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Rethinking Federal Marijuana Policy

By Ed Chung, Maritza Perez, and Lea Hunter   May 1, 2018

For decades, the failed war on drugs has devastated communities across the United States, contributing to unprecedented rates of incarceration. The United States has nearly 25 percent of the world's incarcerated population despite comprising less than 5 percent of the world's total population.[1] This phenomenon gained momentum in the 1970s when President Richard Nixon first declared a war on drugs and policymakers at all levels of government added harsh criminal penalties for drug offenses, leading to explosive incarceration rates. Since then, the nation's incarcerated population has increased sevenfold—from 300,000 people to 2.2 million people today—and 1 out of 5 people incarcerated are serving time for a drug offense.[2]

People of color have disproportionately felt the damaging and unnecessary consequences of these outdated tough-on-crime policies. Members of these communities have been sentenced to long terms of imprisonment as well as lifetimes of poverty and economic insecurity.[3] According to the Drug Policy Alliance, drug enforcement in the United States is rooted in racial discrimination, as the first anti-drug laws were established around the turn of the 20th century and targeted Chinese immigrants, black Americans, and Mexican migrants.[4] Today, between 40 percent and 50 percent of all drug arrests are for marijuana.[5] Discriminatory enforcement of marijuana laws is one reason that black and Latino Americans make up two-thirds of the U.S. prison population despite only comprising 12 percent and 17 percent of the U.S. population, respectively.[6]

These consequences are particularly troubling at a time when the federal government is returning to draconian drug enforcement. Meanwhile, most states are moving in the opposite direction, decriminalizing and liberalizing marijuana laws. As of 2018, 30 states and the District of Columbia have enacted laws that loosen marijuana restrictions to some degree.[7] Additionally, nine states and the District of Columbia have legalized the recreational use of marijuana for adults, and 21 states have legalized it for medical purposes.

The country is at a crossroads: revert to the disastrous drug enforcement policies of the past or pave the way toward smarter, fairer, and more effective criminal justice policy. States have been leading the way toward the latter and have experienced additional positive public health outcomes and improvements in the economy, all while maintaining public safety. The federal government is now in a position to learn from state experiments and take steps to legalize marijuana.

A smart and fair criminal justice and public safety strategy

For states that have liberalized marijuana laws, an inherent tension with federal law exists, as possession, distribution, and cultivation of marijuana remain federal criminal offenses across the country. Marijuana is classified as a Schedule I drug, the most serious of five categories pursuant to the Controlled Substances Import and Export Act.[8] These categories, or schedules, are based on the drug's medical value and susceptibility for abuse. Schedule I substances have been determined by the federal government to have no accepted medical use and a high potential for abuse—a description that does not apply to marijuana, as evidenced by a growing body of research.[9] This classification also attaches serious criminal penalties for criminal offenses and can trigger mandatory minimum sentences.[10] Other Schedule I drugs include heroin, fentanyl, and ecstasy, which, unlike marijuana, regularly contribute to overdose deaths.

Decriminalization versus legalization

Decriminalization means that the possession of small amounts of marijuana will trigger lower or no criminal penalties, although fines and citations may still be levied. In New York, for example, the possession of a small amount of marijuana for recreational use will not lead to an arrest, but the state criminalizes marijuana consumption in public view.[11] Generally, the possession of larger amounts and trafficking of marijuana remain criminally illegal under this system. Many jurisdictions have chosen to decriminalize marijuana in order to prioritize higher-level crimes and cut down on justice-related costs.

Legalizing marijuana not only involves removing criminal penalties but also allowing for the formation of legitimate businesses to cultivate and sell marijuana, taxing their profits and regulating commerce in the same manner as alcohol and tobacco. Colorado is a prime example of this approach.[12] Proponents of legalization argue that decriminalization alone allows an underground marijuana market to continue to flourish.[13]

Attorney General Jeff Sessions' policies exacerbate these tensions. One of his first actions after assuming office called for federal prosecutors to "charge and pursue the most serious, readily provable offense" that carries the most substantial sentence.[14] This was a sharp departure from the Obama administration's Department of Justice, which called for federal prosecutors to avoid triggering mandatory minimums for low-level, nonviolent drug offenders.[15] In January, Sessions rescinded the Obama-era guidance that deprioritized federal enforcement of marijuana possession in states where its use had been allowed, leaving residents and companies in the marijuana industry uncertain whether they would be prosecuted under federal law for what is lawful in their state.[16]

Removing marijuana from the controlled substances schedules would reduce the number of people involved in the criminal justice system, specifically black and Latino Americans, who are systematically and disproportionately affected by criminal justice policies. A 2013 American Civil Liberties Union (ACLU) study found that black Americans are nearly four times more likely than white people to be arrested for marijuana possession, even though both groups use marijuana at comparable rates.[17] Similarly, another study found that, between 2014 and 2016, 86 percent of people arrested for drug possession in New York City were black and Latino. Before Washington, D.C., legalized the recreational and medical use of marijuana, approximately 90 percent of Washingtonians who were arrested for possession of marijuana were black.

It is also important to note that those with disabilities are overrepresented in the criminal justice system, given the large number of people who may self-medicate due to mental or chronic health conditions.[18] Jails and prisons have become institutions for those with disabilities. The Bureau of Justice Statistics found that people behind bars in state and federal prisons are nearly three times more likely to report having a disability than the nonincarcerated population; those in jails are more than four times as likely.

Decreased arrest and incarceration rates for marijuana offenses would not come at the cost of public safety. One recent study found that legalizing medical marijuana in southern border states, on average, reduced violent crime by 13 percent in markets historically controlled by Mexican cartels.[19] The crimes most strongly affected were robbery and murder, which both decreased, while homicides related to the drug trade fell by 41 percent. Similarly, studies found that after Colorado legalized marijuana, violent crime decreased by 6 percent.[20] A large part of these positive public safety benefits stem from the government's ability to regulate the sale and production of marijuana in these jurisdictions, thus reducing criminal activity and the costs and risks associated with illegally transferring drugs from Latin America and elsewhere to the United States.

Congress can take steps toward legalization now

In April, Senate Minority Leader Chuck Schumer (D-NY) announced his support for removing marijuana from the controlled substances schedules. His call to deschedule marijuana signals a significant shift in federal policymakers' attitudes toward marijuana. As Schumer explained concerning his decision to support decriminalizing marijuana, "I'm doing it because I think it's the right thing to do. I've seen too many people's lives ruined by the criminalization."[21]

Schumer's announcement is significant because of his position as leader of the Democratic Caucus of the U.S. Senate. Others have also been outspoken on the issue. For example, in 2017, Sen. Cory Booker (D-NJ) introduced the Marijuana

Justice Act, which Sens. Kirsten Gillibrand (D-NY) and Ron Wyden (D-OR) have also co-sponsored.[22] This bill—which has a House companion—aims to address the human toll of the failed war on drugs by amending the Controlled Substances Act to remove marijuana from Schedule I. It would eliminate criminal penalties for marijuana offenses and apply retroactively so that prior convictions for marijuana could be expunged. Sen. Cory Gardner (R-CO) sponsored the Small Business Tax Equity Act, which would allow marijuana businesses legally operating in a state to take advantage of common business tax deductions and credits.[23] Recently, former House Speaker John Boehner (R-OH) announced his decision to join the board of Acreage Holdings, which cultivates and distributes cannabis in several states. In announcing his decision, Boehner tweeted, "I'm convinced de-scheduling the drug is needed so we can do research, help our veterans, and reverse the opioid epidemic ravaging our communities."[24] Boehner's stance is in line with public opinion, considering that 6 in 10 Americans support marijuana legalization.[25]

Congress now should seriously consider proposals that lead to the legalization of marijuana. This is a time-consuming process that involves numerous issues, industries, and stakeholders, but the experiments in multiple states to liberalize marijuana laws provide a roadmap for the steps that the federal government should take toward legalization.

• Any federal liberalization of marijuana must apply retroactively so as to fairly address the thousands of Americans whose life opportunities have been destroyed by federal marijuana convictions. A number of states across the country have been enacting legislation that would seal or expunge a larger number of criminal convictions, so people with records can more easily obtain jobs, get a loan, and overcome obstacles to leading a productive life after serving their sentence.[26] States like Pennsylvania are passing legislation to make sealing records automatic in order to reduce the bureaucratic and administrative hurdles that often cause unnecessary and burdensome delays in the process.[27] Congress should consider legislation that automatically and immediately seals federal marijuana convictions, especially for those convicted of simple possession.

• Congress must consider ways to solve racial disparities that exist even in legal marijuana markets. While loosening state marijuana laws has resulted in lower arrest rates across all racial groups, black people are still more likely than other groups to be arrested for marijuana law violations.[28] Furthermore, black people have been largely left out of the legal marijuana industry. One 2016 estimate concluded that fewer than three dozen marijuana dispensaries—or about 1 percent of all dispensaries in the United States—are black-owned.[29] Congress must support, train, and license black entrepreneurs in order to ensure that jobs in this industry are also filled by people of color. This can be accomplished by following a model similar to the one proposed in Oakland, California, which recently established an equity program that sets aside half of all marijuana business permits for residents who have been targets of the war on drugs.[30]

- The fact that marijuana is listed as a Schedule I drug establishes significant roadblocks for researchers to understand marijuana, its effects, its risks, and its potential benefits. Scientists are legally restricted in the types, quantity, and quality of the marijuana that may be used for research, preventing long-term, large-scale analyses required for evaluating drugs.[31] The limited research conducted to date has supported the notion that marijuana has positive benefits and may be used to treat various medical conditions, including, but not limited to, chronic pain, muscle spasms, and nausea related to chemotherapy. However, experts and policymakers are locked in a Catch-22, making it difficult to answer the very questions necessary to understanding the full scope of marijuana's effect on public health, which in turn could help determine marijuana's placement on the drug schedule.[32]

- Federal marijuana legalization can facilitate job creation while significantly increasing tax revenue, and Congress should consider how to equitably maximize these economic benefits. A recent study found that legalizing marijuana nationwide could generate at least $132 billion in tax revenue between 2017 and 2025 as well as more than 1 million new jobs across the country.[33] As states have increasingly legalized marijuana, the legal marijuana market in the United States has grown to $9.7 billion.[34] Experts think this is a small fraction of the potential market since, last year, more than 4 million people used marijuana in states where it was legal, but 44 million people across the country consume marijuana products in a given year.[35] The government would also be able to generate billions of dollars in cost-savings by reducing the size of the criminal justice system, as fewer Americans would be incarcerated on marijuana-related offenses. One 2010 estimate pegged the amount spent by states on enforcing marijuana laws at $3.6 billion each year.[36]

- If marijuana is legalized at the federal level, banking regulations must be amended. Most marijuana businesses located in states where marijuana is legal are cash-only operations. Banks will not open accounts for these businesses since marijuana remains illegal at the federal level and handling money from marijuana sales is considered money laundering. Marijuana business owners who are able to find a bank that will work with them must submit to high fees with limited banking services. Therefore, many business owners choose to operate exclusively on cash, making them vulnerable to robberies. Some law enforcement professionals have advocated for federal marijuana legalization in order to facilitate legal banking operations and create paper trails to cut down on criminal activity.[37]

Conclusion

Marijuana laws must be liberalized at the federal level. A growing body of evidence across a variety of fields points to federal marijuana legalization as a smart approach. This policy shift would carry resounding effects across issue areas. The road to legalization begins with decriminalization and the removal of marijuana from the controlled substances schedules. This must be done through smart, fair, and effective criminal justice policy as part of a broader movement to rethink marijuana.

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Endnotes

1 Peter Wagner and Alison Walsh, "States of Incarceration: The Global Context 2016" (Northampton, MA: Prison Policy Initiative, 2016), available at https://www.prisonpolicy.org/global/2016.html.

2 Ta-Nehisi Coates, "The Black Family in the Age of Mass Incarceration," *The Atlantic*, October 2015, available at https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/; Peter Wagner and Wendy Sawyer, "Mass incarceration: the whole pie," *Prison Policy Initiative*, March 14, 2018, available at https://www.prisonpolicy.org/reports/pie2018.html.

3 Center for American Progress, "Nearly Half of U.S. Children Have At Least 1 Parent With a Criminal Record, According to New Data From the Center for American Progress," Press release, December 10, 2015, available at https://www.americanprogress.org/press/release/2015/12/10/127088/release-nearly-half-of-u-s-children-have-at-least-1-parent-with-a-criminal-record-according-to-new-data-from-the-center-for-american-progress/.

4 Drug Policy Alliance, "A Brief History of the Drug War," available at http://www.drugpolicy.org/issues/brief-history-drug-war (last accessed April 2018).

5 Drug Policy Alliance, "Drug War Statistics," available at http://www.drugpolicy.org/issues/drug-war-statistics (last accessed April 2018); American Civil Liberties Union, "Marijuana Arrests by the Numbers," available at https://www.aclu.org/gallery/marijuana-arrests-numbers (last accessed April 2018).

6 David Dinenberg, "Marijuana legalization must include justice reform," *The Hill*, January 31, 2017, available at http://thehill.com/blogs/pundits-blog/crime/317152-marijuana-legalization-must-include-justice-reform.

7 *Governing*, "State Marijuana Laws in 2018 Map," March 30, 2018, available at http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html.

8 Drug Enforcement Administration, "Drug Schedules," available at https://www.dea.gov/druginfo/ds.shtml (last accessed April 2018).

9 The National Academies of Sciences, Engineering, and Medicine, "Nearly 100 Conclusions on the Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report; One of the Most Comprehensive Studies of Recent Research on Health Effects of Recreational and Therapeutic Use of Cannabis and Cannabis-Derived Products," Press release, January 12, 2017, available at http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=24625.

10 Charles Doyle, "Mandatory Minimum Sentencing of Federal Drug Offenses in Short" (Washington: Congressional Research Service, 2018), available at https://fas.org/sgp/crs/misc/R45075.pdf.

11 Matt Taylor, "New York City Is Finally Softening Its Stance on Pot," Vice, November 11, 2014, available at https://www.vice.com/en_us/article/ppm8ev/you-still-cant-smoke-weed-legally-in-new-york-city-1111.

12 Colorado.gov, "Official state information on the laws & health effects of retail marijuana," available at https://www.colorado.gov/marijuana (last accessed April 2018).

13 Jeffrey Miron, "How to kill the marijuana black market," *The Denver Post*, December 16, 2017, available at https://www.denverpost.com/2017/08/11/how-to-kill-the-marijuana-black-market/.

14 Memorandum from U.S. Attorney General Jeff Sessions to all federal prosecutors, "Department Charging and Sentencing Policy," May 10, 2017, available at https://www.justice.gov/opa/press-release/file/965896/download.

15 Sari Horwitz, "Holder seeks to avert mandatory minimum sentences for some low-level drug offenders," *The Washington Post*, August 12, 2013, available at https://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a_story.html?noredirect=on&utm_term=.d318fbcdcc99.

16 Laura Jarrett, "Sessions nixes Obama-era rules leaving states alone that legalize pot," CNN, January 4, 2018, available at https://www.cnn.com/2018/01/04/politics/jeff-sessions-cole-memo/index.html.

17 Will Drabold, "Federal enforcement of marijuana laws will target minorities, civil rights advocates say," Mic, January 4, 2018, available at https://mic.com/articles/187220/federal-enforcement-of-marijuana-laws-will-target-minorities-civil-rights-advocates-say#.27bqiS7M1.

18 Rebecca Vallas, "Disabled Behind Bars: The Mass Incarceration of People With Disabilities in America's Jails and Prisons," Center for American Progress, July 18, 2016, available at https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars/.

19 Jamie Doward, "Legal marijuana cuts violence says US study, as medical-use laws see crime fall," *The Guardian*, January 13, 2018, available at https://www.theguardian.com/world/2018/jan/14/legal-marijuana-medical-use-crime-rate-plummets-us-study.

20 Colorado Department of Public Safety, "Marijuana Legalization in Colorado: Early Findings" (2016), available at http://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf.

21 Shawna Thomas, "Sen. Chuck Schumer to introduce bill to 'decriminalize' marijuana," Vice News, April 19, 2018, available at https://news.vice.com/en_us/article/7xdjqz/sen-chuck-schumer-to-introduce-bill-to-decriminalize-marijuana.

22 *Marijuana Justice Act of 2017*, S. 1689, 115 Cong. 1 sess. (Government Printing Office, 2017), available at https://www.congress.gov/bill/115th-congress/senate-bill/1689.

23 *Small Business Tax Equity Act of 2017*, S. 777, 115 Cong. 1 sess. (Government Printing Office, 2017), available at https://www.congress.gov/bill/115th-congress/senate-bill/777/text.

24 Gene Demby, "What John Boehner's Pivot on Cannabis Tells Us About The Legal Weed Boom," NPR, April 16, 2018, available at https://www.npr.org/sections/codeswitch/2018/04/16/602670537/what-john-boehners-pivot-on-cannabis-tells-us-about-the-legal-weed-boom.

25 Abigail Geiger, "About six-in-ten Americans support marijuana legalization," Pew Research Center, January 5, 2018, available at http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/.

26 National Employment Law Project, "Ensuring People With Convictions Have a Fair Chance to Work," available at http://www.nelp.org/campaign/ensuring-fair-chance-to-work/ (last accessed April 2018).

27 CBS Philly, " 'Clean Slate' Advances In Pennsylvania Legislature," March 13, 2018, available at http://philadelphia.cbslocal.com/2018/03/13/clean-slate-advances-in-pennsylvania-legislature/.

28 American Civil Liberties Union, "The War on Marijuana in Black and White" (2013), available at https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.

29 Amanda Chicago Lewis, "How Black People Are Being Shut Out of America's Weed Boom," BuzzFeed News, March 16, 2016, available at https://www.buzzfeed.com/amandachicagolewis/americas-white-only-weed-boom?utm_term=.jh3o9rMxQ8#.ug5KVyZRGQ.

30 Max Blau, "Legal Pot Is Notoriously White. Oakland Is Changing That," Politico, March 27, 2018, available at https://www.politico.com/magazine/story/2018/03/27/oakland-legal-cannabis-hood-incubator-217657.

31 The National Academies of Sciences, Engineering, and Medicine, "Nearly 100 Conclusions on the Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report."

32 NPR, "How The 'Cannabis Catch-22' Keeps Marijuana Classified As A Harmful Drug," October 12, 2016, available at https://www.npr.org/2016/10/12/497586908/how-the-cannabis-catch-22-keeps-marijuana-classified-as-a-harmful-drug.

33 Katie Zezima, "Study: Legal marijuana could generate more than $132 billion in federal tax revenue and 1 million jobs," The Washington Post, January 10, 2018, available at https://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm_term=.627258119cf2.

34 Paul Sullivan, "As States Legalize Marijuana, Investors See an Opportunity," The New York Times, January 26, 2018, available at https://www.nytimes.com/2018/01/26/your-money/marijuana-investments.html.

35 Zezima, "Study: Legal marijuana could generate more than $132 billion in federal tax revenue and 1 million jobs."

36 Christal Hayes, "Marijuana Arrests Were Up Last Year—And You're Paying Billions for It," Newsweek, September 26, 2017, available at http://www.newsweek.com/pot-arrests-rising-and-youre-paying-millions-it-671478.

37 Robb Mandelbaum, "Where Pot Entrepreneurs Go When the Banks Just Say No," The New York Times, January 4, 2018, available at https://www.nytimes.com/2018/01/04/magazine/where-pot-entrepreneurs-go-when-the-banks-just-say-no.html?mtrref=www.google.com.