

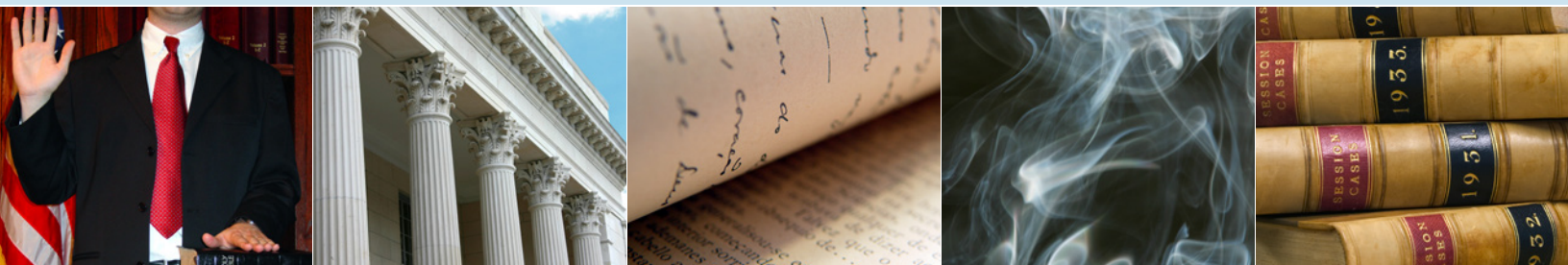
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Toking, Smoking & Public Health: Lessons from Tobacco Control for Marijuana Regulation

Kerry Cork



Tobacco Control
Legal Consortium



Law. Health. Justice.

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Tobacco Control Legal Consortium
875 Summit Avenue
Saint Paul, Minnesota 55105 USA
www.publichealthlawcenter.org
651.290.7506

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Introduction

The proliferation of state efforts to legalize the sale and use of marijuana has created challenges for both opponents and proponents of these measures. Moved by stories of those whose suffering and seizures could be eased by the use of medical marijuana, and the economic and personal toll of arrest and incarceration due to marijuana possession, many jurisdictions have legalized, or are considering legalizing, medical and recreational use of marijuana. Policymakers and public health professionals considering measures to relax prohibitions of this drug are struggling with a host of administrative and regulatory issues, many of which are familiar to the tobacco control community. These issues include the need to restrict public use, prohibit youth access, develop robust licensing and zoning laws, and regulate the price, advertising and marketing of marijuana. In addition, developing effective controls over production (growth and distribution), trafficking, and a variety of other law enforcement issues may be especially problematic for marijuana regulation because of the differences in its treatment under state and federal laws. Significantly, evidence-based policy solutions, which are at the heart of tobacco control, are not yet widely available in the marijuana regulatory regime.

This synopsis presents a brief overview of regulatory issues related to marijuana legalization, looking at both medicinal and recreational use policies from a public health perspective. It focuses on policy issues that are analogous to those faced in tobacco control and, drawing from lessons learned in the tobacco control realm, describes options that local and state governments might consider when developing marijuana regulations.

Key Points

- Although marijuana and tobacco products differ in many ways — particularly in the health risks they pose — the strategies used to regulate these products, and the regulatory obstacles they present, are often similar.
- States and localities tasked with regulating marijuana for medical and recreational use can benefit from the experiences of those who have worked for decades to protect the public from the devastating health impact of tobacco use
- Policymakers and public health professionals considering efforts to legalize the sale and use of marijuana are struggling with a host of administrative and regulatory issues, including many familiar to the tobacco control community: the need to restrict public use, prohibit youth access, develop robust licensing and zoning laws, regulate the price, and control the advertising and marketing of marijuana.
- State and localities should look to tobacco policies for guidance on possible regulatory methods and challenges, but be wary of using them as templates for marijuana. This is a growing industry and each jurisdiction has different regulatory systems and administrative structures to consider.

Although marijuana and tobacco products differ in many ways — particularly in the health risks they pose — the strategies used to regulate these products are often similar, as are many of the regulatory obstacles they present. The products are comparable in other ways as well. For instance, both tobacco and marijuana products can be ingested orally and smoked in a variety of forms.¹ Marijuana, for example, can be smoked using a rolled cigarette (a joint” or “spliff”), a cigar/cigarillo (“blunt”), or a pipe (“bong”).² In addition, cannabis-derived hash oil with tetrahydrocannabinol (THC), the ingredient that produces marijuana’s psychoactive effect, can be consumed through vaporizers similar to those used in electronic cigarettes.³ Smoking either tobacco or marijuana creates secondhand smoke that can harm others.⁴ Both products have a significant appeal to youth, which results in a disproportionately adverse health impact on this

population. Both products are widely trafficked. And both tobacco and marijuana products provide, or could provide, economic revenue to states and local communities through taxation.

The parallels could go even further. Some tobacco control advocates are concerned that a rapidly growing marijuana industry may come to resemble the tobacco industry. They fear that legalizing marijuana may encourage increased investment by major corporations, “including tobacco companies, which have the financial resources, product design technology ... marketing muscle, and political clout to transform the marijuana market.”⁵ Whatever one’s view of marijuana legalization and its future impact on public health, it is clear that state and local authorities tasked with regulating this drug can benefit from the experiences of those who have worked for decades to protect the public from the devastating effects of tobacco use.

Cannabis-derived hash oil with THC, the ingredient that produces marijuana’s psychoactive effect, can be consumed through vaporizers similar to those used in electronic cigarettes.



Background

Legal Status of Marijuana

Marijuana is a mind-altering drug produced by the cannabis sativa plant. Many scientists and researchers who have studied the more than 300 active chemicals (“cannabinoids”) in marijuana, including THC⁶ have found that marijuana can be effective in treating a wide range of illnesses and symptoms.⁷ In fact, scientific research has already led to the development of two U.S. Food and Drug Administration-approved cannabinoid-based medications, and current studies are examining the potential medicinal benefits of other pharmaceuticals that contain marijuana’s active ingredients.⁸ Nevertheless, under the federal Controlled Substances Act, marijuana is categorized as a Schedule 1 drug — that is, a drug with high potential for abuse with no currently accepted medical use in treatment in the U.S.⁹ Thus, it is a federal offense to cultivate, manufacture, distribute, sell, purchase, possess, or use marijuana.¹⁰

Despite this federal law, as of April 2015, at least 23 states, along with the District of Columbia and Guam, have passed laws exempting qualified users of medicinal marijuana from penalties imposed under state law.¹¹ Moreover, a growing number of states have decriminalized possession of small amounts of marijuana, and in 2012, Colorado,¹² and Washington¹³ became the first states to legalize, regulate and tax the sale of marijuana for recreational use by individuals over the age of 21. In 2014, voters in Alaska,¹⁴ Oregon,¹⁵ and the District of Columbia¹⁶ followed suit by passing ballot initiatives to legalize the possession of small amounts of marijuana for recreational use, and in the cases of Alaska and Oregon, to regulate the sale of

marijuana. Because of the rise in the number of jurisdictions that have legalized marijuana for medicinal purposes and recreational use, as well as the proliferation of marijuana legislative proposals across the U.S., policymakers are developing regulatory regimes to cover the cultivation, processing, marketing, sale, distribution, taxation and use of marijuana and its derivative products.¹⁷

At first blush, federal law would appear to be in conflict with any state law that allows marijuana to be used for either recreational or medicinal purposes. Typically, in a direct conflict of laws, federal law preempts state law.¹⁸ The case of marijuana, however, is anything but typical, with a majority of U.S. registered voters believing the drug should be legalized and between 77 and 84 percent of the population believing that medical marijuana has legitimate medical uses for those suffering terminal illness or chronic pain.¹⁹ More importantly, Congress did not intend for the Controlled Substance Acts to completely divest states of their ability to regulate controlled substances.²⁰ States maintain the freedom to pass laws related to marijuana (and other controlled substances) as long as a state’s law does not create a “positive conflict” with federal law, such that the two laws “cannot consistently stand together.”²¹ Although it would seem that a state law allowing for the sale and use of marijuana would create a positive conflict with federal law, this area of law remains unsettled.

Aware of the questions arising about federal preemption of state marijuana laws, the U.S.

Department of Justice issued a memorandum to federal prosecutors on August 29, 2013, to clarify its position on the enforcement of marijuana laws.²² The memo stated that the agency is most interested in using its “limited investigative and prosecutorial resources” to prosecute specific marijuana-related criminal activities, including distribution of marijuana to minors, driving while under the influence of marijuana, growing marijuana on public land, and illegal drug subterfuge.²³

In a significant move, the Department announced that the federal government, at least under the current administration, would be unlikely to prosecute individuals or organizations engaged in marijuana activities that are conducted in clear compliance with state and local narcotics laws that permit and regulate these activities.²⁴ The U.S. Department of Justice has great leeway in choosing whether, and to what extent, to bring criminal prosecutions for violations of the Controlled Substances Act.²⁵ Thus, under the doctrine of prosecutorial discretion, the current federal approach is to not sue state

governments to uphold the federal law on marijuana.²⁶ However, this approach could change in 2017, when a new president takes office.

Despite the Department’s announcement, the extent to which the Controlled Substances Act preempts state marijuana provisions, whether medicinal or recreational, remains murky, and the regulatory and licensing aspects of some of these laws may still pose preemption issues.²⁷ Even as the national debate on marijuana continues and the federal and state regulatory landscapes on marijuana are changing, significant questions remain about the ability of state and local authorities to pursue policies that deviate from those advanced by the federal government. Also, considering the many decades of scientific evidence it took before the federal government asserted regulatory authority over tobacco products, it may be worth establishing authorities’ rights to impose regulations from the outset, because of the difficulty in expanding regulatory scope after the fact.²⁸

Overview of State Marijuana Laws

State laws permitting the use of medical or recreational marijuana vary greatly in their scope and implementation strategies, and state and local governments continue to debate the safety, efficacy and, at times, legality of measures taken to implement these laws.²⁹ The existing laws are frequently confusing. Even the terms referring to marijuana “legalization” and “decriminalization” are often misunderstood. A state “legalizes” conduct when an individual who engages in this conduct is not subject to any state penalty. Washington and Colorado, for example, have removed all state-imposed penalties for qualified marijuana activities.³⁰ A state “decriminalizes” conduct when criminal penalties are removed, but civil penalties remain. Massachusetts, for instance, removes criminal penalties for possession of small amounts of marijuana, but retains civil penalties.³¹

States with medical marijuana laws generally have a patient registry that protects patients against arrest by the state, but not the federal government, for possession of up to a certain amount of marijuana for authorized personal medicinal use. The medical conditions for which marijuana can be prescribed vary by state. Patients are required to have prescriptions from qualified physicians, although these are generally called “recommendations” or “referrals,” because of the federal prescription prohibition. Medical marijuana growers or dispensaries are often called “caregivers” and may be limited to a certain number of plants or products per patient. Certified patients and caregivers are also exempt from arrest and prosecution by the state for growing and possessing marijuana so long as they comply with the state’s legal requirements, such as maintaining appropriate documentation, dispensing

marijuana to those with appropriate referrals, and not exceeding allowable limits on amounts possessed, cultivated and used. Some of the most important policy issues regarding medical marijuana include defining the universe of conditions for which a referral is medically indicated, creating a system for dispensing the drug, and developing and maintaining an active and up-to-date registry of approved patients and providers.³² Depending on the jurisdiction, local governments (as well as the state) may grapple with these issues.

Regulatory Authority

States with medical or recreational marijuana laws vary significantly in how much regulatory authority is delegated to local jurisdictions. For example, in Washington, the marijuana law delegates all regulatory authority to the state's Liquor Control Board.³³ In Colorado, however, the marijuana law allows local governments to issue licenses to retailers and enact regulations concerning the time, place, manner and number of marijuana establishments (e.g., cultivation facilities, product manufacturing facilities, and retail marijuana stores) in their communities.³⁴ Moreover, a state might control all aspects of how medical marijuana growers or dispensaries function, but still allow local governments the legal authority to pass zoning and licensing ordinances that prevent marijuana dispensaries from operating in their communities.³⁵

The delegation of partial authority in marijuana regulation is similar to tobacco control laws in which states preempt local regulation in certain areas, such as smoke-free ordinances or licensing regulations.³⁶ At the same time, this delegation of authority illustrates a key difference between marijuana and tobacco regulation. Since marijuana is illegal under federal law, any regulation that allows for the use of the product needs to be developed and implemented at the state or local level. In tobacco, however, while state and local governments have a great deal of regulatory authority, certain roles (such as creating product standards) are exclusively in the federal govern-

ment's domain. Given the range of laws and preemptive strictures, as well as the evolving nature of many regulatory regimes, policymakers drafting marijuana regulations (as with tobacco control regulations) need to ensure that the state or local government in question has the legal authority to pass and enforce the laws. An attorney with expertise in this area can provide needed guidance here.

Public Health Issues

Despite evidence of the benefits of medical marijuana for certain conditions, underlying public health concerns remain about its health risks. Although the use of tobacco has far more adverse health effects than the use of marijuana,³⁷ marijuana is not a risk-free drug. Research has shown that frequent marijuana use can impair learning; interfere with memory, perception and judgment; and damage the heart, lungs and immune system.³⁸ These risks are magnified for people who start using marijuana at a young age, and some of the effects are irreversible. For example, frequent marijuana use has been linked to the risk of testicular cancer, a decrease in IQ, addiction, and, if used over a prolonged time, recurring psychotic experiences.³⁹ Marijuana has also been shown to pose serious health risks when used by pregnant women, since THC crosses the placental barrier and accumulates in fetal tissues.⁴⁰ Studies have shown that children born to mothers who used marijuana during pregnancy can suffer visual behavioral disturbances; mental, motor and neurobehavioral deficiencies; depressive symptoms; and long-term cognitive and behavioral disorders.⁴¹ Moreover, because marijuana impairs judgment and motor coordination and slows reaction time, a driver high on marijuana has an increased chance of being involved in, and being responsible for, an accident.⁴²

In addition to the immediate public safety concerns posed by drivers under the influence of marijuana, marijuana smokers also risk exposing others to secondhand smoke, which can be a health hazard. In December 2007, researchers in Canada found that "marijuana smoke contains



Limiting the overall consumption of marijuana and restricting youth access are similar to tobacco control goals and are accomplished through similar strategies, such as regulating the use, marketing, sale, licensing and pricing of the product.

significantly higher levels of toxic compounds — including ammonia and hydrogen cyanide — than tobacco smoke and may therefore pose similar health risks.”⁴³ Ammonia levels were 20 times higher in marijuana smoke than in tobacco smoke, while hydrogen cyanide, nitric oxide and certain aromatic amines occurred at levels 3 to 5 times higher in the marijuana smoke.⁴⁴ Although the Institute of Medicine, for example, recognizes the therapeutic value of cannabinoid drugs — primarily THC — for pain relief, control of nausea and vomiting, and appetite stimulation, it reports that “smoked marijuana is a crude THC delivery system that also delivers harmful substances.”⁴⁵

Public Health Goals

Given these health concerns, most regulatory schemes for marijuana focus on limiting the

overall consumption of recreational marijuana and restricting youth access. These public health goals are similar to tobacco control goals and are accomplished through similar strategies, such as regulating the use, marketing, sale, licensing and pricing of the product. Unlike tobacco control, however, where state and local authorities have a wealth of research and experience in developing the most effective policies to reduce and prevent tobacco-related disease and death, the regulation of marijuana as a legal product is a new frontier.⁴⁶ Moreover, marijuana regulation is complicated because, unlike tobacco, marijuana use is still illegal at the federal level and in most states. The following section looks at several effective policy options for regulating tobacco products that could be adapted for regulating marijuana.

Regulatory Options

Usage Restrictions

Public Health Rationale

One policy area of significant overlap between marijuana and tobacco control regulation is product use. Although both tobacco and marijuana products can be consumed in different ways, they are primarily smoked. The combustion of marijuana, like tobacco, produces carcinogens and toxins. As mentioned earlier, research has found that marijuana smoke contains higher levels of several toxic compounds than tobacco smoke, and it can also cause respiratory symptoms, such as coughing, phlegm and wheezing.⁴⁷ Moreover, heavy passive exposure to marijuana smoke can result in measurable THC concentrations in nonusers' blood serum and urine.⁴⁸

In addition to concern about the adverse health impact of secondhand smoke, many in the public health community are troubled by the social impact — particularly on the young — of normalizing the smoking of marijuana in public. Although states with marijuana laws generally prohibit the smoking of marijuana in public places and workplaces, the growing acceptance of recreational marijuana use makes it important to have strong policies prohibiting its use in public places. Also, many public health professionals cite public safety as an important reason to restrict use of marijuana in public venues and when operating a motor vehicle. Research has shown that marijuana impairs motor coordination; moreover, the concurrent use of marijuana and alcohol may increase the risk of traffic crashes, acute health effects, and other harms.⁴⁹

Policy Challenges and Considerations

In states with medical and recreational marijuana laws, restricting the use of marijuana in

certain venues can present challenges for authorities. State laws vary, as do the legal consequences for violations. Below are a few areas where states often prohibit the use of marijuana.

- *Use in public places.* Under federal law, the use of marijuana in public places is prohibited. Although state laws typically include prohibitions against public use of marijuana, many state clean indoor air laws are also written broadly enough to prohibit the smoking of marijuana in places where smoking tobacco products is prohibited.⁵⁰ State and local smoke-free laws should be reviewed for their comprehensiveness and, if necessary, expanded to include language prohibiting smoking marijuana in public places and places of employment.⁵¹ In both Washington and Colorado, where *recreational marijuana* is legal, the smoking of marijuana in public is illegal and punishable by a fine.⁵² In California, where *medical marijuana* is legal, marijuana cannot be smoked wherever the smoking of tobacco products is prohibited, including within 1,000 feet of schools or youth recreation centers.⁵³ New York State recently passed a medical marijuana law that allows certified users to consume the drug in many different ways (for example, extracts, tinctures, oils and edibles), but specifically prohibits the smoking of the drug.⁵⁴ Also, as mentioned below, many states prohibit the use of marijuana when operating motor vehicles and other modes of transportation, such as buses and boats.⁵⁵

The marijuana industry, like the regulatory landscape, is rapidly changing. For example, many electronic smoking devices can

be used to consume hash oil or similar substances.⁵⁶ These devices, which do not emit the odor of marijuana, can present enforcement challenges that are especially acute in areas that allow the use of electronic smoking devices. State and local governments seeking to prohibit the public use of electronic smoking devices may thus have a dual public health purpose: (1) to prevent enforcement problems stemming from confusion as to whether an individual is using an electronic smoking device or a conventional cigarette; and (2) to prevent the surreptitious public consumption of marijuana or other drugs through an electronic smoking device.

Also, as with the rise of “vaping” (e-cigarette use), hookah lounges and cigar bars, some states have seen an increase in “private” marijuana (cannabis or pot) clubs — even though

many of these establishments may not technically be exempt from laws that prohibit the use of these products in public settings.⁵⁷ Similar “private clubs” were established in recent years in attempts to circumvent clean indoor air laws by allowing cigarette smoking. State and local governments that seek to regulate public use of marijuana should be aware of such tactics and should review existing smoke-free laws to ensure that such clubs are covered under any marijuana regulation.

- *Use in workplaces.* Most states allow employers to prohibit all employee use of tobacco products and marijuana in an effort to develop a healthier workforce. A growing number of employers have adopted zero-tolerance drug-free workplace policies that prohibit drug use both on and off-site. Moreover, under the Occupational Safety and Health Administra-



In states with medical and recreational marijuana laws, restricting the use of marijuana in certain venues can present challenges for authorities. State laws vary, as do the legal consequences for violations.

tion Act, employers have a general duty to provide a safe workplace.⁵⁸ Employees who use marijuana at work could be considered a workplace hazard if their use poses a danger to other workers. In addition, some employers may face the loss of federal funding or could be subject to administrative fines if they fail to have and enforce federal, state or local policies aimed at achieving a drug-free workplace.⁵⁹

One possible challenge to such policies is that under the Americans with Disabilities Act, an employer is required to make a reasonable accommodation to a qualified applicant or employee with a known disability so the applicant or employee can perform a particular job.⁶⁰ However, since federal law classifies marijuana as a prohibited controlled substance, it does not recognize disabilities in the context of medically-approved marijuana use, even if approved by a state.⁶¹ Also, the Americans with Disabilities Act exempts current illegal drug users from its definition of “disabled” person.⁶² Thus, while it is important to ensure that employees are not discriminated against because of their medically prescribed use of marijuana, employers are not legally obligated to accommodate an employee’s use, possession, sale or transfer of marijuana in the workplace — particularly if it affects the employee’s performance or creates safety concerns.

If employees disclose that they have a disability and are certified to use medical marijuana, their employer might want to meet with them to discuss whether other equally effective treatments would allow them to perform the essential functions of the job. Many unanswered questions remain about the impact of medically prescribed marijuana in the workplace. For example, some state disability laws may not consider an employee’s behavior in compliance with state medical marijuana laws to be illegal drug use. Nevertheless, several state supreme courts have upheld the right of employers to discharge, or refuse to hire, employees who use medical marijuana, even if

such usage is allowed by state law.⁶³ Because marijuana laws are so jurisdiction-specific, the best resource for questions in this area is local counsel.

- *Use in multi-family housing.* Secondhand smoke, whether from tobacco or marijuana, spreads throughout multi-unit dwellings. This infiltration of smoke can damage the health of other residents and increase the costs of maintaining the apartments. Private, public and other subsidized housing owners have the authority to adopt smoke-free policies which, in addition to combustible tobacco products, can include e-cigarettes and both medical and recreational marijuana. For resources, policy options and additional information on issues related to smoking in residential dwellings, visit the Public Health Law Center’s website.⁶⁴
- *Use when driving.*⁶⁵ Recent epidemiological studies have proven that cannabis users who drive while under the influence are at “increased risk of motor vehicle crashes.”⁶⁶ As a result, many states with marijuana laws include a prohibition on driving while under the influence of marijuana.⁶⁷ However, determining THC-impairment can be difficult because impairment can be affected by several variables, including tolerance, amount of THC consumed, and mode of consumption.⁶⁸ Moreover, THC can be detected in the blood well outside the window of impairment.⁶⁹ Thus, because marijuana does not take effect immediately, a user may consume a product and then experience its effect later when driving. Research is ongoing to identify the amount of THC concentration in the blood that indicates impairment. Most states have laws that equate any detectable level of THC metabolite in urine with detectable levels of actual THC in blood, and criminalize both. To date, only six states have set legal limits for THC concentration in the blood.⁷⁰ In Colorado and Washington, where recreational use has been legalized, that limit

is 5 nanograms per milliliter of blood, or 5 parts per billion.⁷¹ In the meantime, penalties for violating these laws vary by jurisdiction,

and can include criminal sanctions, as well as the suspension or revocation of a user's driver's license and medical marijuana card.⁷²

Youth Access

Public Health Rationale

Just as adolescents who use tobacco tend to become addicted to nicotine,⁷³ research shows that young people who frequently use marijuana can also find themselves addicted.⁷⁴ Studies also indicate that youth are particularly susceptible to adverse health impacts of marijuana use, including the risk of serious mental health problems.⁷⁵ This is particularly alarming because, after a steady decline and flattening in the prevalence of "past month use" of marijuana among youth (12 to 17 year olds) from 2002 through 2008, the rate increased from 6.7 percent in 2008 to 7.9 percent in 2011.⁷⁶

As with the tobacco industry, which continues to develop new non-cigarette tobacco products, marijuana growers and manufacturers continue to invent new ways in which users can ingest this drug other than by smoking it. These include capsules, vaporization, edibles (such as brownies, flour, "cannabutter"), liquids (such as tea), and even suppositories.⁷⁷ With the increase of "new" marijuana laws has come a rise in products that appeal to youth. The medical marijuana industry now sells THC-infused chocolate bars, peanut butter cups, hard candies, and lollipops.⁷⁸ Although these products may be designed for young patients whose medi-



As with the tobacco industry, which continues to develop new non-cigarette tobacco products, marijuana growers and manufacturers continue to invent new ways in which users can ingest this drug other than by smoking it.

cal conditions make them eligible for medical marijuana, they are also likely to appeal to kids who enjoy candy.

As with tobacco products, where the sweet taste, smell and alluring packaging of flavored products, including dissolvables and candy-flavored nicotine “juice,” attract children, a growing number of poisonings have been attributed to the consumption of kid-friendly marijuana products such as cookies, chocolate bars and brownies.⁷⁹ Disturbingly, between 2005 and 2011, the rate of poison center calls for unintentional pediatric marijuana exposure in children ages 9 and under more than tripled in states that decriminalized marijuana before 2005.⁸⁰ The poison center call rate in states that enacted legislation between 2005 and 2011 also increased over that period.⁸¹ States that had not passed marijuana decriminalization showed no change in call rates.⁸²

Policy Challenges & Considerations

Tobacco policy experts have attempted to reduce youth consumption in several ways, including increasing the minimum age for buying tobacco, requiring that products be sold in child-resistant packaging, implementing marketing restrictions, and enacting other broad sales restrictions, both at the point-of-sale and within a certain distance of schools, parks, playgrounds, and other youth venues. Many of these same strategies can be used to limit youth access to marijuana. As with any advertising restriction, First Amendment implications should be considered before moving forward.

State marijuana laws typically prohibit individuals under the age of 21 from possessing or using marijuana or marijuana-infused products, and require all applicants and employees working in licensed marijuana establishments (producers, processors and retailers) to be at least 21 years

old.⁸³ One complicating factor that differentiates medical marijuana from tobacco control policy is that states with medical marijuana laws generally allow young patients with certified medical conditions to use and possess medical marijuana as long as they have a physician’s recommendation.⁸⁴

In light of the rash of incidents involving accidental consumption of marijuana (similar to recent reports of nicotine e-juice poisoning),⁸⁵ state and local governments might want to consider requiring tamper-proof, child-resistant packaging of marijuana products and public health warnings on marijuana products. In Colorado, for example, marijuana products must be sold in a package that clearly indicates that it contains marijuana and is not for consumption by children.⁸⁶ Colorado also recently passed a law that requires marijuana products to be sold in child-resistant packaging to prevent accidental ingestion.⁸⁷

Also, as with tobacco control — and indeed all — regulations, local governments need to ensure they have sufficient regulatory authority to enact policies and that they are not preempted from enacting measures that are more stringent than state law. Policies need to be carefully drafted with strong enforcement provisions that clearly identify the enforcing agent, process and penalty for violators. In general, marijuana youth access policies that focus primarily on the retailer tend to be more effective than those that focus on the minor attempting to purchase or use the product. Because complicated legal issues may be implicated, be sure to consult with an attorney before moving forward with any of these policies.

Retailer Licensing

Public Health Rationale

Licensing tobacco retailers, wholesalers and distributors is a way for state and local authorities to protect the health and safety of their communities by ensuring the accountability of those engaged in the cultivation, manufacture and sale of these products.⁸⁸ Generally used to help enforce tobacco tax and point-of-sale policies, licensing and zoning laws can provide a regulatory framework to achieve many of the same public health goals of marijuana regulation.⁸⁹ For example, studies have shown that greater availability of tobacco products results in increased youth smoking rates,⁹⁰ as well as a higher incidence of tobacco-related disease, especially in low-income communities.⁹¹ Because of this, licensing and land use restrictions, such as zoning ordinances and conditional use permits, have long been effective ways to reduce the number, location, density and types of tobacco retail outlets.⁹² In addition to restricting *where* tobacco products are sold, licensing requirements can also control *how* they are sold by (for example) limiting product displays and certain types of point-of-sale advertising.⁹³

Policy Challenges & Considerations

As with tobacco retailers, state and local governments have an interest in controlling the number, location, concentration and types of marijuana establishments (e.g., cultivators, manufacturers and retailers) in each community. License suspension or revocation, as well as monetary fines, are effective enforcement mechanisms, and licensing authority is a potent regulatory tool. Nevertheless, state marijuana laws vary in how much authority localities have to license or regulate marijuana retailers.

In states that allow recreational marijuana use, state-implemented regulatory and licensing regimes control the cultivation, distribution and sale of marijuana within the state. The regulatory and licensing provisions enable the state to impose controls on the production and dis-

tribution of marijuana and to identify those individuals who have met the requirements to engage in marijuana-related activities.⁹⁴ In the states allowing medical marijuana use, at least fifteen have state-registered dispensary laws, under which the state government regulates and licenses the dispensaries.⁹⁵ Marijuana dispensaries seeking licensure must meet jurisdiction-specific licensing requirements. These requirements typically include restrictions on how far they must be located from schools or similar locations frequented by youth; restrictions from operating within certain distances of other dispensaries; restrictions on the types of outlets that can sell marijuana products; age restrictions for dispensary employees who sell or otherwise distribute marijuana; and minimum sales age requirements for purchasers (including specific processes for verifying their age).⁹⁶

In addition, state and local governments could consider adopting policies to limit point-of-sale advertising of marijuana products, such as restricting the placement of ads in certain store locations and restricting product displays, or even posting health warning signs or posters at marijuana retail establishments. Keep in mind that restrictions on advertising at the point of sale are likely to face legal challenges on First Amendment grounds, so they will need to be drafted carefully to withstand legal scrutiny.⁹⁷

Yet another strategy that has worked successfully with tobacco control retailers is to provide them with incentives for meeting compliance goals. For example, the cost of the annual licensing fee could be lowered if a retailer meets certain requirements, such as having no compliance violations over the past year or using a cash register that reads the magnetic strip on drivers' licenses to verify age. This type of license incentive program could also be used to motivate marijuana retailers to comply with licensing laws, thus reducing youth use of marijuana products.⁹⁸

Pricing

Public Health Rationale

One of the most effective ways to curb tobacco use and reduce tobacco-related diseases is to raise the price of tobacco products. Similarly, levying a tax on marijuana products could lower its use among price-sensitive consumers, especially youth, while generating revenue that could then be used to reduce related health care costs and health disparities.⁹⁹ States could earmark marijuana tax revenue for purposes related to substance abuse prevention and education, medical research, health services and similar activities, and also help use it to defray the administrative costs associated with marijuana regulatory and licensing control policies.¹⁰⁰

Policy Challenges and Considerations

The U.S. Supreme Court has held that a state may “legitimately tax criminal activities,” such as the sale of marijuana and other illegal or controlled substances.¹⁰¹ Many states tax marijuana and at least 20 states require all possessors of marijuana to purchase “tax stamps.”¹⁰² In Colorado, for example, an excise tax is levied on sales of marijuana by cultivation facilities, product manufacturing facilities, or retail stores.¹⁰³ Washington, on the other hand, imposes a 25 percent tax on each transaction within the distribution chain, including sales

from producer to processor; processor to retailer; and retailer to consumer.¹⁰⁴

In addition to imposing taxes, states and local governments often use other non-tax pricing policies to raise revenue and deter particular conduct (such as the use of tobacco or marijuana).¹⁰⁵ Tobacco companies target promotional offers to groups that are most sensitive to higher prices, including youth who may be experimenting with tobacco use and potential quitters.¹⁰⁶ Prohibiting common discount practices used by tobacco manufacturers and retailers helps reduce tobacco use and initiation, especially among young people.¹⁰⁷ Tobacco discount practices include cents-off or dollar-off promotions, redemption of coupons, buy-one-get-one-free offers, and multi-pack discounts (e.g., two-for-one deals).¹⁰⁸ State and local governments with the requisite regulatory authority could prohibit discount and packaging practices by marijuana retailers and enact price floors for certain products. In addition, states or localities can increase fines and penalties for marijuana tax evasion and for violations of all other marijuana product-related state laws, and enhance surveillance to prevent marijuana smuggling and tax evasion. Similar approaches in tobacco control have resulted in higher tobacco prices.¹⁰⁹

Marketing and Advertising

Public Health Rationale

One of the primary goals of restricting the marketing and advertising of tobacco products is to minimize the appeal of this harmful product to a young, vulnerable population. The tobacco industry’s role in creating and sustaining an addiction to nicotine, particularly among young adults, is well known.¹¹⁰ Each year the tobacco industry spends billions of dollars advertising and promoting its products.¹¹¹ Many studies have shown the

powerful effect of this advertising, especially on the decisions by young people to begin smoking and their subsequent purchasing habits.¹¹²

In a similar vein, the key public health rationale for restricting the advertising and marketing of marijuana is to limit interest in recreational marijuana among minors and prevent the increase in drug abuse that is likely to accompany greater availability.¹¹³ Although marijuana is far less addictive

than tobacco, it contains mind-altering substances and, as mentioned earlier, the regular use of marijuana can have adverse health impacts, especially on adolescents. Thus, states considering marijuana legalization laws may want to consider some of the same types of marketing and advertising limits that have been placed on tobacco products. For example, states could restrict or prohibit ads that target children, outlaw outdoor advertising and brand sponsorships, restrict sales to adult-only or medically certified venues, regulate product placement, prohibit free samples, self-service product displays and vending machine sales, and even restrict the sale of all flavored marijuana products.

To date, states have not seen dramatic increases in marijuana advertising, in part because those that have legalized the sale of recreational marijuana have also restricted its advertising. In February 2014, for example, Washington State's Liquor Control Board released rules for its state law regulating recreational marijuana, which also included advertising requirements.¹¹⁴ The state restricts advertising within 1,000 feet of schools, public parks, transit centers, arcades, and other areas where children are present and prohibits advertising that contains statements or illustrations that are false or misleading, promotes overconsumption, represents that a marijuana product has curative or therapeutic effects, or depicts a child or may be appealing to children.¹¹⁵ Washington also requires that all marijuana advertising include prescribed warnings.¹¹⁶ Colorado as well developed rules on regulating the sales and marketing of recreational marijuana.¹¹⁷ The state permits the advertising of recreational marijuana in state newspapers and on radio and television as long as the advertisers have "reliable evidence" that no more than 30 percent of the publication's readership is under the age of 21.¹¹⁸ These restrictions do not apply to medical marijuana. Like Washington, Colorado prohibits billboards that advertise marijuana.

Policy Challenges & Considerations

Although federal law,¹¹⁹ tobacco settlements, and the First Amendment to the U.S. Constitution place limits on the ability of state and local governments to prohibit the advertising of cigarettes, the Family Smoking Prevention and Tobacco Control Act of 2009 makes it easier to restrict the marketing of tobacco products. Under the Tobacco Control Act, state and local governments can impose "specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarette."¹²⁰ While marijuana is not subject to the same constraints on advertising restrictions as tobacco, the advertising of marijuana — even in states where it is legal — remains a grey area of the law.¹²¹ Federal law prohibits the advertising of illegal drugs in newspapers, magazines or other publications, although an exception is made for ads that do not explicitly offer those drugs for sale or distribution.¹²² Because of concern that marijuana advertising could spark a public relations backlash, much of the mainstream media market has been reluctant to market cannabis — medical or recreational.¹²³ However, that appears to be changing. In fact, on August 3, 2014, the *New York Times* ran its first full page ad promoting a marijuana company¹²⁴ — a significant media event because of the newspaper's influence.

As more states legalize the use of marijuana and as sales revenue increases, the need for effective restrictions on the way marijuana is advertised and marketed will only grow. With that in mind, state and local governments might want to consider ways to regulate the promotion of these products, including strict controls on mass market venues (such as TV, radio, and outdoor advertising) — common venues to which children and young people are regularly exposed. Some of these marketing restrictions are likely to be challenged. In the meantime, as with any regulation, but especially those with such direct First Amendment implications, consulting early in the process with an attorney familiar with First Amendment issues is extremely important.

Select Legislation

Following are overviews of a few state laws that regulate marijuana products for medicinal or recreational purposes. The Tobacco Control Legal Consortium does not endorse or recommend any particular provision and is providing these examples for illustrative purposes only.¹²⁵ For a more comprehensive list of marijuana laws, check out a regularly updated web page such as the National Conference of State Legislatures, *State Medical Marijuana Laws* at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> and links to state marijuana laws on FindLaw.com at <http://statelaws.findlaw.com/criminal-laws/marijuana.html>.

Overview of Select State Marijuana Laws

Type of Law	Legislation	Overview
Medicinal marijuana	California Health & Safety Code 11362.5 et seq. (Prop. 215) (2009)	Under California's medical marijuana law, medical patients and their designated primary caregivers may legally possess and cultivate (but not distribute or sell) marijuana if they have a physician's recommendation or approval. State law sets a state threshold of 6 mature or 12 immature plants and 8 ounces of marijuana per patient, but allows local communities to authorize higher allowances. Many cities and counties have local ordinances with zoning regulations. It is unlawful to drive while under the influence of marijuana. For evidence of impairment, officers may administer a field sobriety test, and arrestees may also be required to submit to a urine or blood test. Sale or distribution of marijuana to minors is a felony. Marijuana paraphernalia are illegal to sell or manufacture, but not possess.
Medicinal marijuana	Illinois HB 1 (Compassionate Use of Medical Cannabis Pilot Program Act) (2013)	Under Illinois's medical marijuana law, the Department of Public Health can issue a registry identification card to a person diagnosed by a physician as having a debilitating medical condition, and to that person's primary caregiver, that permits the person or the person's caregiver to legally possess no more than 2.5 ounces of usable cannabis during a 14-day period that is derived solely from an intrastate source. Funds in excess of the direct and indirect costs associated with the implementation, administration, and enforcement of the Act can be used to fund crime prevention programs. A tax is imposed upon the privilege of cultivating medical cannabis at a rate of 7% of the sales price per ounce. "Prescription and nonprescription medicines and drugs" includes medical cannabis purchased from a registered dispensing organization under the Compassionate Use of Medical Cannabis Pilot Program Act. The DUI provisions of the Illinois Vehicle Code do not apply to the lawful consumption of cannabis by a qualifying patient licensed under the Act who is in possession of a valid registry card, unless that person is impaired by the use of cannabis.

Type of Law	Legislation	Overview
Recreational marijuana	Washington State Initiative 502 (2012)	Under Initiative 502, individuals over the age of 21 may possess up to one ounce of dried marijuana, 16 ounces of marijuana infused product in solid form, or 72 ounces of marijuana infused product in liquid form. Marijuana must be used in private, as it is unlawful to “open a package containing marijuana ... or consume marijuana ... in view of the general public.” The “possession, delivery, distribution, and sale” by a validly licensed producer, processor, or retailer, in accordance with the newly established regulatory scheme administered by the state Liquor Control Board (LCB), “shall not be a criminal or civil offense under Washington state law.” “The Initiative sets up a three-tiered production, processing, and retail licensing system that permits the state to retain regulatory control over the commercial life cycle of marijuana. Qualified individuals must obtain a producer’s license to grow or cultivate marijuana, a processor’s license to process, package, and label the drug, or a retail license to sell marijuana to the general public. The Initiative establishes various restrictions and requirements for obtaining the proper license and directs the state LCB to adopt procedures for the issuance of such licenses. On October 16, 2013, the LCB adopted detailed rules for implementing Initiative 502. These rules describe the marijuana license qualifications and application process, application fees, marijuana packaging and labeling restrictions, recordkeeping and security requirements for marijuana facilities, and reasonable time, place, and manner advertising restrictions.” (Adapted from Garvey & Yeh, <i>State Legalization of Recreational Marijuana: Selected Legal Issues</i> (2014))
Recreational marijuana	Colorado Amendment 64 (2012)	Colorado Amendment 64 provides only a general framework for the legalization, regulation, and taxation of marijuana in Colorado — leaving regulatory implementation to the Colorado Department of Revenue. Under Colorado law or the law of any locality within Colorado, an individual 21 years of age or older may possess, use, display, purchase, consume, or transport one ounce of marijuana, and possess, grow, process, or transport up to six marijuana plants. Marijuana may not be consumed “openly and publicly or in a manner that endangers others.” A marijuana-related facility can purchase, manufacture, cultivate, process, transport, or sell larger quantities of marijuana so long as the facility obtains a current and valid state-issued license. Local governments within Colorado may regulate or prohibit the operation of such facilities within their borders. A three-tier distribution and regulatory system, similar to that set up in Washington, involves the licensing of marijuana cultivation facilities, marijuana product manufacturing facilities, and retail marijuana stores.

Select Legal Challenges to Marijuana Laws

Below are a few examples of legal challenges to laws that legalize marijuana, either for medicinal or recreational use. As with tobacco control policies, governments considering adopting a marijuana law should ensure they are not preempted from passing the policy and take appropriate measures to limit their exposure to potential litigation.

Issue	Lawsuit	Overview
Intrastate use of marijuana	<i>Gonzales v. Raich</i> , 545 U.S. 1, 50 (2005)	U.S. Supreme Court upheld Congress's authority, under the Commerce Clause, to enact Controlled Substances Act and prohibit intrastate use of marijuana, even when a state's medical marijuana law permits its use.
	<i>Gonzales v. Oregon</i> , 546 U.S. 243, 251 (2006)	States remain free to pass laws relating to marijuana, or other controlled substances, as long as the laws do not create a "positive conflict" with federal law, such that the two laws "cannot consistently stand together."
Housing authority eviction of tenant using marijuana	<i>Assenberg v. Anacortes Housing Authority</i> , Washington State Court of Appeals, 1st Div. (2007)	Washington State appellate court upheld the housing authority eviction of a tenant who used marijuana for medicinal purpose on ground that requiring housing authority to violate federal law was unreasonable.
Employment discrimination where employee used medical marijuana	<i>Emerald Steel Fabricators v. Bureau of Labor and Industries</i> , 230 P.3d 518 (2010)	An Oregon employee, who had obtained a medical marijuana card due to a disability, was allegedly discharged for admitting that he used marijuana. Oregon law requires that employers "make reasonable accommodations" for an employee's disability as long as such an accommodation does not impose an undue hardship upon the employer. The law is to be interpreted consistently with the federal Americans with Disabilities Act, which does not afford protections for employees "currently engaged in the illegal use of drugs." The Oregon Supreme Court held that the Oregon Medical Marijuana Act stood "as an obstacle to the implementation and execution of ... the Controlled Substances Act" and was therefore preempted. "There is no dispute that Congress has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana."

Basic Tobacco Control Lessons for Marijuana Regulation

- Draw on an interdisciplinary team to help draft policy, including experts in substance abuse, land use, and licensing, as well as public health. Consult with public health attorneys as early in the process as possible, as well as counsel familiar with the laws of your jurisdiction, for help strategizing, reviewing, drafting, enforcing and defending policies. For information about tobacco control policies in general, and common areas between tobacco control and marijuana regulation, contact one of our attorneys at the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu.
- Craft policies that are clear and specific with concise definitions; robust enforcement options that include coordination among different enforcement agents within a community; a reasonable penalty and appeals process; and a well-planned implementation process that includes educating the community and following up on complaints.
- Ensure that smoke-free policies clearly define what constitutes smoking and that, if marijuana smoking is included, the language clearly states this. Also, be explicit about where smoking is prohibited. Some policies, for example, prohibit smoking outdoors within a reasonable distance (typically 15 to 20 feet) from an entrance, an exit, or a vent into any enclosed smoke-free area or any unenclosed area where smoking is prohibited. Other policies define outdoor space by indicating that the policy reaches all property within certain boundaries, or all property in any way controlled by the organization adopting the policy.¹²⁶
- When imposing taxes on marijuana sales, consider levying similar tax rates on all marijuana products and allocating a portion of the revenues from marijuana taxes and fees to substance abuse cessation and prevention, public health, public education or similar services.
- States and localities should look to tobacco and alcohol policies for guidance on possible regulatory methods and challenges, but be wary of using them as templates for marijuana. This is a growing industry and each jurisdiction has different regulatory systems and administrative structures to consider.
- Because the legalization of marijuana is so new, many state and local governments have limited experience developing and implementing effective regulatory policies. Patience, flexibility, and a willingness to modify policies as needed are key.



Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu with any questions about the information included in this publication or to discuss local concerns you may have about issues relating to the regulation of marijuana and tobacco control.

Appendix A

Select Resources

The Tobacco Control Legal Consortium's website at www.publichealthlawcenter.org contains a wealth of publications and resources about tobacco control policy options, many of which may be relevant for those seeking to regulate the use, marketing and sale of marijuana products. Marijuana-specific legal resources include two webinars sponsored by the Network for Public Health Law, "Regulating Non-Medical Marijuana: Lessons Learned and Paths Forward" (2014), available at <http://bit.ly/VA2NSv> and "Expanding Medical Marijuana Laws: Current Policies and Implications for Public Health" (2014), available at <http://bit.ly/1BuIo1V>. The Congressional Research Office's *State Legalization of Recreational Marijuana: Selected Legal Issues* examines many of the legal issues related to marijuana legalization, including federal and state preemption. Other resources on medical and recreational marijuana laws include:

- National Alliance for Model State Drug Laws (regularly updated collection of state laws and resources related to medical and recreational marijuana), <http://www.namsdl.org/marijuana.cfm>.
- National Conference of State Legislatures, *State Medical Marijuana Laws*, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.
- Office of National Drug Control Policy's Marijuana Resource Center, State Laws Related to Marijuana, <http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana>.
- State Marijuana Laws, FindLaw.com, <http://statelaws.findlaw.com/criminal-laws/marijuana.html>.
- ProCon.org (including current information regarding pending legislation or recent bills), <http://medicalmarijuana.procon.org>.
- U.S. Department of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
- National Organization for the Reform of Marijuana Laws, Legal Issues, <http://norml.org/legal>.

Appendix B

Checklist of Tobacco Control Policies that Could Apply to Marijuana Regulation

The following checklist contains common evidence-based tobacco control policies for state and local governments considering the legalization of marijuana products and licensing of marijuana retailers and related establishments. Some of these provisions might already be included in state laws, but localities might have the legal authority to adopt more stringent laws or regulations. Other provisions might be politically challenging to implement. The checklist is provided largely as a reminder of the many regulatory analogues between tobacco control and marijuana regulation, and possible public health policies to consider as this new U.S. industry continues to grow.

Regulatory Options	Regulatory Authority?			Notes
	YES	NO	UNSURE	
Usage				
Prohibit marijuana smoking in public places				
Prohibit marijuana smoking in workplaces				
Prohibit marijuana smoking in federally subsidized housing				
Prohibit marijuana smoking in multi-unit residential properties				
Prohibit marijuana use when operating motorized vehicles, boats, heavy machinery, etc.				
Other options?				
Youth Access				
Raise to 21 the minimum legal sale age to purchase marijuana products.				
Require that marijuana establishment personnel meet the minimum legal sale age				
Require tamper-proof, child-resistant packaging of all marijuana products				
Require easily visible graphic public health warnings (labels) on marijuana products				
Other options to protect youth from easy access to low-cost marijuana products that make marijuana use more affordable and accessible				
Other options?				

(continued)

Regulatory Options	Regulatory Authority?			Notes
	YES	NO	UNSURE	
Retail Licensing				
Set up safeguards, such as photo ID checks, to ensure compliance with minimum legal sale age requirement.				
Restrict the number of marijuana retail outlets				
Require a minimum distance between marijuana retail outlets				
Prohibit the sale of marijuana products at certain types of establishments				
Limit the number of hours/days when marijuana products can be sold				
Implement a licensing incentive program				
Other options?				
Pricing				
Set minimum price laws				
Prohibit price discounting (e.g., cents-off or dollars-off discounts, coupon redemption, buy-one-get-one-free deals, and/or multi-pack discounts)				
Earmark revenue from taxation on marijuana products to substance abuse cessation and prevention, public education, public health, or similar services				
Other options?				
Marketing and Advertising				
Prohibit self-service marijuana product displays and vending machines (or restrict to adult-only / medical marijuana venues)				
Prohibit marijuana product displays (or restrict to adult-only / medical marijuana venues)				
Prohibit Internet sales				
Prohibit free samples of marijuana cigarettes and smokeless marijuana products				
Prohibit brand sponsorship (e.g., athletic, music and cultural events)				
Prohibit mass media advertising (e.g., television and radio)				
Prohibit flavored marijuana products (including menthol and nicotine)				
Other options?				

Endnotes

- 1 Rachel Ann Barry et al., *Waiting for the Opportune Moment: The Tobacco Industry and Marijuana Legalization*, 92 MILBANK QUARTERLY 207, 208-9 (2014), available at <http://bit.ly/1uUpJeb>. Marijuana can be consumed through food (“edibles”), tinctures, beverages and pills (such as prescription medicine Marinol) and tobacco can be consumed orally as snuff and chewing tobacco. *Id.*
- 2 *Id.* at 208.
- 3 *Id.* at 209.
- 4 Nat’l Institute on Drug Abuse, Drug Facts: Marijuana (April 2015), available at <http://www.drugabuse.gov/publications/drugfacts/marijuana>; see also U.S. Dep’t of Health and Human Servs., *The Health Consequences of Smoking — 50 Years of Progress: A Report of the Surgeon General* 11 (2014), available at <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index.html>.
- 5 Barry et al., *supra* note 1, at 208.
- 6 U.S. Dep’t of Justice, Drug Enforcement Admin., *Drug Fact Sheet: Marijuana* (last accessed May 1, 2015), available at http://www.justice.gov/dea/druginfo/drug_data_sheets/Marijuana.pdf.
- 7 U.S. Dep’t of Justice, Drug Enforcement Admin., *The Dangers and Consequences of Marijuana Abuse* 3-6 (May 2014), available at <http://www.justice.gov/dea/docs/dangers-consequences-marijuana-abuse.pdf>.
- 8 *Id.*
- 9 U.S.C. Title 21 § 801, et seq. (1970), available at <http://www.law.cornell.edu/uscode/text/21/chapter-13>.
- 10 *Id.*
- 11 See Nat’l Conference of State Legislatures, *State Medical Marijuana Laws* (April 14, 2015), available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>; see also Pro.Con.org, *Medical Marijuana* (last accessed May 1, 2015) (containing resources and information from opponents and proponents of marijuana legalization), available at <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.
- 12 Colorado Constitution, art 18, sec. 16 (2012), <http://www.sos.state.co.us/pubs/elections/Initiatives/title-Board/filings/2011-2012/30Final.pdf>.
- 13 Washington Initiative Measure 502 (2012), http://sos.wa.gov/_assets/elections/initiatives/i502.pdf. In 2014, Uruguay became the first country to legalize the sale and distribution of marijuana for residents 28 and older. See Rafael Romo, *New Rules in Uruguay Create a Legal Marijuana Market*, CNN NEWS (May 6, 2014), available at <http://www.cnn.com/2014/05/06/world/americas/uruguay-marijuana-rules>.
- 14 Alaska Marijuana Legalization, Measure 2 (2014), <http://www.elections.alaska.gov/petitions/13PSUM/13PSUM-Proposed-Law.pdf>.
- 15 Oregon Legalized Marijuana Initiative, Measure 91 (2014), <http://oregonvotes.org/irr/2014/053text.pdf>.
- 16 Washington D.C. Marijuana Legalization, Initiative 71 (November 2014), [http://ballotpedia.org/Washington_D.C._Marijuana_Legalization,_Initiative_71_\(November_2014\),_full_text](http://ballotpedia.org/Washington_D.C._Marijuana_Legalization,_Initiative_71_(November_2014),_full_text).
- 17 Todd Garvey & Brian Yeh, Congressional Research Service, *State Legalization of Recreational Marijuana: Selected Legal Issues* 14 (2014), available at <http://www.fas.org/sgp/crs/misc/R43034.pdf>.
- 18 U.S. CONST. art. VI, cl. 2.
- 19 Pew Research Center, *Majority Now Supports Legalizing Marijuana* (April 4, 2013), available at <http://www.people-press.org/files/legacy-pdf/4-4-13%20Marijuana%20Release.pdf>; Polling Report, *Illegal Drugs, 2014 -15* (summarizing polls regarding legalization of marijuana), available at <http://www.pollingreport.com/drugs.htm>.
- 20 Garvey & Yeh, *supra* note 17, at 9.
- 21 Pub. L. 91-513, title II, §708, Oct. 27, 1970, 84 Stat. 1284, available at <http://www.deadiversion.usdoj.gov/21cfr/21usc/903.htm>.
- 22 U.S. Dep’t of Justice, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

- 23 The U.S. Department of Justice's priorities are: "Preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property." *Id.* at 1-2.
- 24 *Id.* at 3-4.
- 25 Garvey & Yeh, *supra* note 17, at 14.
- 26 The Department states that "even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances." It makes clear, however, that it expects "that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests." U.S. Dep't of Justice, *Guidance Regarding Marijuana Enforcement*, *supra* note 22, at 4. This federal approach could change with a new Administration in the White House. Garvey & Yeh, *supra* note 17, at 14.
- 27 Garvey & Yeh, *supra* note 17, at 14.
- 28 Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1024 (2014).
- 29 Office of National Drug Control Policy, Marijuana Resource Center, State Laws Related to Marijuana (last accessed May 1, 2015), <http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana>.
- 30 Mass. Gen. Laws, ch. 94C, § 32C; *see also* NORML, Massachusetts Laws and Penalties (last accessed May 1, 2015), *available at* <http://norml.org/laws/item/massachusetts-penalties-2>.
- 31 Garvey & Yeh, *supra* note 17, at 1. As the authors point out, however, even the term legalization is misleading, since "a state cannot fully 'legalize' conduct that constitutes a crime under federal law." *Id.*
- 32 Nat'l Conference of State Legislatures, *supra* note 11.
- 33 Washington Initiative Measure 502 (2012), http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.
- 34 Colorado Constitution, art 18, sec. 16 (2012), <http://www.sos.state.co.us/pubs/elections/Initiatives/title-Board/filings/2011-2012/30Final.pdf>.
- 35 *See, e.g.*, Nat'l Alliance for Model State Drug Laws (last accessed May 1, 2015), *available at* <http://www.namsdl.org/marijuana.cfm>.
- 36 Tobacco Control Legal Consortium, *Preemption: The Biggest Challenge to Tobacco Control* (2014), *available at* http://publichealthlawcenter.org/sites/default/files/resources/tclcf-fs-preemption-tobacco-control-challenge-2014_0.pdf.
- 37 *See generally* U.S. Dep't of Health and Human Servs., *The Health Consequences of Smoking — 50 Years of Progress: A Report of the Surgeon General* 11 (2014), *available at* <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index.html>.
- 38 *See* U.S. Dep't of Justice, Drug Enforcement Admin., *The Dangers and Consequences of Marijuana Abuse* (May 2014), *available at* <http://www.justice.gov/dea/docs/dangers-consequences-marijuana-abuse.pdf>.
- 39 *Id.*
- 40 Chia-Shan et al., *Lasting Impacts of Prenatal Cannabis Exposure and the Role of Endogenous Cannabinoids in the Developing Brain: Adverse Effect of Prenatal Exposure to Marijuana*, Medscape (2012), *available at* http://www.medscape.org/viewarticle/745279_2.
- 41 *Id.*; *see also* Office of Nat'l Drug Control Policy, Marijuana Resource Center, PUBLIC HEALTH CONSEQUENCES OF MARIJUANA LEGALIZATION (last accessed May 1, 2015), *available at* <http://1.usa.gov/1oJgDfl>.
- 42 Patrick O'Malley & Lloyd Johnston, DRUGS AND DRIVING BY AMERICAN HIGH SCHOOL SENIORS, 2001-2006, 68 J. STUDIES OF ALCOHOL & DRUGS 834-42 (2007); Isabelle Richer & Jenson Bergeron, *Driving Under the Influence of Cannabis: Links with Dangerous Driving, Psychological Predictors, and Accident Involvement*, 41 ACCIDENT ANALYSIS & PREVENTION 299-307 (2009).

- 43 *Marijuana Smoke Contains Higher Levels of Certain Toxins Than Tobacco Smoke* SCIENCE DAILY (Dec. 18, 2007), <http://sciencedaily.com/releases/2007/12/071217110328.htm>; David Moir et al., *A Comparison of Mainstream and Sidestream Marijuana and Tobacco Smoke Produced Under Two Machine Smoking Conditions*, CHEMICAL RESEARCH IN TOXICOLOGY (2008) available at <http://www.ukcia.org/research/ComparisonOfSmoke.pdf>.
- 44 Moir et al., *supra* note 43.
- 45 JANET JOY ET AL., *MARIJUANA & MEDICINE: ASSESSING THE SCIENCE*, Inst. of Medicine (1999).
- 46 Michele Simon & Leslie Zellers, *Want to Legalize Marijuana? Learn from Regulating Alcohol and Tobacco*, THE HUFFINGTON POST (Mar. 14, 2014), available at http://www.huffingtonpost.com/michele-simon/want-to-legalize-marijuana_b_4938199.html.
- 47 Moir et al., *supra* note 43.
- 48 Pacula et al., *supra* note 28, at 1025.
- 49 Jorgen Bramness et al., *Impairment Due to Cannabis and Ethanol: Clinical Signs and Additive Effects*, 105 ADDICTION 1080-87 (2010); Carl Soderstrom et al., *Marijuana and Alcohol Use Among 1,023 Trauma Patients: A Prospective Study*, 123 ARCH. SURG. 733-37 (1988).
- 50 Smoking marijuana would be prohibited in jurisdictions that use a definition of smoking that is similar to the version developed by Americans for Nonsmokers' Rights, which defines smoking as "inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, including hookahs and marijuana, whether natural or synthetic, in any manner or in any form. 'Smoking' also includes the use of an electronic smoking device which creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking in this Article," available at <http://www.no-smoke.org/pdf/modelordinance.pdf>.
- 51 See, e.g., Amy Winterfeld, *Marijuana Joins Smoke-free Laws*, Nat'l Conference of State Legislatures, TRENDS & TRANSITIONS — STATE LEGISLATURES MAGAZINE (2013), available at <http://www.ncsl.org/bookstore/state-legislatures-magazine/trends-and-transitions-march-2013.aspx>. For example:
 - Montana lawmakers added medical marijuana to their statewide clean indoor air act in 2011.
 - California prohibits smoking medical marijuana wherever smoking already is banned.
 - Rhode Island prohibits marijuana smoke in public places, on school grounds and wherever it may harm children's health, and prohibits operating vehicles, aircraft and boats under the influence of marijuana
 - Vermont bars smoking marijuana in all indoor and many outdoor public places and prohibits operating vehicles, boats or heavy machinery while under the influence of marijuana.
 - Maine forbids marijuana smoke in places where smoking is prohibited by a landlord.
 - North Dakota's recently expanded smoke-free law includes "lighted or heated tobacco or plant product intended for inhalation." *Id.*
- 52 Colorado Constitution, art 18, sec. 16 (2012), <http://www.sos.state.co.us/pubs/elections/Initiatives/title-Board/filings/2011-2012/30Final.pdf>; Washington Initiative Measure 502 (2012), http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.
- 53 California Health & Safety Code, 10.6, art. 2.5 (commencing with Section 11362.7) (2003), available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0401-0450/sb_420_bill_20031012_chaptered.html.
- 54 NY Compassionate Care Act, S7923/A657 (2014), available at <http://bit.ly/1mkpHnT>.
- 55 See, e.g., Nat'l Alliance for Model State Drug Laws, *supra* note 33.
- 56 Ann Givens & Pei-Sze Cheng, *E-cigarettes, Used to Smoke Marijuana, Spark New Concerns*, NBC NEWS (Oct. 11, 2013), available at <http://bit.ly/1hnNIPB>; see also Rachel Barry et al., *supra* note 1, at 207-42.
- 57 See, e.g., Jennifer Wadsworth, *Pot Club Rules Come Up for a Vote* (May 19, 2014), SAN JOSE INSIDE, available at <http://www.sanjoinside.com/2014/05/19/pot-club-rules-come-up-for-a-vote>.
- 58 29 U.S.C. § 651 et seq.
- 59 Garvey & Yeh, *supra* note 17, at 29-30.
- 60 42 U.S.C. §§ 12111(9), 12112(b)(5).
- 61 See Memorandum from Helen R. Kanovsky, Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing, Jan. 20, 2011, available at <http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing#scribd>.

- 62 29 U.S.C. § 705(20) C(i); 42 U.S.C. § 12210(a) (“[T]he term “individual with a disability” does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”)
- 63 Garvey & Yeh, *supra* 17, at 29.
- 64 The Tobacco Control Legal Consortium, and its parent organization, the [Public Health Law Center](#), have a [web page](#) containing several publications and resources on smoke-free housing. Included are resources that discuss concepts related to [condominiums, apartments and other multi-unit dwellings, affordable housing, and smoke-free housing disclosure policies](#).
- 65 While tobacco use while driving does not pose this type of public safety threat, it can pose public health risks to passengers exposed to secondhand smoke. As a result, a growing number of states have adopted laws prohibiting drivers from smoking in vehicles when transporting children — including several states that include these sanctions in foster care policies. *See, e.g.*, Tobacco Control Legal Consortium, *Kids, Cars & Cigarettes: Policy Options for Smoke-free Vehicles: A Policy Options Brief* (2010), available at http://publichealthlawcenter.org/sites/default/files/resources/phlc-policybrief-kidscarssmoke-2010_0.pdf.
- 66 ROBIN ROOM ET AL., *CANNABIS POLICY: MOVING BEYOND STALEMATE*, Oxford University Press (2010).
- 67 Maggie Koerth-Baker, *Driving Under the Influence, of Marijuana*, INTERNATIONAL N.Y. TIMES (Feb. 17, 2014), available at http://www.nytimes.com/2014/02/18/health/driving-under-the-influence-of-marijuana.html?_r=0.
- 68 ROOM ET AL., *supra* note 66.
- 69 Pacula et al., *supra* note 28, at 1025. “THC levels must be measured from blood or urine samples, which are typically taken hours after an arrest. Urine tests, which look for a metabolite of THC rather than the drug itself, return a positive result days or weeks after someone has actually smoked.” Koerth-Baker, *supra* note 72.
- 70 *Id.*
- 71 Colorado Constitution, art 18, sec. 16 (2012), <http://www.sos.state.co.us/pubs/elections/Initiatives/title-Board/filings/2011-2012/30Final.pdf>; Washington Initiative Measure 502 (2012), http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.
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About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium, a program of the Public Health Law Center, is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.