

WORKING P A P E R

Marijuana Legalization

What Can Be Learned from Other Countries?

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Marijuana Legalization: What Can Be Learned from Other Countries?

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Abstract

In recent decades, a number of other countries have implemented changes in law that significantly reduce the extent of criminalization of marijuana use. Only in Australia and the Netherlands have there been any changes on the criminalization of the supply side and in neither of those countries is it legal to both produce and sell the drug. Thus what is being contemplated in California breaks new territory for any Western nation with a well developed marijuana market.

The relaxations so far, with the exception of the Netherlands, have not been very great i.e. have not much changed the legal risks faced by a user of marijuana. Thus it is perhaps not surprising that the changes in prevalence of use have not been substantial.

This paper provides a brief review of the changes that have been tried in other countries. The emphasis is on the nature of the changes and how they have been implemented rather than on outcomes.

Production Side Policy Innovations

Netherlands¹

As discussed in MacCoun (2010) and as is well known, the Dutch made major policy changes in the 1970s and 1980s. The 1970s change, following the recommendations of two very prominent commissions (the Baan and Huilsman Commissions), allowed for the distribution of cannabis (including hashish as well as marijuana) under tight controls. The notion was that this would aid the separation of markets for soft and hard drugs. The restrictions concerned both the quantities which could be sold without intervention and the locations in which the sale could take place. The criminal law did not formally change, since the government was not eager to incur the wrath of other nations by non-compliance with international treaties. However, an over-riding regulation prevented prosecutors from taking any action against an individual arrested for marijuana possession. It amounted to de facto legalization of drug use and retailing. It did not allow for the production of marijuana, even small quantities for personal consumption.

¹ This sub-section draws on MacCoun and Reuter (2001).

The quantity that could be purchased was initially set at a maximum of 30 grams (approximately one ounce). In 1996 that was reduced to 5 grams. As discussed elsewhere, even that lower quantity is more than enough to supply the average user for a week.

Initially the authorized outlets were youth clubs and other small scale and inconvenient locations. The important policy change in the 1980s was to allow for the sale of marijuana at coffee shops, which were now licensed by municipal governments. Even with tight restrictions on promotion (e.g. no home delivery, no leaflets or signs explicitly stating that cannabis was sold in the shop) that made cannabis much more accessible to users. The number of outlets peaked at 1,179 in 1997 and has since, as a result of government policy aimed particularly at foreign purchasers, declined to 702. Even with these restrictions, few Dutch residents over the age of 18 lack access to a coffee shop.

The Dutch have never permitted the production of marijuana, though police policy is to ignore instances in which an individual is growing five plants or fewer at home (NIS News, 2008). Otherwise production and trafficking (as opposed to retailing) are governed by laws and policies that are no different from those of other Western nations. MacCoun (2010) reviews the evidence that Dutch enforcement against growers has kept the retail prices comparable to levels in neighboring European countries, though they have not prevented the Netherlands from becoming the major European producer for consumption in the European Union.

Australia

The innovations in Australia are more overt, in that the law was explicitly changed, but less radical. Starting with South Australia, a smallish state, in 1987, four Australian jurisdictions have removed criminal penalties for growing a small number of plants. The activity is not legal but is punished only by payment of a fine. Initially South Australia set the limit at 10 plants. Once it became clear that this was far more than needed to supply an individual, the number for which only civil penalties could be imposed was reduced to three and then to one, not to be grown hydroponically. The three other Australian jurisdictions that have also adopted similar legal changes (Australian Capital Territory [1992], Northern Territory [1996] and Western Australia [2004]) have slightly different quantity limits. For example the Northern Territory

allows up to two plants, which can be hydroponically grown. The fines when detected range from \$A50 to \$A200.

The Australian regime change is almost exactly the converse of that in the Netherlands. In the Australian jurisdictions, it is the growing which has been facilitated; sale is still subject to criminal penalty, though gifts by growers to friends are not subject to any penalty. In the Netherlands the growing is still subject to the regular criminal penalties (even when small quantities are involved) but there are licensed sellers.

The rationale for the Australian innovations was that the removal of criminal penalties for possession (as occurred simultaneously in the each state) were meaningless without similar relaxations on the supply side. The restriction to home cultivation of small quantities was intended to prevent the development of a commercial market.

It is difficult to evaluate these supply-side changes on their own since in all instances (Netherlands and four Australian jurisdictions) the supply side legal change was adopted alongside a relaxation of the penalties for possession. MacCoun (2010) summarizes the evidence that the commercialization of sale in the period 1984-1992 (roughly) may have increased consumption but that in the long-run this increased access has not led to the Dutch population showing higher than average rates of cannabis use or longer cannabis using careers. None of the Australian evaluations discussed below has separately dealt with the effect of reducing penalties for production.

Very recently there have emerged “cannabis social clubs” in at least three European countries (Belgium, Germany, Spain). These are co-operative arrangements in which members pool resources to grow cannabis for the personal use of members; re-sale is not permitted by terms of the club charter. There has been at least one court ruling in favor of these clubs in Spain [ENCOD, 2009]. In Belgium after an initially favorable ruling by a lower court, an appeals court ruled against a club in February 2010 (<http://encod.org/info/BELGIAN-JUSTICE-INTENDS-TO-SILENCE.html>). Their legal status is unclear and it is also difficult to predict how important an innovation they would constitute if they were permitted. There is no research on the outcomes.

Consumption Side Innovations

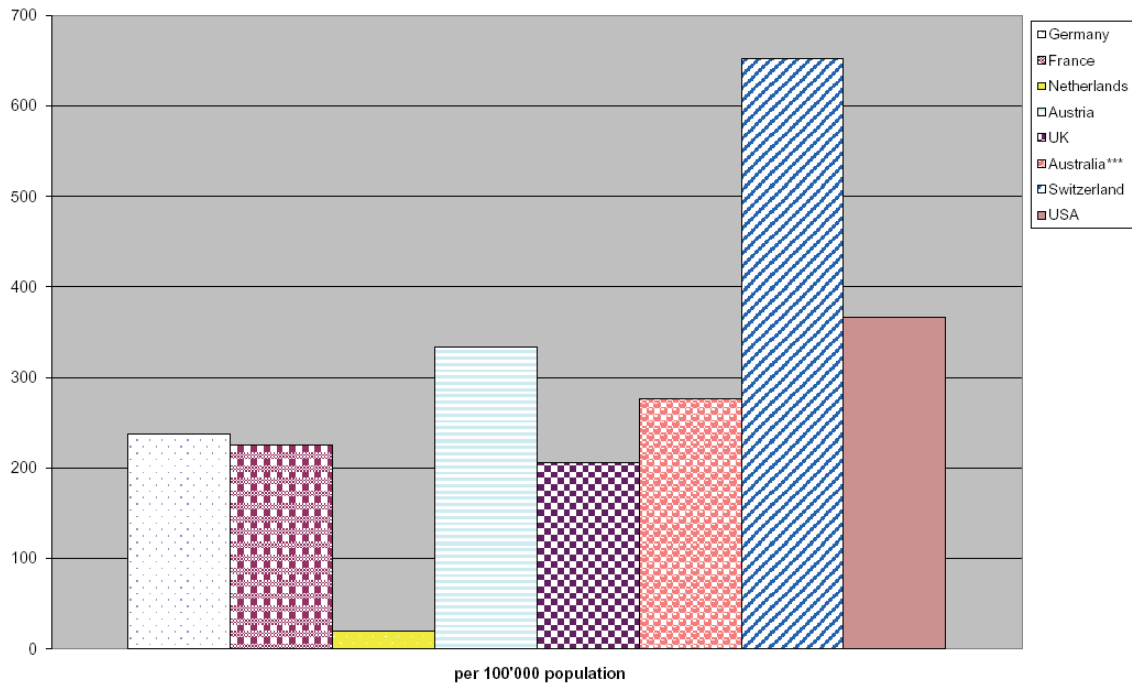
Introduction

The number of countries that have moved from criminal penalties for possession of marijuana is large and increasing. However none, again apart from the Netherlands, has removed all penalties. With that one exception, it is illegal to possess marijuana in every Western nation; all that varies is the nature and severity of the penalty imposed. Very recently a number of Latin American countries have moved to a more drastic removal of all penalties. The motivations for change have varied and that has some consequence for the regime that is implemented. However in most countries the post-arrest penalties for marijuana possession were quite minor, so that the change did not greatly alter the consequences for cannabis users of interactions with the police. We begin here with a brief survey of enforcement in jurisdictions that have not changed from the traditional criminalization of consumption/possession. This is followed by a description of the specific changes in the individual nations.

Pure criminalization in action

Many nations make large numbers of arrests for simple possession of marijuana. In almost all Western nations these constitute a majority, often the overwhelming majority, of drug arrests. For example, in Switzerland, marijuana possession arrests account for 34,000 out of 60,000 (Reuter, with Schnoz, 2009; Chapter 4). Figure 1 provides data on arrest rates for six Western countries. What is striking is their consistency; in all countries the rate falls between 200 and 320 per 100,000 population. They represent nations with widely differing stances to drug problems. France is generally regarded as tough, at least in its international stance, while Switzerland has very explicitly and forcefully adopted a harm reduction approach. The United States, despite the run up in cannabis possession arrests since 1991, does not stand out.

Rate of arrest for cannabis possession per 100,000 population (15- to 64years old) ca. 2005



However for all jurisdictions for which data are available on post-arrest sanctions, the punishments for those who are found guilty (almost always by plea) of cannabis possession are minimal; a modest fine or probation. For example, in Western Australia, before its change of law to decriminalization, only 0.3% of those arrested received a jail sentence; 94% received only a fine (Lenton et al., 1996). In Switzerland the vast majority receive a fine of \$250 or less in a local court; indeed it is possible that no one in Switzerland receives jail time for a cannabis possession offense (Reuter with Schnoz, 2009).² Marijuana users face substantial risk of arrest and minimal risk of a related jail term.

Even though many states in the U.S. retain incarceration as an element of the maximum punishment that can be imposed for marijuana possession, there is evidence that even jail is a rare penalty. For example, Golub, Johnson and Dunlap (2006) report that in New York City,

² The Swiss government argued that most of these “contacts with the police” should not be classified as arrests at all, since they are handled by magistrate’s courts without the power to incarcerate. We think that there is in fact no important distinction between the sanctions faced by a marijuana user post “contact with the police” in Switzerland and the post-arrest sanctions in most other nations.

where marijuana possession arrests increased dramatically from 1993 onwards, arrestees “face a day in jail pending arraignment (if detained) ... and the remote possibility of a few additional days in jail if convicted” (p. 133). New York State is one which is usually classified as having decriminalized marijuana possession but it does have stiff potential penalties for public use.

What is unknown is the extent of pretrial detention for these arrestees. One study in the U.S. (Reuter, Hirshfield and Davies, 2001) found that in three large counties in Maryland in the late 1990s, where no arrestee received a custodial sentence for cannabis possession, about one out of six arrestee spent at least five days in jail pre-trial. We do not know enough about other countries’ criminal justice systems to know whether anything similar is found there. In Switzerland there are substantial numbers of drug arrestees who spend time in prison pretrial but receive no sentence after adjudication (Reuter with Schnoz, 2009) but the data are not drug specific, so we can only suggest the potential exists.

These data are relevant when making comparisons across jurisdictions, between those that have removed the criminal penalty for simple possession of small quantities and those that have retained it. In effect, we are making comparisons that involve very light sanctions related to criminal prohibitions in the former jurisdictions, notwithstanding the high arrest rates. The non-criminal penalties, for example potential denial of a visa to the United States and employer responses, might be as important as the formal criminal justice penalties but they still seem modest on average.

Innovations

Decriminalizing drug possession generally Three European nations have removed penalties for possession of small amounts of any psychoactive substance; Italy (since 1973), Spain (about 1980) and Portugal (2001). Each did this for a different reason. The Italian government adopted the change pragmatically to ensure that there would be no legal barrier to prevent heroin users from seeking treatment; it was sparked by the early stages of a heroin epidemic in that country (MacCoun and Reuter, 2001). Spain adopted the measure as part of the rejection of the highly intrusive state that had been created in the Franco regime; it was not specifically a drug policy decision. Portugal was concerned with over-criminalization of drugs and marijuana was an important target of this effort.

In the last few years there have been broad decriminalization moves in many Latin American countries.³ The changes are new, the reporting unclear and the situation so fluid that our description may well be out of date very quickly. In Argentina in 2009 the Supreme Court ruled that criminal sanctions for drug possession were unconstitutional (Jelsma, 2010). Also in 2009, Mexico passed a law removing all penalties for drug possession (Mexican Embassy, 2009). It is possible that Brazil has also done this recently, though it is unknown where the matter stands in terms of court review. Ecuador has also moved to decriminalization.

Where the reductions in penalties for possession are done through legislation, they are often accompanied by increasing severity of sanctions for dealing; governments are apparently uneasy about the possibility of the charge of being soft on drugs. This for example is true in the case of Mexico, where police other than federal agents were for the first time given the authority to make drug possession arrests and the penalties for selling were made more stringent (Mexican Embassy, 2009). In addition, Hernandez Tinajero and Zamudio Angles (2009) persuasively argue that the limits for legal possession are set so low that in fact it worsens the situation of users. Many who buy small amounts can be charged as dealers now and face longer sentences. The concern is not that they will in fact be incarcerated but that they will be subject to extortion by the notoriously corrupt local police into drug enforcement.

Colombia has seen perhaps the most substantial change in law and points to the variety of rationales for removing criminal sanctions. The Colombian law is relatively long-standing but the lack of regular data on drug use and problems in Colombia has meant that there is no meaningful evaluation of the consequences. In 1994, the Constitutional Court issued a very broad ruling; the state lacked a basis for interfering with how a person chose to live his or her life. It could only intervene when there was clear harm to others (Guzman and Yepes, 2010). The court did not allow for any penalties, even treatment, for possession of small quantities intended for personal possession. President Alvaro Uribe opposed this measure from the time he was elected in 2002 and introduced legislation to overturn it on four occasions. Finally in late 2009 Congress passed an amendment to the Constitution that prohibited these drugs and allowed the state to impose educational or therapeutic sanctions on those who were arrested with small

³ For a recent review of the Latin American legal situation see Jelsma (2010)

quantities (Guzman and Yepes, 2010). While Colombia would still be classified as having decriminalized, the change is seen as a step back toward criminalization since it re-establishes penalties.

There are important differences in the nature of the regime that has been created. For example, in Portugal cannabis possession is still an arrestable offense; the arrestee meets with a three person commission which decides whether the appropriate response is a fine or treatment (Greenwald, 2009). In Spain there is an administrative sanction for use or possession in a public place; there is no fine for use in private settings. In Italy a first offense produces just a warning but a second offense will lead to an administrative sanction, such as suspension of driver's license. There may also well be differences in how an arrest shows in terms of an individual's criminal record.

The implementation of these laws in Italy and Spain, particularly the former, has been characterized by a struggle about what constitutes a "small quantity" consistent with the law's intent to distinguish between dealers and users.⁴ In contrast, the new Mexican legislation is explicit about the maximum amount that can be possessed without penalty; 5 grams of marijuana, 50 mg. of heroin, 500 mg. of cocaine and 40 mg. of methamphetamine. As noted above, there is a concern that these are set so low as make the decriminalization meaningless; for example, 50 milligrams of heroin is barely a single dose. The marijuana limit is the same as the Dutch figure for coffee shop purchases but the potency of Mexican marijuana is lower, so it is more restrictive than the Dutch limit.

Germany's Constitutional Court in 1994 ruled that the state, once it allowed the production and consumption of alcohol and tobacco, could not criminally sanction cannabis use. The implementation of the decision was complicated by the fact that the law itself is a federal statute but the administration of criminal justice is the responsibility of the *'Länder'* (equivalent to U.S. states). The police have no in principle no discretion but must arrest anyone detected violating a criminal statute. However laender prosecutors do have discretion. Thus implementation has

⁴ For example, a 2008 ruling by the high court in Italy allowed Rastafarians, for whom marijuana has a religious significance, to possess more than the usual limit without being charged as dealers (Reuters, 2008).

taken the form of guidelines for prosecutors restricting penalties for those arrested with small amounts of marijuana.

The result has been quite varied rules across Lander (Schafer & Paoli, 2006). For example, while the maximum amount of cannabis eligible for non-prosecution for possession ranges from 3 grams (Baden-Württemberg) to 30 grams (Schleswig-Holstein), several states' directives require non-prosecution for these amounts, whereas in the majority of states this is optional and at the discretion of the prosecutor's office on a case-by-case basis. The proportion of cannabis possession cases still being prosecuted around 2003 despite being eligible for non-prosecution has ranged from 10% to 60% across states in Germany (Schafer & Paoli, 2006). Prosecution decisions have been found to be most strongly influenced by the offender's criminal record, the number of previous offenses, substance amounts involved, and other circumstances of the offense (Schafer & Paoli, 2006). Whereas it is usually taken for granted that administrative penalties are advantageous for the offender, Schafer and Paoli (2006) found that these penalties, particular the suspension of the driving license, may be experienced by the offenders as more burdensome than light criminal penalties, such as fines and may be considered by both the police and the offenders themselves as an effective substitute penalty replacing the criminal ones.

Cannabis specific changes The same four Australian jurisdictions that have removed criminal penalties for home production of small quantities did the same with respect to possession. Though the South Australian system has a rather elaborate name, Cannabis Expiation Notice, it is very similar to what in the United States is called decriminalization. A police officer issues a notice that a fine must be paid in return for non-prosecution; the offender offers a guilty plea. If the fine is paid, no criminal record will be generated. The most striking finding about the shift was that police officers, now relieved of the burden of taking the offender through formal booking procedures, made many more formal arrests. The number of arrests more than doubled from 1987 to 1994. Since many arrestees did not pay their fines, the result was an increase in the number of individuals being incarcerated annually for marijuana offenses, albeit now indirectly for their failure to pay a fine. Other Australian jurisdictions have taken steps to prevent this "net-widening". For example Western Australia uses threat of withholding driver's license renewal for non-payment of the fine and has thus increased the fine payment level within 2 months to over 75% (Swensen, 2007).

It is worth being explicit about the change in the Netherlands. For those aged 21 or over, there are no penalties for possession or use of marijuana, even in public places. The criminal penalties remain for younger individuals. However there are few arrests of those below the legal age.

Gestures A number of countries have made policy changes which are intended to remove the extent of criminalization of cannabis possession but which are difficult to categorize. Notably, the United Kingdom has been through a contentious period in which the classification of cannabis offenses has been changed in both directions. In 2003 cannabis was shifted from a Schedule B to a Schedule C drug, which lessened the maximum penalties that could be imposed on offenders. Possession of a Schedule C drug was not an arrestable offense at that point. However the government made a non-legislative change which created an exemption for cannabis possession; alone amongst Schedule C drugs, possession of small amounts of cannabis could still lead to an arrest. At the same time, the government also lengthened the maximum penalty for sale of cannabis from seven years to 14 years, though sentences of 7 years were almost unheard of.

Then in 2008 the prime minister, Gordon Brown, reacting to recent research findings on the potential of cannabis to trigger psychosis in some users (e.g., Maki et al., 2006), reversed the 2003 decision, without waiting for the report he had requested from the Advisory Council on the Misuse of Drugs.⁵ It is not clear that either change affected how the police and courts handled cannabis possession offenses. Most were dealt with through procedures (warnings and cautioning) that did not involve appearance before a judge.

In Switzerland there have been, over the last twenty years, a number of legislative initiatives, even including one that would have provided for a regulated legal market for cannabis. During this period of legislative uncertainty a few hemp shops emerged that fairly openly distributed cannabis. The police eventually closed those down and also began to take tougher measures against cannabis users who openly smoked on public transport. In 2008 a very carefully orchestrated effort by the government to create new legislation that would effectively eliminate

⁵ The Home Office announcement of the change in policy can be found at <http://www.homeoffice.gov.uk/drugs/drugs-law/cannabis-reclassification/>

criminal penalties for cannabis use was defeated in the legislature. A ballot initiative at the end of the year resulted in a decisive rejection by the voters.

Outcomes

Unfortunately the nature of the changes and/or the available data don't allow for strong evaluations in most countries. For example, because Portugal made a national change, there is no internal variation for analysis. One can only compare the post-change trajectory either with other countries at the same time or with the pre-change trajectory; neither is a strong evaluation design. For Italy and Spain the changes happened many years ago and there are no data specific to marijuana for assessment. For Latin America the problem is the opposite; the changes are so recent that no evaluation has been conducted.

The one country, in addition to the United States itself⁶, for which a reasonable quality evaluation literature is available is Australia. It has the advantage of being a federal nation, allowing for comparison of states that changed with those that did not change. The limit here is that there are only eight independent jurisdictions (6 states and two separate Territories), and the available surveys are not annual and have modest sample sizes in some of the jurisdictions. Tests are not powerful.

Analysis of the national surveys in the years following the introduction of the Civil Expiation Notice in South Australia in 1987 found that though marijuana use increased in that state at a rate greater than in other states, the difference was not statistically significant. For the population 14 and over, lifetime use increased in South Australia between 1985 and 1995 from 26% to 36%. In the states that retained the full prohibition, there were also substantial increases in Victoria (from 26% to 32%), Tasmania (from 21% to 33%) and New South Wales (from 26% to 33%); (Donnelly et al., 1999, 2000). The CEN did not apply to those under age 18; two studies of South Australian school students aged 11-16 showed that their attitudes toward marijuana use did not change between 1986 and 1989 (Donnelly et al., 1992; Neill et al., 1991). Similar findings have been reported for the change in the Australian Capital Territory in 1992 (McGeorge and Aitken, 1997) and in Western Australia in 2004 (Fetherston and Lenton, 2007).

⁶ For a recent review of the research on the effect of changes in possession penalties in the United States see Pacula, 2010.

There are some discrepant studies with Australian household data. For example, Williams (2004) analyzes 5 rounds of the Australian household survey and finds that decriminalization does have a statistically significant effect on the likelihood that a male over the age of 25 uses marijuana. However there are enough methodological problems with these results that the general view is that the Australian experience, like that in the U.S., is consistent with the hypothesis that removing criminal penalties for minor marijuana possession offenses has at most a small positive effect on the prevalence of marijuana use.

Concluding Comments

Many jurisdictions have made changes in the formal law governing use of marijuana, mostly reducing the involvement of the convicted marijuana user with the formal criminal justice system. Just two countries (the Netherlands and four jurisdictions in Australia) have experimented with reductions in the penalties for marijuana supply (selling in the case of the Netherlands, and small scale production for own use and gifts in the Australian case).

The implementation of these changes have sometimes been quite different from the intent. For example, the police may increase the number of arrests, because the burden of arrest for them has been reduced. Or the limits for possession have been set so low that many instances of possession for personal use may be wrongly classified. In the case of Latin America, where the changes are very new, there is little evidence yet about implementation.

Except for the Netherlands, none of the legal innovations appears to have much changed the actual legal risks faced by users or distributors. Thus it is hardly surprising that the few available assessments of the effect of these reductions in formal severity find little evidence that they have led to increases in drug use. Passage of the Ammiano bill or the Regulate, Control and Tax Cannabis initiative will lead California into essentially uncharted waters.

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