Advertising Restrictions on Cannabis Products for Nonmedical Use: Necessary but Not Sufficient?

Fiala et al. (p. 120) show that a legal industry—cannabis in this case—is advertising its products, and those ads reach broad swaths of the public. That is reminiscent of Casablanca's Captain Renault being shocked to find gambling in Rick's nightclub.
What is perhaps more noteworthy is that the advertising was observed before any retail stores had opened, at a time when only medical dispensaries were in operation. This underscores that medical dispensaries in states with liberal medical regimes are strange beasts. They mostly sell botanical products that would not meet US Food and Drug Administration (FDA) Good Manufacturing Practice requirements and are virtually indistinguishable from a recreational drug.

The authors note that Oregon law restricts vendors from making "claims that a marijuana item has curative or therapeutic effects unless the claim is supported by the totality of publicly available scientific evidence." Yet consumers are told by the industry generally, even if not in ads placed specifically by those dispensaries, that marijuana helps with scores of conditions. The popular Web site ProCon.org reports that "Tod Mikuriya, MD, a psychiatrist and addiction medicine specialist, posted a list of 259 conditions which he believed could be treated with marijuana" (http://www.webcitation.org/6tnSeOmzf).

**ONLY THREE BENEFITS**

By contrast, when the National Academies of Science, Engineering, and Medicine reviewed the scientific literature concerning marijuana's health effects, good and bad, it found substantial or conclusive evidence for only three benefits (treating nausea, chronic pain, and spasticity associated with multiple sclerosis) and moderate evidence for one other (sleep disturbance associated with certain conditions).[1] No or limited evidence was found for—or even evidence against—benefits for many other conditions that qualify patients for medical marijuana under state laws, including glaucoma, posttraumatic stress disorder, epilepsy, Parkinson's disease, and weight loss associated with HIV/AIDS or cancer.

**SCHEDULE I PROHIBITED SUBSTANCE**

The FDA generally punishes companies that make health claims about drugs that the FDA has not approved. It does not do so for tetrahydrocannabinol (THC)-bearing marijuana, even though marijuana meets the definition of a drug under the Food, Drug, and Cosmetics Act (namely, a nonfood product that is intended to affect the structure or function of the body). Perhaps FDA ducks this responsibility because marijuana remains a Schedule I prohibited substance under the federal Controlled Substances Act (CSA)—although the Justice Department has issued memos making it explicit policy not to enforce the CSA in states where voters or legislators have decided that marijuana is a useful drug (e.g., http://www.webcitation.org/6tnTRIxxk).

Whatever one's thoughts are about whether marijuana should be legal, the present situation is odd, if not bizarre, and is probably not stable. Policy remains in flux. Legalization is not like a light switch that is flipped on as soon as a state proposition passes. It is a generation-long cultural transformation that began decades ago—California's 1996 medical marijuana law might be as good a date as any to mark its onset—and we may still be closer to the middle than the end of this process.

**ADVERTISING RESTRICTIONS**

Fiala et al. conclude about cannabis legalization that "advertising restrictions may be needed to protect
youths and young adults from pro-use messages." That statement is true but potentially misleading in the sense that those restrictions may be necessary but far from sufficient.

More generally, various commentators have suggested that lessons from alcohol and tobacco control can be applied to legal marijuana.[2] I agree and have made such statements myself.[3] I worry, though, that noting the parallels may lull people into believing that as long as we import alcohol and tobacco regulatory models, all will be OK. For multiple reasons, that could be naïve.

**REGULATORY MODELS**

For one, tobacco- and alcohol-related harm are not solved problems; hundreds of thousands of people die prematurely every year from abuse of those substances. As Kleiman observes, that is not a ringing endorsement of the adequacy of current approaches to alcohol and tobacco control.[4]

For another, important tobacco and alcohol control tools are not available for marijuana. Many restrictions on tobacco firms' lobbying and marketing, including advertising that targets youths, flow from the 1998 Master Settlement Agreement. The cannabis industry has little incentive to agree to similar concessions. It is not threatened by massive lawsuits as the tobacco industry was. It also remains fragmented, with hundreds of small firms, not a few behemoths (yet), so even the mechanics of negotiation would be complicated.

Statutes and regulations imposing similar restrictions could run afoul of First Amendment free speech protections if the product is a legitimate article of commerce, which marijuana is not at present but will be after national legalization. The CSA (Part D, Section 843[c]) currently makes it "unlawful for any person to place in any newspaper, magazine, handbill, or other publications, any written advertisement knowing that it has the purpose of seeking or offering illegally to receive, buy, or distribute a Schedule I controlled substance." For the moment, federal prohibition gives states options that they will not have after national legalization.

Likewise, the 21st Amendment, which repealed Prohibition, granted states special powers over alcohol by prohibiting importation into a state of liquors for delivery or use in violation of that state's laws. The states do not have similar powers over other goods, including marijuana, because the Constitution restricts the states' role in regulating interstate commerce. In particular, a state cannot favor its own, domestic, regulated producers over those from other states.

Marijuana's extreme portability undermines states' ability to serve as laboratories of democracy in Justice Brandeis' sense of the term. A year's supply for a heavy user weighs no more than one 20-ounce can of beer, so, as a practical matter, "dry" marijuana states may not be able to keep out products and marketing from "wet" states, even if their efforts were not judged to be unconstitutional. Rather, state-to-state variation in control policy may just invite industry to relocate to the most permissive states—triggering a race to the bottom as states compete to host those production jobs.
**INDUSTRY CAPTURE**

Industry capture of regulatory bodies is another threat. Many members of Oregon's recreational marijuana rules advisory committee are entrepreneurs in the industry,[5] something the FDA would not allow in its regulation of conventional pharmaceuticals.

Industry capture of users' imagination is also a threat. Smoking tobacco is almost universally viewed as unhealthy, and understanding of alcohol's health effects is at least nuanced. By contrast, there is widespread belief in marijuana's medicinal and other performance-enhancing benefits. Ingraham, summarizing a Yahoo News/Marist poll, notes that only 16% of marijuana users cite "to have fun" as their reason for using; more (19%) cite pain relief.[6]

Profitable industries carry considerable clout in state capitols; profitable industries with a rabid fan base, all the more so.

**LEGALIZING AN INDUSTRY**

Legalizing an industry has many consequences. Fiala et al. give us a baseline regarding one, namely aggressive marketing efforts. I agree that a comprehensive public health response should contemplate advertising restrictions, but fear that much more will be needed if legalization involves a for-profit industry. There are many other, safer ways to legalize marijuana, such as restricting supply to a government monopoly or to nonprofit organizations whose charters reserve a majority of seats on their governing boards for public health and child welfare advocates and that define their mission as meeting existing demand (to undercut the black market) without undertaking marketing efforts designed to increase consumption.[7]

**REFERENCES**


See also Fiala et al., p. 120.

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