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The Colors of Cannabis: Reflections on the Racial Justice Implications of California’s Proposition 64

Steven W. Bender*

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INTRODUCTION

As part of the *UC Davis Law Review* Disjoined Regulation Symposium in 2016, I published *The Colors of Cannabis: Race and Marijuana*,¹ an article that centered race in the discussion of recreational marijuana legalization. The article confronted the salience of race in the last 100-year life cycle of U.S. marijuana prohibition, from its initial criminalization by the states prompted by derogatory racial stereotypes, through its ongoing racialized enforcement in the criminal justice system, and finally the current trend of state decriminalization and legalization, thus far primarily to the benefit of white entrepreneurs and users. At the time of its writing, the article looked at recreational legalization in Colorado (2012), Washington (2012), Oregon (2014), Alaska (2014), and the District of Columbia (2014). In the fall 2016 elections, in addition to three more states

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¹ Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 UC DAVIS L. REV. 689 (2016) [hereinafter *Colors of Cannabis*].

(Arkansas, Florida, and North Dakota)² joining the now majority of states authorizing medical marijuana, four other states legalized recreational marijuana — California (by means of Proposition 64), Maine,³ Massachusetts, and Nevada. This online supplement to my symposium piece focuses on California's Proposition 64 and revisits the themes of that article to examine the prospects for racial justice under the new California legalization regime.

I. CALIFORNIA AS A LEADER IN MARIJUANA PROHIBITION AND REFORM

Although sometimes attributed wrongly as the first state to prohibit recreational marijuana use,⁴ California was nonetheless the first Western state to do so — in 1913 and then again in 1915, following the lead of the first U.S. state to outlaw marijuana, Massachusetts (1911).⁵ Early to the prohibition party, California later led the nation in the trend to legalize marijuana. Evident in this current legalization trend is that medical marijuana legalization will precede recreational legalization, as all eight recreational legalization states and the District of Columbia previously authorized medical marijuana.⁶ Importantly, in 1996, California was the first state to legalize medical marijuana,

² See 28 *Legal Medical Marijuana States and DC*, PROCON.ORG, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Nov. 9, 2016, 11:49 AM PST). Additionally, Montana voters in 2016 expanded that state's existing medical marijuana allowance by means of Initiative 182.

³ Maine's governor, who opposed the legalization measure, initially questioned whether ballot measures are more than mere recommendations, but ultimately signed a proclamation verifying the narrow victory of the ballot measure. See James McClure, *Will Governor Paul LePage Halt Legalizing Marijuana in Maine?* CIVILIZED, <https://www.civilized.life/articles/paul-lepage-halt-legalizing-maine/>; Scott Thistle, *LePage Verifies Marijuana Vote, Making Possession of Small Amounts Legal Jan. 30*, PORTLAND PRESS HERALD, <http://www.pressherald.com/2017/01/03/gov-lepage-says-hes-signed-off-on-legal-marijuana/> (last updated Jan. 4, 2017).

⁴ 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, 558 (2011) (citing RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 41 (1974) for the proposition that California and Utah were the first to outlaw marijuana in 1915).

⁵ See Casey Lyons, *Lost in the Weeds*, BOS. MAG. (Oct. 2012), <http://www.bostonmagazine.com/2012/09/medical-marijuana-in-massachusetts/> (among the sources stating Massachusetts was the first state to prohibit marijuana); see also Dale H. Gieringer, *The Forgotten Origins of Cannabis Prohibition in California*, 26 CONTEMP. DRUG PROB. 237 (1999) (discussing a poorly drafted 1913 California law prohibiting "loco-weed" and the more direct 1915 law outlawing "narcotic preparations of hemp or loco-weed" except with a prescription).

⁶ See 28 *Legal Medical Marijuana States and DC*, *supra* note 2.

pursuant to voter Proposition 215. Although Oregon was first to decriminalize marijuana for all uses in 1973, California soon followed with legislation in 1975 and again in 2010, as a precursor to voters legalizing recreational marijuana in 2016. The 1975 law, adopted by the California legislature in light of findings that 90 percent of marijuana arrests were for possession, reduced the possible criminal sanction for user possession of an ounce or less to a misdemeanor punishable by a maximum \$100 fine.⁷ The 2010 reform, while retaining that maximum fine, downgraded the offense of small-scale marijuana possession from a misdemeanor to an infraction.⁸ Recreational legalization followed in 2016 at the hands of California voters, after two failures at the ballot box in 1972 and 2010.

II. RACIAL ENFORCEMENT OF CALIFORNIA MARIJUANA LAWS

As detailed in the printed article, U.S. marijuana enforcement disproportionately targets black and Latino users, with most arrests stemming from unlawful possession rather than trafficking.⁹ Studies predating California's 2010 decriminalization verify that California's enforcement record reflected that national skew. One study of black arrests in 25 California cities from 2006 to 2008 revealed that African Americans were arrested for marijuana possession at rates up to twelve times the White rate — in Los Angeles, for example, the rate was seven times greater.¹⁰ Similarly, a 2010 Drug Policy Alliance study spanning 2004 through 2008 found that in all of California's 25 largest counties, African Americans were arrested for marijuana possession at higher rates (double, triple, even quadruple) than whites.¹¹ Mirroring

⁷ Jessica Roy, *California's Been Rejecting Legalized Marijuana for More than a Century*, L.A. TIMES (Sept. 13, 2016), <http://www.latimes.com/politics/la-pol-ca-timeline-california-recreational-marijuana-history-20160708-snap-story.html>.

⁸ *Id.* Decriminalization is also somewhat of a precursor for legalization of recreational marijuana, as the states of California, Colorado, Maine, Nevada, and Oregon all eliminated incarceration for simple marijuana possession in advance of legalization. OFFICE OF NAT'L DRUG CONTROL POLICY, WHO'S REALLY IN PRISON FOR MARIJUANA? 14 (2005).

⁹ Bender, *Colors of Cannabis*, *supra* note 1, at 691-92.

¹⁰ James Lance Taylor, *Building Minority Community Power Through Legalization*, in SOMETHING'S IN THE AIR: RACE, CRIME, AND THE LEGALIZATION OF MARIJUANA 92, 108 (Katherine Tate, James Lance Taylor & Mark Q. Sawyer eds., 2014) [hereinafter SOMETHING'S IN THE AIR] (discussing NAACP-commissioned study, "Arresting Blacks for Marijuana in California: Possession Arrests in 25 Cities, 2006–2008.").

¹¹ HARRY G. LEVINE, ET AL., DRUG POLICY ALL., TARGETING BLACKS FOR MARIJUANA: POSSESSION ARRESTS OF AFRICAN AMERICANS IN CALIFORNIA, 2004–08 (2010), http://www.drugpolicy.org/docUploads/Targeting_Blacks_for_Marijuana_06_29_10.pdf

the national experience, California marijuana enforcement also targeted Latinos. A study of marijuana possession arrests in 33 California cities from 2006 to 2008 found Latinos were more likely to be arrested than whites, with the Los Angeles arrest rate twice that for whites.¹²

Overall, a 2016 Drug Policy Alliance report found that nearly half a million Californians were arrested for marijuana crimes between 2006 and 2015, with blacks and Latinos arrested at disproportionate rates despite using and selling marijuana at rates similar to those of whites.¹³ Although arrests declined following the 2010 decriminalization, systemic racial enforcement disparities survived. California's ACLU and the Drug Policy Alliance concluded in 2016 that under the new decriminalization infraction regime, marijuana tickets for blacks were "wildly disproportionate" compared to whites, and Latino ticketing rates were also disproportionate.¹⁴ Despite the citation costing only \$100, that amount could be increased by fees and also fell hardest on poor people, who are disproportionately black and Latino, resulting in arrest warrants for nonpayment and thus elevating a ticketed infraction to an arrest. Through this enforcement experience, decriminalization in California proved no panacea for racialized drug enforcement. But, as suggested below, even legalization is unlikely to fully stem the entrenchment and effects of racialized policing of drugs in California.

(finding that in Los Angeles County, blacks were arrested at more than triple the rate of whites).

¹² Melissa R. Michelson & Joe Tafoya, *The Latino Politics of Proposition 19: Criminal Justice and Immigration*, in *SOMETHING'S IN THE AIR*, *supra* note 10, 115, 118-19.

¹³ DRUG POLICY ALL., IT'S NOT LEGAL YET: NEARLY 500,000 CALIFORNIANS ARRESTED FOR MARIJUANA IN LAST DECADE (2016), http://www.drugpolicy.org/sites/default/files/California_Marijuana_Arrest_Report_081816.pdf [hereinafter *IT'S NOT LEGAL YET*] (finding blacks more than twice as likely as whites to be arrested for marijuana misdemeanors and Latinos forty-five percent more likely to be arrested for a marijuana misdemeanor).

¹⁴ DRUG POLICY ALL., MARIJUANA ENFORCEMENT DISPARITIES IN CALIFORNIA: A RACIAL INJUSTICE (2016), http://www.drugpolicy.org/sites/default/files/CA%20Marijuana%20Infractions_May_2016.pdf (finding infraction issuance rates for blacks in the first two years of decriminalization in Los Angeles were almost four times the white rate). In Massachusetts, decriminalization increased the racial disparities. See JON B. GETTMAN, ET AL., ACLU OF MASS., *THE WAR ON MARIJUANA IN BLACK AND WHITE: A MASSACHUSETTS UPDATE* (2016), <https://aclum.org/wp-content/uploads/2016/10/TR-Report-10-2016-FINAL-with-cover.pdf> (finding that in 2014, five years after decriminalization, marijuana possession arrests for blacks were 3.3 times greater than for whites, exceeding disparities before decriminalization despite a dramatic decline in the total number of people arrested).

III. THE PROPOSITION 64 CAMPAIGN THROUGH A LENS OF COLOR

With the exception of the District of Columbia, previous recreational marijuana legalization campaigns largely ignored the racialization of marijuana criminal enforcement.¹⁵ But racial enforcement played a role in the California campaign, suggesting that in a majority-minority region, race will be more salient in the legalization campaign. Of the four states and District of Columbia that are majority-minority jurisdictions,¹⁶ only California and the District of Columbia thus far have legalized marijuana. In California, the NAACP, the ACLU, and the Drug Policy Alliance all urged Proposition 64 as necessary to help undo and repair the mass incarceration of people of color.¹⁷ Most notably, the legendary rapper Jay Z, now a Los Angeles resident, narrated a video publicized by the *New York Times* that directly linked mass incarceration of minorities to his support for legalization.¹⁸ Released in September 2016 just before the November elections, the video, produced by the political arm of California's Drug Policy Alliance, recounted the failures of the War on Drugs and its focus on users and dealers of color. Relatedly, a California official, Lt. Governor Gavin Newsom, lent his support to Proposition 64 as a racial justice initiative.¹⁹ Some California newspaper endorsements also decried racial injustice in the drug war.²⁰

¹⁵ Bender, *Colors of Cannabis*, *supra* note 1, at 693-94.

¹⁶ Specifically, the four majority-minority states are California, Hawaii, New Mexico, and Texas. Mike Maciag, *A State-by-State Look at Growing Minority Populations*, GOVERNING (June 25, 2015), <http://www.governing.com/topics/urban/gov-majority-minority-populations-in-states.html>.

¹⁷ Nadra Nittle, *Legalizing Pot: Is Prop 64 Really a Civil Rights Issue?*, CALMATTERS (Nov. 3, 2016), <https://calmatters.org/articles/is-legalizing-pot-a-civil-rights-issue-both-sides-of-prop-64-say-yes/>.

¹⁸ Jay Z, et al., Opinion, Jay Z: "The War on Drugs Is an Epic Fail," N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/video/opinion/100000004642370/jay-z-the-war-on-drugs-is-an-epic-fail.html>. The video cast a broad view of legalization, presumably encompassing the other states where legalization was on the ballot (Arizona was the only state whose voters rejected recreational legalization in 2016), and where it may appear in later years.

¹⁹ Katy Steinmetz, *California Lt. Gov. Gavin Newsom on Marijuana Legalization: "Our Purpose is Social Justice"*, TIME (June 21, 2016), <http://time.com/4377239/california-lt-gov-gavin-newsom-marijuana-legalization-social-justice/>.

²⁰ *California Proposition 64, Marijuana Legalization (2016)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_\(2016\)](https://ballotpedia.org/California_Proposition_64_Marijuana_Legalization_(2016)) (last visited Dec. 29, 2016) (quoting *California Aggie* and *East Bay Express* editorials, amongst others, as addressing racial injustice). The *California Aggie* editorial suggested that "Legalizing the use of recreational marijuana would also go a long way in helping to solve some deep-seated inequities, particularly toward people of color in the criminal

Although these organizations, media, and individuals ensured a backdrop of racial justice in the California campaign, the language of Proposition 64 avoids any explicit mention of race. The sections on “Findings and Declarations” and “Purpose and Intent” fail to address the devastating consequences of marijuana criminalization for minorities, while pointing out in racially neutral terms that the “courts are clogged with cases of non-violent drug offenses”²¹ and that the current underground black market benefits “violent drug cartels and transnational gangs.”²² Although allocating some of the tax funding from lawful marijuana sales toward services in “communities disproportionately affected by past federal and state drug policies,”²³ the Proposition language neither identifies those communities nor overtly links their identity to racialized populations or racialized enforcement bias. Indeed, the only explicit mention of race in Proposition 64 is in the context of disbursing research funds to evaluate the impact of legalization to include study of “the geographic location, structure, and function of licensed marijuana businesses, and demographic data, including race, ethnicity, and gender, of license holders.”²⁴ The ballot proponents, at least, were unwilling to explicitly confront and address racial enforcement in the language of the Proposition. The next section more carefully examines the potential racial justice impacts of the new legalization regime Proposition 64 constructed.

IV. IS PROPOSITION 64 A RACIAL JUSTICE INITIATIVE?

While not addressing all the racialized dimensions of marijuana enforcement,²⁵ Proposition 64 nonetheless goes beyond other state

justice system.” *Dope Decisions: The Editorial Board Endorses Legalizing Recreational Marijuana*, CAL. AGGIE (Oct. 25, 2016), <https://theaggie.org/2016/10/25/dope-decisions-the-editorial-board-endorses-legalizing-recreational-marijuana/>. In contrast, in Maine, which is overwhelmingly white, the pro-legalization campaign focused on the now-familiar arguments of revenue raising, product safety, and redirecting police resources to serious crime. *Maine Marijuana Legalization, Question 1 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Maine_Marijuana_Legalization,_Question_1_\(2016\)](https://ballotpedia.org/Maine_Marijuana_Legalization,_Question_1_(2016)) (last visited Dec. 29, 2016).

²¹ Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64 § 2g (Cal. 2016), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf).

²² *Id.* § 2h.

²³ *Id.* § 7 (adding section 34019 to the Revenue and Taxation Code).

²⁴ *Id.*

²⁵ For example, Proposition 64 does not legalize possession of more than an ounce of marijuana nor, as addressed *infra* in note 50, eliminate the potential for an illicit

legalization approaches to begin to undo, and even to repair, the damage of ongoing structural racism in the criminal justice system and particularly in its War on Drugs. Most profoundly, Proposition 64 avoids leaving minors to the prevailing winds of racial profiling and school-to-prison enforcement. Instead, while not legalizing their use as it did for adults, it dramatically reduces penalties for minors to eliminate incarceration, notably whether for the use, sale, or production of marijuana.²⁶ For example, under prior law, a minor who grew marijuana could face as much as three years of imprisonment. Under Proposition 64, that offense is punishable as an infraction requiring drug education and community service rather than a fine or jail time.²⁷ Because minors accounted for two-thirds of the misdemeanor marijuana arrests in California at the time of its enactment, Proposition 64 will have a significant impact in reducing criminal consequences for minors of color (and whites).²⁸ While not immunized from police contact, California youth engaged in illicit marijuana activities can at least avoid serious criminal consequences.²⁹ In contrast, after Colorado legalized marijuana for adults, its black and

market, which remains an emphasis of police in minority communities. See Nittle, *supra* note 17 (including accusation of marijuana activist that Proposition 64 backers were “wildly misconstruing” the advantages of the initiative for people of color, as “Proposition 64 won’t legalize offenses that people in urban communities are arrested for like selling, transporting or possessing more than an ounce of marijuana.”). Public use of marijuana also remains unlawful under Proposition 64, and the Colorado post-legalization experience suggests racial disparities will demarcate public consumption offenses. See Bender, *Colors of Cannabis*, *supra* note 1, at 703 (discussing a study that blacks in Colorado were more than twice as likely as whites to be arrested for public marijuana use). Nevada’s new legalization law leaves public users vulnerable to a misdemeanor offense and fine up to \$600, along with imposing other new crimes of cultivating marijuana within public view and providing marijuana to minors. Question 2, Regulation and Taxation of Marijuana Act §14, <https://www.regulatemarijuanainnevada.org/full-initiative-text/>.

²⁶ Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64, §§ 3(y), 4 (Cal. 2016) (mandating drug education and community service for minors).

²⁷ Nittle, *supra* note 17 (remarks of Lynne Lyman, California state director of the Drug Policy Alliance).

²⁸ See DRUG POLICY ALL., IT’S NOT LEGAL YET, *supra* note 13 (reporting that youth arrests increased their percentage following the 2010 decriminalization law).

²⁹ At the same time, Proposition 64 fails to protect those who fall into the abyss between minors (age 17 and under) and the age of adulthood for possessory legalization purposes (21 and over), subjecting 18–20 year-olds to potential penalties, such as an infraction for possession of small amounts and the potential of imprisonment for possession for purposes of sale, or even when they simply share a marijuana joint. Cal. Proposition 64, § 8.

Latino youth are being arrested at greater rates for marijuana offenses, while white youth arrest rates declined.³⁰

Another significant racial justice attribute of Proposition 64 is its attention to repairing the damage of prior convictions under the old marijuana enforcement regime. As the printed article discusses, it took legislation in Oregon, after its voter-enacted legalization, to enable the expungement of marijuana criminal records.³¹ Proposition 64 is self-contained, providing for expungement or reduction of the prior marijuana offense:

A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction

A person who has completed his or sentence . . . who would not have been guilty of an offense or who have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction³²

Clearing criminal records is more than psychological, as a record can have dramatic everyday consequences from employment to housing.

Marijuana is also effectively eliminated in the new law as probable cause for a search that might reveal other drugs or criminal offenses.

³⁰ SMART APPROACHES TO MARIJUANA, LESSONS LEARNED AFTER 4 YEARS OF MARIJUANA LEGALIZATION 13 (2016), <https://learnaboutsam.org/wp-content/uploads/2016/10/SAM-report-on-CO-and-WA-issued-26-Oct-2016.pdf>.

³¹ See Bender, *Colors of Cannabis*, *supra* note 1, at 705-06 (discussing the ability or inability to overturn past marijuana convictions in legalization states).

³² Cal. Proposition 64, § 8 (adding section 11361.8 to the Health and Safety Code). Previously, Proposition 47 (2014) authorized the retroactive reduction of some controlled substance felonies to misdemeanors. See generally Jenny Espino et al., *Former Felons Find New Jobs and New Hope After Prop 47*, USA TODAY (Dec. 14, 2016), http://www.usatoday.com/story/news/crime_courts/2016/12/14/prop-47-former-felons-new-jobs/94636088/.

Proposition 64 provides that no conduct it deems lawful can constitute the basis for “detention, search, or arrest,”³³ which has racial justice consequences given the concentration of policing efforts in communities of color.

Despite California’s decriminalization law, the potential for racialized injustice lurked in the decision to charge a greater offense for someone caught with more than the decriminalized one ounce of marijuana. White possessors might be charged with a mere (excessive) possession offense, a misdemeanor punishable by as little as a \$500 fine, but minorities caught with sizable amounts were more often charged with the felony offense of intent to sell their stash of marijuana, carrying a maximum three year sentence.³⁴ Under the sentencing scheme of Proposition 64, the potential differential that led to racialized consequences has been eliminated, as both possession of more than an ounce of marijuana and the offense of possession with intent to sell (without a license) carry the same penalty of six months, a \$500 fine, or both.³⁵

In another step toward racial justice, Proposition 64 allocates money, akin to reparations, to the communities most damaged by the War on Drugs. This community reinvestment fund devotes some of the tax revenue from legalized marijuana³⁶ to those “communities disproportionately affected by past federal and state drug policies,” by means of a “Community Reinvestment grants program to local health departments and [by disbursing] at least fifty-percent [of specified annual funds] to qualified community-based nonprofit organizations to support job placement, mental health treatment, substance use disorder treatment, system navigation services, legal services to address barriers to reentry, and linkages to medical care.”³⁷ Presumably the target communities would be those of color, although in California, as detailed below, the Northern California Emerald Triangle region of illicit marijuana production has seen significant enforcement activity and may be poised to collect some of these

³³ Cal. Proposition 64, § 4 (adding section 11362.1 to the Health and Safety Code).

³⁴ Brooke Edwards Staggs, *If Prop 64 Passes, What Happens to Prisoners Convicted of Marijuana Charges?*, ORANGE CTY. REG., <http://www.ocregister.com/articles/marijuana-734244-prop-drug.html> (last updated Nov. 7, 2016).

³⁵ *Id.* (supplying a chart of marijuana penalties before and after Proposition 64).

³⁶ Cal. Proposition 64, § 7 (allocating an initial \$10 million to be increased annually until it reaches a \$50 million annual community investment fund).

³⁷ *Id.* (adding section 34019 to the Revenue and Taxation Code).

monies, but population equity of those affected by the drug war surely favors urban regions dominated by minority residents.³⁸

V. THE COLOR OF LICENSED MARIJUANA IN CALIFORNIA

Another significant contribution to racial justice is Proposition 64's refusal to unduly penalize those convicted of drug crimes by preventing them from participating as entrepreneurs in the newly legalized market. In Washington, for example, a scoring system makes it unlikely for prospective retail licensees with two recent misdemeanor marijuana convictions to obtain a license,³⁹ and those convicted of any felony within the last ten years are effectively barred.⁴⁰ Californians convicted of drug felonies also faced challenges in obtaining licenses to operate California's medical marijuana dispensaries.⁴¹ Proposition 64, however, breaks ground by not barring most convicted drug offenders from licensure in the new lawful marijuana marketplace.⁴² At the same time, the new law doesn't go as far as the medical marijuana approach of Oakland, California, which allocates at least half its distribution permits to those arrested for marijuana in the past ten years or who live in specified districts with high marijuana arrest rates.⁴³

³⁸ In a similar vein, voters in Portland, Oregon overwhelmingly approved an initiative in 2016 to impose a local marijuana sales tax and apply revenues toward small business development, while prioritizing women- and people of color-owned businesses of any type. See generally Melanie Sevcenko, *Could a Marijuana Tax Help Portland's Minority-Owned Businesses?*, GUARDIAN (Sept. 29, 2016), <https://www.theguardian.com/business/2016/sep/29/portland-marijuana-tax-minority-business>.

³⁹ Bender, *Colors of Cannabis*, *supra* note 1, at 697 n.36.

⁴⁰ *Marijuana Licensing FAQ*, WASH. STATE LIQUOR & CANNABIS BD. http://lcb.wa.gov/mjlicense/mj_licensing_faq (last visited Dec. 31, 2016).

⁴¹ See Patrick McGreevy, *New Law Could Put Some Medical Marijuana Dispensaries Out of Business*, L.A. TIMES (May 13, 2016), <http://www.latimes.com/politics/la-pol-sac-pot-dispensary-felon-owners-20160513-story.html> (discussing 2015 law governing medical marijuana that allowed the denial of licenses for felony controlled substance convictions).

⁴² Cal. Proposition 64, § 5 (specifying that prior convictions with completed sentences for possessing, selling, or manufacturing controlled substances will not bar licensure, aside from felony convictions with minors as victims or felony drug trafficking with enhancements related to trafficking conspiracies and the quantity and type of drug trafficked).

⁴³ Sarah Beller, *Marijuana Legalization in California: Despite Schisms, Supporters Are Certain Prop 64 Is Worth It*, INFLUENCE (Aug. 10, 2016), <http://theinfluence.org/marijuana-legalization-in-california-despite-schisms-supporters-are-certain-prop-64-is-worth-it/>.

As addressed in the printed article, little diversity exists in the legal marijuana industry, which thus far is dominated by white male entrepreneurs.⁴⁴ Nationally, only an estimated one percent of owners in the legal marijuana industry are African American.⁴⁵ In part this stems from the relatively small black (and minority) populations in the prior recreational legalization states of Washington and Oregon. Buoyed by Proposition 64, California, and particularly Los Angeles, is poised to change that dynamic. Los Angeles is already home to more medical marijuana dispensaries than operate in the entire state of Colorado for recreational marijuana.⁴⁶ With a majority-minority population comprised of 49 percent Latinos and 10 percent African Americans,⁴⁷ Los Angeles alone can help rewrite the recent experience of white entrepreneurs presiding over an industry that imprisoned so many dealers of color.

Clouding the potential for minority entrepreneurship in the California legalized marijuana industry, however, are two factors, one unique to California and one unique to this moment in history. Northern California's "Emerald Triangle" of Humboldt, Mendocino, and Trinity counties produces a majority of the marijuana, illicit and legal, consumed in the United States,⁴⁸ yet presents a white racial demographic far different from Los Angeles and California generally. Experiencing a land rush even before the passage of Proposition 64,⁴⁹ some of the whitest terrain in California is central to the legalized marijuana economy and portends that entrepreneurs of color will face a geographic challenge, at least on the production side of legalized marijuana.⁵⁰

⁴⁴ Bender, *Colors of Cannabis*, *supra* note 1, at 695-98.

⁴⁵ *As the Legal Pot Industry Booms, African-Americans Are Left Behind*, NPR (Mar. 18, 2016), <http://www.npr.org/2016/03/18/471008253/as-the-legal-pot-industry-booms-african-americans-are-left-behind> (estimate of journalist based on interviews).

⁴⁶ Dennis Romero, *Racial Cannabis: Are Marijuana Sales a 'Whites Only' Industry?*, WORLD CANNABIS (Sept. 14, 2016), <https://www.worldcannabis.net/whites-only-cannabis-business/>.

⁴⁷ *QuickFacts: Los Angeles City, California*, U. S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/0644000> (last visited Dec. 29, 2016). Los Angeles County, more than twice as populous as Los Angeles, is similarly majority-minority. *QuickFacts: Los Angeles County, California*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/LFE305214/06037> (last visited Dec. 29, 2016).

⁴⁸ Beller, *supra* note 43.

⁴⁹ *Id.*

⁵⁰ The dominance of the Emerald Triangle in U.S. illicit weed production also ensures a ready local supply of illicit marijuana if the regulatory hurdles to legalized production and sales, and the taxes imposed (initially a production tax of \$9.25 per ounce of marijuana buds, an excise tax of 15 percent of gross receipts, and state 9

The other more ominous threat to minority entrepreneurship arrived in the same moment as the legalization of recreational marijuana in California — the election of Donald Trump. Currently operating under a truce of sorts with legalization states in the form of the so-called Cole memo,⁵¹ the federal government could return at any time to its prior approach in California and other states of raiding (medical) marijuana operations lawful under local law.⁵² My printed article addressed the reluctance of minorities, already subject to undue scrutiny by law enforcement officials, to enter a high-profile market that is not fully legal.⁵³ With the election of an individual who made so many racially disparaging and polarizing remarks against Latinos and other minorities, and the specter of cabinet appointments such as proposed Attorney General Jeff Sessions, who staunchly opposes legal marijuana and would likely undo the hands-off policies of the Cole memo, racial minorities have much to fear. Would they voluntarily enter the newly minted legalized California market at the same moment that federal enforcement seems more likely than ever in the modern history of legalized recreational marijuana?

CONCLUSION

Advocates of racial justice need to buckle up for the coming years as federal enforcement looms over any advances that Proposition 64 delivered. Apart from this federal omnipresence, the California decriminalization experience suggests that racial justice does not always accompany a de-escalation of the drug war. Rather, racial justice must be a conscious influence in the design and ongoing implementation of drug reforms and, even then, advocates for racial justice cannot expect the system to reform completely, quickly, or even willingly. California will serve as the largest U.S. laboratory of

percent and local sales and use taxes, Control, Regulate and Tax Adult Use of Marijuana Act, Proposition 64, § 7 (Cal. 2016)) allow a proximate black market to undercut the legalized market in the same terrain.

⁵¹ Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to all U.S. Attorneys, on guidance regarding marijuana enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁵² 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, 375-83 (2013) [hereinafter *Joint Reform*] (describing a history of federal raids against medical marijuana operations, including California cooperatives).

⁵³ Bender, *Colors of Cannabis*, *supra* note 1, at 697 (excerpting remarks of director of Drug Policy Alliance).

marijuana legalization for adults, and its racial justice effects bear watching in the years to come.

As I argued elsewhere,⁵⁴ having been the first venue where derogatory racial stereotypes resonated and resulted in the criminality of marijuana use, states are best suited to undo the damage of that criminalization. As laboratories of social justice, the states in the coming presidential regime must take the lead in sensible drug policies that prioritize treatment and education over criminal sanctions. Although the trend toward legalization has flaws in fully confronting and redressing racial injustices in the War on Drugs, Proposition 64 is a hopeful sign that legalization measures are moving toward recognition of the racial implications of policies that have caused more societal harm in the last century than the drug itself.

⁵⁴ Bender, *Joint Reform*, *supra* note 52, at 360.