



A road back to the war on drugs? N.J. cannabis law funds controversial police methods

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It was all going to hell on a balmy June afternoon.

Shouting from behind a podium into an animated crowd at Trenton's Statehouse Annex, the Rev. Charles Boyer condemned the war on drugs to eternal damnation.

"To hell with the drug war!" he shouted. Earlier, he had demanded, "Let our people go!" and his audience echoed back with the same fire.

New Jersey Policy Perspective had just released a report detailing how the state had spent an estimated \$1.2 billion per year from 2010-2019 to support the drug war here, where Black residents are 12 times more likely and Hispanics twice as likely to be incarcerated than white residents.

Many gathered in Trenton that day were people of color, activists, those who had been incarcerated or a mix of all three. The war on drugs, officially launched during the Nixon administration but perpetuated on a federal, state and local level over the ensuing decades, instead had been a personal hell for those gathered.

On that day, they wanted to damn it back.

Billions in revenue was generated from the drug war to the detriment of communities of color. At the statehouse, they wanted their voices heard in a legalized cannabis industry that could generate billions in the opposite direction.

After Boyer's impassioned speech, people clasped hands to form a circle of healing. Another area was set aside for those who wanted to share their personal struggles in the form of an oral history — visceral evidence of collateral damage in the government's decade-long, \$11.6 billion failed campaign.

As the rally gained steam, so did the stakes on a court case, *State v. Olenowski*, that was challenging law enforcement methods, and by extension, increased funding for policing cannabis post legalization.

The political dynamics that led to the court battle traces its roots to the election of Gov. Phil Murphy four years ago. Murphy pledged to legalize adult-use cannabis in New Jersey. The state needed the revenues, but it also was a social justice issue – a way to repair a fraction of the damage done to populations targeted by the war on drugs.

Fast forward to last November. After Murphy and Democratic leadership failed to push through legislative approval, New Jersey voters overwhelmingly voted to legalize adult-use cannabis. When it was time to write the corresponding legislation to guide the new industry, lawmakers wanted to heal the harm previously done by using portions of cannabis tax revenue to fund programs to help rebuild communities.

“Let us remember that every element of the legislation drafted to legalize marijuana was considered with the expectation that it would begin to erase the ravages wrought by a decades-long failed war on drugs,” said state Sen. Nick Scutari, D-Union in a 2020 opinion piece on NJ.com.

Scutari, who was recently selected as Senate president, sponsored the legalization bills. He was widely praised for underlining the harm done by the drug war.

“We have seen too many New Jerseyans, mostly from our most impoverished neighborhoods, die in that war, or seen their lives and livelihoods wrecked because of it,” he wrote.

But as with so many things in New Jersey, there was a catch.

After a series of compromises, the law also would direct a portion of cannabis state revenue to local police departments to train more officers to identify impaired drivers — known as Drug Recognition Experts (DREs) — whose methods were being challenged for being scientifically unreliable.

Even as the decades-old methods were being challenged in court, the Legislature committed more funding to the programs anyway, a move seen by many as a way to win the support of law enforcement and additional legislators.

This week, Scutari, who also has a background as a prosecutor, supports the DRE protocol.

While the science behind drug recognition experts is not settled, he said, “We also have an overarching obligation to the motoring public to protect the general population on the roadways — that people are not driving cars in an intoxicated manner.”

Scutari asserted that there was a shortage of DRE officers. After being told in an interview that New Jersey was estimated to have had some of the highest numbers of DRE officers in the nation, according to data from the International Association of Chiefs of Police (IACP), he claimed not to have been aware of that fact.

The funding mechanism in place for law enforcement in New Jersey can expedite increased spending on DRE programs, even though communities affected by the drug war are still waiting for the state to establish infrastructure for social equity programs. And at this point, no one can explain how much funding will be directed to the program because the law funds any municipality or county that wants to train a DRE.

So, in effect, the total spend would be tied to how many apply.

An erasure of the drug war, as Scutari promised, would have to wait.

“That money should go to Newark. It should go to Irvington. It should go to Plainfield. It should go to Camden,” said Kimberly Schultz, who as an attorney at the Office of the Public Defender has had many clients charged for marijuana possession. “It should go to places where police enforcement of marijuana cases has caused blight, that’s where it should go.”

And so as much as the people gathered around the Statehouse in June wanted to be done with the drug war, it appears the drug war is not done with them.

Verdict before a verdict

Schultz was excited earlier this year to bring her case to the state Supreme Court. Hearings were pushed back due to COVID-19, but restarted in September. She would argue the protocols police use to identify drug impairment weren’t based on valid science.

“The court hasn’t said that it’s reliable, but you have another branch of government saying that it is,” Schultz said, explaining how the legislature allocated DRE money before the Supreme Court had its say.

The state Attorney General’s Office, according to a spokeswoman, places high value on the program.

“New Jersey has long taken a proactive approach to impaired driving, which historically accounts for about a quarter of all of our traffic fatalities,” said Lisa Coryell of the AGO. “We have embraced the DRE program as an effective tool in addressing drug-related impaired driving.”

While Scutari supports DREs, he indicated a willingness to amend the law down the road if they are found unreliable in the court of law.

“Of course, if the court comes back and says they (the DRE techniques) are no good anymore, why would we fund them?” he said.

Requiring police to use legitimate science to prosecute offenders and keeping the roads safe can happen simultaneously, said Alex Shalom, ACLU-NJ’s director of Supreme Court Advocacy.

As for the current state of funding, cannabis legalization in many ways is a rebuke to the way that the plant has been policed, Shalom said.

For that reason, Shalom argued, regardless of the scientific merit, adding more resources to policing cannabis remains antithetical to the nature of the legislation.

“It misses one of the prime rationales for the legalization of cannabis in New Jersey, which is, this has been an overpoliced part of our society and the policing has been targeted at Black and brown communities,” he said. “To think what we need to do is spend more money on policing marijuana is really baffling to me.”

Failing the test sober

Nick Morrow wants all the smoke.

A former drug recognition expert police officer and instructor for the Los Angeles County Sheriff's Department, Morrow, who retired in 1995, is angering former colleagues and helping public defenders poke holes in DRE testimony.

The DRE program originated in the Los Angeles area and Morrow served there in the 1980s, when the program was still in its infancy and branching out.

“The old-timers, especially the guys that have worked with me, they know that I’m ethical and I don’t mess around,” said Morrow, who carries a briefcase with a sticker that says, “True patriots question authority.”

When he shows up to serve as an expert witness, younger officers are less courteous, even more so when they see him in a hallway or parking lot, Morrow said.

“They’ll look me in the eye and they’ll think they’re being badasses, [saying] ‘You’re a traitor and a turncoat’... “These days, if I run into that young officer, my reply is, ‘If you didn’t suck, I wouldn’t be here.’”

The topic of impaired driving has not snuck up on New Jersey officials.

Coryell said the Attorney General’s office has been tracking concerns on impaired driving for years and the office had “anticipated challenges and was preparing to meet them.” She added that the office, over the past three years, has “made significant progress on that front.”

Typically, DRE officers start with a breath test for alcohol. If a subject falls under suspicion for drug impairment, the officer uses the protocol since there is currently no breathalyzer that can measure impairment from cannabis or other drugs. The DREs do a series of tests measuring balance, pupils, vital signs, injection sites and conduct questioning.

The program has expanded across America and overseas since its inception in the 70s — which is also why many in the law enforcement community don’t speak out against it, Morrow said.

“I drank the Kool-aid early on,” Morrow said of his time as a DRE.

In the wake of retirement, however, Morrow came to a much more critical conclusion about the program and what it’s manual taught about drug recognition.

“When you only read one manual, you kind of believe it’s 100% and it’s carved in stone, but when you read the manual and then you read all the criticisms of the particular manual and that particular science you start developing your own opinion,” he said.

That caused Morrow to start working for public defenders.

“I couldn’t as a DRE, on the stand for the prosecution, say ‘These tests aren’t that great,’” he said.

Morrow recounted how some police officers would fail the impairment test in perfectly lit conditions in classrooms.

“I’m an instructor. I know these procedures in and out, (but) I can’t do the test myself,” he said. “Prosecutors don’t like to hear that ... that’s the God awful truth.”

Morrow’s point begs the question: If police officers, whose jobs require physical fitness, attention to detail and exacting training standards, can fail the test sober, what does that mean for the average citizen who was just pulled over?

The irony isn’t lost upon Morrow.

“Cops fail the field sobriety tests in training, but they’re under no stress,” he said. “They’re not going to jail, they’re not going to lose their job, they’re not going to lose their car.”

Morrow said the procedure also lacks a reliable apparatus to know what someone’s baseline performance would have been on the test beforehand.

“Nobody was asked to stand on one foot to get their driver’s license, you’ve got to stand on one foot to keep your driver’s license if an officer thinks you’re under the influence,” he said.

The symptomatology that police officers use to determine impairment is often selective, to which Morrow gives a strong rebuke.

“It’s all horseshit! It’s either there or it’s not. It’s either a part of the symptomatology or not,” he said. “You can’t just pick and choose what things show up.”

Coin toss

Based out of Colorado, where adult-use cannabis was legalized in 2012, Dr. Greg Kane is not in the mood for magic tricks.

“All the hocus pocus about standing on one foot and for eyelid tremors, doesn’t matter,” he said, referring to the protocol used to identify impaired drivers.

Kane, however, does take science seriously.

A medical malpractice specialist with a college background in mathematics, Kane has published a [website](#) on how the science police officers use to identify impairment from cannabis is wrong.

He did so by analyzing the validation studies the police relied upon in order to assert their tests were valid, many of which claimed accuracy within the 90% range. Kane found the data lacking in basic methodological principles such as control groups and balanced sampling.

Additionally, Morrow described the studies the police used to come up with their accuracy rate as biased in that at least one study took already arrested people in for drug evaluation when they were visibly drunk, some of whom were near twice the legal limit in alcohol intoxication.

Put another way, police stacked the deck.

“Of course, the officer is going to guess correctly and of course there might be a few of these people that test positive for drugs in the middle of that whole thing ... a lot of the validation studies they count on got a lot of problems,” Morrow said.

For Kane, 1971 to 1984 is the “No Science” era, 1984 to 2000 is the “Ready, Fire, Aim” era and we’re now in what he calls “The bureaucrats make it up” era.

Kane stressed that he is an avid supporter of law enforcement and his DRE crusade is simply against the science not being done correctly, not the officers trying to interpret and enforce it.

“They are braver than I am,” Kane said of the police. “I just think they’re wrong.”

NJ.com sent the National Highway Traffic Safety Administration a copy of Kane’s findings, asking about the scientific accuracy of its control groups and whether it had engaged with studies that contradict its findings.

The agency didn’t address Kane specifically or the question about contradicting findings, but emailed a response stating support for its studies.

“We stand behind these studies as important contributors to the science behind the DRE program and similar efforts,” said a NHTSA spokesperson in an email.

Kane maintains a different assessment.

“We don’t have to guess whether it works. We can look at their science and their science says it’s no better than a coin toss,” he said.

Traffic crashes

There’s no ban against bungee jumping or downhill skiing on double black diamond slopes.

Harvard economist Jeffrey Miron considers those activities to be acts of insanity, but not necessarily ones that should be banned.

Smoking cannabis, Miron said, tends to involve even less risk.

Miron did a study for The Cato Institute, a libertarian think-tank, on measuring the disadvantages and benefits of cannabis legalization.

In one section of the paper, Miron covered road safety and the assumption it would increase traffic crashes.

“It’s possible that if you search across enough cities or states you’ll find some city or state where the traffic fatality rates were higher after legalization than before, but you’ll find a lot where it was lower and a lot where there was no meaningful change,” Miron said.

The addition of DREs is often cited as a deterrent against impaired driving by law enforcement. The argument that cannabis legalization will affect safety on the roads is often cited as a foundational reason for wanting an increase in DREs.

John Zebrowski, currently listed as president for the New Jersey State Association of Chiefs of Police, who was embroiled in a July lawsuit accusing him of using a racial slur, made the argument in an NJ.com op-ed.

Zebrowski pointed to a study that claimed traffic deaths related to cannabis doubled in Washington state.

The study has been used so often that advocacy organizations like the Marijuana Policy Project dedicated an entire page to the topic and said that the increase “is likely a result of the additional testing rather than an actual increase in THC-positive drivers on the road.”

Zebrowski and the NJSACOP did not return requests for comment in this story and the New Jersey Association of Drug Recognition Experts declined to comment until the case was resolved in court.

Those that make the assertion that cannabis alone could contribute to higher traffic fatalities are not supported by available data that pulls from multiple states, Miron said.

“I think their factual claim is certainly highly misleading because it’s based on a very narrow sample or probably just not even true at all,” he said.

The state, meanwhile, continues to move forward.

The New Jersey Office of Attorney General confirmed it has training in place for the state police and 11 counties. The office plans to expand to a total of 14 over the course of several months.

According to 2018 data from the International Association of Chiefs of Police (IACP), at 463, New Jersey was already the second highest in the nation when it came to DRE officers, only behind California where the program first got started. By the end of 2021 that number is slated to be up to 550 with an additional 2,900 officers partially trained in some aspect of the DRE protocol.

The office said the DRE program costs roughly \$7,800 per class of 30 officers. The office is currently dependent on federal funds. Moving forward, the state’s cannabis legislation will allow counties and municipalities to be reimbursed from a portion of new state cannabis revenue.

Miron described the subjective nature of the DRE program as “ripe for abuse.”

“If we think probabilistically people who are impaired are likely to cause accidents and you would somehow want to create a disincentive for that by having there be a penalty for simply being impaired — That has to be subject to the difficulties of doing it in a way that respects people’s civil liberties that can’t be used in a racially biased way,” Miron said.

New blood

In September, patting people on the back with a broad smile, Brendon Robinson welcomed attendees who wanted to clear their records at an expungement clinic nestled in the lobby of the DoubleTree Hilton next to a bustling Newark Penn Station.

The next room over was the waiting area with tables partially shielded from view as lawyers sat with those in attendance.

Similar to the setting of a voting booth or COVID-era drive through confessional, there was a certain amount of intimacy to the setting. Many came in with folders, their hands clutched tight.

Robinson, along with his business partner Stanley Okoro, runs 420NJEvents — an organization doing cannabis education for those who want to get into a market that previously had been criminalized.

“It’s disgraceful,” Robinson said of the regulations allocating money to DREs. “The fact that people like me and my brother Stan are advocating for folks who have been directly impacted by the war on drugs and paying for this on their own dime and there’s state funding being done to lock more people up again for the same drug is redundant.”

Robinson’s father had been imprisoned for 10 years for the plant. Robinson himself, scarred by the ordeal, was a late bloomer who said he had smoked cannabis when he was in his early 20s.

“I had a love-hate relationship with the drug ... at the same time, it ruined my family,” he said.

The clinic took place in New Jersey’s largest city, which is also the home to one of the state’s largest concentrations of Black and Hispanic residents.

The police in Newark, folded into a newly branded Department of Public Safety, were put under a consent decree that identified patterns and practices of unconstitutional policing that had formed the backbone of New Jersey’s war on drugs.

Robinson’s expungement clinic and many others like it across the state would be eligible down the road for some of the cannabis law’s social impact initiatives. But for now, with a lack of infrastructure and the market opening up, Robinson took it upon himself to find funds elsewhere.

The legalized cannabis market has the ability to help — or harm — communities depending on how that infrastructure is set up, Robinson said.

“It starts with the government understanding that if we’re going to do this, we do it the right way,” he said.