

Persistent Inequities in Cannabis Policy

By Katharine Neill Harris and William Martin



Marijuana is one of the most-used psychoactive substances in the United States, second only to alcohol in popularity. An estimated 45 percent of the adult population have now tried it in their lifetime.¹ Public support for legalization has surged. A September 2019 Pew Research poll found that 91 percent of adults approve of legalizing cannabis for medical use, and 59 percent of this group say it should be legal for general adult use as well.²

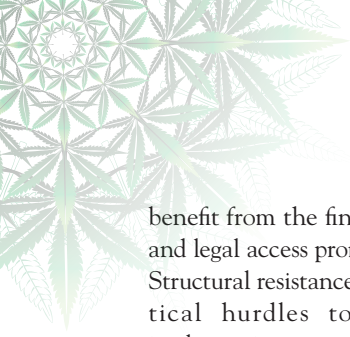
Marijuana policy is slowly but steadily catching up to American preferences. Since 1996, 35 states have loosened cannabis laws. The majority of the U.S. population lives in a state with legalized medical access and a growing plurality live in a state where it is legal for adult use.³ In November 2020, cannabis legalization measures were approved in all states that had them, including Mississippi (for medical purposes); Arizona, New Jersey, and Montana (for general adult use); and South Dakota (for both).

Despite being widely available and highly tolerated, if not enthusiastically endorsed, marijuana remains an integral feature of the larger War on Drugs. More people are arrested for cannabis possession than any other offense in the United States. There were over 1.6 million drug arrests in 2018; 43 percent were marijuana related.⁴ Ninety-two percent of these marijuana arrests were for possession.⁵

Marijuana law enforcement has always disproportionately impacted people of color, a pattern that continues despite reform. Minorities are also less likely to



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benefit from the financial opportunities and legal access promised by legalization. Structural resistance to change and logistical hurdles to developing and implementing new regulatory structures are part of the problem. But at a basic level, these inequities persist because of the failure to center reform around racial justice.

A supposed benefit of policy change, racial justice has too often been eclipsed by arguments touting the economic and personal liberty gains of legalization. Until recently, the expectation that legalization will improve racial equity has been treated as a foregone conclusion, one requiring no additional action beyond legalization itself. We now know, and should have always known, that this is not the case.

War on Marijuana: A Brief History

Until roughly 100 years ago, prohibition of mind-altering substances in the United States was a haphazard endeavor. A few states had laws against cannabis, cocaine, and opium use, motivated by xenophobia, racism, and fear that drugs would trigger the moral demise of white people.⁶ The federal government's role in cannabis prohibition began in the 1930s with Harry Anslinger and the Federal Bureau of Narcotics (FBN). Anslinger, who led the FBN for 32 years, saw in cannabis an opportunity to expand his agency's power, which until that point was largely limited to enforcing restrictions on opium prescribing.⁷ He launched a campaign vilifying marijuana, his preferred term due to its Mexican roots, claiming that it spawned criminal activity and sexual proclivity among all who used it, but especially among Blacks and Hispanics—a crusade we know today as “Reefer Madness.”⁸

The campaign was so successful that all 48 states adopted anti-cannabis laws by 1936; and in 1937, the United States passed the Marihuana Tax Act.⁹ The new law required people to register with the federal government and pay a tax on cannabis sales. More significantly, it enabled the FBN to strengthen its enforcement powers, and it solidified the framing of cannabis use as a criminal act.¹⁰ In the 1950s, national and state-level laws enhanced penalties for marijuana possession and sale,

and while increasingly punitive, drug policy was still largely piecemeal. The 1970 Controlled Substances Act streamlined drug policies by creating a classification system based on abuse potential and medical benefits.¹¹ Marijuana, deemed to have no medical value and high potential for abuse, was placed in Schedule I, where it remains today despite a wealth of evidence showing the errors of this categorization.¹²

The linchpin of public support for marijuana prohibition—its association with minorities and “deviant” populations—began to weaken in the 1960s as more middle-class white youth used cannabis and the civil rights movement demanded equality for the disenfranchised. These changes, however, coupled with the country's fracturing over the Vietnam War, sparked anger and fear among white Christian conservatives.¹³ Richard Nixon, first in his presidential campaign and then during his tenure in the White House, exploited and perpetuated white resentment over integration and civil rights by constructing drugs and crime as problems of the urban poor and minorities.¹⁴ In 1971, he declared the “War on Drugs.” In a recent interview, John Ehrlichman, a former domestic policy chief for Nixon, stated, “We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.”¹⁵

Reflecting the changing attitudes on cannabis use, 11 states reduced penalties for cannabis possession between 1973 and 1978.¹⁶ But the ensuing intensification of the drug war halted further reforms, and state cannabis laws remained relatively stagnant until 1996, when California legalized cannabis for medical use.

Continuing Inequities in Cannabis Policy

The recent shift toward legalization, while beneficial in many respects, has not been enough to undo the racism endemic to cannabis policy. This is apparent in the persistent disparities in enforcement of remaining marijuana laws and in access to the marijuana industry and its profits.

Racial Disparities in Enforcement

Cannabis use rates are roughly equivalent across racial groups, yet Black people on average are 3.64 times more likely to be arrested for possession, a disparity that has remained constant since 2010 despite several states' loosening restrictions since then.¹⁷ Troublingly, disparities increased in 31 states between 2010 and 2018.¹⁸

States that have legalized marijuana sales or decriminalized marijuana possession have lower rates of racial disparities in arrests compared to those that maintain prohibition. But in several states that legalized or decriminalized possession between 2010 and 2018, arrest *disparities* have increased, even as arrest *rates* have declined, demonstrating that these reforms alone are not enough to remedy systemic inequities.¹⁹

In some places, both arrests and disparities have trended up post-legalization. In L.A. County, marijuana arrests increased between 2017, a year before legalization, and 2019, a year after legalization. During that period, the proportion of people arrested who were Black increased from 29 percent to 42 percent.²⁰ Most of these arrests were related to transporting or selling marijuana, but, as others have pointed out, these charges are typically based on officer assumptions, not direct viewing of selling activity.²¹ In Los Angeles, the vast majority of legal marijuana dispensaries are in white neighborhoods, so state-sanctioned marijuana purchases are less physically accessible to minority communities.²²

Data from other cities suggest that minorities are more likely to get arrested for minor marijuana-related law violations. In Washington, D.C., for example, where ending racial disparities was a central tenet of the successful 2014 campaign to legalize marijuana possession, 84 percent of people arrested for public consumption since the change took effect have been Black (45 percent of the city's population is Black).²³

When states legalize medicinal cannabis use without taking additional measures, arrest disparities are also likely to continue, if not increase. Arizona, Arkansas, Florida, Georgia, Louisiana, Montana, New Jersey, Oklahoma, Pennsylvania, Utah, and West Virginia currently allow medical use but

prohibit simple possession (Montana and Arizona had legalization initiatives on the November ballot and passed).²⁴ Many people who use marijuana illegally do so for medical conditions. Residents of medical cannabis states can obtain a license fairly easily—if they have health care access. Minorities and people who are poor are less likely to have this access and are also less likely to live near licensed dispensaries. These factors increase the likelihood that marginalized communities will continue to use marijuana illicitly—even if they have legitimate medical reasons to use and live in a state with medical access—and thus be more vulnerable to law enforcement intervention.

Marijuana arrest disparities are likely greater than available figures suggest. The Federal Bureau of Investigation's Uniform Crime Report, the go-to source for aggregated arrest data, does not specify Latinx ethnicity, typically coding individuals who identify as Latinx as white. This neglects to account for disparate treatment of this group and underestimates the Black-white disparities by inflating the number of white marijuana arrests.²⁵

Conviction for a drug offense can have serious consequences. A student can be tossed out of school or lose a college loan or scholarship. A parent can lose custody of a child or be barred from subsidized housing. A criminal record of any magnitude can make it extremely difficult to land a job. Even when a conviction has been expunged, it does not completely go away, and many employers can likely see it without much effort. And even without a conviction, a marijuana arrest creates a publicly available criminal record and can shape future interactions with the police.²⁶ It would be naive not to think this would be a greater disadvantage to Blacks than to whites.²⁷

Racial Disparities in the Cannabis Industry

Unfortunately, the racial disparity evident in the treatment of people who use marijuana illegally finds its counterpart in the burgeoning commercial industry that has developed in states that have legalized medical and/or adult use of cannabis.

In 2009, when Wanda James opened

Simply Pure in Denver, becoming the first Black person legally licensed to own a cannabis dispensary, she hoped other Black entrepreneurs would follow her lead. Perhaps instead of serving as an entrapping agent that funnels Black men and women into jails and prisons, marijuana would provide honest employment in neighborhoods lacking opportunity and inject sorely needed money back into communities of color. But when PBS reporter Yamiche Alcindor asked for her view of the cannabis industry in June 2020, her response was blunt: "White men. White men. White men. White men."²⁸

James's perspective was understandable. A Denver Cannabis Business and Employment Opportunity Study published that same month reported that almost 75 percent of the owners of licensed cannabis businesses in Denver city and county were white, as were 68 percent of the employees of such businesses. "Blacks or African Americans" accounted for less than 6 percent in both those categories.²⁹ Denver, however, is far from anomalous. A 2017 survey of 389 cannabis businesses in the 33 states and D.C. where medicinal or adult-use marijuana is legal, found that 81 percent of people who have "launched a cannabis business and/or have an ownership stake in a marijuana company" are whites, 5.7 percent are Hispanic/Latinos, and only 4.3 percent are Blacks/African Americans.³⁰

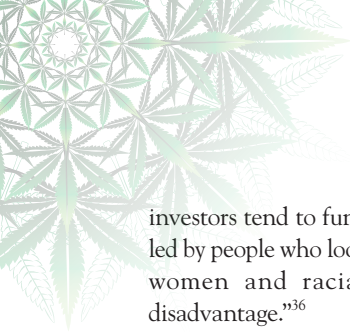
These low levels of involvement cannot be explained as a failure of Blacks and other minorities to see the mind-blowing potential of the new industry. They saw it, they see it, they want to be part of it, but formidable obstacles, many already in place for generations, make attaining it a daunting, often-disillusioning challenge. In the early push to legalize medicinal and adult-use cannabis, it appears that no serious effort was made to facilitate involvement of minorities. Diversity and equitable distribution of the expected benefits simply weren't on the agenda. Ashley Kilroy, director of Denver's Office of Marijuana Policy, said, "People didn't know what they didn't know at the time. I think [they] were just trying to get this passed and . . . up and running."³¹

Lack of access to capital and systemic economic racism dramatically winnow out the wannabes from the weed field. At less than \$10,000 each, cultivation and dispensary licenses in Colorado are quite reasonable, but so many have been issued that new applications are distributed by lottery and the competition from long-established growers and dealers is stiff.

In many other states, these licenses are much more expensive. Illinois charges \$25,000 just to apply for the cultivation fee; those who are successful pay an annual fee of \$100,000. The range is wide and can depend on the cultivation area. Some states require evidence of deep pockets before even considering an application. Just to apply for a \$100,000 annual cultivation fee in Arkansas, applicants must have a \$1 million bond or assets worth \$1 million and be able to show \$500,000 in cash liquidity to indicate the ability to be a viable company in an increasingly competitive industry.³² Not surprisingly, similar challenges face those seeking to operate retail cannabis dispensaries.³³

Such regulations can discourage aspirants with the knowledge and ability to grow and sell cannabis successfully but without that much cash in hand.³⁴ Aaron McCrary, co-owner of one of the two Black-owned cultivation facilities in Nevada, explained the dilemma to the *Marijuana Business Daily*. "When regulators require \$250,000 of liquid assets to score points on an application for new licenses, those applicants with generational wealth have a distinct leg up," he said. "The ability to access large sums of legitimate capital," he said, "is the No. 1 impediment to success of all small businesses."³⁵

According to *Marijuana Business Daily*, "The vast majority of U.S. marijuana companies are privately owned and self-funded by the founders." Friends and family can chip in to help, "but only a small percentage of cannabis companies . . . will manage to secure funding from private equity/venture capital firms or angel investors. . . . Furthermore, investors able to provide the amount of funding that cannabis businesses need to get off the ground are, generally speaking, white males. Whether consciously or unconsciously, white male



investors tend to fund businesses run and led by people who look like them—putting women and racial minorities at a disadvantage.”³⁶

Policies to Improve Equity

Most early iterations of marijuana reform did not incorporate equity provisions. That is starting to change, albeit more slowly than justice advocates would like. Federal leadership, conspicuously absent so far, could provide a blueprint for slow-moving states to adopt equitable reforms. The Marijuana Opportunity Reinvestment and Expungement Act of 2019 (MORE Act) provides such an opportunity.

The MORE Act would decriminalize marijuana by removing it from the list of federally controlled substances and abolishing criminal penalties for possession, distribution, and manufacturing.³⁷ Several other provisions address racial disparities and other damages caused by the drug war, including establishing a federal expungement process for marijuana convictions, prohibiting denial of federal benefits or immigration protections on the basis of marijuana-related convictions, creating a trust fund to support services in communities impacted by the drug war, and requiring the Bureau of Labor Statistics to collect and publish demographic data on those who work in the marijuana industry.³⁸ Federal decriminalization would also help diversify the cannabis industry by giving banks the green light to approve loans for cannabis-related businesses, granting potential access to capital among less wealthy cannabis entrepreneurs.

The House of Representatives is expected to vote on the MORE Act later in 2020.³⁹ Even if it is signed into law, an outcome far from certain, the degree to which cannabis policies promote equity effectively will also depend on individual states. Some states have incorporated equity measures, but these efforts vary considerably. A few early legalizers that ignored equity factors initially have since made tweaks to address these concerns. California legalized adult use in 2016 and instituted automatic expungement for past convictions in 2018.⁴⁰ In 2020, eight years after it legalized adult use, Washington

State implemented a program to grant marijuana retail licenses to individuals impacted by the drug war.⁴¹

Other states are attempting to tackle racial disparities in conjunction with legalization. Illinois’s racial disparities in marijuana arrests increased by over 100 percent between 2010 and 2018, even though it decriminalized possession in 2016.⁴² But the Illinois Cannabis Regulation and Tax Act, signed into law in 2019, includes measures for automatic expungement of prior marijuana convictions (an estimated 740,000 cases are eligible); assistance in obtaining licensing, funding, and training for marijuana business ownership for people impacted by prohibition; and distribution of 25 percent of tax revenue to a community investment program.⁴³ It is too soon to tell whether the program, implemented in January 2020, is having the intended effect, but it is a promising effort.

Still, equity concerns are too often not a central focus of reform initiatives. The legalization measures in Mississippi, Montana, and South Dakota do not address industry equity, and while Arizona and Montana allow residents to apply for expungement of past marijuana convictions, this is a limited offering that burdens individuals with initiating the process.⁴⁴

Even when policymakers try to address racial disparities, effort does not guarantee success. Sometimes bill language is too vague, as in Maryland’s case, where lawmakers directed the Medical Cannabis Commission to “actively seek to achieve racial, ethnic, and geographic diversity.” None of the first 15 licenses issued in the state went to Black applicants. Joe Gaskin, a spokesperson for the African American Cannabis Association, said, “unfortunately, when minority inclusion has been written into legislation, there is a struggle to gain support and passage into law.”⁴⁵ The state’s medical cannabis program was sued for failing to promote industry diversity, and Maryland has since passed legislation more explicitly requiring consideration of applicants’ race, but the program continues to encounter regulatory and legal problems.⁴⁶

Specific language is necessary to achieving desired equity outcomes but is not

always sufficient. Massachusetts’s licensing program includes provisions to assist minority applicants or those who meet criteria such as having a past drug conviction or living in a neighborhood disproportionately impacted by the drug war, but these efforts are hampered by local control over the process that advantages big-money players.⁴⁷ When Ohio legalized medical cannabis, the law required that 15 percent of dispensary licenses be reserved for racial minorities.⁴⁸ This provision seemed effective; by 2018, 16 percent of state-awarded licenses had gone to minorities, but this “racial quota” system was later found unconstitutional.⁴⁹

Conclusion

Cannabis legalization alone cannot erase the racist legacy of prohibition. Many additional measures are needed to dismantle this system. Expungements for past convictions should be automatic. Penalties for remaining law violations in legal states, such as underage or public use, should be drastically reduced or eliminated and should not include collateral consequences like state supervision. Medical legalization measures should decriminalize simple possession.

Newly created medical and adult-use programs must incorporate social equity measures from the outset. In addition to giving priority licenses to social equity applicants, states should provide assistance with the licensing process, lower the financial barrier to entry, and fund programs that offer mentorship and training in the industry.⁵⁰ States and localities should commit to investing a sizable portion of industry tax revenue in communities impacted by the drug war. Localities should seek residents’ input regarding how these funds are spent. Data collection, transparency in the licensing process, and fiscal accountability are critical to ensuring these measures are effective.

States and localities should be doing all they can to implement cannabis reform in an equitable manner, but, ultimately, we need national leadership. The federal government started the war on marijuana, and it must be the one to end it. It is the only entity that can remove cannabis from the

list of Schedule I controlled substances, allow more scientific research, and give banks legal cover to provide cannabis-related business loans. When the federal government eventually enacts marijuana reform, we hope it will do so with social justice and racial equity as primary goals and that this victory will mark the beginning of an end to the War on Drugs. ■

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