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Risk and the Body

“Totally Normal, Pedestrian Behavior”: Deviance, Marijuana Legalization, and the  
Reformulation of Drug Risk

**Introduction**

Marijuana is having what one might call a “moment.” In the past three years, four states have legalized recreation weed. The notion that pot is inherently dangerous is becoming an object of ridicule—just a quick look at Vice’s article “Why Weed Really Is 'Infinitely Worse' Than Cigarettes, Just as Canadian PM Stephen Harper Says” reveals that the 20-something writing the piece doesn’t *really* think “too many fucking strains” is a reason for concern. But is the new acceptance of marijuana’s safety (and, concurrently, social normalcy) reflected by a complete reversal in the assessment and management of risks surrounding its use? As I’ll show, it’s not quite that simple. New types of risks are emerging and being regulated in some surprising ways—and social control is being distributed in ways often constituted by these risk management responsibilities.

## Literature Review

As Reinerman (1994) points out, moral panics around mind-altering substances, and the resulting criminalization, are rarely, if ever, the result of health concerns alone. Instead, he argues, (bureaucratic-)moral entrepreneurs, often in collaboration with industry powers, manipulate media and public opinion to link the use of a certain drug to a “dangerous,” marginalized segment of society. In this way, drugs are made to stand in for a wide array of (perceived) public ills purportedly caused by these groups. For instance, the first narcotics law in the U.S. was the prohibition of opium dens in San Francisco in 1875. Importantly, opium criminalization advocates linked its use to other acts considered deviant in the local context, like prostitution and interracial sex and marriages. Just as importantly, opium dens were spaces in which the feared Chinese were socializing among themselves—the opium ban was intended to control a population as much as a substance.

Behaviors defined as deviant are subject to risk calculations largely divorced from the physical health risks they pose. In general, there is little nuance or analysis present in discussions of deviant substance use; rather, much of the risk discourse around these behaviors expresses the risks of a certain population or group engaging in the behavior in the first place. This moralizing is intimately related to the social consequences of using an illicit substance—one risks social, criminal, and economic sanctions by engaging in the behavior at all. Thus, when the *effects* of deviant substance

use are discussed at all, they often take the form of associating said substance use with other risky and deviant behaviors, such as unprotected sex, or bingeing on food or alcohol; with criminality more broadly (e.g. “gateway effect” discourses, as well as the historically racially charged fear of marijuana users in the U.S.); and/or with pathologized behavioral patterns, like addiction (the gateway discourse is relevant here, as well).

How, then, does a society enact the social controls demanded by those who fear the deviant category of drug users? For most of the 20th century, the answer in the U.S. was law-enforcement surveillance, arrest, and imprisonment. This law-and-order approach to controlling criminal drug use and the populations thereby targeted was typified by the “War on Drugs” anti-drug use campaigns, and the concurrent policies of zero-tolerance drug possession laws and mandatory sentencing minimums for drug crimes.

These policy and discourse strategies, it has become clear, are not very effective. Rates of drug use have remained high, and prisons are filling and overfilling (O’Brien 2013). Garland (1996) argues that this has caused a shift in the criminological approach pursued by governments in the U.S. and U.K. “Adapting” to the new normal of high crime rates and inherent limitations in the scope of traditional law enforcement, states have two main alternatives. One is “responsibilization,” the transfer of crime management responsibilities to non-state organizations, particularly industry.

A second, related strategy is to “define deviance down,” i.e. attempt redefine certain formerly deviant behaviors as acceptable in controlled circumstances. Both of these are evident in the legalization of marijuana, according to O’Brien’s (2013) investigation of medical marijuana in Colorado. According to O’Brien, medical marijuana regulation shifts social controls into the “civil sphere” (in this case, the medical dispensary system) while the state “governs at a distance” through its authority in regulating the newly created legitimate market.

These criminologies—the law-and-order framework that still holds sway in the U.S., and adaptive new strategies supposedly on the rise—are reflective of broader strategies of social control. Garland (1997) explored the resonance Foucault's governmentality idea has with adaptive criminologies. O'Brien's analysis, too, uses the concept of neoliberal governmentality to explain college students' ready acceptance of medical marijuana, both as a regulated commodity in itself and as an industry that provides legitimate economic opportunity. The central observation here seems to be that the state is not simply giving up the war on drugs. Instead, the shared intuition of these authors is that in redefining users from criminals to consumers, the state is also

1. relying on an increasingly distributed kind of governance and
2. maintaining (perhaps increasing) its ability to surveil and sanction users.

Turning to the ways in which these ideologies engage with risk management, we might expect to find similar distribution of controls. As Dean (1998) argues, "...the

'privatization of risk' or the 'individualization of risk' is a key index of a retraction of the socialized risk-management techniques associated with the welfare state and the emergence of new forms of governing in contemporary liberal-democratic states." Simply put, if we see a particular kind of risk being framed as a responsibility of rationally-acting consumers, this is evidence that the state's traditional liability for managing hazards to its citizens is successfully being transferred into the economic market. The citizen as a consumer (and rational actor) is held accountable for their own risk management and the dangers they are thereby exposed to. The way associations with deviance and criminality interact with consumers' individual risk assessments is especially interesting. College students in particular perceived an unregulated (illicit) market as more risky, and often discussed the risks of the black market for marijuana in terms of unreliable quality control.

In a sense, studies like O'Brien's are steps toward figuring out how a rapidly neoliberalizing trend in risk management across the nation (and in many parts of the world) deals with criminality in general and substance use specifically. The answer is not obvious. Marijuana use, unlike the risks posed by environmental toxins and nuclear fallout, is already remarkably individualized in the hazards it poses and the ways to avoid them. The hazards of using it (not just the responses to them) are almost completely constructed by its social indices, i.e. deviance. A relevant distinction suggests itself: the risk of marijuana may be framed in terms of its hazards to the

bodies of its users or in terms of the risk *posed by* users to society. This latter category of risk is just as much a function of the deviance associated with the drug, but it's much less obvious how it might be managed in an individualized way. A comparison with alcohol may be helpful. Taxation of alcoholic drinks, public drinking and public intoxication bans, laws against driving and working while intoxicated, etc., are all examples of collective and largely policy-based strategies of risk management. A central question to my investigation is whether the decreased deviance of marijuana use that accompanies legalization creates a similar situation. Will the risks of marijuana to its users transition from dominating the risk discourse around it to completely neoliberalized, individually manageable considerations?

## **Methods and Data**

To answer these questions, as well as investigate legalization's relationship to the construction of deviance, I analyzed the text of newspaper articles capturing two legalization processes. Articles about marijuana use in Colorado and Oregon were collected from the years of 1995-2000 ("Time 1") and 2010-2015 ("Time 2"). Articles were collected mainly through LexisNexis Academic searches for the terms "marijuana use" and "cannabis use," restricted to the time periods above and to the geographic designations "CO" and "OR." In the end, I had 13 articles from Colorado for Time 1, 11 for Time 2, 5 articles from Oregon for Time 1, and 13 for Time 2. The imbalance here

isn't entirely an artifact of the sampling method—even for specific publications with similar profiles across time, coverage of marijuana in general was low in Oregon in Time 1. This asymmetry is unsurprising, given that both medical marijuana and then recreational marijuana were debated, proposed, and passed after 1998. The bulk of the articles analyzed are from regional papers, both high profile (*the Denver Post*; *the Oregonian*) and local (*The Willamette Week*), and most of the others are from national papers (*USA Today*; *the Washington Post*) and trade publications (*Daily Journal of Commerce*).

Colorado and Oregon were chosen because both recently legalized recreational marijuana recently, Colorado in 2012 and Oregon in 2015. This puts them among the first (and currently only) four U.S. states to do so. These states legalized recreational marijuana by popular initiative ballot measures—my assumption is that this reflects a reduced perception of deviance around marijuana.

My two hypotheses going into data collection were 1. that deviance would be defined down from Time 1 to Time 2 (reflected by less coverage of criminal or otherwise deviant marijuana use) and 2. that the newly created recreational dispensary system would be responsibilized for some kinds of marijuana risk (reflected by risk management strategies enacted by private industry).

Articles found by the searches described above were coded in a system that emerged and was refined throughout the process of data collection. At the outset, I

coded only for risk type present in an article. The types, post-data collection, were:

Risk code	Typical content
Illegality	Arrests; drug syndicates
Potency	“Weed is stronger today”; neurological or psychological hazards
Gateway	Explicit gateway discourse OR conflation of marijuana and cocaine, heroin, other popular illicit drugs
Health consequences	Putative physiological risks of marijuana
Public safety/epidemiological stats	Any report on stats, e.g. rates of use OR risks of legalization or users to public
Rehabilitation/treatment	Rates of addiction and rehab; court-ordered treatment programs

It also proved helpful to include codes for the types of users present in an article, which were:

User code	Typical content
Minors/adolescents	Stats on use among kids; prevention programs
New users	Counts of new users—often alarmist urgency discourse
Seriously ill	Effectiveness in treating MS, AIDS, chemotherapy side effects, etc.
Criminals	War on Drugs; drug dealers and/or users being investigated or prosecuted
Tourists	Weed tourism; high-profile marijuana users attracted to recreational legalization

This coding schema allowed me to analyze a fairly high number of articles while



still capturing some measure of nuance regarding their content. The idea behind the "mentions" sampling strategy is to track the salience of a given discursive feature over time, counterbalancing for the focus and source of the article.

## **Results**

First, to address the deviance hypothesis, I looked at mentions of illegality. Mentions in Colorado decrease from Time 1 to Time 2, 10 to 4. Mentions in Oregon, however, rose from 3 to 5. This isn't a dramatic change, but it would seem to contradict the expected trend. On closer inspection, most of these Time 2 articles deal with investigations and raids on medical growers who are violating quantitative limits on how much product they can have at one time; true to the predictions of defining deviance down, it's suppliers being investigated here, not users, and they're generally subject to fines rather than criminal prosecution. There are almost no arrests reported on in either state in Time 2. Likewise, mentions of specific, criminal users and producers fell across the board (though the Oregon numbers were fairly flat, for similar reasons to those above). The illicit market has not necessarily disappeared, and penalties for black market sales continue to exist, but this is simply not where media coverage is focused in the 2010-2015 period. It appears, then, that the deviance of marijuana use was indeed defined down in the period from 2000-2010.

Addressing the responsabilization hypothesis is a more complicated question.

Evidence that responsabilization is occurring in the domain of marijuana risk management would consist of media coverage showing that managing the risks to the bodies of users and/or to society at large is becoming less a matter of law enforcement procedure and more the responsibility of private companies and organizations (probably subject to “government at a distance” by the state). To partially address this question, I compared mentions of public health and/or epidemiological statistics for Time 1 and Time 2. In Colorado, the count stayed mostly flat (6 and 7 mentions, respectively), largely because there was a large number of articles on DEA and other agencies’ reports on rates of use in Time 1. In Oregon, however, the count rose from 0 to 6. This increase is partly due to the somewhat high-profile new issue of drug testing for recreationally legal marijuana, an issue I turn to in depth below. As a result of this finding (and because I have more complete access to media in Oregon), I mainly focus on Oregon for the remainder of my analysis.

### **Case 1: Urinalysis and Employment Protections**

Anthony Scevers, a drill press operator at Emerald Steel in Eugene, Oregon in January 2003, knowing he’d have to pass a urine test to be hired full-time, told his supervisor he was a card-holding medical marijuana user. A week later, he was fired. Scevers filed suit against his former employer, and a years-long legal battle followed. An ensuing Oregon Supreme Court ruling in 2010 determined that there are no

protections from being fired for failing a urine test for marijuana, even for medical users.

The trade group Associated Oregon Industries said in a statement that the news “could not be better” for Oregon employers, and encouraged companies to apply “zero-tolerance” marijuana policies. The media coverage of this issue largely deals with the potentially economically damaging consequences of accommodating medical users and the resulting relief expressed by representatives of private companies. There is some discussion of the potential “confusion” that employees now have to navigate, and many of the commenters on these stories are quite unsatisfied with this verdict and the way it’s covered. One writes:

“Marijuana stays in your system for up to 30 days, while some very harsh drugs are virtually undetectable within days. Rather than drug testing, I think employers should just be smart about who they hire. Through the interview process you can usually tell who will be a responsible employee versus the type who would actually smoke pot at work. *A lot of very respectable citizens like to smoke pot* on occasion versus drinking, why make them worry about drug testing at work?” (Oregonlive.com 2010; Emphasis added)

Another commenter:

“...why should these corporations have more rights than me as an individual?

Soon they will have all of us as slaves, they pay our politicians to bend the rules for their sake and their interests, when will it end and freedom become a reality?” (DCJOregon.com 2012)

The perception here, then, is that corporate interests have coerced judicial and legislative powers into giving them more control over the lives and bodies of their employees. This would suggest something like a recreancy effect (Freudenberg 1993). While agency capture (or something like it) may in fact be at play in some areas of marijuana legislation (see below), I instead contend that the judicial powers here participating in a responsabilization strategy. Garland’s (1996) idea of responsabilization, again, is that “civil society and the private sector” are encouraged to act as stakeholders in social control. In this case, that means assessing and managing the risks posed by marijuana use are transferred from “law and order” criminological strategies to subtler, more economically embedded processes of assessment and censure. Industry is tasking itself not just with punishing those whose drug use affects their performance, but also with controlling the bodies of its employees outside of the workplace. In this view, a marijuana user (even an ill, medically licensed one) is an unacceptably risky kind of employee to have.

## Case 2: The Faces of Cannabis

“From entrepreneurs to scientists to bureaucrats to growers, these are the influencers in Oregon...people who are poised to become household names as marijuana moves out of leaky Ziploc bags and into the mainstream of American life.” — Matthew Korfhage, “Faces of Cannabis”

Marijuana possession was decriminalized in Oregon in 1973. In 1997, a reversal of this law was put on the ballot as an initiative measure, and voters rejected it, keeping possession of small amounts of marijuana decriminalized. The following year, voters allowed the legalization of medical marijuana, again by ballot measure.

In 2012, Measure 80, another initiative ballot measure, was an attempt to legalize recreational marijuana. According to the *Willamette Week*’s feature “Faces of Cannabis,” this less well-financed campaign was helmed by “true believers”—old-guard proponents of marijuana’s many benefits, who used anti-“prohibition” arguments and had somewhat libertarian political convictions. They were unsuccessful. Two years later, following legalization in Washington and Colorado, a more economically-minded campaign did the work the first wave couldn’t. Money from George Soros, among others, and wide-net multimedia campaigning got out these activists’ message—these were young entrepreneurs, most commonly activist/growers already involved in the medical industry. And their arguments for legalization were economic, rather than

appeals to freedom or morality. As one anonymous industry “insider” said of Anthony Johnson, chief petitioner and co-author of Measure 91, and member of the OLCC rules advisory committee: “He's a champion of the industry. He's done a great deal to open up the market for everyone.”

Legalization turned activists into legitimate economic producers and, often, regulators almost overnight. These activists, billing themselves as literal entrepreneurs more than moral entrepreneurs (Becker 1995), are now collaborating with state agencies to control where, when, and how much marijuana is legal.

## **Discussion**

It seems that in this case, defining down the deviance of marijuana use is a longstanding and gradual trend, beginning at latest in the 1970s. The recent, successful campaigns to legalize recreational marijuana are reflective of something additional—in bringing marijuana use in line with neoliberal consumption and production norms, marijuana users themselves become objects of risk assessment. The creation of a legitimate marijuana market brings with new or different forms of controlling the bodies and conduct of users. Though the deviance of using marijuana is certainly receding somewhat, marijuana users as a social category are subject to invasive physiological surveillance and economic sanctions. While the state holds legislative influence over this process, it has at least partially transferred the responsibility for

control of this social category to the private sector.

## **Conclusion**

As I've demonstrated, the legalization of marijuana has been accompanied by a reformulation of marijuana risk as a public risk, especially as posed by users as consumers and employees. This type of risk, always present to a degree, found an apt set of actuaries and managers in the form of the new recreational dispensary system, governed by the state at a distance (Garland 1996). In light of the literature showing that health risks in general are undergoing increasing levels of individualization, the arguments I have put forth regarding social control are what distinguish this risk from other (formerly) public risks. This investigation also underscores the resonance that industry self-governance and agency capture have with responsabilization, especially in an industry whose producers are also activists, constantly negotiating the social acceptance of their product.

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