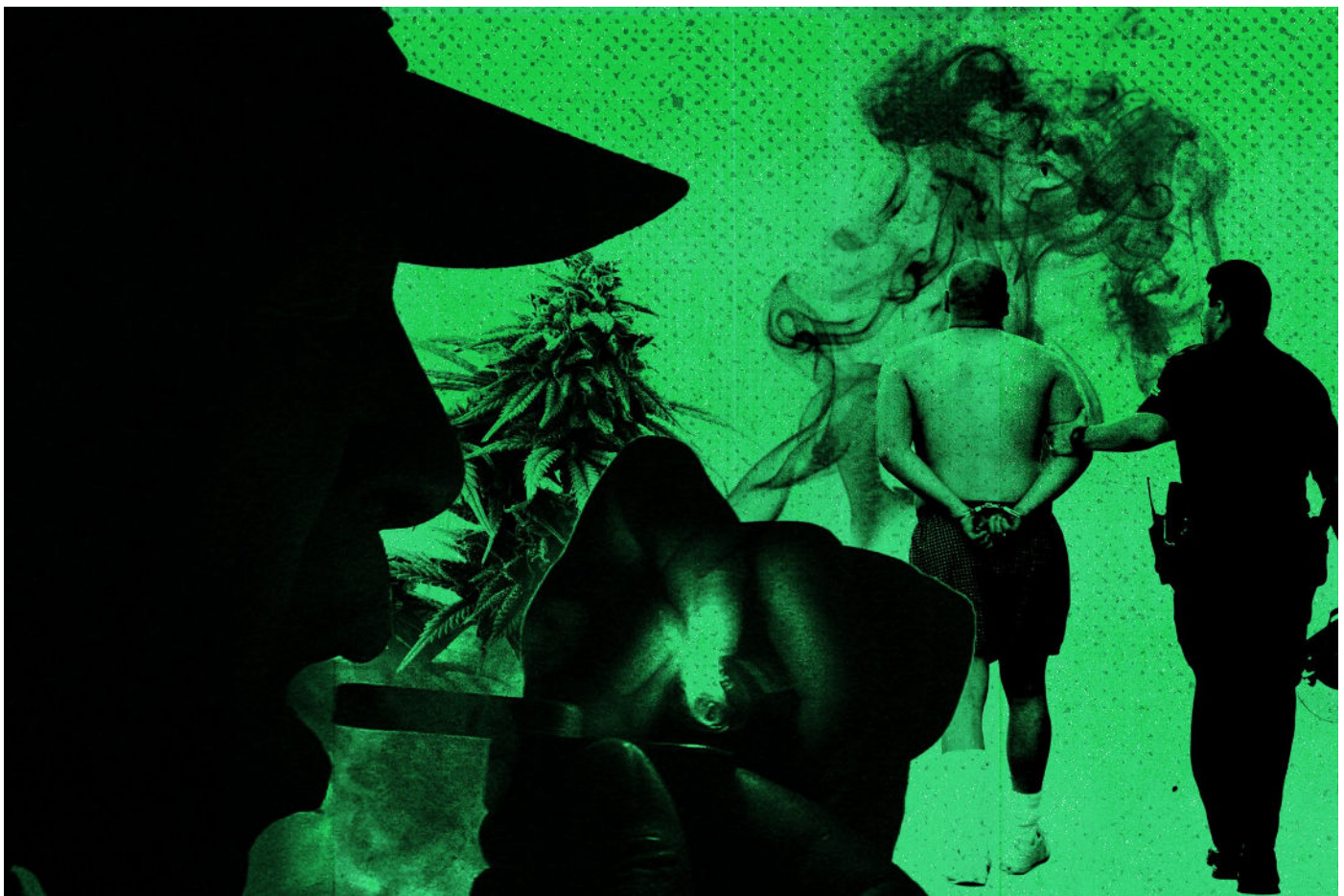


The Failed Promise of Legal Pot

New laws on marijuana were supposed to boost tax revenues and free up cops to go after “real” criminals. But underground sales—and arrests—are still thriving.

[Tom James](#) May 9, 2016



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It's just after four o'clock on a hot Seattle afternoon, and Thomas Terry is standing in the parking lot of a Jack in the Box. Known for fights that end with police sirens and sometimes ambulances, it's a spot some locals half-

jokingly call “Stab in the Box,” but today the scene is quiet.

A man is walking up the street toward Terry and a few other young men who are gathered in the shade of a brick wall where the parking lot meets the sidewalk. As he draws near, one of them opens his mouth, and the words tumble out:

“Kush? You want some weed?”

Whether the man does or not, he says nothing, and keeps walking. It’s the middle of August, two years and eight months after voters in Washington passed an initiative to permit both the possession and sale of recreational marijuana—making the state the second in the nation to do so. In large part, the law was aimed at eliminating the black market for marijuana and redirecting those sales from parking lots and living rooms into stores, where the state could monitor and tax the transactions. Yet, although legal marijuana has generated real declines in arrests, the presence of Terry and the young men on the corner points to a hitch not just in the nuts and bolts of marijuana sales but in one of legalization’s most touted goals.

Asking to be identified only by his initials, D.C., one of the young men on the corner, breaks it down. Business has fallen since the law passed, but enough people think they can score a bargain, or simply don’t trust the shiny new stores, to keep things moving. The police know about it—they always have—and they still bust dealers. Sometimes they do sweeps, D.C. says, referring to a well-publicized raid downtown. The cops are definitely more relaxed about it, he says, but sometimes they still show up and bust whoever’s around.

A few days later, the corner is empty. The reason is a Ford SUV, painted black, blue, and white, idling at the curb a few feet away; a police officer’s arm hangs out the window as he surveys the faces passing by. A few hours later he is gone, and the crowd is back. Mostly, the crowd is black. Mostly, the cops

who will bust them are white. Mostly, on the corner it's hard to see how anything was changed by a movement that aimed to change everything.

The dream of legal marijuana as it is being sold to the American public is that it will not only give states a chance to reap a tax windfall off of a drug millions of Americans already use; it will end the back-and-forth tussle among cops, users, and dealers, and shift police resources to more serious crimes. Most compellingly, advocates hold out the promise of a major step toward dismantling one of the pillars of racially biased policing—the war on drugs—and finally reeling in a legal net that has long entangled black men at vastly disproportionate rates.

Proponents of legalization make this case explicitly. In factsheets and reports, the American Civil Liberties Union [describes](#) marijuana laws as generating “staggering” racial bias. And the [statistics](#) do paint a stark picture: Although whites are as likely to use marijuana as blacks, nationally black people are almost four times more likely to be arrested for possessing the drug. In some states, it's closer to nine times. Those arrests in turn show up on background checks for everything from apartments to jobs, and despite the courts' presumption of innocence, arrests are often treated by society as de facto markers of guilt. So in one fell swoop, voters are told, they can balance government budgets, begin to close a pipeline that sends one in three black men to prison, and free up the cops to chase real criminals. Plus, now it's legal to get stoned.

One-half of the dream is coming true. In the first two states to go legal, arrests for marijuana possession have dropped dramatically—by 98 percent in [Washington](#) and 95 percent in [Colorado](#) as of last year—and high taxes in both states are generating tens of millions of dollars a year for education and public health. At the same time, legal markets in Washington and Colorado along with loosening medical-marijuana laws around the country have

together exerted enough downward pressure on street prices that Central American cartels have [reportedly](#) begun to shift production away from marijuana, toward more profitable drugs like heroin.

But the other half of the dream is faltering. The rub lies in reconciling those dramatic statistics with the reality on the street: The same faces standing on the same corners. The same neighborhoods cruised by the same cops. The same cautious side-to-side look before a thickly flowered stem is removed from a backpack, peered at closely, maybe smelled and rolled between the fingers, and, in a quick change of hands, finally sold.

As legalization efforts proceed apace, the risk is that even as possession arrests taper off, black markets will continue entangling young black men. [Half](#) of all drug arrests are for marijuana, and about one in eight of those is for distribution. According to experts, even that number likely conceals cases where police target dealers but ultimately arrest them only for possession, which has lower probable-cause standards. And like possession arrests, arrests for selling marijuana show broad trends: The sellers who the cops catch are mostly male, more than half are under 24, and black people are arrested at four times the rate of whites, even though whites are [up to 32 percent more likely](#) to sell the drug.

The risk is that, by itself, legalizing marijuana possession changes none of this and that, even as legalization spreads, young black men will continue to be arrested at disproportionate rates for selling the drug. In turn, this leaves intact a version of the same specter that helped spur legalization in the first place: An arrest record's scarlet letter will continue to blight the collective futures of urban communities of color, the natural effect of an economic incentive the state did not remove.

Why is a black market that was supposed to be vanquished still thriving? In

short: economics. Judging the size of a black market has always been a tenuous endeavor. In Washington, one of the first big unknowns the state tackled when it set about creating a legal market was the size of the demand—a state that had just made a historic change to marijuana laws didn't even know how much of it people smoked. But aside from some brief initial shortages, stores in Washington and Colorado haven't generally had a problem keeping the shelves stocked. Partly, that's because both states had preexisting medical-marijuana markets, and some of those producers easily migrated into the new legal recreational system.

Instead, what is keeping people in Colorado's black market is price, with a dose of convenience thrown in, says Mark Vasquez, a former narcotics detective and now the chief of police in Erie, Colorado. Vasquez heads the Colorado Association of Police Chiefs' marijuana working group and has traveled nationally to educate other departments about Colorado's experience with its new legal system. "The black market," he says, "is alive and well and will continue to thrive in Colorado."

There are a few basic reasons for this. First, the medical market, Vasquez says, can sell marijuana more cheaply than the state-licensed and -regulated stores because medical dispensaries don't have to charge most of the combined 27.9 percent tax on the drug. This increases the resale of medical marijuana on the street. Second, there are the plants that are grown for personal use, which are allowed under the law. Vasquez says the result is a steady supply of marijuana not only for street dealers but also for Craigslist sales, which have become so ubiquitous that some city departments don't have the resources to crack down on them.

With various illegal sources flourishing, Vasquez says, the challenge for regulators "is trying to find the sweet spot, where the taxes are low enough that there's an incentive for people to go to the regulated stores."

Francisco Gallardo, a community leader in Denver, summarizes the situation more succinctly: “If it’s ridiculously expensive and they can get it from their homie cheaper, that’s what they’re going to do.”

As a former gang member and a program director for Denver’s [Gang Rescue and Support Project](#), Gallardo works to help predominantly young men of color escape gang and street life in metropolitan Denver, where marijuana culture is a constant presence. Informal dealing, he says, is still very much a part of life in the city, especially in Denver’s urban core. Like Vasquez, and without prompting, Gallardo pinpoints the issue as one of price. In Colorado stores, prices are higher than on the street, Gallardo explains, leaving space for dealers to make a profit while still undercutting the legal market. “There’s people out there definitely shucking and jiving, there’s no doubt about that,” says Gallardo. “If you can do it without the taxes and the cost, people are going to try.”

Data that might tease out the size and extent of the black market since legalization is by turns scarce and mixed—but doesn’t contradict either man’s point. While marijuana distribution arrests in Colorado as a whole fell sharply after legalization—almost 98 percent—in urban Denver, the decline wasn’t nearly as pronounced. Compared with the three years before legalization, the three years since show a [decline](#) in distribution arrests of only 36 percent. And that number should probably be even lower: After the law first passed, Vasquez says, some police officers backed off on making any marijuana arrests, choosing a hands-off approach until they had more clarity about what exactly what was legal under the new rules.

Off the top of his head, Gallardo says, he could name four marijuana dispensaries within walking distance. But even with the stores so close at hand, Gallardo explains, some people keep going to street dealers for one reason: It’s just plain cheaper. The only way to get street sales down, Gallardo

says, “is if they reduce the tax.”

Enter the dead admiral.

In his office at the University of Washington, surrounded by books lining three walls from floor to ceiling, Bill Rorabaugh is every inch the historian. With white hair, wire glasses, and a grandfatherly crinkle around his eyes, he smiles and leans back in his chair. A scholar of 19th- and 20th-century America, Rorabaugh didn't start out specializing in black markets—and certainly not black markets for marijuana. Instead, early in his career, Rorabaugh studied alcohol, especially in the pre-Prohibition era, and wrote his first book, *The Alcoholic Republic*. But in the course of that research, a man came to his attention who seemed to understand black markets especially well—and how to end them. He was Rear Admiral Luther E. Gregory, and he held the solution to a much earlier black market in Washington state.

By the beginning of the 1930s, America's alcohol prohibition was coming to an end. The beneficial effects predicted by prohibition boosters—from reduced crime and mental illness to lower taxes—had not wholly materialized. Instead, violent gangs had taken over the supply chain as well as significant swaths of U.S. cities. Speakeasies sprang up as quickly as the police could close them down, and gangsters massacred opponents in the streets.

In the throes of the Great Depression, legislatures all over the country were also beginning to see alcohol as a way to fill state coffers. Slogans like “Give us beer and balance the budget!” appeared on parade floats and posters. Everyone wanted to bring liquor back—and the lawmakers wanted to do it with a hefty tax. The only problem was that the bootleggers were well established, and fixing prohibition meant finding a way to force illegal

operations to go straight or close their doors.

When repeal finally came, Washington's then-Governor Clarence Martin asked Admiral Gregory to head the state's new Liquor Control Board. Critically, Martin gave Gregory *carte blanche* to mold the new policies as he saw fit. Gregory took up the challenge—and surprised everyone.

First, instead of cracking down on bootleggers and speakeasy operators, Gregory gave them amnesty and issued licenses to anyone willing to play by the state's rules. Second, backed by the governor and his influence in the Senate, Gregory arranged for alcohol taxes to be set as low as any in the nation, which allowed those willing to follow the law to keep a significant amount of their profits, and it made room for legal operators to compete with bootleggers' prices. Third, Gregory punished anyone who broke the rules—even once—with an iron fist, blacklisting them from ever making or selling alcohol in the state again.

Predictably, this caused some turmoil in a legislature anxiously awaiting an infusion of cash from liquor sales, but the governor backed Gregory. Faced with a low cost of entry and legal profits, bootleggers and speakeasies around the state mostly turned legitimate. Meanwhile, the few remaining stragglers were quickly put out of business, and drinkers flocked to a competitive legal market.

That might have been the end of it, but there was one more piece to Gregory's plan. After holding down taxes—and thus prices—for three years, Gregory abruptly raised taxes so much that they were among the highest in the nation. The price of booze went up, of course, but people kept buying legal liquor and beer. There was no alternative left. Gregory had broken the back of the black market.

What the admiral saw so clearly was the importance of the legal market's

cost-price margin—the difference between production cost and final selling price. Gregory knew that margin was where bootleggers lived, and shrinking it would leave less room for them to undercut legal prices and still turn a profit. By bucking the revenue-hungry legislature and setting taxes low in the early years of Washington’s liquor market, Gregory stripped the black market of its ability to compete.

The strategy hasn’t exactly been lost in time. When Vermont commissioned the RAND Corporation to put together a [survey](#) of the different scenarios for legalizing the drug in their state, the policy research behemoth referenced the approach Gregory used as one possible option. Although the report pointedly stopped short of making recommendations, it emphasized the importance of making the legal retailers competitive with the black market.

The report also emphasized that the Gregory plan isn’t without risks. Since marijuana makes up a very small part of most users’ budgets, the report notes, even a relatively high tax would only have significant negative effects on heavy users, and a low tax wouldn’t save average users much money. What’s more, the report warns, allowing prices to drop too low would remove the disincentive of cost from those teetering on the edge of using too much of the drug.

Another, potentially larger risk of the strategy, notes Jonathan Caulkins, the lead author of the report and the former co-director of RAND’s Drug Policy Research Center, is that during the period of initially low taxes and correspondingly high profits, a marijuana business lobby might be able to become sufficiently entrenched in a state to interfere with later plans to raise taxes. And of course, the parallel between street corner weed sellers and bootleggers isn’t a perfect one: Unlike a speakeasy, which might be able to obtain a business license and reopen as a legal business right away, the average drug dealer is separated by a wide gulf of capital and expertise from

being able to open a storefront marijuana retail operation.

But Gregory's strategy can still be mined for shards of economic and social truth. Costs of entry to the legal market matter, as do prices. Dealers' networks and producers' facilities take time to set up, and illicit production especially has significant startup costs of its own—which means that while black marketers may have to be coaxed out of business, once they're out, it's likely they'll stay out. And for a policy movement that promised to reform criminal justice, perhaps the most important lesson to take from Gregory is that a disincentive from the state is infinitely more effective when coupled with positive and easily accessible rewards for following the rules.

One looming unknown pointed out in the RAND report was exactly how much of a premium consumers would be willing to pay to buy marijuana from a legal store. Only one survey had been conducted, the report said, a small poll of Washington-state residents who self-identified as marijuana users. On average, respondents said that they would be willing to pay about \$5 more per gram to buy marijuana from a legal store. For a gram that costs between \$10 and \$15 on the street, that's a price bump of one-third to one-half that consumers would tolerate. But the average belied a split in the respondents: While almost half said they would be willing to pay between \$5 and \$10 extra per gram for legal marijuana, nearly a third said they wouldn't pay anything extra at all. Altogether, just under half of those polled marked maximums of \$2 or less, with the heaviest users indicating the least willingness to pay more.

Parsing the survey too closely would be a mistake, Vermont's RAND report warns, especially with such a small sample size and a methodology that let participants opt in using an Internet form. But despite their lack of specificity, the results paint a plausible picture: a market split between a slim majority of users willing to pay more in a legal store and a smaller but still

significant portion who are relatively happy buying on the black market.

In perhaps the ultimate historical nod to the admiral, legislatures in both Washington and Colorado independently lowered taxes in both states last year, explicitly citing the goal of putting pressure on illegal markets. But both moves were small. Washington's effective tax rate, including sales tax, went from about 44 percent to 43.5 percent; and Colorado passed a measure to reduce its tax from 27.9 percent to 25.9 percent by 2017, leaving both states near what the survey, however imperfect, paints as the upper end of acceptable rates.

The move itself also acknowledges a more worrying possibility. In a classic case of diminishing returns, if even 75 percent of smokers can be enticed into the legal market, a state will capture the majority of the possible revenue from marijuana. But if the Washington survey is even generally right, creating a system that entices *every* buyer to participate would require setting taxes so low that revenue from the whole system would plummet. For states, eradicating the last stubborn traces of the black market may in fact carry little positive incentive.

Yet, even acknowledging such a policy for what it is—a plan for half success—the insidious temptation is that from the outside, the failure built into it looks almost inevitable. After all, getting 75 percent of smokers to go legal is pretty good, right? And lawbreakers will always exist, won't they? In fact, the question of eradicating the black market goes as deep as the roots of crime itself.

In Seattle, a few feet off the corner, Terry explains that he started selling weed when his mom lost her job. He had never sold before, but he'd seen his friends do it. He knew it was possible, he knew how it worked, and he knew he could make money doing it. He was 16.

“If I didn’t provide money, no one else would,” Terry says, adding that he also tried mowing lawns that year. “I couldn’t just wait there and pray that someone would pay the rent.” Later, he dropped out of school, and even though he got a normal day job, he had become familiar with a routine that worked too well to give up. Soon he had a child and, always, there were bills to pay.

Today, Terry says, dealing isn’t his main source of income. He still works a regular job—he’s a dishwasher—and that job provides most of his income. But he’s not full time—few people at his work are, he says—and at \$11 an hour, most weeks he brings home about \$300. After bills and rent, there’s not much left over. The hustle, Terry says, is good because it’s there when he needs it, and it pays cash. “My money that I use to pay for diapers, formula, stuff like that, comes from selling,” says Terry. “Unless you’re the budgeting king of the world, you’re not going to be able to make it on \$300 a week.”

As Terry and others on the corner talk, a picture starts to emerge of dealing as a kind of safety net. A few mention having jobs, and when Terry says that the hotel where he works might be hiring, another man quizzes him for details. But to a man, each also describes his own version of an economic cycle in which the ends that are supposed to meet often don’t: low pay, part-time hours, child support for some, the difficulty of finding a job with a criminal record, and rents that only seem to go up.

“I know that under any circumstances,” says D.C., “I can come out here, and you can give me a bag of weed, and at the end of the day, I can have some money in my pocket.”

Some on the corner are clearly in the game for something more than diaper money. While Terry and D.C. talk, another young man bounces up to the group. All bravado, he’s hoping to sell to the sellers, offering to weigh

everything out on an electronic scale in his SUV parked nearby. Flashing a grin, he says selling weed lets him support four girlfriends.

But for Terry and the others who share the corner with him, the day is short on glamour. After the young man with the SUV and the scale leaves, they go back to what they were doing—taking turns calling out muted offers to the faces walking past, occasionally making a sale, and treading the line between gossip and trash-talking to pass the time. It's an economic equation built around skimming the margin: Buy an ounce, sell it in grams, dodge the cops, and keep the difference. Legalization pinched dealers, D.C. says, because it drove prices down. But there are still customers, and that means they can still make money, even if it's not as much as it used to be. As long as that's true, he says, the work will be what it always has been: reliable.

In one form or another, marijuana legalization is coming, almost without a doubt. Four states and the District of Columbia have legalized recreational marijuana, 16 have decriminalized it, and seven allow medical use of the drug. Altogether, 27 states have relaxed their laws on the drug, and President Obama himself, speaking to [Vice](#) last March, admitted that if enough states legalized marijuana, it would be natural for Congress to consider removing it from Schedule 1 of the Controlled Substances Act—a move that would amount to overnight legalization nationwide. In March, the Supreme Court declined to hear a suit, filed by Nebraska and Oklahoma, that sought to strike down Colorado's law. Less than a month later, Democratic presidential candidate Bernie Sanders floated the idea of de-scheduling the drug at the last Democratic presidential primary debate, and no one batted an eye.

It would be a mistake to call marijuana legalization a failure, even in the loosest sense of the word. After all, nationally, just fewer than one in eight marijuana arrests on average are for distribution; the other seven are for simple possession. That means that out of eight marijuana arrests that would

have happened tomorrow in Colorado, seven of them won't, because possession is legal. That means seven Coloradans who could have lost everything—from their jobs to their housing to their college financial aid—as a result of an arrest or conviction will instead simply go about another day of their ordinary lives. But the persistence of that eighth arrest—the roughly 12.5 percent of marijuana arrests that are for distribution—means that legalization isn't a complete success, either. Those few distribution arrests cause the majority of marijuana-related incarcerations, and still disproportionately affect black men.

On the corner by the Jack-In-The-Box, the greeting/offer is called out again, and again the target keeps walking without reply. Far from being bothered, the young men barely seem to notice. They know their customers are out there, and they are content to wait.

A larger but still familiar cycle is also at play. A few weeks later, as summer is winding down, Seattle police conclude a buy-bust operation months in the making—focused on the corner. Nearby shop owners and residents had complained. The young men made them feel unsafe, hanging around late into the night, offering drugs, and making catcalls. The police go so far as to close nearby alleys, where sales had been occurring, and over two days arrest 20 people for sales of all types of drugs, including nine marijuana sales. Of the 24 people targeted in the sting, 20 are black. The neighborhood is 75 percent white.

Legalization has changed the black market. Gallardo points out that, in Denver at least, it is neither as large nor as violent as it used to be. Plus, instead of buying from cartels, the dealers mostly seem to buy from what Gallardo calls “mom-and-pop operations.” Altogether, even with the remaining risks that arise from dealing, selling marijuana seems to have become a more relaxed affair.

The cops haven't changed as much. People seem less fearful of arrest, but it still happens. And, Gallardo says, the police still seem to use marijuana raids as a tool whenever they want to crack down on a particular corner or block. The drug still amounts to a vector of suspicion, which police are still free to follow into citizens' lives as they see fit. Or, as a Drug Policy Alliance [report](#) puts it, noting that black Coloradoans continue to be arrested for marijuana at 2.4 times the rate of whites: "While the number of marijuana possession arrests has dropped, the law enforcement practices that produce racial disparities in such arrests have not changed."

The stores and the street also attract different sorts of people, Gallardo says. The black market isn't as appealing to people who have the money to pay legal prices. They even seem to understand that, if it costs a bit more, some of the higher prices in regulated stores help to pay for important programs—plus, there's no risk and they can afford it. The street, however, is a draw for people who can't afford legal marijuana. And in most urban centers, the people with the least are also usually people of color.

Listening to Gallardo, the risk begins to sound not so much like one of outright failure, but of a success rendered hollow by its unequal distribution. The new system has clearly not replaced, or even threatened, corner dealers either in Washington or Colorado. Rather, they fit into the cracks of a new world, where middle-class stoners are able to engage in a favorite pastime without fear of prosecution, and an expensive legal market keeps everyone else looking for a bargain. The result: Small-time, under-the-table dealing remains lucrative enough to entice young black men to cross the line, to be arrested far more frequently than their white peers. And the hustle continues.

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