

DRUG POLICY REFORM AND
ORGANIZED CRIME SERIES



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CANNABIS POLICY REFORM AND ORGANIZED CRIME

A MODEL AND REVIEW FOR SOUTH AFRICA

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FROM VISION TO ACTION: A DECADE OF ANALYSIS, DISRUPTION AND RESILIENCE

The Global Initiative Against Transnational Organized Crime was founded in 2013. Its vision was to mobilize a global strategic approach to tackling organized crime by strengthening political commitment to address the challenge, building the analytical evidence base on organized crime, disrupting criminal economies and developing networks of resilience in affected communities. Ten years on, the threat of organized crime is greater than ever before and it is critical that we continue to take action by building a coordinated global response to meet the challenge.



INTRODUCTION

The legal regulation of cannabis is undergoing rapid and unprecedented change worldwide. The century-old, ostensible international consensus among lawmakers has begun to buckle under the growing weight of evidence that blanket prohibition is an ineffective tool to control the harms associated with cannabis. One of the many criticisms of the ‘war on drugs’ approach is that its unintended but inevitable consequences include the creation and empowerment of organized crime. The last decade has seen many countries begin to implement new policy approaches that fall somewhere in the range of (de facto or de jure, partial or full) depenalization, decriminalization, legalization or some other form of liberalization.

A key rationale for this reform is its potential to undermine the power of organized crime. The argument is that legalization can reduce criminal profits, disrupt the black market, reduce the incentives and conditions that drive drug-related violence, lessen the burden on criminal justice systems and create new economic opportunities. Yet it is also possible that the impact of legalization on organized crime may be limited or even damaging. For instance, if legalization leads to a significant increase in cannabis use, it may create new market opportunities for criminal groups to exploit. While research is proliferating on which of these scenarios is emerging, there is an urgent need for a systematic assessment of how this may work in different contexts.

This paper summarizes the history and status of cannabis decriminalization in South Africa, and draws on a review of the available peer-reviewed and grey literature on the impact of cannabis legalization on organized crime to introduce some core organizing concepts. Based on these overarching experiences documented so far in other contexts, it identifies four key sets of variables that determine the impact of legalization on organized crime: the type and degree of restrictiveness of the new regulations; various cultural, socio-economic and political factors; features of the criminal justice system; and the structure and nature of criminal organization in the illegal cannabis market. Reflections are provided on what these suggest about the likely impact of South African cannabis legalization on organized crime, and potential lessons and recommendations are proposed for effective policy reform in South Africa, as well as guidance for similar decision-making in other contexts.



CANNABIS LAW REFORM IN SOUTH AFRICA

In Africa, including parts of South Africa, the cannabis plant has for centuries been cultivated for a variety of social and pharmacological uses and has important indigenous cultural value.¹ Cannabis cultivation in South Africa is well documented from at least the eighteenth century, but colonial disapproval increasingly drove it underground and relegated it to the socio-environmental margins, even before it was first criminalized in the country in 1922.² In 1971, the apartheid government passed the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, which lawmakers boasted was the toughest anti-drug law in the Western world.³ Its harsh penalties, maintained in its 1992 replacement, the Drugs and Drug Trafficking Act, were driven by concerns about moral degeneration and racial mixing, and were used extensively to target and control the black indigenous population. Yet it remained in place after 1994 under the new democratic government, which reproduced the heavy-handed tactics it had inherited.⁴

In 2018, the South African Police Service (SAPS) made over 320 000 arrests for ‘drug-related crime’ – of which, although the category encompasses the manufacture and supply, dealing or possession of controlled substances, virtually all (96%–98%) were for simple possession, and between 65% and 70% were for possession of cannabis.⁵ It was in this context that a 2017 judgement by the Western Cape High Court (involving a member of the Rastafari religion who had previously sought and lost a Constitutional Court petition for a religious exemption from cannabis prohibition)⁶ found that the prohibition of cannabis use within the home unjustifiably restricted the right to privacy.⁷ Despite the government’s vociferous objection, in September 2018 the Constitutional Court confirmed that the prohibition of cannabis use, possession or cultivation by an adult in a private space indeed constituted a limitation of the right to privacy that was not ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.⁸

The court gave parliament 24 months to amend the several pieces of affected legislation and to determine the permissible thresholds of private space and quantities for personal use. With immediate effect, however, the ruling effectively decriminalized the possession of cannabis for personal use. Because the move centred on the right to privacy, rather than resulting from a popular vote or a shift in government thinking on racial justice, public health or organized crime, production and trade remained illegal.⁹ The result was a state of legal limbo and widespread uncertainty, confusion and contradiction. One could not legally obtain cannabis, but one could possess it, in undefined places and quantities.



Members of the Rastafarian community celebrate outside the Constitutional Court in Johannesburg following a ruling that the personal use of recreational cannabis is not a criminal offence, September 2018. © Trevor Kunene/Foto24/Gallo Images

Five years later, the Cannabis for Private Purposes Bill has still not been passed. By the time it was tabled in parliament in September 2020, in a form reflecting its narrow legal directive, it had been overtaken by shifts in popular and political discourse. The government has pivoted to touting the cannabis industry's potential for investment and job creation, especially in impoverished growing areas, with President Cyril Ramaphosa devoting parts of both his 2022 and 2023 State of the Nation Addresses to the urgent efforts in place to finalize the regulatory framework to allow the commercialization of the hemp and cannabis industries. In January 2020, then Finance Minister Tito Mboweni tweeted that he would push for cannabis legalization, pointedly mentioning tax benefits.¹⁰ Some progress has been made in rolling out systems for hemp and medical production, but there has been no progress in developing a legal market for 'recreational' cannabis, known locally as 'dagga'.

The bill has repeatedly been sent back for revision, in part because it retains the criminalization of sale and distribution.¹¹ At the initiative of the Department of Trade, Industry and Competition, and in response to input from public hearings, the Portfolio Committee on Justice and Correctional Services decided in March 2022 to expand the scope of the bill to include: 'commercial activities in respect of recreational cannabis; the cultivation, possession and supply of cannabis plants and cannabis by cultural or religious communities or organisations for cultural or religious purposes; and the use of cannabis for palliation or medication'.¹² It also provided for the expungement of the criminal records of those convicted of possession of or dealing in cannabis.¹³ The government now appears to take the position that alcohol and tobacco regulations are the appropriate starting point for managing the recreational cannabis industry.¹⁴

However, the issue is still very much in flux, as rounds of amendments and public consultation on the bill continue,¹⁵ and no progress is expected in terms of commercialization until at least later in 2024.¹⁶ Even then, specific regulations (including on different categories of licensing, product processing, packaging, quality, safety, harm-reduction measures and public education, and public health monitoring) will be determined by other ministries.¹⁷ This is set to be a slow and contentious process.

In parallel with the parliamentary process, the executive has been developing a Cannabis Master Plan, its strategic framework for developing the domestic cannabis industry. This process has been led by the Department of Agriculture, Land Reform and Rural Development, but involves at least 10 government departments, working across nine pillars:

1. **Effective regulatory systems** (led by the national Department of Health, with the Department of Justice and Constitutional Development);
2. **Sustainable seed supply systems** (led by the Department of Agriculture, Land Reform and Rural Development, with the Department of Small Business Development);
3. **Research and technology development** (led by the Department of Science and Innovation, with the Department of Trade, Industry and Competition);
4. **Producer support systems** (led by the Department of Agriculture, Land Reform and Rural Development, with the Department of Small Business Development);
5. **Market development** (led by the Department of Trade, Industry and Competition, with the Department of Small Business Development);
6. **Supplier development systems** (led by the Department of Small Business Development, with the Department of Trade, Industry and Competition);
7. **Manufacturing and product development** (led by the Department of Trade, Industry and Competition, with the Department of Science and Innovation and the Department of Small Business Development);
8. **Education and training** (led by the Department of Higher Education and Training, with the Department of Basic Education and the Department of Employment and Labour); and
9. **Communication and awareness** (led by the Government Communication and Information System, with the Department of Communications and Digital Technologies).¹⁸

This is an admirably comprehensive remit. Multiple working groups and workstreams – including civil society organizations, academic institutions, the private sector and the cannabis research community – were set up in 2021/22 to review the Cannabis Master Plan.¹⁹ But in early 2023, many of the participants withdrew from the process in frustration at the lack of progress, citing the ‘uneven and irregular participation by government officials’, ‘territorial battles by senior bureaucrats’ and the failure of the government departments involved to find a cohesive policy stance.²⁰ There are also concerns that the benefits of the policy would primarily accrue to large corporations, to the exclusion of the small-scale operations that currently participate in the sector and have historically suffered under its prohibition.²¹ Some activists suspect that the delay is motivated by senior officials’ efforts to establish their own commercial interests in the market.²²



Protestors at the Cannabis Mass Action Gatherings in Pretoria in September 2022 argued that cannabis legislation is taking too long. © Alet Pretorius/Gallo Images via Getty Images

A sense of urgency does seem to be growing. In June 2023, the Department of Agriculture, Land Reform and Rural Development, together with the Presidency, convened a cannabis and hemp 'Phakisa Action Lab' for over 100 key stakeholders, with the aim of securing 'much-needed policy coherence' towards implementing the Cannabis Master Plan.²³ The event fell under Operation Phakisa, a 'fast results delivery programme' that 'highlights government's urgency to deliver' on the National Development Plan.²⁴ *Phakisa* means 'hurry up' in Sesotho. In his letter to the Phakisa participants, President Ramaphosa expressed his confidence that the event would help lead to 'immediate short term regulatory reform, the adoption of a set of foundational policy principles to achieve longer term legislative reform and a detailed plan to achieve inclusive growth and investment'.²⁵ Many details remain unclear, but among the resolutions was 'to reinforce previous instructions to all South African Police Services (SAPS) members to respect the privacy rights of cannabis cultivators and users'.²⁶ Two months later, a SAPS directive instructed police to stop arresting people for personal cultivation and/or possession of cannabis, as the lack of definition or quantification of 'personal consumption' exposed the organization to civil claims.²⁷

Meanwhile, although still entirely illegal, there are reports that business is already booming. A new form of industry is emerging – including lawyers, consultants, retailers specializing in growing equipment, packaging companies and design firms – all preparing for an expected surge in demand and seeking to establish themselves as early movers in the market. This remains largely informal and unregulated, operating in what participants are choosing to interpret as a legal grey area. Some simulate legitimacy by using a membership system, in which members pay a monthly fee to receive a certain amount of cannabis per month, and/or by offering on-the-spot medical 'prescriptions', although neither approach is legal.²⁸ Larger businesses with export ambitions are frustrated that the slow progress is 'eroding this opportunity as the global market and other African countries begin to open up their cannabis industries ahead of South Africa'.²⁹

The lack of capacity and clarity has resulted in a limited and unpredictable law enforcement response.³⁰ Yet anecdotal evidence suggests that some aspects of the oppressive 'war on drugs' persist.³¹ Stories continue to emerge of police arresting, harassing or extorting cannabis users or small-scale growers for possession of small amounts.³² In one incident, a member of the Rastafarian community was allegedly arrested, his life threatened and his dreadlocks cut off.³³ One prominent activist organization reports

that, while before the Constitutional Court ruling it was receiving 15 calls a day for legal advice or assistance, it is still receiving 10 calls a week from people being arrested for cultivation and small-scale trading.³⁴

Nevertheless, after two decades of growth, arrest figures have plummeted – in 2020 they were 43% lower than in 2018.³⁵ This equates to around 700 000 fewer arrests than would have been made in the four years, had the ruling not taken place.³⁶ Given what is by now well established about the lifelong individual and social harms of criminalization, this is in itself a major improvement in terms of justice and human welfare.

What remains unclear is what all this may mean for organized crime. It is too soon to tell, and the eventual policy approach too uncertain to predict, but it is both possible and essential to try to understand what the important considerations should be in different contexts.

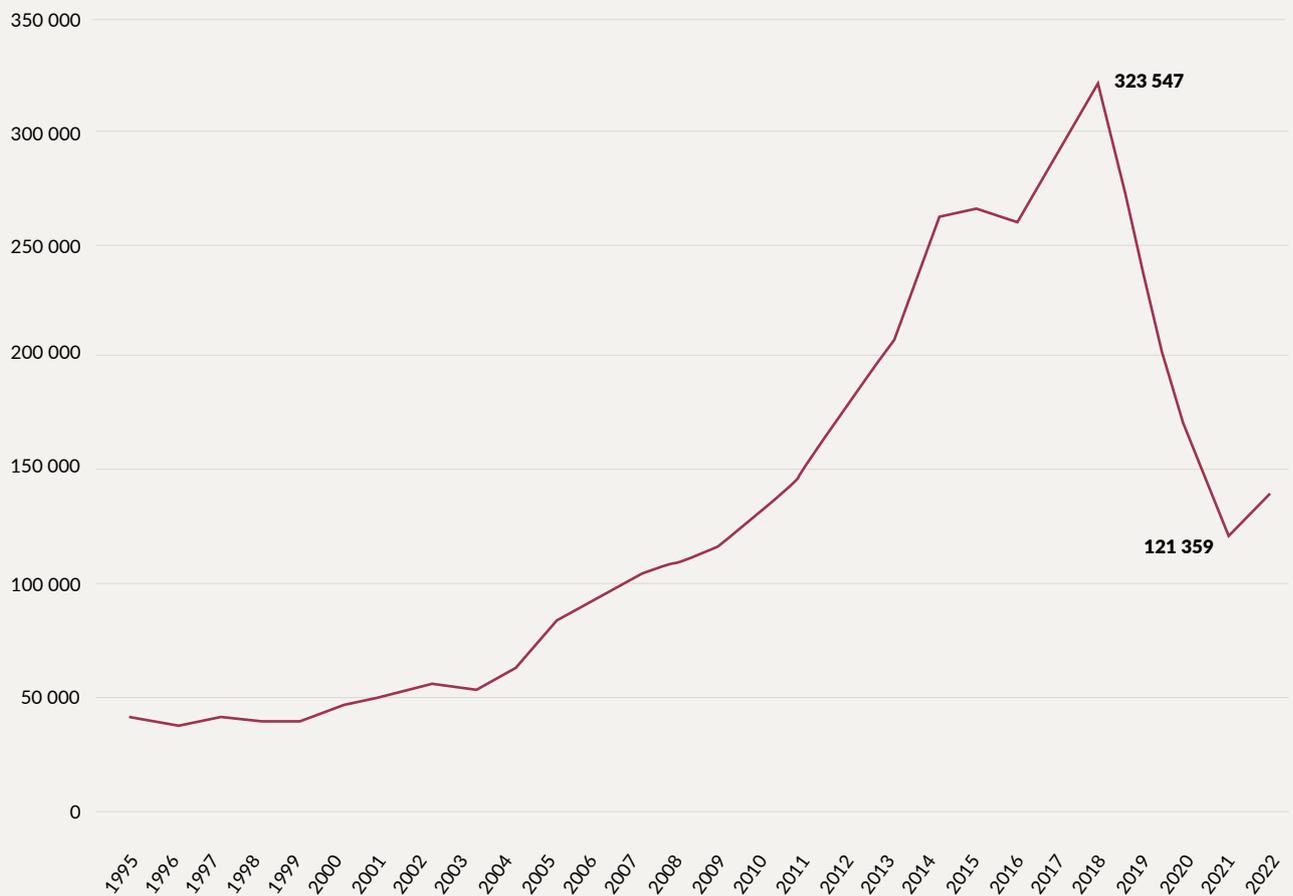


FIGURE 1 South African police-recorded cases of drug-related crime, 1995–2022.

SOURCES: South African Police Service, Annual crime statistics, <https://www.saps.gov.za/services/crimestats.php>; Statistics South Africa, Mid-year population estimates, https://www.statssa.gov.za/?page_id=1866&PPN=P0302&SCH=73305; author's calculation



ORGANIZED CRIME IMPACT FACTORS

The starting point in trying to understand any impact of cannabis legalization must be that experience with it is new. While there have been previous shifts in terms of medical access and approaches involving de facto deprioritization, it is only in the last decade or so that it has been possible to begin accumulating evidence on the impacts of legalizing and commercializing recreational cannabis. This is important as there are likely to be certain clear short-term impacts, but both logic and experience have shown that significant changes take time to manifest.³⁷ Initial assessments are confounded by the fact that challenges and unforeseen difficulties are inevitable in the early adoption phase – as is the case with the implementation of any new major public policy, ‘particularly one so grand as cannabis legalization’.³⁸

So, although research is growing rapidly on the impact on multiple fronts – including physical and mental health, educational outcomes for young people, trafficking incidents and the consumption of other substances – much is still in dispute. The impact on levels of ‘ordinary’, disorganized crime remains somewhat contested, and the evidence is varied, but has largely indicated that legalization, or even less formal deprioritization of cannabis crimes, does not appear to result in increased crime rates.³⁹ Preliminary evidence even suggests that legalization in US states is in fact inducing a crime drop, with possible causal mechanisms including ‘the direct psychotropic effects of cannabis; substitution away from violence-inducing substances; reallocation of police effort; [and] reduced role of criminals in the marijuana business’.⁴⁰ Another possible mechanism is through the drop in price associated with legalization, which reduces the need for drug users to engage in acquisitive crimes. This possibility is ‘supported by evidence that dependent heroin users who move from a criminal supply to prescribed medical provision, reduce their levels of offending dramatically’.⁴¹ Legalization may also improve the relationship between the police and the public, as people may be more willing to cooperate with the police if they are not afraid of being prosecuted for cannabis-related offences themselves.

The impact on organized crime is less clear. But given that legalization disrupts a market that in many places has been in the control of organized crime, some impact is highly likely. The question is instead one of nature and extent, and depends on the policy decisions made.⁴² Legalization is widely advocated as a means of weakening organized criminal groups. One way it might achieve this is by reducing the number of people brought into the criminal justice system for non-violent cannabis possession offences,⁴³ and thereby reducing the drug-related incarceration that has been shown to be fertile



A member of a neighbourhood safety team with a homemade knife and packets of marijuana, seized during a patrol in Bonteheuwel, Cape Town, in July 2019.
© Rodger Bosch/AFP via Getty Images

ground for organized crime recruitment.⁴⁴ More commonly, however, the suggestion is that legalization will deprive criminal groups of their control of, and therefore profits from, the drug trade. A popular analogy is that of the repeal of alcohol prohibition in the US in 1930s, which saw many monstrously violent criminal groups rapidly 'combusted', or reduced to shadows of their former power.⁴⁵ Yet no expert seriously expects that the creation of a legal cannabis market will entirely eliminate the black market. Here tobacco is the prime example. Despite tobacco being a legal product, it is estimated that more than 10% of the global demand for cigarettes is supplied by irregular sources.⁴⁶ What the tobacco industry also demonstrates is the problem of regulatory trade-off – the stricter the regulations, the stronger the incentives to circumvent them.⁴⁷

One issue with determining the impact of cannabis legalization – or indeed any other policy or law enforcement strategy – on organized crime involves defining the actual desired impact. This, in turn, is part of the wider problem of defining and measuring organized crime, which is universally difficult and on which there is no consensus.⁴⁸ Impact assessments often rely on information from law enforcement, but this requires 'a well-developed and competent intelligence program', and there is reason to believe that law enforcement agencies typically know less about organized crime activity than they think they do.⁴⁹ Common measures of 'successful' interventions against organized crime include fewer criminal groups in operation and/or reduced membership of such groups. However, these indicators are not the desired end product but merely strategic steps on the way to the goal, which is likely to be a reduction in the levels of violence, illness, corruption and misery associated with organized crime.⁵⁰ This is difficult to evaluate.

Law enforcement organizations have so far tended to be skeptical that legalization has had any positive impact on organized crime, which is a useful data point but should be viewed with a certain amount of scepticism, given law enforcement's usual hostility to legalization.⁵¹ In the context of cannabis legalization, the key proxy for a positive impact on organized crime is evidence of a decline in the proportion of cannabis in the market that is purchased from illegal sources. By this measure and some others, it is clear that black markets have so far continued to thrive under legalization. For instance, research from Canada so far shows some evidence of a positive impact and some evidence of little to no effect.⁵² In some US states, some even argue that legalization may even have strengthened the black market.⁵³

Various reasons for this are discussed in the sections that follow, but many derive from the challenge of finding an acceptable balance between restriction and liberalization in both supply and demand,

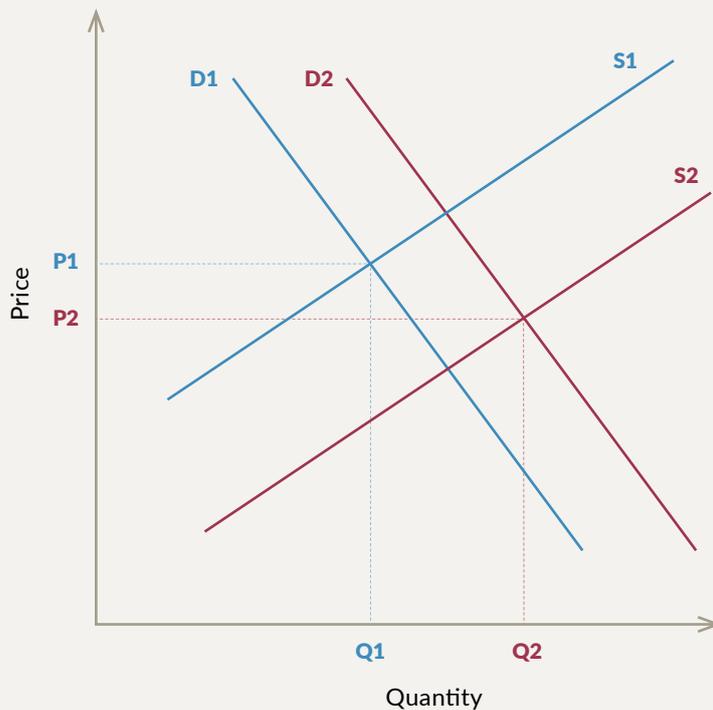


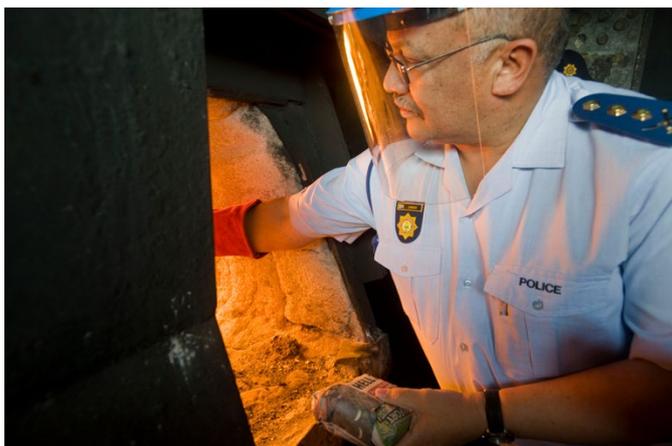
FIGURE 2 Expected impact of drug legalization on supply and demand curves, which determine price and quantities traded in the market.

which together determine prices and quantities traded. The basic logic can be demonstrated by means of a simple comparative static graph of the fundamental economic concept that these are determined by the point of equilibrium between supply and demand.

Drug prohibition is theoretically understood to produce negative shifts in both supply and demand (shifting the curves to the left in Figure 2).⁵⁴ Conversely, legalization is expected to produce a positive shift in demand (a shift to the right), increasing the quantity traded and the price. Legalization is also expected to produce a positive shift in supply (also a shift to the right), increasing quantity but decreasing price. The overall outcome is a considerable increase in quantity and an indeterminate impact on price, with the magnitude of the changes determined by the extent to which consumers and suppliers are induced to change their behaviour (as well as the elasticity of demand and supply respectively – that is, the slopes of the curves).⁵⁵

Legalization affects both quantity and price. While a dramatic increase in quantities consumed will benefit organized crime (and is likely to harm society in other ways), a decrease in the price can be a key mechanism for eroding the profits of organized crime, which may ultimately lead to its demise or at least disempowerment. Prohibition creates a barrier to entry for suppliers, which has allowed criminal organizations to cartelize (or, in some places, even monopolize) the market and charge very high prices.⁵⁶ They are therefore usually able to absorb significant price reductions and still make a profit.⁵⁷

The reality is of course far more complex and contested than this simple model, but the logic it illustrates is that the impact of legalization on the market is a function of multiple factors, including the extent to which prior prohibition actually reduced supply and demand, the extent to which the new regulatory regime increases them, and the sensitivity of both consumers and suppliers to changes in price. Regulators must use limited information and combine market tools (such as taxes) and repression tools (law enforcement) to try to balance competing forces and interests, with multiple objectives, including a reduction in levels of organized crime.



General Arno Lamoer of the South African Police Service loads parcels of marijuana into an incinerator at a forensics laboratory in Delft in July 2011. © Rodger Bosch/AFP via Getty Images

Besides these relatively direct and simple potential effects, legalization can also have a broader impact on organized crime. It can reduce the incalculable costs of prohibition to government, the economy and society. These costs include corruption, money laundering, a destabilized economy, deterred investment, migration, the marginalization of certain communities, the costs of crime and violence and the costs to health.⁵⁸ It can support economic development by redirecting government expenditure away from law enforcement and towards other 'drug-related public health interventions (such as education, prevention, harm reduction and treatment), or wider social policy spending', thereby reducing the loss of productivity and economic activity resulting from the mass incarceration of drug offenders, and increasing tax revenues.⁵⁹

Cannabis legalization can also have an indirect, positive knock-on effect on combatting other forms of organized crime, for instance by reducing the need for money laundering, which also facilitates other crimes (including cybercrime, corruption, and trafficking in weapons, people and wildlife).⁶⁰ It can also change markets in more interesting and unexpected ways. For example, it has been observed that under legalization the face of online cannabis sellers has shifted from young men with dark, anonymous profiles to a culture of individual female influencers, promoting a range of cannabis products as a more mainstream, aesthetically curated accessory to certain feminine lifestyles.⁶¹ Legalization will inevitably transform some aspects of the black market, but the ways in which it will do so are many and varied.

Type and coherence of regulation

As suggested above, the impact of cannabis legalization on organized crime, as well as on other aspects of human welfare, is by no means a simple matter of *whether* it happens, but *how* exactly it is put into policy and implemented.⁶² The key is understanding and finding the right levels of restriction on both demand and supply.

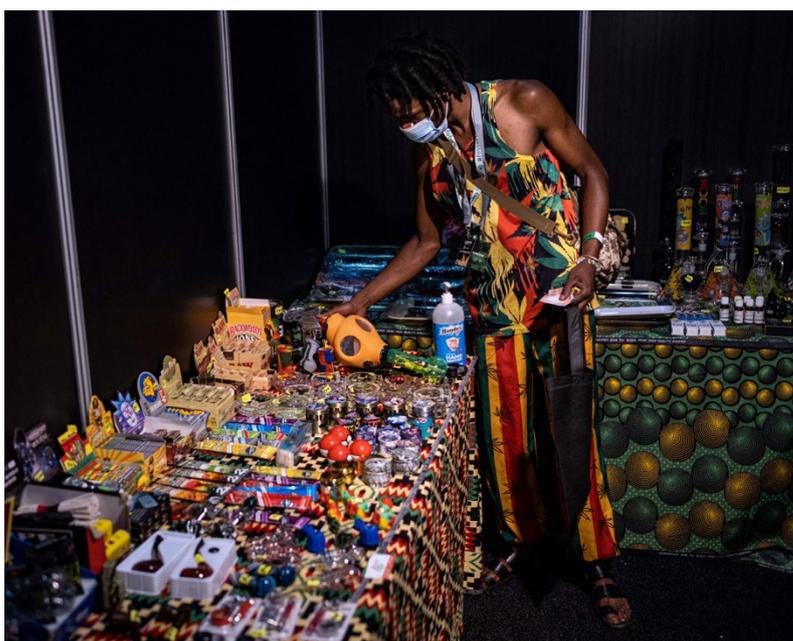
The extent to which legalization shifts demand is a function of the extent to which the new regulatory system eases access, reduces stigma, widens the pool of consumers, and reduces uncertainty and risk in the purchase decision process.⁶³ Constraints on consumers can take various forms and may on balance be justified, but they tend to have the effect of sustaining the illegal market. A drug dealer in Denver, for example, reports that legalization has not hurt business because his customers are people who do not want to be seen in a dispensary (e.g. nurses) or who are selectively prohibited from legal consumption (e.g. truck drivers and minors).⁶⁴ Among the key considerations are the threshold amounts designating personal use versus supply, and the penalties for exceeding those thresholds.

There is enormous variation in these areas among the places that have pursued legalization, with decisions seeming arbitrary, sometimes poorly defined, and allowing for varying degrees of discretion in interpretation by criminal justice decision-makers.⁶⁵ Very generous possession laws can also create loopholes for the black market to exploit, as seen in Colorado, which at one point allowed home cultivation of up to 99 plants, but later reduced this to 12 plants per household.⁶⁶

Equally important is the regulatory lever of supply. The risk of liberalizing demand without a commensurate liberalization of legal supply is one of the clearest lessons of legal reform to date. It is the most frequently cited explanation for the limited success of newly legal cannabis industries in displacing organized crime. In some places, very strict laws have led to supply shortages, driving consumers to the black market.⁶⁷ In other places, very generous laws (in terms of the number of licences granted and lenience in enforcing compliance) have led to an oversupply and oversaturation of the market, and forced farmers to turn to the black market by selling across state lines to make a profit.

It is common cause that where cannabis has been legalized, price drops in the illegal market have been spectacular. Reduced profit margins have driven small-scale legal and illegal operators out of the business in contexts as diverse as Canada⁶⁸ and Mexico.⁶⁹ There is no data on this, but anecdotal evidence suggests that the same is already happening in South Africa.⁷⁰ But it is the legal companies that suffer most from increased price competition, as they have to compensate for high regulatory costs by building them into higher prices. Behavioural economics research on the price elasticity of demand for illegal versus legal cannabis indicates that consumers will generally prefer legal to black-market cannabis, but only if the costs are relatively similar.⁷¹

The onerousness of regulation determines whether the legal product will be competitive (in price, but also in quality and accessibility) with black-market products. The persistence of the black market in places where cannabis has been legalized is largely explained by the failure of legal suppliers to become competitive. Research shows that those consumers who continue to choose the black market, even when there is legal supply available, do so for many reasons. Many may simply be unable to afford the taxed products.⁷² The question of the appropriate tax point has sparked heated debate in some places. But despite much talk of green being the new gold for South African tax revenue, nothing has



A vendor display at the Cannabis Expo 2021 in Sandton, Johannesburg, November 2021. © Emmanuel Croset/AFP via Getty Images

yet been proposed as to how such taxation might work. What is needed is not an adaptation of 'best practices' from high-income countries, but a highly tailored, context-sensitive taxation strategy.⁷³

Consumer decision to transition to legal sources is multifaceted; cost is a primary motivator, but not alone. Legal sources may well offer greater peace of mind, quality assurance, and product variety, but often also limit potency, sales volumes, anonymity and convenience.⁷⁴ Some black-market suppliers have succeeded in capitalizing on the combination of increased demand and their price competitiveness.⁷⁵ Others are abandoning the increasingly high-end, patentable industry, 'whose research and development departments may be more effective than the state in reducing crime of unprecedented scale'.⁷⁶ The more competitive the legal retailers, the more likely they are to displace the illegal market. If they are given the scope, or even incentivized, to do so, they can take measures similar to the Nevada company that created a product specifically designed to beat the cannabis black market. Called BMK (Black Market Killer), this box-wine equivalent is cheaper and less fancy than other legal products, but higher quality and safer than illegal products.⁷⁷

The myriad policy decisions around appropriate barriers to entry and competitiveness in the legal market are related to the motivations for reform. In many places, the starting point has been market regulation, with a major and explicit justification for legalization being its scope to reduce organized crime. In Uruguay, key government goals were to weaken criminal networks by undermining their profits, while freeing up police resources to focus on their violence and trafficking of more harmful substances.⁷⁸ Advocates for reform in California argued that legalization would reduce the role of Mexican drug trafficking organizations in supply, thereby reducing violence both locally and in Mexico.⁷⁹

In South Africa, however, cannabis reform has centred on the right to private consumption, meaning that market regulation has not been the goal, and the potential impact on organized crime impact has played little part in the decision-making process. The current situation, in which consumption is legal but cultivation and supply are still illegal, could conceivably enable law enforcement to allocate resources more effectively in the fight against organized crime. Yet, as discussed later in this paper, this is unlikely in the case of South Africa. In fact, expanding demand without making any attempt to shift supply into the hands of legitimate businesses is arguably the worst possible approach in terms of the impact on organized crime. This has long been a criticism of the Dutch model, with its 'paradox that at the front-door, the sale and possession of small quantities are not prosecuted, while at the back-door supply (cultivation and trade) is still fully criminalised'.⁸⁰ It was also an issue with Uruguay's pre-reform approach of generous judicial discretion, meaning that the state de facto 'allow[ed] individuals to use the substance, but force[d] them to buy it on the black market'.⁸¹

Another lesson from other contexts is that the grey market may pose a bigger threat to the development of a legal industry than black-market drug dealers, because grey market companies do not adhere to complex and costly regulations, but can operate in plain sight, with customers possibly none the wiser.⁸² South Africa's ongoing legal limbo is fostering a dynamic in which more scrupulous (or at least more risk-averse) potential suppliers are not only unable to reap the current commercial rewards of legalization, but are losing out on opportunities to gain an early foothold in the market. Anecdotally, a growing number of companies previously deterred by illegality are now actively seeking a stake before it is too late.

Cultural, socio-economic and political factors

The effectiveness of cannabis legalization in reducing organized crime is also a function of the extent to which patterns of demand and supply are likely to respond to the change in regulatory regime. One set of variables in this regard concerns the sensitivity of current and potential consumers to quality levels and price, and the degree to which they are invested in legitimacy. Some consumers will have a strong preference for cannabis products of superior quality, greater predictability and respectability, improved safety, diversity and aesthetics, and sold within a controlled retail environment. Some will also be highly averse to the risks of coming into contact with law enforcement or black-market suppliers who may be connected with other illegal products or services. They will therefore be strongly inclined to opt for legal products, even if these are more expensive than illegal products. This sector of the market is relatively likely to be middle class.

Other consumers, however, will be less motivated by quality than by price. The experience elsewhere seems to be that the black market continues to supply less expensive products.⁸³ The shift to legal sources in Canada increased within two years across virtually all population subgroups but differed considerably by 'sociodemographic factors, particularly frequency of consumption, ethnicity and racial group, level of education and annual income'.⁸⁴ Young people, habitual high frequency users and the less wealthy are relatively likely to choose the cheaper product, regardless of its quality.⁸⁵

This means that the socio-demographic profile of consumers is a factor in the likely impact of legalization on organized crime. There is no credible data available on this in the South African context. The few available estimates of the prevalence of cannabis use vary widely, have been based on very limited samples, and suggest that the tendency to under-report socially undesirable behaviours is so great that actual use may be as much as five times higher than self-reported use.⁸⁶ Estimating and tracking change requires the urgent development of reliable measures of prevalence.

An equally critical set of variables in understanding the impact of legalization on organized crime concerns producers' sensitivity to changes in regulation and price, and their degree of investment



Cannabis plants at Cilo Cybin Pharmaceutical, the first South African company to win the right to grow, process and package cannabis products. © Waldo Swiegers/Bloomberg via Getty Images

in legitimacy. Some black-market producers will see it relatively easy and attractive to move into the legal market. Others may be unwilling or unable to enter and compete in the legal cannabis market, and would need to find alternatives.⁸⁷ This depends on the degree to which the existing black market is culturally and socio-economically embedded.

In South Africa's traditional cannabis-growing areas, cannabis income is central to the livelihood strategies of many.⁸⁸ Rural areas in South Africa have extremely high levels of unemployment, and it is common for large extended families to rely on one person's income for survival. Embeddedness can go beyond direct involvement in cannabis farming, which may support other industries (including around the supply of fertilizers, farm equipment, storage facilities and transport).⁸⁹ The scope for many of those involved in illegal cannabis supply to find other sources of income is extremely limited. The dramatic drop in prices resulting from legalization will leave these communities poorer and even more desperate. Demand for the relatively low-grade cannabis they produce already seems to be declining.⁹⁰ The Mexican experience has shown that price reductions and general upheaval in the cannabis supply chain may offer a unique opportunity to change the decades-long, symbiotic relationship between farmers and organized criminal groups, but also that farming communities may still find themselves living 'under the constant threat of violence from criminal groups while no longer securing the type of economic benefits they once did from the drug trade'.⁹¹ In other words, legalization can have the effect of increasing the kinds of suffering associated with organized crime.

Small-scale producers may well struggle to enter and survive in commercialized legal cannabis markets. This is a widespread problem even in affluent jurisdictions, which do not have the kind of illegal supply networks found in South Africa's impoverished rural areas, where 'millions of subsistence farmers [till] tiny plots'.⁹² Established growers might have some competitive advantage in terms of know-how and production costs, but this is only if they can find good links to markets at the scale required to make a profit. Another major issue in the traditional growing areas in South Africa's former Bantustans, territories set aside for black South African ethnic groups during apartheid, is that 'rural dwellers lack title deeds and security of tenure, so they are unable to use the land they work as collateral for credit'.⁹³ Where producers are marginalized and have little state protection, they will also be particularly vulnerable to takeover or extortion by criminal actors.⁹⁴

Discussion on the importance of promoting equity in the development of the legal market is already prominent in the Global North.⁹⁵ But it is even more important for Africa, where restrictive colonial laws drove cannabis production to marginalized, resource-poor farmers, and where liberalization is now enabling those in the Global North to capitalize on and 'extract more value from African resources than African farmers can extract'.⁹⁶ A clear example of this is in Lesotho, where the industry is booming for those who can afford licences and who are getting multi-million-dollar export deals, while small-time growers are unable to access any of these benefits.⁹⁷ Those who have been disproportionately affected by prohibition do stand to gain from its end, and some traditional growers in South Africa have welcomed the prospect of being able to conduct their business without fear of the police.⁹⁸ But evidence in the US is already showing that legalization does not resolve racial disparities in enforcement.⁹⁹ Consultations on the Cannabis for Private Purposes Bill were conducted online and only in English, thus 'excluding hundreds of farmers in the Eastern Cape who grow dagga'.¹⁰⁰ This is a poor start for the decolonization of drug-related knowledge and policies in South Africa.¹⁰¹

Ensuring cannabis justice, or policy that is inclusive of the marginalized groups historically involved in the illegal trade, is not only the right thing to do, it is an essential part of maximizing the mitigating impact of legalization on organized crime. If the legal market can absorb black-market participants,

it can lessen the chance of their possible diversification into other criminal activities and eventually engulf the illegal market.¹⁰² Some jurisdictions have sought to address these issues by providing individuals from communities historically engaged in the illegal trade with targeted support to enter the legal market – for example, by providing them with access to credit, assisting with licence application processes, and earmarking a minimum percentage of licences. This can be a political and cultural challenge, as ‘providing drug dealers with a “route to legitimization” may sit uncomfortably with many’.¹⁰³ This does not currently seem to be a contentious issue in the South African context, but conservative political pushback against this or other aspects of legalization may yet grow. For example, some recent data suggests that there has been an increase in the number of young people seeking treatment for cannabis abuse.¹⁰⁴ It is not yet clear what to make of this information, but it is likely to strengthen those voices that seek to maximize restrictions, which may serve to undermine the legal market’s potential to displace organized crime.

Criminal justice factors

The next set of considerations for the impact of legalization on organized crime concerns criminal justice, especially the extent to which the risk of meeting with criminal punishment has affected current and potential market participants and how this is likely to change with legalization. Even after legalization, both consumers and suppliers will need to be compelled to switch to a legal alternative, so targeted enforcement will still be necessary.

Legalization can make law enforcement both easier and more difficult. As discussed earlier, although the evidence is not conclusive, there are some indications that cannabis legalization may reduce rates of other types of crime. Legalization may also allow criminal justice time and other resources to be redirected to other crimes. A common indicator of this is the change in clearance rates, or the percentage of reported crimes that are solved by law enforcement agencies. There is some evidence from the US suggesting that the legalization of cannabis has a beneficial impact on crime clearance,¹⁰⁵ although the effect appears to diminish over time.¹⁰⁶ Increases in crime clearance could also be a response to unchanged performance metrics, which continue to emphasize arrest rates.¹⁰⁷

The ideal would be to shift law enforcement attention away from people who simply use cannabis and who play little or no role in its supply, and towards the networks of large-scale importers, manufacturers and distributors who employ violence and corruption to protect their power and profits.

Law enforcement attention should be directed away from people who use cannabis and towards the importers, manufacturers and distributors who resort to violence to safeguard their interests. © Photo by Alet Pretorius/ Gallo Images via Getty Images



Unfortunately, given what is known about law enforcement, it is questionable whether a simple reallocation of resources 'could be used to fight the most dangerous and harmful remaining drug trafficking organizations or other organized crime groups without further political effort'.¹⁰⁸ Arresting drug users or low-level dealers may simply involve officers being in the vicinity of known hotspots – and perhaps taking the opportunity to extort or otherwise abuse easy, vulnerable targets who are likely to be carrying cash.¹⁰⁹ Indeed, policy reform could reduce the incentives for such street-level corruption in law enforcement.

But countering serious organized crime is far riskier and requires slow, painstaking investigations and complex prosecutions, informed by strategic crime intelligence. These are not strengths of the South African criminal justice system. The country boasts robust anti-organized crime legislation, but effective enforcement is hampered by insufficient political will and state capacity, and the ability to bring high-level organized crime figures to trial is limited.¹¹⁰

A far more likely effect of legalization on law enforcement is that it would make enforcement more difficult and erratic. Police officers are the street-level bureaucrats who have to put these grand regulatory changes into practice.¹¹¹ A legal but highly regulated market is more complicated to police than a blanket prohibition. Officers in some US states report that the 'watered down' laws are impossible to enforce, that there is widespread confusion about the conditions of lawful cannabis use and trade, and that their role has in fact expanded so much that they are not spending less time and effort on cannabis-related matters.¹¹² With organized crime now able to disguise profit-driven production under the guise of individual cultivation or licensed trade, police officers are struggling to counter new forms of the black and grey markets.¹¹³ Even in well-resourced contexts, police report inadequate training and funding for cannabis-related law enforcement activities.¹¹⁴ Resource and management constraints in the South African criminal justice system mean that it is almost certain to fare far worse.

The implication of all this is that if law enforcement is unable to police the black or grey markets, and if the risk of being caught is negligible, then many consumers will 'bypass concerns about the legality of their purchase ... [and] view licit and illicit cannabis as in direct competition with each other'.¹¹⁵ Intrinsic motivations or market tools (such as superior quality products) will play some role in changing behaviour, but the prospects for the legal market to displace or absorb the illegal market (which is far more established and likely to be cheaper and more convenient) also depend on the agility and strength of repressive instruments. South African conditions are not favourable in this regard.

Existing market and organized crime

The final set of variables considered in this paper is what can be predicted about the likely impact of legalization on organized crime from the nature of the existing system of illegal supply. The first part of this concerns the extent to which the illegal cannabis market actually corresponds in any meaningful way to our conception of organized crime. There is no consensus on this, as assessments are inevitably based on limited data and on different definitions of organized crime, which place different emphasis on such factors as the extent to which the relevant structures are hierarchical, rationally profit-motivated, and inclined to use force or corruption.¹¹⁶ Law enforcement agencies generally believe that those who sell cannabis are involved in other kinds of criminality, ranging from burglary to human trafficking.¹¹⁷ However, the evidence for this is highly variable, as cannabis growers vary 'in terms of motivations, cultivation techniques, size of operations or their approaches to markets, and their connections with others who cultivate and distribute cannabis'.¹¹⁸ In some places, criminal gangs

Fentanyl seized in Ensenada, Mexico, in 2022. In Mexico, powerful criminal groups have been able to diversify from cannabis to the production and trafficking of opioids and fentanyl. © Salwan Georges/The Washington Post via Getty Images



have little interest in cannabis, preferring to move 'harder' drugs that offer higher rewards, such as cocaine and opioids.¹¹⁹ Arguably, in the majority of contexts where legalized cannabis markets have been introduced, pre-existing markets 'were not dominated by organized criminal actors, much less characterized by the high levels of violence, corruption, and deprivation which have come to define regions or states worst-affected by the harms of drug trafficking'.¹²⁰

To the extent that organized crime does dominate the illegal cannabis trade, its resilience to legalization is influenced by its reliance on cannabis for profitability, its overall structural robustness, the breadth of its criminal portfolio, its scope for reorientating cannabis supply towards export markets, and its ability to diversify into other drug markets or crime types. Forfeited profits are the main mechanism by which legalization is predicted to undermine organized crime. As such, it is necessary to estimate the proportion of organized revenues that are derived from the illegal domestic supply of cannabis.¹²¹ Large reductions in revenue may well reduce violence in the long term, but may also increase it in the short term, as competition intensifies.¹²²

A major concern is whether organized criminal groups will be able to forestall the unfavourable impact of cannabis legalization on their revenues by diversifying into other markets, producing the classic 'balloon effect'.¹²³ Experience in Mexico shows that more 'competent and powerful criminal groups with more extensive logistical capacities' have been able to switch to the production and trafficking of opioids and fentanyl, as well as extortion of local businesses.¹²⁴

Too little is known about organized crime in South Africa to make a credible assessment of the potential impact of cannabis legalization. There is no doubt that organized criminal groups, ranging from traditional domestic gang structures to looser international networks, 'in conjunction with corrupted state security officials, facilitate the trade of cannabis by air, land and sea routes'.¹²⁵ Given that cannabis is the most widely used drug in the country, it is likely that very large incomes are generated from its sale.¹²⁶ Unfortunately, while policy reform may devastate many subsistence growers, the 'mafia-style' networks or syndicates that drive so much of the violence already tend to be highly diversified in the criminal economy – and may have little trouble recouping lost cannabis profits through other activities, including fraud, armed robbery, poaching, kidnapping for ransom and extortion.¹²⁷



CONCLUSION AND RECOMMENDATIONS

For cannabis reform to have a desired impact (however defined) on organized crime (however defined), it is not simply a matter of removing all criminal justice involvement in the regulation of the substance. It requires an understanding of the logic of what we are trying to achieve in the balance between restriction and liberalization in both supply and demand. Failure to find congruence between the various policy levers may well make things worse. Much of the persistence of the black market in places where these experiments have already taken place can be attributed to the failure to find such coherence. Where the barriers to entry and competitiveness of the legal market are too high, the illegal market will not be displaced. Similarly, where the legal or grey markets are too generously defined or loosely delineated, law enforcement will find it impossible to police the black market.

The South African government's inability so far to find coherence in its cannabis policy is unsurprising, given that the impetus for reform has come not from a change in bureaucratic reasoning or political calculus, but rather from a legal challenge, and given the documented weakness and intransigence of the country's regulatory institutions. This situation does not offer promising prospects for addressing these challenges. Nevertheless, there does seem to be some political appetite for promoting equity in the development of the legal market and providing targeted support to marginalized communities, which is necessary to absorb black-market participants and mitigate their possible diversification into other criminal activities. Yet the capacity of the criminal justice system to implement a more complex regulatory system and reap its potential rewards is extremely limited.

Key considerations include: supporting farmers in remote regions who may struggle to compete in a more sophisticated market with lower profit margins; supporting the legal market to become competitive with black-market prices by limiting the burden of some regulatory costs, perhaps temporarily; limiting legal supply to avoid flooding the market; maintaining strategic enforcement against criminal gangs operating in the black market; educating consumers in order to limit grey markets and address misperceptions about the risks of cannabis use; and promoting access to public health support for potential problem users. In order to limit unintended consequences that could benefit criminal organizations, regulatory frameworks should be implemented in a phased manner and be subject to ongoing monitoring and review, as data emerges and impacts become discernible over time.



South African Deputy President Paul Mashatile (centre left) and cabinet ministers visit a cannabis production showcase at Cedara College of Agriculture in Durban, May 2023. © Darren Stewart/Gallo Images via Getty Images

Credibly assessing and maximizing the impact of cannabis legalization on organized crime in South Africa requires a major investment in the data. The starting point must be basic surveillance measures that track the frequency, quantity, purpose and methods of cannabis use, along with basic socio-demographic characteristics. It is important to note that newly available data sources may differ considerably from pre-legalization data due to decreasing stigma and legal risk. There is a need for consistent measures of prices in both the licit and illicit markets, as well as data on where consumers buy cannabis and why. Criminal justice data sources need to capture police-reported rates of cannabis offences, both old (e.g. simple possession) and new (e.g. breaches of licence conditions); rates of other crimes; illicit drug seizures, including drug type and quantity; crime clearance rates; court outcomes, processing times, expenditure and other burdens on the criminal justice system; the number and membership of organized crime groups and their criminal portfolios; trends in crimes closely associated with organized crime; the proportion of documented cannabis offences that involve (other forms of) organized crime and the proportion of documented organized criminal activity involving cannabis. It is critical to ensure that the data collected is reliable, standardized and consistent over time.

Perhaps the most important lesson for South Africa from experiences with legalization elsewhere is that it is crucial not to underestimate the resilience of criminal organizations. At the same time, we should not be too quick to extrapolate from other contexts (or to other criminal economies), as each will have to contend with its own mix of variables relating to socio-economics and culture, the criminal justice system and market structure.

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