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First State Is Middle of the Pack on Marijuana Policy

Peter S. Murphy, Delaware Law Weekly

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Editor's note: This is the first in a two-part series.

Delaware touts its status as "first" or "best" in many categories, and rightfully so. Not only was it the first state to ratify the U.S. Constitution, Delaware is the home to a majority of Fortune 500 companies and a renowned judiciary. The Delaware General Corporation Law serves as a model for the rest of the country and Delaware's Court of Chancery is considered the premier business court in the land.

Despite these honors, when it comes to marijuana policy, Delaware is somewhere in the middle of the pack, at risk of falling behind. There have been signs of progress over the last four years, including the passage of the Delaware Medical Marijuana Act in 2011 and introduction of a decriminalization bill in 2014. But, on closer inspection, neither the decriminalization bill nor Delaware's Medical Marijuana Act demonstrate concrete steps toward a workable marijuana policy.

Fortunately, Delaware still has a chance to lead its Mid-Atlantic neighbors on these critical policy issues. Among New York, New Jersey, Pennsylvania and Maryland, only New Jersey has a functioning medical marijuana program. New Jersey's program, however, has been called "a disaster" for various reasons, including exceedingly high prices and the fact that it features only three dispensaries for the entire state. Simply put, for New Jersey patients, black-market marijuana remains cheaper and more readily accessible.

In Pennsylvania, state Sen. Mike Folmer, R-Lebanon, sponsored legislation to legalize medical marijuana that was introduced Jan. 15, 2014, as the "Gov. Raymond Shafer Compassionate Use of Medical Cannabis Act." The bill underwent several amendments and was passed by the Senate in a 43-7 vote Sept. 24, 2014. Folmer intends to reintroduce the bill during the General Assembly session beginning this month. Gov.-elect Tom Wolf, unlike his predecessor, supports prompt legalization of medical marijuana.

As for decriminalization, only Maryland—and recently the city of Philadelphia—have true decriminalization laws, which make possession of small amounts of marijuana a civil fine, rather than a criminal charge. Delaware, so often a "laboratory of democracy" in matters of

business law, has a unique opportunity to shape and advance effective marijuana policy in the region.

decriminalization

On June 18, 2014, the Delaware House Public Safety & Homeland Security Committee voted 6-1 to release HB 371, which would decriminalize the possession of small amounts of marijuana (one ounce or less) in the state.

Few seemed to have noticed, however, that HB 371 is not a true decriminalization bill at all. In its current form, HB 371 makes possession of up to 28 grams of marijuana for personal use legal—that is, no criminal or civil penalty whatsoever. Under the bill, only smoking marijuana in public would result in a civil offense of \$100. A true decriminalization statute reduces the penalty for possession and use of marijuana from criminal violation (and its associated consequences, e.g., fingerprinting, establishing criminal record, etc.) to a civil penalty much like a traffic ticket; it does not legalize anything. The legislature adjourned July 1, 2014, without taking any further action on the bill. A new bill is expected this year.

There is nothing mysterious about "decriminalization." It can be achieved through a simple bill aimed at reducing the penalties for marijuana possession from a crime to a civil penalty. For example, a model bill proposed by the Marijuana Policy Project squarely hits the target: "Notwithstanding any law to the contrary, possession of one ounce or less of marijuana shall only be a civil offense, subjecting an offender who is 18 years of age or older to a civil penalty of \$100 and forfeiture of the marijuana, but not to any other form of criminal or civil punishment or disqualification."

As with any law, the key terms would need to be defined and inconsistent aspects of Delaware's criminal penalties would need to be amended. This legal housekeeping, however, would not require an overhaul of any aspect of the Delaware Criminal Code. And, the real-world effect of decriminalization on Delaware citizens and the state budget would be profound.

According to a 2013 American Civil Liberties Union report, between 2001 and 2010, arrests in Delaware for marijuana possession increased by 102 percent. Delaware placed second (behind Montana) as the state with the greatest percentage increase for that time period. Delaware also placed sixth among states with the highest annual per capita fiscal expenditures for enforcing marijuana possession laws in 2010: \$13.2 million. During that year, arrests for marijuana possession accounted for 47 percent of all arrests for drug offenses in Delaware. Finally, and most importantly, marijuana possession arrests disproportionately impact minorities, particularly African-Americans. In Delaware, African-Americans are three times more likely to be arrested for marijuana possession, according to the report.

There are encouraging signs just north of Delaware's border in the city of Philadelphia, where a marijuana decriminalization ordinance went into effect Oct. 20, 2014. Under the new law, for possession of marijuana an individual receives a notice of violation and a \$25 fine. For public use, the fine is increased to \$100, or nine hours of community service. One month following enactment of the ordinance, marijuana-related arrests in Philadelphia fell by 78 percent—from 320 to 72—when compared to 2013 statistics.

More broadly, decriminalization and legalization of marijuana in the United States is also hurting the international drug trade. As a result of decriminalization and legalization in the United States, marijuana growers in Mexico are seeing a sharp decline in the price of their crop—often more than 50 percent—which is considered to be of poor quality and low potency when compared to marijuana grown in the United States. Farmers in Mexico's Sinaloa state, which until recently produced the country's largest harvests, have stopped planting marijuana altogether due to the drop in wholesale prices.

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