

# Marijuana Jail Terms: Costly And Hasty

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## Executive Summary

- [ HB 1173, cleared by the House and starting Senate action today, would stiffen the marijuana possession penalty from a \$100 fine to a potential six—month jail term.
- [ This could boost Colorado's criminal justice costs by \$10 million annually (unacknowledged in the legislative fiscal note) while probably not reducing marijuana use, judging from experience in other states from Maine to California.
- [ The proposal is tucked into a bill whose title gives no hint of it and whose main topic is non-germane, contrary to the state constitution.

Is a six-month jail term an appropriate sentence for possession of less than an ounce of marijuana? For first offenses? This Issue Paper takes no position on that controversial issue. Instead, the Issue Paper argues for two uncontroversial principles: 1. That all laws which have a large fiscal impact should be passed after careful study of that impact; and 2. That all laws should be passed in conformance with applicable Constitutional requirements for public input. While a bill to impose jail sentences for marijuana possession certainly could conform to those two principles, the current proposal before the legislature for jail terms does not.

## Introduction

Under present Colorado law, possession of less than an ounce of marijuana for personal consumption is punished by a summons and fine of one hundred dollars. Some people have proposed that the current penalty be replaced by a jail term of up to six months. Based on studies from other states, *replacing the current system of fines with a system of potential jail sentences would cost Colorado well over 10 million dollars a year, without making a dent in marijuana use*. While the Legislature might determine that the cost is a worthwhile expense, this large fiscal obligation, like any other large expenditure, should be incurred only after thorough consideration of its implications.

The Colorado Constitution requires that all bills by the General Assembly pertain to only one topic, and that the topic be "clearly expressed" in the title. House Bill 1173 violates the "one topic" and "clear title" Constitutional rules, and may therefore be extremely vulnerable to a lawsuit to block enforcement. The Constitution and common sense both suggest that the Legislature be

careful about enacting laws which will be readily overturned on procedural grounds.

## **I. House Bill 1173 Will Likely Cost Colorado over 10 Million Dollars a Year.**

The following analysis of the costs of jail terms for marijuana possession draws on cost studies from other states. Unfortunately, the Legislature has been presented with no analysis from its own research departments regarding HB 1173's costs. The "fiscal note" attached to bill discusses other, unrelated parts of the bill, and makes no mention of the impact of jail sentences for marijuana possession. The lack of the necessary fiscal note should be a cautionary signal to budget-balancers.

### **A. Financial Savings Attributable to the Present Law**

Prior to 1976, California had a set of marijuana laws similar to that advocated by the proponents of HB 1173. Marijuana possession was usually treated as a misdemeanor. If a first-time offender underwent a drug abuse treatment program, charges could be dropped entirely.<sup>(1)</sup> HB 1173 proposes a similar system: a six-month jail term, which its sponsors promise can be avoided by undergoing drug treatment.

In 1976, California enacted the Moscone bill, providing for a summons and a fine for possession of small amounts of marijuana.

According to a detailed study of the entire California justice system, from 1976 to 1985, California saved \$ 958,305,499 in direct criminal justice expenditures.<sup>(2)</sup> That 958 million dollar figure includes only the costs of arrests, courts, state prisons, and parole. The cost saving does not include the amounts saved by reducing expenditures for county jails, prosecutors, public defenders, and probation departments. The savings figure also does not include the revenue raised by the \$100 fine. Taking these other factors into account, California saved well over one billion dollars in a 10-year period, or over one hundred million dollars per year.

The savings derives primarily from the fact that while almost all persons issued a summons to pay a \$100 fine will not contest the charges, persons who face either six months in jail, or thousands of dollars in expenses for unwanted drug treatment, will usually contest all charges vigorously.

For example, after Ohio de-criminalized marijuana, researchers studied the disposition of marijuana cases in Columbus and Cleveland. Before decriminalization, about 80% of marijuana possession cases in those cities had proceeded beyond arraignment, thus requiring many police hours in court. After decriminalization, only 10% of cases went beyond the arraignment stage, and police court hours dropped 91% in Columbus, and 90% in Cleveland.<sup>(3)</sup>

In Maine, decriminalization did not substantially reduce the number of persons who were arrested and charged for marijuana possession. But police and court costs were reduced by a factor of 5 to 13 times; not-guilty pleas fell 87%; guilty pleas increased 263%; and the number of evidence suppression hearings per year plummeted from 148 per year to 2. While the average fine decreased, total fine revenues increased, due to the ubiquity of guilty pleas. As a result, marijuana law enforcement was transformed from a substantial drain on Maine revenues into a net revenue-raiser. "Prior to decriminalization, it was common knowledge to all defense lawyers that if they dug in their heels," one Maine District Attorney explained, "they could frequently get it [a possession case] dropped because the time and money needed to counter the legal tactics couldn't be justified." [\(4\)](#)

California, the state which was the subject of the most thorough, long-term cost analysis, has a population about nine times Colorado's. Accordingly, Colorado's savings from similar legislation might be estimated at about one-ninth of California's, or about 11 million dollars a year in expenses saved the Colorado taxpayers. Repealing Colorado's present law would of course mean repealing those savings.

## **B. Do Jail Terms Reduce Marijuana Use?**

When California was debating the Moscone bill, similar to what Colorado has enacted in 1975, opponents worried that abolishing jail terms would give a "green light" to potential marijuana users. [\(5\)](#) A decade later, a survey of street-level arrests and emergency room admissions revealed that "the two best statistical indicators of drug use in California show that lowering penalties for marijuana possession did not cause a rise in the use of that drug." [\(6\)](#)

In Oregon, where a law similar to Colorado's was enacted in 1973, marijuana use essentially remained level. [\(7\)](#) In Maine as well, marijuana use stayed flat after the Legislature implemented decriminalization. [\(8\)](#) The Ann Arbor, Michigan, City Council enacted an ordinance making marijuana possession a \$5 fine; this ordinance over-rode state law, which made possession a felony. Despite the drastic reduction in the force of the criminal penalty, a survey of high school students in the area showed no increase in marijuana use. [\(9\)](#)

A national study compared states with harsh marijuana law, states with milder marijuana laws, and states which had changed from harsh to mild. Surveying the different states over time, the study found that the patterns of marijuana use rose and fell without any apparent relation to the severity of the law. [\(10\)](#)

The Addiction Research Foundation, after analyzing all of the studies regarding the impact of decriminalization, concluded:

In sum, the decriminalization of marijuana does not appear to have had a major impact on the rates of use, as many people feared it might. On the

other hand, it has resulted in substantial savings to drug enforcement with resources generally redirected toward the enforcement of laws regarding other drugs... [I]t would appear that decriminalization measures have succeeded in reducing the costs without substantially increasing the health and safety hazards associated with marijuana use.[\(11\)](#)

The above surveys are consistent with the data from Colorado. Marijuana use peaked in Colorado at about the time Colorado's present law was enacted; since then, marijuana use has fallen sharply, especially among the young. This may suggest that moral education is a more potent force than the criminal justice system.

### **C. Will "Drug Treatment" Keep HB 1173's Costs in Bounds?**

Although JIB 1173 provides for a jail term, rather than for drug treatment for marijuana offenders, some of its sponsors promise that the true purpose is to coerce offenders into drug treatment programs. This approach, even if universally followed by the courts, will likely not reduce the fiscal impact of JIB 1173.

Persons who do not wish to be forced into drug treatment may resist coerced treatment just as vigorously as they would resist a jail sentence. Accordingly, the drug treatment option will may well reduce actual jail costs, but will probably not substantially reduce trial and other pre-sentence costs.

Moreover, drug treatment generally costs several thousand dollars per patient. This cost will be directly borne by the taxpayers (for indigents) or indirectly borne by the taxpayers (for anyone with private health insurance, which receives numerous tax subsidies). Should taxpayers be forced to provide medical care to people who have only their own illegal behavior to blame for their problems? Should taxpayers pay thousands of dollars, many times over, to attempt to "cure" people who do not wish to be cured?

The amount that the taxpayers will tolerate spending, directly or indirectly, on drug treatment is finite. The evidence suggests that marijuana users are not the most appropriate recipients of public health care dollars. According to the Surgeon General of the United States, marijuana is significantly *less* addictive heroin, cocaine, alcohol, and nicotine. It is even less addictive than caffeine.

Although some persons make an issue of the alleged fact that marijuana is more potent now than it used to be, there has been no increase in potency since 1980; even before then, potent varieties of marijuana were readily available. People who use the more potent varieties simple consume less, just as persons who drink scotch consume a lower volume of fluid than do beer drinkers.[\(12\)](#)

Thus, persons who wish to stop marijuana use generally need only simple willpower, not medical help to cope with withdrawal symptoms. Accordingly,

a policy of coercing marijuana offenders into drug treatment will essentially mean that the drug treatment system will be forced to "cure" persons who are not addicts and do not wish to be cured, and forced to turn away persons who are cocaine or heroin addicts who desperately crave help. Such a policy will not only make drug treatment expenditures less efficient, the policy may also increase crime committed by cocaine or heroin addicts who cannot get treatment.

Lastly, coerced treatment raises serious ethical questions for the government and for physicians. Does the government have a right to impose medical treatment on unwilling adults? Can physicians perform such treatment without violating the Hippocratic Oath, and risking malpractice suits? During the era of alcohol Prohibition, it would have seemed ludicrous to send illegal imbibers to Alcoholics Anonymous meetings, or to alcohol treatment sanitarium. Most people who broke the alcohol laws, like most people who break the marijuana laws, are not physically sick. They are simply persons who refuse to obey the law.

All of the above argument does *not* in itself prove that the Legislature should not impose jail terms for possession of small amounts of marijuana. Most people who support the death penalty would continue to do so even if it were proven that the death penalty is far more expensive to administer than is life in prison, and that the death penalty does not deter crime. Many death penalty advocates simply like the moral statement the death penalty makes, and are willing to spend the money to make it; some legislators might simply like the moral statement made by six month jail terms for possession of any amount of marijuana.

But in the last decades, the General Assembly and the people of Colorado have learned a hard lesson about the consequences of increasing the severity of the criminal law without increasing the funds available to enforce the law. If the Legislature determines that the sharp increase in the marijuana penalty is appropriate, the Legislature should fully assess the resultant costs to the State and the counties, and make the necessary fiscal appropriation. To not do so is to dishonor the Legislative duty to zealously guard the public fisc.

## **II. Colorado's Constitution Requires Full Disclosure in Legislation**

The United States Constitution contains few limits on the procedures and operation of Congress. In contrast, the Colorado Constitution contains numerous provisions detailing "open government" rules for how the General Assembly must address legislation. That is one reason why Colorado's laws can fit on a single shelf, and are generally respected; and why Congress's laws cannot fit on an entire bookshelf, and are generally disrespected.

The Colorado Constitution states:

**Bill to contain but one subject - expressed in title.** No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed. (Colo. Const. Art. V, § 21.)

House Bill 1173 does not conform to the above Constitutional standard. In violation of the Constitution, the bill is about "more than one subject." The main subject of the bill, substance abuse evaluation and testing for persons under the supervision of the criminal justice system, consumes most of the bill's 30 pages. The second subject, increasing the penalty for violation of a criminal law, is a relatively short provision contained in the middle of the bill.

In addition to violating the Constitution's "one subject" rule, the marijuana provision also runs afoul of the rule that the subject of the bill "shall be clearly expressed in its title." The title of JIB 1173 is "A Bill for an Act Concerning the Elimination of Substance Abuse in the Criminal Justice System, and Making Appropriations in Connection Therewith." The title relates to substance abuse evaluations of persons under supervision of the criminal justice system -- persons on parole or probation. The appropriation made "in connection therewith" also relates to that subject.[\(13\)](#)

**In contrast, the subject of increasing the penalty for marijuana possession is not expressed in the bill's title, and is certainly not "clearly expressed" as the Constitution mandates.**

The Constitutional rules of "one subject... clearly expressed in the title," are an important basis for democratic legislation. Because members of the public cannot read every word of every bill that is introduced, the one subject/clear title rules help persons focus on which bills are most important to them. The rules also force each legislative proposal to depend on its own merits for passage, and force the Governor to consider each subject separately in deciding whether or not to exercise his veto power.

Thus, the one subject/clear title provisions of the Constitution provide several checks and balances to ensure that the only laws enacted are those for which citizen input is made easy at every step of the process, and for which both every Legislative body and the Governor make careful, considered decisions.

Because the marijuana penalty was not the subject of its own bill, and was not mentioned in the bill's title, the marijuana penalty would be quite vulnerable to a Constitutional challenge. A person arrested under the new law would have a strong incentive to bring such a case. It would be irresponsible for the Legislative to enact a criminal law that will certainly face a Constitutional challenge, especially when the Constitutional flaw could be easily remedied by careful drafting in a future session.

More importantly, a criminal statute is the mechanism by which the General Assembly orders the People to comply with particular standards. It would be hypocritical, and destructive of respect for government, for the General Assembly to enact a statute in disobedience to the strict Constitutional standards which the People have ordered the General Assembly to obey.

## Notes

1. G.S. Brownell, "Marijuana and the Law in California: A Historical and Political Overview," *Journal of Psychoactive Drugs*, vol. 20 (1988).
2. Dr. Michael Aldrich and Dr. Tod Mikuriya, "Savings in California Law Enforcement Costs Attributable to the Moscone Act of 1976 -- A Summary," *Journal of Psychoactive Drugs*, vol. 20, no. 1, Jan.-Mar. 1988, p. 79, Table LU.
3. National Governor's Conference, *Marijuana: A Study of State Policies and Penalties*, Center for Policy Research and Analysis, 1977, Washington, D.C.
4. M.D. Fulton, R.M. Clark, and T. Robinson, *The Decriminalization of Marijuana and the Maine Criminal Justice System: A Time/Cost Analysis*, Maine Office of Alcoholism and Drug Abuse Prevention, November 1979, Augusta, Maine. (The D.A.'s quote is on page 2.)
5. K. Budman, *A First Report of the Impact of California 's New Marijuana Law (SB 95) (Requested by the California Legislature)*, Office of Narcotics and Drug Abuse, California Health and Welfare Agency (Jan.1977).
6. J. Mandel, "Are Lower Penalties a Green Light for Drug Users?" *Journal of Psychoactive Drugs*, vol. 19, no. 4, pp. 383-85.
7. Drug Abuse Council, "Marijuana Survey -- State of Oregon," news release, Washington, D.C., Jan. 28, 1977; California Senate Select Committee on Control of Marijuana, *Final Report, Marijuana: Beyond Misunderstanding*, Sacramento, 1974.
8. Maine Office of Alcoholism and Drug Abuse Prevention, *An Evaluation of the Decriminalization of Marijuana in Maine*, Augusta, Maine, 1979.
9. R.B. Stuart, K. Guire, and M. Krell, "Penalty for the Possession of Marijuana: An Analysis of Some of its Concomitants," *Contemporary Drug Problems* vol. 5, 1976, p. 553.
10. W. Saveland and D. Bray, *American Trends in Cannabis Use among States with Different and Changing Legal Regimes*, Bureau of Tobacco Control and Biometrics, Health and Welfare, Ottawa, Canada, 1980.
11. Eric W. Single, "The Impact of Marijuana Decriminalization," in eds. Yedy Israel, Frederick B. Glaser, Harold Kalant, Robert E. Paphem, Wolfgang Schmidt, and Reginald O. Smart, *Research Advances in Alcohol and*

*Drug Problems*, Addiction Research Foundation (Plenum Publishing, 1981), P. 423.

12. John P. Morgan, "American Marijuana Potency: Data Versus Conventional Wisdom," *Neuroscience Behavior Review*, (forthcoming, 1991); T. Mikuriya & M. Aldrich, "Cannabis 1988: Old Drug, New Dangers, the Potency Question," *Journal of Psychoactive Drugs*, vol. 20, 1988, pp. 47-55.

13. The bill was amended in Committee to make non-indigent persons subject to testing pay for the tests themselves.

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