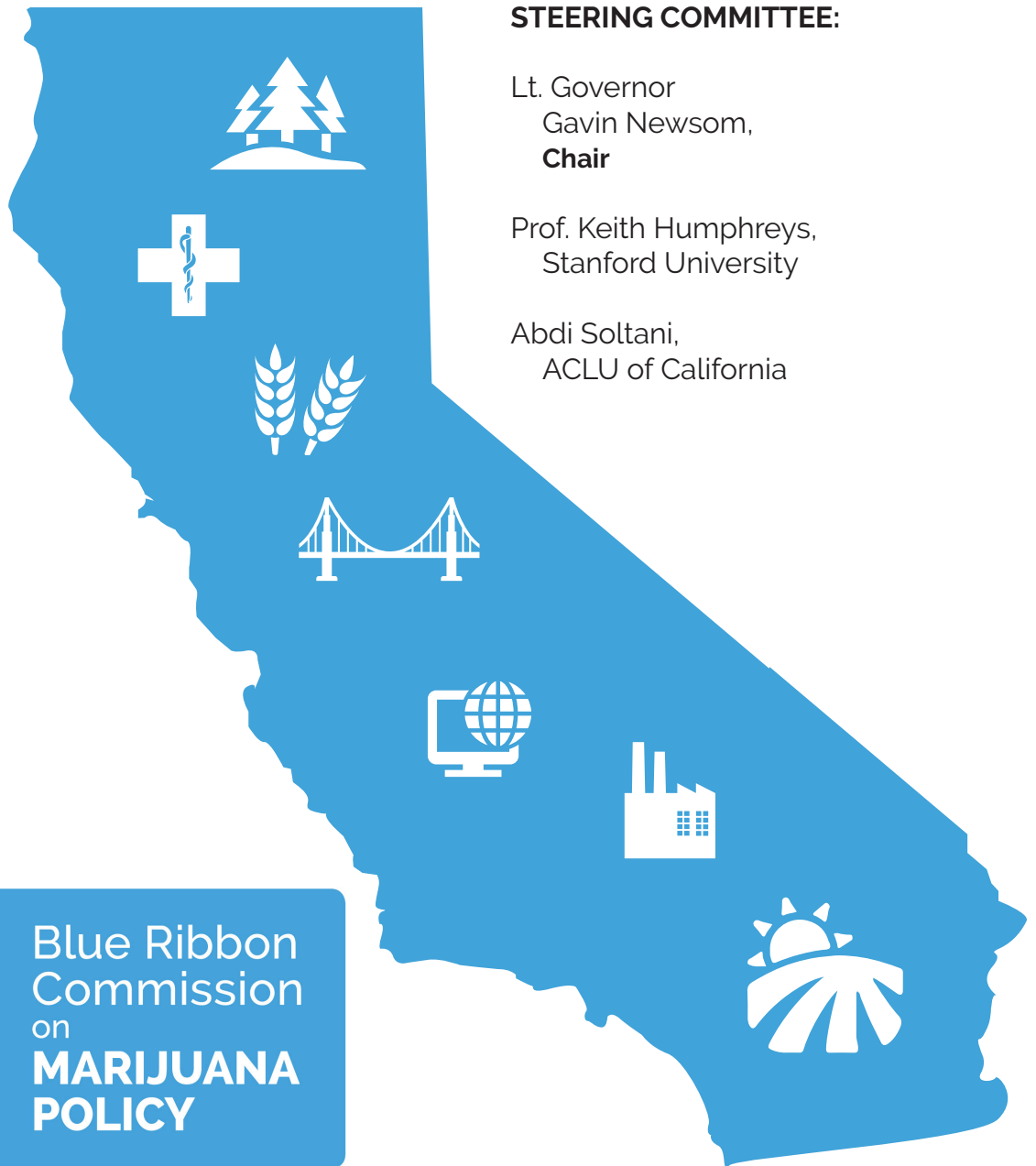


PATHWAYS REPORT

POLICY OPTIONS FOR REGULATING MARIJUANA IN CALIFORNIA



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Blue Ribbon
Commission
on
**MARIJUANA
POLICY**

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July 22, 2015

As the Steering Committee of the Blue Ribbon Commission on Marijuana Policy (BRC), we are pleased to share the *Pathways Report: Policy Options for Regulating Marijuana in California*.

The goal of the BRC is to provide expert research and analysis to help the public and policymakers understand the range of policy issues and options to consider when drafting proposals to legalize, tax, and regulate marijuana.

This report builds on the Progress Report the Commission released in March, which launched the public phase of the BRC. From April through June, we held public forums in Los Angeles, Oakland, Fresno and Humboldt. We are grateful to all the researchers, experts and members of the public who provided valuable testimony and feedback at these events and in other ways.

This report marks the close of this phase of the Blue Ribbon Commission. We will however continue to monitor and analyze marijuana policy issues as legalization initiatives are developed and put before the voters.

We are grateful to all the members of the Blue Ribbon Commission and all the stakeholders who participated in this process. We look forward to the thoughtful and vigorous dialogue that lies ahead.



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EXECUTIVE SUMMARY

The question of whether or not California should legalize adult use of marijuana¹ beyond medical purposes is gaining increased attention by voters and policymakers in California. Four states and the District of Columbia have voted to legalize recreational marijuana use, and each offers important lessons for California. But there are circumstances that are unique to our state that must be thoughtfully analyzed before we move forward with any legalization effort.

The question may well appear on the 2016 statewide ballot. With public opinion polls showing that a narrow majority of likely voters are supportive of the concept of legalization (Public Policy Institute of California, March, 2015), now is the time to think through how such a system could be designed and implemented.

The Blue Ribbon Commission on Marijuana Policy (BRC) was created for this purpose. This Commission report provides guidelines and offers analysis of key issues to be considered by policymakers and voters as they contemplate the legalization and regulation of cannabis in California.

Neither the Commission nor this report is intended to make the case for or against legalization. Rather, this report serves as a resource to help the public and policymakers understand the range of policy issues and options to consider in advance of such a decision.

The *Process* of Legalization: Core Strategies

One of the major findings of the Blue Ribbon Commission's work is that the legalization of marijuana would not be an event that happens in one election. Rather, it would be a *process* that unfolds over many years requiring *sustained attention to implementation*.

That process of legalization and regulation will be *dynamic*. It will require the continued engagement of a range of stakeholders in local communities and at the state level. This report is based on a recommendation that the process the state would embark upon must be based on four macro-level strategies operating concurrently:

¹ In this report, the reader will see both the term marijuana and cannabis. Many strongly prefer the term cannabis, which is the scientific term for the plant and does not have some of the negative associations of the word marijuana. The public, however, is more familiar with the term marijuana, and existing state and federal laws, including our state medical marijuana law, use the term marijuana. Some refer to the word cannabis for the plant, and marijuana for the laws and industry. In this report, we use the term cannabis and marijuana interchangeably. The report also uses the terms "recreational" and "adult use" interchangeably, to indicate marijuana that is not used for a medical reason.

- 1) **Promote the public interest** by ensuring that all legal and regulatory decisions around legalization are made with a focus on protecting California's youth and promoting public health and safety.
- 2) **Reduce the size of the illicit market** to the greatest extent possible. While it is not possible to eliminate the illicit market entirely, limiting its size will reduce some of the harms associated with the current illegal cultivation and sale of cannabis and is essential to creating a well-functioning regulated market that also generates tax revenue.
- 3) **Offer legal protection to responsible actors** in the marijuana industry who strive to work within the law. The new system must reward cooperation and compliance by responsible actors in the industry as an incentive toward responsible behavior. It must move current actors, current supply and current demand from the unregulated to the regulated market. And the new market will need to out-compete the illicit market over time.
- 4) **Capture and invest tax revenue** through a fair system of taxation and regulation, and direct that revenue to programs aligned with the goals and needed policy strategies for safe legalization.

Goals of Legalization and Regulation

The Commission believes any legalization effort should be clear on the goals it is setting out to achieve for the people of California. Other stakeholders may propose different or additional goals. The Commission recommends the following nine goals:

- 1) Promote the health, safety and wellbeing of California's youth, by providing better prevention, education and treatment in school and community settings and keeping youth out of the criminal justice system. Limit youth access to marijuana, including its concurrent use with alcohol and tobacco, and regulate edible products that may appeal to children.
- 2) Public Safety: Ensure that our streets, schools and communities remain safe, while adopting measures to improve public safety.
- 3) Equity: Meet the needs of California's diverse populations and address racial and economic disparities, replacing criminalization with public health and economic development.
- 4) Public Health: Protect public health, strengthen treatment programs for those who need help and educate the public about health issues associated with marijuana use.²
- 5) Environment: Protect public lands, reduce the environmental harms of illegal marijuana production and restore habitat and watersheds impacted by such cultivation.

² For an annotated bibliography of research on marijuana and health, please consult this resource from the Colorado School of Public Health: http://csp.h.ucdenver.edu/cphp/mj_bib.pdf

- 6) **Medicine:** Ensure continued access to marijuana for medical and therapeutic purposes for patients.
- 7) **Consumer Protection:** Provide protections for California consumers, including testing and labeling of cannabis products and offer information that helps consumers make informed decisions.
- 8) **Workforce:** Extend the same health, safety and labor protections to cannabis workers as other workers and provide for legal employment and economic opportunity for California’s diverse workforce.³
- 9) **Market Access:** Ensure that small and mid-size entities, especially responsible actors in the current market, have access to the new licensed market, and that the industry and regulatory system are not dominated by large, corporate interests.

Evaluating Various Policy Options

The Commission studied policy options in seven major areas related to regulation of the industry, which is the primary focus of this report. The goals of protecting youth and public safety are embedded in this report, but additional information on those specific topics is also available on the Blue Ribbon Commission website.

Although these major policy areas overlap to some extent, we discuss them separately in this report for ease of presentation. Beyond the above 13 recommended strategies and goals, the Commission offers 45 additional and related recommendations within the following policy areas for the public, policymakers, and lawmakers to consider:

- A. Defining the Marijuana Industry Structure
- B. Regulating Marijuana Cultivation and Processing
- C. Regulating Marijuana Marketing, Sales and Consumption
- D. Taxing Marijuana
- E. Enforcing the New Rules
- F. Data Collection and Monitoring
- G. Using The New Revenue from Marijuana

³ For a discussion of labor law as it relates to legalized marijuana, please see a new report written by Stanford Law School students in a class led by Professor Robert MacCoun, starting on page 77: https://www.law.stanford.edu/sites/default/files/publication/988796/doc/slpublic/SLS_Marijuana_Policy_Practicum_Report.pdf

Considering California's Unique Characteristics

California policymakers and regulators must craft California-centric solutions to the complex problems that surround cannabis legalization. Policymakers should also take regional variations into account, and realize that challenges that face the northern part of the state, for example, may be fundamentally different than those in the south. These factors include people and demographics, land and environmental protection, industry and commerce, and government at all levels.

Applying Lessons from Other States and Other Industries

While considering our state's unique characteristics, policymakers can learn lessons from different approaches taken by other states and study what has worked and what has not.

The Blue Ribbon Commission on Marijuana Policy has monitored the implementation of marijuana legalization in Washington and Colorado, and has reviewed the early policies and practices of Oregon, Alaska and Washington D.C. Throughout the body of this report, we reference lessons from Washington and Colorado, and to a lesser extent our neighbor to the north, Oregon. In addition, California can apply lessons from its own 20-year history of medical marijuana, including the lack of statewide regulation, the lessons learned from divergent approaches to local regulation and the best practices developed by responsible actors in the industry.

Policymakers can also draw from the lessons of the regulation of other industries in California over many decades, notably tobacco and alcohol,⁴ even though cannabis is different than both tobacco and alcohol in its production, processing and physiological effects.

By virtue of references to those substances, the Commission is not making a statement about relative risks or harms of these substances, but we can draw lessons from the various approaches to regulating those substances and apply these lessons to any new legal marijuana industry *from the outset*.⁵

- Public health and regulatory tools can be adopted to discourage problematic or unhealthy use and educate consumers about health risks associated with such use. In the case of tobacco these tools have helped reduce consumption and associated health risks substantially in California.⁶

4 For an analysis of lessons that can be applied from alcohol and tobacco regulation, please see "Developing Public Health Regulations for Marijuana: Lessons From Alcohol and Tobacco" published in the *American Journal of Public Health*: June 2014, Vol. 104, No. 6, pp. 1021-1028. By Rosalie Liccardo Pacula, Beau Kilmer, Alexander C. Wagenaar, Frank J. Chaloupka and Jonathan P. Caulkins:
<http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2013.301766>

5 For an analysis of the lessons from the tobacco industry and how they apply to marijuana regulation, please see this report "Waiting for the Opportune Moment" by Rachel Barry, Heikki Hiilamo and Stanton Glantz:

http://www.milbank.org/uploads/documents/featured-articles/pdf/Milbank_Quarterly_Vol-92_No-2_2014_The_Tobacco_Industry_and_Marijuana_Legalization.pdf

6 For further information on the impact of California's tobacco control program in reducing harms associated with cigarette smoking, please see this study by John Pierce of UCSD: <http://health.ucsd.edu/NEWS/2010/Pages/9-28-tobacco-control-results.aspx>

- A broad array of civil enforcement tools are available to address alcohol and tobacco sales that are out of compliance with the regulatory system, without first resorting to criminal enforcement.
- Tax policy and its impact on price can be a tool to address problematic use, but only one tool. Cigarette taxes have had a positive effect in reducing use.
- Alcohol taxes, set differently according to beer, wine and spirits (though not necessarily based on alcohol content) provide a model of differential taxing.
- Regulation for beer provides a licensing model that recognizes both function and size, with production caps for smaller entities, strict rules for retail sales, and a separate and distinct function for distributors.
- Large corporations tend to gain influence and exercise greater commercial power in the market, generating greater revenue from regular rather than occasional users.
- Industries can exert influence over political and regulatory decisions; adequate capacity is needed in regulatory agencies to actively monitor those industries given the large number of licensees, and safeguards need to be put into place to ensure against improper industry control of the regulatory process.

Commission Recommendations

While the Blue Ribbon Commission is not making overly specific or prescriptive recommendations, the Commission does offer over 50 recommendations by identifying core strategies, goals, and policy options.

They can serve as guidelines for consideration by the public and policymakers. Some of these recommendations may be appropriate to include in a ballot measure, others in subsequent implementing legislation or regulation. In order to be effective, many of these recommendations would need to be put into place at the outset, whereas others could be sequenced during implementation as greater regulatory and industry capacity evolve.

While the Blue Ribbon Commission is not making overly specific or prescriptive recommendations, the Commission does offer over 50 recommendations by identifying core strategies, goals, and policy options.

There are tradeoffs inherent to the transition from an illegal to a legal market. In the transition to a legal market, the purpose of public policy would be to reduce the harms associated with the prohibition of marijuana, including the criminalization of people, while minimizing the harms and capturing the benefits of a legalized system.

Voters and policymakers will need to balance competing priorities. To be clear, some advocates have set out potential goals that the Blue Ribbon Commission believes should not be priorities. Among them: lowering the price of marijuana for recreational users, creating and promoting the largest industry possible or raising the maximum amount of tax revenue. If these were goals, they would encourage or depend upon the heavy use of cannabis.

If and when California begins the *process* of legalization, these *policy options* can be evaluated in relation to achieving the desired *policy goals*. This framework is illustrated in the Logic Model, see **Figure 1**.

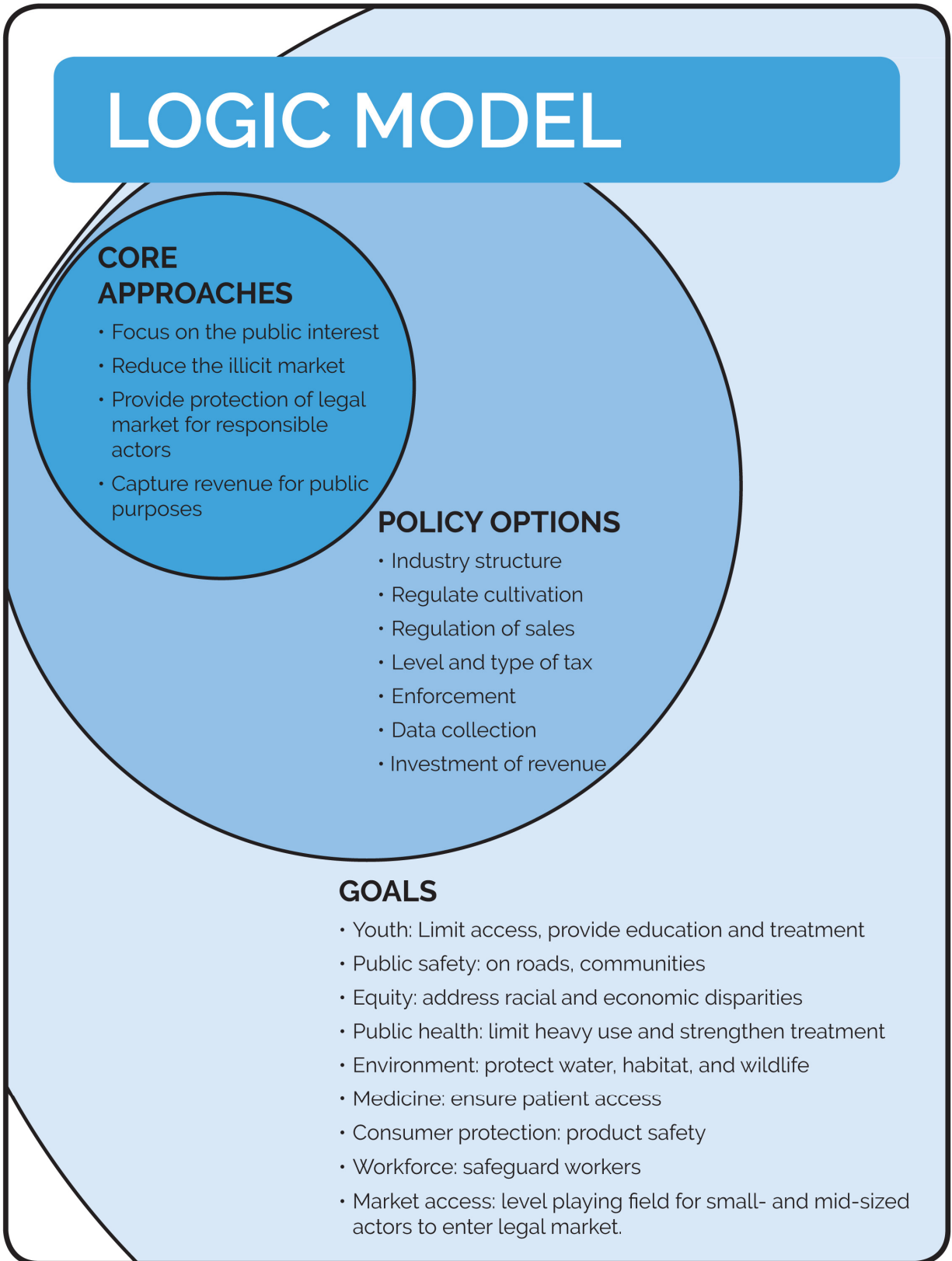


Figure 1

ACKNOWLEDGEMENTS

This report is the work product of the Steering Committee of the BRC, in an attempt to present a comprehensive view of the deliberations and recommendations of this process. Each individual member of the Steering Committee and each member of the Blue Ribbon Commission as a whole does not necessarily agree with every point raised in the report.

It should also be stated clearly that some members of the BRC and many panelists who spoke at the public forums oppose the legalization of marijuana for recreational use. In no case did participation in the BRC as a member or presenter mean the individual supports legalization of marijuana or that the individual has approved every recommendation in this report.

The Steering Committee members of the Blue Ribbon Commission (Lt. Governor Gavin Newsom, Professor Keith Humphreys, and ACLU of Northern California Executive Director Abdi Soltani) would like to thank all the people who have participated in the proceedings of the Blue Ribbon Commission.

Blue Ribbon Commission Members

Youth Education & Prevention Working Group: Timmen Cermak (co-chair), Marsha Rosenbaum (co-chair), Seth Ammerman, Peter Banys, Carl Hart, Steve Heilig.

Public Safety Working Group: W. David Ball (chair), Neill Franklin, Paul Gallegos, Harlan G. Grossman, Chris Magnus, Craig Reinerman, Avelardo Valdez.

Regulatory & Tax Structure Working Group: Sam Kamin (co-chair) Patrick Oglesby (co-chair) James Araby, Rachel Barry, Erwin Chemerinsky, Igor Grant, Alison Holcomb, Ben Rice.

Panelists at Public Forums and Meetings

Los Angeles: W. David Ball, Ventura Police Chief Ken Corney, Paul Gallegos, Harlan Grossman, Chris Murphy, Kristin Nevedal.

Oakland Forum: Peter Banys, Timmen Cermak, Sikander Iqbal, Marsha Rosenbaum, Deborah Small, Bryan Zaragoza.

Fresno Forum: Elizabeth Cox, Rick Crane, Reedley Police Chief Joe Garza, Mihae Jung, David Lampach, Rob MacCoun, Pat Oglesby, Ben Rice, Tulare County Supervisor Steve Worthley.

Humboldt County Forum: Assemblymember Jim Wood, Humboldt County Sheriff Mike Downey, Keith Humphreys, Paul Gallegos, Mourad Gabriel, Luke Bruner, John Corbett.

Shasta County Community Meeting: Jamie Kerr, Betty Cunningham, Cathy Grindstaff.

Hosts of Public Forums and Meetings: University of California Los Angeles, Fresno State University, Youth UpRising of Oakland, Redwood Playhouse of Garberville, ACLU Chapter of Shasta-Tehama-Trinity County.

Humboldt County Visit Partner: Office of Congressman Jared Huffman.

Individuals and Organizations who 1) submitted testimony, 2) attended public forums, 3) spoke at public forums, and 4) provided additional comment.

Observers of the Blue Ribbon Commission, many of whom also provided testimony:

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- Bethany Brass, for research and writing of “California Recreational Cannabis Tax: Model Options and Other Considerations.”
- Keri Gross, for assistance on the public forum in Los Angeles, as well as research and writing of “California Recreational Cannabis Tax: Model Options and Other Considerations.”
- Kendra Livingston, for assistance on the public forum in Los Angeles and research on Native American tribal sovereignty.
- Eugene Yoo, for assistance on the public forum in Los Angeles and research on private right of action and DUID.

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ACLU of California Staff and Consultants: Daniela Bernstein, Margaret Dooley-Sammuli, Wendy Edelstein, Jolene Forman, Clarissa Woo Hermosillo, Allen Hopper, Daniel Galindo, Will Matthews, Courtney Minick, Gigi Pandian, Catrina Roallos, Bill Zimmerman, RootId, Design Action Collective and Grizzly Bear Media.

Lieutenant Governor Newsom Staff: Conrad Gregory and Rhys Williams.

INTRODUCTION

In October 2013, Lieutenant Governor Gavin Newsom announced the formation of the Blue Ribbon Commission (BRC) on Marijuana Policy. Over the last two years, the Blue Ribbon Commission has worked to provide expert research and analysis to help the public and policymakers understand the range of policy issues and options to consider when drafting proposals to legalize, tax, and regulate marijuana.

This spring, the Commission held public forums in Los Angeles, Oakland, Humboldt and Fresno to hear from experts and the public. The Commission also solicited and received written input from the public. Those public comments helped shape the Commission's research and policy recommendations, and are reflected throughout the body of this report.

If Californians opt to move forward with legalizing recreational cannabis production, sale and use, lawmakers and regulators will have many choices to make about who will supply it, who can buy it, how it will be taxed and how it will be regulated.

This report offers analysis of some of the major issues the BRC has been discussing and studying over the past two years and makes a series of recommendations about best practices going forward as the state prepares to vote on legalization of recreational cannabis use.

The BRC is not a policy-setting or advocacy body. From the current period through to the regulatory period after the voters have passed a possible ballot measure, the BRC serves as a resource to interested parties seeking thoughtful analysis about a complicated set of public health, safety, environmental and economic issues.

Current Policy Environment

Any move toward legalization is complicated by the fact that the federal government still lists marijuana as a Schedule 1 drug, creating a series of legal issues for policymakers, the industry and consumers to navigate.

Amid this federal prohibition, California has two current prongs of a marijuana industry: a) a large illicit market of cultivation and retail sale, and b) a quasi-legal medical cannabis system that is largely unregulated, untaxed and untenable. Our loose regulations regarding medical cannabis serve as an invitation to recreational users to use the medical marijuana system, but they are also an invitation for federal intervention because these regulations do not establish clearly what is and is not legal and do not adhere to enforcement guidelines set forth by the U.S. Department of Justice.

Meanwhile, over the past few decades, there is no indication that youth access to marijuana has decreased, and the state government is not receiving substantial tax revenue to help offset the burdens caused by an unregulated industry.

This nebulous system has led to spotty enforcement of federal marijuana laws, and, in some cases, to unfair criminalization of individuals who were trying to play by the rules. Racial disparities persist in the way our criminal justice system continues to deal with marijuana-related offenses.

Unfortunately, the murky legal terrain surrounding cannabis will continue to be an issue for local governments, cultivators, retailers and consumers as long as marijuana remains federally classified as a Schedule 1 drug. While the current federal administration has elected not to crack down on state legalization experiments, this could change at any time. Strong and clear state regulations that deal with medical and adult use of marijuana could immunize the state and its residents, or at least reduce the risk of federal prosecution.

The Commission’s work builds upon a growing body of scientific study on the issue of marijuana policy. In its 2015 report “Considering Marijuana Legalization,” the RAND Drug Policy Research Center writes that policymakers should consider “broad goals” when contemplating legalization.⁷

This report by the BRC is an effort to articulate the broad goals that should be considered for California based upon the expert analysis of the members of the Commission and input from outside experts and the general public over the course of nearly two years since the Commission’s inception in October 2013.

Our goal is to offer analysis to help guide the policy-making process, should California voters opt to go down the path of legalization. It is equally important to realize that any ballot initiative is just another step in that process, not the end. If a ballot measure is going to lead to good, thoughtful public policy, it is imperative that the language of that initiative not hamper needed adjustments in the future. Any ballot measure should allow enough flexibility over time for the creation of effective regulation that is clear, reasonable and responsive, achieves stated goals and is not unduly burdensome.

Our goal is to offer analysis to help guide the policy-making process, should California voters opt to go down the path of legalization.

⁷ This comprehensive research report by the Rand Drug Policy Center in 2015, while developed for the state of Vermont, provides a comprehensive analysis of the effects of different policy options on marijuana use, supply architecture, taxation and regulation that could be used by other jurisdictions: http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR864/RAND_RR864.pdf

BLUE RIBBON COMMISSION WORKING GROUPS

The Commission's work was organized into three working groups, focused on: 1) Youth, 2) Public Safety and 3) Tax and Regulatory Structure. For each topic, the working group convened to identify and discuss issues, reviewed existing research, solicited public and expert input and organized a public forum, which included testimony from expert panelists as well as open public comment. A number of the studies the Blue Ribbon Commission consulted are available on its website.

The Commission held four public forums, each focused on inter-related topics of the BRC: youth, public safety, and taxation and regulation.

Youth: The Youth Education and Prevention Working Group of the Commission reviewed a considerable amount of research on the prevalence and associated risks of marijuana use by youth. At the Oakland forum of the BRC, the Working Group released a Policy Brief, which is included as an Appendix to this report, with an extensive discussion of the issues involving youth and marijuana use.⁸ Additional resources on this topic are available on the BRC website.⁹

Panelists and members of the public at the forum on youth held in Oakland raised the valid concern about the risks of early and heavy use of marijuana by youth and the concurrent use of marijuana with tobacco, alcohol or other drugs. They also noted the importance of reducing youth access both in the current illicit and medical market, as well as diversion from any future legal market.¹⁰

Some members of the public expressed a concern about the message that legalizing marijuana for adult use would send to youth. Others spoke in favor of equipping adolescents with accurate information and real-life skills to make safe and responsible decisions.¹¹ Advisors from the tobacco control movement have also emphasized that public education strategies aimed at the whole population can be effective in changing youth behavior, rather than solely relying on public education campaigns aimed at youth.

8 To download the BRC Youth Education and Prevention Working Group Policy Brief as a free-standing document, rather than read it as an Appendix in this report, please visit: <https://www.safeandsmartpolicy.org/wp-content/uploads/2015/05/Youth-Education-and-Prevention-Policy-Brief.pdf>

9 For additional reference materials prepared by members of the BRC Youth Education and Prevention Working Group, please visit:

<https://www.safeandsmartpolicy.org/reports/youth-education-and-prevention-working-group-reference-materials/>

10 For a further analysis of youth and marijuana policy, please see the report "Youth First" by Drs. Tim Cernak and Peter Banys, who also serve on the BRC, published by the California Society of Addiction Medicine:

http://www.csam-asam.org/sites/default/files/csam_youth_first_final_14.pdf

11 For further resources on providing accurate information to teens about marijuana and drug use, please consult "Safety First" written by BRC member Marsha Rosenbaum, and published by the Drug Policy Alliance:

http://www.drugpolicy.org/sites/default/files/DPA_SafetyFirst_2014_0.pdf

Spotlight on Youth

The BRC focused on youth education, prevention and treatment from the outset. Discussion and analysis of policy solutions aimed at youth can be found throughout this report, including:

- ♦ Regulation of marketing, sales and consumption (page 42) Policy solutions on retail sales environment and diversion to youth
- ♦ Taxation (page 48) Relationship of taxes to illicit market, price and youth access
- ♦ Enforcement (page 57) Enforcing the laws to limit youth access
- ♦ Data Collection and Monitoring (page 64) Research to monitor prevalence of marijuana use and impacts on youth
- ♦ Use of Revenue (page 65) Investments from marijuana tax revenue for youth programs
- ♦ Appendix A (page 72) the full Policy Brief of the Youth Education and Prevention Working Group of the BRC

The working group issued these findings and recommendations:

- Regular or heavy marijuana use at an early age can be associated with reduced educational attainment and educational development.
- Criminal sanctions for marijuana use and possession have multiple negative impacts on youth, especially for youth of color, with regard to educational attainment and employment opportunities, while also reducing law enforcement resources for addressing more serious crime.
- Significant improvements are needed to make drug-safety education more scientifically accurate, realistic and effective at protecting youth.
- Sufficient funding available from marijuana tax revenue, if effectively reserved for and spent on services for youth, could close many gaps in current community-based support for at-risk youth.
- School-based approaches such as Student Assistance Programs (SAPs) are effective in improving school retention, academic achievement and reduction of drug use.
- Universal availability of school-based services throughout California, combined with an evidence-based approach to drug education, could become a reality under a Tax and Regulate public health approach to marijuana policy.
- Well-designed and implemented regulations have the potential to better protect youth.

A few dimensions of these recommendations and those from the Policy Brief of the Youth Education and Prevention Working Group are important to underscore. The recommendations do not focus on marijuana alone but look at marijuana alongside other forms of substance abuse, including alcohol, tobacco and other illegal drugs. They do not isolate substance abuse from other social, emotional and mental health issues facing youth, and the root causes that may drive young people toward substance abuse. They shift the responsibility for addressing youth marijuana use from the primary emphasis on the juvenile justice system to a primary emphasis on public health responses and educational attainment. And they focus on the particular nexus of regular and heavy marijuana use with diminished educational attainment—in both directions—as a point of action. Experts in tobacco control also emphasize the importance of broad-based education campaigns of the public as a whole as an important way to influence youth knowledge and behavior. Concerns about edibles and other products that are particularly appealing to youth were raised. That and other issues affecting regulation that relate to youth are discussed in the Policy Options section.

Public Safety: The Public Safety Working Group of the Commission studied a range of issues related to maintaining safe roads and communities. The forum on public safety, held in Los Angeles, addressed a range of topics, many of which related to enforcement strategies, maintaining separation between the illicit and legal market, and the issues of consumer, workforce and environmental safety, which are discussed throughout this report.

One notable topic was the issue of Driving Under the Influence of Drugs (DUID) on roads and highways, for which the BRC has additional resources on its website. The link between alcohol consumption, alcohol presence in the breath or blood, impairment and crash risk has been well documented, leading to a *per se* standard equating a certain blood alcohol content with a criminal violation of the law, whereas such a scientific link for marijuana has not been established.¹² Similar research on marijuana and other drugs, including prescription drugs, is fairly limited, but important new studies in this area are now being conducted.¹³ The combined efforts of federal and local governments to combat drunk driving due to alcohol are paying off, but the prevalence of other drugs is increasing in drivers without the corresponding research or public education campaigns.

¹² For a full analysis of the history of drunk driving laws, and the comparison of marijuana and alcohol in relation to the law, please consult this report by UC Berkeley Professor Andrea Roth: <https://www.safeandmartpolicy.org/wp-content/uploads/2015/02/2.5.15-version-DUI-marijuana.pdf>

¹³ The National Highway Traffic Safety Agency released two studies in February 2014 on Driving Under the Influence which address alcohol, marijuana and other drug use and highway safety: <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/nhtsa-releases-2-impaired-driving-studies-02-2015>

Law enforcement has existing tools related to impairment which can be used including for alcohol, marijuana and any number of prescription and illegal drugs: *using probable cause* to make traffic stops and *using roadside impairment tests* to establish impairment. These strategies could be enhanced by 1) additional scientifically valid research on marijuana and crash risk to determine if a valid standard could be adopted linking tetrahydrocannabinol (THC)¹⁴ presence with impairment, 2) development of additional tests of intoxication specific to marijuana,¹⁵ 3) training of officers as drug recognition experts, 4) use of video footage of roadside impairment tests for evidence and 5) consumer education about marijuana consumption and driving safety, including combining use with alcohol.

Spotlight on DUID

An important public safety focus of the BRC was on DUID. Further information can be found throughout this report:

- ◆ Introduction (page 3) overview and research related to DUID and highway safety
- ◆ Enforcement (page 57) enforcement strategies for road safety
- ◆ Data (page 64) data collection and research on marijuana impairment and crash risk
- ◆ Use of Funds (page 65) investments and public education for road safety

The deliberations of the working group as well as the public forum hosted on this topic in Los Angeles led to several important findings and recommendations:

- DUID, Road and Highway Safety: A number of steps can be taken to improve road and highway safety as it relates to Driving Under the Influence of Drugs and marijuana impairment specifically. These include support for currently available tools (such as roadside impairment tests available for all drugs) as well as research to develop new scientifically valid tools specific to marijuana.
- Banking: Current federal policy means limited access to banking for marijuana businesses, causing many cultivators and dispensaries to operate on a cash basis. This makes businesses the target of crime, and reduces transparency of financial information. The state should engage the federal government to provide some safe harbor for licensed businesses to access the banking system.

¹⁴ Tetrahydrocannabinol (THC) is one of many cannabinoid compounds found in the plant *cannabis sativa L.* and is considered the primary psychoactive ingredient causing intoxication. Other prominent cannabinoids such as cannabidiol (CBD) are not considered psychoactive, although their precise effect is unknown. In contrast, ethyl alcohol is just one compound, dissolved in water, and easily measured. For further discussion on THC and impairment, see these articles by Santa Clara Law student Eugene Yoo: <https://druglawandpolicy.wordpress.com/2015/04/04/thc-driving-limits-a-shot-in-the-dark/>
<https://druglawandpolicy.wordpress.com/2015/03/07/are-high-drivers-high-risk/>

¹⁵ For a further discussion of attempts to develop a valid way to detect THC and measure impairment, see this article by also by Santa Clara Law student Eugene Yoo: <https://druglawandpolicy.wordpress.com/2015/05/05/what-to-expect-and-not-expect-from-the-thc-breathalyzer/>

- **Masking the Illicit Market:** A third major concern is the ways in which a legal market can be a cover for illegal activity, whether small-scale illegal sales to youth or large-scale cultivation and distribution for sales inside or outside California. Many of the recommendations in the Policy Options section of this report focus on available tools to separate the legal and illicit market and to prevent diversion to and from the illegal market, which can be associated with other violent and serious crime.
- **Other Dimensions of Safety: Environment, Consumer and Worker.** The BRC process addressed other concerns related to public safety that are not currently prominent elements of enforcement, given that law enforcement resources are limited and must be prioritized in other areas. Protection of the environment, consumers and workers can be addressed through civil enforcement and, where appropriate, through criminal enforcement.

Taxation and Regulation: The Tax and Regulatory Working Group studied a range of issues related to policy options in this area, many of which were raised at the public forums held in Fresno and Humboldt. The goals of protecting youth and public safety formed a guiding framework for deliberation regarding taxation and regulation. The extensive findings and recommendations of this working group are discussed in detail later in this report in the chapter titled “Policy Options.”

This commission feels strongly that maximizing tax revenue should not be the focus of cannabis policy even though a successful tax system will need to raise money to pay for increased education, public health and enforcement costs associated with marijuana use and any new regulations.

Protecting youth and ensuring safe, healthy communities must be the guiding principles of any cannabis regulation.

Cannabis taxes can have unintended consequences for youth access and general public safety and public health. Protecting youth and ensuring safe, healthy communities must be the guiding principles of any cannabis regulation, even if that means failing to maximize the potential for cannabis as a source of tax revenue.¹⁶

While promising to fund other government programs through cannabis tax revenue may be a popular selling point for legalization proponents, we do not believe that making government dependent on cannabis taxes makes for sound public policy, nor do we believe cannabis tax revenue will be very large in relation to the total budgets of state and local government.¹⁷ For these reasons, we believe these revenues should be used on a targeted basis to help achieve specific public policy goals related to legalization.

¹⁶ For a discussion on the relationship between legalization, price, tax revenue and related issues, please consult “Altered State? Assessing How Marijuana Legalization in California Could Influence Marijuana Consumption and Public Budgets” by the Rand Corporation: http://www.rand.org/pubs/occasional_papers/OP315.html

¹⁷ For further discussion on factors that are likely to limit the amount of tax revenue even after legalization, please consult this study by Robert Mikos of Vanderbilt University: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1549828

CALIFORNIA'S UNIQUE CHARACTERISTICS

California policymakers and regulators need to craft a California-centric solution to the complex problems that surround cannabis legalization. Policymakers should also take regional variations into account, and realize that challenges that face the northern part of the state, for example, may be fundamentally different than those in the Southern half.

While there are many lessons to be learned from policy tools developed by national research organizations or from legalization efforts that are further along in Colorado, Washington and other states, California has a unique set of circumstances that will require cannabis laws and regulations that are specifically tailored to California.

We are the most populous state in the nation, with some of the nation's largest urban areas. But we also have millions of acres of rural land, many of which are part of our national or state parks systems.

The magnitude and complexity of legalization in California are influenced by a handful of unique characteristics that deserve specific attention as initiative drafters and lawmakers consider future cannabis policy. These factors, which are illustrated in *Figure 2*, include:

People

California is a **large state**—home to 38 million people. Implementing a legalization policy in a state of this size has a greater magnitude for that exact reason—the state is just bigger. It will require careful planning and monitoring to ensure safe and effective implementation.

California is a **racially and ethnically diverse** state, with a plurality of the population made up of people of color, a majority of its youth population are people of color, many foreign-born residents, and many languages spoken. Issues related to racial and ethnic disparity—from who has access to the legal market to how to communicate public health messages—must be considered.

California is home to more **people living in poverty** than any other state, in both rural and urban communities. Poverty affects the other social conditions residents face and the resources available to them to address those conditions, posing unique challenges for how to set cannabis policy that protects and promotes the health and safety of communities.

California has a **large youth population**. This youth population is a driving factor in the state’s growing racial diversity. Over half the children and youth in California are Latino.¹⁸ California has a high child poverty rate, and youth face a number of other social conditions.¹⁹

Land

Environmental protection is a priority for Californians, and should be for those making decisions about cannabis policy. This is of particular concern given the size and scope of the current cannabis industry in California.

California is home to **rural producing regions**, which are the center of marijuana cultivation. These include the so-called “Emerald Triangle” counties of Humboldt, Mendocino and Trinity, and other rural counties, as well as rural areas of urban counties.

Environmental protection is a priority for Californians, and should be for those making decisions about cannabis policy.

California is home to **public lands**, where considerable marijuana cultivation takes place. Some of these lands are owned by the state, others by the federal government. California has more than 1.3 million acres of state park land and more than 8 million acres of national forest and wilderness land. This is a challenge for enforcement agents and regulators. It also means cracking down on these illegal grows will take a funded and coordinated effort from federal, state and local officials to ensure our public lands are being protected.

California is home to **watersheds and habitats** that are essential for wildlife and for human health and wellbeing. These regions face serious issues as illegal cultivators clear-cut large areas of forest and apply large amounts of fertilizer and pesticides. Rivers, streams and forests pay the price, as do rare and endangered species and the people who depend on a healthy environment.

California is a state in **severe drought**, where water is a precious resource even in wet years. Cultivation of cannabis requires water, whether indoors or outdoors. While responsible cultivators adopt good practices for responsible water use, illicit cultivation efforts have led to illegal and often wasteful use of water without permits. Currently, illegal grows siphon off millions of gallons of water each year.

¹⁸ One measure of youth diversity is based on public school enrollment, as published by the California Department of Education <http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp>. Other sources about the youth population as a whole include U.S. Census data.

¹⁹ Many research centers document the social factors shaping the lives of young people in California. KidsData.org is one such useful resource: <http://www.kidsdata.org/export/pdf?dem=1>

Industry

California is home to the nation's oldest **medical marijuana industry**. Voters passed Proposition 215 in 1996, making it the first state to legalize cannabis use for medicinal purposes. This industry includes entities involved in cultivation, retail sales, testing and many other functions. While the industry is 20 years old, it is largely unregulated at the state level. Policymakers must consider the role of existing players in this industry, many of whom are dedicated to responsible cultivation and use, and yet may also have past criminal records associated with their participation in the medical marijuana industry.

This industry serves a large number of patients who legitimately need and benefit from medical marijuana. It also includes individuals with medical cards who may really be using marijuana primarily for recreational reasons. Trying to navigate a mature medical cannabis market poses unique challenges in crafting tax policy and other regulations associated with legalization of recreational use.

California is also home to a substantial amount of **cannabis cultivation**. There are no reliable statistics on how much cannabis is produced in California, but there is wide agreement that California produces more cannabis than it consumes. California is thought to supply a substantial portion of the illegal cannabis market in the United States. Local officials in Northern California have estimated there are more than 30,000 cannabis gardens in the Emerald Triangle region of the state alone. That means that whatever steps are taken to provide a legal market of cultivation and sales in California, a remaining portion of the state's existing cultivation will not have a legal destination in California.

Besides cannabis, California grows a considerable amount of other crops through a robust industry of **agriculture**. While a substantial focus on cannabis cultivation is on the northern part of the state, every region of California is involved in the cultivation of other agricultural crops. Legalization could lead to farmers in other regions to want to cultivate marijuana, since they would operate under state law and likely without federal prosecution. More cultivation could lead to an oversupply in the market.

California is a **tourism** destination for visitors across the United States and from all over the world. Whether they are coming to see the Golden Gate, Half Dome or Hollywood, tourists enjoy the wonders of this state. Consideration should be given to the fact that some tourists will choose to consume cannabis. Proper guidance for tourists can help ensure safe and responsible consumption, prevent use on federal lands, and also prevent taking home a souvenir in violation of federal law.

Californians have **innovation** in their DNA. A legal, adult-use marijuana market will be the focus of venture capital, entrepreneurs and innovators. Harnessing this talent may create innovations favorable to public health and industry oversight—such as improved testing technology—but could also lead to new products and marketing strategies to attract more heavy users.

Government

California has a complex **state constitution** and extensive state laws, which can affect marijuana policy and regulation in unexpected ways. Our initiative system is part of our political fabric, enshrining changes in our state laws and constitution, including changes to state finance and tax policy. It is important that any tax and fee systems that are established for cannabis abide by those structures, or tailor them specifically for the needs of marijuana regulation.

Laws passed by **citizen initiative** are often more difficult to change or amend than legislative measures or regulatory decisions. There are numerous examples of unintended consequences growing out of ballot measures that have proven challenging for state and local policymakers to navigate. That is why it is imperative that any cannabis legalization initiative be crafted in such a way to allow flexibility for policymakers and regulators.

California has a complex and interconnected system of **local governance** with more than 482 cities and 58 counties, as well as 1,000 school districts. Our state laws and constitution provide local government the unique responsibilities and authority to enact legislation related to land use, taxation and other policies, and other significant responsibilities in the areas of public health, safety and education.

California is home to more than 100 federally recognized Native American tribes, with another 78 entities petitioning for recognition. Tribes in California currently have nearly 100 separate reservations or Rancherias. There are also a number of individual Indian trust allotments.

These lands are run by sovereign **tribal governments**, and are not subject to all of the same rules and regulations of non-tribal lands. Casinos, for example, are allowed on California tribal lands, but nowhere else in the state. Recent policy statements by the U.S. Department of Justice have opened the door for Tribal participation in the cannabis industry. Other states that have tried to regulate cannabis sale, production and cultivation have also wrestled with what laws can and should be extended to tribal lands. With or without state legalization, it is entirely possible that some tribal governments will take steps to participate in the medical and/or adult use market as long as they comply with the same DOJ guidelines as states.

California is a state with significant **federal influence**—and this influence runs both ways. The federal government has a large presence in California, including public lands, national parks and military installations, as well as federal law-enforcement agencies, which the state must consider and respect in its legalization efforts. In turn, the state of California, with its large electorate, congressional delegation and influence with federal executive agencies, can also have a voice in federal policy as it affects our state.

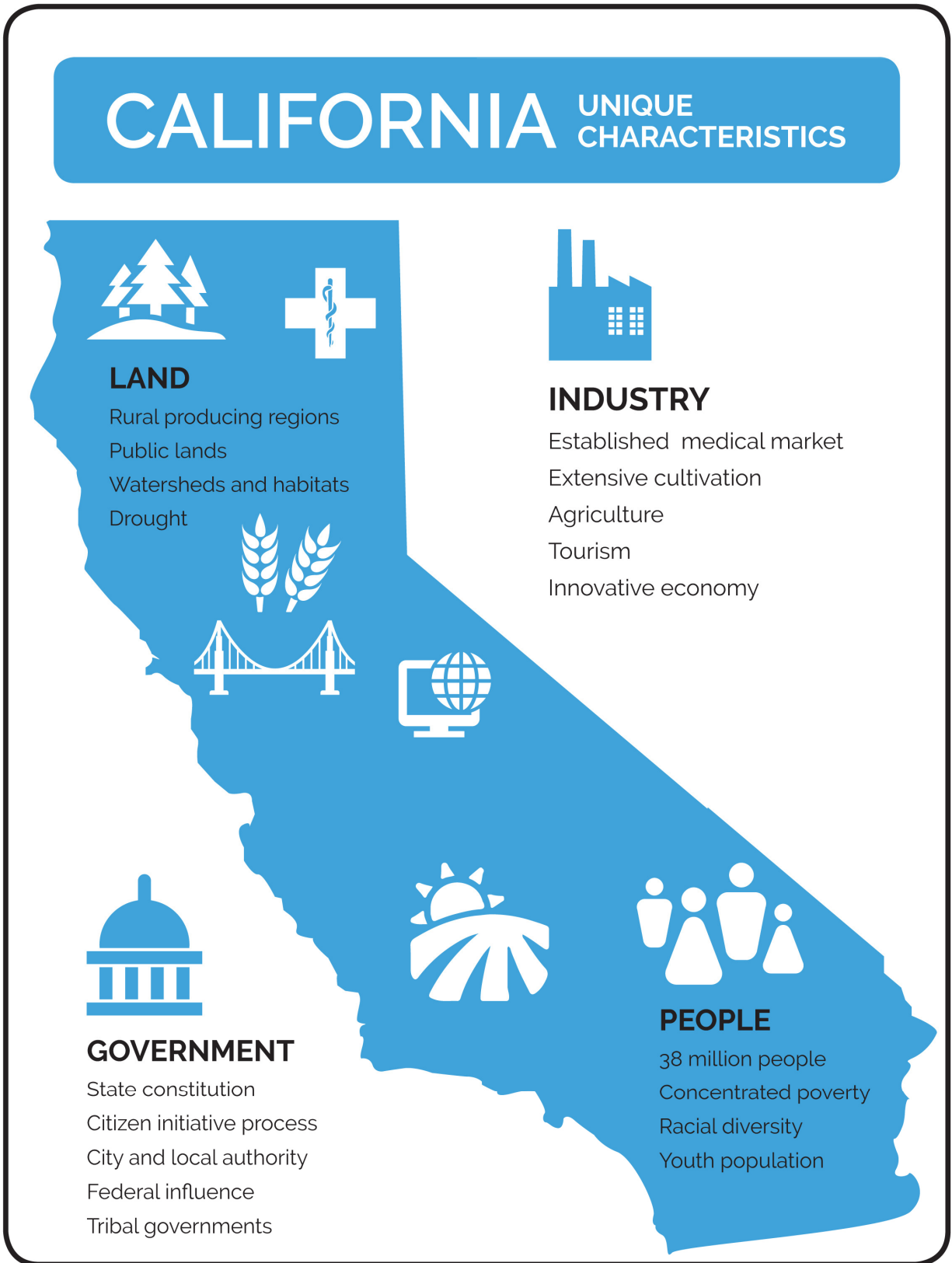


Figure 2

FEDERAL COMPLIANCE AND FEDERAL CHANGES

Over the last two decades, 35 states have enacted laws allowing some extent of medical marijuana use. More recently, several states and Washington D.C. have gone further, legalizing and regulating marijuana for adult use beyond medicine. However, virtually all marijuana use outside of federally sanctioned research trials remains illegal under federal law. This has created an interesting set of challenges both for the federal government and for the states that have taken steps to legalize marijuana.

Over the last two decades, 35 states have enacted laws allowing some extent of medical marijuana use.

While the Supremacy Clause of the U.S. Constitution provides that federal law trumps most contradictory state laws, fundamental tenets of our federalist system of government and specific provisions of the federal Controlled Substances Act (CSA) grant the states considerable autonomy to create their own drug laws even if those state laws allow activities prohibited by federal law. The result is that state laws legalizing marijuana are valid, yet at the same time the federal government can enforce its own laws prohibiting marijuana use even within the states that have legalized it under their own law.²⁰

While the Supremacy Clause of the U.S. Constitution provides that federal law trumps most contradictory state laws, fundamental tenets of our federalist system of government and specific provisions of the federal Controlled Substances Act grant the states considerable autonomy to create their own drug laws even if those state laws allow activities prohibited by federal law.

Marijuana is still banned under federal law and is listed as a Schedule 1 drug by the Drug Enforcement Agency. The Department of Justice has a marijuana enforcement policy that defines its own priorities at the federal level, but has relied on state and local authorities to enforce their own state marijuana and narcotics laws. The Obama administration has implemented an enforcement compromise between competing federal and state laws. In August of 2013, the Department of Justice released new guidelines in a memo by Deputy Attorney General James Cole to all U.S. Attorneys, which outlined eight enforcement priorities for the federal government in relation to marijuana.²¹

²⁰ For additional analysis on the legal issues of federalism and preemption raised by state and federal marijuana regulation, please consult this *UCLA Law Review* article by Erwin Chemerinksy, Jolene Forman, Allen Hopper and Sam Kamin: <http://www.uclalawreview.org/cooperative-federalism-and-marijuana-regulation-2/>

²¹ The full DOJ memorandum is available at this link: <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

Department of Justice Guidelines

The Department of Justice policy statements are widely understood as allowing states to enact and enforce legalization systems so long as the state laws adequately address these guidelines with the goal of preventing:

- 1) Distribution of marijuana to minors;
- 2) Revenue from the sale of marijuana going to criminal enterprises;
- 3) Diversion of marijuana from states where it is legal under state law to other states;
- 4) State-authorized marijuana activity from being used as a cover for the trafficking of other illegal drugs or other illegal activity;
- 5) Violence and the use of firearms in the cultivation and distribution of marijuana;
- 6) Drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- 7) Growing of marijuana on public lands and the attendant public safety and environmental dangers; and
- 8) Possession or use of marijuana on federal property.

The clear message from the current administration is that states will not be sanctioned for legalizing recreational or medical cannabis use if they work within these guidelines. Clarity and focus from state and local officials in ensuring that California remains within these guidelines can help resolve some of the tensions and issues that can arise in this legal environment.

If voters approve a legalization initiative in 2016, state officials should engage the federal government, both to ensure compliance with these federal enforcement priorities and to help change other federal rules that may be obstacles to safe legalization at the state level. By making clear they want to be part of the solution, state officials can play an important role in providing legal and financial clarity for its citizens. There are certain key issues where policy changes are needed at the federal level to allow for clarity and stability in the cannabis industry. Here we discuss two of these issues.

First among these is banking. Because of the federal prohibition on marijuana, people in the marijuana industry who want to be good actors and play by the rules often have limited access to the banking system. Banks are regulated federally and are prohibited from engaging in money laundering for illegal enterprises. While marijuana businesses operating under state regulation may be willing to accept the risks associated with operating under the current federal enforcement guidelines, most banks are averse to do so. That has led to, among other things, dispensaries that operate as cash businesses that are the targets of robbery and violent crime. It also leads to massive cash payments being delivered to tax-collecting agencies for operators who want to abide by state tax laws. Better access to banking can help the state meet its goals, but also allows California to meet the federal guidelines.

A second area is IRS tax rules. The state should engage the federal government on changing current IRS rules that prohibit marijuana-related businesses from deducting normal business expenses from their federal taxes. Licensed retailers, trying to compete with the illicit market, cannot deduct the taxes they pay to wholesalers or cultivators, as can retailers in other industries. This prohibition encourages policies that assess taxes only on retail sales. However, this tax structure may not be the best path forward for California. Securing changes in these IRS rules will increase state flexibility in creating a tax system that is guided primarily by protecting youth, public health and public safety.

LESSONS FROM OTHER STATES

While considering our state’s unique features, policymakers can learn lessons from the different approaches taken by other states, and study what has worked and what has not. It is important to understand that effective implementation and regulation will be an ongoing process that will take continued work from state and local officials.

In Washington, state lawmakers recently concluded a special legislative session to address issues that have arisen in that state’s experimentation with legalized recreational cannabis. Among the changes made during that session were changes to tax policy.

While considering our state’s unique features, policymakers can learn lessons from the different approaches taken by other states, and study what has worked and what has not.

Washington originally levied taxes at every stage of cannabis production, distribution and sale. The state collected a 25% excise tax at three transfer points: when producers sell to processors, when processors sell to retailers and when retailers sell to end consumers—though producers who merged with or became processors could avoid one level of tax, so most did.

The state is moving away from that model to one that simply taxes cannabis at the retail point of sale. Business owners in the industry say the old tax structure inhibited their ability to do business and drove up prices. Part of this has to do with federal rules. As long as cannabis is illegal at the federal level, anyone involved in cultivation would be unable to deduct normal business expenses on federal tax returns (Internal Revenue Code section 280E). Washington’s repealed tax on producers was arguably not imposed on production, but rather on a producer’s act of selling. So a producer could not deduct it. The state is moving to a system that would charge a one-time tax of 37% on retail sales of both medical and non-medical cannabis (though medical cannabis is exempt from Washington’s standard 6.5% retail sales tax). By shifting to a tax at the retail level that the consumer pays, Washington clearly avoids this federal tax problem.

Washington lawmakers also voted to effectively end the side-by-side existence of separate recreational and medical marijuana systems. Medical marijuana dispensaries as they exist now will either close or seek licenses in the regulated adult-use industry. In the future, medical customers will have to look for “medically endorsed” recreational marijuana stores for their supply.

In Colorado, Gov. John Hickenlooper recently signed a measure that will lower that state’s retail marijuana tax, with the cut delayed until 2017 to avoid short-term budget problems. The tax rate will go from 10% to 8%. Proponents of the move believe it will lower the price of cannabis, which will help the legal cannabis market compete with the illicit market.

Colorado, which had a more closely regulated medical cannabis system before legalizing recreational use, is trying to move forward with a two-tiered approach that would allow recreational and medical markets to exist side-by-side under slightly different rules and regulations. Colorado originally enacted a 15-percent tax on production, but converted that percentage to a weight-based tax, and collects different per-pound production taxes for the more valuable cannabis flowers (generally used for smoking) and less valuable cannabis trim (leaves and other trimmings that are processed into other products.)

Oregon is currently debating a tax rate and structure for its marijuana market. The Oregon Legislature is considering imposing a 17 percent state tax on retail sales. Cities and counties would be able to levy an additional 3 percent tax if local voters approve.

The table following illustrates some different approaches to tax, regulatory and enforcement policies in Washington, Colorado and Oregon—all states where voters have approved recreational cannabis.²²

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²² Adapted from Oregon Liquor Control Commission. Retrieved from http://www.oregon.gov/olcc/marijuana/Documents/Measure91_sidebysidecomparison.pdf

OREGON/WASHINGTON/COLORADO COMPARISON

	OREGON	WASHINGTON	COLORADO
Tax Rate	\$35 per ounce of marijuana flower, \$10 per ounce for leaves, \$5 per immature plant, paid by the producer. State has exclusive right to tax.	37% marijuana excise tax collected exclusively at retail level—charged to customer.	10% special sales tax paid by consumer on retail marijuana/products. 15% wholesale excise tax for marijuana based on average market price of product.
Retail and Wholesale	Licensed entities may sell at both wholesale and retail levels.	"Tiered structure" prohibits licensed entities from selling at both wholesale and retail levels.	For initial rollout, retailers were required to produce 70% of their own product. (Provision expired 10/1/14.)
Home Cultivation	4 plants.	Prohibited.	6 plants per person, with 3 being mature plants. 12 plants maximum per residence.
Drugged Driving	Oregon Liquor Control Commission is required to report to Legislature about driving under influence of marijuana. Current law prohibits driving under influence of any controlled substance, including marijuana.	Per se drugged driving limit: drivers with THC levels greater than 5ng/mL of blood are guilty of marijuana DUI.	Marijuana impairment can be legally inferred at THC levels greater than 5ng/mL of blood, but defendant can rebut presumption of impairment.
Local Control	The measure preempts any local ordinances. Local governments may adopt time, place and manner regulations, but may prohibit recreational marijuana businesses only via general election.	Washington AG has declared that local governments are not pre-empted from adopting ordinances that prohibit recreational marijuana businesses	Local governments may prohibit marijuana businesses.
Number of Licenses	Measure 91 does not limit the number of licenses that may be issued.	Retail licenses capped at 334 for the state.	No limit on total number of licenses.
Medical Marijuana	Measure 91 does not impact the Oregon Medical Marijuana Act but does distinguish medical marijuana as applying to patients with qualifying medical conditions.	State recently combined medical and recreational into one recreational system. Patients will now use "medically endorsed" recreational cannabis stores under new system.	For initial rollout, only licensed medical dispensaries were allowed to apply for retail licenses. (Provision expired 10/1/14.)

Figure 3

POLICY OPTIONS

The Blue Ribbon Commission divided its work into three broad topic areas to match three significant public concerns about legalized recreational cannabis use in California. The Commission held a public hearing on each of these topics and solicited expert and public testimony in each area. Those three topic areas were:

- 1) Public Safety
- 2) Youth Education and Prevention
- 3) Tax and Regulatory Structure

While this structure gave us access to a broad spectrum of expert opinion and sensitized us to a myriad of critical and important problems, solutions to those problems necessarily overlap across the three issues. It also sensitized us to the reality that a policy that works well in one area can complicate matters in another. For example, a tax that is too high may maintain or boost the illicit market, posing a danger to public safety and increasing illegal grows that have a negative environmental impact. A tax that is too low could contribute to a low price that could lead to increased use.

Given this significant crossover and the likely possibility of unintended consequences, we believe it is imperative that drafters build as much flexibility as possible into a legalization initiative. The process of legalizing recreational cannabis should be viewed as just that—a process. The ballot initiative is the beginning of that process, and should be structured to allow state and local lawmakers and regulators flexibility to improve and adapt enabling legislation and policy. Details specified in ballot initiatives can be changed only by other ballot initiatives unless specifically stated in the initiative itself. Requiring additional voter approval is too cumbersome and difficult for necessary adjustments and accommodations likely to be needed as experience reveals unanticipated problems.

Agencies Responsible for Implementation and Stakeholder Engagement

The Blue Ribbon Commission did not focus on which state agency or state agencies should be responsible for regulation. However, given what we have learned through the scope of our work, a few themes are emerging. First, a designated individual or entity should be charged with the authority and responsibility to provide oversight of implementation. This entity would be required to coordinate a number of state agencies that would have a significant role in the regulation of the industry and implementation of the policy—from the Board of Equalization to the Department of Public Health to many others.

Given the wide scope of areas that are involved in marijuana regulation, it is necessary to engage the many state agencies focused on those specific functions, rather than try to recreate expertise in literally dozens of areas all in one new entity. At the same time, distributing authority without any central

A range of stakeholders—including law enforcement, treatment providers, patient advocates, public health, civil rights, youth, parents, researchers and the public—should be engaged in the process.

coordination and accountability would create problems as well. This also is a topic where California can learn from other states that have legalized marijuana, as well as from the regulation and control of alcohol, tobacco and other products subject to state or federal regulation.²³

A range of stakeholders—including law enforcement, treatment providers, patient advocates, public health, civil rights, youth, parents, researchers and the public—should be engaged in the process. The level of thoughtful, constructive and insightful public comment from many sectors through the proceedings of the Blue Ribbon Commission is a positive indicator of the contribution that Californians can make to a future implementation process. Such public engagement is built into California’s regulatory process, with

periods of notice and public comment before regulations are finalized. The state should periodically publish reports of the progress, successes and challenges of implementation and provide for public and stakeholder feedback for course corrections.

Additional structures for more formal stakeholder engagement should also be considered. It is critical that any boards, commissions or agencies that oversee the legal marijuana industry represent all the public interests of the people of California rather than being dominated by individuals with an economic stake in the industry itself.

Summary of Policy Option Recommendations

Earlier, in the Introduction to this report, we discussed specific recommendations related to Youth and Public Safety, two of the working groups of the BRC. In this section, we summarize the recommendations of the BRC as they relate to tax and regulatory decisions, the third working group. It is important to note that many of the tax and regulatory recommendations are informed by the goals related to youth and public safety. They are organized first as a group of general recommendations and then by seven specific areas of policy discussed in more detail in the subsequent sections of this chapter.

²³ A new report written by students in a class led by Professor Robert MacCoun of Stanford Law School provides an extensive discussion of the advantages and disadvantages of different agency choices and structures for marijuana regulation, starting on Page 16: https://www.law.stanford.edu/sites/default/files/publication/988796/doc/slspublic/SLS_Marijuana_Policy_Practicum_Report.pdf

General Recommendations

1. Develop a highly regulated market with enforcement and oversight capacity from the beginning, not an unregulated free market; this industry should not be California’s next Gold Rush.
2. Build ongoing regulatory flexibility and responsiveness into the process, while ensuring regulatory agencies are engaged constructively to ensure successful and faithful implementation.
3. Establish a coordinated regulatory scheme that is clearly defined with a unified state system of licensing and oversight, as well as local regulation.
4. Designate a central person, agency or entity with the authority and responsibility to coordinate the implementation process and to engage all relevant state agencies and local governments in their respective roles in the process.
5. Any boards, commissions or agencies that oversee the legal marijuana industry should represent all the public interests of the people of California rather than being dominated by individuals with an economic stake in the industry itself.
6. State officials should engage the federal government, both to ensure industry compliance with current federal enforcement priorities and to help change other federal rules that may be obstacles to safe legalization at the state level.

Build ongoing regulatory flexibility and responsiveness into the process, while ensuring regulatory agencies are engaged constructively to ensure successful and faithful implementation.

Marijuana industry structure

7. Consider options that limit the size and power—both economic and political—of entities in the marijuana industry, through limits on the number and types of licenses that are issued to the same entity or owners, limits on the size of any one license, encouragement of non-commercial options and incentives for smaller players. The goal should be to prevent the growth of a large, corporate marijuana industry dominated by a small number of players, as we see with Big Tobacco or the alcohol industry.
8. Require participants in the cannabis industry to meet high standards of licensing and training, and provide paths of entry to the industry for California’s diverse population.
9. Licensing fees should be set at reasonable levels to cover the cost of regulation, certification and oversight by state and local government. They should not be so onerous as to limit smaller actors from participating in the industry.

10. Business entities involved in the marijuana industry should be required to hold both state licenses and local permits.
11. Provide flexibility and authority for local government to adopt additional measures responsive to public health, safety and economic development, as well as to regulate business practices of licensees in their jurisdiction. Apart from this local authority to regulate commerce, the state should set uniform minimum guidelines related to personal cultivation, possession and consumption.
12. Urge the federal government to provide better access to banking in order to help the state meet its goals, and also help California comply with federal guidelines.
13. Accommodate the medical and recreational uses of marijuana based on conscious policy decisions as to which functions of the two systems will be merged and which will remain separate. To the extent any functions are merged, ensure certain key guidelines are met to ensure medical access. To the extent any functions are separate or provide a benefit to patients, establish clearer guidelines for who can qualify as a patient.

Regulating marijuana cultivation and processing

14. Protect the ability of individuals to consume, possess or cultivate marijuana within certain uniform statewide guidelines, apart from the additional authority granted to local government.
15. Provide for a designated level of legal licensed cultivation at the state level, and in coordination with local government, to supply the demand in California, without diversion to other states.
16. Establish a statewide seed-to-sale tracking system ensuring that marijuana is cultivated, distributed and sold through the licensed, regulated system, with the minimum amount of diversion out to—or in from—the illicit market.
17. Current participants in the market who have been responsible actors, and are willing to be licensed and abide by regulations should be given consideration for the new recreational licenses.
18. Existing environmental laws must be enforced. State and local agencies responsible for this enforcement should have the authority and resources to ensure marijuana cultivation meets environmental standards.
19. Afford the same protections and rights to cannabis workers as other workers in the similar industries.
20. Testing of cannabis—for potency as well as for pesticides, molds and other contaminants—should occur near the points of harvesting and/or processing.

Regulating marijuana marketing, sales and consumption

21. Testing and oversight of the supply chain (through a seed to sale tracking system) should be in place throughout the process—including at the stage of retail sales to ensure consumer safety and to limit diversion to and from the illicit market.
22. The state should regulate the retail sales environment (ID and age requirement of 21 years old and over to enter stores, public health information, child-proof packaging) and what marijuana products can legally be brought to market (including limits on THC content, products such as concentrates and different forms of edibles).
23. All products should have consistent labeling, especially as to dosage and concentration of key cannabinoids.
24. Through their permitting, land use, and regulatory authority, local governments can limit the number of marijuana retailers, limit retailer density and maintain cannabis-free zones near places like schools and parks.
25. Place limits on advertising and marketing of marijuana, in accordance with constitutional standards, with the particular aim of limiting or prohibiting tactics aimed at youth or that encourage heavy and problematic use.
26. Comply with public smoking, smoke-free, and public consumption laws.

Taxing marijuana

27. Adjust the taxation of the industry periodically throughout implementation, including the base, type, timing and level of tax.
28. When determining changes to the level and type of tax, consider the four core strategies (public interest, legal actors, illicit market, and capture revenue) and specific policy goals (youth, public health, medical access) as the basis for those changes.
29. The state should engage the federal government on changing IRS rules that prohibit marijuana-related businesses from deducting normal business expenses from their federal taxes; this change will help responsible actors pay tax at whatever stage of production the state determines is best for public policy.
30. A successful tax system will raise the money needed to pay for the increased education, public health and enforcement costs associated with marijuana use and new regulations. However, this commission feels strongly that maximizing revenue—which would depend on higher levels of consumption - should not be the focus of cannabis tax policy.

Enforcing the new rules

31. Deploy a spectrum of enforcement tools appropriate to the offense, with clarity regarding state and local responsibilities using a) inspections and demands for correction for licensed entities that regularly comply with the law, recognizing the higher cost of compliance they have relative to the illicit market, b) civil enforcement tools of fines, suspensions and license revocations for entities that regularly fail to meet standards, c) alternatives to incarceration for low-level offenses in the illicit market, and d) the most serious criminal justice penalties for individuals who cultivate on public land, engage in large-scale trafficking, operate enterprises to sell to youth or engage in other violent or serious crime.
32. State law needs to clarify how enforcement responsibilities will be divided between state and local agencies.
33. Illegal sales by adults to minors, as well as illegal cultivation on public and private lands, must remain enforcement priorities.
34. Policymakers should consider alternatives to arrest and jail wherever possible for youth involved in marijuana sales.

Collecting Data

35. Conduct research and collect and analyze data on key indicators to make further, evidence-based decisions through the course of implementation.
36. Data collection should include demographic factors, such as race, age, income bracket, etc.
37. Data collection and research should cover a range of topics, with metrics and indicators aligned to the core strategies (for example, the size of the illicit market) and policy goals the state adopts (for example, youth, public health, etc.)
38. Research and data collection related to youth, public health and public safety should include marijuana as well as tobacco, alcohol, illegal drugs, abuse of prescription drugs, etc.
39. This research and monitoring function should be paid for from marijuana tax revenue.
40. The state should periodically publish reports of comprehensive data, with information about progress, successes and challenges of implementation and provide for public and stakeholder feedback for course corrections.

Using the new revenue

41. Revenue raised from marijuana taxes should be used to help further the public interest in achieving the policy goals directly associated with legalization. Governments should not view marijuana taxes as a potential source of general fund revenue. All investments should be evaluated for their impact on the desired goals.
42. The state must fund necessary programs to protect youth, including evidence-based education, prevention and treatment; and also universally available assistance to students in schools and community-based settings, for example Student Assistance Program.
43. Funding should be available from the outset for a vigorous public health effort to educate the public and provide health-based solutions and responses to problem use.
44. Funding should be provided for public safety, such as better research on impaired driving, and enforcement priorities, such as sales to minors and grows on public lands.
45. Funding should be provided to invest in communities with high levels of unemployment, high levels of crime, and large numbers of drug arrests to provide general job training and employment opportunities.

The rest of this chapter is devoted to exploring the tax and regulatory policy discussions of the Commission, which contributed to many of the above recommendations. They are grouped into the following seven categories:

- A. Defining the Marijuana Industry Structure
- B. Regulating Marijuana Cultivation and Processing
- C. Regulating Marijuana Marketing, Sales and Consumption
- D. Taxing Marijuana
- E. Enforcing the New Rules
- F. Data Collection and Monitoring
- G. Using The New Revenue from Marijuana

A. Defining the Marijuana Industry Structure

Scale and Integration

The comprehensive study by the RAND Corporation provides an explanation of the variety of choices relating to the basic structure of the industry. Indeed, the choice is not a binary choice between prohibition and unregulated legalization. There are many intermediary points in the spectrum even among legalization options. These range from state monopoly to public benefit or not-for-profit corporations, to small for-profit entities, to a for-profit industry with no limits to scale.

In evaluating these options relative to the specific conditions in California, a prudent approach is to take a middle course. Given the federal prohibition against marijuana, a state monopoly, whatever its virtues and drawbacks, would require many of its employees to systematically commit—and document that they had committed—federal felonies. Another public model allows local public authorities to participate in the market, similar to the quasi-municipal store that sells recreational cannabis in North Bonneville, Washington.

The Commission and many of the individuals it consulted had significant reservations about the other end of the continuum, namely a market dominated by large corporations that could exert increasing influence on the commercial and political process.

It is appropriate and probably wise for the state of California to adopt a path that limits the size and power—both economic and political—of any one entity in the marijuana industry. The experience of tobacco and alcohol control shows that large corporations with resources for political influence (legislative lobbying, campaign contributions, regulatory interference) and marketing muscle will promote widespread and heavy use to increase sales and profits. Legislative behavior in this context is often incongruent with public health goals.

In addition to limiting the scale of operations, it may be appropriate for the state to set limits on vertical integration, namely what different licenses the same entity can have in the supply chain; or horizontal integration, namely what other non-cannabis businesses in which a cannabis business can also participate.

There are many small players already in the marijuana market in California, and bringing these players into the fold of a legalization system is a valid goal, as is the goal of spreading the economic opportunities and benefits of a legal market. If that is the goal, it would be appropriate for the state to adopt laws or regulations that either encourage more small entities, or even go further, and limit the size of any individual actor involved in cultivation or sales in this market. This may have the effect of increasing the relative costs to produce and sell marijuana. It will also increase the costs of regulating and inspecting a system with many actors. This kind of industry structure would have some similarities to the so-called “craft beer” market where many small players (local microbreweries) exist at one end of the scale, and larger players (regional craft breweries) exist at the other end of the scale, with plenty of room in the market for a large spectrum of entities.

In evaluating these (industry structure) options relative to the specific conditions in California, a prudent approach is to take a middle course.

In addition to size, the state can consider whether to encourage or provide incentives in regulations for participants in this market to be nonprofit or public benefit corporations, but with these entities still taxed on their cultivation or sales. Such a model would be more akin to local credit unions than large statewide banks. Many medical marijuana dispensaries are currently established as nonprofit or public benefit corporations.

Regardless of what dominant form the industry takes, allowing individuals the right to grow their own cannabis and share it without financial profit would provide consumers another option and put some constraints on the power of corporate actors. Balanced against these benefits is the danger that some growers will also sell to the illicit market. Limits on the number of plants would reduce the risk of diversion to the illicit market, while larger grows can be addressed through other means.

In terms of vertical integration, some states are experimenting with a closed, vertically integrated system, such that a dispensary will have a set amount of area under cultivation, matching the amount of area to the amount of potential sales and tax paid. For instance, Colorado has adopted a “70/30 rule” that is still required in the medical marijuana system but was only temporarily required for the recreational system, which forces retailers to grow 70% of the marijuana they sell. This model treats each system of cultivator-retailer as a relatively closed system that has its production, sales and taxes measured. Many of the current collectives and cooperatives in the medical marijuana market operate in this manner.

Criticism of such a system includes a concern that these entities are poorly run without accountability or that in the long term it may give too much power to single entities. For example, alcohol regulation clearly separates manufacturer, distributor and retailer, with few exceptions. Prohibiting all vertical integration would have the effect of breaking up some current responsible players in the medical marijuana industry who engage in cultivation and sales, while requiring vertical integration of cultivation and sales could force large numbers of small incumbent growers into rushed and perhaps unwanted “shotgun marriages” with retailers.

In the area of horizontal integration, the question arises of what other products cultivators can grow or wholesalers and retailers can sell beyond cannabis. Some argue that at a retail level, on-site consumption of marijuana should be permitted in adult-only facilities that also sell food. Others are concerned about the simultaneous consumption specifically of alcohol and marijuana. These issues will be discussed later in the discussion of licensing and later in retail sales.

In evaluating these options, policymakers and voters must consider the tradeoffs inherent in these options. If the policy goal is to promote market access, so as to spread the economic opportunities in this market to a larger number of actors and to reduce the concentration of power, then an industry structure that encourages more small players will be beneficial. Such a system will probably have higher prices, greater costs of regulation and more potential locations for diversion along the supply chain.

Licensing and Training

Participants in this industry should meet high standards of licensing and training.

Licensing should apply to any entity that seeks to participate in the marijuana industry, which can include the following:

- cultivators who grow cannabis, harvest it and process it
- distributors and wholesalers, who may also be involved in processing, packaging, labeling in bulk or for individual sale
- manufacturers who make specific products for retail sale
- retailers who sell to individuals
- transporters who are responsible for delivery between any two points in the system, including to individuals through delivery services, if applicable
- suppliers of seeds, cannabis agricultural products or products and supplies
- product testing, cannabis technology vendors, third-party certifiers, training providers and any other entities involved in supply chain monitoring, product safety testing or employee training

The section on testing and supply chain management, which relates to regulation of cultivation and retail sales, addresses the possibility of using technology to monitor the flow of supply through each stage of legal licensing, providing real-time statewide information to regulators.

Decisions need to be made as to 1) how many licenses an individual or entity can hold in any one stage or across multiple stages of the supply chain, 2) how many licenses will be given at any stage, and whether the industry will have a “choke point” or “hour glass” structure through which most of the supply must flow, 3) how much commerce can be conducted on each license, 4) the extent to which a licensee in that stage can be involved in both medical and adult use of marijuana to the extent a distinction remains, 5) whether licensees in any one stage can be involved in another industry or product.

Licensing fees should be reasonable to provide for the cost of certification and oversight, and not be so onerous as to limit participation in the industry to only those with large amounts of capital. Further, if license fees are too high, it will be a further reason for current players who wish to comply with regulations to remain in the illicit market. The temporary or permanent loss of such a license would be

among the available enforcement sanctions available to policymakers and government. It would be appropriate for state or local government to evaluate potential licensees based on their qualifications to participate and their commitment to comply with the law.

Beyond licensing the entities and organizations in the industry, policymakers should consider licensing and workforce training requirements for the individuals involved in the industry as workers. This agricultural industry will not be like others. It must establish public trust in its operation, handle a high-value crop, and ensure that its harvest is not diverted to the illicit market. For these reasons, consideration of employee licensing and workforce training in cultivation is appropriate. Likewise, this retail industry will not be like others. The employees in retail establishments could be licensed and trained in the health impacts of cannabis, the risk factors of heavy use, the critical priority of limiting youth access, and the consequences of breaking these rules. These measures would be intended to regulate cannabis, in a sense, better than alcohol or tobacco, which do not face similar requirements.

To ensure access, any individual requirement could be provided through apprenticeships concurrent to paid employment, rather than just as an educational requirement before employment. Any such requirements may also need to be phased in over time, rather than required at the outset.

The requirement of business and individual licensing also provides an additional tool for civil enforcement: the potential to levy fees and fines, pursue unfair business or competition laws, collect taxes and the potential to revoke licenses for entities and individuals who do not play by the rules. It provides a tool beyond criminal sanctions, which should be reserved to the extent possible for serious, repeated or large-scale offenses in this new industry.

Beyond licensing the entities and organizations in the industry, policymakers should consider licensing and workforce training requirements for the individuals involved in the industry as workers.

Medical Marijuana

The Blue Ribbon Commission was not established to evaluate the benefits or limits of marijuana as medicine generally or for specific conditions. California voters made the decision to legalize medical marijuana 20 years ago and scientists continue to research these medical benefits and limits with many doctors giving recommendations to patients for its use. Many other states have followed California in legalizing medical marijuana, but the federal government does not recognize marijuana as medicine. Even then, marijuana is very different from the traditional drugs the FDA regulates, which are made up of just one or a few compounds.

In this context, a major public policy question is how the legal recreational marijuana market would work alongside the medical marijuana market. And to the extent that any distinction is maintained that provides a benefit for medical marijuana compared to other adult uses of marijuana, attention needs to be paid to the criteria based on which marijuana can be used for medicine, which in turn requires evidence and

research to guide doctors, patients and policymakers. In California’s current medical marijuana system, patients with serious and legitimate medical needs coexist with adult users with medical cards whose main use of marijuana is recreational.

The experience of the State of Washington, which had a very loosely regulated medical cannabis system prior to the legalization of recreational use, is important for California to consider. The newly legal recreational system competes for customers with the medical system, where those users may pay no excise tax and thus are unlikely to move over to the recreational system.

Ultimately, California will have to consider whether to treat recreational and medical marijuana the same or differently.

In an attempt to reconcile the two systems, earlier this year, state lawmakers in Washington effectively consolidated the medical and recreational systems, after concerns that a regulated and taxed recreational market could not effectively function alongside the existing medical market Washington had created.

California’s medical system is also unregulated at the state level, with a patchwork of differing local regulations from county to county and from city to city. The success of a legal recreational approach in California is necessarily intertwined with the nature of its existing medical marijuana system. As of this writing, bills proposed in the California legislature seek to establish a statewide regulatory framework for medical cannabis.

Ultimately, California will have to consider whether to treat recreational and medical marijuana the same or differently. Some issues are likely to be the same – for example, no driver should get behind the wheel of a car while impaired, regardless of the reason for consuming marijuana. Other policy issues will require specific attention, as illustrated in *Table 1*.

Table 1: Regulatory Decisions of Medical and Recreational Marijuana

Function	Medical-Recreational Same for that Function	Medical-Recreational Separate for that Function
Regulatory Oversight	Same regulatory entities develop and oversee rules for all uses, including for medical and recreational uses.	Different regulatory entities develop and maintain rules for unique systems.
Cultivation, Manufacturing, Distribution, etc.	Same entities can cultivate, process, manufacture, distribute, test, or otherwise supply products for both the medical and adult-use market.	Different entities would need to be licensed to specifically provide that specific stage for medical and adult- use markets.
Retail Stores	Same retailer can sell a variety of products to both medical and adult- use customer.	Totally separate retailers, some for medical only, and some for recreational only, with no overlap.
Customer	Customers for medical and recreational treated the same, requirement to show ID to establish 21 years of age, no medical card required. Patients aged 18-21 would require a medical card for specific medical conditions.	Medical patients continue with valid medical cards. May need to tighten standards to obtain the medical card. Recreational users show ID only to establish 21 years or older.
Plants and Products	Same range of products available for medical or recreational use. Same high level of quality testing and labeling for product safety and content.	Encourage plant biodiversity and require products that have stronger therapeutic or medical benefits to the extent possible; stricter testing, quality control and labeling for medical products.
Tax Rate	Same taxes, both excise and sales, charged for marijuana regardless of whether consumer is medical or recreational.	Higher taxes charged either for recreational customers, recreational retail stores, or, if possible, for products intended for recreational use. Or a discount on taxes could be available for qualified medical patients with serious medical need, could means test based on Medi-Cal.
Who is Allowed to Discuss Possible Health Benefits	All retail workers trained and licensed for both medical and recreational sales and are allowed to discuss possible health benefits with customers/patients up to the same limit, recognizing these employees are not doctors or pharmacists.	Only specially trained and licensed professionals allowed to discuss possible medical or health benefits in the retail sales facility up to the limit allowable for employees who are not doctors or pharmacists; all other retail sales staff prohibited from doing so.

Policymakers can pick:

1) Unitary System: All policy choices completely merge the two markets into one and treat them the same.

This has the advantage that state and local governments have to establish only one—rather than two—legal systems, while they also work to limit the illicit market. Legal actors in the market can reach the entire market of both recreational and medical users, which would help them offset the costs of compliance with regulations and better compete against the illicit market. A possible drawback is the potential for medical patients to now pay additional excise taxes, although this could be offset if there is a comparable drop in prices, such that the after-tax price before and after is similar to what it is now without an excise tax.

Another drawback to a unitary system is the potential for the larger recreational market to drown out the development and marketing of products with medical and therapeutic benefits. That could be offset with strategies outside the marijuana marketplace: 1) investments in scientific research into the medical benefits and limits of marijuana for a variety of medical conditions, age groups, etc. and 2) education and dissemination of information to doctors about those medical benefits and limits so they can make better informed recommendations to patients that match the labeling requirements for all cannabis products (product type, chemical content, dosage, etc.) leaving the customer to only need assistance in the retail store to find that type of product, without further medical advice needed in the retail store.

2) Completely Separate Systems: All policy choices to maintain complete separation of medical and adult use from seed to sale.

This model ensures that those patients with valid medical needs receive different, specialized products and services. The issue of 18-21 year olds with valid medical need would be addressed; they would pick up their medicine at the same retailers with adults 21 and over that also have medical need. This model does risk increasing the costs both for regulators and for cultivators and retailers because they could only work on one side of the industry or the other. If the medical products are subject to stronger testing requirements, and have a more limited market size and customer base to spread their fixed costs, those products may well become more expensive—potentially much more expensive—because of the underlying business costs, even if the tax rate is lower than recreational. In this case, some medical users would likely turn to the adult use retailers anyway, which will still have tested and labeled products for basic consumer safety needs, potentially leaving the medical retailers with even fewer customers.

3) Hybrid System(s): Some policy choices merged and some separated.

Starting with a unitary system where all functions are merged, perhaps the first accommodation of a separate function would be how to provide medical marijuana to patients with valid medical needs between the ages of 18-21. Consideration should be given as to whether stricter controls for access to

medical cards would be needed for 18-21 year olds than current policy. The reality is that these young adults, who are not minors, can currently access marijuana through either the medical or illicit market.

Policymakers could also mix and match additional functions, with a dizzying number of combinations. For example, the same regulatory agency could oversee both systems (the FDA regulates certain aspects of both food and drug regulation), and cultivators could grow cannabis for either market. Retailers could be the same, but the employees who sell could be differently trained and licensed within the same retail facility.

The reality is that young adults, who are not minors, currently access marijuana through either the medical or illicit market.

Policymakers could merge almost all the functions to achieve the greatest efficiency but tax patients with serious medical needs at a lower rate than recreational users or offer them subsidized or reduced prices at the point of retail sale. This avoids the risk of a small separate medical system with higher operating costs passed on as higher prices to patients, despite a lower tax for patients. But it creates a new problem— incentivizing adults to still get medical marijuana cards. To combat the problem of adults abusing the medical system, the state could establish stronger requirements to obtain a medical card, which would impose a

burden on doctors and legitimate patients. Yet another option is to waive taxes or offer subsidized prices to patients with both a valid medical marijuana card and on Medi-Cal, ensuring that subsidies are going only to those with financial need.

These questions have to be asked: Does the benefit of a lower tax for patients justify the burden to patients and doctors posed by stricter requirements for medical cards in order to keep recreational users out of the less taxed medical marijuana system? Or, in an effort to avoid that burden on patients and doctors, is the benefit of a lower tax for everyone applied equally worth the reduction in tax revenue? Could a smaller medical industry provide competitive prices for unique products and services relative to the legal adult-use market, regardless of tax? What other unique issues face patients who need medicine, as compared to other adult users who choose marijuana for recreational purposes?

These policy decisions need to be made and their impacts monitored, with flexibility built in to the new rules so that they can be adjusted in response to lessons learned. California can also learn from lessons in Washington and Colorado, with the former integrating medical and adult use, and the latter maintaining separate systems.

Regardless of how the two systems are structured, these five guidelines should be considered:

- 1) **Research** into medical marijuana benefits and its limits in treating various medical conditions
- 2) **Information** provided to doctors and patients from reliable sources about those medical benefits and limits
- 3) **Products** with medical and therapeutic value, as well as plants bred for those purposes
- 4) **Affordability** for patients with true medical needs relative to current costs, taking into consideration both the underlying product cost and the excise taxes that are imposed
- 5) **Access** for patients, including the seriously ill, with relative convenience and in establishments respectful of their needs.²⁴

The first of these points—research—deserves more discussion.²⁵ Given its number of universities and medical centers, California itself can support further research into the medical benefits and limits of marijuana for a range of medical conditions. Ultimately, the federal government may consider the medical benefits and limits of marijuana as well. One challenge in the long term is that cannabis is a plant, made up of many chemical compounds beyond just THC or CBD, whereas the FDA traditionally approves prescription drugs that are made up of only one or just a handful of compounds.

Given the number of universities and medical centers, California itself can support further research into the medical benefits and limits of marijuana for a range of medical conditions.

It should be noted that in every gym, there are people who exercise for medical reasons (e.g., rehabilitating after an injury) and people who exercise because they enjoy it or want to improve their appearance. In every grocery store there are people buying the same products because they like the taste, and because they expect a health benefit. It is not therefore clear that there needs to be an entirely distinct medical and recreational sales system for cannabis; the costs of an entirely separate system do not seem to be justified relative to the benefits. However, a completely unitary system for adults aged 21 and over, ignores 18-to-21-year-old medical patients with legitimate need. It also leaves the seriously ill to fend for themselves in a market that will likely tilt toward a larger customer base of recreational users seeking intoxication. Invariably, even a system merged in some functions will need to maintain unique elements to meet the needs of patients.

²⁴ For additional information from a patient advocate perspective on the regulation of medical marijuana alongside adult use, consult this policy brief from Americans for Safe Access: https://american-safe-access.s3.amazonaws.com/Hunter/Med_v_Rec_rev1.pdf

²⁵ For additional information on the perspective of doctors related to marijuana regulation, please see this 2011 policy brief “Cannabis and the Regulatory Void” from the California Medical Association: https://www.safeandsmartpolicy.org/wp-content/uploads/2015/04/CMA_Cannabis_TAC_White_Paper.pdf

Local and State Regulation

Throughout this discussion of policy options, consideration needs to be given to the extent to which state law drives the process, and the extent to which local regulation is permitted. Business entities involved in the marijuana industry should probably be required to hold both state licenses and local permits in the jurisdiction in which the business operates, similar to many other industries. In this instance, in order to comply with Department of Justice requirements, state oversight and licensing is a necessary component. This interplay between state and local regulation can exist across a spectrum:

- State rules *preempting* any further local rules
- State rules *permitting* further local rules (whether those rules are more permissive or restrictive)
- State rules permitting *local opt out* (banning a certain stage of the marijuana industry altogether such as cultivation, retail sale, whether by a vote of a legislative body or the requirement of a vote by local citizens)
- State rules providing *parameters* within which local government can act

Through the course of the public phase of the Blue Ribbon Commission, it has been made clear that some degree of flexibility for local government in marijuana policy and enforcement is necessary. The experience of tobacco and alcohol regulation points to the need to authorize local government to enact measures responsive to community public health, safety and economic development concerns. In these industries, state preemption of local laws was often used to maintain low levels of regulation and enforcement, by preventing local government from enacting stronger regulations. The ability of local government to adopt innovative policies to control over-consumption through retail licensing laws is important in any marijuana regulatory regime. Many industries exercise more power at the state legislative and regulatory level than they can in local government.

At the same time, many residents who participated in the Blue Ribbon Commission spoke with great frustration about their local government's adoption of de facto bans on medical marijuana cultivation or sales. They look to uniform statewide rules that are consistent and reliable throughout the state.

Native American Tribes

California is a state with a large number of Native American tribes, each of which has sovereignty in many aspects of its operations, with some areas subject to federal law and in some cases subject also to state law. The role of tribal lands comes into play in 1) cultivation, 2) on-site consumption at the point of retail sale, 3) purchase for transport to homes outside tribal lands, 4) tax collection and more. Some tribes operate facilities such as casinos, including in urban areas, so this is an urban and rural issue.

Late in 2014, the federal government announced that the same Department of Justice guidelines applicable to states with regard to marijuana regulation and enforcement are applicable to Native American tribes. Because of the complex nature of both federal-state preemption, and federal-state-tribal relationships, it may be that Native American tribes in California can proceed even now with medical and/or adult recreational marijuana cultivation or sale, even without any state approval or further state legalization. If California takes the step of legalizing marijuana for adult use, it certainly affects the chances that Native American tribes would do so as well, and it would not be clear if the tribes would be subject to local and state regulation. Legislators and/or those crafting a ballot initiative should consider explicitly addressing the unique needs and legal status of the state's many tribes when drafting these new laws and regulations. A further question is whether each tribe would be subject to the federal guidelines individually, while being denied the ability to participate in the rest of the state market. The Blue Ribbon Commission is not offering a legal opinion on these questions, but identifying them as issues for consideration.

Path to Entry

One of the core issues that needs to be addressed is who can work in or own licenses in this new industry, and whether previous criminal records should be a bar to entry. A variety of the core strategies of legalization and a variety of public policy goals come into play here.

Many current cultivators or sellers of marijuana have prior criminal convictions, while others do not. If a strategy of legalization is to bring current participants in the illicit market who are willing to comply with regulations into the legal market, then categorical exclusions of people who have in the past or are currently in the illicit market would be counterproductive, leaving many to continue working in the illicit market. Such categorical exclusions would also exacerbate racial disparities given past disparities in marijuana enforcement. For these reasons, categorical exclusions that are too broad, and that overly rely on past convictions as predictors of future behavior, should not be considered.

Important goals—such as those related to youth, public safety, consumer safety and many others—require the new industry to be composed of people who will uphold the law and require that there be consequences for those who do not. A core public safety goal is to ensure that the legal market does not act as a cover for illegal activity. Everything from diversion from the legal market, sales to youth, and tax evasion are ways licensees could violate the law.

There are several approaches available to strike the right balance in this area. To the extent that past offenses should be considered, one possible approach is to limit exclusions to serious crimes unrelated to marijuana where a specific, valid risk or concern exists. Within marijuana or drug-related offenses, consideration could be given to the nature of the offense: how serious the offense was, how long ago the person was convicted, etc.

In addition, failure to participate in or complete training and licensing requirements is an obvious reason to exclude an individual from the legal market. And any concern about their potential to divert product

to the illicit market or to sell to youth must be addressed through effective oversight of the supply chain and effective enforcement of preventing sales to minors. The threat of and actual loss of a license in the marijuana industry based on failure to follow the law and regulations is yet another tool to ensure compliance.

B. Regulating Marijuana Cultivation and Processing

Cultivation for Personal Consumption

Growing cannabis for personal consumption is an important topic, but it is relatively self-contained so we will address it on its own first, before going into the main discussion on cultivation.

After the passage of Proposition 215, Senate Bill 420 established certain rules for the medical marijuana system including a state limit of 6 mature and 12 immature plants, and possession of up to 8 ounces of marijuana, with certain exceptions. A similar model could be established to provide statewide guidelines for cultivation for personal use. Counties could provide additional flexibility or rules, but since cultivation for personal use is not a business or commercial activity, local outright bans of personal cultivation may not be appropriate, especially for medical use. If an individual exceeds these limits, for instance with a large unlicensed grow, law enforcement can use these guidelines to remedy the problem.

Matching Supply and Legal Demand

The major challenge for regulating marijuana cultivation is the sheer size and scope of California's cannabis production. California is the fruit basket of America, a leader in the cultivation and export of dozens of varieties of fruits, vegetables, nuts, wine, dairy and meat products. Marijuana is not an exception. While firm figures are not available, every analyst we consulted believes that a significant portion of the marijuana grown in California is sold out-of-state (and that a meaningful part of the nation's marijuana supply is grown in California). This is a critically important point, because it means that there is currently more supply than there is demand in the legal in-state market.

This is important first and foremost because California likely does not want to invite a new gold rush of people into the state to cultivate marijuana, as happened in counties like Santa Cruz after fairly permissive policies were passed before regulatory capacity was in place. While it is not likely legal to exclude people from other parts of the country *permanently* from the legal market in California, the message must be clear that California does not need to add to the supply of marijuana. Residency requirements in Colorado and Washington have not been challenged and continue to operate unscathed (aggrieved nonresidents would need a court to grant federal constitutional protection for commerce that is deemed federally illegal). While a residency period would likely run afoul of the federal constitution eventually, some consideration should be given to ways to slow down the ability of out-of-state residents to enter the market.

Because of the limited demand in the market for a legal supply, it is important that the amount of cannabis supplied be available to a reasonably large number of smaller producers. Current cannabis cultivators who are willing to be licensed and abide by regulations and who have responsible track records should be given due consideration in a market where legal supply exceeds legal demand. Probably a bigger issue than out-of-state migration into California will be current California farmers who cultivate other crops that may want to become licensed to cultivate marijuana, adding further to a possible oversupply of cannabis in the market.

A valid policy approach is to try to maintain a price for legal, regulated marijuana that can compete with the illegal market but that does not drop dramatically to the point that it helps foster overuse and its associated public health harms. If the state is successful in adopting rules and tax policies that do not result in a collapse in price, even small farmers should be able to operate at a scale and with a profit margin to succeed economically.

One challenge for how to manage supply is the interaction of state and local regulation, and the interaction of state and local tax revenue. If localities benefit from taxes imposed at the point of cultivation, some rural counties may want to encourage a large amount of cultivation, at a level greater than the state market as a whole can bear from that county. On the other hand, if taxes are imposed only at the point of sale, areas where production flourishes may lose out on any significant revenue gains while bearing the burden of production. Consideration must be given as to what a fair division of tax revenue should look like when taking into account the differences of how localities will participate in this industry. Some will mainly cultivate and produce, some will mainly sell at retail, and some will opt out entirely. Any tax scheme among these varying jurisdictions will require deliberation and balance.

One approach is to allow fluctuations in price and healthy business competition to act as drivers in balancing supply and demand in the market. But, this method poses the risk of a sharp price drop, reduction in state revenue (if taxes are tied to retail price), and greater risk of diversion toward out-of-state sales. Another approach is for the state to determine a level of cultivation that would meet the demand in California (by weight of product or square footage of cultivation area), allocate a certain amount to counties that enter the regulated cultivation market and provide licenses to cultivators meeting the total state and county cultivation targets. The level of production can have a flexible cap set by a regulatory agency that adjusts depending on demand in the legal market and efforts to reduce the illicit market. We can look to Colorado as an example of a state that has set and is managing production caps, as well as to other models of agricultural regulation, where the government has a hand in making sure that supply and demand of some commodities remain in relative balance over time in order to avoid rapid price changes.

Land Use, Water and Wildlife

One of the critical challenges facing regions with illicit cultivation is the impact on the environment. Land use issues are an important consideration in marijuana policy, both in cultivation and in sales.²⁶ There are

²⁶ For more information on land use and marijuana regulation as they pertain to both cultivation and sales, please see these articles by Santa Clara Law student Laurence Weiss: <https://druglawandpolicy.wordpress.com/2015/03/04/the-fight-for-the-future-of-commercial-marijuana-land-use/> <https://druglawandpolicy.wordpress.com/2015/05/09/cannabis-land-use-regulation-in-the-warm-california-sun-santa-cruz/>

laws already in place at the state and local levels against pollution, agricultural runoff, diversion of streams and the like. Whether new laws are needed or not for marijuana cultivation specifically, it is clear that existing environmental laws must be enforced. State and local agencies responsible for this enforcement should have the authority and mandate to do so with marijuana cultivation as well.

Under a legalization and regulation system, licensed cultivators should be able to access various permits to better comply with water, land use, grading, and other environmental considerations, the same as people growing other legal crops. Failure to comply with environmental and water rules could be grounds for loss of such a license. A portion of tax revenue could be designated to environmental restoration of sensitive habitats and watersheds, especially those affected by cannabis cultivation.

One challenge for regulating cultivation to mitigate environmental harm is that a portion of the product will not have a legal destination in California; even if the grower wants to comply with environmental laws and local permits, they may not be able to get a state license. Unlicensed growers who blatantly disregard environmental rules and those growers who continue to operate illegally on public lands or trespass on private lands pose a different challenge. These unscrupulous cultivators should be the priority for law enforcement.

Worker Protection and Safety

The workforce involved in marijuana cultivation and processing should be afforded the same protections and rights as other workers in the agriculture and processing industries. This includes the right to collective bargaining, as well as other worker safety protections. Once again, consideration should be given not only to these issues in the regulated industry, but also to make those involved in the illicit market that abuse workers an enforcement priority.

Licensing requirements are commonplace in many industries, often coupled with a formal requirement of training or a specific college or professional degree. Apprenticeships are a useful model of providing that training while an employee is working and receiving compensation. If the state adopts licensing requirements for individual employees, the requirements should balance the needed training requirements without creating undue barriers that drive large numbers of people to remain working in the illicit market.

Testing and Monitoring the Supply Chain

Cultivation is the first step in supply chain management. After cultivation comes processing, which is an intensive part of the cannabis process. Testing of cannabis—for potency and also to ensure that it is free of contaminants, pesticides and mold—should occur near this point in the supply chain before any products reach the retail level. Cannabis in many forms may be processed for sale at this point and distributed in bulk. Technology can be used to begin the monitoring of all cannabis supplies as they pass through the supply chain, from licensed entity to licensed entity to the point of legal retail sale. Comparable models from other industries include the tracking of produce and meat through the supply

chain to ensure product safety and for the purpose of product recalls. Colorado, Washington and other states are already experimenting with ways to provide testing and technology that enables regulators to monitor the marijuana supply chain. Key goals at this stage are to ensure that 1) illegally cultivated cannabis does not enter the legal supply chain, 2) licensed cannabis cultivation is not diverted to the illegal market, both in state or out-of-state, and 3) only product that is tested for safety and cannabinoid content proceeds to the retail market.²⁷

Consideration should be given as to when in the supply chain manufactured, branded or packaged products can be produced; whether on site at the point of cultivation, in distribution centers or at the point of retail sale.

Movement along the supply chain from cannabis cultivation to retail sales may include an intermediary stage with a wholesaler or distributor. For example, in the case of alcohol regulation, a three-tier system of producer, distributor and retailer separates those functions with only a few exceptions allowed. Regardless of industry structure or licensing scheme, testing and oversight of the entire supply chain should exist from the beginning of cultivation through to the final point of sale. The technology monitoring the supply chain should record transfers from cultivators or processors to retailers, and then the further sale to and tax collection from customers. Possible further testing on samples at the retail point of sale can be used to confirm cannabinoid content, accurate labeling, as well as to confirm that the product remains free of contamination or other unwanted adulteration.

C. Regulating Marijuana Marketing, Sales and Consumption

Regulating What Products Can Be Sold: Smokable, Edible and Beyond

Cannabis is an evolving plant, and with it come ever-evolving products. Innovations in breeding are leading to new strains of cannabis. Innovations in processing are yielding new concentrates and forms of marijuana. Innovations in production are yielding greater varieties of products such as new types of edibles. Just as policymakers can regulate the level of alcohol in beer, wine and spirits (which is easier to do because ethyl alcohol is the only active ingredient in alcoholic drinks and it is readily measured), it is appropriate for the state to have some oversight in relation to what products can legally be brought to market, including possible limits on THC content, limits on products such as concentrates, and limits on different forms of edibles.

Regardless, all products should have consistent labeling, especially in regards to dosage and concentrations of key cannabinoids. Experience from tobacco control can be useful in this area, where products carry large warning labels of possible health risks. As was adopted in tobacco restrictions for the cartoon character, Joe Camel, no product should be packaged in a way that would especially appeal to children or be confused by children as a product meant for them. One way to avoid attracting the attention of young people is to sell products in plain packaging in order to reduce their visual appeal.

²⁷ For additional information on testing and analysis of marijuana, please consult resources from the state of Washington: http://liq.wa.gov/marijuana/botec_reports

Policymakers should consider regulations for the different types of marijuana products. The most common product is dried cannabis flower intended for smoking, which comes with the associated health risks of smoking²⁸ in general. Policymakers should also anticipate “vaping,” whereby a concentrated extract of cannabis is vaporized and inhaled. Consumption of cannabis concentrates through various forms of vaporization is gaining favor in some segments of the market. Although current research has not led to a broad consensus, researchers are concerned about the health effects of vaping, whether from tobacco or marijuana, and continue to conduct various studies. Care must be applied to consider policies that regulate the new and innovative ways cannabis is being consumed.

Edible marijuana products (e.g., cannabis-infused baked goods or cannabis-infused drinks) have the advantage of not being inhaled as smoke into the lungs, as well as the related advantage of not causing secondhand smoke. But edibles come with a problem of their own—because metabolism of THC via digestion is slower than direct absorption into the blood via the lungs, it can take longer for the effect to be felt, causing some people to ingest a greater amount of THC than they intended. Edible products also carry the risk of being accidentally consumed by individuals (including children and adults) who did not intend to or should not consume marijuana at all, especially if the product resembles enticing food or candy. Strong guidelines on labeling should require clear information on cannabinoid content, dosage and timing for the onset and duration of effects. Consistent and accurate labeling, when combined with consultation by trained and licensed workers at the retail location, should help prevent over dosage and unintended consumption. Limiting the amount of THC within each separately sealed package is another option, as are other regulations on what products can be sold. Edibles could also be sold in tamper-proof or childproof packaging.

Where Marijuana Can Be Consumed

The following factors must be considered in regard to where marijuana can be consumed, including the product type and the variety of locations:

- Product type—is it smokable, edible, etc.
- Single family residence—issue of secondhand smoke, indoor or outdoor smoking
- Apartment—issue of ventilation systems, air circulation, rules on indoor smoking
- Renters and landlords—issue of lease agreements and general housing laws²⁹

28 For more information on the health effects of second hand smoke from tobacco and marijuana, please see this article by Matthew Springer and Stanton Glantz: <https://tobacco.ucsf.edu/marijuana-use-and-heart-disease-potential-effects-public-exposure-smoke>

29 For discussion of tenant-landlord issues, evictions and other issues related to marijuana consumption by tenants, see this article by Santa Clara Law student Ruby Renteria: <https://druglawandpolicy.wordpress.com/2015/05/22/medicated-patients-facing-eviction-because-most-landlords-are-not-pot-friendly/>

- Public housing—marijuana possession and consumption remain illegal under federal law, but landlords receiving Section 8 subsidy have discretion³⁰
- Vehicle—no consumption in any form by driver or passenger, similar to open-bottle laws
- Parks, open space, public space—subject to local and state rules
- Federal lands—consumption prohibited
- Hotels—California has many tourists who stay in hotels, motels, and alternative lodging like Airbnb
- Presence of children, youth and young adults—schools, colleges, dorms, playgrounds, etc.

There are complex issues related to on-site and off-site consumption of cannabis.³¹ This is illustrated by a concern in Colorado that the absence of legal places for novice consumers and tourists to smoke marijuana led many to consume edible marijuana products instead, which had stronger intoxication effects than they anticipated. Because of this unintended consequence, some have argued for on-site consumption as a way to provide more choices for responsible consumption.

But on-site consumption has drawbacks as well. One set of drawbacks relate to the consumer, who would feel the effect of the marijuana outside the safety and comfort of their home, and who may consume too much if the retailer is motivated to sell more product and increase use, as is sometimes the case with the sale of alcohol in bars.

Another issue is compliance with smoke-free laws to protect workers from exposure to smoke from the use of combustible marijuana in indoor spaces, which would be a serious health issue. Colorado law allows for some clubs where members pay dues and can smoke. California's current smoke-free laws also have exceptions where some businesses can allow on-site indoor smoking of tobacco (for example, businesses with fewer than five employees). Any consideration of marijuana smoking within California's smoke-free laws must consider the impact of secondhand smoke on workers.

Exposure to smoke from marijuana is harmful to health just as exposure to tobacco smoke is. If the state of California takes the step of legalizing recreational marijuana, the state's laws related to smoke-free indoor spaces, public smoking, and public consumption and intoxication from alcohol could be reviewed as possible guidelines in relation to public smoking or consumption of marijuana.

30 For an analysis of HUD guidelines on Section 8 housing, please see this article also by Santa Clara Law student Ruby Renteria:

<https://druglawandpolicy.wordpress.com/2015/03/18/hud-has-cleared-the-smoke-it-is-now-safe-for-landlords-and-public-housing-agencies-to-come-down/>

31 For a series of articles on on-site consumption, please consult these posts by Santa Clara Law student Phil Brody:

<https://druglawandpolicy.wordpress.com/author/pbrody2015/>

Workplace Considerations

Employers have the ability to set rules related to a drug-free workplace. Each employer can consider the unique factors facing their workplace, which can include issues like worker safety, hazardous situations, workers operating motor vehicles and equipment, workers in sensitive positions, etc. Many employers also have their own licensing requirements or consideration for compliance with federal rules, for example, the operation of large vehicles with special licensing requirements. Employers already must contend with a range of issues related to workers who come to work under the influence, consume drugs at work, or have substance abuse problems that extend to a number of substances including marijuana, alcohol, other illegal drugs, prescription drugs and more.

Employers should retain the ability to set their drug-free workplace policies and apply them fairly and equally among all their employees.

Employers should retain the ability to set their drug-free workplace policies and apply them fairly and equally among all their employees. Marijuana, however, poses a special challenge. It is a common drug and its use is widespread, similar to alcohol. THC remains in the system long after its effects have worn off. Also, alcohol is socially accepted, and some employers do not prohibit employees from having a beer at lunch, and the employer may even provide alcohol at work functions. In the absence of reliable tests of impairment, employers may want to retain the ability to enforce a drug-free workplace policy against an employee who may not be impaired but has THC present in their system. To medical marijuana users, such a policy is overly strict. Finding the right balance between employer and employee considerations in this area is important. Development of reliable tests of impairment will be important for workplace considerations, as it is for determining DUID.

Retail Licensing Laws

Local governments have considerable authority through zoning and land-use laws to regulate business entities within their jurisdiction. One of the regular concerns raised in the public forums of the Blue Ribbon Commission regarded the location siting and conduct of some current retailers in the medical marijuana industry who do not adhere to state or local laws or industry best practices. Public health and community development advocates who participated in the BRC hearings cited the concern that marijuana dispensaries are often sited/concentrated in poor communities and communities of color. These advocates noted that oftentimes, these same communities may also have a strong presence of other retailers selling tobacco or alcohol, while simultaneously lacking access to fresh food, drug addiction services, or job opportunities. Retailer density in poor communities and communities of color as it relates to tobacco and alcohol can shed light on potential risks for problem marijuana consumption.

Local governments, when issuing licenses to businesses that plan to sell marijuana, should consider these issues of equity in terms of siting cannabis businesses. Through their licensing authority, local

governments can limit the number of marijuana retailers, limit retailer density and require set distances from places like schools and parks.

While concerns were raised about overly permissive zoning, licensing and siting decisions, particularly in poor communities and communities of color, others in the BRC process, particularly from more rural counties, had the opposite concern: entire cities or counties that essentially opted out of any legal medical marijuana market, including personal cultivation. It may be appropriate for the state to set or incentivize some lower and upper limits on the presence and location of marijuana retailers through tax measures, regulations or other inducements. Local restrictions that directly or effectively ban the commercial market should be evaluated in relation to the extent to which they stimulate demand in illicit market.

Limits on Advertising and Marketing

Years of work by the tobacco control community have resulted in stronger limits on advertising for tobacco than for alcohol. Tobacco advertising restrictions began with radio and television in 1970. In 1998, after the settlement of a major lawsuit with tobacco companies, further restrictions were put in place that prohibited billboards, cartoon characters, event sponsorships and any other advertising that was particularly appealing to youth. The legal settlement, however, did not address advertising tobacco products in print, online and in retail stores, areas where tobacco companies increasingly concentrate their marketing expenditures, particularly after 1998. Alcohol has much more permissive rules for advertising, including broadcasting on programs such as sports events with large numbers of people under 21 watching. Pharmaceutical drugs are also widely advertised on television, on the Internet and in print publications.

Years of work by the tobacco control community have resulted in stronger limits on advertising for tobacco than for alcohol.

Because players in the marijuana industry currently operate at relatively small scales, it is unlikely that initial levels of advertising would lead to significant problems. Nevertheless, there are considerable benefits to limiting the advertising and marketing of marijuana, even if it may pose a challenge to marijuana retailers and consumers. Advertising rules could limit exposure to children and youth, and limit tactics that target young people, poor communities, communities of color, women and LGBTQ communities. More limited commercial advertising also allows for public messaging about safe and responsible use and health risks to reach the audience more effectively. Local or state policy could prohibit coupons, promotions, discounts, bulk sales and other enticing offers by retailers.

There are several available policy tools to limit advertising and marketing. The first, and perhaps most effective policy tool is shaping the industry's structure itself, specifically, creating an industry structure that works to limit the size and scale of any one actor. Without very large actors in the industry, few, if any, will have the resources for broadcast media advertising. This type of indirect limit on advertising rests on the government's ability to license and regulate the industry. While a trade association may band

together to advertise, its resources would likely be more limited than what a single large corporation could deploy.

A second approach is to limit in-store sales and marketing to only those retail locations or dispensaries where adults aged 21 and over can enter, and as discussed earlier, to limit what other non-cannabis products can be sold in these establishments so that adults enter with the sole purpose of purchasing cannabis. These choices can have the effect of preventing youth exposure to in-store advertising, and likewise that adults who were not intending to buy marijuana would not initiate a purchase due to point-of-sale marketing tactics.

The third tool is to adopt actual limits to advertising through legislation that meets constitutional standards.³² Because the federal government regulates broadcast media such as TV and radio, and because the Controlled Substances Act specifically bars advertising of a Schedule I controlled substance, marijuana advertising would not have federal constitutional protection. State constitutional protections might apply to some mediums of advertising (perhaps not those explicitly regulated by the federal government) and some types of restrictions, for example, those aimed at limiting exposure to youth. Whether and how state constitutional protections for this form of advertising would affect the ability of state and local government to regulate it in certain media requires further analysis.

The fourth policy tool is the denial of tax deductions for business advertising. Under section 280E of current income tax law, taxpayers cannot deduct the expenses of cannabis advertising on their federal returns. Similarly, individual taxpayers cannot now deduct those expenses on their California returns. There is no federal or state Constitutional right to deduct advertising or marketing expenses for any business, cannabis related or not. To be sure, denying state tax deductions would not eliminate advertising, but that approach would make it somewhat more costly. However, when legal operators are shouldering the costs of regulation, licensing and compliance, as well as other tax burdens, without the benefit of regular business tax deductions, such an additional burden at the outset may be too onerous.

A different but related approach is to limit the overall extent and types of marketing to adults, and in particular, to regulate sales practices that draw in new users (bundled sales for discount with other products, free offers with purchases of other products, etc.) or that may encourage regular or habitual use of marijuana (bulk discounts, coupons, loyalty points, etc.).

Limiting Sales and Diversion to Youth

California youth already have ready access to marijuana, as described in the Policy Brief of the Youth Education and Prevention Working Group. Likewise, the illicit selling of cannabis will continue at some level, even with enforcement and competition from a legal market. The issue of enforcement will be addressed in a subsequent section, including for the illicit market. A key component of regulating licensed retailers, however, will be to ensure that 1) the product is not diverted generally into illicit sales, and 2)

³² For a further discussion of advertising and state and federal constitutional issues, please see this article by Santa Clara Law student Jeff Madrak: <https://druglawandpolicy.wordpress.com/2015/03/30/building-big-marijuana-marketing-and-advertising-for-the-brave/>

the product is not sold, or resold, to youth. For this second objective, regulation and licensing of retailers, the threat of the loss of licenses and fines, workforce training requirements and other provisions will be needed to limit youth access. Limits on advertising and marketing, as well as restricting marijuana advertising in businesses youth can enter, must be given consideration. Retailers should be responsible for activity both on-site and in the immediate vicinity of their facilities. Customers can be notified of this important requirement and its consequence at the point of purchase. Illegal resale by adults to youth after the point of sale is more difficult to enforce through the retailer, and is addressed in the enforcement section.

D. Taxing Marijuana

The ability to tax cannabis is one of the main political reasons given to support recreational legalization. A successful tax system will need to raise money to pay for increased education, public health and enforcement costs associated with marijuana cultivation and use. However, this commission feels strongly that maximizing tax revenue should not be the focus of cannabis tax policy.

California will have to wrestle with when and how to tax marijuana. Each decision has trade-offs that must be considered by policymakers. Protecting youth and ensuring safe, healthy communities must be the guiding principles of any cannabis regulation, even if that means failing to maximize the potential for cannabis as a source of tax revenue.

While promising to fund other government programs with cannabis taxes may be a popular selling point for legalization proponents, we do not believe that making government dependent on cannabis taxes makes for sound public policy. Tax dependence can produce an alliance between government and corporations committed to maximizing sales and revenue. Furthermore, while the tax revenue may be noticeable and substantial, we do not expect tax revenue from cannabis to be so large as to make a dramatic impact on the state budget as a whole.

Yet it still remains that a logical and effective taxation system can help establish effective broader public policy. Regulators and decision makers should consider how to set up a tax scheme that will help them achieve the core goals of legalization policy that have been stated earlier in this report.

In drafting any taxation scheme, it is important to devise a plan that can be administered and enforced effectively. Tax policy can be the driving force for public policy only if it is effectively enforced, and effective enforcement will result only from systems that can be properly administered.

Tax and regulatory compliance should be simple to execute and formulated in a way that makes compliance desirable to market participants.³³

³³ For additional information and analysis of taxation, drawing lessons and applications from other California excise taxes on substances such as alcohol and tobacco, and products such as fuel, please see this paper by Santa Clara Law students Bethany Brass and Keri Gross prepared in consultation with members of the BRC and submitted to the Board of Equalization in June of 2015: https://druglawandpolicy.files.wordpress.com/2015/07/ca-cannabis-tax-options_written-by_b-brass-k-gross.pdf

HOW TO TAX: PRICE VS. WEIGHT VS. THC

Discussion of marijuana taxation is mainly about an excise tax, which is a specific tax on a product (as we have for alcohol, cigarettes, gasoline) that is above and beyond the standard sales tax charged on nearly all products. A key question is whether any excise taxes on legal marijuana should impose a constant amount based on weight (e.g., \$1/gram) or be a percentage of price, “ad valorem” (e.g., 15% of sale price). Alternatively, taxes could be based on the amount of THC, or perhaps other cannabinoids, sold.

An excise tax can be based on the quantity of cannabis sold. For example, the federal government charges an 18-cents-per-gallon excise tax that doesn’t change when the price of gasoline goes up or down. Similarly, California’s tire fee is \$1.75 per tire, regardless of price. In contrast, an ad valorem tax is charged as a percentage of the price paid. In California, for example, if a consumer buys an item on sale they get not only a lower price, they also pay less tax because the 7.5% state sales-tax rate is based on the lower price charged during the sale.³⁴

Price-based Taxes

Taxing by percentage of sale price seems easy and quick. This is the approach that Washington State has taken. Regulators need not worry about measuring the weight or potency of the product, which is important because these variables can change based on various factors during cultivation and processing.

But calculating marijuana taxes as a percentage of price creates the danger that taxes will be, at first, too high, and then later too low. Initial business start-up costs and possible shortages in supply can drive up the retail cannabis cost in the beginning, artificially creating more tax revenue. But then as businesses and the market mature and production costs go down, tax revenue will decrease. Taxes that are too high make prices for the legal market unattractive to consumers relative to the prices for the untaxed illicit market. This results in two negative effects: (1) lower actual tax collections, and (2) a continued illicit market.

In the short run, however, early supply shortages in the taxed legal market, combined with increased demand for taxed legal cannabis, could mean that the legal market will be able to sell all available supply at a price that consumers are willing to pay—a price that leaves cannabis companies with plenty of cash flow to stay comfortably in business. In this constrained-supply scenario, high taxes early on may, for a short time, create no problems.

In time however, businesses in the market will adapt. Efficiency, business experience and eliminating the need to hide from law enforcement will drive the industry’s costs down. When those efficiencies are reflected as cost savings in the price of marijuana, the price will fall, perhaps dramatically. The state

³⁴ For further discussion of the advantages and disadvantages of different types of tax and levels of tax, please see the Stanford Law School report, starting on page 44: https://www.law.stanford.edu/sites/default/files/publication/988796/doc/slspublic/SLS_Marijuana_Policy_Practicum_Report.pdf

revenue brought in by ad valorem taxes would shrink right along with it. There would also be no meaningful floor for the price of marijuana, and cheap marijuana could both attract more young people and problem users, and could lead to federal government intervention if criminals take advantage by distributing the cheap cannabis around the country. In addition, taxing based on price invites attempts to circumvent the tax, like employee discounts or “free” cannabis with non-cannabis purchase, in order to disguise the true price.

Another issue with price-based taxation is that prices can be hard to find or measure. That’s why Colorado’s original 15% price-based producer tax was converted to a weight base—so the state has something it can measure. In many cases, there is no actual producer price to tax. Colorado originally required producers to sell directly to consumers (forced vertical integration). When the producer is not a separate entity from the retailer, there is no “arm’s-length,” or actual, producer price. The absence of an arm’s-length market price caused the state to estimate an “average market rate” which it uses to compute a weight-based tax. This average market rate, adjusted every six months, applies even to sales between unrelated parties.

Weight-based taxes

A weight-based excise tax has the advantage of creating a kind of price floor under the market and guaranteeing at least some government revenue even in the event of a marijuana price collapse. Assessing tax on the basis of the weight sold raises potential arguments about when the weight should be assessed (e.g., at the farm gate, at the processor, at the retail outlet) and how to account for the fact that, as a harvested plant, marijuana will change in weight as it loses moisture.

Colorado’s de facto weight tax uses scales calibrated at the outset and then periodically adjusted by the Department of Agriculture. All commercial cannabis travels tax-paid, accompanied by shipping manifests, in bags of not more than one pound, with the state notified whenever transportation occurs.

A further challenge of a weight-based tax is that it could incentivize producers to make extremely high-potency products so as to reduce the amount of tax per unit of THC sold. With a single tax rate, an ounce of marijuana that has 15% THC would be taxed at the same level as an ounce of marijuana with only 5% THC. There may be advantages to avoiding a market filled with high THC cannabis products, just as there are advantages to alcoholic beverages being widely available at strengths lower than that of hard liquor: increased consumer choice and greater chance that people will establish non-dependent use patterns that do not harm their health.

A policy could compensate for this problem by setting a different tax rate for high potency products, similar to what is done for alcohol. In the first half of 2012, Colorado taxed trim (the leaves and clippings of cannabis) at 12 cents per gram, while taxing dried flower for smoking at 66 cents per gram. These differential rates distinguish between the potent flowers of the plant that contain higher concentrations of THC from the less potent leaves, which are typically processed into concentrates and extracts used for other products like edibles. Similarly, taxing concentrates differently from the

raw plant material could be used to alter consumer behavior by incentivizing the consumption of one form of marijuana over another.

A key issue for a weight-based tax, or any tax or fee expressed in dollar terms, is indexing for inflation. Federal alcohol taxes have been cut by over 50%, in real terms, since the last rate change, because they are not adjusted for inflation over time. The choice to adjust for inflation any cannabis tax or fee expressed in dollar terms should be made deliberately and not overlooked.

THC-based taxes

Targeting a tax directly at intoxication might seem a theoretical best practice. Some have suggested taxing THC, the primary intoxicant, directly—or adjusting the tax down for the presence of CBD, which may have a mitigating effect on THC. Indeed, measuring THC in homogeneous concentrates, before incorporation into edibles and other products, might yield reliable and replicable results. But measuring THC in raw plant material, like dried flower, is more problematic. These products are not homogeneous. Broad-brush test results, accurate enough to warn or inform consumers, may not be accurate enough for taxation. In that way, unprocessed cannabis may be like cigarette tobacco, another non-homogeneous product, where taxes are not based on tar or nicotine, but more crudely on weight.

There was some skepticism expressed at the public forums about the ability to tie taxes to specific levels of potency, due primarily to the challenges of measuring a variety of cannabinoids in plant material. And no state has so far pursued this route because of these challenges. However, given the other policy goals and options described in this report (consumer safety, proper labeling, supply-chain control), basing some level of taxes on some measure of potency (for example, merely distinguishing high potency from low potency) could be within reach. When further capacity for testing, supply-chain management and labeling are in place, taxes related to potency could become more practical.

Tax Bases Over Time

The Commission emphasizes the view that legalization is a *process* that will take time, not a one-time fix with all rules in place from the beginning and static in perpetuity. The state may benefit from implementing tax rules in phases or steps. Steps in the process may reflect and co-exist with an evolving and maturing marketplace. For instance, a low square footage tax or fee could be imposed at the outset of legal production. Shortly thereafter, the very first commercial sales might well bear a modest ad valorem excise tax. But the state could decide initially to delay imposition of weight-based or potency-based taxes for some period of time. There are two reasons to delay or phase in these taxes: first, to give the legal market time to compete with the illicit market, and second, to give the Board of Equalization time to create the rules and structure to collect the tax.

Other Revenue Sources

While taxation tools based on price, weight, or potency, are likely to contribute most to the goal of adequate revenue generation, other taxation tools may better serve other policy goals. For example, licensing fees are a standard adjunct to any regulatory system.

A cannabis tax or fee based on square footage of plants grown or “canopy” is only moderately difficult to set up, and its administration overlaps with regulatory oversight. Decisions about what square footage to count and whether to collect annually or per harvest cycle would be required. Such a tax would allow state or local agencies to collect the tax up front, thus providing initial funds to support the rollout of the legalized cannabis system. Alternatively, a low-level per plant tax or fee could also be administered with the development of regulatory capacity. For a short time, Mendocino County imposed a per-plant fee, with the Sheriff’s office selling zip-ties to be used as tags for legal medical cannabis plants, until the federal government dismantled this system. Yet another alternative is a tax on the electricity used by indoor cultivators, like the one collected by the City of Arcata, which might be adopted by other localities if not the State.

WHEN TO TAX

Cannabis taxes can be assessed during at least two different stages of commerce: cultivation or retail sales. If a separate distribution or processing stage is required, taxes can be assessed there as well. States that have already passed legalization measures have set up different methods of taxing cannabis—each with their own advantages and disadvantages.

Taxes that are easiest to calculate, monitor and collect, for example, may not be the best for public health. Also, because marijuana prices and marijuana consumption will change over time, certain types of taxes may offer more stable tax revenue and consistent after-tax prices than others.

When Washington State originally passed Initiative 502, it taxed marijuana at all three stages of the supply chain, levying a 25% excise tax at three key points: when producers sell to processors, when processors sell to retailers, and when retailers sell to consumers—though processors who merged with producers escaped one of those tax stages. These taxes were arguably included in federal taxable income but not deductible on federal income tax returns under Section 280E of the Internal Revenue Code. Businesses complained the tax structure drove up prices and did not allow retail stores to compete with the illicit market.

In an attempt to remedy this issue, earlier this year Washington opted to replace the three-tiered tax system with a one-time excise tax of 37% on retail sales of both medical and non-medical cannabis. This new tax solves the 280E problem by keeping the state tax separate from federal taxable income for businesses and shifting it to consumers; at the same time, the new tax aims to keep state revenue relatively

steady in the short term. This change in tax policy cut costs for businesses, without deliberately cutting state tax receipts.

As of the writing of this report, Oregon was planning to replace its initiative's weight-based tax on producers with an ad valorem retail tax based on a percentage of the sale price. That change would more readily allow tax exemption for medical cannabis, which could be identified at the point of sale.

Colorado taxes recreational cannabis from the licensed and regulated market at the point of production, with a de facto weight tax. In addition, Colorado adds a 10% tax on recreational cannabis at the retail level as well. (Both medical and non-medical cannabis bear Colorado's standard 2.9% retail sales tax.)

In mature industries, collection of excise taxes typically follows two guidelines. First, taxes are collected as early as possible in the supply chain. Early identification of legal product lets law enforcement identify contraband. Second, excise taxes are typically collected at a choke point, where there is a small number of taxpayers in the supply chain.

States and the federal government follow both guidelines for alcohol and tobacco taxes. They collect as early as they can. Meaning that federal alcohol and tobacco taxes are typically collected at the factory or point of production.

State alcohol and tobacco taxes are collected as soon as finished products, wherever they are produced, are directed to the particular state. None of those excise taxes are collected from farmers: grapes, corn and hops are not intoxicating; there is no retail market for loose, unpackaged tobacco leaves. So the risk of valuable product escaping tax does not appear until processing. Cannabis is different. As flowers or bud mature on the plant and then leave the farm gate, they are extraordinarily valuable.

Taxing at the farm gate would indeed ensure the early collection of taxes, but might involve a large number of taxpayers—the opposite of a choke point.

If we put aside the risks of leakage and tax evasion, late collection has certain apparent advantages—despite the “collect early” guideline. With any chosen ad valorem tax percentage on price, imposing it as late as possible gives the state more revenue, since the price of any product ordinarily rises as it passes through the supply chain. For instance, a 20% retail tax will collect more revenue than a 20% production tax, since the retail price is normally higher than the production price. If, instead of a particular percentage, the state seeks a specific dollar amount of revenue, taxing later in the supply chain usually results in lower consumer prices, since retailers tend to add a percentage of profit margin based on their costs, including the cost of taxes. For example, if the state wants a million dollars of revenue, collecting that amount at the retail level should increase costs to consumers by about a million dollars. Alternatively, collecting the million dollars in tax revenue earlier, for instance at the production level, would increase the price of cannabis along the entire supply chain, with retailers adding their desired percentage of profit margin to this increased price, meaning that the total amount consumers paid would increase by more than a million dollars.

Pushing consumer prices down may appear to be an advantage at first, because lower prices in the legal market would allow it to take customer share from the illicit market. But it may also have the unintended consequence of increasing access for youth and heavy users. Finally, late collection allows tax preferences for products identified for medical use.

But there need not be only one method. Taxing and generating revenue at each stage of the supply chain—cultivation, processing and sales—spreads out the taxing pressure, so that the incentive to circumvent the tax is smaller at any one point. Multiple stages of taxation have the added benefit of acting as checkpoints to prevent illicit cannabis from entering the legal supply chain or to prevent legal cannabis from being diverted to the illicit market.

SETTING A TAX RATE

State and local officials will also have to wrestle with proper tax rates for cannabis. Again, finding the proper balance will be key, and may require some trial and error. A tax rate that is too high runs the risk of pushing customers back into the illicit market, inadvertently resulting in lower tax revenue.

Tax rates that are too high on the production side can also force out small producers, creating a system where only interests with access to large amounts of capital would be able to afford to produce cannabis. This would undermine the ability of the state to ensure Big Tobacco or other large, corporate interests do not dominate the production market, something we believe should be a key goal of any legalization policy. High taxes will also have the effect of creating an incentive for illegal sales in California as sellers and buyers try to avoid the tax.

Setting the rate too low, however, can make cannabis products more accessible to youth and fail to cover the costs of public health, safety and education programs that should accompany legalization.

If, as predicted, the legal cannabis market experiences a large drop in pre-tax prices after legalization, a static tax burden will result in drastic reductions in the total price the consumer pays. That is not an outcome we seek. The RAND Report outlines several options for increasing tax rates over time, including delegating authority and scheduling rate increases. Scheduled rate increases, like the gradual increase in the minimum hourly wage in Los Angeles to \$15 by 2020, give businesses time to adjust. Delegation of rate-setting authority might seem more tenable if rates were tied to a fixed formula preventing the exercise of discretion.

TAXING CULTIVATION

California may have an additional incentive to try to tax cannabis production before the point of sale. Because the state is a net exporter of cannabis, the state can miss out on tens of millions of dollars in potential revenue if cannabis is not taxed at the producer level.

In addition, we can imagine a system where areas that grow more than is consumed locally, like the Emerald Triangle region of Mendocino, Humboldt and Trinity Counties, may find themselves unable to recoup local costs associated with monitoring and regulating cannabis cultivation.

Again, we do not believe that maximizing tax revenue should be the state's primary goal. But if state officials opt for only a retail-based taxation system, other steps might be taken to ensure that high-cultivation areas receive their fair share of cannabis tax revenue.

The state can miss out on tens of millions of dollars in potential revenue if cannabis is not taxed at the producer level.

TAXING MEDICAL CANNABIS

Policymakers should acknowledge the important and legitimate use of cannabis for therapeutic and medicinal purposes. One question regulators will need to address is whether to tax medical cannabis at a different rate than recreational cannabis, as discussed earlier in the section on industry structure.

Other states have wrestled with this problem. In Washington, which first legalized medical cannabis in 1998, recreational businesses complained of unfair competition by medical dispensaries that were able to provide cheaper products due to lesser tax rates. Earlier this year, Washington Governor Jay Inslee signed a bill that merged medical and recreational dispensaries, effectively creating one 37% excise tax rate for all legal cannabis products, and exempting medical marijuana from only the general state sales tax.

Taxation, Flexibility and Constitutional Constraints

Having flexibility to adjust the tax—including the base, type, rate and timing—is critically important to effective implementation. Other states have already made adjustments, but it is not possible to predict now with perfect certainty what will be the right tax policy at each stage of implementation to help the state proceed toward its core strategies. We would do well to pick the right starting point, but we cannot foresee how or when a proper balance among the different goals will be struck.

This need for flexibility exists within the constraints of the state constitution and state law in at least three respects:

- 1) The initiative process: If the initiative locks in the tax and requires a future initiative to change it, then the time it takes to make future adjustments may not be adequate to meet the demands of implementation.
- 2) The legislative process: It would likely take a $\frac{2}{3}$ majority of the legislature to impose a new tax, or even potentially change the tax policy, which may prove too difficult or slow moving to correct implementation deficiencies.
- 3) The regulatory process: The state constitution may not grant that authority to a regulatory agency. There may also be issues with administrative procedure and the notice and comment periods that should be anticipated.

Federal Restrictions

Cannabis is currently listed as a Schedule 1 drug by the federal government. Even if cannabis is legalized in California, it is still illegal under federal law. The current administration has chosen not to enforce federal marijuana laws against states that have pursued medical or recreational legislation that meet federal guidelines. But the continued gray legal area has created particular challenges in the area of taxation.

Cannabis business operators are not able to deduct business expenses other than “cost of goods sold” (the expense of producing or buying the product) from their federal taxes. (This result is mandated by Federal Tax Code Section 280E, which applies only to businesses selling federally illegal drugs.) This is a particular problem for marijuana retailers, whose expenses for selling costs, like rent and salaries, are not deductible, because they are not product acquisition costs. California may seek to avoid making its state taxes a problem under 280E, perhaps by imposing them on the consumer rather than the retailer of the product (with the retailer serving only as a collection agent, as is the case under Washington’s new law), or by explicitly imposing production-level taxes on production, rather than sale.

E. Enforcing the New Rules: Highway safety, underage use, continuing illicit grows and sales, criminal and noncriminal sanctions

The major framework for enforcement of marijuana laws historically has been the criminal justice system: its frontline workers were police and sheriffs, and its institutional workers were the staff at jail and state prison. Shifting to a regulated system introduces other tools and players into the enforcement system. These include the tax collector, the city attorney, county counsel, natural resources professionals, agricultural inspectors, and public health professionals, among many others.

Civil and Criminal Enforcement

The new enforcement system can provide these individuals with a full array of tools:

- Safe harbor and incentives for those who follow the law and do so to the highest standards.
- Third-party certification—a model through which cultivators, processors or retailers pay for a third party to inspect and certify their operations, either only to encourage best practices or as part of an enforcement system that interacts with local or state government.
- Tax collection—ability to collect taxes from those in the legal market and even those who are not.
- Private right of action – policymakers can consider the option of a private right of action, allowing private attorneys to sue and seek compliance and damages from those acting with or without a license who are in violation of the law (this may raise public safety issues in certain instances).³⁵
- Civil enforcement—fines and fees, unfair competition laws, code and zoning rules on grower, seller, and property/landowner, including the threat of the loss of license.
- Criminal penalties—misdemeanors for lower level offenses that still require criminal enforcement, and felonies for serious offenses such as large-scale operators working in the illicit market, cultivating on public lands or engaged in other serious or violent crime.

³⁵ For more on the private right of action in the area of environmental protection, see this article by Santa Clara law student Eugene Yoo <https://druglawandpolicy.wordpress.com/2015/05/13/greedy-lawyers-are-good-for-the-environment-controlling-the-environmental-effects-of-marijuana-cultivation-through-private-enforcement/>

Policymakers can use a framework to recognize the spectrum between licensed entities playing by the rules to large-scale illegal grows on public land, systematic sales to youth, etc. Some of these state enforcement priorities would match the federal enforcement priorities, such as diversion to minors.

State law also needs to clarify which areas, if any, are the domain of enforcement for state government, which are the domain of local government, and which are domains where both state and local law enforcement are engaged in marijuana enforcement. Criminal enforcement has an existing framework of responsibility, whereas the new civil enforcement tools will require more attention to clarify roles and build capacity.

Policymakers can use a framework to recognize the spectrum between licensed entities playing by the rules to large-scale illegal grows on public land, systematic sales to youth, etc.

Eliminating Racial Disparities in Enforcement

An element of data collection is to measure the types of sanctions used, and the racial disparity in those sanctions. Colorado has seen a drop in the number of criminal justice sanctions, but the racial disparity has persisted. Oregon has just reduced penalties for certain marijuana-related felonies to misdemeanors. Considerations include the racial makeup of different individuals who are likely to be engaged in different practices, the geographic location of those individuals (producing counties vs. urban counties) and the type of conduct. Individuals charged with illicit sale in urban areas will be far more likely to be black or Latino.

Table 2: Enforcement Spectrum

	Licensed, responsible entities	Licensed but frequent problems	Licensed but engaged in illegal activity	Unlicensed cultivators and retailers	Unlicensed individuals engaged in additional serious crimes
Types of conduct	Regularly follow rules, good faith effort at compliance, occasionally makes mistakes given complexity of compliance	Poor management and poor oversight of facility means frequent rule-breaking	Using licensed business as a cover for large-scale criminal activity	Cultivators who do not have a license or cannot supply the legal market in California. Small-scale illegal retail sale within California	Illegal sales by adults to minors. Illegal grows on public land. Large-scale export out of California. Frequent abuse of workforce, environmental laws
Civil enforcement, incentives and penalties: need to specify state and local roles	Provide opportunities for errors to be corrected and improved, recognize the extra costs these responsible actors bear, before imposing heavy fines or sanctions	Use increasing levels of fines, require further compliance and monitoring, revoke license if behavior persists. Apply models from alcohol and tobacco regulation	Use all the tools of civil enforcement, including fines as well as loss of license	Use tools of civil enforcement, including fines	Use civil enforcement, fines, fees, tax collection when appropriate
Criminal enforcement and penalties: follow existing roles of city, county and state law enforcement	Do not use any criminal penalties for these individuals and entities	Generally do not use criminal penalties, unless behavior is more serious	Use criminal justice system and penalties for large-scale and serious offenses.	Pursue alternatives to arrest and incarceration as a first response when appropriate. Apply similar penalties as unlicensed activity in other industries, like alcohol	Use criminal justice sanctions and make these types of activity the enforcement priorities

Enforcement of DUI on Roads and Highways

Driving under the influence of any drug, whether alcohol, marijuana or prescription drugs, is already against the law. The question is how we can prevent it in the first place, and how law enforcement can detect it and prove it in a court of law. The step of prevention requires public education generally, and consumer education specifically. Public education campaigns through the media or consumer education campaigns at the point of sale can instruct people on instructions for not driving while under the influence of marijuana and other drugs.

In the area of law enforcement, the scientific research and legal framework for driving under the influence of alcohol is very well developed. Careful research, conducted over several decades, has established a relationship between blood alcohol content, impairment, and crash risk, such that the measure of blood alcohol content is itself a crime (what is considered a *per se* standard). In the case of marijuana, THC can remain in the bloodstream long after the effects of intoxication have worn off, so the presence of THC is not in and of itself a reliable measure of intoxication. Research on the link between marijuana consumption and roadside impairment is increasingly being conducted.

In the area of law enforcement, the scientific research and legal framework for driving under the influence of alcohol is very well developed.

All stakeholders in the BRC process, from advocates to patients to police chiefs, agree that a person impaired and under the influence of marijuana, whether for medical or adult use, should not get behind the wheel of a car. In addition, existing standards apply whereby an officer may stop a motorist with probable cause based on erratic driving. Once stopped, existing protocols of a roadside impairment test can be conducted for the driver, whether impaired by marijuana, alcohol or prescription drugs. The difference emerges that a roadside test like the Breathalyzer to confirm blood alcohol content is not available for marijuana, which requires a blood test that officers cannot currently conduct on the side of the road. Because intoxication based on alcohol is relatively easy to measure, many agencies do not measure for other drugs after alcohol is found to be a factor, which limits the knowledge of the extent other drugs are a factor in intoxication.

A remaining question is whether the mere presence of THC in the blood, absent evidence of impairment, should be sufficient for a criminal justice sanction. One approach is the *per se* test, adopted by some states, which says that the presence of THC at a certain level is itself a crime. The problem with such an approach is that it is arbitrary and not based in science—at least not yet. A second legal approach, used in Colorado, is called permissive inference, which instructs juries that a certain level of THC measured in the blood can be used to infer that a crime occurred. This also is arbitrary. A lesser standard would be to allow for a civil fine, such as a ticket, but not a criminal penalty, for the mere presence of THC at a high level, without other signs of impairment. Another approach is to use a blood test or a mouth swab test for THC only as confirmation of impairment that is tested, observed and documented through a roadside impairment test, but not to consider it a valid measure of intoxication on its own.

The currently available strategies of *using probable cause* to make traffic stops and *using roadside impairment tests* to establish impairment are a reliable starting point. These strategies could be enhanced by 1) additional scientifically valid research on marijuana and crash risk to determine if a valid standard could be adopted linking THC presence with impairment, 2) development of additional tests of intoxication specific to marijuana, 3) training of officers as drug-recognition experts, 4) use of video footage of roadside impairment tests for evidence and 5) public and consumer education about marijuana consumption and DUID.

The currently available strategies of using probable cause to make stops and using roadside impairment tests to establish impairment are a reliable starting point.

Limiting Sales to Youth

Enforcement of the rules limiting access to people under the age of 21 requires special attention. Many of the issues affecting youth are considered in great detail in the Policy Brief released by the Youth Education and Prevention Working Group. In this section, we focus on enforcement strategies. In the investment section, we discuss the kinds of programs that are needed for prevention, education and treatment.

First, we need to consider that we are dealing with 1) minors under the age of 18, 2) adults between the age of 18 and 21 who are legally adults but would not be permitted access to the legal market, and 3) adults over age 21. California has already made simple possession of marijuana an infraction for all people, including minors.

Illegal sales by retailers. One of the issues that was raised in the public forum is that in some communities youth can access marijuana by standing outside a dispensary and waiting for an adult who will buy for them, sometimes while a guard simply looks the other way. The tobacco model may provide some insights, where retailers are checked by having people go in to purchase, resulting in penalties if the retailer sells to the minor or if the retailer fails to secure the area immediately around their location. In a regulated market, with oversight, licensing and training for retailers and employees, and stiff penalties, such practices can certainly be reduced from current levels.

Illegal sales to youth. Stepping away from the retailer, youth may access marijuana that is either diverted from the legal market or product that originated and stayed in the illicit market. All previous discussion related to control of the supply chain may limit diversion, but the existing illicit market remains an issue. Policymakers could maintain the current criminal justice penalties, change those penalties, or also add civil penalties to the tools available to limit these illegal sales to minors. Illegal sales by adults to minors should remain a public safety priority.

Illegal sales by minors and young adults. Youth or young adults involved in selling drugs are another factor to consider and an especially important one with respect to racial disparities. One factor for these age groups is that one young person may purchase marijuana, and then share it and split the cost with peers. While the transaction may appear as sale, it may not be sale for profit.

In general, youth and young adults selling small amounts of marijuana or first-time offenders should not be subject to incarceration in the juvenile justice or adult correctional system, due to the cascade of other harms that can occur and the dramatic racial disparities in these arrests (see Policy Brief from Youth Education and Prevention Working Group). A 20-year-old black adult selling marijuana on the street should no more be subject to arrest and incarceration than an affluent white student selling marijuana in a college dorm. Where possible, diversion even before the point of arrest would be preferable. This behavior does not need to be excused and should be addressed, but it also likely does not need to land a young person in jail. Policymakers should consider alternatives to arrest and jail wherever possible for youth involved in marijuana sales.

Policymakers should review the current rules for penalties for the sale of alcohol or tobacco products to and by youth, and determine how those penalties could be used in the marijuana context. Clear criteria should apply for the use of infractions, misdemeanors, felonies and probation for marijuana-related offenses. For example, there is considerable latitude to up-charge an infraction to a misdemeanor for possession of a small amount of marijuana. Repeat offenses could be considered differently than first offenses. Completion of an educational program could erase a fine imposed on a person, giving people with limited financial means a way to comply without spiraling fees and penalties.

Illegal Grows and Out of State Sales

Illegal cultivation, especially trespass grows on public and private land, will remain a problem that deserves attention even after legalization. A portion of the cannabis that is cultivated in California will be sold for consumption outside California, in violation of federal law. These types of illegal grows and large operations aimed at out-of-state sales would need to be enforcement priorities for the state, both to promote public safety and to comply with federal guidelines.

Historically, the enforcement strategies aimed at illegal cultivation and sales have had a limited impact on either the supply or the demand for marijuana. Taking a more heavy-handed approach to enforcement poses challenges even after legalization: it may simply drive the illicit cannabis industry deeper into public lands and into more remote areas. One approach would be to concentrate law enforcement resources on those operations 1) being carried out on public lands or trespassing private lands, 2) engaged in environmentally destructive practices, or 3) also engaged in other violent and serious crime. One overall challenge in this area is that much cannabis production takes place in low-population areas with fairly limited local resources.

This would leave the small grower who is otherwise complying with local standards as a low enforcement priority, regardless of the destination of the cannabis, but without the protection of a license. One question is whether local government should—or could—undertake policies or programs to mitigate the environmental harms of these grows. For example, agencies that focus on environmental quality could develop programs through which any marijuana that is cultivated should comply with environmental, natural resource and water protection standards, whether its ultimate destination is California or not. This may prove to be a difficult gray area for the state and local governments, given federal guidelines against out-of-state export. The state may also want to tax these producers, but would face the same challenge of compliance with the federal guidelines.

PREVIOUS RECORDS

In addition to the question of what new sanctions should be in place, there is a question of what to do with sanctions from the past. Should people with criminal records for non-violent offenses that relate to marijuana possession, cultivation or sales be able to expunge their records?

Policymakers can consider these questions in relation to specific offenses, which range from possession for personal use (from before it became an infraction), to possession for sale, to sale itself, to larger offenses for people operating larger enterprises. Policymakers should also recognize that racial disparities in marijuana enforcement mean that a larger share of people of color have these convictions on their records. If a goal of legalization is to further some sense of racial equity, then a mechanism to expunge some criminal records might be an appealing option. For example, as of July 2015, Oregon passed legislation to convert a number of marijuana felonies to misdemeanors or lesser felonies, and allow for a process to expunge previous records.

F. Data Collection and Monitoring

Gathering information about consumption and commerce critical to modifying existing regulations in order to meet policy goals.

From the outset, the state of California should be clear not only on its goals for legalization, but also the data it will collect to monitor and evaluate the impact of our policy choices in relation to those goals. The data and oversight system should:

- **Use metrics in relation to the policy goals** that policymakers and voters prioritize for marijuana legalization
- Collect data on age, gender, race, ethnicity and other **demographic characteristics**
- Be **funded to cover the costs** of gathering and analyzing data
- Inform state and local policymakers **to make adjustments** in the policy options governing the system, including the laws, regulations and investments, with recognition of the tradeoffs before and after legalization, and among the policy goals and policy options
- Cover **an array of research tools** from simple data collection, to surveys and focus groups, to scientifically valid research studies, to long-term longitudinal studies of cohorts and populations

Among the research topics, the BRC recommends:

Consumption and Its Impacts: Monitor cannabis use, both occasional and frequent, by youth and adults in the context of the use of other substances. The state should sponsor scientifically valid studies on the level of use, substitution and poly product use of marijuana and other substances, including alcohol, tobacco, other illegal drugs, the illegal use of prescription drugs, and method of ingestion (smoking, edible, e-cigarette, hookah, etc.). In addition to consumption, researchers should monitor for addiction and other indicators of cannabis use disorder as well as addiction to other substances, the impact on educational attainment and other social indicators for youth, and on employment, family well-being and other factors for adults. As the market matures, research should also be conducted on price elasticity for marijuana use (both occasional and heavy use by youth and adults) as has been done for other substances. Data should also be gathered on medical marijuana patients and trends in their use and access in the market.

Production, Sale and Industry Data: Measure marijuana production from seed to sale, measuring the amount of marijuana cultivated, processed, and sold in the legal market and its progress through the supply chain. The state should also monitor the types of products, the THC content, potency, etc. Data should be collected on the number of licensees, characteristics of the workforce, and impacts on the local

and state economy. Research should also measure, to the extent possible, the size and scope of the remaining illicit market.

Health and Safety: Conduct scientifically valid studies on DUI, crash risk and marijuana impairment, including interaction with alcohol and other drugs. Collect data on other safety and health risks involving marijuana, such as calls to poison-control centers. Conduct research and gather data on potential health benefits (including on medically valid research studies of marijuana as a treatment for a variety of medical conditions) and health risks of marijuana (including cardiovascular, respiratory and brain development/function).

Enforcement: Collect data on the number of infractions, misdemeanors and felonies for enforcement of marijuana laws for those breaking the rules or acting outside the legal market. Maintain data on the policy options that counties and cities adopt and conduct scientifically valid studies comparing those policy options to consumption, health, public safety and other outcomes, including the size of the remaining illicit market. Evaluate the effectiveness of different sanctions, both criminal and civil.

Investments: Document the amount of licensing fees and tax revenues collected, and the amounts invested in various strategies. Ensure that all investments have clear goals and are evaluated independently for effectiveness.

G. Using the New Revenue from Marijuana

Allocating revenue to cover the cost of new administrative burdens, new enforcement policies, and new protections for the public.

Types of Revenue and Local/State Relationship

There are three major sources of revenue in a legalized, regulated and taxed market. The first is from licensing fees (for cultivators, retailers and potentially individual workers). The second is from fines against business entities or individuals who do not comply with the law or regulations. And the third is from tax revenue.

In all three cases, some may be applicable to marijuana businesses the same as any other business, while some fees, fines and taxes may be unique to marijuana businesses. For each of these sources, consideration needs to be given to the local and state split, and whether revenue is earmarked for a specific purpose or the general fund. As discussed elsewhere, decisions have to be made about counties that opt out of certain aspects of the industry and the unique issues facing rural counties with heavy cultivation. These factors are shown in the Local/State Finance Revenue Matrix below.

Table 3: Local/State Finance Revenue Matrix

	State	Local	Opt Out Jurisdictions or High Producing Counties
License & Permit Fees - General	As current law	As current law	As current law
License & Permit Fees - Specific to Marijuana	State retains its licensing fee, use for costs of regulation specifically; determine whether jurisdiction where the licensee is located also gets a portion	Local jurisdiction retains any local fees, use for costs of processing and regulation	Opt-Out Jurisdictions- Not applicable. High Producing Counties - use for regulation
Fines - General	As current law	As current law	As current law
Fines - Marijuana	To be determined whether shared, whether both state and local authority exists for that enforcement action, and how revenue is used	To be determined whether shared, whether both state and local authority exists for that enforcement action, and how revenue is used	Opt-Out Jurisdictions - unlikely to receive any from licensed entities, could receive fines from enforcement of illicit market. High Producing Counties - necessary to receive income from these fines
Sales tax - general	As current law	As current law	Opt-Out Jurisdictions - as current law High Producing Counties - to extent tax is charged when cultivator buys supplies or sells wholesale (as well as local retail consumer sales)
Excise tax - specific, depends also on timing	Requires a policy decision as to sharing with local government and whether use is restricted	Requires a further policy decision if local jurisdiction imposes an additional tax beyond state, and whether use is restricted	Requires a policy decision as to sharing with opt-out counties and for high-producing counties and whether use is restricted

One of the major considerations is how the state and local jurisdictions (including cities and counties) would share in the various sources of revenue for marijuana. There is also a question about the extent to which both the state and local jurisdiction would have overlapping or separate enforcement powers, including the power to collect fines. In addition, consideration should be given as to whether schools would receive a portion of any excise tax.

Standard Sales Tax

The standard sales tax would be subject to existing sharing rules between local and state government, which include a portion for the state general fund (of which a substantial portion reaches schools and community colleges through Prop 98), and portions for state and local government to functions such as local public safety, mental health, public health, social services, etc. which can relate to goals of marijuana policy in general terms. To the extent that general fund state and local resources are used in relation to marijuana law implementation, a portion could be paid for through this general sales tax.

General or Designated Use of Funds

In terms of the uses of the fines and excise tax revenue, one major option is for the funds to accrue to the general fund of the state or local jurisdiction. This has the advantage that the resources can be used to meet whatever is the most important and urgent priority as determined by elected officials.

The basic challenge of this approach is that the tax revenue from marijuana legalization has so far come below projections in the states that have legalized. It is worth mentioning that recent estimates of tobacco product taxes in California generate less than \$900 million per year, while the state's general fund budget is over \$100 *billion* dollars per year. In other words, tobacco product taxes represent less than one percent of the general fund. No one should therefore expect the taxes on another plant, where there is continued competition with an illicit market, to fundamentally alter the state's fiscal picture.

Beyond the fact that the revenue will be limited, a drawback to leaving the revenue in the general fund is that the specific areas needing funding in order to implement and regulate marijuana legalization may not receive adequate investment. This may leave a number of the policy goals voters desire (such as protecting youth, public safety or public health) without the necessary resources to achieve them. Voters and policymakers may be left wondering what they got for the money, and not have a way to evaluate the measurable benefits of that money on marijuana-related policy goals relative to any potential burdens of legalization.

Uses of Revenue

Here we discuss the potential uses of revenue. We heard a number of potential recommendations for investment. The use of the revenue should be aligned with the goals that voters and policymakers ultimately prioritize. For example, when voters approved Proposition 99 to increase the tobacco tax, specific percentages were allocated to designated accounts, including for health education, hospitals,

physician services, and research. Whether the funding priorities described below are earmarked from an excise tax created in a ballot measure or derived from the general sales tax that flows to a variety of government programs, they are worthy of consideration by policymakers and voters as priority investments related to successful implementation. This list is by no means comprehensive, but it illustrates some of the important and relevant ways that revenue from marijuana taxes, fees and fines could be invested to generate returns in relation to state goals.

Experience from tobacco control shows that a complementary strategy to reach youth is broad-based education of the public as a whole, through which youth hear public health messages that are also aimed at adults.

Youth: Fund necessary programs to protect youth, including research-based education, prevention, treatment, and assistance to students in schools and community-based settings. Programs should equip youth with knowledge and resources to make responsible decisions, as well as provide needed assistance and treatment to youth who need it. One promising example is Student Assistance Programs that 1) provide broad-based education on marijuana, alcohol and other substance abuse issues, 2) target outreach to youth at risk of substance abuse and 3) assist youth who are abusing marijuana, alcohol and other drugs. Funding youth education and prevention, with a focus on school attendance and educational attainment is key, as is funding programs to

support youth currently not in school through community-based services.

These investments should be 1) broader than just marijuana, to address other substances as well as the underlying social issues that may be driving substance abuse, 2) evidence based, informed by research at the front end and evaluated with data at the back end, and 3) go beyond abstinence to provide real information in an honest and comprehensive way.

These services should recognize the racial diversity of California’s youth and the limited economic resources of many of their families. If funding is limited due to limited tax revenue or other legitimate priorities, priority for site-specific funds should be given to youth and schools in low-income communities. Funding can be managed through county departments of public health, county offices of education or through school districts but should encourage collaboration across these entities regardless.

Experience from tobacco control also shows that a complementary strategy to reach youth is broad-based education of the public as a whole, through which youth hear public health messages that are also aimed at adults.

Public Health: Funding should be available from the outset for a vigorous public health effort to educate the public and provide health-based solutions and responses to problem use. A lesson learned from tobacco is that a full suite of controls and “counter advertising” can be effective to limit use. One example of such an effort from tobacco control is a public education campaign that is aimed at the general population, which can also reach youth effectively. If the experience of tobacco control applies, limiting media campaigns to youth may have counterproductive effects. These campaigns should contain

themes and information that are important for achieving public policy goals and that are backed by evidence. These messages should not employ scare tactics that are out of sync with the daily experiences of youth and adults, such that the message loses credibility.

Topics for a public education campaign can include: 1) DUI and safety as it relates to driving, 2) risks of smoking and secondhand smoke (including to youth/children health), 3) the health risks associated with marijuana use (including heavy use) and dual use with other substances, 4) safer ways to use of marijuana for those who choose to, 5) the importance of delayed use by youth, and 6) other scientifically valid, evidence-based information that can influence responsible use. In addition, funding should be available for drug treatment, including for those with addiction to marijuana or other elements of cannabis-disorder syndrome. Public health and substance abuse treatment are two different systems at the local level, both of which need attention and support.

Public Safety: A transition to a legalized market will have some predictable and some unknown impacts on public safety. Marijuana is already very common, sold both in the illicit market and through medical marijuana dispensaries. Legalizing it for adult use will change how it is cultivated and sold, causing a disruption to the illicit market just as new oversight mechanisms get put in place. Funding should be provided for public safety priorities discussed earlier, for example, to limit diversion to youth and address trespass grows on public lands.

An important priority is DUI and road safety. In particular, funding should be provided for 1) training of law enforcement to be drug recognition experts who can detect impairment and conduct effective roadside impairment tests that can be used in prosecution, 2) research on ways to observe impairment for driving due to marijuana that may be different from alcohol and development of further roadside impairment tests, 3) research on marijuana consumption, impairment and crash risk, including for marijuana alone but also for consumption alongside alcohol and other drugs, 4) development of tests such as oral fluid sampling if supported by research as a valid link of impairment and crash risk and 5) public education campaigns on the risks of driving under the influence of marijuana.

Enforcement: Establish regulatory and oversight mechanisms, licensing procedures, etc. and cover all resulting administrative expenses. It is critically important that the capacity for new civil enforcement systems be in place, and in a timely manner, to accompany criminal justice and law enforcement strategies. Enforcement priorities should include illicit grows on public lands, grows that harm the environment, sale to minors and growers and sellers involved in other serious and violent crime. Funding can support additional burdens placed on enforcement entities: police, health inspectors, tax collection, forest rangers, agricultural officers, etc.

Workforce Development: Policymakers should recognize that illegal marijuana cultivation and sales have provided income that has kept individuals and families afloat. Particularly for individuals with limited educational attainment, few other job prospects, and living in communities with concentrated poverty, pathways to legal employment opportunities will be important both to shrink the illicit market and to respond to the fact that it is shrinking. Programs could provide training and legal employment both 1) for people to enter the legal marijuana industry, especially if the state imposes training or licensing

requirements for individual workers and 2) to target people in the current illicit market or in communities heavily impacted by drug arrests, unemployment and crime and move them toward legal employment in other larger, legal industries.

Environment: Develop and fund necessary environmental protection and restoration, land use and watershed monitoring. This is critically important, especially in the environmentally sensitive areas where numerous illegal grows occur. Investments can be used both to restore damage done by past illegal grows but also to prevent and address future damage.

Research and Data Collection: Gather the data and conduct the research to provide effective monitoring and implementation of the new law. Funding should be provided for the strategies described in the data collection section of the report, including on topics related to: 1) consumption and its impacts, including the use of other substances beyond marijuana, 2) production, sale and industry, including the legal and illicit market, 3) health and safety, 4) enforcement and 5) investments.

CONCLUSION

This report provides an overview of a range of broad approaches in a dynamic process of implementation. Legalization entails broad approaches that the state will undertake at the same time, including advancing the public interest, reducing the illicit market, providing the protection of the legal market and capturing and investing tax revenue. The state will need to define clear policy goals, and then deploy a set of policy options over time, and adjust those based on data throughout the process of implementation. Priority goals—such as those related to youth, public safety and public health—should be front and center in the regulatory and tax decisions of the state.

This report covers many topics, but it is certainly not exhaustive. Many of the issues in the report go well beyond what would be considered in a ballot measure, and would be the subject of subsequent legislation and specific regulations. Many of the topics require careful research and quantitative analysis to help inform the best decisions.

Invitation for Further Public Comment

The Blue Ribbon Commission invites further public comment. In particular:

- 1) Are there some things that this report gets wrong? The report covers many topics, and we were not able to research the full dimension of each topic. If we got something wrong, please tell us.
- 2) Do you think the report presents the core approaches and the goals correctly? If yes, why? If not, how would you look at it differently?
- 3) Do you agree or disagree with any of the recommendations in the report? If so, why?
- 4) The report lays out a range of policy options to achieve those goals. What policy options would you pick? Why?

Please submit comments to info@safeandsmartpolicy.org.

APPENDIX A:

Youth Education and Prevention Working Group Policy Brief

Executive Summary

Californians are reasonably concerned about the impact upon youth of adding marijuana to the drugs that are already legally available for adults, such as tobacco and alcohol. It is well known that marijuana use among youth has been a reality for decades. In some surveys, youth report that marijuana is more readily available and accessible than alcohol. While any marijuana use by youth is a central concern, the data show that the vast majority of youth who try marijuana only experiment with it in a limited or occasional manner. However, a minority of teens is at risk of experimenting at a very young age or engaging in more regular or more excessive use. This same demographic is also at greater risk for problems with alcohol and other substance abuse, disciplinary and other problems in school and are more likely to get caught up in the criminal justice system. These youth are the most vulnerable and in need of the best protection and assistance the state can provide. Our working group has focused on how to best protect the health and wellbeing of children and adolescents (especially these youth who are most at risk) if marijuana were to be legalized, taxed and regulated for adults.

Available data (provided in greater detail in the source materials we reviewed and which are available on the BRC website) support the following conclusions:

- 1) Regular or heavy marijuana use at an early age can be associated with reduced educational attainment and educational development.
- 2) Criminal sanctions for marijuana use and possession have multiple negative impacts on youth, especially for youth of color, with regard to educational attainment and employment opportunities, while also reducing law enforcement resources for addressing more serious crime.
- 3) Significant improvements are needed to make drug safety education more scientifically accurate and realistic.
- 4) Well-designed and implemented regulations have the potential to better protect youth.
- 5) Sufficient funding available from marijuana tax revenue, if effectively reserved for and spent on services for youth, could close many gaps in current community-based support for at-risk youth.
- 6) School-based approaches such as Student Assistance Programs (SAPs) are effective in improving school retention, academic achievement and reduction of drug use.
- 7) Universal availability of school-based services throughout California, combined with an evidence-based approach to drug education, could become a reality under a Tax and Regulate public health approach to marijuana policy.

Some assume that marijuana use by youth will increase in California as a result of the reduced perception of its risk. This working group reviewed data from the Netherlands and other countries that have reduced or removed criminal penalties for adult marijuana use. We also looked at the numerous states that have decriminalized possession and legalized and regulated some medical marijuana use, and found insufficient evidence to support this assumption. Data indicate that California's adoption of adult medical marijuana (1996) and decriminalization of marijuana possession for personal use (2011) were not followed by increases in availability or marijuana use by youth. However, as a commercial industry develops there are risks of targeted advertising similar to prior tobacco campaigns, and this should be taken into account in planning regulations.

For this report, our working assumption is that "adults" are defined as those 21 years and over. This is consistent with the four states (Alaska, Colorado, Oregon and Washington) that have legalized recreational marijuana use by adults. This leaves basic questions about how to deal with recreational marijuana use by younger individuals. We analyzed policy options with an eye toward delaying the onset of marijuana until adulthood and reducing marijuana-related harms. We also considered the unintended detrimental impacts of any criminal justice and school disciplinary sanctions for youth involved with marijuana. Under adult legalization, care must be taken to ensure that any responses to youth marijuana use are not unduly punitive, for the following reasons:

- Youth who are arrested become defined and treated as criminals, often permanently;
- Criminal arrests initiate youth into institutional cultures, such as probation and juvenile hall, which can produce psychological and re-entry problems;
- Racial disparities in law enforcement have detrimentally impacted minority communities;
- Ineligibility for federal school loans reduces educational opportunities;
- School expulsions and suspensions reduce supervision and remediation;
- Pre-employment screening of legal problems reduces job opportunities;
- Fines and attorney's fees place disproportionate burdens on the poor; and
- Immigration/naturalization problems are increased.

The data we have reviewed indicates that prevention strategies will be effective to the extent they are able to:

- Provide honest, science-based information in a non-judgmental and non-punitive setting;
- Prioritize safety and delay use through personal responsibility and knowledge; and
- Encourage abstinence, but also recognize the importance of moderation, self regulation, and harm reduction for those young people who will not abstain completely.

Many young people currently use marijuana under current legal prohibitions, so the standard for a new approach is not zero use, but delayed use and less use than is now occurring. Strict regulation and taxation of the marijuana industry, with protection of youth as its primary goal, could reduce availability from unregulated sources by significantly curtailing the illicit market, while earmarking tax revenues from legal sales to increase funding that would mitigate educational harms associated with adolescent marijuana use. Potential regulatory controls that would benefit youth (some of which, such as accurate labeling, would also aid adult users) include:

- Strictly enforcing an age 21-year marijuana distribution and possession law;
- Strictly limiting the number, type, location and sales practices of marijuana retail outlets;
- Limiting sale of products that are particularly attractive to young people, such as edibles that look like candy;
- Restricting marketing and advertising practices that appeal to youth;
- Establishing standards for labeling, potency, purity and total dose; and
- Developing *non-criminal* sanctions (such as infraction “fix-it tickets” requiring participation in education or Student Assistance Programs) for individuals under 21.

Although all of the consequences of adopting a tax and regulate policy cannot be anticipated at this time, the data the YEP working group has reviewed suggest that tax revenues dedicated to increase support services for at-risk youth would be beneficial. Those drafting a ballot initiative, legislation and subsequent regulations should strongly consider (a) adopting rules designed to protect youth that will be consistently enforced, (b) prioritizing sufficient tax resources for youth services, both for youth who are not in school, and to create and maintain school-based services such as Student Assistance Programs in California high schools and (c) adopting a public health approach to youth marijuana use.

Marijuana tax revenues could help improve school retention and performance if sufficient funds are reserved to create and maintain school-based programs, e.g., Student Assistance Programs (SAPs), in California high schools. SAPs emphasize learning skills, remediate academic performance, improve

school climate and school retention, and promote peer group interventions, family engagement and reduced drug use. The data this working group reviewed indicate that SAPs using a three-tiered (Institute of Medicine) approach to prevention are effective tools that could be employed to further these goals, if sufficient and stable funding is provided. History suggests that unless the initiative or implementing regulations specify a mechanism for ensuring stable funding over time, there is a danger that the level of funding necessary for effectively sustaining programs such as SAPs will not be maintained.

Any community or school programs funded for this purpose should be evidence based and evaluated for effectiveness. Research will allow policymakers to assess the effectiveness of the regulatory system at reducing age of onset, regular use, and access to marijuana. Long-term outcomes studies by California universities and research institutes will allow evaluation of SAPs and similar programs funded by tax revenue to measure impact upon school performance, retention and dropout rates, use of marijuana and other drug/alcohol use among students.

School districts disproportionately impacted by high dropout rates could have preferential funding for student support and treatment services. Tax revenues could also be directed toward support services for youth under 21 impacted by marijuana use who are no longer in school and for clinical care for disadvantaged and uninsured youth suffering the most severe end of the cannabis use disorder spectrum.

A system that regulates, controls, and taxes marijuana has the potential to reduce youth access to marijuana, provide effective prevention, improve drug education, mitigate current harms and improve school retention and performance if adequate regulations are written (and strictly enforced) to protect youth, and if sufficient funding from marijuana tax revenue is committed to school-based services for youth.

Invitation for Public Comment and Feedback

This policy brief of the Youth Education and Prevention Working Group is intended to stimulate further dialogue on these important issues. In addition, the June 3rd Public Forum of the Blue Ribbon Commission will consider what tax and regulatory policies can best further the goal of limiting youth access to marijuana. We invite you to submit further comments and feedback (via email at info@safeandsmartpolicy.org) on the topics contained in this paper or other related issues:

- Are there points raised in this paper with which you disagree? If so, why?
- What role can peers, parents, families, and communities play in delaying and reducing youth use of marijuana?
- What role can schools, public health and law enforcement entities play in limiting youth access and responding to youth who do use marijuana?
- What tax policies and regulations could help limit youth access to marijuana?
- What treatment and responses are most effective for youth who are regular and heavy users of marijuana?

Data and Analysis

Public Health Concerns

Youth are one of the groups most at risk for experiencing harms associated with regular marijuana use, but California's current enforcement-oriented marijuana policy is failing to protect them. Marijuana is readily available to youth (73% of California's 11th graders say marijuana is "fairly" or "very easy" to obtain). Despite easy access to marijuana, however, our youth have only limited access to quality drug education, counseling or treatment when needed.

Lifetime prevalence rates exaggerate the risk of addiction for youth, since the majority of lifetime users never become regular or heavy users. Concern should focus on the rate of regular use (10-19 days/month) and heavy use (at least 20 days/month) among youth. The California Healthy Kids Survey reports that 2-3% of California high school students are regular users and another 7-8% are heavy users, which translates into 48,500 and 131,000 respectively (out of a total student population of nearly 2 million). It is impossible to accurately predict whether these numbers are likely to increase or decrease under a new tightly regulated adult recreational market. Nonetheless, these data, about youth use under the current unregulated system, are relevant to determining the funding necessary to fully support services for youth most likely to be detrimentally impacted by marijuana use.

The YEP Working Group has reviewed scores of research studies finding associations between regular and heavy marijuana use and psychosocial harms including poorer school performance, higher school dropout rates, poorer cognitive performance, and limited success in education, employment, and income. Such problems can extend into adulthood. Associations with poorer performance has been observed in multiple cognitive domains, including memory, learning, executive functions and emotion.

An important limitation of these studies is the inability to draw conclusions about causality because most human marijuana studies are not prospective and compare findings in users to non-using controls that are matched for as many variables as possible. Nor is it possible to subject humans to the kinds of intrusive brain research conducted with animals, and long-term prospective cohort studies tracking individual changes over time remain rare. The National Institute of Health (NIH) has planned a 10-year prospective Adolescent Brain and Cognitive Development (ABCD) study that will provide much needed longitudinal change data.

Whenever discussing problematic youth behavior it is also important to recognize that "at-risk" youth often experience multiple stressors, including poverty, physical and sexual abuse, hunger, living in an environment of violence and racism, to list only a few. In addition, a child's ability to succeed in school depends, to a great extent, on family and social factors affecting the child's life well before the child begins school. Marijuana use constitutes only one risk factor for impaired learning. It is extremely difficult to tease out cause and effect for complex problems.

But one need not resolve the myriad open research questions in order to conclude that a leading policy goal should be to delay youth marijuana use, and to reduce regular or heavy use. Those readers seeking more analysis of current science are referred to the numerous source materials on the BRC website. For the purposes of this report, the working group assumes general support for the policy goals of minimizing youth marijuana use, and especially regular or heavy use, and protecting the most at-risk youth to the greatest extent possible.

Professional Treatment

Although most teenaged users of marijuana are experimental, occasional, or episodic users, there is a subgroup of about 11% of juniors and seniors in California high schools who are regular or heavy users. This is the group in which schoolwork and school retention are at greater risk, and this cohort contains youth among whom a diagnosis of DSM V cannabis use disorder is most likely.

Unfortunately, teens in severe trouble rarely seek professional help, until pressured by parents or authorities. In treating marijuana-dependent teens, clinicians typically find that their closest friends use drugs; that they have a high level of denial that the marijuana use has any negative behavioral effects; and, that they are not addicted (“I can stop anytime I want”). A washout period of a month or more is often needed before cognitive benefits of stopping use are recognized. As in all addiction treatments, relapses are the rule rather than the exception and should not be punished.

In the community, there are typically few organized treatment venues for youth, apart from consultations with school counselors, pediatricians, and child psychiatrists. In refractory cases, families with means often turn to residential wilderness programs or therapeutic boarding schools to extract the teen from the environment and provide for extended socialization in the principles of recovery. For families without means, school-based counseling and the juvenile justice system remain the “treatments” of last resort.

A Comprehensive Assessment of Harm

The question of “harm” caused by marijuana is often distorted in two important ways. First, negative outcomes in the lives of marijuana users are too often automatically interpreted as *caused* by the drug rather than *associated* with both marijuana and a multitude of other factors that place youth at risk. Second, “harms” are often defined only in medical/biological terms, failing to account for the harms caused by enforcement-based marijuana policies.

Engagement with our criminal justice system has its own potential for long-lasting harms:

- Criminal arrest records, initiation into probation and juvenile hall’s incarceration subculture (“crime school”), psychological and re-entry traumas
- Ineligibility for federal school loans
- School expulsions and suspensions
- Employment screening problems

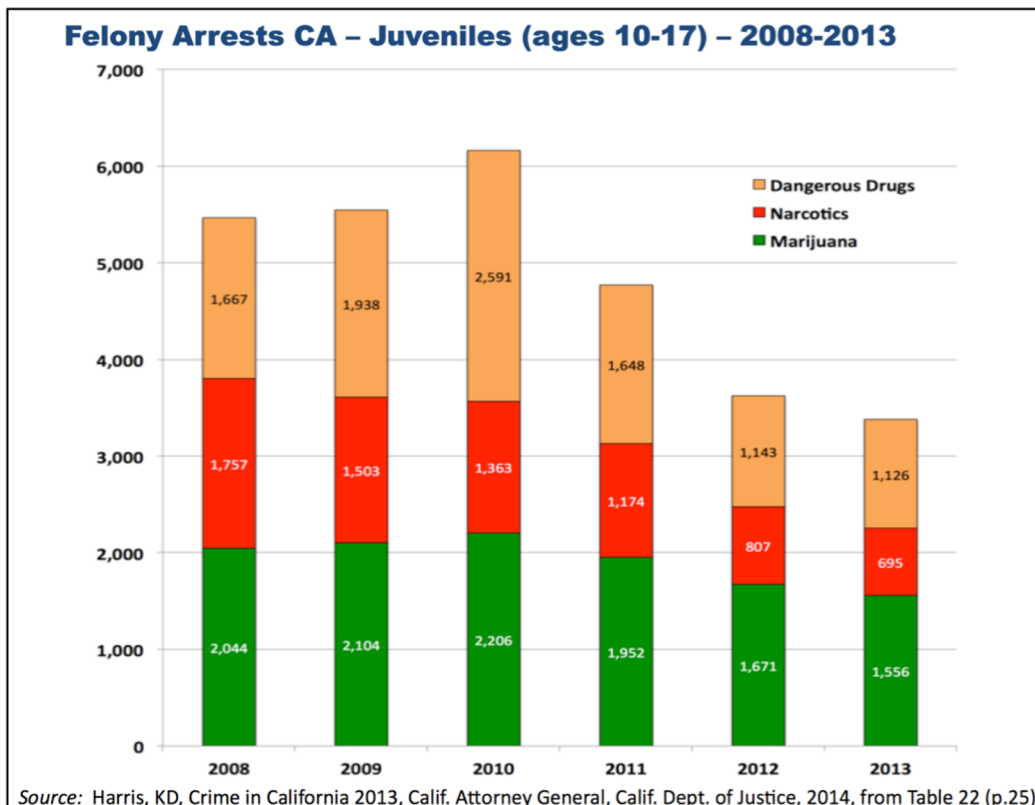
- Racial discrimination in arrest and adjudication
- Fines and attorney’s fees, which place the greatest burden on the poor
- Immigration/naturalization problems

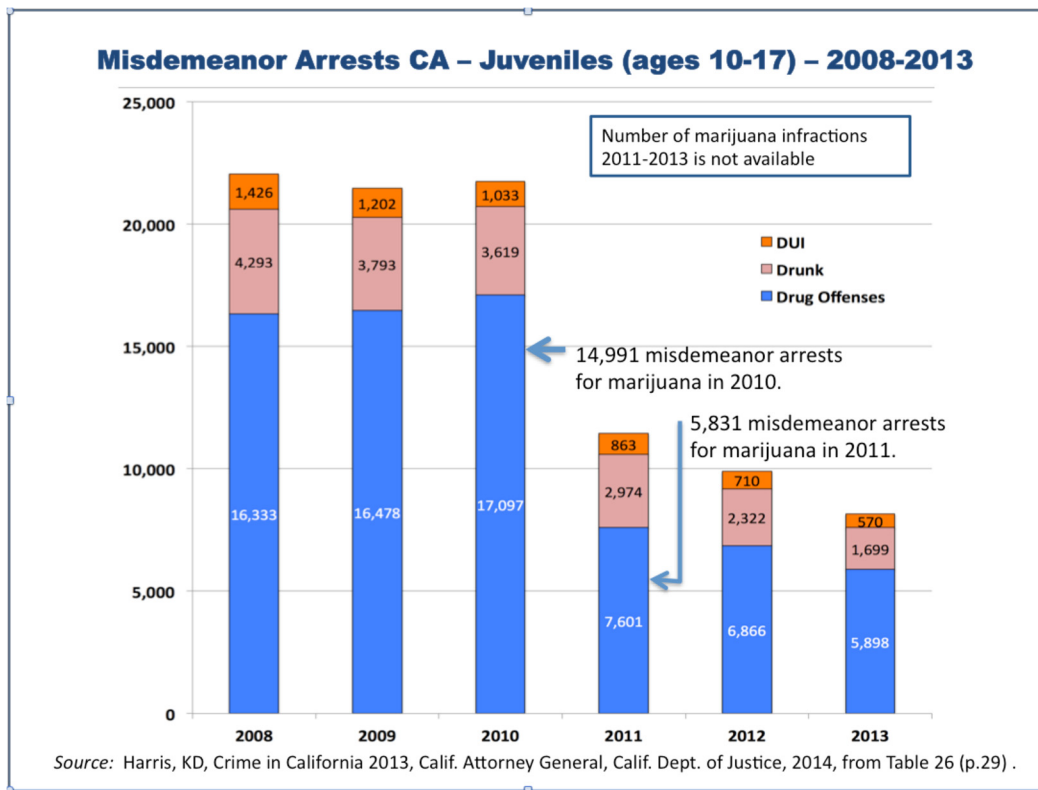
If marijuana use and possession are legalized for California adults in 2016, it is only those under 21 years of age for whom possession and use will remain illegal. Penalties should not exceed the harms of the drug itself. A 2010 law that downgraded possession of less than 1 ounce of marijuana to an infraction significantly reduced arrests. But policymakers could go beyond this to develop *non-punitive* sanctions to support families, school retention and remediation for the minority of youth using marijuana regularly or heavily.

Since a decriminalization law was enacted in late 2010, juvenile marijuana misdemeanor arrests have dropped dramatically while juvenile marijuana felony arrests have declined much more slowly.

In 2011, three-fourths of California's declining marijuana possession arrestees (5,800/7,800) were under age 18, up from one-third in 2010.

The criteria for so many continuing misdemeanor arrests are not clear. Unfortunately there is no California Department of Justice data tabulating the rates of marijuana infraction citations; and the law enforcement distinctions between a juvenile misdemeanor and an infraction remain unclear, poorly documented, and are likely to vary in practice according to locale. At present there appears to be no systematic collection of marijuana infraction data.





A legalization initiative in California could provide an effective arrest record expungement process for individuals under 21 years of age. If it does, the experience with Proposition 36, enacted in 2000, should be considered: Although successful addiction treatment completers could have their records expunged under Prop. 36, online computer searches, in many cases, can still easily find a historical record of arrests.

Under legalization, youth and communities will also benefit if the nature of marijuana legal charges and the attendant penalties or sanctions are clearly stated and understandable to everyone. In particular, there should be clear criteria established for discriminating among infractions, misdemeanors, and felonies for youth. The level of criminal sanction and its duration should be appropriately linked to the level of the offense.

Non-Criminal Sanctions

A middle ground of community and school-based sanctions that neither criminalizes nor medically pathologizes youthful marijuana users is critically important. The Office of the California Attorney General should seriously consider developing a systematic tracking system for marijuana-related infractions (while individual offenders should be anonymized in state and local databases). Charging minors with infractions rather than misdemeanors, whenever possible, is necessary to minimize the detrimental impacts of criminal convictions upon educational and life opportunities. Fix-it tickets that call for education (similar to traffic school) and/or enrollment in a Student Assistance Program (SAP) might be appropriate. An infraction ticket for a minor could require a parental notification. Infraction fines (approximately \$100) could be waived for minors after completion of sanctioned education.

Protecting Youth under Adult Marijuana Use Legalization

It is impossible to fully predict what the consequences of a Tax & Regulate framework will be in California. Without adult legalization, it has already proven impossible to ensure that adolescents delay initiating marijuana use until adulthood. However, with a Tax and Regulate framework, it should be possible to promote various forms of harm reduction based on an honest presentation of the scientific rationale for delay. Most prevention and remediation work is best done in the school system. Additional efforts to reach youth should be made through community and public health systems.

Regulations

Legalization requires regulation, just as legalization of alcohol and tobacco has been accompanied by intense regulations and public health efforts at dissuasion. A wide range of regulations governing a legal cannabis industry would have significant impact on adolescents, including the following:

- Strict enforcement of laws against distribution of marijuana to individuals under 21;
- Maintenance of artificially high price, without being high enough to foster an underground market;
- Strict limits on the number, type, location and sales practices of marijuana retail outlets;
- Strict limits on sale of products that are particularly attractive to young people (no candy edibles);
- Restrictions on marketing and advertising practices that appeal to youth; and
- Accurate quality assurance and labeling of potency, purity and total dose.

If marijuana use is legalized, taxed and regulated for adult consumption, policymakers should consider what tools will limit access and consumption by children and youth. In all considerations of regulations, youth must be a top priority.

The Influence of Marijuana Price on Youth Use

Young people have less disposable income than adults, which makes them what economists call a “price-sensitive” population. For this reason, taxes that raise the price of cigarettes are particularly effective in deterring youth tobacco use. The same principle may apply to marijuana under legalization: Lower prices may be particularly tempting for youth, higher prices will help deter use. A fall in marijuana's price after legalization is certain (Washington State's prices have declined by 50% in the past 12 months) because it is simply cheaper to do business in a legal market than an illegal one. That said, there are a number of ways that regulators might choose to keep the price from falling so far that youth use increases dramatically. For example, as has been done with alcohol in some countries, a minimum price could be set under which marijuana could not legally be sold (e.g., \$5/gram). Another approach is to make any tax on marijuana an excise tax rather than a tax based on a percentage of price (e.g., \$50 an ounce versus 20% of sale price). This would ensure that marijuana could not be sold for less than whatever the amount of the excise.

Because lower prices have the advantage of helping eliminate illicit markets, concerns about not letting prices fall so low that they incite increased youth use must be balanced with concerns about illicit market reduction. Whatever choice is made in this domain, it should be noted that price regulation is a potent way to affect youth use, regardless of where a young person lives and whether they are in school.

Student Assistance Programs

Marijuana tax revenues could help ensure that school retention and performance are improved. Funds could be preferentially allocated to school-based programs, e.g., Student Assistance Programs (SAPs) for high schools, that emphasize learning skills, remediation of academic performance, school climate, school retention, peer group interventions, family engagement and reduced drug use, as well as to support services for vulnerable youth populations no longer in school. Our review indicates that SAPs are effective over the short term (long-term studies of SAP impacts are lacking). There are many SAP working models to consider, both in-state and elsewhere in the U.S. The key goals should emphasize school retention, cognitive/learning assessments, and academic remediation, as well as referrals for professional care when indicated. The research suggests that this approach will yield better outcomes than punitive policies (zero-tolerance suspension/expulsion policies or random toxicology testing). Tax revenues could also help fund ongoing outcomes research to allow policymakers to assess the effectiveness of various aspects of the marijuana regulatory system in improving school performance, retention and dropout rates, availability and use of marijuana and other drug/alcohol use among students, and co-occurring behavior problems.

SAPs are modeled on the confidential services provided for adults by Employee Assistance Programs (EAPs). The “workplace” for youth is the classroom. SAPs can provide the three-tiered range of prevention services outlined by the Institute of Medicine (IOM) by addressing three levels of risk:

- 1) *Universal* prevention strategies provide drug education for every student.
- 2) *Selected* prevention strategies target subgroups known to be at elevated risk (e.g., those just entering high school or with a family history of addiction).
- 3) *Indicated* prevention strategies focus on individuals known to have initiated risky behaviors (e.g., marijuana use or binge drinking).

Prevention conceptually encompasses all services provided *before* a diagnosis of substance use disorder is made and before treatment is needed. In most cases marijuana-related problems will result in learning problems before they rise to the level of an addiction diagnosis *per se*. The most effective SAPs also involve students’ families as genuine partners in early intervention. SAPs can successfully respond to students at different levels of risk, providing universal preventive education for every student, specialized education for selected at-risk populations, and focused interventions when indicated.

The following table summarizes SAP’s multi-tiered prevention and mitigation approach to supporting adolescents to delay and limit marijuana use.

Key Findings	Implications
1. Early onset (ages 13-16) of marijuana use is a significant risk factor.	a) Universal and selected prevention activities that seek to delay initiation of marijuana use. b) Engagement of cohesive peer groups . c) Family engagement for at-risk youth.
2. Regular (10-19 days/month) and heavy users (at least 20 days/month) are more likely to show cognitive slippage than occasional users. 3. There will likely be 49,000 regular users (3%) and 130,000 heavy users (8-9%) in California high schools (2015-16), before any change in access or use attributable to a legalization initiative.	a) Indicated intervention by Student Assistance Programs (SAPs) b) SAPs need to include cognitive and learning assessments . c) SAP referral mechanisms for learning skills training and professional assistance for drug dependence.
4. Regular and heavy users are more likely to skip school, drop out and not proceed to further education.	a) Evidence-based programs to improve school climate . b) Engagement methods for unaffiliated schools.
5. Transitions of marijuana use are common after high school, but are poorly studied.	a) Recovery support b) Long-term outcome research needs to be funded by new marijuana tax revenues.

SAPs are valuable interventions for young people. Additionally, individual school districts and schools may wish to adopt different strategies to protect youth, and innovative designs with outcomes measures could also be considered for funding from marijuana tax revenues. The critical requirements are that (1) the program fits well with the cultural, social and educational needs of the district or school concerned and (2) The program has a solid evidence base. Beyond SAPs, some programs meeting these criteria include prevention programs that help teachers promote pro-social, task-focused classrooms (e.g., The Good Behavior Game <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3188824/>) and programs that help communities come together to intervene effectively for a range of youth development issues, including but not limited to substance use.

For example, the Communities that Care (CTC) program is based on a system developed by researchers and distributed in a variety of formats by the University of Washington Center for Communities that Care. The Center helps communities learn about CTC and install it, and offers personalized support to help implement it. CTC was tested in a randomized controlled trial involving 24 communities across seven states matched in pairs within each state and randomly assigned to either receive CTC or serve as control communities. A total of 4,407 students from CTC and control communities were followed and surveyed annually from the fifth grade. By the spring of the eighth grade, significantly fewer students from the CTC communities had health and behavior problems than those from the control communities. Compared to the control groups, students from CTC communities were: 25% less likely to have initiated

delinquent behavior; 32% less likely to have initiated the use of alcohol and; 33% less likely to have initiated cigarette use. These significant effects were sustained through tenth grade, one year after the intervention phase of the trial ended. By the end of the tenth grade, students from CTC communities also had 25% lower odds of engaging in violent behavior in the past year than those from control communities.

Reforming Drug Education

There is little dispute that *abstinence* is the best choice for teenagers, for a host of sociological, psychological and physiological reasons. However, given the persistence of marijuana use among young people, and despite our best efforts to date, a more comprehensive strategy is required.

We do not find evidence to support the efficacy of “scare them straight” programs. Most drug education programs are aimed solely at *preventing* marijuana and other drug use. After instructions to abstain, the lessons end. No information is provided about how to avoid problems or prevent abuse for those who do experiment. Abstinence is treated as the sole measure of success, and the only acceptable teaching option. The abstinence-only mandate puts adults in the unenviable position of having nothing to say to the young people we most need to reach—those who refuse to “just say no” to marijuana use, thereby foregoing the opportunity for having real conversations about how to reduce risk and stay safe.

The educational/prevention components of school-based programs could be much more effective in preventing, delaying and mitigating harms of use by:

- Providing science-based information on the effects of cannabinoids,
- Providing data in support of delay of marijuana use,
- Encouraging moderation, self-regulation and harm reduction when abstinence is not practiced, and
- Development of universal education for all age groups.

Research on Long-Term Outcomes

Those drafting any reform initiative or subsequent legislation, budgets or regulations should strongly consider ensuring adequate, stable funding for outcomes research to guide revisions to the law focusing on topics such as:

- School retention, dropout rates;
- School performance, cognitive functions, further education;
- Levels of marijuana and cannabinoid use among students, other drug use, including alcohol and tobacco, and;
- Co-occurring behavior problems.

Conclusion

Under legalization for adults, a school-based approach to delaying initiation, harm-reduction, mitigation and academic support holds promise for protecting the health of adolescents. The goals of reducing drug use and improving school retention and performance have not been achieved under prohibition. However, without a mechanism for ensuring ongoing sufficient funds to provide support needed by at-risk youth, school-based services such as Student Assistance Programs (SAPs) will remain underused, despite their proven value. A Tax and Regulate policy legalizing marijuana use by adults has the potential to reserve sufficient revenue to provide universal access to programs such as SAPs that emphasize learning skills, remediation of academic performance, improved school climate, school retention, peer group interventions, family engagement and more effective drug education, prevention and counseling programs. School districts disproportionately impacted by high dropout rates should have enhanced funding for student outreach, support and treatment services. Tax revenue could also be committed to support clinical care for disadvantaged and uninsured youth in the most severe end of the cannabis use disorder spectrum as well as services for high-risk youth no longer in public schools. A framework of regulations governing the marijuana industry designed to protect youth will also be needed to limit youth access to marijuana and foster an environment for prevention and education programs to be maximally effective.

Please visit the Publications section of www.safeandsmartpolicy.org for source materials and additional studies reviewed by the Youth Education and Prevention Working Group.

Appendix B:

Summary of Blue Ribbon Commission Report Recommendations

The 58 total recommendations from the Pathways Report of the Blue Ribbon Commission on Marijuana Policy (BRC) are numbered and outlined below with accompanying report text for clarity and context. The recommendations begin with four core strategies and nine goals, followed by 45 additional recommendations related to taxation and regulation. These additional recommendations can be used as policy options to achieve the nine goals within a framework created by the four core strategies.

The work of the Commission was divided into three working groups: Youth Education and Prevention, Public Safety, and Tax and Regulatory. While the third group, Tax and Regulatory, detailed the 45 additional recommendations, the Pathways Report also included the findings and recommendations of the other two working groups, Youth and Public Safety, which appear in this appendix as well. Their findings and recommendations are not counted as part of the report's 58 total recommendations because the work of these two groups informed and guided much of the Commission's work, including providing a rationale and basis for all subsequent decisions regarding recommendations.

The *Process* of Legalization: Core Strategies

One of the major findings of the Blue Ribbon Commission's work is that the legalization of marijuana would not be an event that happens in one election. Rather, it would be a *process* that unfolds over many years requiring *sustained attention to implementation*.

That process of legalization and regulation will be *dynamic*. It will require the continued engagement of a range of stakeholders in local communities and at the state level. The Commission recommends that the process the state would embark upon must be based on four macro-level strategies operating concurrently:

- 1) **Promote the public interest** by ensuring that all legal and regulatory decisions around legalization are made with a focus on protecting California's youth and promoting public health and safety.
- 2) **Reduce the size of the illicit market** to the greatest extent possible. While it is not possible to eliminate the illicit market entirely, limiting its size will reduce some of the harms associated with the current illegal cultivation and sale of cannabis and is essential to creating a well-functioning regulated market that also generates tax revenue.
- 3) **Offer legal protection to responsible actors** in the marijuana industry who strive to work within the law. The new system must reward cooperation and compliance by responsible actors

in the industry as an incentive toward responsible behavior. It must move current actors, current supply and current demand from the unregulated to the regulated market. And the new market will need to out-compete the illicit market over time.

- 4) **Capture and invest tax revenue** through a fair system of taxation and regulation, and direct that revenue to programs aligned with the goals and needed policy strategies for safe legalization.

Goals of Legalization and Regulation

The Commission believes any legalization effort should be clear on the goals it is setting out to achieve for the people of California. Other stakeholders may propose different or additional goals. The Commission recommends the following nine goals:

- 5) Promote the health, safety and wellbeing of California's youth, by providing better prevention, education and treatment in school and community settings and keeping youth out of the criminal justice system. Limit youth access to marijuana, including its concurrent use with alcohol and tobacco, and regulate edible products that may appeal to children.
- 6) Public Safety: Ensure that our streets, schools and communities remain safe, while adopting measures to improve public safety.
- 7) Equity: Meet the needs of California's diverse populations and address racial and economic disparities, replacing criminalization with public health and economic development.
- 8) Public Health: Protect public health, strengthen treatment programs for those who need help and educate the public about health issues associated with marijuana use.
- 9) Environment: Protect public lands, reduce the environmental harms of illegal marijuana production and restore habitat and watersheds impacted by such cultivation.
- 10) Medicine: Ensure continued access to marijuana for medical and therapeutic purposes for patients.
- 11) Consumer Protection: Provide protections for California consumers, including testing and labeling of cannabis products and offer information that helps consumers make informed decisions.
- 12) Workforce: Extend the same health, safety and labor protections to cannabis workers as other workers and provide for legal employment and economic opportunity for California's diverse workforce.

- 13) Market Access: Ensure that small and mid-size entities, especially responsible actors in the current market, have access to the new licensed market, and that the industry and regulatory system are not dominated by large, corporate interests.

Evaluating Various Policy Options

The Commission studied policy options in seven major areas related to regulation and taxation of the industry, which is the primary focus of the *Pathways Report*. The goals of protecting youth and public safety are embedded throughout the report, but additional information on those specific topics is also available on the Blue Ribbon Commission website.

Although these major policy areas overlap to some extent, they are discussed separately in the *Pathways Report* for ease of presentation. Beyond the above 13 recommended strategies and goals, the Commission offers additional and related recommendations within the following policy areas for the public, policymakers, and lawmakers to consider:

- A. Defining the Marijuana Industry Structure
- B. Regulating Marijuana Cultivation and Processing
- C. Regulating Marijuana Marketing, Sales and Consumption
- D. Taxing Marijuana
- E. Enforcing the New Rules
- F. Data Collection and Monitoring
- G. Using The New Revenue from Marijuana

Policy Option Recommendations

In this section, we summarize the recommendations of the BRC as they relate to tax and regulatory decisions, the third working group. It is important to note that many of the tax and regulatory recommendations are informed by the goals relating to youth and public safety. The beginning recommendations are listed as general recommendations, followed by other recommendations grouped into the seven major policy areas outlined above.

General Recommendations

- 14) Develop a highly regulated market with enforcement and oversight capacity from the beginning, not an unregulated free market; this industry should not be California's next Gold Rush.
- 15) Build ongoing regulatory flexibility and responsiveness into the process, while ensuring regulatory agencies are engaged constructively to ensure successful and faithful implementation.
- 16) Establish a coordinated regulatory scheme that is clearly defined with a unified state system of licensing and oversight, as well as local regulation.

- 17) Designate a central person, agency or entity with the authority and responsibility to coordinate the implementation process and to engage all relevant state agencies and local governments in their respective roles in the process.
- 18) Any boards, commissions or agencies that oversee the legal marijuana industry should represent all the public interests of the people of California rather than being dominated by individuals with an economic stake in the industry itself.
- 19) State officials should engage the federal government, both to ensure industry compliance with current federal enforcement priorities and to help change other federal rules that may be obstacles to safe legalization at the state level.

Marijuana industry structure

- 20) Consider options that limit the size and power—both economic and political—of entities in the marijuana industry, through limits on the number and types of licenses that are issued to the same entity or owners, limits on the size of any one license, encouragement of non-commercial options and incentives for smaller players. The goal should be to prevent the growth of a large, corporate marijuana industry dominated by a small number of players, as we see with Big Tobacco or the alcohol industry.
- 21) Require participants in the cannabis industry to meet high standards of licensing and training, and provide paths of entry to the industry for California’s diverse population.
- 22) Licensing fees should be set at reasonable levels to cover the cost of regulation, certification and oversight by state and local government. They should not be so onerous as to limit smaller actors from participating in the industry.
- 23) Business entities involved in the marijuana industry should be required to hold both state licenses and local permits.
- 24) Provide flexibility and authority for local government to adopt additional measures responsive to public health, safety and economic development, as well as to regulate business practices of licensees in their jurisdiction. Apart from this local authority to regulate commerce, the state should set uniform minimum guidelines related to personal cultivation, possession and consumption.
- 25) Urge the federal government to provide better access to banking in order to help the state meet its goals, and also help California comply with federal guidelines.
- 26) Accommodate the medical and recreational uses of marijuana based on conscious policy decisions as to which functions of the two systems will be merged and which will remain separate.

To the extent any functions are merged, ensure certain key guidelines are met to ensure medical access. To the extent any functions are separate or provide a benefit to patients, establish clearer guidelines for who can qualify as a patient.

Regulating marijuana cultivation and processing

- 27) Protect the ability of individuals to consume, possess or cultivate marijuana within certain uniform statewide guidelines, apart from the additional authority granted to local government.
- 28) Provide for a designated level of legal licensed cultivation at the state level, and in coordination with local government, to supply the demand in California, without diversion to other states.
- 29) Establish a statewide seed-to-sale tracking system ensuring that marijuana is cultivated, distributed and sold through the licensed, regulated system, with the minimum amount of diversion out to—or in from—the illicit market.
- 30) Current cannabis cultivators who have been responsible actors, and are willing to be licensed and abide by regulations should be given consideration for the new recreational licenses.
- 31) Existing environmental laws must be enforced. State and local agencies responsible for this enforcement should have the authority and resources to ensure marijuana cultivation meets environmental standards.
- 32) Afford the same protections and rights to cannabis workers as other workers in the similar industries.
- 33) Testing of cannabis—for potency as well as for pesticides, molds and other contaminants — should occur near the points of harvesting and/or processing.

Regulating marijuana marketing, sales and consumption

- 34) Testing and oversight of the supply chain (through a seed to sale tracking system) should be in place throughout the process -- including at the stage of retail sales to ensure consumer safety and to limit diversion to and from the illicit market.
- 35) The state should regulate the retail sales environment (ID and age requirements to enter stores, public health information, sale of alcohol or tobacco stores that sell marijuana) and what marijuana products can legally be brought to market (including limits on THC content, products such as concentrates and different forms of edibles).
- 36) All products should have consistent labeling, especially as to dosage and concentration of key cannabinoids.

- 37) Through their permitting, land use, and regulatory authority, local governments can limit the number of marijuana retailers, limit retailer density and maintain cannabis-free zones near places like schools and parks.
- 38) Place limits on advertising and marketing of marijuana, in accordance with constitutional standards, with the particular aim of limiting or prohibiting tactics aimed at youth or that encourage heavy and problematic use.
- 39) Comply with public smoking, smoke-free, and public consumption laws.

Taxing marijuana

- 40) Adjust the taxation of the industry periodically throughout implementation, including the base, type, timing and level of tax.
- 41) When determining changes to the level and type of tax, consider the four core strategies (public interest, legal actors, illicit market, and capture revenue) and specific policy goals (youth, public health, medical access) as the basis for those changes.
- 42) The state should engage the federal government on changing IRS rules that prohibit marijuana-related businesses from deducting normal business expenses from their federal taxes; this change will help responsible actors pay tax at whatever stage of production the state determines is best for public policy.
- 43) A successful tax system will raise the money needed to pay for the increased education, public health and enforcement costs associated with marijuana use and new regulations. However, this commission feels strongly that maximizing revenue – which would depend on higher levels of consumption - should not be the focus of cannabis tax policy.

Enforcing the new rules

- 44) Deploy a spectrum of enforcement tools appropriate to the offense, with clarity regarding state and local responsibilities using a) inspections and demands for correction for licensed entities that regularly comply with the law, recognizing the higher cost of compliance they have relative to the illicit market, b) civil enforcement tools of fines, suspensions and license revocations for entities that regularly fail to meet standards, c) alternatives to incarceration for low-level offenses in the illicit market, and d) the most serious criminal justice penalties for individuals who cultivate on public land, engage in large-scale trafficking, operate enterprises to sell to youth or engage in other violent or serious crime.

- 45) State law needs to clarify how enforcement responsibilities will be divided between state and local agencies.
- 46) Illegal sales by adults to minors, as well as illegal cultivation on public and private lands, must remain enforcement priorities.
- 47) Policymakers should consider alternatives to arrest and jail wherever possible for youth involved in marijuana sales.

Collecting Data

- 48) Conduct research and collect and analyze data on key indicators to make further, evidence-based decisions through the course of implementation.
- 49) Data collection should include demographic factors, such as race, age, income bracket, etc.
- 50) Data collection and research should cover a range of topics, with metrics and indicators aligned to the core strategies (for example, the size of the illicit market) and policy goals the state adopts (for example, youth, public health, etc.)
- 51) Research and data collection related to youth, public health and public safety should include marijuana as well as tobacco, alcohol, illegal drugs, abuse of prescription drugs, etc.
- 52) This research and monitoring function should be paid for from marijuana tax revenue.
- 53) The state should periodically publish reports of comprehensive data, with information about progress, successes and challenges of implementation and provide for public and stakeholder feedback for course corrections.

Using the new revenue

- 54) Revenue raised from marijuana taxes should be used to help further the public interest in achieving the policy goals directly associated with legalization. Governments should not view marijuana taxes as a potential source of general fund revenue. All investments should be evaluated for their impact on the desired goals.
- 55) The state must fund—and make universally available—programs to protect youth, including evidence-based education, prevention and treatment in schools and community-based settings, for example Student Assistance Programs.
- 56) Funding should be available from the outset for a vigorous public health effort to educate the public and provide health-based solutions and responses to problem use.

- 57) Funding should be provided for public safety, such as better research on impaired driving, and enforcement priorities, such as sales to minors and grows on public lands.
- 58) Funding should be provided to invest in communities with high levels of unemployment, high levels of crime, and large numbers of drug arrests to provide general job training and employment opportunities.

Findings and Recommendations of Youth and Public Safety Working Groups

Youth Education and Prevention Working Group

Based on its research and a public forum held in Oakland, the working group issued these findings and recommendations:

- Regular or heavy marijuana use at an early age can be associated with reduced educational attainment and educational development.
- Criminal sanctions for marijuana use and possession have multiple negative impacts on youth, especially for youth of color, with regard to educational attainment and employment opportunities, while also reducing law enforcement resources for addressing more serious crime.
- Significant improvements are needed to make drug-safety education more scientifically accurate, realistic and effective at protecting youth.
- Sufficient funding available from marijuana tax revenue, if effectively reserved for and spent on services for youth, could close many gaps in current community-based support for at-risk youth.
- School-based approaches such as Student Assistance Programs (SAPs) are effective in improving school retention, academic achievement and reduction of drug use.
- Universal availability of school-based services throughout California, combined with an evidence-based approach to drug education, could become a reality under a Tax and Regulate public health approach to marijuana policy.
- Well-designed and implemented regulations have the potential to better protect youth.

Public Safety Working Group

The deliberations of the working group as well as the public forum hosted on this topic in Los Angeles led to several important findings and recommendations:

- **DUID, Road and Highway Safety:** A number of steps can be taken to improve road and highway safety as it relates to Driving Under the Influence of Drugs and marijuana impairment specifically. These include support for currently available tools (such as roadside impairment tests available for all drugs) as well as research to develop new scientifically valid tools specific to marijuana.
- **Banking:** Current federal policy means limited access to banking for marijuana businesses, causing many cultivators and dispensaries to operate on a cash basis. This makes businesses the target of crime, and reduces transparency of financial information. The state should engage the federal government to provide some safe harbor for licensed businesses to access the banking system.
- **Masking the Illicit Market:** A third major concern is the ways in which a legal market can be a cover for illegal activity, whether small-scale illegal sales to youth or large-scale cultivation and distribution for sales inside or outside California. Many of the recommendations in the Policy Options section of this report focus on available tools to separate the legal and illicit market and to prevent diversion to and from the illegal market, which can be associated with other violent and serious crime.
- **Other Dimensions of Safety: Environment, Consumer and Worker.** The BRC process addressed other concerns related to public safety that are not currently prominent elements of enforcement, given that law enforcement resources are limited and must be prioritized in other areas. Protection of the environment, consumers and workers can be addressed through civil enforcement and, where appropriate, through criminal enforcement.