

Fordham Urban Law Journal

Volume 49
Number 3 *The Legalization of Marijuana in
Urban Communities*

Article 2

2022

The Regulatabilization of Cannabis

Donald J. Kochan

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

Recommended Citation

Donald J. Kochan, *The Regulatabilization of Cannabis*, 49 Fordham Urb. L.J. 519 (2022).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol49/iss3/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE REGULATABILIZATION OF CANNABIS

*Donald J. Kochan**

Introduction	519
I. Background on the Move Away from Illegality of Cannabis	522
II. The Importance of the “Regulatabilization” Frame for Appreciating the Character and Consequences of Cannabis Law Reform	525
III. Categories of Regulation Attaching to Non-Illicit Cannabis Activities and Products	528
A. Generally Applicable Laws and Regulations.....	529
B. Taxation of Cannabis	531
C. Specific Cannabis-Related Regulation, Including but Not Limited to Soft Prohibition Measures	532
IV. Regulatabilization, Its Influence Regarding Illicit Cannabis Markets, and an Accurate Assessment of the Potential to Realize Gains from Non-Illegality	540
Conclusion	551

INTRODUCTION

The framing of the move by governments to change the legal status of marijuana and cannabis products is fundamentally imprecise, with negative consequences for a nuanced understanding of the legal move at issue. With the change in legal status, marijuana is not really being legalized or even just decriminalized. It is being made regulatable or, to coin a phrase, regulatabilized.¹ Markets in illegal goods — along with the goods’

* Professor of Law and Deputy Executive Director, Law & Economics Center, George Mason University Antonin Scalia Law School; Non-Resident Scholar, Georgetown Center for the Constitution.

1. For purposes of this Article, “regulatabilized” means being made subject to regulation, particularly when it involves a change of status from something which remains outside the purview and scope of regulation but because of a legal shift in status the activity suddenly becomes subjected to regulation, or capable of being regulated within the eyes of the law. It follows on the general use of the suffix “-ize.” *See -ize*, MERRIAM-WEBSTER,

creation, cultivation, distribution, taxation, sale, etc. — are controlled by criminal law but not regulated per se. Indeed, they are not regulatable because to do so would acknowledge the legitimacy of the activity. Thus, for example, illegal marijuana grow operations are not subject to water allocation rules, and the types or amounts of pesticides used are not regulated by the environmental agencies. In the illicit markets, every aspect of the production and supply chain events for marijuana happens underground. If an inspector shows up, you are not looking at a National Pollutant Discharge Elimination System permit violation under the Clean Water Act.² Your problems are much bigger and different from the application of regulatory law. Similarly, if you are running an illicit drug house, zoning violations are not front of mind. Now, remove the illegality. Suddenly, marijuana markets are operating in the great wide regulatory open. You must dance with the regulatory labyrinth if you want to dance with legal, and hence regulatable, Mary Jane,³ and must comply with every last petty demand of the government and the costs associated with it. Illicit drugs do not go through Food and Drug Administration (FDA) approval, nor are they subject to labeling laws. Remove illicitness, and suddenly regulatability brings with it layers upon layers of compliance obligations.

From an economics perspective, the regulabilization framing is key because it puts front and center that we are not looking at the functional dynamics between an illicit market and one that simply removes illicitness. It is a move that introduces regulatableness. And with that, regulatory costs are passed onto consumers through price. If regulatory costs are too high, then illicit markets with lower-cost alternative goods emerge — or

<https://www.merriam-webster.com/dictionary/-ize> [<https://perma.cc/8TTK-ZQRJ>] (last visited Feb 2, 2021). Examples of similar word usage that inspire this usage here include criminalize, decriminalize, and legalize. Indeed, “regulabilization” is the best term for this Article’s purposes because of the need to compare it with a discussion that characterizes the change in legal status for marijuana as legalization or decriminalization of marijuana.

2. See *NPDES Permit Basics*, EPA, <https://www.epa.gov/npdes/npdes-permit-basics> [<https://perma.cc/9T7S-G3TY>] (last visited Feb 2, 2021). See generally Christopher D. Strunk & Mackenzie S. Schoonmaker, *How Green Is the “Green Rush”?* *Recognizing the Environmental Concerns Facing the Cannabis Industry*, 21 VT. J. ENV’T. L. 506 (2020) (describing the new layer of environmental regulations applying the legal cannabis that did not apply when it was illegal).

3. “Mary Jane” is a street word, or code word, for marijuana. See *MaryJane*, URBANDICTIONARY, <https://www.urbandictionary.com/define.php?term=MaryJane> [<https://perma.cc/MK6D-QHZQ>] (last visited Feb. 1, 2022). As an astute reader might notice, the sentence to which this footnote attaches and the one before also make allusions to lyrics in Tom Petty songs, including his hits “Last Dance with Mary Jane” and “Into the Great Wide Open.” See *Lyrics for “Into the Great Wide Open” by Tom Petty and The Heartbreakers*, AZ LYRICS, <https://www.azlyrics.com/lyrics/tompettyandtheheartbreakers/intothegreatwideopen.html> [<https://perma.cc/DVG5-63XV>] (last visited Feb. 2, 2022). Petty often indirectly referenced marijuana in his song titles or lyrics. See, e.g., *id.*

sustain themselves to the extent they are pre-existing. Many of the public health, safety, taxation, and other benefits touted to flow from legalization or decriminalization can be called into question when it is recognized that we are dealing with regulatabilization and the concomitant effects on price. That is, the continuation of an illicit market is almost guaranteed even with the introduction of a legitimate market in marijuana cultivation, distribution, use, and the like.

If illicit markets are attractive for both suppliers and consumers, they will exist. Substantial economics research demonstrates this fact.⁴ Yet, the pervasiveness of markets for illicit activity even in the face of a legal market for the same activity is a regularly underappreciated and misunderstood phenomena.⁵ As Jens Beckert, Professor of Sociology and Director at the Max Planck Institute for the Study of Societies, and Matías Dewey, a Senior Researcher at the same institute, explain: “Illegal markets [including for drugs] have great economic significance, have relevant social and political consequences, and shape economic and political structures.”⁶ They continue by identifying the risk of blindness to these facts: “Despite the importance of illegality in the economy, the field of economic sociology unquestioningly accepts the premise that the institutional structures and exchanges taking place in markets are law-abiding in nature.”⁷ Urban planners and other policymakers cannot pretend or believe that simply making an industry like cannabis legal will automatically make all cannabis activity law-abiding in nature, especially if the costs of operating within the legal market are higher than the illicit alternative.

This is all the more reason that an imprecise frame risks obscuring the real costs and market limitations of an effective legalization or decriminalization strategy. Understanding these facts and drawing attention to them with a regulatabilization frame will allow the discussion to more realistically evaluate whether the legal move of opening the door to legal markets in marijuana can accomplish its goals. It also allows the policy debate to focus on how governments might encourage suppliers, distributors, and consumers of marijuana by better explaining the benefits

4. See HENRY N. BUTLER, CHRISTOPHER R. DRAHOZAL & JOANNA SHEPHERD, *ECONOMIC ANALYSIS FOR LAWYERS* 103–04 (3rd ed. 2014). See generally Jens Beckert & Matías Dewey, *The Social Organization of Illegal Markets*, in *THE ARCHITECTURE OF ILLEGAL MARKETS: TOWARDS AN ECONOMIC SOCIOLOGY OF ILLEGALITY IN THE ECONOMY* 1–34 (Jens Beckert & Matías Dewey eds., 2017).

5. See generally Beckert & Dewey, *supra* note 4.

6. *Id.*

7. *Id.*

of operating in the lawful open and why they are worth the potentially increased cost of doing business or purchasing product.

Part I gives a general background on the move away from illegality in the states and the continuing prohibition at the federal level. Part II explains the importance of framing to understanding the nature of any problem, and it compares and contrasts traditional framing in terms of legalization and decriminalization with the more accurate framing of regulatibilization. Part III describes the differences between illicit activities operating under a cover of darkness and open activities under the umbrella of the regulatory state. It includes an analysis of types of regulations that will apply to cannabis operations as a result of becoming legal — including from the fields of land use, environmental regulation, and pharmaceutical regulation, among others. Part IV explains price systems in illicit versus legal markets and how this affects the incentives to choose whether to engage in one or the other. Part IV also explains the implications that regulatability, therefore, has on the likelihood of success of a variety of claimed positive outcomes — claims which, to varying degrees, rely on assumptions of little or no regulation of marijuana to reach their conclusions regarding the benefits of eliminating illicitness. While this Article does not conclude that these revelations necessarily counsel against changing the legal status of marijuana, it does attempt to introduce a greater level of realistic expectations of the regulatory landscape after changing the legal status of marijuana and industries related to it, as well as contributing a level of nuance and sophisticated understanding of what it means to change that status.

I. BACKGROUND ON THE MOVE AWAY FROM ILLEGALITY OF CANNABIS

Political jurisdictions across the United States are moving to relax their criminal treatment of cannabis and cannabis-related activities.⁸ Cannabis law reform is occurring at some level in almost every state.⁹ No doubt,

8. For a recent update on the different types of state laws legalizing or decriminalizing marijuana for either recreational use, medical use, or otherwise, see Michael Hartman, *Cannabis Overview*, NAT'L CONF. ST. LEGISLATURES (July 6, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/RP2U-GFYA>]. See also Gina K. Grimes & Morris C. Massey, *Medical Marijuana: Differences Among States' Regulatory Frameworks and Land Use and Zoning Regulations*, PROB. & PROP., Nov./Dec. 2015, at 47; Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RESV. L. REV. 719, 719 (2015) ("More than twenty states have already legalized marijuana for some purposes under state law, and the number is sure to grow."); ANGELA DILLS ET AL., CATO INST., THE EFFECTS OF STATE MARIJUANA LEGALIZATIONS: 2021 UPDATE (2021), <https://www.cato.org/sites/cato.org/files/2021-01/PA908.pdf> [<https://perma.cc/MRD5-F9V8>].

9. See Sam Kamin, *Marijuana Law Reform in 2020 and Beyond: Where We Are and Where We're Going*, 43 SEATTLE U. L. REV. 883, 883–84 (2020).

these changes have also required the adaptation of state and local regulatory regimes now faced with the reality that, rather than treating cannabis-related activities as criminal and outside the regulatory space, they must find new ways to either fit existing regulations to now legitimate activities¹⁰ or create new regulatory regimes for those no-longer-criminal activities.¹¹

Of course, at the federal level, cannabis products, their uses, and the industries supporting them are still largely illegal, at least formally.¹² The Controlled Substances Act¹³ still considers marijuana a Schedule I drug, and, therefore, federal law still prohibits the possession, importation, distribution, and sale of marijuana.¹⁴ Nonetheless, the current U.S. Department of Justice (DOJ) policy favors exercising discretionary power against federal enforcement of federal law in states that have relaxed marijuana laws.¹⁵ However, that DOJ policy does not change the statutory determination of federal “illegality.”¹⁶ Beyond the simple federal criminality, the fact that marijuana is still a Schedule I drug affects the operation of all kinds of other federal laws. Notable examples have been the inability for cannabis operations to contract with federally approved banks¹⁷ and the failure to recognize federally protected intellectual property

10. See, e.g., Mikos, *supra* note 8, at 724 (“It is, of course, far too early to gauge the impact of local marijuana regulations. But we do have more than one century worth of experience with local alcohol regulations.”).

11. See, e.g., Grimes & Massey, *supra* note 8, at 46 (surveying marijuana-related regulations like bans, limits on the number of dispensaries, restrictions on ownership, and location restrictions); Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?*, 62 PLAN. & ENV’T. L. 3, 6 n.8 (2010) (surveying licensing and permitting requirements for marijuana land uses); Charles S. Gascon, *As More States Legalize Marijuana, Economics Comes into Play*, FED. RSRV. BANK ST. LOUIS (May 18, 2020), <https://www.stlouisfed.org/publications/regional-economist/first-quarter-2020/states-legalize-marijuana-economics> [<https://perma.cc/36HC-FK7T>].

12. See generally Jonathan H. Adler, *Introduction: Our Federalism on Drugs*, in MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020).

13. See 21 U.S.C. § 812.

14. See *id.*

15. See, e.g., Memorandum from David Ogden, Deputy Att’y Gen., to all U.S. Att’y’s (Oct. 19, 2009), <http://www.justice.gov/opa/blog/memorandum-selected-untied-state-attorneys-investigations-and-prosecutions-states> [<https://perma.cc/6MFK-CLX3>] (“provid[ing] clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana”).

16. See generally Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 940–41 (2017).

17. See PETER CONTI-BROWN, PENN WHARTON PUB. POL’Y INITIATIVE, THE POLICY BARRIERS TO MARIJUANA BANKING 4 (2018); see also Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE W. RSRV. L. REV. 597, 597 (2015).

rights for cannabis trademarks or plant patents.¹⁸ Recent years have seen a variety of bills introduced in Congress to relax cannabis laws at the federal level.¹⁹ Nonetheless, there is not yet strong optimism that federal reform will be passed into federal law anytime soon.²⁰

This Article will not focus on this schism between federal and state law.²¹ Federal descheduling is on the menu of the current democratically controlled Congress, with many allies from the Republican side yet with a cool reception from the Biden Administration,²² and the analysis in this Article will be a useful aid to that discussion. But this Article's insights also have independent relevance in the state debates as well. The point of this Article is that legal status changes are important but must be viewed as ushering in a new regulatory era for cannabis products, displacing any romantic vision that legalization or decriminalization can be analyzed without consideration of the effects of a regulatory web sticking to those efforts.

18. See, e.g., Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217, 220 (2016); Nicholas J. Landau & James W. Wright, Jr., *Cannabis Patents, Trademarks, and Other Forms of Intellectual Property Face Difficulties*, 31 INTELL. PROP. & TECH. L.J. 9, 9 (2019).

19. See, e.g., Richard Cowan, *New Marijuana Decriminalization Effort Weighed in U.S. House Report*, REUTERS (Nov. 9, 2021, 5:40 AM), <https://www.reuters.com/world/us/new-marijuana-decriminalization-effort-weighed-us-house-report-2021-11-08/> [<https://perma.cc/F5LC-ADJJ>]; Tiffany Kary, *The Dose: A Republican Congresswoman's Formative Moment with Marijuana*, BLOOMBERG (Nov. 22, 2021, 7:00 AM), <https://www.bloomberg.com/news/newsletters/2021-11-22/republican-nancy-mace-came-to-cannabis-after-a-personal-tragedy> [<https://perma.cc/CE8G-MNDF>]; Tiffany Kary & Steven T. Dennis, *Schumer Vows Action on Cannabis, but Major Hurdles in Way*, BLOOMBERG (July 14, 2021, 3:36 PM), <https://www.bloomberg.com/news/articles/2021-07-14/schumer-vows-action-on-cannabis-bill-but-major-hurdles-in-way> [<https://perma.cc/653T-3897>].

20. See, e.g., Mike DeBonis, *Democratic Divide Puts Congressional Action on Marijuana in Doubt*, WASH. POST (Nov. 18, 2021, 6:00 AM), https://www.washingtonpost.com/politics/marijuana-democrats-legalize/2021/11/17/61dd37b4-47b3-11ec-95dc-5f2a96e00fa3_story.html [<https://perma.cc/L4ND-DMJM>].

21. For background on the tension and relationships between federal and state laws and officials on cannabis, see Robert A. Mikos, *The Evolving Federal Response to State Marijuana Reforms*, 26 WIDENER L. REV. 1, 4 (2020).

22. See John Hudak, *Why Has President Biden Been Slow to Embrace Cannabis Reform?*, BROOKINGS INST. (May 24, 2021), <https://www.brookings.edu/blog/fixgov/2021/05/24/why-has-president-biden-been-slow-to-embrace-cannabis-reform/> [<https://perma.cc/4F5D-VWQ8>].

II. THE IMPORTANCE OF THE “REGULATABILIZATION” FRAME FOR APPRECIATING THE CHARACTER AND CONSEQUENCES OF CANNABIS LAW REFORM

The labels typically chosen for the legal change affected by a relaxation of our laws related to cannabis have been imprecise. The word “legalization” creates a vision of a legal status change that simply lifts the cloud of criminality without acknowledging the concomitant application of an existing regulatory structure as a result of moving the activity out of the shadows or underground and into the legitimate economy. The word “legalization” also fails to capture the invitation such changes make for the imposition of new regulatory structures. Indeed, advocates for legalization often believed that everything that was happening in the illicit market could continue as it was, with only the risk of criminal consequences changing once the activity was deemed “legal.” Seldom do we see a recognition that deeming cannabis legal means making it subject to regulation, indeed vast regulation, like the rest of the activities in a modern-formal economy. The word “decriminalization” has similar infirmities, although it was presented as something seemingly less dramatic than “legalization” to make it more saleable to the public. These labels created frames by which expectations were set and around which debates were structured — by both advocates and opponents.

How urban planners and other policymakers react to the move away from illegality will undoubtedly be impacted by the framing chosen to characterize that change. As Jamie Terence Kelly, Associate Professor of Philosophy at Vassar College and an expert on the effects of linguistic choices, summarizes in his book on framing: “Although there is still disagreement about the specific nature of these behavioral rules, empirical research has for some time now shown that the framing of decisions reliably affects human decision making.”²³ The injection of the regulatability frame as an alternative lens by which the change can be visualized could have dramatic effects on how governments and the public perceive the change and how they choose to structure the governance framework that will attach to cannabis activities.

Consumers of laws — in other words those who read, evaluate, are the targets or beneficiaries of, or must comply with laws — reflect upon the labels legislators or commentators give laws to decide how they feel about those laws. There is a reason that most congressional legislation is given a name designed to attract supporters and sellable to constituents — like the

23. JAMIE TERENCE KELLY, *FRAMING DEMOCRACY: A BEHAVIORAL APPROACH TO DEMOCRATIC THEORY* 12 (Princeton Univ. Press 2012).

USA Patriot Act,²⁴ Net Neutrality,²⁵ the Affordable Care Act.²⁶ Political scientists Brian Schaffner and Patrick Sellers explain that “politicians devote great attention and care to framing their messages to the public and each other These crafted messages can significantly affect the opinions and evaluations of target audiences.”²⁷ Knowing this, politicians and advocates for or against legal change regularly frame their presentations of issues and actions.²⁸

One very accessible example of contrasting labels in politics is in the taxation of estates, where opponents to new taxation upon estates deploy “Death Tax” as a preferred term to what others more gently call an “Estate Tax” or “Inheritance Tax.” Studies have shown that this example of labeling is, in fact, effective on citizen reaction. Brian Schaffner, a Professor of Political Science at the University of Massachusetts at Amherst, and Mary Layton Atkinson, a Political Science Professor at the University of North Carolina Charlotte, studied that very set of contrasts. Their survey results showed that when the issue was framed as the death tax, respondents believed more people were subject to it because we all will die, even if we do not have much of an estate.²⁹ What was significant to those researchers was that their study not only showed that framing can affect one’s support or opposition to an issue, something regularly replicated in the literature, but the scholars also “document[ed] . . . an

24. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

25. See, e.g., California Internet Consumer Protection and Net Neutrality Act of 2018, S.B. 822 (Cal. 2018).

26. See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

27. Brian F. Schaffner & Patrick J. Sellers, *Introduction*, in *WINNING WITH WORDS: THE ORIGINS & IMPACT OF POLITICAL FRAMING* 1, 1 (Brian F. Schaffner & Patrick J. Sellers eds., Routledge 2010).

28. As Anthony Amsterdam and Jerome Bruner explain:

We will witness the struggle again and again Is a federal court’s desegregation order a “remedy for a constitutional violation” or is it “running the public schools” []? Is the shift of population in the Atlanta suburbs sprawling across DeKalb County a “natural demographic shift” or is it “white flight” []? As we have already hinted, these are questions that bedevil not only Supreme Court Justices, Presidents, and “spin doctors” — each from a vastly different perspective.

ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 35 (2000).

29. See Brian F. Schaffner & Mary Layton Atkinson, *Taxing Death or Estates? When Frames Influence Citizens’ Issue Beliefs*, in *WINNING WITH WORDS: THE ORIGINS & IMPACT OF POLITICAL FRAMING*, *supra* note 27, at 121.

effect in the debate over . . . the inheritance tax” where “frames can [] influence the public’s beliefs *about the content of* policy proposals.”³⁰

This example is not isolated. James Druckman, Payson S. Wild Professor of Political Science at Northwestern University, explains the presence of competing labels and concomitantly competing frames across a wide swath of political hot spots. He notes that “much of politics involves battles over how a campaign, a problem, or an issue should be understood;”³¹ and he continues by articulating several accessible examples where framing is quite strategically employed to affect the way an issue is viewed. These examples include the different phrases available to describe topics of debate, “such as campaign finance (free speech or democratic corruption?), abortion (rights of mother or rights of unborn child?), gun control (right to bear arms or public safety?), affirmative action (reverse discrimination or remedial action?), welfare policy (humanitarianism or overspending?), [and] hate group rallies (free speech or public safety?),” among others.³² Whether intentionally chosen or not, these labels to legal instruments, movements, or legal changes can affect how communities, urban planners, and government regulators react.

Our word choices matter not only for accurately describing the character and consequences of the cannabis law reform debate but also for generating an accurate picture of the legal landscape capable of being assessed by observers trying to evaluate the likely effects of so-called legalization or decriminalization. Diatram Scheufele, the John E. Ross Professor in Science Communication and Vilas Distinguished Achievement Professor at the University of Wisconsin-Madison, and Shanto Iyengar, the Chandler Professor of Communication and Professor of Political Science at Stanford University, explain in their co-authored article on these subjects that “framing effects refer to behavioral or attitudinal outcomes that are not due to differences in *what* is being communicated, but rather to variations in *how* a given piece of information is being presented (or framed) in public discourse.”³³ Regulabilization anchors the receptor of the word in the concept of a regulated space rather than emphasizing concepts that fall short of recognizing the regulatory overlay. Especially when we are talking about a change in status away from illegality, legality and de-

30. *Id.* (emphasis added).

31. James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225, 235 (2001) (“Most agree that emphasis framing effects also occur with some regularity — for example, Chong . . . explains that these types of framing effects constitute ‘the essence of political opinion formation.’” (internal citation omitted)).

32. *Id.*

33. Diatram A. Scheufele & Shanto Iyengar, *The State of Framing Research: A Call for New Directions*, in THE OXFORD HANDBOOK OF POLITICAL COMMUNICATION 619 (2017).

criminality focus only on the elimination of illegality. Regulatability focuses on the more complex end result — a product and set of activities formally unregulated because it was illegal is now subject to the full umbrella of regulations that we apply to all aspects of the legitimate economy.

The more precise regulatabilization frame could have several different kinds of effects. Some skeptics of legalization or decriminalization may find the regulatabilization frame comforting. To these individuals, a reminder that the new cannabis market will be regulated may allay fears. The regulatability frame may be welcomed because it makes the new regime seem less like the unbound Wild West, making relaxing prohibitions more acceptable to some otherwise opposing forces. To others, the regulatability frame may seem like a scary acknowledgment of the horrors to come from compliance obligations and associated costs. Still further, the regulatability frame to some might just awaken them to the need to evaluate the drivers of a continuing illicit market for cannabis as a result of the costs associated with operating in the daylight of law. This Article does not intend to evaluate which of these or other reactions are more likely or more appropriate, nor is it necessary to resolve those questions when the purpose of this Article is to make the limited contention that the frame makes a difference. And, as Parts III and IV show, the frame better prepares those evaluating cannabis law and policy for the consequences that flow from a newly regulated market.

III. CATEGORIES OF REGULATION ATTACHING TO NON-ILLICIT CANNABIS ACTIVITIES AND PRODUCTS

This Part describes the regulatory landscape that legal cannabis industries must traverse. Note that this is new and foreign terrain for cannabis operations. Prior to legalization, these operations had to only concern themselves with avoiding getting caught rather than keeping books, applying for permits, and adjusting behavior to comply with the complex regulatory web. These are the costs of doing business attendant to all legitimate, lawful businesses. There are three general categories of regulation and taxation that will apply to legalized or decriminalized cannabis, making them the more appropriate terminological choice to be the regulatabilization of cannabis: (1) general laws and regulations applicable to all legal activities and products, now encompassing cannabis activities and products as well; (2) general and specific taxation provisions applying to cannabis; and (3) specific cannabis-related regulation of activities or products in cannabis markets, including regulations that

amount to “soft prohibition,” i.e., means of using the regulatory process to discourage cannabis business or cannabis consumption.³⁴ Categories (2) and (3) get a fair amount of attention in the cannabis literature, while category (1) is regularly ignored. Yet, it is category (1) that is perhaps the most consequential in terms of imposing regulatory costs on cannabis operations and correspondingly raising the prices of legal cannabis products by increasing compliance costs and raising the barriers to entry for cannabis businesses.

A. Generally Applicable Laws and Regulations

Every legal activity and product in the formal market economy is subject to generally applicable laws and regulations. In other words, if someone operates in the legal economy then that individual is operating inside the legal ecosystem with the goal of having their actions recognized as legal, which necessarily means their actions must be judged for consistency and compliance with that legal environment. Noncompliant action, or those actions outside the strictures of laws and regulations, also by necessity then gets deemed as extra-legal or illegal. From another vantage point, by the nature of being illegal and operating in the shadows of informal markets, almost every illegal activity is not subject to those same generally applicable laws and regulations because they apply only to legal activity. Thus, when you make illegal activity not illegal anymore, more happens than just the removal of the cloth of illegality. What also happens is the new layering of the cloth of regulatability. This is the true, more complete story of making cannabis not illegal, or what many call cannabis legalization or decriminalization.

Understanding this regulatibilization of cannabis as the better term for the legal status change affected by removing cannabis illegality, we can quickly begin to appreciate the vast layer of regulations and concomitant regulatory and compliance costs that follow. This first Section focuses on those regulations that treat cannabis-related activities like all other activities in the formal market. It will be impossible to name all of the regulations that begin to apply, but a few examples should demonstrate the point.

After the move away from illegality, state and local regulators will now be asked to consider how existing zoning rules apply to dispensaries, for example. While the criminal seller never concerned herself with whether the street corner or dorm room was zoned for commercial sales, the new

34. See generally Donald J. Kochan, *Incumbent Landscapes, Disruptive Uses: Perspectives on Marijuana-Related Land Use Control*, 3 TEX. A&M J. PROP. L. 35, 47 (2016).

legal cannabis dispensary must do precisely that.³⁵ Furthermore, cannabis stores will need to be aware of and in compliance with health and safety regulations. State and eventually federal workplace safety standards will apply. Their employees will be protected by labor laws. They will need to contribute payroll taxes, social security taxes, and workers' compensation funds for their employees.³⁶ The local illicit dealer was not in the practice of giving his crew a W-4 form.

Especially after federal descheduling, if that occurs, the federal drug approval processes will need to be followed.³⁷ This will dramatically affect non-illegal cannabis operations. Calling it a legal drug necessarily means the pharmaceutical components of cannabis are subject to approval and conditions imposed by the FDA. Right now, federal FDA regulations dominate the field and largely preempt state drug approval laws. This means we have been in a quandary with state legalization but with no place to get the drugs approved because of continued federal scheduling. Once the federal government deschedules, marijuana could be deemed a drug, that like all other legal drugs, must go through the rigors of the FDA approval process.³⁸ This example is a classic case of the net that comes when a drug becomes non-illegal.

Consumer protection laws will govern the kinds of advertisements and claims made about cannabis products. And, an added layer of product safety considerations will become applicable, enforceable, and litigable, creating significant compliance obligations. Prices will be scrutinized by regulators, and concerns over antitrust or monopoly could eventually emerge as some market consolidation occurs in the cannabis trade.

Land use and environmental laws will also come into play.³⁹ Cannabis agricultural operations use pesticides and engage in other activities regulated under state and federal environmental laws. So too are chemicals used in processing cannabis, making it necessary to comply with regulations regarding the use and disposal of toxic substances.⁴⁰ Costs

35. See *id.* at 39–40 (discussing the application of land use controls, including zoning, to marijuana-based operations).

36. See Rochelle B. Spandorf, *Who's the Boss*, L.A. LAW., Mar. 2011, at 18 (explaining the general duties of lawful employers to employees).

37. See Sean M. O'Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation, Even After Descheduling*, 68 AM. U. L. REV. 823, 824 (2019).

38. On the rigors of the FDA regulatory process generally, see Christopher-Paul Milne & Kenneth I. Kaitin, *Are Regulation and Innovation Priorities Serving Public Health Needs?*, 10 FRONTIERS PHARMACOLOGY 144 (2019).

39. See Strunk & Schoonmaker, *supra* note 2.

40. See, e.g., Jodi Helmer, *The Environmental Downside of Cannabis Cultivation*, JSTOR DAILY (June 18, 2019), <https://daily.jstor.org/the-environmental-downside-of-cannabis-cultivation/> [<https://perma.cc/R9HF-8WE8>].

must be incurred to contain against water pollution. In fact, studies show that legalization of cannabis leads to more cultivation in urban areas and hence new water pollution issues seeping into those urban environments.⁴¹

And grow operations are water intensive.⁴² This means that regulations over water usage will apply to operations and significant transaction costs will be incurred associated with identifying, buying, and sometimes, litigating water rights for irrigation.⁴³ The hidden fields of the illicit markets did not have owners who went to court to litigate the scope of the water rights they were using to irrigate their illegal plants.⁴⁴

Like all legitimate businesses, cannabis businesses will need to get licenses and file to operate as partnerships, LLCs, or corporations. Businesses will need to file taxes, and individuals operating within the industry will need to report income from their cannabis activities,⁴⁵ whereas previously, it was an all-cash and keep-quiet illegal regime. Non-discrimination provisions will apply to how dealers and really any business owner operating within the cannabis industry may hire and fire. The list could go on and on. Anything federal, state, or local government can do to regulate businesses or transactions they can now do to regulate cannabis activities once it is legalized. And, while most of the examples are state ones because the general federal laws do not yet apply, in many of the categories already listed there will be a federal regulatory component either on top of or in coordination with state officials — such as when both the Environmental Protection Agency and state environmental enforcement officials become concerned with environmental hazards.

B. Taxation of Cannabis

Taxation of cannabis is a major part of the narrative behind efforts to remove illegality.⁴⁶ If you legalize it, you can track its sales and tax it. The revenue generated can be used for all sorts of things deemed useful like

41. See Ariani C. Wartenberg et al., *Cannabis and the Environment: What Science Tells Us and What We Still Need to Know*, 8 ENV'T. SCI. TECH. LETTERS 98, 100 (2021).

42. See *id.*

43. See Vanda Felbab-Brown, *Pot, Water Theft, and Environmental Harms in the US and Mexico*, BROOKINGS INST. (Apr. 12, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/04/12/pot-and-water-theft-and-environmental-harms-in-the-us-and-mexico/> [<https://perma.cc/9CNP-P6VW>].

44. See *id.*

45. See De Lon Harris, *Providing Resources to Help Cannabis Business Owners Successfully Navigate Unique Tax Responsibilities*, INTERNAL REVENUE SERV. (Sept. 27, 2021), <https://www.irs.gov/about-irs/providing-resources-to-help-cannabis-business-owners-successfully-navigate-unique-tax-responsibilities> [<https://perma.cc/23VP-SY3W>].

46. For a general discussion and background on taxation of marijuana, see generally Benjamin M. Leff, *Marijuana Taxation: Theory and Practice*, 101 B.U. L. REV. 915 (2021).

education, roads and infrastructure, public health services, law enforcement or local fire department and other public services, and more. This is a major selling point in the campaigns to change state marijuana laws. While taxation and regulation generally can be considered two distinct categories of governmental activity, for this Article's purposes it is useful to lump taxation in with regulation as each is imposing a cost of doing business with crossover explanatory power for overhead's impact on price.

States have applied general tax structures to marijuana sales, such as state sales tax. And, they have constructed cannabis-specific taxation levels, often designed with social engineering purposes in mind. Some herald such taxation as a great way to reduce undesirable behavior. The higher costs of a product once tax is added in will price some people out of the market for that product; the tax disincentivizes purchasing the taxed product. This may be a socially desirable result because we get fewer users of the socially undesirable product. Yet, one of the pitfalls associated with creating taxation strategies with such a goal in mind is that fewer purchases also mean fewer collected taxes. And, if the system is also depending on collecting lots of taxes from legalization, revenue generation and activity deterrence goals work at cross purposes. If you are taxing a product hoping to generate large revenues, then you want large sales. The higher the taxes, the more likely you will discourage sales or drive individuals into the black market.⁴⁷ This strikes against the revenue generation goal, so the trick is to set the taxation at the optimal level to maximize overall sales. Of course, many advocates like the idea that taxes deter consumption and call for a high tax rate not for revenue generation but activity deterrence. Of course, this is incompatible with a revenue generation model of taxes. It also is naïve in the sense that it assumes the absence of a black market substitute for consumption of the same good an individual would have otherwise consumed in the formal market if the tax level had not pushed them out of it.

Solving the debate over these objectives and identifying the optimal tax rate is beyond the scope of this Article. Nonetheless, it is critical that taxation be understood as one of the costs not imposed on illicit operations and one emerging only as a consequence of a legal shift to cannabis becoming non-illegal.

C. Specific Cannabis-Related Regulation, Including but Not Limited to Soft Prohibition Measures

In addition to the application of general laws and regulations to cannabis activities as the simple consequence of them being legal activities that now

47. *See infra* Part IV.

fall within those general laws, there is also an additional layer of regulation in most states that is targeted specifically at regulating cannabis because it is cannabis.⁴⁸ As Paul Larkin, a cannabis policy expert and a Senior Legal Research Fellow at the Heritage Foundation’s Meese Center for Legal and Judicial Studies’ Institute for Constitutional Government, explains, most states have used their police power to craft cannabis-specific regulations.⁴⁹ We already see a large amount of new regulation emerging that is cannabis-specific — including zoning, planning, permitting, and licensing systems.⁵⁰ This Section will survey some of these restrictions and predict how others may emerge based on examples from other industries.

One purpose of this Section is to further explain the overall regulatory costs that erect barriers to success for the operation of legal cannabis markets and that incentivize illicit cannabis markets, the subject of Part IV. Jeffrey Miron, Director of Economic Studies at the Cato Institute, provides a useful summary of the issues to get this Part started and to set up Part IV:

One obstacle to moving the marijuana market fully above ground is that all state legalizations to date — and the regulatory frameworks imposed at the state or city level — impose substantial restrictions on the marijuana market. Details vary, but regulations generally limit the number of retail outlets, the specific products they can sell, the amount customers can purchase per visit, and the location of stores. Much regulation also restricts or bans home delivery, bars some individuals from obtaining retail licenses, and imposes a minimum purchase age of 21. Apart from this over-regulation, some states impose a tax burden that prices legal marijuana well above illegal marijuana.⁵¹

Urban planners and other regulators certainly have vast tools in their arsenal if they wish to use them to regulate and control non-illegal cannabis. Yet caution is in order. These decisionmakers should be aware of the potential unintended consequences of their choices, including potentially propping up the illicit market or working against the goals they have set to support the change in cannabis’s legal status.

State and local governments operate with an extraordinarily wide general police power, with broad authority to regulate public health, safety, morals, and public welfare. The U.S. Supreme Court recognized great

48. See Kochan, *supra* note 34; see also Paul J. Larkin, Jr., *Cannabis Capitalism*, 69 *BUFF. L. REV.* 215, 243–44 (2021).

49. See Larkin, *supra* note 48, at 243–44 (“No state gives businesses free rein to sell anything and everything they might generate however they want. States have traditionally regulated local businesses since the colonial era under their inherent ‘police power.’”).

50. See Kochan, *supra* note 34, at 48.

51. Jeffrey Miron, *How to Kill the Marijuana Black Market*, CATO INST. (Aug. 11, 2017), <https://www.cato.org/commentary/how-kill-marijuana-black-market> [https://perma.cc/4UUN-48EM].

might in this “public welfare” standard. Consider, for example, the Court’s statement in *Berman v. Parker* that: “The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.”⁵² As directed at cannabis operations, the specific health, safety, and welfare concerns associated with cannabis become the justification for tailored regulations layered on top of the general regulations discussed in Section III.A.

Among these are special zoning, permitting, and licensing provisions, and other public land use controls that govern the time, place, and manner where cannabis-related activity may occur.⁵³ Regulations exist for where, when, and how cannabis can be sold. Hours and volume limitations are often placed on dispensaries. In many cities, consumers can buy marijuana but have very few places to legally smoke it, including because smoking indoors is often banned, and few jurisdictions allow “pot clubs” to legally operate.⁵⁴

These cannabis-specific regulations are similar to targeted regulations aimed at similar industries and activities. History shows us that special regulations have been considered justified exercises of the police power to deal with other “vice”-related or otherwise “on the edge of illegal” activities. Some regulations, in fact, seem like they are effectually either hard or soft prohibition. Vanderbilt University Law Professor Robert Mikos explains that opponents to the relaxation of marijuana laws are finding ways to make it difficult to take advantage of legalization.⁵⁵ For example, “[c]ommunities in at least twelve marijuana legalization states have already passed local bans on marijuana dispensaries.”⁵⁶ Mikos notes that “[e]ven in Colorado, arguably the state with the most liberal marijuana policies, more than 150 municipalities have passed ordinances banning the commercial sale of marijuana.”⁵⁷ Several localities have also enacted moratoria to get their arms around their regulatory options.⁵⁸ Some states

52. 348 U.S. 26, 33 (1954) (emphasis added).

53. See Salkin & Kansler, *supra* note 11, at 3 (describing use of special use permits for marijuana facilities).

54. See, e.g., Matt Laslo, *American High: State-By-State Guide to Legal Pot*, ROLLING STONE (Apr. 19, 2017, 6:14 PM), <https://www.rollingstone.com/culture/culture-news/american-high-state-by-state-guide-to-legal-pot-192704/> [https://perma.cc/6XH5-JG5F] (surveying the limitations on places to smoke or consume marijuana even in states that legalize recreational use).

55. See Mikos, *supra* note 8, at 720.

56. *Id.*

57. *Id.*

58. See Salkin & Kansler, *supra* note 11, at 3 (describing the number of municipalities that have enacted moratoria on medical marijuana establishments, explaining that “[w]henver new and seemingly controversial land uses arrive on the scene, it is not

allow localities broad discretion to regulate marijuana distribution, including allowing complete bans on opening dispensaries in a locality.⁵⁹

And the police power justification is not a hard sell to the courts. Claims of secondary effects from adult entertainment establishments, for example, have long been considered by the courts a legitimate reason to target restrictive land-use regulations at such businesses.⁶⁰ The Supreme Court has even rejected certain First Amendment challenges to some regulations of this kind because of the strength of the local community concerns to safeguard public health, safety, and morals.⁶¹

A host of examples have formed the blueprint for adding a targeted layer of regulation on top of the generally applicable layer, including liquor stores;⁶² bars (and concomitant liquor license supply controls);⁶³ adult entertainment, bookstores, porn shops;⁶⁴ massage parlors; strip clubs; and other similar “vice-laden” or “sinful” lifestyle activities.⁶⁵ Other examples include nightclubs, assisted living homes,⁶⁶ abortion clinics,⁶⁷ video arcades,⁶⁸ and other “disfavored” activities. In a survey of marijuana laws

uncommon for planners and municipal official to enact moratoria to buy some time to study and develop appropriate regulations”).

59. See Grimes & Massey, *supra* note 8, at 46.

60. See Thomas B. Griffen, Note, *Zoning Away the Evils of Alcohol*, 61 S. CAL. L. REV. 1373, 1395–96 (1988).

61. See *id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68–71 (1976)).

62. See Mikos, *supra* note 8, at 751 (comparing marijuana land use regulations to the history where “[l]ocal communities have long regulated the sale and even possession of alcoholic beverages . . . [with] a patchwork of dry, damp, and wet communities in local option states”); see also Shelley Ross Saxer, “*Down With Demon Drink!*”: *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 SANTA CLARA L. REV. 123, 147–51, 156 (1994) (discussing the “broad and deep” zoning authority to restrict the sale of alcohol in buildings and on certain lands).

63. See Saxer, *supra* note 62, at 144–47 (discussing local government requirements for liquor licenses, often in addition to licensing obtained from the state).

64. See Salkin & Kansler, *supra* note 11, at 3 (describing use in marijuana land use decisions of “distance requirements, similar to those used in the regulation of adult business uses”).

65. See Griffen, *supra* note 60, at 1396 (discussing cases on use of zoning to exclude adult entertainment businesses including porno shops and massage parlors).

66. See, e.g., Michael Kling, Note, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 ELDER L.J. 187 (2002) (explaining the ways that zoning can work to keep out or shrink the location options for siting assisted living facilities in light of neighborhood opposition).

67. See Griffen, *supra* note 60, at 1395 (discussing cases on use of zoning to exclude abortion clinics).

68. See *id.* at 1396–97 (discussing cases on use of zoning to exclude video arcades, which courts generally have upheld on the basis that video arcades “have the capability of producing nuisance-like adverse impacts on surrounding neighborhoods such as litter, noise, pedestrian traffic, depreciation of neighboring property values, and crime” and because “video games are said to be addictive, psychologically harmful, conducive to gang activity

across the United States, particularly as they relate to medical marijuana, University of Colorado Planning Professor Jeremy Németh and his co-author Eric Ross described emerging marijuana land-use restrictions and tied them to their historic precursors, with “communities around the country . . . adopting the same zoning restrictions that prohibit any businesses selling alcohol, pornography, firearms, and fast food from locating in residential or even mixed-use neighborhoods” to marijuana operations.⁶⁹ Németh and Ross point to examples where “local jurisdictions are applying the same proximity buffers used to separate sex-oriented businesses from residential areas and sensitive uses such as schools, parks, and playgrounds,” while “also employing density controls commonly used to control bar and liquor store density, most often the spacing between such facilities.”⁷⁰ Furthermore, common law doctrines like nuisance can be the basis for lawsuits against cannabis operations, further increasing the costs of doing business. This regulatability by litigation is also not new to cannabis.⁷¹ Cases involving the secondary adverse effects or secondary nuisances traceable to the liquor store operation, for example, have seen success.⁷² And, observers can predict its

and other anti-social behavior, and are said to produce adverse effects on morality and frugality”).

69. Jeremy Németh & Eric Ross, *Planning for Marijuana: The Cannabis Conundrum*, 80 J. AM. PLAN. ASS’N 6 (2014) (“[I]n practice [medical marijuana dispensaries] are regulated most closely to liquor stores and other nuisance/vice uses.”).

70. *Id.* (surveying local government marijuana-related land use regulations); *see also*, e.g., Salkin & Kansler, *supra* note 11, at 4–5 (describing Colorado 1,000-foot distance regulations from previously denied permit locations or a “school; alcohol or drug abuse treatment facility; principal campus of a seminary, college, or university; or a child care facility” and more generally surveying local government distance regulations related to proximity to “churches, drug and alcohol rehabilitation facilities, group homes, halfway houses, recreational property, and in some instances, any publicly owned or maintained property” as well as some requiring dispensaries be “a certain distance from smoke shops, marijuana paraphernalia shops, and other dispensing facilities”).

71. *See* Salkin & Kansler, *supra* note 11, at 8 (explaining that some jurisdictions consider outdoor growing of marijuana a nuisance because of observability as well as “excess odor, heat, glare, noxious gases, traffic, crime, and other impacts” as well as “repeat responses . . . by law enforcement personnel to the site, excessive noise, or any distributive impact created by the cultivation”); *see also* Mikos, *supra* note 8, at 764 (surveying the state laws either authorizing localities to ban retail marijuana sales, denying local governments that authority, or not yet resolving that issue of authority; but concluding, “[n]otwithstanding their firm rejection of local authority to ban marijuana shops, all of these states do allow local authorities to enact some reasonable regulations to govern them”).

72. *See* Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441, 472 (1995) (“The mere location of a lawful retail liquor store may constitute a nuisance — not because of illegality, but because of the associated crime problems accompanying such a land use.”); *see also* Saxer, *supra* note 62, at 124 (“Many neighborhood nuisance problems such as graffiti, loitering, and prostitution, are linked to the sale of alcohol.”).

application based on the playbook under which other industries like those above have faced lawsuits.⁷³ Cannabis-related properties should expect to see the same types of efforts.

On top of targeted regulation and even some regulations that effectively reach near-prohibition levels, there are also several measures that, by their motivation, seem to be designed to work as what might be called “soft prohibition.” In other words, they are regulations based on a community desire to legalize but not endorse, and thus control, cannabis operations.⁷⁴ It is like having one bucket of regulations⁷⁵ that treat cannabis like it is a legal product and a second bucket (Section III.C here) that treat cannabis as if it were still illegal or at least highly undesirable. In the latter bucket, the legal and regulatory framework makes it hard to do that which is admittedly legal but considered morally or socially undesirable, repugnant, or at least disfavored.

Licensing and zoning,⁷⁶ for example, are broad enough authorities that they give local governments the tools to make it very hard to engage in the legal cannabis industry inside any particular urban area, city center, or even their outskirts.⁷⁷ As Setha M. Low, Professor of Environmental Psychology and Anthropology and Director of the Public Space Research Group at the Graduate Center, City University of New York, and Denise Lawrence-Zúñiga, Professor of Architecture at California State Polytechnic University, Pomona, explain: “Urban environments provide frequent opportunities for spatial contests because of their complex structures and differentiated social entities that collude and compete for control over material and symbolic resources.”⁷⁸ The very idea of urban governance

73. See Saxer, *supra* note 62, at 173 (describing ways to characterize establishments selling liquor as nuisances per se or nuisance per accidents and cases that did so); see also Saxer, *supra* note 72, at 472 (“The sale of intoxicating liquor has been deemed a common law nuisance by some courts, although many of the decisions involved liquor operations that were illegal.”).

74. See Németh & Ross, *supra* note 69, at 3 (identifying NIMBY-based opposition to marijuana land uses).

75. See *supra* Section III.A.

76. See Griffen, *supra* note 60, at 1392–93 (“Freed from the confines of nuisance theory, the courts rapidly expanded the legitimate objectives of zoning by construing many novel ordinances While some judges have objected to this expansion, a municipality’s power to enact an ordinance in the name of general welfare seems well settled.” (citations omitted)); see also Salkin & Kansler, *supra* note 11, at 3 (explaining zoning options — and the importance of clearly defining terms — for controlling marijuana-related land uses).

77. See James G. Hodge, Jr. & Megan Scanlon, *The Legal Anatomy of Product Bans to Protect the Public’s Health*, 23 ANNALS HEALTH L. 20, 33–34 (2014) (stating that “[a]lthough licensing or zoning may not be used to ban products entirely, they effectively outlaw them from certain zones to curtail the prevalence” of them).

78. See THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE 19 (Setha M. Low & Denise Lawrence-Zúñiga eds., 2003).

consistently includes conflicts over competing preferences for the use and management of the scarce and valuable resources that constitute the urban environment. It should not be surprising that drug law relaxation creates fissures in that urban space that must be carefully navigated.

Location limitations, operational restrictions, and the like have been used by some local governments to make it nearly impossible to site a liquor store, for example.⁷⁹ Mikos again explains that “countless other communities that otherwise welcome or at least tolerate the marijuana industry are nonetheless attempting to regulate it, imposing their own idiosyncratic rules concerning the location, size, hours, signage, security, goods sold, and taxes paid by local vendors.”⁸⁰ Hard caps on the number of facilities can make it very difficult to engage in cannabis commerce. Florida, for example, allows for only five dispensaries statewide.⁸¹ Similarly, Salkin and Kansler identify laws in Colorado, New Mexico, Maine, and Rhode Island where localities have imposed distance and visibility regulations for grow sites and dispensing facilities as well as additional licensing conditions that require extra security measures be taken by such businesses.⁸²

Indeed, soft prohibition regulations are often designed to increase costs with the belief that it will also decrease occurrences of the undesirable activity,⁸³ sometimes failing to recognize that the increased costs will not diminish activity as much as they think but instead shift much of it to the black market. Other ways to limit the activity or its success include signage restrictions⁸⁴ or requirements to have security guards.⁸⁵ The regulators might impose limits on hours,⁸⁶ location, size, adequate lighting,

79. See Griffen, *supra* note 60, at 1388 (discussing cases finding wide authority to use zoning to control liquor stores).

80. Mikos, *supra* note 8, at 720.

81. See Grimes & Massey, *supra* note 8, at 47.

82. See Salkin & Kansler, *supra* note 11, at 4.

83. See Saxer, *supra* note 62, at 158–59.

84. See Salkin & Kansler, *supra* note 11, at 6–7 (surveying marijuana advertising and signage restrictions and the corresponding free speech concerns).

85. See *id.* (explaining security requirements associated with marijuana land use permits that resemble the same requirements attached to liquor store permits).

86. See *id.* at 7 (giving examples of opening and closing hour restrictions for marijuana facilities); see also Saxer, *supra* note 62, at 159–60 (describing some of the conditions for liquor store licenses as including agreements to “remove graffiti promptly, provide adequate lighting, remove trash, provide a security guard, and in some instances, limit hours of operation,” along with things like advertising limits and spatial proximity restrictions between stores and between a store and sensitive areas like schools, parks, churches, and the like).

graffiti, or litter removal, etc.⁸⁷ Hour and day restrictions on the sale of alcohol are common, for example, often justified by noise, disorderly conduct, religious concerns, amount of traffic on a specific day, and the heightened need to control against impaired driving.⁸⁸ Other innovative examples of soft prohibition-like regulation targeting past vice-like activities include setting caps on the number of liquor licenses within a certain radius, thereby keeping out unwanted activities.⁸⁹ It is not a stretch for regulators to make the analogies to liquor and the minimization of community harm rationale for strong licensing, permitting, and zoning. Regulations could flow from analogies to the concentration limits mentioned above, where caps are placed on the overall number of liquor licenses within a certain area⁹⁰ based on the belief that such limits help to control crime and the blight that it is claimed can result if many “undesirable” establishments like liquor stores are in the same vicinity.⁹¹ Other analogies could be made to limiting the manner and location of sale generally⁹² and distance or proximity restrictions — such as in relation to schools, child care and youth facilities, parks, and playgrounds, seminaries, colleges, and universities, treatment facilities and jails, and residential areas.⁹³

87. See Salkin & Kansler, *supra* note 11, at 7 (stating that very much like with liquor-based or adult establishments, several municipalities have “[z]oning ordinances have also imposed a duty on dispensing facilities to ensure the cleanliness of the neighborhood. Some localities require dispensing facilities to frequently retrieve litter from around the building and the surrounding sidewalks. Others ordinances require that graffiti on dispensary facility walls be removed promptly”); see also Griffen, *supra* note 60, at 1375–76 (describing Los Angeles ordinance as an example that dramatically decreased applications to sell liquor by implementing a comprehensive permitting scheme to combat blight with concentration restrictions, lighting and security requirements, hours of operation limits, neighbor notification with public hearings before permit issuance, proximity limitations (to protect schools, churches, and hospitals), special planning approvals, and other mechanisms).

88. See Saxer, *supra* note 62, at 170–71.

89. See Kochan, *supra* note 34, at 49.

90. See Salkin & Kansler, *supra* note 11, at 5 (discussing limits on the number of marijuana dispensing facilities in an area); see also Saxer, *supra* note 62, at 166 (discussing regulatory strategies “that may help combat liquor store overconcentration” and liquor store density controls through “limits on the number of outlets that are allowed”); Saxer, *supra* note 72, at 443–44 (discussing over-concentration of liquor stores and liquor licensing).

91. See Saxer, *supra* note 62, at 123 (“Recent studies indicate that there is a ‘high correlation between the number of liquor stores and a neighborhood’s crime rate.’”); see also Saxer, *supra* note 72, at 472–73 (discussing legitimacy of state interests as measured by loitering, graffiti, and other crime control necessitated by “having a liquor store in the neighborhood”).

92. See Griffen, *supra* note 60, at 1374 (“Municipalities have taken aim at the vendors of alcoholic beverages by passing zoning ordinances that limit the number and type of establishments permitted to sell liquor.”).

93. See Saxer, *supra* note 62, at 169–70 (examining regulations that control against “undue concentration” including placing distance limitations on liquor sales). Borrowing

* * *

Each of these categories of regulatory and taxation costs to cannabis businesses and consumers is uniquely available when the product and operations are made non-illegal and therefore regulatable. The next Part considers the potential consequences of those costs and emphasizes why the regulatability frame becomes so important for evaluating the likelihood of success at achieving the goals motivating the change in cannabis's legal status.

IV. REGULATABILIZATION, ITS INFLUENCE REGARDING ILLICIT CANNABIS MARKETS, AND AN ACCURATE ASSESSMENT OF THE POTENTIAL TO REALIZE GAINS FROM NON-ILLEGALITY

Adopting a regulatabilization frame for understanding the shift in cannabis's legal status allows urban planners and other policymakers and observers to make a more honest and accurate assessment of the costs and benefits of the shift. As part of that assessment, this Part explains why regulatory costs incentivize continued illicit markets. One goal in this Part is to help explain the implications that regulatability has on the likelihood of success of a variety of claimed positive outcomes — claims which, to varying degrees, rely on assumptions of little or no regulation of cannabis to reach their conclusions regarding the benefits of eliminating illicitness.

A significant benefit of operating illegally is the absence of regulatory compliance costs. Moving an illicit activity out of the underground means it must now face the costs of regulation and begin to internalize those costs. This puts legal cannabis operations at a competitive disadvantage vis-à-vis illicit cannabis operations. Thus, operationally, ending criminal prohibition should be more robustly understood as not just about eliminating the costs associated with risk of prosecution but is also about the imposition of massive new costs from multiple categories of regulation as a result of becoming a law-abiding business. Multiple layers of regulation will increase costs, risk stifling innovation, preclude entry, and push some operations back underground while encouraging others to stay there or emerge there.

from liquor store regulations, similar distance regulations are emerging for marijuana-related uses of property. *See, e.g.*, Salkin & Kansler, *supra* note 11, at 7 (describing zoning measures being used to control growing and cultivation of marijuana, including location, size, distance, visibility, and security restrictions); *see also, e.g.*, Mikos, *supra* note 8, at 731–32 (“[T]o varying degrees communities in Colorado and elsewhere restrict the number, location, size, and hours of operation of locally permitted marijuana stores.”).

It cannot be doubted that the regulation of cannabis changes the costs of doing business.⁹⁴ And, urban planners and other policymakers must take better account of these changes. First, decisions must be made on how to regulate and to what ends. But, equally important, regulators and planners must better understand the consequences of their regulations. They must assess the ends of the regulations themselves and whether they can be successfully attained. Further, they must work especially hard to understand whether the regulations imposed positively or negatively affect the policy objectives underlying the decision to change the legal status of cannabis in the first place.

Consider some of the arguments in favor of legalizing cannabis. Many involve the gains to be obtained by shifting from illegal markets to legal ones. Among these are that legal cannabis can be taxed; eliminating the illicit market will decrease crime and associated urban issues; shifting away from the illicit market will provide health benefits from safer regulated products; and police and other municipal resources can be diverted toward non-cannabis ends when the illicit market disappears. Notice how all of these are dependent on the assumption that when the legal market emerges, then the illicit market disappears. If, however, the illicit market remains, then: (1) illegal cannabis will not be taxed and the existence of the alternative illicit supply will bring down the amount of legal sales to subject to taxation; (2) crime and associated negative effects on urban environments will continue, and it may become even harder to police such crime because law enforcement will have the extra burden of trying to distinguish legal from illegal sales and the transaction costs associated with detangling after that blurring are proving to be quite high; (3) the health and safety concerns associated with an unregulated supply of differing quality and perhaps dangerous ingredients will continue as price-sensitive consumers become willing to take risks with cheaper drugs; and (4) the savings from diverting police and law enforcement authorities and the concomitant benefits by redirecting them to other urban and municipal concerns will not obtain because of the continued, and perhaps more complicated, need to monitor and contain the continuing illicit cannabis market.

The benefits of legalization will be realized only if the incentives for continued or expanded illicit markets are correspondingly limited. As one raises the costs of doing something legally, it increases the incentives to do something illegally outside the regulations and controls of the government.

94. See Scott Zamost, Melissa Lee & Jennifer Schlesinger, *A Look Inside the Black Market for Weed Shows the Huge Threat to Legal Businesses*, CNBC (July 12, 2019, 7:36 AM), <https://www.cnn.com/2019/07/11/las-black-market-for-weed-threatens-the-growth-of-its-legal-business.html> [<https://perma.cc/WCM3-GA99>].

Consequently, the benefits of legalization must be evaluated against the limitations to their attainment — and regulatability is a big one — imposed by legalization itself. In this context, urban planners and others must at the very least examine those limits that exist within a regulated market that does not exist for an unregulated market for the sale of goods — because the absence of those limitations is a competitive advantage to operating in the illicit market. Illicit markets emerge when regulated markets become burdensome, and there are opportunities to earn more outside the law rather than inside it.

Thus, the regulatabilization of cannabis creates rivalrous objectives. Each regulation designed to achieve positive ends competes with the goals associated with eliminating an illicit market precisely because regulation creates incentives to engage in illicit activity.⁹⁵ As one analysis summarized the opinions of cannabis experts: “To suppress the black market, which has no quality controls, safety standards or product testing, the pricing in the legal market will need to be lower than what is available in black market channels.”⁹⁶ And, observers recognize that this rivalry is playing itself out on the streets.⁹⁷ As one commentator put it, “many attentive residents of legalized states know that” the promises of legalization have not “panned out” because the “[c]annabis’ illegal market is anything but dying; in some cases, it’s more active than it has been in years.”⁹⁸ There is no doubt that a primary goal of the legalization and decriminalization movements has been to fully integrate cannabis products and cannabis activity into the legitimate market for goods. But the continuing existence of the illicit market is almost guaranteed if the regulatory conditions in the legitimate market incentivize evasion of that market. Individuals operate in the legal market when the regulatory climate makes it inviting to do so. Individuals also shift to, or remain, operating in illicit markets — even for goods where there are legal markets

95. See Allie Howell, *Do Marijuana License Fees Help Keep the Black Market Going?*, REASON FOUND. (July 15, 2020), <https://reason.org/policy-brief/do-marijuana-license-fees-help-keep-the-black-market-going/> [<https://perma.cc/YU9N-YCT2>].

96. Iris Dorbman, *NY Legalizes Pot: Will That Squash the State’s Black Market?*, FORBES (Apr. 5, 2021, 8:00 AM), <https://www.forbes.com/sites/irisdorbman/2021/04/05/ny-legalizes-pot-will-that-squash-the-states-black-market/?sh=1f2815963ddb> [<https://perma.cc/PK7F-PWX8>] (describing opinions of experts, including Charles Gormally, a cannabis attorney at Roseland, New Jersey-based Brach Eichler and Keith Cich, co-founder and president of California-based cannabis company Sunderstorm).

97. See Joseph Detrano, *Cannabis Black Market Thrives Despite Legalization*, RUTGERS CTR. ALCOHOL & SUBSTANCE USE STUD. (CAS), <https://alcoholstudies.rutgers.edu/cannabis-black-market-thrives-despite-legalization/> [<https://perma.cc/64H7-A7WE>] (last visited Feb. 11, 2022).

98. *Id.*

available — when the legitimate market’s regulatory conditions make it the less attractive and less profitable forum.

Increasingly, news stories are highlighting the continued existence, if not the enlargement of illicit cannabis markets in jurisdictions where cannabis has been made legal or decriminalized and where, consequently, as this Article notes, has become concomitantly regulabilized.⁹⁹ Some studies indicate that the black market, with \$70 billion in illegal sales per year nationally, still dwarfs the seven times smaller legal cannabis market.¹⁰⁰ Studies in individual states where the legal status of cannabis has been relaxed show similar results, with illegal cannabis dominating legal markets.¹⁰¹ Curiously, some of these studies show that legalization has increased overall demand for cannabis and even that legal and illegal prices have both increased,¹⁰² but that illicit sellers are getting a bigger share of those new customers than legal sellers.¹⁰³

There are huge advantages in the lower costs of doing business in illicit markets (despite the need to calculate in the potential costs of criminal liability) to be gained from avoiding regulatory burdens (allowing illicit sellers to charge a lower price because they do not have to pass these costs on to the consumers) and offering an untaxed product (which also lowers prices).¹⁰⁴ Consider evidence from California where the so-called “gray market” companies — meaning the illicit sellers within a jurisdiction that permits legal sales of the same product — “don’t adhere to the complex

99. See Zamost et al., *supra* note 94 (“‘The black market is a huge problem,’ said Patricia Heer, an attorney and founder of Cannabis Law Digest. ‘In some states, it’s between 70% and 80% of sales.’”).

100. See, e.g., *id.* (“New Frontier Data, a Denver-based company that studies cannabis trends, estimates there are \$70 billion in illegal sales nationally — seven times the size of the legal market. This means the legal market is ‘capturing only a fraction of total demand,’ the company said in a summary of U.S. cannabis demand trends released this month.”).

101. See Tom Schuba, *Billions in Black-Market Weed Still Selling in Illinois 18 Months After Marijuana Legalized*, CHI. SUN-TIMES (June 14, 2021, 7:49 PM), <https://chicago.suntimes.com/cannabis/2021/6/14/22534079/illinois-dispensaries-illegal-legal-marijuana-cannabis-pot-bud-sale> [<https://perma.cc/K5EW-QQD5>] (“Even as legal weed sales in Illinois continue to shatter records nearly 18 months after they kicked off, the illicit pot trade is still dominating a total statewide market some experts have values at over \$4 billion.”).

102. See *id.* (describing situations in which the price of illicit weed has increased because the competitor product, legal weed, has been forced to increase its price and some consumers expect higher prices).

103. See *id.*

104. See Detrano, *supra* note 97 (“[T]here are distinct advantages that local, underground pot salespeople have over licensed dispensaries. Perhaps the most significant of these advantages is the possibility for local dealers to sell bud at far lower prices.”).

regulations covering everything from security to product testing.”¹⁰⁵ As a consequence, these unregulated companies “can undersell their law-abiding counterparts by up to 50%.”¹⁰⁶ That gives a substantial competitive edge to the companies operating outside the law and discourages operating inside the regulated environment.

The black market will not dissipate unless the legal market is able to compete by offering lower prices.¹⁰⁷ The regulatability-differential makes that outcome very difficult to imagine. The simple answer to why these markets thrive is that illicit sellers can offer lower prices, sometimes as much as 40% lower, because the black market sellers are not paying permitting fees or taxes.¹⁰⁸

It is even more difficult to envision the dissipation of the illicit market when we consider the price sensitivity of cannabis customers.¹⁰⁹ It is a very basic rule of economics that prices affect demand, because consumers respond to prices including by forgoing consumption or, more likely, by seeking alternative products, alternative sellers of the same product, or more price-friendly alternative markets for the same product when available.¹¹⁰ In a recent study, research by Reason Foundation policy experts Geoffrey Lawrence and Spence Purnell reveals that marijuana customers are price sensitive and will move to the black market if costs get too high and if the lower price equals the “risk premium” that must be offered to give up the benefits of buying a legal product.¹¹¹ Consequently: “Black markets will continue to operate so long as high taxes in the legal market create a large price disparity.”¹¹² Indeed, illicit markets not only offer a lower-priced product, they can also offer consumers other benefits too. For example, as a CNBC investigative report discovered, black market

105. See Alex Halperin, *Can Legal Weed Ever Beat the Black Market?*, GUARDIAN (Mar. 18, 2019, 1:30 AM), <https://www.theguardian.com/society/2019/mar/17/legal-weed-black-market-california-gavin-newsom> [<https://perma.cc/2TKG-ARGD>].

106. *Id.* (citing analysis from Bryce Berryessa, the president of the licensed California cannabis company La Vida Verde).

107. On black markets generally, see BUTLER ET AL., *supra* note 4, at 103–04.

108. See Zamost et al., *supra* note 94 (“Cameron Wald, executive vice president of Project Cannabis, which owns four stores in LA, said the illegal dispensaries can sell the same product for nearly 40% less than a legal store. ‘We have outrageous price compression that we have to see at our stores to compete with people that are not paying their taxes,’ he said. ‘They’re not paying their permitting fees. They’re not paying the city.’”).

109. See Geoffrey Lawrence & Spence Purnell, *Marijuana Taxation and Black Market Crowd-Out*, REASON FOUND. (Jan. 31, 2020), <https://reason.org/policy-study/marijuana-taxation-and-black-market-crowd-out/> [<https://perma.cc/2Q9X-SCBN>] (“As demonstrated by alcohol and cigarettes, excessive taxation can influence consumers’ decisions to patronize the black market.”).

110. See BUTLER ET AL., *supra* note 4, at 56–58.

111. See Lawrence & Purnell, *supra* note 109.

112. *Id.*

dispensaries can offer free samples, stay open longer hours, have no sales caps, etc. — all putting them at a profit-making and competitive advantage over legal operations.¹¹³

Both suppliers and consumers will react rationally when it comes to choosing between whether to sell or buy in an illicit market versus a legal one, and will depend on the available profits, costs, and associated risks of participating in each. Consider Lawrence and Purnell’s assessment of these concerns. They posit that: “[W]hen a legal market exists, such as in those states that have passed legalization statutes, producers face a trade-off between seeking a risk premium for participating in the black market or facing higher tax expense and regulatory costs in the legal market.”¹¹⁴ This tradeoff means that: “All else equal, a producer should be expected to remain in the black market if their profit margin exceeds the profit margin that would be available in the legal market plus their required risk premium for participating in the black market.”¹¹⁵ Consumers do a similar calculus, where they “should be expected to remain in the black market only if the cost savings available from lower prices on that market exceed the consumer’s risk premium for participating in it.”¹¹⁶ It is a given that most people like to operate within the law, but incentives matter. While consumers prefer to buy legal drugs, they will move to illegal suppliers when pricing and quality conditions push them there. If the consumers do not believe they are getting substantial benefits from buying at a higher legal price, then they will move to the illicit market. There is a breaking point. Consequently, while “[m]ost consumers prefer, other things equal, to purchase from legal suppliers,”¹¹⁷ urban planners and policymakers should recognize that their policies regularly will have unintended consequences. Black markets emerge when poorly designed public laws and policies encourage them, meaning they “arise only when government policy forces markets underground by outlawing them or by imposing excessive regulation or taxation.”¹¹⁸ It is really just a matter of competition. Competitors do not emerge unless they have something to offer that will pull them away from existing suppliers. When existing suppliers add costs, there will be incentives for alternative suppliers to emerge — whether they are operating inside or outside the law. If the way to offer a cheaper product is to do it illegally, then so be it. Entrepreneurs regularly seek to overtake incumbents, and there is nothing that says an

113. See Zamost et al., *supra* note 94.

114. See Lawrence & Purnell, *supra* note 109.

115. See *id.*

116. See *id.*

117. Miron, *supra* note 51.

118. *Id.*

entrepreneur is only the one who operates inside the law. Sometimes the entrepreneurial aspect of the competitor's enterprise is its very illicitness, the thing that allows it to escape costs that attach uniquely to the entrepreneur's competitor who is seeking to operate inside the law.

Achieving the promises of legalization becomes complicated when so many of them depend on the elimination of the illicit market. Indeed, the high costs of compliance and the competitive disadvantages when an illicit market continues to be an available substitute make the incentives to enter the less-profitable legal market much lower than many expected.¹¹⁹ As one reporter notes: "One big reason to legalize cannabis is to wrest the market away from criminal enterprises and tax the proceeds. But in Canada and the US [sic] states where weed is legal, the illegal market has proven to be a tenacious competitor — and it's likely to remain so for years."¹²⁰ The persistence of the illicit market follows from the costs associated with operating in a legal market and ensures that the desired regulatory structures are far less effective because they will not apply to the entire market, legal and illicit, for marijuana.

The expected tax revenue from legalization is also far lower than expected because black market sales are keeping legal sales down. When some stay in the black market, that means there are fewer entrants in the legal market. Furthermore, attractive lower-cost purchasing opportunities in the untaxed illicit market means that less product is being sold in the taxed market.¹²¹ Consequently, urban planners and other policymakers cannot count on this additional revenue to serve the budget offset or new expenditure expectations that they anticipated when advocating in favor of legal cannabis — in part a miscalculation because there was not a full appreciation for the fact that this was not really just legalization but instead, making a product legal *and* regulatable. As Lawrence and Purnell observe: "Many view marijuana legalization as a potential windfall for state budgets. Accordingly, states have sought to identify tax rates, licensing rates and other fees that extract the maximum revenue from the industry to fund unrelated government projects ranging from education to infrastructure improvement."¹²² Yet, the authors continue in their next sentence by making the critical point of stone-cold realism that "by raising the price of marijuana for consumers" through the imposition of regulations and taxes, "these costs undermine a major competing purpose of legalization:

119. See Zamost et al., *supra* note 94 ("Many saw legalization of marijuana as a huge economic opportunity, but the reality is its potential isn't fully realized. An underground economy is cutting into the profits of legal businesses.").

120. Halperin, *supra* note 105.

121. See Zamost et al., *supra* note 94.

122. Lawrence & Purnell, *supra* note 109.

elimination of the black market.”¹²³ The revenue generation does not flow if the channels toward legal sales also do not flow because of an alternative product stream from illicit paths.

Indeed, the continuation of an illicit market actually creates new burdens for law enforcement, urban planners, and local regulators because the new mix of both legal and illegal cannabis operations adds the need to devote resources to distinguishing between the two and effectively punishing illegal operations if the legal operations are to be protected. Indeed, the punishment or deterrence of illegal operations is one of the critical prerequisites to an efficiently operating legal market. Without it, there is little reason to operate in the light instead of the shadows.¹²⁴ So, advocates of legal cannabis cannot abandon the effort to police illegal operations lest they risk giving up the whole game.

But these new monitoring costs further tax urban budgets and push the realization of revenue savings or revenue generation away from local governments’ reach. The need to distinguish legal versus illegal operations is a new transaction cost of legalization. Before that, it was easy. Everyone involved in cannabis cultivation, sales, and distribution was a criminal. Now, the authorities need to be able to determine who is who and what is what. Thus, there are new dual costs of monitoring and policing legal operations to make sure they are complying with regulations and paying taxes while also monitoring and policing illegal operations to punish and deter as well as to create incentives to operate in the legal market. We sometimes forget that legal markets operate efficiently only when the authorities provide them protection against illegal market competitors. Tons of new inquiries must be made — for example, which dispensaries or cultivators have permits and which do not; which possessors are holding legal products versus illegal product; which grow operations are in full compliance with environmental laws and which are scofflaws; which products are adulterated and which are consistent with health and safety guidelines; and which operations are following labor laws, supply limits, hours of operation constraints, selling to minors, reporting sales for taxes, and so on.¹²⁵

123. *Id.*

124. *See generally id.* (recognizing that the risk of getting caught and the possibility of suffering criminal sanctions is felt and operates as a real constraint on illicit behavior, but the level of constraint is directly proportional to the risk of getting caught and the weighing of the costs versus the gains from engaging in the illicit activity, discounted by the probability of imposition of penalties).

125. *See, e.g., Differentiating Legal vs. Illegal Cannabis Products*, CANNGEN INS. SERVS. (July 20, 2022), <https://www.canngenins.com/differentiating-legal-vs-illegal-cannabis-products/> [<https://perma.cc/EW38-R88A>]; *Legal vs. Illegal Cannabis*, HARRISBRICKEN (Oct. 15, 2015), <https://harrisbricken.com/cannalawblog/legal-vs-illegal-cannabis/> [<https://>

Just as regulatory compliance costs are not neutral with legalization, it is a similar fantasy to believe that enforcement costs are neutral or capable of realizing savings. Enforcement costs will exist for the whole new layer of regulations. And, as noted here, additional enforcement costs will be created when an industry moves from entirely illegal to legal but with an inevitable continuation of an illegal side market.¹²⁶

And it is not just regulators that will have a hard time distinguishing legal versus illegal markets. Consumers have this problem too, adding another layer of complication when it comes to urban officials and other policymakers trying to safeguard the health of consumers who cannot be trusted to know or simply do not have adequate tools or education to know what products are or are not better for them. Urban planners already struggle with finding ways to improve health literacy, especially among poor and minorities in their communities given that social determinants like these affect the level of health literacy amongst those groups.¹²⁷ Planning for health literacy should focus on “development of skills and capacities intended to enable people to exert greater control over their health and the factors that shape health.”¹²⁸ When it comes to cannabis consumption decisions, many of these consumers are already underinformed because they have never faced the need to choose between illegal or legal cannabis before when the only option was to get it on the streets.

It is often unclear to customers which operations are legal and which are not, creating difficulties in achieving the urban goal of channeling customers to legal, safer outlets and adding an administrative burden for law enforcement who must expend extra resources to distinguish between operations.¹²⁹ In fact, the sheer mass of illegal operations — including

perma.cc/P5JL-V7U6]; *Legal vs. Illegal Dispensaries: What to Look For*, CANNGEN INS. SERVS. (July 17, 2020), <https://www.canngenins.com/legal-vs-illegal-dispensaries-what-to-look-for/> [<https://perma.cc/G6NC-WLSA>].

126. See Detrano, *supra* note 97 (describing substantial continued enforcement costs in California due to illegal farms, operations, smuggling, and other illegal activities).

127. See generally Deborah Chinn, *Critical Health Literacy: A Review and Critical Analysis*, 73 SOC. SCI. & MED. 60 (2011); Mary Evelyn Northridge & Lance Freeman, *Urban Planning and Health Equity*, 88 J. URB. HEALTH 582 (2011) (describing health and health literacy inequalities and the need to account for them in urban planning); *Health Literacy*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/health-literacy> [<https://perma.cc/5UG9-25HT>] (last visited Jan. 26, 2022) (explaining that “health literacy” is “the degree to which individuals have the capacity to obtain . . . basic health information”).

128. Don Nutbeam, *The Evolving Concept of Health Literacy*, 67 SOC. SCI. & MED. 2072, 2072 (2008); see also Kristine Sørensen, *Health Literacy: A Key Attribute for Urban Settings*, in OPTIMIZING HEALTH LITERACY FOR IMPROVED CLINICAL PRACTICES 1 (Vassilios E. Papalois & Maria Theodosopoulou eds., 2018).

129. See Halperin, *supra* note 105.

easier-to-identify-as-illegal pure street sales as well as those that look legal, i.e., are operating as if they are part of the legal market but that have not received requisite approvals — blurs the market for consumers who have significant transaction costs associated with identifying legal operations compared to illegal ones, especially with illegal operations often masquerading as legal and taking advantage of consumer ignorance.¹³⁰

Furthermore, one of the conditions motivating consumers to prefer a legal market may very well break down in the cannabis space. Once you have blending of a legal market and illicit market for the same product, the product itself may be virtually indistinguishable to both private enforcement authorities and public enforcement authorities. In other words, police, landlords, or employers may not be able to tell if you are possessing or smoking a product that originated from a legal or an illegal grower or distributor. If it becomes almost impossible to police, or at least to police the end users of the product, while at the same time the existence of a legal market makes the taboo go away, then the end users may no longer be deterred from obtaining the product on the illicit market in the first place. Couple this with the fact that this same group who is no longer as strongly deterred from buying illegally also consists of price sensitive consumers. That price sensitive group may feel very little shame from buying from the illicit sellers, even if they can determine whether the seller is legitimate or illicit as an original matter. It may no longer matter.

Thus, local authorities, in many ways, have a more complicated, greater burden than before legalization. Of course, if budgets for these dual roles do not increase, then legalization and concomitant regulation of legal cannabis actually dilutes enforcement resources by spreading them thin and makes urban authorities worse at each task — controlling legal and policing illegal operations — when forced to do both at the same time without increased resources.¹³¹ And, if both cannot be done well, it means success at achieving the goals of each suffers, with crossover effects.¹³² While a primary point of legalization was to eliminate the costs associated with policing a black market, the persistence of the black market means those benefits are not being realized. When the benefits are greater to act outside the legal controls or the illegal market than they are to act inside, the incentives to innovate illicitly emerge. The less effective control over the illegal market makes the illegal markets even more robust, further detracting from the benefits of operating in the legal markets and further

130. See Detrano, *supra* note 97.

131. See Zamost et al., *supra* note 94.

132. See *id.*

pushing the infinitely regressive cycle toward a continuing illicit market which diminishes benefits of legalization and on and on.

It is encouraging that some commentators are beginning to recognize that one of the unintended consequences of taxing legal cannabis is to channel operations and consumption into a continuing illicit drug market.¹³³ But the focus is too often myopic when there is a vast regulatory field built into the price of legal cannabis. The vast majority of research and press on the issue of price effects is focused on this issue of taxation, without understanding the much broader regulatory overlay that also impacts price. Thus, while it is helpful that this recognition of price effects exists, the fact that the commentary and research associated with pricing effects and illicit markets after cannabis legalization is almost universally related to the effects of direct taxation means that the picture surrounding the drivers behind the continued illicit market is incomplete. Indeed, it is so laser focused that it seems like most observers and commentators are entirely blind to the taxation-like effects of the broader regulatory thicket in which legal cannabis is entangled but through which illicit cannabis need not pass. Understanding the impacts associated with the regulatory layer that is imposed on any once-illegal now-legal activity — and how that layer creates a fundamentally different market for the sale of goods than existed when the cultivation, distribution, sales, and use of those goods were illegal — is critical. Such comprehension of the interplay between regulation and market prices helps illuminate the shape of both the legal cannabis market and the contours, features, and drivers of an enduring yet transformed illicit market for cannabis that now competes with the legal market.

This recognition itself should be a useful, eye-opening exercise for any urban planner or other policymaker. It is the regulatibilization of cannabis that policymakers and communities are dealing with and not just simple legalization. Understanding this fact, decisionmakers can better predict the consequences of the change in legal status and better calculate the anticipated costs and benefits not just of status changes but better assess which kinds of regulations they wish to impose on cannabis-related activity and in what manner. Furthermore, researchers must do better at calculating the regulatory burden in the cannabis market beyond taxes. For example, some researchers like Lawrence and Purnell advise policymakers that they should set taxes at rates sensitive to avoid incentives for consumers to seek lower prices in the black market.¹³⁴ The same advice applies to setting

133. See, e.g., Lawrence & Purnell, *supra* note 109.

134. See *id.*; see also Dorbian, *supra* note 96 (explaining claim that need to ease in taxation to push out black market).

non-tax regulatory burdens as well because those operating costs similarly push legal cannabis prices up and increase the attractiveness of illicit markets.

CONCLUSION

The way an issue is framed can affect how it is evaluated. And omitted features of a frame too can deprive the observer of the opportunity to appreciate key aspects of the content. This Article has contended that the current frame for the shift in status to make cannabis activities and products not illegal has been imprecisely and incompletely framed as a legalization or decriminalization move to the detriment of our ability to understand and forecast the effects of the move. The legal move involves far more than flipping a switch turning illegality off and legality on. When the legality light shines into the cannabis room, complex webs of regulatory structures are revealed in the room.

The regulatabilization frame better captures the true nature of the emerging cannabis law regime and creates an emphasis on regulation that urban planners and other policymakers cannot ignore. Without such emphasis framing, there is a risk that the consequences of a regulatory overlay will go underappreciated and the resulting policy choices will be under informed. Separate and apart from the re-framing proposal, this Article, at the very least, has presented an economic understanding of the effects of regulation on price and the corresponding effects on illicit, shadow markets as an alternative to the formal cannabis markets. The regulatabilization frame helps us see the consequence more clearly. The existence of complex and high-cost regulations necessarily changes the legal cannabis business outcomes and consequently incentivizes the continuation of the illicit market. Without addressing the incentives driving the continuation, indeed emboldenment, of the illicit cannabis market in many states today, the purported benefits of making cannabis not illegal cannot be optimally realized. However, if policymakers better understand these effects, they will be better equipped to navigate so as to minimize their occurrence.