The symbiotic tensions of the regulatory–carceral state: The case of cannabis legalization

Ely Aaronson
University of Haifa, Faculty of Law, Haifa, Israel

Gil Rothschild-Elyassi
University of California, Berkeley, Jurisprudence and Social Policy, Berkeley, USA

Abstract
Recent scholarship has emphasized the need to develop a polymorphic conceptualization of the regulatory state. This article contributes to this theory-building project by outlining a research agenda for exploring the symbiotic interactions and tensions between the regulatory and carceral morphs of the state. Using the case study of cannabis legalization reforms in the United States, we argue that the legitimation deficits of the carceral state stimulate the proliferation of new regulatory frameworks for governing social problems that were traditionally handled by the criminal justice system. We demonstrate how the polymorphic approach illuminates the ways in which the regulatory and carceral morphs of the state compete for influence over shared policy domains, but also complement and reinforce one another. Thus, rather than precipitating the demise of the carceral state, cannabis legalization reforms sustain a bifurcated governance structure perpetuating long-standing patterns of using drug law as a means for racialized social control.

Keywords: cannabis legalization, carceral state, drug policy, race, regulatory state.

1. Introduction

One of the raisons d’être of the development of regulation and governance studies as a discrete scholarly field is to stimulate cross-fertilization between scholars studying regulatory practices in different disciplines (Braithwaite et al. 2007; Braithwaite 2014). This undertaking, however, is often impeded by the persistence of rigid walls between communities of researchers investigating different aspects of the governance landscape. The insufficient dialogue of the regulatory state literature with bodies of scholarship offering alternative conceptualizations of the dominant functions of the post-Keynesian state provides a case in point (Levi-Faur 2014, p. 599). The regulatory state has been a focus of research for regulation and governance scholarship since the 1990s (Majone 1997; Braithwaite 2000; Yeung 2010; Levi-Faur 2013a; Scott 2017). Its increasing salience is part of a wider renaissance in the scholarly analysis of the state. In recent decades, scholars in various fields have emphasized the need to “bring the state back in” and developed new concepts that aim to capture the state’s “ultimate” essence (e.g. the national security state, fiscal state, litigation state, and warfare state). The fragmentation affecting state theory has raised concerns about the growing cacophony between competing research paradigms in the field. As Orren and Skowronek (2017, p. 9) observed: “[T]he very multiplicity of labels suggests their limitations…These scattered subsystems can only gesture at the background system that comprises governance in its entirety.”

In a series of articles, Levi-Faur (2013a, 2013b, 2014) offered a way forward by developing a polymorphic approach to the study of the regulatory state. This approach builds on Michael Mann’s conceptualization of the state as a polymorphic institution. As explained by Mann (1993, p. 75), “[I]n chemistry, a polymorph is a substance that crystallizes in two or more different forms, usually belonging to different systems.” The polymorphic approach illuminates how “states crystallize as the center – but in each case as a different center – of a number of power networks” (Mann 1993, p. 75). Each of these networks shapes the exercise of a different modality of state power. This article contributes to this theory-building project by outlining a research agenda that focuses on the
interactions and tensions between the regulatory and carceral morphs of the state. Using cannabis legalization reforms in the United States as a case study, we explore the expansion of the regulatory state into policy domains previously governed predominantly by carceral tools and consider how such processes transform the character of both the regulatory state and the carceral state. Ultimately, we argue that the relationship between the regulatory state and the carceral state is best described as one of symbiotic tension. These two morphs of the state often vie for influence over the same policy domains, yet like in other symbiotic dynamics they also feed off each other’s institutional expansion and catalyze mutual adaptations of their respective modes of operation. A research agenda that focuses on the symbiotic tensions of the regulatory–carceral state provides new opportunities for interdisciplinary dialogue between regulation and governance studies and criminology, two disciplines that have long failed to realize their potential for cross-fertilization (Braithwaite 2000, 2003; Almond & Erp 2020).

Levi-Faur (2014) applied the polymorphic approach to explain how the distinctive styles of governance of the regulatory state have served to advance the goals of the welfare state. This analysis illuminates how the expansion of the regulatory state does not precipitate the demise of the welfare state but instead catalyzes welfare institutions to reorganize their activity during a period in which traditional instruments of redistribution and service provision are increasingly criticized as ineffectual. This polymorphic approach, then, allows us to explore not only epochal changes between modes of governance but also their coproducitive relationship. A similar process seems to be looming today with respect to the carceral state. The rise of the Black Lives Matter movement has reinvigorated long-standing criticisms of the pernicious effects of the carceral state on civil rights and democratic values (Roberts 2017). These criticisms supplement those raised by bipartisan coalitions that emerged during the post-2008 recession era to oppose the use of costly and ineffective measures such as the death penalty, three strikes laws, life-without-parole statutes, and supermax prisons (Aviram 2015). Consequently, the carceral state is undergoing a transformative moment in which different paths for change are placed on the agenda (Beckett 2018). One prominent path is the creation of alternative civil and administrative frameworks for performing governance tasks that were previously undertaken by the criminal justice system (Beckett & Murakawa 2012, p. 231).¹

This development poses the question of how carceral and regulatory modes of governance interact within the same policy domain. To explore this question, we use the case study of cannabis legalization reforms in the United States. Mobilizing the potential of the case study approach for theory elaboration (Steinmetz 2004), our analysis develops a theoretical framework and analytic vocabulary for exploring context-sensitive relationships between regulatory and carceral interventions. This framework offers important insights not only for students of decriminalization and legalization initiatives in other contexts (e.g. sex work/prostitution) but also for scholars examining other campaigns to roll back the carceral state and supplant it with regulatory forms of governance. A polymorphic approach allows us to examine whether and how carceral and regulatory modalities do not merely supplant but also continuously interact with one another. While answers to these questions vary depending on context, our polymorphic outlook provides analytic purchase to articulate and operationalize inquiries in this vein.

The past two and a half decades have seen dramatic changes in the laws and regulations governing the cultivation, distribution, sale, and use of cannabis in the United States (Caulkins et al. 2016; Mikos 2017). In 1996, California became the first state to permit the medical use of cannabis by registered patients. To date, the medical use of cannabis has been legalized in 34 other states and in the District of Columbia. These changes paved the way for more radical reforms, including the legalization of the recreational use of cannabis in 15 states and in the District of Columbia. The diffusion of cannabis legalization has gained momentum despite the fact that cannabis continues to be classified as an illegal drug with no valid medical uses under federal law (Mikos 2009) and notwithstanding criticism from key regulatory international actors (Aaronson 2020).

Cannabis legalization reforms have received wide scholarly attention by scholars of the carceral state (Gottschalk 2014; Aviram 2015). However, because studies in this vein typically rely on a monomorphic lens, they have mainly focused on how these reforms partake in broader efforts to dismantle the carceral state and paid little attention to how legalization stimulates the development of non-penal regulatory measures. Our polymorphic approach provides tools to explore these questions and account for the complex governance effects of legalization reforms. Viewed from the vantage point of the regulatory state literature, cannabis legalization reforms provide a distinct illustration of what John Braithwaite (2008, p. 8) described as the “myth of deregulation.” As Braithwaite and others have demonstrated (e.g. Vogel 1996; Levi-Faur & Jordana 2006; Levi-Faur 2014), market
liberalization processes do not typically precipitate the “hollowing out” of the state. Instead, they often stimulate the development of expansive systems of regulatory rules, institutions, and networks through which the state wields power over private actors. Regulation and governance scholarship has explored these dynamics in a wide range of policy domains wherein the opening up of markets to private actors was driven by efforts to reorganize the service provision and distributive activities of national governments (e.g. telecommunications, electricity, post, media, and banking). The case study of cannabis legalization helps to assess the distinctive aspects of regulatory diversification processes triggered by efforts to remove the criminal status of certain commodities or services. For our purposes, it also provides a testing ground for examining the relationship between the regulatory and carceral morphs of the state within a single policy domain. Importantly, a polymorphic perspective obviates the tendency to classify each particular institution or measure (such as the “criminal justice system” or administrative laws) into monomorphic categories. Instead, this approach encourages us to explore how each measure may operate simultaneously along both regulatory and carceral registers.

Our analysis shows that legalization reforms may have complex and bifurcating implications. On the one hand, such reforms facilitate the regulatory state’s expansion into governance areas that were previously dominated by penal forms of governance. At the same time, however, the carceral state continues to cast its shadow over these policy domains. It does so not only by providing tools to escalate the severity of sanctions in cases in which more lenient regulatory responses have failed (Ayers & Braithwaite 1992; Braithwaite 2011) but also by constituting a residual-yet-expansive array of social control mechanisms for governing populations that are deemed to be “dangerous” or “unruly” (Feeley and Simon 1992). Rather than signaling a definite transition from carceral to regulatory forms of governance, cannabis legalization policies contribute to the bifurcation of the governance structure. These developments perpetuate long-standing patterns of racialized enforcement through adaptive strategies such as the assignment of regulatory intermediaries with drug control responsibilities, the creation of racially skewed barriers to obtaining licenses to use medical cannabis, and the introduction of new prohibitions and enforcement tactics that predominantly target poor communities of color.

In Section 2, we delineate the analytic parameters of the regulatory and carceral morphs of the state. The next two sections use the case study of cannabis legalization to examine the relational dynamic between these morphs, considering both their inner tensions and their symbiotic interaction. In Section 3, we assess the distinctive role of the regulatory morph of the state in shaping the governance of legalized cannabis markets and consider how regulatory mechanisms are complemented or counteracted by carceral ones. In Section 4, we focus on the enduring role of the carceral state in cannabis legalization regimes, highlighting how carceral forms of governance circumscribe the regulatory state’s sphere of influence and buttress its conditions of possibility. In Section 5, we conclude and elaborate on the notion of symbiotic tension and some of our framework’s implications for other arenas.

2. Untangling the relationship between the regulatory state and the carceral state

Over the past two decades, the concept of the carceral state has served as a bridge between criminological research and a wide variety of disciplines, including political science (Gottschalk 2006, 2014), history (Thompson 2010), and geography (Gilmore 2007). This concept has been used to describe the assemblage of institutions, actors, policies, and practices that collectively shape the state’s deployment of penal powers (Rubin & Phelps 2017). In this broad sense, the concept is not confined to a specific country or period (Lacey 2009), yet the extensive scholarly attention it received has largely been driven by an interest in explaining the peculiar role of penal institutions in the post-1970 United States. The final decades of the twentieth century witnessed a historically unprecedented and demographically concentrated growth of the incarcerated population in the United States. The rise of “mass incarceration” was fueled by dramatic changes in various aspects of the criminal process, including the adoption of aggressive policing strategies known as “zero-tolerance” or “order-maintenance” policing (Harcourt 2001; Beckett & Herbert 2010), and the expansion of community supervision enabling the imposition of restrictive surveillance and disciplinary measures that often serve as a pathway (rather than as an alternative) to incarceration (Miller 2014; Phelps 2020). At the peak of this trend in 2007, nearly 1 in 100 adults lived behind bars (Beckett 2018. p. 236), and nearly 1 in every 53 adults (and 1 in 12 African American men) was on probation (Phelps 2020, p. 262). These figures represent the most visible tentacle of a sweeping paradigm
shift in which crime governance technologies have become increasingly involved in tackling an ever-expanding domain of human activity (Garland 2001; Simon 2007).

An important strand of the carceral state literature goes beyond the confines of formal state institutions and examines how discourses and technologies of crime governance shape the fabric of community life and govern everyday experiences in schools (Rios 2017), workplaces (Satz 2020), and families (Suk 2006). This scholarship demonstrates how the carceral state’s expansion does not exclusively rely on state-sponsored imposition of penal sanctions. It is also facilitated by the responsibility of private actors and the strategic harnessing of their governance capacities (Garland 2001, pp. 124–7). This broader perspective shows how the carceral state encompasses multiple institutions, norms, and technologies as well as varying forms of interpenetration between state, market, and community governance mechanisms (Simon 2007). As will be demonstrated later, it also prepares the ground for cross-fertilization with the literature on decentered regulation (Black 2002).

Much of the scholarship on the carceral state applies this concept as though all aspects of governance can be reduced thereto and thereby leaves undertheorized other modes of governance and their relation to carcerality. This monomorphic perspective underpins many of the blind spots identified by John Braithwaite in his pointed critique of the sociology of punishment (Braithwaite 2003) and of mainstream criminological theory (Braithwaite 2000). As Braithwaite (2003, p. 5) observed, “the sociology of punishment is seen...as contributing useful insights, but less than it might because of its focus on societal choices of whether and how to punish instead of on choices of whether to regulate by punishment or by a range of other important strategies.” By decoupling penal change from other trajectories of regulatory development, sociologists of punishment often overlook the ways in which the design and impact of penal policies are shaped by and interact with non-penal forms of regulation. This point, however, cuts both ways, and it equally applies to the insufficient engagement of regulation and governance scholarship with the extensive literature exploring how the carceral state facilitates the spread of crime governance technologies across regulatory domains. A growing body of work demonstrates how crime control strategies under neoliberalism do not exclusively rely on command and control instruments such as the imposition of new prohibitions and tougher penalties. Various governmental strategies complement such formal controls by activating individuals and organizations to adopt strategies of self-regulation (Garland 2001, p. 10). Against this backdrop, the need to better understand the interactions between the regulatory and carceral morphs of the state becomes as urgent for regulation and governance studies as it is for punishment and society scholarship.

To conceptualize the relationship between the regulatory and carceral morphs of the state, we first need to circumscribe the analytic parameters of these concepts. Our basic premise is that the distinction between these two morphs rests neither on their application to different policy domains nor on their distinct institutional parameters, but rather on the differences between the conceptual frames and associated techniques they mobilize to govern behavior. As will be shown in our analysis of the policy domain of cannabis law, some legal rules are implemented through both regulatory and carceral frames, with each frame applying to different actors and activities. Viewed as ideal types, the two frames operate according to distinct logics that are distinguishable in terms of their generalized goal, their methods or technologies, their practicable object or presumed target of intervention, and their way of conceptualizing law and legal force (Table 1). Accordingly, each frame also situates the inquiry, both historically and theoretically, within different assemblages of social meanings and governance techniques (Silbey 2011).

Levi-Faur (2013a, p. 39) defines the regulatory state as “a state that applies and extends rule making, rule monitoring, and rule enforcement either directly or indirectly...[including] via the supervision or activation of other regulatory systems.” This definition captures aspects of criminal justice policy and practice in which the use of policing and penal sanctions maintains a causal and instrumental relation to rule violations. This understanding resonates with a traditional view presuming that criminal justice institutions proceed in a reactive and linear fashion from non-compliance to prosecution, to the assignment of legal responsibility, and ultimately to legal punishment. From this perspective, the primary tasks of criminal justice institutions are to design rules that are likely to reduce the incidence of unwarranted forms of conduct, to determine whether the suspect/defendant had violated those rules, and to tailor a regulatory response that may or may not involve penal sanctions. This liberal paradigm accordingly views the presumed targets of governance as individual, autonomous actors with the capacity to choose between different courses of action (moral/immoral, rational/irrational, and licit/illicit). When
considered through this lens, penal sanctions are indeed situated near the tip of a broad-based pyramid (Braithwaite 2000, 2011).

Accounts that locate criminal justice institutions as part of the regulatory state shed important light on certain aspects of their operation, notably their efforts to achieve utilitarian goals such as general and individual deterrence. Such accounts, however, have limited explanatory power with regard to the recent expansion of the crime control field, the long-standing racial disparities that pervade it, and the links between these institutional dynamics and broad social, cultural, and economic processes shaping pervasive racism and economic disparities. First, key writings in the regulatory state literature assume that incapacitation should be employed as a tool of last resort (Hawkins 1992; Braithwaite 2011), whereas in practice incapacitative imprisonment has become a predominant model of punishment (Simon 2007, p. 142). This has been accompanied by the declining significance of penal rationalities that seek to prevent future lawbreaking through deterrent and rehabilitative interventions. Second, recent decades have seen a growing use of policing tactics that are based not on individuated suspicion regarding the commission of a specific offense but on generalizing assumptions about the disorderly character of targeted populations (Harcourt 2001). As noted by Tracey Mears (2014, p. 335), “today policing agencies use stop and frisk prophylactically, stopping in some cities tens or even hundreds of thousands of people annually,” despite widespread empirical contestation of the crime-reductive impact of such policing tactics (Mears 2014, p. 342–5). Third, recent decades have seen the expanding operation of community supervision measures such as parole and probation as “net-wideners” stimulating the imposition of imprisonment terms for low-level cases, including technical violations that are not themselves defined as criminal offenses (Miller 2014; Phelps 2017). In 2017, for example, 45% of state prison admissions were attributable to violations of the supervision conditions of probation or parole programs (Phelps 2020, p. 262). Following these large-scale transformations of the US criminal justice landscape, the long-recognized differences between the governance styles employed by regulatory agencies and by crime control institutions (Kagan 1984) have become more pronounced.

Regulation and governance scholarship has conceptualized the nature of the state’s regulatory power in contradistinction to two other subsets of governance: service provision and distribution (Braithwaite et al. 2007, p. 3). The carceral state literature brings to the fore another subset of governance, operating through the classification of certain populations as “unruly” or “dangerous” (Muhammad 2010) and subjecting members of these populations to distinctive forms of surveillance and confinement (Feeley & Simon 1992). In a sense, the carceral state literature sheds critical light on the racialized and classist dynamics shaping how regulatory actors classify certain individuals as “incompetent or irrational actors” (Braithwaite 2011, p. 486). It also examines how institutional dynamics at the micro and meso levels reflect and reinforce broader processes of social stratification. The carceral state literature thus complements research on the regulatory state by foregrounding the coproductive relations between state policies and social norms and practices. This subset of governance was famously explored by Michel Foucault in his classic study of how carceral institutions emerged in 19th-century France to discipline and punish marginalized populations who failed to conform to the behavioral norms demanded of the working classes under industrial capitalism (Foucault 1977). In the United States, this modality of governance has deep roots in the slavery and Jim Crow eras (Alexander 2010). Accordingly, the recent expansion of the carceral state has mainly been directed toward “a largely black and Hispanic population living in concentrated zones of poverty in central cities, separated physically and institutionally from...mainstream social and economic life in America”

| Generalized goal            | Regulatory state | Carceral state                        |
|-----------------------------|-----------------|--------------------------------------|
| Generalized method          |                 |                                      |
| Presumed targets of         |                 |                                      |
| governance interventions    |                 |                                      |
| Function of rules and legal |                 |                                      |
| force                      |                 |                                      |

Table 1 The regulatory state and the carceral state

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54% of the people arrested for cannabis possession between 2005 and 2015 were Blacks (Levine & Siegel 2015, p. 248). For example, in New York City, where African Americans constitute about 25% of the city 2000.

The criminalization of cannabis use has often been described as a cornerstone of the carceral state and as a primary vehicle of the staggering increase in the incarceration levels in the United States during the final decades of the 20th century, when the war on drugs gained unprecedented salience in American politics (Gottschalk 2006).

Our polymorphic approach stresses that the regulatory and carceral morphs of the state are not mutually exclusive but rather interact in ways that both complement and counteract one another. From this perspective, the criminal justice system does not exclusively belong to the regulatory state or to the carceral state. Instead, it blends the ideological and institutional elements shaped by these two morphs. In the following sections, we use the case study of cannabis legalization to demonstrate how a polymorphic approach can improve our understanding of both the distinct roles played by these morphs and their forms of counterinfluence. Cannabis prohibitions can be construed through a regulatory lens highlighting how they target individuals’ behavior by creating risks of penal sanctions, affecting individuals’ beliefs about the drug’s medical harms and moral stigma, and driving up the drug’s prices to precipitate reductions in demand (Reuter & Kleiman 1986; MacCoun & Reuter 2011). Cannabis legalization policies seek to remedy the widely documented shortcomings of prohibitionist policies (Caulkins et al. 2016, pp. 108–9) by activating regulatory instruments that cannot be effectively deployed in illegal market environments (Seddon 2020). However, the performance of these regulatory instruments takes shape through interactions with institutional dynamics pertaining to the carceral morph of the state. The polymorphic approach reveals how cannabis legalization reforms facilitate a bifurcation of the governance landscape and the construction of two distinct-yet-interrelated terrains: the first regulates certain cannabis-related activities according to a largely responsive model in which penal sanctions are situated near the tip of a broad-based pyramid, and the second excludes certain populations from legalized cannabis markets and channels them to the residual-yet-expansive domain of the carceral state. This bifurcating process resonates with Garland’s (2001, p. 137) depiction of neoliberal crime governance strategies as being premised on the distinction between the criminology of the self (characterizing offenders as normal, rational consumers) and the criminology of the other (which predicates penal policies on the image of the “threatening outcaste, the fearsome stranger, the excluded, and the embittered”).

3. Legalization reform and the diversification of regulatory strategies for governing cannabis markets

For most of the 20th century, cannabis policy in the United States was thoroughly prohibitionist. Laws criminalizing the sale and use of cannabis first emerged in the 1910s, driven by the confluence of the Progressive Era’s rise of ‘moral regulation’ and racialized moral panics about the consumption habits of Mexican migrants and African Americans (Bonnie & Whitebread 1974). The US Congress initially refrained from criminalizing the use of cannabis and focused on its regulation through consumer protection laws dealing with adulterated and mislabeled food and drug products (Musto 1999, p. 216). However, beginning in the 1930s, the federal government gradually abandoned its reliance on non-penal tools of regulation and started to promote an inexorable prohibitionist agenda premised on the classification of cannabis as a narcotic substance on par with cocaine and heroin (Frydl 2013). Its adherence to a prohibitionist stance became increasingly steadfast in the final decades of the 20th century, when the war on drugs gained unprecedented salience in American politics (Gottschalk 2006).

The criminalization of cannabis use has often been described as a cornerstone of the carceral state and as a primary vehicle of the staggering increase in the incarceration levels in the United States during the final decades of the 20th century. As argued by Alexander (2010, p. 6), drug convictions “account for two-thirds of the rise in the federal inmate population and more than half of the [soaring state prison population] between 1985 and 2000.” During the 1990s, cannabis arrests constituted almost 80% of the overall growth in drug arrests nationwide (Bender 2013, p. 367). Despite the wealth of studies documenting comparable rates of cannabis use between African Americans and Whites, figures on cannabis arrests have long been heavily racially skewed (Mikos 2017, p. 248). For example, in New York City, where African Americans constitute about 25% of the city’s residents, 54% of the people arrested for cannabis possession between 2005 and 2015 were Blacks (Levine & Siegel 2015,
p. 118). This forms a part of a nationwide pattern in which African American people are about 3.5 times more likely than White people to be arrested for cannabis possession (American Civil Liberties Union 2020, p. 5). It is unsurprising, then, that cannabis legalization reforms are usually understood as a product of the intensifying pressures to reform the carceral state in the late 20th and early 21st century (Aviram 2015).

The polymorphic approach we apply in this article shares with the carceral state literature an interest in studying how drug policy reinforces systemic inequalities. It stresses, however, that accounts of the current crisis of the prohibitionist approach are incomplete as long as they fail to account for policy lineages rooted in other morphs of the state. From the perspective of the regulatory state literature, this crisis resonates with a wider skepticism about the effectiveness of punitive regulatory measures in numerous policy domains (Baldwin 2004, pp. 370–4; Welsh 2011, p. 312). Incorporating this perspective, the polymorphic approach posits that support for legalization is not exclusively driven by ambitions to reform the carceral state but also by the recognition that legalization provides a necessary precondition for instituting diverse regulatory tools that cannot be effectively deployed under prohibition regimes (Pacula et al. 2014). These include administrative regulatory measures (such as licensing, taxing, and zoning), civil regulation measures (such as fines), new public health regulations (such as by limiting types of products sold or keeping prices artificially high), and technological monitoring instruments (such as video surveillance systems). In a way, legalization seeks to bring cannabis policy into fuller convergence with other branches of the drug regulation landscape (Braithwaite & Drahos 2000, pp. 360–398; Seddon 2010, 2016), including the regulatory regimes governing prescription drugs (medical cannabis) and non-prescription drugs (recreational cannabis). It also resonates with regulatory models that have been deployed by a number of countries (including New Zealand and the Netherlands) in the area of prostitution/sex work, based on the premise that licensing brothels and subjecting them to administrative forms of regulation might lessen some of the social harms generated by commercial sex markets (Weitzer 2012).

Discussions of legalization reforms often focus on the ways in which they remove the regulatory burdens on drug consumers. However, legalization also provides the state with more diverse opportunities to cast its regulatory net over drug users and suppliers. For example, the Retail Marijuana Code of the state of Colorado encompasses more than 215 pages and includes a litany of administrative, civil, and penal regulations governing the retail distribution of the drug (Colorado Department of Revenue 2016). Some of these regulations – for example, those restricting advertising by commercial licensees, limiting the size of permissible retail transactions, or obliging them to test, package, and label cannabis products according to specified standards – treat dispensary owners and managers as regulatory targets. However, similarly to the findings of van Wijk and Mascini (2019) in their analysis of how municipal authorities in the Netherlands harness brothel brothel owners to serve as regulatory intermediaries in the fight against pimps and traffickers, some of the provisions of the Code assign retailers with demanding governance tasks. The Code requires licensed retailers to install advanced security systems and submit to 24/7 web-based video monitoring, thus harnessing them to further the state’s effort to expand its surveillance capacities in public areas (Goold 2004; cf. Grabosky 2013). It requires licensees to verify customer eligibility to purchase cannabis and to report to the authorities on any suspected crime committed on the licensed premises (Colorado Department of Revenue 2016, p. 137). The Code sets a variety of sanctions for violations of these regulations, ranging from a simple warning to revocation of the license and disbarment from holding another license for a period of years.

The regulatory impact of these rules is not based exclusively on the civil and penal sanctions they contain but also on their ability to socialize cannabis retailers into compliance. Ethnographic research on how personnel in Dutch “coffee shops” experience and interpret the regulatory rules governing their activity demonstrates how such rules shape perceptions of the moral legitimacy of legalized forms of drug selling and help cannabis retailers to draw symbolic boundaries vis-à-vis illegal drug dealers and “irresponsible” consumers (Dickinson & Jacques 2020; Jacques 2019). Once we direct attention to the ways in which regulatory rules shape norms and constitute the attitudes of actors performing informal governance functions (Almond & Erp 2020), we can see how legalization opens new possibilities for bringing profit-motivated actors to enforce consumers’ compliance with the broad regulatory goals of drug policy.

In the United States, however, the familiar tensions emanating from the dual positioning of intermediaries as both targets and agents of regulatory activity (Abbott et al. 2017) are exacerbated by the conflicts between the inexorable prohibitionist stance of the federal government and the more ambivalent posture of state and local
governments implementing legalization policies. Within the regulatory schemes of state and local governments, cannabis retailers are presumed to be capable of promoting the regulatory goals of preventing the diversion of cannabis to unapproved users. The assumptions underpinning the regulatory frameworks of the federal government are radically different. Not only do these regulatory frameworks not presume that cannabis retailers can be trusted to serve as regulatory intermediaries, but they also target them using the same regulatory tools governing the activities of illegal drug dealers. For example, during the first decade and a half to the operation of medical cannabis regimes, the Department of Justice issued warnings to landlords renting property to medical cannabis dispensaries to terminate their tenants’ illegal activities or else risk forfeiting the rental property. These enforcement activities relied on Section 856(a)(2) of the Controlled Substance Act, which was enacted prior to the legalization era (1986) to deter landlords from renting their property to tenants involved in illegal drug trade. Such strategies have sought to mobilize private property owners to serve as ‘frontline enforcers’ of prohibitionist policies (Almond & Gray 2017) and to overcome constitutional barriers to the involvement of federal government in directly criminalizing the activities of cannabis retailers in states that chose to legalize the supply of medical cannabis (Mikos 2009).

Similar efforts by federal agencies to assign intermediaries are noticeable in their attempts to bring state medical boards to incorporate prohibitionist principles into the regulatory frameworks governing the practices of physicians within medical cannabis regimes. Soon after the state of California first permitted the use of medical cannabis, the Drug Enforcement Administration issued guidelines requiring health practitioner associations and licensing boards to revoke the registration of physicians who recommend cannabis to their patients (Office of National Drug Control Policy 1997). Later on, the Veterans Health Administration, a federal agency implementing the healthcare programs of the US Department of Veteran Affairs, leveraged its market influence and adopted a policy forbidding its physicians from recommending cannabis to their patients (Mikos 2017, p. 610). Such policies were successfully challenged in court and were eventually replaced by regulatory measures using a more persuasive and cooperative tone to harness medical boards to utilize their disciplinary powers to restrain the normalization of medical cannabis use (Mikos 2011).

These examples illustrate how cannabis legalization reforms bring state and federal governments to utilize responsibilization techniques mobilizing commercial and professional actors to play an active role in governing cannabis use. This development resonates with a broader shift in governance strategies seeking to extend the reach of state agencies by linking them with the practices of business and civil society actors (Garland 2001, pp. 124–7). A polymorphic approach for studying such responsibilization strategies draws attention to the ways in which they extend the reach of both the regulatory and the carceral morphs of the state while generating symbiotic tensions between these morphs. From the perspective of the regulatory morph, legalization enables governments to compensate for the shortcomings of direct penal regulations by activating a broad range of “governing at a distance” techniques. Consequently, drug market actors that under prohibition regimes are mainly governed through punitive measures are now being regulated through a mixture of directive and facilitative techniques for steering their conduct and manipulating their situational environments. As long as these actors operate within the broad parameters set by the regulatory frameworks, their activities are governed by enforcement strategies that markedly differ from the reactive styles of policing and prosecuting street crime shaping the contours of the carceral state.

However, the carceral state does not disappear from the regulatory settings in which legalized cannabis markets operate. In fact, as part of their symbiotic relation the persistence of the carceral state also furnishes the expansion of the regulatory state. First, the carceral state casts its long shadow over these regulatory environments by providing punitive sanctions for cases in which civil and administrative regulatory measures are deemed too lenient or prove ineffective (Ayers & Braithwaite 1992). Second, at a more subterranean level, the carceral state sustains the conditions of possibility for the regulatory state by providing ways for governing marginalized populations whose access to legalized markets is structurally inhibited by a range of economic and cultural forces. Consider, for example, the impact of the interactions between the regulatory and the carceral morphs of the state on the operation of the rules governing eligibility to use medical cannabis. To obtain a license to use medical cannabis, patients are required to acquire a diagnosis and recommendation by a qualified physician and to register with the state agency (Mikos 2017, p. 100). From a regulatory perspective, these requirements are seen as instruments for guiding the actions of patients and physicians. However, these same requirements, even if
unintentionally, erect barriers that inhibit large populations from obtaining legal access to medical cannabis. These barriers include the fact that millions of Americans do not have ready access to a physician; that if they do have such access, many will face numerous barriers in navigating the healthcare system, including structural and other forms of racism that will likely affect their diagnosis and/or physicians’ willingness to provide them with the proper recommendation; and that, given the long-standing systemic segregation, many lack the cultural resources to navigate the labyrinthine bureaucracy of healthcare institutions (Feagin & Bennefield 2014).

The additional requirement to register with a state health agency further compounds these stratifying dynamics, as members of marginalized communities – especially those who have had contact with the criminal justice system – prefer to avoid contact with institutions that keep formal records. As expressed by Brayne (2014), individuals who have been stopped by the police, arrested, convicted, or incarcerated are less likely to interact with surveilling institutions, including medical ones. Importantly, because encounters with the criminal justice system are disproportionately distributed (Western 2006), this dynamic may effectively give rise to a systemic duality in which for relatively resourced populations, medical cannabis regimes create opportunities for more responsive forms of regulation, whereas for structurally disadvantaged populations they provide pretextual grounds for legitimizing the continuing criminalization of cannabis consumption. Further crystallizing this duality are commonplace provisions that restrict access to medical marijuana from those who are incarcerated, on parole or probation, or have prior convictions for certain types of drug offenses (Mikos 2017, p. 120). A similar bifurcating process operates with respect to the recreational cannabis industry, wherein relatively high retail prices (themselves partly driven by taxation and regulation) may end up limiting the ability of less-resourced individuals to licitly obtain cannabis (cf. Reuter & Kleiman 1986; Seddon 2020). In this state of affairs, the interactions between market dynamics, regulation, and taxation create a stratifying mechanism that hinders the capacity of the poor to benefit from legalization and instead directs them to the expansive-yet-residual domain of the carceral state, wherein the choice continues to be between illicit use and none at all.

In these contexts, then, legalization works to legitimize stratified patterns of drug law enforcement by placing the responsibility for their occurrence with professional actors and market dynamics. Such ideological constructions are embedded within a wider “penology of racial innocence” (Murakawa & Beckett 2010) that uses narrow standards of intent and causation to tackle legitimation challenges related to the racially skewed and class-bound consequences of facially neutral policies.

4. The enduring role of the carceral state in legalization regimes

Our discussion thus far shows that despite the rapid expansion and diversification of the regulatory frameworks governing legalized cannabis markets, these frameworks do not extend over all cannabis-related activities. In particular, we suggested that the bifurcated governance structure of legal cannabis regimes has been constituted by stratifying processes channeling certain populations into the ambit of the regulatory state while diverting others into the domain of the carceral state. The previous section focused on the role played by the regulatory morph of the state within this bifurcated governance structure. In this section, we turn to analyze the operation of the carceral morph.

Regulation and governance scholarship often portrays criminal justice institutions as playing a limited role within governance structures, a role held in reserve for the minority of cases where persuasion fails (Ayers & Braithwaite 1992). This, of course, does not mean that such institutions are insignificant from the perspective of regulation; it only means that their significance does not show in the number of people they process as much as it does in the number of people they potentially influence (Lacey 2004, pp. 149–150; Braithwaite 2011, p. 489). In the regulatory state, then, criminal justice institutions play governance roles based on their standard-setting and deterrent capacities in the innumerable cases where people do not break the law. As already noted, however, this perspective presumes a certain capacity to comply with the defined standards of regulation. Only under this presumption can those who persistently “fail” to follow the rules be deemed a minority of “incompetent or irrational” actors (Braithwaite 2011, p. 486) for whom incapacitation may be the appropriate option. Nevertheless, as our brief discussion of access to medical care and legalized markets illustrates, the capacity to comply is far from being evenly distributed. Simply put, although for members of some groups compliance is mostly a matter of choice, for others it involves material barriers and may be altogether impossible. Curiously, prohibition regimes
generally level the terrain of formal law by casting blanket prohibitions on all subjects, whereas legalization regimes allow for more subtle distinctions whose disparate impact largely rely on the uneven distribution of the capacity to comply.

A commonplace provision that illustrates this state of affairs involves the ban on using cannabis in public. For example, Washington State’s Initiative 502, which legalized the recreational use of cannabis, provides that “It is unlawful to open a package containing marijuana … or consume marijuana … in view of the general public.” In a similar fashion, Michigan’s medical marijuana law provides that it “does not permit any person to…[p]ossess marijuana, or otherwise engage in the medical use of marijuana…[i]n any public place.” Washington, DC, likewise prohibits cannabis consumption in public places or in “any place to which the public is invited.” Further, the Alaska “Responsible Consumer” guide elaborates to the general public that “[t]he law bans all public use of any marijuana (not just smoking)” and clarifies that “it is illegal to use marijuana in schools and universities, amusement venues, businesses, parks, playgrounds, sidewalks, or roads, just to name a few. Responsible consumption occurs on private property, though some property owners or homeowners associations may have policies that prohibit marijuana use.”

One possible reading of these provisions situates them as part of the regulatory state’s strategic use of penal tools. From this perspective, rules governing cannabis use in public are aimed at influencing behavior and trigger the imposition of sanctions only in the minority of cases in which persuasion fails. This reading, however, presumes certain conditions that provide individuals with sufficient choice between the public and private use of cannabis. Put differently, these rules play a regulatory function only with respect to those with sufficient opportunity to use cannabis on private property in the first place. Yet to those with minimal or no control over private property, these provisions often cannot be properly deemed a guide-for-action. This latter category includes unhoused folks as well as anyone whose living conditions do not permit sufficient privacy or distance from others. Importantly, this category also includes numerous public housing residents whose living arrangement makes them subject to federal authorities (Mikos 2017, p. 727). For example, to Illinois residents who live in federally subsidized public housing or use Section 8 housing vouchers, using cannabis in any form may carry harsh penalties – including potential eviction – even after legalization (Romo 2019). Furthermore, many recreational cannabis states allow employers and private property owners to make consequential decisions about cannabis use within their purview. Thus, Amendment 64 in Colorado permits employers to test employees for cannabis and to make employment decisions based on the results. It also allows rental property owners to ban the possession and use of cannabis products on their properties. These arrangements illustrate how the delegation of regulatory powers to non-state actors, which is enabled by legalization, draws upon the already existing distribution of private property and wealth. While the state remains responsible for public spaces, it cedes regulation within business and private spaces to their rightful owners. Under these layered arrangements, the capacity to comply with the ban on “public use” is systematically skewed against poor residents, who are also disproportionately Black, Latinx, Indigenous, and immigrant. In New York, the courts have limited this capacity even further by declaring a privately owned vehicle “a public place” when it is driven in a public location. To those who do not “own or control” private property, then, the choice is often not between licit or illicit use as much as it is between different forms of illicit use.

Such systemic disparities cannot be treated as yet another component of the regulatory state or a layer in the pyramid of sanctions. Instead, we suggest that these disparities form a foundational feature of a bifurcated regime that functions under two parallel registers: the regulatory and the carceral. This is so because, from the perspective of dominant institutions, these inequities undergird an important distinction between those who are by and large deemed rational and autonomous actors and those who are deemed, for most practical purposes, unruly in that their behavior is believed to be less responsive to civil forms of regulation (Cf. Garland 2001, p. 184). The regulatory state is generally tasked with governing the former population, while the carceral state is tasked with governing the latter. This state of affairs, in turn, prefigures the routinized workings of criminal justice agencies such that they too become polymorphic institutions. Even the most emblematically carceral institutions – namely prisons and jails – can be considered both as forming the tip of a broad-based pyramid of sanctions and as a normal life experience for entire populations (Western 2006). A polymorphic perspective suggests that we need not choose between these seemingly antithetical functions but instead investigate their relations and simultaneous existence.
A polymorphic approach can also help us gain a better understanding of the bifurcated role of policing in legal cannabis regimes. Seen as part of the enforcement apparatus of the regulatory state, police institutions are tasked with detecting and curbing violations of substantive criminal law (Gill 2002). By contrast, when considered as part of the carceral state, policing is less concerned with the formal legal status of any particular action than with the general project of social control, seminally defined by Stanley Cohen (1985, pp. 1-2) as “the organized ways in which society responds to behavior and people it regards as deviant, problematic, worrying, threatening, troublesome, or undesirable.” From this perspective, police stops, searches, and arrests do not only enforce substantive rules but also to govern populations whose putative dangerousness is believed to justify the use of stricter measures of surveillance and confinement (Harcourt 2001; Kohler-Hausmann 2014). Accordingly, criminalized behaviors such as the public use or possession of small amounts of cannabis are not merely important in and of themselves (namely because they constitute a crime) but rather because they are potential indicators of unruliness and could therefore exacerbate disorder.

A polymorphic perspective allows us to consider policing as part of both the regulatory and the carceral morphs of the state. This perspective helps explain the persistent findings according to which cannabis-related stops and arrests, prior to legalization, have been not only on the rise despite decriminalization but also racially skewed even after controlling for social structure, local crime conditions, and stop levels (Geller & Fagan 2010). As argued by Geller and Fagan, these findings suggest that with respect to certain populations, cannabis-related stops and arrests are not simply used instrumentally to enforce substantive prohibitions but rather serve as a “pretext” for other purposes altogether. This perspective also helps explain why racial disparities in cannabis-related arrests were not attenuated in states that legalized cannabis use (ACLU 2020; Drug Policy Alliance 2015, 2018). First, as already noted, legalization regimes allow for the creation of new distinctions—such as between “private” and “public” use—that help sustain existing disparities. Although more research is needed, initial findings indicate that in urban areas—such as Denver, Colorado, and Washington, DC—sharp decreases in arrests leading to possession charges are associated with considerable increases in arrests leading to public display/consumption charges (DPA 2015, 2018). Moreover, because the private/public distinction effectively overlaps with structural differences, this state of affairs prefigures systemic disparities in policing practices. Indeed, as revealed by the 2016 arrests data from DC, an African American man is more than 10 times more likely to be arrested for public consumption of cannabis than a White person (DPA 2018, p. 31), despite the fact that African American residents use cannabis at similar rates as White residents.

Yet more generally, changing the legal status of cannabis-related activity without, at the same time, more broadly reimagining the role of criminal justice institutions in a democratic society is not likely to have a dramatic impact on the overall nature and effects of carceral paradigms of policing. Although legalization may indeed diminish the police’s capacity to rely on cannabis-related prohibitions as a means to target “unruly” populations, it nonetheless leaves open alternative routes for pursuing similar logics. One such long-standing avenue relies on officers’ established categorizations of “risk” according to spatial distinctions between “good” and “bad” neighborhoods, which in turn prefigure disparate policing approaches in different areas (Bell 2020; Jones et al. n.d.). The reliance on policing measures that are suitable for ‘markets of vice’ (Braithwaite 2005) persists in such neighborhoods in a post-legalization world because they nest neatly into the wider institutional frameworks shaping law enforcement practices in areas of concentrated disadvantage. The increasing prevalence of algorithmic policing provides another avenue for maintaining carceral paradigms under legalization regimes. Relying on quantified institutional data, policing algorithms assign “risk scores” to individuals. In turn, these scores supplement experiential knowledge and inform police practice such that the algorithms may be considered as regulatory instruments of sorts (cf. Yeung 2018). Importantly, the scoring system of such algorithms “generates a feedback loop by which [accumulated data] are both causes and consequences of high point values. An individual having a high point value is predictive of future police contact, and the police contact further increases the individual’s point value” (Brayne 2017, p. 987). With this system in place, past stops and arrests (even those that did not result in a criminal record) may continue to feed into contemporary risk scores and thus sustain established policing patterns. Simply put, past stops and arrests, which were sanctioned by now-defunct prohibitions, may come to sanction future stops under legalization regimes through the mediation of an algorithm. An important upshot of this process is that past discriminatory patterns become embedded in colorblind technological intermediaries that are likely to orient policing practices well into the future (Rothschild-Elyassi forthcoming).
The differential effects of yet other pervasive institutions demonstrate how legalization may not reflect a definitive break with the legacy of using drug law for social control purposes. Probation and parole supervision, which have grown to mass scales over the past decades (Phelps 2017, 2020), provide a notable example. As it comes to supervised individuals, courts (and sometimes supervising officers) have wide discretion to set restrictive terms and conditions, which regularly include the prohibition of otherwise legal behaviors such as consuming alcohol or consorting with certain individuals. Once under supervision, then, individuals may be prohibited from using cannabis even in jurisdictions where cannabis use has been decriminalized or even legalized (Caulkins et al. 2016, p. 123). Although this state of affairs is being increasingly challenged with respect to medical cannabis (Mikos 2017, pp. 120–121), it remains pervasive when it comes to recreational use. For example, although a Colorado bill permits the use of medical cannabis under probation,10 no parallel arrangement exists with respect to recreational cannabis. Given the pervasive and demographically concentrated nature of community supervision in the era of “mass probation” (Phelps 2020), this mechanism guarantees that certain populations continue to live under conditions that are more akin to prohibition regimes than to legalization regimes.

5. Conclusion

In this article, we develop a polymorphic approach to explore the relationship between the regulatory and carceral morphs of the state. This approach bridges two bodies of literature that typically employ a monomorphic conception of the state and, accordingly, consider its governance activity in relation to different assemblages of institutions and knowledge practices. We then use our polymorphic approach to consider the complex governance effects of cannabis legalization reforms. This analysis offers two main contributions. First, contrary to common wisdom, legalization does not imply less regulatory activity and state intervention. Instead, cannabis legalization prefigures the diversification of regulatory strategies and the delegation of regulatory power to numerous non-state actors, including retailers, healthcare providers, employers, and private property owners. Adding a new layer to the critique of the myth of deregulation, this analysis has illuminated the distinctive regulatory consequences of market liberalization processes generated by the removal of criminal prohibitions on certain activities.11

At the same time, our analysis challenges monomorphic perspectives that consider legalization as a rupture point between carceral and regulatory forms of governance. Such a reading reflects the inherent oversights of monomorphic approaches and their limited capacity to explain relational dynamics between contemporaneous modes of governance originating from distinct morphs of the state. The second contribution of our analysis, then, lies in conceptualizing the relationship between the regulatory state and the carceral state. Building on a case study approach, we consider this relationship in terms of symbiotic tension. Our inquiry has shown that the contraction of carceral forms of governance does not affect all populations equally. While the expanding activity of the regulatory state in the field of cannabis policy focuses on governing actors who, by and large, are seen as responsive to regulation, the carceral state remains active in this policy domain and targets marginalized populations who have long borne the brunt of the war on drugs. From this perspective, legalization does not precipitate the dismantling of the carceral state, but instead sustains a bifurcated governance structure in which regulatory and carceral forms of social ordering interact and complement one another. To be sure, the balance of power between the regulatory state and the carceral state does not remain constant over time. However, the longstanding patterns of using drug law as an instrument of racialized social control are sufficiently pliable to adapt to the dramatic regulatory changes that legalization reforms generate (cf. Seddon 2016).

More broadly, our frame encourages researchers in others areas to consider both the tensions between regulatory and carceral forms of governance and how these very tensions may help sustain a certain balance over and against societal changes. This symbiotic dimension implies that both sides of the equation not only contest but also benefit from the relationship. Thus, for the carceral state, conceding some grounds to the regulatory state may prove effective in managing its legitimacy crisis while continuing to cast its net far and wide. For the regulatory state, on the other hand, the persistence of carceral logics is useful not only as a powerful deterrent for those individuals deemed “regulatable” but also as a vast underbelly that continuously sanitizes the regulatory domain by materially excluding from its parameters those who are rendered as “unable to comply” and thus categorically “risky” (Jones et al. n.d.). At a more conceptual level, the construction of the “risky” subject provides a
categorical backdrop against which a foundational premise of the entire project of regulation may be defined, that is, the notion of free and volitional action (cf. Mehta 1999; Johnson 2003).

Although most other countries have been less inclined than the United States to incarcerate individuals for cannabis-related offenses during the war on drugs era, the use of drug law as a tool of racialized social control is by no means confined to the American context. Although further empirical research is needed to examine whether legalization reforms outside of the United States follow the trends discussed in this article, current research on cannabis decriminalization in other countries provides troubling evidence of such tendencies. Studies of decriminalization policies in Australia and the United Kingdom, for example, have demonstrated how such reforms produce net-widening effects leading police to make arrests in low-level cases that they would not have pursued previously (Christie & Ali 2000; Shiner 2015). It is too early to assess whether cannabis legalization policies are more successful than decriminalization schemes in overcoming the tendencies toward institutional inertia in the drug control domain. Nevertheless, our analysis of the entrenched role of drug policy in governing marginalized populations carries important insights into the causes of the resilience of deep-seated patterns of racially skewed drug law enforcement even in periods of progressive reform.

In addition to its contribution in the field of drug policy, the polymorphic approach delineated in this article provides analytic purchase to critically explore legalization efforts in other policy domains. For example, this approach can deepen our understanding of the complex interactions between regulatory and carceral frames of governing commercial sex markets in countries that have legalized prostitution/sex work (Weitzer 2012). Current research suggests that along with the removal of certain criminal prohibitions and the creation of new measures of regulating licensed brothels, such reforms give rise to a plethora of national laws and municipal ordinances governing the public disorders and nuisance with which red light district zones (and “vice areas” more generally) are being associated (Outshoorn 2012). The enforcement of such measures disproportionately targets marginalized urban populations and resonates with wider stratifying patterns of increased surveillance of urban public spaces (Huisman & Nelen 2014). Our polymorphic approach provides tools to examine how social control measures developing under the influence of contemporary anti-vice politics interact with the liberally oriented regulatory measures that are usually placed at the center of research concerning legalized sex service markets.

More broadly, the polymorphic perspective developed in this article helps us assess various initiatives to reform, defund, or abolish policing and penal practices in the current era of heightened political attention to criminal justice reform (Beckett 2018). Many current initiatives adopt a monomorphic approach in that they recognize that criminal justice institutions have been overly shaped by exclusionary logics, and consequently attempt to shift the balance from carceral to regulatory forms of governance. As we suggest, however, much like each morph onto itself, the relationship between these two morphs has a fraught genealogy characterized not only by their competition for dominance but also by their symbiotic adaptability and mutual reinforcement. From this perspective, reform agendas that are not informed by reflexive reckoning with the complex relationship between carceral and regulatory forms of governance will do little to transform the underlying conditions that divide our polities into separate – and alarmingly segregated – worlds (Du Bois 1935). If history is any guide, reform efforts that leave these conditions untouched will likely result in the deployment of old carceral modes via new avenues (Alexander 2010; Beckett & Herbert 2010; Aaronson 2014; Gottschalk 2014). A transformative polymorphic approach stresses the need to address long-standing mechanisms of exclusion and redirect resources first and foremost to marginalized communities and to supporting their capacity to fully participate and in social and public life.

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Conflict of Interest

The authors declare that there are no conflicts of interest.
Data availability statement
Data sharing is not applicable to this article as no new data were created or analyzed in this study.

Endnotes
1 We do not argue that the carceral state singularly monopolized these governance responsibilities throughout the 20th century. In some cases (e.g. juvenile justice), this path of reform revives approaches that exerted considerable influence prior to the post-1970s’ expansion of the carceral state.
2 To a certain extent, similar dynamics are at work outside the United States, such as in the United Kingdom with respect to “mass supervision” (e.g. McNeill 2019) or measures introduced to tackle antisocial behavior (Brown 2004).
3 Although Foucault famously coined the social-scientific concept of carceral power, it is important to note that the role of coercive institutions in shaping the African American experience was already extensively discussed by African American scholars in the early twentieth century (see e.g. Du Bois 1935).
4 To be sure, cannabis legalization reforms are also motivated by other goals, for example, raising tax revenues (Mikos 2010). However, in this article, we focus on their regulatory objectives and governance effects.
5 Rev. Code. Wash. §69.50.445(1).
6 Mich. Comp. L. 333.26427 (2016).
7 Marijuana Possession Decriminalization Amendment Act of 2014. D.C. Law 20-0126; D.C. Official Code §48-1201, et seq.
8 http://dhss.alaska.gov/dph/Director/Documents/marijuana/ResponsibleConsumerFactBook.pdf
9 New York v. Jackson 967 N.E.2d 1160 (N.Y. Ct. App. 2012).
10 Colo. Rev. Stat. §18-1.3-204.
11 Time will tell whether the current proliferation of cannabis legalization laws will catalyze similar trends pertaining to hard drugs, or else entrench the exceptional status of cannabis. In November 2020, voters in Oregon passed a ballot initiative decriminalizing the personal possession of hard drugs such as heroin and Lysergic Acid Diethylamide. Such reforms are likely to have an impact on the relationship between the carceral and the welfarist morphs of the state (e.g. by stimulating the provision of therapeutic services to drug addicts). However, in our opinion, they seem less likely to precipitate bolder moves toward establishing regulatory regimes for governing the legal sale of hard drugs by private market actors.

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