



When Law Creates the Harm It Claims to Prevent: Prohibition, Corruption, Capture, and the Constitutional Review of Restrictive Law

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Abstract

This paper develops the concept of prohibition integrity as a legal-theoretical model for evaluating whether prohibitions, licensing regimes, and restrictive regulations reduce concrete harm or instead generate greater social and institutional harm. Building on prior work on conditionalized sovereignty and defensive sovereignty, the paper extends the analysis from permission-based autonomy and operational rights-disabling to the design of restrictive law. It argues that prohibitions should be assessed not only by their declared protective purpose, but by their operational consequences, including illegal market formation, corruption incentives, regulatory capture, criminalization of regulatory disagreement, democratic distortion, and operational rights-disabling. The paper identifies three core mechanisms of harm-producing prohibition: criminogenic prohibition, where bans suppress lawful supply without suppressing demand and thereby strengthen illegal markets; corruption-enabling prohibition, where vague or panic-driven legal categories may expand discretionary enforcement and valuable exceptions; and capture-based prohibition, where the public justification is harm prevention but the operational effect may be market protection, incumbent advantage, or cartel-like exclusion through law. It further argues that serious restrictive laws should be subject to civil-first analysis, democratic lawmaking review, constitutional friction, and periodic harm-reduction evaluation before becoming permanent. The paper introduces the Prohibition Integrity Test as a diagnostic screening tool rather than a mechanical formula. It identifies warning signs that require heightened justification, narrowing, conversion into regulation, independent review, or automatic expiry. The central claim is that no serious prohibition should be enacted or maintained unless the state can demonstrate net harm reduction.

Keywords: Constitutional review, Corruption, Harm reduction, Legal cartelization, Prohibition integrity, Regulatory capture, Rule of law.

1. Introduction

Legal systems frequently justify prohibitions in the language of protection. A prohibition may be introduced to prevent violence, reduce public health risks, protect minors, preserve public order, prevent fraud, limit intoxication, maintain security, protect consumers, reduce social instability, or defend moral and civic goods. In this formal sense, prohibition appears as an instrument of harm prevention. Yet the protective intention of a prohibition does not settle its legal, social, or institutional legitimacy. A legal rule may claim to prevent harm while producing greater harm through its operational effects.

The central question of this paper is: when does prohibition cease to be harm-reducing regulation and become harm-producing governance?

This question is not limited to drug policy, although drug policy provides one of the clearest fields of analysis. It applies more broadly to legal systems that prohibit, license, restrict, criminalize, or condition access to goods, services, practices, substances, professions, technologies, forms of treatment, modes of communication, market participation, or self-regarding conduct. The paper evaluates prohibition not as a single legal category, but as a family of restrictive instruments whose legitimacy depends on harm type, market effects, enforcement structure, sanction design, democratic production, and constitutional review.

A restriction may be legitimate where it prevents concrete harm to others. It becomes more difficult to justify where the harm is abstract, moralized, speculative, politically amplified, or shaped by inherited bias. It becomes still more problematic where the legal intervention creates illegal markets, strengthens organized crime, increases violence, expands discretionary enforcement, generates corruption opportunities, protects incumbent interests, eliminates competitors, criminalizes regulatory disagreement, or makes rights practically harder to use and defend.

This paper does not treat prohibition as inherently illegitimate. It argues that prohibitions require heightened justification where they fail to eliminate demand, create illegal markets, expand discretionary enforcement, generate valuable permissions or exemptions, protect incumbent interests, criminalize regulatory disagreement, or produce greater harm than proportionate regulatory alternatives. The model does not assume that prohibition is

always inferior to regulation. It assumes only that prohibition is a legal instrument with predictable risk profiles that must be justified by evidence, proportionality, and net harm reduction.

The burden should rest on the state to demonstrate that a prohibition reduces net harm, not on citizens to prove why liberty should remain available. This does not require predictive certainty. It requires reasoned, evidence-based justification, monitoring of foreseeable secondary harms, and correction when the measure fails.

This paper builds on prior work on conditionalized sovereignty and defensive sovereignty. Conditionalized sovereignty describes how formal autonomy may become dependent on permission, especially where competent adults are treated as fully mature for obligation but only conditionally mature in self-regarding domains [1]. Defensive sovereignty shifts the analysis from formal rights to the operational conditions required to use, contest, and defend those rights against arbitrary power [2]. The present article extends these models to prohibition design by asking whether restrictive laws reduce harm or instead create illegal markets, corruption incentives, capture, criminalization of regulatory disagreement, democratic lawmaking vulnerability, and rights-disabling effects.

The original contribution of this paper is not the claim that prohibition, corruption, capture, democratic distortion, or harm reduction are new topics. Existing research has examined these themes separately. The contribution lies in integrating them into a single legal-theoretical screening model for evaluating restrictive law before it becomes permanent legal architecture.

2. Method and Scope

This paper uses conceptual legal and political-theoretical analysis. It does not present an empirical study, a jurisdiction-specific doctrinal survey, or a full comparative criminal-law account. Its purpose is to identify a recurring legal structure: prohibitions may be formally justified as harm prevention while operationally producing greater harm through illegal market formation, discretionary enforcement, corruption, capture, cartel-like market effects, criminal escalation, democratic distortion, and rights-disabling consequences.

The breadth of the model is intentional, but its function is limited. It does not replace domain-specific empirical analysis. It identifies the minimum legal and institutional questions that should precede serious restrictive law. The model is normative in the sense that it rests on rule-of-law, proportionality, due process, and harm-reduction commitments. It is diagnostic in the sense that it translates those commitments into review questions and institutional safeguards.

The selected examples are illustrative rather than exhaustive. Alcohol prohibition in the United States is used as a historical reference point because it demonstrates how a prohibition can fail to eliminate demand while shifting supply into illegal markets. Modern drug prohibition is used because it shows the continuing relevance of illegal market formation, organized crime, violence, and public health risk. Harm-reduction models are considered because they illustrate alternative regulatory approaches. Lobbying, regulatory capture, and occupational licensing are discussed because prohibitions and restrictive regulations may also function as market-control instruments. Rule-of-law principles are included because vague, abstract, or panic-driven prohibitions can expand discretion and weaken legal predictability. Constitutional friction and democratic lawmaking vulnerability are introduced because ordinary lawmaking may be influenced by ideology, party interest, lobbying, donors, institutional incentives, media pressure, moral panic, and temporary political emotion. The Civil-First Principle is introduced because not every conflict between citizen and state should be treated as a criminal matter.

The article is theoretical and diagnostic. It does not claim to prove universal empirical causation. It identifies mechanisms and risk conditions that should be examined before prohibitions are enacted or maintained. Its central purpose is to ask whether restrictive law genuinely reduces concrete harm or instead creates greater total harm through institutional design.

3. Literature Background and Research Gap

Research on prohibition and violence has already shown that bans may produce unintended consequences. Jeffrey Miron's work on alcohol and drug prohibition examines the relation between prohibition enforcement and homicide in the United States and argues that stronger enforcement of prohibition has historically been associated with higher homicide rates [3]. Such research does not prove that every prohibition necessarily causes violence. It does, however, support the more careful claim that prohibition can create structural conditions under which violence becomes more likely, especially where demand persists and legal dispute-resolution mechanisms are unavailable.

Drug-market research also supports the relevance of illegal market formation. The United Nations Office on Drugs and Crime has repeatedly described illicit drug markets as global systems involving organized crime, criminal revenue, transnational trafficking, and violence in several regions [4]. These findings matter for prohibition theory because drug markets are not merely consumer-risk environments. They are also institutional, financial, territorial, and criminal-governance environments.

Harm-reduction research has developed a different policy orientation. Rather than treating punishment as the sole or primary response, harm reduction asks whether policy reduces preventable death, disease, unsafe use, violence, exclusion, and barriers to treatment [5]. In this paper, harm reduction is not limited to drug-use risk. It is extended into a broader legal standard: a prohibition should be evaluated by whether it reduces total concrete harm, including institutional harms such as corruption, arbitrary enforcement, rights-disabling, legal cartelization, criminal overreach, and capture.

Regulatory capture literature provides a second major foundation. The OECD describes policy capture as a condition in which public decisions are repeatedly or consistently directed away from the public interest toward specific interests [6]. This is directly relevant to prohibitions because bans, licensing systems, and restrictive regulations may create benefits for incumbent actors, agencies, professional groups, industries, or political coalitions. George Stigler's classic theory of economic regulation likewise argued that regulation may be acquired by industry and designed for its benefit [7]. Later work on regulatory capture and institutional corruption further develops this concern [8].

Competition literature further shows that regulation can create entry barriers. Occupational licensing, professional regulation, exclusive authorizations, and high compliance burdens can sometimes protect the public from fraud or incompetence, but they can also restrict entry, increase prices, and protect incumbents [9]. The issue is not that licensing or professional regulation is always illegitimate. Some standards protect consumers from concrete harm. The issue is whether a regulatory burden is necessary and proportionate, or whether it protects incumbent actors by raising costs, restricting entry, limiting alternatives, and producing cartel-like effects through law.

Rule-of-law literature is also central. A legal order is not protected merely because restrictions are enacted through formal procedure. The rule of law requires clarity, predictability, reviewability, proportionality, equality before the law, protection from arbitrary power, and access to remedy [10, 11]. This concern is also consistent with classical rule-of-law theory, especially the requirements of legality, generality, prospectivity, clarity, stability, and the capacity of law to guide conduct [23, 24]. Vague prohibitions can undermine these conditions by giving enforcement authorities excessive interpretive power. Where vague legal categories also create valuable exemptions, licensing gateways, enforcement tolerances, or discretionary exceptions, the risk of selective enforcement and corruption increases.

Democratic lawmaking literature supports the view that the legitimacy of law depends not only on formal adoption, but also on the quality of the lawmaking process. Democratic legislation should be grounded in rule of law, human rights, impact assessment, consultation, oversight, publication, accessibility, and evaluation across the legislative cycle [12]. Regulatory impact assessment and evidence-based lawmaking literature similarly emphasize that laws should be planned, scrutinized, evaluated, and corrected where they fail to meet their stated objectives [13].

The literature therefore supplies the components of the problem, but not yet an integrated test for assessing restrictive law as a harm-producing legal architecture. Prohibition research identifies illegal market effects; harm-reduction literature evaluates health and safety outcomes; capture literature explains interest-group distortion; rule-of-law scholarship emphasizes clarity, predictability, and remedies; democratic theory examines legitimacy, deliberation, and constitutional restraint; and overcriminalization scholarship questions the expansion of criminal law. What remains missing is a unified screening model that asks whether a restrictive law should be enacted, maintained, narrowed, converted into regulation, or allowed to expire. That gap is the point of departure for the Prohibition Integrity Test.

4. Conceptual Structure: Prohibition Integrity and Three Harm-Producing Mechanisms

The model uses Prohibition Integrity and Net Harm Reduction as its central concepts. Criminogenic, corruption-enabling, and capture-based prohibition describe the three primary mechanisms through which restrictive law may become harm-producing. Later sections address sanction design, democratic process, and constitutional review as institutional safeguards within the Prohibition Integrity Test rather than as independent theories.

4.1. Prohibition Integrity

Prohibition integrity refers to the legal and institutional quality of a prohibition, measured by whether it prevents concrete harm without producing greater harm through illegal markets, violence, corruption, arbitrary enforcement, regulatory capture, legal cartelization, criminal escalation, democratic distortion, or operational rights-disabling.

A prohibition has high integrity where it is directed at concrete harm, defined clearly, supported by evidence, proportionate, targeted, reviewable, resistant to capture, and accompanied by safeguards against corruption, selective enforcement, criminal overreach, democratic distortion, and market distortion. A prohibition has low integrity where it relies on abstract panic, moralized harm, inherited bias, vague categories, broad discretion, symbolic enforcement, protected incumbency, or unsupported claims of safety while producing greater total harm. A prohibition must not be judged by the harm it claims to prevent, but by the total harm it produces, reduces, transfers, hides, or institutionalizes.

4.2. Net Harm Reduction

Net harm reduction means that a prohibition must reduce the targeted harm without producing equal or greater secondary harms through illegal markets, violence, unsafe supply, corruption, arbitrary enforcement, criminal overreach, capture, legal cartelization, democratic distortion, or operational rights-disabling.

This standard does not require perfect prediction. It requires that lawmakers identify the targeted harm, define measurable indicators, anticipate foreseeable secondary harms, compare less restrictive alternatives, and revise or terminate the restriction where it fails. Net harm reduction therefore shifts the analysis from intention to total consequence.

Net harm reduction should not be understood as a purely mathematical aggregation of all harms into a single commensurable value. Many relevant harms are partly incommensurable. Overdose deaths, violent crime, enforcement costs, corruption risks, rights restrictions, loss of legal trust, and institutional capture cannot be reduced to one neutral metric without normative judgment. The model therefore treats net harm reduction as a structured proportionality assessment. Quantitative indicators should be used where measurable, while qualitative and constitutional harms require reasoned justification, transparent weighting, and explicit acknowledgment of trade-offs.

Where harms are incommensurable, the state should not hide the conflict behind technical measurement. It should disclose the normative choice: which harm is being prioritized, which secondary harms are being tolerated, why less restrictive alternatives are insufficient, and what threshold would require revision or repeal.

4.3. Criminogenic Prohibition

Criminogenic prohibition occurs when a ban suppresses lawful supply without suppressing demand, thereby transferring market governance from courts, contracts, taxation, regulation, product standards, and civil accountability to illicit networks, violence, corruption, and informal coercion.

If demand persists and legal access is removed, supply does not necessarily disappear. Instead, supply may move into illegal channels. Illegal suppliers face enforcement risk and therefore charge risk premiums. Because contracts cannot be enforced through ordinary courts, disputes may be resolved through threats, violence, retaliation, intimidation, or territorial control. Because products cannot be regulated openly, consumers face quality, purity, dosage, contamination, and information risks. Because profits are illegal, criminal networks may launder money, bribe officials, infiltrate institutions, and expand into other illicit activities.

Criminogenic prohibition therefore does not mean that the prohibited object is harmless. A substance, product, service, or activity may carry real risks. The point is different: the legal response may create additional harms beyond those associated with the object itself.

4.4. Corruption-Enabling Prohibition

Corruption-enabling prohibition occurs where vague, abstract, morally charged, panic-driven, or overly broad legal categories may expand discretionary enforcement power and create valuable permissions, exemptions, licenses, tolerances, or enforcement decisions that can be selectively applied, monetized, politicized, or captured.

This paper treats corruption structurally rather than merely morally. The issue is not simply that individual officials may be corrupt. The deeper issue is that certain legal designs create corruption opportunities. A prohibition creates enforcement power. Enforcement power creates discretion. Discretion becomes especially dangerous when standards are vague, consequences are severe, exceptions are valuable, and oversight is weak.

Corruption-enabling prohibition does not mean that vague law automatically causes corruption. It means that vague, broad, or discretionary prohibitions may increase corruption opportunities by expanding enforcement discretion, creating valuable permissions, and weakening predictable review. The causal claim is therefore structural and probabilistic rather than linear.

4.5. Capture-Based Prohibition and Legal Cartelization

Capture-based prohibition occurs where legal restrictions, licensing systems, compliance burdens, or prohibitions are shaped, or are at heightened risk of being shaped, by organized interests in ways that protect incumbent actors, exclude competitors, create artificial scarcity, or transform regulation into a market-control instrument.

Legal cartelization is used analogically, not doctrinally. It does not describe an antitrust cartel in the strict legal sense. It refers to cartel-like market effects generated through public law: restricted entry, artificial scarcity, high compliance costs, protected incumbents, reduced competition, higher prices, fewer alternatives, and legally created exclusion.

Capture-based prohibition is difficult to detect because its public language often sounds protective. It may speak of safety, professionalism, quality, expertise, public order, consumer protection, health, security, or responsibility. These purposes may be legitimate. The problem arises when the operational effect is not concrete harm reduction, but market protection.

Capture-based prohibition does not mean that every restrictive regulation is captured or that regulation directly creates market domination. It means that prohibitions and licensing regimes may amplify capture risks where organized interests influence legal design, where compliance burdens favor incumbents, or where public safety language masks exclusionary market effects.

5. Typology of Prohibitions

A prohibition integrity analysis must distinguish between different types of prohibitions. The paper does not treat all prohibitions as equivalent.

Harm-preventive prohibitions are directed at concrete injury to others, such as violence, coercion, fraud, exploitation, trafficking, poisoning, or sale to minors. These prohibitions are usually easiest to justify because the harm is direct and other-regarding.

Risk-management prohibitions address realistic and specific risks, such as unsafe production, contaminated goods, hazardous materials, or conduct that creates serious danger to others. These may be justified where risk is evidence-based and proportionately addressed.

Moralized prohibitions are grounded primarily in taboo, disapproval, inherited bias, moral panic, symbolic politics, or abstract danger. These require heightened justification because they risk treating discomfort or majoritarian morality as public injury. This distinction reflects the classical debate over the moral limits of criminal law, especially the difference between preventing harm to others, preventing offense, and restricting self-regarding conduct [17–20].

Market-shaping prohibitions restrict entry, access, licensing, supply, professional authorization, or commercial participation. These may be legitimate where necessary for safety or competence, but they become suspect where they protect incumbents, suppress alternatives, or create legal cartelization.

Criminogenic prohibitions arise where demand persists, lawful supply is eliminated, and illegal markets become more profitable, violent, or institutionally resilient.

This typology clarifies the paper's central position: prohibition is not rejected as such. It must be classified, justified, monitored, and corrected according to its harm profile.

6. From Harm Reduction to Harm Production

The legitimacy of prohibition depends on the relationship between harm prevented and harm produced. A prohibition may be justified where the prohibited conduct directly harms others, such as violence, coercion, fraud,

exploitation, non-consensual injury, contamination, trafficking, or serious danger to minors. The strongest case for prohibition exists where harm is concrete, direct, preventable, and not adequately addressed by less restrictive means.

The justification weakens where harm is abstract, speculative, moralized, symbolic, inherited, or based on public discomfort. It weakens further where the prohibition produces secondary harms: criminal markets, violence, corruption, unsafe products, selective enforcement, fiscal costs, institutional capture, market concentration, criminal overreach, rights-disabling, democratic distortion, or distrust in law.

Harm reduction should therefore be understood as a legal standard, not merely a public health slogan. In the context of prohibition integrity, harm reduction means the reduction of total concrete harm, including institutional harms such as corruption, arbitrary enforcement, rights-disabling, market capture, and unnecessary criminalization.

The key question is whether the prohibition reduces total concrete harm or relocates harm into criminal, corrupt, discretionary, punitive, democratically distorted, or captured structures.

6.1. Harm-Reduction Indicators

A prohibition integrity review requires predefined indicators. These indicators should be selected before enactment, not after political actors already know the results. Relevant indicators may include violent-crime trends, illegal-market persistence, organized-crime revenue indicators, corruption complaints or prosecutions, enforcement costs, product safety indicators, overdose or injury rates where relevant, treatment access, number of licenses or exemptions granted and denied, market concentration, price effects, entry barriers, due-process claims, civil-liberty impact, rights-impact assessments, and documented use of civil rather than criminal remedies.

The purpose of such indicators is not to reduce all legal judgment to quantitative measurement. Some harms are qualitative, institutional, or constitutional. The point is that lawmakers should define the expected protective outcome before restricting conduct. If the state claims that a prohibition reduces harm, it should define what harm means, how reduction will be assessed, what secondary harms will be monitored, and what consequence follows if the law fails.

6.2. Methodological Limits of Net Harm Reduction

Net harm reduction cannot be reduced to a simple mathematical calculation. Some harms can be quantified, such as enforcement costs, violent-crime trends, overdose rates, market concentration, product contamination, licensing denials, or corruption complaints. Other harms are qualitative, institutional, or constitutional, such as loss of trust in law, chilling effects on liberty, erosion of due process, selective enforcement, or rights-disabling. These categories are not always commensurable.

For that reason, the Prohibition Integrity Test should be understood as a structured proportionality and justification model rather than a single metric. The state should disclose which harms it prioritizes, which secondary harms it anticipates, which trade-offs it accepts, why less restrictive alternatives are insufficient, and what evidence would trigger narrowing, conversion into regulation, or repeal. Where indicators are politically contested, they should be subject to independent meta-review, public justification, and counter-indicators capable of detecting harm displacement.

7. Comparative Illustrations: Prohibition, Drug Policy, and Harm-Reduction Alternatives

Alcohol prohibition in the United States remains a central historical reference because it illustrates how a prohibition can fail to eliminate demand while transforming the institutional environment of supply. The point is not that the historical experience of alcohol prohibition automatically applies to every substance or market. The point is that it reveals a general mechanism: if demand persists, prohibition may not abolish exchange; it may change who governs the exchange [3].

Under lawful conditions, markets can be governed through contracts, courts, insurance, product standards, taxation, civil liability, licensing, consumer remedies, advertising limits, age controls, and public oversight. Under unlawful conditions, those mechanisms weaken or disappear. Producers and distributors cannot sue openly for breach of contract. Consumers cannot easily report unsafe products without exposing themselves. Suppliers cannot advertise legally, verify quality transparently, or resolve territorial disputes through lawful procedures. Criminal actors may then become the market's governing institutions.

Modern drug prohibition shows similar structural risks. Drug trafficking remains connected to organized crime, criminal profits, and violence in many regions [4]. The relevant question is not whether drugs carry risks. Many do. The question is whether prohibition reduces those risks or creates a second layer of harm through illegal market governance. This second layer of harm is particularly serious because black-market substances are not subject to ordinary quality control, labeling, dosage standards, contamination checks, or legal accountability. As a result, consumers may face risks that arise not only from the substance itself, but from the uncontrolled conditions under which it is produced, adulterated, distributed, and consumed.

A careful analysis must distinguish at least four sources of harm: substance-related harm, behavior-related harm, market-related harm, and prohibition-related harm. Substance-related harm includes toxicity, dependence, overdose, impaired driving, psychosis risk, or long-term health effects. Behavior-related harm includes violence, neglect, dangerous conduct, workplace risk, or harm to minors. Market-related harm includes contamination, uncertain dosage, unsafe production, lack of labeling, lack of product accountability, and absence of legal remedies. Prohibition-related harm includes organized crime, territorial violence, corruption, mass enforcement, unsafe supply, hidden use, stigma, barriers to treatment, and rights-disabling.

The comparative evidence does not support a simplistic legalization thesis. It does not show that all prohibited conduct should be commercialized. It does show that prohibition must be compared against specific regulatory alternatives, each measured by actual harm-reduction outcomes. Decriminalization, medical regulation, state-controlled or medically supervised supply, commercial legalization, and civil regulation each have different risk

profiles. Decriminalization may reduce criminalization harms but may not eliminate illegal supply. Medical regulation may reduce unsafe supply but may create professional gatekeeping. State-controlled supply may reduce criminal dependence but may be narrow and politically contested. Commercial legalization may reduce illegal profits but may create corporate incentives to expand consumption. Civil regulation may avoid criminal stigma while still allowing targeted intervention.

The paper therefore does not advocate one universal model. It proposes a legal test: where prohibition produces greater harm than a realistic alternative, the prohibition fails integrity review.

8. Sanction Design and State-Citizen Asymmetry

The state is not merely a neutral background condition of law. It is itself a legal person acting through institutions, officials, agencies, and legal procedures. While the state possesses public authority and cannot be equated with a private individual in every respect, it remains bound by legal personality, legality, justification, accountability, and liability. This matters for prohibition integrity because disputes between the state and the citizen should not automatically be translated into criminal law.

Where the conflict concerns reporting, licensing, registration, administrative disagreement, regulatory ambiguity, documentation, payment, non-violent non-compliance, or self-regarding conduct, criminalization should not be the default response. Civil, administrative, corrective, compensatory, or injunctive mechanisms may often be more proportionate. Criminal law should remain a last resort for concrete harm, coercion, violence, fraud, exploitation, serious endangerment, or intentional violation of the rights of others.

This principle is consistent with overcriminalization scholarship, which warns that criminal law may expand beyond principled limits of harm prevention [14]. Criminal punishment carries stigma, coercive investigation, social consequences, and potential deprivation of liberty. For that reason, regulatory disagreement should not become criminal guilt unless civil, administrative, corrective, or compensatory mechanisms are insufficient.

A further problem arises where the state is not only the regulator, but also the institutional environment in which disputes about regulation are adjudicated. In criminal and administrative matters, the citizen may face a legal order in which the state has enacted the rule, defined the prohibited conduct, authorized enforcement, investigated the violation, prosecuted or sanctioned the citizen, and then adjudicated the dispute through courts that speak in the name of the republic, the state, the crown, the people, or the constitutional order.

The modern rule-of-law answer to state-citizen asymmetry is the separation of powers and judicial independence. Independent courts are designed precisely to prevent the state from being judge in its own cause. The argument here does not deny that function. It asks whether formal judicial independence is sufficient where the citizen confronts a legal architecture in which the state has also defined the offense, controlled enforcement resources, structured procedure, imposed evidentiary burdens, and attached criminal consequences to regulatory disagreement.

This concern is closely connected to due process, access to remedy, and equality-of-arms principles [10, 11]. The term is used here in a structural rather than doctrinal sense. It does not claim that every legal system formally violates equality of arms, nor does it deny judicial independence or personal impartiality. It identifies the need for heightened safeguards where the state occupies multiple procedural roles: norm-maker, regulator, investigator, prosecutor or sanctioning authority, institutional beneficiary, and adjudicative environment. In such cases, the legitimacy of punishment depends not only on formal legality, but also on notice, reasons, proportionality, independent review, appeal, and a meaningful forum for challenging the underlying rule.

Judicial independence is therefore a necessary safeguard, but not the only one. Prohibition integrity also requires clear legal definitions, accessible procedures, meaningful appeal, equality of arms in a practical sense, proportional sanctions, civil-first remedies, and the possibility of challenging the underlying rule itself.

This asymmetry becomes especially serious where the underlying prohibition is vague, panic-driven, capture-based, or only weakly connected to concrete harm. In such cases, the citizen is not merely accused of injuring another person. He is accused of disobeying a state-defined order whose justification may itself be unclear, moralized, captured, or structurally harmful. The criminal process then risks transforming regulatory disagreement into sovereign disobedience.

9. Democratic Lawmaking Vulnerability and Constitutional Friction

A prohibition integrity model must examine not only the content of restrictive law, but also the democratic process through which such law is produced. A law is not necessarily legitimate merely because it has passed through a formally democratic procedure. Democratic form may coexist with interest-group influence, party discipline, donor pressure, bureaucratic incentives, media amplification, moral panic, ideological mobilization, institutional self-preservation, or short-term electoral advantage. Moral panic and punitive political culture can further accelerate this process by transforming symbolic fear into durable criminal or regulatory control [21, 22].

Democratic lawmaking vulnerability matters for prohibition integrity because a prohibition may be harm-producing not only in its enforcement, but already in its creation. If restrictive law is produced through panic, capture, donor pressure, party discipline, or bureaucratic self-interest, its harm profile may be distorted before enforcement even begins.

Democratic lawmaking vulnerability does not imply that democratic lawmaking is illegitimate. It means that democratic form alone cannot settle the legitimacy of restrictive law. Representative democracy may be shaped by party discipline, lobbying, campaign finance, bureaucratic drafting, and executive dominance. Direct democracy may correct parliamentary capture, but it may also be shaped by fear, simplified campaigns, financial influence, majoritarian emotion, or hostility toward unpopular minorities [15]. Deliberative democracy adds public reasoning, evidence, counterargument, and reflection, but it may be slow, selective, or vulnerable to expert and stakeholder capture. Constitutional democracy provides rights-based limits, but constitutional institutions may also operate within state-centered legal architecture.

Deliberative and constitutional-democratic theory further supports the view that legitimacy is not exhausted by preference aggregation. Restrictive law requires public reason, contestability, institutional limits, justification

under conditions of pluralism, and protection against the conversion of temporary political will into durable coercive power [25, 28–31]. Regulatory governance literature likewise supports evidence-based and proportionate regulatory design [26, 27]. This matters especially for prohibitions because the most harmful restrictions often arise not only from enforcement failure, but from distorted lawmaking processes in which fear, capture, moral urgency, or institutional self-interest define the legal problem before evidence is properly assessed.

For that reason, serious restrictive law should require multi-layered legitimacy: representative approval, public consultation, disclosure of lobbying influence, ex-ante impact assessment, constitutional review, harm-reduction indicators, and ex-post evaluation. The legitimacy of a restrictive law should depend not only on whether one democratic institution approved it, but also on whether the lawmaking process was transparent, evidence-based, deliberative, constitutionally bounded, resistant to capture, and open to later correction.

Constitutional friction provides the final safeguard. Restrictive legislation should not be easy to make permanent, because ordinary lawmaking is not an abstractly neutral process. A prohibition, licensing regime, or restrictive regulatory model should first operate as a provisional measure. It should be enacted only for a limited period and should include measurable harm-reduction objectives from the beginning.

Sunset clauses should not be treated as a complete solution. They can help prevent controversial or emergency measures from becoming permanent by default, but they are effective only where expiration is real, review is independent, and renewal requires evidence rather than political inertia [16]. At the end of the provisional period, the measure should expire unless it passes renewed constitutional, democratic, and empirical review.

The model must also account for genuine regulatory uncertainty. In emerging fields such as artificial intelligence, novel synthetic substances, biotechnology, or rapidly evolving digital systems, reliable ex ante evidence may be unavailable. In such cases, the state may adopt precautionary provisional measures where the potential harm is serious, plausible, and not adequately manageable through ordinary civil remedies. However, uncertainty does not justify permanent or unlimited prohibition. It strengthens the case for temporariness, narrow tailoring, predefined review, adaptive indicators, and automatic revision once evidence improves.

Precautionary regulation is therefore compatible with prohibition integrity only where it remains provisional, evidence-seeking, proportionate, reviewable, and open to correction. Where evidence is incomplete, the answer is not permanent prohibition without proof, but provisional regulation with explicit uncertainty, adaptive indicators, independent review, and automatic revision.

The exact institutional design may differ across constitutional systems. The principle is not institutional uniformity, but heightened friction before coercive law becomes permanent. Permanent restrictive law should require more than ordinary political will. It should require constitutional compatibility, evidence of net harm reduction, definitional clarity, proportionality, anti-corruption safeguards, anti-capture transparency, competitive neutrality, due process, civil-first review, democratic lawmaking review, and periodic evaluation. Where these conditions are not met, the default should not be permanence but expiration, narrowing, conversion into less restrictive regulation, or repeal.

10. The Three-Year Provisional Law Model

The Three-Year Provisional Law Model operationalizes constitutional friction. The three-year period is illustrative rather than mandatory. The essential requirement is a defined review period, predefined indicators, independent evaluation, and automatic expiry absent demonstrated net harm reduction.

Before enactment, lawmakers must define the concrete harm, expected harm-reduction indicators, market-displacement risks, corruption risks, capture risks, sanction risks, democratic process risks, and less restrictive alternatives. After the review period, an independent evaluation determines whether the measure reduced more harm than it created. Without renewed multi-layered approval and evidence of net harm reduction, the measure expires automatically.

The model also requires review of the indicators themselves. A temporary law should not be judged only by whether it satisfied politically selected benchmarks. Evaluation must examine whether the benchmarks were complete, non-captured, publicly justified, and capable of detecting secondary harms. Otherwise, a restrictive law may manufacture its own validation by defining success too narrowly.

Table 1. The Three-Year Provisional Law Model.

Phase	Function
Constitutional Pre-Review	Identifies concrete harm, legal clarity, proportionality, constitutional compatibility, and less restrictive alternatives before enactment
Temporary Application	Allows the measure to operate for a fixed period with predefined harm-reduction indicators
Indicator Meta-Review	Assesses whether the benchmarks are complete, non-captured, publicly justified, and capable of detecting secondary harms
Harm-Reduction Evaluation	Measures whether the law reduced concrete harm or created secondary harms such as illegal markets, violence, corruption, rights-disabling, or criminal overreach
Anti-Capture and Corruption Review	Examines lobbying influence, conflicts of interest, institutional beneficiaries, incumbent protection, and valuable permissions or exemptions
Civil-First Review	Determines whether criminal penalties remain necessary or whether civil and administrative remedies are sufficient
Democratic Legitimacy Review	Examines whether the law was shaped by deliberation and evidence or by party discipline, donor influence, media panic, or majoritarian emotion
Multi-Pillar Renewal	Requires renewed legitimacy through representative, deliberative, constitutional, and where available direct democratic review
Automatic Expiry	Terminates the measure unless the state demonstrates net harm reduction and constitutional compatibility

The burden should not rest on citizens to repeal harmful restrictive law. The burden should rest on the state to justify its continuation.

11. The Prohibition Integrity Test

The Prohibition Integrity Test is a diagnostic screening tool, not a mechanical formula. It identifies warning signs that trigger heightened justification, independent review, narrowing, conversion into regulation, or expiry. The test does not invalidate all prohibitions. It identifies when a prohibition requires heightened justification because it affects markets, rights, enforcement discretion, corruption risks, competition, constitutional structure, democratic legitimacy, civil remedies, criminal liability, or operational citizenship.

Table 2. The Prohibition Integrity Test.

Module	Core Question	Main Risk	Safeguard
Harm Justification	What concrete harm is prevented?	Moralized or panic-based harm replaces concrete harm	Harm statement, evidence, burden on state
Market Displacement	Does prohibition shift demand underground?	Illegal markets, unsafe products, violence, organized crime	Market assessment, regulated alternatives
Discretion and Corruption	Does the law create broad power or valuable exceptions?	Arbitrary enforcement, bribery, selective prosecution	Clear definitions, due process, independent review
Capture and Competition	Who benefits from the restriction?	Incumbent protection, legal cartelization, exclusion of competitors	Lobby transparency, conflict disclosure, competition review
Sanction and Adjudication	Is criminal law necessary and neutral?	Regulatory disagreement becomes criminal subordination	Civil-first remedies, criminal law as ultima ratio, independent review
Democratic and Constitutional Review	Should the restriction become permanent?	Panic, ideology, or capture becomes durable law	Temporary enactment, impact assessment, indicator meta-review, sunset, multi-layered renewal

12. Discussion

The Prohibition Integrity Test contributes to the literature in several ways.

First, it shifts analysis from protective intention to operational consequence. A law may have a protective purpose and still produce harmful outcomes. The test therefore asks not only what the law claims to prevent, but what institutional, market, enforcement, constitutional, criminal, democratic, and rights-related structures it creates.

Second, it integrates harms usually studied separately. Prohibition research often focuses on illegal markets and violence. Harm-reduction research often focuses on health outcomes. Regulatory capture research focuses on policy influence and incumbent advantage. Rule-of-law analysis focuses on clarity, discretion, and due process. Constitutional theory focuses on limits on lawmaking power. Democratic theory focuses on representation, participation, deliberation, and constitutional restraint. Criminal-law theory focuses on punishment, culpability, and ultima ratio. This paper combines those domains into a legal-theoretical screening model focused specifically on restrictive law.

Third, the model treats prohibition as both a criminal-law issue and a governance issue. A prohibition may shape economic incentives, citizen-state relations, bureaucratic power, private advantage, democratic legitimacy, constitutional structure, and operational rights. For that reason, prohibition integrity should be assessed before enactment and not only after damage occurs.

Fourth, constitutional friction adds a temporal dimension. Defective prohibitions are especially dangerous when they become permanent before their real effects are known. Temporary restrictive law, independent evaluation, indicator meta-review, multi-pillar renewal, and automatic expiry reduce the risk that transient fear, ideology, lobbying pressure, democratic distortion, or administrative convenience hardens into durable coercive power.

Fifth, the civil-first dimension adds a sanction-design dimension. A prohibition may be harmful not only because of what it forbids, but because of how the state responds to violation. Where civil, administrative, corrective, or compensatory remedies would be sufficient, criminal punishment may transform legal disagreement into subordination.

Sixth, the model clarifies how precautionary regulation can be used without becoming a permanent substitute for evidence. Genuine uncertainty may justify provisional safeguards in emerging fields, but it does not justify indefinite coercive law. The proper response to uncertainty is transparent provisionality, adaptive indicators, independent review, and automatic correction.

The model avoids a simplistic anti-prohibition conclusion. It permits prohibition where concrete harm, necessity, proportionality, clarity, reviewability, constitutional compatibility, democratic legitimacy, civil-first analysis, and net harm reduction are shown. It rejects only those prohibitions that fail to justify their total harm profile.

13. Limitations

This paper is conceptual and diagnostic. It does not claim that all prohibitions generate illegal markets, corruption, capture, or violence. Nor does it claim that legalization, decriminalization, or regulation is always superior to prohibition. The model identifies risk mechanisms that should be examined where restrictive law affects demand, market access, enforcement discretion, criminal sanctions, competition, democratic process, or operational rights.

Empirical application requires jurisdiction-specific data, including market conditions, enforcement patterns, institutional safeguards, public health outcomes, crime trends, corruption indicators, competitive effects, civil-liberty impacts, and available regulatory alternatives. The Prohibition Integrity Test should therefore be

understood as a structured screening model. It does not replace empirical research, constitutional adjudication, legislative judgment, or democratic deliberation. It clarifies which questions should be asked before restrictive law is enacted, maintained, or made permanent.

14. Policy Implications

The model suggests eight safeguards for legal systems.

First, every proposed prohibition should include a mandatory harm statement. The state should define the concrete harm before defining the prohibition.

Second, every serious prohibition should undergo a market displacement assessment. Lawmakers should ask whether demand will persist, whether illegal markets will form, whether criminal profits will rise, whether violence may increase, and whether consumers will face greater product risks.

Third, every prohibition should undergo an anti-corruption and anti-capture review. This should identify valuable permissions, licenses, exemptions, enforcement tolerances, discretionary decisions, lobbying influence, conflicts of interest, institutional beneficiaries, and expected economic beneficiaries.

Fourth, prohibitions with market effects should undergo a competition review. This should examine whether the law creates artificial scarcity, high entry costs, incumbent protection, reduced competition, or exclusion of alternatives.

Fifth, every prohibition should be subject to civil-first review. Criminal law should not be the default response where civil, administrative, corrective, compensatory, or injunctive remedies are sufficient.

Sixth, serious prohibitions should undergo democratic lawmaking and indicator review. The process should examine whether the law and its evaluative benchmarks were shaped by evidence and deliberation or by party discipline, donor influence, lobbying, media panic, bureaucratic self-interest, or temporary ideological mobilization.

Seventh, serious prohibitions should initially be treated as temporary restrictive measures rather than permanent laws. A defined review period can reveal whether the law actually reduces harm or instead creates new harms. In genuinely uncertain fields, precautionary regulation should remain provisional, evidence-seeking, and adaptive.

Eighth, serious prohibitions should include automatic expiry. A restriction that cannot demonstrate net harm reduction should not survive by inertia.

15. Conclusion

This paper has proposed a diagnostic model for evaluating restrictive law before it becomes permanent legal architecture. Its purpose is not to predetermine whether prohibition is justified, but to require a structured inquiry into harm, secondary effects, alternatives, institutional incentives, sanction design, democratic production, and constitutional safeguards.

The central argument is that legitimate law should reduce concrete harm while preserving legal clarity, proportionality, contestability, institutional integrity, democratic legitimacy, public trust, and practical freedom. A prohibition that claims to protect the public must therefore be assessed not only by its declared purpose, but by the total harm it produces, reduces, transfers, hides, or institutionalizes.

Defective prohibition may do more than fail. It may reallocate power. It may transfer power from lawful markets to criminal networks, from citizens to enforcement discretion, from open competition to protected incumbents, from civil disagreement to criminal subordination, from democratic procedure to captured lawmaking, and from constitutional restraint to ordinary political will. It may claim to reduce harm while producing crime markets, corruption incentives, arbitrary enforcement, regulatory capture, legal cartelization, democratic lawmaking vulnerability, sovereign adjudication asymmetry, and operational rights-disabling.

No prohibition should be enacted or maintained unless the state can demonstrate that it reduces more harm than it creates. Where evidence is incomplete, the answer is not permanent prohibition without proof, but provisional regulation with explicit uncertainty, adaptive indicators, independent review, and automatic revision.

The Prohibition Integrity Test offers a method for applying that principle. Constitutional friction strengthens the test by asking a further question: even if a restrictive measure is temporarily justified, should it become permanent law? The answer should not depend on political convenience alone. It should depend on evidence, constitutional compatibility, democratic renewal, anti-capture transparency, due process, competitive neutrality, civil-first analysis, measurable harm reduction, and review of the indicators themselves.

Good law reduces harm through clarity, proportionality, accountability, and review. Defective prohibition may relocate harm, hide harm, monetize harm, criminalize disagreement, distort democratic legitimacy, and empower those who benefit from harm. The task of a legal system committed to liberty, public safety, democratic integrity, and institutional accountability is to know the difference.

References

- Rubenstein, E. (2026). Conditionalized sovereignty: The permission-based citizen and the asymmetry of legal maturity. *International Journal for Multidisciplinary Research*, 8(3). <https://doi.org/10.36948/ijfmr.2026.v08i03.79690>
- Rubenstein, E. (2026). When rights cannot be used: Defensive sovereignty, privacy, and the operational conditions of citizenship. *International Journal for Multidisciplinary Research*, 8(3). <https://doi.org/10.36948/ijfmr.2026.v08i03.80074>
- Miron, J. A. (1999). Violence and the U.S. prohibitions of drugs and alcohol. *American Law and Economics Review*, 1(1), 78–114. <https://doi.org/10.1093/aler/1.1.78>
- United Nations Office on Drugs and Crime. (2025). *World drug report 2025*. United Nations Office on Drugs and Crime. <https://www.unodc.org/unodc/en/data-and-analysis/world-drug-report-2025.html>
- Csete, J., Kamarulzaman, A., Kazatchkine, M., Altice, F., Balicki, M., Buxton, J., Cepeda, J., Comfort, M., Goosby, E., Goulão, J., Hart, C., Horton, R., Kerr, T., Lajous, A. M., Lewis, S., Martin, N., Mejía, D., Camacho, A., Mathieson, D., & Beyrer, C. (2016). Public health and international drug policy. *The Lancet*, 387(10026), 1427–1480. [https://doi.org/10.1016/S0140-6736\(16\)00619-X](https://doi.org/10.1016/S0140-6736(16)00619-X)
- OECD. (2017). *Preventing policy capture: Integrity in public decision making* (OECD Public Governance Reviews). OECD Publishing. <https://doi.org/10.1787/9789264065239-en>
- Stigler, G. J. (1971). The theory of economic regulation. *The Bell Journal of Economics and Management Science*, 2(1), 3–21. <https://doi.org/10.2307/3003160>

- Carpenter, D., & Moss, D. A. (Eds.). (2014). *Preventing regulatory capture: Special interest influence and how to limit it*. Cambridge University Press. <https://doi.org/10.1017/CBO9781139565875>
- OECD. (2024). *Competition and regulation in professions and occupations*. OECD Publishing. <https://doi.org/10.1787/218869f5-en>
- European Commission for Democracy through Law (Venice Commission). (2016). *Rule of law checklist* (CDL-AD(2016)007). Council of Europe.
- European Commission for Democracy through Law (Venice Commission). (2025). *Updated rule of law checklist* (CDL-AD(2025)002). Council of Europe.
- OSCE Office for Democratic Institutions and Human Rights. (2024). *Guidelines on democratic lawmaking for better laws*. Organization for Security and Co-operation in Europe.
- Tunyan, B., & Goetz, K. H. (2024). *Parliaments and evidence-based lawmaking in the Western Balkans: A comparative analysis of parliamentary rules, procedures and practice* (SIGMA Papers No. 68). OECD Publishing. <https://doi.org/10.1787/e95bebb9-en>
- Husak, D. (2008). *Overcriminalization: The limits of the criminal law*. Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780195328714.001.0001>
- International IDEA. (2008). *Direct democracy: The International IDEA handbook*. International Institute for Democracy and Electoral Assistance.
- Fagan, F. (2013). After the sunset: The residual effect of temporary legislation. *European Journal of Law and Economics*, 36(1), 209–226. <https://doi.org/10.1007/s10657-011-9219-x>
- Feinberg, J. (1984). *Harm to others* (Vol. 1). Oxford University Press.
- Feinberg, J. (1985). *Offense to others* (Vol. 2). Oxford University Press.
- Feinberg, J. (1986). *Harm to self* (Vol. 3). Oxford University Press.
- Mill, J. S. (1859). *On liberty*. John W. Parker and Son.
- Cohen, S. (1972). *Folk devils and moral panics: The creation of the mods and rockers*. MacGibbon and Kee.
- Garland, D. (2001). *The culture of control: Crime and social order in contemporary society*. University of Chicago Press.
- Fuller, L. L. (1964). *The morality of law*. Yale University Press.
- Raz, J. (1979). The rule of law and its virtue. In *The authority of law: Essays on law and morality* (pp. 210–229). Oxford University Press.
- Rawls, J. (1993). *Political liberalism*. Columbia University Press.
- Sunstein, C. R. (2014). *Valuing life: Humanizing the regulatory state*. University of Chicago Press.
- Alemanno, A. (2015). *Better business regulation in a risk society*. Springer. <https://doi.org/10.1007/978-1-4939-1751-1>
- Dryzek, J. S. (2000). *Deliberative democracy and beyond: Liberals, critics, contestations*. Oxford University Press.
- Fishkin, J. S. (2009). *When the people speak: Deliberative democracy and public consultation*. Oxford University Press.
- Habermas, J. (1996). *Between facts and norms: Contributions to a discourse theory of law and democracy*. MIT Press.
- Ginsburg, T., & Huq, A. Z. (2018). *How to save a constitutional democracy*. University of Chicago Press. <https://doi.org/10.7208/chicago/9780226564418.001.0001>