
The Colors of Cannabis: Race and Marijuana

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TABLE OF CONTENTS

INTRODUCTION	689
I. REEFER MADNESS: THE HISTORY OF RACIALIZED PROHIBITION AND ENFORCEMENT	690
II. CAMPAIGN COLORS	692
III. THE NEW WHITE MARKET: EXAMINING THE COLOR OF THE LEGAL MARIJUANA INDUSTRY	695
IV. THE RESILIENT “BLACK MARKET”	698
V. LIFE AFTER LEGALIZATION: BLUNT REALITIES FOR MINORITY USERS	700
VI. NEXT STEPS: REFORM TOWARD RACIAL JUSTICE	705

INTRODUCTION

The campaign to legalize small quantities of recreational marijuana drew attention from media and law reviews with its successes in Colorado (2012), Washington (2012), Oregon (2014), Alaska (2014), and the District of Columbia (2014).¹ Both media and law reviews concentrated their analysis on the interplay between the continued federal prohibition of marijuana, whether for medical or recreational use, and the onset of legalization or decriminalization of marijuana at state and local levels.² Having addressed that legal collision myself,³

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¹ See, e.g., COLO. CONST. art. XVIII, § 16; WASH. REV. CODE ANN. § 69.50.4013 (2016).

² For discussion of the many states decriminalizing marijuana to eliminate jail time, see Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Criminalization Law and Noncitizens*, 9 DEPAUL J. FOR SOC. JUST., 1, 1-2 & nn. 1-4 (2016).

here I take a broader focus and look at the life cycle of U.S. marijuana prohibition, concentrating on the impact of recent legalization and the user consequences that remain. Evident in that timeline is racialization at each stage examined below — in the initial criminalization of marijuana rooted in racial stereotypes, the enforcement of that prohibition throughout the twentieth century to the present day by means of racial profiling, and the recent legalization of recreational (or medical) marijuana in some states. Despite that legalization, marijuana usage continues to disproportionately impose serious consequences on racial minorities, while white entrepreneurs and white users enjoy the early fruits of legalization.⁴

I. REEFER MADNESS: THE HISTORY OF RACIALIZED PROHIBITION AND ENFORCEMENT

Marijuana criminalization, as with cocaine and opiates, stemmed from racialized perceptions of users of color as threatening public safety and welfare.⁵ In the case of marijuana, racial prejudice against both African Americans and Mexicans merged to prompt states and local governments to outlaw usage. In states with significant Mexican populations, such as Texas, Mexican prejudice was the catalyst for prohibition. As contended on the floor of the Texas Senate in the early 1900s, “[a]ll Mexicans are crazy, and this [marijuana] is what makes them crazy.”⁶ In Southern states with large black populations, fears of violent black smokers led to marijuana laws.⁷ As I summarized elsewhere, fueled by prejudice, “marijuana was scapegoated as prompting murder, rape, and mayhem among blacks in the South, Mexican Americans in the Southwest, and disfavored white immigrants from laboring classes — with marijuana blamed for the seduction of white girls by black men and for violent crimes

³ See generally Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359 (2013) [hereinafter *Joint Reform*].

⁴ See *infra* Parts III, V.

⁵ See STEVEN W. BENDER, RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS 97 (2012) [hereinafter RUN FOR THE BORDER].

⁶ PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 45 (2009); see also JOHANN HARI, CHASING THE SCREAM 15 (2015) (mentioning 1927 *New York Times* headline “Mexican Family Go Insane” to describe the consequences of a family ingesting marijuana). For Mexico's role in instigating the “Reefer Madness” hysteria, see ISAAC CAMPOS, HOME GROWN (2012).

⁷ Bender, *Joint Reform*, *supra* note 3, at 362.

committed by these groups.”⁸ By the time of the exploitative 1936 film *Reefer Madness*, most states had outlawed marijuana,⁹ and the federal government soon followed with the Marihuana Tax Act of 1937 banning nonmedical uses. This act was a precursor to later federal laws designating marijuana as a Schedule I dangerous drug with no safe uses, effectively banning even medical marijuana.¹⁰

Marijuana use by youth of color has been the focal point of the War on Drugs from its inception.¹¹ Most U.S. drug arrests stem from unlawful possession rather than trafficking in drugs, and most of those possession arrests are for marijuana, amounting to near a million arrests annually.¹² Evidencing the racial inequity of the War on Drugs, African Americans and Latinos account for most of those arrests despite their smaller population numbers than whites and studies confirming that white youths use marijuana in the same percentage as African American and Latino youth.¹³

⁸ *Id.*

⁹ *See id.*

¹⁰ *Id.* at 364-65; see Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 82-83 (2015). As recently as summer 2016, the federal Drug Enforcement Agency refused to downgrade marijuana to a Schedule II drug in the same category as cocaine. See Emily Willingham, *DEA's Hypocritical Marijuana Decision Ignores the Evidence*, FORBES (Aug. 13, 2016, 8:42 AM), <http://www.forbes.com/sites/emilywillingham/2016/08/13/deas-marijuana-decision-is-hypocrisy/#23f0e7ca4e44>.

¹¹ See Bender, *Joint Reform*, *supra* note 3, at 367.

¹² See *id.* (supplying statistic of 872,721 state and local marijuana possession arrests in 2007). More recent statistics are the estimated 700,993 arrests in 2014, with 88% of those for possession. See *FBI Reports Annual Marijuana Arrests in U.S. Increased Last Year for the First Time Since 2009*, MARIJUANA POL'Y PROJECT (Sept. 28, 2015), <https://www.mpp.org/news/press/fbi-reports-annual-marijuana-arrests-in-u-s-increased-last-year-for-the-first-time-since-2009/>.

¹³ See Bender, *Joint Reform*, *supra* note 3, at 367. For harder drugs such as cocaine and heroin, a recent study found much higher abuse rates among delinquent white (non-Hispanic) teens than for black delinquent youth. See Kristin Samuelson, *Among Delinquent Teens, Whites More Likely Than Blacks to Abuse Hard Drugs*, NORTHWESTERN (Mar. 17, 2016), <http://www.northwestern.edu/newscenter/stories/2016/03/race-delinquent-youth-substance-use-disorder.html> (discussing study published in 2016 in the American Journal of Public Health).

Before Colorado's legalization of recreational marijuana, African Americans, comprising only 4% of the state's population, accounted for 22% of the state's marijuana arrests. See Nekima Levy-Pounds, *Going up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV'T L. REV. 560, 576 (2014).

In Washington D.C., African Americans were eight times more likely to be arrested for possession than white marijuana users. See ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 17-18 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf (also revealing nationally that blacks are 3.7 times more likely

Although reports of disparities in marijuana enforcement have tended to focus on blacks,¹⁴ the drug war also disproportionately impacts Latinos. Latinos are profiled for possible trafficking given the supply routes connecting Latin American production of illicit drugs to U.S. consumers.¹⁵ Latinos also face detrimental immigration consequences for marijuana possession and other drug offenses, aggravated by racial profiling and the significant number of Latino immigrants.¹⁶

II. CAMPAIGN COLORS

Launching the trend of legalization, California (1996) was the first state to legalize medical marijuana, and Colorado (2012) and

than whites to be arrested for possession); *see also* Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), <http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html>. Once arrested, these defendants were less likely than whites to be released on bail, and more likely to face mandatory minimum charges. *See* Abby Haglage, *When White Girls Deal Drugs, They Walk*, DAILY BEAST (Nov. 30, 2015, 10:00 PM ET), <http://www.thedailybeast.com/articles/2015/12/01/when-white-girls-deal-drugs-they-walk.html> (addressing the arrest and prompt release on bail of the white daughter of a DEA official found with large amounts of a variety of illicit drugs for sale).

¹⁴ *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 15-16 (2010) (inviting scholars and advocates to engage the mass incarceration and drug war experiences of women, Latinos, and immigrants as she does for African American men).

¹⁵ *See generally* BENDER, *RUN FOR THE BORDER*, *supra* note 5, at 114-38 (reviewing the history of Latin American immigration as it relates to United States drug policy).

¹⁶ Simple possession offenses are grounds for deportation of noncitizens under the Immigration and Nationality Act unless they fall under the exception for single offense possession of small amounts of marijuana. *See* Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 531-35 (2015) (discussing how this personal use exception can be lost by more than one marijuana offense, or by a conviction for social sharing of marijuana; also noting that there is no personal use exception when noncitizens who travel abroad attempt to return to the United States, and concluding that low-level marijuana offenses create serious consequences for noncitizen offenders); Rosenbaum, *supra* note 2, at 45-46 (discussing how Latino noncitizens will continue to suffer disproportionate criminal and immigration impacts despite state decriminalization of marijuana). *See generally* Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967 (2015) (addressing how racial profiling of the minority noncitizen adds to the treacherous immigration law impact of drug offenses); Grace Meng, *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses*, HUM. RTS. WATCH (June 16, 2015), <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses> (discussing the rise in drug deportations and the consequent impact on families).

Washington (2012) first legalized recreational marijuana.¹⁷ Noticeably absent in most political campaigns to legalize marijuana at the state level — whether for medical or recreational use — is the racialized inception and enforcement of marijuana laws. Proponents for medical marijuana legalization have pointed to permissible medical uses for other illicit drugs such as opiates, and also to the compelling narratives of easing chronic pain, relieving nausea of cancer patients, and preventing seizures in epileptic children.¹⁸ Recreational legalization campaigns have emphasized the potential revenue gains of taxing marijuana sales, as well as honoring the individual liberty to use marijuana instead of the more dangerous alcohol.¹⁹

Rarely mentioned was the disproportionate burden of marijuana enforcement on racial minorities. Anecdotally, a Washington advocate for marijuana legalization told me that racial profiling arguments won't win legalization campaigns and instead will alienate voters.²⁰ Rather than a desire to dismantle laws with disproportionate impact on users of color, more evident in the campaigns for legalizing recreational marijuana was disdain for feathering the nest of the illicit drug cartels,²¹ widely assumed to be operatives of color.²² Frustration

¹⁷ Bender, *Joint Reform*, *supra* note 3, at 371-73.

¹⁸ See Sarah Breitenbach, *Many States Still Grapple with Regulating Medical Marijuana*, HUFFINGTON POST (last updated Oct. 19, 2015), http://www.huffingtonpost.com/entry/medical-marijuana-state-laws_5625054ee4b0bce3470156fc (detailing arguments for and against legalizing marijuana for medical uses).

¹⁹ See LEGIS. COUNCIL OF THE COLO. GEN. ASSEMBLY, 2012 STATE BALLOT INFORMATION BOOKLET AND RECOMMENDATIONS ON RETENTIONS OF JUDGES 12, 14 (2012) (summarizing arguments for adoption of Colorado legalization measure to include the statement that “[a]dults should have the choice to use marijuana, just as they have that choice with other substances such as alcohol and tobacco”).

²⁰ Conversation with Confidential Source, Washington Advocate of Marijuana Legalization (Feb. 7, 2013)

²¹ E.g., KATE BROWN, OR. SEC'Y OF STATE, VOTERS' PAMPHLET: OREGON GENERAL ELECTION 125 (2014) (Former chief federal prosecutor for Oregon Kris Olson arguing “[m]oney spent on legal marijuana will be diverted from the black market and drug cartels. Instead, it will go into legitimate businesses, and the taxes generated will go to essential public services like police, mental health and drug prevention.”); see, e.g., STATE OF ALASKA OFFICIAL ELECTION PAMPHLET 79 (2014), <https://www.elections.alaska.gov/doc/oep/2014/AK-Region-I-book.pdf> (argument of Political Director/Treasurer of Campaign to Regulate Marijuana Like Alcohol Christopher Rempert) (advocating moving marijuana from the underground criminal market to one that generates tax revenue); see also HARI, *supra* note 6, at 282 (“The Washington campaign argued that drugs should be legalized not because they are safe, but because they are dangerous. It's precisely because they are risky that we need to take them back from the gangsters and cartels, and hand them to regulated stores . . .”).

²² For some drugs such as cocaine this is a reasonable assumption given supply

with cartels of color controlling drug production and distribution was evident not just in the upset over their profiteering from illicit drugs, but in the perception that cartels pay no attention to product safety and that government is better situated to ensure an unadulterated product.²³ As reinforced by the next section that discusses how white entrepreneurs dominate the legal marijuana market, voters may have been making the choice between their perception of shady cartels of color controlling the illicit market, and of more trusted white business owners and local government profiting from marijuana consumption.

A notable exception to the whitewashed arguments elsewhere for legalizing medical and recreational marijuana was Washington D.C.'s campaign for recreational legalization. As Georgetown law professor Paul Butler observed, Washington D.C. "is really the first place where the racial justice arguments were the main reasons behind the [legalization] campaign."²⁴ Butler opined that in other jurisdictions, advocates for legalization may "be scared to talk about race, because they think it would turn people off, or make people more willing to lock up marijuana users if they know it has a disparate impact on African Americans."²⁵ Yet in Washington D.C., he concluded, "[w]e heard an argument about racial justice and we responded We said we're not going to accept Jim Crow law enforcement in our town."²⁶

The legalization of recreational and medical marijuana through whitewashed campaigns mirrored the dynamic of marijuana decriminalization that swept federal and state government in the late 1960s and early 1970s.²⁷ As "Reefer Madness" views of axe-wielding black and Mexican smokers were replaced by the reality of widespread white usage, especially on college campuses, campaigns mounted to

chains that now travel through Mexico and Central America to production sites in Colombia, Bolivia, and other South American counties. See STEVEN W. BENDER, *MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY* 140-41 (2015) [hereinafter *MEA CULPA*]. For marijuana this assumption is more questionable given the significant production of illicit marijuana within the United States, particularly in the so-called Emerald Triangle of Northern California's Humboldt, Mendocino, and Trinity counties, by operatives of all backgrounds.

²³ See, e.g., *Marijuana Legalization and Regulation*, DRUG POL'Y ALL., <http://www.drugpolicy.org/marijuana-legalization-and-regulation> (last visited Aug. 23, 2016) (discussing how marijuana product testing is becoming a standard feature in legalized marijuana regimes).

²⁴ Rebecca Sheir, *An Uncomfortable Link Between Race and Marijuana Arrests in D.C.*, WAMU 88.5 AM. UNIV. RADIO (May 1, 2015), http://wamu.org/programs/metro_connection/15/04/30/an_uncomfortable_link_between_race_and_marijuana_arrests_in_dc.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Bender, *Joint Reform*, *supra* note 3, at 369.

reduce penalties for marijuana possession by these more trusted users.²⁸ In 1970, Congress lowered the penalty for possession of small amounts from a felony to a misdemeanor in what one commentator labeled the “whitening of [the] marijuana use dilemma.”²⁹ Several states did the same: In 1973, Oregon, the site of a predominantly white population, became the first state to take the bigger step towards reducing punishment for small quantity marijuana possession from a jailable offense to a mere fine.³⁰

Similar to the whitening and lightening of marijuana penalties that preceded outright legalization is the current softening of enforcement response to the epidemic of opiate use among whites. Rather than confronting that widespread use with criminal penalties, increasingly police and politicians are turning their focus to saving young lives from overdose.³¹ Indeed, the irony of drug stereotypes is that while opiate deaths have spiraled, the overdose rate for young blacks has risen only slightly — likely due to the reluctance of doctors to prescribe painkillers to minority patients for fear they will sell them or be more susceptible to addiction.³²

III. THE NEW WHITE MARKET: EXAMINING THE COLOR OF THE LEGAL MARIJUANA INDUSTRY

Michelle Alexander best described the painful irony of the post-legalization experience in which white male entrepreneurs now dominate the legal marijuana industry:

Here are white men poised to run big marijuana businesses, dreaming of cashing in big — big money, big businesses selling weed — after 40 years of impoverished black kids getting prison time for selling weed, and their families and futures destroyed. Now, white men are planning to get rich doing precisely the same thing?³³

²⁸ See *id.*

²⁹ See Thomas J. Moran, Note, *Just a Little Bit of History Repeating: The California Model of Marijuana Legalization and How It Might Affect Racial and Ethnic Minorities*, 17 WASH. & LEE J.C.R. & SOC. JUST. 557, 568 (2011).

³⁰ Bender, *Joint Reform*, *supra* note 3, at 369.

³¹ Ekow N. Yankah, Opinion, *When Addiction Has a White Face*, N.Y. TIMES, Feb. 9, 2016, at A23.

³² See Gina Kolata & Sarah Cohen, *Drug Overdoses Propel Rise in Mortality Rates of Young Whites*, N.Y. TIMES, Jan. 17, 2016, at A1.

³³ See April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014), <http://www.alternet.org/drugs/michelle->

Several factors appear responsible for the lack of diversity in the legal marijuana business. Among them is the reluctance of banks to supply credit to marijuana entrepreneurs for fear of being seen as enabling a business still illegal under federal law. Instead, marijuana entrepreneurs must use their own financial resources or those of their circle of friends and business associates.³⁴ Given the vast disparities in wealth between whites and blacks/Latinos, and the high start-up costs of a marijuana business,³⁵ white entrepreneurs have an advantage that

alexander-white-men-get-rich-legal-pot-black-men-stay-prison; see also Ted Hesson, *DC's Black Residents Want a Piece of the Legal Marijuana Market*, FUSION (Feb. 28, 2015), <http://fusion.net/story/56325/black-residents-want-a-piece-of-dcs-marijuana-market/> (“The legal marijuana industry is very white. . . . [I]ndustry insiders widely acknowledge a lack of diversity in the emerging [legal marijuana] field.”); Karen Mawdsley, Rilwan Balogun & Montinique Monroe, *Experts: Minorities Struggle for Footing in Lucrative Cannabis Industry*, WEEDRUSH (Aug. 15, 2015), <http://weedrush.news21.com/experts-minorities-struggle-for-footing-in-lucrative-cannabis-industry/> (noting the legal cannabis industry is dominated by white men). An example of the controversy of white businessmen profiting from what imprisoned so many men of color is the gentrifying neighborhood in Seattle’s Central District where African American groups have criticized a white-owned marijuana outlet near a local church’s teen center. The church’s pastor suggested that if a marijuana outlet is allowed on the same intersection where police traditionally arrested African Americans selling marijuana, then the Seattle mayor “needs to let all the brothers and sisters go who are incarcerated for marijuana.” Bob Young, *Protesters March on Seattle’s Uncle Ike’s Pot Shop*, SEATTLE TIMES (Apr. 20, 2016), <http://www.seattletimes.com/seattle-news/marijuana/protesters-march-on-seattles-uncle-ikes-pot-shop/>.

³⁴ See Chemerinsky et al., *supra* note 10, at 91-93 (addressing the unavailability of banking services for the legal marijuana industry); Andrew Folkerth & J. Marcus Painter, *Legalized Marijuana and the Real Estate Finance Dilemma*, COLORADOBIZ (Aug. 19, 2013, 5:35 AM), <http://www.cobizmag.com/articles/legalized-marijuana-and-the-real-estate-finance-dilemma> (addressing an additional factor of the potential federal forfeiture of assets involved in the marijuana business, as well as the reluctance of landlords to rent to a marijuana business given the similar risk of federal forfeiture of the real estate). The recalcitrance of landlords may compel a marijuana business to own the real estate itself, without the benefit of a real estate loan, thereby increasing capital needs.

In the omnibus spending bill approved in late 2015, Congress agreed to prevent federal authorities from interfering with state medical marijuana laws but, despite Senate approval, Congress refused an amendment to allow banks to deliver financial services to marijuana businesses.

³⁵ See Jana Kasperkevic, *Medical Marijuana: As Profitable as Apple Stores, but Only for High Rollers*, GUARDIAN (Oct. 29, 2014, 8:00 AM), <http://www.theguardian.com/business/2014/oct/29/medical-marijuana-business-new-york> (discussing the start-up costs and impediments for New York medical marijuana businesses); Mawdsley, et al., *supra* note 33 (citing wealth disparities and high start-up costs as impeding minority entry into medical marijuana operations, noting recommended start-up funds of between \$3 million and \$5 million in Connecticut); Dan Weissmann, *The Legal Business of Marijuana Is Growing but the Industry Lacks Diversity*, NPR (July 3, 2015, 5:06 AM), <http://www.npr.org/2015/07/03/419692413/the-legal-business-of-marijuana-is-growing->

minority borrowers unable to obtain bank credit cannot overcome. In this way, the wealthy parents who might have grounded their child years ago if he smoked pot instead have no hesitation to back his now legitimate and profitable agricultural or retail marijuana business.

Another factor of disparity is the typical regulatory requirement that legal marijuana retailers have a clean criminal record,³⁶ which disproportionately disqualifies racial minorities given the disparities in enforcement of marijuana prohibitions, other drug crimes, and nondrug criminal offenses.³⁷ With the exception of Oregon, the legalization laws fail to erase prior convictions of those prosecuted for what became lawful conduct.³⁸ Additionally, the legal uncertainty of marijuana sales conducted pursuant to state law given the ongoing federal prohibition likely makes racial minorities, already subject to undue law enforcement scrutiny, especially nervous. As the director of the Drug Policy Alliance opined:

African Americans know that whenever something is in a gray area of the law they will feel more vulnerable, and for good reason since statistically minorities are more likely to be targeted or seen as suspects. . . . It may be that the general element of racism and racial disproportionality in law enforcement around drugs can make minorities queasy about entering an area which is not fully legal.³⁹

but-the-industry-lacks-diversity (“You can’t even submit [a marijuana business] application in most states for under \$100,000.”).

³⁶ See Tracy Jarrett, *Six Reasons African Americans Aren’t Breaking into Cannabis Industry*, NBC NEWS (Apr. 19, 2015, 8:29 PM), <http://www.nbcnews.com/news/nbcblk/6-reasons-african-americans-cant-break-cannabis-industry-n344486> (reporting most states will deny a cannabis retail license to individuals with a misdemeanor or arrest for possession of marijuana or any drug). The state of Washington, for example, has a scoring system for licensees, with those convicted of two misdemeanors unlikely to obtain a license. *Id.* Ironically, Colorado’s first African American woman to own a marijuana dispensary was inspired to start her business by her brother’s experience as a youth who spent several years of forced labor picking cotton in Texas while imprisoned on a petty marijuana charge. See Amy Goodman, *Colorado’s First Black Woman Pot Entrepreneur on Edibles, Incarceration, & the Industry’s Whiteness*, DEMOCRACY NOW! (Apr. 22, 2016), http://www.democracynow.org/2016/4/22/as_black_youth_are_locked_up.

³⁷ See Shaleen Title, *How Insidious Laws Are Keeping Many from Participating in the Promising Legal Marijuana Economy*, ALTERNET (July 14, 2016), <http://www.alternet.org/drugs/most-laws-barring-people-felonies-marijuana-business-pure-hypocrisy>.

³⁸ See discussion *infra* Part VI of the different approaches to past convictions taken in Oregon and Colorado.

³⁹ Jarrett, *supra* note 36; see discussion *infra* Part VI.

Finally, the first four states of recreational legalization — Alaska, Washington, Oregon, and Colorado — have smaller minority populations than many other states, lowering the pool of minority entrepreneurs in those states.⁴⁰ Effectively excluded as sellers of legal marijuana, minorities are often excluded from the legal market as buyers too, as the next section reveals.

IV. THE RESILIENT “BLACK MARKET”⁴¹

Elsewhere I addressed the possible impact of marijuana legalization on Mexican drug cartels,⁴² suggesting the cartels might respond by redoubling their efforts to export other illicit drugs.⁴³ As predicted, the cartels reacted to falling U.S. demand for illicit marijuana in the wake of broadening legalization of localized production by ramping up

⁴⁰ See Russ Belville, *In Defense of White Guys and Marijuana Legalization*, MARIJUANA POL. (Apr. 30, 2015, 11:56 AM), <http://marijuanapolitics.com/in-defense-of-white-guys-and-marijuana-legalization/> (objecting to the notion of racism in legal marijuana operations given that the (at the time) four states of legalization are among the 20 least black populated states). Other state-specific factors holding back minorities include the experience under the Florida medical marijuana law which allows nurseries registered for 30 years to grow medical marijuana, thus excluding black farmers who suffered discrimination in the past at the hands of the U.S. Department of Agriculture. See Carolyn M. Brown, *Black Farmers Shut out of \$10 Billion Legal Marijuana Business*, BLACK ENTERPRISE (Nov. 10, 2015), <http://www.blackenterprise.com/small-business/black-farmers-shut-out-of-legal-marijuana-business/>. Another factor is the residency requirements for licensed sellers in these legalization states with few minorities. See, e.g., Daniel Shortt, *Marijuana Industry Residency Requirements*, CANNA L. BLOG (Apr. 28, 2015), <http://www.cannalawblog.com/marijuana-industry-residency-requirements/> (discussing Colorado’s two year residency requirement). Oregon, however, repealed its two-year residency requirement in 2016. Vince Sliwoski, *Oregon Opens Its Cannabis Industry to Non-Residents*, CANNA L. BLOG (Mar. 8, 2016), <http://www.cannalawblog.com/hb-4014-opens-oregons-cannabis-industry-to-non-residents/>. As discussed in the next part, in states where recreational marijuana is not legal, the black market continues to thrive, free of the entry constraints of the legal market. As one writer observed, the illicit drug industry is the only “factory” still open in some cities, employing “children, old people, people who’ve been shooting drugs for 20 years, it doesn’t matter.” Yana Kunichoff, *Do New Marijuana Legalization Laws Only Benefit White People?*, CHI. MUCKRAKERS (June 7, 2013, 1:05 PM), <http://www.chicagonow.com/chicago-muckrakers/2013/06/do-new-marijuana-legalization-laws-only-benefit-white-people/>.

⁴¹ In using this familiar phrasing I am aware of the negative connotation often associated with black-descriptors such as black market and blackmail, in contrast to white-phrases such as white collar. See generally RICHARD LEDERER, *THE MIRACLE OF LANGUAGE* 53-55 (1991) (explaining how more black expressions have unsavory connotations than white ones).

⁴² See Bender, *Joint Reform*, *supra* note 3, at 383-91.

⁴³ *Id.* at 388.

opium poppy production and heroin/opiate exports, along with methamphetamine, at the same time that cannabis exports decreased.⁴⁴ Increasingly, U.S. buyers have opportunities to buy U.S. grown marijuana produced lawfully under state law for medical or recreational uses, even if purchased for use outside that state, or for impermissible non-medical uses, or by minors ineligible to purchase marijuana. Accordingly, reliance on Mexican marijuana, and other marijuana grown outside the local legal allowances, has decreased. Still, the black market for marijuana appears to have survived even for recreational users of age in states where recreational usage has been legalized. Because recreational marijuana is taxed heavily (in Washington, for example, recreational marijuana is taxed at 37 percent, with an additional 9.5 percent sales tax),⁴⁵ oftentimes black market marijuana is cheaper. Although middle class or wealthy buyers might prefer a legal purchase from a regulated store, many poor buyers, who are disproportionately buyers of color, are effectively

⁴⁴ See Nick Miroff, *Losing Marijuana Business, Mexican Cartels Push Heroin and Meth*, WASH. POST (Jan. 11, 2015), https://www.washingtonpost.com/world/the-americas/losing-marijuana-business-mexican-cartels-push-heroin-and-meth/2015/01/11/91fe44ce-8532-11e4-abcf-5a3d7b3b20b8_story.html; see also HEROIN: CAPE COD, USA (HBO 2015) (attributing surge of heroin to Mexican drug cartels replacing lost marijuana revenue). See generally Olga Khazan, *The New Heroin Epidemic*, ATLANTIC (Oct. 30, 2014), <http://www.theatlantic.com/health/archive/2014/10/the-new-heroin-epidemic/382020/> (describing the surge in illicit use of prescription opiates in the early 2000's and a resulting rise in demand for heroin). Some synthetic drugs classified as opiates, such as fentanyl, can be produced in laboratories in Mexico and elsewhere without need for the opium poppy. See Azam Ahmed, *40 Times Stronger than Heroin, Fentanyl Enriches Drug Cartels*, N.Y. TIMES, June 10, 2016, at A1.

⁴⁵ See Bryan Adamson, *Washington's Marijuana Laws and Social Justice — Our Clinical Work at Seattle University School of Law*, LAW PROFESSOR BLOGS NETWORK (Oct. 29, 2015), http://lawprofessors.typepad.com/clinic_prof/2015/10/washingtons-marijuana-laws-and-social-justiceour-clinical-work-at-seattle-university-school-of-law.html; see also Sarah Aitchison, *The Year That Went to Pot: \$250M in Marijuana Sales — Yet Some Merchants Feel It's Been a Bummer*, PUGET SOUND BUS. J. (July 10, 2015, 3:00 AM), <http://www.bizjournals.com/seattle/print-edition/2015/07/10/the-year-that-went-to-pot-250m-in-marijuana-sales.html> (discussing the still active black market in Washington despite recreational legalization, prompting the legislature to replace the former three tiers of 25 percent tax at the stages of growing, packaging, and selling, with a single layer of 37 percent tax); Dylan Petrohilos, *Weed Is Now Legal in DC. Here's Why Drug Dealers Aren't Worried*, THINKPROGRESS (Feb. 26, 2015), <http://thinkprogress.org/justice/2015/02/26/3626608/pot-comes-to-dc/> (reporting that the unregulated market is still thriving in Colorado because it is cheaper to purchase unregulated marijuana). A Washington lawmaker has proposed a bill reducing state excise taxation further, down to 25 percent, in order to reduce the competitive advantage enjoyed by the black market. H.B. 2347, House Reg. Sess. 2015–2016 (Wash. 2016). In addition to taxation, the costs of licensing and regulation are substantial, with the added cost of a brick and mortar store as compared to the illicit drug dealer's home or automobile.

priced out of the legal market and must purchase under the black market that remains criminalized.⁴⁶ Ironically, then, due to their disproportionately precarious financial position, racial minorities might be excluded from both ends of the legal marijuana transaction as sellers and buyers.⁴⁷

V. LIFE AFTER LEGALIZATION: BLUNT REALITIES FOR MINORITY USERS

Detailed above were some of the disproportionate consequences of marijuana use for racial minorities in local and federal regimes of criminalization, particularly evident in racial profiling and inequities in arrests despite equal usage with whites, and in the deleterious consequences for noncitizens of drug convictions.⁴⁸ Additional consequences exist not addressed in any detail here, ranging from those in higher education of student loan denials⁴⁹ and NCAA drug testing suspensions⁵⁰ to denials of federally subsidized housing⁵¹ and state-supplied welfare and food stamps to poor users.⁵² Although these consequences, at least for federal benefits such as student loans, in theory survive state legalization given the ongoing federal prohibition of recreational and medicinal marijuana, as a practical matter arrests for marijuana possession (as opposed to trafficking) occur at the state

⁴⁶ Charing Ball, *Will Black People Miss out on the Benefits of Marijuana Legalization?*, MADAM NOIRE (Jan. 6, 2014), <http://madamenoire.com/337897/will-black-people-miss-benefits-marijuana-legalization/>.

⁴⁷ Cf. *infra* Part V (explaining that racial minorities are also excluded disproportionately from lawful use, or at least consumption without economic and other deleterious consequences).

⁴⁸ See *supra* Part I.

⁴⁹ Introduced as an amendment to the federal Higher Education Act in 1998, and signed by President Clinton, was a denial of federal financial aid to students convicted of minor drug offenses, suspending first offenders from benefits for a year. See *Clinton Signs Law Denying Student Aid to Marijuana Smokers*, NORML (Oct. 8, 1998), <http://norml.org/news/1998/10/08/clinton-signs-law-denying-student-aid-to-marijuana-smokers>.

⁵⁰ But cf. *Schools Easing Athlete Penalties for Marijuana, Report Says*, ESPN (Dec. 28, 2015), http://sports.espn.go.com/college-football/story/_/id/14449159/many-power-five-schools-step-pot-easement-trend (discussing results of Associated Press study finding major conference schools were treating athlete marijuana use less harshly than 10 years ago, including at the University of Oregon where athletes don't lose playing time until the third failed test).

⁵¹ See generally Adamson, *supra* note 45 (detailing federal housing consequences of marijuana use).

⁵² See MICHAEL A. HARWIN, *The New Deal for Drug Defendants: Lose Your Federal Benefits and Privileges*, in DEFENSE STRATEGIES FOR DRUG CRIMES: LEADING LAWYERS ON INTERPRETING TODAY'S DRUG CASES, DEVELOPING A THOROUGH DEFENSE, AND PROTECTING A CLIENT'S RIGHTS 3 (2015), Westlaw 6157371.

and not the federal level.⁵³ Therefore, these consequences, for the most part, should ease in state legalization regimes.⁵⁴

The discussion below identifies the areas of continued vulnerability for arrest or other detrimental consequences that survive in state legalization regimes. It assumes that racial minorities, as under drug criminalization regimes, will suffer the brunt of the enforcement emphasis through racial profiling, “broken window” policing,⁵⁵ and saturation enforcement placing emphasis in neighborhoods of color. It further assumes the disproportionately low income and wealth of racial minorities and the obvious consequences for employment and housing that flow from that financial predicament.

Three vestiges of racial profiling in a legalization regime attach to offenses that survive legalization — driving under the influence of marijuana, possession of marijuana by youths, and public consumption of marijuana.⁵⁶ State DUI laws potentially ensnare drivers in traffic stops suspected of having used otherwise legal marijuana, even those whose legal use was days or weeks past, as THC can be detected through blood tests for several months after use by frequent marijuana smokers.⁵⁷ Reflected in the familiar phrases Driving While Black and Driving While Hispanic is the reality that

⁵³ See Chemerinsky et al., *supra* note 10, at 84 (citing statistics that nearly all marijuana arrests occur at the state level, with a 109 to 1 ratio in 2012).

⁵⁴ For example, NCAA drug testing will survive in legalization regimes, in part because most athletes are younger than the minimum legal age for consumption in those states, 21. The possibility exists too of federal possession charges for using marijuana in a federal park or other federal place.

⁵⁵ See generally Raven Rakia, *When People Are Property: How Strategically Choreographed, Racialized Fear Built Prisons out of Broken Windows*, MEDIUM (July 22, 2014), <https://medium.com/@aintacrow/when-people-are-property-296dfe5105b1#2y4xijeia> (detailing the history of broken windows policing and situating marijuana arrests within this enforcement strategy).

⁵⁶ Other surviving offenses include possession of amounts in excess of the legal limit, which for marijuana and its various product permutations such as edibles can be challenging for the user to determine. Another potential offense is purchasing marijuana from a black market seller in a regime where purchases from registered sellers (with the exception of social sharing) are required.

⁵⁷ See Katy Hall & Jan Diehm, *Here’s Where You Can Get Arrested for DUI Weeks After Smoking Marijuana*, HUFFINGTON POST (Dec. 31, 2013, 12:28 PM ET), http://www.huffingtonpost.com/2013/12/31/marijuana-dui_n_4520129.html (discussing how exceeding the legal THC limit in Washington can result in a DUI offense regardless of a showing of actual impairment, while in Colorado exceeding the limit is only a permissive inference of intoxication). See generally Andrea Roth, *The Uneasy Case for Marijuana as Chemical Impairment Under a Science-Based Jurisprudence of Dangerousness*, 103 CALIF. L. REV. 841 (2015) (attacking the assumptions and junk science of marijuana driving impairment laws).

minority drivers are frequent targets of traffic stops seeking contraband or evidence of other crimes.⁵⁸ In legalization regimes, then, minority drivers might nonetheless steer a path toward criminalization, or at least be subjected to continued harassment.

Because legalization protocols exclude underage users, generally defined as those under age 21,⁵⁹ the prevailing enforcement regime survives for those most vulnerable to marijuana as a gateway drug — here as a gateway to the educational, employment, income, and other negative consequences of a criminal record. For the youngest users, the so-called school to prison pipeline⁶⁰ of enforcement and disciplinary prerogatives in schools is alive and well whether in Alaska or Arkansas.

Public consumption of marijuana remains a crime in legalization regimes.⁶¹ Legal uncertainties abound, and minorities have fared poorly when unclear laws, such as loitering, are applied to target them.⁶² Obviously, consumption in a public park would be unlawful, but what about on a private residence porch, or when a vehicle passenger consumes marijuana while on a public street?⁶³ Even if smoked indoors in a sufficiently private place, might later visible intoxication outdoors result in a public intoxication charge? Might poor residents, disproportionately racial minorities, be forced into

⁵⁸ See Rosenbaum, *supra* note 2, at 3.

⁵⁹ See COLO. CONST. art. 18, § 16. *But see* Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64, § 3(y) (Cal. 2016) (proposing reduced penalties by providing drug education and community service for minors in possession). Many medical marijuana states such as Washington, however, do not exclude otherwise eligible minors from their permitted users of medical marijuana.

⁶⁰ See generally *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline?redirect=fact-sheet/what-school-prison-pipeline> (last visited Oct. 15, 2016) (explaining that the school to prison pipeline is a disturbing national trend wherein children are funneled out of public schools and into the criminal justice system).

⁶¹ WASH. REV. CODE ANN. § 69.50.445 (2016) (criminalizing use of marijuana “in view of the general public”).

⁶² STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION* 55 (2003) (discussing vague loitering and gang membership laws used to target Latinos and African Americans).

⁶³ See generally David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 HARV. L. & POL’Y REV. 359, 374 (2014) (discussing how the Denver City Council narrowly rejected an ordinance that would have prohibited recreational marijuana smoking on a front porch); Vince Sliwoski, *Oregon’s Hazy Law on Smoking Marijuana in “Public Places,”* CANNA L. BLOG (Aug. 5, 2015), <http://www.cannalawblog.com/oregons-hazy-law-on-smoking-marijuana-in-public/> (discussing uncertainties under Oregon law, including whether consumption in a vehicle is considered a public place and looking to analogous Oregon authority to conclude affirmatively).

public spaces for much of their day due to overcrowding in the home, causing them to engage in otherwise legal behavior if within the home but made illegal by its visibility in public?⁶⁴ Evidencing the continuance of racialized enforcement in Colorado was the recent post-legalization study of marijuana arrests that found blacks there more than twice as likely as whites to be arrested for public use of marijuana⁶⁵ and a separate study finding post-legalization arrest rates of Colorado schoolchildren were even more racially disproportionate than before.⁶⁶

Related to the trap for public consumption of marijuana is consumption within a rental unit. Because racial minorities are more likely to be renters than whites, they are vulnerable to the typical residential lease provision outlawing smoking or other consumption of drugs, including legalized marijuana.⁶⁷ To escape the rental restrictions enforced by watchful property managers or neighbors, residents might consume marijuana outside the complex in public spaces, rendering them vulnerable to a different enforcer — police.

⁶⁴ Another group uniquely susceptible to public use laws is our homeless population, whose presence in public spaces is criminalized in an increasing variety of ways that cover most aspects of their lives. Essential life functions that are lawful when done in the privacy of one's home, such as urinating and sleeping, are often criminalized when they take place in public spaces. See generally Sara Rankin, *The Influence of Exile*, 76 MD. L. REV. (forthcoming 2016).

⁶⁵ Kristen Wyatt, *Report: Racial Disparities in Drug Arrests Persist After Colorado Legalizes Marijuana*, U.S. NEWS & WORLD REP. (Mar. 25, 2015, 1:57 PM), <http://www.usnews.com/news/us/articles/2015/03/25/report-racial-disparities-in-arrests-persist-with-legal-pot> (finding against a backdrop of post-legalization plummeting of marijuana arrests that blacks were also much more likely than whites to face arrest in Colorado for illegal cultivation of marijuana or possession beyond the legal limit).

⁶⁶ Amanda Chicago Lewis, *Marijuana Arrests down in Colorado for White Teens, up for Black and Latino Teens*, BUZZFEED NEWS (May 10, 2016, 3:09 PM), https://www.buzzfeed.com/amandachicagolewis/marijuana-arrests-down-in-colorado-for-white-teens-up-for-bl?utm_term=.hw375zMOR#.ke2o48VR2 (discussing report finding that between 2012 and 2014, marijuana arrests of Colorado youth aged 10–17 were down for whites and up significantly for blacks and Latinos). At the same time, a post-legalization survey found Colorado teen recreational use of marijuana declined from pre-legalization results in 2009 (25 percent) to 2015 (21 percent). See Kylie Cheung, *Surprise, Surprise: Legal Pot Does Not Increase the Number of Teens Smoking*, ALTERNET (July 1, 2016), <http://www.alternet.org/drugs/how-marijuana-legalization-really-affects-number-teens-smoking-pot>.

⁶⁷ See generally Dirk VanderHart, *Apartment #420: For Some Portland Apartment Dwellers, Weed's Only Sort of Legal*, PORTLAND MERCURY (Apr. 29, 2015), <http://www.portlandmercury.com/portland/apartment-420/Content?oid=15520508> (reporting that Portland apartment managers reminded tenants of their lease obligations after passage of the Oregon recreational legalization measure).

Employment drug testing also survives in legalization regimes, likely even for employees using marijuana for medicinal purposes and thus claiming protection under disability antidiscrimination laws, but denied that protection given the continued illegality of marijuana under federal law.⁶⁸ Because most low-wage employers require drug testing, encompassing fast food restaurants, retail stores, hotels, and public transportation, racial minorities may bear the brunt of these requirements that control their behavior by private contract, as with residential leases.⁶⁹

⁶⁸ In the medical marijuana context, see *Coats v. DISH Network, LLC*, 350 P.3d 849, 852-53 (Colo. 2015) (ruling similarly that Colorado medical marijuana law did not insulate an employee from discharge for medical marijuana use outside of work, as that activity, violating federal law, was not a protected “lawful activity”); *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC*, 257 P.3d 586, 597 (Wash. 2011) (holding Washington’s Medical Use of Marijuana Act does not protect employee from discharge based on lawful medical marijuana use outside the workplace that is illegal under federal law); see also G. M. Filisko, *Employers and Workers Grapple with Laws Allowing Marijuana Use*, A.B.A. J. (Dec. 1, 2015 5:30 AM CST), http://www.abajournal.com/magazine/article/employers_and_workers_grapple_with_laws_allowing_marijuana_use (discussing inconsistencies in state law protections or prohibitions of employee medical marijuana use); Thomas Mitchell, *Legal Marijuana States Aren’t That Safe for Pot-Smoking Employees, Survey Finds*, WESTWORD (Dec. 18, 2015, 9:50 AM), <http://www.westword.com/news/legal-marijuana-states-arent-that-safe-for-pot-smoking-employees-survey-finds-7426384> (discussing *Coats* case and survey results that most employers in legalization regimes still prohibit employee marijuana use, whether medical or recreational). Colorado’s recreational marijuana law, unlike Washington’s, specifically refers to employment and denies protection to the employee for marijuana use:

Nothing in this section is intended to require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.

COLO. CONST. art. 18, § 16(6)(a); cf. ARIZ. REV. STAT. ANN. § 36-2813(B)(2) (2016) (Arizona employers prohibited from terminating registered medical marijuana user unless use, possession, or impairment took place on the job). In contrast to the lack of protection in private employment settings, the Colorado courts deferred to legalized marijuana use in the family law setting. Whether raised protectively or opportunistically, the potential exists in family law disputes, particularly dissolution, for the marijuana use of a parent to be used against them. See *In re Marriage of Parr*, 240 P.3d 509, 512-13 (Colo. Ct. App. 2010) (holding a father’s use of medical marijuana cannot support a restriction on parenting time absent an evidentiary hearing to demonstrate some threat to the health or safety of the child); cf. David Malleis, Note and Comment, *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, 33 U. LA VERNE L. REV. 357 (2012) (discussing cases where courts employed lawful marijuana use as negative evidence in child custody decisions).

⁶⁹ Moreover, past drug offenses can haunt the applicant, as more than 90 percent

VI. NEXT STEPS: REFORM TOWARD RACIAL JUSTICE

Some of the consequences mentioned above, such as federal immigration law impacts, will ease as more states embrace the legalization model for recreational marijuana. And inequities such as the reluctance of banks to extend credit to marijuana enterprises will disappear once federal law is reformed to, at minimum, respect the right of states to regulate marijuana as they choose, and further to remove federal criminal penalties for marijuana use. But more may be needed. Michelle Alexander argues that merely legalizing marijuana is inadequate relief for embattled racial minorities ravaged by the War on Drugs:

After waging a brutal war on poor communities of color, a drug war that has decimated families, spread despair and hopelessness through entire communities, and a war that has fanned the flames of the very violence it was supposedly intended to address and control; after pouring billions of dollars into prisons and allowing schools to fail; we're gonna simply say, we're done now? I think we have to be willing, as we're talking about legalization, to also start talking about reparations for the war on drugs, how to repair the harm caused.⁷⁰

Financial reparations are rarely granted to communities of color, and the fear of reparations even stymied an official apology by Congress to African Americans for the brutalities of slavery.⁷¹ The Oregon experience, however, suggests a costless olive branch that should be extended to racial minorities, and anyone convicted of a marijuana possession offense in a regime that eventually legalizes the same conduct. After its recreational legalization, Oregon's legislature allowed the expungement of the criminal records of those convicted only of marijuana crimes.⁷² Relatedly but more narrowly, the Colorado

of employers undertake background checks on prospective employees that encompass criminal records. See Levy-Pounds, *supra* note 13, at 585.

⁷⁰ Short, *supra* note 33. Equally, reformers for racial justice might urge legalization of other illicit drugs such as cocaine, or at minimum an equalization of penalties for crack, used more often by racial minorities, and powdered cocaine.

⁷¹ See Darryl Fears, *House Issues an Apology for Slavery*, WASH. POST (July 30, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/29/AR2008072902279.html> (noting prior efforts to give an apology for slavery were hampered by fears of a call for reparations).

⁷² OR. REV. STAT. § 137.225 (2016) (uncodified provision § 129); cf. Noelle Crombie, *Some Felony Pot Convictions Can Be Sealed Under New Oregon Law*, OREGONIAN (Nov. 10, 2015, 5:00 AM), http://www.oregonlive.com/marijuana/index.ssf/2015/11/most_old_marijuana_convictions.html (explaining that under Oregon's expungement law felony convictions for growing or selling marijuana within 1,000 feet of a school, or for selling

Court of Appeals has applied that state's legalization law retroactively to overturn marijuana possession convictions that had not become final on appeal before the new law took effect.⁷³

The racial consequences described above are no reason to resist legalization in remaining states and at the federal level, even if the benefit of legalization may fall primarily to white entrepreneurs and white users. Rather, the racial consequences that remain despite legalization are a reminder of the broader ills of our criminal justice system that is fixated on enforcement against minorities. Marijuana and other drug laws have served as the centerpiece of the decades-long mass incarceration of minorities,⁷⁴ and a shift to treat use and addiction as a health issue rather than a crime is a needed step in the long road toward racial justice.

marijuana to a minor, cannot be expunged; the impetus for the law came from constituents, especially African Americans, whose marijuana convictions made it difficult for them with employers, landlords, and even as chaperone volunteers for their children's field trips).

⁷³ See, e.g., *People v. Boyd*, No. 12CA2607, 2015 WL 4760414 (Colo. Ct. App. Aug. 13, 2015) (holding that Colorado's legalization law retroactively overturns marijuana possession convictions that had not become final on appeal before the new law took effect).

⁷⁴ See BENDER, *MEA CULPA*, *supra* note 22, at 140-42.