

ASPEN CASEBOOK SERIES

MIKOS

**MARIJUANA LAW, POLICY,
AND AUTHORITY**



Wolters Kluwer

Marijuana Law, Policy, and Authority

by

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Prefatory note by author: This is the Table of Contents and Chapter 1 from my textbook, **MARIJUANA LAW, POLICY, AND AUTHORITY** (Aspen 2017). This-first-of its kind text is designed to guide lawyers, lawmakers, instructors, and students through the competing approaches to regulating marijuana, the policies behind those approaches, and the power of various federal, state, and local government actors to pursue them. The introductory Chapter (Chapter 1) explains why marijuana law and policy has become such a fascinating and worthwhile field; it also provides more details about the content and features of the book.

For more information about the book and for analysis of breaking developments in marijuana law and policy, visit the book's companion webpage at: <https://my.vanderbilt.edu/marijuanalaw/>.

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MARIJUANA LAW, POLICY, AND AUTHORITY

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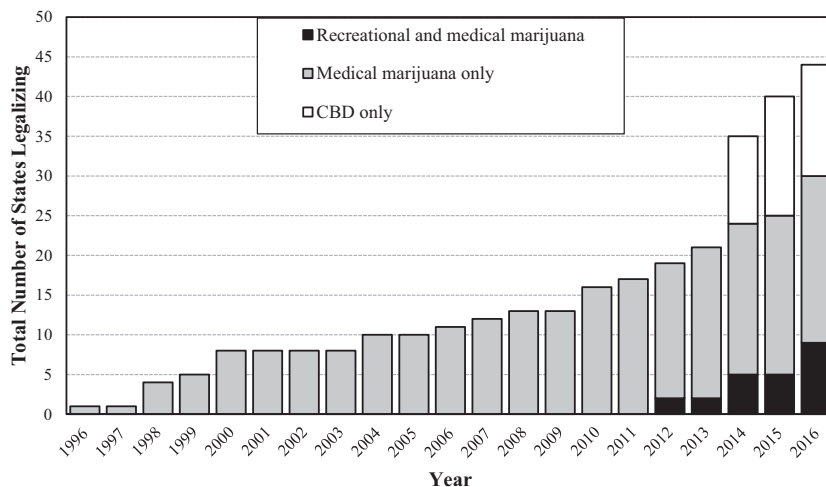
Introduction

Following nearly two decades of regulatory reform in the states, marijuana law and policy has emerged as a robust and fascinating field of study. Abandoning the strict prohibitions that dominated the previous seven decades, and that are still in effect at the federal level, more than forty states have legalized marijuana in at least some circumstances. **Figure 1.1** displays the proliferation of state reforms from 1996 to 2016.

The chart depicts the running tally of states that have legalized (1) both the recreational and medical use of marijuana; (2) only the medical use of marijuana; and (3) only the medical use of cannabidiol (CBD), one of the chemicals found in marijuana.

The reforms have sparked lively debates about the content of marijuana regulations, the wisdom of competing regulatory approaches, and the authority of different government actors to choose among them. Who may use and supply marijuana under state law? Does legalization increase use of the drug? Could the President legalize marijuana without the passage of new congressional legislation? May the states legalize the drug while Congress forbids it? Even so, are state licensing requirements and similar regulations

Figure 1.1. Twenty Years of Marijuana Reform in the States



preempted by federal law? These are just a few of the intriguing questions that are now being confronted in this field.

The standard law school curriculum—and even courses devoted to drug law and policy—do not begin to prepare one for such questions. This first-of-its-kind textbook in Marijuana Law, Policy, and Authority is intended to fill this gap. It guides students, teachers, and practitioners alike through the competing approaches to regulating marijuana, the policies behind those approaches, and the power of various federal, state, and local government actors to pursue them. Importantly, the book takes an evenhanded approach to these often divisive issues. It fully explores the different sides of the many controversies surrounding marijuana law and policy, not to persuade the reader that any one position is necessarily correct, but to foster lively discussion and hone the reader's ability to think more critically about issues in the field.

The sections below provide further introduction to this burgeoning field and to the content, organization, and features of the book.

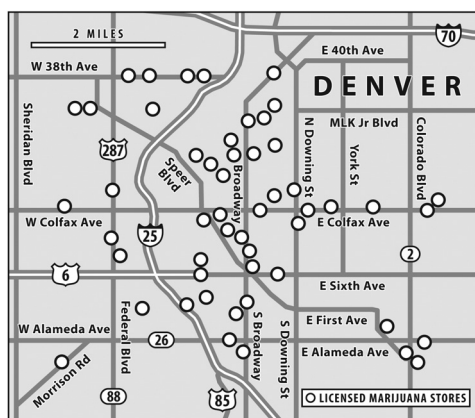
A. WHY CARE ABOUT MARIJUANA LAW AND POLICY?

Given that you opened this book, you probably already have some inkling of why the subject matters. But because marijuana law and policy has undergone major upheavals of late, this section highlights a few reasons why this field has become so interesting and worthwhile of study.

First, and most obvious, the laws and policies governing marijuana affect a huge segment of the population. Marijuana is one of the most widely used substances in the United States. More than 44 percent of Americans aged 12 or older have tried marijuana sometime during their lives, and more than 22 million Americans are considered *regular* (i.e., past-month) users of the drug. Substance Abuse and Mental Health Services Administration, *Results from the 2014 National Survey on Drug Use and Health: Detailed Tables*, tbl. 1.12B, <https://perma.cc/LH4J-723T>. In fact, more people use marijuana than use *all other illicit substances combined*. *Id.* (estimating that 8.7 million people regularly use illicit drugs like heroin or abuse licit drugs like opioid painkillers).

The demand for marijuana has also attracted a large number of people willing to grow and distribute the drug, both licitly (at least at the state level) and illicitly. For example, as of September 2016, more than 600 vendors had obtained a license from the state of Colorado to sell medical and/or recreational marijuana. Colorado Dep't of Revenue, *MED Licensed Facilities*, <https://perma.cc/BP55-F7JL>. These licenses sold nearly \$1 billion dollars' worth of marijuana in 2015 alone. Ricardo Baca, *Colorado marijuana sales skyrocket to more than \$996 million in 2015*, *The Cannabist* (Feb. 9, 2016).

Figure 1.2. Map of Licensed Marijuana Stores in Downtown Denver, Colorado



But users and their suppliers are not the only ones who are affected by the laws and policies governing marijuana. A broad array of third parties who interact with users and suppliers—including physicians, lawyers, banks, schools, universities, landlords, insurers, investors, and employers, among others—are increasingly being drawn into the ambit of this field. For example, physicians are being asked to recommend marijuana to patients, a necessary step for those patients to obtain the legal protections created by state medical marijuana laws. Firms are being asked to accommodate their employees’ medical use of marijuana, much as they accommodate their use of other state-approved drugs. Banks are being asked to provide loans and payment services to licensed marijuana growers and distributors, just as they do for other types of businesses. Even if these third parties never participate directly in the marijuana market itself, they are nonetheless affected by the laws and policies governing the drug.

The need for informed legal advice for all of these parties—users, suppliers, and various third parties—should be abundantly clear. Marijuana is one of the most highly regulated substances in the United States, and the laws governing users, suppliers, and third parties are incredibly complex, even in (and sometimes *especially* in) states that have legalized the drug. In prohibition regimes, questions abound concerning whether sharing a joint with a friend constitutes “distribution” of the drug (and thus is subject to harsh criminal sanctions), whether DOJ enforcement guidelines provide a defense in federal marijuana prosecutions, and whether suppliers are liable in civil Racketeer Influenced and Corrupt Organizations (RICO) lawsuits, among many other matters. Though prohibition has faded in popularity, these questions have not lost their relevance. To cite just two telling statistics: police made more than 700,000 arrests for marijuana-related offenses in 2014, Fed. Bureau of Investigation, *2014 Crime in the United States*, and there are roughly 12,000 people now serving time in *federal* prisons due principally to a conviction for a marijuana offense, Bureau of Justice Statistics, *Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data* (Oct. 2015).

Even in jurisdictions that have legalized marijuana, the drug remains subject to a litany of regulatory restrictions. Colorado, for example, has passed more than 150 pages of civil regulations governing just the retail distribution of marijuana. See Colorado Dep’t of Revenue, Marijuana Enforcement Division, *Retail Marijuana Code*, <https://perma.cc/4F6H-6EM3>. Among many other things, Colorado’s regulations require marijuana suppliers to apply for a special license from the state; maintain detailed records of inventory; install advanced security systems; submit to 24/7 web-based video monitoring; test, package, and label products in a particular way; and verify customer eligibility to purchase marijuana. The many firms that are supplying marijuana in Colorado and elsewhere need legal advice to help them comply with these and other regulations (not to mention federal prohibitions), akin to the advice regularly provided to firms in other highly regulated industries, like energy, alcohol, gaming, and pharmaceuticals.

Indeed, the need for informed legal advice is perhaps even more acute in this field as compared to others because of questions surrounding the enforceability of many of the aforementioned regulations. Conflicts among the policies pursued by different government actors have sparked challenges to federal, state, and local marijuana regulations and have exacerbated the confusion over the legal risks and obligations faced by marijuana users, their suppliers, and various third parties. Does Congress have the constitutional power to ban the simple possession and use of marijuana? May the DOJ suspend its enforcement of the congressional ban? Do the states have the authority to

legalize possession and use of a drug that Congress strictly forbids? Even so, may they license private firms to produce and distribute the drug? May local governments ban distribution of the drug if their state allows it? May a state legislature repeal or amend a marijuana ballot initiative passed by the people of a state? Are contracts with marijuana distributors enforceable?

Not surprisingly, the legal market is already responding to the demand for advice in this field. Lawyers have developed boutique firms and practice groups dedicated to serving the market, including Vincente-Sederberg (which bills itself as the Marijuana Law Firm) and Harris-Bricken's Canna Law Group, among others. Enterprising lawyers have even founded the National Cannabis Bar Association. State bar associations have begun to issue special guidelines addressing the ethical issues that confront the growing number of lawyers practicing in the field. And a growing number of law schools are now offering courses on or related to marijuana law and policy.

Of course, marijuana law and policy also impacts other stakeholders in society besides lawyers and the people they represent. For one thing, marijuana affects the public health, for good or ill. In large part, the reforms depicted in **Figure 1.1** above reflect the belief that there is a "beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating medical conditions." N.J. Code 24:6I-2(a) (establishing New Jersey's medical marijuana program). Outright prohibitions, by contrast, reflect the belief that marijuana is harmful to users and others, say, because it impairs driving, and the belief that the drug lacks any medical utility that might redeem it. *E.g.*, Dep't of Health and Human Services, *Basis for the Recommendation for Maintaining Marijuana in Schedule I of the Controlled Substances Act*, 81 Fed. Reg. 53690 (Aug. 12, 2016) (recommending against rescheduling marijuana under the federal Controlled Substances Act).

How marijuana is regulated also has a significant impact on public finances. By some estimates, circa 2010, prohibition regimes were spending between \$1.2 billion and \$6 billion combined (annually) enforcing their bans on marijuana. American Civil Liberties Union, *The War on Marijuana in Black and White*, 68-77 (2013) (surveying estimates). In contrast, some jurisdictions have reportedly turned marijuana into a net revenue *generator* for public budgets, by legalizing and taxing distribution of the drug. As an example, Colorado collected \$103 million in taxes and fees from its licensed marijuana vendors in 2015. Colorado Dep't of Revenue, *Marijuana Tax Data*, <https://www.colorado.gov/pacific/revenue/colorado-marijuana-tax-data>. The possible impacts on public health and on public finance give citizens more reasons to care about this subject, even if they never plan to participate in the marijuana market themselves.

Given all of the reasons to care about marijuana law and policy, policymakers face a host of questions about how they should regulate the drug: Is marijuana beneficial? What are its harms? Which of those benefits and harms should inform policy decisions? Should marijuana be banned or allowed, and if allowed, for whom? How can jurisdictions prevent diversion of the drug to non-approved uses? How do different policies affect the use of marijuana and any harms associated with such use? What are the costs of competing approaches to regulating marijuana?

These are not idle or purely academic questions. In contrast to many other policy domains characterized by gridlock, marijuana law and policy is dynamic. **Figure 1.1** above captures just a small slice of the changes (big and small) that have been adopted in this domain in recent years, changes that have been fueled at least in part by growing

public support for regulatory reform. *E.g.*, Pew Research Center, *6 Facts About Marijuana*, <https://perma.cc/6DKN-UT47> (Apr. 14, 2015). In light of the interest the field is attracting, policymakers need to know what other jurisdictions are doing, how those regulations are performing, and what options they have the power to pursue. In other words, policymakers need informed advice, just like the people who are affected by their policies do.

A final reason why marijuana law and policy matters is that it may hold lessons for other fields as well. Marijuana law has been at the center of cutting-edge legal controversies over the President's duty to enforce the laws, the courts' obligation to apply the literal language of statutes and referenda, and the ability of private litigants to challenge state laws as preempted, among other issues. How courts and policymakers choose to resolve these controversies could have far-reaching ramifications. In fact, marijuana law can be used as a focal example to explore a host of important legal topics that are relevant for lawyers (and others) working in a range of fields and industries. Indeed, marijuana law provides a terrific vehicle for this purpose—after all, it takes little effort to explain marijuana or to get people interested in the subject.

B. USING THIS BOOK

The book is designed to guide readers through the multifaceted legal and policy issues now confronting lawyers, lawmakers, judges, scholars, and students working in this emerging field. It gives readers an in-depth understanding of and ability to critically evaluate:

- the different ways of controlling the use and supply of marijuana and other substances
- the disagreements over whether marijuana use and similar behaviors should be controlled and how best to do so
- the complex battles between (and within) federal, state, and local governments for control over public policy domains, including (but hardly limited to) marijuana policy
- the interrelationship among law, policy, and authority

Although the book is written in a style that is familiar to law students and is thus well-suited for the law school classroom or as a desk reference for lawyers, it is designed to be accessible to non-law audiences as well. The book provides the non-lawyer or non-law student enough background to enable them to examine even the trickiest legal subjects. It is thus suitable for undergraduate and graduate courses across a variety of non-law disciplines, and, of course, for the reader pursuing the topic on her own.

The sections below discuss in more detail the topics covered by the book, the organization of its chapters, and its key design features.

1. The Topics Covered in the Book

The book explores three broad interrelated topics: the law, policy, and governmental authority surrounding marijuana. This section briefly explains the scope of each topic and the connections among them.

The Substantive Law. Several chapters of the book are devoted to surveying the competing approaches to regulating marijuana-related activities. These chapters detail the legal restrictions jurisdictions impose on marijuana users, suppliers, and third parties, and the legal consequences of violating those restrictions.

The substantive law chapters divide jurisdictions into two basic categories: prohibition regimes and legalization regimes. Prohibition regimes are those that ban outright the possession, manufacture, and distribution of marijuana (and related activities); they include regimes that have decriminalized marijuana—i.e., those that have reduced the sanctions for but do not yet allow the possession of marijuana. Legalization regimes, by contrast, are those that explicitly permit at least some people to possess, manufacture, and/or distribute marijuana for medical or other purposes without sanction. Sorting jurisdictions into these two broad categories makes the discussion of the law more manageable, but the book also highlights key differences among the jurisdictions within each of these categories, such as the differences among the three types of legalization regimes depicted in **Figure 1.1** above.

Policy. The book also explores the policies behind the competing regulatory approaches surveyed in the substantive law chapters. The policy chapters explore the *objectives* behind different substantive rules and the beliefs (both factual and philosophical) that animate those objectives. In other words, what are lawmakers trying to accomplish and why? The policy chapters also compare the *outcomes* produced by different regulatory regimes. In other words, how well do regulations achieve their objectives and what is sacrificed by pursuing those regulations? The discussions of policy objectives and outcomes enable readers to critically evaluate and more fully comprehend the laws governing marijuana.

Authority. Regulatory power in the United States is diffused both across and within different levels of government. The federal government and the states both wield some authority in this field, and a variety of officials within each level of government—from members of Congress to the deputies of a local township—have influenced how that power has been exercised. But they do not always agree about how marijuana should be regulated. Indeed, their divergent views have generated extensive litigation and debate over who has the authority to determine marijuana policy, as noted in Section A above.

The chapters devoted to authority issues guide readers through these power disputes. The chapters discuss key legal doctrines in federalism, separation of powers, localism, and individual rights that illuminate how courts resolve these controversies. Just as importantly, however, these chapters also discuss the practical (i.e., *de facto*) power these same actors wield over marijuana policy. Developments in this field over the last twenty years have demonstrated the need to consider both *de jure* (i.e., formal) and *de facto* power over marijuana.

Although each of these three topics is fascinating and significant in its own right, it is also important to recognize the connections among them—a theme emphasized throughout the book. Indeed, one would be hard-pressed to grasp many of the nuances in marijuana law, policy, or authority without having some understanding of each of the other topics.

Consider just one simple example to illustrate the connections among the topics. All states that have legalized marijuana for medical purposes now require prospective users to obtain a physician’s “recommendation” to use the drug. The recommendation

requirement and what it entails are essentially *substantive law* issues: To satisfy the requirement, for example, a physician must usually diagnose her patient with a designated condition, stipulate with some degree of confidence that marijuana would improve the patient's outlook, and submit forms to a state health agency attesting to these findings. The rationale for imposing the recommendation requirement is more of a *policy* issue: The requirement helps states limit access to marijuana. In theory, the recommendation ensures that only people who are using marijuana for *bona fide* medical purposes are shielded from criminal and civil sanctions under state law. But the reason why states require a "recommendation" as opposed to a "prescription"—a more familiar and well-tested requirement the states use to limit access to other controlled substances—stems from limitations on state and federal *authority*. The federal Drug Enforcement Agency (DEA) has threatened to punish physicians who prescribe marijuana, and the states cannot block the DEA from imposing those sanctions. But the DEA arguably cannot punish physicians for merely recommending marijuana, because a recommendation, unlike a prescription, is considered protected speech under the First Amendment (at least in the eyes of one important court). The states designed their recommendation requirement to exploit this limitation on the DEA's power and thereby defuse the threat posed by the agency's control over physician prescriptions. This example helps to illustrate the linkages among law, policy, and authority in this field. By highlighting such linkages, the book imparts a much richer and deeper understanding of marijuana law and policy.

2. The Organization of the Book

The heart of the book is divided into three parts (II-IV).¹ Each part explores the law, policy, and authority issues surrounding one distinct set of regulated parties: marijuana users, their suppliers, or the third parties who interact with users and suppliers. The paragraphs below highlight some of the specific topics covered in each part and the rationale behind discussing the three parties separately.

Part II. Part II, which includes Chapters 3-6, explores the law, policy, and authority issues that are most relevant to marijuana users. Chapter 3 begins by examining the law governing users in prohibition regimes. It elaborates on the elements of the key prohibition directed at users in such regimes, namely, bans on the simple possession of marijuana; the defenses users might raise against possession charges (e.g., the defense of necessity); and the criminal and civil sanctions that commonly attach to simple possession offenses. Chapter 4 then surveys the laws governing users in legalization regimes, including medical marijuana states, recreational marijuana states, and CBD states. It explores who is allowed to use marijuana in each type of jurisdiction, the restrictions such jurisdictions commonly impose on lawful marijuana users (e.g., bans on driving under the influence), and the different levels of protection jurisdictions provide against search, arrest, prosecution, and other government-imposed sanctions for marijuana possession or use.

1. Part I of the book includes this introductory chapter as well as the next chapter on the definition of marijuana.

Chapter 5 turns to the policy issues raised by the use of marijuana and the regulation of marijuana users. It explores the medical/scientific debates over the harms and benefits of marijuana use, as well as the more philosophical debates over which of those harms and benefits should motivate government policy. Using social science theory and evidence, the chapter then discusses the impact of different user regulations on marijuana use and harms, as well as the comparative costs of those regulations.

Finally, Chapter 6 explores the authority of different government actors to influence the regulation of marijuana users. It first examines the federal government's authority to regulate marijuana use and possession, focusing on the limits of Congress's enumerated powers as well as the potential protections given users by the Due Process Clause of the United States Constitution. It then examines the states' power over marijuana users, focusing on their ability to *legalize* marijuana for purposes of state law, i.e., to remove the sanctions *they* previously imposed on the possession (etc.) of marijuana. The chapter also examines how authority is allocated within the federal and state governments. At the federal level, the chapter focuses on the executive branch's delegated authority to reschedule drugs under the federal Controlled Substances Act (CSA). For the states, the chapter focuses on the ability of citizens and local governments to influence state policy toward marijuana users.

Part III. Part III focuses on the law, policy, and authority issues surrounding marijuana *suppliers*, i.e., those who grow or distribute marijuana. Chapter 7 details the elements of and criminal sanctions imposed for key marijuana trafficking crimes in prohibition regimes, including the manufacture of marijuana, distribution of marijuana, and possession with the intent to distribute marijuana. It also explores the viability of various legal defenses, including ones based on recent Department of Justice (DOJ) enforcement guidelines and congressional budget legislation. Chapter 7 then discusses the additional costs marijuana suppliers face stemming from civil forfeiture actions, special tax impositions, private RICO suits, and the inability to register trademarks at the federal level.

In a similar fashion, Chapter 8 details the regulation of marijuana suppliers in legalization regimes. The chapter details who is allowed to grow or distribute marijuana (e.g., users, their caregivers, licensed commercial firms, etc.) and the myriad restrictions states place on the cultivation and distribution of marijuana, like those imposed by the Colorado Retail Marijuana Code noted above in Section A. Chapter 8 also details how legalization regimes supervise and discipline commercial suppliers.

Chapter 9 explores key policy issues surrounding marijuana suppliers. It builds on the discussion in Chapter 5 by exploring how various regulations directed at these *suppliers* are expected to affect marijuana *use*. The chapter also discusses the comparative costs of different supply regulations, including the net fiscal impact of state reforms.

Chapter 10 completes the discussion of marijuana suppliers by examining the authority different government actors wield over them. The chapter begins by discussing the constitutionality of DOJ memoranda that discourage enforcement of the congressional marijuana ban against state-licensed marijuana suppliers. The chapter then examines the limits imposed on state authority over marijuana suppliers. It looks beyond the states' power to legalize the use and supply of marijuana (covered in Chapter 6) and instead focuses on their power to *regulate* those same activities, i.e., to impose restrictions

and conditions (like licensing and labeling requirements) on the production and distribution of marijuana. To that end, it explores whether any of the state regulations detailed in Chapter 8 are preempted by federal law. The chapter concludes by examining the power of local governments to resist state reforms, and in particular, to ban the local production or distribution of marijuana after a state has legalized those activities.

Part IV. Part IV focuses on the law, policy, and authority issues surrounding third parties who commonly interact with marijuana users and suppliers, including professionals (like physicians and lawyers), businesses (like banks and employers), and state officials (like school administrators and police officers). Chapter 11 begins by surveying the regulations that potentially apply to all such third parties, including aiding and abetting, conspiracy, and money laundering offenses. Given the heterogeneity of third parties, however, the remaining chapters in Part IV each focus on one specific type of third party and the law, policy, and authority issues confronting it.

Chapter 12 covers the unique law, policy, and authority issues confronting professionals. It first examines the issues surrounding physicians. For example, it explores whether physicians may be sanctioned for recommending marijuana to their patients and how states have regulated physician recommendation practices. The chapter next examines the issues surrounding attorneys. For example, it asks what sorts of legal services attorneys may provide to clients regarding marijuana activities that are still prohibited at the federal level.

Chapter 13 then addresses the key law, policy, and authority issues confronting businesses that deal with marijuana users and suppliers. Transacting with marijuana users and suppliers raises a host of thorny questions addressed by the chapter: Will courts enforce contracts between marijuana suppliers and other businesses? If those contracts are not enforceable in court, how can businesses protect their reliance interests? Do some types of contracts expose businesses to legal sanctions? For example, could a landlord be criminally prosecuted for leasing property for a marijuana storefront? Can banks handle the proceeds of marijuana sales? May employers terminate employees for using marijuana? Who decides these questions?

Lastly, Chapter 14 covers the law, policy, and authority issues surrounding government officials. State officials have been caught in the crossfire of marijuana law and policy. While the federal government continues to criminalize the possession, manufacture, and distribution of marijuana, state lawmakers have ordered state officials to implement more permissive policies toward the same activities. Marijuana reforms thus raise challenging questions concerning the rights and duties of these state officials. Could state officials be prosecuted under the federal CSA for implementing state reforms? Could they be held civilly liable if they *refuse* to implement such reforms? May state officials prevent federal law enforcement agents from obtaining sensitive information the states gather from marijuana users and suppliers? Will state agencies lose federal funding by pursuing a softer approach toward marijuana? Chapter 14 addresses these and related questions.

The book's discussion of three basic topics surrounding each of three regulated parties results in a three by three organizational structure, depicted in **Figure 1.3** below. **Figure 1.3** highlights where some key issues are discussed regarding each topic and regulated party.

Figure 1.3. The Organization of the Book and Some Selected Topics

	Users (II)	Suppliers (III)	Third Parties (IV)
Law	Possession; necessity; physician recommendation; registration; qualifying condition; open use/use in public; DUI impaired; DUI-per se; search; probable cause; immunity; affirmative defense	Manufacture; distribution; possession with intent; sentencing; DOJ enforcement memoranda; budget restrictions; forfeiture; Section 280E; civil RICO; trademarks; personal cultivation; licensing; advertising restrictions; labeling and packaging laws; marijuana taxes	Conspiracy; aiding and abetting; money laundering; crack house statute; rules of professional conduct; DEA prescription authority; employment and housing discrimination; Section 885(d) immunity
Policy	CSA scheduling; medical benefits; recreational benefits; physical harms; the harm principle; law's impact on usage; fiscal costs; racial disparities	Diversification; law's impact on price; tax collections; industry concentration; racial disparities in licensing	Access to physicians, lawyers, and banking services; recommendation mills
Authority	Congress's enumerated powers; DEA scheduling authority; anti-commandeering rule; Due Process	Preemption; private preemption suits; Take Care Clause; the local option	Preemption; contract enforcement; First Amendment; federal grant conditions

This three-by-three organizational structure serves two main purposes. First, it helps to emphasize that the issues surrounding the three regulated parties, while often similar, are by no means identical. Nearly all jurisdictions, for example, impose far less onerous regulatory restrictions on marijuana users than they do on marijuana suppliers. In some jurisdictions, marijuana use (or possession) may be lawful or at least decriminalized, while marijuana cultivation or distribution remain subject to criminal prohibitions and correspondingly harsh sanctions. To be sure, one could cover all of the substantive law, policy, or authority issues surrounding all three parties at one time. The structure of the book even makes this possible; e.g., the instructor or reader could regroup the chapters around a particular topic rather than a particular party. But doing so could be overwhelming; consider that the book devotes nearly 300 pages just to the substantive laws governing marijuana. Interspersing discussions of law, policy, and authority adds some variety to the subject and thereby helps to keep each topic more engaging.

Second, the organization enables the book to gradually introduce more complexity into each of the topics. The book starts with marijuana users in large part because the rules, policies, and authority issues surrounding them are relatively straightforward. It then introduces the more complicated rules, policies, and authority issues that apply to

suppliers, and, finally, those that apply to third parties. There is, of course, some inescapable overlap in the topics across the three groups. However, the book is careful to discuss a common issue only once, and to refer the reader to that discussion any time it becomes relevant elsewhere in the book.

While following the suggested order of topics has advantages, the book's structure allows the instructor (or reader) to easily and seamlessly customize the ordering of topics or to focus on a specific topic or regulated party of interest. For example, the instructor who is particularly interested in the health law issues surrounding marijuana might focus on the laws defining who may use marijuana for medical use (Chapter 4), the debates over marijuana's health harms and benefits (Chapter 5), the DEA's authority to reschedule marijuana (Chapter 6), and the laws governing physicians who recommend the drug to their patients (Chapter 12). Likewise, the instructor who is particularly interested in the business law issues surrounding marijuana might focus on the unique federal tax, trademark, contracting, and banking risks faced by such businesses (Chapters 7 and 13), the sundry regulations legalization states have imposed on them (Chapter 8), and the preemption challenges directed at those (and local) regulations (Chapter 10). Along these lines, the Teacher's Manual provides suggestions for customizing a syllabus to meet the needs of a particular course of study.

3. The Features of the Book

The book includes several distinctive features that are designed to explain, to provoke critical thinking about, and to facilitate discussions of each of the topics outlined above. This section briefly describes those features.

Text. The book includes a substantial amount of original text. The text clearly introduces each of the issues covered, providing the background needed for the reader to understand and evaluate the materials—a critical feature for a relatively new subject, especially one implicating a diverse array of legal doctrines and topics. The text also provides summaries of the laws and it highlights key discrepancies in the regulations adopted by different jurisdictions. The text and structure of the book also help to explain the relationships among topics—i.e., how all of the pieces of this complex puzzle fit together.

Excerpts from Primary Sources. The book also includes excerpts from a variety of primary materials, including cases, statutes, regulations, government reports, memoranda, lawsuits, and secondary scholarship. There is no shortage of potential materials in this field; the difficult part is figuring out the ones on which the time-strapped instructor or reader should focus. To that end, I reviewed *several thousand* sources as I was writing this book. Each source that is included was chosen because it provides an illuminating discussion or treatment of a particular topic—whether or not I agree with it. (Note, however, that the omission of a source is not meant to suggest that it is unimportant or unhelpful—there is simply far too little space to fit everything I would have wanted to include in the book.) I trimmed each excerpt down to a manageable size to focus on key points of interest and to save the reader time, but the companion website (described below) contains links to full versions of many of them.

Notes and Questions. Following most excerpts and many sections of text, you will find a Notes and Questions section. The Notes and Questions sections include questions

about the excerpt or text, further details on the topic at hand and related subjects, and Problems (discussed below). These materials are important but generally less essential than the main excerpt or text they follow. Putting these materials into a separate section enables instructors and readers to probe certain issues more fully as they choose, without having to spend time on issues that may be of less import or relevance to them.

Website. The law governing marijuana is constantly evolving and research in the field is growing at a fast clip. Nonetheless, the materials excerpted in the book were chosen to stand the test of time; i.e., their discussions of particular issues should remain enlightening and relevant, notwithstanding changes to the law. However, the book also has a companion website to help keep the reader abreast of important developments in the field. The website also provides supplemental materials, such as links to sources excerpted in the book and additional cases and statutes from different jurisdictions that can be used to focus on the laws of a particular state, if so desired.

Problems. Another valuable feature of the book are the more than 100 Problems interspersed throughout every chapter. Each Problem is carefully and clearly constructed to facilitate critical thinking about and provoke thoughtful discussion of the issues raised in the text and excerpts. Some Problems are based on real-life cases and events; those Problems typically include citations to and even quotes from the inspirational materials. Here are some examples of Problems, taken from different chapters in the book:



Problem 4.15: While driving her car, Camilla is stopped for speeding. In the course of inspecting Camilla's license and car registration, the officer detects the faint smell of unburnt marijuana emanating from Camilla's car. Does the smell of the marijuana alone give the officer probable cause to search the car? How, if at all, does your answer change if the state has: prohibited possession outright, decriminalized possession, legalized possession for certain medical uses, or legalized possession by adults of up to one ounce irrespective of the purposes for which it will be used?



Problem 5.1: Suppose you meet a genie with magical powers. The genie makes you the following offer: at your command, she will make all of the marijuana (plants included) in the world instantly disappear forever. There is no catch, and you believe she could do it. Would you give the command? Why, why not?



Problem 8.16: Delilah is the owner of a licensed Retail Marijuana Store in Small Town, Colorado. Seventy-five percent of the population of Small Town is 21 years old or older. In early December, Delilah runs a small advertisement for her store in the local paper. The ad has a picture of Santa Claus stuffing marijuana into a stocking with the name "Mrs. Claus" on it. Does the ad violate the Colorado Retail Marijuana Code advertising restrictions? Cf. Beer Institute, Advertising and Marketing Code §3(b) (June 2015).

Problem 10.6: In 2016, the City of Oakland, California, adopted the Dispensary Equity Permit Program, under which the City will award at least 50 percent of its marijuana business licenses to applicants who meet the following criteria:



A. Criteria. Applicant must have at least one member who meets all of the following criteria:

1. Be an Oakland resident who:
 - a. Resides for at least two (2) years prior to the date of application in Oakland Police Department Beats 26Y, 30X, 30Y, 31Z, 32Y, and 34X; or those individuals who, within the last ten (10) years, have been previously incarcerated for a marijuana-related offense as a result of a conviction arising out of Oakland, California;
 - b. Maintains not less than a fifty percent (50%) ownership in the Dispensary applicant entity, partnership, limited liability corporation, collective, corporation, worker cooperative or other recognized ownership entity; and
2. Prior marijuana or cannabis conviction shall not be a bar to equity ownership.

Oakland Mun. Code 5.80.045 (2016). Is the Dispensary Equity Permit Program constitutional? See generally Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 133 Mich. J. Race & L. 277 (2007).

Problem 12.11: Andy is an attorney who is licensed to practice in a recreational marijuana state. Camila tells Andy that she wants to launch a retail marijuana store. Under the state's marijuana law, Camila must first apply for a retail marijuana license from the state. Camila has no legal training. She asks Andy for help in completing the license application, which is 13 pages long and includes many questions for which a legal background would be helpful. If Andy completes the application on behalf of Camila, would he be in violation of Rule 1.2(d) of the Model Rules of Professional Conduct? Suppose Camila completes the application herself, but she asks Andy for help in deciphering the meaning of certain questions on the application (e.g., "Has any interest or share in the profits of the sale of Marijuana been pledged or hypothecated as security for a debt or deposited as a security for the performance of an act or to secure the performance of a contract?"). Can Andy answer Camila's questions under Rule 1.2(d)?



Problem 13.1: Ivan is an investor who loaned \$500,000 to Oma. Oma is the owner of The Dude Ranch, a state-licensed medical marijuana dispensary. Pursuant to the terms of the loan agreement, Oma was supposed to use the funds "to grow and sell marijuana through The Dude Ranch, to the extent permitted by state law." In return, Oma would pay Ivan 12 percent interest annually over 30 years, with the principal due at the end of the loan term. However, Oma instead used the \$500,000 to buy a house for herself. She has



refused to pay Ivan any of the interest due on the loan, and she has refused to refund any of the loan principal. Ivan has sued Oma in state court for breach of contract. Will the court enforce the contract? If so, what remedy will it award?

Teacher's Manual. The Teacher's Manual helps instructors to design and prepare to teach their own courses on this subject. Among other things, the Manual offers explanatory notes about topics and materials (e.g., why a particular case was included in the book, etc.), suggestions for additional classroom exercises, and thoughts about questions posed in the text and Problems. The Manual also provides sample syllabi to help instructors design their course around different credit requirements, themes, and so on.

* * *

I hope this brief Introduction inspires you to read on. And as you read on, I hope the book enlightens your views on this important subject—whatever they might be—just as writing the book challenged, informed, and refined my own views.

So, without further ado, let's get going!