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# Legalization Is Not Enough

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Summaries, Introduction and Policy Recommendations  
from The New ACLU Report

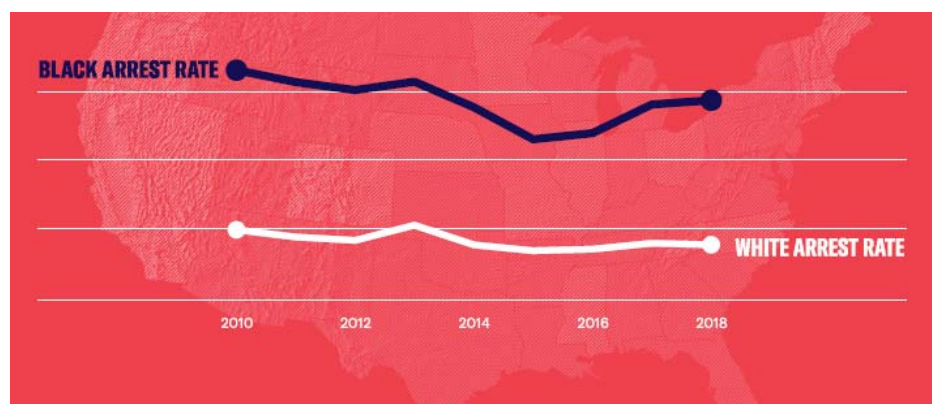
*A Tale of Two Countries:  
Racially Targeted Arrests  
in the Era of Marijuana Reform*

Released on April 20, 2020 – full report at:

[https://www.aclu.org/sites/default/files/field\\_document/042020-marijuanareport.pdf](https://www.aclu.org/sites/default/files/field_document/042020-marijuanareport.pdf)

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# Executive Summary

In 2013, the ACLU published an unprecedented national report on marijuana possession arrests, *The War on Marijuana in Black and White*,<sup>1</sup> analyzing data from all 50 states (and the District of Columbia) between 2001 and 2010. Over that time period, law enforcement made millions of marijuana arrests, the vast majority of which were for possession, and Black people<sup>2</sup> were much more likely to be arrested than white people for marijuana possession despite comparable usage rates. This report updates our previous findings through an analysis of marijuana possession arrests and attendant racial disparities from 2010 to 2018, and provides specific analysis on states that have approved legalization and decriminalization laws. The report relies on the Federal Bureau of Investigation's Uniform Crime Reporting Program (UCR), supplementary data from jurisdictions not included in UCR, and the United States Census' annual county population estimates to document arrest rates per 100,000 for marijuana possession, by race, at the state and county level.<sup>3</sup>

## **FINDING #1**

The War on Marijuana Rages on: Marijuana Arrests Still Widespread Across the U.S.

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## **FINDING #2**

Extreme Racial Disparities in Marijuana Possession Arrests Persist Throughout the Country, and Have Not Improved Since 2010

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## **FINDING #3**

Marijuana Arrests Decreased after Legalization or Decriminalization

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## **FINDING #4**

Racial Disparities in Arrests Persist Even in States That Legalized or Decriminalized Marijuana

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## **FINDING #5**

Data Collection Failures Block a Fuller Understanding of Racial Disparities in Marijuana Arrests

Disturbingly, too much has remained unchanged in the past decade despite several states having reformed marijuana policy. While marijuana arrests were down by 18% overall since 2010, law enforcement still made more than 6.1 million such arrests over the past eight years. In 2018, there were almost 700,000 marijuana arrests, which accounted for more than 43% of all drug arrests. In fact, in 2018, police made more marijuana arrests than for all violent crimes combined, according to the FBI. Further, it is not clear that marijuana arrests are trending down—they have actually risen in the past few years, with almost 100,000 more arrests in 2018 than 2015. This rise in marijuana arrests has been driven by states in which marijuana is still illegal, whereas between 2010 and 2018, marijuana arrests were significantly lower in states that had

legalized and went down modestly in states that had decriminalized. Consistent with our previous report, the majority of marijuana arrests — nine out of every 10 — were for possession.

Equally as troubling, this report finds that stark racial disparities in marijuana possession arrests have remained unchanged nationwide. On average, a Black person is 3.64 times more likely to be arrested for marijuana possession than a white person, even though Black and white people use marijuana at similar rates. Just as before, such racial disparities in marijuana possession arrests exist across the country, in every state, in counties large and small, urban and rural, wealthy and poor, and with large and small Black populations. Indeed, in every state and in over 95% of counties with more than

## Recommendations at a Glance

### For Federal, State, and Local Governments

- Legalize marijuana use and possession
- Do not replace marijuana prohibition with a system of fines, fees, and arrests
- Grant clemency to or resentence anyone incarcerated on a marijuana conviction and expunge all marijuana convictions
- Eliminate collateral consequences that result from marijuana arrests or convictions
- Ensure new legal markets benefit and are accessible to communities most harmed by the War on Drugs
- Ensure marijuana possession and other low-level offense arrests are not included in performance measures for federal funding

### For Law Enforcement Agencies

- End the enforcement of marijuana possession and distribution
- End racial profiling by police
- Eliminate consent searches
- End the practice of using raw numbers of stops, citations, summons, and arrests as a metric to measure productivity and efficacy
- Develop systems for the routine collection of accurate data on a range of police practices
- Invest in nonpunitive programs and community-based services and divest from law enforcement
- Develop, secure, and implement strong, independent, and effective oversight mechanisms for local law enforcement

30,000 people in which at least 1% of the residents are Black, Black people are arrested at higher rates than white people for marijuana possession. Although, on average, states that legalized marijuana through taxation and regulation had lower rates of racial disparities in marijuana possession arrests (1.7x) than states where marijuana has not been legalized (3.2x), a distressing pattern continues — racial disparities persist in every state that has rolled back marijuana prohibition — and in some cases, disparities have worsened.<sup>4</sup>

This report should be the final nail in the coffin for the inane War on Marijuana, and sound yet another abolition knell for this country's 45-year drug prohibition charade. The question no longer is whether the U.S. should legalize marijuana — it should — or whether marijuana legalization is about racial equity — it is. It is also no longer about whether all levels of government should redirect resources away from prosecution of marijuana and toward public health investments and community collaborations — they should. Rather, the question is: When states legalize, how can they do so through a racial justice lens to address the panoply of harms that have been selectively aimed at Black and Latinx communities for decades? These harms include not only arrests, incarceration, and lifelong criminal convictions, but also the loss of jobs, housing, financial aid eligibility, child custody, and

immigration status. This report provides a detailed road map for ending the War on Marijuana and ensuring legalization efforts center racial justice as they address the widespread collateral damage.

The ACLU reaffirms its recommendation that federal and state governments legalize marijuana for persons 21 or older through a system of taxation, licensing, and regulation, and urges that legalization repair the harms that prohibition has wreaked on communities of color.

In every state,  
**Black people**  
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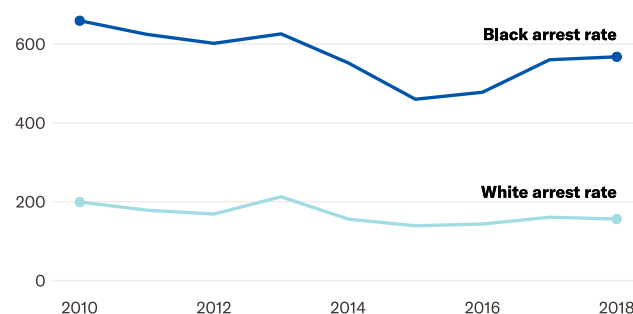
# Key Findings

## FINDING #1

### The War on Marijuana Rages on: Marijuana Arrests Still Widespread Across the U.S.

- Although marijuana arrests have decreased by 18% since 2010, that trend slowed to a halt in the middle of the decade. There were more marijuana arrests in 2018 than in 2015, despite the fact that eight states legalized marijuana for recreational use or decriminalized marijuana possession in that timeframe.
- In general, states that have legalized or decriminalized marijuana possession have seen a decline in marijuana possession arrests, but in many other states, arrest rates have increased or remain unchanged.
- Marijuana arrests made up 43% of all drug arrests in 2018, more than any other drug category. While that percentage has dropped from just over 50% in 2010, this is due in part to a steady increase in arrests in other drug categories.
- The overwhelming majority of marijuana arrests – 89.6% – are for possession only.

## Rates of Black and White Marijuana Possession Arrests per 100k People



Source: FBI/Uniform Crime Reporting Program Data  
Note: Florida and Washington, D.C. did not provide data.

## FINDING #2

### Extreme Racial Disparities in Marijuana Possession Arrests Persist Throughout the Country and Have Not Improved Since 2010.

- Black people are 3.64 times more likely than white people to be arrested for marijuana possession, notwithstanding comparable usage rates. The increasing number of states legalizing or decriminalizing marijuana has not reduced national trends in racial disparities, which remain unchanged since 2010.
- While national arrest rates for marijuana possession were lower in 2018 than in 2010 for both Black and white individuals, racial disparities in those arrests have not improved, and in some jurisdictions, they have worsened.

- In every single state, Black people were more likely to be arrested for marijuana possession, and in some states, Black people were up to six, eight, or almost 10 times more likely to be arrested. In 31 states, racial disparities were actually larger in 2018 than they were in 2010.
- Montana, Kentucky, Illinois, West Virginia, and Iowa were the states with the highest racial disparities in marijuana possession arrest rates (9.62, 9.36, 7.51, 7.31, and 7.26 respectively).
- In legalized states, arrests for marijuana sales also decreased greatly from 2010 to 2018 (81.3%). Sales arrest rates also dropped in decriminalized states, although to a lesser degree (33.6%).

### FINDING #3

#### Marijuana Arrests Decreased After Legalization or Decriminalization, But There Was Significant Variability Across States That Only Decriminalized.

- Arrests for marijuana possession decreased over time (from 2010–2018) in all states that legalized recreational marijuana possession. In some states, these decreases clearly began after legalization (Colorado, Maine, Nevada). In other legalized states, decreases continued on a downward trend that had begun pre-legalization (Alaska, Oregon, Washington). In two states (California, Massachusetts), though there was a decline in arrests from 2010–2018, there was little change after legalization. In these states, the decrease in arrests occurred prior to legalization and remained low, perhaps due to earlier decriminalization.
- Overall, arrests for marijuana possession also fell slightly between 2010–2018 in states that had decriminalized but not legalized recreational marijuana. However, there is significant variability across states – and in one state (Missouri), arrest rates actually increased after decriminalization. Marijuana possession arrest rates were approximately eight times higher in decriminalized states than in legalized states, although lower than in states where marijuana possession remained illegal.

### FINDING #4

#### Racial Disparities in Arrests Persist Even in States That Legalized or Decriminalized Marijuana.

- Although the total number of people arrested for marijuana possession, and rates of arrests, have decreased in all legalized states and most decriminalized states for both Black and white people, the racial disparities in arrest rates in these states remain. Specifically, in every state that has legalized or decriminalized marijuana possession, Black people are still more likely to be arrested for possession than white people.
- In some legalized states, such as Maine and Massachusetts, the racial disparities in marijuana possession arrests were larger in 2018 than in 2010. In other legalized states, such as California and Nevada, the disparities narrowed, although Black people were still more likely to be arrested for marijuana possession than white people.
- On average, states that have legalized marijuana possession had lower racial disparities in possession arrests in 2018 compared both to states that have only decriminalized and states where marijuana remains illegal. However, it is not clear that this difference is a result of legalization – these states also had lower racial disparities in 2010, before any states had legalized.

### FINDING #5

#### Data Collection Failures Block a Fuller Understanding of Racial Disparities in Marijuana Arrests.

- Although a great body of evidence establishes that Latinx individuals face racial bias in policing and discrimination in the criminal legal system writ

large, we were not able to compare marijuana arrest rates for Latinx individuals in this report.

- The FBI's Uniform Crime Reporting arrest data is the most up-to-date and comprehensive data on arrests nationally, by state, and by county. However, similar to many federal data collection efforts, UCR data fails to disaggregate between Latinx individuals of different races, making it impossible to distinguish between Latinx and non-Latinx individuals in the Black and white populations. Because UCR data does not identify Latinx populations as a distinct racial group, potential disparities in arrest rates for Latinx populations cannot be examined. Arrests of Latinx individuals coded as white in the data likely artificially inflate the number of white arrests, leading to an underestimate of the disparity between Black and white arrest rates.<sup>5</sup>
- In addition to their impact on Black and Latinx populations, other racial or ethnic groups may be affected by bias in policing and marijuana enforcement. Future research using UCR data is warranted to examine disparities for Native and Indigenous populations, and Asian and Pacific Islander populations, particularly in jurisdictions with large enough samples of these populations. However, disparities for bi- or multiracial people cannot be examined with UCR data because the UCR Program employs a "check one" approach to race, and does not allow for an individual to be coded as more than one race. Furthermore, disparities for Arab and Middle Eastern people cannot be examined with UCR data as they are not identified by the UCR Program at all.
- The variation in reporting quality across years, agencies, and geographies also leaves some gaps in some constituents' ability to quantify racial disparities at the local level.

# Introduction

The criminalization of marijuana and the “War on Drugs” more broadly has been a misinformed and racist government campaign that continues to result in the criminalization of millions of Americans.<sup>6</sup> Pursued under the guise of public safety and reducing marijuana consumption, this decades-long debacle has been an abject failure — it has harmed communities, needlessly derailed lives, and wasted taxpayers’ valuable dollars. Both public opinion and sage public policy have called for an end to marijuana prohibition. In response, several states have legalized or decriminalized marijuana use in recent years. As of March 2020, 11 states and Washington, D.C.<sup>7</sup>, have legalized the recreational consumption of marijuana, and in 2019, Hawai‘i became the 15<sup>th</sup> state to reduce the criminal consequences of marijuana-related offenses.<sup>8</sup>

A growing body of research has sought to explore the impact of these reforms, finding that these reforms led to a reduction in marijuana-related arrests and the myriad harmful consequences associated with a criminal conviction.<sup>9</sup> However, research suggests that racial disparities in marijuana arrests persist in several of those states, remaining as sharp a thorn in the nation’s side as they were a decade ago.<sup>10</sup> Moreover, according to the FBI, after an overall dip in the number of marijuana arrests between 2010–2014, such arrests began to increase again, and there were roughly 100,000 more marijuana arrests in 2018 than in 2015.<sup>11</sup> This report seeks to build on this existing research — as well as our 2013 report *The War on Marijuana in Black and White*<sup>12</sup> — to document the national, state, and local landscape; to assess our progress; and to examine the potential promise of reforms. As this report will demonstrate, much of this country has yet to start on the road toward equitable, smart, reparative marijuana policy, and for those that have, the journey is not complete.

## The War on Marijuana

In our 2013 report *The War on Marijuana in Black and White*, we documented the national scope of our country’s decades-long, multibillion-dollar, racist war against people who use marijuana. We found that, in 2010, despite the fact that Black and white people<sup>13</sup> use marijuana at similar rates, Black people were arrested at over three times the rate of white people, and up to eight times as often in some states. Further, such racial disparities increased between 2001 and 2010, as did marijuana possession arrests overall.

Such wasteful and race-driven enforcement of marijuana laws did not occur overnight. Since the early decades of the 20th century, the criminalization of marijuana has been a pretext for the criminalization of Black and Brown people.<sup>14</sup> Taking advantage of several decades of Reefer Madness propaganda, in 1970, President Richard Nixon signed the Controlled Substances Act and



classified marijuana under Schedule I — reserved for the most dangerous class of drugs with the highest potential for abuse and little to no medical value, a designation shared by drugs like heroin, methamphetamines, and PCP. But such classification — like the drug war generally — had nothing to do with marijuana or science, and everything to do with criminalizing and controlling certain communities. As John Ehrlichman, counsel to Nixon and assistant to the president for domestic affairs, said over two decades later:

*“We knew we couldn’t make it illegal to be against the war (Vietnam) or Black, but by getting the public to associate the hippies with marijuana and the Blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”<sup>15</sup>*

This war on people who use drugs has since been declared a failure by countless public health officials and advocacy organizations, the World Health Organization, and the United Nations.<sup>16</sup> In response, certain countries have pursued nationwide legalization of marijuana, while many jurisdictions across the U.S. have decriminalized or legalized marijuana for both recreational and medicinal use.<sup>17</sup> Despite the often bipartisan groundswell to legalize marijuana use, and the fact that two in every three Americans support legalizing marijuana,<sup>18</sup> marijuana remains illegal in a majority of states.

## Inconsistency at the Federal Level

At the federal level, marijuana remains a Schedule I substance, subjecting people involved in marijuana activities to harsh penalties and preventing a range of scientific research that could upend decades of propagandized misinformation driven by racism and fear.

Much of this country has yet to start on the road toward **equitable, smart, reparative marijuana policy.**

Making matters worse, the Trump administration has sought to abandon the Obama administration’s more sensible approach to marijuana policy by resurrecting the saber-rattling of bygone anti-marijuana crusaders. Under the Obama administration, local jurisdictions enjoyed substantial deference with regard to setting marijuana policy. In 2013, Deputy Attorney General James Cole issued a guideline (“The Cole Memorandum”) significantly limiting the enforcement of federal marijuana laws in states that had legalized.<sup>19</sup> Such deference to states that were experimenting with legalization was crucial for the vitality of the newly legalized markets. Consumers needed to feel safe participating in marijuana activities, and entrepreneurs needed to know that the federal government was not about to shut down their ventures or prosecute them for engaging in business that was legal in their state. The Obama administration’s approach reassured states that the federal government would not interfere with states’ legalization efforts as long as those efforts did not implicate federal enforcement priorities, such as interstate drug trafficking and drug cartels.<sup>20</sup>

Rather than respecting the will of the voters in states that legalized marijuana, the Trump administration and its first attorney general, Jeff Sessions (who, when he was a U.S. Senator, famously proclaimed, “Good people don’t smoke marijuana”), promptly rescinded this policy. The same week that California began selling and taxing marijuana for recreational

use<sup>21</sup> and Vermont’s legislature called for a formal vote on its own legalization bill,<sup>22</sup> the Department of Justice announced that the Cole Memorandum was no longer in effect. Instead, Attorney General Sessions, echoing discredited alarmists of yesterday, asserted that “marijuana is a dangerous drug and that marijuana activity is a serious crime”<sup>23</sup> and instructed federal prosecutors “to use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country.”

Notwithstanding Sessions’ peddling of prohibitionist, time-worn rhetoric, most Americans support legalizing marijuana. Furthermore, state-level efforts to get smart on marijuana continue, and federal marijuana prosecutions are declining.<sup>24</sup> Even Sessions’ replacement, Attorney General William Barr, recently communicated to members of Congress that he would support a carve-out exemption that would protect states from federal prosecution if they legalized recreational marijuana consumption.<sup>25</sup>

In spite of this ongoing sea change, law enforcement in the U.S. continues to make hundreds of thousands of marijuana arrests every year, and Black people continue to bear the disproportionate brunt of those arrests. Marijuana legalization should be – and indeed is – a racial justice issue. But thus far, racial justice has largely been a peripheral or incidental goal of legalization, resulting in continued racist enforcement of marijuana laws, the exclusion of

people of color from participating in, leading, and building wealth from the marijuana industry, and the failure to repair the harms done to communities of color by the drug war.<sup>26</sup>

## Centering Racial Justice

Marijuana legalization has always been a racial justice issue.<sup>27</sup> Whereas marijuana use by white people has been de facto legal in much of the country, in Black and Brown communities, police have routinely stopped people, particularly youth – at the park, on the street, in the train, on the bus, at school, near school, by the community center, on the porch, or while driving – searching (usually in vain) for something illegal, and, if they found marijuana, arresting and hauling people to jail.<sup>28</sup> Such police harassment not only criminalizes people of color for engaging in an activity that white people participate in with relative impunity, it is a means of surveillance and social control<sup>29</sup> counterproductive to public safety and community health. Indeed, repeated police encounters prove traumatic and dehumanizing for those who endure them.<sup>30</sup>

Simply put, marijuana is used at similar rates by Black and white people across America,<sup>31</sup> yet Black and Brown people are disproportionately targeted for and harmed by its criminalization, subjected to stops, frisks, arrests, and convictions of marijuana-related offenses because of their race. This is true for drug enforcement generally (see crack versus cocaine enforcement and sentencing) but perhaps no more starkly than when it comes to marijuana enforcement.<sup>32</sup>

While some states that have legalized marijuana built expungement, resentencing, and reclassification mechanisms into their reforms to ensure that people previously convicted of marijuana violations benefit retroactively from marijuana’s legal status, their effectiveness in reducing the disparate harm on people of color remains unclear. Furthermore, other states have not centered racial equity in their reforms,

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and much more can be done to guarantee that drug reform laws repair the harms suffered by communities of color as a result of racially biased enforcement and criminalization. Precisely because of this history, racial justice remains a critical prism through which drug reform policies should be evaluated.<sup>33</sup>

## Reforms Beyond Legislation: The Role of Prosecutors and Police

To be sure, while legalization is the most powerful step toward reducing the damage of marijuana criminalization, there are other steps that can be taken in the meantime. For example, local prosecutors have the power to end prosecution for marijuana violations. Cyrus Vance, the district attorney for Manhattan, instituted a Decline-to-Prosecute policy on marijuana possession and consumption cases, reportedly resulting in a substantial reduction of such cases in the first 90 days of the policy taking effect.<sup>34</sup> District Attorney Larry Krasner of Philadelphia, State's Attorney Marilyn Mosby of Baltimore, Fairfax County Commonwealth Attorney Steve Descano of Virginia, Cook County State's Attorney Kim Foxx of Illinois, and a growing list of prosecutors have launched similar efforts in order to discontinue the harmful approaches of their predecessors on marijuana policy.

While they ameliorate the harm of criminal prosecutions, such approaches cannot be successful in reducing the harm caused to individuals subject to marijuana arrests if police departments are not partners in the prosecutors' efforts. For example, after the Austin, Texas, City Council passed a resolution to reduce arrests for low-level marijuana violations, the local police chief quickly rebuffed legislators and vowed to continue to enforce the police department's policy of arresting or issuing citations for marijuana violations.<sup>35</sup> Conversely, in Seattle, the police department played a critical role in minimizing the harms of marijuana criminalization.<sup>36</sup>

Of course, progressive policies toward marijuana enforcement can only be effective if they are part of a broader effort by prosecutors and police to end selective enforcement of all criminal laws against Black and Brown people. After all, marijuana prohibition is simply one tool in governments' criminal law arsenal – albeit a very effective and ubiquitous one – to marginalize and disempower people of color.

Criminal consequences is not the only harm of marijuana prohibition. There is a range of potentially debilitating collateral consequences as well, many of which persist even after marijuana is decriminalized or even legalized. These can further erode people's civil rights by impacting housing rights, parental rights, the administration of public benefits, access to education, and immigration status. For example, families who live in federally subsidized public housing face eviction or family separation if someone is accused of using marijuana on their premises. Parents may lose their children in family court proceedings if accused of using marijuana. Disabled and poor recipients of public benefits still face the threat of losing their benefits for marijuana use. Immigrants can face deportation for marijuana use. Because of the race-driven way in which marijuana criminal laws have been enforced, each of these potentially life-altering consequences of criminalization has been borne disproportionately by communities of color.

## Conclusion

In 2020, we enter a decade marked by confusion and contradictions when it comes to marijuana policies. Today, marijuana is still categorized by the federal government among the most dangerous drugs with no medicinal value, and yet 37 states have rolled back prohibitionist laws (11 states and the District of Columbia have legalized recreational use, 15 other states have decriminalized use, and 11 additional states have legalized it for medical use only).<sup>37</sup> People in neighboring states, such as

Illinois and Wisconsin, enjoy markedly different rights given the conflicting legal status of marijuana across their borders.<sup>38</sup> Traveling from Illinois to Wisconsin, someone who uses marijuana goes from being a casual consumer protected by local law to a potential target of criminal laws subject to life-altering prosecution. And the injustice of the past is a harbinger for today's marijuana market. While corporations, entrepreneurs, and governments in some jurisdictions are making millions of dollars in profits and revenues in the legal marijuana industry, poor people in other jurisdictions are stuck in handcuffs or jail cells, or with lifelong criminal records for possessing or selling miniscule fractions of what these powerful companies move daily. In some states, there are even people serving sentences of life without parole for marijuana convictions.<sup>39</sup> Clearly, there is a long way to go to end the harms of marijuana prohibition and ensure that racial equity guides the implementation of legalization and decriminalization efforts.

As we begin a new decade, it is time to assess the progress and failures of this country's marijuana policies at the state and county level with regard to racial justice. This report provides a new, unprecedented examination of the state of marijuana enforcement in the U.S. and the ramifications of decriminalization and legalization efforts — on overall arrests, and specifically on the racial inequities perpetuated by this war. Using data on marijuana arrests that local police departments provide the FBI under the Uniform Crime Reporting Program, alongside supplemented data obtained directly from unreported jurisdictions, this report examines nationwide and state trends in both arrests and Black/white racial disparities. Keenly aware of the consequential policy decisions made at local levels, this report also examines how different counties behave with respect to marijuana arrests and racial disparities in such arrests. And as the number of states implementing reforms in marijuana laws has increased since our last report, we are able to examine the potential impact legalization or

## This report provides a **new, unprecedented examination** of the state of marijuana enforcement in the U.S.

decriminalization policies have had on such arrests and racial disparities.

Indeed, while there is some existing research examining the potential fiscal and public safety impacts of marijuana law reforms in select states or jurisdictions, there is considerably less empirical research on the impact of these reforms on people of color. The scope of this report not only allows for an examination of the national, state, and local landscapes, it will provide new information on the success — or failure — of these current laws to address the racial inequities perpetuated by marijuana prohibitions. As such, these findings offer direction for policymakers, criminal justice leaders, and advocates who seek not only to end the war on marijuana, but to ensure that we do so in reparative ways that allow us to confront the racial injustice of the past by building a path forward with and for the people and communities most deeply harmed by marijuana prohibition.

# Recommendations

As the ACLU recommended in our original report in 2013, the most effective way to eliminate arrests for marijuana use and possession, and the racial disparities that plague such arrests, is through marijuana legalization.<sup>53</sup> If legalization is not yet achievable, states should, at a minimum, decriminalize marijuana offenses. Based on the findings from this report, racial equity should be centered in every aspect of the legalization and decriminalization process. States must also improve their data collection practices and policies with regard to arrests by race. We cannot undo the harms perpetuated by marijuana prohibition, but we can chart a smarter, fairer future that uplifts and repairs the people and communities most harmed by criminalization.

## Recommendations at a Glance

### For Federal, State, and Local Governments

- Legalize marijuana use and possession
- Do not replace marijuana prohibition with a system of fines, fees, and arrests
- Grant clemency to or resentencing anyone incarcerated on a marijuana conviction and expunge all marijuana convictions
- Eliminate collateral consequences that result from marijuana arrests or convictions
- Ensure new legal markets benefit and are accessible to communities most harmed by the War on Drugs
- Ensure marijuana possession and other low-level offense arrests are not included in performance measures for federal funding

### For Law Enforcement Agencies

- End the enforcement of marijuana possession and distribution
- End racial profiling by police
- Eliminate consent searches
- End the practice of using raw numbers of stops, citations, summons, and arrests as a metric to measure productivity and efficacy
- Develop systems for the routine collection of accurate data on a range of police practices
- Invest in nonpunitive programs and community-based services and divest from law enforcement
- Develop, secure, and implement strong, independent, and effective oversight mechanisms for local law enforcement

## Federal, State, and Local Governments

### 1. Legalize marijuana use and possession.

The federal government should remove marijuana from the Controlled Substances Act; until it does, it should not enforce marijuana offenses.

States should legalize marijuana through a system of taxation, licensing, and regulation under which private businesses licensed and regulated by the state can sell marijuana. This mode of legalization offers numerous benefits; it would largely address the arrests epidemic and – if centered in racial equity – its attendant racial disparities by removing marijuana possession and use from the criminal justice system. Further, it would save cash-strapped state and local governments millions of dollars in decreased police, jail, and court costs that could be redirected toward repairing the harms of the War on Drugs.

As a society, we permit the controlled use of alcohol and tobacco, substances that can be dangerous to health and, at times, public safety. We educate society about those dangers and have constructed a system of laws that allow for the use and possession of these substances while seeking to protect the public from their dangers. Particularly given the findings of this report, states that have not legalized should create similar systems for legalizing marijuana use and possession.<sup>54</sup>

In addition, while legalization and decriminalization significantly lower the overall numbers of marijuana arrests, some states have seen an even steeper rise in the proportion of Black people whose lives are impacted by a marijuana arrest.<sup>55</sup> This indicates that it is critical that states' legalization schemes must be equitable and grounded in racial justice. The recommendations in this report are vital to instill equity into the legalization process and to

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help ensure that racial disparities do not continue post-legalization.

Further, some states have seen a rise in youth arrests for marijuana.<sup>56</sup> It is vital that when states legalize for adults, they do not continue to criminalize youth. They should also decriminalize marijuana-related activities for youth. Instead of the continued criminalization of young people, jurisdictions that legalize, decriminalize, or depenalize youth offenses should provide alternatives to criminal intervention such as drug education programs or community service. If drug education programs are provided as an alternative, they should be scientifically accurate about the harms of drugs and sympathetic toward the young people in the program who may have used and/or sold drugs.

### 2. Do not replace marijuana prohibition with a system of fines, fees, and arrests.

We should not replace a criminal system with fines and fees that create a modern-day debtors' prison. It is important to recognize that replacing marijuana arrests with fees, fines, or tickets is not an ideal solution for a number of reasons. First, the same racial disparities that exist nationwide in arrests for marijuana possession would likely be replicated in citations for civil offenses for marijuana possession. Second, the monetary fines that accompany civil

offenses can place a substantial burden on those fined, particularly the young, poor, and people of color – all of whom are disproportionately targeted by police. Third, individuals who are unable to make payments in a timely fashion, or at all, or who do not appear in court to answer to the civil charge, are subject to arrest – often by a warrant squad – which results in individuals being brought to court and in some cases jailed for failing to pay the fines or to appear. In addition to placing significant personal and financial burdens on the individual, this imposes significant costs on the state, possibly exceeding the original fine imposed. All fees, taxes, and surcharges that are imposed for the purpose of recouping operating costs should be repealed.

While fees should never be implemented, if fines must be, they should be proportionate, both in terms of individual income and severity of the offense, and they should impose an equitable burden on people regardless of income level. In the case of nonpayment, there should be limited penalties for failure to pay. At a bare minimum, “ability to pay” hearings should be required before the imposition of any fines or fees, and any preexisting laws that tie the hands of judges who wish to reduce or waive fines should be repealed.<sup>57</sup> For those who cannot pay, there should be mechanisms in place for proactively requesting a reduction or waiver based on financial circumstances prior to default.<sup>58</sup> In the case of

Legalization must come with processes for **clemency, resentencing, and expungement** to reflect the change in law.

nonpayment, penalties should be limited and under no circumstances should they result in incarceration, suspension or revocation of driver’s licenses, disenfranchisement, extension or revocation of probation, parole or any other form of supervision, or additional monetary penalties.<sup>59</sup> Finally, because of the discriminatory impact of fines and fees and their massive impact, outstanding debt for marijuana fines and fees should be forgiven with legalization.

### **3. Include clemency, resentencing, and expungement processes in legalization efforts.**

While progress in reforming our nation’s drug laws is vital, we must remember that if we legalize marijuana without righting the wrongs of past enforcement, we risk reinforcing the decades of disproportionate harm communities of color have endured. That is why legalization must come with processes for clemency, resentencing, and expungement to reflect the change in law. No one should be incarcerated on a marijuana offense. And having a marijuana conviction on your record can make it difficult to secure and maintain employment, housing, or secure government assistance for the rest of your life.<sup>60</sup> If we believe that marijuana is not worthy of criminal intervention, then it is only right we stop the suffering inflicted on people by marijuana prosecution, especially since we know it disproportionately falls on the shoulders of low-income communities and communities of color. Clemency, resentencing, and expungement processes should be speedy, automatic, and provided at no cost to the person who is being granted clemency or resentencing or whose record is being expunged.

Illinois, California, and others have instituted expungement and resentencing processes concurrently with or following legalization, giving us a model of successful tactics as well as roadblocks to clearing people’s records. The categories of offenses eligible for automatic clemency, resentencing, or expungement should be wide, and include as many people and types of offense as possible. This

means ensuring that the burden is placed on the government, not the people, to begin the process of expunging marijuana records and granting clemency and resentencing to people incarcerated or being punished for marijuana offenses. This process should be as quick as possible. Every day, week, month, or year that people spend incarcerated or being punished for marijuana offenses or that marijuana records are maintained is a day, week, month, or year that large numbers of people will struggle to gain employment, housing, education loans, and others. An expedient process is burdensome but also tremendously beneficial. Some localities have found creative ways to ensure that people are resentenced or have their records expunged in a timely manner. Cook County, for example, is using Code for America to assist in analyzing conviction data to autopopulate forms for expungement.<sup>61</sup> For all those who are not automatically expunged, the process should be as quick and cheap as possible.

#### **4. Eliminate collateral consequences that result from marijuana arrests or convictions.**

No person should be denied public benefits or suffer other collateral consequences due to marijuana use, arrest, or conviction. Collateral consequences can significantly derail many aspects of a person's life post arrest, conviction, or incarceration. As enforcement of marijuana offenses disproportionately falls on communities of color, so too does the brunt of collateral consequences and discrimination on the basis of marijuana use, arrests, and conviction.

The following collateral consequences and discriminatory measures should be eliminated with legalization:

- Denial of public benefits based on use, arrests, or convictions for marijuana
- Drug tests for benefit eligibility
- Separation of families in the child welfare system

- Loss of driver's licenses
- Deportation
- Loss of federal financial aid
- Bans on participation in the marijuana industry for those with drug arrests
- Felony disenfranchisement

#### **5. Implement new legal markets to benefit communities most harmed by the War on Drugs.**

The benefits reaped from emerging legal marketplaces for marijuana should be shared with the communities most harmed by the War on Drugs. We have seen multiple states that prevent those with drug convictions on their record from participating in the legal marijuana marketplace, therefore preventing those most harmed by marijuana legalization from the profits and employment that these new markets bring.<sup>62</sup> If legislatures or residents determine that we should no longer criminalize marijuana because it is ineffective and disproportionately impacts people of color, then those most harmed by criminalization should be able to access the industry.

In addition, legalization should include licensing for consumption spaces that are open to the public in order to provide space for legal consumption for those who live in public housing or rental units that do not allow consumption or smoking. This is important, because if legalization occurs without providing consumption spaces (such as cafes) open to the public, people who live in rental or public housing have no place to consume marijuana without risking eviction or criminalization for public consumption.

Given the history of the War on Drugs and the devastating harm it has caused communities of color, it is only just that the tax revenue raised by the new legal market be put toward repairing these harms. Revenue can be invested in communities most harmed by the drug war through programming



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that helps to end the collateral harms of marijuana prohibition, including barriers to employment, and supports small businesses owned and/or run by communities directly impacted by the War on Drugs.

Finally, it is important to create fair licensing structures in which the cost of obtaining a license is reasonable and accessible to small business owners and to the communities most impacted by the War on Drugs. It should not take an exorbitant amount of money to be able to profit from the new legal market, and the communities most impacted by the failed War on Drugs should be able to participate in and profit from the emerging industry.

## **6. Ensure marijuana possession and other low-level offense arrests are not included in performance measures of law enforcement agencies for federal funding.**

Federal government grants, including the Byrne Justice Assistance Grants (or Byrne JAG), should not include arrest numbers in their performance measures. As long as arrest statistics – which include any arrest, including any drug arrest – are included in law enforcement’s performance measures, police departments are likely encouraged to increase their arrest numbers by targeting their resources

on people who commit low-level offenses, including low-level drug users, possessors, and distributors. By including marijuana possession arrests and other low-level offense arrests in performance assessments of a state’s use of federal funds, the federal government is relying upon an unreliable measure of law enforcement’s ability to increase public safety and reduce the exploitative trafficking of drugs. Indeed, such arrests reduce neither the use nor availability of marijuana.

## Law Enforcement Agencies

### **1. End the enforcement of laws criminalizing marijuana possession and distribution.**

Aggressive enforcement of low-level offenses such as marijuana possession unnecessarily funnels hundreds of thousands of people into the criminal legal system – primarily young people of color and particularly Black people. Therefore, police departments and municipal government entities should end police enforcement of marijuana possession and marijuana distribution, as well as a range of other low-level offenses, such as traffic infractions and “quality of life” offenses, and work to address these issues through measures that do not employ the criminal legal system. If this is not possible, police departments and local government entities should make these offenses a low priority for enforcement.

Over the past decade, certain cities, including Seattle and San Francisco (prior to legalization), made marijuana possession their lowest enforcement priority.<sup>63</sup> Such a policy provides local governments with additional resources to fund public health, economic, and education initiatives that address the social challenges at the root of most criminal offenses.

### **2. End racial profiling.**

Racial profiling refers to the act of selecting or targeting a person(s) for law enforcement contact (including stop, frisk, search, and arrest) based on the individual’s actual or perceived race, ethnicity, or national origin rather than a reasonable suspicion that the individual has or is engaged in criminal activity. Racial profiling includes policies or practices (such as broken windows policing) that have a disparate impact on certain communities — specifically those of color.

Police interactions with people should be directed only toward investigating actual threats to public safety. However, too often, police stop and search people of color without substantial evidence of wrongdoing, based on explicit and implicit biases. Such racial profiling can lead to the aggressive enforcement of minor offenses in communities of color, disproportionately and needlessly entangling people — particularly young people — in the criminal legal system for offenses that are rarely, if ever, enforced in more affluent, predominantly white communities. Police departments should adopt model racial profiling policies that define racial profiling, prohibit law enforcement from engaging in it, and make clear that it is unconstitutional under the Fourth Amendment.<sup>64</sup>

A further step that courts and state legislatures should take is to raise the level of suspicion required to stop and briefly detain a person against their will for investigative purposes. The current constitutional baseline requires a relatively low bar — reasonable suspicion of criminal activity — for such stops.<sup>65</sup> Raising this standard to the same standard as a regular arrest — probable cause to believe the person is engaged in criminal activity — would significantly reduce the number of innocent people detained and reduce the risks of racial profiling. For similar reasons, courts and state legislatures should consider raising the standard for “frisk” searches during investigative stops by requiring more than mere “reasonable belief” that someone is armed to carry out a search of their person.

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Further, police departments as well as local and state governments should ban pretextual stops, where police stop someone — often because of the person’s race or ethnicity — for a minor infraction, such as a traffic offense, as a pretext to investigate other possible crimes. Indeed, marijuana possession is often used as such a pretext.

Police departments should investigate all complaints in a thorough and timely manner using their existing resources, if they are not already being handled by a more effective independent oversight body (more discussion in the later sections), and implement appropriate and proportionate discipline for noncompliance with such policies (including dismissal).

### **3. End the use of consent searches.**

Consent searches are defined as searches made by law enforcement based on the consent of the individual whose person or property is being searched. Because the legality of the search depends on the fact of consent rather than any particular evidentiary showing by the police, police officers use consent searches to circumvent legal standards that require most searches to be based on probable cause. However, the environment in which they seek consent is inherently coercive, and most policies do not even

require officers to notify the person that it is possible to refuse consent. They are used overwhelmingly against people of color, in circumstances where it is doubtful that the officers would have been able to justify the search without the legal fiction of consent. As such, local governments should ban the use of consent searches through policies and legislation.

#### **4. End the practice of using raw numbers of stops, citations, summons, and arrests as a metric to measure productivity and effectiveness.**

Evaluating law enforcement agencies and individual officers based on the numbers of stops, citations, summons, and arrests does not properly measure public safety and health; it also exerts additional pressure on police officers and departments to aggressively enforce criminal laws for low-level offenses. Including arrests as a measure of effectiveness and productivity, through COMPSTAT and similar programs, creates an incentive for police to selectively target and harass poor and marginalized communities for enforcement of low-level offenses, as such offenses are committed more frequently than serious, harmful crimes.

When officers are subject to arrest goals or quotas, making arrests for low-level offenses is the easiest way to meet these requirements because they are low-resource and less time-intensive than investigating serious crimes. By relying heavily on numbers of stops, citations, summons, and arrests, police departments squander their resources on low-level offenses. This increases arrest statistics and can make departments appear productive and highly active, while discouraging police from reporting and solving more serious crimes. Further, the pressure on police officers to “make their numbers” results in aggressive stops and searches that often fail to meet constitutional requirements and lead to arrests for minor offenses, including marijuana possession. The end results are that overpoliced communities are not made safer but rather harmed by the routine presence

and harassment of police; justified frustration and anger toward our criminal legal system, particularly policing practices; a de-emphasis on true justice and healing, including restorative justice and trauma-informed responses to harms in communities; and the funneling of people of color into our criminal legal system at immense personal cost to individuals and their families as well as pecuniary cost to taxpayers.

To move away from evaluating public safety and police efficacy through arrest numbers, police departments should reduce the reliance on stops, citations, summons, and arrests and broaden their benchmarks of success, relying instead on measurements such as community satisfaction with law enforcement; number of complaints filed against law enforcement; rate of racial disparities in arrests; and number of serious crimes solved.

#### **5. Develop systems for the routine collection of accurate data regarding a range of police practices.**

Police should prioritize accountability and transparency by collecting stop, frisk, search, citation, and arrest data; making the aggregate data publicly available and easily accessible; creating evaluation systems to analyze such data to identify and address racially biased and harmful practices and policies; and developing strategies and tactics that eliminate any form of racial disparities in enforcement practices.

Whether or not a citation is issued or an arrest is made, the police officer must document the following information (in addition to providing the data, time, and location of the stop as a “receipt” to anyone they stop or search):

- The demographic information of the individual stopped (including race, national origin, ethnicity, age, disability, and gender) and the date, time, and location of the stop
- The duration and reason for the stop

- Whether a search was conducted and for what reason
- Whether and what type of contraband was recovered
- The outcome of the encounter (summons, citation, warning, arrest, no action)
- The identification of the officers involved

To guarantee statewide uniform arrest and citation documentation, state legislatures should require all police departments (municipal and state) to electronically record information regarding stops, frisks, searches, citations, and arrests by locality, race, national origin, ethnicity, age, and gender, share the information with a central state agency, and publish the data in quarterly reports (on their website and in print so it is accessible to everyone in the community). Personally identifiable information about the individual stopped should not be recorded, so as not to violate the individual's right to privacy. The reports should be easily searchable. Such transparency will provide the public — community members, activists, local and state policymakers, criminologists, lawyers, academics, the media, etc. — with a meaningful empirical basis for determining whether any demographics have been targeted and to raise concerns and propose policy solutions. This would provide more objective and understandable information for assessing public safety; inform discussions about the nature and appropriateness of police practices and police resources; promote community safety, trust, and autonomy; and better ensure accountability of police departments and individual officers.

## **6. Invest in nonpunitive programs and community-based services rather than the criminal legal system.**

Since the 1980s, the amount of money spent on the criminal legal system has dramatically outpaced expenditures on community services (such as

housing, schools, jobs, public health, and violence prevention programs) that help build stable, safe communities rather than furthering harm by relying on punitive interventions. State and local governments spend over \$100 billion a year on their law enforcement agencies. The federal government supplements funding costs by giving out billions of dollars' worth of grants to law enforcement agencies through DOJ programs such as Byrne JAG.<sup>66</sup> Police should not be given unfettered discretion to redirect the money saved from halting the enforcement of low-level offenses toward other types of enforcement; instead, DOJ should mandate that local governments and the police put such resources toward nonpunitive and public health programs that benefit public safety through measures unrelated to the criminal legal system. As such, local, state, and federal governments should work with community members to limit the role of police in communities of color and redirect these funds to other services so jurisdictions can appropriately and adequately address economic, health, and social problems at their root in ways that strengthen rather than sabotage impacted communities.

Local, state, and federal governments should work with community members to **limit the role of police** in communities of color.

## **7. Implement strong, independent, and effective oversight mechanisms for local law enforcement.**

A range of government entities on the municipal, state, and federal levels should work to develop external oversight agencies that conduct regular audits and review of police departments and practices, including marijuana enforcement and racial disparities in such enforcement and enforcement more broadly.<sup>67</sup> These agencies could take the form of independent prosecutors, inspectors general, independent and strong community oversight boards, or some combination of the three. That said, community oversight is especially important, because it ensures the community has autonomy to oversee and hold law enforcement accountable, as is appropriate in a democratic society where public servants serve the people. Any external oversight agency should regularly analyze data regarding a police department's stops, frisks, searches, citations, and arrests to assess whether there are any racial disparities in enforcement practices and policies. Their analyses and findings should be made available to the public. They should also be given the power to review and implement policies that are not subject to a unilateral veto by the mayor, police commissioner, or police chief.