

Twenty-First Century Illicit Drugs and Their Discontents: The Failure of Cannabis Legalization to Eliminate an Illicit Market

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KEY TAKEAWAYS

Legalization of cannabis has not led to the promised elimination of an illicit market.

The illicit cannabis market, which exceeds the size of the licit one, is accompanied by violence and environmental degradation.

Advocates of legalization sold Americans a bill of goods regarding cannabis and should not be trusted when they urge legalization of new drugs.

Introduction: The Illicit Market for Cannabis

Drug abuse has wreaked havoc across the nation for more than 150 years.¹ A common response has been that the harms result principally from criminalizing the manufacture, distribution, possession, and use of drugs rather than from legalizing and regulating those activities.² That argument was often made in connection with the long-standing but still-ongoing debate over the issue of whether to legalize the distribution and use of cannabis.³

Legalizing cannabis, the argument goes, would eliminate the existence of the illicit market for drugs⁴ while also allowing the government to earn revenues from reasonable taxes, permits, and the like.⁵ The so-called Iron Law of Prohibition—viz., demand will always drive supply—ensures that a sought-after

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product always will be available if there is a critical mass of people willing to pay for it. The result is the birth of an illicit market for whatever product or service consumers demand.⁶ Legalization would eliminate an illicit market because most consumers prefer to do business with legitimate vendors selling products known to be safe because of regulation. Legalization also would have an additional benefit: namely, elimination of the harms that result from use of the criminal law to prohibit disfavored products or activities.⁷ Violence is necessary to settle disputes because parties cannot resort to the judicial system to seek relief for disagreements over contraband. Corruption of law enforcement officials becomes commonplace because poorly paid state and local police officers, judges, and other officials find it easier and more profitable to look the other way when they believe that an activity is unstoppable. By contrast, legalization is a win-win for individuals and society.

At least, that's the argument.⁸

Since 1996, more than 40 states have become their own real-life versions of the “Hamsterdam” made famous in the fictional television series *The Wire*.⁹ They have revised their laws on cannabis, making it legal to grow, sell, possess, and use it for medical or recreational purposes. Cannabis is now available in a host of forms different from the classic joint, such as ointments, beverages, and “edibles.”¹⁰ California was the first state to legalize medical-use cannabis. Voters passed a citizen initiative, Proposition 215, entitled the Compassionate Use Act of 1996.¹¹ It authorized the cultivation, distribution, possession, and use of marijuana by patients for medical purposes by creating an affirmative defense to the state criminal code for physician-approved personal medical use. In 2016, California took the next logical—and always planned—step of passing Proposition 64, which legalized the cultivation and sale of cannabis for recreational use, thereby eliminating the pretense that cannabis was a legitimate therapeutic product.¹² Since then, numerous states have adopted their own medical or recreational cannabis programs.¹³

Today, 37 states, four territories, and the District of Columbia allow cannabis or its products to be used for medical purposes. As the night follows the day, numerous states have taken the next logical step toward complete legalization. Currently, 18 states, two territories, and the District of Columbia permit cannabis to be used recreationally. There, advocates for legalization have pushed the ball across the goal line.

We have accumulated years of experience with the effect of those laws, and one result is clear: Cannabis legalization has not eliminated an illicit market for the drug. In some states—California is the leading

example—the illicit market is larger than the lawful one and is driving pseudo-legitimate businesses to close because they cannot compete with the illicit market.¹⁴ Moreover, violence has not disappeared in states with legalized cannabis programs. In some instances, that problem has worsened.

The upshot is this: The Iron Law of Prohibition has some explaining to do. It seems that, sometimes, supply drives demand. Whatever the theory might be, there is evidence to that effect.¹⁵ Increasing the availability of cannabis, effectively eliminating criminal prosecution for its possession or use, and giving cannabis the same imprimatur that comes with state regulation of any other consumer product—all that has lifted the legal and moral restraints that kept a lid on some of the harms resulting from its production and use by enticing new users to light up. Moreover, given politicians’ and bureaucrats’ natural inclination to kill the goose that lays the golden egg—that is, to overtax and overregulate any newly approved source of revenue, regardless of the second-level effects that such overaction might have—legalized cannabis programs have not erased the illicit markets that legalization’s supporters guaranteed us we would see in the rear-view mirror. Why? Consumers are motivated by cost and availability factors, meaning that they prefer cheaper cannabis from an established seller rather than legal dope from a perhaps distant store. Economic theory, meet common sense. As far as eliminating illicit markets goes, we have taken one step forward and two steps backwards.¹⁶

This *Legal Memorandum* will explain what has happened and why it did. It then will offer some advice for elected and appointed officials, along with the public, to consider.

Regulation of the Market for Cannabis

Cannabis—popularly known by its slang term, marijuana—is contraband under federal law.¹⁷ The principal federal statute outlawing cannabis is the Controlled Substances Act of 1970 (CSA).¹⁸ It classifies cannabis as a Schedule I controlled substance and forbids its use for any purpose,¹⁹ even if a state-licensed physician would recommend that a patient might find it therapeutic.²⁰

There has been considerable debate since the CSA became law over such issues as whether Congress should reclassify cannabis below Schedule I or leave the subject entirely to the states to regulate.²¹ Members of Congress have introduced bills that would declassify cannabis altogether, shift

it downward from Schedule I to a less restrictive schedule, or revise the federal regulatory scheme in other ways,²² but none of those proposals has become law. Congress has nibbled around the edges of the issue by limiting the government’s ability to enforce the controlled substances laws against state medical-use—but not recreational-use—cannabis programs.²³ Nonetheless, Congress has not fundamentally reconsidered how the nation should treat cannabis. It remains a Schedule I controlled substance whose distribution is a felony.²⁴

The Continued Existence of an Illicit Cannabis Market

Despite its status as contraband under federal law, cannabis is widely available across the nation and is the most commonly used illicit drug today.²⁵ How has that incongruity—a “potential train wreck” is a more colorful and apt term²⁶—come about? The explanation is threefold.

One explanation is that the CSA does not preempt the state medical or recreational cannabis schemes.²⁷ The state legalization programs might exempt distributors and users from state criminal laws, but they cannot shield anyone against a federal prosecution. The Article VI Supremacy Clause makes federal law supreme, preempting state law whenever it conflicts with federal law, so no state could exempt anyone from the reach of the CSA.²⁸ But the state programs do not purport to bar the federal government from enforcing the CSA, nor do they order anyone to violate federal law, so there is no conflict to be preempted. Atop that, the Constitution does not require the states to criminalize drug distribution, possession, or use, and the CSA does not expressly bar the states from exempting cannabis from their controlled substances laws. Of course, the state medical and recreational cannabis programs can be described as granting individuals permits to commit federal crimes that turn out to be useless, but the Supremacy Clause does not prevent the states from confusing the public about its responsibilities under the federal criminal code.

The second explanation is that the federal government cannot fully enforce the CSA provisions outlawing cannabis. That is true for two reasons. One is legal. Since 2014, Congress has regularly passed appropriations bill riders limiting the U.S. Department of Justice (DOJ) from enforcing the CSA against state medical cannabis programs.²⁹ The riders do not altogether bar enforcement of the CSA. They only forbid the use of appropriated funds to “prevent” states from “implementing” state medical marijuana programs,³⁰ and the federal government could take

numerous actions short of violating that proscription. Nonetheless, the DOJ has decided not to take an aggressive enforcement posture across presidential Administrations.³¹ The second reason for the federal government's nonenforcement is practical. Even without the riders, the Department lacks the resources to investigate and prosecute every cannabis sale.³² The federal government has only a small fraction—about 10 percent—of the number of law enforcement officers available to the states and localities.³³

The third explanation for the widespread prevalence of cannabis is that, despite the assurance of legalization's advocates that lawfully available cannabis would vanquish the black market and its accompanying harms, the state legalization schemes have not eliminated an illicit market for the drug.³⁴ The Drug Enforcement Administration has found that cannabis continues to be smuggled across the southwest border from Mexico and is widely grown illegally throughout the United States.³⁵ Researchers, journalists, and trade groups have noted that, despite the assurance that legalization would eliminate an illicit market, one has survived legalization and in some places is thriving.³⁶

No one knows the size of the illicit cannabis market, although some have tried to estimate it.³⁷ But however large it might be, the illicit market generates a considerable amount of product.³⁸ New Frontier Data, which studies the cannabis industry, estimates that the illicit market is seven times as large as the state-sanctioned market.³⁹ According to one report, "The marijuana black market has continued to thrive to the point where legitimate growers and sellers are struggling to stay afloat in areas of the country awash in illegal weed."⁴⁰

That is particularly true in California, where "Weedmania" began.⁴¹ Consider these figures:

The size of the persisting illegal market can also dwarf legal production. In Colorado, many illegal grows cultivate hundreds or thousands of plants. California's Stanislaus County, for example, imposes a cap of 61 commercial cannabis permits. Yet more than four years after Proposition 64 legalized marijuana, the county is estimated to feature between 1,100 and 1,500 illegal pot grows, even while enforcement has been intense. In the 2019 to first half of 2020 period, the county's sheriff's department destroyed almost 100,000 illegal outdoor and indoor cannabis plants and seized tens of thousands of pounds of processed marijuana. In the state's Siskiyou County, 130,000 illegal cannabis plants, some 26,000 pounds of processed marijuana, and 13 illegal firearms were seized in raids and 123 arrests were made in 2020. In California overall,

over 1.1 million cannabis plants and 20.5 tons of processed pot were seized from 455 grow sites last year.⁴²

The illicit market has almost killed off its hoped-for replacement.⁴³ One commentator has estimated that in 2019, 80 percent of the cannabis sold in California came from an illicit market.⁴⁴ According to a detailed account in the *Los Angeles Times*, “The immense scale of illegal cultivation fed a glut that crashed wholesale prices last year, jeopardizing even those in the licensed market. Small-scale legal farmers unable to sell their crop have been pushed toward financial ruin.”⁴⁵ The problem also exists at the distribution level: “Prosecutions are rare, according to court records, and shop employees say some dispensaries don’t even wait a day to reopen after being shut down by the police.”⁴⁶

California does not stand alone; other states have experienced the same result: illicit markets have survived legalization.⁴⁷ The phenomenon also is not limited to the United States. Canada legalized cannabis use in 2018, and it too has a sizeable illicit cannabis market.⁴⁸ As one commentator has noted, “the extinction of the black market is the chief fallacy of arguments for legalizing marijuana. If anything, legalization has forced hordes of stoners, namely the poor, to continue to rely on the streets.”⁴⁹ Other commentators have reached the same conclusion.⁵⁰ The illicit cannabis market gives truth to the aphorism, to paraphrase Ray Kinsella, “If you grow it, they will come.”⁵¹

Those explanations for illicit cannabis’s widespread availability are not surprising. The goal of the medical cannabis movement was to ease the transition to recreational use by demonstrating that society would not collapse, the sky would not fall, if cannabis were available under medical supervision as a treatment for the worst of life’s maladies, such as end-stage cancer.⁵² With that foothold, the step to outright legalization was a short one. Indeed, there often is little difference between most medical and recreational cannabis use programs other than that the latter are more honest in their goal. For example, before the U.S. Department of Justice announced in 2009 that it would not enforce the CSA against individual patients and caregivers, there were only approximately 2,000 registered medical cannabis users in Colorado. After the announcement, the number jumped to 127,000 by March 2011, leading comedian Jon Stewart to remark that Colorado changed almost overnight from “the healthiest state in the country” to “one of the sickest.”⁵³ Just a coincidence, of course. Legalization of recreational use in numerous states should have come as no surprise to anyone. That was the goal all along.⁵⁴

Why Did the Illicit Cannabis Market Survive?

Legalization did not oust an illicit market. That is true for several reasons.⁵⁵

The first one is a combination of economics and politics. As noted earlier, both price and availability influence consumer decisions.⁵⁶ With more businesses entering the cannabis cultivation and distribution markets, supply increased, which forced prices downward, encouraging businesses to export their surplus to other states.⁵⁷ Moreover, politicians see the legal cannabis market as a new revenue source for their pet projects or new giveaway programs for constituents, a modern-day version of bread and circuses for the Roman mob.⁵⁸ Delaying the onset of high taxes might lead to a gradual reduction in the size of the illicit market,⁵⁹ but few politicians think about the long-term effects of their decisions. Most have three short-term time-horizons: television news shows that evening, talking-head shows the upcoming Sunday morning, and their re-election. Besides, each legislator fears that colleagues will move first and capture tax revenues for their own pet projects. The result is tax laws that drive up the price beyond what many consumers are willing to pay, a result that encourages the growth of illicit markets, which leads to the harms that accompany them.⁶⁰

The real problem, of course, is not finding a tax rate that satisfactorily achieves targeted deterrence and reasonable income generation. Well-intentioned, rational legislators could haggle over the appropriate tax range and come up with a number that might be passably useful. But that is not what leads to trouble. Politicians become just as addicted to promising new revenue streams as any other addict is to his or her drug of preference. Moreover, politics being what it is, a small number of powerful, well-placed elected officials—say, the chairs of appropriations or rules committees—can have a greatly outsized influence over the progress of legislation. The result is the passage of legislation supported by a small minority of legislators, or perhaps just one, because a large majority of legislators are fearful of making enemies who can torpedo their own favored bills.⁶¹ That political phenomenon is one that neither economics nor law can remedy.

Overregulation is also common. Legalization's advocates propose regulation as a consumer protection mechanism.⁶² The problem is that regulators often go overboard.⁶³ As George Will once put it, "Fish gotta swim, birds gotta fly, and regulators, too, have a metabolic urge to do what they were created to do."⁶⁴ Regulators regulate whether their subject is hazardous waste or cannabis. Overregulation drives up costs and encourages the opening of firms that are willing to skirt the rules.⁶⁵ Just look at what has happened in

California.⁶⁶

Finding the tax and regulatory “sweet spot” would be a challenge for the best-intentioned officials.⁶⁷ There is, however, no reason to believe that every public official is so inclined. Some states have decided that cannabis distribution licenses should be awarded on the basis of race and, believe it or not, a criminal record. New York legalized recreational cannabis use in 2021, and the New York State Office of Cannabis Management has been quite upfront in that regard. The office has published that one of its goals is to “promote social and economic equity applicants who have been harmed by the prohibition of cannabis, such as having been convicted of a cannabis-related offense,” and that it will award “50% of licenses to social and economic equity applicants” to achieve that goal.⁶⁸ Atop that, the office will favor people who have been convicted for cannabis trafficking or even just possession, a lesser included offense that often is the result of a plea bargain. Under the New York program, “[p]eople with marijuana-related convictions get first dibs on the new permits, and hundreds of millions of taxpayer dollars will be directed toward helping them purchase and renovate storefronts to peddle cannabis products.”⁶⁹ The result, as Jason Riley put it, is that “[t]he same lawmakers who refuse to expand education options for low-income minorities trapped in failing schools are eager to help former drug dealers get back in the game.”⁷⁰ If the goal is to hand out cannabis distribution licenses to favored constituents—including ones with convictions for cannabis trafficking pled down to cannabis possession—there is no reason whatsoever to believe that any such program would eliminate an illicit market by making owners out of past illicit-market traffickers.

The second explanation for the existence of illicit markets is psychological and personal. Some individuals will want to use, or perhaps just experiment with, cannabis but do not want to “out” themselves as doing so. Perhaps they work for the government or companies that would frown on their cannabis use. Members of the medical profession, primary or high-school teachers, the clergy, various businesses with an anti-drug policy—those people and others might suffer being fired because of the reaction of their patients, parents, parishioners, superiors, or the public to their drug use. If so, they cannot afford to let it be known publicly that they light up. That could happen, however, were they to run into someone they know at a state-licensed cannabis store. (“Joe, I never expected to see you here!”) The only recourse those people have is to a black market. They would perhaps pay a premium to cover the costs of secrecy, but the additional price would be worth the

privacy that a black market provides. No amount of legalization could ever eliminate that phenomenon. The result is that a black market will always exist to service people who want to keep their cannabis use to themselves and their dealers.

The result is the growth of two different types of illicit markets.⁷¹ One is the traditional black market. An example is the market fed by drugs that are illicitly grown or manufactured and smuggled from another country, like Mexico, into the United States across the southwest border. Similarly, cannabis grown in a state where its sale is legal is shipped to states where it is not, where it is sold on the black market.⁷² But there is also a so-called gray market in the cannabis industry. Businesses will openly sell cannabis from brick-and-mortar storefronts identified on *Weedmaps*, an online dispensary locator. Those companies give the appearance of legality, but they do not take the time and expense to obtain a license, nor do they pay taxes or comply with the regulations governing state-licensed cannabis businesses.⁷³ Ignoring requirements such as product testing rules enables gray market businesses to shave off a large amount of the compliance costs borne by businesses that play by the state's rules.⁷⁴

Where Do We Go From Here?

What lessons can we draw about continued legalization of cannabis, as well as ongoing efforts to legalize other now-forbidden drugs? There are a few.

Lesson 1. One lesson is that legalized supply might create new demand.⁷⁵ There is likely to be a nontrivial number of people who refuse to use cannabis when it is contraband but who are willing to try it once its sale has been legalized. Some of those people will try it because they no longer fear criminal prosecution for possession, some will use it for its euphoric effect, and some will do so just to learn what all the fuss was about.

Why they try cannabis, however, is far less important than what they do after lighting up. People who experiment with cannabis and go no further are not a serious public policy problem, but people who go on to use more dangerous drugs put themselves—and others—at risk of health problems that are no laughing matter.⁷⁶ That is particularly true if adults become dependent on or addicted to cannabis, which a goodly number will.⁷⁷ The problems caused by heavy, long-term use are even worse for adolescents, because early and continued use can damage a minor's labile brain.⁷⁸ To be sure, just as one drink does not make someone an alcoholic, one joint does not an addict make. Multiplying them,

however, can become problematic.⁷⁹

Lesson 2. A second lesson is always to distrust elected officials who paint rosy pictures about the consequences of a “progressive” change in the controlled substances laws (or, said in reverse, who never discount the likelihood of unintended consequences coming to pass). Consider the promise that crime associated with illicit markets would wither away as those markets rode off into the sunset, and the government would no longer need to devote considerable resources to policing the cannabis laws. It hasn’t happened so far. “From Colorado to California, illegal grows have been associated with automatic-weapon shootings and homicides (as well as other problems such as water theft and depletion).”⁸⁰ There is no reason to believe that those problems will dissipate over time.

This does not mean that illegal cultivation and distribution themselves have disappeared; they go with the existence of an illicit cannabis market. It also does not refer to the increase in the incidence of people who drive under the influence of cannabis and cause motor vehicle crashes, grievous bodily injury, and deaths. That is a crime—and a tragedy—whenever it occurs, and it seems to be occurring with an altogether far greater frequency than legalization’s advocates are willing to admit.⁸¹

No, the issue here is serious violent crime. Colorado and California’s “Emerald Triangle”— Humboldt, Mendocino, and Trinity Counties—have been infiltrated by the Mexican drug cartels⁸² (and perhaps by Chinese nationals as well⁸³). Their associates grow cannabis in the United States to meet the new in-state demand, as well as to capture the high profits available from sales in states that have not legalized it. We also are not talking about your friendly neighborhood Bernie Sanders-look-alike dealer who sells to neighbors what he grows in his closet. Drug cartel growers play for keeps.⁸⁴ In California, “[o]utlaw grows have exacerbated cannabis-related violence, bringing shootouts, robberies, kidnappings and, occasionally, killings. Some surrounded residents say they are afraid to venture onto their own properties.”⁸⁵ That is not exactly the Promised Land that legalization’s advocates foretold. As two University of California at Davis economists have noted:

[S]ome activists thought they could have the best of all worlds: regulate legal weed so thoroughly that you make it perfectly safe, bring lots of tax dollars to the state, make enterprises rich, eliminate the illegal weed market, and make the new system inclusive of the formerly illegal operators who suffered under criminal laws that are viewed by today’s lawmakers and citizens as unjustly harsh. [¶] Recreational legalization has brought none of that anywhere in North America.⁸⁶

Remember that lesson when legalization's advocates ask us to double down on a past bet.⁸⁷

Lesson 3. Another lesson is that form might follow function, but policy must follow biology. We must make policy decisions based on the imperfect nature of the people who will implement those policies and who will be affected by them. As Stanford Law School Professor John Kaplan explained in connection with heroin maintenance proposals, “we must be careful to do more than merely consider how heroin maintenance would work in a perfect world. After all, in a perfect world we would probably not have heroin maintenance to begin with.”⁸⁸ As a result, “we must consider how heroin maintenance would work with the imperfect human beings and institutions that would, in fact, run it.”⁸⁹

The same is true with regard to cannabis. As long as people remain people—which means forever—we will never eliminate an illicit drug market simply by asking people not to use it. Drug trafficking might not be one of the world's oldest professions, but (at least at the upper levels) it might be one of the world's most profitable—and harmful—today. The nation needs a serious commitment to reduce the number of people who abuse drugs, including today's new hyperpotent cannabis.⁹⁰ We have not yet got our arms around that new drug, and we should not move forward with further legalization efforts until we do.

That means ensuring that medical-use or recreational-use drugs like cannabis are not harmful,⁹¹ which in turn means waiting for the U.S. Food and Drug Administration (FDA) to decide that they are safe, effective, and uniformly made. We didn't wait for the FDA to make those findings in the case of cannabis. In fact, the agency often told us that smoking a joint was not a safe and effective treatment for any disease.⁹² The states jumped ahead of the agency in a rush to deliver an ersatz medical treatment by lying to the public about what the true goal was: legalization of recreational use. The upshot was to abandon the judgment Congress has invariably made for 85 years that the FDA—not the states, and certainly not the public—should make the medical judgments necessary before any drug could be deemed a legitimate medicine. Under the Federal Food, Drug, and Cosmetic Act of 1938,⁹³ the responsibility to approve the distribution of a “drug”⁹⁴ in interstate commerce rests with the Commissioner of Food and Drugs.⁹⁵ Along with his or her principal lieutenants and staff, the Commissioner must review all “new drugs”⁹⁶ to determine whether they are “safe,” “effective,” and uniformly made for their intended treatment purposes.⁹⁷ There is no good reason to exempt cannabis from the FDA's jurisdiction.⁹⁸

Also, to reduce drug use and abuse, both supply-side and demand-side actions are necessary. Sometimes supply creates demand, especially if the government is unwilling or unable to enforce the law on the books. That is happening today at our southwest border with Mexico. Cannabis is not the principal drug of concern being smuggled into the United States—illicit fentanyl holds that place of dishonor—but the federal government’s refusal to take any serious step to interdict the drugs smuggled across the border by the Mexican drug cartels has generated among the public the belief that the government does not believe that drugs should be illegal but is unwilling to be honest about its policy. Moreover, the federal government’s matador defense at the border also suggests that the Administration does not care about what happens to drug users. That neglect encourages drug use of all types. Those problems do not require us to give up and legalize all drugs as some have argued. What they should do is compel us to enforce the laws we have.

Lesson 4. A final lesson is this: As long as politicians remain politicians—which, again, means forever—we will see overtaxation and overregulation of any newly legalized commodity. Those tendencies are like gravity: You can try to ignore them, but they won’t go away. We therefore need to treat the assurances we will receive that legalization of other now-banned drugs will eliminate the black market in hallucinogens, stimulants, or depressants as the codswallop that it is: It didn’t happen in the case of cannabis, and it won’t happen if we legalize cocaine, LSD, peyote, speed, and the like.⁹⁹ Elected officials will find irresistible the impulse to overtax any newly legalized drug, and regulatory officials will find unavoidable the desire to promulgate what they see as the perfect regulatory régime. Those actions themselves guarantee the existence of an illicit market for cannabis based just on price considerations alone. Add in the limited exposure that is provided by purchasing a drug from a known, nonpublic source and you have another reason why that market would survive. That is true even if some new, hitherto unknown batch of legislators and regulators somehow becomes a majority in the federal and state governments and throttles back on the to-date overwhelming urge for new taxes and regulations.

Conclusion

The advocates of cannabis legalization argued that the illicit market would disappear once it was legal to sell and buy the drug because the public would choose a lawful, safe, clearly identified product with known ingredients over one of unknown and potentially hazardous content. That did not

happen. Clearly. Only a fool would believe that something different would occur if we continued to legalize cannabis, let alone legalize other controlled substances whose distribution is now a crime. Of course, as H.L. Mencken once observed, no one ever went broke by underestimating the intelligence of the public, so we could see further drug legalization efforts succeed.

But I hope not. As the Reverend Dr. Martin Luther King once said, “Nothing in the world is more dangerous than sincere ignorance and conscientious stupidity.” That danger can be avoided if we wise up to the consequence of our past mistakes. We don’t need to decide how many of the cannabis legalization advocates anticipated that illicit markets and their ills would remain with us once lighting up became legal (although some doubtless did). What we need to do is to realize that, regardless of whether they were charlatans and sold us beachfront property in Kansas or just made an honest mistake about the future, we are not in the land of milk and honey. We need to learn from our past mistakes, and surrender is not the lesson they teach. As Manhattan Institute Fellow Thomas Hogan has written:

Supreme Court Justice Louis Brandeis once noted that “a state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Oregon has chosen to run a novel social experiment in decriminalizing hard drugs. Let’s hope the other 49 states are paying attention to the results.¹⁰⁰

Amen, brother. Fool me once....

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Endnotes

1. Alcohol abuse is an even more ancient problem. See, e.g., *Genesis* 9:20–25 (King James) (Noah's drunkenness led to the Curse of Ham); *Isaiah* 5:11 (inveighing against excessive drinking); 2 SAMUEL JOHNSON, *THE LIVES OF THE MOST EMINENT ENGLISH POETS* 399 (1781) ("In the bottle, discontent seeks for comfort, cowardice for courage, and bashfulness for confidence."). The problem has existed in this country for drugs other than alcohol since at least the Civil War. The injection of processed opium through hypodermic needles as an analgesic led soldiers to become addicted with what was then known as the "army disease." H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980*, at 108 (2001).
2. For a sample of the views on drug prohibition versus regulation, see BRITISH MED. ASS'N, *THERAPEUTIC USES OF CANNABIS* (1997); NAT'L ACAD. OF SCIS., ENG'G & MED., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS* (2017); *DRUG LEGALIZATION: FOR AND AGAINST* (Rod L. Evans & Irwin M. Berent eds., 1992); ROBERT L. DUPONT, *THE SELFISH BRAIN: LEARNING FROM ADDICTION* (Rev. ed., 2000); DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS* (2005); JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* (1985) [hereafter KAPLAN, HEROIN]; MARK A.R. KLEIMAN, *AGAINST EXCESS: DRUG POLICY FOR RESULTS* (1992); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES* (2001); John Kaplan, *Taking Drugs Seriously*, 92 PUB. INT. 32 (1988); Jeffery A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. ECON. PERSP. 175, 177 (1995); James Q. Wilson, *Against the Legalization of Drugs*, 89 COMMENT. 21 (1990).
3. See, e.g., RICHARD J. BONNIE & CHARLES H. WHITBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (1999); JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* (2012); WAYNE HALL, *CANNABIS USE AND DEPENDENCE: PUBLIC HEALTH AND PUBLIC POLICY* (2003).
4. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 18–19 (2005) (noting that "there is an established, albeit illegal, interstate market" for cannabis); *Leary v. United States*, 395 U.S. 6, 39–52 (1969).
5. See, e.g., JOHN HUDAK, *MARIJUANA: A SHORT HISTORY* 153 (2016); MARK A.R. KLEIMAN ET AL., *DRUGS AND DRUG POLICY: WHAT EVERYONE NEEDS TO KNOW* 104–16 (1992) (2011); JEFFREY A. MIRON, *THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION* (2005), <http://web.archive.org/web/20110718082631/http://www.prohibitioncosts.org/mironreport.html> ("The report estimates that legalizing marijuana would save \$7.7 billion per year in government expenditure on enforcement of prohibition. \$5.3 billion of this savings would accrue to state and local governments, while \$2.4 billion would accrue to the federal government. [¶] The report also estimates that marijuana legalization would yield tax revenue of \$2.4 billion annually if marijuana were taxed like all other goods and \$6.2 billion annually if marijuana were taxed at rates comparable to those on alcohol and tobacco."); Steven Malanga, *The New Weed Whackers*, CITY J., Oct. 24, 2022, <https://www.city-journal.org/legalization-no-cure-for-black-market-in-pot> ("Californians who opened their voters' guides to the state's 2010 elections could read a pitch from backers of Proposition 19, an initiative designed to legalize the recreational use of marijuana. The argument: that 'Prohibition [of marijuana] has created a violent criminal market run by international drug cartels.' The advocates promised that '[b]y controlling marijuana, Proposition 19 will help cut off funding to the cartels.' Though voters failed to approve Prop. 19 that year, advocates returned six years later with a more focused initiative, backed by a similar justification—in sum, that legalization 'creates a safe, legal system for adult use of marijuana' in California. This time, voters agreed, and recreational pot use became legal in the state."); Jeffrey Miron, *How to Kill the Marijuana Black Market*, CATO INST. (Aug. 11, 2017); *Reeferregulatory Challenge*, ECONOMIST, Feb. 16, 2016, <https://www.economist.com/briefing/2016/02/13/reeferregulatory-challenge> ("Legalisers argue that regulated markets protect consumers, save the police money, raise revenues and put criminals out of business as well as extending freedom."); Ethan A. Nadelmann, *The Case for Legalization*, 92 PUB. INT. 3 (1988); cf. Christine Minhee & Steve Calandrillo, *The Cure for America's Opioid Crisis? End the War on Drugs*, 42 HARV. J.L. & PUB. POL'Y 547 (2019). Not everyone has bought that argument. See, e.g., WILLIAM J. BENNETT & ROBERT A. WHITE, *GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA* (2015); KEVIN A. SABET, *REEFER SANITY: SEVEN GREAT MYTHS ABOUT MARIJUANA* (2013); Edwin Meese III, *Drugs, Change, and Realism: A Critical Evaluation of Proposed Legalization*, in *SEARCHING FOR ALTERNATIVES: DRUG CONTROL POLICY IN THE UNITED STATES* 283 (Melvyn B. Krauss & Edward P. Lazear eds., 1991). Some have argued that an illicit market of some size will always remain viable in the absence of nationwide legalization. See, e.g., CLAYTON MOSHER & SCOTT AKINS, *IN THE WEEDS: DECRIMINALIZATION, LEGALIZATION, AND THE EVOLUTION OF U.S. MARIJUANA POLICY* 216–18 (2019). Yet Canada legalized pot, and it has a black market. *Infra* note 48.
6. See, e.g., Jens Beckett & Matias Dewey, *The Social Organization of Illegal Markets*, in *THE ARCHITECTURE OF ILLEGAL MARKETS: TOWARDS AN ECONOMIC SOCIOLOGY OF ILLEGALITY IN THE ECONOMY* 1–34 (Jens Beckett & Matias Dewey eds., 2017); KAPLAN, HEROIN, *supra* note 2, at 45–46 ("The fact that only those willing to commit illegal acts can traffic in marijuana means that the only question is whether disorganized or organized crime will dominate the trade."); MARK A.R. KLEIMAN, *MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL* 29–32 (1989); Donald J. Kochan, *The Regulabilization of Cannabis*, 49 FORDHAM URB. L.J. 519, 521 (2022) ("If illicit markets are attractive for both suppliers and consumers, they will exist. Substantial economics research demonstrates this fact.") (footnote omitted).
7. The late Mark Kleiman offered an excellent summary of those harms: "The illicit marijuana market engenders violence and crime, participates in the corruption of public officials, demoralizes law enforcement and law-abiding citizens, contributes to the revenues of criminal organizations whose activities are not confined to handling marijuana, and complicates our relationships with foreign governments." KLEIMAN, *supra* note 6, at 29–30; see also, e.g., *id.* at 30–32.
8. See, e.g., Tom James, *The Failed Promise of Legal Pot*, ATLANTIC, May 9, 2016, <https://www.theatlantic.com/politics/archive/2016/05/legal-pot-and-the-black-market/481506/> ("The dream of legal marijuana as it is being sold to the American public is that it will not only give states a chance to reap a tax windfall off of a drug millions of Americans already use; it will end the back-and-forth tussle among cops, users, and dealers, and shift police resources to more serious crimes. Most compellingly, advocates hold out the promise of a major step toward dismantling one of the pillars of racially biased policing—the war on drugs—and finally reeling in a legal net that has long entangled black men at vastly disproportionate rates.").
9. A small area where the police allowed drugs to be sold freely.

10. Cannabis products come in many forms, including food and drink. See HUDAK, *supra* note 5, at 17–18 (noting that edibles come in “countless forms including cookies, brownies, candies, granola, salad dressing, and even pasta sauce.”); Paul J. Larkin, Jr., *Marijuana Edibles and “Gummy Bears,”* 66 BUFF. L. REV. 313, 318–19 (2018) [hereafter Larkin, *Gummy Bears*].
11. See CAL. HEALTH & SAFETY CODE § 11362.5 (West 2023).
12. For an explanation of why the Food and Drug Administration (FDA) could never authorize the interstate distribution of cannabis as a “safe,” “effective,” and uniformly made drug, see Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OH. ST. J. CRIM. L. 99 (2020).
13. See Paul J. Larkin, *Twenty-First Century Illicit Drugs and Their Discontents: The Troubling Potency of Twenty-First Century Cannabis*, HERITAGE FOUND., Legal Memorandum No. 317, at 2 (Dec. 7, 2022), <https://www.heritage.org/sites/default/files/2022-12/LM317.pdf>; STATE MEDICAL CANNABIS LAWS, NAT’L CONF. OF STATE LEG. (Feb. 3, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/8FTQ-THGR>]. State cannabis regulations differ widely. See, e.g., DRUG POLICY AND THE PUBLIC GOOD 245–54 (Thomas Babor et al. eds., 2d ed. 2018); Rosalie Liccardo Pacula et al., *Words Can Be Deceiving: A Review of Variation Among Legally Effective Medical Marijuana Laws in the United States*, 7 J. DRUG POL’Y ANALYSIS 1 (2014).
14. “Pseudo” since cannabis distribution is still a federal crime. 21 U.S.C. §§ 812 & 841(a) (2018).
15. See, e.g., Robert Verbruggen, *What the Opioid Crisis Can Teach Us About the War on Drugs*, L. & LIBERTY, Nov. 1, 2017, <https://lawliberty.org/forum/what-the-opioid-crisis-can-teach-us-about-the-war-on-drugs/> (“We are also watching the demise of a common way of looking at drug addiction. The journalist Sam Quinones, author of *Dreamland* (2015), a book chronicling the epidemic and the rise of Mexican heroin in the United States, described the shift in his own thinking in a podcast conversation with the economist Russ Roberts. Quinones said that when he was in Mexico reporting previous books and articles, he had believed that all drug stories were demand-driven, and that ‘drug scourges were created by demand for those drugs. Now, when I did this book, this changed my mind, honestly. I came to think that really most drug problems begin because of excess supply—easy, cheap availability of a drug. And that’s exactly what happened here.’”).
16. See, e.g., ROBIN GOLDSTEIN & DAVID SUMNER, CAN LEGAL WEED WIN? THE BLUNT REALITIES OF CANNABIS ECONOMICS xi (2022) (“[W]eed retail prices that have little to do with the cost of farming, heavy-duty weed investments in crisis, and laws dreamt up by activists and tech elites [wound] up *illegalizing* more weed businesses than they legalized.”) (emphasis in original); *id.* at 128 (“What is very clear is that Proposition 64 [which legalized recreational-use cannabis] did little to shift much weed from illegal to legal. In many specific cases it did the opposite.”).
17. For excellent (albeit, now dated) histories of American cannabis prohibition, see RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES (Lindesmith Ctr. 1999) (1974), and JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970). For a more recent treatment, see Larkin, *supra* note 13.
18. The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–904 (2019)). The Controlled Substances Act was Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Title I addressed prevention and treatment of narcotics addiction, and Title III dealt with the import and export of controlled substances. *Gonzales v. Raich*, 545 U.S. 1, 12 n.19 (2005). A “controlled substance” is “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of [the] subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” 21 U.S.C. § 802(6) (2018). The CSA incorporates the definition of a “drug” from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1) (2018). The CSA applies to the interstate and intrastate distribution of cannabis. See *Gonzales v. Raich*, 545 U.S. 1 (2005).
19. The CSA established several different “schedules” or classes of certain types of drugs, denominated “controlled substances.” A “controlled substance” is “a drug or other substance, or immediate precursor, included in Schedule I, II, III, IV, or V of part B of this title,” except for “distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954.” 21 U.S.C. § 802(6) (2018). The Controlled Substances Act incorporates the definition of a “drug” from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 201(g)(1) (2018). The CSA assigns drugs to one of five schedules according to their potential benefits and risks. The CSA placed cannabis into Schedule I, drugs that are potentially dangerous, that lack a legitimate medical purpose, and that have available substitutes. See 21 U.S.C. §§ 812, 841 (2018). Schedule I drugs may not be distributed or possessed for any purpose. Congress placed cannabis in Schedule I in 1970, and it remains there today. See 21 C.F.R. § 1308.11(d) (31) (2022).
20. Because cannabis is contraband, physicians may not prescribe cannabis for any use. Physicians whose prescription practices exceed the boundaries of legitimate medical practice can be federally prosecuted and convicted for their actions. See *Ruan v. United States*, 142 S. Ct. 2370 (2022); *United States v. Moore*, 423 U.S. 122 (1975). The U.S. Court of Appeals for the Ninth Circuit, however, has ruled that a physician may “recommend” that a patient consider using marijuana as a treatment. See *Conant v. McCaffrey*, 172 F.R.D. 681, 694–95 (N.D. Cal. 1997) (issuing preliminary injunction), 2000 WL 1281174 (N.D. Cal. Sept. 7, 2002) (issuing permanent injunction), *aff’d*, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (upholding permanent injunction).
21. For a small sample of the literature, see MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020); JONATHAN P. CAULKINS ET AL., RAND CORP., CONSIDERING LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS (2015); LESLIE IVERSEN, THE SCIENCE OF MARIJUANA (2d ed. 2008); MARK A.R. KLEIMAN, MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL (1989); CONTEMPORARY HEALTH ISSUES ON MARIJUANA (Kevin A. Sabet & Ken C. Winters eds., 2018); Paul J. Larkin, Jr., *Reflexive Federalism*, 44 HARV. J.L. & PUB. POL’Y 523 (2021).
22. See, e.g., H.R. 3617, Marijuana Opportunity Reinvestment and Expungement (MORE) Act, 117th Cong. (2022) (passed by the House but not the Senate); H.R. 1996, Secure and Fair Enforcement Banking (SAFE) Act of 2021, 117th Cong. (2022) (same); S. 4591, Cannabis Administration and Opportunity Act, 117th Cong. (2022).

23. Since 2014, Congress has regularly passed appropriations bill riders barring the U.S. Department of Justice from halting state medical marijuana programs. See Larkin, *supra* note 21, at 530–31 & nn.30–33; *infra* text accompanying notes 31–33.
24. The FDCA also regulates the interstate distribution of cannabis because it prohibits the interstate distribution of any “new drug” unless the Commissioner of Food and Drugs has found it “safe” and “effective” for its intended use. With certain exceptions for “dietary supplements,” a “drug” is defined as “(A) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).” 21 U.S.C. § 321(g)(1). The Food and Drug Administration has concluded that cannabis would be a “new drug” for FDCA purposes. See Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Descheduling*, 68 AM. U. L. REV. 823 (2019) (explaining that descheduling cannabis would simply transfer regulatory authority entirely to the FDA). The FDA has never made those findings for the agricultural form of cannabis. By contrast, the agency has approved use of biologically active cannabis compounds, known as cannabinoids. The FDA has approved the synthetic delta-9-THC analogues dronabinol (Marinol) and nabilone (Cesamet) for treatment of chemotherapy-induced nausea and emesis, as well as appetite stimulation in cachexic patients suffering from cancer or HIV/AIDS wasting syndrome. The FDA has also approved Epidiolex, a purified form of cannabidiol (CBD), for use in treating Dravet’s Syndrome and Lennox-Gastaut Syndrome, two severely debilitating forms of childhood-onset epilepsy. U.S. Food & Drug Adm’n, FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD), Questions and Answers 3 & 4 (Dec. 6, 2019), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#approved> [<https://perma.cc/SB3X-9V2U>].
25. See, e.g., DRUG ENF’T ADMIN, 2020 NATIONAL DRUG THREAT ASSESSMENT DEA-DCT-DIR-008-21, at 47 (Mar. 2021) (“Marijuana is widely available and cultivated in all 50 states.”).
26. Stuart Taylor, Jr., *Marijuana Policy and Presidential Leadership: How to Avoid a Federal–State Train Wreck*, BROOKINGS INST., GOVERNANCE STUDIES 3 (Apr. 2013).
27. See Larkin, *supra* note 12, at 109–11.
28. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).
29. See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, § 101, 130 Stat. 1005, 1005–06 (2016); Continuing Appropriations Act, 2016, Pub. L. No. 114-53, § 104, 129 Stat. 502, 506 (2015); Further Continuing Appropriations Act, 2016, Pub. L. No. 114-96, 129 Stat. 2193 (2015); Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response Preparedness Act, 2017, Pub. L. No. 114-223, 130 Stat. 857, 908–20 (2016); H.J. Res. 99, Making Further Continuing Appropriations for Fiscal Year 2017, and for Other Purposes, Pub. L. No. 115-30, 131 Stat. 134 (2017); Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 228 (2017); Further Additional Continuing Appropriations Act, 2018, Pub. L. No. 115-96, 131 Stat. 2044 (2017); Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, 132 Stat. 29 (2018); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 351, 444–45 (2018); Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, §§ 101-103, 312 Stat. 3123, 3123 (2018); H.J. Res. 143, Making Further Continuing Appropriations for Fiscal Year 2019, and for Other Purposes, Pub. L. No. 115-298, 132 Stat. 4382 (2018); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 101, 113 Stat. 10, 10 (2019); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 91, 138 (2019); Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, Pub. L. No. 116-59, § 101, 113 Stat. 1093, 1093–94 (2019); Further Continuing Appropriations Act, 2020, and Further Health Extenders Act of 2019, Pub. L. No. 116-69, § 101, 133 Stat. 1134 (2019); Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2385, 2433 (2019); Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 113 Stat. 2534 (2019). See generally Larkin, *supra* note 21, at 530 n.29 (collecting riders).
30. Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 13, at § 538.
31. Larkin, *supra* note 21, at 531–32 & n.32.
32. *Id.* at 532 n.33.
33. See Larkin, *supra* note 21, at 532 n.33.
34. See, e.g., Matthew Walsh, *The State of the Marijuana Black Market*, BROWN POL. REV., Jan. 8, 2020, <https://brownpoliticalreview.org/2020/01/the-state-of-the-marijuana-black-market/> (“From California, where there are more than three times as many illicit cannabis dispensaries than licit ones, to Oregon, where the State Police Sergeant laments a growing problem with illegal marijuana, the black market for weed has persisted in states that have legalized the drug. Advocates of legalization have painted a rosy picture of a flourishing legal market while the illicit market withered—a picture far from reality in 2019. ... Legalization advocates relied on a few key assumptions to make their case: First, that cannabis consumers would almost always prefer legal, state-sanctioned weed over the illegal stuff. The second was that entrepreneurs, seeing a fruitful business opportunity, would rush into the marijuana market and crowd out illegal competitors. [¶] Neither presumption has turned out to be true.”).

35. See 2020 DEA NATIONAL THREAT ASSESSMENT, *supra* note 25, at 47 (“Marijuana remains illegal under federal law and is the most commonly used illicit drug in the United States. The national landscape continues to evolve as states enact voter referenda and legislation regarding the possession, use, and cultivation of marijuana and its associated products. The prevalence of marijuana use, the demand for potent marijuana and marijuana products, the potential for substantial profit, and the perception of little risk entice diverse drug traffickers and criminal organizations to cultivate and distribute illegal marijuana throughout the United States. [¶] Mexico remains the most significant foreign source for marijuana in the United States; however, in U.S. markets, Mexican marijuana has largely been supplanted by domestic-produced marijuana. ... Marijuana is widely available and cultivated in all 50 states. In 2019, the majority of DEA Field Divisions indicated marijuana availability was high in their respective areas, meaning marijuana is easily obtained at any time. Only four DEA Field Divisions—Atlanta, Caribbean, El Paso, and New Jersey—indicated marijuana availability was moderate, meaning marijuana is generally readily accessible. DEA’s Atlanta Field Division was the only division that reported marijuana was less available compared to the previous reporting period.”).
36. See, e.g., Joseph Detrano, Rutgers Cntr. of Alcohol & Substance Use Studies, *Cannabis Black Market Thrives Despite Legalization* (2023), <https://alcoholstudies.rutgers.edu/cannabis-black-market-thrives-despite-legalization/> (“Cannabis’ illegal market is anything but dying; in some cases, it’s more active than it has been in years.”).
37. See Paige St. John, *Nobody Knows How Widespread Illegal Cannabis Grows Are in California. So We Mapped Them*, L.A. TIMES, Sept. 8, 2022, <https://www.latimes.com/california/story/2022-09-08/how-we-mapped-illegal-cannabis-farms-in-california> (“The Times obtained 2021 satellite imagery from a mix of public and private sources to canvass nearly 3,000 square miles of land in parts of six counties: Siskiyou, Trinity, Mendocino, Shasta, Butte and San Bernardino. ... The Times followed another industry practice and reduced raw crop estimates by 30%. [¶] Measured that way, the survey area contained 25 million square feet of illicit greenhouses with ample capacity to grow 2.6 million pounds of weed—enough to supply the entire legal California market.”); Paige St. John, *The Reality of Legal Weed in California: Huge Illegal Grows, Violence, Worker Exploitation and Deaths*, L.A. TIMES, Sept. 8, 2022, <https://www.latimes.com/california/story/2022-09-08/reality-of-legal-weed-in-california-illegal-grows-deaths> [hereafter St. John, *Legal Weed Reality*] (“The Times’ analysis of satellite images shows that unlicensed operations in many of California’s biggest cultivation areas, such as parts of Trinity and Mendocino counties, outnumbered licensed farms by as much as 10 to 1.”).
38. See, e.g., Stefan Sykes, *Marijuana’s Black Market Is Undercutting Legal Business*, CNBC, Dec. 23, 2023, <https://www.cnbc.com/2022/12/23/marijuana-black-market-undercuts-legal-business.html> (“While it’s an issue in states like Colorado, Michigan and Washington, it’s a much bigger problem in New York. Unlicensed businesses are ‘taking a pretty hefty percent of the potential market share,’ according to Amanda Reiman, a researcher at cannabis intelligence company New Frontier Data. None of the 36 newly licensed dispensaries in New York have even started operating yet. ... The problem is particularly cumbersome in New York City, Knowles said. Weed can be bought from brick-and-mortar storefronts, trucks, pop-up shops, bodegas and even courier services that deliver directly to consumers. His office has sent out cease-and-desist letters to some of the unlicensed operators in the state, but some trade groups say there are likely tens of thousands of illegal businesses in the city alone.”); Sean Williams, *The Great Marijuana Mystery That’s Likely to Leave Investors Disappointed*, THE MOTLEY FOOL, Apr. 17, 2016, <https://www.fool.com/investing/general/2016/04/17/the-great-marijuana-mystery-thats-likely-to-leave.aspx> (“Just how big is the underground (i.e., illegal) market for marijuana? No one knows for sure, which is why it’s called the ‘black market’ in the first place, but estimates from various sources have often cited a figure as high as \$100 billion. For comparison, ArcView Market Research tallied legal marijuana sales at \$5.4 billion in 2015. No matter how we look at it, the black market continues to dwarf the legal market in size, which is to be expected given that recreational marijuana, the main legal industry growth driver, is still in its infancy.”); Shannon Young, *New York’s Black Market for Weed Thrives Ahead of Legal Sales*, POLITICO, Nov. 14, 2022, <https://www.politico.com/newsletters/weekly-new-york-health-care/2022/11/14/new-yorks-black-market-for-weed-thrives-ahead-of-legal-sales-00066650>.
39. Scott Zamost et al., *A Look Inside the Black Market for Weed Shows the Huge Threat to Legal Business*, CNBC, July 12, 2019 (“Many saw legalization of marijuana as a huge economic opportunity, but the reality is its potential isn’t fully realized. An underground economy is cutting into the profits of legal businesses. New Frontier Data, a Denver-based company that studies cannabis trends, estimates there are \$70 billion in illegal sales nationally—seven times the size of the legal market. This means the legal market is ‘capturing only a fraction of total demand,’ the company said in a summary of U.S. cannabis demand trends released this month.”).
40. Mike Bebernes, *Why Hasn’t Legal Weed Killed the Marijuana Black Market?*, YAHOO!NEWS, Dec. 16, 2022, <https://news.yahoo.com/why-hasnt-legal-weed-killed-the-marijuana-black-market-224158722.html>; see also, e.g., 2020 DEA NATIONAL THREAT ASSESSMENT, *supra* note 25, at 51 (“[B]lack market marijuana production continues to grow in California, Colorado, Oregon, Washington, and other states that have legalized marijuana, creating an overall decline in prices for illicit marijuana as well.”); Larkin, *supra* note 18, at 572–73 n.192 (“Professors Young and Baude assume that cannabis-legal states are able and willing to prevent homegrown marijuana from crossing their borders headed elsewhere so that the states can escape from the CSA’s clutches. That assumption is untenable. There is no reason to presume that what happens in California, stays in California. The evidence certainly doesn’t offer much promise in that regard.”) (footnote omitted); Adeline Dixon, *Legalization of Marijuana and Its Effects on Licit and Illicit Markets in the United States*, in 2 PERSPECTIVES ON BLACK MARKETS (Ind. Univ. 2018) (online publication), https://iu.pressbooks.pub/perspectives2/chapter/legalization-of-marijuana-and-its-effects-on-licit-and-illicit-markets-in-the-united-states/#_edn16 (“One major problem with the presence of illegal markets in a state where marijuana is legalized is that law enforcement has no way of knowing where the consumer purchased the marijuana. This ambiguity in a products [sic] origin has allowed for illegal farms to thrive by offering a lower price than the premium rate of legalized marijuana.”).
41. “California is known in popular mythology as queen of weed, producing and consuming prolific amounts of it in-state and exporting more than half of America’s illegal supply for decades.” GOLDSTEIN & SUMNER, *supra* note 16, at 97; *id.* at 148.
42. Vanda Felbab-Brown, *Will Cannabis Legalization Reduce Crime in Mexico? Has It in the US?*, BROOKINGS INST., Apr. 26, 2021, <https://www.brookings.edu/blog/order-from-chaos/2021/04/26/will-cannabis-legalization-reduce-crime-in-mexico-has-it-in-the-us/>.

43. See GOLDSTEIN & SUMNER, *supra* note 16, at vii: “Las Vegas, Nevada, December 2019: At the weed industry’s biggest conference of the year, MJBizCon..., hundreds of white male investors in suits are pacing around angrily. Many of the investors have lost most of the money they ever invested in weed. A major cannabis stock index has fallen 80 percent in 2019. California’s legal weed market is officially in crisis mode, according to Marijuana Business Daily.” See also, e.g., Editorial Bd., *California’s Marijuana Paradise Lost*, WALL ST. J., Feb. 7, 2023, https://www.wsj.com/articles/california-marijuana-pot-black-market-interstate-compact-export-11675810453?mod=Searchresults_post&page=1 (“California has been at the forefront of this experiment, and it’s not turning out well. High taxes and regulation have made it harder for state-licensed businesses to make money. Significantly higher prices in the state-regulated market have led to a boom in the black market controlled by drug cartels, which has led to violence and water theft. [¶] At the same time, California has struggled to enforce its pot laws. One reason is that the 2016 ballot measure reduced penalties for most pot offenses because of their alleged disparate impact on minorities. Illegal pot plantations have mushroomed.”); Rosalie Liccardo Pacula, Letter, *California’s Marijuana Market Is Crumbling*, WALL ST. J., Feb. 15, 2023, https://www.wsj.com/articles/california-legal-marijuana-market-weed-black-market-federal-law-9267c345?mod=Searchresults_pos5&page=1.
44. See William J. Meadows, *Cannabis Legalization: Dealing with the Black Market*, DRUG ENF’T & POL. CNTR., OHIO ST. UNIV., No. 13, at 3 (Oct. 2019); see also, e.g., Alexander Nieves, *California’s Legal Weed Industry Can’t Compete with Illicit Market*, POLITICO, Oct. 23, 2021, <https://www.politico.com/news/2021/10/23/california-legal-illicit-weed-market-516868> (“California’s cannabis market is booming nearly five years after voters legalized recreational weed. But there’s a catch: the vast majority of pot sales are still underground. [¶] Rather than make cannabis a Main Street fixture, California’s strict regulations have led most industry operators to close shop, flee the state or sell in the state’s illegal market that approaches \$8 billion annually, twice the volume of legal sales. ... California has just 823 licensed brick-and-mortar cannabis shops, but close to 3,000 retailers and delivery services operate in the state without a permit, a February 2020 market analysis by Marijuana Business Daily found.”); Malanga, *supra* note 5 (“California has yet to see its black-market disappear, however. In fact, illegal growing and selling of pot have increased so rapidly in the past six years that earlier this month, Sacramento vastly expanded the state’s war on pot by taking a decades-old seasonal commission designed to curb illegal growing and turning it into a full-time, multi-agency task force with the job of snuffing out a booming black market.”); Jorge Mercado, *Six Years After Legalization, Cannabis Black Market Still Thriving*, PAC. COAST BUS. TIMES, Sept. 15, 2022, <https://www.pacbiztimes.com/2022/09/15/six-years-after-legalization-cannabis-black-market-still-thriving/> (“When California legalized cannabis for recreational use in 2016, the idea was to create a new legal industry and eliminate an illegal one. [¶] Instead, the illicit market continues to have a stronghold in California, as legal growers struggle to turn a profit amid high taxes and strict regulations, and state and local governments often fail to enforce the rules against unpermitted and untaxed growers and sellers. ... [Skip Mostenbocker, CEO of Pacific Stone, a cannabis grower] estimates that the black market still accounts for about 80% of California’s cannabis industry.”); St. John, *Legal Weed Reality*, *supra* note 37 (“Proposition 64, California’s 2016 landmark cannabis initiative, sold voters on the promise a legal market would cripple the drug’s outlaw trade, with its associated violence and environmental wreckage. [¶] Instead, a Los Angeles Times investigation finds, the law triggered a surge in illegal cannabis on a scale California has never before witnessed. [¶] Rogue cultivation centers like Mount Shasta Vista now engulf rural communities scattered across the state, as far afield as the Mojave Desert, the steep mountains on the North Coast, and the high desert and timberlands of the Sierra Nevada. ... The scale of the crisis is immense. A Times analysis of satellite imagery covering thousands of square miles of the state showed dramatic expansion in cannabis cultivation where land is cheap and law enforcement spread thin, regardless of whether those communities permitted commercial cultivation.”); Zamost et al., *supra* note 39 (“In California, early projections anticipated annual cannabis tax receipts of more than \$1 billion by 2018. But those predictions were far off, with \$345 million actually collected last year, according to the state’s legislative analyst’s office and tax records. The black market is widely cited as a major reason for the lower numbers. ... A review of Weedmaps listings in mid-June found 229 illegal dispensaries in LA. The Los Angeles Police Department estimates the number is closer to 259, but no one knows exactly how many are in business. There are 186 licensed dispensaries in LA.”).
45. St. John, *Legal Weed Reality*, *supra* note 37.
46. Matthew Ormseth, *Killings, Robberies, Extortion. California Can’t Stop Its Booming Illegal Cannabis Stores*, L.A. TIMES, Sept. 13, 2022.
47. See, e.g., Mike Brake, *Black Market, Other Risks Remain as Legalized Weed Turns Three*, OK. COUNCIL OF PUB. AFFS. July 8, 2021, <https://www.ocpathink.org/post/as-legalized-weed-turns-three-a-critical-look-at-its-effects>; Natalie Fertig, “Talk About Clusterf---: Why Legal Weed Didn’t Kill Oregon’s Black Market”, POLITICO, Jan. 14, 2022, <https://www.politico.com/news/magazine/2022/01/14/oregon-marijuana-legalization-black-market-enforcement-527012>; Malanga, *supra* note 5 (“In Oregon, where recreational pot became legal in 2015, officials now estimate that thousands of illicit marijuana farms operate in the southern part of the state, where gun battles among rivals have become common. Despite legalization in 2016, more than two-thirds of pot transactions in Massachusetts take place in the black market, state officials estimate. Mexican cartels and other foreign gangs, meantime, have reportedly moved into the business in Colorado—another of the 19 states that has created a legal market for recreational pot.”); Alanna Flood, *Black Market Marijuana Still Popular Despite Legalization*, 22NEWS WWLP.COM, Aug. 25, 2022, <https://www.wwlp.com/news/local-news/black-market-marijuana-still-popular-despite-legalization/> (“Despite the fact that marijuana is legal here in Massachusetts, illegal sales remain strong and dangerous. Like many things, the lower cost of illegal marijuana is a major reason illicit sales continue to flourish in the state.”); Chris Kudialis, *Nevada’s Pot Industry Struggling to Overtake Black Market, Advocate Says*, LAS VEGAS SUN, Aug. 22, 2018, <https://lasvegassun.com/news/2018/aug/22/nevada-pot-industry-fails-overtake-black-market/>; Steve Neavling, *Why Marijuana Sales on the Black Market Are Blooming in Michigan After Legalization*, DETROIT METRO TIMES, Feb. 26, 2019, <https://www.metrotimes.com/weed/why-marijuana-sales-on-the-black-market-are-blooming-in-michigan-after-legalization-20375993>; Williams, *supra* note 38 (“[D]ata from Perfect Price across 66 large cities throughout six states (Washington, Oregon, Colorado, Arizona, Michigan, and California) shows that only four cities have less expensive legal marijuana than black market marijuana (Spokane, Wa., Aurora, Co., Denver, Co., and Mesa, Az., for those curious). Conversely, 52 of 66 cities have price gaps of 10% or higher between legal marijuana and black-market marijuana, including differences of 73% in Medford, Or., and 65% in Sacramento, Ca.”).

48. See, e.g., PUBLIC SAFETY CANADA, GOV'T OF CANADA, CANNABIS BLACK MARKET (June 15, 2020) ("The government is committed to maintaining the integrity of the legal cannabis market by displacing the black market.... One of the main goals of the legalization of cannabis was to reduce criminal activity by keeping profits out of the pockets of criminals. ... One year after legalization, 52% of Canadians obtain (at least some of) their cannabis from a legal source (compared to 22% prior to legalization). However, it seems that Canadians are still obtaining their cannabis from the black market. In the third quarter of 2019, results from the National Cannabis Survey show that 42% of Canadians had purchased cannabis from an illegal source. Some provinces are experiencing more challenges displacing illegal sales. For example, in British Columbia, less than 40% of cannabis users report obtaining cannabis from the legal market. Consumers are turning to the black market for a variety of reasons, including but not limited to: higher prices, limited selection, and a scarcity of licensed stores in their area. According to Statistics Canada a gram of legal cannabis costs 55 per cent more than illicit cannabis (\$10.30/gram vs. \$5.73/gram). ... The Criminal Intelligence Service of Canada (CISC) monitors the involvement of organized crime in the Canadian criminal marketplace. In their latest report published in April 2019, CISC reported that of the assessed OCGs involved in the black market of cannabis, almost all of these groups were also involved in at least one other illicit drug market and were unlikely to be disrupted by legalization, given their alternate streams of revenue. CISC reported that although the new cannabis legislation makes it harder for OCGs to infiltrate the legal regime, these groups are finding new ways and adapting to changes in the market."); Kevin Connor, *Ontario's Licensed Cannabis Producers Losing Revenue to Black Market*, TORONTO SUN, Nov. 12, 2022, <https://torontosun.com/news/local-news/ontarios-licensed-cannabis-producers-losing-revenue-to-blackmarket>; William Turvill, "The Legal Stuff Is Garbage": Why Canada's Cannabis Black Market Keeps Thriving, GUARDIAN, Mar. 18, 2020, <https://www.theguardian.com/society/2020/mar/18/cannabis-canada-legal-recreational-business>.
49. Mike Adams, *Why Our Cannabis Experiment Failed*, SPECTATOR WORLD, Oct. 14, 2022, <https://thespectator.com/topic/america-cannabis-experiment-failed-marijuana/>.
50. See, e.g., James, *supra* note 8; Peter Hitchens, *Justin Bieber and the Truth About Cannabis*, SPECTATOR WORLD, Oct. 7, 2021, <https://thespectator.com/topic/justin-bieber-truth-about-cannabis-marijuana/> ("Every few days some celebrity ninny will call for the scrapping of marijuana laws, saying that it will take the drug out of the hands of criminal gangs. And all kinds of conservative-minded people will gravely nod their heads at the idea. ... The clear evidence from North America should put the issue beyond any doubt: criminal gangs have flourished in Canada and Colorado, supplying marijuana to consumers who do not want to pay the heavy taxes levied on legal outlets. But if an untrue thing is said publicly often enough by famous, popular people, it will be believed."); Julian Shen-Berro & Shannon Young, *The Black Market Strangled California's Legal Weed Industry. Now It's Coming for New York*, POLITICO, Nov. 13, 2022, <https://www.politico.com/news/2022/11/13/california-black-market-weed-new-york-00066470>; Laura Williams, *Decriminalizing Cannabis Won't Stop the Black Market*, AM. INST. FOR ECON. RESEARCH, Apr. 25, 2022, <https://www.aier.org/article/decriminalizing-cannabis-wont-stop-the-black-market/> ("When both legal and illegal supplies of similar goods are available, a high tax confers an instant price advantage to black market purchases. If taxes vary between jurisdictions, there is incentive to smuggle goods, or divert legal products to illegal sales. ... Even now, the tightly controlled "legal" markets comprise fewer than 1 in 4 cannabis purchases.");
51. *Field of Dreams* (Universal Pictures 1989) ("If you build it, he will come.");
52. See Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453, 508–15 (2015). As Steve Malanga has explained: "The notion that legalization would end the often-violent crime surrounding drug markets, including the pot business, dates from at least the 1970s, when President Jimmy Carter endorsed national legislation to end criminal penalties for pot. The waves of violent crime and addiction that emerged from the cocaine epidemic of that era, however, effectively ended talk of drug legalization, even for pot, which was linked in some studies to later cocaine use. [¶] It took more than 20 years for supporters to find another route to legalization—in marijuana's case, through so-called medicinal pot as a painkiller for severely ill people. California led the way with 1996 legislation setting up a legal market for medical marijuana. Other states followed suit. Despite limited evidence of pot's medicinal value, and doubts among many doctors about its usefulness, the momentum created by the medical-marijuana movement eventually led to today's growing passion for legalizing recreational pot." Malanga, *supra* note 5.
53. Larkin, *supra* note 52, at 511 & n.277 (citation and punctuation omitted).
54. See *id.* at 511–12 ("There is considerable proof that many state medical marijuana programs are simply a sham for the decriminalization of that substance. Consider the following: according to a 2013 study, in Arizona merely seven of 11,186 applications for medical marijuana had been denied. Only 2,000 patients registered for Colorado's medical marijuana program before the Justice Department announced in 2009 that it would not enforce the federal marijuana laws against individual patients and caregivers. Colorado residents apparently listened because by March 2011, there were more than 127,000 Colorado registrants. In Colorado, fewer than fifteen physicians wrote more than seventy percent of all medical marijuana recommendations, with the reason being severe or chronic pain in ninety-four percent of the reported conditions. Michigan had fifty-five physicians certify approximately 45,000 patients. California does not require patients to register to receive marijuana for medical use, so the number of patients is a matter of speculation. Estimates, however, are that the number increased from 30,000 in 2002 to more than 300,000 in 2009 and 400,000 in 2010. The California statute permits a patient or caregiver to possess six plants, but it allows counties to amend state guidelines. Humboldt County, which lies in the heart of the Northern California marijuana farming, allows a resident to grow up to ninety-nine plants on behalf of a patient. Not surprisingly, there is also considerable evidence that significant quantities of marijuana grown or sold for medical uses have been diverted for recreational use. [¶] The result is that a large segment of the nation's population justifiably believes that the medical marijuana movement is merely a Trojan Horse for legalization.") (footnotes omitted).
55. No one in California should have been surprised by that result. A 2015 commission chaired by then-Lieutenant Governor Gavin Newsome foretold that outcome. See BLUE RIBBON COMM'N ON MARIJUANA POL'Y, PATHWAYS REPORT—POLICY OPTIONS FOR REGULATING MARIJUANA IN CALIFORNIA (July 22, 2015) ("Reduce the size of the illicit market to the greatest extent possible. While it is not possible to eliminate the illicit market entirely, limiting its size will reduce some of the harms associated with the current illegal cultivation and sale of cannabis and is essential to creating a well-functioning regulated market that also generates tax revenue.") (emphasis omitted).

56. See, e.g., Alex Halperin, *Can Legal Weed Ever Beat the Black Market?*, GUARDIAN, Mar. 18, 2019, <https://www.theguardian.com/society/2019/mar/17/legal-weed-black-market-california-gavin-newsom>; James, *supra* note 8 (“Why has a black market that was supposed to be vanquished still thriving? In short: economics. ... [W]hat is keeping people in Colorado’s black market is price, with a dose of convenience thrown in. ... There are a few basic reasons for this. First, the medical market, [Erie, Colorado, Chief of Police Mark Vasquez] says, can sell marijuana more cheaply than the state-licensed and -regulated stores because medical dispensaries don’t have to charge most of the combined 27.9 percent tax on the drug. This increases the resale of medical marijuana on the street. Second, there are the plants that are grown for personal use, which are allowed under the law. Vasquez says the result is a steady supply of marijuana not only for street dealers but also for Craigslist sales, which have become so ubiquitous that some city departments don’t have the resources to crack down on them.”); *id.* (“Francisco Gallardo, a community leader in Denver, summarizes the situation more succinctly: ‘If it’s ridiculously expensive and they can get it from their homie cheaper, that’s what they’re going to do.’”); Geoffrey Lawrence & Spence Purnell, *Marijuana Taxation and Black Market Crowd-Out*, REASON, Jan. 31, 2020, <https://reason.org/policy-study/marijuana-taxation-and-black-market-crowd-out/> (“A key limitation to measuring the effectiveness of various tax regimes is the difficulty of estimating the volume of transactions that flee to the black market in legal states. Notably, the literature on consumer responsiveness to price in both legal and illegal markets indicates consumers in legal markets tend to be more price-sensitive than consumers in illegal markets.”).
57. See DEA 2020 DRUG THREAT ASSESSMENT, *supra* note 25, at 51 (“This [price drop] further incentivizes trafficking organizations operating large-scale grow sites in these states to sell to customers in markets throughout the Midwest and East Coast, where marijuana commands a higher price. Marijuana is also shipped via mail and express consignment shipping services from the United States mainland to the U.S. Virgin Islands (USVI).”); Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All?*, 96 DENV. L. REV. 221, 227–30 (2019).
58. See, e.g., GOLDSTEIN & SUMNER, *supra* note 16, at 49–52 (noting that California state and local taxes can double the price of legal over illegal cannabis); Iris Dorman, *NY Legalizes Pot: Will that Squash the State’s Black Market?*, FORBES, Apr. 5, 2021, <https://www.forbes.com/sites/irisdorbman/2021/04/05/ny-legalizes-pot-will-that-squash-the-states-black-market/?sh=6ab456a73ddb> (“To suppress the black market, which has no quality controls, safety standards or product testing, the pricing in the legal market will need to be lower than what is available in black market channels. [¶] This will be a challenge as government is salivating at the prospects for high taxes imposed on cannabis purchases, much of it being utilized to fund expensive new government agencies to regulate access to the marketplace.”) (punctuation omitted).
59. See, e.g., James, *supra* note 8 (“What [Luther Gregory, the head of Washington State’s post-Prohibition Liquor Control Board] saw so clearly was the importance of the legal market’s cost-price margin—the difference between production cost and final selling price. Gregory knew that margin was where bootleggers lived, and shrinking it would leave less room for them to undercut legal prices and still turn a profit. By bucking the revenue-hungry legislature and setting taxes low in the early years of Washington’s liquor market, Gregory stripped the black market of its ability to compete.”); Pat Oglesby, *How Tax Competition Can Threaten Marijuana Revenue*, THE HILL, Feb. 6, 2018, <https://thehill.com/opinion/finance/372396-how-tax-competition-can-threaten-marijuana-revenue> (“Overall, cannabis taxes can go up over time—that’s because, after legalization, pre-tax cannabis prices will fall, for two reasons. First, the legal market will gain efficiency and cut costs; second, the black market will wither as law enforcement patiently roots it out. Early on, to beat the black market, some cannabis taxes should start low.”).
60. See, e.g., Dorman, *supra* note 58 (“A bone of contention for some experts is the 13% taxation that will be levied on cannabis products as stipulated in the new law. ‘[I]t’s just too high,’ said Dustin Robinson, founding partner of Mr. Cannabis Law, a cannabis and psychedelics-focused law firm based in Fort Lauderdale, Florida. ‘If New York truly wants to create jobs and a robust legal market, it will need to reduce taxes, provide entry points for black market participants and educate the public on the value of consuming third-party tested legal product rather than non-tested black-market product.’ ... ‘Government should let the marketplace mature, temper taxation for the first few years and the black-market will be priced out more quickly.’”); Lawrence & Purnell, *supra* note 56 (“Many view marijuana legalization as a potential windfall for state budgets. Accordingly, states have sought to identify tax rates, licensing rates and other fees that extract the maximum revenue from the industry to fund unrelated government projects ranging from education to infrastructure improvement. But by raising the price of marijuana for consumers, these costs undermine a major competing purpose of legalization: elimination of the black market.”); Walsh, *supra* note 34 (“Cameron Wald, the Executive Vice President for California marijuana company Project Cannabis, claims that ‘if you’re a consumer and you can go somewhere and get 40 percent less price for what they think is the same product, you’re going to go there.’”); Williams, *supra* note 38 (“According to data from Perfect Price, the average dispensary in Oregon is charging \$214 per ounce for marijuana, the lowest rate for a state in the country. Comparatively, though, the black market price for marijuana averages just \$191 per ounce in Oregon, or an 11% discount to the legal dispensary pricing.”). Cannabis firms also must pay federal income taxes but cannot deduct ordinary business expenses because they sell a product that federal law deems contraband. Williams, *supra* note 38. Ironically, a tax rate that is too low also creates problems because it encourages use by cost-sensitive cannabis parties that society should deter from using cannabis: minors and heavy users. See JONATHAN P. CAULKINS ET AL., RAND CORP., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 62 (2015) (“For most consumer goods, lower prices are a cause for celebration, but, if consumers are vulnerable to overindulging, low prices might be problematic. For example, some view innovation that has led to very low prices for soda pop, junk food, and candy to be a curse, not a blessing, for the American public.”); Kamin, *supra* note 57, at 229–30 (noting that a “drop in the price of marijuana is a significant cause for concern” because, *inter alia*, it “could result in a dramatic increase of youth consumption rates”); Paul J. Larkin, Jr., *Cannabis Capitalism*, 69 BUFF. L. REV. 215, 262 (2021) (“‘Cannabis consumption, like alcohol consumption, follows the so-called 80/20 rule (sometimes called ‘Pareto’s Law’): 20 percent of the users account for 80 percent of the volume.’ Professor Caulkins made the same point from another direction. ‘[D]aily users are thought to consume (on average) the equivalent of three to four joints per day.’”) (footnotes and citation omitted); Larkin, *Gummy Bears*, *supra* note 10, at 315–16 (“One point on which everyone has agreed is that marijuana should not be peddled to children. Perhaps that is because the supporters of marijuana liberalization believe that arguing for marijuana to be treated in the same manner as alcohol—viz., lawfully sold but regulated—is an easier political sell than complete legalization. Perhaps that is because proponents of liberalization know that the political blowback from any proposal that would allow minors free access to marijuana would

sink their efforts to legalize adult marijuana use. Or perhaps it is because of something else entirely. Regardless, despite the well-known adage that advocates for any principle tend to push it to the extreme limit of its logic, no one argues today that minors should be free to use marijuana in the same manner as adults. Even states that allow marijuana to be sold to adults for recreational purposes deny minors that privilege.”) (footnotes omitted); *Reeferregulatory Challenge*, *supra* note 5 (“[T]he available evidence persuades many supporters of legalisation that cannabis consumption should still be discouraged. The simplest way to do so is to keep the drug expensive; children and heavy users, both good candidates for deterrence, are particularly likely to be cost sensitive.”).

61. See, e.g., Alex Baltzegar, *Legalizing Medical Marijuana Is First Bill Filed in NC Senate*, CAROLINA J., Jan. 25, 2023, <https://www.carolinajournal.com/legalizing-medical-marijuana-is-first-bill-filed-in-nc-senate/> (“Sen. Bill Rabon, R-Brunswick, has filed the NC Compassionate Care Act (S. B. 3), a bill that legalizes medical marijuana. It was the first bill filed in North Carolina’s state Senate on Wednesday, the first day of bill filing. Sens. Michael Lee, R-New Hanover, and Paul Lowe, D-Forsyth are also primary sponsors. [¶] Earlier this year, Rabon was reappointed as chairman of Senate Rules and Operations, the most powerful committee in the Senate, by Senate Leader Phil Berger, R-Rockingham. Rabon is widely regarded as one of the most powerful and effective state legislators in North Carolina.”).
62. See GOLDSTEIN & SUMNER, *supra* note 16, at 46 (“In the preregulation legal medical weed market [in California], the preexisting level of state oversight had often amounted to little more than a wink and a nod.”).
63. For an excellent summary of the state of cannabis regulation, see GOLDSTEIN & SUMNER, *supra* note 16, at 45–48. See also, e.g., Kevin Rector, “*The War on Drugs Part II: California Taxes, Rules Are Killing Small Legal Weed Farms*,” L.A. TIMES, Dec. 29, 2022 (“Across California’s legal cannabis industry, small operators are facing financial ruin. [¶] The farmers say they support regulations that ensure their weed is safe for consumers. But they object to rules that nitpick their farming practices and needlessly drive up their costs—rules that their illegal competitors don’t follow. [¶] In addition to paying cultivation and excise taxes, state licensing fees and other upfront costs, legal cannabis farmers have been forced to comply with intense tracking and testing regimens and an array of bureaucratic rules that dictate how they can farm their crop—some of which state officials have conceded are excessive and have begun to walk back. One that the state eliminated had required farmers to weigh every one of their plants individually. Another restricted outdoor farmers’ use of ‘light deprivation,’ a traditional farming method to limit the amount of sunlight plants get in the field. ... Brian Roberts, of Homestead Collective Weed Co., tallied up what he said were \$24,000 in taxes and fees ‘prior to even planting’ any crops, which he said may be ‘great for the county, but it’s killed the entire Humboldt County cannabis industry.’”).
64. GEORGE WILL, *THE CONSERVATIVE SENSIBILITY* 134 (2019).
65. See, e.g., Zamost et al., *supra* note 39 (“A team of CNBC producers carrying hidden cameras visited 10 illegal cannabis dispensaries across LA. Some allow open consumption of weed. Others offer free cannabis for a positive review on Weedmaps, an online listing of legal and illegal cannabis businesses around the country. Others are open past 10 p.m. None of this is allowed under state regulations. [¶] And despite a legal limit on the daily amount of cannabis stores are allowed to sell, there’s no limit in many of the illegal stores. [Los Angeles City Attorney Mike Feuer’s] office ... has used civil litigation to go after illegal stores, with a recent lawsuit against one dispensary, which he said was selling cannabis laced with a type of pesticide used on golf courses. The case is pending. [¶] ‘I do not think your viewers who buy marijuana are aware of the grave risks associated with buying marijuana at a location that does not test its product,’ he said.... Cannabis industry attorney David Welch said he doubts these [California enforcement] efforts will have much impact. [¶] ‘What you find are dispensaries not being enforced against,’ Welch said. ‘Even when they’re enforced against, they simply go and open up the next day because the penalties are so low it doesn’t dissuade them from violating the law because the profit they’re making is so much more.’ [¶] The penalties are largely misdemeanors so if a store is shut down, there is an incentive to reopen since it’s likely there will only be a fine, he said.”)
66. See, e.g., GOLDSTEIN & SUMNER, *supra* note 16, at 45–48.
67. See, e.g., James, *supra* note 8 (“In a classic case of diminishing returns, if even 75 percent of smokers can be enticed into the legal market, a state will capture the majority of the possible revenue from marijuana. But if the Washington survey is even generally right, creating a system that entices every buyer to participate would require setting taxes so low that revenue from the whole system would plummet. For states, eradicating the last stubborn traces of the black market may in fact carry little positive incentive.”) (emphasis in original); Lawrence & Purnell, *supra* note 56 (“A central question is the degree to which marijuana excise taxes approach or exceed the risk premium necessary to compensate producers and consumers for their decision to participate in black market transactions. Policymakers looking to minimize illicit markets must determine the level of taxation that would discourage consumers and producers alike from seeking black market alternatives, while still ensuring that tax rates cover the costs of regulatory enforcement.”); Meadows, *supra* note 44, at 10 (“A key takeaway from the early dominance of the black market is that states have failed to find a good balance in regulatory decisions. For example, California’s barriers to entry are too high, which incentivizes both growers and consumers to choose the black market. Oregon’s barriers to entry were so low that it created oversupply problems and ended up fueling the state’s black market as growers began selling to other states for higher profits.”) (footnotes omitted).
68. N.Y. Off. of Cannabis Mgmt., Licensing (Undated; last accessed Feb. 14, 2014), <https://cannabis.ny.gov/licensing>.
69. Jason L. Riley, *How Legalizing Pot in New York City Became a Farce*, WALL ST. J., Feb. 14, 2023, https://www.wsj.com/articles/legalizing-pot-doesnt-repeal-the-law-of-unintended-consequences-marijuana-drug-dealer-weed-minorities-dispensary-505781d8?mod=opinion_lead_pos8.
70. *Id.*
71. See Lawrence & Purnell, *supra* note 56.

72. See, e.g., Natalie Fertig, *How Legal Marijuana Is Helping the Black Market*, POLITICO, July 19, 2021, <https://www.politico.com/magazine/story/2019/07/21/legal-marijuana-black-market-227414/> (noting that “one widespread side effect of marijuana legalization” is that “[i]n many cases it has fueled, rather than eliminated, the black market. In Los Angeles, unlicensed businesses greatly outnumber legal ones; in Oregon, a glut of low-priced legal cannabis has pushed illegal growers to export their goods across borders into other states where it’s still illegal, leaving law enforcement overwhelmed. Three years after Massachusetts voters approved full legalization of marijuana, most of the cannabis economy consists of unlicensed ‘private clubs,’ home growing operations and illicit sales.”); Larkin, *supra* note 20, at 572 n.193 (collecting authorities); Walsh, *supra* note 34 (“[W]eed exportation across state lines has become more commonplace. In Oregon, a glutted legal market has yielded low prices and tiny profit margins for many marijuana cultivators, prompting them to send their weed across state lines to turn a better profit. Because of the Idaho’s [*sic*] proximity to Oregon, Idaho state troopers have reported confiscating more marijuana than usual. Drug enforcement authorities in Colorado also remain hard at work finding individuals growing more weed than the state permits and sending it across the border: In May 2019, authorities seized over 80,000 cannabis plants from people who had exceeded the state law’s 12-plant limit and intended to export the surplus across state lines. Marijuana growers in one of the 11 legal states who want to make an extra buck can and have grown more plants than what state law sanctions and have sold the surplus.”).
73. See, e.g., Halperin, *supra* note 56 (“Because these companies don’t adhere to the complex regulations covering everything from security to product testing, they can undersell their law-abiding counterparts by up to 50%, according to Bryce Berryessa, the president of the licensed California cannabis company La Vide Verde.”).
74. See, e.g., *Reeferregulatory Challenge*, *supra* note 5 (“To live outside the law, Bob Dylan memorably if unconvincingly claimed, you must be honest; to live inside it you must be regulated. Ms Vander Veer [president of the Medicine Man cannabis dispensary] points to a ‘two-inch thick’ book of rules applicable to Medicine Man’s business.”). Adults will purchase from an illicit market for other reasons as well, such as convenience, familiarity, delivery services, thrill-seeking, and the lack of a cap on quantity purchased or psychoactive content. Minors resort to illicit markets because for them, it is the only available source of weed. See Meadows, *supra* note 44, at 16–18; Williams, *supra* note 50. For some people, what is particularly valuable about the black market is the low-profile nature of purchases. Williams, *supra* note 50 (“Like every other kind of retail store, some dispensaries gather far more personal information than they actually need, and often more than customers are aware they are logging. Email addresses, phone numbers, shopping patterns and history may be kept in a customer database. Some outlets permit buyers to decline this collection, or require it only as part of customer loyalty programs. [¶] Cameras and video recordings are ubiquitous at legal dispensaries, too, and state laws often require recordings of everyone coming and going. [¶] With mixed-legal status of cannabis, many consumers may simply not want their identities in these dispensary systems. Aside from the core medical privacy concerns, people may assume that their employers, their families, their landlords, and law enforcement might disapprove of their consumption whether it’s legal or not. [¶] For those folks, buying from a black market entrepreneur—who requires no such proof of identity—may be preferable on privacy grounds alone.”).
75. See Kamin, *supra* note 57, at 243 (“One important question going forward, however, is to what extent [exported] Colorado marijuana is merely replacing imported marijuana elsewhere in the country, and to what extent the availability of Colorado marijuana is creating demand that did not previously exist.”).
76. See *id.* at 243–44.
77. See Alex Berenson, *Marijuana Is More Dangerous Than You Think*, 116 Mo. MED. 88, 88 (Mar.–Apr. 2019) (“[T]he number of Americans who use cannabis heavily is soaring. In 2006, about 3 million Americans reported using the drug at least 300 times a year, the standard for daily use. By 2017, that number had increased to 8 million—approaching the 12 million Americans who drank every day. Put another way, only one in 15 drinkers consumed alcohol daily; about one in five marijuana users used cannabis that often.”); Brake, *supra* note 47 (“According to the Oklahoma Department of Mental Health and Substance Abuse Services (ODMHSAS), marijuana consistently ranks third, behind only methamphetamine and alcohol, when those being admitted for addiction treatment are asked what is their primary drug of abuse. A report by the Oklahoma Bureau of Narcotics cited data showing that 14 percent of all addiction treatment admissions in 2015 were due primarily to marijuana habits.”); Larkin, *Cannabis Capitalism*, *supra* note 60, at 257–58 (“Approximately ten percent of the people who ever smoke marijuana become dependent on it, but that risk goes up for someone who uses cannabis frequently, particularly when regular use began during adolescence.”).
78. See Larkin, *Gummy Bears*, *supra* note 10, at 328–31 (“Of particular concern in the case of minors is the neurophysiological effect that THC has on the juvenile brain. According to one textbook, ‘[g]rowing evidence suggests that marijuana use during adolescence affects normal physiological maturation processes in the frontal cortex.’ Those adverse effects could be a contributory factor to future problems with executive functioning and impulse control, including substance use disorders. [¶] Since the 1960s, scientists have discovered that the human brain maturation process extends into a person’s mid-twenties as the brain creates neurons while pruning and reorganizing neural pathways for efficient use by adults. The process of ongoing development is particularly important in connection with the prefrontal cortex, the region responsible for higher mental functions such as reasoning, judgment, and decision-making. Given the labile state of the adolescent brain, and depending on the dose and frequency of use, a minor’s use of a psychoactive substance like THC is likely to have adverse physical and mental effects that would not occur in an adult or, even if they did, would not be present to the same degree. The result hampers development of higher-order mental states necessary for mature reasoning and planning. [¶] Those adverse effects can manifest themselves in several ways. As the American Academy of Pediatrics has noted, numerous published studies have established the harmful short- and long-term effects suffered by minors—from infants to adolescents—resulting from unwitting THC consumption or heavy, long-term marijuana use. Aside from intoxication, the range of effects include: decreased concentration, attention span, diminished judgment, reaction time, tracking ability, and problem-solving skills, which hampers driving ability; short-term memory loss; respiratory deficits or arrests; and increased risk of mental health disorders such as psychosis and depression.”) (footnotes omitted).
79. See, e.g., Larkin, *Cannabis Capitalism*, *supra* note 60, at 259–60 (“According to cannabis experts Wayne Hall and Rosalie Pacula, ‘the following rules of thumb’ are useful in determining the likelihood of dependence: The risk is one in ten for people who have ever used cannabis. Using the drug on more

than a few occasions increases the risk to between one in five and one in three. Use it daily and the risk jumps to approximately one in two. The risk is even higher for someone who begins marijuana use during adolescence, given the labile nature of the adolescent brain. [¶] To be sure, the risk of addiction to someone who samples any psychoactive drug is low, and cannabis is not as addictive as other drugs, such as nicotine, heroin, cocaine, or alcohol. But a 10 percent risk of dependency is far from trivial for anyone, and knowingly accepting a 50 percent risk of dependency—a mere coin flip—would legally be deemed reckless behavior. The risk to society from cannabis dependency is also considerable. Marijuana is the most widely available and used illicit drug. As such, even a one-in-ten chance of becoming dependent, let alone a 50-50 chance, means that a sizeable number of people will likely suffer from that condition.”) (footnotes omitted).

80. Felbab-Brown, *supra* note 42; Rector, *supra* note 62 (noting that the illicit market “is causing labor and environmental catastrophes across the state.”); *see also, e.g.*, Berenson, *supra* note 77, at 89 (“Before states legalized recreational cannabis, advocates predicted that legalization would let police focus on hardened criminals rather than on marijuana smokers, and thus reduce violent crime. Some advocates even claim that legalization has reduced violent crime: In a 2017 speech calling for federal legalization, Sen. Cory Booker (D, NJ) said that ‘these states are seeing decreases in violent crime.’ [¶] But Mr. Booker is wrong. The first four states to legalize marijuana for recreational use were Colorado and Washington in 2014 and Alaska and Oregon in 2015. Combined, those four states had about 450 murders and 30,300 aggravated assaults in 2013. In 2017, they had almost 620 murders and 38,000 aggravated assaults—an increase far greater than the national average.”); Felbab-Brown, *supra* note 42 (“U.S. states where recreational cannabis use has been legalized have all needed to grapple with the persistence of large black markets in cannabis and to generate substantial resources to countering it. In the city of Durango, Colorado, alone, for example, almost US \$80,000 was dedicated to maintaining compliance with the state’s marijuana laws and dismantling illegal grows. That money goes to training of officers since the complexity of the marijuana laws does not make identifying all violations easy, as well as to communication and forced-entry equipment. Enforcement doesn’t come cheaply anywhere. It requires criminal investigators, enforcement program managers, dedicated district attorneys, zoning enforcement officers, environmental officers, crime analysts, deputy sheriffs, and community services officers. In California’s Stanislaus County, revenues from the legal cannabis industry generated an estimated US \$3.1 million in the 2019–20 budget year, while the county’s cannabis-related costs amounted to US \$1.4 million. But in fiscal year 2020–21, the anticipated cannabis-related costs for the county reached US \$3.2 million while revenues were not expected to increase from US \$3.1 million, an actual loss for the county.”); Matthew Ormseth, *Killings, Robberies, Extortion. California Can’t Stop Its Booming Illegal Cannabis Stores*, L.A. TIMES, Sept. 13, 2022 (“Unlicensed dispensaries have become hotbeds of crime. Sometimes the operators are the perpetrators, authorities say, selling cocaine and methamphetamine alongside cannabis. At other times, they are the victims. In August 2021, a man was gunned down in the doorway of the illegal dispensary he ran in East Los Angeles.”).
81. *See* Paul J. Larkin, *Driving While Stoned in Virginia*, 59 AM. CRIM. L. REV. ONLINE 1, 7–10 (2022) (“Like alcohol, THC impairs a driver’s ability to handle a vehicle safely. That effect does not automatically or rapidly dissipate. It can last for hours; in long-term heavy users, it can last for up to several weeks. Unfortunately, a goodly number of users reported driving under the influence of cannabis. What is worse, a considerable number of individuals believe that cannabis use does not impair their ability to drive safely (or actually improves their driving skills), a conclusion that is demonstrably false. Atop that, a large number of people who use cannabis combine it with alcohol. The psychoactive ingredient in each drug—THC and ethanol, respectively—amplifies the effect of the other, making a cocktail of the two a particularly dangerous combination. Given the recent increase in cannabis use by drivers, cannabis-impaired driving threatens to undermine our successes over the last four decades in reducing alcohol-impaired driving fatalities.”) (footnotes omitted); *id.* at 7 n.24 (collecting authorities). For a recent conclusion to that effect, *see* Samantha Marinello & Lisa M. Powell, *The Impact of Recreational Cannabis Markets on Motor Vehicle Accident, Suicide, and Opioid Overdose Fatalities*, 320 SOC. SCI. & MED. 115680, at 6 (2023) (“The results for motor vehicle accidents revealed statistically significant increases in deaths in Colorado, Oregon, Alaska, and California of 16%, 22%, 20%, and 14% respectively; the estimated effects for Washington, Nevada, and Massachusetts were mixed and not statistically significant.”). *See also, e.g.*, EUROPEAN MONITORING CNTR. FOR DRUGS AND DRUG ADDICTION, DRUGS USE, IMPAIRED DRIVING AND TRAFFIC ACCIDENTS 33–41 (2d ed. 2014); NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., MARIJUANA, ALCOHOL, AND ACTUAL DRIVING PERFORMANCE 39–40 (1999); Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, 59 CLIN. CHEMISTRY 478, 478 (2013) (“Epidemiologic data show that risk of involvement in a motor vehicle accident (MVA) increases approximately 2-fold after cannabis smoking.”); Robert L. DuPont et al., *Marijuana-Impaired Driving: A Path Through the Controversies*, in CONTEMPORARY HEALTH ISSUES ON MARIJUANA 183, 186 (Kevin A. Sabet & Ken. C. Winters eds., 2018) (“Today there is a wealth of evidence that marijuana is an impairing substance that affects skills necessary for safe driving.”).
82. *See, e.g.*, GOLDSTEIN & SUMNER, *supra* note 16, at 43 (noting that some interstate illegal cannabis transporters are connected with the Mexican drug cartels); Rene Chun, *Ending Weed Prohibition Hasn’t Stopped Drug Crimes*, ATLANTIC, Jan./Feb. 2019, <https://www.theatlantic.com/magazine/archive/2019/01/california-marijuana-crime/576391/> (“Legalizing pot was supposed to reduce crime, or so advocates argued. ... Talk to authorities in California’s Emerald Triangle, though, and a different story emerges. This 10,000-square-mile area (which includes Humboldt, Mendocino, and Trinity Counties) by some estimates grows 60 percent of the country’s marijuana.”).
83. *See* Jon Michael Raasch, *Chinese Nationals Operate Nearly Every Illegal Indoor Marijuana Farm in the Largest US County, Sergeant Says*, FOX NEWS, Mar. 2, 2023, <https://www.foxnews.com/us/chinese-nationals-operate-nearly-illegal-indoor-marijuana-farm-largest-us-county-sergeant-says>.
84. *See, e.g.*, JOHN NORES, JR. & JAMES A. SWAN, *WAR IN THE WOODS: COMBATting THE MARIJUANA CARTELS ON AMERICA’S PUBLIC LANDS* viii–ix (2010) (“Bad dudes—organized crime syndicates, primarily Mexican drug cartels—cultivate these gardens [on public lands]. Unlike the flower children pot growers of the 1960s and 1970s, drug cartel-sponsored marijuana farmers are well armed and not afraid to protect themselves and their gardens with firepower and booby traps.”); Chun, *supra* note 82 (“Legalizing pot was supposed to reduce crime, or so advocates argued. ... Talk to authorities in California’s Emerald Triangle, though, and a different story emerges. This 10,000-square-mile area (which includes Humboldt, Mendocino, and Trinity Counties) by some estimates grows 60 percent of the country’s marijuana. Ben Filippini, a deputy sheriff in Humboldt, told me that ever since California’s 1996 medical-marijuana initiative, violent crime in his jurisdiction has increased: ‘People are getting shot over this plant. All legalization did here was create

a safe haven for criminals.' When I asked Trinity County's undersheriff, Christopher Compton, what's happened since a 2016 initiative legalized pot in the state, he said: 'We haven't seen any drop in crime whatsoever. In fact, we've seen a pretty steady increase.' Compton's counterpart in Mendocino, Matthew Kendall, agreed: 'We're seeing more robberies and more gun violence.'"); Meadows, *supra* note 44, at 12 ("In 2017, Denver law enforcement officials considered seven of the city's fifty-six homicides as marijuana-related. Additionally, '[t]he U.S. Attorney's Office in Denver classified one-third of its 2017 marijuana cases as violent.' Further, Ray Padilla, a drug agent, stated that he 'encountered more weapons in marijuana locations than any other type of drug.'") (footnotes omitted); *id.* at 12–13 ("Public safety is further threatened by the possible existence of drug cartels in states that have legalized. Colorado's Department of Public Safety reported '31 organized crime case filings in 2012 and 119 in 2017,' suggesting an increase in criminal enterprises since legalization. Officials believe that criminal organizations, including groups tied to Mexican and Cuban drug cartels, are flocking to Colorado in an attempt to capitalize on the high profit margins.") (footnotes omitted).

85. St. John, *Legal Weed Reality*, *supra* note 37; *id.* ("At this hour and distance, serene hues cloak the rugged enclave of Mount Shasta Vista, a tense collective of seasonal camps guarded by guns and dogs where the daily runs of water trucks are interrupted by police raids, armed robberies and, sometimes, death. ... Rogue cultivation centers like Mount Shasta Vista now engulf rural communities scattered across the state, as far afield as the Mojave Desert, the steep mountains on the North Coast, and the high desert and timberlands of the Sierra Nevada. [¶] Residents in these places describe living in fear next to heavily armed camps. Criminal enterprises operate with near impunity, leasing private land and rapidly building out complexes of as many as 100 greenhouses. Police are overwhelmed, able to raid only a fraction of the farms, and even those are often back in business in days."); see also, e.g., Staff, *Fighting Drug Cartels in California's Emerald Triangle*, CRIME REP., Aug. 14, 2017, <https://thecrimereport.org/2017/08/14/fighting-drug-cartels-in-californias-emerald-triangle/> ("While pot legalization has been celebrated in many quarters, it has also engendered an illegal grow industry powered by criminal cartels that developed to meet the increased demand, ... These growers are all armed. They arrive not long after the snow melts and stay on site 24/7 until the crop is harvested. And they are fueling violence. If growers from two different groups decide to grow on the same area, they settle the claim with guns, burying the dead in the woods. Illegal growers also shoot at outdoor recreationists. ... Cartel-run illegal pot gardens have been found in 20 other states and 67 national forests. Today, illegal marijuana gardens on both private and public wildlands typically have 5,000 to 30,000 plants According to DEA Agents and California game wardens, a cartel 'owns' every national forest, national park, state park, and wildlife refuge in the state. [¶] California has the most cartel-run illegal pot gardens, but they've been found in 20 other states and 67 national forests. The Emerald Triangle situation may well be a sign of what's to come."). And don't forget the violence that cannabis-induced schizophrenia can cause. See ALEX BERENSON, TELL YOUR CHILDREN: THE TRUTH ABOUT MARIJUANA, MENTAL ILLNESS, AND VIOLENCE (2019); Berenson, *supra* note 77, at 88 ("None of these studies prove that rising cannabis use has caused population-wide increases in psychosis or other mental illness, although they do offer suggestive evidence of a link. What is clear is that, in individual cases, marijuana can cause psychosis, and psychosis is a high risk factor for violence. What's more, much of that violence occurs when psychotic people are using drugs. As long as people with schizophrenia are avoiding recreational drugs, they are only moderately more likely to become violent than healthy people. But when they use drugs, their risk of violence skyrockets. The drug they are most likely to use is cannabis. [¶] The most obvious way that cannabis fuels violence in psychotic people is through its tendency to cause paranoia. Even marijuana advocates acknowledge that the drug can cause paranoia; the risk is so obvious that users joke about it, and dispensaries advertise certain strains as less likely to do so. But for people with psychotic disorders, paranoia can fuel extreme violence. A 2007 paper in the *Medical Journal of Australia* looked at 88 defendants who had committed homicide during psychotic episodes. It found that most of the killers believed they were in danger from the victim, and almost two-thirds reported misusing cannabis—more than alcohol and amphetamines combined.").
86. GOLDSTEIN & SUMNER, *supra* note 16, at 134.
87. See *California's Marijuana Paradise Lost*, *supra* note 43 ("Marijuana advocates told us that legalizing the drug would curb the black market. We're still waiting. The opposite has happened in California, where a glut of illegal weed is undercutting legal purveyors. Now progressives are proposing an interstate compact to export their pot and rescue the industry. ... Imagine if Texas were to form an interstate compact to sell firearms that are illegal under federal law. Some conservatives argue that states should be allowed to regulate pot within their borders. But California is proposing an interstate market to sell a product that is illegal under federal law, if the Biden Administration chose to enforce it. None of this is working like the pot promoters promised."); Dixon, *supra* note 40 ("Currently, black markets in the United States for marijuana thrive due to the imbalance of regulations across the country. If legalization were to occur on a federal level, black markets would not disappear. Black markets will thrive as long as they are making money. Since a goal of legalization is to make money off taxes, illicit markets will persist because their product is cheaper.").
88. JOHN KAPLAN, THE HARDEST DRUG: HEROIN AND PUBLIC POLICY 167 (1983).
89. *Id.*
90. See Berenson, *supra* note 77, at 88 ("[T]hey are consuming cannabis that is far more potent than ever before, as measured by the amount of THC it contains. THC, or delta-9-tetrahydrocannabinol, is the chemical responsible for the drug's psychoactive effects. In the 1970s, most marijuana contained less than 2% THC. Today, marijuana routinely contains 20–25% THC, thanks to sophisticated farming and cloning techniques, and to the demand of users to get a stronger high more quickly. In states where cannabis is legal, many users prefer extracts that are nearly pure THC."). See generally Larkin, *supra* note 13.
91. See Pacula, *supra* note 43 ("Along with health benefits, cannabis can have negative health effects when potency goes unchecked. High-potency products can generate acute psychosis, cyclical vomiting and accidental poisoning, not to mention addiction.").
92. See, e.g., U.S. FOOD & DRUG ADMIN., FDA REGULATION OF CANNABIS AND CANNABIS-DERIVED PRODUCTS, INCLUDING CANNABIDIOL (CBD) (Oct. 16, 2019); U.S. FOOD & DRUG ADMIN., WHAT YOU NEED TO KNOW (AND WHAT WE'RE WORKING TO FIND OUT) ABOUT PRODUCTS CONTAINING CANNABIS OR CANNABIS-DERIVED COMPOUNDS, INCLUDING CBD (July 17, 2019).

93. 21 U.S.C. §§ 301–392 (2018).
94. With certain exceptions for “dietary supplements,” a “drug” is defined as “(A) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).” 21 U.S.C. § 321(g)(1).
95. See 21 U.S.C. § 393(d)(1)(2).
96. “The term ‘new drug’ means (1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a ‘new drug’ if at any time prior to June 25, 1938, it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or [¶] (2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.” 21 U.S.C. § 321(p)(1) & (2); 21 C.F.R. § 310.3(h) (2021).
97. See, e.g., HHS Sec’y Alex M. Azar II, Remarks on Surgeon General’s Marijuana Advisory, Press Conf. (Aug. 29, 2019), <https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-surgeon-general-marijuana-advisory.html> (“Especially as the potency of marijuana has risen dramatically over the past several decades, we don’t know everything we might want to know about this drug. But we do know a number of things: It is a dangerous drug. For many, it can be addictive. And it is especially dangerous for adolescents and pregnant women, because of what we know about how it affects the developing brain. We need to be clear: Some states’ laws on marijuana may have changed, but the science has not, and federal law has not.”) (internal paragraphing omitted); Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 849 (2017) (noting the long-standing consensus that the states regulate “medical *practice*—the in-person, hands-on work of physicians and other health care professionals with their patients—while the federal government regulates the distribution of medical *products*, including drugs.”) (footnote omitted).
98. See Paul J. Larkin, Jr., *States’ Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a “States’ Rights” Issue*, 16 GEO. J.L. & PUB. POL’Y 495 (2018).
99. As Oregon already has. See, e.g., Thomas Hogan, *Experiment in Chaos: Oregon’s Decriminalization of Drug Possession Is Proving Disastrous*, CITY J., July 21, 2022, <https://www.city-journal.org/oregons-disastrous-drug-experiment>: “In 2020, Oregon became the first state to decriminalize possession of drugs, including hard drugs. Portland district attorney Michael Schmidt gleefully announced that his office would immediately stop prosecuting drug possession even before the law went into effect, saying, ‘Past punitive drug policies and laws resulted in over-policing of diverse communities, heavy reliance on correctional facilities and a failure to promote public safety and health.’ Less than two years later, Oregon is suffering through the predictable results of this experiment: overdoses are skyrocketing, violent crime is rising, and virtually nobody is getting treatment. ... Criminal-justice reformers garnered support for the bill by claiming that it would reduce both addiction and alleged racial disparities in the criminal-justice system. A solitary dissenter, Paul Coelho, a physician with Salem Health Hospitals and Clinics, said, ‘The framers of ballot Measure 110 portray individuals with active addictions as rational actors who will naturally seek out and accept treatment for their condition. But I can assure you as a front-line provider this is simply not true. ... Unfortunately, removing the threat of incarceration and abandoning the collaboration between law enforcement, the judiciary, probation, and the drug court system will result in a revolving door of drug abuse, treatment refusal, crime, homelessness, and ongoing costly health related expenditures for hospitalizations due to overdose, infections, and drug-induced psychosis.’ [¶] Oregon should have listened. On the issue of reducing addiction and overdoses, Oregon’s decriminalization of drug use has been a tragic failure. Overdose deaths rose by over 33 percent in Oregon in 2021, the year after the law was passed, compared with a rise of 15 percent in the rest of the United States. As for the claim that the law would provide a pathway to treatment for addicts, less than 1 percent of the people eligible for treatment under Measure 110—a paltry 136 people—ended up getting help. In fact, out of the 2,576 tickets written by police for drug possession, only 116 people called the help hotline to get the ticket waived, with the vast majority of the others choosing to pay the minimal fine instead. As Coelho warned, without the threat of incarceration and the mandatory court programs that come with an arrest, addicts seldom have any interest in getting treatment. [¶] The impact of decriminalizing drugs did not stop with addiction and overdoses. Police in Portland report that all categories of crime jumped in reaction to Measure 110. Drug addicts need money; they got it by stealing items and reselling them, so property crimes rose. Once a drug market opens up, drug dealers move in to service it. As a result, the streets of Portland are awash in guns and drugs. With drug dealers battling for turf, gun violence increased. Portland recorded 90 homicides in 2021, shattering the old record for annual murders in the city. ‘We’ve seen more guns than we’ve ever seen in our investigations,’ a Portland police supervisor bluntly stated. ‘Almost everybody is armed. ... Criminal organizations are robbing other criminal organizations. That’s kind of our big push right now—trying to stop the gun violence and the drug violence that goes with it, because they’re hand in hand. It’s not one or the other. It’s not related to the pandemic, it’s not related to Covid, it’s because we have a criminal environment that’s tolerated and allowed to flourish here.’”
100. *Id.*