

## REEFER REPARATIONS

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*250 years of slavery. Ninety years of Jim Crow. Sixty years of separate but equal. 35 of years of racist housing policy. Until we reckon with our compounding moral debts, America will never be whole.*

-Ta-Nehisi Coates, 2014

In quick step, the cannabis industry has evolved from an illicit market to one of the most highly regulated, and immensely profitable, business sectors in the United States. Slowly but surely, this evolution is ensuring that only a monied few will enjoy the pathway to entrepreneurship and success with cannabis. But what about those whose lives have been destroyed by decades of marijuana prosecutions, disparately imposed penalties for drug crimes, and social exclusion by way of a criminal record for a prior marijuana offense? The cannabis industry may be creating boundless fortunes and changing the world's business landscape, but it has failed to reconcile its success with decades of cannabis prosecutions. America's pernicious "War on Drugs," driven in large part by demonizing cannabis and punishing those who use it, has long victimized the most vulnerable among us. This has created a moral debt which is owed to those harmed by years of prohibition. This debt can be recompensed by enabling those injured by prohibition to benefit from the unique entrepreneurial opportunities offered within the burgeoning cannabis industry.

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### I. INTRODUCTION

Currently, many Americans can walk into a local dispensary and buy cannabis, or can grow it in their own home, without fear of legal consequences. Meanwhile, Wall Street speculators, millionaire hedge funders, and former politicians who had previously helped to punish mere possessors of cannabis, are jumping into the newly legalized marijuana industry. Yet other Americans remain in prison for growing or selling marijuana. In states where marijuana is legalized or decriminalized, people are still getting arrested for marijuana offenses, even as others profit from it. In states where cannabis is legal for medical or adult use, the industry that has emerged is increasingly inaccessible for those who experienced the greatest impacts of marijuana prohibition.

Given the sea change in state and local legislatures regarding cannabis prohibition, a conflict now exists between state law and

federal law<sup>2</sup> on the legality of medical and recreational cannabis, leaving large, unanswered questions about how to properly regulate a nascent industry with a controversial past. It not a question of *when* federal prohibition will end, but *how*. Forty-six states now have some form of marijuana legalization.<sup>3</sup> Thirty-four states have enacted medical marijuana laws and have functioning medical programs currently serving patients; seventeen states have enacted programs that allow limited medical access.<sup>4</sup> Eleven states and the District of Columbia, allow for adult recreational marijuana use.<sup>5</sup> In the latter half of 2018, Canada legalized recreational cannabis and began government-sponsored sales, and Mexico's Supreme Court ruled cannabis prohibition unconstitutional, paving the way for full decriminalization and eventual recreational sales.<sup>6</sup> Tides are changing rapidly in the movement to legalize both medical and adult recreational marijuana use, yet those benefitting the most from the economic opportunities legalization brings are not those who suffered the consequences of marijuana criminalization.

This article examines the paradox that is the current, legal cannabis market: The marijuana millionaires now command an outsized industry advantage, leaving those who were persecuted, prosecuted and incarcerated for marijuana offenses with little to no opportunity to join or keep pace. As state and local governments press forward with legalization and decriminalization, there is increased momentum on how to recognize the people who suffered

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<sup>2</sup> See Controlled Substance Act, 21 U.S.C. §§ 801, 812 (2012). As discussed more fully in Section II *infra*, marijuana is classified as a "schedule 1" substance. This classification means that there is a high risk for abuse, the drug currently has no currently accepted medicinal use and there is a lack of accepted safety for use of the drug or other substance under medical supervision.

<sup>3</sup> See generally NAT'L CONFERENCE OF STATE LEGISLATURES, *State Medical Marijuana Law* (Mar. 10, 2020), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>4</sup> *Id.* at Table 1, 2.

<sup>5</sup> See generally NAT'L CONFERENCE OF STATE LEGISLATURES, *Marijuana Overview* (Oct. 17, 2019), <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

<sup>6</sup> See NATIONAL SUPREME COURT OF JUSTICE, MEXICO CITY, *Press Release Regarding Case No. 140/2018* (Oct. 31, 2018), <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=5785>.

most under prohibition, by legislating a way for them to benefit most under legalization. Problematic to that endeavor is an industry where the majority of legal cannabis businesses are owned and operated by white entrepreneurs or large corporate interests.<sup>7</sup> Recognizing that this inequity has been brought about, at least in part, by the extensive, generations-deep harm caused by the War on Drugs, state legislatures have attempted to design “social equity” programming to address the lack of minority participation in the industry. Yet, these solutions can lack uniformity and are therefore insufficient to achieve equity in the industry. In particular, and as this article explores, state-level government continues to struggle with how to comprehensively handle the erasure of prior marijuana convictions, how to allocate sales revenue in ways that benefit vulnerable communities, and how to create specialized access for those who lack the financial and educational resources to compete in an exploding industry.

At bottom, the industry must square the benefits of legalization with the consequences of historical criminalization. By analyzing current state-level cannabis programs, this article argues that the industry must be re-designed to foster ownership opportunities that benefit those who have been marginalized by prohibition. The industry must also establish a formal method by which sales revenue is to be reinvested into the communities that suffered the most under prohibition policies.

While “reparations” is a term that primarily invokes discussion about resolving racial and economic inequality in America<sup>8</sup>, the objectives advanced by social equity programming—

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<sup>7</sup> See Eli McVey, *Chart: Percentage of Cannabis Business Owners and Founders by Race*, MARIJUANA BUS. DAILY (Sep. 11, 2017), <https://mjbizdaily.com/chart-19-cannabis-businesses-owned-founded-racial-minorities/>. (Depicting a reader survey from Marijuana Business Daily with a small sample size of 388 businesses.)

<sup>8</sup> Reparations refer to righting a wrong with economic restitution. As defined by Black’s Law Dictionary, reparations are the redress of an injury, or amends for a wrong inflicted. *See Reparation*, BLACK’S LAW DICTIONARY (2nd ed. 1910). Historically, reparations

expungement initiatives, licensing preferences, and community reinvestment—should be embraced as a unique form of reparations. Perhaps it is a myth that cannabis legalization is a panacea for the decades of injustice stemming from drug wars and mass incarceration, but the opportunity for minority participation in cannabis companies “should be seen as a form of restitution, and a recognition that poor communities of color bore the terrible brunt of this war that cut people’s lives short, limited their opportunities, limited their educational and career advancement.”<sup>9</sup>

## II. A HISTORY OF RACIALIZED PROHIBITION & LAW ENFORCEMENT PRIORITIES

The pharmacological use of Cannabis in the United States dates to the middle of the nineteenth century,<sup>10</sup> however, over time, prejudices against both blacks and Mexicans fused to ensure the demonization and criminalization of those who sold and used marijuana. Mexican laborers in the Southwest, already viewed as lazy, criminally minded, and of lesser intellect, became associated with marijuana smoking as a explanation for their bad attributes.<sup>11</sup> The term “[M]arijuana” came into vogue to underscore the drug’s

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have referred to a comprehensive analysis of the financial impact of slavery upon generations of African Americans, as well as the impact of structural racism resulting from Jim Crow-era laws, and what should be done to recompense the living descendants of those who suffered from these oppressive legacies.

<sup>9</sup> Katie Weiner, *Overpoliced, Underrepresented: Racial Inequality and Cannabis Capitalism*, HARV. POL. REV. (May 19, 2019), <http://harvardpolitics.com/culture/racial-inequality-cannabis/>.

<sup>10</sup> See STEVE D’ANGELO, *THE CANNABIS MANIFESTO: A NEW PARADIGM FOR WELLNESS*, 43-44 (2015). (noting that Cannabis was part of U.S. pharmacopeia from 1850-1942, when physicians would prescribe it in extract or tincture form to suppress headaches, increase appetites, and as a sleep aide.)

<sup>11</sup> See Steven Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689-690 (2016) (citing PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 45 (2009)).

'Mexican-ness,' further inciting anti-immigrant sentiments."<sup>12</sup> Similarly, black marijuana smokers in the South, particularly the jazz musicians of New Orleans, ignited racialized fears of violent crime.<sup>13</sup> Marijuana was scapegoated as prompting murder, rape, and mayhem among black communities. Harry J. Anslinger, the first Commissioner of the Federal Bureau of Narcotics, promoted several false theories that associated cannabis with violence and death.<sup>14</sup> With titles such as "Marijuana: Assassin of Youth,"<sup>15</sup> his propaganda ultimately resulted in the passage of the Marijuana Tax Act (MTA) in 1937,<sup>16</sup> which effectively made marijuana a controlled substance under federal law.<sup>17</sup>

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<sup>12</sup> Matt Thompson, *The Mysterious History Of 'Marijuana'*, NAT'L. PUB. RADIO CODE SW!TCH: RACE IN YOUR FACE (Jul. 22, 2013), <http://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana>.

<sup>13</sup> See 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, 366 (2013).

<sup>14</sup> See Jerome Himmelstein, *The Continuing Career of Marijuana: Backlash... Within Limits*. 13 CONTEMP. DRUG PROBS. 1, 4 (1986) (Discussing the projection of "marijuana as a 'national menace.'" No distinction was drawn between levels of use—moderate, experimental, social, or chronic use—all was regarded as equally dangerous and synonymous with culturally deviant and marginalized groups.) See also, Eric Schlosser, *Reefer Madness*, THE ATLANTIC (Aug. 1994), <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/>.

<sup>15</sup> See Eric Schlosser, *Reefer Madness*, THE ATLANTIC (Aug. 1994), <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/>.

<sup>16</sup> In 1973, The MTA was subsumed by the Controlled Substances Act (CSA). See Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 et seq. (2006) (Codifying Title II of the 1970 Drug Abuse Prevention and Control Act as the Controlled Substances Act (CSA), in 1973). Within the context of the CSA, controlled substances are placed on a schedule, depending on accepted medical use(s) and practices of abuse. Cannabis is identified as a schedule 1 substance, defined as a drug with no currently accepted medical use and a high potential for abuse.

<sup>17</sup> See PBS FRONTLINE, *Marijuana Timeline*, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited August 16, 2019). The MTA effectively outlawed cannabis by requiring physicians and pharmacists to register and report use of the plant, as well as pay an excise tax for authorized medical and industrial uses.

In the 1940s and 1950s, state-level legislation strengthened marijuana prohibition through implementing increasingly draconian punishments for its possession and sale.<sup>18</sup> In the 1960's, as drugs became symbols of youthful rebellion, social upheaval, and political dissent against the Vietnam War, perceptions regarding the "dangers" of marijuana came under scrutiny, with many viewing its use as less harmful than previously assumed.<sup>19</sup> The federal government declined to engage with this emerging viewpoint, and instead chose to increase the legal framework by which marijuana possession, use, and sale would be punished. In June 1971, President Nixon declared a "War on Drugs," which increased the size and presence of federal drug control agencies, as well as criminal penalties for possession, sale, and distribution, of controlled substances, including marijuana.<sup>20</sup> This policy shift eroded Fourth Amendment protections, emboldening law enforcement, and justifying reliance upon law enforcement as the singular tool in regulating drug-related behaviors.<sup>21</sup> The "War on Drugs" also laid the foundation for an outsized role of U.S. law enforcement in combatting the drug trade around the world.<sup>22</sup> Federal agents were deployed to Latin America and Asia, going after producers and traffickers with the same gusto as they did in heavily ambushed communities of color across the U.S.<sup>23</sup>

To Nixon, the antiwar left and minority communities, were his chief political enemies; by criminalizing both groups heavily through anti-drug hysteria, Nixon realized the political power that could be derived from "arrest[ing] their leaders, raid[ing] their homes, and vilify[ing] them night after night on the evening

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<sup>18</sup> Himmelstein, *supra* note 14 at 5.

<sup>19</sup> Himmelstein, *supra* note 14 at 6.

<sup>20</sup> See DRUG POLICY ALLIANCE, *A Brief History of the Drug War*, <http://www.drugpolicy.org/issues/brief-history-drug-war>. (last visited Aug. 15, 2019).

<sup>21</sup> *Id.*

<sup>22</sup> See generally, Ioan Grillo, *Inside the Trial of Joaquin 'El Chapo' Guzman, the World's Most Infamous Drug Baron*, TIME (May 10, 2018), <http://time.com/longform/joaquin-guzman-el-chapo-trial/>.

<sup>23</sup> *Id.*

news.”<sup>24</sup> Marijuana found itself caught up in a broader cultural backlash against the perceived chaos of the civil rights and anti-war movements. Such trends continued alongside an increase in carceral punishments for nonviolent drug offenses, which increased from 50,000 in 1980 to eventually reaching over 400,000 by 1997.<sup>25</sup> In particular, the Reagan administration’s highly-publicized anti-drug campaign, with its slogan “Just Say No,” seemed to enhance these regressive policies. What resulted was the blocking of harm-reduction strategies to reduce the rapid spread of HIV/AIDS among intravenous drug users, and the passage of even greater draconian criminal penalties for drug offenses. Bill Clinton continued to escalate the drug war, notoriously rejecting a U.S. Sentencing Commission recommendation to eliminate the disparity between crack and powder cocaine sentences.<sup>26</sup>

George W. Bush continued more of the same in the early 2000’s, even as crime rates began to decline and it became more apparent that harshly punishing illicit drug distribution had no impact on slowing down rates of use.<sup>27</sup> Uniquely, the Bush administration oversaw a rapid militarization of domestic drug enforcement, evidenced by about 40,000 paramilitary-style SWAT raids annually, mostly for nonviolent drug offenses.<sup>28</sup>

In 2013, in what became known as the Cole Memo, President Obama directed the Department of Justice not to interfere with existing state medical and adult-recreational marijuana laws.<sup>29</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> See DRUG POLICY ALLIANCE, *A Brief History of the Drug War*, <http://www.drugpolicy.org/issues/brief-history-drug-war>. (last visited Aug. 15, 2019).

<sup>26</sup> Editorial, *Cocaine Sentencing, Still Unjust*, N.Y. TIMES, (Nov. 5, 1995), <https://www.nytimes.com/1995/11/05/opinion/cocaine-sentencing-still-unjust.html>.

<sup>27</sup> See DRUG POLICY ALLIANCE, *supra* note 20.

<sup>28</sup> *Id.*

<sup>29</sup> JAMES M. COLE, GUIDANCE REGARDING MARIJUANA ENFORCEMENT, 1-2 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The Cole Memo essentially identifies eight prevailing priorities when it comes to



While the Cole Memo freed states of federal interference in their marijuana legislation, it did nothing to create a lasting resolution to the harm caused by decades of the federal government's war on drugs. As legalization metes itself out on the state level, federal support of drug policy reform remains elusive, and makes obvious that reform cannot happen without a reconstruction of federal laws. With the development and promulgation of the Cole Memo, and the changing attitudes of the Department of Justice during the Obama administration, the case was made that states are a suitable laboratory to prove up the viability, acceptance, and success of medical and recreational cannabis markets. However, federal prohibition still stands in the way of creating an accessible industry, as critical components of a healthy business sector are missing—including small business support, as well as adequate education, and financing opportunities for entrepreneurs of all socio-economic levels. Further detracting from state-level reforms is the sobering reality that about 700,000 people are still arrested in the U.S. for marijuana offenses annually,<sup>30</sup> and data from as recent as November of 2018 which reflects that forty-six percent of the federal prison population is serving a sentence for a drug offense.<sup>31</sup>

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enforcement of marijuana prohibitions: prevent distribution of marijuana to minors; prevent marijuana revenue from funding criminal enterprises, gangs or cartels; prevent marijuana from moving out of states where it is legal; prevent use of state-legal marijuana sales as a cover for illegal activity; prevent violence and use of firearms in growing or distributing marijuana; prevent drugged driving or exacerbation of other adverse public health consequences associated with marijuana use; prevent growing marijuana on public lands; and prevent marijuana possession or use on federal property.

<sup>30</sup> See FBI UCR, 2017 CRIME IN THE UNITED STATES, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-29>. (last visited May 14, 2020) (Documenting that nearly 40% of all drug-related arrests made nationwide in 2017 were marijuana related, with 36.7% of those arrests related to possession offenses alone.)

<sup>31</sup> See FED. BUREAU OF PRISONS, OFFENSES, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (Aug. 3, 2019).

### III. THE IMPACT OF CANNABIS PROHIBITION & POLICING COMMUNITIES OF COLOR

Given the racialized history of marijuana's regulation, the War on Drugs has facilitated U.S. law enforcement's targeting of communities of color, creating a legacy of profiling and punishment directed at African-American and Latino cannabis users and sellers.<sup>32</sup> This has rendered a unique portrait of the U.S. prison system, which seems to have been designed almost exclusively with the intent to cage African-American and Latino drug offenders. Drug convictions "account[ed] for two-thirds of the rise in the federal inmate population and more than half of the [soaring state prison population] between 1985 and 2000."<sup>33</sup> In the early 2000s, the U.S. prison system held 792,000 African-American men, the same number as had been enslaved in 1820.<sup>34</sup> The War on Drugs essentially "delivered the number of incarcerated African-American men to match the number that were forced into chattel bondage at slavery's peak, in 1860."<sup>35</sup>

Over-incarceration is directly responsible for wealth inequality along the same racial and ethnic lines.<sup>36</sup> Acutely high

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<sup>32</sup> See Bender, *supra* note 13 at 366, (Discussing how "police at all levels of government concentrated anti-drug initiatives in neighborhoods of color and along the U.S.-Mexico border, resulting in today's staggering prison population," rendering "drug convictions [as] play[ing] a decisive role in mass incarceration and the racialization of U.S. prisons.")

<sup>33</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2, 59 (2010) (Discussing the current mass imprisonment of African Americans as arguably the next chapter in the U.S. history of oppression, control, and subordination of African Americans, following slavery and Jim Crow laws.)

<sup>34</sup> See Graham Boyd, *The Drug War in the New Jim Crow*, AM. CIV. LIBERTIES UNION (Jul. / Aug. 2001), <https://www.aclu.org/other/drug-war-new-jim-crow>.

<sup>35</sup> *Id.*

<sup>36</sup> Sasha Abramsky, *Toxic Persons*, SLATE, (Oct. 8, 2010), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/10/toxic\\_persons.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/toxic_persons.html). Abramsky cites to a criminology study conducted by the American Academy of Arts and Sciences, concluding "that once a person has been incarcerated, the experience limits their earning power and their ability to climb

incarceration rates have interfered with employment and wealth-building opportunities for African Americans in particular, regardless of their contacts with the criminal justice system, in part as a result of the systemic loss of “bread-winner” males to the carceral state.<sup>37</sup>

In 2013, the American Civil Liberties Union (ACLU) released a comprehensive report on marijuana arrests around the country. It found that in Washington D.C., African Americans were eight times more likely to be arrested for possession than white marijuana users, even though the population of blacks and whites was essentially the same.<sup>38</sup> Despite the fact that black and white Americans use marijuana at about the same rate, national data reveals that blacks have been arrested for possession at more than 3.5 times the rate of whites—a gap that has gotten worse over time.<sup>39</sup>

The collateral consequences of a single criminal conviction can range from codified exclusion from civic participation, to discretionary exclusion from numerous employment and educational opportunities.<sup>40</sup> Broadly speaking, drug prosecutions

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out of poverty even decades after their release. It’s a vicious feedback loop that is affecting an ever-greater percentage of the adult population ... [to illustrate]. In 1980, one in ten black high-school dropouts were incarcerated. By 2008, that number was 37 percent.”

<sup>37</sup> RAKESHA KOCHHAR AND RICHARD FRY, WEALTH INEQUALITY HAS WIDENED ALONG RACIAL, ETHNIC LINES SINCE END OF GREAT RECESSION, (Dec. 12, 2014) <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>. (Determining that the median wealth of African Americans declined from \$6,800 in 1999 to \$1,233 in 2013, while during the same time frame the median wealth of White Americans increased from \$102,000 to \$122,336.)

<sup>38</sup> AM. CIV. LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE, 48, 55 (Jun. 2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rell.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rell.pdf).

<sup>39</sup> *Id.* at 4.

<sup>40</sup> See NAT’L INST. OF JUSTICE, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, (Nov. 13, 2018), <https://www.nij.gov/topics/courts/pages/collateral-consequences-inventory.aspx>. The American Bar Association (“ABA”) has identified more

have resulted in statistics that are familiar, staggering and insidious. The United States is home five percent of the world's population but twenty-five percent of its prisoners.<sup>41</sup> An estimated 2.3 million people populate state, local, and federal incarceration centers across the country.<sup>42</sup> Eighty-seven percent of prisoners are held in state systems.<sup>43</sup> Additionally, 4.7 million adults are presently on some kind of supervised release (probation or parole), or otherwise tethered to the court system.<sup>44</sup>

For those who are formerly incarcerated, a recent analysis by the Prison Policy Initiative showed that more than 27 percent are unemployed, which is higher than the overall unemployment rate during the Great Depression. These results are compounded for African Americans due to existing racial discrimination present in employment practices; indeed, one study found that white job applicants with a criminal record were more likely to be called for a job interview than black applicants without a criminal record.<sup>45</sup>

In short, contact with the criminal justice system confines one to reduced employment opportunities for generations to come,

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than 40,000 state and federal regulations that impose collateral consequences on criminal convictions.

<sup>41</sup> See Roy Walmsley, World Prison Population List (Tenth Edition) (October 2013), [https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_10.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_10.pdf)

<sup>42</sup> See Wendy Sawyer and Peter Wagner, Mass Incarceration: The Whole Pie 2020 (March 24, 2020), [HTTPS://WWW.PRISONPOLICY.ORG/REPORTS/PIE2020.HTML](https://www.prisonpolicy.org/reports/pie2020.html).

<sup>43</sup> See JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION – AND HOW TO ACHIEVE REAL REFORM, 13 (2017).

<sup>44</sup> See LAUREN GLAZE & DANIELLE KAEBLE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, PAGE 2, TABLE I (Dec. 2014), <https://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

<sup>45</sup> MARITZA PEREZ, OLUGBENGA AJILORE, & ED CHUNG, USING MARIJUANA REVENUE TO CREATE JOBS, 2, May 20, 2019, <https://www.americanprogress.org/issues/criminal-justice/reports/2019/05/20/470031/using-marijuana-revenue-create-jobs/>.

exponentially impacting ones ability to build wealth, and depriving families of breadwinners and workers.<sup>46</sup>

Despite the fast-paced changes in cannabis laws and enforcement priorities, particularly for possession of small amounts, arrests and convictions persist. For example, even though the city of Pittsburgh decriminalized marijuana in late 2015, the subsequent two years still rendered hundreds of people criminally charged with marijuana possession, mostly in small amounts, with black residents making up most of Allegheny County's prosecutions for misdemeanor marijuana possession.<sup>47</sup> Between 2016 and 2017, about fifty-one percent of the people charged in these cases were black, even though only thirteen percent of the county's population is black.<sup>48</sup> Although follow up data revealed that many of these charges were ultimately reduced or dismissed, defendants are entered into the system, and later must explain or expunge their arrest record.

The microcosm of Pittsburgh demonstrates a continuum of enforcement disparities, despite the decriminalization of cannabis. As has been the reality for decades, a heavier police presence in communities of color leads to arrests for low-level offenses at a much greater frequency than in predominantly white communities.<sup>49</sup> Furthermore, federal prohibition continues to embolden third-party policing "machines," like public housing authorities, placing people who use medical cannabis and receive federal housing subsidies in a precarious situation, often risking eviction.<sup>50</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> See Joshua Vaughn, *After Pittsburgh Decriminalizes Pot, Black People are Still Disproportionately Charged with Possession*, THE APPEAL, (Oct. 3, 2018), <https://theappeal.org/2-years-after-pittsburgh-decriminalized-pot-black-people-disproportionately-face-charges-for-possession/>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Carolyn Thompson, *Medical Marijuana User, 78, Evicted from Subsidized Housing*, ASSOCIATED PRESS, (Dec. 7, 2019), <https://www.apnews.com/e1ce5433411a4d87ade7db1c40cef55b>.

Despite decriminalization on the state and local level, communities are eager for further reform. For example, while Pennsylvania and New York have legalized some limited medical cannabis sales, neither state has legislatively changed the way in which marijuana prosecutions are handled. The district attorneys in both jurisdictions have changed their internal charging policies such that they no longer prosecute marijuana possession cases.<sup>51</sup> In the absence of state legislative action for broader reform, these so called “decline to prosecute” policies are essentially the only tool to available to localities that wish to stop diverting resources to marijuana enforcement. Unfortunately, it is also apparent that without explicit policy re-directives, law enforcement will continue to decimate the same communities over and over again, until they are ordered to stop.

#### IV. THE BUSINESS OF LEGAL CANNABIS IN CURRENT TIMES: INEQUALITIES WITHIN THE SYSTEM

For decades, cannabis has been dismissed as having a negative impact on productivity and societal engagement, and its users have been largely stigmatized and demonized. Yet as legalization crisscrosses the United States, a highly effective “rebranding” is helping to discourage those stereotypes. Cannabis has emerged as a bonafide wellness product on the brink of global domination. Attitudes have shifted as profits prove that mass-marketed cannabis has successfully integrated into daily life for many. Prohibition is a relic, and sales are booming.

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<sup>51</sup> See Brian X. McCrone, *Marijuana Criminal Cases Dropped En Masse by Philadelphia District Attorney Larry Krasner*, (Mar. 19, 2018), <https://www.nbcphiladelphia.com/news/local/Marijuana-Criminal-Cases-Dropped-En-Masse-by-Philadelphia-District-Attorney-Larry-Krasner-474228023.html>; Noah Manskar, *3,000 Marijuana Cases Thrown Out in Manhattan*, PATCH (Sep. 12, 2018), <https://patch.com/new-york/new-york-city/3-000-marijuana-arrest-warrants-thrown-out-manhattan>. Additionally in September 2018, Manhattan District Attorney Cyrus Vance dismissed more than three thousand open marijuana possession cases, citing an effort to “even out racial disparities” and “right-size” the criminal justice system.

Edward Weidenfeld, who served as general counsel to Ronald Reagan's campaign for president, said at the time, he respected the Reagan's escalation of the drug war. However, now, Weidenfeld admits that "the more [I] learned about the war on drugs, the more I learned it was really a war selectively fought against minorities in th[is] country."<sup>52</sup> Now, Weidenfeld co-owns Phyto Management, a medical cannabis cultivator in Washington, D.C. He also co-owns a large marijuana grow business in Washington state, and he uses medical marijuana to treat his Parkinson's disease.<sup>53</sup>

Weidenfeld's candor signals a powerful shift in cannabis industry; there is an acknowledgment that prohibition was a failure. New corporate giants have emerged, focusing primarily on a single business concern—the elimination of section 280E of the tax code, which prohibits cannabis businesses from deducting business expenses.<sup>54</sup> Along with the inability to deduct expenses, the industry is financially prohibitive, keeping "resource-short" entrepreneurs from entering the market.<sup>55</sup> Due to federal prohibition, standard banks fear lending money for cannabis endeavors because such loans are not backed by FDIC insurance.<sup>56</sup> Consequently, would-be entrepreneurs cannot utilize loans or other government-backed subsidies that are necessary for any small business to afford application and start-up costs.<sup>57</sup>

The reality of the current industry is that many lack access to the capital or investment necessary for the licensing and

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<sup>52</sup> See Eleanor Clift, *How a Reagan Veteran Learned to Stop Worrying and Love the Weed Business*, DAILY BEAST (Apr. 20, 2018), <https://www.thedailybeast.com/how-washington-republican-edward-weidenfeld-learned-to-stop-worrying-and-love-the-weed-business>.

<sup>53</sup> *Id.*

<sup>54</sup> Jeremy Borden & Isaac Fornarola, *PART II: The Cannabis Industry Learns to Play Politics*, CANNABIS WIRE (Nov. 14, 2018), <https://cannabiswire.com/2018/11/14/part-ii-the-cannabis-industry-learns-to-play-politics/>.

<sup>55</sup> See Andre F. Bourque, *After the Smoke Clears*, EBONY MAGAZINE, Spring 2019 (published at <https://www.magzter.com/articles/13294/347233/5cdab7bc37360>).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

regulatory fees required to legally cultivate or distribute cannabis and cannabis-derivative products.<sup>58</sup> This in turn discourages diversity within the industry, as very few minority-owned businesses can afford the average start-up costs for a dispensary, which range from \$250,000 to \$750,000, or more.<sup>59</sup> A current snapshot of the cannabis industry reflects that eighty-one percent of business owners are white, with Black and Latinos sharing five percent and four percent of that market, respectively.<sup>60</sup> Without access to standard banking, large-scale private equity is responsible for underwriting most cannabis businesses.<sup>61</sup> This means that most prospective cannabis license holders need private investment to exist, crowding out any opportunity for small, craft companies with no traditional business experience to enter the market. The industry also lacks a cadre of socially conscious investing firms that can support the entrepreneurs trying to diversify the market. Lastly, state-level regulations have yet to construct workable pathways for industry revenue to be diverted towards educational and financial resources for those who might otherwise enter the market but are barred from doing so due to lack of capital.<sup>62</sup>

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<sup>58</sup> See OFFICE OF CANNABIS, HUMAN RIGHTS COMM'N & CONTROLLER'S OFFICE, CITY & COUNTY OF SAN FRANCISCO CANNABIS EQUITY REPORT 38-41 (Nov. 1, 2017), <https://mass-cannabis-control.com/wp-content/uploads/2017/12/CNBADMPSC11-21-2017-San-Francisco-Equity-report.pdf>.

<sup>59</sup> See Gary Cohen, *How Much Does it Cost to Open a Dispensary?* (Sep. 25, 2018), <https://thecannabisindustry.org/member-blog-how-much-does-it-actually-cost-to-open-a-dispensary/> (Discussing steep costs associated with licensing applications, legal services, property costs, marketing, and maintaining competitive inventory).

<sup>60</sup> See Eli McVey, *Chart: Percentage of Cannabis Business Owners and Founders by Race*, MARIJUANA BUS. DAILY (Sep. 11, 2017), <https://mjbizdaily.com/chart-19-cannabis-businesses-owned-founded-racial-minorities/>. (Reflecting data from a reader survey with a small sample size of 388 businesses.)

<sup>61</sup> See Weiner, *supra* note 9.

<sup>62</sup> See Cresco Labs, *Cresco Labs Launches Cannabis Industry's First Comprehensive National Social Equity & Education Initiative*, (May 29, 2019), <https://investors.crescolabs.com/investors/press-releases/press-release-details/2019/Cresco-Labs-Launches-Cannabis-Industrys-First-Comprehensive-National-Social-Equity--Education-Initiative/default.aspx>. Interestingly, the



In June of 2019, the House Committee on Small Business held a hearing to discuss how federal prohibition and criminalization stymied economic employment opportunities in the emerging legal cannabis industry. The committee noted that the Small Business Administration (SBA), which provides support, guidance, and microloans to small businesses, was prohibited from providing these services to cannabis businesses.<sup>63</sup> Also of note, current state-level regimes lacked inclusiveness, and federal policy worked as a roadblock for qualified entrepreneurs by preventing publicly available investment options for disenfranchised populations.

These financial barriers signal the direction the cannabis industry is heading, and how federal policy promotes Wall Street, instead of supporting the vitality of “Main Street.” Despite the fact that the legalization movement itself was spearheaded by small-scale growers who risked the fury of the law to pursue their dreams of cultivating cannabis, worldwide media outlets are literally asking: where is the Starbucks of cannabis?<sup>64</sup>

In New York, where in 2019 state legislators were promising to legalize adult recreational cannabis, national retailers were

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CRESCO Labs Company, a Chicago-based multi-state cannabis company, recently launched Social Equity & Educational Development (SEED) program in May of 2019, as the first national social equity initiative developed and funded by a private cannabis company. CRESCO’s SEED program is “designed to ensure that all members of our society have the skills, knowledge and opportunity to work in and own businesses in this industry. From collaborating with universities to develop cannabis-focused curriculum to working with local agencies and community organizations to sponsor expungement events, the SEED initiative consists of impactful programs and actionable solutions-based approaches that we believe will help make the cannabis industry a highly inclusive force for job creation.”

<sup>63</sup> See Justin Strekal, *Unlocked Potential? Small Businesses in the Cannabis Industry*, NORML, (Jun. 19, 2019), <https://blog.norml.org/2019/06/19/house-committee-on-small-business-holds-hearing-on-cannabis/>.

<sup>64</sup> See Laura Bianchi, *Lawyer Up: Where is the Starbucks of Cannabis?*, MERRY JANE, (Jun. 19, 2018), <https://merryjane.com/culture/lawyer-up-where-is-the-starbucks-of-cannabis-june-2018>.

already clamoring to service what they expect to be a huge market.<sup>65</sup> Businesses like Medmen, a California-based chain of dispensaries, are hoping to acquire real estate in Manhattan in advance of an anticipated New York market.<sup>66</sup> This stands in contrast to the “craft” industry of small-scale growers which pre-dated the explosion of the commercial cannabis health and wellness market. In fact, craft and home-grow cannabis operations are viewed by some as a proactive, political form of opposition to the highly regulated and inequitable government legalization programs.<sup>67</sup> Craft and home-grow operations are a less expensive way of procuring one’s own cannabis, and are considered a way of stepping outside the largely commercialized system through which cannabis is produced and sold in state-regulated facilities. Outdoor farming and home growing have long been thought of as more socially and environmentally conscious than the large-scale, indoor grow operations that blanket the current industry, and are far more accessible to resource-scarce entrepreneurs.<sup>68</sup> Conversely, state-level regulations discourage a healthy, private cannabis industry, in favor of a heavily regulated one, preferring large scale businesses that stand at a distance to simple, home-grow operations.<sup>69</sup>

For example, in Washington D.C., mayor Muriel Bowser recently proposed legislation entitled the Safe Cannabis Sales Act of 2019 (SAFE Act), which would create adult-use recreational cannabis regulations; the Safe Act purposely does not allow for personal home-grow, a marked change from the medical cannabis

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<sup>65</sup> See Craig Giammona, *Marijuana Gear for the Discerning New Yorkers Is Flying off the Shelves*, BLOOMBERG, (Dec. 14, 2018), <https://www.bloomberg.com/news/articles/2018-12-14/marijuana-gear-for-discerning-new-yorkers-is-flying-off-the-shelves>.

<sup>66</sup> *Id.*

<sup>67</sup> See Kieran Delamont, *Slow Cannabis: How Home Growing Could Challenge Corporate Cannabis*, MERRY JANE, (Dec. 12, 2018), <https://merryjane.com/news/slow-cannabis-how-home-growing-could-challenge-corporate-cannabis>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

program that has existed in D.C. since 2013.<sup>70</sup> Omitting home-grow businesses from adult recreational sales only further immobilizes smaller privatized businesses, to the benefit of larger corporate operators.<sup>71</sup>

Former Massachusetts congressman Barney Frank recently discussed this conflict in the industry when he announced his decision to join a Massachusetts-based cannabis company Beantown Green, a local collective of “underground growers, marketers, and event organizers.”<sup>72</sup> Frank’s investment in Beantown was based upon a desire to support “. . . the people who have been working away on this forever [who] shouldn’t get squeezed out” of the industry because they embrace the industry as a business-driven environment but operate with an ideological commitment to avoid exploitation of profit.<sup>73</sup> Frank’s comments suggest that without private investment to increase diversity, small businesses and cooperatives have slim chance of success in the cannabis industry.

Despite progress at the state-level, a focused look at the 2018 Farm Bill, also known as the Agriculture Improvement Act of 2018, reveals a U.S. Congress that is unclear about how properly and comprehensively regulate cannabis, even as legalization of hemp and hemp-derived products has prompted a revision of the

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<sup>70</sup> See Safe Cannabis Sales Act, Leg. No. B23-0280, (Introduced May 6, 2019) <http://lims.dccouncil.us/Legislation/B23-0280?FromSearchResults=true>

<sup>71</sup> See Joshua Kaplan, *D.C. is Ready to Make Legal Marijuana a Boon for Big Business. But What About for Racial Justice?*, WASHINGTON CITY PAPER, (Aug. 15, 2019), <https://www.washingtoncitypaper.com/news/article/21082603/dc-is-ready-to-make-legal-marijuana-a-boon-for-big-business-but-what-about-for-racial-justice>. (Discussing how the bill lacks any mechanism for “small and microbusinesses” to get in the game.)

<sup>72</sup> See Dan Adams, *Barney Frank Joins Local Marijuana Business*, THE BOSTON GLOBE, (Mar. 1, 2019), <https://www.bostonglobe.com/news/marijuana/2019/03/01/barney-frank-joins-local-marijuana-business/hJctVWYVap3iGCRMrsHJ/story.html>.

<sup>73</sup> *Id.*

Controlled Substances Act.<sup>74</sup> The Agriculture Improvement Act signifies a major shift in agriculture and drug policy, by lifting the hundred-year ban on hemp production, giving rise to the beginnings of a regulated market for hemp-derived cannabidiol (CBD).<sup>75</sup> But the regulation of CBD also reveals major risks for hopeful farmers and entrepreneurs, in an expanding industry that has yet to design explicit guidelines for food regulation, quality control, and methods of enforcement.<sup>76</sup> In fact, it reveals that Congress may be hostile towards “craft cannabis” or small business interests.

Significantly, the Farm Bill reveals that exclusion from licensing and employment opportunities due a drug-crime related criminal record, has created a critical barrier to equitable industry participation.<sup>77</sup> Specifically, the Farm Bill excludes anyone convicted of a drug-related offense or a felony from securing a hemp

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<sup>74</sup> See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat 4490 (2018). The Act allows for hemp and hemp-derived products to be transported across state lines like any other farm crop, made possible by removing cannabis that contains no more than .3% Tetrahydrocannabinol (THC) from the Controlled Substance Act, and thus removing its regulation from the purview of federal law enforcement and the Drug Enforcement Agency (DEA). The hemp plant itself does not contain THC, but is rich in Cannabidiol (CBD), a non-psychoactive cannabinoid that has been increasingly accepted for its immense therapeutic potential, and marketed as an alternative to THC.

<sup>75</sup> *Id.*

<sup>76</sup> See Steven Schain, *Cannabis and Hemp Industry Trembles After FDA Cracks the Whip*, CANNABIS BUS. EXEC., (May 9, 2019), <https://www.cannabisbusinessexecutive.com/2019/05/cannabis-and-hemp-industry-trembles-after-fda-cracks-the-whip/>. Because CBD-based food and cosmetics products have flooded interstate commerce, the Food and Drug Administration (“FDA”) has taken up the nebulous mantle of regulation. The FDA thus has enormous influence over how hemp-derived products can be prepared, manufactured and sold, but has yet to provide explicit, federal regulations for CBD products. The problem with the lack of state regulations, and FDA not acting on standardizing, is that scrutiny of these products is equally unhinged, and there are worrisome points of discretionary regulation.

<sup>77</sup> See 7 USC §1639p.(e)(3)(B) (Excluding anyone with a drug-related felony conviction within the last 10 years from participating in any state-level programming or licensing for hemp production or sale.)

license for ten years after the conviction.<sup>78</sup> This mirrors existing state-level prohibitions against awarding licensing to those with criminal records, as well as denying employment opportunities. For example, South Carolina bars licensing for any hemp applicant who has been convicted of any drug-related felony offense within the last ten years.<sup>79</sup> North Carolina, similarly, bars anyone with a felony conviction within the past ten years, or any drug-related felony at any time, from applying for a license to cultivate hemp.<sup>80</sup>

The Farm Bill underscores the racial and economic equity issues in the cannabis industry that have been problematic since the wave of legalization took force via ballot initiatives, starting with Colorado in 2013. Colorado initially banned those with felony convictions within the past 5 years from working in its recreational use industry, in an effort to show the federal government that they were complying with the Department of Justice's 2013 Cole Memo; however in 2019 Colorado lawmakers amended that rule to exclusion of those with felonies discharged within the prior 3 years.<sup>81</sup>

At bottom, regulations that exclude those with a drug arrests or convictions prohibit those who have been cultivating, selling and using the cannabis plant for decades from a chance at participating in the legal industry. Essentially, the industry works to exclude the original, standard operators who could not escape the consequences of prohibition; the new "health and wellness" industry does not seem to make space for those who paved the way ahead of it.

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<sup>78</sup> See Lesley Clark, *Hemp Advocates Angry at Federal Felon Ban – but states already impose barriers*, MCCLATCHY WASH. BUREAU, (Aug. 6, 2018), <https://www.mcclatchydc.com/news/politics-government/article215759285.html#storylink=cpy>.

<sup>79</sup> See S.C. Code Ann. § 46-55-20(A)(3) (2019).

<sup>80</sup> See N.C. Gen. Stat. § 106-568.53 and § 90-87(16) (2016) (North Carolina has left in place its regulations from its Industrial Hemp Pilot Program, initially authorized in 2014, until further guidance from Congress).

<sup>81</sup> See CO SB19-223 (Signed into law on May 29, 2019 to take affect Jan 1, 2020).

## V. CANNABIS & “SOCIAL EQUITY”

The ultimate goal of the cannabis industry should be to design racially inclusive cannabis policies at both the state and federal levels, so that these laws can work in tandem to support diversity. This begins with identifying areas of impact from drug prosecutions, then designing mechanisms for prioritizing licensing for those who experienced direct or collateral impact from criminalization and prohibition.<sup>82</sup> This should be followed by the development of programming aimed at increasing access. Such programming should promote education and small business support for those who need it to survive in a competitive industry, and the creation of socially responsible systems for managing revenue, such that it is equitably distributed into communities disproportionately impacted by criminalization and prohibition. Lawmakers must also grapple with how to handle corporations that have been given a unique upper hand—they can easily inject investment into their endeavors, and are not burdened by prior contacts with the criminal justice system.

### *a. Social Equity Programs*

The Massachusetts Cannabis Control Commission rolled out the first state-wide “social equity program” after legalization of adult recreational cannabis sales were approved by its state legislature in 2016.<sup>83</sup> The stated goals of the program are to reduce barriers to entry into the industry, and to provide technical support and training to those who desire mentorship.<sup>84</sup> “Equity” applicants are to be allowed an early start in applying for a cannabis license, and can also receive help from the state in raising capital and

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<sup>82</sup> See Perez, Ajilore, & Chung, *supra* note 45. Some proposals for determining areas of impact include “using a weighted index of communities’ poverty rate, median earnings, and nonemployment. To determine which communities have experienced disproportionate arrest rates for marijuana offenses, ..[to] access historical data on marijuana arrests using the FBI’s Uniform Crime Reporting (“UCR”) database and other similar state-based data collections to find areas that experienced high marijuana arrest rates relative to their population.”

<sup>83</sup> See MASS. GEN. LAWS ch. 94G (2016).

<sup>84</sup> *Id.*

guidance on meeting compliance. The law requires that the Commission promote and encourage full participation by people disproportionately harmed by marijuana prohibition and enforcement.<sup>85</sup> Special priority is given to “economic empowerment” applicants, who come from communities that have been heavily impacted by marijuana arrests. Applicants must also have a past drug conviction, or being the spouse or child of a person with a drug conviction. The Commission has also been considering an amendment to their current regulations which would create a no-interest loan program, to improve access for social equity applicants.<sup>86</sup> To its credit, this “economic empowerment” program seems to be a success story; in March 2020, Boston’s first recreational dispensary opened for business, and it is also the first business to be licensed under the program.<sup>87</sup>

At least four California cities—Los Angeles, Oakland, Sacramento and San Francisco—have created “equity programs” via municipal regulations. These programs purport to help those personally affected by the war on drugs, or who come from communities that bore the brunt of it.<sup>88</sup> Yet California’s social

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<sup>85</sup> *Id.*

<sup>86</sup> See An Act Relative to A Social Equity Training and Technical Assistance Fund, S.1708, (Introduced Jan. 22, 2019), <https://malegislature.gov/Bills/191/S1708>; See also Shira Schoenberg, *Massachusetts Senate Weighs no-interest loans for marijuana business*, MASS LIVE, (May 21, 2019), <https://www.masslive.com/news/2019/05/massachusetts-senate-weighs-no-interest-loans-for-marijuana-businesses.html>. (Stating, that the amendment would use ten percent of the tax revenue from legal cannabis sales to create a Cannabis Social Equity Loan Trust Fund which would be matched by private donations.)

<sup>87</sup> See Chris Moore, *Boston’s First Legal Weed Shop is Finally Expected to Open Monday*, MERRY JANE (Mar. 5, 2020), <https://merryjane.com/news/bostons-first-legal-weed-shop-is-finally-expected-to-open-on-monday>.

<sup>88</sup> See Katie Zezima, *California Cities Try to Atone for War on Drugs with Help for Minority Marijuana Entrepreneurs*, WASH. POST (Jan. 5, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/01/05/california-cities-try-to-atone-for-war-on-drugs-with-help-for-minority-marijuana-entrepreneurs/?noredirect=on&utm\\_term=.4871af946f9c](https://www.washingtonpost.com/news/post-nation/wp/2018/01/05/california-cities-try-to-atone-for-war-on-drugs-with-help-for-minority-marijuana-entrepreneurs/?noredirect=on&utm_term=.4871af946f9c). Oakland

equity programs have recently come under scrutiny for falling dramatically short of their intended goals, and local leaders have blamed funding shortfalls, long waits, and limited oversight for such failures.<sup>89</sup>

Los Angeles provides an interesting place to analyze how “social equity” programs should be implemented and if they can help balance the scales of the industry, given that the city itself has long been identified as the largest cannabis market in the world.<sup>90</sup> With only 169 licensed shops throughout the region, an estimated 1,700 shops and small businesses operate illicitly.<sup>91</sup> This paradigm evidences the ongoing criminalization of its cannabis industry, even in states where cannabis has been legalized.

Los Angeles has created its own a social equity program that involves matching licensed cannabis stores with businesses run by entrepreneurs from disadvantaged backgrounds, including those

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purports to offer no-interest loans and technical assistance to those who qualify; Sacramento offers a small business support center, with market incentives for minority businesses or incubators that house them; and San Francisco offers small cannabis businesses assistance in navigating regulations and connecting them with other entrepreneurs.

<sup>89</sup> See Andre F. Bourque, *supra* note 55 (Discussing shortfalls in the current social equity programs, including staffing and funding shortages, long wait times to receive business licensing, and “limited oversight of business partnership arrangements among social equity applicants and outside investors.”)

<sup>90</sup> See Amanda Chicago Lewis, *Los Angeles v. Legal Weed*, CURBED, (Oct. 24, 2018), <https://www.curbed.com/a/texas-california/los-angeles-weed-stores-zoning-history-california>. The cannabis economy of Los Angeles has an estimated few million customers, tens of thousands of workers, and billions of dollars each year in sales. It is also long been lamented as one of the most complex economies to regulate, in part because the city government long held off on permitting medical marijuana dispensaries even though many other localities allowed for medical businesses to thrive. L.A.’s cannabis businesses have been operating and flourishing in the shadows of California’s medical cannabis regulations since their creation in 1996, and this left many particularly vulnerable to law enforcement in the decades leading up to the legalization of recreational cannabis, which began in January of 2018. In short, the city has not created a licensing system that is robust enough to encompass what came before legalized adult-use sale of cannabis.

<sup>91</sup> *Id.*



with cannabis convictions on their record, and those who hail from over-policed neighborhoods.<sup>92</sup> Current regulations call for 338 cannabis store applications to be processed through the social equity program, which is expected to take several “phases” for application and awarding of business licenses.<sup>93</sup> In early 2019, the city concluded a “social equity analysis,” in order to acquire the necessary data to roll out a second phase of applying for cannabis licenses, specifically available for Social Equity Applicants who qualify.<sup>94</sup>

Interestingly, while the analysis was underway to produce a “Phase II” licensing process for social equity applicants, the city of L.A. set aside \$2.3 million for law enforcement resources to investigate the *illegal* cannabis market.<sup>95</sup> These inconsistent priorities work against each other and underscore a continued commitment to criminalization which only deepens the industry’s inequities. As recently as December 2019, the California Bureau of Cannabis Control made clear its priority to go after unlicensed businesses while failing to create opportunities for more illicit businesses to become licensed operators within the market.<sup>96</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See CITY OF LOS ANGELES DEP’T OF CANNABIS REGULATION, *Social Equity Program*, <https://cannabis.lacity.org/licensing/social-equity-program-2>. (last visited August 12, 2019). The City was able to identify individuals with past cannabis arrests and/or convictions, as well as those who are low income and lived in high arrest communities or “Disproportionately Impacted Areas” and experienced the brunt of societal harms associated with cannabis criminalization.

<sup>95</sup> See Hayley Fox, *California’s Illegal Weed Industry is Doing Better Than Ever*, VICE, (Sep. 6 2018), [https://www.vice.com/en\\_us/article/a3q5yb/californias-illegal-weed-industry-is-doing-better-than-ever](https://www.vice.com/en_us/article/a3q5yb/californias-illegal-weed-industry-is-doing-better-than-ever).

<sup>96</sup> See STATE OF CALIFORNIA: BUREAU OF CANNABIS CONTROL, *State Cannabis Authorities Serve 24 Search Warrants Against Illegal Cannabis Retailers*, (Dec. 13, 2019), [https://bcc.ca.gov/about\\_us/documents/media\\_20191213\\_2.pdf](https://bcc.ca.gov/about_us/documents/media_20191213_2.pdf).

*b. Criminal Record Relief*

Another feature of social equity programming is the clearing criminal records, but state to state, this process lacks uniformity. Many states, such as Colorado and Pennsylvania, have enacted procedures for clearing prior cannabis convictions for the general public, yet still specifically exclude individuals who have prior drug convictions from entering into and participating in the cannabis industry.<sup>97</sup> Other states have endeavored to use executive action, such as the clemency process, to clear prior records, or have revised expungement procedures to permit automatic removal of certain prior convictions from an individual's record, removing the need to petition a court for an order of expungement.<sup>98</sup> This so called "automatic expungement," for offenses that have since been decriminalized is the least burdensome way to offer full restoration to those harmed by prohibition. Nevertheless, many states still require that litigants engage in the expungement process on their own.<sup>99</sup>

In the spring of 2019, Illinois became the 11<sup>th</sup> state to legalize adult recreational marijuana sales, and the first to do so via legislation rather than a voter initiative.<sup>100</sup> Among the many robust elements of Illinois' social equity programming, the bill provided for the automatic expungement of marijuana convictions relating to possession or distribution of up to 30 grams, and allowed for a petition process for convictions related to 30–500 grams.<sup>101</sup> The establishment of an automated processes for removal of prior

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<sup>97</sup> See Javier Hasse, *What Does the Latest Pot Legalization Wave Mean for Jobs and Social Equity?* MERRY JANE (Dec. 12, 2018), <https://merryjane.com/news/what-does-the-latest-pot-legalization-wave-means-for-jobs-and-social-equality>.

<sup>98</sup> See Katie Zezima, *Cities, States work to Clear Marijuana Convictions, Calling It a States' Rights issue*, WASH. POST, (Feb. 1, 2018), [https://www.washingtonpost.com/national/2018/02/01/cities-states-work-to-clear-marijuana-convictions-calling-it-a-states-rights-issue/?utm\\_term=.dc07f300a06d](https://www.washingtonpost.com/national/2018/02/01/cities-states-work-to-clear-marijuana-convictions-calling-it-a-states-rights-issue/?utm_term=.dc07f300a06d).

<sup>99</sup> *Id.*

<sup>100</sup> See HB-1438 (Il. 2019) <http://ilga.gov/legislation/101/HB/10100HB1438sam002.htm>.

<sup>101</sup> *Id.* at Article 7, §1-25.

convictions stands in contrast to jurisdictions who merely allow for expungement or record sealing, but require affirmative action on the part of the applicant. Automatic expungement achieves the same goal as proactive motions or petitions to the court, without the time and costs.

*c. Community Reinvestment*

Some localities, such as Los Angeles, direct revenue from the cannabis industry into enforcing industry regulations; other jurisdictions have elected to use portions of cannabis tax revenue for social programs and as much needed revenue for other budgetary shortfalls. For example, Clark County, Nevada recently voted to direct \$1.8 million from cannabis business license fees to fund new housing opportunities for homeless youth, and for rapid re-housing initiatives for low-income persons upon discharge from local hospitals.<sup>102</sup> In 2017, Colorado directed \$105 million in cannabis tax revenue to its “Marijuana Tax Cash Fund,” that underwrites housing, mental health, and school health programs.<sup>103</sup> These allocations demonstrate the spectrum of possible uses for cannabis-related revenue; however, there is a distinction between cannabis tax revenue simply augmenting state and local coffers, and cannabis tax revenue being maintained exclusively for the purposes of community reinvestment.<sup>104</sup> It is tempting to simply allow cannabis

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<sup>102</sup> See Chris Moore, *Nevada County Directs Nearly \$2 Million on Pot Revenue to Help the Homeless*, (May 23, 2019), <https://merryjane.com/news/nevada-county-directs-nearly-dollar2-million-in-pot-revenue-to-help-the-homeless>.

<sup>103</sup> *Id.*

<sup>104</sup> For example, Illinois’ adult use recreational bill allows for a number of specific reinvestment initiatives, including A “Cannabis Business Development Fund” will provide financial resources for business start-ups, which can be used to offset licensing fees or used for low-interest loans for those who qualify. In addition, after covering the costs of administration and expungement, the remaining tax revenue funds are to be distributed as follows: 2% to public education and safety campaigns, 8% to the Local Government Distributive Fund, for prevention and training for law enforcement, 25% to the Recover, Reinvest, and Renew (3R) Program, 20% to mental health services and substance abuse programs, 10% to pay unpaid bills, and 35% to the General Revenue Fund. See HB-1438, *supra* note 100.

tax revenue to address general budgetary needs, but in so doing, jurisdictions miss a valuable opportunity to provide long overdue and much needed reparations to communities hit the hardest by prohibition. There can be no “one size fits all” reinvestment solution, which is why simply co-mingling cannabis tax revenue with all other public funding may be insufficient to achieve the goal of addressing the harms caused by decades targeting, overpolicing and over-incarcerating members of minority and low-income communities. Citizens should be able to offer input as to prioritizing and developing reinvestment opportunities, and the most comprehensive way to achieve this objective would be to create legislatively established re-investment goals that speak to the harms done by prohibition.<sup>105</sup>

#### VI. REPARATIONS & RIGHTING THE WRONGS OF PROHIBITION

*We recognize our lineage as a generational trust, as inheritance and the real dilemma posed by reparations is just that: a dilemma of inheritance.*<sup>106</sup>

The failure of the War on Drugs has had a sweeping impact on the American criminal justice system. State-level regulations attempting to construct an equitable and diverse cannabis industry must navigate the inevitable collision between corporate industry,

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<sup>105</sup> See, e.g., The Marijuana Justice Act, a federal legalization bill introduced by Senator Cory Booker in late 2017, as an example of a comprehensive attempt to merge reparations with modifications to the CSA. It proposes to punish states and localities that have disproportionately arrested low-income and minority individuals (and continue to do so), and establishes a Community Reinvestment Fund that would finance community development projects in neighborhoods hit hardest by prohibition. See also, *Marijuana Justice Act of 2017*, 131 HARV. L. REV. 926, 926 (2018). This proposed bill is viewed by some as “reparatory legalization,” and has inspired discussion among lawmakers about how to distribute the wealth that expected to be generated by the industry in the years to come.

<sup>106</sup> See *Here’s What Ta-Nehisi Coates Told Congress About Reparations*, N.Y. TIMES, (Jun. 19, 2019), <https://www.nytimes.com/2019/06/19/us/ta-nehisi-coates-reparations.html>.

and restorative justice. Given the massive tax revenue generated by the cannabis industry, the discussion of restitution is no longer abstract; states have at their fingertips a real opportunity to legislatively ensure that appropriate relief directly reaches those who were most harmed by prohibition.

The cannabis industry in the United States, grew to \$10.4 billion in 2018, and employed more than 250,000 people.<sup>107</sup> This staggering data, underscores the need to assess how to recompense those who, under current law, can no longer be said to have committed any wrong. But for centuries, the United States government has failed to acknowledge reparations as a way to reconcile centuries of racial injustice. The concept of reparations is not new to American politics or its system of justice.

As the historian Roy E. Finkenbine has documented, at the dawn of this country, black reparations were actively considered and often effected. Quakers in New York, New England, and Baltimore went so far as to make ‘membership contingent upon compensating one’s former slaves.’ In 1782, the Quaker Robert Pleasants emancipated his seventy-eight slaves, granted them 350 acres, and later built a school on their property and provided for their education. ‘The doing of this justice to the injured Africans,’ wrote Pleasants, ‘would be an acceptable offering to him who rules in the kingdom of men.’<sup>108</sup>

The “contributions and consequences of slavery,” since its arrival on America’s shores 400 years ago, deserve

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<sup>107</sup> See Don Reisinger, *The Legal Marijuana Industry is Soaring—And 2019 Could Be Its Best Year Yet*, FORTUNE, (Dec. 27, 2018), <https://fortune.com/2018/12/27/legal-marijuana-industry-sales/>.

<sup>108</sup> See Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (Jun. 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>. Coates refers to the oldest form of suggested reparations for the victims of slavery, where Sherman famously invited the notion of offering “40 acres and a mule” to the recently freed slaves who witnessed his march from Atlanta to the shore.

reexamination.<sup>109</sup> The brutality and theft caused by the War on Drugs draw easy comparison to the plunder of the enslaved, upon whose labor the American financial system was built.<sup>110</sup> It is necessary to reframe American history as having been financed by slavery, and to recognize that our current “racial wealth gap is perhaps the most glaring legacy of American slavery and the violent economic dispossession that followed.”<sup>111</sup>

Every year between 1989 and 2017, Representative John Conyers introduced legislation to research the financial impact of slavery upon African Americans.<sup>112</sup> In 2018, Representative Jackson Lee became the bill’s first sponsor. H.R. 40, known as the Commission to Study Reparations for African Americans Act, acknowledges the fundamental injustice of slavery, and proposes studying the impact of slavery upon African Americans, and making recommendations for appropriate remedies to redress this harm.<sup>113</sup> On June 19, 2019, Congress held its most substantive hearing yet on determining appropriate reparations for African Americans.

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<sup>109</sup> See THE 1619 PROJECT, <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>. (last visited Aug. 22, 2019).

<sup>110</sup> See Nikole Hannah-Jones, *Our democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True*, (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html>. (“[P]rofits from black people’s stolen labor helped the young nation pay off its war debts and financed some of our most prestigious universities. It was the relentless buying, selling, insuring and financing of their bodies and the products of their labor that made Wall Street a thriving banking, insurance and trading sector and New York City the financial capital of the world.”)

<sup>111</sup> See Trymaine Lee, *A Vast Wealth Gap, Driven by Segregation, Redlining Evictions, and Exclusion, Separates Black and White America*, (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html>.

<sup>112</sup> Steve Bogira, *It’s Time, Finally, to Discuss Reparations for African-Americans*, CHICAGO READER, (May 28, 2014), <https://www.chicagoreader.com/Bleader/archives/2014/05/28/its-time-finally-to-discuss-reparations-for-african-americans>.

<sup>113</sup> Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 115th Cong. (2017).

Scholars testified to estimates of wealth that were stolen from African Americans during slavery, reconstruction, Jim Crow, and through our system of criminal justice and mass incarceration.<sup>114</sup>

Without further exploration and discussion, there can be no progress in creating an actual monetary figure which captures both historical and contemporary data. This is not to say, however, that calculating reparations is impossible. Indeed, some American courts and institutions have actively engaged in calculating reparations for the aggrieved.

For example, following the confinement of Japanese-Americans during World War II, the U.S. convened the Commission on Wartime Relocation and Internment of Civilians (CWRIC), which recommended to lawmakers that survivors of internment receive an apology, and restitution in the amount of \$20,000.<sup>115</sup>

Following an extensive investigation into the Chicago Police Department's record of torture perpetrated against mostly African-American men from 1972-1991, advocates were able to secure the exoneration of numerous wrongfully convicted torture survivors. Going further, the United Nations issued a recognition of the city's wrongdoing, and oversaw the creation of the Illinois Torture Inquiry and Relief Commission.<sup>116</sup> As a result, the City of Chicago implemented several forms of reparations for the victims of police torture, including tuition-free enrollment at city colleges for the victims and their families, the establishment of a treatment center for victims of law enforcement abuse, and the construction of public

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<sup>114</sup> See Van R. Newkirk, *Balancing the Ledger on Juneteenth*, THE ATLANTIC, (Jun. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/juneteenth-and-reparations-hearing-house/592036/>. (“Researchers have also clearly outlined exactly how state power helped produce the wealth of those who have it: through favorable tax policy, social insurance, powerful institutions, and massive land and wealth transfers.”)

<sup>115</sup> The Commission on the Wartime Relocation and Internment of Civilians, *Personal Justice Denied, Part Two: Recommendations* 8-10 (1983).

<sup>116</sup> G. Flint Taylor, *Long Path to Reparations for the Survivors of Chicago Police Torture*, 11 NW. J. L. & SOC. POL'Y. 330, 331 (2016).

memorials for torture victims.<sup>117</sup> The city also conducted public outreach and education on police misconduct, and agreed to pay a sum of \$5.5 million, with a cap of \$100,000 for each individual living victim.<sup>118</sup> Private institutions have engaged in a similar process. Georgetown University granted preferred enrollment status to the descendants of the 272 enslaved persons that the University had owned and sold in 1838.<sup>119</sup>

These public and private examples of planning and achieving economic recompense to citizens victimized by systems of oppression can be instructive to the current moment in the evolution of cannabis legalization. To start, it does not seem impossible to marshal the data from federal and state criminal justice systems from decades of marijuana prosecutions in order to better understand the precise scope of the damage done.<sup>120</sup> With this information alone, we can determine the severity and pervasiveness of prohibition.<sup>121</sup> To some degree, state-level equity programs have already started this work by offering education and licensing opportunities to people who have been arrested for a drug offense, or come from a locality where drug arrests were statistically high.<sup>122</sup>

Further, it is certainly not impossible to actualize the current and near future revenue from legal cannabis sales. For the purposes of equitable distribution of reparation coffers, as suggested by Sen. Booker's Marijuana Justice Act, we need only look to marijuana prosecution data to correlate which communities have been

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<sup>117</sup> *Id.* at 348.

<sup>118</sup> *Id.*

<sup>119</sup> Aaron Barksdale, *Georgetown Students Successfully Get University To Change Its Racist Legacy*, HUFFINGTON POST (Nov. 17, 2015), [https://www.huffingtonpost.com/entry/georgetown-students-successfully-get-university-to-change-its-racist-legacy\\_us\\_564b483fe4b045bf3df0ce30](https://www.huffingtonpost.com/entry/georgetown-students-successfully-get-university-to-change-its-racist-legacy_us_564b483fe4b045bf3df0ce30).

<sup>120</sup> See Perez, Ajilore, & Chung, *supra* note 45 (Listing proposed methods for locating areas of impact.)

<sup>121</sup> Such data might include: The number of arrests, terms of incarceration served, and demographic data of those persons who had contact with the criminal justice system.

<sup>122</sup> See CITY OF LOS ANGELES DEP'T OF CANNABIS REGULATION *surpa* note 94. Los Angeles uses locality data such as zip codes with previously high arrest rates, to offer specialized entry into the industry.



disproportionally affected by cannabis prohibition. It would then be up to the community reinvestment funds to distribute the money appropriately. Such a solution also speaks to a broad-scale notion of rehabilitation not just for individuals, but also for communities on a whole. Cannabis-related revenue is already being utilized by state and local governments for social programs and general budgeting, but if handled more deliberately, these kinds of initiatives could fund the creation of a larger, more diverse sector of the industry.

As discussed in section II in this article, since Nixon's declaration of a "War on Drugs" in 1971, the U.S. has commanded outsized attention around world as not only the world's largest jailer, but also for its ubiquitous presence in high drug trafficking areas around the globe. This article leaves for another day how the the growth and development of the U.S. legal cannabis industry has impacted the international drug trade, however there is value in taking a global perspective on "reefer reparations," and how it can be a building block towards international decriminalization and regulation. The human toll of prohibition has impacted the most vulnerable around the globe, and reparations are due to the international communities that fell victim to the brutality of prohibition.

To that end, the United Nations (UN) may provide guidance as to identifying and defining reparations. The UN divides its basic principles of reparations into five distinct categories: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>123</sup> Restitution is returning the victim of the human rights violation to the state they were in prior to the violation.<sup>124</sup> Compensation is what people traditionally associate with reparations, namely, monetary awards for "economically accessible damage," which are calculated based on the severity of the wrong

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<sup>123</sup> G.A. Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Dec. 16, 2005), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

<sup>124</sup> G.A. Res. 60/147 (IX) ¶ 19.

suffered, and the circumstances associated with that wrong.<sup>125</sup> Rehabilitation includes, “medical, psychological, social services, and legal assistance.”<sup>126</sup> Satisfaction can include the cessation of the human rights violations and abuses, truth and reconciliation commissions, public apologies, and commemoration or memorialization.<sup>127</sup> Guarantees of non-repetition include reforms that ensure the prevention of future abuse.<sup>128</sup>

These UN principals could offer our federal government perspective and inspiration as we collectively grapple with righting the wrongs of the War on Drugs, and bolster state-level initiatives by formalizing the notion of “reefer reparations” as a global necessity.

## VII. CONCLUSION

The criminalization of cannabis has forever changed communities of color and left a legacy of disenfranchisement which very closely resembles the legacy left by slavery. At the same time, the “war on drugs” has been rebranded into a massively profitable cannabis-based health and wellness industry that is on the brink of global domination. Arguably, the timing has never been better for righting the inequities caused by years of prohibition.

A pathway exists for the creation of “reefer reparations.” Minority businesses, craft cannabis, and small collectives want to compete and thrive within the industry, and their needs should be addressed alongside a clear and equitable solution to managing cannabis profit and revenue. Social equity programming must, at a minimum, include opportunities for (1) education and business preparedness; (2) ease and speed of record expungements; and (3) economic support vis-a-vis the banking system. This programming is needed to boost diversity within the industry, and to create more voices regarding how revenue should be allocated for community

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<sup>125</sup> *Id.* ¶ 20.

<sup>126</sup> *Id.* ¶ 21.

<sup>127</sup> *Id.* ¶ 22.

<sup>128</sup> *Id.* ¶ 23.

reinvestment. State and federal governments may want to utilize that revenue to address pitfalls in their budgets, but that would be a critical, missed opportunity to provide actual restitution to those who suffered from prohibition. The cannabis industry may not be the perfect place to finally achieve the promised “40 acres and a mule,” but it does seem like the right place to get started.