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## Original Intent: Whether Recent Reforms Signal a Legislative Break from Marijuana Criminalization Under the Controlled Substance Act

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# Original Intent: Whether Recent Reforms Signal a Legislative Break from Marijuana Criminalization Under the Controlled Substances Act

*Oliver J. Kim\**

I. THE CONTROLLED SUBSTANCES ACT AS THE FIFTY-YEAR-OLD FOUNDATION FOR MODERN DRUG POLICY .....	131
A. Early Federal Regulatory Efforts Prior to the CSA .....	131
B. The CSA and the Scheduling of Drugs.....	134
C. The Political Push to Revise the CSA Toward Criminalization .....	136
II. A TRIO OF NEW REFORMS: POLICY SUCCESSORS TO THE CSA OR SOMETHING DIFFERENT? .....	137
A. The Legislative Responses to the Opioid Epidemic .....	137
1. CARA .....	138
2. SUPPORT .....	141
3. Funding for the Opioid Response .....	143
B. Criminal Justice Reform: FIRST STEP .....	145
III. MARIJUANA IN THE SHADOW OF THE CSA .....	150
A. State Activity on Marijuana .....	150
B. Recent Federal Activity on Marijuana to Amend the CSA.....	154
IV. POLITICAL REALISM: LOOKING AT WHY MARIJUANA LEGALIZATION HAS FAILED AND ITS LESSONS.....	155
A. Is the Public Ahead of Politicians?.....	156
B. Difficulties Building an Evidence Base for Policy Changes .....	157

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C. Different Faces Produce Different Laws and Policies .....	159
V. CONCLUSION .....	160

“You know, when people think about drugs, they’re just disgusted by it. They just want to lock them up, and throw away the key. But it’s more complex than that.”

- U.S. President Richard Nixon<sup>1</sup>

“It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission.”

- U.S. Attorney General Jeff Sessions<sup>2</sup>

Given the acrimony of our current political moment,<sup>3</sup> it is hard to imagine a time when a Republican administration and a Democratic Congress could work together and compromise on key legislation affecting health, the environment, and criminal justice.<sup>4</sup> And yet, recent developments on drug policy and criminal justice harken back to this period of legislative achievement. One of the laws produced in the era that this symposium is examining—the Controlled Substances Act

<sup>1</sup> Interview with Egil “Bud” Krogh, Jr., *Frontline*, PBS SOCAL (2000), <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/krogh.html> [<http://perma.cc/D4HH-XVCM>] (interviewing Krogh, the White House Deputy for Domestic Affairs under President Nixon, and his account of Nixon’s view on addiction).

<sup>2</sup> THE U.S. DEP’T OF JUSTICE, *Justice Department Issues Memo on Marijuana Enforcement* (Jan. 4, 2018), <http://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [<http://perma.cc/8LCS-F3RF>] (noting rescission of prior guidance on prosecuting marijuana felonies).

<sup>3</sup> See Lee Rainie et al., *Trust and Distrust in America*, PEW RES. CTR. 1, 3 (2019), <http://www.people-press.org/2019/07/22/trust-and-distrust-in-america/> [<http://perma.cc/6XTZ-MSMJ>] (“Majorities believe the public’s confidence in the U.S. government and in each other is shrinking, and most believe a shortage of trust in government and in other citizens makes it harder to solve some of the nation’s key problems.”).

<sup>4</sup> David T. Courtwright, *The Controlled Substances Act: how a “big tent” reform became a punitive drug law*, 76 DRUG & ALCOHOL DEPENDENCE 9, 10–11 (2004) (“Nixon declared the 1970s to be ‘a great age of reform of the institutions of American government’ and pressed for changes in any number of federal laws, those governing the draft, welfare system, tax code, revenue sharing, and economic opportunity programs being among the best-known examples.”) (citation omitted).

(“CSA”)—shares some similarities in its development with three pieces of legislation on drug policy and criminal justice that passed in the last five years.<sup>5</sup> The legacy of the CSA certainly shaped these issues over the last fifty years.

The original intent of the CSA was to be a reform package that sought to harmonize the country’s approach to drug policy.<sup>6</sup> As part of a Nixon-era set of reforms, the CSA was not intended to be a harsh, punitive approach to drug control; however, in the intervening years, the CSA lost its original purpose, as political winds changed in ways that shifted the focus of the CSA toward more punitive approaches toward this goal.<sup>7</sup>

Despite the political gridlock currently plaguing our federal government, Congress has come together under two very different presidential administrations to pass legislation on substance abuse and criminal justice reform.<sup>8</sup> Indeed, Congress actually passed legislation focused on the country’s opioid epidemic, not once, but twice: the Comprehensive Addiction and Recovery Act<sup>9</sup> (“CARA”) in 2016, and then the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (“SUPPORT”) for Patients and Communities Act<sup>10</sup> in 2018. The relative ease by which Congress passed these two bills, as well as the more difficult passage of the criminal justice reform bill, the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (“FIRST STEP”) Act,<sup>11</sup> might signal a policy shift and a political change in our views on drug policy and criminalization that we have not seen in decades, and could harken back to returning to the original intent of the CSA of balancing competing policies in its approach to drug policy.

The surprising break in partisanship to address addiction policy might strike some as a sign of an opportune time to make a major reform of the CSA regarding a major public policy problem posing a conflict between a majority of the states and the federal government. Many states are considering whether to legalize marijuana for clinical and non-clinical “recreational” purposes, and some states already have adopted regulatory

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<sup>5</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.) (2012 & Supp. V 2017).

<sup>6</sup> Courtwright, *supra* note 4, at 10.

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

<sup>8</sup> *Id.* at 12.

<sup>9</sup> Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, 130 Stat. 695 (2016).

<sup>10</sup> Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act, Pub. L. No. 115-721, 132 Stat. 3894 (2016).

<sup>11</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

schemes for marijuana,<sup>12</sup> but the federal regulatory scheme under the CSA has put states' ability to legalize marijuana in question. Fifty years after the passage of the CSA, is it not time to reconsider how we approach marijuana? Are CARA, SUPPORT, FIRST STEP, and the changes at the state level precursors for a change to the CSA in an area that seems to be overwhelmingly popular?<sup>13</sup>

The answer to that question might be yes, but I would argue that the political reality is that reform at the federal level is not necessarily coming soon—even if the 2020 elections result in partisan changes in Congress and the federal government. Instead, I argue that, despite these seemingly monumental bills in a time of epic dysfunction, there is no fundamental shift in drug policy at the federal level. This “policy plateau” is evident by the failure to move legislation to amend the CSA in order to give states the ability to regulate marijuana.

While states continue to move forward on drug policy, the conflict with federal law creates conflict in many important policy areas, including medical practice, banking policy, and taxation. Having legal and policy clarity by amending the CSA would provide needed certainty, but several questions still face advocates and policymakers. Are those recent reforms—CARA, SUPPORT, and FIRST STEP—a harbinger for reform of the CSA? How do issues such as class and race play into potential reforms? Are there potential lessons that can be learned in order to alter the CSA? Given the Supreme Court's decision in *Gonzales v. Raich* that federal laws such as the CSA still apply regardless of state regulations, including in the traditional state sphere of medical professionals' scope of practice,<sup>14</sup> these questions are important to answer in order to solve the conflict emerging between states' movement toward legalization and federal inaction.

To answer these questions, this Article will analyze the various aforementioned laws in the context of the current political environment. First, the Article will provide an overview of the CSA's legislative history, particularly looking at the initial intent of the law against how it was subsequently amended in a different political climate. Second, the Article will compare the

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<sup>12</sup> Courtwright, *supra* note 4, at 10.

<sup>13</sup> Hannah Hartig & A.W. Geiger, *About six-in-ten Americans support marijuana legalization*, PEW RES. CTR. (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/> [<http://perma.cc/P75F-V85N>].

<sup>14</sup> *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

response to the opioid epidemic to marijuana policy at the state and federal level. Third, the Article will discuss the legal, political, and policy conflicts between the opioid legislation and the failure to pass marijuana legislation at both the state and federal level. Finally, the Article will conclude that, despite some advances on bipartisanship reform for drug laws, these small steps are insufficient to change the law at the federal level to decriminalize marijuana. The opioids legislation, CARA, SUPPORT, and FIRST STEP, represent different pieces that share some common threads with the CSA as initially envisioned; however, there are key differences between the efforts to be explored that could help advocates and policymakers.

## I. THE CONTROLLED SUBSTANCES ACT AS THE FIFTY-YEAR-OLD FOUNDATION FOR MODERN DRUG POLICY

American drug policy includes both regulation of substances for patient use on the commercial market, as well as interdiction of substances believed to be dangerous for human consumption or only consumed for limited purposes under close supervision. This section provides a brief snapshot of the policy developments that provide the foundation for our current drug regime.

### A. Early Federal Regulatory Efforts Prior to the CSA

During the twentieth century, the federal government exercised increasing control over drug policy, by regulating the use of certain drugs through a complex approval process and supervising medical professionals, and by criminalizing other drugs as illegal substances.<sup>15</sup> In one stream of federalizing drug policy, Congress began to formalize the process for demonstrating the safety of prescription drugs starting with the 1906 passage of the Pure Food and Drugs Act.<sup>16</sup> This law, and a series of subsequent laws, led to the creation of the Food and Drug Administration (“FDA”), which became seen as “a ‘gatekeeper’ to protect public health by using its regulatory authority over the drug approval process.”<sup>17</sup> For instance, the FDA began using its authority to regulate the use of addictive non-narcotic drugs after the medical community recognized that drugs such as

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<sup>15</sup> Courtwright, *supra* note 4; *see also infra* SPILLANE note 17.

<sup>16</sup> Oliver J. Kim, *Trying and Dying: Are Some Wishes at the End of Life Better Than Others?*, 41 DALHOUSIE L.J. 94, 97 (Spring 2018).

<sup>17</sup> *Id.*; *see also* JOSEPH F. SPILLANE, *Debating the Controlled Substances Act*, 76 DRUG & ALCOHOL DEPENDENCE 17, 19 (2004) (discussing how federal law “created a class of drugs available only on a physician’s prescription, and gave the FDA authority to designate which drugs would be placed in that category”) (citation omitted).

“barbiturates were not addicting in the narcotic sense, but that they were habit forming and subject to improper use.”<sup>18</sup>

In another stream of federalization, Congress began addressing the growing concern about the addictive nature of narcotics, ultimately leading to a process of interdiction and criminalization.<sup>19</sup> Initially, Congress used its tax power to pass the Harrison Act<sup>20</sup> as a means of regulating narcotics (defined as opioids and cocaine) and, thus, made the Treasury Department the initial regulator of these substances.<sup>21</sup> This statute marked a substantial shift in regulatory policy, as the states had principally been the primary regulators by enacting a patchwork of policies.<sup>22</sup>

The Treasury Department largely resisted adding additional non-narcotics to its responsibilities under its Federal Bureau of Narcotics.<sup>23</sup> But the Bureau’s director, Harry Anslinger, did favor greater criminalization of marijuana at both the state and federal level.<sup>24</sup> Congress passed the Marijuana Tax Act in 1937, adding the only non-narcotic drug under the jurisdiction of the Treasury Department’s Federal Bureau of Narcotics.<sup>25</sup> Although the Marijuana Tax Act was framed as a revenue law to quell Anslinger’s concerns about the constitutionality of regulating marijuana, it effectively banned the use of marijuana given the high cost of the tax.<sup>26</sup> Subsequently, Congress went further in the Boggs Act by adding criminal penalties, including mandatory minimum sentences for possession and trafficking of marijuana and narcotics,<sup>27</sup> and the federal government encouraged states to pass similar legislation to standardize drug laws.<sup>28</sup>

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<sup>18</sup> SPILLANE, *supra* note 17.

<sup>19</sup> *Id.* at 18.

<sup>20</sup> Harrison Narcotics Tax Act, Pub. L. No. 63-223, 38 Stat. 785 (1914).

<sup>21</sup> SPILLANE, *supra* note 17, at 18.

<sup>22</sup> See Kathleen Ferraiolo, *From Killer Weed to Popular Medicine: The Evolution of American Drug Control Policy, 1937-2000*, 19 J. POL’Y HIST. 147, 150 (2007); see also Courtwright, *supra* note 4, at 10.

<sup>23</sup> SPILLANE, *supra* note 17.

<sup>24</sup> JOSEPH F. SPILLANE & DAVID B. WOLCOTT, A HISTORY OF MODERN AMERICAN CRIMINAL JUSTICE 233 (2013) (noting that Anslinger “presented marijuana as addictive, a gateway to more serious drugs like heroin, and a source of crime”); Ferraiolo, *supra* note 22, at 153–54.

<sup>25</sup> SPILLANE & WOLCOTT, *supra* note 24.

<sup>26</sup> Ferraiolo, *supra* note 22, at 154; David Katner, *Up in Smoke: Removing Marijuana from Schedule I*, 27 B.U. PUB. INT. L.J. 167, 173 (2018).

<sup>27</sup> SPILLANE & WOLCOTT, *supra* note 24, at 234. See VIRGINIA L. ROTHWELL, *The Boggs Act* in Encyclopedia of Drug Policy 96–97 (Mark Kleiman & James Hawdon, eds., 2011), for a discussion of how the Boggs Act also marked the first time that marijuana and narcotics had been combined in legislation.

<sup>28</sup> SPILLANE & WOLCOTT, *supra* note 24, at 234.

During the 1960s, there was a growing recognition of fundamental problems with the differing streams of federal regulation, as “[n]ew substances were being introduced into widespread use faster than research could develop and the traditional addiction model, which had been based on physical dependence, was not adequate.”<sup>29</sup> Instead of providing a unified response to the patchwork of state policies, “Congress’s habit of ad hoc legislation, sometimes based on the constitution’s taxing power and sometimes on its commerce power, had produced a patchwork of enforcement agencies with different priorities and resources.”<sup>30</sup> The Johnson Administration was unable to formulate legislation in time for consideration before the 1968 election, resulting in the incoming Nixon Administration modifying the initial proposals that ultimately became the CSA.<sup>31</sup>

In 1970, Congress passed the CSA as part of the Comprehensive Drug Abuse Prevention and Control Act<sup>32</sup> as an effort to consolidate these different approaches.<sup>33</sup> Policymakers realized the country was facing “three very visible drug problems”: an increase in heroin use in urban areas, as well as among service members stationed in Vietnam, and in young people using marijuana and psychedelics.<sup>34</sup> Historians note a difference in political philosophy between the Democratic majority in Congress and the Nixon Administration toward criminal justice, but these opposing partisans were able to merge their differences.<sup>35</sup> For instance, “the conventional liberal wisdom [was] that federal officials had botched the psychotropic drug problem while demonizing narcotic offenders and stonewalling maintenance experiments. . . . Above all, the reformers thought that the old sanctions, especially those involving marijuana, were unfair and inflexible, and brought disrepute upon the control system.”<sup>36</sup> Key officials in the administration agreed with that assessment and believed “that the new guidelines [under the CSA] would make the system fairer and more workable, while preserving moral distinctions

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<sup>29</sup> SPILLANE, *supra* note 17, at 21.

<sup>30</sup> Courtwright, *supra* note 4, at 10.

<sup>31</sup> SPILLANE, *supra* note 17, at 21.

<sup>32</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

<sup>33</sup> SPILLANE, *supra* note 17.

<sup>34</sup> Jerome H. Jaffe, *One Bite of the Apple: Establishing the Special Action Office for Drug Abuse Prevention*, 43, 45 in *ONE HUNDRED YEARS OF HEROIN* (David Musto ed., 2002).

<sup>35</sup> For a video discussing how President Nixon had to work with Democrats in order to govern, see *Bridging The Branches—How President Nixon Worked With A Democratic Congress*, RICHARD NIXON FOUND. (Apr. 30, 2018), <http://www.nixonfoundation.org/2018/04/bridging-branches-president-nixon-worked-democratic-congress/> [<http://perma.cc/V7RS-733P>].

<sup>36</sup> Courtwright, *supra* note 4, at 12.

among casual users, addicts, and organized criminal traffickers, with the heaviest sentences reserved for the latter.”<sup>37</sup>

Conversely, the Nixon Administration deemed drug abuse a priority issue because “the problem was getting out of hand.”<sup>38</sup> Nixon himself believed that drug misuse and addiction was a cause of crime, and he had campaigned on reducing the supply side of this equation.<sup>39</sup> Thus, the administration had determined that the existing legal authorities were inadequate and needed to be replaced with a single modern law that would give the government the appropriate tools and flexibility in order to combat this problem.<sup>40</sup>

Recognizing the need to compromise with the more liberal “establishment”<sup>41</sup> in Congress, President Nixon’s submission to Congress, which became the Comprehensive Drug Abuse Prevention and Control Act, reflected a compromise between interdiction and public health approaches to drug control:

When Nixon submitted his drug bill to Congress in July 1969, he outlined a 10-point action plan. Characteristically, points 1–5 dealt with supply control. Points 6–10 emphasized education, research, rehabilitation, training, and communication. The legislation itself reflected this multi-front approach. The CSA was part (Titles II and III) of . . . the Comprehensive Drug Abuse Prevention and Control Act of 1970. Title I provided authority and money for the Department of Health, Education, and Welfare (HEW) to mount additional prevention and treatment efforts through community mental health centers and public health service hospitals. It authorized the National Institute of Mental Health to increase research and training. It protected the privacy rights of subjects under the care of approved researchers. All of these were unmistakably public-health initiatives, part of the same legislation as the CSA.<sup>42</sup>

## B. The CSA and the Scheduling of Drugs

At the heart of the CSA is its regulatory scheme for classifying drugs under five different schedules. The CSA initially classified certain drugs under these schedules, with marijuana being included under Schedule I.<sup>43</sup> The Drug Enforcement Administration (“DEA”) within the Justice Department can add additional drugs to the schedule as a

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 11.

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

<sup>40</sup> *Id.* at 10.

<sup>41</sup> *Id.* at 11.

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

<sup>43</sup> 21 U.S.C. § 812(c)(d)(1).

“controlled substance.”<sup>44</sup> Schedule I is the most restrictive category and reserved for substances with no medical value, with Schedule V being the least restrictive.<sup>45</sup> In order to be classified as a Schedule I controlled substance, the DEA must find that the drug has a high potential for abuse,<sup>46</sup> there is no currently accepted medical use in treatment in the United States,<sup>47</sup> and “[t]here is a lack of accepted safety for use of the drug or other substance under medical supervision.”<sup>48</sup> The CSA allows the Attorney General to reclassify a controlled substance to a lower schedule or completely remove the substance in question.<sup>49</sup> But as a political compromise,<sup>50</sup> the Department of Health and Human Services (“HHS”) or “any interested party” can petition for adding, reclassifying, or removing a drug from the schedule, just as the Attorney General could on “his own motion.”<sup>51</sup>

Since the CSA initially classified marijuana under Schedule I, there have been five petitions to reschedule it—all unsuccessful and often lengthy.<sup>52</sup> As part of a 2016 denial, the DEA laid out a five-part test to determine whether a drug has an accepted medical use, as follows: “[T]he drug’s chemistry is not known and reproducible; there are no adequate safety studies; there are no adequate and well-controlled studies proving efficacy; the drug is not accepted by qualified experts; and the scientific evidence is

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<sup>44</sup> 21 U.S.C. § 812 (2012 & Supp. V 2017).

<sup>45</sup> For a useful summary with examples of drugs falling under each of the five schedules, see Elizabeth Hartney, *Controlled Drugs in the Controlled Substance Act*, VERYWELLMIND (Sept. 29, 2019), <http://www.verywellmind.com/what-are-controlled-drugs-22310> [<http://perma.cc/HC5N-MCX6>]. Drug schedules are different from the five classes of drugs—narcotics, depressants, stimulants, hallucinogens, and anabolic steroids—that fall under the CSA. *Id.*

<sup>46</sup> 21 U.S.C. § 812(b)(1)(A).

<sup>47</sup> 21 U.S.C. § 812(b)(1)(B).

<sup>48</sup> 21 U.S.C. § 812(b)(1)(C).

<sup>49</sup> 21 U.S.C. § 811(a) (2012 & Supp. V 2017).

<sup>50</sup> SPILLANE, *supra* note 17, at 22.

<sup>51</sup> 21 U.S.C. § 811(a). *See also* 21 U.S.C. § 811(c) (explaining that when making this determination, the DEA must consider eight factors laid out in the CSA: “(1) Its actual or relative potential for abuse. (2) Scientific evidence of its pharmacological effect, if known. (3) The state of current scientific knowledge regarding the drug or other substance. (4) Its history and current pattern of abuse. (5) The scope, duration, and significance of abuse. (6) What, if any, risk there is to the public health. (7) Its psychic or physiological dependence liability. (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.”).

<sup>52</sup> Diane Hoffmann et al., *Will The FDA’s Approval Of Epidiolex Lead to Rescheduling Marijuana?*, HEALTH AFFAIRS: HEALTH AFFAIRS BLOG (July 12, 2018), <http://www.healthaffairs.org/doi/10.1377/hblog20180709.904289/full/> [<http://perma.cc/94UU-ZWF6>] (“The first petition (1972) took 22 years before a decision was issued; the second (1995) took six years; and a 2002 petition was not decided until 2011. The most recent petitions (2009 and 2011) were decided in 2016.”).

not widely available.”<sup>53</sup> Several petitioners have attempted to sue the DEA to force proceedings to go forward, but the courts have upheld the DEA’s denials.<sup>54</sup>

Classifying a drug under Schedule I greatly restricts potential research that could demonstrate whether a controlled substance actually has medical use.<sup>55</sup> Although Congress expanded research at the National Institute of Mental Health at the same time it was passing the CSA,<sup>56</sup> the Comprehensive Drug Abuse Prevention and Control Act gave greater control to the Justice Department—rather than HHS—to approve research using Schedule I controlled substances under the rationale of preventing such drugs from being diverted inappropriately in clinical trials.<sup>57</sup>

### C. The Political Push to Revise the CSA Toward Criminalization

Although the CSA had initially been passed with “something in it for everybody,”<sup>58</sup> it increasingly became pulled toward criminalization and away from public health. In the 1970s, angry and worried middle-class parents grew fearful of a seemingly growing acceptance of marijuana use among young people.<sup>59</sup> Concerned about the harms of marijuana and its possible gateway effect to harsher drugs, organized groups of parents successfully lobbied for tougher criminal sanctions and “zero tolerance” laws, rather than pushing for harm-reduction approaches.<sup>60</sup> Subsequently, as cocaine, and then crack, became cheaper and easier to produce, the government increased its law enforcement efforts, often with bipartisan majorities.<sup>61</sup>

These fears, however, accompanied prejudices as illicit drug use was associated with “minority subcultures—musicians, artists, urban African Americans, Hispanic laborers.”<sup>62</sup> Thus, it was not

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<sup>53</sup> Denial of Petition To Initiate Proceedings To Reschedule Marijuana, 81 Fed. Reg. 53688 (proposed Aug. 12, 2016).

<sup>54</sup> *Ams. for Safe Access v. Drug Enf't Admin.*, 706 F.3d 438, 438–41 (D.C. Cir. 2012); *All. for Cannabis Therapeutics v. Drug Enf't Admin.*, 15 F.3d 1131, 1131–33 (D.C. Cir. 1994).

<sup>55</sup> Grace Wallack & John Hudak, *Marijuana Rescheduling: A Partial Prescription for Policy Change*, 14 OHIO ST. J. CRIM. L. 207, 208–12 (2016).

<sup>56</sup> Courtwright, *supra* note 4, at 11.

<sup>57</sup> See SPILLANE, *supra* note 17, at 22–23.

<sup>58</sup> Courtwright, *supra* note 4, at 13.

<sup>59</sup> *Id.* While seemingly concerned about the societal costs of potentially losing a generation to drug abuse, Nixon also stoked parents’ fears as a political device by arguing, “It is doubtful that an American parent can send a son or daughter to college today without exposing the young man or woman to drug abuse.” *Id.* at 11.

<sup>60</sup> *Id.* at 13.

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

<sup>62</sup> SPILLANE & WOLCOTT, *supra* note 24, at 260.

just the fear of “white middle-class youth” engaging in drug use, but their association with these perceived undesirable, deviant elements of society.<sup>63</sup> While the CSA initially reformed sentencing guidelines, subsequent legislation reversed this trend.<sup>64</sup>

## II. A TRIO OF NEW REFORMS: POLICY SUCCESSORS TO THE CSA OR SOMETHING DIFFERENT?

In comparison to the time period that this symposium focuses on, today’s congressional arena has been characterized by gridlock<sup>65</sup> and deemed a “legislative graveyard.”<sup>66</sup> Despite this hostile environment, CARA, SUPPORT, and FIRST STEP all achieved rare bipartisan support in an increasingly polarized legislature. This section will provide an overview of each of these laws, as well as some of the political and legislative machinations behind the passage of each law.

### A. The Legislative Responses to the Opioid Epidemic

Over the last twenty years, Americans’ use of opioids has increased dramatically: the sales of prescription opioids nearly quadrupled since 1999 due to several potential causes.<sup>67</sup> At the same time, the death rate due to overdoses tripled to 19.8 per 100,000 individuals, with nearly two-thirds of deaths involving either prescription or illegal opioids.<sup>68</sup> Deaths due to opioid overdoses exceed automobile accidents in the United States.<sup>69</sup> The opioid epidemic’s toll on the American public’s health is so extensive that it is linked to a decline in the country’s life expectancy.<sup>70</sup> In addition to the loss of life, the opioid epidemic has had other public health consequences: nearly two million Americans have a

<sup>63</sup> *Id.*

<sup>64</sup> Katharine A. Neill, *Tough on Drugs: Law and Order Dominance and the Neglect of Public Health in U.S. Drug Policy*, 6 *WORLD MED. & HEALTH POL’Y* 375, 382–83 (2014).

<sup>65</sup> Rainie, *supra* note 3, at 14.

<sup>66</sup> Jordain Carney & Maggie Miller, *McConnell under fire for burying election bills in ‘legislative graveyard’*, HILL (July 27, 2019, 5:50 AM), <http://thehill.com/homenews/senate/454967-mcconnell-under-fire-for-burying-election-security-bills-in-legislative-graveyard> [<http://perma.cc/S4FD-HUDQ>].

<sup>67</sup> Claire Felter, *The U.S. Opioid Epidemic*, COUNCIL ON FOREIGN REL., [http://www.cfr.org/backgrounder/us-opioid-epidemic?gclid=Cj0KCQjwjrVpBRC0ARIsAFrFuV9q18QVmo9U03Pa7jQAz6HUTRZwbFDNRotsevt-y1MMpnTzTGwY6toaAuF\\_EALw\\_wcB](http://www.cfr.org/backgrounder/us-opioid-epidemic?gclid=Cj0KCQjwjrVpBRC0ARIsAFrFuV9q18QVmo9U03Pa7jQAz6HUTRZwbFDNRotsevt-y1MMpnTzTGwY6toaAuF_EALw_wcB) [<http://perma.cc/D4MH-FSMJ>] (last updated Sept. 17, 2019).

<sup>68</sup> HOLLY HEDEGAARD ET AL., *DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2016* 5 (Dec. 2017), <http://www.cdc.gov/nchs/data/databriefs/db294.pdf> [<http://perma.cc/6JQU-XC7J>].

<sup>69</sup> Ken Kolosh, *Accidental Injury Becomes #3 Cause of Death in the U.S.*, NAT’L SAFETY COUNCIL (Jan. 22, 2018), <http://www.nsc.org/safety-first-blog/accidental-injury-becomes-3-cause-of-death-in-the-us-1> [<http://perma.cc/4VVS-QM7F>].

<sup>70</sup> Felter, *supra* note 67.

prescription opioid use disorder, leading to an increase in illicit opioid use and diseases, such as Hepatitis C and HIV.<sup>71</sup>

Many Americans, particularly in rural communities, believed that a government response was necessary to stem the tide of opioid misuse.<sup>72</sup> By the 2018 midterm elections, sponsoring legislation aimed at the opioid epidemic was seen as politically astute.<sup>73</sup> Although advocates criticized the legislation because these bills failed to provide sustainable funding for needed services,<sup>74</sup> politicians viewed introducing legislation as a response to a pressing societal concern, while being fiscally responsible.<sup>75</sup>

## 1. CARA

By 2014, drug overdose deaths had nearly tripled over a fifteen-year period, and over three out of five of the 47,055 drug overdose deaths that year involved an opioid.<sup>76</sup> Shortly before the 2014 midterm elections, a small bipartisan group of Senators—mainly from states seeing the beginning of the epidemic<sup>77</sup>—introduced the first version of CARA.<sup>78</sup> Subsequently, a

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<sup>71</sup> Office of the Nat'l Coordinator for Health Info. Tech., *Health IT Playbook*, HEALTHIT, <http://www.healthit.gov/playbook/full> [<http://perma.cc/V88V-7VY4>] (last updated Feb. 28, 2018).

<sup>72</sup> Danielle Kurtzleben, *Poll: Rural Americans Rattled By Opioid Epidemic; Many Want Government Help*, NPR (Oct. 17, 2018, 5:01 AM), <http://www.npr.org/2018/10/17/656515170/poll-rural-americans-rattled-by-opioid-epidemic-many-want-government-help> [<http://perma.cc/XEV2-SUEE>].

<sup>73</sup> See Brianna Ehley & Jennifer Haberkorn, *Tough reelection? Sponsor an opioid bill*, POLITICO (June 16, 2018, 6:37 AM), <http://www.politico.com/story/2018/06/16/lawmakers-opioid-bills-midterms-624926> [<http://perma.cc/URD8-XG5H>]; see also Katie Zezima & Colby Itkowitz, *Flailing on Fentanyl*, WASH. POST (Sept. 20, 2019), [http://www.washingtonpost.com/graphics/2019/investigations/fentanyl-epidemic-congress/?wpisrc=al\\_news\\_alert-politics-alert-national&wpmk=1](http://www.washingtonpost.com/graphics/2019/investigations/fentanyl-epidemic-congress/?wpisrc=al_news_alert-politics-alert-national&wpmk=1) [<http://perma.cc/X9JK-DWT4>] (interviewing the House Republican sponsor of the bill to increase sentencing minimums for trafficking fentanyl, about his belief that the bill was not considered because, “[a]s a Republican from a reliably red district who wasn’t going to face a difficult path to reelection, he didn’t need a legislative success to tout on the campaign trail.”).

<sup>74</sup> Brianna Ehley, *Congress’ latest opioid bill won’t solve the crisis*, POLITICO (Sept. 17, 2018, 7:28 PM), <http://www.politico.com/story/2018/09/17/congress-opioids-crisis-illegal-drugs-792373> [<http://perma.cc/3SQY-R9H2>] (“Public health experts and first responders say the massive bipartisan legislation . . . takes some important steps toward better access to treatment but lacks the urgency, breadth and steady long-term funding required to quell the emergency . . .”).

<sup>75</sup> Ehley & Haberkorn, *supra* note 73 (“Republican supporters of the bills say the extended time on the floor reflects how seriously the House takes the opioid issue. Most of the bills sponsored by vulnerable lawmakers are not controversial, in part because they don’t designate new spending.”).

<sup>76</sup> Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2010–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445 (2016).

<sup>77</sup> Yongwen Jiang et al., *Rhode Island Unintentional Drug Overdose Death Trends and Ranking—Office of the State Medical Examiners Database*, R.I. MED. J. 33, 34 (2018), <http://www.rimed.org/rimedicaljournal/2018/02/2018-02-33-health-jiang.pdf> [<http://perma.cc/P4NY-Q8KB>].

bipartisan group of Representatives<sup>79</sup> introduced a companion bill.<sup>80</sup> Because the bills had been introduced so late in the 113th Congress, there was little chance either bill would move; however, advocates responded positively to the legislators' interest and began to plan for the next Congress.<sup>81</sup>

The 2014 elections resulted in giving Republicans control of both chambers of the 114th Congress, for the first time since the 2006 elections, while President Obama was in his final two years of office.<sup>82</sup> Republicans initially used their new majorities in a fruitless attempt to repeal the Affordable Care Act (“ACA”),<sup>83</sup> but subsequently, both parties focused on working collaboratively around two major initiatives—the opioid epidemic<sup>84</sup> and an investment in medical research<sup>85</sup>—in an effort to demonstrate the ability to govern and to produce legislative victories.

Advocates for CARA noted that “the dramatic increase in opioid-related overdose deaths in virtually every Congressional district in America” was tragically one of the leading factors that raised attention to the issue and created a sense of urgency to pass the bill into law.<sup>86</sup> When CARA was signed into law on July 22, 2016,

<sup>78</sup> S. 2839, 113th Cong. § 1 (2014).

<sup>79</sup> Jim Sensenbrenner, *Sensenbrenner, Scott, Marino, Bass, Joyce, Ryan Introduce Comprehensive Legislation to Combat Drug Addiction*, JIM SENSENBRENNER (Dec. 10, 2014), <http://sensenbrenner.house.gov/2014/12/sensenbrenner-scott-marino-bass-joyce-ryan-introduce-comprehensive-legislation-to-combat-drug-addiction> [<http://perma.cc/YB77-CAA3>].

<sup>80</sup> H.R. 5845, 113th Cong. § 1 (2014).

<sup>81</sup> Sensenbrenner, *supra* note 79 (noting that the bill had been endorsed by ninety-three national organizations).

<sup>82</sup> *Republicans Rule House and Senate for First Time in 8 Years*, NBC NEWS (Nov. 4, 2014, 1:38 PM), <http://www.nbcnews.com/politics/elections/republicans-rule-house-senate-first-time-8-years-n241126> [<http://perma.cc/JW8U-2C96>].

<sup>83</sup> Russell Berman, *‘Promise Kept’: The Senate Finally Votes to Repeal Obamacare*, ATLANTIC (Dec. 4, 2015), <http://www.theatlantic.com/politics/archive/2015/12/the-senate-finally-votes-to-repeal-obamacare/418644/> [<http://perma.cc/CZQ2-DQPH>] (noting the Senate’s party-line, 52-47, in favor of a reconciliation bill that gutted, but did not fully repeal, the ACA was “purely symbolic” because President Obama vetoed the bill).

<sup>84</sup> Paul Demko & Brianna Ehley, *Republicans cast opioid bill as their health care achievement*, POLITICO (Sept. 22, 2018, 6:44 AM), <http://www.politico.com/story/2018/09/22/republicans-defend-opioid-bill-achievement-796837> [<http://perma.cc/J3QH-8UEK>]. Note that advocates had urged federal intervention much earlier. Geoff Mumford, *Chasing the dragon: Psychology informs strategies to contain the opioid epidemic*, AM. PSYCHOL. ASS’N (May 2016), <http://www.apa.org/science/about/psa/2016/05/opioid-epidemic> [<http://perma.cc/7A8N-62D3>] (While “it would appear from news accounts that the epidemic reached crisis proportions only recently,” advocates had begun “to raise the alarm as early as 2006”).

<sup>85</sup> Norm Ornstein, *A Bipartisan Victory for Medical Research in Congress*, ATLANTIC (July 13, 2015), <http://www.theatlantic.com/politics/archive/2015/07/21st-century-cures-act-bipartisan/398369/> [<http://perma.cc/M5MD-MK9R>].

<sup>86</sup> Jeremiah Gardner & Robert Ashford, *CARA History & Breakdown*, HAZELDEN BETTY FORD FOUND. (July 11, 2016), <http://www.hazeldenbettyford.org/articles/gardner/cara-history-and-breakdown> [<http://perma.cc/Z53T-9SUS>].

advocates hailed it as the “first major federal addiction legislation in forty years and the most comprehensive effort undertaken to address the opioid epidemic, encompassing all six pillars necessary for such a coordinated response—prevention, treatment, recovery, law enforcement, criminal justice reform, and overdose reversal.”<sup>87</sup>

Thus, CARA mirrored some of the original promise of the CSA. First, CARA contained numerous public-health approaches to combating the opioid epidemic. In addition to a general grant program for community-based organizations,<sup>88</sup> CARA also increased access points for community-based treatment,<sup>89</sup> training for first responders,<sup>90</sup> grants targeted at addiction treatment for pregnant and postpartum women,<sup>91</sup> and the types of health professionals who could prescribe medications to treat opioid misuse disorders.<sup>92</sup> Second, CARA contained several grants aimed at improving law enforcement responses, including for state, local, and tribal law enforcement to pursue innovative approaches to policing,<sup>93</sup> and for states to establish prescription drug monitoring programs.<sup>94</sup> Third, CARA reformed processes at the Department of Veterans Affairs (“VA”) to address how the VA health system treats pain and prescribes opioids.<sup>95</sup>

But critics raised concerns about CARA’s approach. First, critics noted that CARA did not contain actual funding, but rather provided for authorizations for appropriations.<sup>96</sup> Indeed, including actual funding would have endangered passage in the

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<sup>87</sup> *The Comprehensive Addiction and Recovery Act (CARA)*, CADCA, <http://www.cadca.org/comprehensive-addiction-and-recovery-act-cara> [<http://perma.cc/7QL2-BYGW>].

<sup>88</sup> *Id.* §§ 103, 601.

<sup>89</sup> *Id.* §§ 107, 110.

<sup>90</sup> *Id.* § 202.

<sup>91</sup> *Id.* §§ 501, 503.

<sup>92</sup> *Id.* § 303.

<sup>93</sup> *Id.* § 201.

<sup>94</sup> *Id.* § 109.

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

<sup>96</sup> Bill Heniff, Jr., *Overview of the Authorization-Appropriations Process*, CONG. RES. SERV. (Nov. 26, 2012) (discussing the two-step process for federal spending to carry out a program, which includes: “(1) enactment of an authorization measure that may create or continue an agency, program, or activity as well as authorize the subsequent enactment of appropriations; and (2) enactment of appropriations to provide funds for the authorized agency, program, or activity.”). CARA authorized a total of \$187 million annually in new appropriations, but there is no guarantee that Congress will allocate that level of funding. See Jeremiah Gardner & Robert Ashford, *CARA History & Breakdown*, HAZELDEN BETTY FORD FOUND. (July 11, 2016), <http://www.hazeldenbettyford.org/articles/gardner/cara-history-and-breakdown> [<http://perma.cc/Z53T-9SUS>]; see also Mumford, *supra* note 84 (“Because funding CARA and passing CARA are separate legislative processes, skirmishes over how to pay for CARA programs may continue to play out long after the bill is successfully conferred and sent to the president for signature.”).

House.<sup>97</sup> Although Democrats decried the lack of actual funding and unsuccessfully attempted to amend CARA to do so,<sup>98</sup> they ultimately supported the bill.<sup>99</sup> Second, there was a question about equity in regards to how Congress was responding to the opioid epidemic versus its prior responses to drug abuse. The Centers for Disease Control and Prevention (“CDC”) found that victims of opioid overdoses were overwhelmingly white, tended to be male, and middle-aged.<sup>100</sup> Four of the five most affected states—West Virginia, New Hampshire, Kentucky, and Ohio<sup>101</sup>—are rural and tended to lean Republican or be politically competitive.<sup>102</sup> Thus, in addition to the moral and public-health reasons for the response to the epidemic, there was a political incentive for the majority party to respond to this drug epidemic differently than prior federal responses.<sup>103</sup>

## 2. SUPPORT

A little over two years after CARA’s passage, Congress revisited the opioid epidemic, passing SUPPORT and sending it to President Trump for signature.<sup>104</sup> Although the opioid epidemic was still raging, a cynic might question whether a second bill was needed so quickly or whether SUPPORT was meant to give Republicans a healthcare achievement prior to the 2018 midterm elections. Indeed, prior to the passage of SUPPORT, Congressional

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<sup>97</sup> Burgess Everett & Jennifer Haberkorn, *Anti-opioid bill touted by vulnerable Republicans hits snag*, POLITICO (June 30, 2016, 1:03 PM), <http://www.politico.com/story/2016/06/congress-republicans-opioid-bill-224985> [<http://perma.cc/7SFP-R6UW>] (quoting a key Senate Republican that the issue over including funding was “more of an issue in the House than it is in the Senate—from the standpoint of making sure things are paid for and there isn’t mandatory funding”).

<sup>98</sup> *Id.*

<sup>99</sup> *Despite Discord Over Funding, Congress Sends Opioid Bill To President’s Desk*, KHN (July 14, 2016), <http://khn.org/morning-breakout/despite-discord-over-funding-congress-sends-opioid-bill-to-presidents-desk/> [<http://perma.cc/GS74-FAZK>]. In his signing statement, President Obama also indicated that he was “deeply disappointed that Republicans failed to provide any real resources for those seeking addiction treatment to get the care that they need. In fact, they blocked efforts by Democrats to include \$920 million in treatment funding.” Office of the Press Sec’y, *Statement by the President on the Comprehensive Addiction and Recovery Act of 2016*, WHITE HOUSE (July 22, 2016), <http://obamawhitehouse.archives.gov/the-press-office/2016/07/22/statement-president-comprehensive-addiction-and-recovery-act-2016> [<http://perma.cc/G8JY-68PE>].

<sup>100</sup> Rudd, *supra* note 76, at 1448, 1450 tbls.1 & 2.

<sup>101</sup> *See id.* at 1447 fig.1.

<sup>102</sup> *See* Paul Chisholm, *Analysis Finds Geographic Overlap In Opioid Use And Trump Support In 2016*, NPR (June 23, 2018, 8:02 AM), <http://www.npr.org/sections/health-shots/2018/06/23/622692550/analysis-finds-geographic-overlap-in-opioid-use-and-trump-support-in-2016> [<http://perma.cc/U86H-NGKS>].

<sup>103</sup> 162 CONG. REC. 2372 (2016) (statement of Rep. Jackson Lee) (noting that many of those who turned to crack cocaine were incarcerated rather than offered treatment).

<sup>104</sup> *See* Devin Miller, *Opioids bill becomes law; AAP advances key priorities*, AAP NEWS (Nov. 20, 2018), <http://www.aapublications.org/news/2018/11/20/washington112018> [<http://perma.cc/NL9S-J2G9>].

Republicans attempted to repeal the ACA again with the knowledge that President Trump would sign any repeal legislation;<sup>105</sup> however, the congressional repeal effort failed again.<sup>106</sup>

SUPPORT faced some of the same criticisms related to sustainable funding as CARA did.<sup>107</sup> But whereas CARA seemed to have some logical themes in its legislative structure,<sup>108</sup> some criticized SUPPORT as “scattershot compared with what is needed.”<sup>109</sup> Legislators noted that the process for developing SUPPORT was “rushed,” as the House considered many different proposals that were ultimately packaged into a single bill.<sup>110</sup> House Energy and Commerce then-Ranking Member, Frank Pallone, worried that many of the bills that would ultimately become the foundation of SUPPORT lacked meaningful review:

Due to the rushed timeline, many of these bills are works in progress and are still in discussion draft form. These forced time constraints mean that some bills suffer from lack of technical assistance from our federal agencies or a [fiscal] analysis. Additionally, and equally important, stakeholders have not had the opportunity to adequately evaluate these bills or weigh in on their impact.<sup>111</sup>

Generally, proponents grouped SUPPORT’s provisions into “four buckets: advancing treatment and recovery initiatives, improving prevention, protecting our communities, and bolstering efforts to fight deadly illicit synthetic drugs such as fentanyl.”<sup>112</sup>

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<sup>105</sup> Maggie Haberman & Robert Pear, *Trump Tells Congress to Repeal and Replace Health Care Law ‘Very Quickly’*, N.Y. TIMES (Jan. 10, 2017), <http://www.nytimes.com/2017/01/10/us/repeal-affordable-care-act-donald-trump.html> [<http://perma.cc/GPY8-4MBG>].

<sup>106</sup> See Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK (July 29, 2017, 6:53 PM), <http://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832> [<http://perma.cc/V43T-BL4C>] (noting that Trump called on Senate Republicans via Twitter to continue to push forward on repeal efforts).

<sup>107</sup> Abby Goodnough, *In Rare Bipartisan Accord, House and Senate Reach Compromise on Opioid Bill*, N.Y. TIMES (Sept. 26, 2018), <http://www.nytimes.com/2018/09/26/health/opioid-bill-congress.html> [<http://perma.cc/H9PK-5JLB>] (quoting a researcher who stated, “Compared to how we responded to AIDS, it’s a failure,” but that Congress “didn’t want to spend, so they agreed on every second-tier issue they could”). During the legislative debate, Ranking Member Rep. Pallone noted, “The reality is that meaningful policy in this space may cost money, and agreement on appropriate offsets that do not harm people—including the very people that we may be trying to help—is a critical component needed in order for me to support these bills moving forward.” Frank Pallone, Jr., *Pallone’s Opening Remarks at Health Subcommittee Markup of Opioid Legislation*, HOUSE COMMITTEE ON ENERGY & COM. (Apr. 25, 2018), <http://energycommerce.house.gov/newsroom/press-releases/pallone-s-opening-remarks-at-health-subcommittee-markup-of-opioid> [<http://perma.cc/XSL8-FUXF>].

<sup>108</sup> CADCA, *supra* note 87.

<sup>109</sup> Goodnough, *supra* note 107.

<sup>110</sup> Pallone, *supra* note 107 (Pallone noted that the committee was considering at least sixty-three bills in “the Chairman’s extremely hasty timeframe to pass opioid legislation”).

<sup>111</sup> *Id.*

<sup>112</sup> Greg Walden, *Thanks to Congress, we’re making real progress in the opioid crisis*, WASH. EXAMINER (June 22, 2019, 12:00 AM), <http://www.washingtonexaminer.com/opinion/op->

### 3. Funding for the Opioid Response

It is worth discussing further how Congress funded the legislative response, given that the failure to create sustainable streams of funding for opioid recovery was a criticism of both CARA and SUPPORT. While some reforms had little or no fiscal impact, others would require a substantial investment of funding in order to be effective.<sup>113</sup>

As aforementioned, most of CARA and SUPPORT used authorizations and did not provide mandatory funding. Following the passage of CARA, Congress included \$500 million in grants to states for both federal fiscal years 2017 and 2018<sup>114</sup> to supplement their efforts to address opioid abuse as part of the 21st Century Cures Act.<sup>115</sup> Subsequently, Congress agreed to provide \$6 billion in funding as part of an informal deal to pass a larger budget compromise.<sup>116</sup> These monies, though, would be allocated through the annual appropriations process.<sup>117</sup>

Relatedly, both CARA and SUPPORT were passed after Republicans attempted to repeal the ACA, which in itself plays a

eds/thanks-to-congress-were-making-real-progress-in-the-opioid-crisis [http://perma.cc/T4CE-GTCV] (writing, in an editorial, an overview of SUPPORT). *But see* Zezima & Itkowitz, *supra* note 73 (discussing congressional failures to recognize the increasing dangers of the synthetic opioid fentanyl).

<sup>113</sup> Felter, *supra* note 67.

<sup>114</sup> A federal fiscal year begins on October 1 and ends on September 30 of the following year. U.S. SENATE, *Glossary Term: Fiscal Year*, [http://www.senate.gov/reference/glossary\\_term/fiscal\\_year.htm](http://www.senate.gov/reference/glossary_term/fiscal_year.htm) [http://perma.cc/EMW6-TXS4].

<sup>115</sup> 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016). For more on this law, see Ornstein, *supra* note 85.

<sup>116</sup> See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018) (The \$6 billion commitment—\$3 billion for federal fiscal years 2018 and 2019—was a promise by Senate leadership); see also *Bipartisan Budget Act of 2018*, FIRST FOCUS (Feb. 2018), <http://firstfocus.org/wp-content/uploads/2018/02/BBA2018-Fact-Sheet.pdf>. [http://perma.cc/LXU8-DU43] (“To ease passage of the BBA, Senate leadership committed to several funding priorities . . . including . . . \$6 billion in additional funding for combatting the opioid substance abuse epidemic.”).

<sup>117</sup> Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018) (shortly after the Bipartisan Budget Act’s passage, the federal fiscal year 2018 was passed into law). “The FY 2018 appropriations bill allocated more than \$4.65 billion across agencies to help states and local governments in their efforts toward prevention, treatment and law enforcement initiatives. That represents a \$3 billion increase over 2017 spending levels.” For an accounting of how these monies were allocated in the first year of implementation, see Holland & Knight, *Memorandum: Opioid Crisis Proposals and Funding* (Apr. 9, 2018), <http://www.hklaw.com/files/Uploads/Documents/Alerts/HealthcareLifeandSciences/040918HealthcareMemoOpioidCrisisProposalsandFunding.pdf> [http://perma.cc/B6UG-MW8H]; German Lopez, *Congress’s omnibus bill adds \$3.3 billion to fight the opioid crisis. It’s not enough.*, VOX (Mar. 22, 2018, 12:20 PM), <http://www.vox.com/policy-and-politics/2018/3/22/17150294/congress-omnibus-bill-opioid-epidemic> [http://perma.cc/CDU8-4XAJ]; *Tracking Federal Funding to Combat the Opioid Crisis*, BIPARTISAN POLY CTR. (Mar. 2019), <http://bipartisanpolicy.org/wp-content/uploads/2019/03/Tracking-Federal-Funding-to-Combat-the-Opioid-Crisis.pdf> [http://perma.cc/6JLZ-BLFK].

major role in providing financial support and coverage for treating opioid misuse and other addictions.<sup>118</sup> These pivots suggest moving away from a fight that had grown unpopular with the broader electorate,<sup>119</sup> but also an attempt to push forward reforms on the cheap.<sup>120</sup> Had the ACA been repealed and replaced in its entirety, it would have created havoc for many initiatives attempting to fight the opioid epidemic and provide treatment to those suffering from opioid addiction.<sup>121</sup> Several wavering Senators requested that additional funding, specifically for addressing the opioid epidemic, would be included in a repeal proposal, but ACA supporters argued such funds would not be

<sup>118</sup> Kendal Orgera & Jennifer Tolbert, *The Opioid Epidemic and Medicaid's Role in Facilitating Access to Treatment*, KAISER FAM. FOUND. (May 24, 2019), <http://www.kff.org/medicaid/issue-brief/the-opioid-epidemic-and-medicoids-role-in-facilitating-access-to-treatment> [http://perma.cc/6PZA-48RL] (Of the “nearly two million nonelderly adults in the United States [who] had an opioid use disorder (OUD) . . . nearly four in ten were covered by Medicaid”). Note that some conservatives believe that the ACA and its Medicaid expansion helped cause the opioid epidemic. See Majority Staff Report of the Comm. on Homeland Sec. & Gov't Affairs, *Drugs for Dollars: How Medicaid Helps Fuel the Opioid Epidemic*, Executive Summary 2 (2018), <http://www.hsgac.senate.gov/imo/media/doc/2018-01-17%20Drugs%20for%20Dollars%20How%20Medicaid%20Helps%20Fuel%20the%20Opioid%20Epidemic.pdf> [http://perma.cc/TY7Z-MBUL]; see also Nicholas Eberstadt, *Our Miserable 21st Century*, COMMENTARY (Feb. 2017), <http://www.commentarymagazine.com/articles/our-miserable-21st-century> [http://perma.cc/DJ25-XQSH] (declaring it “incontrovertible” that “Medicaid inadvertently helped finance America’s immense and increasing appetite for opioids in our new century”). Others, however, argue that there is little data to support such a conclusion:

First, trends in opioid deaths nationally and by Medicaid expansion status predate the ACA. Second, counties with the largest coverage gains actually experienced smaller increases in drug-related mortality than counties with smaller coverage gains. Third, the fact that Medicaid recipients fill more opioid prescriptions than non-recipients largely reflects greater levels of disability and chronic illness in the populations that Medicaid serves.

Andrew Goodman-Bacon & Emma Sandoe, *Did Medicaid Expansion Cause The Opioid Epidemic? There's Little Evidence That It Did.*, HEALTH AFF. (Aug. 23, 2017), <http://www.healthaffairs.org/doi/10.1377/hblog20170823.061640/full> [http://perma.cc/4FCZ-S6GM].

<sup>119</sup> Ashley Kirzinger et al., KAISER FAM. FOUND., *6 Charts About Public Opinion On The Affordable Care Act*, RAMAON HEALTHCARE (July 19, 2019), <http://ramaonhealthcare.com/6-charts-about-public-opinion-on-the-affordable-care-act/> [http://perma.cc/5KFN-8BTB] (“During Republican efforts to repeal the Affordable Care Act (ACA) during the summer of 2017, KFF Health Tracking Polls began to find a slight uptick in overall favorability towards the 2010 health care law.”).

<sup>120</sup> Goodnough, *supra* note 107.

<sup>121</sup> Paige Winfield Cunningham, *The Health 202: Trump administration undermines anti-opioid efforts by opposing Obamacare*, WASH. POST (Mar. 28, 2019), <http://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/03/28/the-health-202-trump-administration-undermines-anti-opioid-efforts-by-opposing-obamacare/5c9ba06f1b326b0f7f38f28a/?noredirect=on> [http://perma.cc/2H7G-2CZK] (noting that a repeal of the ACA would “endanger the [federal government]’s anti-opioids effort by leaving around 25 million Americans without health coverage and removing the law’s requirements for insurers to cover substance abuse services as part of 10 essential health benefits”).

sufficient to make up for a repeal of the ACA.<sup>122</sup> The major repeal proposals would have restructured Medicaid,<sup>123</sup> and many opponents of this effort argued that it would have resulted in a cut to safety-net, public-funded behavioral health programs and other state initiatives.<sup>124</sup> The Medicaid program, which provides federal matching dollars for state health services for low-income adults, provides the financial foundation for many substance misuse disorder programs.<sup>125</sup> Additionally, opponents of the repeal noted that eliminating the ACA would strike its requirement that substance abuse treatment be considered an essential benefit, as well as protect consumers from being discriminated against for having a pre-existing condition, such as a substance misuse disorder.<sup>126</sup>

## B. Criminal Justice Reform: FIRST STEP

In recent years, pundits have highlighted shifts in how some policymakers—particularly conservative ones—have approached criminal-justice issues and how the electorate has responded.<sup>127</sup> At the federal level, a meaningful attempt to address some of the punitive measures from the amended CSA took shape in 2015

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<sup>122</sup> Dylan Scott, *More opioid funding won't save the Senate health care bill*, VOX (June 29, 2017, 5:20 PM), <http://www.vox.com/policy-and-politics/2017/6/29/15895906/voxcare-bcra-opioid-funding-capito> [<http://perma.cc/T2R7-27HB>] (noting that one key Senator requested \$45 billion in specific funding for the opioid epidemic).

<sup>123</sup> CONG. RESEARCH SERV., COMPARISON OF THE AMERICAN HEALTH CARE ACT (AHCA) AND THE BETTER CARE RECONCILIATION ACT (BCRA), 11–22 (2017), <http://crsreportscongress.gov/product/pdf/R/R44883> [<http://perma.cc/C9AT-RRM6>].

<sup>124</sup> Marianna Sotomayor, *Trump signs sweeping opioid bill with vote to end 'scourge' of drug addiction*, NBC NEWS (Oct. 24, 2018, 1:51 PM), <http://www.nbcnews.com/politics/congress/trump-signs-sweeping-opioid-bill-vow-end-scourge-drug-addiction-n923976> [<http://perma.cc/L9UF-AWFY>] (quoting Pallone regarding SUPPORT, that it would be “disingenuous at best to promise relief to people struggling with opioid addiction while also attempting to cut funding for Medicaid and eliminate protections for people with pre-existing conditions, which include opioid use disorder”).

<sup>125</sup> Orgera & Tolbert, *supra* note 118.

<sup>126</sup> Reed Abelson et al., *What Happens if Obamacare Is Struck Down?*, N.Y. TIMES (Mar. 26, 2019), <http://www.nytimes.com/2019/03/26/health/obamacare-trump-health.html> [<http://perma.cc/A2K6-US4N>].

<sup>127</sup> Timothy Williams & Thomas Kaplan, *The Criminal Justice Debate Has Changed Drastically. Here's Why.*, N.Y. TIMES (Aug. 20, 2019), <http://www.nytimes.com/2019/08/20/us/politics/criminal-justice-reform-sanders-warren.html> [<http://perma.cc/N56G-Q7MD>] (discussing how previously “radical” ideas were being debated as part of the Democratic presidential nomination campaign due to “a seismic shift in how the American public views criminal justice issues,” but likely to be “used by President Trump and his allies to tar whoever becomes the Democratic nominee”). Additionally, several reforms have occurred at the state level, such as restoring voting rights in purple states, like Virginia and Florida. *See id.* (discussing a California initiative limiting the use of deadly force); *see also* Victoria Shineman, *Florida restores voting rights to 1.5 million citizens, which might also decrease crime*, CONVERSATION (Nov. 7, 2018, 2:05 AM), <http://theconversation.com/florida-restores-voting-rights-to-1-5-million-citizens-which-might-also-decrease-crime-106528> [<http://perma.cc/NK4R-P5BX>].

when a key Republican, the Senate Judiciary Chairman Chuck Grassley, agreed to introduce bipartisan legislation to reform federal sentencing laws.<sup>128</sup> But there was skepticism whether reform efforts would continue after the 2016 election ushered in the Trump Administration and a more conservative Congress.<sup>129</sup> Although polling found general public support for reforming federal sentencing laws for drug convictions,<sup>130</sup> the issue did not seem to have the same overt public outcry from the general public as addressing the opioid epidemic.<sup>131</sup>

An unusual coalition of disparate interests were able to maintain momentum for criminal justice reforms in the next Congress.<sup>132</sup> These key discrete constituencies in the unusual political coalition provided the political cover necessary to overcome the “law and order” resistance against the modest

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<sup>128</sup> See Antonio Ginatta, *Dispatches: Strange Bedfellows for US Criminal Justice Reform*, HUM. RIGHTS WATCH (Oct. 1, 2015, 5:09 PM), <http://www.hrw.org/news/2015/10/01/dispatches-strange-bedfellows-us-criminal-justice-reform> [<http://perma.cc/YM94-AR8L>].

<sup>129</sup> See Miriam S. Gohara, *Keep on Keeping On: Maintaining Momentum for Criminal Justice Reform During the Trump Era*, 14 STAN. J. C.R. & C.L. 1, 1 (2018), <http://law.stanford.edu/wp-content/uploads/2018/05/Gohara-05.28.18.pdf> [<http://perma.cc/N98T-RXZM>]; see also Bill Keller, *How Criminal Justice Reform Died*, VICE (Sept. 28, 2016, 9:00 PM), [http://www.vice.com/en\\_us/article/yvewn7/how-criminal-justice-reform-died-bill-keller](http://www.vice.com/en_us/article/yvewn7/how-criminal-justice-reform-died-bill-keller) [<http://perma.cc/DVL4-CATT>] (discussing political campaigning during the 2016 election cycle and partisan concerns about giving the outgoing Obama Administration a victory); see also Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), <http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html> [<http://perma.cc/MF72-JZJ2>] (quoting a Republican Senator that the Republican leadership did not want the caucus to seem divided on a key issue, as well as noting that then-Republican presidential nominee Trump was campaigning on a “tough-on-crime” message).

<sup>130</sup> See *Poll Shows Americans Overwhelmingly Support Prison, Sentencing Reforms*, COMM. ON JUD. (Aug. 23, 2018), <http://www.judiciary.senate.gov/press/rep/releases/poll-shows-americans-overwhelmingly-support-prison-sentencing-reforms> [<http://perma.cc/DKC5-UG8C>]; see also *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <http://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<http://perma.cc/GT7R-87DR>].

<sup>131</sup> See John Gramlich, *Voters' perception of crime continue to conflict with reality*, PEW RES. CTR. (Nov. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality> [<http://perma.cc/AXG3-J4AB>] (“Almost eight-in-ten voters who supported President-elect Donald Trump (78%) said this, as did 37% of backers of Democrat Hillary Clinton” and believed that crime worsened between 2008 and 2016, although “U.S. violent crime and property crime rates fell 19% and 23%, respectively,” from 2008 to 2015); see also *Little Partisan Agreement on the Pressing Problems Facing the U.S.*, PEW RES. CTR. (Oct. 15, 2018), <http://www.people-press.org/2018/10/15/little-partisan-agreement-on-the-pressing-problems-facing-the-u-s> [<http://perma.cc/LX2A-GW9A>] (noting that while Democrats and Republicans shared similar views on whether “violent crime (49% of Republicans, 47% of Democrats) and drug addiction (67% of Republicans, 64% of Democrats)” were priority issues before the 2018 elections, “71% of Democratic voters say the way racial and ethnic minorities are treated by the criminal justice system is a very big problem for the country, compared with just 10% of Republican voters.”).

<sup>132</sup> Ray Suarez, *Trump's Push For Prison Reform*, ON POINT (May 21, 2018), <http://www.wbur.org/onpoint/2018/05/21/trump-prison-reform> [<http://perma.cc/HW4H-3PSQ>].

reforms in FIRST STEP.<sup>133</sup> For instance, although President Trump campaigned<sup>134</sup>—and continues to campaign<sup>135</sup>—on a hardline message regarding “law and order,” and selected a conservative Attorney General known to oppose marijuana legalization and other reforms,<sup>136</sup> his embrace of FIRST STEP helped overcome some Senate Republicans’ reservations of supporting it.<sup>137</sup>

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<sup>133</sup> Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), <http://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump> [http://perma.cc/8LHN-KMEX] (“The significant buy-in from the right is the culmination of years of effort from a cadre of libertarian-leaning conservatives, like the anti-tax zealot Grover Norquist, and evangelicals, such as Chuck Colson, the founder of the Christian nonprofit organization Prison Fellowship, who have worked to convince others that the prison system has become too costly, punitive, and government-empowering.”). See also Arthur Rizer & Lars Trautman, *The conservative case for criminal justice reform*, GUARDIAN (Aug. 5, 2018, 6:00 PM), <http://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform> [http://perma.cc/SL6L-7AFW] (arguing why “conservatives must go back to the principles of liberty and dignity that first defined their party,” and apply “these principles to criminal justice reform”). Key influential conservatives were moved by the massive costs for maintaining a vast prison system with seemingly little effect on crime rates, SPILLANE & WOLCOTT, *supra* note 24, at 279 (noting “the high social costs of mass incarceration”), as well as an increasing policy presence—particularly by the federal government—that threatened individual liberties. See *Criminal Justice Reform*, CHARLES KOCH INST., <http://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/> [http://perma.cc/493E-ECQU]. But see Keller, *supra* note 129 (arguing that the “spectacular mustering of bipartisan solidarity at a time of political polarization and paralysis . . . was not nearly as muscular as it seemed”).

<sup>134</sup> Hulse, *supra* note 129 (noting that Trump’s 2016 campaign included “warnings of a United States at risk from sinister forces, even though violent crime is low compared with past decades”).

<sup>135</sup> Christina Wilkie, *Trump praises ‘stop and frisk,’ calls for tougher policing tactics*, CNBC (Oct. 8, 2018, 4:06 PM), <http://www.cnbc.com/2018/10/08/trump-praises-stop-and-frisk-calls-for-tougher-policing-tactics.html> [http://perma.cc/7J96-DYTW]. In relation to the opioid epidemic, Trump seemingly called for the death penalty for drug trafficking. See Ayesha Rascoe, *How Trump Went From Tough on Crime’ To Second Chance’ For Felons*, NPR, MORNING EDITION (Dec. 17, 2018, 5:00 AM), <http://www.npr.org/2018/12/17/676771335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons> [http://perma.cc/T82Z-HRK5] (quoting President Trump as suggesting “at some point, we’ll get very smart as a nation and give them the ultimate punishment”).

<sup>136</sup> Jordan Waldrep, *What Replacing Jeff Sessions As AG Means For Marijuana Legalization*, FORBES (Nov. 13, 2018, 8:28 AM), <http://www.forbes.com/sites/jordanwaldrep/2018/11/13/what-replacing-jeff-sessions-as-ag-means-for-marijuana-legalization/#1a138ae0103f> [http://perma.cc/2DAG-7J2K]. Most notably, during his tenure, Attorney General Jeff Sessions reversed the so-called Cole memo, which was guidance issued under the Obama Administration that permitted U.S. Attorneys to focus resources away from marijuana prosecutions in states where its use was permitted. See THE U.S. DEPT’ OF JUSTICE, *supra* note 2.

<sup>137</sup> Gohara, *supra* note 129. Trump’s son-in-law, Jared Kushner, whose father had served time in federal prison, is often credited for pushing Trump to support FIRST STEP. Rascoe, *supra* note 135. Trump’s embrace of FIRST STEP has led subsequently to strange confrontations over credit for its passage. See Jacey Fortin, *Trump Insults Chrissy Teigen and John Legend, and They Fire Back*, N.Y. TIMES (Sept. 9, 2019), <http://www.nytimes.com/2019/09/09/us/chrissy-teigen-trump-twitter.html> [http://perma.cc/N239-Q6RZ].

Despite this confluence of support, the legislative debate over FIRST STEP was quite divisive and reflective of different positions within conservative philosophy.<sup>138</sup> Passed shortly after SUPPORT and in the “lame duck” session following the midterm elections,<sup>139</sup> FIRST STEP represented a series of compromises, again paralleling some of the compromises between the Nixon Administration and the Democratic Congress over the CSA.<sup>140</sup>

One of the bill’s Senate Republican sponsors even suggested revising the bill’s sentencing reforms to make it more palatable to opposing Senators.<sup>141</sup> Such revisions included a new mechanism for allowing early release, a look at who would be eligible to participate in early release,<sup>142</sup> and what penalties were appropriate for drug offenses.<sup>143</sup> Senator Tom Cotton, a Republican from Arkansas and the lead opponent of FIRST STEP, argued that the bill’s proponents were incorrect in their public statements as to how the bill would actually work.<sup>144</sup> In a series of opinion pieces outlining his opposition,<sup>145</sup> Cotton argued that the bill would allow a larger segment of felons than the proponents described to be able to seek early release.<sup>146</sup> Cotton

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<sup>138</sup> Everett & Haberkorn, *supra* note 97. Given the limited window for debate on the Senate floor, Senate leaders are generally reluctant to bring up bills that divide their caucus and could delay other competing legislative priorities. Burgess Everett & Elana Schor, *Cotton wields sex offender report to tank prisons bill*, POLITICO (Nov. 26, 2018, 1:26 PM), <http://www.politico.com/story/2018/11/26/tom-cotton-criminal-justice-reform-senate-republicans-trump-1015149> [<http://perma.cc/HE92-RLEV>]. Further, in this particular situation, it was likely that the Senate would pass a bill different than what the House had passed earlier in the legislative session, and because a number of House Republicans were retiring or had been defeated in the 2018 election, it could be difficult to convince the House to remain in session to take up a new bill. *Id.*

<sup>139</sup> Burgess Everett & Elana Schor, *Criminal justice reform bill still alive as McConnell deliberates*, POLITICO (Nov. 29, 2018, 5:12 PM), <http://www.politico.com/story/2018/11/29/congress-criminal-justice-reform-senate-mcconnell-1032469> [<http://perma.cc/XYU9-7QC3>].

<sup>140</sup> See *supra* notes 21–57.

<sup>141</sup> Elana Schor, *Criminal justice deal faces steep Senate hurdles despite Trump’s push*, POLITICO (Aug. 17, 2018, 5:08 AM), <http://www.politico.com/story/2018/08/17/senate-criminal-justice-deal-trump-781876> [<http://perma.cc/2N8F-KCWS>] (quoting Senator John Cornyn, “The sentencing reform stuff begins to divide people, including the administration.”).

<sup>142</sup> First Step Act of 2018, Pub. L. No. 115-391, § 101, 132 Stat. 5193, 5196–98 (2018) (to be codified at 18 U.S.C. § 3632).

<sup>143</sup> *Id.* at 5220–21.

<sup>144</sup> Tom Cotton, *What’s Really in Congress’s Justice-Reform Bill*, NAT’L REV. (Nov. 26, 2018, 10:48 AM), <http://www.nationalreview.com/2018/11/first-step-criminal-justice-reform-bill-whats-in-it/> [<http://perma.cc/VHV7-RWVP>].

<sup>145</sup> See *id.*; see also Tom Cotton, *Lame-duck Congress’ rush for criminal justice reform plan will hurt, not help*, USA TODAY (Nov. 15, 2018, 9:02 AM), <http://www.usatoday.com/story/opinion/2018/11/15/tom-cotton-congress-criminal-justice-reform-bill-opioids-laws-column/2003829002/> [<http://perma.cc/C4LY-2B26>].

<sup>146</sup> Cotton, *supra* note 144. For a response to Cotton’s argument that many early-released prisoners will commit felonies subsequently, see Zak Cheney-Rice, *Tom Cotton’s America Is Not a Free America*, N.Y. MAGAZINE (Dec. 13, 2018), <http://nymag.com/intelligencer/2018/12/toms-cotton-first-step-act.html> [<http://perma.cc/C3YF-3RWF>] (noting that Cotton’s arguments do not

also attacked granting federal judges more discretion to ignore mandatory minimum sentences for those with prior criminal records.<sup>147</sup> Lastly, Cotton invoked the opioid epidemic at least twice: he noted that “[m]ore than 90 percent of traffickers [of heroin and fentanyl] will be eligible for the time credits” toward an early release, and he argued that the bill would result in a repeat fentanyl trafficker potentially serving half of the prison sentence than would be required under current law.<sup>148</sup>

In response, Senator Mike Lee, a Republican from Utah, defended FIRST STEP in a parallel editorial.<sup>149</sup> Lee noted that certain federal inmates could seek “pre-release custody—meaning home confinement, supervised release, or a halfway house.”<sup>150</sup> Lee reiterated that the bill explicitly would exclude certain categories of offenders, and only allows inmates to seek the new credits created by FIRST STEP if they are at a minimum or low risk of recidivism.<sup>151</sup> Whereas Cotton argued that this determination of recidivism was too reliant on “government bureaucrats” and could be gamed by a future administration,<sup>152</sup> Lee responded that the determinations would be made by “experienced law-enforcement officers.”<sup>153</sup> Lee also noted that FIRST STEP only granted discretion for federal judges to ignore mandatory minimums in limited circumstances; for instance, such discretion would not be available in cases where defendants “used or threatened violence or possessed a

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distinguish between those in federal versus state prison, and thus incorrectly account for those “locked up for drug offenses” and recidivism rates).

<sup>147</sup> Cotton, *supra* note 144.

<sup>148</sup> *Id.*; see also Zezima & Itkowitz, *supra* note 73 (discussing how Senate leadership decided not to bring up a bill for consideration that would increase the sentence for fentanyl trafficking because of concerns that it “would clash with the effort and possibly imperil the bill’s [FIRST STEP’s] passage”).

<sup>149</sup> Mike Lee, *The Truth about the FIRST STEP Act*, NAT’L REV. (Nov. 27, 2018, 10:05 AM), <http://www.nationalreview.com/2018/11/the-truth-about-the-first-step-act/> [<http://perma.cc/VS48-EW6C>].

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

<sup>151</sup> *Id.* Additionally, the Senate Judiciary Committee disputed Cotton’s arguments related to FIRST STEP’s treatment of sex offenders. See Everett & Schor, *supra* note 138 (referring to a committee spokesperson who distinguished between credits for good behavior under current law and changes made by FIRST STEP); see also *Summary of the Revised First Step Act*, *infra* note 156 (“Original text of the bill already excluded sex offenders.”).

<sup>152</sup> Cotton, *supra* note 144 (“But this requires extraordinary faith in the government’s ability to predict the recidivism risk of violent felons. . . . But it is surprising to me that conservatives, and especially libertarians, have faith that government bureaucrats can judge the state of a felon’s soul and predict his future behavior. Even if you trusted the current administration to do so, would you trust a future Democratic administration?”).

<sup>153</sup> Lee, *supra* note 149; see also Salvador Rizzo, *Does the sentencing bill give early release to drug traffickers, sex offenders?*, WASH. POST (Nov. 30, 2018), <http://www.washingtonpost.com/politics/2018/11/30/does-sentencing-bill-give-early-release-drug-traffickers-sex-offenders/> [<http://perma.cc/2E3D-2U8F>] (discussing the “objective criteria and a point system to assess risk” used by the Bureau of Prisons).

firearm or other dangerous weapon, or if their offense resulted in serious bodily injury or death.”<sup>154</sup> Finally, Lee disputed Cotton’s determination of the time a fentanyl dealer would serve and the amount of qualifying activities such felons could participate in to reduce their sentences.<sup>155</sup>

In the end though, the Senate adopted an amendment to FIRST STEP that addressed several of Cotton’s and other opponents’ arguments.<sup>156</sup> Although Cotton and his allies voted against FIRST STEP, it overwhelmingly passed the Senate<sup>157</sup> and then was agreed to by the House.<sup>158</sup>

### III. MARIJUANA IN THE SHADOW OF THE CSA

As Congress has debated responses to the opioid epidemic and whether to reform federal sentencing for drug offenses, there has been a related debate has been over the treatment of marijuana. Legalization of marijuana is seemingly popular with the electorate, and some policymakers have called for its legalization for medical purposes, and sometimes even recreational use, as well as forgiveness for prior drug offenses related to marijuana. Yet, even while change is happening rapidly at the state level, marijuana remains criminalized by the fifty-year-old CSA. This section will explore the movement at the state level toward legalization of marijuana, the failure to amend the CSA, and the conflict between state and federal law.

#### A. State Activity on Marijuana

As discussed previously, the federal government often plays a leadership role in influencing and standardizing states’ criminal laws.<sup>159</sup> For instance, when the CSA became law, the Nixon Administration promoted a Uniform Controlled Substances

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<sup>154</sup> Lee, *supra* note 149.

<sup>155</sup> *Id.*

<sup>156</sup> See CONG. REC. (daily ed. Dec. 13, 2018) (Sen. McConnell proposing an amendment to S. 756); see also *Summary of the Revised First Step Act*, SENATE COMMITTEE ON JUDICIARY (Dec. 12, 2018), <http://www.judiciary.senate.gov/imo/media/doc/Revised%20First%20Step%20Act%20-%20Summary.pdf> [<http://perma.cc/EV3W-9CTA>]. In order to move quickly through the legislative process, the Senate amended an unrelated bill that had already passed the House with the modified version of FIRST STEP. In response, the House voted on a motion to concur with this Senate amendment, allowing the bill to move to the President for signature. *Summary: S. 756 (115th): S. 756: FIRST Step Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/115/s756/summary> [<http://perma.cc/B4DP-NT6N>] (last updated Dec. 18, 2018).

<sup>157</sup> U.S. S. ROLL CALL VOTE 271, 115th Cong., 2nd Session (passing 87 to 12).

<sup>158</sup> U.S. HOUSE ROLL CALL VOTE 448, 115th Cong., 2nd Session (passing 358 to 36).

<sup>159</sup> SPILLANE & WOLCOTT, *supra* note 24, at 234–35.

Act that eventually was adopted by the states.<sup>160</sup> Although several politicians in the 1960s adopted a tough-on-crime message to capitalize on a general concern about disorder,<sup>161</sup> a public health approach to drug addiction also emerged as a competing policy option to criminalization.<sup>162</sup> Additionally, increasing use of marijuana created some public skepticism about criminalizing drugs.<sup>163</sup> Thus, as aforementioned, advocates for each of these different policy options were able to find compromise in the initial CSA, but subsequently, policymakers amended the CSA and made other policy decisions that favored criminalization and interdiction over a public health approach to drug issues.<sup>164</sup>

Advocates for reform, particularly for marijuana reform, looked for other avenues, such as popular referendums, as a means of bypassing resistant legislative majorities.<sup>165</sup> The first success was in California: after several legislative failures, advocates petitioned for a referendum on legalizing marijuana for medical purposes.<sup>166</sup> Advocates focused on the belief that marijuana could provide relief for those with terminal illnesses such as HIV and cancer.<sup>167</sup> Ultimately, in 1996, the referendum, Proposition 215, successfully passed 55% to 44%, making California the first state to legalize medical marijuana.<sup>168</sup> Subsequently, thirty-two more states and the District of Columbia have legalized medical marijuana, either through ballot initiatives or by traditional legislation.<sup>169</sup>

Building on these successes, advocates have turned toward legalizing marijuana for recreational or “adult” use, and time will tell if this movement is as successful as efforts to allow for

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<sup>160</sup> *See id.* (“Today, every U.S. state has passed this legislation [the Uniform Controlled Substances Act], ensuring that the federal government sets the terms of drug control.”).

<sup>161</sup> *Id.* at 254–56.

<sup>162</sup> *Id.* at 235 (discussing the “emerging influence of the mental health profession [as] an alternative approach to the problem of narcotics”); Ferraiolo, *supra* note 22, at 157 (discussing how “mental health professionals responsible for treating addicts gained a voice in policy debates”).

<sup>163</sup> SPILLANE & WOLCOTT, *supra* note 24, at 235 (“[W]idespread use of marijuana and narcotics created a reality that undermined [federal officials’] horror stories about them.”); Ferraiolo, *supra* note 22, at 157.

<sup>164</sup> It remains to be seen whether CARA, SUPPORT, and FIRST STEP, *supra* Part III, signify a divergence from this course or a temporary aberration.

<sup>165</sup> Ferraiolo, *supra* note 22, at 163.

<sup>166</sup> *Id.* at 163–65.

<sup>167</sup> *Id.* at 167–68.

<sup>168</sup> Proposition 215, *printed in* Cal. Sec’y State, California Ballot Pamphlet: General Election November 5, 1996, at 58 (1996).

<sup>169</sup> *State Medical Marijuana Laws*, NCSL (Sept. 27, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<http://perma.cc/9CBM-CEPH>].

medical marijuana. In 2012, voters in Colorado<sup>170</sup> and Washington<sup>171</sup> passed ballot initiatives, making the two states the first to legalize marijuana for adult-use purposes. Subsequently, Alaska,<sup>172</sup> California,<sup>173</sup> Illinois,<sup>174</sup> Maine,<sup>175</sup> Massachusetts,<sup>176</sup> Michigan,<sup>177</sup> Nevada,<sup>178</sup> Oregon,<sup>179</sup> and Vermont,<sup>180</sup> adopted adult-use policies, often with the expectation of raising state revenues while hoping to reduce enforcement efforts.

In addition to the divergence between medical and recreational use of marijuana, the approach used in each state toward legalization—particularly for recreational use—has varied as well.<sup>181</sup>

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<sup>170</sup> COLO. CONST. amend. 64. A prior amendment, that would have decriminalized marijuana in 2006, had failed. *Colorado Votes In Favor Of Pot Legalization*, CBSDENVER (Nov. 6, 2012, 11:56 PM), <http://denver.cbslocal.com/2012/11/06/no-on-64-concedes-colorado-votes-in-favor-of-pot-legalization/> [<http://perma.cc/C3LH-FWN3>].

<sup>171</sup> Initiative Measure 502 (Wash. 2012).

<sup>172</sup> *A Summary of Measure 2, An Act to Tax and Regulate the use of Marijuana*, MARIJUANA POL'Y PROJECT, <http://www.mpp.org/states/alaska/a-summary-of-measure-2-an-act-to-tax-and-regulate-the-production-sale-and-use-of-marijuana/> [<http://perma.cc/RJ7W-RDUP>] (discussing successful 2014 ballot measure).

<sup>173</sup> CAL. CIV. CODE § 1550.5(a)(3) (West 2019) (explaining that AUMA, under the initiative Prop. 215, was enacted into the state legislature).

<sup>174</sup> 410 ILL. COMP. STAT. ANN. 705 (West 2019). Illinois is the first state to approve legal sales through the state legislature rather than a ballot measure.

<sup>175</sup> *As retail stores open across the state, regulators consider delivery, social consumption rules*, MARIJUANA POL'Y PROJECT (Aug. 12, 2019), <http://www.mpp.org/states/maine/> [<http://perma.cc/3W5U-S7HE>] (discussing successful 2016 ballot measure and the delays in implementation).

<sup>176</sup> *Historic victory: The 2016 Yes on 4 Campaign*, MARIJUANA POL'Y PROJECT (Aug. 12, 2019), <http://www.mpp.org/states/massachusetts/> [<http://perma.cc/69SH-HNA6>] (discussing successful 2012 ballot measure).

<sup>177</sup> *Marijuana Regulatory Agency publishes emergency rules to implement legalization*, MARIJUANA POL'Y PROJECT (July 22, 2019), <http://www.mpp.org/states/michigan/> [<http://perma.cc/NFE-QCBF>] (discussing successful 2018 ballot measure).

<sup>178</sup> *States increasingly looking to Nevada as a model*, MARIJUANA POL'Y PROJECT (Nov. 5, 2018), <http://www.mpp.org/states/nevada/> [<http://perma.cc/VY55-38YQ>] (discussing successful 2016 ballot measure).

<sup>179</sup> *The Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act: A Summary of Measure 91*, MARIJUANA POL'Y PROJECT, <http://www.mpp.org/states/oregon/summary-of-oregons-measure-91/> [<http://perma.cc/R9FH-2AMD>] (discussing successful 2014 ballot measure).

<sup>180</sup> Vermont became the first state to decriminalize, by legislation, the adult-use of marijuana by decriminalizing possession and limited cultivation of cannabis by adults twenty-one and older. *See Vermonters enjoy legal home-grown cannabis; bill to regulate retail sales passes Senate—House to take up bill in early 2020*, MARIJUANA POL'Y PROJECT (May 28, 2019), <http://www.mpp.org/states/vermont/> [<http://perma.cc/4MUY-9YSW>]. However, this state law did not set up a regulatory system for sales or production. Wilson Ring, *Vermont, New Hampshire Both Could Delay Marijuana Proposals*, CBS BOSTON (May 18, 2019, 2:35 PM), <http://boston.cbslocal.com/2019/05/18/vermont-new-hampshire-could-delay-recreational-marijuana-proposals/> [<http://perma.cc/9J78-GSB2>].

<sup>181</sup> Ferraiolo, *supra* note 22, at 149 (“The growing willingness of policy entrepreneurs to invoke the initiative process may heighten political conflict between federal and state institutions and actors with divergent policy priorities.”).

Despite the apparent popularity of marijuana legalization,<sup>182</sup> most states' legalization process came through ballot initiatives, not through legislation.<sup>183</sup> This difference is even starker in efforts around recreational marijuana. Of the states that have legalized recreational use, only Illinois<sup>184</sup> and Vermont<sup>185</sup> have done so via the legislative process, with high-profile legislative failures in the politically liberal states of Connecticut,<sup>186</sup> New Jersey,<sup>187</sup> New Mexico,<sup>188</sup> and New York.<sup>189</sup> While some opposition focused on oft-cited concerns about criminal activity, other political concerns included the impact on low-income communities and whether these communities would see the economic benefits of legalization.<sup>190</sup>

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<sup>182</sup> Hartig & Geiger, *supra* note 13.

<sup>183</sup> A referendum, however, failed in North Dakota that would have legalized marijuana for adult use and expunged prior offenses automatically. *North Dakota Measure 3, Marijuana Legalization and Automatic Expungement Initiative (2018)*, BALLOTPEDIA, [http://ballotpedia.org/North\\_Dakota\\_Measure\\_3,\\_Marijuana\\_Legalization\\_and\\_Automatic\\_Expungement\\_Initiative\\_\(2018\)](http://ballotpedia.org/North_Dakota_Measure_3,_Marijuana_Legalization_and_Automatic_Expungement_Initiative_(2018)) [http://perma.cc/DY6Q-YXX2].

<sup>184</sup> 410 ILL. COMP. STAT. ANN. 705 (West 2019).

<sup>185</sup> Ring, *supra* note 180 (discussing how Vermont had decriminalized recreational use of marijuana, but had not yet passed a scheme for regulating such use).

<sup>186</sup> Ryan Holz, *Connecticut Joins Other Northeast States in Failing to Pass Recreational Marijuana Legislation in 2019*, JD SUPRA (June 14, 2019), <http://www.jdsupra.com/legalnews/connecticut-joins-other-northeast-97789/> [http://perma.cc/QDY8-PTMD].

<sup>187</sup> Ryan Hutchins et al., *Legal pot bill dead: New Jersey lawmakers to move ahead with 2020 referendum*, POLITICO (May 15, 2019, 11:57 AM), <http://www.politico.com/states/new-jersey/story/2019/05/15/marijuana-bill-dead-new-jersey-lawmakers-to-move-forward-with-referendum-1017330> [http://perma.cc/5FCC-CLZ4].

<sup>188</sup> N.M. MUT., *Recreational marijuana use in New Mexico could pass in 2020. Will your business be ready?*, ALBUQUERQUE BUS. FIRST (June 1, 2019), <http://www.bizjournals.com/albuquerque/news/2019/06/01/recreational-marijuana-use-in-new-mexico-could.html> [http://perma.cc/Z675-NSWT].

<sup>189</sup> Joseph Spector & Jon Campbell, *Why legalizing marijuana in New York failed, but decriminalizing it passed*, DEMOCRAT & CHRON. (June 21, 2019, 8:20 AM), <http://www.democratandchronicle.com/story/news/politics/albany/2019/06/21/why-legalizing-pot-new-york-failed-but-decriminalizing-passed/1521505001/> [http://perma.cc/5Z6T-TUGE].

<sup>190</sup> Vivian Wang, *Final Push to Legalize Pot Fails in New York*, N.Y. TIMES (June 19, 2019), <http://www.nytimes.com/2019/06/19/nyregion/marijuana-legalization-ny.html?module=inline> [http://perma.cc/6GWS-L8QK] (finding that suburban state senators might not have voted for the bill); Nick Corasaniti, *Effort to Legalize Marijuana in New Jersey Collapses*, N.Y. TIMES (Mar. 25, 2019), <http://www.nytimes.com/2019/03/25/nyregion/new-jersey-marijuana.html> [http://perma.cc/Z2TL-K38D] (noting that lawmakers were concerned about the public health impact on minority communities and “challenges faced by other states that have legalized cannabis, including how to keep the drug away from teenagers and prevent people from driving under its influence”); Vivian Wang & Jeffery C. Mays, *Black Lawmakers to Block Legalized Marijuana in N.Y. if Their Communities Don't Benefit*, N.Y. TIMES (Mar. 11, 2019), <http://www.nytimes.com/2019/03/11/nyregion/marijuana-legalization-african-americans.html?action=click&module=RelatedLinks&pgtype=Article> [http://perma.cc/B6MZ-CKQD] (noting that black legislators in New York would withhold support for an adult-use legislation bill unless they were “assured that some of that money will go toward job training programs, and that minority entrepreneurs will receive licenses to cultivate or sell the marijuana”).

## B. Recent Federal Activity on Marijuana to Amend the CSA

In contrast to tremendous state activity following the California ballot initiative, little has changed in regard to marijuana at the federal level since the CSA passed some fifty years ago.<sup>191</sup> The following subsection will provide a brief overview of federal actions, with a particular focus on federal enforcement of the CSA.

Although several high-profile members of Congress have introduced legislation on marijuana,<sup>192</sup> there has been little movement on these proposals in either the Democratic-controlled House or Republican-controlled Senate.<sup>193</sup> The issue gaining attention in the 116th Congress is providing a “safe harbor” for financial institutions to do business with state-licensed marijuana companies and related providers.<sup>194</sup> The House passed the Secure And Fair Enforcement (“SAFE”) Banking Act,<sup>195</sup> while the Senate Banking Committee is considering marking up the same or similar legislation.<sup>196</sup> Some advocates, however, have

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191 When a majority of states adopt a similar position—even if that position is in contrast to federal law—it can provide political cover for federal policymakers to amend federal law to be consistent with the states. Kim, *supra* note 16, at 94 (noting how state right-to-try laws helped usher a change to federal regulations around access to experimental drugs).

192 Justin Strekal, *4/20: Will Congress advance marijuana legislation in 2019?* HILL (Apr. 20, 2019, 9:00 AM), <http://thehill.com/opinion/civil-rights/439806-4-20-will-congress-advance-marijuana-legislation-in-2019> [<http://perma.cc/9HWV-KZVF>] (“As of this writing, members of Congress have introduced five separate bills to end the federal prohibition of marijuana. In addition, there are also more than half a dozen bills pending before Congress that seek to restrain the federal enforcement of cannabis prohibition in states that have reformed their marijuana laws.”).

193 See, e.g., Caitlyn Kim, *After Years of Stalemate, Federal Cannabis Legislation Finds Traction in Congress*, CPR (July 22, 2019), <http://www.cpr.org/2019/07/22/after-years-of-stalemate-federal-cannabis-legislation-finds-traction-in-congress/> [<http://perma.cc/EY8C-CPW5>]. The Marijuana Policy Project lists a dozen bills—with several having bipartisan support—in the current 116th Congress. See *Several marijuana-related bills filed in new Congress*, MARIJUANA POL’Y PROJECT (Sept. 25, 2019), <http://www.mpp.org/policy/federal/> [<http://perma.cc/5PR4-DUXJ>].

194 Sam Kamin, *Legal Cannabis in the U.S.: Not Whether but How?*, 50 U.C. DAVIS L. REV. 617, 620 (2016) (“In addition, anyone conspiring with or aiding and abetting those violating federal law are equally liable for a violation of federal law. This includes, at least in principle, anyone leasing space to marijuana businesses, working for or contracting with them, or providing basic services such as accounting, banking, financial, and legal services.”) (footnotes omitted).

195 H.R. 1595, 116th Cong. (2019) (passing the House by a vote of 321 to 103).

196 Zachary Warmbrodt, *Crapo plans landmark cannabis banking vote*, POLITICO (Sept. 13, 2019, 5:02 AM), <http://www.politico.com/story/2019/09/13/crapo-cannabis-banking-vote-1729925> [<http://perma.cc/5GHD-J7NM>] (noting the committee chairman’s interest “because of questions surrounding transactions with other businesses, like plumbers and hardware stores, that provide services to the marijuana industry”). Notably, Senator Mike Crapo of Idaho, the Banking Committee Chairman, represents a state that does not allow for either medical or recreational marijuana. *2020 medical marijuana ballot petition approved for circulation*, MARIJUANA POL’Y PROJECT (Aug. 15, 2019), <http://www.mpp.org/states/idahof> [<http://perma.cc/8KMU-8G2T>].

raised concerns about addressing the financial issues of the marijuana industry without also addressing some of the systemic issues caused by the federal criminalization of marijuana.<sup>197</sup>

Congress has also intervened in the federal enforcement of the CSA. Given the supremacy of federal law, the Supreme Court has held that state legalization does not prohibit federal enforcement of the CSA, even on wholly intrastate activities, such as a patient growing a small amount of marijuana for personal consumption.<sup>198</sup> After receiving criticism on its policy on marijuana prosecutions,<sup>199</sup> the Obama Administration issued guidance in 2013 to federal prosecutors to exercise their discretion whether to prosecute marijuana cases in states with a robust regulatory system for legalized uses of marijuana.<sup>200</sup> Subsequently in 2014, Congress included an amendment in an appropriations bill that prohibited the Justice Department from prosecuting those involved in state medical marijuana initiatives.<sup>201</sup> So far, Congress has continued to include the same funding restriction in the annual appropriations bill for the Justice Department.

#### IV. POLITICAL REALISM: LOOKING AT WHY MARIJUANA LEGALIZATION HAS FAILED AND ITS LESSONS

As discussed, given the changing attitudes toward drug policy and criminal justice, the changing state landscape on marijuana, and the popularity of legalizing it (at least medical purposes), it would seem that the time would be ripe for Congress to respond by amending the CSA, particularly in the Democratic-controlled House. Indeed, a key committee chairman claimed that marijuana legalization would be one of the first items on the majority's agenda,<sup>202</sup> but a month later, the Republican ranking member of

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<sup>197</sup> See Natalie Fertig et al., *Advocates ask Pelosi, Hoyer to press pause on cannabis banking*, POLITICO (Sept. 18, 2019, 5:47 AM), <http://www.politico.com/newsletters/morning-cannabis-preview/2019/09/18/advocates-ask-pelosi-hoyer-to-press-pause-on-cannabis-banking-478449> [<http://perma.cc/4JTP-FFH9>]; see also Letter from American Civil Liberties Union et al., to Nancy Pelosi, Speaker, U.S. House of Representatives, and Steny Hoyer, Majority Leader, U.S. House of Representatives (Sept. 17, 2019), <http://www.politico.com/f/?id=0000016d-41d0-db25-a77d-5fd3acdc0000> [<http://perma.cc/YVV5-72WW>].

<sup>198</sup> *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

<sup>199</sup> Kamin, *supra* note 194, at 628–30 (discussing initial inconsistencies in the Obama Justice Department toward prosecution of marijuana cases).

<sup>200</sup> Memorandum from James M. Cole, Deputy Att'y Gen. to U.S. Att'ys (Aug. 29, 2013).

<sup>201</sup> The amendment passed the House by a 219 to 189 vote on May 30, 2014, and was subsequently included in Section 538 of Division B (Commerce-Justice-Science) of the Consolidated and Further Continuing Appropriations Act, 2015 P.L. 113–235.

<sup>202</sup> Kyle Jaeger, *House Will Vote To End Federal Marijuana Prohibition Within Weeks*, *Key Chairman Says*, MARIJUANA MOMENT (Mar. 27, 2019), <http://www.marijuanamoment.net/house-will-vote-to-end-federal-marijuana-prohibition-within-weeks-key-chairman-says/>

the House Judiciary Committee complained of the lack of progress on the issue.<sup>203</sup>

Yet, change has only happened at the margins on the federal level, such as turning a blind eye to states' legalization activities. Here, I try to offer a few reasons why this process is so difficult, even under the best of circumstances.

#### A. Is the Public Ahead of Politicians?

Given the polling,<sup>204</sup> observers might assume that the public is ahead of policymakers in being ready to advance marijuana legalization. This issue polls well in the general public, and when presented as a ballot measure, bypassing the politicians, legalization efforts have generally, but not always, been successful.<sup>205</sup>

But there are important caveats to this political assumption. First, ballot measures may fail to address some of the complex, historical issues related to equity that might be better handled through legislation. Even more telling, several states with progressive political environments have failed to pass legislation to legalize marijuana, suggesting that there still remain many barriers based on law, policy, politics, and equity that remain unresolved. High profile failures in New Jersey and New York are not necessarily about legalization itself, as that simple question—should adults be able to consume marijuana legally?—generally had common agreement in those legislatures. Rather, it is the more complex issue of whether communities that have been devastated by the legacy of the CSA should be able to share in the economic benefits that legal sales might bring.<sup>206</sup>

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[<http://perma.cc/BC3L-Z8PR>] (interviewing House Rules Chairman, Jim McGovern, who predicted a vote on legislation to grant states an exemption from the CSA “in a relatively short time, within the next several weeks”).

<sup>203</sup> Tom Angell, *Top GOP Congressman Presses Democratic Majority To Pass Marijuana Bill*, FORBES (Apr. 4, 2019, 10:03 AM), <http://www.forbes.com/sites/tomangell/2019/04/04/top-gop-congressman-presses-democratic-majority-to-pass-marijuana-bill/#1ef04b88faa9> [<http://perma.cc/QZ5P-8G4P>].

<sup>204</sup> Hartig & Geiger, *supra* note 13.

<sup>205</sup> See, e.g., Tom Angell, *Marijuana Won The Midterm Elections*, FORBES (Nov. 7, 2018, 11:10 AM), <http://www.forbes.com/sites/tomangell/2018/11/07/marijuana-won-the-midterm-elections/#453589c93a91> [<http://perma.cc/8W7F-BQFD>] (“[O]ne clear winner in the midterm elections was marijuana.”). *But see North Dakota Measure 3, Marijuana Legalization and Automatic Expungement Initiative*, *supra* note 183 (noting the failure of a referendum in North Dakota).

<sup>206</sup> Wang, *supra* note 190 (noting a disagreement between legislators and the New York governor over how to invest any revenue derived from recreational sales with one legislator arguing, “I’m not willing to create a market that will allow existing wealthy people to gain wealth and leave out the people that I represent.”).

Second, while polling suggests general support, there are differences based on partisan identification and religious affiliation that make it less likely that Republicans would support legalization efforts.<sup>207</sup> For instance, a 2018 Pew poll found that, while the overall public supported legalization 62% to 34%, Republicans were far less likely to support it than Democrats and even independents who generally leaned in favor of Republican policies.<sup>208</sup> Further, white Evangelicals and Catholics were more likely to oppose legalization while “mainline” Protestants and unaffiliated individuals were more likely to support it.<sup>209</sup> Similarly, a poll in New York, shortly after the legalization effort failed, found that, while a majority of the public (55% to 40%) supported such a policy, most Republican voters opposed it (40% to 53%).<sup>210</sup>

Thus, while states may be reforming their marijuana laws, those activities have not necessarily translated to an active debate in Congress.<sup>211</sup> In part, that is because the means of pursuing policy change are not the same at the federal level as in the states.<sup>212</sup>

## B. Difficulties Building an Evidence Base for Policy Changes

Another issue is that policy decisions around marijuana are often being made without strong scientific evidence because of how the CSA classifies marijuana as a Schedule I drug. Rather, states are looking at other states’ experiences with marijuana legalization to learn about best practices and unforeseen issues.<sup>213</sup>

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<sup>207</sup> See, e.g., Warmbrodt, *supra* note 196 (noting that Banking Committee Chairman Crapo is open to considering legislation allowing banks to work with marijuana businesses, but does not support amending the CSA to legalize marijuana).

<sup>208</sup> Hartig & Geiger, *supra* note 13 (“Republicans are divided, with 45% in favor of legalizing marijuana and 51% opposed. Still, the share of Republicans saying marijuana should be legal has increased from 39% in 2015. Independents who lean toward the Republican Party are far more likely than Republicans to favor marijuana legalization (59% vs. 45%).”).

<sup>209</sup> *Id.* (surveying Evangelicals (52% opposed, 43% support), Catholics (44% opposed, 52% support), white mainline Protestants (31% opposed, 64% support), unaffiliated (19% opposed, 79% support)).

<sup>210</sup> *Voters on End of Session Agenda: ‘Yes’ on Marijuana (55-40%)*, SIENA C. RES. INST. (June 10, 2019), <http://scri.siena.edu/2019/06/10/voters-on-end-of-session-agenda-yes-on-marijuana-55-40/> [<http://perma.cc/8UFY-93BJ>].

<sup>211</sup> Collective state action may be the catalyst for change at the federal level. See, e.g., Kim, *supra* note 16, at 102 (discussing how, after a majority of states passed language authorizing a “right to try” experimental drugs, Congress entered into the policy space to pass a federal version of such a “right”).

<sup>212</sup> Ferraiolo, *supra* note 22, at 171 (“Policy change in the states has not led to federal reform. Rather, two factors—the ballot initiative (which provided a means for public opinion to be heard and invoked) and policy entrepreneurs’ framing efforts (which emphasized a medical, compassionate image of marijuana and its users)—have allowed the coexistence of two different policy images and approaches.”).

<sup>213</sup> J.B. Wogan, *For This Pot Guy, States Are His Biggest Customers*, GOVERNING (Aug. 2017), <http://www.governing.com/topics/mgmt/gov-marijuana-colorado-andrew->

But while the economics of legalization are becoming better known, the CSA restricts research. The National Academy of Medicine (“NAM”) noted in a literature review:

[The] growing acceptance, accessibility, and use of cannabis and its derivatives have raised important public health concerns. Moreover, the lack of any aggregated knowledge of cannabis-related health effects has led to uncertainty about what, if any, are the harms or benefits from its use. . . . As laws and policies continue to change, research must also.<sup>214</sup>

Efforts to expand medical research are slowly moving forward in response to the NAM concern. In 2016, the DEA called for applications from marijuana growers to become licensed medical researchers.<sup>215</sup> Approval of these applications stalled under then-Attorney General Sessions,<sup>216</sup> but Attorney General Barr since has announced that the DEA has resumed reviewing the applications.<sup>217</sup> Some hope that other parts of the federal government are taking actions that suggest they may becoming more receptive to marijuana research.<sup>218</sup>

Such research could be useful in validating prior studies, helping consumers,<sup>219</sup> and making informed policy decisions—especially

freedman-states-regulation.html [http://perma.cc/H5WT-C29T] (“[A]fter voters approve a marijuana measure, officials look for advice from the few places with some experience in taxing and regulating legal marijuana” with Colorado “field[ing] calls from more than 25 states asking for guidance.”).

<sup>214</sup> *Nearly 100 Conclusions on the Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report*, NAT’L ACAD. SCI. (Jan. 12, 2017), <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24625> [http://perma.cc/2BHG-LCX2].

<sup>215</sup> Applications To Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States, Drug Enforcement Administration, 81 Fed. Reg. 53846 (Aug. 12, 2016).

<sup>216</sup> See Jeffrey Miron, *Jeff Sessions Stonewalls Permission for Medical Marijuana Research*, CATO INST. (July 12, 2018, 11:30 AM), <http://www.cato.org/blog/jeff-sessions-stonewalls-permission-medical-marijuana-research> [http://perma.cc/3WSK-33UL].

<sup>217</sup> Sara Brittany Somerset, *The DEA Is Rewriting Obama’s Federal Cannabis Regulations*, FORBES (Aug. 28, 2019, 2:53 PM), <http://www.forbes.com/sites/sarabrittanyosomerset/2019/08/28/the-dea-has-rewritten-obamas-federal-cannabis-regulations/#6d7701553dae> [http://perma.cc/9TG3-MAVM] (noting the difficulties in qualifying because manufacturers that already process marijuana in state-licensed arrangements cannot become federally qualified producers).

<sup>218</sup> Compare Hoffmann, *supra* note 52 (“[T]he first time that the FDA has found the marijuana plant, in this case an extract, has an accepted medical use.”), with Jerome Adams, *Marijuana Use & the Developing Brain*, HHS (Aug. 29, 2019), <http://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html> [http://perma.cc/74LM-CNWN] (“Science-based messaging campaigns and targeted prevention programming are urgently needed to ensure that risks are clearly communicated and amplified by local, state, and national organizations.”).

<sup>219</sup> See, e.g., Bridget Small, *Serious health claims for CBD products need proof*, FED. TRADE COMMISSION CONSUMER INFO. (Sept. 10, 2019), [http://www.consumer.ftc.gov/blog/2019/09/serious-health-claims-cbd-products-need-proof?utm\\_source=govdelivery](http://www.consumer.ftc.gov/blog/2019/09/serious-health-claims-cbd-products-need-proof?utm_source=govdelivery) [http://perma.cc/5BT9-3CCB] (issuing a warning against three companies for making health claims about products containing cannabidiol (“CBD”), a chemical compound derived from the cannabis plant).

policymakers looking to amend marijuana policy as a means of addressing the opioid epidemic. For instance, in 2014, researchers found:

States with medical cannabis laws had a 24.8% lower mean annual opioid overdose mortality rate . . . compared with states without medical cannabis laws. Examination of the association between medical cannabis laws and opioid analgesic overdose mortality in each year after implementation of the law showed that such laws were associated with a lower rate of overdose mortality that generally strengthened over time . . . .<sup>220</sup>

The study became widely used in justifying legalization, not only domestically, but even internationally.<sup>221</sup> Others, though, argue that “marijuana is a companion drug rather than substitution drug and that marijuana use may be contributing to the opioid epidemic rather than improving it”—something that could be worrisome if ultimately correct.<sup>222</sup> Thus, reflecting the 2017 NAM position, some researchers worried:

For many reasons, ranging from significant barriers to research on cannabis and cannabinoids to impatience, cannabis policy has raced ahead of cannabis science in the United States. For science to guide policy, funding the aforementioned studies must be a priority at the federal and state level. Many companies and states (via taxes) are profiting from the cannabis industry while failing to support research at the level necessary to advance the science. This situation has to change to get definitive answers on the possible role for cannabis in the opioid crisis, as well as the other potential harms and benefits of legalizing cannabis.<sup>223</sup>

### C. Different Faces Produce Different Laws and Policies

The prior two sections raised some fundamental questions about the legacy of the CSA and our country’s approach to the opioid epidemic and lingering resistance to reforming marijuana policy. At a time when policymakers seem to be more sympathetic

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<sup>220</sup> Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, 174 JAMA INTERNAL MED. 1668, 1668 (2014).

<sup>221</sup> Brittany Flaherty, *Legalizing medical cannabis reduces opioid overdose deaths? Not so fast, new study says*, STAT (June 10, 2019), <http://www.statnews.com/2019/06/10/legalizing-medical-marijuana-opioid-overdose-deaths/> [<http://perma.cc/552B-YDZ3>] (quoting a researcher in Australia that the 2014 study has “been cited in my own country as compelling evidence that medical cannabis reduces opioid overdose deaths”).

<sup>222</sup> Kenneth Finn, *Why Marijuana Will Not Fix the Opioid Epidemic*, 115 MO. MED. 191, 193 (2018), [http://www.ncbi.nlm.nih.gov/pmc/articles/PMC6140166/pdf/ms115\\_p0191.pdf](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC6140166/pdf/ms115_p0191.pdf) [<http://perma.cc/CF29-GYFL>].

<sup>223</sup> Kevin P. Hill et al., *The Role of Cannabis Legalization in the Opioid Crisis*, 178 JAMA INTERNAL MED. 679, 680 (2018).

to addiction issues and rethinking sentencing for drug offenses, why has it proven difficult to rethink the CSA's approach to marijuana?

The same issues continue to repeat themselves: there is a segment of society that is uncomfortable with the criminalization of drug use and addiction, just as there is a segment of society that associates drug use with criminal elements and deviant behavior.<sup>224</sup> Moreover, there is a long history of associating those criminal elements with the poor, minorities, and the youth, and this history parallels the move to amend the CSA towards a law enforcement approach rather than a public health approach.<sup>225</sup>

In this light, CARA, SUPPORT, and FIRST STEP seem like an aberration, not a change in course, because the policy response is due to the face of who was affected initially by the opioid epidemic: an older, whiter, and male demographic.<sup>226</sup> Additionally, many of these individuals became addicted, not by choice, but because of failures in our healthcare system. Adding to this sympathy, some conservative commentators wrote:

America's nationwide opioid epidemic has *not* been accompanied by a nationwide crime wave (excepting of course the apparent explosion of illicit heroin use). Just the opposite: As best can be told, national victimization rates for violent crimes and property crimes have both reportedly dropped by about two-thirds over the past two decades.<sup>227</sup>

## V. CONCLUSION

It is true that many of the contenders for the Democratic presidential nomination support legalization of marijuana, and thus could try to initiate the regulatory process in order to change how it is regulated under the CSA.<sup>228</sup> But in looking at this

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<sup>224</sup> SPILLANE, *supra* note 17, at 23 (“[T]wo general and competing models emerge—the ‘deviance’ and ‘victimization’ models of drug abuse.”).

<sup>225</sup>

To the extent that drug offenders are perceived negatively, undeserving of assistance, and deserving of punishment, drug policies are likely to reflect and perpetuate these sentiments. Insofar as the population identified with drug use overlaps with other populations—racial minorities and the poor—who are *already* viewed as threatening to social order, then punitive policies can appear justified.

Neill, *supra* note 64, at 377.

<sup>226</sup> Rudd, *supra* note 76, at 1450 tbl.2.

<sup>227</sup> Eberstadt, *supra* note 118. *But see* German Lopez, *Why the opioid epidemic may have fueled America's murder spike*, VOX (Feb. 6, 2018, 10:30 AM), <http://www.vox.com/policy-and-politics/2018/2/6/16934054/opioid-epidemic-murder-violent-crime> [<http://perma.cc/PR6G-4JMB>] (noting that as the opioid epidemic shifts from prescription drug misuse to use of illicit drugs, such as heroin, it may be related to an increase in the murder rate because of violence associated with illegal drug trafficking).

<sup>228</sup> See Paul Demko et al., *How Democrats are failing on legalized marijuana*, POLITICO (May 19, 2019, 7:15 AM), <http://www.politico.com/story/2019/05/19/democrats-marijuana-legalization-1331710> [<http://perma.cc/DNA9-4NW7>] (noting that the overwhelming

exercise as a matter of a legislative initiative for purposes of this symposium, the bottom line, of course, is whether change will occur via Congress. Does the passage of CARA, SUPPORT, and FIRST STEP mean something for marijuana reform and a return to the bipartisan compromise that the CSA was initially built upon?

In looking at the politics behind those bills, I would answer no. Personally, I do believe that the tide is turning on reforming federal law and policy related to marijuana, but as I have argued here, I believe while change is in the future, I do not believe change—particularly if we focus solely on change via Congress—is on the immediate policy horizon yet. Despite well-welcomed changes in the politics and public perception of addiction, these are not enough yet to overcome well-worn attitudes and presumptions in law and politics.