

After prohibition: What will marijuana policy reform look like?

by [Benjamin J. Dueholm](#) in the [July 23, 2014](#) issue



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In July 2012, a SWAT team entered the Philadelphia home of Leon and Mary Adams and carried away the couple's adult son Leon Jr., who had sold \$20 worth of marijuana to a police informant. A month later, with Adams still awaiting trial, the city moved to seize his parents' home and sell it at auction. The case was still pending last August when Sarah Stillman reported on it in the *New Yorker*. "With this hanging over our heads," Mary Adams told Stillman, "it's devastating."

It's a tragic story, but not an exceptional one. It represents the reality of America's militarized approach to regulating marijuana: extreme enforcement tactics targeting mostly African Americans on the basis of often trivially small amounts of pot.

The war-on-drugs approach to marijuana has become a crisis. As the moral and fiscal costs of enforcement mount, objections to this long-standing status quo are being raised with new urgency. Just months after Leon Adams Jr. was arrested, voters in Colorado and Washington State approved measures to legalize marijuana, taking a bold step beyond the 20 other states and the District of Columbia that already allow for the medical use of the substance.

The regulation of these new legal cannabis markets is being made up on the fly—with consequences that are not yet known. As a result, two critical arguments are taking place at once. The first is over the wisdom of policies that subject marijuana to strict prohibition, sometimes enforced by SWAT teams and the seizure of assets from people not charged with any crime. The second is over what specific

policies to adopt instead. Neither argument is close to being over.

When marijuana prohibition took effect less than 90 years ago, it would have been hard to anticipate the challenges that now beset federal policy. Cannabis had been a frequent ingredient in “patent medicines,” products pitched at Americans’ peculiar and enduring desire to get healthy while getting high. Possession and sale became felonies much later, as the drug’s popularity grew in various countercultures. Only later still did it become the target of a “war.” Even today, marijuana is hardly the primary target of drug policy. But decades of increasing enforcement have made it a major driver of incarceration, expanding police powers, racial discrepancies, and black markets.

Prohibition has also gotten quite expensive. In 2010 (the most recent data), some 784,000 arrests were made for marijuana possession. This resulted in about 40,000 incarcerations, usually paid for out of overextended state and local budgets. Partly for this reason, the case against prohibition is being made on the right as well as the left. Rick Perry, the outgoing governor of Texas, went on Jimmy Kimmel’s late-night show recently to explain his opposition to criminal laws against cannabis. “You don’t want to ruin a kid’s life for having a joint,” said the former Republican presidential candidate.

Perry’s comments surprised some viewers, but they reflect a long trend in that conservative state. In 2007, faced with a \$2 billion price tag for 17,000 new prison beds, the state legislature opted instead for a greater (and cheaper) reliance on drug treatment and prison alternatives for nonviolent offenders. Support for Texas’s reform has been high across parties and demographics.

Sentencing reform has been embraced by many politicians, highly conservative ones prominent among them. A proposal in the U.S. Senate by liberal Democrat Dick Durbin of Illinois and Tea Party Republican Mike Lee of Utah aims to reduce mandatory minimum sentences for drug offenses, a major cause of our world-leading incarceration rate and our \$6.4 billion federal prison budget.

Meanwhile, penalties for marijuana possession have already been substantially downgraded in some jurisdictions, from conservative states like Nebraska and Alabama to liberal cities like Chicago and Washington, D.C. While these measures do not change marijuana’s illegal status, they do amount to a meaningful repudiation of the drug policy status quo—and an opening for the public to look at users of

marijuana and other drugs with more sympathy and less judgment.

This is a consequential departure, not least because the policy tools of arrest and incarceration have been aimed disproportionately at people and communities of color. This has created, in legal scholar Michelle Alexander's provocative phrase, "the new Jim Crow": a systematic form of discrimination and legal disability imposed on African Americans and, to a lesser extent, Latinos. While marijuana use by African Americans and Latinos appears to be no higher than for whites, they are arrested at much higher rates—and these arrests and the convictions that sometimes result have a cascading effect on asset seizures, employment, housing, and access to the ballot box. Drug laws may be neutral on the surface, but according to a 2000 report by the Leadership Conference on Civil Rights, they are "enforced in a manner that is massively and pervasively biased." When the California NAACP endorsed that state's (failed) 2010 ballot measure legalizing pot, it was on the grounds that arrests and incarceration had become a civil rights issue.

Prohibition poisons the relationship between law enforcement and entire communities that experience the dangers and indignities of aggressive policing. In communities of greater privilege it cultivates something different: a cynicism and hypocrisy regarding the law itself. Andrew Sullivan coined the phrase "the cannabis closet" to describe the ways people are obliged to deny their casual use or even past use in everything from job applications to bar exams.

The problem such widespread dishonesty creates is very real. A prohibition that cannot be enforced with anything approaching reliability or equity damages the concept of law itself. For me, and for most of the people I knew in high school and college, laws against marijuana did not express a social contract to which we owed deference but rather a game we intended to win.

Against these arguments for reform, supporters of the status quo tend to argue that marijuana is dangerous, both on its own and as a gateway to harder drugs. On both counts, however, the evidence is unclear. The first phase of federal marijuana prohibition, in the 1930s, emphasized the drug's potential for fomenting violence. Today prohibitionists point instead to studies correlating heavy (and/or youthful) marijuana use with lower IQ, lower educational attainment, and greater dependence on other substances. Such correlations are suggestive but not dispositive. Cannabis can certainly be abused, but it is less addictive than alcohol or tobacco. Standards and protocols for cannabis-impaired driving are difficult to establish, and there is

some evidence that it is causing problems in places where use is more common. Still, a lethal dose of marijuana is 1,000 times the size of an intoxicating dose. For heroin, that number is five; for alcohol, it's ten.

Marijuana's effects are perhaps not fully understood. (One difficulty is the scarcity of legally available product for scientific study.) But it's rare to find a rigorous argument that cannabis is, in itself, even close to being as harmful as alcohol. And even opponents of full legalization rarely argue that the drug-war approach has yielded net gains. Writing in *Commentary* in April, David Frum sharply rebutted legalization efforts, citing the ominous studies, the profusion of dispensaries under leaky medical marijuana laws, and the problems created by defining and enforcing laws against cannabis-impaired driving. Even so, Frum allowed that the drug-war approach has been misguided and ineffective—and should be reformed by emphasizing civil penalties and treatment.

Neither cultural stigma nor aggressive enforcement has managed to push marijuana use into the marginal, dangerous, and darkly romanticized position of, for example, heroin. Marijuana remains the most popular illicit substance after misused prescription drugs, consumed by perhaps 30 million Americans in the last year. The prohibitionist approach has amounted to a randomly imposed excise tax, enforced through a combination of higher prices (the “risk premium” on banned goods) and racially skewed incarceration. But this tax flows not to public coffers but to the illegal organizations that distribute the product—some of which are terrifyingly violent. In this sense, marijuana offers a close analogy to alcohol during Prohibition.

“We’re in 1928,” drug-policy scholar Mark Kleiman told the *New Yorker* last year: marijuana prohibition “is about to collapse under its own weight.” When the 2012 ballot initiatives were proposed, at least half of Americans still wanted marijuana to be fully illegal—but few cared enough to give money or time to keep it that way. The legalization side was much better funded.

The most recent polling shows new majorities that support legislation. Pat Robertson—an even unlikelier friend to the marijuana reform movement than Rick Perry—is among them. “We should treat marijuana the way we treat beverage alcohol,” said the televangelist.

But would such a change be as simple as Robertson makes it sound? With public opinion swiftly shifting, the question is how exactly to reform marijuana law. Several

partial steps have been proposed or attempted—expanded medical use, reduced penalties, small-scale decriminalization. But a cannabis version of liquor stores is where most advocates for commercial legalization of marijuana want the drug war to end.

“You would have to present ID,” Betty Aldworth tells me, “and there would be some level of security present.” The executive director of Students for Sensible Drug Policy explains that under licensed legalization, “people are economically incentivized to follow the rules. We can teach people about appropriate use”—something that blanket prohibition makes impossible. “When you have clear bright lines in which you can color, when you can’t stay within those lines that’s your problem,” Aldworth says. “When there are no lines, everyone is coloring all over the place.”

Yet it isn’t obvious where the lines should fall. The two emerging state-level legal regimes are significantly different. In Washington, homegrown product is illegal unless you have a medical dispensation. In Colorado, people are allowed to grow a limited amount but, like home brewers, are not allowed to sell it. In Washington, producers face limits on cultivation—partly at the urging of UCLA’s Kleiman, who feared a supply spillover to other states—and they have to be separate entities from the retailers. In Colorado, producers need a connection to retail in order to operate legally. Aldworth reports that violations of the new rules have already been detected and punished. Excise taxes are being debated right now. Aldworth and others insist that they have to be low enough to undercut black market prices, while Kleiman argues that taxes should be higher and the revenues used to stamp out the black market.

Public health advocates are wary. “We should regulate marijuana better than alcohol,” Katie Baldassar responded when I proposed the analogy between the two substances. Baldassar is director of Lake County Build a Generation, a public health department in central Colorado that promotes good health outcomes in policies from education to housing to the environment. The way alcohol is regulated offers a troubling model for Baldassar, who sees higher cannabis use among young people as an unpredictable and probably undesirable effect of Colorado’s policy reform. “We survey students about habits,” she says of her program, which serves a low-income area with a heavily Latino youth population. “There’s a pretty clear line between adult social norms and youth use.”

While the spectacular failure of Prohibition and the subsequent social acceptance of drinking have obscured the issue, from a public health standpoint modern regulation of alcohol has been only a mixed success. Alcohol abuse creates enormous direct and indirect costs, from chronic health problems to lost productivity to fetal alcohol syndrome, road fatalities, and domestic violence. And these costs are less visible than they would be if they were not so concentrated. Alcohol consumption patterns exist in a sort of parallax: most users are moderate, experiencing little or no harm from alcohol, but most use is heavy. Ninety percent of alcohol is consumed by 20 percent of drinkers.

The excise taxes on alcohol—around a nickel per beer in federal tax, more for spirits—are not nearly high enough either to deter abusive drinking or to alleviate the social costs it creates. Liquor is a powerful and highly consolidated industry that works continually to weaken the sort of post-Prohibition rules meant to keep prices high and consumption restrained. According to Tim Heffernan, writing in the *Washington Monthly*, the liquor industry has created “a vertically integrated pipeline for cheap drink,” much like what flourished before Prohibition. Why would legal marijuana be any different? The substance may have some subversive ambience, but it will not take long for its own version of MillerCoors to supplant the odd mix of medical dispensaries and boutique growers that supply today’s gray-market pot.

In an attempt to learn from the shortcomings of the alcohol market, marijuana policy reformers are proposing measures like state-owned retail stores and nonprofit suppliers. Portugal and Spain have allowed co-ops or clubs that facilitate noncommercial exchange among members while still prohibiting buying and selling. Once a lucrative industry is in place, of course, such distribution innovations become difficult to enact. It will also get harder to maintain or increase excise taxes, preserve regulations, or restrict advertising.

In arguing for a relatively libertarian approach, Students for Sensible Drug Policy’s Aldworth stresses that cannabis is “objectively less harmful than alcohol.” A more stoned society might not appeal to everyone, but if it’s also a less drunk society, the net result will by most accounts be positive for public health. What’s more, federal law currently defines cannabis as a drug with no possible beneficial use—placing undue limits on research on its benefits in treating epilepsy, cancer, and Alzheimer’s.

“Nobody has done this before,” Lake County’s Baldassar says, referring to the legal landscape in Colorado. “People talk about the Netherlands, but there’s no advertising of marijuana there. This is a grand experiment.”

“As I listen to the various arguments,” a woman going by the name Leah Allen wrote in a heartrending *Atlantic* essay in January, “they all come back to the same thing for me: Dad, Dad, Daddy.” While the pseudonymous writer supports marijuana legalization, she is frank about the effect her father’s constant use has had on her family, from badly impaired driving to taking her and her siblings to a reggae festival and forgetting them for days. Her essay is a grim reminder that if the tragedies of the drug war are vivid and outrageous, the tragedies of drug use itself are subtler and less liable to being reformed.

The national conversation on marijuana tends to focus on its use by upper-middle-class college students and young adults. David Brooks penned a widely mocked column earlier this year describing the dozey effects the drug once had on him and his friends, and Dave Weigel at *Slate* fired back an uncensored account of his highly and harmlessly stoned New Year’s Eve. There is something perverse about debating the impact of marijuana prohibition on people who are highly unlikely to have their homes seized because of it—and also less likely to slip into a daily haze if this prohibition is removed. Like the tobacco and alcohol industries before, a postprohibition cannabis industry is likely to target the 60 percent of users with a high school diploma or less, making this demographic feel the health and economic consequences of increased use most sharply. Yes, most marijuana users will be responsible. But the real money will be made off of people like Leah Allen’s dad.

There is an urge within humans to alter our consciousness. If there is no strictly “safe” way to do this, this is perhaps because the urge itself can become excessive and incompatible with any other good thing in life. Cannabis doesn’t seem to be addictive in the sense that other drugs are, but this is somewhat beside the point. Whatever can be used can be abused. The challenge in reforming marijuana policy is an old one: balancing the legitimate urge for a measure of intoxication with the need for sobriety.

Americans are no better at this balancing act than anyone else. Few of us living today can appreciate how blitzed our 19th-century ancestors were. At Lincoln’s second inauguration, Vice President Johnson was nearly too drunk to take the oath of office. If Prohibition was a failure, Prohibitionism was a forgotten triumph—a

desperate cultural response to a crisis of inebriation. The idea that alcohol could effectively be banned was discredited, at some unhappy cost. But the idea that it's good to spend a substantial portion of each day sober has been so successful that it is, in some quarters at least, taken for granted.

Such a turn may be needed again. Voices across the political spectrum are calling for an end to the unwinnable and indefensible war on marijuana use. But it's less obvious what will follow. Moderate reforms might not come in emotionally satisfying language. Yet these reforms—from decriminalization to the liberalizing of federal laws on medical research to the creation of nonprofit distribution systems—are available and significant. If lawmakers and cultural actors are unwilling to embrace such ideas, the pressure for reform may move instead toward a new industry of intoxication.