

Cannabis

In the U.S. cannabis is federally classified as schedule I drug, the highest level of drug illegality (Bodie et al., 2022; Young, 2015). At the same time, 40 out of 50 states allow Cannabis to be sold legally in state regulated markets. In this essay I will explore how the differences between the U.S. federal governments prohibitory regulatory regime and Washington State's regulated market regulatory regime inherently create different outcomes. The fundamental reasoning for the vastly different approaches that the federal government has taken from Washington lies in their interpretation of the risk around cannabis and how to best encourage behavior change based on the risk.

The Federal Government's Regulatory History

The U.S. federal government has had a history of cannabis prohibition dating back to 1937 when it passed a de facto ban in the Marihuana Tax Act of 1937 (Bodie et al., 2022). The first laws prohibiting cannabis in the early 20th century were highly influenced by law makers entrenched racial biases against African Americans and Mexican people at the time. Harry Anslinger, the Commissioner of the Federal Bureau of Narcotics, during the creation of the Marihuana Tax Act of 1937, argued that the "primary reason to outlaw marijuana is its effect on the degenerate races" (Halydier, 2022). The federal government continued to over exaggerate the risk of cannabis throughout the 20th century, eventually passing the Controlled Substances Act (CSA) of 1970. This is still the basis for cannabis regulation today. In an interview with John Ehrlichman, who was President Nixon's domestic affairs advisor, at the time of the passage of the CSA, Ehrlichman admitted to over exaggerating the risk of cannabis and other drugs to go after their political enemies.

We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily... Did we know we were lying about the drugs? Of course, we did" (Oliva & El-Sabawi, 2022).

High Risk Evaluation

These racially motivated agenda directly led to over regulation due to exaggerated risk. Schedule I drugs are those that high potential for abuse, no currently accepted medical use, and a lack of accepted safety (Bodie et al., 2022). The CSA created a regulatory regime that focuses on very strict standards. This creates a regime in which information gathering and behavioral change methods are done by some of the harshest methods typically reserved for some of the highest risks to society. This classification has led the federal regulatory regime to be highly prohibitory, with the manufacture, distribution, and possession of cannabis remaining a federal crime (Bodie et al., 2022). The federal government took the regulatory approach of being extremely prescriptive, purposely committing a type I error by airing on the side of being too inclusive (Lodge & Wegrich, 2012).

This high level of determined risk has also led the federal government to lean heavily on incapacitation and deterrence as its enforcement structure for Cannabis. The main agency that oversees the enforcement of this prohibitory regime is the Department of Justice (DOJ). They are responsible for

setting specific policies based on the set of laws regulating drugs in the U.S (Bodie et al., 2022). The DOJ has a specific drug enforcement arm called the Drug Enforcement Administration (DEA). Under this structure, the DOJ will determine if a case should be prosecuted, while the DEA conducts the actual investigations and enforcement actions (Bodie et al., 2022).

The Federal Government's Regulatory Failure

The classical method used by federal government to regulate cannabis fits within the command and control approach to regulation where there are clear fixed standards with criminal sanctions as consequences. It is common for command and control style regulation to be too rigid making it hard to target the regulation appropriately. This can lead to over regulation, which States that have legal cannabis have argued has happened (Lodge & Wegrich, 2012). We see evidence of regulatory failure in the arrest rates for cannabis by race. Despite evidence showing white and black people in the U.S. use cannabis at about the same rate, black people were 3.64 times more likely to be arrested for cannabis possession than white people (Halydier, 2022). This type of extremely punitive and unequal enforcement is a common problem in command and control style regulation (Lodge & Wegrich, 2012).

A command and control regime is also at higher risk of type I error, over regulation (Lodge & Wegrich, 2012). Considering cannabis to be a schedule I drug has been continuously proven to be overzealous. 47 states, the Washington D.C., and 3 U.S. territories, allow the use cannabis as medication (Centers, 2021). The overregulation of cannabis puts up high barriers to study cannabis as a medication. To study cannabis's medical use, a researcher must go through a tremendously complex approval process involving multiple agencies. For instance, the researcher is required to obtain a DEA registration and site license, and the researcher acquire approval from Food and Drug Administration's (FDA) for their specific testing methods even to run their study (Halydier, 2022). The federal government also is the only legal supplier of cannabis for these studies. Researchers have often criticized the cannabis supplied as low quality, hindering their studies (Bodie et al., 2022). These restrictions have slowed innovation and have slowed relief for many from many medical issues (Halydier, 2022). This regulatory regime is far too overinclusive leading to regulatory failure.

Washington's Legal Cannabis Market

Throughout the 2000's public sentiment around cannabis has drastically changed from the 1970's. The public in America began to recognize that the risk federal government used to justify cannabis prohibition was exaggerated, and by having such an extreme prohibition and enforcement methods, the federal government was actually causing more harm than good. In 2012, Washington put the question of legalization directly to the voters with initiative I-502 (Rashid, 2023). The pro-legalization campaign argued that the federal prohibition was creating a dangerous black market for cannabis that created a higher risk to the public than a legal market would. Under prohibition, there is no seller that can be in compliance with the regulations. The sellers that do exist have a high probability of detection

and harsh sanctions. This creates a market full of sellers who have low motivation to comply, creating a market consisting only of amoral calculators and principled objectors. The voters of Washington passed I-502 and chose to amend the rules instead of continuing the prohibition regime.

Washington has used a couple methods of standard-setting in their legal market. They have introduced performance and management based standards to ensure public safety rather than prohibition. They require all cannabis product producers to test and report the level of THC in their products, which is a performance based standard (Kreit, 2015). They also use a management based standard called their “seed to scale” tracking system. This requires everyone in the cannabis supply chain to track where products come from and where they are going. The purpose of this tracking is to ensure a safe supply chain (Washington State Auditor, 2024).

Washington did recognize that while reducing the risk created cannabis prohibition, a legal market did create new risk to public health. They modeled this new market’s regulatory regime after the structure they had already created for alcohol, which poses similar risks to the public (Davenport et al., 2015). However, because less was known about cannabis and its risk to the public, Washington not only used standard-setting regulations, but also utilized information gathering to inform how they can effectively encourage behavioral change and prevent bad public health outcomes.

To reduce underestimated risks to public health they also required the Washington Institute for Public Policy to collect public health data and generate reports over the first 20 years of legalization. These reports monitor key risk indicators (KRI) such as substance use rate for those 12 years of age, conviction rates for cannabis possession, substance use disorder rates, and fatal traffic collisions (Rashid, 2023). By closely monitoring these KRI’s Washington is attempting to create a resilient regulatory regime that can bounce back if any of these KRI spike. This represents information gathering that can inform standard-setting in the future (Lodge & Wegrich, 2012).

Washington also introduced a 25% sales tax at all parts of the cannabis market. This form of regulation aims to achieve two outcomes. It aims to collect funds to provide education on cannabis use to the public to reduce the risk of overconsumption, and by increasing the cost, the government is nudging behavior and lowering the demand (Rashid, 2023).

To create new standards for this market, and to collect data, Washington created the Liquor and Cannabis Board. This board, oversees all aspects of the sale, and consumption, manages licenses for growers, producers and sellers and sets restrictions on products (Rashid, 2023). This new market based regulatory regime in Washington used standard-setting, information-gathering, and behavior-modification, and market forces to create a nuanced regulatory regime. Washington aimed to use enforcement methods at the bottom of the enforcement pyramid, persuasion, persuasion, warning, education, and assumes good faith in the system (Lodge & Wegrich, 2012).

The Regulatory Failures in Washington

While Washington's regulatory regime is generally seen as successful among Washington residents (Hammond et al., 2022), data to suggest they overcorrected the federal governments type I error and may suffering from a type II error, specifically not regulating high potency concentrates of THC (PRSC, 2020). The link between frequent use of high potency cannabis products and developing psychosis, was previously unproven. Many years of legal cannabis, however, has allowed researches to study these links more closely. Many high quality studies have found a strong risk of developing psychotic disorders, such as schizophrenia, with daily use of high potency cannabis. Washington has failed to capture this risk due to the lack of information available. While they did not take the approach of banning high potency cannabis, the Washington legislature saw the potential risks they did not capture with their first iteration of their regime, and passed Substitute Senate Bill 5092 which instructed the Washington Health Care Authority to research health effects, and recommend regulatory solutions to reduce the health risks (PRSC, 2020). The final report was sent to the 2022 state legislature and included 3 recommendations. First, they suggested using a behavioral change regulation through the use of taxes. They suggested to tax cannabis with a rate based on THC concentration. Taxing more harmful products at higher rates has shown to reduce consumption with tabaco and alcohol. The second recommendation they made was based in setting new standards. They suggested banning the advertisement of high potency cannabis products, and raising the age to legally purchase these products from 21 to 25. Finally, they suggested the use of education through mandating warning and serving size labels on cannabis products, requiring consumer education when they purchase a high dose cannabis product, and educational campaigns and public service announcements. These educational suggestions are a mix of standard-setting for the companies who would need to comply with these new labels and education, and behavioral change, with the hopes of educating the public about the risk of these products would change their behavior (PRSC, 2020).

Conclusion

The conflicting cannabis regulatory regimes in the federal government and in Washington, is a fundamental example of the clash between a command and control regime and more flexible regulatory structure. The federal government's absolutist regulatory regime has failed to keep up with a large portion of what the public in the U.S. value. Successful regulatory regimes should only have "sustained and focused control exercised by a public agency over activities that are valued by a community" (Selznick, 1985). Washington while not perfect, is based directly off of a public referendum, and has taken a more data based approach that allows for more resiliency through monitoring KRIs (Rashid, 2023). The Washington regime is relatively new still continues to evolve. As of right now, the federal government has looked the other way allowing Washington to have this legal market (Adler, 2015). There is inherent risk in this. There is the possibility of the federal government changing how it handles this, and being inconsistent. The best way to ensure a stable market and lower risk to consumers would be to reform the federal government's regulatory regime to be closer to Washington's regulatory regime.

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