

**Colorado Attorney General Phil Weiser Keynote Address**  
**Symposium on the Economics and Law of Cannabis Markets**  
**October 13, 2020**

I appreciate George Mason University taking the time and effort to investigate the Law and Economics of Cannabis. For years, I taught a seminar on the “Law and Economics of the Information Age” as well as led a program for state regulators known as the “Institute of Regulatory Law and Economics.” I appreciate and respect the rigor of a law and economics inquiry and believe we need that level of rigorous thinking about cannabis policy. I also believe that we must learn from the experience of states like Colorado that have legalized cannabis and created a framework for a regulated market. Ideally, you would all be in Colorado for this discussion, but that will have to wait until after this pandemic. In the meantime, I’m glad we can have this conference virtually and appreciate you advancing this important conversation.

In my talk, I will outline what we know, what we need to learn, and some areas for improvement, focusing on a few of the critical issues facing public policy in this area. I will first consider the importance of criminal justice reform and how legal cannabis constitutes an important step in that direction. Second, I will discuss the concept of social equity within the licensed regulated marketplace and the work we have already done and that we still have to do on that score. Finally, I will examine a few consumer protection issues, including issues related to labeling and kids’ access to cannabis.

**I. Criminal Justice and Cannabis**

With the Nixon administration’s War on Drugs policy, continued by many administrations after, and the Rockefeller drug laws in New York, followed by other states, criminal justice policy at the federal and state level took a harsh stance on the sale and possession of illegal drugs, including cannabis. These policies contributed to an immense rise in incarceration levels. For a quick sense of the numbers, consider that: (1) between 1990 and 2010, the United States saw a 188% increase in persons incarcerated for cannabis offenses;<sup>1</sup> (2) between 2001 and 2010, 7

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<sup>1</sup> See “The War on Marijuana in Black and White”, American Civil Liberties Union (June 2013) ([here](#)).

million arrests were made for cannabis possession; and (3) in 2010 alone, nearly half of all drug arrests were for cannabis possession.<sup>2</sup>

During this time period, communities of color were disproportionately subjected to enforcement of laws criminalizing the sale and possession of cannabis. Even with dozens of states having reformed their policies on cannabis and criminal justice, and despite equal usage rates, Black Americans are still four times more likely than white Americans to be arrested for cannabis use.<sup>3</sup> As we look back over the last 50 years, the critical public policy questions are whether this policy made us safer and, if so, whether any public safety benefits were worth the costs? The answers to both are clear: no and no.

As a first order approximation, it is very difficult to make the case that the increase in incarceration rates of many cannabis users made us safer or that the costs, including disproportionate application, of this policy were justified. Notably, these costs were born not only by the state in the form of fiscal outlays to build more jails and prisons, but also by those who were incarcerated (in lost income, educational or career development, and time away from family) and by their friends and families. In short, where an individual is not a danger to society, but merely engaging in behavior that is, at worst, damaging to him- or herself, the better course of action is providing treatment as an alternative to incarceration.

It is critical that we acknowledge that our society faces major substance abuse challenges. A central question, however, is whether we are making a mistake in relying primarily on criminal enforcement tools for a public health problem. The promise of a greater public investment in substance abuse treatment is that individuals can resume productive and sober lives.

The central benefits of legalizing cannabis are, first, that we are no longer incarcerating cannabis users or those selling cannabis (as long as they are licensed businesses following the law) and, second, we are now taxing and regulating cannabis sales. In place of the illegal marketplace, in Colorado we have created a regime in which consumers choose to enter a strictly regulated marketplace where marijuana is tracked, taxed and tested.

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<sup>2</sup> *Id.*

<sup>3</sup> See “A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform”, American Civil Liberties Union, 7 (April 20, 2020).

From a public safety perspective, since legalization, we have not seen significant long-term effects on violent or property crime rates in Colorado.<sup>4</sup> From a fiscal perspective, Colorado is saving money by not incarcerating individuals for low level marijuana possession crimes, and Colorado has collected \$1.4 billion in tax revenue, split between the state and local levels, since 2014 when adult-use sales first began.<sup>5</sup>

One public safety risk of legalizing cannabis is that cannabis businesses often operate a purely cash business. In large part, this is a function of a federal bar on cannabis firms using the banking system. This law is antiquated and dangerous, as the operation of an all cash business is a lure for criminal activity. Moreover, compliance and oversight are materially harder when a firm operates in this environment. That's why my office led a coalition of state AGs to advocate for a change in the law (and the adoption of the SAFE Banking Act).

Three challenges with respect to cannabis relate to the illegal market for cannabis. Notably, this market includes those who are growing the product illegally and shipping to other states. The data reveals that since 2012, the number of Colorado Organized Crime Control Act (state RICO equivalent) filings associated with cannabis has increased from 31 to 119.<sup>6</sup> These filings are directed towards those operating outside of the regulated marketplace. Our department takes this seriously and is involved in several law enforcement actions in this area, which often intersect with other areas of illegal activity. Just recently, for example, we filed an indictment alleging that a front of massage parlors was involved in human trafficking, money laundering, and illegal cannabis sales.<sup>7</sup>

The second challenge involves youth getting access to cannabis illegally, especially those products with extremely high levels of potency. Given the rise in popularity of "dabbing," using cannabis in more concentrated amounts than ever before, there is a material risk to kids from abusing cannabis. This is true about alcohol as well, where we continue to see both binge drinking and tragic alcohol-related deaths (including driving under the influence). Given that young

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<sup>4</sup> Ruibin Lu, Dale Willits, Mary K. Stohr, David Makin, John Snyder, Nicholas Lovrich, Mikala Meize, Duane Stanton, Guangzhen Wu & Craig Hemmens (2019), "The Cannabis Effect on Crime: Time-Series Analysis of Crime in Colorado and Washington State", Justice Quarterly, DOI: [10.1080/07418825.2019.1666903](https://doi.org/10.1080/07418825.2019.1666903);

<sup>5</sup> See Colorado Department of Revenue Marijuana Tax Data. ([Here](#))

<sup>6</sup> Reed, Jack, "Impacts of Marijuana Legalization in Colorado: A Report Pursuant to Senate Bill 13-283", at 2, Colorado Department of Public Safety, Division of Criminal Justice (October 2018).

<sup>7</sup> <https://www.denverpost.com/2020/08/20/denver-massage-parlor-human-trafficking-prostitution-indictment/>

people’s brains are not fully developed, we need to do better in raising awareness of this issue as well as addressing the rise in an illegal market providing access to cannabis to young people.

Finally, we are tracking whether the decision to legalize cannabis has created greater challenges in “driving under the influence.” Before I share some important statistics, it is important to acknowledge that prosecuting impaired driving due to cannabis use is not a straightforward matter. In Colorado, the legislature set a 5.0 ng/ML of Delta-9 THC as a *per se* impairment limit. However, cannabis and alcohol metabolize differently in the body and detection of THC in the blood does not necessarily indicate intoxication. Thus, for local law enforcement, detecting and prosecuting cannabis impaired driving can be more challenging than alcohol impaired driving. Nonetheless, here are some of the basic points we learned in Colorado and elsewhere:

- Between 2012 and 2017, the number of fatalities with cannabis only or cannabis-in-combination positive drivers increased by 153%, from 55 in 2013 to 139 in 2017;<sup>8</sup>
- In 2018, 13.5% of drivers in a fatal crash tested positive for cannabis; and
- A January 2020, AAA Foundation Report concluded that in Washington State, the number of THC-positive drivers nearly doubled since legalization.<sup>9</sup>

A recent two-year public awareness campaign by the Colorado Department of Transportation – The Cannabis Conversation – explored the root causes of these trends. The campaign focused heavily on personal choices and behavioral patterns. This effort recognized that, whereas people who consume cannabis infrequently are more cautious of its effects on driving behavior, the “more often people consumed cannabis, the *less* dangerous they considered driving under the influence of cannabis to be.”<sup>10</sup> This understanding underscores the importance of informing the public about the dangers of impaired driving and to consistently track the data. Impaired driving, whether due to alcohol, cannabis, or any other substance, represents a significant public safety danger. We clearly need to be concerned and addressing this issue.

## II. Social Equity within the Regulated Marketplace

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<sup>8</sup> Reed, Jack, “Impacts of Marijuana Legalization in Colorado: A Report Pursuant to Senate Bill 13-283”, at 1, Colorado Department of Public Safety, Division of Criminal Justice (October 2018).

<sup>9</sup> “Cannabis Use Among Drivers in Fatal Crashes in Washington State Before and After Legalization”, (January 2020), AAA Foundation for Traffic Safety. ([Here](#)).

<sup>10</sup> “The Cannabis Conversation” (FY 2020), Colorado Department of Transportation. ([Here](#))

When Colorado legalized cannabis, it took an important step forward on criminal justice reform, cutting back on incarceration of non-violent cannabis users. Indeed, between 2012 and 2017, the number of cannabis arrests in Colorado decreased by 52%.<sup>11</sup> But our legalization effort failed to take affirmative steps to enable equity in the industry. Our initial statutes, moreover, banned from the legal industry those with prior convictions related to cannabis. That is, if one had a conviction for selling or possessing cannabis within 10 years of application or within 5 years of legalization, those individuals were barred from entering the industry. Just recently, we addressed this unduly punitive rule, removing entirely the barrier to entry for past cannabis convictions and reducing the prohibition for all felonies from 5 years to 3 years.<sup>12</sup>

With respect to social equity, as the term is called, Colorado government and industry still have important work to do in enabling opportunity for people who were disproportionately impacted by the War on Drugs to move into the industry, including into leadership positions. This imperative requires that industry leaders prioritize inclusive hiring practices, provide mentorship for new hires, and develop effective programs for helping young and talented individuals from underrepresented communities to make bold entrances into the industry. We in government can, and are, beginning to reduce regulatory barriers to entry and increase access to capital.

Just recently, Colorado took several steps in this direction. In the 2019 legislative session, Colorado passed Senate Bill 19-224 creating new accelerator licenses. In the 2020 legislative session, Colorado passed House Bill 20-1424, establishing a Social Equity license and expanding on the accelerator program to support such opportunities. The social equity license is a program designed to reduce regulatory barriers to entry and launch business leadership opportunities for individuals who live in areas disproportionately impacted by the War on Drugs, have a past cannabis offense, or meet a certain level of household income. Programs like these have been adopted by our sister-states like Massachusetts, Illinois, Michigan, and California, and in Colorado we are learning from their experiences. As we sit here, Colorado's regulatory authority is currently in a rulemaking proceeding to further develop the groundwork for successful implementation of the social equity license and accelerator program.

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<sup>11</sup> Reed, Jack, "Impacts of Marijuana Legalization in Colorado: A Report Pursuant to Senate Bill 13-283", at 1, Colorado Department of Public Safety, Division of Criminal Justice (October 2018).

<sup>12</sup> §§ 44-11-306(1)(i), 44-12-305(1)(g) and 44-10-307(1)(g), C.R.S.

Although other states have previously implemented social equity programs, Colorado is chartering a new path with our accelerator program. This is a first-of-its-kind cannabis program. Borrowing from best practices in technology start-up design thinking, which has flourished here in Colorado, the cannabis accelerator program empowers a social equity licensee to partner with a seasoned business owner and receive training, support, and capital investment. This form of support is all with the goal of increasing participation in the marketplace. In addition to the accelerator effort, we need to look for and find ways to encourage the private sector to step-up to support social equity goals. Our department looks forward to supporting and encouraging such initiatives.

Another component of social equity, which relates back to criminal justice reform, is the effort to expunge or pardon low-level cannabis related offenses. A conviction for cannabis not only hinders an individual's ability to enter the cannabis market, but it can become a barrier against full employment in many other industries. States across the country are experimenting with expungement policies that wipe clean any non-violent and low-level cannabis convictions. Most states already permit some form of expungement for a qualifying criminal conviction, but the data shows very few people avail themselves of the opportunity. Indeed, researchers from the University of Michigan Law School found that only 6.5% of those eligible take advantage of the opportunity.<sup>13</sup> High attorney's fees, byzantine processes, and an overall mistrust of the criminal justice system are some of the causes for this underuse. Public policy can and should be crafted to nudge individuals towards accessing this life-changing opportunity.

Colorado's most recent effort to address this issue was passage of HB 20-1424. The law creates a new pathway for pardoning cannabis related offenses. In addition to an individual's right to seek relief, the Governor can pardon a class of defendants who were convicted of possession of up to 2 ounces of cannabis. My department will be working closely with the Governor on this program.

### **III. Consumer Protection and Illegal Sales**

As Colorado Attorney General, consumer protection is a top priority. In general terms, this means that consumers should be aware of what they are buying and receive what they expect.

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<sup>13</sup> J.J. Prescott, Sonja B. Starr, "Expungement of Criminal Convictions: An Empirical Study", Harvard Law Review, Vol. 133, No. 8 (June 2020). ([here](#)).

They should not, particularly when their health is at issue, be subject to a bait-and-switch. And companies should not market their products to those who cannot legally and safely use them.

If we found evidence of cannabis companies marketing to kids, that would be a cause for real concern and, very likely, legal action. Indeed, JUUL's social media campaign to get kids hooked on vaping is now a basis of our lawsuit against the company—along with their effort to downplay other health risks from vaping. To our knowledge, as noted above, kids are getting access to cannabis through illegal channels, not regulated retail distributors who have point-of-sale protections. Moreover, Colorado has mandated a range of labeling and child-resistant packaging requirements to address the concern that certain cannabis products—namely edibles—would be used by children, whether intentionally or inadvertently.

One concern that we are hearing more and more about in the consumer protection area is the sale of CBD products that include THC. Under the 2018 Farm Bill, hemp-based products must be no more than 0.3% THC. In practice, however, we have heard that some CBD products are mislabeled and contain well above that amount, even creating the risk that users of such products could become impaired and unable to drive safely—without even realizing it. Last year, I joined a coalition calling on the FDA to move faster to create a regulatory program for CBD infused products that partners with states and states Attorneys General in exercise of their consumer protection powers. It is time for the federal government to do more in this area. As the CBD market develops, we will continue to keep an eye on this concern.

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One astute criticism of law school is that law students are often not taught about supply and demand, cost/benefit analysis, or the law of unintended consequences. At its essence, a law and economic analysis of legalized cannabis should incorporate all three points. Here in Colorado, we relish our role as an innovator and laboratory of democracy in this field. We also welcome rigorous analysis of our ongoing experiment and suggestions as to how we can improve it. Thanks for hosting this important conversation, and we look forward to the continued conversation.