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CANNABIS AT THE CROSSROADS: A TRANSDISCIPLINARY ANALYSIS AND POLICY PRESCRIPTION

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ABSTRACT

Cannabis has returned to the mainstream in recent years after an interlude of legal prohibition and partial societal stigmatization. 2019 U.S. state-legal cannabis sales have been estimated at \$13.6 billion with predictions for sales to near \$30 billion by 2025. The global market for cannabis products—including a range of products produced from non-psychoactive hemp—could approach hundreds of billions of dollars annually. At the same time, the legal cannabis industry faces significant challenges in the United States; legalization has been uneven, with disparities among states, and federal law continues to impose obstacles to predictability in the nationwide market for cannabis.

Conflicts between U.S. federal and state laws regarding cannabis are numerous. Federal law treats most forms of cannabis as illegal, yet 97.7% of the U.S. population—located in 47 states, the District of Columbia, and 4 U.S. territories—are living in jurisdictions where medical or recreational use of cannabis, including cannabidiol (CBD) oil, is now legal.

This Article takes a transdisciplinary approach and proceeds in eight parts. First, we explore the history of cannabis including its earliest uses, noting periodic prohibitions. Second, we look at applicable current U.S. federal statutes, both criminal and non-criminal. Third, we consider the legalization approaches and experiences in the states. Fourth, we look at the Canadian experience including national recreational market legalization in 2018. Fifth, we examine the ethical issues around recreational and medical marijuana use. Sixth, we describe the future outlook for cannabis businesses in terms of both market potential and regulation. Seventh, we describe congressional proposals to change federal laws on cannabis. Eighth, we then draw upon these various perspectives to arrive at a policy prescription. And last, we conclude.

Keywords: Agricultural Act, business, cannabis, CBD, controlled

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substance, criminal justice, decriminalization, drug policy, entrepreneurship, ethics, Farm Bill, FDA, federalism, hemp, legalization, legislation, localism, marihuana, marijuana, medical marijuana, policy, preemption, prohibition, regulation

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There has been a dramatic shift in Americans' views of cannabis in recent years. Polling shows that about 65% of Americans support legalization of marijuana. 93% of the American public support medical marijuana. In fact, majorities of both parties support legalization. In a time when all the talk is about how divided we are in a country, we are remarkably united on this issue.

This disconnect between federal and state marijuana laws has become, as the Attorney General has testified, both "intolerable" and "untenable."

Cory Gardner
U.S. Senator, Colorado¹

I. OVERVIEW

Cannabis has made a significant return to the mainstream in recent years after an interlude of legal prohibition and partial societal stigmatization. 2019 U.S. state legal cannabis sales have been estimated at \$13.6 billion, with predictions for sales to near \$30 billion by 2025.² The global market for cannabis products—including a range of products derived from non-psychoactive hemp—could approach hundreds of billions of dollars annually. At the same time, the legal cannabis industry faces significant challenges due to the uneven and inconsistent progress made towards expanded legalization and the burden of meeting the expectations of regulators, investors, and customers.

Conflicts between U.S. federal and state laws regarding cannabis are numerous. Federal law treats most forms of cannabis as illegal, yet 97.7% of the U.S. population—located in forty-seven states, the District of Columbia, and four U.S. territories—are living in jurisdictions where medical or recreational use of cannabis, including cannabidiol (CBD) oil, has been legalized.³

1. Press Release, U.S. Senator Cory Gardner of Colorado, Gardner Testifies at First Senate Banking Committee Hearing on Cannabis Challenges (July 23, 2019), <https://justfacts.votesmart.org/public-statement/1361768/gardner-testifies-at-first-senate-banking-committee-hearing-on-cannabis-challenges>.

2. New Frontier Data, *Ten Intriguing Statistics from 2019*, NEW FRONTIER DATA (Dec. 15, 2019), <https://newfrontierdata.com/marijuana-insights/2019-year-in-review/>.

3. Press Release, Congressman Ed Perlmutter, Safe Banking Act Passes U.S. House of Representatives With Overwhelming, Bipartisan Support (Sept. 25, 2019), <https://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=4657>.

This Article takes a transdisciplinary approach and proceeds in eight parts. First, we explore the history of cannabis, including its earliest uses and relatively recent interludes of prohibition and legalization.⁴ Second, we look at applicable U.S. federal statutes, both criminal and non-criminal.⁵ Third, we consider legalization approaches and experiences in the states.⁶ Fourth, we look at the Canadian experience, including national recreational market legalization in 2018.⁷ Fifth, we examine the ethical issues around recreational and medical marijuana use.⁸ Sixth, we describe the future outlook for cannabis businesses in terms of both market potential and regulation.⁹ Seventh, we describe congressional proposals to change federal laws on cannabis.¹⁰ Eighth, we draw upon these various perspectives to arrive at a policy prescription.¹¹ And last, we conclude.

II. CANNABIS HISTORY

A. *Cannabis sativa L.*

Marijuana and hemp are both varieties of the plant *Cannabis sativa L.* A “primary difference between hemp and marijuana is the concentration of delta-9-tetrahydrocannabinol (THC),”¹² one of at least 113 cannabinoids found in *Cannabis sativa L.* and the principal psychoactive constituent of cannabis. With its higher THC content, marijuana is distinguished from hemp by its intoxicating effects as well as the differences in uses and cultivation practices.¹³ Both marijuana and hemp also contain varying levels of another cannabinoid, cannabidiol (CBD).¹⁴

4. See *infra* notes 12-65 and accompanying text.

5. See *infra* notes 66-162 and accompanying text.

6. See *infra* notes 163-93 and accompanying text.

7. See *infra* notes 194-205 and accompanying text.

8. See *infra* notes 206-29 and accompanying text.

9. See *infra* notes 230-38 and accompanying text.

10. See *infra* notes 239-46 and accompanying text.

11. See *infra* notes 247-48 and accompanying text.

12. Brian Arnall et al., *Agronomic Considerations for Industrial Hemp Production*, OKLAHOMA COOPERATIVE EXTENSION SERVICE (May 2019), <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-11423/PSS-2921pod.pdf>.

13. Despite these fundamental differences, the terms “cannabis,” “marijuana or marihuana,” and “hemp” have been, and continue to be, used interchangeably in many contexts, resulting in considerable confusion.

14. Renee Johnson, Cong. Research Serv., R44742, *Defining Hemp: A Fact Sheet* (Mar. 22, 2019), at 1, <https://fas.org/sgp/crs/misc/R44742.pdf>.

B. Brief History of Cannabis and Its Use

Cannabis may have been one of the first plants to be deliberately grown and utilized by humanity.¹⁵ Archeological evidence indicates that cannabis was cultivated and used in various parts of Eurasia as early as 5-8,000 BC,¹⁶ though some sources give credence to archeological evidence indicating cannabis use by humans 12,000 years ago.¹⁷

By 3,000 BC, there were several sites in East Asia where hemp was being used to make clothes, fabric, paper, ropes, and shoes.¹⁸ Harnessing the psychoactive and pharmacological properties of cannabis in the context of medical treatment and spiritual and recreational pursuits can be traced to South Asia.¹⁹ From the Indian subcontinent, cannabis use expanded through the Middle East, where its use by Scythians was noted by Herodotus.²⁰ Around the ancient world—from China, South Asia, and the Middle East to Egypt, Greece, and Rome—there are records of medical uses of cannabis.²¹ From Eurasia, use of cannabis spread to Africa by the 1200s and, by way of European colonization, to the Americas.²²

Europeans introduced cannabis to the Americas in the 1500s.²³ British colonials were required to grow hemp in the 1600s to help meet demand for maritime rope.²⁴ It was cultivated on the plantations of George Washington and Thomas Jefferson, who debated how to best process it.²⁵

15. Ethan B. Russo, *History of Cannabis and Its Preparations in Saga, Science, and Sobriquet*, 4 CHEMISTRY & BIODIVERSITY 8, 1614-48 (2007).

16. Tengwen Long et al., *Cannabis in Eurasia: origin of human use and Bronze Age trans-continental connections*, 26(2) VEGETATION HISTORY AND ARCHAEOBOTANY 245-58 (2017).

17. See generally Ernest Abel, *MARIHUANA THE FIRST TWELVE THOUSAND YEARS* (1980).

18. Peter Stafford, *PSYCHEDELICS ENCYCLOPEDIA* 157 (Jeremy Bigwood ed., 1982).

19. See generally Michael R. Aldrich, *Tantric Cannabis Use in India*, 9 J. PSYCHEDELIC DRUGS 3, 227-33 (1977).

Meng Ren et al., *The origins of cannabis smoking: Chemical residue evidence from the first millennium BCE in the Pamirs*, 5(6) SCIENCE ADVANCES 4 (June 12, 2019), <https://doi.org/10.1126/sciadv.aaw1391> (citing Herodotus, A. D. Godley, *Trans. THE HISTORIES* (1920)).

21. The Hazelden Betty Ford Foundation, *History of Alcohol and Marijuana Policy*, <https://www.hazeldenbettyford.org/recovery-advocacy/marijuana-education/policy-history> (last visited Feb. 12, 2021).

22. Barney Warf, *High Points: An Historical Geography of Cannabis*, 104(4) GEOGRAPHICAL REV. 414, 424 (2014).

23. *Id.* at 425.

24. Abel, *supra* note 17 at 78-81.

25. See The Associated Press, *Marijuana Nation: The Legalization of Cannabis Across*

However, as described in the next section, even as hemp would continue to be valued as a source of fiber for rope into the 1940s, the era of European colonialism would witness a wave of spreading usage, exploitation, fear of the psychoactive properties of cannabis, and ultimately its prohibition.

C. Brief History of Cannabis Prohibition

Against this backdrop of thousands of years of cultivation and use, and as detailed in this section, the era of cannabis prohibition is comparatively brief. A fairly exhaustive search for precedents of prohibition in the historical record results in just a handful of examples prior to the nineteenth century. Simply put, the record of banning cannabis prior to the twentieth century can be characterized as brief and sparse.

The first documented prohibition of cannabis use was by an edict of Soudoun Sheikouni, the emir of Joneima in Arabia in 1378, who ordered destruction of the plants and punishment of users.²⁶ By the late 1700s, smoking of cannabis in the capital of the Kingdom of Merina (modern day Madagascar) was widespread, intense, and blamed for users climbing palace walls and falling into defensive ditches, prompting King Andrianampoinimerina to ban its usage and make it punishable by death soon after ascending to the throne in 1787.²⁷ Napoleon banned its consumption by his soldiers after their adoption of the practice during the French campaign in Egypt in 1798-1801.²⁸ While the Portuguese most likely brought cannabis to Brazil to cultivate it for hemp fiber,²⁹ the recreational use of the plant by African slaves led the Municipal Council of Rio de Janeiro in 1830 to ban bringing the plant to the city and its use by slaves.³⁰

Meanwhile, the British were deploying Indian indentured workers throughout their empire, resulting in the spread of cannabis consumption, known by South Asians as ganja.³¹ Similar to Napoleon and the

the USA, 4 (2015).

26. 1 *Addiction Medicine, Science and Practice* 303 (Bankole A. Johnson ed., 2011).

27. Gwyn Campbell, David Griffiths and the Missionary “History of Madagascar” 437 (2012).

28. Martin Booth, *Cannabis: A History* 76–77 (2015).

29. Robert C. Clarke & Mark D. Merlin, *Cannabis: Evolution and Ethnobotany* 182 (2013).

30. *Id.*

31. L. Hon Koon, *The Community’s Response to Drug Use* 71 (Stanley Einstein ed.,

Portuguese, the British grew concerned and banned cannabis consumption in several colonies including Natal (now South Africa) in 1870.³² The British-Indian government criminalized, investigated, and ultimately enacted the prohibition of cannabis during the nineteenth century.³³

It must be noted that the nineteenth century prohibitions of cannabis use by the British were enacted and enforced even as their empire engaged in the Opium Wars, smuggling and then forcing the sale of opium in China.³⁴ Cannabis prohibition continued apace during the twentieth century. By the 1920s, it had been banned in the United Kingdom and Canada,³⁵ and a treaty was negotiated at the Hague to restrict the international trade of cannabis.³⁶ In the United States, at the federal level, the Marihuana Tax Act enacted in 1937 effectively prohibited the production of all forms of cannabis—both hemp and marijuana.³⁷ It should

1980).

32. The 1870 South African prohibition was known as the Coolie Law Consolidation and prohibited “the smoking, use, or possession by and the sale, barter, or gift to, any Coolies [Indian indentured workers] whatsoever, of any portion of the hemp plant (*Cannabis sativa*)...” *Timeline of cannabis law*, Wikipedia, https://en.wikipedia.org/wiki/Timeline_of_cannabis_law (last visited Jan. 23, 2021) (citing Brian M. Du Toit, *Cannabis, Alcohol, and the South African Student: Adolescent Drug Use 1974-85*, 1991).

33. *Report of the Indian Hemp Drugs Commission, 1893-94*, documents the findings of investigations into whether cannabis use was indeed causing harms such as to justify prohibition. “In respect to the alleged mental effects of the drugs, the Commission have come to the conclusion that the moderate use of hemp drugs produces no injurious effects on the mind. . . . Viewing the subject generally, it may be added that the moderate use of these drugs is the rule, and that the excessive use is comparatively exceptional. . . . The injury done by the excessive use is . . . confined almost exclusively to the consumer himself; the effect on society is rarely appreciable. It has been the most striking feature in this inquiry to find how little the effects of hemp drugs have obtruded themselves on observation.” *Id.* at 264 (Archived material made available by Tod Mikuriya, *Physical, Mental, and Moral Effects of Marijuana: The Indian Hemp Drugs Commission Report*, <http://druglibrary.org>).

34. See generally W. Travis Hanes & Frank Sanello, *The Opium Wars: The Addiction of One Empire and the Corruption of Another* (2004).

35. Daniel Schwartz, *Marijuana was criminalized in 1923, but why?*, CBC News (May 3, 2014), <https://www.cbc.ca/news/health/marijuana-was-criminalized-in-1923-but-why-1.2630436>.

36. International Convention, Adopted by the Second Opium Conference (League of Nations), and Protocol Relating Thereto, Feb. 19, 1925, 81 L.N.T.S. 317, *amended by* Single Convention on Narcotic Drugs, 1961, Mar. 30, 1961, 18 U.S.T. 1407 *and* Amendment of the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 26 U.S.T. 1439.

37. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937), *invalidated*

be highlighted that the American Medical Association (AMA) opposed this, as some were using cannabis in treating patients.³⁸ As the AMA's legislative counsel, Dr. William C. Woodward, stated in oral testimony before the House Ways and Means Committee, there was "no evidence" that medical use of cannabis resulted in addiction, and cannabis prohibition would "deprive the public of the benefits of a drug that on further research may prove to be of substantial value."³⁹

The history of hemp cultivation is more complicated. The ban on the cultivation of hemp accompanying the prohibition of marijuana has been attributed to both previous difficulties in differentiating between the plants and competition from new industries producing synthetic fibers.⁴⁰ Regardless, the U.S. government's policy was reversed temporarily during World War II when imported sources of fiber were cut-off and domestic hemp cultivation was seen as essential to the war effort.⁴¹ The U.S. government went so far as to produce a short film, *Hemp for Victory*, to raise awareness of this policy.⁴² After World War II, hemp programs ceased, and the Controlled Substances Act of 1970 (CSA) formally made cannabis of any kind (both hemp and marijuana) illegal under federal law by classifying cannabis sativa as a Schedule I drug.⁴³ Schedule I has the highest level of control, designating a substance as having no safe medical use and a high risk of abuse or misuse.⁴⁴ After passage of the CSA, both marijuana and hemp could only be grown with a license from the Drug Enforcement Administration (DEA).⁴⁵

by *Leary v. United States*, 395 U.S. 6 (1969) and *repealed* by Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, (1970).

38. Christopher Ingraham, *More and more doctors want to make marijuana legal*, WASHINGTON POST (Apr. 15, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/04/15/more-and-more-doctors-want-to-make-marijuana-legal/>.

39. Mark Eddy, *Medical Marijuana: Review and Analysis of Federal and State Policies*, STATE AND LOCAL GOVERNMENT ISSUES 43, 45 (William S. Jamerson ed., 2007).

40. T. Randall Fortenbery, *Industrial Hemp: Opportunities and Challenges for Washington*, WASH. STATE UNIV. (2014), <http://ses.wsu.edu/wp-content/uploads/2015/02/WP2014-10.pdf>.

41. Hemp Industries Association, *Hemp History*, <https://www.thehia.org/history> (last visited Jan. 19, 2021).

42. *Id.*

43. Controlled Substances Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801).

44. *Id.*

45. *Id.*

D. Brief History of Cannabis Legalization

The first decriminalization of cannabis is commonly attributed to the Dutch government, which, in 1972, classified cannabis as less dangerous and reduced possession of small amounts to the status of a misdemeanor.⁴⁶ Since then, the Dutch have tolerated the recreational use of cannabis in licensed coffee shops (or cannabis cafés) without legalizing a commercial cannabis industry.⁴⁷

Medical research in the 1970s and 1980s led to a better understanding of its psychoactive and physiological effects.⁴⁸ Cannabis consumption was increasingly adopted as a means of treating pain and wasting syndrome in cancer and AIDS patients.⁴⁹ This contributed to California becoming the first state to legalize the medicinal use of marijuana in 1996.⁵⁰ Colorado followed with amendment twenty to its state constitution in 2000.⁵¹ In 2001, Canada became the first country to adopt a system regulating the medical use of cannabis.⁵² Also in 2001, Portugal decriminalized all drugs, though some restrictions on production and trafficking of some drugs remained criminal offenses.⁵³ This began a wave of decriminalization by countries.⁵⁴

46. Martin Booth, *Cannabis: A History* 338 (2003).

47. *Id.* at 339.

48. Louis Vachon et al., *Marihuana effects on learning, attention and time estimation*, 39 *Psychopharmacologia* 1, 1-11 (1974); Adam Sulkowski, *Marihuana "High": A Model of Senile Dementia?*, 23 *Perspectives in Biology and Medicine*, 2, Pt.1, 209-14 (1980); Adam Sulkowski & Louis Vachon, *Side effects of simultaneous alcohol and marijuana use*, 134 *Am. J. Psychiatry* 6, 691-92 (1977); Adam J. Sulkowski et al., *Propranolol effects on acute marihuana intoxication in man*, *Psychopharmacology*, 52, 47-53 (1977); Louis Vachon et al., *The Effect of Beta-adrenergic Blockade on Acute Marihuana Intoxication*, in *The Therapeutic Potential Of Marihuana*, Sidney Cohen, Richard C. Stillman, eds., 161-171 (1976).

49. See Alison Mack & Janet Joy, *Marijuana As Medicine? The Science Beyond the Controversy* (2001).

50. See Rosalie Liccardo Pacula & Rosanna Smart, *Medical Marijuana and Marijuana Legalization*, *Ann. Rev. Clin. Psychol.* 13: 397-419 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6358421/>.

51. Andrew A. Monte et al., *The Implications of Marijuana Legalization in Colorado*, 313 *J. Am. Med. Ass'n.* 3, 241-42 (2015).

52. *Marijuana's journey to legal health treatment: the Canadian experience*, CBC News (June 20, 2011), <https://www.cbc.ca/news/health/marijuana-s-journey-to-legal-health-treatment-the-canadian-experience-1.799488>.

53. *Portugal legalises drug use*, BBC NEWS (July 7, 2000), <http://news.bbc.co.uk/2/hi/europe/823257.stm>.

54. Nick Kovacevich, *Cannabis Goes Global While The U.S. Falls Behind*, FORBES

In December 2013, Uruguay became the first country in the world to fully legalize cannabis for both medical and non-medical purposes.⁵⁵ In 2014, Uruguay took steps to create a state-controlled dispensary regime and started registering growing clubs.⁵⁶ In 2013 and 2016, the Canadian federal government expanded medical access to cannabis following a series of court challenges and created a legal role for licensed commercial producers of cannabis.⁵⁷ In 2018, Canada joined Uruguay as the second country in the world to legalize recreational cannabis nationwide through legislation introduced by the governing Liberal Party.⁵⁸ In the United States, thirty-three U.S. states have legalized some form of medical marijuana use, and eleven states have legalized some form of adult or recreational marijuana use as of April 2020.⁵⁹

While marijuana remains illegal under U.S. federal law, federal regulation of hemp has been modified through the 2014 and 2018 Farm Bills.⁶⁰ In response, hemp is again cultivated in the U.S. to be used in a wide range of products, including fabrics, textiles, paper, and construction

(Nov. 16, 2018), <https://www.forbes.com/sites/nickkovacevich/2018/11/16/cannabis-goes-global-while-the-u-s-falls-behind/#394dd5ec1783>.

55. Malena Castaldi and Felipe Llambias, *Uruguay becomes first country to legalize marijuana trade*, REUTERS (Dec. 10, 2013), <https://www.reuters.com/article/us-uruguay-marijuana-vote/uruguay-becomes-first-country-to-legalize-marijuana-trade-idUSBRE9BA01520131211>.

56. John Hudak et al., *Uruguay's cannabis law: Pioneering a new Paradigm*, THE BROOKINGS INSTITUTION (Mar. 2018), https://www.brookings.edu/wp-content/uploads/2018/03/gs_032118_uruguaye28099s-cannabis-law_final.pdf.

57. PwC Canada, *Chapter 9 - Cannabis in the pharmaceutical industry*, PwC CANADA'S CANNABIS SERIES, <https://www.pwc.com/ca/en/industries/cannabis/pwc-cannabis-series-chapter-9-cannabis-in-the-pharmaceutical-industry.html>.

58. *Canada becomes second country to legalise recreational cannabis*, BBC NEWS (Oct. 17, 2018), <https://www.bbc.com/news/world-us-canada-45806255>.

59. Audrey McNamara, *These states now have legal weed, and which states could follow suit in 2020*, CBS NEWS (Jan. 1, 2020),

<https://www.cbsnews.com/news/where-is-marijuana-legal-in-2020-illinois-joins-10-other-states-legalizing-recreational-pot-2020-01-01/>. As will be elaborated upon in later sections of this paper, however, the approach taken by states has differed greatly. Adam J. Sulkowski, *California's Pot Biz "Wild West" May End, Massachusetts Could "Head It Off At The Pass"*, HUFFPOST (Sept. 16, 2015), https://www.huffpost.com/entry/californias-pot-biz-wild-b_8142156; see *infra* Section IV.

60. John Hudak, *The Farm Bill, hemp legalization and the status of CBD: An explainer*, BROOKINGS INSTITUTION (Dec. 14, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/>.

materials.⁶¹ One area of interest and exploration has been the development of hemp-derived CBD products for both human and animal consumption.

Global cannabis consumer spending for 2019 was estimated at \$344 billion, with a small but increasing share of those purchases through legal channels.⁶² More than 200,000 acres of hemp were licensed to be planted in the U.S. in 2019, up from roughly 25,000 two years earlier.⁶³ As described below, products derived from hemp could positively impact a variety of industries, from textiles to agriculture, fuel, and construction materials.⁶⁴ The total economic impact of the cannabis industry goes beyond these figures as there are a multitude of ancillary industries that are being created or expanded: everything from products and services to enable cultivation, harvesting, processing, testing, packaging, and transportation to the professional services in logistics, law, accounting, banking, marketing, finance, and insurance.⁶⁵

III. APPLICABLE FEDERAL STATUTES

Federal regulation of cannabis rests on the Commerce Clause of the United States Constitution.⁶⁶ As described below, a variety of federal statutes have both criminal and non-criminal implications for cannabis commerce.

61. Renee Johnson, Cong. Research Serv., RL32725, *Hemp as an Agricultural Commodity*, Congressional Research Service, (June 22, 2018), <https://fas.org/sgp/crs/misc/RL32725.pdf>.

62. *Ten Intriguing Statistics from 2019*, NEW FRONTIER DATA (Dec. 15, 2019), <https://newfrontierdata.com/marijuana-insights/2019-year-in-review/>.

63. Craig Giammona & Bruce Einhorn, *Booming demand for CBD is Making Hemp the Cannabis Cash Crop*, BLOOMBERG BUSINESSWEEK (Jul. 18, 2019), <https://www.bloomberg.com/news/articles/2019-07-18/booming-demand-for-cbd-is-making-hemp-the-cannabis-cash-crop>.

64. *See infra* Section VII.

65. Observations of co-author Adam J. Sulkowski at the Cannabis World Congress & Business Exhibition, (Oct. 24-26, 2019), <https://www.cwcbexpo.com/conference-program-boston-2019/>. The program documents the variety of ancillary industries and specific companies and entrepreneurs affected by the trend of cannabis legalization. *See* https://www.cwcbexpo.com/wp-content/uploads/2019/10/Boston-2019-Seminar-Grid_Revised-Oct-18_2019.pdf.

66. *Gonzales v. Raich*, 45 U.S. 1, 9 (2005).

A. Controlled Substances Act

The Controlled Substances Act (CSA)⁶⁷ created five categories of potentially harmful substances, ranging from Class I to Class V. “Marihuana” is deemed a Schedule I drug, along with other drugs such as heroin and LSD.⁶⁸ Under the CSA, it is a Federal crime to:

- A. “knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with [the] intent to manufacture, distribute, or dispense” marijuana.⁶⁹
- B. aid or abet the manufacture, distribution, or dispensing of marijuana.⁷⁰
- C. “conspire[] to commit any offense” under the CSA.⁷¹
- D. possess equipment, chemicals, products, or materials with the intent to use it to manufacture marijuana and to distribute equipment, chemicals, products, or materials knowing that it will be used in marijuana manufacture.⁷²
- E. use a telephone, email, mail, or other communication facility to further the manufacture or sale of marijuana and to use the internet to advertise marijuana for sale.⁷³
- F. engage in a financial transaction for the purpose of promoting or furthering a known marijuana business.⁷⁴
- G. receive a payment of more than \$10,000 from a known marijuana business.⁷⁵
- H. deal in marijuana within 1,000 feet of a school, college, or playground.⁷⁶
- I. “open, lease, rent,” maintain, manage, or control any place, “permanently or temporarily, for the purpose of manufacturing, distributing,” storing, or using marijuana.⁷⁷

67. 21 U.S.C. §§ 801-904 (2018).

68. 21 U.S.C. § 812 (2018).

69. 21 U.S.C. § 841(a) (2018).

70. 18 U.S.C. § 2 (2018).

71. 21 U.S.C. § 846 (2018).

72. 21 U.S.C. § 843(a)(6)-(7) (2018).

73. 21 U.S.C. § 843(b), 843(c)(2)(A) (2018).

74. 18 U.S.C. § 1956 (2018).

75. 18 U.S.C. § 1957 (2018).

76. 21 U.S.C. § 860(a) (2018).

77. 21 U.S.C. § 856(a)(1) (2018).

J. “manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using” marijuana.⁷⁸

The penalties for violating the CSA range from ten years to life, and fines go up to \$2 million. As an example, a vendor accepting a payment for providing equipment to a known marijuana business can face ten years in prison.⁷⁹ Because marijuana remains a Schedule I substance under the CSA, all interstate transport of marijuana, other than narrow exclusions for DEA-approved research programs, is prohibited. As a result, U.S. marijuana companies operating in state-legal programs must establish completely separate supply chains for each state in which they operate.

In 2016, the DEA denied a petition from members of Congress to initiate rulemaking proceedings to reschedule marijuana. It cited U.S. Department of Health and Human Services (HHS) conclusions that “the available evidence is not sufficient to determine that marijuana has an accepted medical use.”⁸⁰ This means that marijuana was determined to have “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and “a lack of accepted safety for use of the drug or other substance under medical supervision.”⁸¹

The Department of Justice (DOJ) has yet to articulate a coherent strategy regarding how to operate in an environment where marijuana has been legalized in various states but remains illegal at the federal level under the CSA. Under the Obama Administration, the DOJ took a forbearance approach to much of the marijuana-related activities (both medical and recreational) rather than pursuing all activities that violated the CSA.⁸² This culminated in August 2013 when the DOJ issued what is known as the Cole Memorandum, advising U.S. Attorneys that their

78. 21 U.S.C. § 856(a)(2) (2018).

79. 18 U.S.C. §§ 1957(b)(1), 1956(h).

80. DEA, DENIAL OF PETITION TO INITIATE PROCEEDINGS TO RESCHEDULE MARIJUANA, 81 Fed. Reg. 53,767, 53,792 (Aug. 12, 2016).

81. 21 U.S.C. § 812(b)(1) (2018).

82. U.S. DEP’T. OF JUST., MEMORANDUM FROM DAVID W. OGDEN, DEPUTY ATTORNEY GENERAL, INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING MEDICAL USE OF MARIJUANA (Oct. 19, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

offices should focus their limited resources on specific marijuana-related crimes.⁸³ Then, in 2014, additional guidance was issued related to prosecutions of financial transactions involving marijuana proceeds.⁸⁴

The federal position changed in January 2018 when the Cole Memorandum was rescinded by Attorney General Jeff Sessions.⁸⁵ U.S. Attorneys were advised that the decision on whether to prosecute marijuana-related crimes should be guided by the DOJ's traditional principles that apply to all criminal prosecutions. During a Senate hearing, William Barr said of the current state of affairs:

The situation that I think is intolerable and which I'm opposed to is the current situation we're in, and I would prefer one of two approaches rather than where we are. . . . Personally, I would still favor one uniform federal rule against marijuana but, if there is not sufficient consensus to obtain that, then I think the way to go is to permit a more federal approach so states can make their own decisions within the framework of the federal law and so we're not just ignoring the enforcement of federal law. . . . I would like to see Congress address this issue.⁸⁶

B. Rohrabacher–Farr Amendment

Starting in 2014, and in each year since, Congress has passed an

83. U.S. DEP'T. OF JUST., MEMORANDUM FROM JAMES M. COLE, DEPUTY ATTORNEY GENERAL, GUIDANCE REGARDING MARIJUANA ENFORCEMENT (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

84. U.S. DEPT. OF JUST., MEMORANDUM FROM JAMES M. COLE, DEPUTY ATTORNEY GENERAL, GUIDANCE REGARDING MARIJUANA RELATED FINANCIAL CRIMES (Feb. 14, 2014), <https://www.justice.gov/sites/default/files/usao-dwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20%282%29.pdf>.

85. U.S. DEPT. OF JUST., MEMORANDUM FROM JEFF SESSIONS, ATTORNEY GENERAL FOR UNITED STATES ATTORNEYS, (Jan. 4, 2018) <https://www.justice.gov/opa/press-release/file/1022196/download>; Paul Seaborn, *Sessions' war on pot could speed up marijuana legalization nationwide*, THE CONVERSATION (Feb. 6, 2018), <https://theconversation.com/sessions-war-on-pot-could-speed-up-marijuana-legalization-nationwide-89834>.

86. Kyle Jaeger, *U.S. Attorney General Says He Prefers Marijuana Reform Bill To Current Federal Law*, MARIJUANA MOMENT (April 10, 2019), <https://www.marijuanamoment.net/u-s-attorney-general-says-he-prefers-marijuana-reform-bill-to-current-federal-law/>.

appropriations bill that includes a provision, known as the Rohrabacher-Farr Amendment, stating that the Department of Justice cannot use any appropriated fund to “prevent” any named state from implementing a medical marijuana plan.⁸⁷ The Commerce, Justice, Science, and Related Agency Appropriations bill for FY 2020 provides:

SEC. 531. None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.⁸⁸

Notable in the terms of the amendment is that Congress does not define medical marijuana, leaving that determination to the named states and the courts. The Ninth Circuit has interpreted the Rohrabacher-Farr Amendment as prohibiting the Department of Justice from spending funds from relevant appropriations acts for the prosecution of individuals who are engaged in conduct permissible under state medical marijuana laws and who fully complied with such laws.⁸⁹ The amendment has been cited as justification for halting federal prosecutions and asset forfeiture actions related to medical cannabis businesses.⁹⁰

In spite of the restriction on use of appropriated funds, a number of issues still exist. First, the restriction expires at the end of each fiscal year

87. Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2431 (2019).

88. 160 CONG. REC. H4968 (daily ed. May 29, 2014).

89. *United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016).

90. *United States v. Pisarski*, 274 F. Supp. 3d 1032, 1034 (N.D. Cal. 2017).

with its appropriation bill and requires support from both the House and Senate in the subsequent appropriations bill to be renewed. Second, the amendment does not cover adult-use marijuana programs. A bill containing a provision (§550) extending similar protections to state adult-use marijuana programs passed the House in 2019 but did not receive support in the Senate.⁹¹

Relying on the appropriations restriction described above, defendants in several federal marijuana prosecutions and forfeiture cases have moved to dismiss. On August 16, 2016, a panel of the Ninth Circuit held that the appropriations bills entitled marijuana defendants to an evidentiary hearing “to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.”⁹² The panel deferred to the district courts on remand to decide what remedy would be appropriate, noting the transitory nature of the potential relief:

We note the temporal nature of the problem with these prosecutions. The government had authority to initiate criminal proceedings, and it merely lost funds to continue them. DOJ is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills.⁹³

However, the Ninth Circuit has also held that the appropriation restriction does not cut off funds for forfeiture of property even if its use is in full compliance with state law. Compliance with the “relevant conditions imposed by state law” is compliance with those conditions that were imposed at the time of the offense.⁹⁴ The burden of proof of compliance is

91. Kyle Jaeger, *House-Passed Marijuana amendments Stripped from Congressional Spending Bills*, MARIJUANA MOMENT, (Dec. 16, 2019), <https://www.marijuanamoment.net/house-passed-marijuana-amendments-stripped-from-congressional-spending-bills>.

92. *McIntosh*, 833 F.3d at 1179.

93. *Id.*

94. *Pisarski*, 274 F. Supp. 3d at 1036 (citing *McIntosh*, 833 F.3d at 1163).

on the defendant.⁹⁵

In cases disposed of on procedural grounds, both the Ninth and the Tenth Circuits left open the possibility that the funds restriction applied to the Bureau of Prisons so that the Bureau of Prisons could not continue to incarcerate a convict whose marijuana operation had complied with state law.⁹⁶

C. *Racketeer Influenced and Corrupt Organization Act*

The Racketeer Influenced and Corrupt Organization Act (RICO)⁹⁷ is a federal law enacted to combat organized crime. It has a private attorney general provision permitting persons whose business or property has been injured by a racketeering enterprise to recover treble damages and attorney's fees. Suits are brought in federal court. Marijuana cultivation and distribution is a racketeering enterprise under RICO. Thus, private parties seeking damages from cannabis businesses have a statute available to them to deter marijuana businesses that does not require intervention by federal or state authorities. To date, most of these cases have been dismissed. However, often merely bringing suit is enough to drive the ancillary parties away and leave the marijuana business with no way to operate.

The Tenth Circuit has held that a RICO injury could consist of nuisance type injuries. This could include "noxious odors" that were carried onto plaintiffs' property. If the open operation of growing marijuana were to reduce the value of plaintiffs' land, the grower could be liable for compensation. The defendants sued by the Safe Streets Alliance were the entities and people involved in the marijuana operation. Since that opinion, which found the defendants not responsible for any of the alleged damages, the kinds of potential defendants have expanded to include others doing business with the cannabis operation.⁹⁸ Crimson Galeria Limited Partnership sued not just a grow site and dispensary but also a cannabis consulting firm, the landlord, the depository bank, and the insurers of the grow site and dispensary. The depository bank, the plaintiffs alleged, "knew and intended for Healthy Pharms to use the funds deposited

95. *United States v. Evans*, 929 F.3d 1073, 1076-77 (9th Cir. 2019).

96. *Sandusky v. Goetz*, 944 F.3d 1240, 1247 (10th Cir. 2019); *Davies v. Benov*, 856 F.3d 1243, 1247-48 (9th Cir. 2017).

97. 18 U.S.C. § 1961-68 (2018).

98. *Safe Sts. All. v. Hickenlooper*, 859 F. 3d 865, 913-14 (10th Cir. 2017).

in its bank account(s) to operate a marijuana business in violation of the CSA.”⁹⁹

Other suits are based on the same theories.¹⁰⁰ In one case, plaintiffs sued the landlord and the bank holding the mortgage on the leased property. Damages were attributed to the bank’s allowing the “[p]roperty to be used for the production and processing of marijuana, and profit[ing] from such use.”¹⁰¹ The bank, plaintiffs alleged, had been notified of the use of the property and had “knowingly permitted the production and processing of marijuana to continue on the . . . [p]roperty, and derived a profit from such activity via the monthly mortgage payments it received.”¹⁰²

To state a RICO claim there must be some damage to business or property. Loss of enjoyment of property does not qualify.¹⁰³ Under California law, damage to the value of real property in a nuisance action does not qualify.¹⁰⁴ In the Safe Streets litigation, the hotel alleged the loss of two bookings because of the proximity of the dispensary.¹⁰⁵ However, a jury found that the grow operation did not generate any smell and that there was no loss of value.¹⁰⁶ But loss of sales because grapes were contaminated with smell will qualify.¹⁰⁷ Additional RICO cases are likely to appear until marijuana is no longer a Schedule I drug under the CSA.

D. Civil Forfeiture Laws

Civil forfeiture laws allow the government to take all of the assets that it has deemed to be involved in criminal activity and any property

99. Complaint at 34, *Crimson Galeria Ltd. P’ship v. Healthy Pharms, Inc*, No. 1:17-cv-11696 (D. Mass. 2018).

100. Complaint, *McCart v. Beddow*, No. 3:17-CV-00927-AC (D. Or. 2017).

101. *Id.* at 20.

102. *Id.* at 39.

103. *Ainsworth v. Owenby*, 326 F.Supp.3d 1113 (D. Or. 2018); *Ainsworth v. Owenby*, No. 6:17-cv-01935 (D. Or. 2019); *Shultz v. Derrick*, 369 F. Supp. 3d 1120 (D. Or. 2019); *Underwood v. 1450 SE Orient, LLC*, No. 3:18-cv-01366 (D. Or. 2019).

104. *Bokaie v. Green Earth Coffee LLC*, 2018 WL 6813212 (N.D. Cal. 2018).

105. Complaint, *Safe Sts. All. v. Medical Marijuana of the Rockies*, No. 1:15-cv-00350 (D. Colo. 2015).

106. JOHN INGOLD, *Jury finds in favor of Colorado marijuana grow in closely watched federal lawsuit*, COLORADO SUN (Oct. 31, 2018), <https://coloradosun.com/2018/10/31/colorado-safe-streets-rico-lawsuit-verdict/>.

107. *Momtazi Family, LLC v. Wagner*, 2019 WL 4059178 (D. Or. 2019).

traceable to the proceeds of the business.¹⁰⁸ Thus, marijuana businesses face a risk that their assets will be seized and forfeited, even if there is no prosecution. Assets that could be forfeited include bank accounts, investor capital, profits already paid back to investors, land used to grow marijuana, and any building where the business operates. It could also include clawing back payments to vendors for services rendered. The most prominent example of federal intervention was the seizure of 100 homes in the Sacramento area in April 2018. The homes targeted played no role in California's state-regulated cannabis industry but were suspected of being part of an illegal growing operation operated by a Chinese organized crime syndicate.¹⁰⁹

E. Agricultural Act of 2014

The Agricultural Act of 2014 (2014 Farm Bill) became law on February 7, 2014 and changed the federal government's treatment of industrial hemp in a number of ways.¹¹⁰ The new law defined industrial hemp as distinct from marijuana, with industrial hemp defined as, "the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."¹¹¹

The 2014 Farm Bill also authorized institutions of higher education or state departments of agriculture to regulate and conduct research and pilot programs for cultivating, processing, and marketing hemp.¹¹² The 2014 Farm Bill was silent on how to obtain or transport hemp seeds. The bill also did not define research or specifically address the legality of hemp's constituent compounds such as CBD. While the 2014 Farm Bill relaxed restrictions on the cultivation and processing of hemp and hemp-derived products, it did not include any provisions specifically allowing hemp or its products to be transported across state lines. Nonetheless, a large number of participants in state pilot programs chose to begin producing and selling industrial-hemp derived CBD products, leading to a "proliferation of hemp and hemp-derived CBD products across the

108. 18 U.S.C. §§ 981, 983 (2018).

109. SAM STANTON & DALE KASLER, *Chinese Crime Syndicate's Alleged Pot Grows Lead to Seizure of 100 Homes in Sacramento Area*, SACRAMENTO BEE (Apr. 4, 2018), <https://www.sacbee.com/news/local/crime/article207911324.html>.

110. Agricultural Act of 2014, Pub. L. 113-79, 7 U.S.C. § 5940 (2018).

111. 7 U.S.C. § 5940(a)(2) (2018).

112. 7 U.S.C. § 5940(b) (2018).

country.”¹¹³ Products were sold to the public both within and between states through a variety of channels including general retail stores and mail-order.

F. Agricultural Improvement Act of 2018

The Agriculture Improvement Act of 2018 (2018 Farm Bill) became law on December 20, 2018.¹¹⁴ The act excludes hemp from the definition of “marihuana” in the CSA¹¹⁵ and defines industrial hemp as:

the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.¹¹⁶

The 2018 Farm Bill expands the allowance for hemp cultivation beyond the state pilot programs permitted under the 2014 Farm Bill. Under the act, hemp can be produced under a U.S. Department of Agriculture (USDA) approved state or tribal plan or, absent such a plan, by the USDA under the plan established by the USDA.

In response to the act, the USDA created the U.S. Domestic Hemp Production Program. As of February 12, 2020, the USDA had approved plans submitted by five states (Delaware, Louisiana, New Jersey, Ohio, and Texas) and seven tribes under this program.¹¹⁷ Also on that date, there were seventeen tribal plans and thirteen state plans under review by the USDA.¹¹⁸ Presently, every state except Mississippi, South Dakota, and Idaho has an industrial hemp program.¹¹⁹ The states that have yet to be

113. *CBD: Cannabinoids Escape the Dispensary*. BDS Analytics Report, at 5 (Sept. 2019).

114. Pub. L. 115–334 (the “2018 Farm Bill”).

115. 21 U.S.C. § 802 (2018).

116. Pub. L. 115-334.

117. U. S. Dep’t of Agric., USDA APPROVES FIRST STATE AND TRIBAL HEMP PRODUCTION PLANS (2019), <https://www.ams.usda.gov/content/usda-approves-first-state-and-tribal-hemp-production-plans>.

118. U. S. Dep’t of Agric., STATUS OF STATE AND TRIBAL HEMP PRODUCTION PLANS FOR USDA APPROVAL (2020), <https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review>.

119. NATIONAL CONFERENCE OF STATE LEGISLATURES, State Industrial Hemp Statutes (Apr. 16, 2020), <https://www.ncsl.org/research/agriculture-and-rural-development/state->

approved under the U.S. Domestic Hemp Production Program are continuing to operate under the 2014 Farm Bill program which will expire after October 30, 2020.¹²⁰

Though there will likely be variations among state and tribal plans and between them and the USDA plan, the basic elements of state and tribal plans will be the same. Each state or tribal plan must include, among other things:

1. a practice to report to the USDA specific, relevant, real-time information for each licensed producer;¹²¹
2. include a procedure for “accurate and effective sampling of [the] hemp”;¹²²
3. a testing procedure that uses post decarboxylation or a similar method;¹²³
4. an effective disposal procedure for hemp plants that are produced not meeting the THC limits;¹²⁴ and
5. the USDA must be notified of any plants failing the test along with proof of appropriate disposal.¹²⁵

Under the USDA plan, license applications will be accepted until November 2, 2020 and thereafter only from August 1 through October 31 of each year.¹²⁶ Licenses expire on December 31 of the third year after issuance.¹²⁷ Licenses do not automatically renew and must be renewed prior to expiration.¹²⁸ Prospective producers in states that do not have a USDA approved plan can apply electronically.¹²⁹ The testing procedures are generally the same as required under a state plan.¹³⁰

Sampling and testing are big issues. Hemp samples must be collected

industrial-hemp-statutes.aspx.

120. Agriculture Improvement Act of 2018, Pub. L. 115-334, § 7605, 132 Stat. 4490.

121. 7 C.F.R. § 990.3(a)(1) (2020).

122. 7 C.F.R. § 990.3(a)(2) (2020).

123. 7 C.F.R. § 990.3(a)(3) (2020).

124. 7 C.F.R. § 990.3(a)(6) (2020).

125. 7 C.F.R. § 990.3(a) (2020).

126. 7 C.F.R. § 990.21(a)(2) (2020).

127. 7 C.F.R. § 990.21(a)(6) (2020).

128. 7 C.F.R. § 990.21(a)(6) (b) (2020).

129. U.S. DEP’T OF AGRIC., INFORMATION FOR PRODUCERS, <https://www.ams.usda.gov/rules-regulations/hemp/information-producers> (last visited Jan. 24, 2021).

130. 7 C.F.R. §§ 990.24, .25, .26 (2020).

within fifteen days of the anticipated harvest. The sampling method must have a confidence level of 95% that no more than 1% of the plants exceed the THC threshold, and the testing lab must be registered with the DEA.¹³¹ The USDA has established a site for DEA registered labs to list their availability to test hemp, but there are not many labs on the list.¹³² That, coupled with the requirement that samples be taken within fifteen days of anticipated harvest, raises the specter that samples cannot all get tested.

Another result of the 2018 Farm Bill is that licensed growers of hemp may be eligible for various farm programs, such as crop insurance, farm loans, and disaster assistance.¹³³ The farm bill also puts no restrictions on the sale, transport, or possession of hemp-derived products, as long as those items are produced in a manner consistent with the law.¹³⁴ While states and tribes are granted the option to implement more restrictive state regulations over industrial hemp than the federal government, they cannot prohibit the interstate transport of hemp across their state or tribal territory since the act also explicitly allows the transfer of hemp-derived products across state lines for commercial or other purposes.¹³⁵

The expanded opportunities provided by the 2018 Farm Bill for the production of industrial hemp and the sale, transport, and possession of hemp-derived products have further increased the availability and interest in CBD and hemp-derived CBD products. As of 2018, CBD products have quickly become ubiquitous across the United States. A number of national retailers have already begun to carry CBD products on a pilot or ongoing basis.¹³⁶ Producers of hemp-derived CBD products have generated significant market share and brand recognition in only a few short years. Nonetheless, general confusion about the legal status of CBD products remains.

Legally, CBD is marijuana unless it is not. CBD being an extract of

131. 7 C.F.R. § 990.3(a)(2) (2020).

132. U. S. DEP'T OF AGRIC., HEMP ANALYTICAL TESTING LABORATORIES, <https://www.ams.usda.gov/rules-regulations/hemp/dea-laboratories> (last visited Jan. 22, 2021).

133. U. S. DEP'T OF AGRIC., HEMP AND FARM PROGRAMS, <https://www.farmers.gov/manage/hemp> (last visited Jan. 22, 2021).

134. John Hudak, *The Farm Bill, hemp legalization and the status of CBD: An explainer*, BROOKINGS INSTITUTE (Dec. 14, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/>.

135. Agricultural Marketing Act, 7 U.S.C. § 1621 (2018).

136. Connor Skelly, *Retailers are Going After CBD*, BRIGHTFIELD GROUP (Mar. 18, 2019), <https://blog.brightfieldgroup.com/retailers-enter-cbd>.

the “marihuana” plant is, along with THC, a Schedule I Controlled Substance and cannot be legally grown, processed, or sold.¹³⁷ However, following passage of the 2018 Farm Bill there are now two ways that CBD is not deemed a Schedule I substance. First, a long-standing but little-known exception is if material is produced from those parts of the marijuana plant excepted from Schedule I of the CSA. These parts legislatively excepted are the mature stalks, fiber, oil, or cake (unless produced using extracted resin). The DEA takes the position based on the scientific literature that CBD only occurs in trace amounts in the excepted parts of the marijuana plant. Therefore, the DEA says it is not practical to produce CBD from those excepted parts.¹³⁸ Second, and more broadly impactful, is that CBD is extracted from industrial hemp, rather than marijuana, and industrial hemp is now excluded from the definition of “marihuana” in the CSA under the 2018 Farm Bill. Even if CBD derived from industrial hemp falls outside the purview of the CSA, significant legal uncertainties remain when CBD products are marketed and sold in ways that conflict with the Federal Food, Drug, and Cosmetic Act described in the next section.

G. Federal Food, Drug, and Cosmetic Act

The Federal Food, Drug, and Cosmetic Act (FDCA) is a set of laws that grant authority to the U.S. Food & Drug Administration (FDA) to regulate the safety of food, drugs, medical devices, and cosmetics. Under the FDCA, a drug is defined as “intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease”¹³⁹ or “intended to affect the structure or any function of the body.”¹⁴⁰ Thus, the agency’s jurisdiction is triggered by the intended use of the product rather than its physical composition. Generally, intended use is determined on the basis of claims made in labeling, advertising, and other promotion of the product. Therefore, any health claim made about cannabis products, including those with CBD, will be treated by the FDA as a drug.

The FDA has approved CBD in the drug Epidiolex and synthetic THC in the drugs Marinol and Syndros. These drugs are early in their life cycle,

137. See Kimberly Houser, *What Inconsistent Federal Policy Means for Marijuana Business Owners: Washington’s I-502 and the Federal Controlled Substances Act*, 50(3) *Geo. U. L. Rev.* 305 (2015).

138. DEA, *CLARIFICATION OF THE NEW DRUG CODE (7350) FOR MARIHUANA EXTRACT*.

139. 21 U.S.C. §321 (2018).

140. *Id.*

but their approval has increased interest in the medicinal properties of other cannabinoids.¹⁴¹

The 2018 Farm Bill preserved the Food and Drug Administration's authority to regulate products containing cannabis or hemp. Consequently, the FDA's position is that:

Under the FD&C Act, any product intended to have a therapeutic or medical use, and any product (other than a food) that is intended to affect the structure or function of the body of humans or animals, is a drug. Drugs must generally either receive premarket approval by FDA through the New Drug Application (NDA) process or conform to a "monograph" for a particular drug category, as established by FDA's Over-the-Counter (OTC) Drug Review. CBD was not an ingredient considered under the OTC drug review. An unapproved new drug cannot be distributed or sold in interstate commerce.¹⁴²

The FDA has sent warning letters to CBD product manufacturers to that effect.¹⁴³ Further, the FDA has taken the position that almost any sale of CBD violates federal law.¹⁴⁴ Unsurprisingly, the FDA takes the position that, since CBD is an approved drug, it is illegal to label products containing CBD as a dietary supplement.¹⁴⁵ If it were a dietary supplement it would need to conform to the FDA Dietary Supplement Labeling

141. Sara Brittany Somerset, *CBN Is Another Cannabis Compound With Beneficial Properties*, FORBES (July 30, 2019), <https://www.forbes.com/sites/sarabrittanyosomerset/2019/07/30/cbn-is-another-cannabis-compound-with-beneficial-properties/#25ab113f1d9b>.

142. U.S. FOOD & DRUG ADMIN., FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD), Question 4, <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd>.

143. FDA, *FDA warns 15 companies for illegally selling various products containing cannabidiol as agency details safety concerns* (Nov. 25, 2019), <https://www.fda.gov/news-events/press-announcements/fda-warns-15-companies-illegally-selling-various-products-containing-cannabidiol-agency-details>.

144. FDA, *Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#dietarysupplements>.

145. 21 U.S.C. § 321(ff)(3)(B) (2018).

Guide.¹⁴⁶ And the FDA would need to be informed of the addition.¹⁴⁷ The FDA takes the position that, since CBD is an approved drug, it is illegal to put it in human or animal food.¹⁴⁸ Were it otherwise, then the label would need to conform to the FDA's "Guidance for Industry: A Food Labeling Guide."¹⁴⁹ Under the FDCA, cosmetic products and ingredients are not subject to premarket approval by FDA, except for most color additives. Certain cosmetic ingredients are prohibited or restricted by regulation, but currently that is not the case for any cannabis or cannabis-derived ingredients.¹⁵⁰

H. Internal Revenue Code

The Internal Revenue Code, formally the Internal Revenue Code of 1986, is another statute with relevance to cannabis. In 1981, the U.S. Tax Court allowed an illegal business to recover the cost of the controlled substances obtained on consignment and also to claim certain business deductions.¹⁵¹ In response, Congress enacted § 280E in 1982, which reversed the holding in *Edmondson* as it relates to deductions other than the cost of the controlled substances.¹⁵² Section 280E reads as follows:

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in

146. U.S. FOOD & DRUG ADMIN., DIETARY SUPPLEMENT LABELING GUIDE, (Apr. 2005), <https://www.fda.gov/food/dietary-supplements-guidance-documents-regulatory-information/dietary-supplement-labeling-guide>.

147. 21 U.S.C. § 350b(d) (2018).

148. 21 U.S.C. § 331(ii) (2018).

149. U.S. FOOD & DRUG ADMIN., A FOOD LABELING GUIDE GUIDANCE FOR INDUSTRY (January 2013), <https://www.fda.gov/media/81606/download>.

150. A cosmetic is defined in 201(i) as "(1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap." <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd#cosmetics>.

151. See Jeffrey Edmondson v. Commissioner, T.C. Memo. 1981-623. See also Kimberly A. Houser, Jeffrey Gramlich, and Debra Sanders, *How Current Tax Law Policy Affects the Marijuana Industry*, Tax Notes Federal, 899 (Feb. 22, 2016).

152. INTERNAL REVENUE SERVICE, OFFICE OF CHIEF COUNS., No.: 201504011 (2015).

controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.¹⁵³

In recent years the IRS has held that § 280E applies to cannabis businesses that “traffic in controlled substances”—those that cultivate, process, transport, or sell marijuana—even if they are in full compliance with state cannabis regulations, since cannabis is still a Schedule I substance.¹⁵⁴ This section effectively denies these businesses the ability to deduct otherwise ordinary business expenses from gross income.¹⁵⁵ A number of marijuana businesses have challenged the application of § 280E against cannabis businesses in court, but its application continues to be upheld.¹⁵⁶

Ancillary businesses that indirectly support the cannabis industry but are not part of licensed state cannabis programs are generally excluded from the provisions of § 280E. With the exclusion of industrial hemp from the CSA as of the 2018 Farm Bill, companies only involved with industrial hemp and products derived from industrial hemp are also no longer subject to § 280E. Professor Kimberly Houser has warned, “[i]t is currently unclear whether CPAs could face federal criminal prosecution for providing tax services to businesses in states where it is legal to sell marijuana and whether doing so violates state codes of conduct for CPAs.”¹⁵⁷

I. Bank Secrecy Act and Related Regulations

Significant barriers to increased legal marijuana sales, both recreationally and medically, are federal laws and regulations that discourage financial institutions from allowing loans or banking to marijuana-related businesses (MRBs). In addition to the criminal law

153. I.R.C. § 280E (2018).

154. *Alterman v. Commission of Internal Revenue*, T.C. Memo. 2018-83.

155. Given the number of states that have legalized some form of marijuana, it is likely that 280E is more frequently applied to state-legal cannabis businesses than to the types of illegal drug trafficking businesses for which it was originally intended.

156. *E.g.*, *NCSBA v. Commissioner*, 153 T.C. 65 (2019); *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187 (10th Cir. 2018).

157. Jeffrey Gramlich & Kimberly A. Houser, *Marijuana Business and Section 280E: Potential Pitfalls for Clients and Advisers*, 46 TAX ADVISER 524, 524 (2015).

implications of “aiding and abetting,”¹⁵⁸ engaging in a financial transaction¹⁵⁹ and taking payments over \$10,000 derived from marijuana operations¹⁶⁰ a financial institution has Bank Secrecy Act/Anti-Money Laundering (BSA/AML) obligations.¹⁶¹ Banks and credit unions are required to determine if a customer is using the financial institution to further an illegal enterprise and, if so, to report that circumstance to the federal government.¹⁶² Since marijuana is illegal at the federal level, financial institutions have been unsure of their specific obligations. To provide some clarity, the Financial Crimes Enforcement Network (FinCEN)¹⁶³ issued its “BSA Expectations Regarding Marijuana-Related Businesses” on February 14, 2014 (“Cannabis Guidance”).¹⁶⁴ The Cannabis Guidance has been based in part on the Cole Memo priorities.¹⁶⁵ The Cole Memo from the Obama-era Department of Justice has been rescinded but has no effective replacement in the Trump Administration. Many of the current proposals in Congress seek to provide some of the same protection for state-legal operations.¹⁶⁶

The Cannabis Guidance¹⁶⁷ limits its application to those businesses that manufacture, distribute, or dispense marijuana to MRBs. Both MRBs that seek banking services and financial institutions that want to work with MRBs argue that banking MRBs is a public service. A number of U.S. Representatives believe so as well. In January 2018, a bipartisan group of thirty-one members of the House of Representatives jointly sent a letter to FinCEN stating that “FinCEN’s stated priorities have allowed [marijuana] businesses to conduct commerce more safely through financial institutions which reduces the use of all cash, improves public safety, and reduces

158. 18 U.S.C. § 2 (2018).

159. 18 U.S.C. § 1956 (2018).

160. 18 U.S.C. § 1957 (2018).

161. Bank Secrecy Act of 1970, 31 U.S.C. § 5326 (2018); 12 C.F.R. § 1020.320.

162. *Id.*

163. The Financial Crimes Enforcement Network (“FinCEN”), a bureau of the Department of the Treasury, issued guidance on February 14, 2014 (the “Cannabis Guidance”), to clarify Bank Secrecy Act expectations for financial institutions seeking to provide services to marijuana-related businesses. *See supra* notes 156-59 and accompanying text.

164. *See* U.S. DEP’T OF TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014).

165. Cole Memo, *supra* notes 83-84.

166. *See infra* notes 253-60 and accompanying text.

167. *See supra* notes 152-55 and accompanying text.

fraud.”¹⁶⁸ Access to conventional banking improves public safety by getting money off the streets and into the banking system so that it can be monitored and tracked.

The Cannabis Guidance does not permit financial institutions to take deposits from or make loans to MRBs. Nor does it insulate the bank or credit union from criminal or civil liability. All it does is describe what the bank or credit union must do to discharge its BSA/AML obligations. Reports are that the financial institution regulators seem to be satisfied if the bank or credit union has done its diligence and is appropriately discharging its BSA/AML responsibilities.¹⁶⁹ It is evident that federal law imposes significant burdens on MRBs. Altogether, legal uncertainties persist because of federal criminalization of marijuana, because of the exclusion of adult-use cannabis from the Rohrabacher-Farr Amendment and its regular need for renewal, because of the possibility of RICO actions and civil forfeiture, and because of the lack of certainty in how cannabis will be treated under all the statutes described above. Until Congress acts, the constraints on access to the payment system are unlikely to be eased substantially.

The only guidance for investors and cannabis entrepreneurs on the federal criminalization front is to exert continued political pressure on members of the Senate and House to revise the CSA and to be consistent in funding appropriations riders. As to RICO actions, cannabis operations will have to be diligent in following local ordinances and state regulations and take measures to ensure that their locations and methods of operation have minimal negative impact on adjoining property owners and the community. Similarly, cannabis businesses are wise to consider the potential responses of the USDA, FDA, USPTO, and IRS to any and all actions given the considerable lack of precedent and regulatory clarity.¹⁷⁰

168. Letter from Denny Heck et al., House of Representatives, to Ken Blanco, Director, Financial Crimes Enforcement Network (Jan. 17, 2018) (on file with authors).

169. David Baumann, *CUs Won't Be Sanctioned for Providing Marijuana Banking: NCUA Chairman Hood*, CREDIT UNION TIMES (Aug. 5, 2019), <https://www.cutimes.com/2019/08/05/cus-wont-be-sanctioned-for-providing-marijuana-banking-ncua-chairman-hood/?sreturn=20200129141753>.

170. See, e.g., W. Michael Schuster & Jack Wroldsen, *Entrepreneurship and Legal Uncertainty: Unexpected Federal Trademark Registrations for Marijuana Derivatives*, 55 AM. BUS. L.J. 117 (2018).

IV. EXPERIENCES IN THE STATES

In New York we recognize the significant economic development opportunities the booming medical marijuana and industrial hemp industries offer our farmers and businesses. We have made significant progress in creating a supportive regulatory landscape and breaking down barriers for this industry, including supporting banking services for medical marijuana-related businesses by New York State-chartered banks and credit unions.

Andrew M. Cuomo
Governor of New York
September 25, 2019¹⁷¹

This section examines how U.S. states have implemented cannabis legalization before synthesizing some general observations. As will become apparent, how something is legalized is nearly as important as the question of whether to legalize it in the first place.¹⁷² Chief among these observations is that state regulations can have significant effects on the costs of operating a cannabis business and the competitiveness of the legal market relative to the illicit market.

A. State Alcohol & Tobacco Regulations as Antecedents for Cannabis Regulation

When Prohibition ended in the United States in 1933 with ratification of the Twenty-first Amendment,¹⁷³ the Senate sponsor of the amendment resolution, Senator Blaine, said that its purpose was “to restore to the [s]tates . . . absolute control . . . over interstate commerce affecting intoxicating liquors.”¹⁷⁴ Subsequent alcohol control was left up to individual states, municipalities, and counties and included restrictions on price advertising,¹⁷⁵ vertical integration across production, distribution and

171. Press Release, Andrew M. Cuomo, Governor of New York, Statement from Governor Andrew M. Cuomo on Passage of the Secure and Fair Enforcement Banking Act in the U.S. House of Representatives (Sept. 25, 2019), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-passage-secure-and-fair-enforcement-banking-act-us-house>.

172. See Sulkowski, *supra* note 59.

173. U.S. CONST. amend. XXI.

174. 76 Cong. Rec. 4143 (1933).

175. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

retail, regulation on consumption age, the permissible times and locations of sale and consumption, and limitations on sale and shipment in and out of each state.¹⁷⁶ Tobacco has also had a long history of regulation in the United States, including regulations on advertising, product labeling, age restrictions, taxation, and public consumption.¹⁷⁷ These regulations were primarily implemented by the states prior to the passage of the Family Smoking Prevention and Tobacco Control Act in 2009.¹⁷⁸

As U.S. states have begun to legalize cannabis in various forms, substantial regulation of commercial activity has been typical, and prior alcohol and tobacco regulations have provided a menu of regulatory options. In many states, the regulatory authorities tasked with establishing and enforcing a state cannabis program are the same authorities that oversee alcohol and tobacco.¹⁷⁹ Ballot initiatives, in states such as Colorado, and congressional proposals have explicitly suggested that marijuana be regulated like alcohol.¹⁸⁰ Just as U.S. states differ in their regulation of alcohol and tobacco, they also differ significantly in their regulation of cannabis across a number of dimensions described below.

B. Legalized Uses, Forms, and Quantities of Cannabis

The U.S. states differ significantly in the permitted uses, forms, and quantities of cannabis. The key distinction in usage is between medical use approved by a physician for a specific qualifying condition and adult or recreational use with no restriction on the reasons for usage. Within the medical model, each state defines a set of qualifying medical conditions and a process by which physicians are provided responsibility for determining whether an individual's medical conditions should qualify him or her for legal access to cannabis. The breadth of qualifying conditions approved in each state has proven to have a significant impact

176. Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumer's Rights*, 38 AM.BUS.L.J. 38: 1-40 (2000).

177. Sugarman, R.L.R.S.D., *Regulating tobacco*. Oxford University Press on Demand (2001).

178. Family Smoking Prevention and Tobacco Control and Federal Retirement Reform Act, Pub. L. No. 111-31, 123 Stat. 1776.

179. E.g., Washington State Liquor and Cannabis Board, Oregon Liquor Control Commission.

180. See Colorado Marijuana Legalization Initiative, Amendment 64 (2012); Colo. Const. art. XVII, § 16.

on the number of patients obtaining medical cards and the overall size of the state medical market.

While thirty-three states have legalized medical marijuana, the remaining seventeen have all passed laws allowing the use of CBD extract, usually in oil form, with minimal THC.¹⁸¹ The range of THC levels permitted ranges from 0% to 5% across these states.

Among states that have legalized some form of medical marijuana, there is also considerable variation in personal possession limits, defined in terms of the number of days supply, the weight or usable weight, or the number of plants. Often physicians are given responsibility for determining a specific individual limit. States that have legalized recreational marijuana also have personal possession limits, as well as varying limits on the range of legal forms and size of allowable transactions. States have prohibited certain shapes and colors of products, particularly edibles, to limit appeal to youth.¹⁸²

C. *Licensing Models*

Under the open license model used by states such as Colorado, Washington, and Oregon, the state establishes minimum eligibility requirements and an application process to obtain a cannabis license but does not establish a maximum number of such licenses.

In contrast, under the limited license model implemented in states such as Nevada, Illinois, Massachusetts, and Ohio, the state establishes a maximum number of cannabis licenses in a particular category and then develops an allocation process, usually either through merit-based application review or lottery, to allocate those limited licenses.

In many cases the choice between these licensing models is explicitly provided for in the ballot initiative or legislation that establishes the state cannabis program. Another point of licensing variation between states is in determining whether licensed commercial participants in a state medical marijuana program are granted early or exclusive access to participate in recreational or adult-use markets where they exist.

The importance of these licensing decisions can be seen in the wide disparities in the number of licensed providers across legalized states and

181. BRITANNICA PROCON.ORG, <https://medicalmarijuana.procon.org/states-with-legal-cannabidiol-cbd/> (last updated Dec. 3 2020).

182. *E.g.*, Wash. State Liquor & Cannabis Board, Packaging and Labeling Guide: For Medically Compliant and Recreational Marijuana (2019).

the number of lawsuits that have been filed to challenge the licensing decisions of various state regulators including in Ohio,¹⁸³ Nevada,¹⁸⁴ and Maryland.¹⁸⁵

D. Vertical Integration

Vertical integration is a business strategy in which one company participates in all stages of the production path of a product. For cannabis, this can encompass cultivation, processing, or manufacturing and sales. U.S. states differ significantly in their openness to vertical integration in the cannabis industry. When Washington voters passed Initiative 502 (I-502) in 2012, the referendum language mirrored post-prohibition alcohol laws prohibiting vertical integration and ultimately slowing the flow of product to customers as each licensed cultivator had to find a suitable licensed retail partner before sales could commence.¹⁸⁶ Others, such as Colorado and Massachusetts, at least initially required some degree of vertical integration, with cultivators also required to sell to patients or customers, and retailers also required to cultivate their own cannabis products. Required vertical integration was thought to simplify the oversight responsibilities for the state by reducing the total number of license holders and reducing transfers of cannabis between them. However, vertical integration has also proven to be a barrier to industry diversity as it limits the number of individuals with the resources to operate a more complex business.¹⁸⁷

E. State Taxation

As with alcohol and tobacco, states have allowed a wide range of taxes to be applied to cannabis at both the state and local levels. Indeed, the

183. See *PharmaCann Ohio, LLC v. Ohio Department of Commerce*, No. 17-CV-10962, 2018 WL 7500067 (Ohio Com.Pl.) (Trial Order).

184. See *Serenity Wellness Center v. State of Nevada Dept. of Taxation*, No. A-19-786962-B, 2019 WL 10247971 (Nev. Dist. Ct.) (Trial Order).

185. See *Jane and John Doe v. Alternative Medicine Maryland, LLC*, 168 A.3d 21 (Md. 2017).

186. Anne van Leynseele, *Washington: Vertical Integration: What It is and Why It Matters to Cannabis*, CANNABIS L. J., <https://journal.cannabislaw.report/washington-vertical-integration-what-it-is-and-why-it-matters-to-cannabis/>.

187. Jolene Hanson, *The Pros and Cons of Vertical Integration*, CANNABIS BUS. TIMES, October 2017, <https://www.cannabisbusinesstimes.com/article/the-pros-and-cons-of-vertical-integration/>.

generation of substantial tax revenue has been one of the arguments used in favor of cannabis legalization. However, there are significant complexities in generating tax revenue from a federally illegal substance and questions regarding whether proceeds of taxation are sufficient relative to regulatory costs and societal impacts.¹⁸⁸

Oregon, which does not have a general sales tax, levies a 17% sales tax on marijuana.¹⁸⁹ In Colorado, taxes for medical cannabis are lower than those for recreational cannabis, with a 15% excise tax on the sale of marijuana from a cultivator to a retailer as well as a 15% sales tax on recreational sales.¹⁹⁰ A portion of Colorado state tax revenue is specifically directed to K-12 education and exceeded ninety million dollars in 2017-18.¹⁹¹ Counties and municipalities may also apply specific cannabis taxes.

The total effective tax rate on cannabis has a significant impact on the competitiveness of the legal cannabis market with the illicit market, as seen in the experience of California and Massachusetts. For example, in Massachusetts, the price of the same amount of marijuana at a legal point-of-sale may reportedly be seven times its illicit market price.¹⁹²

F. CBD

Just as the production and sale of CBD products raises legal questions at the federal level, it also raises legal questions at the state level. The first consideration is whether CBD is legal under state law. A number of states have specific laws legalizing CBD for the treatment of certain diseases. Following the 2014 Farm Bill, a number of states established industrial

188. Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, Vanderbilt Public Law Research Paper No. 10-05; Vanderbilt Law and Economics Research Paper No. 10-04; University of Chicago Legal Forum 222, 223 (2010), <https://ssrn.com/abstract=1549828>.

189. Katherine Loughhead & Morgan Scarborough, *How High Are Recreational Marijuana Taxes in Your State?*, TAX FOUNDATION (Apr. 26, 2018), <https://taxfoundation.org/state-marijuana-taxes-2018/>.

190. COLORADO DEPARTMENT OF REVENUE, TAXATION DIVISION, RETAIL MARIJUANA SALES TAX CHANGES FACT SHEET (June 30, 2017), <https://www.colorado.gov/pacific/sites/default/files/2017JulySB267.pdf>.

191. COLORADO DEPARTMENT OF EDUCATION, MARIJUANA TAX REVENUE AND EDUCATION (last updated June 12, 2019), <https://www.cde.state.co.us/communications/2019marijuanarevenue>.

192. Quote from NORML Board of Directors member Keith Saunders at Boston conference (Oct. 2019), <https://www.cwcbexpo.com/session/is-consumer-friendly-cannabis-policy-possible/>.

hemp pilot programs with varying levels of state support for commercial sale of hemp-derived products. Under the 2018 Farm Bill, some states have already had their state programs approved and others will follow to have USDA approved growers of hemp.

The difficulties with Oklahoma's statutory scheme may be instructive. Oklahoma has made industrial-hemp farming legal.¹⁹³ In Oklahoma, industrial hemp is excluded from the definition of marijuana under certain circumstances.¹⁹⁴

Because of the various effective dates, it seems that industrial-hemp grown in Oklahoma is not exempt from the definition of marijuana in Oklahoma. How a court would handle this is in question. It is inconsistent to have an Industrial-Hemp Pilot Program to grow hemp in Oklahoma and have penalties for growing hemp in Oklahoma. In any event, CBD oil derived from hemp grown in other jurisdictions would remain illegal as it is not "grown pursuant to the Oklahoma Industrial Hemp Program."¹⁹⁵ Or in the case of version two, it can only be imported to treat specific diseases.

Regardless of how state statutes treat hemp cultivation, a separate topic that has yet to be addressed by most state legislatures is the permissibility of out-of-state shipment and sale of CBD products into the state.

G. Compliance Obligations

In states where there is some form of legalized cannabis, there are substantial compliance obligations for licensed cannabis businesses over and above those of other businesses. These obligations include physical security, cultivation and processing practices, product specifications, and transaction conformance. Each compliance obligation represents additional operating costs for cannabis businesses.

193. OKLA. STAT. tit. 2 § 3-401 (2019).

194. Two amendments to 63 OKLA. STAT. §2-101(23)(h) in the last legislative session cloud the matter. Two amendments were adopted. One was by Laws 2019, SB 868, c. 91, § 10, emerg. eff. April 18, 2019 ("Version 1") and by Laws 2019, SB 848, c. 428, § 16, emerg. eff. May 21, 2019 ("Version 2"). They both exempt "industrial hemp" from the definition of marijuana. Version 1 exempts "h. industrial hemp . . . and any part of such plant . . . which shall only be grown pursuant to the Oklahoma Industrial Hemp Program and may be shipped intrastate and interstate." Version 2 exempts "h. industrial hemp . . . and any part of such plant . . . which shall not be grown anywhere in the State of Oklahoma but may be shipped to Oklahoma pursuant to the provisions of subparagraph e or f of this paragraph."

195. OKLA. STAT. tit. 63 § 2-101(23)(h) (2019).

Requirements for physical security include seed-to-sale tracking and inventory reconciliation, building access control protocols, video surveillance, disposal of waste, separation of medical and recreational areas and products, and filing of product transportation manifests.

Due to the Schedule I classification of cannabis, the USDA has not provided guidance to cannabis cultivators on acceptable pesticide use for cannabis crops. Instead, a number of states, including Colorado, have introduced their own requirements.¹⁹⁶ Processing practices are also regulated, including limiting the use of highly hazardous substances such as flammable gases to state-licensed processors.¹⁹⁷ More recently, Colorado was the first state to introduce heavy metals testing.¹⁹⁸ States, as well as local authorities, may also regulate odor, noise, and operating hours.

Many states have rules dictating the allowable THC in a purchased item and each serving portion contained within. Packaging rules typically require THC warning labels, disclosure of THC content and other ingredients, as well as child-resistant packaging.

Compliance requirements are also significant at the time of sale to customers. Medical cannabis programs require dispensaries to verify that purchasers have valid proof of medical eligibility, and requirements to determine state residency and age are also commonplace. In consideration of personal possession limits and concerns about diversion of legally purchased marijuana into the illicit market, purchase volume restrictions have also been implemented. For example, Colorado's Retail Marijuana Code Rule 402 provides that "[a] Retail Marijuana Store and its employees are prohibited from Transferring more than one ounce of [marijuana] . . . in a single transaction to a consumer."¹⁹⁹ Dispensaries face an additional challenge in monitoring repeat customers to avoid "looping," repeated purchases designed to exceed these transaction limits.²⁰⁰

Professor David Orozco has written extensively about compliance

196. COLO. REV. STAT. § 35-10 (2015).

197. COLO. REV. STAT. § 18-18-406(2)(a)(I).

198. *See New Colorado rules increase marijuana product safety and improve business efficiencies*, Colorado Marijuana, Col. Official State Web Portal (Nov. 13, 2018), <https://www.colorado.gov/pacific/marijuana/news/new-colorado-rules-increase-marijuana-product-safety-and-improve-business-efficiencies>.

199. COLO. CODE REGS. § 212-2.402 (2018).

200. Robert A. Mikos, *The Looping Problem in Marijuana Sales*, MARIJUANA L., POL'Y, & AUTH. BLOG (May 9, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/05/the-looping-problem-in-marijuana-sales/>.

effectiveness, procedures, and necessary feedback loops.²⁰¹ The application of compliance effectiveness to the cannabis industry appears to be a robust area for future research.

V. THE CANADIAN EXPERIENCE

Canada's approach to national cannabis legalization and the results provide some useful insights regarding options available to the United States should some form of federal cannabis legalization be enacted. Three defining characteristics of the Canadian experience have been a stated prioritization of public health and safety over commercial interests, division of regulatory responsibilities between federal and provincial/local governments, and a phased approach to implementation. The results of this legalization approach for cannabis businesses have been decidedly mixed and have fallen short of the expectations of cannabis businesses as well as investors and customers.

A. Prioritization of Public Health and Safety

When Canadian Prime Minister Justin Trudeau's Liberal Party introduced legislation to make Canada the second nation to completely legalize marijuana as a consumer product, the provided justification was framed around health and safety. "Criminal prohibition has failed to protect our kids and our communities," said Bill Blair, who was appointed by Trudeau to lead the implementation process. "It is not our intent to promote the use of this drug."²⁰² This prioritization has been demonstrated in strict limitations placed on product packaging "that could be appealing to young persons or encourage its consumption," prominent warning labels required on cannabis packaging, and prohibitions on event sponsorship by cannabis companies.²⁰³

201. See David Orozco, *A Systems Theory of Compliance Law*, 22 U. PA. J. BUS. L. (2020); David Orozco, *Compliance by Fire Alarm, Regulatory Oversight Through Information Feedback Loops*, 46 J. CORP. L. 97 (2020).

202. Ian Austin, *Trudeau Unveils Bill Legalizing Recreational Marijuana in Canada*, N.Y. TIMES (April 13, 2017), <https://www.nytimes.com/2017/04/13/world/canada/trudeau-marijuana.html>.

203. Bill C-45 2(d)(31) and 2(a)(17). Accessed at <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-45/royal-assent>.

B. Division of Regulatory Responsibilities

Under the Canadian model, Health Canada, the equivalent of the U.S. FDA, controls the licensing of all cultivator and cultivation facilities, defines legal product forms and testing standards, and sets a minimum standard for purchase age. Individual Canadian provinces have jurisdiction over retail distribution and sales in their province, whether through government-operated or privately-operated businesses and through physical stores or online and mail-order. The provinces can also set higher restrictions on age of consumption, product forms, and locations of consumption. Some provincial governments are also involved in partnerships with private businesses for economic development purposes.

C. Phased Implementation

Canada, like a number of U.S. states, permitted medical use of cannabis for a number of years prior to expanding legal access for non-medical purposes. However, there have also been a number of other phased aspects to the implementation process. At the time of initial adult-use legalization on October 17, 2018, prohibitions on possession and home cultivation of cannabis were lifted, but the commercial availability of cannabis was still limited. Many provinces did not yet have physical retail stores approved and open for business, leaving adult-use customers only limited mail-order options. For the first year of adult-use legalization, product forms were limited to flower, oils, and creams, but edible products were not allowed, consistent with Canada's prior medical marijuana program. An expanded set of products were permitted as of October 2019, with availability delayed at least sixty days pending Health Canada's approval of each product. The number of retail stores selling cannabis has grown, led by the city of Calgary and the province of Alberta with 65 and 306 licensed retail cannabis stores, respectively.²⁰⁴ Legalization has proceeded despite a lack of accepted techniques for assessing impaired driving and in advance of standard policies on public consumption.

204. Madeline Smith and Kevin Maimann, *How Alberta emerged as Canada's unexpected pot capital, one year post-legalization*, TORONTO STAR (Oct. 16, 2019), <https://www.thestar.com/calgary/2019/10/16/how-alberta-emerged-as-canadas-unexpected-pot-capital-one-year-post-legalization.html>.

D. Mixed Stakeholder Reactions

The Canadian experience has generated mixed reactions from societal and business stakeholders. From a societal perspective, Statistics Canada figures show that legalization did not affect the overall consumption of cannabis in the country.²⁰⁵ Some opponents of legalization continue to feel that Canada has moved too quickly and broadly in establishing a national legal industry while supporters of legalization argue that the pace and scope of legalization has been too limited. What is not in debate is that legalization has so far failed to significantly eliminate the illicit cannabis market, with over 40% of consumers still getting some of their cannabis from illegal sources.²⁰⁶ In January 2020, Statistics Canada reported that legal cannabis was selling for \$10.30 per gram as compared to only \$5.73 per gram for illicit cannabis. From Q4 2018 to Q4 2019, the average selling price for licensed Canadian cannabis grew by more than 6% while prices for illegally produced cannabis declined by 11%.²⁰⁷

From a commercial perspective, benefits of Canada's national legal cannabis framework have included the ability to operate and transport cannabis nationally and to be taxed the same as non-cannabis firms. Canadian companies have also been able to access international medical cannabis markets, both through investment and trade.²⁰⁸ Canadian cannabis companies are publicly traded not only on Canadian stock exchanges but on the New York Stock Exchange and NASDAQ, since they are deemed in compliance with laws in their operating jurisdictions.²⁰⁹ These same U.S. exchanges will not list state-licensed

205. Sahar Esfandiari, *One year after Canada legalized weed, figures suggest a large number of Canadians still buy their cannabis on the black market*, BUS. INSIDER (Oct. 17, 2019), <https://www.businessinsider.com/canada-weed-black-market-boom-despite-legalization-2019-10>.

206. *Id.*

207. Eric Volkman, *In Canada, the Price Gap Between Legal and Black-Market Marijuana Is Near Its Peak*, THE MOTLEY FOOL (Jan. 20, 2020), <https://www.fool.com/investing/2020/01/24/canada-marijuana-price-gap-legal-black-market-peak.aspx>.

208. See generally Eric Foster et al., *Global cannabis trade: A primer on Canadian import/export requirements for cannabis*, JD SUPRA (Jan. 15, 2020), <https://www.jdsupra.com/legalnews/global-cannabis-trade-a-primer-on-13428/>.

209. Sean Williams, *Aurora Cannabis or Canopy Growth: Which Pot Stock Will Have the Better 2020?*, MOTLEY FOOL (Dec. 16, 2019), <https://www.fool.com/investing/2019/12/16/aurora-cannabis-or-canopy-growth-which-pot-stock-w.aspx> (discussing which Canadian cannabis firms have better prospects for 2020 on the New York Stock Exchange).

U.S. cannabis companies due to the conflict with federal law.

However, commercial challenges still exist, and some stem from variation in how individual provinces and municipalities have regulated aspects of the industry under their authority. Cannabis producers and customers have complained that taxes and markups make legal cannabis too expensive relative to the illicit market.²¹⁰ Many areas are lacking sufficient physical stores to meet consumer demand, and businesses operating in multiple jurisdictions must comply with differing policies.²¹¹ While there are no longer any legal restrictions preventing Canadian banks from taking on cannabis clients, many major banks are still reluctant to do so.²¹² 2019 legal Canadian cannabis sales finished far below initial projections of \$4.34 billion²¹³ due to factors that may include inadequate supply, limited product forms, and the slow rollout of retail outlets. Publicly traded Canadian cannabis companies have experienced volatile stock market performance and many have laid off employees in the early months of 2020.²¹⁴

VI. ETHICAL ISSUES FOR CANNABIS LEGALIZATION

Now legal in sixteen states, recreational cannabis poses ethical questions that are distinct from ethical questions about medical marijuana.²¹⁵ One such question is: Whether people using cannabis for pleasure, rather than for reducing pain or treating underlying medical

210. Ian Austen, *From Canada's Legal High, a Business Letdown*, N.Y. TIMES (Dec. 15, 2019), <https://www.nytimes.com/2019/12/15/world/canada/marijuana-cannabis-legalization.html>.

211. *Id.*

212. Vanmala Subramanian, *'They still don't like you': Why Major Canadian Banks Remain Cool to the Red-hot Cannabis Sector*, FIN. POST (Oct. 25, 2018), <https://financialpost.com/cannabis/why-canadian-banks-remain-cool-to-the-red-hot-cannabis-sector>.

213. *See generally Cannabis: A Turning Point for Society, an Industry Quickly Maturing*, DELOITTE (2019), <https://www2.deloitte.com/global/en/pages/finance/articles/turningpoint-cannabis.html>.

214. Tara Deschamps, *More Cannabis Industry Layoffs Likely After 500 positions Cut at Aurora: Experts*, THE CANADIAN PRESS (Feb. 17, 2020), <https://globalnews.ca/news/6523682/cannabis-industry-layoffs-aurora/>.

215. Ulrik Boesen, *How High Are Taxes on Recreational Marijuana in Your State?* TAX FOUNDATION (Mar. 31, 2021), [https://taxfoundation.org/state-recreational-marijuana-taxes-2021/#:~:text=Currently%2C%2016%20states%20\(Alaska%2C,sale%20of%20recreationa%20marijuana%2C%20and](https://taxfoundation.org/state-recreational-marijuana-taxes-2021/#:~:text=Currently%2C%2016%20states%20(Alaska%2C,sale%20of%20recreationa%20marijuana%2C%20and).

conditions, are somehow “less moral?”²¹⁶ If so, another question, at a societal systems level, is: Whether legalization of recreational cannabis—encouraging or at least legitimizing such use—would be less moral as well? In between these basic personal and societal questions is: Whether a business organization selling recreational marijuana products is less moral or “socially responsible” than other retailers, such as an automobile dealership?²¹⁷

A. *Morals and the Individual Use of Recreational Marijuana*

We first address the questions about individual morality, and find, overall, that while there may be reasons to find that recreational use of marijuana is morally questionable, it is difficult to make the philosophical or empirical case that it is significantly more “wrong” to use marijuana recreationally than it is to use many other products currently consumed in the United States.²¹⁸

216. The original impetus for medical marijuana laws was that cannabis had positive medicinal effects for people who were suffering a variety of ailments; for recreational marijuana, no such claims are made, so the moral basis of “relieving suffering” is absent. On March 17, 1999, “11 independent scientists appointed by the Institute of Medicine reported that medical marijuana was effective in controlling some forms of pain, alleviating nausea and vomiting due to chemotherapy, treating wasting due to AIDS, and combating muscle spasms associated with multiple sclerosis.” Clark, Peter A., *The Ethics of Medical Marijuana: Government Restrictions vs. Medical Necessity*. 21 J. Pub. Health Pol. 1, 40-60 (2000).

217. Odd comparisons occur; for example, car and truck driving damages the environment and results in over 40,000 fatalities on U.S. highways every year, while the environmental damage of marijuana grow houses is limited to a distinctive odor and no recorded cases of overdose deaths from smoking cannabis have been found in extensive literature reviews. See Robert S. Gable, *The Toxicity of Recreational Drugs*, AM. SCIENTIST (Research Triangle Park, NC: Sigma Xi, The Scientific Research Society, May-June 2006) Vol. 94, No. 3, p. 207. If, however, you count marijuana as a “gateway drug,” then there are indeed deaths from opioids, heroin, and other “hard” drugs. See generally Common Sense for Drug Policy, *Drug War Facts*, (2020), https://www.drugwarfacts.org/chapter/causes_of_death. A relevant aspect of this site counts annual U.S. fatalities as above 480,000 for tobacco, and 34,658 for alcohol. Annual deaths from heart disease, arguably the result of “wrongful consumption,” exceeds 835,000. *Id.*

218. At this time, the known negative social effects of alcohol are likely be greater than negative social effects of recreational marijuana. Dirk W. Lachenmeier and Jurgen Rehm, *Comparative risk assessment of alcohol, tobacco, cannabis and other illicit drugs using the margin of exposure approach*. SCI. REP. (Jan. 30, 2015); The Marijuana Policy Project claims that “consuming marijuana is simply something that some adults choose to do, and some specifically choose to do it instead of having that cocktail, beer, or glass of wine. . . . Marijuana is less toxic than alcohol, less addictive, less harmful to the body, and less

Under the banner of a “free society,” the question of individual consumption choices is usually answered by invoking allied concepts of individual liberty and personal autonomy. Autonomous individuals have every right to pursue happiness as they choose for themselves; self-determination of “the pursuit of happiness” (an ideal proclaimed in the Declaration of Independence) does not mean that we have no obligations to others, but that others have much weaker claims on what we can choose as good for ourselves.²¹⁹

On this view, those who prefer to watch the Metropolitan Opera are not “better” morally than those who enjoy episodes of *Beavis and Butthead* or even pornography. On this view, as well, those who often engage in binge drinking are no better or worse morally than teetotalers or “social drinkers” who might have one glass of wine or beer at a party.

Joined with “individual autonomy” are claims that “individual liberty” favors legalization. The basic claim is that people should be able to use or do anything as long as they do not impair the liberty of others. This fits the classic claim that “your right to swing your arm ends at the tip of my nose.” But plenty of product uses can cause harm to others’ noses and beyond: secondhand smoke, negligent driving, and drunken acts can adversely affect other people. Even without direct touching, teenagers vaping in class, reckless drivers, or obnoxious drunkards at football games can and do affect other people’s sensibilities, as well as the overall social culture.

Thus, “individual liberty” as a moral basis for legalization is only a

likely to contribute to violent or reckless behavior.” Marijuana is safer than alcohol: it’s time to treat it that way.” Marijuana Policy Project, *Marijuana Is Safer Than Alcohol: It’s Time To Treat It That Way*, <https://www.mpp.org/marijuana-is-safer/> (last visited Apr. 22, 2021).

Of course, more long-term studies on the negative effects of alcohol will be done, but preliminary indications are that alcohol, tobacco, sugar, and other products legally consumed in the U.S. present serious problems. See, e.g. American Addiction Centers, *Survey Says Sugar is More Harmful Than Marijuana*, (Dec. 11, 2019), <https://www.rehabs.com/blog/survey-says-sugar-is-more-harmful-than-marijuana/>.

219. Autonomy is “an individual’s capacity for self-determination or self-governance.” In common parlance, this is the “right” to pursue life in one’s own way, with freedom in key areas of one’s life. Philosophers draw distinctions among personal autonomy, moral autonomy and political autonomy. “Moral autonomy, usually traced back to Kant, is the capacity to deliberate and to give oneself the moral law, rather than merely heeding the injunctions of others. Personal autonomy is the capacity to decide for oneself and pursue a course of action in one’s life, often regardless of any particular moral content. Political autonomy is the property of having one’s decisions respected, honored, and heeded within a political context.” “Autonomy,” INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://www.iep.utm.edu/autonomy/>.

starting point. Society must balance individual freedom for users with due regard for others' sensibilities and for public safety. This is why governments intrude on absolute individual liberty. In Colorado, for example, recreational cannabis is legal, but public use of cannabis is prohibited. There are also restrictions on the amount of THC that can be in any item sold, regulations on who can qualify as a cannabis entrepreneur, and restrictions on the amount that can be sold by one retail outlet to one customer in any 24-hour period.²²⁰ We will address the societal level ethical question of legalization in the subsection that follows. First, though, we will go a little deeper into the individual's "right to choose" recreational marijuana consumption and attempt to summarize some ethical argumentation from the classical philosophers to more recent commentary.

One argument that an individual's recreational cannabis use may be "less moral" is that human beings are better off not indulging in certain temporary pleasures, as they may become less healthy, mindful, and thriving as individuals. This argument has Aristotelian overtones, suggesting that individuals should avoid excess. But that does not definitively militate against legalization, as a "golden mean" of moderate use, versus abstinence or addiction, can be compatible with legalization.

Still, it is possible to construct an Aristotelian argument against individual recreational marijuana use. Some studies suggest that heavy use of cannabis diminishes our capacity to use reason in moral deliberation. Most of western philosophy has regarded "reason" or "rationality" as a distinctively human trait.²²¹ Descartes' "I think, therefore I am" represents this approach, but well before Descartes, Plato and Aristotle emphasized how the good life for humans required full engagement of our rational faculties. Aristotle, for example, characterizes the happy life "as involving centrally the exercise of reason, whether practical or theoretical. Happiness turns out to be an activity of the rational soul, conducted in accordance with virtue or excellence, or, in what comes to the same thing, in rational activity executed excellently."²²²

The need for reason in moral deliberation is supported by Aristotle's

220. *Laws About Marijuana Use*, Colorado Marijuana, <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use>.

221. Although there is increasing evidence that humans make decisions based more on emotion than reason. *See infra*, note 221 and accompanying text.

222. Aristotle, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/aristotle/#Log> (last visited Jan. 22, 2021).

virtue ethics but is contradicted by some parts of Kantian thought: a proponent of legalizing recreational cannabis could universalize its occasional recreational use and could do so without contradicting known universal principles; moreover, the occasional cannabis user is not using anyone else as a means to his or her own ends. But, like Aristotle, Kant might well object to a debilitating and persistent abuse of recreational cannabis as impairing the individual's autonomy, given the well-known effects of memory loss, impairment of judgment in critical situations, or long-term developmental effects on teen brains. As to the morality of individual cannabis use, this leads to a conclusion that those who choose not to impair their rational deliberations may stand on higher moral ground than those who do. To the extent that by rational and deep reflection they are also able to see and correct for their own biases and heuristics, they would stand on higher moral ground than those who do not even try to reflect and recognize their own strong biases and heuristics. Whether through intoxicants or otherwise, some people abandon rationality and reflection entirely, become deeply irrational, and may even come to embrace their own biases proudly and openly, such as Islamic terrorists, White Nationalists, contributors to viral and toxic social media, and fanatics of every stripe and political bend.

Before turning our focus to the societal ethics and policy question, it is important to note that certain religious perspectives—fully laden with advice about how to live—will have their say here, as well. The Bible does not address cannabis use but has much to say about drunkenness. St. Paul criticized drunkenness as wrong because it prevents us from making wise choices and discerning God's will²²³; he also claimed that drunkenness is the behavior of those who walk in darkness.²²⁴ Jesus condemned drunkenness because it weighs down the heart and makes us inattentive to the coming of the Lord.²²⁵ Some utilitarians would say that some pleasures rank higher than others.²²⁶ Walking in darkness with a heavy heart would probably not qualify as a very high pleasure, but “getting high” is

223. *Ephesians* 5:18; 1 *Corinthians* 5:11 (“But now I am writing you not to associate with anyone who claims to be a brother but is sexually immoral or greedy, an idolater or a verbal abuser, a drunkard or a swindler. With such a man do not even eat.”).

224. *Romans* 13:13 (“Let's behave properly as in the day, not in carousing and drunkenness, not in sexual promiscuity and debauchery, not in strife and jealousy.”).

225. *Luke* 21:34.

226. Michael Sandel discusses Bentham, Mill, and “higher versus lower pleasures” in his lecture series, offered online. See Lecture 4, <https://scholar.harvard.edu/sandel/justice>; See also MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? (2009), at 52-56.

obviously a great pleasure for some, and in the wake of the Coronavirus, was even deemed “essential” after some state quarantines closed non-essential businesses.²²⁷ In Colorado, this was evidently the people’s choice as to what was essential to wait out the quarantine—they “voted” with their feet and bodies, creating large and crowded lines that defeated the purpose of the quarantine.²²⁸

Presumably there were more than a few practicing Christians in those lines. But when it comes to policy questions around marijuana, legislators at the federal level have not been ready to embrace legalization of either medical marijuana or recreational marijuana, and even as recently as 2005, only a third of those polled by Gallup favored legalizing recreational marijuana.²²⁹ At the same time, Americans remain quite divided in their overall support for legalization of marijuana use, with 48% in the poll saying it should be legal and 50% saying it should not be. Americans’ views are roughly the same as they were last October, but as recently as 2005, only about a third of Americans supported marijuana legalization. In 1969, when Gallup first asked about the issue, 12% supported legalization. In what follows, we question the long history of criminalizing people who used marijuana, a policy that since the 1930s has caused many negative social consequences in the United States. But we also question the ethics of empowering potential drug abuse by full federal legalization of recreational marijuana.

B. The Morals of Marijuana Legalization

For many years, the National Organization for the Reform of Marijuana Laws (NORML) argued publicly that marijuana should be classified much lower in the controlled substances categories of the CSA and for complete legalization. President Nixon declared a War on Drugs in 1970 and saw to it that marijuana was kept on the list of the most

227. In Colorado, Governor Polis issued “remain in place” requests for individuals, but also identified “essential services,” such as groceries and pharmacies. After extremely long lines at marijuana dispensaries, liquor stores, and gun shops, those providers were added to the “essential services” list. See NPR, 1A, *A Governor and a Patient Weigh In on the Fight Against COVID-19* (Mar. 31, 2020), <https://www.npr.org/2020/03/31/824584608/a-governor-and-two-patients-weigh-in-on-the-fight-against-covid-19>.

228. *Id.*

229. Frank Newport, *Americans Want Federal Gov’t Out of State Marijuana Laws*, GALLUP (Dec. 10, 2012), <https://news.gallup.com/poll/159152/americans-federal-gov-state-marijuana-laws.aspx>.

penalized substance use. There were evident racial biases in play even then.²³⁰ The majority of people went along, considering marijuana a “gateway drug,” one that would most likely lead to use and abuse of other substances high on the CSA’s classification, substances such as heroin and cocaine; because the War on Drugs was politically popular, arguments by NORML and others gained little traction.

But the War on Drugs, like the War on Poverty or the Global War on Terror, has been an abject failure in many ways.²³¹ With an increasing number of states legalizing cannabis in conflict with federal policy, we well may ask what ethical perspectives could inform the debate on federal policy.

Ethical perspectives that embrace “individual choice” or “personal autonomy” are well reflected in the position of the Libertarian Party; its perspective is that government should be limited to essential protections for property and freedom.²³² While individuals can overuse or abuse almost any substance (sugars, trans-fats, caffeine, alcohol, tobacco, cannabis) or service (gambling casinos, brothels, etc.), the government must not engage in telling people what kind of life to pursue. As the Libertarian Party puts it, “[i]ndividuals own their bodies and have rights over them that other individuals, groups, and governments may not violate. Individuals have the freedom and responsibility to decide what they knowingly and voluntarily consume, and what risks they accept to their

230. *A Brief History of the Drug War*, DRUG POLICY ALLIANCE (January 22, 2021) <https://www.drugpolicy.org/issues/brief-history-drug-war>. “A top Nixon aide, John Ehrlichman, later admitted: ‘You want to know what this was really all about. The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying. We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.’ Nixon temporarily placed marijuana in Schedule One, the most restrictive category of drugs, pending review by a commission he appointed led by Pennsylvania Governor Raymond Shafer.” As early as 1972, that commission unanimously recommended that possession of marijuana for personal use be decriminalized, but Nixon ignored the recommendation. *Id.*

231. Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INSTITUTE (April 12, 2017) <https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs>.

232. *It’s high time for Congress to end marijuana prohibition*, LIBERTARIAN PARTY (Jan. 6, 2018), <https://www.lp.org/high-time-congress-end-marijuana-prohibition/>.

own health, finances, safety, or life.”²³³

As for the utilitarian perspective, it is hard for them to make the case that the government can successfully define and enforce what pleasures are lawful and which ones should be limited.²³⁴ But it is also clear that empirical examination of the effects of some substances as more harmful or less harmful would be useful. What is happening in states that have legalized medical and recreational marijuana can provide helpful empirical data, especially if federal research restrictions are lifted.

Some of Kant’s writings seem to side with Libertarians, as he argues that the welfare of citizens cannot be the basis of state power, and that governments cannot legitimately impose any particular conception of happiness upon its citizens.²³⁵ Governments would then be treating adult citizens as children, unable to understand what is truly useful or harmful to themselves.

But the field of behavioral ethics tells us that often we fail to understand our own choices.²³⁶ Our cognitive biases and heuristics make us “predictably irrational,”²³⁷ and when we are “under the influence,” whether due to alcohol or cannabis, it is even more difficult to make good choices and to speak and act with moral consideration for others. If moral reflection is difficult in the best of circumstances, it becomes more so with any mind-altering substance, and the point of using cannabis recreationally is, at least, to alter consciousness.

233. Libertarian Party, 2018 Platform, 1.1 Self Ownership. <https://www.lp.org/platform/>.

234. Yet the laws are full of seemingly utilitarian thinking: e.g. crack cocaine is “worse” or more harmful than other forms of cocaine, that minors should be forbidden to buy cigarettes or buy alcohol, that child pornography is “worse” than many other forms of pornography, etc. In each case, people and policy-makers seemingly make rational calculations about what would be “worse” for society, but in the case of marijuana versus other substances or products that may be abused, those calculations can be anything but rational. See *supra*, note 206, (on fatality comparisons for use of other substances, such as alcohol).

235. *Kant’s Social and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 24, 2017), <https://plato.stanford.edu/entries/kant-social-political/>.

236. See generally Herbert Simon, *A behavioral model of rational choice*, QUARTERLY JOURNAL OF ECONOMICS, 69, 99-118 (1955); Amos Tversky and Daniel Kahneman, *Judgment under uncertainty: heuristics and biases*, 185 SCIENCE, at 1124-30. (1974). Amos Tversky and Daniel Kahneman, *The framing of decisions and the psychology of choice*, 211 SCIENCE at 453-63 (1981); Daniel Kahneman, THINKING, FAST AND SLOW. (2011).

237. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008).

As we saw in the preceding section, some philosophical arguments claiming that legalized cannabis, even routinely used, may diminish an individual's capacity for reasoning, practicing virtue, and being spiritually oriented. Even if we accept those claims, the question remains whether those are persuasive and adequate reasons for shaping public policy against recreational cannabis. Consistent with Libertarian thought, the values of "liberty" and "personal autonomy" argue against government prohibitions, while communitarian thought emphasizes connections between people, collaboration, diminished emphasis on self-serving individualism, and sacrifice for the greater good as a measure of character. If repeated recreational cannabis diminishes empathy and awareness of the emotions of others, as some research has found,²³⁸ then communitarians would have the more ethical view.

But it is not ethical perspectives from Aristotle, Kant, communitarians, or religious teachings that hold sway in public policy deliberations. Political "reasoning" often comes down to interest groups and appraisals by citizens and legislators about the costs and benefits of cannabis legalization. The often awkward and contentious arguments about costs and benefits lands us squarely in utilitarian territory, and the thirty-nine states that have not legalized recreational cannabis can be overwhelmed by the empirical claims of political proponents and opponents. It is here that we see claims about legalization leading to more individuals becoming addicted, with negative effects on both the individual and society, a distinctly utilitarian appeal. The positions are by now familiar: legalizing recreational cannabis prevents prison overcrowding and ruined young lives for crimes with no victims, boosts tax revenues and creates jobs, versus the other side's position of children being exposed to cannabis edibles to their detriment, more emergency room visits for cannabis use, the increased prevalence of cannabis odors, and impaired workers. These kinds of cost-benefit calibrations cannot and will not be settled here, but we will have states' experiences with legalization and regulation in what Brandeis called the laboratories of democracy.²³⁹

The middle ground of decriminalization, rather than legalization, is an

238. Lucy J. Troup, Stephanie Bastidas, Maia T. Nguyen, Jeremy A. Andrzejewski, Matthew Bowers, & Jason S. Normi, *An Event-Related Potential Study on the Effects of Cannabis on Emotion Processing*, PLOS ONE (Feb. 29, 2016), <https://doi.org/10.1371/journal.pone.0149764>.

239. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

option that some jurisdictions may consider, as both the benefits and costs of legalized non-medical cannabis remain uncertain. After five years of legalization in Colorado, for example, cannabis use by teenagers may actually be falling, not rising, and cannabis sales have created jobs and tax revenues. Over the same period, though, there are increased emergency room admissions for cannabis abuse or accidental ingestion of edibles.²⁴⁰ Some benefits in terms of job creation and sustaining small or local cannabis businesses may be short lived, however, as the legal landscape changes, future federal permissiveness in terms of banking or interstate commerce could create economies of scale that would greatly curtail smaller “mom and pop” operations that have proliferated in Colorado. But it is legal uncertainty, rather than ethical qualms, that currently inclines large companies to stay on the sidelines in the United States, although the legalization of recreational marijuana in Canada has attracted substantial amounts of capital, some of it from the United States.

Prominent among the ethical issues around cannabis use are the dire effects that criminalization of cannabis has wrought. Numerous sources claim that the initial animus toward cannabis use in America originated with Harry Anslinger, who was convinced that black male use of cannabis posed a clear and present danger to white women. Anslinger was head of the Federal Narcotics Bureau (a precursor to the DEA) for more than three decades—a formative period that shaped the United States’ drug policy for years to come. Anslinger implemented stringent drug laws and long prison sentences that would give rise to America’s prison-industrial complex.²⁴¹ The long history of disproportionate imprisonment for African American men in the U.S. has its origins with Anslinger’s racism. But as Laura Smith points out, “Anslinger was a xenophobe with no capacity for intellectual nuance, and his racist views informed his work to devastating effect. But he couldn’t have done it, nor reigned as long as he did, without a cast of complicit politicians who shared his bigoted vision for what America should be.”²⁴²

The statistics around imprisonment of black males for marijuana

240. Erin Brodwin, There’s been a spike in ER visits in Colorado following marijuana legalization, and edibles are doctors’ biggest concern, *BUS. INSIDER* (Mar. 25, 2019).

241. Lisa D. Moore and Amy Elkavich, Who’s Using and Who’s Doing Time: Incarceration, the War on Drugs, and Public Health, *AM. J. PUBLIC HEALTH* (May 2008), at 782-86.

242. Laura Smith, *How a racist hate-monger masterminded America’s War on Drugs*, *MEDIUM-TIMELINE* (Feb. 27, 2018), <https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189>.

possession are a stark reminder of this racism. Black men are sent to state prisons on drug charges at thirteen times the rate of white men. Blacks make up only 12% of the U.S. population, but comprise 62% of the drug offenders sent to state prisons. SWAT raids are also carried out more against minority groups. Nearly 50% of all SWAT raids between 2011 and 2012 were conducted against blacks and Latinos, while only 20% of raids involved white suspects.²⁴³

Still, some NGOs warn that cannabis legalization will not magically create better families and economic prospects for the black community. The 2017 marijuana-related African American arrest rate in Colorado was nearly twice that of Caucasians (233 in 100,000 versus 118 in 100,000).²⁴⁴ In Colorado, 39% of African American marijuana related arrests in 2017 were made without a warrant, while only 18% of Caucasians were arrested without a warrant. Drug suspension rates in Colorado schools with 76% or more students of color are over two times higher compared to Colorado schools with fewer than 25% students of color.²⁴⁵

Discrimination also dims the hopes of those who were hopeful that legalization might bring economic opportunities for African Americans to share in the legal cannabis businesses. The economics of launching a successful startup business weigh against minorities, especially Black Americans, and state laws may prevent convicted felons, many of whom are black, from obtaining the required licenses.²⁴⁶

But social justice advocates are using cannabis ballot initiatives to address regulatory issues that policymakers struggled with in the past. California's 2016 ballot initiative was more than sixty pages in length, covering everything from rules for marijuana testing laboratories to

243. Coyne and Hall, *supra* note 231.

244. German Lopez, *After legalization, black people are still arrested at higher rates for marijuana than white people*, VOX (Jan. 29, 2018), <https://www.vox.com/policy-and-politics/2018/1/29/16936908/marijuana-legalization-racial-disparities-arrests>.

245. Impacts of Marijuana Legalization in Colorado - A Report Pursuant to Senate Bill 13-283, Oct. 2018, http://cdpsdocs.state.co.us/ors/docs/reports/2018-SB13-283_Rpt.pdf.

246. In order to qualify for a cannabis business license in Colorado, for example, you may not have any controlled substance felonies within the past 10 years, or five years from May 28, 2013, whichever is longer, and you may not have any other felony convictions that have not been expunged in the past five years. Colorado also investigates the criminal history of any business partners to determine whether "he or she is not of good moral character." However, Colorado does make an exception for past marijuana possession or use convictions. Lisa Rough, *Can You Get a Cannabis License if You're a Convicted Felon?*, LEAFLY (June 17, 2019), <https://www.leafly.com/news/industry/can-convicted-felons-get-a-cannabis-business-license>.

expungement of marijuana crimes from criminal records. The initiative allowed people with drug convictions to obtain marijuana licenses. It set aside \$10 million a year to pay for services such as job placement, legal help, and mental health and addiction treatment for residents of communities hit hard by former drug laws. The ballot initiative passed by 57%. In 2018, a bill considered in the New York state senate would allow people to possess, use, buy, or transport up to two pounds of marijuana; reduce penalties for some marijuana crimes; make it easier for people to get criminal records sealed for such crimes; and disburse some tax revenue to nonprofits in communities “disproportionately affected” by former drug policies.

The brief answer to the ethical question of whether governments should legitimize recreational cannabis use will vary depending on which ethical framework is used and the scope and nature of the legitimization. Individuals who seek to practice Kantian autonomy—or, follow Aristotle, to live the most virtuous life—should seek to avoid addiction of all kinds. States can be protective of that purpose by keeping it illegal; that is, avoiding addiction may be more difficult in a state where its use is legal and widespread. But addictions cannot be “nannied” by the state, as Libertarians would insist, and as common sense since the Prohibition Era has shown. That is, it is hard to see how government bans on all pleasurable and potentially addictive substances (marijuana, tobacco, alcohol, caffeine) would do any better than prohibition did in the twentieth century.

From a social justice perspective, the marijuana laws as applied since Harry Anslinger’s days demonstrate the need for statutory reform, including expungement of “marijuana-related criminal records including employment, professional licenses, financial aid, public housing, travel abroad, firearms’ purchases, the right to vote, and jury service.” As it stands, we cannot rely on utilitarian reasoning at this point to know whether a given state, or even the federal government, jurisdiction is “better off” by legalizing recreational and medical marijuana, so trial and error in this area will continue to unfold, even as there seem to be persuasive reasons to relinquish the hardline attitudes toward marijuana use that began with Harry Anslinger.

VII. FUTURE OUTLOOK FOR CANNABIS BUSINESSES

The future outlook for cannabis businesses is one of great promise but also great risk. The current regulatory “system” is fraught with

uncertainties and inconsistencies. First, the experience with legalization has led to forecasts of significant future growth in the size of legal markets. By 2025, the global market for legal cannabis use is projected to be worth anywhere from \$40 billion to \$66 billion,²⁴⁷ to as much as \$89 billion.²⁴⁸ Global hemp sales are projected to reach almost \$6 billion in 2020.²⁴⁹ Hyperbolic statements and excitement about the potential for explosive growth in the cannabis industry are understandable, given that its derivatives have been estimated to be the most popular drugs in the world.²⁵⁰

Second, while the legalization of marijuana in its psychoactive form was the focus of most early cannabis legalization efforts, the largest economic impacts from legalization may arise from the use of hemp in underappreciated applications: to have restorative effects in the context of agriculture and land remediation, as a raw material for biodegradable and locally sourced plastic and fabric, an ingredient of biofuel, a green building material, and to combat malnutrition.²⁵¹ Such hemp products have the potential to disrupt several industries including, but not limited to, agriculture, nutrition and health, fuel, and building materials.²⁵² An analogy may be drawn between the legalization of cannabis and the early days of blockchain deployment: industry hype and the popular imagination focused on the disruptive potential of cryptocurrencies, but the truly massive disruption to the supply chains of many (if not all) industries is under-covered in both popular media and scholarly

247. Legal Marijuana Market Worth \$66.3 Billion By 2025 | CAGR: 23.9%. May 2019 | Report Format: Electronic (PDF). <https://www.grandviewresearch.com/press-release/global-legal-marijuana-market>.

248. *Global Cannabis Market Now Projected to Exceed \$89 Billion by 2024*, FINANCIALNEWSMEDIA.COM (Aug. 20, 2019), <https://www.prnewswire.com/news-releases/global-cannabis-market-now-projected-to-exceed-89-billion-by-2024-300904306.html>.

249. Craig Giammona and Bruce Einhorn, *Booming Demand for CBD Is Making Hemp the Cannabis Cash Crop*, BLOOMBERG BUSINESSWEEK (July 18, 2019), <https://www.bloomberg.com/news/articles/2019-07-18/booming-demand-for-cbd-is-making-hemp-the-cannabis-cash-crop>.

250. Eliana Dockterman, *Marijuana Now The Most Popular Drug In The World*, TIME MAGAZINE (June 29, 2012), <https://newsfeed.time.com/2012/06/29/marijuana-now-the-most-popular-drug-in-the-world/>.

251. Rachel Garland, *15 Mind-Blowing Ways Hemp Can Impact the Planet*, GREEN FLOWER (Aug. 18, 2017), <https://www.green-flower.com/articles/industry/15-mind-blowing-ways-hemp-can-heal-the-world>.

252. *Id.*

journals.²⁵³

Third, as time passes and the experiences of legalizing cannabis in various jurisdictions are observed, it appears less likely that a return to the complete prohibition of cannabis will occur. While many issues with legalization remain to be addressed, most of the dire predictions associated with legalization have not been realized.

But the outlook for cannabis businesses is also filled with challenges and threats. The process of legalization continues to be far from straightforward across all jurisdictions—the precise mechanisms of oversight, regulation, and taxation can be challenging to put in to practice, and the pace of implementation often lags behind both the promises of governments and the expectations of legalization proponents.²⁵⁴ Some of the persistent cost gaps between legal and illicit cannabis can be attributed to the complexities of the federal, state, and local regulations under state cannabis industry operations, such as granting municipalities the option to impose zoning laws that outlaw cannabis operations or instead require “community impact fees” and other contributions from permitted businesses.²⁵⁵

The Canadian experience is also a cautionary one; not all of the expected advantages of national legalization for businesses have been realized and additional disadvantages have been observed. In Canada, as in the U.S. states, the complexities and costs of the current environment not only pose a burden to cannabis businesses but have created a significant disincentive for some consumers to participate in the legal market.

Another challenge and risk is that the growth of the cannabis industry makes it a greater target of scrutiny and pressure from other stakeholders such as regulators, health professionals, and incumbent industries including tobacco, alcohol, and pharmaceuticals; these incumbent

253. Adam J. Sulkowski, *Blockchain, Business Supply Chains, Sustainability, and Law: The Future of Governance, Legal Frameworks, and Lawyers?*, 43 *DEL. J. CORP. L.* 303, 340-41 (2019); Lawrence J. Trautman, *Bitcoin, Virtual Currencies and the Struggle of Law and Regulation to Keep Pace*, 102 *MARQ. L. REV.* 447 (2018); Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 *CARDOZO L. REV.* 1041 (2017); Lawrence J. Trautman & Mason J. Molesky, *A Primer for Blockchain*, 88(2) *UMKC L. REV.* 239 (2019).

254. See Sulkowski, *supra* note 59.

255. Matthew Walsh, *The State of the Marijuana Black Market*, *BROWN POL. REV.* (Jan. 8, 2020), <http://brownpoliticalreview.org/2020/01/the-state-of-the-marijuana-black-market/>.

industries are generally more experienced on the national and international stage than the early leaders of cannabis businesses operating in a limited number of jurisdictions. The resulting challenges are evident in the disjointed and muted response of the legal cannabis industry to the emergence of vaping health issues. Investment interest in cannabis from tobacco, alcohol, and pharmaceutical companies may be welcomed by some but viewed warily by others.

Yet another challenge relates specifically to the medical portion of the cannabis market. Today, there is limited integration and consistency between state medical cannabis programs and the mainstream health care industry due to federal illegality. At the same time that society is recognizing the harms that have been generated by various FDA-approved opioids and other prescription drugs, physicians, including those affiliated with Veterans Affairs (VA) hospitals and on university campuses, lack approvals, data, and guidance to recommend cannabis as an alternative even in states with medical cannabis programs. In the absence of clinical trials, approvals, and dosage recommendations, doctors are rightfully concerned about potential accusations of malpractice and lack of insurance coverage. Cannabis users may also be reticent to disclose their use of a federally banned substance to their physicians. Integrating medical cannabis more fully into the existing health system could accelerate the pace of cannabis research and provide opportunities for businesses with the ability to operate in a manner suitable to the FDA. But it could also exclude the vast majority of existing cannabis businesses with no experience in this environment, shift control from the states to the federal government, and trigger additional restrictions as seen after the FDA's entry into tobacco regulation.

Finally, despite growing public support for cannabis legalization, Congress has no coherent strategy or true consensus on cannabis. This may stem from both uncertainty about how voters perceive cannabis usage and general challenges in advancing new legislation of any kind.

VIII. PROPOSED U.S. FEDERAL CANNABIS LEGISLATION

Many prescriptions for improving U.S. cannabis policy have already been suggested by NGOs, such as NORML, and politicians in both parties. Most of them point to the need to rationalize national policy so that state and federal laws are not in conflict.

There is some bipartisan support for removing marijuana from the Controlled Substances Act, providing safe harbor for banks that would

deal with cannabis retailers, and declaring that states' decisions regarding cannabis generally and marijuana specifically should not be subject to federal legislation of any kind.

Three major bills, each introduced into the House and Senate during the 116th Congress, have significant bipartisan support but have not yet passed in both chambers. They are the Secure and Fair Enforcement (SAFE) Banking Act,²⁵⁶ The Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2019,²⁵⁷ and The STATES Act.²⁵⁸

The SAFE Banking Act was introduced in the House by Representative Ed Perlmutter (D-CO). The bill generally prohibits a federal banking regulator from penalizing a depository institution for providing banking services to a legitimate marijuana-related business. It was passed by the House in September 2019. On the Senate side, the bill was referred to the Senate Banking and Finance Committee. The chair of that committee, Mike Crapo (R-ID), said he was opposed to legalizing marijuana on the federal level and in Idaho and did not support the act as it was passed in the House.²⁵⁹ Senators Cory Gardner (R-CO) and Lisa Murkowski (R-AK) co-sponsored the bill in the Senate. Senator Gardner believed it would pass in the Senate, as it had in the House, if it were brought to the floor. There was considerable Democratic support in the Senate for the act, but observers gave the bill little chance of coming out of committee and much less of a chance of getting approval of a floor vote from Majority Leader Senator Mitch McConnell (R-KY). As one lobbyist has said, "I would be shocked if Sen. McConnell wanted to spend a single second of floor time on weed."²⁶⁰ He did not. The SAFE Banking Act was again passed by the House on April by a vote of 321-101 (virtually the same as in 2019). As of this article, it's future in the Senate is still

256. H.R. 1595—116th Congress: Secure and Fair Enforcement Banking Act of 2019, <https://www.congress.gov/bill/116th-congress/house-bill/1595/text>.

257. H.R. 3884—116th Congress: Marijuana Opportunity Reinvestment and Expungement Act of 2019, <https://www.congress.gov/bill/116th-congress/house-bill/3884/text>

258. H.R. 2093 — 116th Congress: The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act, <https://www.congress.gov/bill/116th-congress/house-bill/2093/text>.

259. Neil Haggerty, Crapo delivers crushing blow to pot banking, *AMERICAN BANKER* (Dec. 18, 2019), <https://www.americanbanker.com/news/crapo-delivers-crushing-blow-to-pot-banking>.

260. Paul Demko & Natalie Ferrig, Why the most pro-marijuana Congress won't ever deal with weed, *POLITICO* (Sept. 9, 2019), <https://www.politico.com/story/2019/09/09/marijuana-congress-1712973>.

uncertain.²⁶¹

The Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2019 was simultaneously introduced in the House by Jerrold Nadler (D-NY) and in the Senate by Kamala Harris (D-CA) in July 2019. The bill would end federal cannabis prohibition in the United States by removing it from the Controlled Substances Act. As a more comprehensive marijuana reform measure, MORE would also expunge prior marijuana convictions and spur resentencing hearings for people still under supervision. It also would set up a 5% federal sales tax on marijuana products that would fund three grant programs, including one that would pay for the expungement proceedings, and one that would provide job training, legal aid, and other services to the individuals and communities hit hardest by the long-standing War on Drugs.²⁶² The law would also allow the Small Business Administration to issue loans and grants to marijuana-related businesses and provide a green light for physicians in the VA system to prescribe medical cannabis to patients, as long as they abide by state specific laws.²⁶³

In November of 2019, the House Judiciary Committee voted 24-10 to approve the MORE Act with two Republicans voting in favor. As of April 2020, the full House has yet to vote on the bill and the counterpart bill in the Senate has not moved through the committee process.

In April 2019, a bipartisan, bicameral group of lawmakers introduced the STATES Act to recognize that the federal government should honor and not interfere with state efforts to legalize cannabis. The bill, co-sponsored in the Senate by Colorado Republican Cory Gardner and Massachusetts Democrat Elizabeth Warren, and in the House by Oregon Democrat Earl Blumenauer and Ohio Republican David Joyce, would amend the federal drug law so its marijuana provisions no longer apply to individuals acting in compliance with state, territorial, D.C., or tribal laws.

261. Jonathan Nicholson, *Cannabis-banking bill approved by House; future in Senate uncertain*, MARKETWATCH (Apr. 19, 2021), https://www.marketwatch.com/story/cannabis-banking-bill-approved-by-house-future-in-senate-uncertain-11618878433?mod=mw_latestnews.

262. Victor Reklaitis, *House panel passes bill that aims to legalize marijuana, but top Democrat concedes 'Senate will take its own time.'*, MARKETWATCH (Nov. 20, 2019), <https://www.marketwatch.com/story/house-judiciary-chief-nadler-says-his-panel-will-pass-bill-legalizing-marijuana-but-concedes-senate-will-take-its-own-time-2019-11-19>.

263. Javier Hasse, *Key Committee in Congress Approves Marijuana Legalization Bill*, FORBES (Nov. 20, 2019), <https://www.forbes.com/sites/javierhasse/2019/11/20/marijuana-legalization-judiciary-committee/#13deb8002c35>.

“The STATES Act simply says that if you are operating in conformance with your state laws, what you are doing is legal under federal law,” Blumenauer said.²⁶⁴ The House approved the bill mostly along party lines, with six Democrats voting against and five Republicans voting for.²⁶⁵

IX. SYNTHESIS & DISCUSSION: A POLICY PRESCRIPTION

This paper has considered the legacy of the prohibition of cannabis and subsequent partial legalization from various angles, yielding the following observations that support continued and expanded cannabis legalization and inform our advice to cannabis entrepreneurs.

First, cannabis cultivation and usage of both hemp and marijuana date back millennia, to near the dawn of the agricultural revolution. While there are a few pre-twentieth century precedents for attempting to ban consumption of marijuana for psychoactive applications, no attempt was ever made to ban hemp cultivation and usage prior to the twentieth century. As described above, a review of marijuana use and prohibition in British-occupied-and-administered South Asia resulted in the conclusion that there was no need for prohibition. Against this backdrop of historical context, the recent move towards greater legalization of cannabis represents a return to the predominant status quo during human history rather than a radical new experiment.

Second, experiences with cannabis legalization across a variety of jurisdictions, including Canada and Portugal, as well as experience derived from observing legal access to other products with perceived societal risks such as alcohol, teach us that expanded legalization offers a number of societal benefits over designating cannabis as illegal. For example, legalizing such products reduces criminality, allows for oversight and regulation, and provides government with an additional source of revenue, which can be used for law enforcement as well as harm reduction and treatment programs.

Third, the current U.S. approach to cannabis, with a patchwork of state approaches to cannabis legalization, contradiction between these state approaches and the federal prohibition of marijuana, and significant

264. Jim Saska, *Marijuana bill could help Cory Gardner’s re-election chances. Will Senate GOP leaders get behind it?* ROLL CALL (April 2019).

265. Deidre Walsh, *House Approves Decriminalizing Marijuana; Bill To Stall In Senate* NPR (Dec. 4, 2020), <https://www.npr.org/2020/12/04/942949288/house-approves-decriminalizing-marijuana-bill-to-stall-in-senate>.

reliance on interpretation of a series of DOJ memos for federal guidance, is a suboptimal approach, especially given the uncertainty that it fosters for all direct and indirect stakeholders. While the status quo may benefit some incumbent cannabis firms in legal states and some citizens in those states, it fails many others. For example, the medical cannabis programs that do exist at the state level are far from being an integrated part of the traditional medical system and inaccessible to those affiliated with the military.

Fourth, ethically speaking, and especially in light of decades of medical research documenting the comparatively benign health impacts of marijuana consumption compared to tobacco use, and the comparatively miniscule negative impacts of marijuana compared to alcohol in terms of contributing to violence, addiction, and death, there is no strong ethical argument to support prohibition.

A. U.S. Federal Policy Options

If the desired policy outcome is to suppress illegal cannabis activity and instead have marijuana consumption take place in open, legal, monitored, regulated, and taxed markets, achieving that outcome requires not just any form of legalization but one where regulation of cannabis is sufficiently comprehensive without the imposition of excessive costs on legal market participants. In the U.S. context, a number of approaches are possible, each with varying advantages and disadvantages. We describe three primary options below.

One option is for the federal government to explicitly leave all responsibility to the states (similar to what is proposed in the STATES Act), with no other change at federal level. This approach requires minimal effort by the federal government and would result in the least amount of disruption and change for the states. States could continue to vary in their approach to cannabis and serve as a source of experimentation and insight. States have demonstrated relevant experience and expertise in regulating commercial facilities, retail stores, bars and restaurants, liquor stores, tobacco sales, breweries, and have departments of agriculture; still, most states are not experienced in regulating food and food ingredients, medicines and drugs, or agricultural pesticides. But this first option does not solve or address federal banking, intellectual property, bankruptcy protection, or interstate commerce or transport issues; nor does it provide state-legal cannabis companies with access to traditional U.S. stock exchanges, all of which currently require federal legality. This option also

does not change barriers to medical research of cannabis or general integration of cannabis with traditional medicine. Nor would individual states be in a position to enter into international import or export agreements, leaving the U.S. on sidelines as other countries integrate their cannabis industries.

A key concern is that this first option offers little potential to significantly diminish the illicit market for cannabis in the U.S., since large portions of the country would likely continue to lack legal access to cannabis, and legal cannabis businesses would still operate under the unique and costly burdens of federal illegality. Given market uncertainties, evolving regulatory and tax burdens, and lack of cross-state border competition, non-legal cannabis would continue to have price and availability advantages over legal sources.

A second option is for the U.S. federal government to legalize cannabis federally but to provide for a significant role for states and local governments, including imposing varying state or local rules that are more restrictive than those of the federal government. This option would have some similarities to how alcohol and, more recently, tobacco are regulated in the U.S. and would also share similarities with Canada's approach to legalization.²⁶⁶ This option would require more effort and decision-making by the federal government than the first option, both to create new federal regulations and to coordinate with the states. It would also likely require significant changes in existing and future state cannabis programs. In an area such as pesticide usage rules for cannabis cultivators, the USDA could assume primary regulatory responsibility as it generally does for other crops, removing this responsibility from individual states.

The way in which federal legalization is implemented would determine the extent to which the cannabis industry is treated in the same manner as other industries in terms of banking, interstate commerce and transport, intellectual property protection, bankruptcy issues, and having access to traditional stock exchanges and other sources of capital. The more these issues are addressed, the more successful such an approach would be at diminishing the illicit U.S. market by making legal cannabis more price competitive. This option could also allow the U.S. to enter into international agreements for cannabis import and export. It could reduce barriers to medical research of cannabis and increase general integration

266. Tobacco Control Legal Consortium, *Federal Regulation of Tobacco: Impact on State and Local Authority*, (July 2009), <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fda-impact.pdf>.

of cannabis into traditional medicine.

A third option is the introduction of a strong federal legalization program that eliminates existing state cannabis programs, similar to the establishment of the National Organic Program (NOP) by the FDA in 1990 that created national standards for organic agriculture; standards that superseded various state organic programs and restricted use of the term “organic” to only products from approved NOP participants. Such an approach would also share similarities with the U.S. treatment of prescription drugs, where states have a minimal role, and the FDA is the sole regulatory body. This option would require a large effort by the federal government but would allow the cannabis industry to be treated consistently with other industries. All of these changes, combined with the fact that cannabis would be legal throughout the country, could make the legal market more competitive against the illicit market. This option could also dramatically reduce barriers to medical research of cannabis and increase general integration of cannabis into traditional medicine and allow the U.S. to enter into international agreements.

Implementation of this option would inevitably be the subject of intense federal lobbying to influence the details of the federal program to be more or less favorable to incumbent marijuana companies, drug companies, and alcohol and tobacco companies. In this area, the apparent increasing influence of larger agricultural producers over the USDA NOP is a cautionary tale. This option would also likely be strongly opposed by some stakeholders who are supportive of existing state cannabis programs and wary of a federal replacement. Some state legal MRBs would oppose federalization, fearing that “Big Cannabis” would wipe out smaller state legal MRBs; among other things, complete federalization might not address the social justice issues that some states have built into their legalization programs. It would also be opposed by those opposed to legalization at all levels, whether state or national.

B. Our Policy Prescription

Of the three options described above, we see considerable advantage to the second option of balanced federal and state responsibility as the best long-term approach for the United States. Neither the status quo nor the complete delegation of cannabis policy to the states provides the cannabis industry with sufficient regulatory certainty or access to federal rights afforded to other industries, nor do these options provide both medical or recreational cannabis users throughout the U.S. with the level of oversight

and support they have come to expect from most other products. While establishing a role for the U.S. federal government in cannabis regulation will increase bureaucracy, potentially create new points of contention between states and the federal government, and make the federal government a target of lobbying from powerful interest groups, the extent of these three challenges are more moderate than they would be if the third option were chosen, where the federal government takes a dominant role, and the control of states is largely eliminated.

In our view, the goal of all stakeholders—policymakers, market participants, and consumers, as well as non-consumers in society—should be to agitate for an unambiguous policy at the federal level that legalizes cannabis and provides sufficient federal oversight while also ensuring a meaningful role for individual states. Balancing state and federal responsibilities will be difficult and there is a risk that the resulting system could undermine state progress in areas such as product safety, social justice and diversity, and economic development and further increase consolidation and nationalization of the cannabis industry. Nonetheless, we feel such an approach is warranted, particularly given the potential to significantly diminish the illicit U.S. cannabis industry.

A number of steps can be taken to help reduce the complexity of the combined federal and state system. At the federal level, there is an opportunity to base the first set of national regulations on state cannabis regulations that have proven effective. There is also an opportunity to build on recent efforts in the 2014 and 2018 Farm Bill to ensure that industrial hemp is properly distinguished from marijuana throughout federal regulation rather than treated identically. At the state level, model uniform state law should continue to be developed and proffered to state legislatures, particularly those that have yet to begin the legalization process.

To summarize, the policy prescription of this paper is two-fold: (1) federal cannabis prohibition should end completely and unambiguously, and (2) an approach where the federal and state governments share responsibility for cannabis oversight is preferable. If this policy prescription is clear, then the implication for the legally informed strategies of cannabis entrepreneurs is equally clear. For those who currently operate or are considering starting a cannabis business, the task is two-fold: (1) to operate the business in ways that minimize negative impacts and maximize positive impacts on adjoining property owners and the community, taking responsibility for any specific harms that may arise,

and (2) to work politically and publicly to make the moral case that medical and recreational marijuana, as well as hemp and CBD products, are an overall benefit to individuals and communities and should become a fully accepted part of the legal and social mainstream.

The latter task requires cannabis businesses to shake their stakeholders out of complacency, inform them, and build coalitions to agitate for a pragmatic change in the interests of both their companies and of society.²⁶⁷ The critique of this prescription and advice might be that it simply amounts to typical self-interested lobbying. On the contrary, the status quo actually serves some incumbents in some jurisdictions, in that they have found ways to operate securely and very lucratively, while enjoying the benefit of high barriers to entry by potential competitors (among them, limited licensing caps, uncertainty, and legal overhead). A unified campaign on the part of cannabis entrepreneurs would seek to serve a balance of approaches in the states, and education of the general public, policymakers, and other businesses about the various benefits of further legalization, de-stigmatization, and mainstreaming of cannabis.

X. CONCLUSION

This Article has examined the legacy and recent history of cannabis prohibition and legalization from a holistic and transdisciplinary perspective, including an excursion into the long history of human cannabis use and the ethics of recreational marijuana use from personal and societal perspectives. This transdisciplinary approach adds another dimension to our analysis of the legal complexities resulting from states legalizing cannabis in various ways and at various speeds while federal prohibition of marijuana continues.

With the added perspectives of ethics and history, it becomes clear that the time has come for an overhaul of cannabis laws and regulations that balance state and federal interests. We have suggested such a balance: a pragmatic policy solution requires full legalization of cannabis at the federal level, with delegation of significant cannabis regulations to the states.

267. Adam J. Sulkowski, Melissa Edwards, and R. Edward Freeman, *Shake Your Stakeholder: Firms Leading Engagement to Cocreate Sustainable Value*, ORG. & ENVT. 31, 33 (2018).