

How to Legalize Marijuana in New Jersey

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The victory of Democrat Phil Murphy in the New Jersey gubernatorial election this past November makes it quite likely that recreational marijuana will be legalized in the Garden State. Public opinion in the state has clearly been ready for a change in the drug war model of prohibition - with even Murphy's Republican opponent having called for decriminalization.

Murphy quite rightly made racial justice his central argument for legalization: In New Jersey African Americans are three times more likely than whites to be arrested for marijuana possession despite similar usage rates - a disparity that has been growing over time. And the consequences of these arrests can be significant. As the ACLU noted,

Even for individuals who are never incarcerated, collateral consequences that flow from their arrests and convictions—such as lost jobs, ineligibility for public housing, suspended driver's licenses, and restrictions on access to federal student loans—can significantly derail their lives. A “criminal history” built on minor marijuana convictions can categorize defendants as “career criminals” for sentencing purposes in subsequent cases, thereby triggering harsh mandatory sentences.

Decriminalization would also address some of these concerns, but that policy has several disadvantages compared to legalization. (I leave aside the problem that in many cases decriminalization isn't real: New York supposedly decriminalized marijuana back in 1977, but its marijuana-related arrest rate in 2013 was twice the national average. New York City mayor Bill de Blasio ordered the issuing of summonses instead of arrests for minor possession, which lowered the arrest tally for a while, but the numbers soon went up again.) Decriminalization means that users are still getting their marijuana from illegal drug cartels, thereby contributing to the profits of vicious organizations that have done so much to undermine democracy and social justice in Latin America.[1] Decriminalization means that users still directly get their marijuana from illegal dealers, who are far more likely than legal ones to also be selling other illegal and more dangerous drugs. And decriminalization means that it is difficult to regulate the quality of the marijuana (for example, to ensure the absence of contaminants) or the conditions of purchase. And decriminalization foregoes tax revenues, which are estimated at \$300 million a year in New Jersey.

But if legalization is better than decriminalization and both are far better than the war on drugs approach, this still doesn't tell us *what kind* of legalization would be best. The way that legalization has been carried out across the nation thus far has been far from optimal.

I.

In Colorado, Washington, and most recently California, marijuana production and sales have been placed in the hands of private entrepreneurs. One doesn't have to be a committed socialist to realize

that the capitalist profit motive is not the way to maximize social welfare. The free market can of course be tamed to some degree by government regulations, but it has been well documented over many years that regulatory agencies under capitalism are susceptible to being captured by - and becoming beholden to - the very industries they are supposed to regulate. It may be more gross under Trump, but it has been a constant feature of modern capitalism. So regulation of an industry will rarely be as successful as public control of that industry in furthering the public interest, given that a regulated industry (as long as it is profitable) still retains the financial clout to lobby and tame regulators.

The relative ineffectiveness of regulations has been particularly evident with respect to the tobacco and alcohol industry. Private alcohol and tobacco corporations have ferociously worked to expand their user base, especially among young people who can become lifetime customers. These corporations also know that a major portion of their sales come from heavy users, so they push those people to use even more. And the corporations deploy their substantial financial resources to oppose any public health measures that might cut into their profits.

For years cigarette companies were able to use part of their immense profits to buy politicians to protect them from any legislation that might interfere with their narco-trafficking. When finally the scientific evidence of tobacco's health effects could no longer be suppressed, the cigarette companies were banned from advertising on TV and radio. But they moved their massive advertising budgets to other media. In 2014 tobacco companies spent more than \$9 billion on marketing (50 percent more than the obscene \$6 billion spent on marketing candidates in the 2016 election). Today, they cram the *Sports Illustrated* swimsuit issue, with its substantial teen-age readership, with their tobacco ads; they manufacture candy-flavored e-cigarettes and cigars to lure kids. (E-cigarettes might offer a valuable means of helping smokers reduce the use of regular cigarettes, but in 2013 more than a quarter of a million high school kids who had never smoked cigarettes were using e-cigarettes.) Cigarette ads invariably feature beautiful models in order to make smoking more glamorous. When critics appealed to the companies' social conscience and asked them to stop this practice, the Tobacco Institute responded, "What do they want us to use for a model, a hobo wearing a torn raincoat and standing in front of a porno store? We have a product to sell."^[2] This, of course, is precisely the problem: they have a product to sell. And this doesn't get into the even more horrendous record of U.S. tobacco companies overseas.

The alcohol industry too spends billions of dollars on advertising, and there is plentiful evidence that ads glamorizing alcohol - on TV and elsewhere - contribute to the prevalence of binge drinking and hazardous drinking behaviors. Such behavior is clearly not socially valuable, but it is extremely profitable for the alcohol companies.

The only way to really end drug advertising and promotion is to nationalize the alcohol and tobacco companies. Admittedly, this is not on the agenda today. However, as marijuana legalization creates a new industry, we have the opportunity to do this one right from the start, and avoid establishing a privately-owned special interest that, once established, will be very difficult to control given that private profits will be spent to oppose any restrictions on those profits.

To be sure, government-owned operations can also behave irresponsibly. In the United States, state government advertising for their state lotteries has been vile. And state entities are exempt from the Federal Trade Commission's truth-in-advertising regulations. But while it's been very hard to limit private advertising - the Supreme Court has generally supported "commercial free speech" - state agencies are more subject to public control, either as a result of political pressure or as part of their enabling legislation, or both. That is, the law legalizing marijuana could specify that the state agency set up to handle marijuana would be prohibited from all advertising. In addition, legislation could put the agency under the Department of Health, rather than an economic development department,

to make sure that public health considerations would be given top priority.

II.

Many drug policy experts agree that a government-run agency has many advantages from public health and public policy points of view, but they suggest that, “alas,” this option is not currently available in the United States because marijuana remains illegal under federal law throughout the country.[3]

To understand this objection, and why it’s not compelling, the complex legal status of marijuana must be clarified. Under the Controlled Substances Act of 1970, marijuana has been classified as a Schedule 1 narcotic, with a high likelihood of addiction, no medical benefits, and no safe dosage. Marijuana is thus in the same category as heroin, LSD, and Ecstasy, and in a more restrictive category (prohibiting, for example, clinical trials) than cocaine, oxycodone, or methamphetamines. Under the U.S. Constitution, states have no obligation to pass laws in conformity with federal law – that is, they don’t have to make marijuana distribution, possession, and use state crimes – nor do they have to enforce federal law, but at the same time they do not have the authority to change or override federal law and make marijuana legal under federal law.

During the 2008 presidential campaign, candidate Barack Obama hinted that he might be more tolerant of marijuana. Early in his administration, Deputy Attorney General David Ogden released a memo indicating that, unlike under George W. Bush, federal resources would not be focused “on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” But when California put a referendum question on the ballot in 2010 to legalize recreational marijuana, Attorney General Eric Holder warned that if the measure passed, he would not show the same forbearance. The referendum question, which had been leading in the polls until that point, went down to defeat. The next year the Justice Department released another memo, the Cole Memo, which explained that the Ogden Memo was not intended to shield the medical marijuana business from federal law; and federal agents cracked down on legal medical marijuana. However, when in 2012 Colorado and Washington passed referenda legalizing recreational marijuana, the Justice Department issued yet another memo, Cole Memo II, declaring that – given their drug enforcement priorities – they would not enforce the federal CSA in states that passed their own marijuana laws as long as state laws met federal priorities (keeping marijuana from minors, keeping revenues from going to gangs, preventing violence, preventing drugged driving, and exacerbation of other public health consequences, etc.).[4] But of course, as legalization advocates had long argued, all these priorities were better addressed with regulated legalization than with unregulated criminalization.

Nevertheless, the disconnect between state and federal law still caused serious problems. Banks would not give loans to marijuana entrepreneurs for fear they would run afoul of federal anti-money laundering legislation. Most lawyers would not provide legal assistance to marijuana companies for fear of being disbarred for aiding and abetting an illegal enterprise. Credit card companies are hesitant to offer their services to marijuana retail outlets. And when a Coloradan was fired by a company for using marijuana in his off hours, despite any evidence that he was ever impaired at work, the state Supreme Court ruled that the firing was justified because the state’s statute prohibiting termination for lawful off duty conduct didn’t apply given that marijuana is not legal.[5] And it was at least questionable whether contracts – say a contract between a marijuana grower and retailer – could be enforced for nonperformance as long as marijuana remained formally illegal.

Thus, all state legalization programs have run up against this legal difficulty. Anyone who distributes, possesses, or uses marijuana will remain in violation of federal law regardless of state

law. But whether or not they will be prosecuted depends on what the Justice Department does. On January 4, 2018, Trump's attorney general, Jeff Sessions, announced that he was rescinding the Obama-era guidance and that U.S. Attorneys were now directed to enforce all laws enacted by Congress regarding marijuana.

It would of course be hard for the federal government to enforce the CSA in a legalization state - it simply doesn't have enough federal officers to do the job (the vast majority of marijuana arrests are made by state and local law enforcement officers). But it would be trivial for the federal government to close down the "legal" market. Arresting a single retailer and confiscating her or his assets (as drug laws allow) would immediately drive the marijuana business back underground.

But Sessions is going to get a lot of political pushback. 29 states - including many "Red" states - plus the District of Columbia have legalized marijuana to some degree and almost two thirds of Americans - including a majority of Republicans! - favor legalization of recreational marijuana. A more detailed poll carried out by an anti-legalization organization found that "Only 16 percent of Americans favored keeping the current policy. About 29 percent backed only medical legalization, 5 percent backed decriminalization, and 49 percent backed full legalization. The remaining 1 percent were not sure." Even among Republican voters, only 25% favored the current war-on-drugs policy.

In Congress, there is broad criticism of Sessions and a bi-partisan bill has been introduced to deny the Justice Department funds for carrying out marijuana enforcement in violation of state laws. A bi-partisan group of California House members has called on the state's U.S. Senators to refuse to confirm any Justice Department appointees until Sessions reinstates the Cole II memorandum. How this will play out, we don't yet know.

The question, however, is not whether legalized marijuana in any state is vulnerable to a federal decision to close it down - of course it is - but whether a state-run legalization program is more vulnerable than a free market model. It is hard to see why this would be the case.

Consider the most extreme federal action: where they not only close down legal marijuana, but act to punish those who worked in the industry while it was legal under state law. Yes, in principle the federal government could arrest every state employee who worked in the state-run marijuana industry and prosecute them for violation of the CSA. Having facilitated marijuana use by many people they could theoretically be charged with being major distributors. States could pass laws giving employment protection and pension guarantees for anyone charged only under federal marijuana laws, but they couldn't keep them out of prison if the feds were determined to punish them.

But the same is true of participants in a free market legalized marijuana industry: anyone who owned or worked in a marijuana retail establishment, a marijuana processor, a marijuana growing establishment, a firm transporting marijuana from farm to processor to retail - all these people would be (and are) potentially at risk of a vindictive federal government deciding to charge them retroactively as major drug dealers. Moreover, even under the free market model, there are still many state employees who are involved in the industry: the regulators who verify the quality of the marijuana, the police who offer protect to the participants in the marijuana business (the enforcers for illegal drug cartels are aiding and abetting drug trafficking even if they are not actually trafficking themselves), the staff who maintain the California Cannabis Portal. All of these folks are potentially subject to vindictive federal enforcement policies.

Say instead the feds don't try to punish people for what they did under the legalization regime, but simply force it to close. Under a state-run model, the state as a whole would bear the financial loss

(unneeded facilities rented, goods and services purchased, etc.), while under the free market model the burden would fall hardest on the individual participants who laid out the money. There would be job losses in both cases, but presumably the state can take better care of its former employees than of independent operators. Many supporters of a legalized free market model urge that special efforts be made to recruit minorities and the poor to these businesses (as a way to partially compensate communities who have borne the brunt of the drug war). To the extent that this diversification is successful, the costs of failure will be especially borne by the most vulnerable. The poor will not have been able to get bank loans for their small marijuana stores, so they may have pooled family resources to make a go of it. In the event of forced closure, those resources would be wiped out. State stores forced to close would impose a financial burden on the state as a whole, and (especially if the millionaires' tax that Murphy promised is enacted) not on those worst off.

Do governors violate their oath to uphold the U.S. Constitution when they set up a state-run marijuana operation, given that such operations conflict with a ban in federal legislation? Perhaps, but so do governors who authorize state employees to regulate the quality of marijuana, which aids and abets those carrying out an activity that conflicts with a ban in federal legislation. In both cases it might be argued that the legalization measures actually reduce the things that the CSA is most concerned about (people being harmed by drugs, drugs supporting organized crime, etc.), and thus comport with the spirit if not the letter of the federal legislation. Whether this argument is persuasive or not is a political question, not a legal one. If Congress and the Justice Department want to close down legal marijuana, they will do so, whether that legal marijuana is provided by the free market or a state-run program.

III.

Some will wonder why marijuana should be treated as a public health concern at all. Isn't it true that the dangers of marijuana have been grossly exaggerated, with "reefer madness" propelled by a mixture of racism and hypocrisy? The racial history here is clear - and if we needed it, Republican Kansas state representative Steve Alford provided vivid proof that the racism is not just a thing of the past, when he urged a tightening of marijuana laws because of African Americans' character make-up and genetics. And the hypocrisy too is clear, given that marijuana is vastly less harmful than tobacco or alcohol.

But less harmful doesn't mean harmless. Given the sordid history and the hypocrisy and the ways the war on drugs has devastated poor communities, it is understandable why many on the left dismiss all health concerns about marijuana. Nevertheless, one needs to follow the science, wherever it may lead. And one needs to be wary of the claims of those with a financial interest. The counterculture made many valuable critiques of traditional medicine and practices, but once the alternatives have become industries of their own (like the dietary supplements industry) they too lobby, they too oppose regulations and oversight, and ignore science and the public interest in their quest for profits.

In short, it is imperative to look at the public health evidence in a non-ideological way.

So first the good news. Marijuana is not just less harmful than many other substances, but likely has a substitution effect with more harmful substances. That is, it seems that people who use marijuana reduce their use of alcohol and opiates, leading to a substantial public health gain.

But though alcohol impairs driving far more than marijuana does, the joke that the only problem with marijuana is that potheads will stop at the green understates the very real dangers of driving under the influence of marijuana (and the even greater dangers of driving under the combined influence of alcohol and marijuana). So strict enforcement of laws against intoxicated driving is

essential. Marijuana presents special challenges in this regard because blood level measurements are not accurate indicators of impairment. So, it makes sense for field sobriety tests to be the basis for sanction, not blood or breathe tests. Ideally, all cars would be equipped with devices that would prevent driving if there were driver impairment for any reason (alcohol, drugs, tiredness).

There are many other issues related to legal marijuana: what should the price be set at, should THC levels be regulated, and so on. The key to all these questions is that public health concerns should be paramount, and not private profit or the need for tax revenues. And that means make the marijuana industry state-run rather than private and house it in the public health department.

IV.

Legalization would mean an end to one part of the incredibly destructive war on drugs that has ravaged poor and minority communities. But it is essential that to the maximum extent possible the past harm of the drug war be rectified. This means that anyone serving a sentence for marijuana possession and low-level distribution should be immediately released; anyone serving or having served a sentence for one of these crimes should have their convictions expunged and be eligible for state-funded job training and other support programs.

Some have proposed that the funds derived from taxing marijuana should be earmarked for the poor and minority communities that have suffered the most from the drug war. The need to re-invest in and re-build the State's impoverished communities is indeed an urgent moral obligation, but it is unclear whether earmarking marijuana funds is the way to do this. (The evidence is mixed as to whether earmarking lottery revenue for K-12 education actually raises education spending.[6]) In this case, would earmarking encourage legislators to view marijuana proceeds as the only source of funds for inner cities? Would it leave the rebuilding of poor communities dependent upon the unsettled legal status of marijuana? Would we be setting up a system under which the desire to raise funds to help poor communities would create pressures on the government to encourage greater drug use?

What is clear is that the war on drugs has been a disaster in so many respects. We now have a chance to chart a new course: it's important that it be done right.

[1] Analysts differ as to the effect of U.S. drug legalization on the Mexican cartels. The Rand Corporation estimated that legalization in the US would not have a very dramatic effect on the cartels' profits, while other sources differ. Many people, however, would prefer not to contribute to the cartels' profits in either case. One recent study found that medical marijuana laws lead "to a reduction in violent crime in markets that are traditionally controlled by Mexican drug trafficking organisations."

[2] Elizabeth M. Whelan, *A Smoking Gun: How the Tobacco Industry Gets Away With Murder*, Philadelphia: George F. Stickley Co., 1984, p. 186.

[3] Jonathan P. Caulkins, et al., "High Tax States: Options for Gleaning Revenue from Legal Cannabis," *Oregon Law Review*, vol. 91 (2013), p. 1050; Transform Drug Policy Foundation, *How to Regulate Cannabis A Practical Guide*, 2nd ed., Updated Oct. 2016, , pp. 26, 54, 173; Sam Kamin, "Legal Cannabis in the U.S.: Not Whether but How?" *UC Davis Law Review*, Vol. 50, Dec. 2016, 617,

n25.

[4] Armikka R. Bryant, "Taxing Marijuana: Earmarking Tax Revenue from Legalized Marijuana," *Georgia State University Law Review*, vol. 33, Spring, 2017, 659, pp. 670-76.

[5] Kamin, "Legal Cannabis in the U.S.," p. 631.

[6] Neva Kerbeshian Novarro, "Does Earmarking Matter? The Case of State Lottery Profits and Educational Spending," *Stanford Institute for Economic Policy Research*, SIEPR Discussion Paper No. 02-19, Stanford University: December 2002 ("a dollar of lottery profits earmarked for education increases current educational spending by roughly 36 cents more than a non-earmarked dollar"); Louis Pantuosco, William Seyfried, and Robert Stonebraker, "The Impact of Lotteries on State Education Expenditures: Does Earmarking Matter?" *Review of Regional Studies*, vol. 37, no. 2 (2007), 169-185 ("earmarking lottery proceeds for K-12 education has little or no impact on actual state K-12 funding").