

Memorandum

To: Jamie B. Raskin, Chair, Subcommittee on Civil Rights and Civil Liberties,
House Committee on Oversight and Reform
Nancy Mace, Ranking Member, Subcommittee on Civil Rights and Civil Liberties,
House Committee on Oversight and Reform

From: Eric E. Sterling (Exec. Dir., Criminal Justice Policy Foundation, 1989-2020;
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Re: **Fundamental challenges of cannabis law reforms and opportunities for the
Oversight and Reform Committee**

Date: November 15, 2022

The good news that American adults will soon be able to enjoy the liberty of using cannabis responsibly without fear of criminal prosecution and to obtain cannabis legally, unfortunately brings up some grim realities.

As we re-establish liberty, we need to provide reparations for those who have been handicapped by their arrests and prosecution, and for their communities.

Even bigger challenges involve shaping the legal industry. There are two key challenges:

- (1) Eliminating the criminal organizations that are still growing large quantities of cannabis on Federal lands and elsewhere, often in collaboration with transnational criminal organizations based in Mexico and other organized criminal organizations. The total failure of federal law enforcement over the past half-century is not encouraging.
- (2) Protecting our society from the unintended but foreseeably negative consequences of the promotional activities and consolidation of the new legal cannabis industry. The experience with new industries and their consolidation -- from railroads, petroleum, automobiles, television, air travel, the Internet and smartphones -- is one of profound impacts on society and the economy that are unanticipated.

Essential to address these challenges are three huge obstacles:

- (A) Cannabis consumers must be encouraged to participate in the legal market and abandon the lower prices and convenience of the illegal market.
- (B) If cannabis taxation and fees are high and regulations expensive and burdensome, legalization will fail. Hugely unrealistic expectations of the revenues from the legal cannabis industry are protecting the criminal industry. With California's high taxes, a recent estimate is over half of the cannabis market is illegally sourced.
- (C) Our collective ability to think carefully about cannabis policy is challenged by the pervasive impact of over a century of cannabis prohibition (including 85-years of federal prohibition) on our modes of thought and cultural assumptions. No matter where we stand on the legalization spectrum, our conceptions of what we want and what we can achieve -- as parents, educators, neighbors, policymakers, government officials, and cannabis industry participants -- are being shaped by the role of prohibition on our prejudices and our experiences with people who use cannabis.

The Oversight and Reform Committee is unique in the House of Representatives with government-wide oversight responsibility. It has an unmatched opportunity to investigate and legislate how the society and the government can best address these many challenges that crosscut government agency responsibilities. Ideally, the President will create a mechanism for all federal agencies to reconceptualize their missions to incorporate the potential changes that legal cannabis will mean for each agency's stakeholders -- perhaps a national commission as John Hudak has suggested.

Many organizations have great expertise in analyzing the reparative dimensions of cannabis legalization ranging from criminal justice to economic development opportunity, and I won't address those important issues in this memorandum. However, the suggestion that cannabis taxation can fund important programs of equity and reparations should be questioned. In the balance between seeking revenue from cannabis for important programs and the objective to eliminate organized crime from the illegal cannabis industry, the latter is the more urgent mission. Reparations and equity are public goods that deserve to be funded from the revenue stream at large, not a dedicated revenue stream based on cannabis.

Defeating the criminal cannabis industry tied to Mexican drug trafficking organizations and other organized crime organizations must be understood as an urgent national security and environmental priority that cannot be achieved unless cannabis consumers overwhelmingly enter the legal market. Taxation and excessive regulation give the illegal market a substantial price advantage over the legal market. If cannabis taxation is not initially low, the legal cannabis market will always be handicapped by the criminal competition. To continue with decades of large-scale illegal cannabis production and sales will be a defeat for the rule of law, a significant driver of corruption, money laundering and environmental destruction, and a potential source of contaminated cannabis. With high cannabis taxation, illegal cannabis enforcement will continue to fail and remain a source of criminal justice disproportionality.

Indeed, even with low cannabis taxation it will be an enormous challenge to convince cannabis consumers to abandon the convenience, familiarity, and price advantage of their "legacy" cannabis suppliers. Cultural assumptions about cannabis users and the historic discrimination against them disincline cannabis users to embrace the "legal" system. Many regulatory features, especially those involving identification, that carry over from the legal medical cannabis regimes, are viewed with suspicion by many cannabis users. Laws (based on prohibition assumptions) that continue to enable employers, landlords, educational systems, health care providers, and the justice system to discriminate against cannabis users discourage cannabis users go to legal dispensaries with their "Fort Knox" surveillance environments.

A grave danger is that the legal industry's challenge to bring consumers into their stores will be met by promotional and marketing campaigns that mimic tobacco and alcohol promotion and lead to excessive cannabis consumption among vulnerable populations and increased consumption generally. Protecting youth requires more than checking IDs. Indeed, the imperatives of promotion and marketing will encourage and be encouraged by the market consolidation that we are witnessing in many states with the rise in "multi-state operators," notwithstanding state efforts to limit the size of cannabis licensees. The committee should study the relative effectiveness of the states using their regulatory powers to control the

consolidation of the legal cannabis industry in their state. The committee should also assess how federal legalization will not immediately upend the states' legal cannabis regimes and hasten the consolidation of the legal cannabis industry in a few corporations. This is likely if federal reform does not explicitly suspend the operation of the Dormant Commerce Clause, as Scott Bloomberg and Rob Mikos [explain](#) in *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 49 Pepp. L. Rev. 839 (2022).

The committee should also study the total failure to eliminate large scale criminal cannabis operations over the past forty years by the Drug Enforcement Administration, the U.S. Forest Service, Internal Revenue Service, Bureau of Land Management, FBI, ATF, and their state law enforcement allies. (I helped write the National Forest System Drug Control Act of 1986 (Title XV, P.L. 99-570), as counsel to the House Subcommittee on Crime. No one claims the law has achieved its goals.)

My legalization colleagues and I have argued for years that legalization of cannabis will largely eliminate the criminal market. That argument has always assumed that cannabis consumers will flock to the legal market, and does not adequately appreciate the tenacity, ingenuity, viciousness, and immorality of the criminal industry. Large, illegal cannabis operations will have significant cost of goods advantages in the marketplace. New strategies are necessary to effectively eliminate these criminal operations when their customers' possession of cannabis will be legal.

The committee should also study the impact of cannabis legalization on society at large and anticipate the implications of consolidated ownership of the industry as we see in other industries. The history of the marketing of tobacco and alcohol and the consolidation of those industries are warnings.

At the earliest stages of creating this industry, undertaking measures to encourage home cultivation, small craft cultivation, small grower cooperatives, the use of barter, home delivery of cannabis by small independent entrepreneurs, and the marketing of cannabis outside the media of mass communication are important potential tools that increase the likelihood of suspicious cannabis consumers to participate in the legal market. Opposition to such approaches may be seen in the historic prejudices of cannabis prohibition. In my tenure on the Maryland Medical Cannabis Commission (2013-2017), I found that our excessive regulatory scheme grew out of legislative and regulatory suspicion of the patients, doctors, and potential licensees. We need to be aware that all of us have internalized the ideology and prejudices of prohibition. Powerful (and often false) ideas are shaping the behavior of consumers, the regulators, the industry, and the public's reactions to the evolving industry.

Conclusion:

The regulatory measures and taxation levels for the legal market must have the overarching goal to drive the illegal businesses out of existence, not maximizing revenues. "Taxing the heck out of marijuana" is an appeal for cannabis legalization but will be a disaster for an effective and safe legal cannabis program. Only after large-scale criminal production and distribution is dismantled can the full potential of cannabis revenue be available. Rushing the revenue raising component of cannabis legalization will be counterproductive. # # #