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Cannabis legalization and public health: legal niceties, commercialisation, and countercultures

It is interesting to see the varied directions in which a discussion of legalization of cannabis for nonmedical purposes (1) can take us. I thank the commentators for their interesting and informed responses.

The Conventions and US jurisprudence. Hawken and Kulick (2) dispute my assertion that in setting up legal nonmedical markets Washington and Colorado clearly contravene the conventions. I acknowledge my assertion was too strong, if it is read as implying that US courts would necessarily decide this way. Hawken and Kulick conclude that nations “with federal systems of government” are not bound by the Conventions “to override legalization in their constituent political units”. But this states the issue too broadly; legal interpretation on this will vary between federal countries (3, pp. 213-237). Hawken and Kulick focus on the relation between US state and federal law, a vexed issue in US history, but there is also the issue of current US jurisprudence on the application of treaties within the US in general, whether at the national or the state level. In recent decades, US courts have moved away from regarding US accession to a treaty as putting the treaty’s provisions into effect as national law (despite the US Constitution’s unambiguous wording: “all treaties made ... shall be the supreme law of the land; and the judges in every state shall be bound thereby...”). Reflecting a political backlash against the potential application of human rights treaties in cases against US governments, U.S. courts have increasingly only applied the constitutional provision where they decide a treaty is “self-executing” (4); a treaty provision which requires that a criminal law be passed, for instance, is not self-executing, even though it has gone through US ratification (5). Since “US courts are reluctant to find multilateral treaties self-executing” (6), they might well decline to make an order applying provisions in the drug treaties.

Whatever US courts decide, in terms of facts on the ground the US is as much in violation of the 1961 treaty as Uruguay. The International Court of Justice might thus well decide differently from a U.S. court on the issue, in the unlikely event that another nation decided to bring a case against the U.S. there.

Control models, commercialisation and public health. A theme weaving through four of the commentaries is a shared concern about the “active commercialisation” (7) already evident in the Colorado and Washington processes. Uchtenhagen (8) reminds us of the “experience with weakening restrictive regulations on alcohol availability and advertising” under pressure from private interests, and Lenton (9) wonders whether the outcome of the next 20 years of experimentation will be “the triumph of public health over private profit”. To counter this, Pedersen (7) suggests the model of a state retail monopoly, as in Norway for alcohol, and Reuter (10) agrees that pushing alternative approaches such as a restrictive legalization of “grow your own” or a state monopoly is “a cause worth taking up”. Interestingly, versions of both of these approaches are part of the Uruguay legislation (contrary to Hawken and Kulick’s comment (2), in my view Uruguay’s model is well attuned to public health issues). In the U.S., an Oregon voter’s initiative that came close to passing in 2012 (46% in favour) would have had the cannabis sold in state stores. But in the present US policy climate, where a popular initiative pushed by commercial interests abolished the Washington state liquor stores, such an idea is easily brushed off as “wacky” (11), and the current gold-rush of commercial interests into the area which Pedersen mentions would provide strong opposition to it.

Cannabis policy is not the only arena in which the conflict of commercial interests with public health interests has come to the fore. The United Nations and the World Health Organization are in the midst of making the prevention and control of Non-Communicable Diseases (e.g., cancer, heart disease, chest diseases, diabetes) a global development priority. This includes public health action to control the main risk factors (12, 13), three of which -- tobacco, harmful use of alcohol, unhealthy diet (14) – involve items of consumption where commercial interests and the public health interest are often in conflict. Policymaking on the regulation of cannabis should be set into this wider context of the need for mechanisms to give public health interests priority over commercial interests and trade considerations, particularly since legalized cannabis may otherwise be caught up in trade disputes animated by commercial interests.

The fate of the “hang loose” ethic. Pedersen points out that there is another dimension at stake in the status of cannabis – the persisting association he finds in Norway (7), noted also elsewhere (e.g. 15), with counter-cultural “green” values of the 1960s. As he implies, a legal and regulated regime is in any case likely to take the edge off cannabis use, the illegality of which, as John Prine’s

ballad “Illegal Smile” (1971) reminds us (16),¹ has long served as a gentle gesture of defiance of authority. The alcohol and tobacco experience with commercialisation suggests, however, that at least the anti-authority gestures of the counterculture are likely to live on, though coopted to serve new ends in advertising and promotion.

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¹ “...You may see me tonight with an illegal smile
It don’t cost very much, but it lasts a long while
Won’t you please tell the man I didn’t kill anyone
No I’m just trying’ to have me some fun.”

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