

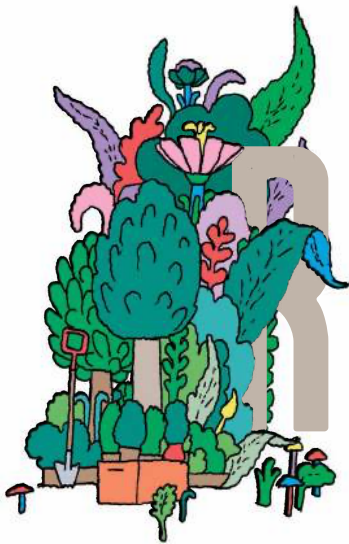
# THE

**Despite efforts  
to decriminalize marijuana,  
arrest rates and  
racial disparities  
are still rampant.**

# ROAD

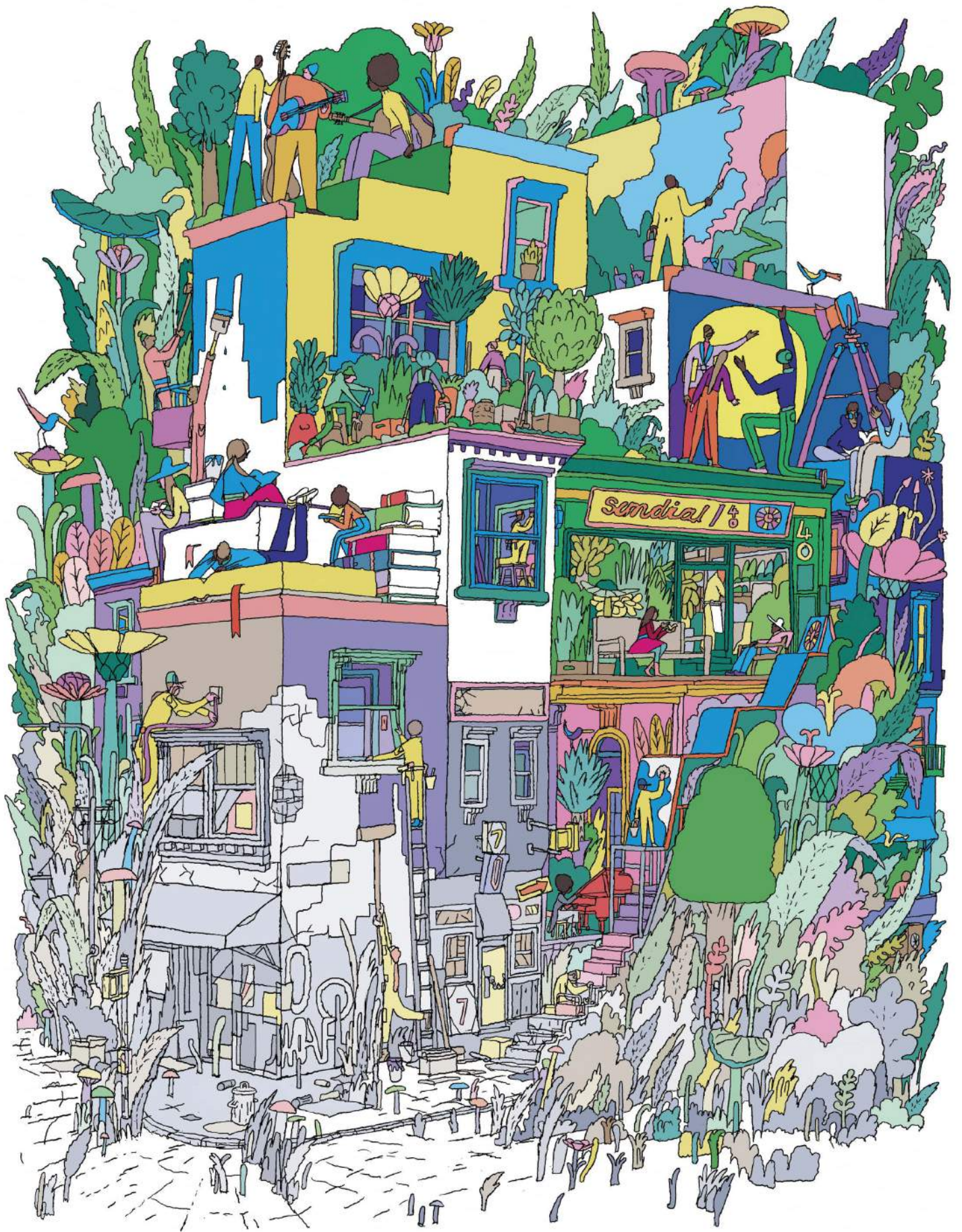
# TO

**The ACLU confronts  
the racist War on Drugs  
to chart a new path  
for marijuana reform  
and true justice.**



**BY JAY A. FERNANDEZ**

# REFORM



**F**or advocates of marijuana legalization, news in recent years has been very good. Public support has risen to 67 percent. Thirty-six states have now sanctioned the medicinal use of cannabis, and since 2012, 15 states and Washington, D.C., have legalized its recreational use. Legal markets are springing up around the country, early-adopting states are benefiting from the flow of new tax revenue, and dispensaries in many jurisdictions have been labeled essential businesses during the COVID-19 lockdown. Marijuana has gone legit, and momentum is accelerating.

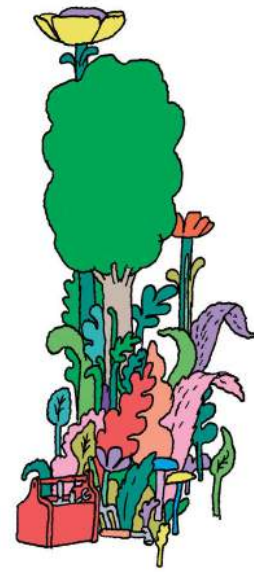
But the history of marijuana prohibition in America is ugly and complex. Legalization alone neither confronts the racist origins of drug criminalization nor addresses the harm suffered by targeted populations. For lasting change, the marijuana reform movement must center racial justice to make restitution to the Black and Brown communities devastated by the decades-long War on Drugs and its insidious effects: mass incarceration, poverty, police harassment, and long-standing barriers to employment, housing, and financial assistance for anyone with a marijuana-related conviction on their record. The steps toward racial equity—expungement of criminal records, dedicated community reinvestment, guaranteed access to legal cannabis markets, removal of collateral consequences, changes in prosecutorial policy, and police divestment—are clear, achievable, and morally just. But there is much work to be done, and the ACLU continues to fight at the federal, state, and local levels to bring about systemic equality in marijuana reform.

The truth is that despite the genuine headway being made, legalization and decriminalization have done little to decrease marijuana arrests or the racial disparities of enforcement. A recent ACLU report, *A Tale of Two Countries: Racially*

*Targeted Arrests in the Era of Marijuana Reform*, shows that though there has been a downward trend nationally between 2010 and 2018, law enforcement still made a staggering 6 million marijuana arrests during that period—and the annual number has actually ticked upward again in recent years. In 2018, law enforcement made nearly 700,000 marijuana-related arrests—90 percent for possession only—and they still account for 43 percent of all drug arrests. According to the FBI, police made more arrests for marijuana in 2018 than for all violent crimes combined.

At the same time, the report highlights alarmingly persistent trends in racist enforcement of marijuana laws. Nationally, Black people are, on average, 3.64 times more likely to be arrested for possession than white people, despite similar usage rates, and these disparities exist in every single state regardless of legalization. In 31 states, including a handful where cannabis is now legal, disparities were actually *larger* in 2018 than in 2010—Black people were as much as nine times more likely to be arrested in some states, while the disparity in some counties is triple that.

Ending the drug war is not tangential to achieving racial justice; it is one of the most effective paths to restoring civil rights and liberties, which is why the ACLU has consistently prioritized marijuana reform. But to fully under-



stand why this injustice persists and how to repair the damage, it's necessary to acknowledge the racist structures that were built into drug criminalization from the very beginning.

**B**y intention, the government has long used drug prohibition to demonize and demoralize certain groups with racism and xenophobia. In 1971, President Nixon made marijuana prohibition a centerpiece of his War on Drugs, though his initial focus was more on prevention and rehabilitation than enforcement and punishment. Still, decades later former Nixon adviser John Ehrlichman infamously admitted that the administration's anti-drug motivations were indeed about vilifying and persecuting Black people and the anti-war left.

# 700,000

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## “THE WAR ON DRUGS HAS BEEN A STORY ABOUT THE GOVERNMENT TURNING ON ITS OWN PEOPLE, TARGETING THE MARGINALIZED.”

The Controlled Substances Act that classified marijuana, alongside heroin, as a Schedule 1 drug with no accepted medical use launched the modern era of aggressive policing ramped up during the Reagan and Bush administrations. All along, enforcement has been baldly selective, with Black and Brown populations suffering more arrests and prosecutions, longer sentences, and for immigrants, higher rates of deportation.

“Drug prohibition as practiced in America has never been about science or crime,” says ACLU Criminal Law Reform Project Director Ezekiel Edwards. “It’s been about associating certain drugs with certain groups. It’s been about fear and greed. And it’s been about scoring political points, scapegoating, and controlling certain communities that are perceived as threats to jobs, to status, and to white supremacy. The War on Drugs has been a story about the government turning on its own people, targeting the marginalized. By design, it has fostered community destruction.”

The drug war has wasted billions of dollars and law enforcement hours. Over-policing in Black communities has fed mass incarceration with deep collateral consequences. Incarceration separates families and often removes breadwinners from low-income households. After serving their sentences, those with criminal records face obstacles to employment, voting, housing, student financial aid, and child custody. Even simply a confiscated driver’s license for a low-level marijuana offense can impede access to education and the ability to look for a job or get to the courthouse.

“Legalization isn’t enough because of all of the other [effects] that remove

the ability to be a self-agent, to be self-determined,” says Cynthia Roseberry, deputy director of policy at the ACLU’s Justice Division. “The trauma is deep within that person, and then it’s broad across children, families, and communities.”

**T**o achieve true, equitable reform, the ACLU and its affiliates are advocating for several key reparatory elements: the expungement of past marijuana convictions, the commitment of tax revenue from cannabis sales to community reinvestment, and guaranteed access to the legal industry for those from communities most impacted by the War on Drugs. States are implementing these ideas.

In 2018, Vermont became the first state to legalize the possession of recreational marijuana through the legislature—Illinois followed suit the following year—and in October 2020 the state legalized the sale of marijuana for recreational purposes under pressure from a coalition that included the ACLU of Vermont. At the same time, Governor Phil Scott signed into law a bill that automates the pardon and expungement of past marijuana convictions from criminal records. As of 2019, in California, individuals can petition to get low-level offenses expunged and high-level offenses downgraded, a reform that may affect as many as 220,000 people. Montana’s 2020 Ballot Issue I-190 included a provision that allows for individuals to apply for resentencing or expungement of certain convictions. In June 2020, the ACLU of Nevada successfully persuaded the state government to pardon more than 15,000 people convicted of misdemeanor possession.

Arizona recently passed Proposition 207, which includes social justice provisions pushed by the ACLU of Arizona: earmarked tax revenue for a Justice Reinvestment Fund, an avenue to petition for expungement of certain convictions, and a Social Equity Ownership Program that issues a dedicated number of licenses to cannabis business owners “from communities disproportionately impacted by the enforcement of previous marijuana laws.”

Cannabis is already big business: Sales totaled about \$15 billion in 2019, and that figure is expected to hit \$30 billion by 2024—Arizona and New Jersey alone are projected to generate at least \$700 million and \$850 million, respectively, in yearly recreational sales by 2024. Tax revenues will scale accordingly and must be earmarked for investments in schools, public health, job training, housing, and services in communities ravaged by the War on Drugs. Since entering the industry can be expensive and federal prohibition prevents banks and other institutions from granting loans, licenses must be affordable so the market doesn’t favor the white and the wealthy. Black and Brown entrepreneurs and those from lower-income neighborhoods need to have equal access to the economic benefits of the legal cannabis industry.

Several states are leading the way with ACLU-supported racial justice-centered reforms. Since 2014, Colorado has generated nearly \$8 billion in cannabis sales, with a portion of the hundreds of millions of dollars in annual taxes going to fund vocational programs, business education, and agricultural training, while also making available low-interest loans and grants for entrepreneurs to repair these



communities. With its 2019 Cannabis Regulation and Tax Act, Illinois baked in social equity programs, a \$20 million low-interest loan program to diversify ownership, and a business development fund. San Francisco recently established an equity program to set aside dispensary licenses for people in zip codes that were heavily targeted by drug enforcement. In October 2020, the first Latina dispensary owner to benefit from this opened her doors.

“Earlier models shut people out,” says Edwards. “And what it cost to pay fees or get a license was exorbitant and unattainable for a lot of people. If we legalize without ensuring that communities whose economic health has been most compromised by prohibition reap the fiscal benefits, then we will have missed a critical opportunity to right the wrongs of the

drug war and avoid perpetuating other forms of inequality going forward.”

**S**hifting our country’s approach to cannabis from one of criminal punishment to one of public health is one reason why police divestment is necessary, and it’s inextricably critical to advancing racial justice. Policing low-level marijuana possession packs our jails and reinforces tension in harassed minority neighborhoods. Legal-

izing cannabis would immediately lower the prison population by hundreds of thousands, an outcome made even more urgent by COVID-19, which by late 2020 had infected nearly 150,000 incarcerated people and killed 1,300 more. It would also reduce stop-and-frisk encounters that too often lead to police violence.

“It’s going to be a lot harder for police to use the alleged smell of marijuana as a pretext to search a car or backpack,” says staff attorney Jared Keenan of the ACLU

**“IT’S OUR RESPONSIBILITY  
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of Arizona, which worked for the successful passage of Prop 207. “You’ll have fewer police-civilian interactions, and since any interaction with the police can turn deadly, reducing those is a very good thing.”

In the new administration, as well as at the state, city, and county levels where governors, mayors, and district attorneys have tremendous impact on policy, the ACLU is advocating for the implementation of a wide range of related reforms: divesting from police department budgets and reinvesting in communities that have been marginalized by police policies and practices; noncrim-

inal responses to certain drug offenses; and an end to racial profiling.

Taxpayer dollars spent on police activities that are unproductive and harmful must be reallocated to public health workers better equipped to handle them as well as local infrastructure that lifts up affected neighborhoods. Government agencies that collect data about how police resources are used must be stronger, more transparent, and more accessible to the public.

Decreasing the power of prosecutors and rescinding harsh recidivism statutes would also have a positive impact on those trapped in a biased criminal justice sys-

tem. In Arizona, for instance, prosecutors can charge individuals arrested for first-time marijuana possession with a felony, no matter how small the amount—a felony conviction has severe, long-term impact on a person’s future opportunities. “Removing power from prosecutors is going to go a long way toward fixing some of the problems of our criminal legal system,” says Keenan.

Action taken by Congress would speed the process. New Jersey Senator Cory Booker’s Marijuana Justice Act would decriminalize marijuana at the federal level and incentivize states to change marijuana laws that target minorities and low-income people. A similar initiative, the Marijuana Opportunity Reinvestment and Expungement Act, is an ACLU priority for the new administration.

While we’ve yet to elect a president who fully supports legalization, as progress in the states builds and best practices spread, racial justice-centered marijuana reform is sure to accelerate. Officials and other stakeholders are increasingly accepting that it’s not only a moral imperative to heal these wounds, it’s good public policy, which is why these efforts are gaining bipartisan support.

“The marijuana reform movement is strong,” says Edwards. “There has been fairly broad agreement across America, and to some extent across political parties, about the failure of marijuana criminalization. The more people elected at the state and local level understand the history of this country when it comes to race, policing, and the origins of criminalization, the more effectively we’re going to advance marijuana reform centered in racial equity.”

“The War on Drugs was a war against Black people, so when you stop that war, and marijuana is the chief arrow in the quiver, then you necessarily have an impact on racial justice,” says Roseberry. “The work has to be done. It’s our responsibility to push for equity, fairness, and justice, and for America finally to have this reckoning. It’s time. It’s past time.” ■

## SMART JUSTICE

**On November 3, 2020**, Oregon voters passed the ACLU-backed Measure 110, which decriminalizes personal possession of controlled substances and establishes drug addiction treatment programs to be partially funded by tax revenues from marijuana sales. By reclassifying drug offenses, the trailblazing ballot initiative helps shift drug abuse from a criminal justice issue to a public health issue.

In 1973, Oregon became the first state to decriminalize marijuana; it legalized medical cannabis in 1998 and recreational in 2014. The state now generates more than \$130 million in annual tax revenue from marijuana sales, some of which is earmarked for the new Drug Treatment and Recovery Services Fund that will give grants for addiction recovery centers.

The state’s Criminal Justice Commission estimates that the drug arrests of Black and Indigenous Oregonians would decline by 95 percent, mostly erasing long-standing racial disparities in policing and prosecution. The savings from reduced arrests and incarceration, which could be as much as \$25 million over the next few years, will also be funneled to the new recovery fund.

Marijuana reform is on the march. In the 2020 election, Arizona, Montana, and New Jersey all passed legalization measures, South Dakota voters passed initiatives to legalize both medical and recreational cannabis, and Mississippi approved a medical marijuana initiative. The Oregon measure will encourage other states to adopt similar racial justice-centered drug reform, a major goal of the ACLU in the new administration.

Visit [aclu.org/smartjustice](https://aclu.org/smartjustice) to learn more about advancing criminal justice reform bills in your state.