK5>].

<sup>280</sup> See *supra* note 276 for several bills that are dead or standing still in committee.

<sup>281</sup> Robert L. Johnson, *Cannabis is Legal in Most of America. But Federal Laws Still Block Businesses from Banks*, USA TODAY (Dec. 20, 2022, 1:52 PM EDT), <https://www.usatoday.com/story/opinion/2022/12/20/cannabis-banking-helps-marijuana-businesses-grow/10896278002/> [<https://perma.cc/4U82-AX2J>].

would be to amend federal tax law (the infamous §280E, disallowing marijuana businesses from deducting normal business expenses).<sup>282</sup> Those reforms would give a competitive advantage to legitimate players, smoothing the path towards a regulated market.<sup>283</sup>

The best option, however, is for the state to take initiative in developing a coherent strategy to dealing with the marijuana industry. Underscore industry. Consider how states and the federal government typically regulate industry. Seldom is it with stormtrooper style raids.<sup>284</sup> Instead, regulatory agencies use traditional white-collar crime techniques to investigate and, fine non-compliant businesses.<sup>285</sup>

Depending on the industry, states have developed various investigatory methods. Inspection of business records may be routine, including random audits.<sup>286</sup> Where an agency may have suspicion of improper conduct, based on less than probable cause, agents may subpoena records and then may pursue further interventions if an investigation suggests criminal conduct.<sup>287</sup>

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<sup>282</sup> Kyle Jaeger, *GOP Congresswoman Files Bill to Provide Federal Tax Relief for Marijuana Businesses by Amending IRS's 280E Code*, MARIJUANA MOMENT (Jan. 2, 2023), <https://www.marijuanamoment.net/gop-congresswoman-files-bill-to-provide-federal-tax-relief-for-marijuana-businesses-by-amending-irss-280e-code/> [<https://perma.cc/LET6-RY2P>]; see also 26 U.S. Code § 280E.

<sup>283</sup> See *supra* discussion in Part II noting the difficulties marijuana businesses face in becoming legitimate. Moreover, even if Congress were not so dysfunctional, such reforms may not take place. For example, Democratic lawmakers might not sign off on those measures without some meaningful guarantees to expand minority participation in the industry. Many California voters favored Proposition 64 because it seemed to promise such reforms. As discussed above, such reforms have not been robust. Established industry participants are not likely to support a congressional statute that will provide substantial protection for a new group of market competitors.

<sup>284</sup> An exception to this is in regard to regulating immigration. Under the Trump administration, worksite raids were carried out from coast to coast, targeting workers for arrest and deportation while at work. *Worksite Immigration Raids*, NATIONAL IMMIGRATION LAW CENTER (Jan. 2020), <https://www.nilc.org/issues/workersrights/worksite-raids/> [<https://perma.cc/QY6W-RTFE>].

<sup>285</sup> In the past year and a half, the “US Department of Justice has taken a tougher stance on white-collar crime. Multiple DOJ representatives have spoken about the DOJ’s increased focus on corporate prosecution and its decision to commit additional resources to the initiative against white-collar crime.” Stephanie Bernard, *The DOJ’s New Approach to White-Collar Crime Enforcement*, MARCUM ACCOUNTANTS (Mar. 16, 2023), <https://www.marcumllp.com/insights/dojs-new-approach-to-white-collar-crime-enforcement> [<https://perma.cc/9GHC-LJ6F>].

<sup>286</sup> See *What Does the Prosecution Need to Prove in a White-Collar Case*, FEDERAL CRIMINAL PRACTICE GROUP OF PRICE BENOWITZ LLP (2023), <https://whitecollarattorney.net/virginia-federal/white-collar-defense/prosecution/#:~:text=Many%20times%20they%20will%20subpoena,the%20benefits%20that%20were%20obtained> [<https://perma.cc/D9BC-FAJW>].

<sup>287</sup> See Sam Israels, *Subpoenas in California Criminal Cases*, CRON, ISRAELS, & STARK (Aug. 25, 2020), <https://www.cronisraelsandstark.com/subpoenas-in-california-criminal-cases> [<https://perma.cc/U987-URAA>].

Some local governmental entities in California have used other methods to increase compliance with the state regulatory scheme. Prosecutors and city attorneys complain that illegal operations pop up and that they must engage in whack-a-mole.<sup>288</sup> Unable to keep up with illegal operations, some local officials have pressured landlords with the threat of forfeiture to assure that marijuana business lessees are following state and local law.<sup>289</sup> These kinds of enforcement mechanisms are likely to increase revenue and to do so without the heavy hand of the police.<sup>290</sup>

California policy makers obviously can shift their focus towards a white-collar crime approach.<sup>291</sup> Almost certainly, a shift in approach from blue-to-white-collar enforcement techniques would come within the now-informally-followed Ogden-Cole policies, nominally abandoned by then-President Trump's Attorney General Jeff Sessions.<sup>292</sup>

Apart from a refocus on state enforcement tactics, marijuana law supporters in Congress might realistically expand the scope of the Rohrabacher-Farr rider to the annual budget bill.<sup>293</sup> As currently written, the amendment prohibits federal authorities from spending funds to prosecute private entities that comply with state medical cannabis laws.<sup>294</sup> The amendment might be expanded to include recreational

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<sup>288</sup> Manfield, *supra* note 75.

<sup>289</sup> Julie Hamill, Federal Enforcement Risks for Property Owners Leasing to California Cannabis Operators, HAMIL LAW & CONSULTING (Feb. 21), <https://www.juliehamill-law.com/blog/federal-enforcement-risks-for-property-owners-leasing-to-california-cannabis-operators> [<https://perma.cc/LE77-VZT9>].

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

<sup>291</sup> See discussion *infra*.

<sup>292</sup> In 2013, Deputy Attorney General James M. Cole established internal enforcement priorities within the Department of Justice regarding the protection of state recreational cannabis from federal prosecution. Under the memorandum, the DOJ stated it would not prosecute individuals and companies complying with the robust and well-enforced state legalization programs. In January 2018, Attorney General Jeff Sessions made it easier for US prosecutors to enforce federal marijuana laws in states that had legalized the substance by revoking this guidance. Even with Sessions revocation, so long as states comply with certain federal regulatory priorities the federal government will leave states free to regulate. Talar Berberian, Recreational Marijuana Shake-up: Session Revokes Cole Memorandum, THOMPSON COBURN LLP (Jan. 4, 2018), <https://www.thompsoncoburn.com/insights/blogs/tracking-cannabis/post/2018-01-04/recreational-marijuana-shake-up-sessions-revokes-cole-memorandum> [<https://perma.cc/HA9D-TYLB>]. Matt Zaposky, Use of Legalized Marijuana Threatened as Session Rescinds Obama-era Directive that Eased Federal Enforcement, THE WASHINGTON POST (Jan. 4, 2018), [https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175_story.html) [<https://perma.cc/D6KF-SKM6>].

<sup>293</sup> See *infra* notes 294 and 296.

<sup>294</sup> See NORML, *supra* note 115.

marijuana.<sup>295</sup> It might be clarified to make clear that business supporting state-legal marijuana businesses come within the provisions of the rider.<sup>296</sup>

These suggested reforms are not panaceas. Rohrabacher-Farr allows prosecution of businesses and other entities that are not in strict compliance with state law.<sup>297</sup> Two federal circuit courts have divided on how to determine whether a marijuana business is in strict compliance with state law.<sup>298</sup> The Court of Appeals for the Ninth Circuit requires a showing by a preponderance of the evidence that the defendant is in strict compliance with state law.<sup>299</sup> That allows the federal government to pursue industry players who may largely comply with state law, but who may enter the grey market to avoid some of what many consider excessive taxation and regulation.<sup>300</sup>

More recently, the First Circuit Court of Appeals rejected the Ninth Circuit's strict compliance approach.<sup>301</sup> In *United States v. Bilodeau*, the defendants ran three cultivation operations in Maine. According to the facts, the defendants "displayed facially compliance paperwork and patient designation cards outside their grow

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<sup>295</sup> Congressman Blumenauer supports this expansion stating, "I have spearheaded the work to develop this language, which protects the state and tribal-legal programs that have been enacted laws to end prohibitory policies and allow the development of both adult-use and medical marijuana programs." See *Id.*, supra note 115.

<sup>296</sup> See Officer of Governor Gavin Newsom, *Governor Signs Bills to Expand the Legal Cannabis Market and Address Impacts from Past Prohibition of Cannabis*, CA.GOV (Sept. 19, 2022), <https://www.gov.ca.gov/2022/09/18/governor-newsom-signs-legislation-to-strengthen-californias-cannabis-laws/> [<https://perma.cc/2KU2-NZ25>].

<sup>297</sup> See *NORML*, supra note 115.

<sup>298</sup> The Ninth Circuit and First Circuit are not aligned in determining whether a marijuana business is in strict compliance with state law. See *infra* notes 299 and 301.

<sup>299</sup> In *United States v. McIntosh*, the DOJ argued that prosecuting defendants under federal law, even where the defendant was compliant with state law, did not prevent states from implementing and giving effect to their medical cannabis laws. In what was good news for industry participants, the Ninth Circuit held that the rider's term "implement" meant "to carry-out" or "put into practical effect." Therefore, by the rider's plain meaning, the DOJ was prohibited from spending funds on "actions that prevent Medical Marijuana States' giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *United States v. McIntosh*, 833 F.3d 1163, 1176 (9th Cir. 2016).

<sup>300</sup> See *Id.*

<sup>301</sup> *United States v. Bilodeau*, 24 F.4th 705, 713 (1st Cir. 2022) (holding Congressional appropriations rider forbidding the Department of Justice from spending Congressionally appropriated funds in a manner that prevents a state from implementing its own laws that authorize the use, distribution, possession, or cultivation of medical marijuana, does not require strict compliance with state law).

rooms.”<sup>302</sup> But a federal investigation into their operation led to evidence that they were in violation of state law.<sup>303</sup>

The First Circuit rejected the Ninth Circuit’s strict compliance as impracticable.<sup>304</sup> As it stated, the First Circuit found that the strict compliance standard was not practicable in the highly regulated cannabis market.<sup>305</sup> Its concern was that the risk of “federal prosecution hanging as a sword of Damocles, ready to drop on account of any noncompliance” would deter people from entering the market as operators, and would also increase the cost of product since operators would undoubtedly pass on the high price of the continuous and monumental efforts to remain in strict compliance and avoid even the most minute or unintentional of mistakes.<sup>306</sup> Converting every minor infraction of state law into a justification for federal interference would indirectly violate the Rohrabacher-Farr rider.<sup>307</sup> Not entirely clear is where the bar should be set, but the Court suggested that the bar was somewhat higher than mere facial compliance with state law, e.g., the litigant must prove something more than having licenses to operate.<sup>308</sup>

The two cases demonstrate the tensions at work in the industry. As is the case in California, many criticize the state for overregulating.<sup>309</sup> As suggested by the First Circuit, allowing federal intervention simply on the basis of relatively minor violations does not allow a largely compliant industry to flourish.<sup>310</sup> The cases also suggest a way that the DOJ might create guidelines to encourage greater enforcement of federal law without targeting businesses that are at least mostly working in the legal arena.<sup>311</sup> In effect, the DOJ might be encouraged to follow a similar approach to investigating businesses in marijuana-legal states. Importantly, the ideal approach to determining compliance with Rohrabacher-Farr is what I have called the white-collar crime approach to regulating businesses generally.<sup>312</sup>

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<sup>302</sup> Id. at 710.

<sup>303</sup> Id. at 711.

<sup>304</sup> Id. at 718.

<sup>305</sup> Id. at 713–14 (explaining that the threat of technical noncompliance looms heavy over state-legal cannabis operators because a person’s reasonable efforts cannot always ensure strict compliance).

<sup>306</sup> Id. at 713.

<sup>307</sup> Id.

<sup>308</sup> Id.

<sup>309</sup> See Nieves, *supra* note 175.

<sup>310</sup> See Bilodeau, *supra* note 301.

<sup>311</sup> Id.

<sup>312</sup> See discussion *supra*.

Adhering to a white-collar crime model hardly solves all the problems facing transition to a regulated market in California.<sup>313</sup> But, instead of inviting vigorous law enforcement against industry players, the proposal would encourage compliance. At the back end, however, tougher enforcement probably remains a necessary evil.<sup>314</sup>

To wit, if, as headline stories indicate, organized crime groups are muscling into the industry, more traditional law enforcement tactics may be necessary.<sup>315</sup> At times, state officials have welcomed federal involvement. For example, prominent Californians urged the DEA to enforce marijuana laws against illegal growers on federal lands in California.<sup>316</sup> Ironically, recent years have seen fewer large scale federal operations against illegal operators.<sup>317</sup> Other drug crises, like illegal importation of fentanyl, may have reduced the DEA's interest in marijuana prosecutions.<sup>318</sup>

Unless one believes that the industry, left to its own devices, can self-regulate, enforcement against some actors may be necessary to achieve legitimate policy goals. But before merely endorsing aggressive law enforcement tactics, state and federal officials might agree that traditional law enforcement tactics be employed only upon a clear showing that less intrusive methods were unlikely to produce compliance.

Naively, some legalization proponents promised severe cuts in prison and law enforcement costs needed to enforce marijuana laws.<sup>319</sup> In an embarrassing reversal,

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<sup>313</sup> In a study conducted by David Weisburd and Ellen Chayet submitted to the National Institute of Justice finds those convicted of white-collar crimes are often repeat offenders. David Weisburd & Ellen Chayet, *White Collar Crime and Criminal Careers*, NATIONAL INSTITUTE OF JUSTICE (Jul. 1993), <https://www.ojp.gov/pdffiles1/Digitization/145143NCJRS.pdf> [<https://perma.cc/F4EU-HWS7>].

<sup>314</sup> See *Id.*

<sup>315</sup> Baker, *supra* note 92.

<sup>316</sup> For example, US Congressmen Jay Obernolte and Mike Garcia urged Attorney General Merrick Garland and the federal government to take action in addressing the growing crisis and prosecute illegal growers to the fullest extent of the law. *DEA Raid of Southern California Illegal Marijuana Grow Operations*, CONGRESSMAN JAY OBERNOLTE (Jun. 8, 2021), <https://obernolte.house.gov/media/press-releases/dea-raid-southern-california-illegal-marijuana-grow-operations-comes-following> [<https://perma.cc/X7NT-7EUE>].

<sup>317</sup> However, the Department of Cannabis Control is still busting large illegal cannabis operations. For example, authorities seized more than \$30 million in plants, along with firearms and cash in Oakland. *Nearly \$34 Million in Illegal Cannabis Found During Raids in Oakland*, CBS BAY AREA (Feb. 6, 2023), <https://www.cbsnews.com/sanfrancisco/news/illegal-cannabis-grows-oakland-hayward-raids-department-of-cannabis-control/> [<https://perma.cc/48ZY-KYXL>].

<sup>318</sup> Administrator Anne Milgram stated, "Fentanyl is the single deadliest drug threat our nation has ever encountered." *Fentanyl Awareness*, DEA (2023), <https://www.dea.gov/fentanylawareness> [<https://perma.cc/YZ3F-3P7N>].

<sup>319</sup> See Ezekiel Edwards, *Hundreds of Economists: Marijuana Prohibition Costs Billions, Legalization Would Earn Billions*, ACLU (Apr. 26, 2012), <https://www.aclu.org/news/smart-justice/hundreds-economists-marijuana-prohibition-costs-billions> [<https://perma.cc/5L2M-LHQW>].

supporters of legalization who hope to reform the current state of the law are urging vigorous enforcement of marijuana laws.<sup>320</sup> While that seems like one part of a larger set of reforms needed to bring California's market participants out of the illegal or quasi-illegal market into the legal market, vigorous law enforcement efforts pose a new set of challenges.<sup>321</sup>

#### CONCLUSION

Do the proposals in the previous section have a chance to become law? Maybe.

The Obama Administration's Ogden and Cole Memoranda demonstrate the effectiveness of agency action. Given a dysfunctional Congress, legislative action to move towards a regulated market is unlikely in the short-term.<sup>322</sup> DOJ policies create precedent for the kind of regulatory guidelines that might ratchet up federal action against bad actors, leaving in play participants more willing to comply with state regulations.

Expanding Rohrabacher-Farr, too, is not unimaginable. An increasing number of members of Congress represent states where some form of marijuana is lawful.<sup>323</sup> Their states have a strong interest in developing regulated markets for many reasons, including collecting tax revenues lessened by illegal marketeers.<sup>324</sup> That certainly gives those members of Congress incentive to expand Rohrabacher-Farr.

Another advantage of my proposals is that they are incremental, building on existing law. Some scholars have argued that policymakers have greater success when they develop policy incrementally.<sup>325</sup> To date, the grand bargain sought by some members of Congress, including Senator Majority Leader Chuck Schumer, has

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<sup>320</sup> Supporters of marijuana legalization fear without vigorous enforcement of marijuana laws, the illicit market will take over. See Stefan Sykes, Marijuana's black market is undercutting legal businesses, CNBC (Dec. 22, 2022), <https://www.cnn.com/2022/12/23/marijuana-black-market-undercuts-legal-business.html> [<https://perma.cc/5LTE-5SXH>].

<sup>321</sup> See discussion *supra* Part III.

<sup>322</sup> See Jacob Bronsther & Guha Krishnamurthi, *supra* note 278.

<sup>323</sup> Dan Avery, Marijuana Laws by State: Where is Weed Legal?, CNET (Jan. 3, 2023, 11:00 a.m. PST), <https://www.cnet.com/news/politics/marijuana-laws-by-state-where-is-weed-legal/> [<https://perma.cc/DS43-ETWW>].

<sup>324</sup> See California Department of Tax and Fee Administration, *supra* note 55 (showing massive revenues California takes in from cannabis taxation).

<sup>325</sup> Jeff Smith, Cannabis Lobbyists Believe Incremental Steps are the Most Likely Path to Federal Reform, MJBIZDAILY (Mar. 1, 2022), <https://mjbizdaily.com/marijuana-reform-will-involve-incremental-steps/> [<https://perma.cc/7CGK-YRMG>]; E.K. McWilliams & Nika Arzoumanian, Federal Cannabis Reform: Inevitable but Inevitably Piecemeal, LAW 360 (Aug. 6, 2021, 5:34 PM EDT), <https://www.law360.com/articles/1409480/federal-cannabis-reform-inevitable-but-inevitably-piecemeal> [<https://perma.cc/4AVL-XAYB>].

stalled in Congress.<sup>326</sup> Especially a rider to the spending bill may not create headlines that can create pushback from constituents.

Apart from national action, this article has argued in favor of a shift in the way in which California views policing the marijuana industry.<sup>327</sup> Californians, including policymakers, are waking up to the failures of Proposition 64.<sup>328</sup> As developed in Section I, they recognize the need for an increased role for law enforcement.<sup>329</sup> But cases like *Empyrean* signal the need for sensible law enforcement efforts to create space for individuals who want to participate in a normalized legal market, even as the state ratchets up its law enforcement efforts.<sup>330</sup> A shift from a blue-collar criminal model to a white-collar criminal model may give space for market participants who act in good faith to compete with actors willing to flaunt the law.<sup>331</sup>

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<sup>326</sup> See *supra* notes 276 and 280.

<sup>327</sup> See discussion *supra*.

<sup>328</sup> See discussion *supra* Part I.

<sup>329</sup> See discussion *supra* Part I.

<sup>330</sup> See discussion *supra* Part II.

<sup>331</sup> See discussion *supra*.