

We(ed) the People of Cannabis, in Order to Form a More Equitable Industry: A Theory for Imagining New Social Equity Approaches to Cannabis Regulation

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I. INTRODUCTION

“A complete disaster” concluded a Native Hawaiian national cannabis¹ legalization advocate testifying about the implementation of

¹ There is an evolving discussion on how to refer to the cannabis plant in such a way as to remain scientifically accurate, recognize the Mexican roots of cannabis use in North America, effectively refer to documents and policies codifying a particular name for the plant and its derivative products, and avoid reifying the racist history of the United States’ interactions with the cannabis plant. See Ryan B. Stoa, *Equity in Cannabis Agriculture*, 101 B.U. L. Rev. 101, 104-05 (2021); and see Daniel G. Orenstein, *Preventing Industry Abuse of Cannabis Equity Programs*, 45 S. ILL. U. L.J. 69, 71 n.1 (2020). *Cannabis* is the scientific term for the genus of the cannabis plant—some scientists argue that there is only one species, *Cannabis sativa*, while others divide the genus into three distinct species (individually or grouped together under *Cannabis sativa*): *Cannabis sativa*, *Cannabis indica*, and *Cannabis ruderalis*. *Species of ‘Cannabis’*, U.S. NATIONAL PLANT GERMPLASM SYSTEM, <https://npgsweb.ars-grin.gov/gringlobal/taxonomylist?category=species&type=genus&value=Cannabis&id=2034> (last visited Sep. 6, 2022). “Hemp” refers to cultivars of *Cannabis sativa* with lower concentrations of psychoactive components typically used in industrial or medicinal settings. Stoa, *supra* note 1, at 104.

“Marihuana” and “marijuana” are interchangeable spellings of the Spanish word used in Mexico for the cannabis plant. Various state, federal, and international laws and regulations alternatively use “marijuana,” “marihuana,” “cannabis,” and “hemp” to refer to the cannabis plant and its derivatives. See e.g. 1937 Marihuana Tax Act, Pub. L. No. 75-

“social equity” in cannabis legalization programs in California and across the United States.² The testifier was speaking at the first meeting of the Act 169 Dual Use of Cannabis Task Force convened by the Hawaii State Department of Health on April 25, 2022.³ This testimony was not an anomaly—every single one of the forty-one unique testifiers and fifty-two pieces of written and verbal testimony presented to the Task Force that day referenced “social equity” or advocated for Hawaii to implement elements of cannabis social equity⁴ programs used in other states.⁵ Even

238, 50 Stat. 551 (repealed 1970) and Act of May 2, 2017, 2017 Haw. Sess. Laws 607 (requiring all references to “marijuana” in Hawaii state statutes, administrative rules, documents, letterhead, websites, and other necessary items be replaced with “cannabis”). Historically, the United States federal government used these terms to racialize the use of cannabis and stir public opposition to Mexican immigrants, *see infra* Section II(A), a practice continued today. *See* Christopher Ingraham, ‘Marijuana’ or ‘Marihuana’? It’s All Weed to the DEA, WASHINGTON POST (Dec. 16, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/12/16/marijuana-or-marihuana-its-all-weed-to-the-dea/>.

Accordingly, to remain scientifically and historically accurate, respect Mexico’s historic connection with the plant, and challenge the United States’ historical racism on this issue, this article will use “cannabis” in reference to the plant and its cultivars throughout, except when reference to “marijuana” or “marihuana” are necessary to refer to specific statutes or historical actions for clarity. “Hemp” will be used to identify cannabis with low amounts of psychoactive components when the distinction is required.

² HDOH MedCann, 2022 04 25 Dual Use of Cannabis Task Force Meeting, YOUTUBE (May 20, 2022), <https://youtu.be/WLKN10Djmr0>. The testifier echoed the language of NBA star Al Harrington who similarly described the implementation failures of the Los Angeles social equity program that only licensed six black-owned businesses out of two hundred licensed cannabis businesses. Katelin Edwards et al., *Social Equity – Or Lack Thereof – in the Cannabis Industry*, SIMPLIFYA (Jun 10, 2020), <https://www.simplifya.com/social-equity-or-lack-thereof-in-the-cannabis-industry/>.

³ STATE OF HAWAII, DEPARTMENT OF HEALTH MEDICAL CANNABIS PROGRAM: DUAL USE OF CANNABIS TASK FORCE, <https://health.hawaii.gov/medicalcannabis/dual-use/> (last visited Aug. 10, 2022).

⁴ As this paper will contrast various theories of “social equity”, this paper will adopt the convention of referring to each theory by its discipline first, i.e. “cannabis social equity” or “public administration social equity”, and will use “social equity” alone to refer only to the general concept of social equity.

⁵ *See generally* Monday April 25, 2022: Written Testimony, STATE OF HAWAII, DEPARTMENT OF HEALTH MEDICAL CANNABIS PROGRAM: DUAL USE OF CANNABIS TASK FORCE (2022) [hereinafter Written Testimony], <https://health.hawaii.gov/medicalcannabis/files/2022/04/2022-04-25-Dual-Use-of-Cannabis-Task-Force-Testimony-T.pdf>; Monday April 25, 2022: Written Testimony received - late, STATE OF HAWAII, DEPARTMENT OF HEALTH MEDICAL CANNABIS PROGRAM: DUAL USE OF CANNABIS TASK FORCE (2022) [hereinafter Written Testimony Received Late], <https://health.hawaii.gov/medicalcannabis/files/2022/05/2022-04-25-Dual-Use-of-Cannabis-Taskforce-LATE-Testimony.pdf>; and HDOH MedCann, *supra* note 2.

organizations opposing the legalization of cannabis in Hawaii supported the implementation of cannabis social equity policies.⁶

There was also general agreement on the sorts of policies constituting cannabis social equity in adult-use cannabis regulations—programs that promote diverse ownership of cannabis licensed businesses (“industry equity”),⁷ decriminalize sales and possession of cannabis and expunge cannabis conviction records (“criminal justice equity”), reinvest in communities adversely affected by the War on Drugs (“community equity”), and provide equitable access to cannabis products (“access equity”).⁸ Testifiers explicitly defined “Social Equity” (cannabis social equity) as this limited collection of policies,⁹ with the implicit understanding that there are significant current inequities between different groups of cannabis users and these policies need to be put in place to redress those inequities.¹⁰ Despite the general agreement on the sorts of harms to be redressed and the available menu of policy options, there was also a general consensus among the testifiers that the nationwide implementation and results of cannabis social equity programs (currently in thirteen adult-use and two medical-use cannabis states) left a lot to be desired.¹¹

This diagnosis of universal failure amongst cannabis social equity programs is not unique to Hawaii’s cannabis law testifiers.¹² For instance, the Minority Cannabis Industry Association (“MCBA”) argues in its 2022 National Cannabis Equity Report “that not one [program] has resulted in an equitable cannabis industry on all four measures (industry, justice,

⁶ HDOH MedCann, *supra* note 2.

⁷ This shorthand is necessary to efficiently distinguish between the different categories of policies that advocates and scholars variously group in whole or in part to define “social equity.” *See infra* Section III.

⁸ *See generally* Written Testimony, *supra* note 5; Written Testimony Received Late, *supra* note 5; and HDOH MedCann, *supra* note 2.

⁹ Written Testimony, *supra* note 5 (paraphrasing the definition of “social equity” given by the Minority Cannabis Industry Association, MINORITY CANNABIS INDUSTRY ASSOCIATION, NATIONAL CANNABIS EQUITY REPORT 2 (2022) [hereinafter MCBA REPORT], <https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf>).

¹⁰ *See generally* Written Testimony, *supra* note 5; and HDOH MedCann, *supra* note 2.

¹¹ *See generally* Written Testimony, *supra* note 5; and HDOH MedCann, *supra* note 2.

¹² *See e.g.* MCBA REPORT, *supra* note 9, at 31; RELEASE, REGULATING RIGHT, REPAIRING WRONGS: EXPLORING EQUITY AND SOCIAL JUSTICE INITIATIVES WITHIN UK CANNABIS REFORM 12-13 (2022), https://www.release.org.uk/sites/default/files/pdf/publications/Regulating-Right-Repairing-Wrongs-UK-Cannabis-Reform_Release.pdf; and Sarah Ratliff, *10 Years Into Legalization and We Still Can’t Get Social Equity Right*, Cannabis & Tech Today (July 28, 2022), <https://cannatechtoday.com/still-cant-get-social-equity-right/>.

community, and access).”¹³ This critique is chiefly concerned with implementation failures of cannabis social equity policies inside cannabis programs, rather than with the content of the legislation or administrative rules behind those policies.¹⁴ Each time a new state considers implementing an adult-use cannabis program, the same organizations appear, promoting the same cannabis social equity policies—with the promise that ‘if these policies are implemented correctly this time, unlike the other states, your state will be at the forefront of cannabis social equity—your state will be the first to get it right.’¹⁵

Cannabis social equity advocacy organizations, state legislatures, and cannabis administrative bodies alike base their cannabis social equity policies on a goal-oriented, top-down definition of social equity that is merely a collection of policies purported to reduce variously defined inequities.¹⁶ These proposed policies are not based in any particular theory of social equity that bridges the gap between goal and policy, nor are they compared against previous incarnations and implementations of social equity theory for lessons learned or the practicality of implementation. Rather, proponents identified a narrow collection of inequities¹⁷ and developed a set of policies crafted more for narrative resonance than effective resolution. While this progression is a natural outgrowth of the foundations of the recent popular cannabis social equity movement,¹⁸ it

¹³ MCBA REPORT, *supra* note 9, at 31.

¹⁴ Critiques of the text of statutory codification of state social equity proposals are certainly valid and would shine light on the process of turning social equity policies into law, but that analysis is beyond the scope of this article. This article is most concerned with an analysis of the policies that cannabis social equity advocates propose in the first place and the critiques that cannabis social equity advocates assert about the implementation of their proposed social equity policies.

¹⁵ See e.g. HDOH MedCann, *supra* note 2 (Marijuana Policy Project discussing Hawaii’s potential program and failure of others); Written Testimony, *supra* note 5 (career national cannabis legal advocate discussing Hawaii’s potential program and failure of others); *Social Equity in Cannabis Law and Policy Podcast with Cat Packer*, ATTORNEY GENERAL ALLIANCE (Oct. 15, 2021), <https://www.gotostage.com/channel/7ea69eab353b4fefa57462797d687e23/recording/32fbbbd288b74a889a93296abdac8134/watch> (Attorney General Alliance discussing with the executive director of the Los Angeles Department of Cannabis Regulation updates to current program and failure of others); MCBA REPORT, *supra* note 9, at 31 (discussing failure of programs while recommending similar programs); CANNABIS REGULATORS OF COLOR COALITION, PRINCIPLES (2020), <https://www.crc-coalition.org/principles> (providing the same equity principles to each state for which they provide policy testimony); and NATIONAL ASSOCIATION OF CANNABIS BUSINESSES, NACB SOCIAL EQUITY MODEL (2022), <https://nacb.com/social-equity/>.

¹⁶ See *infra* Section III discussions of current views of social equity.

¹⁷ A collection of inequities that is remarkably incomplete and unaddressed by most cannabis social equity proposals. See *infra* Section II(B).

¹⁸ See *infra* Section III(A) discussion of origins of current social equity cannabis

lacks the theoretical rigor necessary to effectively diagnose the current failures of cannabis social equity and iterate those policies to substantially reduce inequities.

The cannabis social equity movement has certainly identified real, existing inequities resulting from the War on Drugs and reified in the emerging cannabis industry, and many of its proposed policies can likely have positive impacts on those inequities. Even so, many of the policies for which there is the greatest consensus have, to date, at best reduced the overall magnitude of the harm without actually reducing the level of inequity. For example, in states and countries where cannabis possession has been legalized, the total number of arrests for cannabis declined, but racial disparities in arrests remained the same or even increased by a nontrivial amount.¹⁹ Additionally, the policies that attract the most public and advocacy attention often require the most administrative resources,²⁰ and are frequently inherently limited in the amount of inequity they can actually redress given the scale of the problem. Beau Kilmer et al, writing in the Boston University Law Review, state this issue succinctly:

By expunging past records of cannabis law violations, a state the size of Virginia could improve the employment prospects of hundreds of thousands of people. Increasing employment of DAC [disproportionately affected community] members in the cannabis industry could benefit thousands. Equity programs directed at the owners of cannabis businesses

movement.

¹⁹ Kenneth Sebastian Leon, *Minority-Owned Cannabis Businesses as a Social Justice Imperative*, in MORE ON LEGALIZING MARIJUANA – ONGOING SHIFTS IN AMERICAN POLICIES 167, 171-72 (Nancy E. Marion, ed., 2019); Akwasi Owusu-Bempah & Alex Luscombe, *Race, Cannabis, and the Canadian War on Drugs*, 91 Int'l. J. of Drug Pol. 102937 (2021); COLORADO DEPARTMENT OF PUBLIC SAFETY, MARIJUANA LEGALIZATION IN COLORADO: EARLY FINDINGS 5-6, 8, 20-21 (2016), <https://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf>; Caislin L. Firth et al., *Did Marijuana Legalization in Washington State Reduce Racial Disparities in Adult Marijuana Arrests?*, 54(9) SUBSTANCE USE & MISUSE 1582, 1585-86 (2019); Ben Markus, *As Adults Legally Smoke Pot in Colorado, More Minority Kids Arrested for It*, NPR (June 29, 2016), <https://www.npr.org/2016/06/29/483954157/as-adults-legally-smoke-pot-in-colorado-more-minority-kids-arrested-for-it>; ATTORNEY GENERAL ALLIANCE, *supra* note 15; and *see generally* DRUG POLICY ALLIANCE AND MARIJUANA ARREST RESEARCH PROJECT, UNJUST AND UNCONSTITUTIONAL: 60,000 JIM CROW MARIJUANA ARRESTS IN MAYOR DE BLASIO'S NEW YORK (2017), https://drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf.

²⁰ Beau Kilmer et al., *Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-offs*, 101 B.U. L. REV. 1003, 1026 (2021) (“The cannabis social equity literature extensively discusses provisions for entrepreneurs, but these policies affect far fewer people than do provisions affecting cannabis industry workers”).

could directly help several dozen. All are helpful, and all can be done simultaneously. But the scale in terms of numbers of direct beneficiaries is sharply different.²¹

The United States rarely gets to explicitly plan the creation and regulation of new industries from scratch, and this is a unique opportunity to envision and create regulations that foster a new industry that is both equitable and economically successful. That said, the newness of the industry does not mean that lessons learned from previous efforts seeking to promote social equity in other industries should be discarded. The rich history of social equity theory and practice, developed through cooperation between disparate scholarly disciplines and practical administrations in the years since the Civil Rights Act passed in 1964 should be actively applied to the current inequities in the cannabis market and to the populations adversely affected by the War on Drugs. Such exploration will help bridge the “results gap” between the goals of cannabis social equity advocates and the policies they currently believe will solve those inequities. Additionally, investigating this theoretical history will likely generate additional novel solutions to effectively address cannabis inequities.

This paper contributes to the investigation and remediation of inequities resulting directly and indirectly from the United States’ War on Drugs by integrating the theories of social equity developed in the fields of public administration, philosophy, and law into a framework for imagining, implementing, and refining cannabis social equity policies. This new framework will be used to evaluate current cannabis social equity policies, potential federal legislation, and new opportunities for remediating the harms caused by cannabis regulations over the last century.

Part II gives a brief history of cannabis regulation in the United States, the scope and detrimental nature of the resulting inequities on adversely affected populations, and the current movement across the country towards legalization of adult-use cannabis. Part III reviews the current theory of cannabis social equity as it is utilized across popular and scholarly literature. Part IV evaluates current cannabis social equity proposals and already-implemented policies in the cannabis industry to identify their relative effectiveness. Part V uses the United States’ rich intellectual history with theories of social equity as developed in the fields of cannabis policy, public administration, philosophy, and law to propose an integrated theory of cannabis social equity for use by the cannabis industry. Finally, Part VI will deploy this newly integrated social equity theory to imagine potential solutions for current inequities resulting from the War on Drugs.

²¹ *Id.* at 1026-31.

II. THE INEQUITABLE HISTORY AND MODERN CONSEQUENCES OF THE WAR ON DRUGS

While the history of the United States' War on Drugs, its origins, and its lasting impact have been extensively chronicled elsewhere,²² a brief review with special emphasis on the variety of harms, inequities, and adverse impacts of the War on Drugs on targeted populations will provide the proper context for the development of an effective theory of cannabis social equity.

A. *A Brief History of Cannabis Regulation in the United States*

1. Early Federal Food and Drug Regulations

Since the beginning, modern regulation of cannabis in the United States has been tied to the fate of other psychoactive substances and their societal effects, real or imagined. In the late 19th century, a majority of the states enacted “poison laws” requiring labeling and content disclosures on patent medicines (name brand, non-generic medicine)²³ in response to growing knowledge and concerns about how certain substances could harm the body and mind (including additives such as strychnine, arsenic, and prussic acid and psychoactive substances including opiates, cocaine, and alcohol).²⁴ While most of these laws did not explicitly name cannabis products, cannabis products were patent medicines at the time and subject to the labeling requirements.²⁵

Even at the inception of U.S. drug regulations, race played a key role in justifying their imposition: the original federal import regulation regarding drugs was justified by blaming adulterated foreign drugs for the excess deaths of American soldiers during the Mexican-American War in the 1840s;²⁶ the Chinese-American Angell Treaty in 1887 and Opium

²² See e.g. LESTER GRINSPOON & JAMES B. BAKALAR, *MARIHUANA, THE FORBIDDEN MEDICINE* (1993); Kim Hewitt, *History and Cultural Context of Marijuana in the United States*, in UNDERSTANDING MEDICAL CANNABIS 40 (2021); and David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1 (2020).

²³ See generally Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39(1) Food, Drug, & Cosmetic L.J. 2 (1984).

²⁴ See H.R. Rep. No. 30-664, at 20 (1848); David D. McKinney, *The Mexican-American War Brings Regulation on Drug Importation*, 3 FRONTLINE 50 (2010); and Angela Walch, *A Spurious Solution to a Genuine Problem: An In-Depth Look at The Import Drugs Act of 1848* (2002) (Law Thesis, Harvard Law School) (available at <https://dash.harvard.edu/bitstream/handle/1/8846790/Walch.html?sequence=2&isAllowed=y>).

²⁵ Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42(3) PHARMACY & THERAPEUTICS 180 (2017).

²⁶ ROBERT M. HARDAWAY, *MARIJUANA POLITICS: UNCOVERING THE TROUBLESOME HISTORY AND SOCIAL COSTS OF CRIMINALIZATION* 83 (2018); H.R. Rep.

Exclusion Act of 1909 were created to keep Americans away from the “seedy” behavior of “undesirable[]” Chinese immigrants.²⁷

Following a few prior acts regulating specific foods, in 1906, the federal government made its first foray into the general regulation of the contents of food and drugs produced in the United States with the passage of the Pure Food and Drug Act.²⁸ Similar to the state poison laws, the Pure Food and Drug Act required labeling and disclosure of the amounts of certain substances referenced in the United State Pharmacopeia, but unlike many of the poison laws, the federal law explicitly included cannabis.²⁹

2. The First Federal Narcotics Regulation

As the 20th century brought increased awareness and levels of opium addiction around the world, and the use of morphine and cocaine for non-medical uses, Congress passed the Harrison Narcotics Tax Act of 1914.³⁰ Based in the federal government’s Article I³¹ taxing power and upheld as a legitimate use of that power by the United States Supreme Court,³² this law required all importers, producers, and distributors of opium or cocaine to register with the federal government, report all transactions, and pay taxes, with failure to comply becoming a federal criminal violation.³³ The Harrison Narcotics Tax Act did not explicitly regulate cannabis, but it served as the United States’ chief enforcement mechanism for opium and cocaine until the passage of the federal Controlled Substances Act in 1970 and formed the constitutional basis for the Marihuana Tax Act of 1937.³⁴

While the requirements of the Harrison Narcotics Tax Act were purely administrative and did not restrict the possession or distribution of any drug, the Act laid the foundation for state and federal cooperation in the criminalization of drugs. Failure to comply with the merely administrative requirements of the Harrison Narcotics Tax Act was a federal crime, but

No. 30-664, at 20.

²⁷ HARDAWAY, *supra* note 26, at 86-89; Audrey Redford & Benjamin Powell, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20(4) THE INDEP. REV. 509, 512-14 (2016).

²⁸ Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56(6) VA. L. REV. 971 (1970); HARDAWAY, *supra* note 26, at 83-85.

²⁹ HARDAWAY, *supra* note 26, at 87-88.

³⁰ Harrison Narcotics Tax Act, Pub. L. No. 63-233, 38 Stat. 785 (1914); *See id.* at 89.

³¹ HARDAWAY, *supra* note 26, at 90-92.

³² *Id.* at 91-92; United States v. Doremus, 249 U.S. 86 (1919).

³³ HARDAWAY, *supra* note 26, at 90-92.

³⁴ 1937 Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970); *id.* at 83.

compliance with the federal administrative requirements meant admitting to a felony under state laws prohibiting the non-medical use and distribution of opium and cocaine. This interaction between state and federal law created *de facto* federal criminalization of opium and cocaine possession and distribution.³⁵

3. The Marihuana Tax Act of 1937

In 1930, the U.S. Congress created the Federal Bureau of Narcotics under the Department of Taxation³⁶ (as narcotics regulations were still only federally enforceable under Article I), and Harry J. Anslinger was appointed commissioner—a position he would occupy for the next 32 years.³⁷ Having served previously on the Treasury Department’s Bureau of Prohibition enforcing alcohol prohibition during the 1920’s, Anslinger was adamantly opposed to drug use of all sorts.³⁸ His first major victory was the creation of the Uniform Narcotic Drug Act in 1932, a model statute designed to facilitate uniformity and enforcement of state drug laws which was adopted by thirty-five states by 1937.³⁹ However, the “evils” of cannabis smoking were not yet widely known in the U.S.,⁴⁰ so cannabis regulation was only an optional provision in the model law.⁴¹

While cannabis and hemp had been grown in the U.S. for centuries,⁴² and were even viewed as strategic resources as late as World War II,⁴³ smoking of cannabis was relatively new in the United States, introduced in the early 20th century by immigrants and workers from

³⁵ Patton, *supra* note 22, at 6-7.

³⁶ HARDAWAY, *supra* note 26, at 92, 95.

³⁷ *Id.* at 95.

³⁸ Historians are divided on whether the alcohol and drug prohibition movements were linked or merely coincided in time, but at the very least Harry Anslinger’s personal career spanned both movements. Compare RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 26-27 (1974) and LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* (2016); and see *id.*

³⁹ Bonnie & Whitebread II, *supra* note 28, at 1034.

⁴⁰ Hewitt, *supra* note 22, at 41.

⁴¹ Bonnie & Whitebread II, *supra* note 28, at 1034.

⁴² HARDAWAY, *supra* note 26, at 78.

⁴³ Victor S. Clark, *History of Manufactures in the United States: 1607-1860* 9 (1916), 9; and *The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619* 218 (William Waller Hening, ed., 1969) (Proceedings of the Virginia General Assembly stating that “every planter as soone as he may, provide seede of flaxe and hempe and sowe the same” for immediate export to England’s navy); and Patton, *supra* note 22, at 4 (“The ‘Hemp for Victory’ Campaign during World War II promoted the production of hemp for rope to be used by U.S. military forces” (citing BONNIE & WHITEBREAD II, *supra* note 38, at 2-3)).

Mexico and the Caribbean after the criminalization of opium and cocaine.⁴⁴ It was so new in fact, that it was not until the late 1920's that cannabis use became popular in Black areas of larger cities; and it was not until the mid-1930's that national media gave cannabis use regular attention in response to fears of Mexican immigrant usurpation of American jobs during the Great Depression.⁴⁵ Anslinger's Bureau of Narcotics conducted an education campaign in 1932⁴⁶ "describing the drug, its identification, and its evil effects" and fostering a growing awareness of cannabis smoking in the media, public, and law enforcement.⁴⁷ However, despite Anslinger's description of cannabis as a "national menace",^{48 49} he admitted that it had only spread out of the southwestern United States between 1934 and 1937.⁵⁰ Still, due to Anslinger's education campaign (and apocryphal coordination by William Randolph Hearst),⁵¹ the media eventually seized on the foreign origins of cannabis smoking in the late 1930's and began to publish frequent, unsubstantiated, and exaggerated accounts of crazed Mexican and

⁴⁴ Hewitt, *supra* note 22.

⁴⁵ HARDAWAY, *supra* note 26, at 82, 98.

⁴⁶ This campaign included the infamous 1936 film *Reefer Madness*. Patton, *supra* note 22, at 9.

⁴⁷ HARDAWAY, *supra* note 26, at 98, 111; and *see generally* George Fisher, *Racial Myths of the Cannabis War*, 101 B.U. L. Rev. 933 (2021).

⁴⁸ Bonnie & Whitebread II, *supra* note 28.

⁴⁹ Anslinger stated worse as well, "There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos, and entertainers...marijuana causes white women to seek sexual relations with Negroes...the primary reason to outlaw marijuana is its effect on the degenerate races...Reefer makes darkies think they're as good as white men." Akele Parnell, *Why Does Social Equity Matter*, in UNDERSTANDING SOCIAL EQUITY, 22 (Christopher Nani, ed., 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622268.

⁵⁰ HARDAWAY, *supra* note 26, at 111.

⁵¹ Hewitt, *supra* note 22, at 43.

In 1923, a Hearst paper reported that "Marihuana is a short cut to the insane asylum. Smoke marihuana cigarettes for a month and what was once your brain will be nothing but a storehouse for horrid specters." In 1928, a Hearst paper reported that "marijuana was known in India as the 'murder drug,' it was common for a man to 'catch up a knife and run through the streets, hacking and killing every one he [encountered].'" In one of the most bizarre claims, the article claimed one could grow enough cannabis in a window box to "drive the whole population of the United States stark, raving mad."

Black men, high on cannabis, performing violent and depraved acts against upstanding American citizens.⁵²

Citing increasingly racialized public agitation and the wave of state laws criminalizing non-medicinal use of cannabis (both encouraged by the Federal Bureau of Narcotics educational campaigns),⁵³ Anslinger successfully argued to Congress, without disclosing his knowledge of evidence to the contrary, that the states' enforcement efforts were insufficient, and that federal action was necessary to address the drug's dangers.⁵⁴ Congress quickly passed the Marihuana Tax Act of 1937 on the same Article I constitutional grounds as the Harrison Tax Act. Similar to the Harrison Tax Act, the Marihuana Tax Act's registration requirements, in conjunction with state criminalization of cannabis, functioned as a de facto criminalization of all non-medical cultivation, possession, and distribution of cannabis.

The Marihuana Tax Act remained the principle federal tool for cannabis enforcement until 1969,⁵⁵ augmented by both the Boggs Act in 1951 and the Narcotics Control Act of 1956 which increased penalties,

⁵² For example, one contemporaneous description of the effects of cannabis on the user stated:

Perhaps the most marked effects of marijuana can be observed in its attack upon the moral standards of the user. In this respect it goes farther than alcohol. Alcohol will lower the standards and release the inhibitions, allowing the individual to follow his base and secret desires. Marihuana destroys the inhibitions much more effectively and completely, abolishing the power of censoring one's acts, and doing away with the conception of right and wrong. It not only destroys the true conception, but sets up in its place a totally false conception. Whereas liquor breaks down moral standards, marihuana not only breaks them down, but sets up in their place standards diametrically opposed. Under alcohol it is all right to disregard that which is moral and right; under marijuana it is not only right to do wrong, but it would be wrong not to do wrong. . .

immediately upon the loss of moral control, the subject becomes convinced that a certain act, from pickpocketing and theft to rape and murder, is necessary, and is seized by an overwhelming desire to perform that act because to him it becomes a deed born of necessity. . .

Intoxicated by liquor, a crime may be committed because moral restraint is not functioning; under the spell of marihuana, the crime must be committed because it is the right thing to do, and it would be wrong not to do it. . .

ERICH GOODE, *THE MARIJUANA SMOKERS* 208-09 (1970) (quoting from the research and documentation of EARLE ALBERT ROWELL & ROBERT ROWELL, *ON THE TRAIL OF MARIHUANA: THE WEED OF MADNESS* 46, 48 (1939); and see HARDAWAY, *supra* note 26, at 98, 111; Hewitt, *supra* note 22, at 42-43; and see generally Fisher, *supra* note 47.

⁵³ Katharine Neill Harris & William Martin, *Persistent Inequities in Cannabis Policy*, 60(1) *THE JUDGES J.* (2021).

⁵⁴ Bonnie & Whitebread II, *supra* note 28, at 1049-51.

⁵⁵ HARDAWAY, *supra* note 26, at 100-01.

created mandatory minimum sentences, and eliminated the possibility of probation, suspension, and parole for most offenses traceable to imported cannabis.⁵⁶ Cannabis was removed from the United States Pharmacopeia in 1942 on a finding that it was of no medicinal value, being only “a harmful addictive drug that caused psychoses, ... and violent behavior.”⁵⁷

4. A False Start and Dashed Hopes: *Leary v. United States* and Nixon’s War on Drugs

In 1969, the United States Supreme Court held the Marihuana Tax Act of 1937 to be unconstitutional in *Leary v. United States*, 395 U.S. 6 (1969).⁵⁸ While upholding the law as an appropriate use of Congress’ tax power,⁵⁹ the Supreme Court held that the Marijuana Tax Act’s de facto nationwide criminalization of cannabis—using federal administrative requirements to force participants to admit to state level cannabis crimes—violated Leary’s 5th Amendment right against self-incrimination.⁶⁰ This ruling capped a decade of societal upheaval, progress in racial equity, development of the original theory of social equity, shifting social views of cannabis, and a growing movement for legal reform that cited newly researched medical bases for the legalization of cannabis.⁶¹

The 1960’s saw mass civil and political demonstrations—from increasingly large anti-Vietnam War protests, free speech advocacy, and environmentalism to the growing civil rights movement and the most

⁵⁶ NANCY E. MARION & JOSHUA B. HILL, MARIJUANA 360: DIFFERING PERSPECTIVES ON LEGALIZATION 22 (2019); *id.* at 105.

⁵⁷ Note the circular reasoning that has plagued the relationship between cannabis illegality and medical research since cannabis was first removed from the U.S. Pharmacopeia after the passage of the 1937 Marihuana Tax Act: ‘there has been very little research on the medicinal value of cannabis (because cannabis is illegal to research) so cannabis should remain illegal because there is no research to show that it does have medicinal value.’ See Elena Qualtrone, *The Catch 22 of Marijuana [Il]Legalization*, 22 B.U. J. SCI. & TECH. L. 299, 301-02 (2016). There is also a dark humor in the continuing conflation of cannabis and opioids when cannabis was documented to treat opioid addiction as early as 1889, see GRINSPOON & BAKALAR, *supra* note 22, at 6.

⁵⁸ HARDAWAY, *supra* note 26, at 106-07.

⁵⁹ A power recently reinforced by the Supreme Court’s decision upholding the taxing provisions of the Affordable Care Act as a legitimate exercise of Article I taxing and spending powers. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

⁶⁰ Catholic University Law Review, *Leary and Covington: Registration and the Fifth Amendment*, 19 CATH. U.L. REV. 87 (1970); HARDAWAY, *supra* note 26, at 107.

⁶¹ GOODE, *supra* note 52, at 3-4 (a contemporaneous evaluation of the gravity of societal changes in the 1960’s); HARDAWAY, *supra* note 26, at 105-06 (later review of the impact of the changing attitudes of the 1960’s on the evolution of America’s regulation of cannabis).

widespread series of race riots in United States history.⁶² Consequently, the United States made substantial strides in developing the legal and programmatic basis for redressing some of the societal harms caused by years of Jim Crow laws—approving the various Civil Rights, Voting Rights, and Fair Housing Acts of the 1960s.⁶³ These movements were harnessed by President Lyndon B. Johnson and The New Left to pass many of his “Great Society” policies to reduce poverty, reduce crime, abolish inequality, and improve the environment.⁶⁴

Cannabis use on college campuses and amongst the middle class across the United States increased as much as 70% during this decade, reducing cannabis’ popular association with poverty and crime.⁶⁵ These factors fostered a growing movement for cannabis law liberalization toward the end of the 1960’s, bolstered by the Leary court’s striking down the Marihuana Tax Act in 1969.⁶⁶

Yet, the seeds of a backlash against the decade’s reforms were already planted, and, when those seeds bloomed with the 1968 election of President Richard Nixon as a “law-and-order” candidate,⁶⁷ the new administration moved quickly to nip cannabis liberalization in the bud as a covert way of poisoning the roots of improving racial equality. In response to the Leary decision, President Nixon pushed Congress to pass the Comprehensive Drug Abuse Prevention and Control Act in 1970, with Title II, the Controlled Substances Act (“CSA”), provisionally listing the cannabis plant as a Schedule I drug along with the chemical compounds of drugs like heroin, LSD, and opiates. Schedule I, the most highly restricted designation in the Act, contained substances considered to have a high potential for abuse and no accepted medical use,⁶⁸ and Schedule I violations were subject to harsh minimum sentencing requirements and no-knock warrants under the CSA.⁶⁹

Congress created the National Commission on Marihuana and Drug Abuse, led by Pennsylvania governor Raymond Shafer, to “determine[e] the appropriate disposition” of cannabis scheduling under the CSA.⁷⁰ The

⁶² Patton, *supra* note 22, at 13; Hewitt, *supra* note 22, at 44-45.

⁶³ Hewitt, *supra* note 22, at 45.

⁶⁴ *See id.* at 46.

⁶⁵ Patton, *supra* note 22, at 13; and *see* HARDAWAY, *supra* note 26, at 113; Hewitt, *supra* note 22, at 46-47.

⁶⁶ HARDAWAY, *supra* note 26, at 113.

⁶⁷ Harris & Martin, *supra* note 53; Hewitt, *supra* note 22, at 47.

⁶⁸ HARDAWAY, *supra* note 26, at 107; Julia Peoples, *Reconceptualizing Cannabis* (2021) (Honors theses, University of Mississippi) (eGrove).

⁶⁹ Hewitt, *supra* note 22, at 47; Peoples, *supra* note 68.

⁷⁰ Patton, *supra* note 22, at 16-17.

“Shafer Commission” published its findings in 1972 that cannabis was not associated with criminality nor a gateway drug.⁷¹ This finding was supported by a similar report from the National Institute of Mental Health in the same year.⁷² Yet, the decision whether to reschedule cannabis was administrative, and President Nixon explicitly used cannabis’ provisional scheduling as “illegal” under the CSA to justify its criminal sanction as one of the “dangerous drugs”—ignoring the Shafer report and establishing the foundation for the War on Drugs against “America’s public enemy number one.”⁷³

President Nixon’s stated intentions to use the criminalization of cannabis to covertly disrupt anti-war protests and black communities in defense of Nixon’s white, suburban voters are now a matter of public record.⁷⁴ White House Chief of Staff Robert Haldeman wrote in his diary that: “[Nixon] emphasized that you have to face the fact that the whole [drug] problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.”⁷⁵ White House Domestic Affairs Advisor John D. Ehrlichman later described the Nixon administration’s justification and approach to cannabis legalization in detail.

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.⁷⁶

The CSA created federal criminal penalties for possession of cannabis and, while the federal government could not require the states to enforce federal law, President Nixon’s administration pushed for the eventually unanimous state adoption of the identical Uniform Controlled Substances Act—making cannabis possession a criminal felony under both

⁷¹ HARDAWAY, *supra* note 26, at 108.

⁷² Patton, *supra* note 22, at 16-18.

⁷³ *Id.*

⁷⁴ Stephen Siff, “Why Do You Think They Call It Dope?”: Richard Nixon’s National Mass Media Campaign Against Drug Abuse, 20(3) JOURNALISM & COMM’N. MONOGRAPHS, 172, 176 (2018) (citing Matthew D. Lassiter, *Impossible Criminals: The Suburban Imperatives in America’s War on Drugs*, 102(1) J. OF AM. HIST. 126, 134 (2015)).

⁷⁵ Patton, *supra* note 22, at 16.

⁷⁶ *Id.* at 17; Parnell, *supra* note 49, at 21-22.

state and federal law. Soon after, the Drug Enforcement Authority (“DEA”) was created to consolidate enforcement of federal drug laws.⁷⁷ The federal government also quickly provided substantial amounts of funding⁷⁸ and training⁷⁹ to state and local law enforcement agencies to enforce state cannabis regulations, primarily amongst communities of color. Federal antipathy towards cannabis intensified through the 1980s and 1990s,⁸⁰ manifesting through ever-increasing minimum penalties for cannabis crimes, exponential increases in incarceration rates, and the introduction of civil asset forfeiture laws.⁸¹

Throughout this period, the United States also pushed the United Nations to codify international requirements on drug control regulations within and between nations. Beginning in 1946 in Lake Success, New York, the Commission on Narcotic Drugs sought to build on the previous opioid conventions,⁸² culminating in: the Single Convention on Narcotic Drugs, 1961,⁸³ as amended by the 1972 Protocol;⁸⁴ the Convention on Psychotropic Substances, 1971,⁸⁵ and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.⁸⁶ These treaties collectively established international control measures to prevent diversion of scheduled substances to illegal channels and require countries to criminalize

⁷⁷ HARDAWAY, *supra* note 26, at 109.

⁷⁸ Robert Hardaway, *The Cannabis Strain: Marijuana Prohibition in an Era of Police Defunding*, in STONEOVER: THE OBSERVED LESSONS AND UNANSWERED QUESTIONS OF CANNABIS LEGALIZATION 21, 32-33 (Nikolay Anguelov & Jeffrey Moyer eds., 2022); DRUG ENFORCEMENT ADMINISTRATION, STATE AND LOCAL TASKFORCES (2018), <https://www.dea.gov/operations/state-and-local-task-forces>.

⁷⁹ DRUG ENFORCEMENT ADMINISTRATION, OUR HISTORY: THE DEA YEARS 30, 38 (2018), <https://www.dea.gov/about/history>.

⁸⁰ Federal legislation increasing cannabis related criminal penalties during this period included Comprehensive Crime Control Act of 1984, the Anti-Drug Abuse Act of 1986, and the Anti-Drug Abuse Amendment Act of 1988. *See generally* MARION & HILL, *supra* note 56, at 23-25.

⁸¹ Jared Kriwinsky, *Achieving Diversity in the Marijuana Industry: Should States Implement Social Equity into Their Regimes?*, 4 (Ohio State Public Law Working Paper No. 503, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978766.

⁸² Robert W. Gregg, *The Single Convention for Narcotic Drugs*, 16 FOOD DRUG COSM. L.J. 187, 189-93, 197 (1961); Rick Lines, *‘Deliver Us From Evil’? – The Single Convention on Narcotic Drugs, 50 Years On*, 1 INT’L J. ON HUM. RTS. & DRUG POL’Y 3, 5-6 (2010).

⁸³ The Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151.

⁸⁴ Protocol Amending the Single Convention on Narcotic Drugs, Mar. 25, 1972, 976 U.N.T.S. 3.

⁸⁵ Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 1019.

⁸⁶ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95.

cultivation, production, possession and trafficking of scheduled substances.⁸⁷ Cannabis was placed in Schedules I and IV as a substance considered among the most addictive and harmful with “particularly dangerous properties”⁸⁸ and no therapeutic usefulness.⁸⁹

The CSA, related state laws, and compliance with its treaty obligations remain the foundation of federal United States drug law today. In *Gonzalez v. Raich*, 545 U.S. 1 (2005), the U.S. Supreme Court built on that foundation, giving Congress the power to regulate individual possession of cannabis under Article I’s interstate commerce power.⁹⁰ The Court reasoned that Congress could regulate an entire class of individual *intrastate* commerce activities if the class of activities as a whole had a substantial impact on *interstate* commerce. Unlike the previous Marihuana Tax Act whose requirements were purely administrative, the *Raich* court upheld the cannabis provisions in the CSA as directly enforceable against individuals by federal law enforcement, expanding the reach of the federal government directly into local communities.

5. Modern Cannabis Liberalization

In contrast to the increasingly strict federal approach, a gradual relaxation of state penalties and decriminalization of a few states’ cannabis laws for legitimately medicinal purposes⁹¹ began almost immediately and spread slowly between 1973 and 1990.⁹² This relaxation culminated in the first ballot measures creating state programs for the legal use of medical cannabis in Alaska, California, Maine, Nevada, Oregon, and Washington in the late 1990s.⁹³ In 2000, Hawaii became the first state to create a legal medical cannabis program through its legislature.⁹⁴ To this day, states continue to create medical cannabis programs and decriminalize

⁸⁷ *The UN Drug Control Conventions: A Primer*, TRANSNATIONAL INSTITUTE (Oct. 8, 2015), <https://www.tni.org/en/publication/the-un-drug-control-conventions#3>.

⁸⁸ The Single Convention on Narcotic Drugs, *supra* note 83, at Art. 2.

⁸⁹ *The UN Drug Control Conventions: A Primer*, *supra* note 87.

⁹⁰ It is notable that two of the great reaffirmations and expansions of federal congressional power in United States history were rooted in the federal government’s justifications of its attempts to regulate cannabis as a tool of enforcement against minority communities. It is arguable that *Gonzalez v. Raich* would have had a different outcome if it had been about a backyard tomato garden.

⁹¹ See generally GRINSPOON & BAKALAR, *supra* note 22, at 18-20.

⁹² Robert Mikos, The Evolving Federal Response to State Marijuana, 26 WIDENER L. REV. 1 (2020).

⁹³ NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE MEDICAL CANNABIS LAWS (Aug 27, 2022, 2:05 PM), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

⁹⁴ *Id.*

possession of various amounts of cannabis—as of 2022, forty-two states, U.S. territories, and the District of Columbia have created legal medical cannabis programs;⁹⁵ twelve additional states and territories have created limited legal medical cannabis programs for CBD only medicine;⁹⁶ and twenty-six states and the District of Columbia have passed full or partial decriminalization laws.⁹⁷ Beginning in 2012, some states took a further step and created controlled, legalized cannabis markets without a medicinal use requirement, currently including twenty-two states, territories, and the District of Columbia.⁹⁸

As states began to liberalize their cannabis regimes, federal agencies continued to enforce and fund state enforcement of the remaining criminal cannabis laws (with continued interference in communities of color and poor communities)⁹⁹ until 2009, when the Department of Justice (“DOJ”) and the U.S. Treasury’s Financial Crimes Enforcement Network (“FINCEN”) issued the first¹⁰⁰ of several¹⁰¹ memos ordering federal law

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Hewitt, *supra* note 22, at 49-50.

¹⁰⁰ The first memo was drafted in 2009 by Deputy Attorney General David W. Ogden under the direction of Attorney General Eric Holder to deprioritize federal enforcement of federal cannabis restrictions against parties operating in compliance with state medical cannabis laws. *See* Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009) (<https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>); Patton, *supra* note 22, at 23-24.

¹⁰¹ Additional memos include: (1) A 2011 memo written by Deputy Attorney General James M. Cole, noting that while enforcement was deprioritized, cannabis cultivation and distribution activities remained illegal and prosecutable under federal law, especially if there was suspicion that the money or cannabis product was making its way outside of activities authorized by state medical cannabis regulations, *see* Memorandum for United States Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) (<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>); (2) A 2013 memo written by Deputy Attorney General James M. Cole that further deprioritized federal enforcement actions in states with well-regulated medical cannabis markets unless the enforcement action was to prevent one of eight different activities such as diversion to minors, interstate transport, or use on federal lands, *see* Memorandum for All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>); and (3) A 2014 memo from FINCEN detailing rules for how financial institutions could engage with state authorized medical cannabis businesses, *see* Guidance, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014) (<https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>); Patton, *supra*

enforcement to deprioritize cannabis enforcement in states that chose to create regulated cannabis markets.¹⁰² These memos reserved the right for federal agencies to continue to prioritize eight areas of cannabis enforcement, including diversion to the illegal market, failure to comply with state laws, and the provision of cannabis to minors.¹⁰³ The spirit of these memos was continued, despite Attorney General Jeff Sessions eventual rescission of these memos,¹⁰⁴ by the 2014 Rohrabacher-Farr amendment¹⁰⁵ defunding federal enforcement of cannabis laws against individuals and organizations operating in compliance with their state's cannabis regulations. The DOJ initially misapplied this amendment to reinvigorate federal cannabis enforcement across the country, but later court decisions forced the DOJ to almost entirely curtail cannabis enforcement in jurisdictions with medical and/or adult-use cannabis laws.¹⁰⁶ The most recent U.S. Attorney Generals, William Barr and Merrick Garland, have not deviated from this policy, deferring to Congress to address cannabis regulation as a legislative matter.¹⁰⁷ Congress is now considering various bills to legalize medical and/or adult-use consumption of cannabis at the federal level.¹⁰⁸

B. *The Inequitable Impacts of the War on Drugs*

State and federal enforcement of cannabis laws since the implementation of the 1937 Marihuana Tax Act wasted the lives of those sentenced to years in prison, disrupted families, and devastated communities across the United States.¹⁰⁹ As state and federal governments seek to liberalize current cannabis laws, some measure of redress for all of those affected must be a part of those programs. However, this enforcement and disruption was by no means universal across any number of dimensions—disproportionately and adversely impacting minority

note 22, at 24-26.

¹⁰² William C. Tilburg et al., *Symposium Article: Emerging Public Health Law and Policy Issues Concerning State Medical Cannabis Programs*, 47 J.L. MED. & ETHICS 108, 108 (2021).

¹⁰³ MARION & HILL, *supra* note 56, at 29-36.

¹⁰⁴ Patton, *supra* note 22, at 27-29.

¹⁰⁵ The amendment has been renewed ever since under various sponsoring names. *Id.* at 28-29.

¹⁰⁶ *US v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

¹⁰⁷ Patton, *supra* note 22, at 29-30.

¹⁰⁸ See e.g. Cannabis Administration and Opportunity Act, S. ____, 117th Cong. (2022) (discussion draft); Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2022); and Secure and Fair Enforcement Banking Act of 2021, H.R. 1996, 117th Cong. (2022).

¹⁰⁹ Parnell, *supra* note 49, at 22-23.

populations and communities in innumerable ways. Any survey of these harms will necessarily be incomplete, totalizing and essentializing the unique trauma and suffering of individuals and communities across the United States. But a detailed empirical and narrative accounting of these harms is still essential to document and understand the inequities that modern cannabis social equity advocates seek to address. Accordingly, the following evidence and categorizations of harms should not be viewed as either exhaustive nor normative in content, scope, or organization. Rather, what follows is a recitation of some of the inequities caused by the enforcement of cannabis crimes and the War on Drugs to provide the outline of a target at which to aim the United States' initial, fumbling attempts at cannabis social equity policies.

1. Racial Inequities

As early as 1970, the year in which the CSA passed, commenters noted the unequal enforcement of cannabis in minority communities of all types.¹¹⁰ The consequences of this enforcement echo through today.

a. Black and Minority Inequities

In recent cannabis social equity literature, the most cited source¹¹¹ for the racial disparity in cannabis enforcement actions is a report from the American Civil Liberties Union ("ACLU") first published in 2013 and updated periodically ever since.¹¹² This report obtained its statistics from the Uniform Crime Reporting Program and its replacement the National Incident-Based Reporting System, while acknowledging the margin of error in these system's data.¹¹³

¹¹⁰ GOODE, *supra* note 52, at 14, 41, 294-97, 316-17 (Jews, making up a quarter of New York City's population at the time, and African Americans in urban areas were each more likely to be cannabis users and subject to increasingly biased enforcement and negative consequences).

¹¹¹ See e.g. Samuel DeWitt, *Achieving Social Equity in the Cannabis Industry*, 1 (Ohio State Legal Studies Research Paper No. 618, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861692 (citing the 2020 version of the ACLU report) and Owusu-Bempah & Luscombe, *supra* note 19 (citing the 2013 version of the ACLU report).

¹¹² A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM, ACLU (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [hereinafter "ACLU REPORT"].

¹¹³ ACLU REPORT, *supra* note 112, at 28.

While the data from NIBRS is not perfect (Missing demographic variables, including race, ethnicity, age, and gender, are a major concern when assessing incident disparities. Ethnicity data, in particular, have limited utility because it is an optional measure, While NIBRS is designed to collect uniform data, collection processes and quality vary across agencies and warrant additional review. NIBRS does not

According to the most recent data in the ACLU report, white and Black populations use cannabis at about the same rate.¹¹⁴ Total arrest rates have grown from almost 200,000 in 1970 to a number that consistently fluctuates between 500,000 and 600,000 each year.¹¹⁵ These numbers have remained relatively stable since the mid-1990s, as has the fact that between 80 and 90% of all arrests are for possession each year (decreasing to about 70% in the late 2010s),¹¹⁶ despite the increasing number of states that have legalized or decriminalized cannabis possession.¹¹⁷ Each year cannabis arrests account for more arrests than any other drug (43% of all drug arrests are for cannabis) and for more arrests than all types of violent crime combined.¹¹⁸

Despite the equanimity in usage rates, these large numbers of arrests disproportionately fall on Black and minority communities. In 2018, Black people were 3.64 times more likely than white people to be arrested for cannabis possession (the highest rate in nine years).¹¹⁹ While national arrest rates for possession fell gradually in the 2010s, this racial ratio of arrests has not changed, and in every single state Black people are more likely to be arrested for possession than white people.¹²⁰ Even in states that have

correspond to state specific criminal laws; thus, agencies may have different interpretations of offense codes (25), meaning the reliability of a cannabis measure may change over time, as cannabis policies change.

Samantha M. Doonan, et al, *Using the National Incident-Based Reporting System (NIBRS) to Examine Racial and Ethnic Disparities in Cannabis Incidents*, 46(5) AM. J. OF DRUG & ALCOHOL ABUSE 513, 15-17 (2020);

Marijuana arrest disparities are likely greater than available figures suggest. The Federal Bureau of Investigation's Uniform Crime Report, the go-to source for aggregated arrest data, does not specify Latinx ethnicity, typically coding individuals who identify as Latinx as white. This neglects to account for disparate treatment of this group and underestimates the Black-white disparities by inflating the number of white 25 marijuana arrests.

Harris & Martin, *supra* note 53; and see FBI, NATIONAL INCIDENT BASED REPORTING SYSTEM DATA, CRIME DATA EXPLORER (2022), <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/arrest>.

¹¹⁴ ACLU REPORT, *supra* note 112, at 29.

¹¹⁵ LYNN ZIMMER & JOHN P. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS 41 (1997); ACLU Report, *supra* note 112, at 11.

¹¹⁶ ZIMMER & MORGAN, *supra* note 115, at 41; Melissa Perlman, *Reefer Blues: Building Social Equity in the Era of Marijuana Legalization*, 24 U.C. DAVIS SOC. JUST. L. REV. 94, 101-02 (2020).

¹¹⁷ ACLU Report, *supra* note 112, at 11.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 29.

¹²⁰ *Id.* at 30.

legalized or decriminalized cannabis possession, this disparity remains, improving slightly in some states and getting worse in others.¹²¹ Studies have directly connected this racial disparity in enforcement, and its relative increase after legalization, to structural and explicit racial profiling by police, and increased association of Black people with what remains of the illicit market after legalization.¹²²

These racial arrest disparities deepen as the arrestee moves through the judicial system. For instance, in 2019, the Mississippi Supreme Court upheld Allen Russell's life sentence for possession of 43 grams of cannabis, ruling that it was not "cruel and unusual punishment."¹²³ This story is not unique:

Almost 80[%] of people serving time for a federal drug offense are [B]lack or Latino. . . . In the federal system, the average [B]lack defendant convicted of a drug offense will serve nearly the same amount of time as a white defendant would for a violent crime. People of color account for 70[%] of all defendants convicted of charges with a mandatory minimum sentence.¹²⁴

Over 30% of all Black males will be imprisoned at some point in their life, and 25% of Black children will have had at least one parent serve time by the time the child is 14 years old.¹²⁵ The proportion of these imprisonments due to drug crimes is only increasing.¹²⁶ One key reason for these disparities in incarceration rates is the imposition of mandatory minimum sentences for drug crimes and three-strike laws, especially if the arrestee has prior convictions of any sort.¹²⁷ For example, in 2015, Trent Bouhdida was 21 when he was caught selling an undercover cop an ounce

¹²¹ Zara Snapp & Jorge Herrera Valderrábano, *Regulating Cannabis in Uruguay, the United States, and Canada: Is a Social Justice Framework Possible?*, in RESEARCH HANDBOOK ON INTERNATIONAL DRUG POLICY 305 (David R. Bewley-Taylor & Khalid Tinasti eds., 2020); Firth et al., *supra* note 19, at 1585-86; *id.* at 35 (states that already exhibited a trend of reducing the disparity continued that trend post legalization, and states that did not exhibit that trend did not improve post legalization); Harris & Martin, *supra* note 53 (a number of states and communities exhibit this trend, for example, L.A. saw its racial arrest disparity increase from 29% to 42% post legalization).

¹²² Owusu-Bempah & Luscombe, *supra* note 19; DeWitt, *supra* note 111, at 13.

¹²³ Manisha Krishnan, *The U.S. Regularly Treats Black Weed Users Like Brittany Griner*, VICE NEWS (Aug. 16, 2022), <https://www.vice.com/en/article/v7vbn4/brittney-griner-weed-laws>.

¹²⁴ Perlman, *supra* note 116, at 102.

¹²⁵ JUDGE JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 45 (2001); Kriwinsky, *supra* note 81, at 1, 5-6.

¹²⁶ *Id.* at 1, 6.

¹²⁷ Krishnan, *supra* note 123.

of weed, yet he was sentenced to 16 years in jail because of his prior convictions. As told by a judge whose hands were tied by the three-strikes laws, in Orange County California in the 1990s, possession of less than an ounce of cannabis incurred a \$100 fine; possession of even half a gram more than an ounce resulted in a life sentence.¹²⁸ In Massachusetts, the average mandatory minimum sentence for a drug crime is five years, and the disparity in arrest rates rapidly causes the number of Black and minority offenders incarcerated to compound.¹²⁹ And yet, there is no evidence these sentencing provisions ever reduced cannabis use.¹³⁰

Incarceration is not an isolated consequence. Those incarcerated lose many state and federal benefits, including access to college loans, small business loans, farm subsidies, occupational licensing, and government grants, contracts, and fellowships.¹³¹ They can also expect to lose their jobs, remain on probation for years, pay for expensive lawyers, and in some states pay exponentially scaled taxes on the cannabis they possessed when they were arrested.¹³² For instance, *Anonymous* from Kauai, Hawaii, has a degree in mathematics but cannot find a teaching job due to a prior cannabis conviction for simple possession, despite Hawaii's perennial shortage of over 1,000 teachers each year.¹³³ According to the Brennan Center for Justice, "formerly incarcerated" individuals can expect their lifetime earnings to be \$484,400 lower than their peers.¹³⁴

Between 1970 and 2001, almost 1.4 million Black people—about 13% of adult Black males in America—had lost the right to vote due to incarceration, could not serve on a jury, or adopt a child.¹³⁵ A family member's arrest for a drug crime can also lead to eviction from public housing, loss of employment, removal from extracurricular activities, suspension and expulsion from school, denial of medical assistance, welfare, and access to homeless shelters.¹³⁶

¹²⁸ JUDGE GRAY, *supra* note 125, at 33.

¹²⁹ *Id.* at 45.

¹³⁰ ZIMMER & MORGAN, *supra* note 115, at 46.

¹³¹ Perlman, *supra* note 116, at 108.

¹³² ZIMMER & MORGAN, *supra* note 115, at 43-44; DeWitt, *supra* note 111, at 3-4.

¹³³ Interview with *Anonymous*, in Kauai, HI. (Aug. 6, 2022); *Ending Hawaii's Teacher Shortage Crisis*, HSTA.ORG, [https://www.hsta.org/crisis/#:~:text=hawaii%20has%20a%20teacher%20shortage,teacher%20\(hqt\)%20each%20year](https://www.hsta.org/crisis/#:~:text=hawaii%20has%20a%20teacher%20shortage,teacher%20(hqt)%20each%20year) (last visited Oct. 8, 2022).

¹³⁴ TERRY-ANN CRAIGIE ET AL., CONVICTION, IMPRISONMENT, AND LOST EARNINGS 7 (2020).

¹³⁵ JUDGE GRAY, *supra* note 125, at 45.

¹³⁶ M.Y. Iguchi et al., *How Criminal System Racial Disparities May Translate Into Health Disparities*, J. OF HEALTH CARE FOR THE POOR AND UNDERSERVED 48, 50 (2005); ZIMMER & MORGAN, *supra* note 115, at 43-45; Perlman, *supra* note 116, at 108.

Additionally, law enforcement will frequently seize an arrestee's house, cash, car, boat, and land under civil asset forfeiture laws—a practice that is very expensive to reverse even if one is innocent, and (assuming the state *actually tracks* its instances of civil asset forfeiture).¹³⁷ In Puna, Hawaii, aggressive use of civil asset forfeiture has deprived residents of their homes, land, and cars, even when arrestees were innocent. The region has seen a resulting, and dramatic, economic decline since enforcement of the Controlled Substances Act began.¹³⁸ Local governments obtain significant revenue from these actions, further incentivizing the initiation of civil asset forfeiture cases against those most at risk and least able to defend themselves—guilty or not.¹³⁹

The consequences for those imprisoned are direct and immediate, and the repercussions reverberate through the rest of the arrestee's life and the lives of their families and communities, restricting their ability to earn a stable income, accumulate wealth, access health care, attain education, and every other underlying determinant of health.¹⁴⁰

b. Native American and Native Hawaiian Inequities

Just as with Black and minority communities, Native American communities have been subject to differential enforcement actions. A recent and egregious example of which was the DEA's raid of a hemp planting for seed development and education operated by the College of the Menominee nation¹⁴¹—a planting firmly in compliance with the 2014 Farm Bill's legalization of hemp for research purposes.¹⁴² This was not an isolated incident. The morass of state, county, federal, and Native American sovereignty regulations provide opportunity for federal and state enforcement officials to argue that their restrictions and raids on Native American territories are justified when those same justifications are not applied to growers on the other side of the border.¹⁴³ The impact of differential enforcement on these communities is not only the challenge to current understandings of Native American sovereignty, but also the chilling effect such enforcement has on Native American nations' ability to

¹³⁷ JUDGE GRAY, *supra* note 125, at 119-22.

¹³⁸ Interview with *Anonymous*, in Hilo, HI. (July 23, 2022).

¹³⁹ JUDGE GRAY, *supra* note 125, at 119-22.

¹⁴⁰ Nicole Huberfeld, *Health Equity, Federalism, and Cannabis Policy*, 101 B.U. L. REV. 897, 913 (2021); Perlman, *supra* note 116, at 108; DeWitt, *supra* note 111, at 3-4.

¹⁴¹ Courtney Lewis, *Confronting Cannabis: Legalization on Native Nation Lands and the Impacts of Differential Federal Enforcement*, 43(4) AM. INDIAN QUART. 409, 418-19 (2019).

¹⁴² Agricultural Act of 2014, Pub. L. No. 113-79, § 7606.

¹⁴³ Lewis, *supra* note 141, at 422, 430; and see generally Mark J. Cowan, *Taxing Cannabis on the Reservation*, 57(4) AM. BUS. L. J. 867 (2020).

decriminalize/legalize cannabis (or even to prevent the same in some cases)¹⁴⁴ in the same way as neighboring states.¹⁴⁵

Many Native American nations would like the freedom to pursue medical research, invest in future economic opportunities in the cannabis space, protect their cultural knowledge and private intellectual property based on their unique histories with cannabis, and protect human rights and health by using cannabis as part of the solution to the opioid crisis.¹⁴⁶ There is one positive instance of equity in this context, tribally owned cannabis businesses do not pay federal income tax and so enjoy a significant tax preference compared to private cannabis businesses that cannot claim the federal 280E exemption for cost of goods sold.¹⁴⁷

For Native American nations, differential enforcement has raised sovereignty issues and larger policy discussions concerning the future of cannabis industries on Native American land. For Native Hawaiians,¹⁴⁸ however, the impacts of differential enforcement are more personal and similar to those affecting Black and other minority communities. Despite only representing 10.5% of Hawaii's population in the 2020 Census,¹⁴⁹ in 2019, Native Hawaiian individuals made up 40% of all arrests for marijuana possession in Hawaii.¹⁵⁰ These numbers are consistent with a 2010 report from the Office of Hawaiian Affairs which found that 32% of those admitted to prison for drug offenses were Native Hawaiian, even though Native Hawaiians do not use drugs at a statistically significant amount more than other ethnicities, according to State data.¹⁵¹ But for Native Hawaiians, these arrest statistics do not tell the whole story. To this day, Hawaii's law enforcement agencies execute cannabis eradication and arrest operations

¹⁴⁴ Lewis, *supra* note 141, at 418-19.

¹⁴⁵ *Id.* at 424-26.

¹⁴⁶ Lewis, *supra* note 141, at 429-30; and Konstantia Koutouki & Katherine Lofts, *Cannabis, Reconciliation, and the Rights of Indigenous Peoples: Prospects and Challenges for Cannabis Legalization in Canada*, 56 ALTA. L. REV. 709, 714-16 (2019).

¹⁴⁷ Cowan, *supra* note 143, at 899-900.

¹⁴⁸ Defined by the U.S. Government as "A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands. It includes people who reported their race as "Fijian," "Guamanian or Chamorro," "Marshallese," "Native Hawaiian," "Samoan," "Tongan," and "Other Pacific Islander" or provide other detailed Pacific Islander responses." U.S. CENSUS BUREAU, QUICKFACTS: HAWAII, <https://www.census.gov/quickfacts/fact/table/HI/> (last visited Aug. 31, 2022).

¹⁴⁹ *Id.*

¹⁵⁰ E-mail from Joshua J. Alvarez, PEW Research, Hawaii State Senator Joy San Buenaventura, Act 169 Dual Use Task Force, Social Equity Permitted Interaction Group (July 25, 2022, 11:05 HST) (on file with author).

¹⁵¹ THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM, OFFICE OF HAWAIIAN AFFAIRS 10, 15 (2010), https://www.oha.org/wp-content/uploads/2014/11/es_final_web_0.pdf.

with federal funding and national guard support.¹⁵² Operation “Green Harvest” and “Operation Wipe Out” continue to be successful in eliminating a large portion of the supply in Hawaii, raising prices per pound from \$2,500 to \$6,000 per pound, contributing to the high local rates of meth use as a cheaper, and “safer” (at least from a carceral standpoint), alternative to cannabis. Even today, federally approved hemp operations and individual legal medical cannabis card holders in their homes are routinely subject to military style raids, with local law enforcement carrying machine guns roping down from helicopters and dozens of heavily armed officers showing up to perform “compliance checks.”¹⁵³ These checks have many times lead to “avoidable deaths, gruesome injuries, demolished property, enduring trauma, blackened reputations, [] multimillion-dollar legal settlements at taxpayer expense,”¹⁵⁴ and serve as the basis for frequent, but untracked exercises of law enforcement’s civil asset forfeiture powers.¹⁵⁵

As with the consequences of differential enforcement on Black and minority communities, Native Hawaiians who are incarcerated, their families, and their communities “suffer socioeconomic and health strains as evidenced by overrepresentation in low-wage jobs without health insurance and a higher prevalence of chronic disease compared with Hawaii’s other ethnic groups. Native Hawaiians are more likely to attend community colleges than 4-year colleges and have high dropout rates.”¹⁵⁶

2. Health Inequities

In addition to the negative health effects of incarceration and differential enforcement on minority communities described above, the illegality of cannabis in the United States further consigns medical patients to suffering. Despite literally thousands of years of medicinal cannabis use

¹⁵² Rob Parsons, *Operation GreenHarvest*, MAUI TIME, (Aug. 20, 2009), <https://mauitime.com/news/operation-greenharvest/> and Guthrie Scrimgeour, *KPD Requests Funds for Green Harvest Operations*, THE GARDEN ISLAND, (May 6, 2022), <https://www.thegardenisland.com/2022/05/06/hawaii-news/prosecutor-continues-to-de-emphasize-marijuana-prosecutions/>.

¹⁵³ Interview with *Anonymous*, in Kauai, HI., *supra* note 133; Interview with *Anonymous*, in Honolulu, HI. (Aug. 7, 2022); Parsons, *supra* note 152.

¹⁵⁴ Elizabeth A. Bennett, *Extending Ethical Consumerism Theory to Semi-Legal Sectors: Insights from Recreational Cannabis*, 35 AGRIC. HUM. VALUES 295, 309 (2018).

¹⁵⁵ See HAWAII CRIMINAL JUSTICE DATA CENTER, <https://ag.hawaii.gov/hcjdc/> (last visited Sep. 3, 2022); Interview with *Anonymous*, in Kauai, HI., *supra* note 133; Interview with *Anonymous*, in Honolulu, HI., *supra* note 153; and Interview with *Anonymous*, in Hilo, HI., *supra* note 138.

¹⁵⁶ See generally Jamie Kamaile Boyd et al., *Pathway Out of Poverty: A Values-Based College-Community Partnership to Improve Long-Term Outcomes of Underrepresented Students*, 6(1) PROG. COMM. HEALTH P’SHIP 25 (2012).

around the world, patients today have very few legal options to access medical cannabis.¹⁵⁷

Even in states with medical cannabis rules or full legalization, doctors hesitate to interact with the industry and patients due to bureaucratic constraints and a general lack of training on the medical use, dosage, and effectiveness of cannabis for treating patients.¹⁵⁸ Due to the status of cannabis as a Schedule I drug, doctors are not even allowed to prescribe medical cannabis or directly provide medical advice about its use because the DEA will pull their prescribing license, even in states where medical cannabis is legal.¹⁵⁹ Doctors can merely certify that a patient has a qualifying condition.¹⁶⁰

Doctors' lack of involvement in the industry and the patchwork of medical cannabis regulations have forced patients to uproot their lives and move across the country to treat their illnesses.¹⁶¹ Many have to keep their children out of school in order to provide anti-epilepsy and other medication as needed—which schools refuse to do, citing federal restrictions despite state legalization of cannabis as medicine for minors.¹⁶² As one patient bluntly put it: “It’s better to be a living cannabis criminal, rather than a dead law-abiding citizen.”¹⁶³ While the DEA continues to maintain that cannabis and its component chemicals exhibit no accepted medical use,¹⁶⁴ the U.S. Federal Government has patented the cannabis plant for a variety of medical uses including autoimmune disease, strokes, Alzheimer’s, Parkinson’s, HIV,

¹⁵⁷ Elena Quattrone, *The “Catch-22” of Marijuana [Il]legalization*, 22 B.U. J. SCI. & TECH. L. 299, 301 (2016).

¹⁵⁸ GRINSPOON & BAKALAR, *supra* note 22, at 20.

¹⁵⁹ TODD GARVEY ET AL., CONG. RSCH. SERV., R43435, MARIJUANA: MEDICAL AND RETAIL—SELECTED LEGAL ISSUES 8 (2015); *See Conant v. Walters*, 309 F.3d 629, 629 (9th Cir. 2002), cert. denied, 540 U.S. 946 (2003).

¹⁶⁰ Kevin F. Boehnke et al., *Qualifying Conditions of Medical Cannabis License Holders in the United States*, 38(2) HEALTH AFF (MILLWOOD) 295, 295 (2019).

¹⁶¹ Quattrone, *supra* note 157 (citing Susan K. Livio, *Medical Marijuana: NJ Child Improves as Family Finds Fewer Roadblocks in Colorado*, NJ.COM (Sep. 21, 2014), <http://www.nj.com/politics/index.ssf/2014/09/medicalmarijuana-nj-child-improves-as-family-findsfewer-roadblocksin-colorado.html>).

¹⁶² *See e.g.* Alexander Lekhtman, *The Fight to Let Kids Get Medical Marijuana in Schools Comes to Maryland*, FILTERMAG (Feb. 26, 2020), <https://filtermag.org/medical-marijuana-children/>; and MaryAnn Tapper Strawhacker, *Medical Cannabis and School: Separating Fact from Fiction*, 2019 NASN SCH. NEWS. 43 (2019).

¹⁶³ Melissa Bone & Toby Seddon, *Human Rights, Public Health and Medicinal Cannabis Use*, 26(1) CRITICAL PUB. HEALTH 51, 56-57 (2016).

¹⁶⁴ *Washington v. Barr*, 925 F.3d 109 (2019).

and general inflammation,¹⁶⁵ and the FDA has approved several synthetic cannabis drugs to manage epilepsy and the side effects of chemotherapy.¹⁶⁶

In 2017, the U.S. National Academy of Sciences issued a report reviewing cannabis's medical efficacy and finding that there is conclusive or substantial evidence for chronic pain, chemotherapy-induced nausea and vomiting, multiple sclerosis spasticity symptoms; moderate evidence for short-term sleep disorders, sleep apnea, and fibromyalgia; as well as limited evidence for HIV weight loss, Tourette syndrome symptoms, anxiety, post-traumatic stress disorder, and better outcomes after a traumatic brain injury.¹⁶⁷ These illnesses affect large portions of the American population, and the continued illegality of cannabis and prosecution of the War on Drugs pushes patients to the illicit market, or prevents them from accessing effective medicine altogether, and is directly responsible for their continued suffering.¹⁶⁸

3. Stigma and Inequity

In addition to the physical harms directly inflicted on minority populations and medical patients, ninety years of propaganda, misinformation, and the “reefer madness” mindset created a stigma with very real, ongoing consequences.¹⁶⁹ In contrast to the relatively neutral and malleable “stereotype,” a “stigma” always refers to a devalued characteristic, defined through an interpersonal process of norms within a culture that evaluates and judges an individual's or group's fit or lack of fit. Stigmas “activate” a negative social judgment that discredits the subject.¹⁷⁰ The cannabis stigma affects all cannabis users, with acute effects on the minority communities where the majority of enforcement occurs.

Being suspected of committing a crime, being under surveillance, having one's dwelling and/or person searched, being arrested, booked, brought to trial, and (if it comes to that) convicted, not to mention the nature of one's experiences in a penitentiary, all serve as public degradation

¹⁶⁵ U.S. Patent No. 6,630,507 (filed Oct. 7, 2003).

¹⁶⁶ See e.g. EPIDIOLEX, <https://www.epidiox.com/> (last visited Aug. 31, 2022); Quattrone, *supra* note 157, at 305.

¹⁶⁷ NATIONAL ACADEMIES PRESS, THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH 128, Box 4-1 (2017), <https://nap.nationalacademies.org/read/24625/chapter/1>.

¹⁶⁸ Tilburg et al., *supra* note 102, at 108.

¹⁶⁹ Rachel Watson, *Panel: Cannabis Industry Needs to Improve Equity, Prosperity*, GRAND RAPIDS BUS. J., August 21, 2020, <https://grbj.com/news/law/panel-cannabis-industry-needs-to-improve-equity-prosperity/> 2/5.

¹⁷⁰ MICHELLE NEWHART & WILLIAM DOLPHIN, THE MEDICALIZATION OF MARIJUANA: LEGITIMACY, STIGMA, AND THE PATIENT EXPERIENCE 174-75 (2018).

ceremonies. Marijuana users often state that they "don't think of marijuana use as a crime." But going through the procedure of being arrested impresses in the mind of the offender the view that one powerful segment of society (and perhaps, by extension, society in general) has of his activity's legality. In other words, the elaborate legal procedure, and its attendant social implications, serve as a kind of dramaturgic rite de passage, which serves to transform the transgressor publicly into a criminal, into "the kind of person who would do such a thing."¹⁷¹

The cannabis stigma not only prevents patients from seeking the opinions of medical professionals,¹⁷² but also forces cannabis business owners out of the financial system, creates fear in business owners and consumers alike who register their illegal participation in the industry with the federal government by paying taxes, and decreases trust in the industry by encouraging participants to turn each other in to law enforcement for reward money.¹⁷³ Children, even those legally using cannabis-derived medicines like Epidiolex, are continually subject to stigmatizing programming at school.¹⁷⁴ The application of the cannabis stigma to an individual, even to verified medical patients, endangers their job, requires medical registration with the very authority required to enforce the law against them, is uniformly interpreted as an adverse factor in Family Court determinations, outright bars their exercise of the second amendment, and automatically disqualifies them for organ transplant.¹⁷⁵

Name another issue responsible for such barbaric laws that is discussed as a joke by politicians and leaders. There is none. . . . If you were talking about a crime that actually warranted the repressive laws of prohibition, it wouldn't be something you'd be laughing about. Politicians don't joke about arson, rape, murder, robbery, embezzlement. These are truly serious crimes. If a crime is serious enough to have police regularly smash into homes and hold taxpayers at gunpoint, put them in jail, take their kids, take their homes, well, that would not be a laughing matter. . . . These are the most serious things a government can do to its citizens in a

¹⁷¹ GOODE, *supra* note 52, at 281-82; LESTER GRINSPOON, MARIHAUNA RECONSIDERED 355 (1977).

¹⁷² Bennett, *supra* note 154, at 310.

¹⁷³ *Id.*; DeWitt, *supra* note 111, at 8.

¹⁷⁴ See generally Vanessa L. Parker et al, *Changing Cannabis Policies and Social Work: Implications for Students, Families, and Schools*, 45(2) Sch. Soc. Work J. 34 (2021).

¹⁷⁵ NEWHART & DOLPHIN, *supra* note 170, at 172-74, 180-81.

society.¹⁷⁶

The societal consequences of the stigma are reinforced by the seriousness of the government's enforcement¹⁷⁷—creating a “cyclical system of disenfranchisement” that continues to wreak destruction on communities of color, where there is a fear that “vestiges of racial profiling in a legalization regime attach to offenses that survive legalization” such as driving under the influence of, underage possession of, and public consumption of marijuana.¹⁷⁸

4. Business Inequities

The personal and community consequences of involvement in the cannabis industry since the 1970s are detailed above, but even as the industry moves towards legality, state and federal regulations continue to reinforce inequities in a variety of domains, whether intentionally or not. These inequities are most clearly evidenced in the barriers to entry and failure rates of small, legacy, or industry equity licensed businesses.

a. Agricultural Inequity

Cannabis is primarily an agricultural product. However, the means of production vary substantially, from multi-million square foot, climate controlled hydroponic grows with AI controlled lighting to small outdoor grows of a few square feet and a few dozen plants taking advantage of the natural sun in a local micro-climate.¹⁷⁹ This disparity, much like the centralization of food crop production, presents many barriers that small, traditional or legacy growers must overcome, including: Access to sufficient start-up capital, viable farmland, and technological know-how for indoor growing. These tools are even further out of reach of the many who wish to participate in the industry but are unable to due to prior cannabis convictions.¹⁸⁰ Additionally, cannabis farmworkers and trimmers are chiefly composed of already vulnerable minority, women, and migrant populations. These workers, even in multi-state operations, are forced to work under-the-table, without minimum wage/maximum hour protections or insurance, due to their low bargaining power and the cash economy

¹⁷⁶ *Id.* at 171.

¹⁷⁷ See Morgan M. Philbin et al., *Associations Between State-Level Policy Liberalism, Cannabis Use, and Cannabis Use Disorder from 2004 to 2012: Looking Beyond Medical Cannabis Law Status*, 65 INT'L. J. OF DRUG POL. 97 (2019).

¹⁷⁸ DeWitt, *supra* note 111.

¹⁷⁹ See Stoa, *supra* note 1, at 107; Taylor Engle, *World's 7 Largest Commercial Cannabis Cultivation Facilities*, MG MAGAZINE (Apr. 4, 2022), <https://mgmagazine.com/business/growing-horticulture/7-worlds-largest-cannabis-grows/>; and Interview with *Anonymous*, in Hilo, HI., *supra* note 138.

¹⁸⁰ Stoa, *supra* note 1, at 107.

nature of the industry. This danger is compounded for migrant workers for whom any encounter with federal law enforcement while working in the federally illegal cannabis industry could lead to immediate deportation and worse.¹⁸¹

b. Banking Inequity

Federal law, despite the guidance from FINCEN deprioritizing enforcement against banks that work with the cannabis industry,¹⁸² remains one of the chief obstacles to the legal cannabis industry, and an insurmountable expense for all but the largest operators.¹⁸³ Nearly every transaction with a cannabis touching business requires a bank to fill out a Suspicious Activity Report to comply with federal money laundering laws.¹⁸⁴ The Treasury Department also requires that banks monitor any cannabis touching clients individually with invasive, and expensive, compliance procedures.¹⁸⁵ Since cannabis is federally illegal, even if interactions with the industry are deprioritized for enforcement, they still place a bank and its leadership at risk of federal criminal liability for any compliance failures.¹⁸⁶ These strictures and expenses often force cannabis businesses into the “gray economy”—paying taxes, employees, rent, suppliers, and shareholders in cash.¹⁸⁷ The sheer volume of cash involved creates substantial—and again expensive—security risks for every cannabis business.¹⁸⁸ Cannabis businesses also cannot use major credit card providers to accept payment, further increasing costs.¹⁸⁹ These fixed costs are partly responsible for the significant failure rates of small businesses, legacy operators joining the legal industry, and social equity licensees.¹⁹⁰

¹⁸¹ Stoa, *supra* note 1, at 116-18.

¹⁸² Guidance, BSA Expectations Regarding Marijuana-Related Businesses, *supra* note 101.

¹⁸³ Mikos, *supra* note 92, at 12.

¹⁸⁴ Colleen M. Baker, *Entrepreneurial Regulatory Legal Strategy: The Case of Cannabis*, 57(4) AM. BUS. L.J. 913, 922-26 (2020); Adrian F. Snead, *Banking Marijuana Business: A Primer on This Emerging Field*, 60(1) JUDGES' J. 17 (2021).

¹⁸⁵ Mikos, *supra* note 92, at 12.

¹⁸⁶ Snead, *supra* note 184.

¹⁸⁷ Baker, *supra* note 184, at 951.

¹⁸⁸ Snead, *supra* note 184.

¹⁸⁹ Gabriel J. Greenbaum, *Note, What to Do with All This Green: Using Casino Regulations as a Model for Cannabis Industry Banking*, 58 WASHBURN L.J. 217, 223 n.50 (2019).

¹⁹⁰ DeWitt, *supra* note 111, at 4-5; Alex Malyshev & Sarah Ganley, *The Challenges of Getting Social Equity Right in the State-Legal Cannabis Industry*, REUTERS (July 22, 2021), <https://www.reuters.com/legal/litigation/challenges-getting-social-equity-right-state-legal-cannabis-industry-2021-07-22/>.

c. RICO Liability Inequity

Another way that federal law continues to create compliance costs and deter entry into the legal cannabis industry is ongoing federal liability under the Racketeer Influenced and Corrupt Organization Truce (RICO). While Congress generally defunded the Department of Justice's prosecution of federal cannabis crimes in states that have legalized cannabis at some level, the RICO criminal statute can be enforced by private individuals. Under the statute, a private individual can bring a civil suit against any cannabis business for racketeering activity, i.e. growing or selling cannabis in the market.¹⁹¹ These suits only require an injury to "business or property" attributable to the racketeering activity and provide for treble damages to winning plaintiffs. In fact, large cannabis businesses are increasingly using this tactic as a tool to eliminate their competition.¹⁹² These dynamics place businesses at risk of company ending lawsuits; a risk uniquely problematic for small businesses and social equity licensees already operating on very narrow margins.

d. Business Ownership Inequity

In 2021, "while Black Americans represent 13% of the national population, they represent less than 2% of all cannabis company owners."¹⁹³ Over 80% of all cannabis businesses nationwide are predominately owned and controlled by white men, while only 57% of total businesses nationwide are owned by white men.¹⁹⁴ There is some variation across states in the rates of minority, women, and veteran ownership of cannabis businesses, but they are all below the average for total businesses.¹⁹⁵ This inequity exists for many of the reasons enumerated above, including high capital requirements, expensive compliance regimes, prior conviction exclusions, banking access, as well as additional barriers in the form of high tax burdens and high application fees.¹⁹⁶ These reasons, plus the historical adverse impacts of incarceration on entire communities, negatively affected those

¹⁹¹ Mikos, *supra* note 92, at 13-14; and see A.J. Herrington, Arkansas Marijuana Companies Slapped With Racketeering Lawsuit, FORBES (Aug. 5, 2022), <https://www.forbes.com/sites/ajherrington/2022/08/05/arkansas-marijuana-companies-slapped-with-racketeering-lawsuit> (cannabis patients sue to shutdown Arkansas medical cannabis program over allegations of collusion between dispensaries and laboratories to inflate THC levels).

¹⁹² John Schroyer, *Cannabis Businesses Starting to Use RICO Lawsuits Instead of Being Targets in Such Cases*, MJBIZDAILY (Aug. 30, 2021), <https://mjbizdaily.com/cannabis-businesses-starting-to-use-rico-lawsuits-instead-of-being-targets/>.

¹⁹³ MCBA REPORT, *supra* note 9, at 32.

¹⁹⁴ *Id.*

¹⁹⁵ See Stoa, *supra* note 1, at 101.

¹⁹⁶ Edwards et al., *supra* note 2.

communities' human capital reserves and the workforce capacity necessary to effectively start and run a high proportion of successful businesses in a highly regulated industry.¹⁹⁷ Due to these same disparities, white business owners engage in “regulatory entrepreneurship” to further entrench their interests by advocating for favorable regulatory changes.¹⁹⁸

This issue has animated cannabis social equity conversations since the very first attempts to address social equity.¹⁹⁹ These policies typically reserve small amounts of business licenses for “social equity licensees” and sometimes provide other financial and technical support to those licensees.²⁰⁰ The general consensus however is that these policies have thus far failed to achieve the desired results—in some cases actively facilitating the growth of white-owned multi-state operators who either buy licenses from failed social equity licensed businesses or partner with social equity licensees to own and operate the license in all but name.²⁰¹ Slow roll-outs of equity licenses, error-riddled processes, lack of technical support, and high prices further hinder the implementation and potential success of current cannabis social equity programs.²⁰² Additionally, federal courts have begun to uphold interstate commerce and equal protection challenges, striking down state programs that prohibit out-of-state business ownership or directly require minority ownership of some number of cannabis businesses.²⁰³ Despite these challenges, minority cannabis business

¹⁹⁷ See Ryan C. Reaves, *Women & Equity in the Emerging Commercial Cannabis Industry*, NORML WOMEN'S ALLIANCE 1, 41 (Apr. 2019), https://www.researchgate.net/publication/334023388_Women_Equity_in_the_Emerging_Commercial_Cannabis_Industry.

¹⁹⁸ See generally Baker, *supra* note 184, at 913 (This paper develops a theory of “regulatory entrepreneurship” whereby well-funded businesses make changing the current law to their benefit part of their business strategy and costs).

¹⁹⁹ Edwards et al., *supra* note 2.

²⁰⁰ See generally Leon, *supra* note 19; Edwards et al., *supra* note 2; and Jelena Martinovic, *Green Thumb Industries Cannabis Co. to Open LEAP, New Business Accelerator for Illinois Social Equity Licensees on August 1*, BENZINGA (July 30, 2021), <https://www.benzinga.com/markets/cannabis/21/07/22247544/green-thumb-industries-cannabis-co-to-open-leap-new-business-accelerator-for-illinois-social-equ>.

²⁰¹ MCBA REPORT, *supra* note 9, at 31; Jerod MacDonald-Evoy, ‘Social Equity’ Marijuana Licenses Were Meant to Right a Wrong, AZ MIRROR (Nov. 17, 2021), <https://www.azmirror.com/2021/11/17/social-equity-marijuana-licenses-were-meant-to-right-a-wrong-critics-say-theyll-just-make-cannabis-giants-even-richer/>; and Edwards et al., *supra* note 2.

²⁰² See Matt Krupnick, ‘A Farce of Social Equity: California Is Failing Its Black Cannabis Businesses’, THE GUARDIAN (Nov. 4, 2021), <https://www.theguardian.com/us-news/2021/nov/04/cannabis-california-black-businesses>; MCBA REPORT, *supra* note 9; and Edwards et al., *supra* note 2.

²⁰³ See e.g. *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 2022 U.S. App. LEXIS 22848 (1st Cir. Aug. 17, 2022) (striking down Maine’s law prohibiting non-resident cannabis business licensees for violating interstate commerce);

ownership remains one of the four pillars of cannabis social equity programs in the fifteen states and several municipalities with such programs, as championed by the many organizations advocating for cannabis social equity.²⁰⁴ Whatever the effectiveness of these programs, current business ownership statistics speak for themselves, demonstrating clear inequities in the business of cannabis.

5. Research Inequity

To support its absolute denial that cannabis has any medical benefit, the DEA actively bars the development of a sufficiently robust body of peer-reviewed scientific studies to effectively argue to the contrary. Researchers must navigate a labyrinthine regulatory process to study the effects of cannabis. They must obtain an investigational new drug approval from the FDA, an administrative letter about the processing facilities and strains used in the research, DEA registration and site licensure in accordance with Schedule I drug restrictions, state controlled substance certificates from state boards of medical examiners and law enforcement agencies regulating narcotics, any additional state-level approvals, approval of security provisions by the DEA, and approval for human trials from an institutional review board.²⁰⁵ Despite these research restrictions, slow progress has been made, building on the work of Israeli researcher Dr. Raphael Mechoulam, who received funding from the U.S. National Institute of Health every year since the 1970s, to isolate and identify the active components of cannabis.²⁰⁶

Further contributing to the difficulty of researching the effects of cannabis in the United States, the U.S. Federal Government has only authorized a single entity, the Research Institute of Pharmaceutical Sciences at the University of Mississippi School of Pharmacy, to grow a limited amount of cannabis each year for the last fifty years for research,²⁰⁷ a

Original Invs., LLC v. Oklahoma, No. CIV-20-820-F, 2021 U.S. Dist. LEXIS 50142 (W.D. Okla. Mar. 17, 2021) (striking down Oklahoma's law prohibiting non-resident cannabis business licensees because of the federal illegality of cannabis without reaching the merits); *and PharmaCann Ohio, LLC v. Ohio Dep't of Commerce*, No. 17-CV-10962 (Ohio Ct. Com. Pl. Aug. 24, 2018) (striking down Ohio's law preferencing business ownership using racial criteria for violating the Equal Protection Clause).

²⁰⁴ See e.g., MCBA REPORT, *supra* note 9, at 2.

²⁰⁵ See *supra* note, at 377-90; Quattrone, *supra* note 157, at 317-18.

²⁰⁶ Yardena Schwartz, *The Outsourcing of American Marijuana Research*, NEWSWEEK (Dec. 15, 2015 12:29 AM), <https://www.newsweek.com/2015/12/25/outsourcing-american-marijuana-research-406184.html>.

²⁰⁷ The University of Mississippi routinely grows less cannabis than is permitted under its contract, and it is criticized for not producing the quality and variety of cannabis strains necessary to support a robust medical research agenda for the few medical cannabis research projects that have been approved. See NATIONAL ACADEMIES PRESS, *supra* note 205, at 377-90; Britt E. Erickson, *Cannabis Research Stalled by Federal Inaction*, CHEMICAL & ENGINEERING NEWS (June 29, 2020), <https://cen.acs.org/biological->

portion of which is already designated for the FDA's compassionate Investigational New Drug (IND) program.²⁰⁸ This program has provided over three hundred pre-rolled cannabis joints per month since 1982 to a small number of patients.²⁰⁹ Follow-up research on these patients has demonstrated the medical effectiveness of the program, yet no new patients have been admitted since the 1990s.²¹⁰ While the FDA has begun to loosen these restrictions in the past couple of years and the DEA has begun to require the University of Mississippi to increase production for research, the majority of these bureaucratic and stigmatic barriers to the robust investigation of the effects of cannabis remain—to the detriment of both patients and public health professionals.²¹¹

6. Energy Inequity

In 2012 legal cannabis businesses consumed an estimated 1% of all electricity used in the United States.²¹² As more states legalize, those numbers will continue to grow as indoor cannabis grow operations start up across the country, concentrated in the cities and states that cannot support profitable outdoor cannabis agriculture. As the country moves to full legalization, the amount of energy required for cannabis agriculture could easily surpass 3% of U.S. energy use—even more if international export becomes a reality.²¹³ Simultaneously, in many states, cannabis businesses are forced to set-up shop in poor and minority neighborhoods because of zoning regulations, legislative strictures, lower rents, and suburban “not-in-my-back-yard” dynamics.²¹⁴ These two facts combined lead to dramatically

chemistry/natural-products/Cannabis-research-stalled-federal-inaction/98/i25; and see Sydney Slotkin Dupriest, *Federally Funded Marijuana Turns 50*, OLEMISS (Dec. 5, 2018), <https://news.olemiss.edu/federally-funded-marijuana-turns-50/>.

²⁰⁸ GRINSPOON & BAKALAR, *supra* note 22, at 21-22; Dupriest, *supra* note 207.

²⁰⁹ Daniel Oberhaus, *The US Government Has Sent This Guy 300 Joints Each Month for 34 Years*, VICE (Sep. 8, 2016), <https://www.vice.com/en/article/dp3e4y/the-us-government-has-sent-this-guy-300-joints-each-month-for-34-years>.

²¹⁰ See Ethan Russo, *Chronic Cannabis Use in the Compassionate Investigational New Drug Program*, 2(1) J. OF CANNABIS THERAPEUTICS 3 (2002).

²¹¹ Quattrone, *supra* note 157, at 318-19 (2016).

²¹² Natalie Fertig & Gavin Bade, *An Inconvenient Truth (About Weed)*, POLITICO (Aug. 10, 2021), <https://www.politico.com/news/2021/08/10/weed-cannabis-legalization-energy-503004>.

²¹³ Evan Mills, *The Carbon Footprint of Indoor Cannabis*, 46 ENERGY POL. 58, 61 (2012); Jocelyn Durkay & Duranya Freeman, *Electricity Use in Marijuana Production*, NAT. CONF. OF STATE LEGISLATURES (Aug. 2016), <https://www.ncsl.org/research/energy/electricity-use-in-marijuana-production.aspx>.

²¹⁴ Solmaz Amiri et al., *How Does the Growth of Washington State's Cannabis Industry Relate to Neighborhood Socioeconomic Characteristics*, COM. HEALTH AND SPATIAL EPIDEMIOLOGY LAB (Sep. 2019), <https://www.chaselab.net/Cannabis/Cannabis.htm>; Jon Murray, *The Marijuana Industry's*

higher energy prices in poor and minority neighborhoods and present direct health consequences for those neighborhoods.²¹⁵ This inequity is further exacerbated by the environmental consequences of increased energy usage which are primarily born by lower socio-economic communities.²¹⁶

7. Sex and Gender Inequities

The recitation thus far chiefly recounts the statistics of incarcerated black men and the business ownership of white men, but the consequences of the War on Drugs do not stop there. The unique experiences and statistics of women and non-cis gendered populations in relation to cannabis demonstrate that sex and gender differences uniquely manifest the inequities described above and introduce wholly new inequities.

a. Incarceration Inequity

It has been known since at least 1970 that men are considerably more likely to use cannabis and participate in the illegal market.²¹⁷ In 2020 and 2021, point of sale data across the United States showed that men consistently purchased twice as much cannabis from the legal market as women.²¹⁸ Yet, between 1986 and 1996, the number of women incarcerated for drug offenses increased by 888%, compared to a 129% increase from non-drug related offenses.²¹⁹ 76% of incarcerated women in this period

War on the Poor, POLITICO (May 19, 2016), <https://www.politico.com/magazine/story/2016/05/what-works-colorado-denver-marijuana-pot-industry-legalization-neighborhoods-dispensaries-negative-213906/>; Kip Hill, *WSU Study Links Cannabis Businesses to Poorer Neighborhoods, as Local Laws Limit Locations*, THE SPOKESMAN-REVIEW (Dec. 4, 2019), <https://www.spokesman.com/stories/2019/dec/04/wsui-study-links-cannabis-businesses-to-poorer-neig/>; CANNA LAW BLOG, *The Marijuana Industry Is Not at War with the Poor*, HARRIS BRICKEN (May 27, 2016), <https://harrisbricken.com/cannalawblog/the-marijuana-industry-is-not-at-war-with-the-poor/>.

²¹⁵ Jennifer B. Unger et al., *Locations of licensed and unlicensed cannabis retailers in California: A threat to health equity?*, 19 PREVENTATIVE MED. REP. 101165 (2020).

²¹⁶ See generally U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT VOL. 2 (2017), <https://nca2018.globalchange.gov/>; and Kemal Dervis, *Devastating For The World's Poor: Climate Change Threatens The Development Gains Already Achieved*, XLIV(2) UN CHRON. (2007), <https://www.un.org/en/chronicle/article/devastating-worlds-poor-climate-change-threatens-development-gains-already-achieved>.

²¹⁷ GOODE, *supra* note 52, at 32.

²¹⁸ *Exploring Cannabis Consumer Trends & Demographics in 2021*, HEADSET (Jan. 31, 2022), <https://www.headset.io/industry-reports/exploring-cannabis-consumer-trends-demographics-in-2021>.

²¹⁹ JUDGE GRAY, *supra* note 125, at 43.

were imprisoned for non-violent, chiefly possession-based offenses.²²⁰ Current data from the U.S. Department of Justice show that 26% of female state prisoners and 61.6% of female federal prisoners were serving sentences for drug-related offenses compared to 13% of male state prisoners and 45.6% of male federal prisoners.²²¹ The intersection of race and sex only exacerbate these statistics, with Black and Hispanic females imprisoned at 1.7 and 1.26 times respectively the rate of white women and Native American and Alaska Native females imprisoned at 4.3 times the rate of white females.²²² These statistics diverge further for younger demographics where every single tracked minority demographic has a higher female imprisonment rate than white females.²²³

b. Family Inequity

The raw numbers of these incarceration rates display the current and historical sex-based inequities of the War on Drugs. The consequences of incarceration for female prisoners are similar to the consequences for male prisoners, affecting the lives of their families and communities; restricting their ability to earn a stable income, accumulate wealth, access health care, and attain education; and inhibiting every other underlying determinant of health.²²⁴ Additionally, about 75% of female prisoners are single parents whose incarceration means they legally abandoned their children, placing them into the child dependency system.²²⁵

It was traumatizing, the police came in with guns and forcibly removed my teenaged son from my home because I grew medical cannabis plants in my home on Maui under a legal medical cannabis certification from the state. My son knew what they were for and did not touch the plants. Yet, I haven't seen him in two years while the government shuffles him around the system from Colorado to Florida.²²⁶

Children taken out of the home experience notably poorer long-term social and economic outcomes, at the margin, than children who remained in the home, with the greatest risks for the already high-risk children of minorities and those in poverty.²²⁷ Children of minorities enter the child

²²⁰ *Id.*

²²¹ E. ANN CARSON, PRISONERS IN 2020 28, 32 (2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

²²² *Id.* at 23.

²²³ *Id.*

²²⁴ See *supra* Section II(B)(1)(a).

²²⁵ JUDGE GRAY, *supra* note 125, at 43.

²²⁶ Interview with *Anonymous* mother, in Maui, HI. (Aug. 14, 2022).

²²⁷ See Joseph J. Doyle, Jr. *Child Protection and Child Outcomes: Measuring the*

dependency system at a rate twice that of white children²²⁸ and are at higher risk for post-care mortality and incarceration.²²⁹ These statistics were chiefly gathered to compare the outcomes for children who stayed in a physically abusive home versus children placed in the child dependency system—so placing children in the child dependency system when the mother was imprisoned for drug possession, rather than for child abuse, likely exacerbates the disparity shown in these outcomes.²³⁰ Family courts frequently remove children from their homes as well, without imprisoning the parents, due to the court’s antipathy towards a failed cannabis drug test and the mere existence of cannabis in the home, even in states with legalized cannabis for medical use.²³¹

c. Research and Health Inequity

For the same reasons that general cannabis research has been hobbled by the plant’s status as a Schedule I drug, there is a dearth of research on female specific health interactions. For example, in a recent survey style study of 73,551 women, researchers found that cannabis use increased significantly among women before pregnancy and after pregnancy, but not during pregnancy, in states that had legalized recreational cannabis compared with states that had not legalized cannabis.²³² However, the researchers were unable to study or make any medical or health claims related to these usage statistics based on the paucity of related medical data and the regulatory infeasibility of conducting a related medical study under current DEA and FDA restrictions.²³³

The few medical studies that have been conducted show that sex-related biological factors interact with cannabis use to influence male and female bodies differently.²³⁴ Despite men using cannabis more

Effects of Foster Care, 97(5) AM. ECON. REV. 1583 (2007).

²²⁸ INSTITUTE OF MEDICINE & NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, *NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH* 213-14 (2014).

²²⁹ See Richard P. Barth & Melissa Jonson-Reid, *Outcomes After Child Welfare Services*, 22(9) CHILDREN & YOUTH SERVICES REV. 763 (2000).

²³⁰ See Doyle, *supra* note 227, at 1583 (2007).

²³¹ NEWHART & DOLPHIN, *supra* note 170, at 172-74, 180-81.

²³² Kara R. Skelton et al., *Association of Recreational Cannabis Legalization With Maternal Cannabis Use in the Preconception, Prenatal, and Postpartum Periods*, 4(2) JAMA NETWORK OPEN (Feb 25, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776901>.

²³³ *Id.*

²³⁴ Lorraine Greaves & Natalie Hemsing, *Sex and Gender Interactions on the Use and Impacts of Recreational Cannabis*, 17 INT’L. J. OF ENV’T RSCH. & PUB. HEALTH 509, 510, 514 (2020).

frequently and in greater quantities, females are more susceptible to cannabis use disorder and severe cannabis use disorder²³⁵ and report lower quality of life than similarly situated males, even controlling for greater rates of depression in females.²³⁶ Females also exhibit higher withdrawal intensity²³⁷ more co-occurring mental health issues like anxiety and depression,²³⁸ and more days of poor physical health than males.²³⁹ As with many other areas of medicine,²⁴⁰ females are also underdiagnosed for cannabis-related health issues compared to men.²⁴¹

d. Stigma and Gender Inequity

There may also be a gendered component to sex-based differences in cannabis health outcomes.²⁴² Women experience greater stigma and discrimination when they use substances of any kind, and they experience and report more shame and blame regarding their substance use, describing cannabis use in terms of guilt, shame, and minimization of consequences.²⁴³ Evidence suggests that traditional gender roles restrict female's use of cannabis, even for medicinal use, requiring females to enact a form of masculinity in opposition to their sex category to earn the approval of male users.²⁴⁴ Gendered roles associated with mothering and fathering further perpetuate this stigma, whether enforced in the legal world by adverse family court determinations or in the world at large where stigmas condemn any intersection of cannabis use and caregiving.²⁴⁵

²³⁵ Katina C. Calakos et al., *Mechanisms Underlying Sex Differences in Cannabis Use*, 4 CURRENT ADDICTION REP. 439 (2017).

²³⁶ Greaves & Hemsing, *supra* note 234, at 515.

²³⁷ Nicholaz J. Schlein et al., *Cannabis Withdrawal: A Review of Neurobiological Mechanisms and Sex Differences*, 4 CURRENT ADDICTION REP. 75 (2017).

²³⁸ Calakos et al., *supra* note 235; and see Liana Fattore & Walter Fratta, *How Important Are Sex Differences in Cannabinoid Action?*, 160(3) BRITISH J. OF PHARMACOLOGY 554 (2010).

²³⁹ Greaves & Hemsing, *supra* note 234, at 516; and see Evan S. Herrmann et al., *Sex Differences in Cannabis Withdrawal Symptoms Among Treatment-Seeking Cannabis Users*, 23(6) EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 415 (2015) (females experiencing withdrawal are more likely to report gastrointestinal symptoms such as nausea and stomach pain).

²⁴⁰ See e.g. Sonya N. Burgess, *Understudied, Under-Recognized, Underdiagnosed, and Undertreated: Sex-Based Disparities in Cardiovascular Medicine*, 15 CIRCULATION: CARDIOVASCULAR INTERVENTIONS 127 (2022).

²⁴¹ Greaves & Hemsing, *supra* note 234, at 516.

²⁴² Silje Louise Dahl & Sveinung Sandberg, *Female Cannabis Users and New Masculinities: The Gendering of Cannabis Use*, 49(4) SOCIOLOGY 696, 699 (2015).

²⁴³ Greaves & Hemsing, *supra* note 234, at 516; *id.*

²⁴⁴ Dahl & Sandberg, *supra* note 242, at 707.

²⁴⁵ Greaves & Hemsing, *supra* note 234, at 512-13; NEWHART & DOLPHIN, *supra*

Finally, “[g]ender identities and the ‘performance’ of our identities; whether feminine, masculine, or gender diverse (transgender, non-binary, or queer) have an impact on how and why substances such as cannabis are used, ingested, and in what contexts, not to mention how they are marketed and advertised when legal.”²⁴⁶ Transgendered men and women in particular are more likely than heterosexual-identified individuals to internalize this stigma and increase their cannabis use to potentially dangerous levels, even controlling for demographics, sexual orientation, and gender incongruence.²⁴⁷ Transgender men who self-identified with a sexual orientation of pansexual or queer were significantly more likely than heterosexual-identified individuals to engage in cannabis use, while transgendered women were even more likely to engage in cannabis use than transgendered men, chiefly due to internalized stigma.²⁴⁸ The stigmas around cannabis use historically nurtured against those branded as outside the boundaries of society are now applied to and internalized by transgender, LGBTQ, and non-binary individuals who consequently experience higher rates of discrimination, lower rates of social support, higher rates of at-risk cannabis use, greater susceptibility to cannabis use disorder, and greater risks of cannabis addiction than cis-gendered individuals.²⁴⁹

e. Business Inequity

In the cannabis business sphere, women entrepreneurs face all of the same challenges as minority and/or previously incarcerated male business owners who attempt to enter the cannabis industry.²⁵⁰ Women entrepreneurs also face both traditional barriers to women’s success in business as well as barriers unique to women’s success in the cannabis industry.²⁵¹ Across

note 170, at 172-74, 180-81.

²⁴⁶ Greaves & Hemsing, *supra* note 234, at 513.

²⁴⁷ Cesar A. Gonzalez et al., *An Examination of Demographic Characteristics, Components of Sexuality and Gender, and Minority Stress as Predictors of Excessive Alcohol, Cannabis, and Illicit (Noncannabis) Drug Use Among a Large Sample of Transgender People in the United States*, 38(4) J. OF PRIMARY PREVENTION 419 (Aug. 1, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5516932/>.

²⁴⁸ *Id.*

²⁴⁹ Ryan Ruppert et al., *Review: Prevalence of Addictions among Transgender and Gender Diverse Subgroups*, 18 INT’L J. OF ENV’T RSCH. & PUB. HEALTH 8843 (2021), <https://www.mdpi.com/1660-4601/18/16/8843>; and see Madeline C. Frost et al., *Disparities in Documented Drug Use Disorders Between Transgender and Cisgender U.S. Veterans Health Administration Patients*, 15(4) J of Addiction Med. 334 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8384140/>.

²⁵⁰ Reaves, *supra* note 197, at 35-41.

²⁵¹ Michael J. McManus, *Women’s Business Ownership: Data from the 2012 Survey of Business Owners*, ISSUE BRIEF NUMBER 3, U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY 47-48 (May 31, 2017),

industries, women-owned firms have lower profits, lower sales, worse survival rates, fewer employees, less starting capital, less debt and equity.²⁵² In the cannabis industry specifically, women also struggle to be taken seriously in the professional environment, obtain sufficient capital investment, network in the right circles, find the right contractual and compliance lawyers, and break into the cannabis-touching side of the industry.²⁵³

Women tend to leave the industry as it transitions from a black market or less regulated medical market to a more regulated legalization regime.²⁵⁴ The percentage of women executives declined by 39% over the last six years, from 36% in 2015 to 22.1% in 2021, and is now well below the 30% national average of executive positions filled by women.²⁵⁵ Women also struggle to break into the more profitable plant-touching elements of the industry—the majority of women owners and founders are in ancillary firms with lower sales revenue.²⁵⁶ Meanwhile, the number of women owners of plant-touching retailers, cultivators, vertically integrated firms, and cannabis investment firms remains well below the national average for women owned businesses.²⁵⁷ Minority woman-owned businesses constitute less than 5% of the companies in the entire industry.²⁵⁸ Ironically, simultaneous with the exodus of woman-owned businesses from the cannabis industry, women of all ages now comprise the fastest growing demographic of cannabis users, and current retail outlets are ill-equipped to understand and meet their needs.²⁵⁹ Compounding gendered ownership

<https://cdn.advocacy.sba.gov/wp-content/uploads/2017/05/22154543/Womens-Business-Ownership-in-the-US.pdf>; Reaves, *supra* note 197, at 34.

²⁵² McManus, *supra* note 251.

²⁵³ Reaves, *supra* note 197, at 34.

²⁵⁴ *Id.* at 40-42.

²⁵⁵ JENEL STELTON-HOLTMEIER, WOMEN & MINORITIES IN THE CANNABIS INDUSTRY 1, 5 (2021), https://mjbizdaily.com/wp-content/uploads/formidable/47/MJBizDaily-Women-and-Minorities-in-Cannabis-Report.pdf?utm_medium=email&utm_source=&utm_campaign=MJD_202110_Women_Minorities_Report_Confirmation; Rosie Mattio, *Why 2022 Will Be a Defining Year for Female Leadership in Cannabis*, ROLLING STONE (Jan. 13, 2022), <https://www.rollingstone.com/culture-council/articles/defining-year-female-leadership-in-cannabis-1282687/>.

²⁵⁶ STELTON-HOLTMEIER, *supra* note 255, at 6.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 9.

²⁵⁹ *Exploring Cannabis Consumer Trends & Demographics in 2021*, *supra* note 218 (retail sales to females in 2021 grew from \$600 million to \$1 billion per quarter); *A Look at Cannabis Demographics & Consumer Behavior in 2020*, HEADSET (Jan. 20, 2021), <https://www.headset.io/industry-reports/a-look-at-cannabis-demographics-consumer-behavior-in-2020#form> (Gen Z women experience 151% growth in retail sales); and see

inequities in the cannabis industry into the future, the lack of women business owners directly affects the prospects of women professionals (and likely future owners) because woman-owned businesses employ more full-time employees, retain employees longer, and hire more women managers.²⁶⁰

8. Hemp

Until 2014, the CSA labeled both hemp and cannabis as a Schedule I drug.²⁶¹ There was no legal differentiation as hemp and cannabis are different names for the same plant and can literally describe the same actual plant at different times in the plant's life.²⁶² The 2014 Farm Bill redefined hemp as a cannabis plant that contains less than .3% Tetrahydrocannabinol ("THC") content (the chief psychoactive component of cannabis) and legalized the production of hemp by states for industrial use and for research purposes.²⁶³ The 2018 Farm Bill completely legalized hemp at the federal level, removing cannabis with less than 0.3% THC content from the definition of cannabis under the CSA and clearing it for interstate commerce.²⁶⁴ Most states followed suit, except for Idaho and Mississippi.²⁶⁵ Hemp and its extracts, chiefly cannabidiol ("CBD"), can be used for everything from industry materials and soil remediation²⁶⁶ to workout recovery drinks and topical arthritis relief.²⁶⁷

Inequity in the hemp market arises as a direct result of complications with the ongoing listing of cannabis as a Schedule I drug in the CSA—specifically, continued prosecution of the War on Drugs against hemp growers by states that have not legalized hemp, continued prosecution of the War on Drugs against hemp growers with plants and products with merely suspected THC content higher than .3% across the country (no

Mattio, *supra* note 255 (companies must adjust their strategies and marketing to account for this growth in female-driven cannabis sales).

²⁶⁰ Pat Roberson-Saunders et al., *Do Women Fare Better in Female-Owned Businesses*, 19(3) J. OF DEVELOPMENTAL ENTREPRENEURSHIP 1450017-1, 1450017-16-17 (2014).

²⁶¹ Lisa Pittman, *The Rise of Hemp Litigation and the Primary Jurisdiction Doctrine*, 60(1) JUDGES' JOURNAL 37 (2021).

²⁶² *Id.*

²⁶³ Agricultural Act of 2014, Pub. L. No. 113-79, § 7606.

²⁶⁴ Agricultural Improvement Act of 2018, Pub. L. No. 115-34, § 10113.

²⁶⁵ NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE INDUSTRIAL HEMP STATUTES (Apr. 16, 2020), <https://www.ncsl.org/research/agriculture-and-rural-development/state-industrial-hemp-statutes.aspx>.

²⁶⁶ Pittman, *supra* note 261.

²⁶⁷ *Inside Recharge CBD Cream: Clinical Trial*, APOTHEM (2020), <https://apothemlabs.com/blogs/news/the-recharge-clinical-trial-1>.

matter how small the surplus), and the lack of FDA regulations concerning hemp-derived CBD products.

In 2019, Idaho State Police seized 6,701 lbs. of cannabis product being transported from Oregon to Colorado.²⁶⁸ The companies involved argue that the cannabis product was legal hemp; but Idaho's law requires only the mere existence of THC, not a specific concentration, to make the product illegal (despite the new federal law).²⁶⁹ In what is not an isolated incident, the truck driver plead down, leaving him with a criminal record, to avoid a five-year mandatory minimum sentence and \$15,000 fine.²⁷⁰ The hemp was impounded and not returned.²⁷¹

In 2022 in Honolulu, Hawaii, as one farmer described it:

[S]tate police officers in tactical gear and carrying machine guns rappelled from helicopters and almost a dozen vehicles carrying about thirty kitted-out state offices drive onto my legal, registered hemp farm to perform a compliance check. They had no warrant or reason to suspect I was out of compliance or growing cannabis instead of hemp. They scared the s*** out of my little daughter and embarrassed me in front of my neighbors. I already cannot grow my hemp within five hundred feet of any dwelling, including my own, limiting my crop a lot; I get my s*** tested and have never been over the limit... What did I do to deserve this?"²⁷²

If a farmer's hemp product does test higher than .3%, it must be destroyed immediately, but such tests are not always accurate or reproducible.²⁷³ Additionally, factors beyond the hemp farmer's control can

²⁶⁸ Paul R. Murphy, *Police Seize Almost 7,000 Pounds of Cannabis from a Truck*, CNN (Feb 7, 2019), <https://www.cnn.com/2019/02/06/us/hemp-marijuana-idaho-trnd>.

²⁶⁹ *Id.*; and see *Big Sky Sci. LLC v. Idaho State Police*, No. 1:19-CV-00040-REB, 2019 WL 438336 (D. Idaho Feb. 2, 2019).

²⁷⁰ *Truck Drivers Sentenced for Transporting Hemp Through Idaho*, KTVB (Sep. 26, 2019), <https://www.ktvb.com/article/news/crime/truck-drivers-sentenced-for-transporting-hemp-through-ada-county-idaho/277-48d9ec07-b224-4623-b556-2291f5bcd3b>; and see Lynn Garcia & Peter Stout, *Hemp or Marijuana? The Importance of Accurate and Reliable Forensic Analysis to the Fair Administration of Justice*, 60(1) JUDGES' J. 22 (2021).

²⁷¹ Suzie Trigg et al., *Sourcing Cannabis Lawfully for CBD Consumer Products*, FOOD & DRUG L. INST. (2021), https://www.fdli.org/2021/03/sourcing-cannabis-lawfully-for-cbd-consumer-products-and-clinical-research-challenges-and-opportunities/#_ftn67

²⁷² Interview with *Anonymous* Honolulu hemp farmer, in Kona, HI. (July 23, 2022).

²⁷³ Nick Jikomes & Michael Zoorob, *The Cannabinoid Content of Legal Cannabis in Washington State Varies Systematically Across Testing Facilities and Popular Consumer Products*, 8(1) NATURE: SCIENTIFIC REPORTS 1 (2018), <https://www.nature.com/articles/s41598-018-22755-2>; and see Garcia & Stout, *supra* note

raise the THC content in a plant beyond acceptable levels and require its destruction—like a rainstorm that postpones harvesting by a few days or a drought inducing heatwave, both of which can increase the concentration of THC in a plant.²⁷⁴

In 2018, on the same day the 2018 Farm Bill was announced, the FDA released a statement claiming that it retained authority to regulate hemp-derived CBD, that CBD was a drug because the FDA had previously approved Epidiolex as a CBD drug for epilepsy, that CBD could not be marketed as a dietary supplement, and that CBD infused food products could not be shipped in interstate commerce.²⁷⁵ The FDA has yet to issue formal guidance or regulations on any of these issues, although it has issued several warning letters (not formal cease-and-desist agency actions) to companies for their CBD infused products and marketing claims.²⁷⁶ The FDA's continued reticence to issue formal guidance on the labeling, content, and marketing of hemp CBD products not only places hemp companies in legal and financial limbo, but actively undermines traditional consumer protections. This causes real and significant, but insoluble, health and financial harms to consumers, as evidenced by dozens of federal cases deeming the FDA's current lack of a regulatory framework insufficient to resolve the plaintiff's claims.²⁷⁷

9. International

The U.S. led the creation of the current battery of international drug control conventions, with consequences at home and abroad.²⁷⁸ The treaties criminalize access to cannabis except in very limited circumstances and

270.

²⁷⁴ *THC Levels in Cannabis and Harvest Dates*, ENCORE LABS (June 13, 2019), <https://www.encore-labs.com/thc-levels-in-cannabis-and-harvest-dates>; and Deron Caplan et al., *Increasing Inflorescence Dry Weight and Cannabinoid Content in Medical Cannabis Using Controlled Drought Stress*, 54(5) HORTSCIENCE 964 (2019), <https://journals.ashs.org/hortsci/view/journals/hortsci/54/5/article-p964.xml>.

²⁷⁵ *Statement from FDA Commissioner Scott Gottlieb, M.D., on Signing of the Agriculture Improvement Act and the Agency's Regulation of Products Containing Cannabis and Cannabis-Derived Compounds*, PRESS RELEASE, U.S. FOOD & DRUG ADMIN. (Dec. 20, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys>. State health departments vary in their own follow-up regulations banning or regulating hemp infusions in food. Pittman, *supra* note 261.

²⁷⁶ *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FDA (Jan. 22, 2021), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd>.

²⁷⁷ Lisa Pittman, *The Rise of Hemp Litigation and the Primary Jurisdiction Doctrine*, 60(1) JUDGES' JOURNAL 37 (2021); and see e.g. *Snyder v. Green Rds. of Fla.*, Case No. 0:19-cv-62342-UU, 2020 U.S. Dist. LEXIS (S.D. Fla. Jan. 3, 2020).

²⁷⁸ See description of treaties/lake access in history section.

justify the U.S. federal government's domestic commodity and penal regulations of cannabis.²⁷⁹ After all, the argument goes, the federal government cannot allow cannabis legalization if it means explicitly refusing to comply with its treaty obligations and risk undermining the international principles of good faith treaty interpretation and implementation, non-derogation, and *pacta sunt servanda* that underly the entire modern international system.²⁸⁰

Even the language of the drug control treaty regime has deep roots in the United States' historical, racist stigmatization of cannabis use. At the Third Session of the Commission on Narcotic Drugs in 1948, U.S. Representative to the Commission Harry J. Anslinger, led the Commission to describe narcotics as “a powerful instrument of the most hideous crime against mankind” and urge the United Nations to “ensure that the use of narcotics as an instrument of committing a crime of this nature be covered by the proposed Convention on the prevention and punishment of Genocide.”²⁸¹ More recently, the Executive Director of the UN Office of Drugs and Crime at the 50th session of the Commission in 2007 said “Let’s recognize it. Evil minds are at work, looking for productivity improvements even in the deadly business of illicit drug making. . . . Especially nasty is the role of bio-technologies, that are increasing the THC potency and its yields by many multiples, with plants grown indoors—in booby-trapped urban properties.”²⁸²

This language stigmatizes individuals themselves, not just criminal activities, as evil, and has been cited approvingly to justify long prison sentences and even the death penalty in domestic courts and governmental bodies from Kazakhstan to the European Court of Human Rights.²⁸³ Governments around the world use this U.S.-led international stigmatization and drug control regime to dehumanize victims of the War on Drugs and justify:

the execution of hundreds of people annually for drug offences; the arbitrary detention of hundreds of thousands of people who use (or are accused of using) illicit drugs; the

²⁷⁹ Bone & Seddon, *supra* note 163, at 52.

²⁸⁰ Roogin Habibi & Steven J. Hoffman, *Legalizing Cannabis Violates the UN Drug Control Treaties, But Progressive Countries like Canada Have Options*, 49(2) OTTAWA L. REV. 427, 434, 445 (2018).

²⁸¹ U.N. Economic and Social Council: Commission on Narcotic Drugs, 160-61, U.N. Doc. E/CN.7/155 (Feb. 16, 1949); Lines, *supra* note 82, at 10-11.

²⁸² Antonio Maria Costa, Executive Director of the U.N. Office on Drugs and Crime, The Context of Enforcement: Lessons Learned from a Quarter Century of Drug Control, Address to the 25th International Drug Enforcement Conference (May 8, 2007) (transcript available at: https://www.unodc.org/unodc/en/about-unodc/speeches/speech_2007_05_08_2.html).

²⁸³ Lines, *supra* note 82, at 10-11; Habibi & Hoffman, *supra* note 280, at 445-46.

infliction of torture, or other forms of cruel, inhuman or degrading treatment, in the name of ‘drug treatment’; the extrajudicial killings of people suspected of being drug users or drug traffickers; and the denial of potentially life saving health services for people who use drugs.²⁸⁴

Some do argue that developing international norms for the protection of human rights and public health conflict with the drug control regime’s “outdated and restrictive drug control mechanisms.”²⁸⁵ However, the only ways forward are difficult or politically dangerous in the international community: collectively rescheduling cannabis within the treaties or reforming and rewriting the treaties, or individually reserving specific exceptions for cannabis or outright denouncing the treaties.²⁸⁶

Additional inequities created by the U.S.-led international drug control regime involve indigenous rights and intellectual property protections. Under the Single Convention for Narcotic Drugs, acceding countries were to phase out historical indigenous use of cannabis within twenty-five years, i.e. 1989.²⁸⁷ The consequences of this can be seen in the continuing conflicts over the cannabis industry between Native American and Native Hawaiian communities and the federal government.²⁸⁸ While peyote is still allowed for some religious use by Native American tribes in the United States, cannabis is not.²⁸⁹

On the intellectual property front, any country that legalizes cannabis and leaves the international drug control regime (officially or not), such as Canada, will create an industry that develops any number of patents

²⁸⁴ Lines, *supra* note 82, at 4; and see e.g. “*Skin on the Cable*”: *The Illegal Arrest, Arbitrary Detention and Torture of People Who Use Drugs in Cambodia*, HUM. RTS. WATCH (Jan. 25, 2010), <https://www.hrw.org/report/2010/01/25/skin-cable/illegal-arrest-arbitrary-detention-and-torture-people-who-use-drugs>; Roxanne Saucier, *Extreme Abuse in the Name of Drug “Treatment”*, OPEN SOC’Y FOUND. (Mar. 13, 2014), <https://www.opensocietyfoundations.org/voices/extreme-abuse-name-drug-treatment>; *Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights*, HUM. RTS. WATCH (Jul. 7, 2004), <https://www.hrw.org/report/2004/07/07/not-enough-graves/war-drugs-hiv/aids-and-violations-human-rights>; and Danilo Andres Reyes, *The Spectacle of Violence in Duterte’s “War on Drugs”*, 35(3) J. OF CURRENT SE. ASIAN AFFS. 111 (2016), <https://journals.sagepub.com/doi/10.1177/186810341603500306>.

²⁸⁵ Peter Yeoh, *Legal Challenges for the Cannabis Industry*, 23(2) J. of Money Laundering Control 327, 335-36 (2020); Habibi & Hoffman, *supra* note 280.

²⁸⁶ Habibi & Hoffman, *supra* note 280.

²⁸⁷ The Single Convention on Narcotic Drugs, *supra* note 83; and see Gregg, *supra* note 82, at 201.

²⁸⁸ Lewis, *supra* note 141, at 422, 430; and see generally Cowan, *supra* note 143.

²⁸⁹ *Compare* Emp. Div, Dep’t of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990) with *Oklevueha Native Church of Haw. Inc. et al. v. Loretta E. Lynch*, 828 F.3d 1012 (9th Cir. 2016), *cert. denied*, 580 U.S. 1000 (2016).

and copyrights in the genetics, strains, cultivation and manufacturing processes, traditional knowledge, and marketing of cannabis.²⁹⁰ Companies in early adoption countries will use the framework for intellectual property protection contained in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) to enforce their patent and copyright ownership to devastate any new industry that another country may later attempt to start²⁹¹—“intellectual property colonialism.”²⁹²

* * * *

In sum, whatever the (in)effectiveness of the War on Drugs at reducing drug use, the state and federal governments have more than made their \$1 trillion investment back in ruined lives.²⁹³

III. CONCEPTUALIZING THE CURRENT THEORY OF CANNABIS SOCIAL EQUITY

“Social Equity” as a concept is a newcomer to the cannabis industry and cannabis scholars, both in practice and linguistically. It is an evolving portmanteau²⁹⁴ of the broad, traditional theories of “social justice” developed throughout history²⁹⁵ and the emerging practical notions of

²⁹⁰ *TRIPS—Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited Aug. 10, 2022); Hughie Kellner, *Mitigating the Effects of Intellectual Property Colonialism on Budding Cannabis Markets*, 28 IND. J. GLOB. LEGAL STUD. 377 (2021).

²⁹¹ Garrett I. Halydier, *A Hybrid Legal and Economic Development Model that Balances Intellectual Property Protection and Economic Growth: A Case Study of India, Brazil, Indonesia, and Vietnam*, 14(1) ASIAN-PAC. L. & POL. J. 86, 96-98 (2012).

²⁹² Kellner, *supra* note 290; Perlman, *supra* note 116.

²⁹³ Perlman, *supra* note 116.

²⁹⁴ See generally Rachel Swan, *Oakland’s Race and Equity Official Reviews Cannabis Industry*, SAN FRANCISCO CHRONICLE (Jan. 29, 2017, <https://www.sfchronicle.com/bayarea/article/Oakland-race-and-equity-official-reviews-cannabis-10892600.php>); Leon, *supra* note 19.

²⁹⁵ See generally LORETTA CAPEHEART & DRAGAN MILOVANOVIC, *SOCIAL JUSTICE: THEORIES, ISSUES, AND MOVEMENTS* 3 (2007):

the study of social justice includes developing an understanding of distributive principles (fair allocation of rewards and burdens) and retributive principles (appropriate responses to harm); how they relate to political economy and historical conditions; their local and global manifestations; the struggle for their institutionalization; how human well-being and development at the social and individual levels is enhanced by their institutionalization; and developing evaluative criteria or processes by which we may measure their effects.

and see Elaine Walster & G. William Walster, *Equity and Social Justice*, 31(3) J. OF SOC. SCI. 21 (1975) (Social justice is a broad concept describing theories of both distributive justice (rewards are distributed in proportion to merit) and equal justice (how rewards are distributed equally among all)).

“equity” as policy implementations that fairly distribute scarce resources while accounting for historic inequities.²⁹⁶ In fact, approximately 85% of all news articles and over 90% of all academic work mentioning both “cannabis” and “social equity” were written in the two years after January 1, 2020.²⁹⁷

From the passage of the CSA and escalating cannabis enforcement efforts in the 1970s until at least late 2019, advocates and scholars almost exclusively used the broad language of “justice”²⁹⁸—whether “racial justice,”²⁹⁹ “restorative justice,”³⁰⁰ or “social justice”³⁰¹—to argue for the relaxation of cannabis prohibitions and to generally call for the rectification of the harms of the War on Drugs. This language paralleled, but was distinct from, the language of “criminal justice” reform used generally by advocates for reform of the United States’ incarceration system as a whole.³⁰²

This distinction is not mere semantics. Coalition-building for drug policy reformation and the pursuit of justice and equity are only possible inside an accurate, specific framing derived from the history, evolution, and manipulation of drug policies reified by existing language.³⁰³ Thus, it is

²⁹⁶ H. PEYTON YOUNG, *EQUITY: IN THEORY AND PRACTICE* XI-XIII (1994) (“This book is not about equity in [the social justice] sense. Rather, it is about the meaning of equity in concrete situations that we meet every day. . . . It is strongly shaped by cultural values, by precedent, and by the specific types of goods and burdens being distributed. . . . Principles of equity are the *instruments* by which societies resolve distributive problems.”).

²⁹⁷ Data on file with Author. See further Pamela Mejia, MPH, MS, et al, Berkeley Media Studies Group, Address at American Public Health Association’s 2019 Annual Meeting and Expo (Nov. 3, 2019).

²⁹⁸ See e.g. GRINSPOON, *supra* note 171, at 392.

²⁹⁹ See e.g. Ben Sheppard, *Going for the Green: Social Equity in the Recreational Cannabis Industry*, 8(1) LINCOLN MEMORIAL U. L. REV. 280, 296-97 (2020) (advocates for decriminalization in Washington D.C. ran a campaign in 2014 focused on the language of “racial justice.” Advocates in Massachusetts did the same in 2016).

³⁰⁰ See Amanda Reiman, *The Intersection of Cannabis Reform and Other Progressive Movements*, in THE ROUTLEDGE HANDBOOK OF POST-PROHIBITION CANNABIS RESEARCH 336, 339-340 (Dominic Corva & Joshua Meisel eds., 2021).

³⁰¹ Bryon Adinoff & Amanda Reiman, *Implementing Social Justice in the Transition from Illicit to Legal Cannabis*, 45(6) AM. J. OF DRUG & ALCOHOL ABUSE 673 (2019).

³⁰² CAPEHEART & MILOVANOVIC, *supra* note 295, at 3 (“criminal justice” is a distinct, relatively recent subset of “social justice”); and see e.g. Natalie Fertig, *Black Lives Matter Movement Sparks ‘Collective Awakening’ on Marijuana Policies*, POLITICO (Aug. 7, 2020), <https://www.politico.com/news/2020/08/07/black-lives-matter-movement-marijuana-policies-392434>, and see Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 387 (2020).

³⁰³ Hakique N. Virani & Rebecca J. Haines-Saah, *Drug Decriminalization: A Matter of Justice and Equity, Not Just Health*, 58(1) AM. J. OF PREVENTATIVE MED. 161 (2022).

vital to untangle the various uses of “social equity” so that disparate interests can effectively coordinate their efforts to imagine and implement common solutions for the many inequities of the War on Drugs.

A. *The Current Cannabis Social Equity Movement*

The conversation around specific equity policies in the cannabis industry as an implementation to address racial injustice first emerged in relation to the City of Oakland’s (“Oakland”) 2017 program to broadly reserve cannabis dispensary licenses for those with prior cannabis convictions.³⁰⁴ Oakland developed their novel “cannabis equity program,” as it was dubbed, in response to a report generated by Oakland’s new Department of Race and Equity’s investigation of racial equity in the cannabis industry.³⁰⁵ Between 2017 and 2019, other California municipalities and a few states swiftly mirrored Oakland’s program with similar business ownership policies to assist those with previous cannabis convictions.³⁰⁶ These programs acknowledged the disparate racial impacts of the War on Drugs, but explicitly reserved dispensary licenses based on evidence of prior convictions rather than on any race-based classification.³⁰⁷ Through 2019, the academic and popular literature generally used “social equity” as mere shorthand for the subset of business ownership restorative justice policies supporting the general accessibility of the cannabis industry by direct victims of the War on Drugs, if the term was mentioned at all.³⁰⁸

On May 25, 2020, several non-Black Minneapolis police officers, later convicted of murder, killed George Floyd, a Black man, while arresting him for potential counterfeiting.³⁰⁹ This incident catalyzed a simmering

³⁰⁴ Rebecca Brown, *Cannabis Social Equity: An Opportunity for the Revival of Affirmative Action in California*, 3 SOC. JUST. & EQUITY L.J. 205, 235 (2019); Sarah Ravani, *Oakland’s Groundbreaking Cannabis Equity Program Showing Modest Results So Far*, SAN FRANCISCO CHRONICLE (May 25, 2019), <https://www.sfchronicle.com/bayarea/article/Oakland-s-groundbreaking-cannabis-equity-13895654.php>; and see *Become an Equity Applicant or Incubator*, CITY OF OAKLAND, <https://www.oaklandca.gov/topics/become-an-equity-applicant-or-incubator> (last visited Nov. 26, 2022).

³⁰⁵ Swan, *supra* note 294.

³⁰⁶ See generally Adinoff & Reiman, *supra* note 301; STATE MEDICAL MARIJUANA SOCIAL EQUITY PLAN COMPARISON, in COMMONWEALTH OF MASSACHUSETTS CANNABIS CONTROL COMMISSION PUBLIC MEETING MINUTES (Dec. 11, 2017), <https://masscannabiscontrol.com/wp-content/uploads/2018/01/2017.12.11-Meeting-Minutes-APPROVED.pdf>.

³⁰⁷ Emily Alpert Reyes, *L.A. Aims to Help Disadvantaged Communities Cash in on Marijuana Legalization*, LOS ANGELES TIMES (Oct. 20, 2017), <https://www.latimes.com/local/lanow/la-me-ln-marijuana-equity-20171020-story.html>.

³⁰⁸ See e.g. Adinoff & Reiman, *supra* note 301 (equating business “equity” programs with “restorative justice” as implementations of “social justice. “Social equity” is merely a label applied to a table of state equity programs and does not appear in the text).

³⁰⁹ *Timeline of Events Since George Floyd’s Arrest and Murder*, ABCNEWS (Oct.

critique of racial discrimination in police enforcement generally³¹⁰ into the nationwide “Black Lives Matter” protests of a wide variety of systemic manifestations of racial inequity throughout society.³¹¹

The cannabis industry was uniquely situated to interact with this dynamic for two reasons. First, *supra* Section II(A), it is well established in the public consciousness³¹² that criminal enforcement of the War on Drugs has an incredibly racialized history in the United States, so a movement based on general inequities in police enforcement naturally gravitated towards historically racialized cannabis enforcement as one of the more widespread and explicit manifestations of those racial inequities.³¹³ Second, the new, legal cannabis industries initiated in Colorado in 2012, and in nine other states by Spring 2020, had matured enough for the public to see clear racial disparities in the demographics of business ownership in the industry.³¹⁴

As a direct response to the Black Lives Matter protests, a number of states and municipalities implemented policies to address racial inequities in their cannabis licensing programs.³¹⁵ For instance, with a bill introduced fifteen days after the death of George Floyd and signed by the Governor just twenty days after that, Colorado made near immediate changes to its cannabis licensing program to provide licenses, incentives, and technical assistance to those with prior cannabis convictions or those who lived in neighborhoods adversely affected by the war on Drugs.³¹⁶ Other states and

23, 2022), <https://abcnews.go.com/US/wireStory/timeline-events-george-floyds-arrest-murder-91957818>.

³¹⁰ See Maquita Peters, *Being Black in America: ‘We Have A Place In This World Too,’* NPR (June 5, 2020), <https://www.npr.org/2020/06/05/867060621/being-black-in-america-we-have-a-place-in-this-world-too>.

³¹¹ Hardaway, *supra* note 78, at 21, 22, 33.

³¹² DeWitt, *supra* note 111, at 4.

³¹³ Seth Reichtsmeier, *Seeing Color: An Examination of Racial Injustice in the Cannabis Industry*, CANNABIS CREATIVE (June 17, 2020), <https://cannabiscreative.com/blog/seeing-color-an-examination-of-racial-injustice-in-the-cannabis-industry/>; DeWitt, *supra* note 111, at 9-10.

³¹⁴ Erik Altieri, *Marijuana Legalization and the Fight for Racial Justice*, NORML (June 1, 2020), <https://norml.org/blog/2020/06/01/marijuana-legalization-and-the-fight-for-racial-justice/>; and see Crime and Justice News, *Racial Justice Protests Help Push Pot Reforms*, CTR. ON MEDIA CRIME & JUST. AT JOHN JAY COLL. (Aug. 7, 2020), <https://thecrimereport.org/2020/08/07/racial-justice-protests-help-push-pot-reforms/>.

³¹⁵ Fertig, *supra* note 302.

³¹⁶ *HB20-1424 Social Equity Licensees In Regulated Marijuana*, SECOND REGULAR SESSION COLORADO GENERAL ASSEMBLY, <https://leg.colorado.gov/bills/hb20-1424> (last visited Nov. 27, 2022); Sheppard, *supra* note 299, at 282; Diana Novak Jones, *Colorado Gov. Signs Cannabis Social Equity Bill into Law*, LAW360 (June 30, 2020), <https://www.law360.com/articles/1288074/colorado-gov-signs-cannabis-social-equity-bill-into-law>.

municipalities quickly implemented or expanded their programs to pardon prior convictions and clear the records of those with cannabis convictions.³¹⁷ While governing bodies increasingly referenced racial inequality as the impetus for these programs, the programs themselves only operated for those specifically harmed by the War on Drugs, prioritizing those with prior convictions for industry equity programs and focusing on resentencing and record clearance generally, rather than on any race-specific implementations.³¹⁸ Even as the programs themselves acknowledged the distinction between “social equity” and “social justice,” the language used in the news and academia implicitly and explicitly shifted after 2020.

As originally applied, “social equity” merely described programs meant to provide access to business ownership in the cannabis industry for those previously convicted of cannabis offenses or those living in areas where cannabis laws were disproportionately enforced.³¹⁹ The popular literature explicitly contrasted these industry equity policies with other economic and non-economic policies that would more directly address racial inequities and systemic racial bias in the cannabis industry.³²⁰ For example, the Brookings Institute’s argument that the best policies for successful criminal justice reform and racial justice include resentencing, record clearance, and government funded community reinvestment³²¹ mirrored that of The Center for American Progress’s distinction between industry equity programs, resentencing and record clearance, and community reinvestment.³²²

³¹⁷ Fertig, *supra* note 302; Danny Reed, *Calls to Defund Police Activity Reach the Cannabis Industry*, MG MAGAZINE (June 19, 2020), <https://mgmagazine.com/business/legal-politics/calls-to-defund-police-activity-reach-the-cannabis-industry/>.

³¹⁸ See e.g. Jones, *supra* note 316 (Colorado’s new social equity program was justified as a means to oppose racial inequity in the cannabis industry, but its implementation provided for social equity licenses to go to those with prior convictions rather than using race as a selection criteria).

³¹⁹ Ravani, *supra* note 304.

³²⁰ See e.g. Morgan Sung, *The Legal Cannabis Industry Must Reckon With Systemic Racism*, MASHABLE (July 8, 2020), <https://mashable.com/article/cannabis-weed-systemic-racism-black-lives-matter> (distinguishing industry equity policies from “legal,” “medical,” and industry-initiated economic solutions to address systemic racism); Fertig, *supra* note 302; and Brandon Soderberg, *Concerned About Racial Equity in The Cannabis Industry? Consult the Accountability List*, THE OUTLAW REPORT (June 16, 2020), <https://outlawreport.com/cannabis-diversity-accountability/> (distinguishing industry equity policies from the need for broader solutions to “racial equity”).

³²¹ See John Hudak, *Reversing the War on Drugs: A Five-Point Plan*, BROOKINGS (July 7, 2021), <https://www.brookings.edu/research/reversing-the-war-on-drugs-a-five-point-plan/>.

³²² See Akua Amaning, *The Facts on Marijuana Equity and Decriminalization*, AM. PROGRESS (Apr. 20, 2021), <https://www.americanprogress.org/article/facts->

Beginning in 2020 however, the term “social equity” rapidly broadened in definition and application to subsume each of the more specific, traditional theories of social justice, racial justice, and restorative justice, appropriating policies previously associated with these theories. To give a few examples, High Times began to refer to social equity as policies that use tax money from cannabis sales to provide redistributive payments to those affected by the War on Drugs.³²³ PEW Research now uses social justice, racial justice, and equity interchangeably to refer to decriminalization, record clearance, and other drug policies.³²⁴ New Frontier Data acknowledged the initial definition of social equity as industry equity policies to redress inequality, but explicitly expanded it to include the use of marijuana tax revenue to support low and moderate-income neighborhoods; resentencing and record clearance; and support for workforce development, licensing ownership, and entrepreneurship.³²⁵

This modern expansion of the definition of social equity is nowhere more evident than in the language of cannabis legalization advocates who have adopted an inclusive, policy-oriented understanding of the term. According to the Minority Cannabis Business Association, social equity includes industry equity policies, community reinvestment, resentencing and record clearance, and equitable access.³²⁶ The Cannabis Regulators of Color Coalition describe social equity as resentencing and record clearance, protections for medical patients, business ownership policies, and community reinvestment.³²⁷ The National Association of Cannabis Businesses includes industry equity policies, resentencing and record clearance, and community reinvestment in its definition of social equity.

Thus, while originally used exclusively to refer to the reservation of dispensary licenses for those with prior convictions, the definition of “social

marijuana-equity-decriminalization/.

³²³ See Addison Herron-Wheeler, *House of Representatives Plan Vote on MORE Act in December*, HIGH TIMES (Nov. 11, 2020), <https://hightimes.com/news/house-representatives-plan-vote-more-act-december/>.

³²⁴ See Sophie Quinton, *Policing Protests Propel Marijuana Decriminalization Efforts*, PEW STATELINE (July 2, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/02/policing-protests-propel-marijuana-decriminalization-efforts>; and see Sophie Quinton, *Pandemic, Anti-Racism Protests May Boost Marijuana Legalization*, PEW STATELINE (Oct. 29, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/10/29/pandemic-anti-racism-protests-may-boost-marijuana-legalization>.

³²⁵ See Noah Tomares, *Civil Protests Give Urgency to Cannabis Industry’s Social Equity Programs*, NEW FRONTIER DATA (July 5, 2020), <https://newfrontierdata.com/cannabis-insights/civil-protests-give-urgency-to-cannabis-industrys-social-equity-programs/>.

³²⁶ MCBA REPORT, *supra* note 9.

³²⁷ CANNABIS REGULATORS OF COLOR COALITION, *supra* note 15.

equity” has grown to now include every sort of policy meant to address the social, cultural, economic, and political consequences of the War on Drugs.

B. *Cannabis Social Equity in the Academic Literature*

The popular conception of social equity as either a discrete set of policies or simply as the goal of righting the harms of the War on Drugs is generally mirrored in the academic literature. Most scholarly writers either accept this definition of social equity implicitly or start from scratch with a dictionary definition of equity. Only a small minority of writers have used or proposed more general frameworks in which to ground social equity. Any general theory of cannabis social equity then must first map this current intellectual topology before embarking in new directions.

1. Social Equity as a Collection of Policies

By far the most common theory of cannabis social equity in the academic literature appears to take the de facto position that policies labeled as social equity policies are in fact social equity policies and proceeds with analyzing those policies on that basis. Some explicitly note that there is no standard definition of social equity.³²⁸ Others simply cite the definition of equity used by Massachusetts’ Cannabis Control Commission (one of the first cannabis regulatory bodies to define equity): “Equity is the recognition and accommodation of differences through fairness to prevent the continuation of an inequitable status quo.”³²⁹

a. 2019: Early Academic Attention

One of the first scholars to seriously approach the concept of social equity in the cannabis industry was Christopher Nani, who started working on the issue in 2017, at the same time as the implementation of Oakland’s social equity program, first publishing an article that provides a system for evaluating the effectiveness of social equity policies in January 2019.³³⁰ While frequently cited as a source for the definition of social equity,³³¹ this

³²⁸ See e.g. CHRISTOPHER NANI, UNDERSTANDING SOCIAL EQUITY, 3, 13 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622268; Kilmer et al., *supra* note 20, at 1009.

³²⁹ Equity Programs, CANNABIS CONTROL COMMISSION, <https://mass-cannabis-control.com/equityprograms> (last visited Nov. 27, 2022); and see e.g. Benjamin Rajotte, *Cannabusiness Ethics*, 45 S. ILL. U. L.J. 109, 111-13 (2020); Brown, *supra* note 304; Kerry Cork, *Recreational Marijuana, Tobacco, & the Shifting Prerogatives of Use*, 45 S. ILL. U. L.J. 45 (2020).

³³⁰ Christopher Nani, *Social Equity Assessment Tool for the Cannabis Industry*, 3-4 (Ohio State Legal Studies Research Paper No. 471, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312114.

³³¹ See e.g. Kilmer et al., *supra* note 20, at 1009 n.23; Cork, *supra* note 329; and Rajotte, *supra* note 329, at 109, 111 n.13.

work merely adopts the definition of social equity given by the Massachusetts Cannabis Control Commission.³³²

Other works in a variety of contexts in 2019 followed suit, limiting the definition of social equity to industry equity policies. Rebecca Brown accepted the Massachusetts definition of social equity to argue that industry equity policies should explicitly be used as the tool to achieve racial justice for the harms of the War on Drugs.³³³ Samuel DeWitt also took a broad look at social equity policies implemented by a number of different states, defining social equity as both the outcome of diversity within the cannabis industry itself and the industry equity policies necessary to achieve that outcome.³³⁴ Similarly, in her survey of current legalization regulatory structures, Maya Rahwanji discussed social equity solely in the context of the business ownership policies of the initial wave of equity programs in Oakland, Los Angeles, and Massachusetts, among others.³³⁵ Addressing the cannabis industry and the rights of indigenous peoples, Konstantia Koutouki and Katherine Lofts describe social equity only as business ownership policies.³³⁶ Even in the psychology literature, social equity was defined as business ownership policies and contrasted with resentencing and record clearance policies.³³⁷

One outlier article by Bryon Adinoff and Amanda Reiman in the 2019 public health literature did presciently incorporate the entire panoply of current social equity policies (business ownership, community investment, and resentencing and record clearance) into a single policy-based definition, but they still chiefly used the language of social justice and restorative justice rather than social equity.³³⁸

b. 2020: Increasing Academic Awareness

In 2020, the definition of social equity began to vary widely amongst academic authors. Many authors continued to delineate business ownership programs from community reinvestment and resentencing and record clearance policies, although authors did begin to more explicitly tie these policies to racial harms rather than those with prior cannabis convictions more generally.³³⁹ Beau Kilmer and Erin Kilmer Neel use social equity to

³³² Nani, *supra* note 330, at 3-4.

³³³ Brown, *supra* note 304, at 209-10, 246.

³³⁴ DeWitt, *supra* note 111, at 2, 6, 8.

³³⁵ Maya Rahwanji, *Hashing out Inequality in the Legal Recreational Cannabis Industry*, 39 NW. J. INT'L. & BUS. 333 (2019).

³³⁶ Koutouki & Lofts, *supra* note 146, at 726.

³³⁷ Candice Bowling & Stanton A. Glantz, *Civic Engagement in California Cannabis Policy Development*, 51(5) J. OF PSYCHOACTIVE DRUGS 391, 396 (2019).

³³⁸ Adinoff & Reiman, *supra* note 301, at 674.

³³⁹ See e.g. Cassia Furman & Kelsey Middleton, *Introduction to Cannabis and*

describe both a set of business ownership policies and the desired outcome of those policies to “help communities of color that have been and still are disproportionately affected by prohibition.”³⁴⁰ Ben Sheppard analyzes social equity as those business ownership policies adopted by states to promote minority inclusion in the commercial industry.³⁴¹ Similarly, Jared Kriwinsky writes about social equity programs strictly as those business ownership policies implemented by states and separate from both criminal law reform and community reinvestment policies.³⁴² Daniel J. Mallinson, writing for a regulatory audience, addresses social equity in relation to diversity amongst owners and operators in the cannabis industry and the policies addressing ownership imbalances, delineating these policies from their analysis of resentencing and record clearance policies.³⁴³ Both Katherine Jagers and Deborah Aherns in separate articles advocate for resentencing and record clearance policies under a traditional restorative justice framework rather than social equity. They argue that future decriminalization or legalization at the state or federal level must be tied to retroactive relief from prior criminal penalties as a way to address racial inequity.³⁴⁴ Even outside the United States, Peter Yeoh, writing about the future of cannabis legalization in England, notes the complications that state-level, business ownership social equity policies pose for future United States federal legalization.³⁴⁵

In contrast to the limited business ownership policy definition, Benjamin Rajotte, could be considered as having begun the transition to a broader definition by defining social equity in the business context as a response to the harms of the War on Drugs more broadly, arguing that social equity “is a concept which strengthens the fundamentality of positive multidirectional feedback loops that invest in and grow the power and wellbeing of communities.” Despite this broader language, their definition remained limited to business ownership policies, again quoting the

Social Equity, in THE CANNABIS BUSINESS: UNDERSTANDING LAW, FINANCE, AND GOVERNANCE IN AMERICA’S NEWEST INDUSTRY 83, 145-54 (Charles S. Aloviseti & Cassia-Furman, eds., 2020).

³⁴⁰ Beau Kilmer & Erin Kilmer Neel, *Being Thoughtful About Cannabis Legalization and Social Equity*, 19(2) WORLD PSYCHIATRY 194, 194 (2020).

³⁴¹ Sheppard, *supra* note 299, at 282.

³⁴² See Kriwinsky, *supra* note 81, at 3-4.

³⁴³ Daniel J. Mallinson et al., *The Consequences of Fickle Federal Policy: Administrative Hurdles for State Cannabis Policies*, 52(4) STATE & LOCAL GOV. R. 241 (2020).

³⁴⁴ Katherine Jagers, *Correcting Injustices: Expunging Prior Marijuana Convictions is Kentucky’s Next Best Step Towards Restorative Justice*, 48 N. KY. L. REV. 385 (2021); Ahrens, *supra* note 302.

³⁴⁵ Yeoh, *supra* note 285, at 329.

Massachusetts' Cannabis Control Commission definition of social equity, the "recognition and accommodation of differences through fairness to prevent the continuation of an inequitable status quo."³⁴⁶ Rajotte contrasts this narrower, policy-oriented definition of social equity in the business context against the procedural and substantive aspects of generalized theories of "social justice" and "environmental justice." According to Rajotte, these broader theories require procedural participation by affected communities in the decision-making process so that those communities feel the injustices have been addressed as well as the substantive use of broad definitions of justice to actively identify and oppose specific political manifestations of injustice.³⁴⁷

Jazmin Mize similarly incorporates traditional theories of justice and their notions of procedural participation into their definition of social equity as a group of policies—resentencing and record clearance, business ownership policies, and community reinvestment—that function as a specific implementation of reparations. She argues that social equity should involve a broader procedural process for business ownership policies: "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."³⁴⁸

While Rajotte and Mize gesture at an explicit expansion of the definition of social equity, other authors began to use the term interchangeably with those broader, participative theories. For instance, Melissa Pearlman states that "social equity is about giving people of color and the poor the opportunity to become financially empowered through owning their own business, and what it means to be an owner rather than just an employee."³⁴⁹ She used this business-policy oriented definition of social equity interchangeably with social justice and broadened it further to include the restorative justice policies of resentencing and record clearance as a necessary precondition.³⁵⁰ She also used social equity both as a set of discrete policy considerations and as a business ownership end-state where the cannabis industry is managed to "minimize racially harmful practices while supporting fair competition."³⁵¹ Similarly, Cassia Furman and Kelsey Middleton follow by implicitly defining "social equity" as "cannabis programs that seek to redress the disproportionate impact of the war on

³⁴⁶ Benjamin Rajotte, *Cannabusiness Ethics*, 45 S. ILL. U. L.J. 109, 109, 111 n.13 (2020) (quoting Equity Programs, *supra* note 329).

³⁴⁷ *Id.*

³⁴⁸ Jasmin Mize, *Reefer Reparations*, 3(2) SOC. JUSTICE & EQUITY J. 1 (2020).

³⁴⁹ Perlman, *supra* note 116, at 122.

³⁵⁰ *Id.* at 112-13, 120-21.

³⁵¹ *Id.* at 99.

drugs on communities of color,” including business ownership, community investment, and resentencing and record clearance policies.³⁵²

Going further still, some authors did begin to explicitly define social equity to include additional sorts of policies.³⁵³ Kerry Cork begins with the Massachusetts’ definition of social equity as business ownership policies, but implicitly includes employment protections and housing protections as additional policies defining social equity.³⁵⁴ Daniel G. Orenstein defines social equity as those programs that “provide access to grants, loans, and technical assistance and offer licensure priority or preference to businesses owned by or hiring persons from target communities. These programs justifiably seek to remediate past harms.”³⁵⁵ Kumar et al. found that corporations enter the cannabis space in part to mitigate cannabis “inequity” which they define as providing funding for state-level resentencing and record clearance initiatives.³⁵⁶

Nothing exhibits this shift in language in 2020 more than two articles from outside the United States in 2019 and 2020 respectively which compare U.S. social equity policies with those in New Zealand. In 2019, Marta Rychert and Chris Wilkins initially discuss the “social problems” of an unequal cannabis industry driven by profit motive. Their language shifts in 2020 as they propose that New Zealand’s cannabis policies support “social equity” outcomes as defined by United States jurisdictions to include business ownership equity, community reinvestment, and criminal law reform policies.³⁵⁷

c. 2021: Moving Towards a Consistent Definition

2021 saw the definition of social equity coalesce around a discreet set of policies promoting business ownership, community reinvestment, and

³⁵² Furman & Middleton, *supra* note 339, at 83, 151-53.

³⁵³ For instance, Christopher Nani expanded his 2019 definition of social equity, acknowledging in 2020 that social equity is an amorphous term that does not have an agreed upon definition. Individuals may use the term to refer to the specific act of earmarking cannabis licenses for social equity applicants while others may more broadly use it to refer to helping communities and individuals harmed by the War on Drugs. NANI, *supra* note 328, at 3.

³⁵⁴ Cork, *supra* note 329.

³⁵⁵ Orenstein, *supra* note 1, at 71.

³⁵⁶ Navin Kumar, *Understanding Motivations for Large US Cannabis Firms’ Participation in the Cannabis Space*, 39 DRUG & ALCOHOL REV. 347, 353 (2020).

³⁵⁷ Compare Marta Rychert & Chris Wilkins, *A ‘Community Enterprise’ Model for Recreational Cannabis: Lessons from Alcohol Licensing Trusts in New Zealand*, 67 INT’L. J. OF DRUG POL. 72, 72-73 (2019), with Marta Rychert & Chris Wilkins, “You Have to Make Some Money Before You Can Do Some Good”: Balancing the Commercial, Social and Public Health Objectives in a “Community Enterprise” Regulatory Model for Alcohol and Cannabis, 77 INT’L. J. OF DRUG POL. 1, 1, 4 (2020).

resentencing and record clearance.³⁵⁸ Shaleen Title, in a paper specifically intended to create a comprehensive social equity approach for implementation by state regulators, defines social equity as both the goal of “remedying the injustices of the drug war” and specific, resentencing and record clearance, community reinvestment, and business ownership policies.³⁵⁹ Tilburg et al., describe “social equity” programs as resentencing and record clearance and business ownership policies.³⁶⁰ The Collateral Consequences Resource Center, an organization concerned with criminal justice reform generally, explicitly noted that the concept of social equity in the cannabis industry had grown to include policies for resentencing and record clearance.³⁶¹ In the *Judges Journal*, Katharine Neill Harris and William Martin describe “social equity” as the equitable implementation of business ownership policies and community reinvestment.³⁶² Students writing on the topic at this time implicitly defined social equity as state-level business ownership policies, community reinvestment, and resentencing and record clearance.

Even when acknowledging the lack of a solid definition, writers converged on the same set of policies as a proxy definition. For instance, Ryan B. Stoa, in evaluating equity policies targeted at agricultural inequities, acknowledges that no given definition of “social equity” exists, noting that “[t]o some, equity means righting the wrongs of the past and, in the case of cannabis, the harms inflicted by the [W]ar on [D]rugs. To others, equity means a forward-facing policy framework that ensures equitable participation and distribution of benefits.”³⁶³ And the international literature similarly affirmed this expansion of the definition, with Peter J. Adams et al., equating by reference the explicit social equity policy approaches of the United States with the industry initiated “public goods” seen in New Zealand’s cannabis industry, especially the common goals of economic development, employment, and criminal law reform.³⁶⁴

³⁵⁸ Even students writing on the topic at this time implicitly defined social equity as state-level business ownership policies, community reinvestment, and resentencing and record clearance. Peoples, *supra* note 68.

³⁵⁹ Shaleen Title, *Fair and Square: How to Effectively Incorporate Social Equity into Cannabis Laws and Regulations*, 3-12 (Ohio State Legal Studies Research Paper No. 672, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978766.

³⁶⁰ Tilburg et al., *supra* note 102, at 110.

³⁶¹ COLLATERAL CONSEQUENCES RESOURCE CENTER & DRUG ENFORCEMENT AND POLICY CENTER, MARIJUANA LEGALIZATION AND EXPUNGEMENT IN EARLY 2021 5 (2021).

³⁶² Harris & Martin, *supra* note 53.

³⁶³ Stoa, *supra* note 1, at 103.

³⁶⁴ Peter J. Adams et al., *Policy Influence and the Legalized Cannabis Industry: Learnings from Other Addictive Consumption Industries*, 116 ADDICTION 2939, 2939 n.1, 2941 (2021).

d. 2022: *The Modern Definition*

This broader definition of social equity as a set of policies now appears to be the definition of choice in the vacuum left by the lack of a formal, theoretical definition of the term. Jeffrey Moyer recently reported how social equity implementation in Massachusetts had morphed since 2018 to include business ownership policies, reparations, and resentencing and record clearance.³⁶⁵ They again used the definition of social equity provided by Massachusetts, but acknowledged the difficulty in defining the term and generally referred to social equity as the end state pursued by racial justice initiatives that seek to ensure that cannabis legalization benefits communities targeted by criminalization by providing economic opportunities for those with prior cannabis arrest records.³⁶⁶

2. Early Attempts to Theorize About Cannabis Social Equity

Despite the generally haphazard development of the definition of cannabis social equity chronicled above, some authors have tried to gesture at a theoretical definition of social equity in the cannabis industry, but they often end up with the same policy-based definitions as discussed above. For instance, in the *Boston University Law Review*, Beau Kilmer et al., explicitly acknowledge that as of 2021 there is a narrow definition and an umbrella definition of social equity. Their article chooses to apply the umbrella definition, building a definition of equity as the pursuit of policy outcomes “accounting for different starting points and the unique needs of different populations as a result of long-standing systemic and legislated barriers to opportunities to access those resources.” They draw on a general definition of equity from a racial equity advocacy group as “fairness and justice and focuse[d] on outcomes that are most appropriate for a given group, recognizing different challenges, needs, and histories,” and an ancillary definition of “health equity” from the British Columbia Centre for Disease Control as “when everyone has a fair opportunity to achieve their full health potential without social, economic, or environmental barriers.” Beau Kilmer et al., use these definitions together to compare the outcome-based nature of equity with the concept of equality which is “generally focuses on ensuring that everyone has access to the same resources.” They conclude their umbrella definition of social equity with a list of social equity policies “addressing arrests and penalties, previous cannabis offenses, licensing preferences, diversity in the cannabis workforce, government revenues, and health.”³⁶⁷

³⁶⁵ See Jeffrey Moyer, *Implementing Social Equity Opportunities and Challenges from Marijuana Legalization in Massachusetts*, in *STONEOVER: THE OBSERVED LESSONS AND UNANSWERED QUESTIONS OF CANNABIS LEGALIZATION* 83, 103 (Nikolay Anguelov & Jeffrey Moyer eds., 2022).

³⁶⁶ *Id.*

³⁶⁷ See Kilmer et al., *supra* note 20, at 1009 n.22.

An edited work by Christopher Nani collected comments on social equity from several industry participants. Cedric Haynes, the Director of Public Policy and Partnerships at Weedmaps, explicitly attempts to define social equity from scratch, starting with Google’s version of the Oxford English Dictionary “the quality of being fair and impartial” and “the value of the shares issued by a company,”³⁶⁸ yet simply ends with the City of Los Angeles’ version: social equity is the promotion of “equitable ownership and employment opportunities in the commercial cannabis industry to decrease disparities in life outcomes for marginalized communities and to address disproportionate impacts of past cannabis enforcement in those communities.”³⁶⁹ Similarly, Eli McVey, Research Editor for Marijuana Business Daily, restricts the definition of social equity to business ownership policies, but argues for a broader definition that provides business ownership equity proportionally to all demographics.³⁷⁰

A few authors have made more concrete steps in proposing broader theories in which to ground cannabis social equity.

Writing in the public health field, Melissa Bone and Toby Seddon deploy a human rights perspective to argue for health equity through medical cannabis use, showing how community involvement in the recommendation and use of medical cannabis can offer more social, physical mental, and emotional support for complex health issues than the traditional pharmacy model alone, especially in contrast to outright prohibition.³⁷¹

Daryl K. Henderson, a management consultant, argues in *New Cannabis Ventures* that diversity, equity, and inclusion initiatives from the employment law context should be the governing framework for implementing social equity, though limited to business ownership equity. He uses this framework to argue for an industry led approach to social equity, with cannabis businesses themselves taking responsibility for diversity amongst their employees and ownership structures.³⁷² However,

³⁶⁸ NANI, *supra* note 328, at 13-15. The first definition is found in the Oxford English Dictionary (2nd ed. 1989) and its updates to the present day. The second definition is not present in the Oxford English Dictionary (2nd ed. 1989) and is only available via Google and a “unified entry” containing a definition and related words in the Oxford American Dictionary and Thesaurus (2003) (a source which simultaneously reduces the first definition to the single word “fairness”).

³⁶⁹ AMEC FOSTER WHEELER ENVIRONMENT & INFRASTRUCTURE, INC., CANNABIS SOCIAL EQUITY ANALYSIS REPORT (2017), <https://static.business.ca.gov/wp-content/uploads/2021/07/Cannabis-Equity-Grants-Program-for-Local-Jurisdictions-Annual-Report-to-the-Legislature-7-1-2021v2.pdf>.

³⁷⁰ NANI, *supra* note 328, at 40.

³⁷¹ See Bone & Seddon, *supra* note 163.

³⁷² See Darryl K. Henderson, *Why the Cannabis Industry Should Embrace Diversity Equity and Inclusion*, NEW CANNABIS VENTURES, Mar. 24, 2019.

Marty Otañez and David Vergara argue that a corporate social responsibility framework such as this cannot be implemented effectively by individual corporations or legislatures, nor easily distinguished from mere marketing schemes, as long as the industry remains generally unaccountable due to its hyperlocalized nature and the consequences of federal legalization.³⁷³

While not necessarily a theory of social equity, Christopher Nani's first article in 2019 does provide a framework for understanding the success of a social equity program. He recommends evaluations of both the accessibility of a state's business ownership program and a state's additional equity policies, such as educational services and community reinvestment, to provide an overall social equity score. However, this score is heavily weighted towards business ownership equity and efficiency in achieving that goal, comparatively undervaluing community reinvestment and ignoring almost entirely policies for resentencing and record clearance.³⁷⁴

Zara Snapp and Jorge Herrera Valderrábano provide what is likely the most complete theoretical framework by which to evaluate a successful cannabis social equity policy, based on the unintended harms of cannabis prohibition identified by the United Nations Office on Drugs and Crime.³⁷⁵

“[A] cannabis regulation within a social justice framework is one that:

1. Actively recognizes the oppression and privilege dynamics, by understanding and confronting structural conditions;

³⁷³ See Marty Otañez & David Vergara, *Cannabis Corporate Social Responsibility: A Critical and Mixed-Method Approach*, in *THE ROUTLEDGE HANDBOOK OF POST-PROHIBITION CANNABIS RESEARCH* 183, 183-88 (Dominic Corva & Joshua Meisel eds., 2021).

³⁷⁴ See Nani, *supra* note 330, at 3-4.

³⁷⁵ The United Nations Office on Drugs and Crime identified several unintended consequences of international cannabis prohibitions.

“The first and most significant of these is the creation of a lucrative and violent black market. Secondly, the focus on law enforcement may have drawn away resources from health approaches to what, ultimately, is a public health problem. Thirdly, enforcement efforts in one geographic area have often resulted in diversion of the problem into other areas. Fourthly, pressure on the market for one particular substance has, on occasion, inadvertently promoted the use of an alternate drug. Finally, use of criminal justice system against drug consumers, who often come from marginal groups, has in many instances increased their marginalisation, diminishing capacity to offer treatment to those who need it most.

U.N. OFF. ON DRUGS AND CRIME, 2008 WORLD DRUG REPORT, U.N. Sales No. E.08.XI.1 21 (2008), https://www.unodc.org/documents/wdr/WDR_2008/WDR_2008_eng_web.pdf.

2. Recognizes the existence of historically vulnerable groups and actively creates benefits during the production, processing and selling process for people who used to cultivate illegally, have been arrested for crimes related to drugs, or are from communities with high rates of violence;
3. Generates affirmative and retributive actions to level the balance of justice, by drafting and implementing equity programs for specific social groups; and
4. Channels resources to repair the harms caused by prohibition.³⁷⁶

Couched as a theory of social justice, this framework provides some goals and tools for an effective social equity program. Yet, when the author's applied this framework to evaluate current equity programs in the U.S., Canada, and Uruguay, that understanding of social equity remained limited to the same set of business ownership, community reinvestment, and resentencing and record clearance policies as the previous policy-based social equity theories.³⁷⁷

At least two works used social equity as historically defined in the field of public administration since the 1970s.³⁷⁸ In 2020, Christopher Nani included a piece in his edited work written by Richard Ng, a social equity consultant, describes how this historic use has evolved into many different definitions of social equity. He then drafts his own prescription for business ownership social equity couched in the language provided by public administration's theories of social equity.

More robustly, but still limited to evaluating the effect of business ownership equity, Alfred Lee Hannah et al., writing in the *Public Administration Review*, naturally dive deeper into the four pillars of public administration: "effective, efficient, economical, and equitable management of public services."³⁷⁹ Tracing the genesis of social equity, and its addition as the fourth pillar of public administration back to the 1968 Minnowbrook Conference, *see infra* Section IV, Alfred Lee Hannah et al. recount the definition of social equity as currently conceptualized in the field of public administration: administrative activities governed by "procedural fairness,

³⁷⁶ Snapp & Valderrábano, *supra* note 121, at 302.

³⁷⁷ *See generally id.*

³⁷⁸ *See* NANI, *supra* note 328, at 17; and *see* Nicole Huberfeld, *Health Equity, Federalism, and Cannabis Policy*, 101 B.U. L. REV. 897 (2021) (describing the same evolution of the term).

³⁷⁹ Alfred Lee Hannah et al., *Maximizing Social Equity as A Pillar of Public Administration: An Examination of Cannabis Dispensary Licensing in Pennsylvania*, 2022 PUB. ADMIN. REV. 1, 2 (2022).

access, quality, and outcome” to achieve “fair treatment, justice, and equitable distribution of goods and services.”³⁸⁰

Alfred Lee Hannah et al use two of the four principles, efficiency and equity, from this historical framework to evaluate the implementation of a business ownership equity policy by Pennsylvania’s medical cannabis program.³⁸¹ Their research shows how the Pennsylvania program privileged the effectiveness of the resulting industry over equity concerns in the initial evaluation of licensed business owners, with the balance between those two metrics gradually shifting somewhat towards equity over time.³⁸² However, their application is purely descriptive of the impacts of the program and possible contributing factors, it does not use the theories from the field of public administration to evaluate the merit of business ownership equity policies nor imagine new solutions to the discrepancy in equity they identify.

Even on the front lines of public administration, the Cannabis Regulators Association, which brings together regulators from a majority of states with cannabis programs, has no formal recommendations for the successful pursuit of equity in the administration of cannabis laws.³⁸³

This historiography shows how the definition of “social equity” has expanded to include a large, but discrete, set of policies, while simultaneously losing the procedural tools and theoretical basis of the various theories of justice that the definition supplanted. Without those tools, states tend to implement blunt, facially unconstitutional equity by fiat,³⁸⁴ rather than working with affected populations to identify, confront, and rectify the harms of the War on Drugs. This approach is incapable of imagining new solutions for real, structural, large, and ongoing harms, especially when those policies do not live up to their reputation.³⁸⁵

IV. CURRENT CANNABIS SOCIAL EQUITY POLICIES AND THEIR (IN)EFFECTIVENESS

Out of the definitional mishmash chronicled above, the meaning of social equity has coalesced around a discrete set of policies designed to produce equitable industries, communities, justice, and access.³⁸⁶ Many

³⁸⁰ *Id.* at 3.

³⁸¹ *Id.* at 5.

³⁸² *Id.* at 14-15.

³⁸³ See generally CANNRA, <https://www.cann-ra.org> (last visited Dec. 10, 2022).

³⁸⁴ CHARLES S. ALOVISETTI & CASSIA FURMAN, *THE CANNABIS BUSINESS: UNDERSTANDING LAW, FINANCE, AND GOVERNANCE IN AMERICA’S NEWEST INDUSTRY* 148-51 (2020).

³⁸⁵ See e.g., Snapp & Valderrábano, *supra* note 121, at 305; MCBA REPORT, *supra* note 9.

³⁸⁶ See MCBA REPORT, *supra* note 9, at 2.

organizations and academics routinely catalog and score the effectiveness of these policies on a state-by-state basis, so a brief survey of the specific policies currently used to embody social equity and their documented results suffices to map the limitations of current approaches.³⁸⁷

A. *Industry Equity*

In general, industry equity refers to the set of policies designed to provide explicit on-ramps for business ownership and employment in the cannabis industry to those most effected by the War on Drugs. After the 2022 midterm elections, thirty-seven states now maintain medical cannabis programs and twenty-one of those states have also authorized legal adult use cannabis.³⁸⁸ Sixteen of the adult use states and one of the medical only states include explicit industry equity provisions.³⁸⁹ States tend to look to industry equity policies first, and often exclusively, as the proper tool for addressing social inequity, following the lead of the initial set of equity policies implemented in the cannabis industry by Oakland's 2017 program. As shown *supra* Section III(B), these policies by themselves constitute the most common definition of cannabis social equity.

1. Definition of Industry Equity

States use a variety of criteria to determine who qualifies for an industry equity program as a social equity license applicant. Early programs reserved licenses for those with prior cannabis convictions.³⁹⁰ Other criteria states traditionally use include income, state residency, and residency in qualifying neighborhoods with a history of disproportionate drug

³⁸⁷ Data compilation on file with author. Data is accurate as of December 2022. Data gathered from state regulator websites; state statutes and administrative rules; MARIJUANA BUSINESS DAILY, ANNUAL MARIJUANA BUSINESS FACTBOOK (2022), <https://insights.mjbizdaily.com/factbook-2022/>; and National Conference of State Regulators, NCSL.ORG, <https://www.ncsl.org/> (last visited Dec. 18, 2022).

³⁸⁸ States with both medical and adult use programs include: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington. States with medical use only programs include: Alabama, Arkansas, Delaware, Florida, Hawaii, Louisiana, Minnesota, Mississippi, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and West Virginia.

³⁸⁹ Adult use programs with social equity provisions include: Arizona, California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, Rhode Island, Vermont, Virginia, and Washington. Pennsylvania is now the sole medical only program with social equity provisions.

³⁹⁰ See e.g. *Become an Equity Applicant or Incubator*, *supra* note 304; and An Initiative Measure Relating to the Responsible Adult Use, Regulation and Taxation of Marijuana, Ballot Initiative Prop. 207 (2019), <https://www.azcourts.gov/Portals/0/Prop%20207/Arizona-Prop-207-Ballot-Initiative-Measure.pdf?ver=2021-06-01-194330-600>.

enforcement.³⁹¹ A few of the more recent programs also provide social equity licensee status to veterans, women, distressed farmers, Native Americans, and Asian or Pacific Islanders.³⁹² In the wake of the growing public awareness of racial disparity in cannabis business ownership, some states have also explicitly included race as a criteria for social equity status.³⁹³

Depending on the state, qualifying social equity applicants are entitled to either licensing priority for cannabis business ownership, exclusive business types reserved only for social equity applicants (like delivery businesses), and/or exclusive set asides of a certain number or percentage of licenses.³⁹⁴ Cannabis business licenses application fees can reach over \$100,000, so many programs provide social equity applicants with application fee waivers or reductions.³⁹⁵ Some states also provide social equity applicants with startup capital, low-interest business loans, license application support, and/or technical training.³⁹⁶

2. Industry Equity Limitations

As demonstrated *supra* Section III(A), in 2020, public and legislative attention to the issue of social equity in the cannabis industry largely rose in response to the lack of racial diversity amongst cannabis business owners. As such, social equity came to be defined as a set of industry equity policies which form the cornerstone, and in many cases the entirety, of cannabis social equity programs in new adult-use cannabis states and municipalities. In the time since, cannabis scholars and advocates have yet to hail an industry equity program that effectively approaches its goal of fostering a more diverse cannabis industry.³⁹⁷

³⁹¹ See e.g. *HB20-1424 Social Equity Licensees In Regulated Marijuana*, *supra* note 316 (income); *Equity Programs*, MASSACHUSETTS CANNABIS CONTROL COMMISSION, <https://masscannabiscontrol.com/equity-programs/> (last visited Dec. 12, 2022) (state residency); and *Illinois Adult-Use Cannabis Social Equity Program*, ILLINOIS DEPARTMENT OF COMMERCE & ECONOMIC OPPORTUNITY, <https://dceo.illinois.gov/cannabisequity.html> (last visited Dec. 12, 2022) (disproportionately enforced neighborhoods).

³⁹² See MCBA REPORT, *supra* note 9, at 14 (New York, Pennsylvania, Virginia, New Jersey, and Illinois use some combination of these as criteria for social equity licenses).

³⁹³ See e.g. OHIO REV. CODE ANN. § 3796.09 (LexisNexis 2022).

³⁹⁴ See e.g. *Equity Programs*, *supra* note 391 (licensing priority and reservation of delivery and social consumption licenses for social equity applicants); and REV. § 3796.09 (15% of all licenses reserved for social equity applicants).

³⁹⁵ See generally MARIJUANA BUSINESS DAILY, *supra* note 387.

³⁹⁶ See MCBA REPORT, *supra* note 9, at 18, 20.

³⁹⁷ See generally André Douglas Pond Cummings & Steven A. Ramirez, *The Illinois Cannabis Social-Equity Program: Towards a Socially Just Peace in the War on Drugs?*, 53 LOY. U. CHI. L. REV. 791 (2022); Orenstein, *supra* note 1, at 71; and MCBA

The reasons for the ineffectiveness of these industry equity programs are diverse, but the limitations on their success can generally be grouped broadly as follows: limitations built into the social equity licensing process, limitations resulting from the restrictions placed on the market by state cannabis regulations generally, and limitations resulting from cannabis industry dynamics relatively independent of state market regulation.

a. Limitations Due to the Licensing Process

Licensing process limitations are the elements and implementations of a state's social equity licensing program itself that hinder, directly or indirectly, the program's purpose in facilitating cannabis business ownership and employment by adversely affected populations.

The first few limitations are inherent to top-down control of a highly regulated industry. Many states limit the number of total licenses they issue for each type of business—cultivation, manufacturing, dispensing, and ancillary plant-touching businesses. For instance, out of thirty-five states that issue medical dispensary licenses, there are an average of forty-one available dispensary licenses per state. That is an average of one license per 332,221 residents, and a median of one license per 137,708 residents.³⁹⁸ A few states allow for unlimited licenses,³⁹⁹ but many of those states permit local restrictions or outright bans, which results in low numbers of licenses overall.⁴⁰⁰ States with social equity programs reserve an even smaller number or percentage of these licenses for social equity operators, if any at all.⁴⁰¹

State application fees for dispensaries range from \$250 to \$125,000 per application (average of \$9,515), and only nineteen of fifty-one medical and adult use programs provide license fee waivers or reductions for social equity applicants.⁴⁰² Many states require that license applicants, including social equity applicants, provide proof of start-up capital ranging from \$100,000 to \$4,000,000.⁴⁰³ Thirty-five state programs require applicants

REPORT, *supra* note 9, at 31-33.

³⁹⁸ Data compilation on file with author. *Supra* note 387.

³⁹⁹ Alaska, California, Colorado, Massachusetts, Michigan, Montana, Oklahoma, Oregon, Washington, and South Dakota do not place limits on the number of medical dispensaries.

⁴⁰⁰ For instance, 56% of California cities and counties ban all types of cannabis businesses. Department of Cannabis Control California, *Where Cannabis Businesses are Allowed*, CA.GOV, <https://cannabis.ca.gov/cannabis-laws/where-cannabis-businesses-are-allowed/> (last visited Dec. 18, 2022).

⁴⁰¹ Arizona is one of the only currently functioning programs that directly reserves licenses for social equity applicants, reserving 26 of 130 vertically integrated licenses. MARIJUANA MARIJUANA BUSINESS DAILY, *supra* note 387, at 28.

⁴⁰² Data compilation on file with author. *Supra* note 387.

⁴⁰³ See e.g. Utah and Illinois.

show proof of a lease or other guarantee that a location has already been secured in compliance with local zoning and building codes before the license application will even be accepted.⁴⁰⁴ Some applications even require a certificate of occupancy for the proposed property as part of the license application.⁴⁰⁵ All of these factors work together to drive up the demand for licenses and the amount that operators are willing to pay to secure one. This competition makes the application process inaccessible for many of those adversely affected by the War on Drugs who may have a more difficult time accessing both sufficient capital and the technical expertise to manage the application process.⁴⁰⁶

The licensing decision-making process further exacerbates these issues. Neither merit-based nor lottery systems address these concerns, as the application requirements must all be met to make one's license eligible under either system. Merit based systems have been notoriously opaque and frequently subject to legal challenges that dramatically increase the time and expense of obtaining and maintain a license prior to the start of business operations.⁴⁰⁷ Lottery systems are ostensibly fairer to adversely affected applicants, but they lower application costs and the limited number of licenses awarded encourage applicants with deeper pockets to submit additional applications to increase the number of licenses they receive.⁴⁰⁸

Other limitations that hinder the effectiveness of industry equity programs in achieving their goals of diversifying the legal industry include statutory disqualification of both potential applicants and employees with prior felony convictions. While some states explicitly reserve their social equity licenses for those with prior cannabis convictions,⁴⁰⁹ some states exclude applicants with non-cannabis related felonies,⁴¹⁰ and most exclude

⁴⁰⁴ Data compilation on file with author. *Supra* note 387.

⁴⁰⁵ See e.g. Michigan. Cannabis Regulatory Agency, *Paper Applications, Forms, and Resources*, MICHIGAN.GOV, <https://www.michigan.gov/cra/sections/adult-use/adult-use-paper-applications-forms-and-resources> (last visited Dec. 18, 2022).

⁴⁰⁶ Orenstein, *supra* note 1, at 82-84; Cam Wade, *Capitalizing on Missed Opportunities: An Overview of Cannabis Fundraising Disparities* (Ohio State Legal Studies Research Paper No. 694, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4063072 (social equity applicants and small cannabis businesses struggle to obtain capital).

⁴⁰⁷ Title, *supra* note 359, at 11.

⁴⁰⁸ Dr. Laura Garius & Amal Ali, *Regulating Right, Repairing Wrongs: Exploring Equity and Social Justice Initiatives within UK Cannabis Reform*, RELEASE.UK.ORG (Jan. 12, 2022), <https://www.release.org.uk/publications/cannabis-regulating-right>; Harris & Martin, *supra* note 53, at 11.

⁴⁰⁹ See e.g. Arizona, Colorado, Illinois, Michigan, Massachusetts, New Jersey, and Virginia.

⁴¹⁰ See e.g. Arizona, California, Colorado, Connecticut, Florida, Maine, Massachusetts, Nevada, New Mexico, New York, Oregon, Virginia, and Vermont.

all applicants with prior felonies.⁴¹¹ Similar rules also bar those with prior cannabis felonies from employment in the industry.⁴¹² These latter rules directly reduce a program's ability to pursue equity in the cannabis industry by excluding those most directly affected by the War on Drugs. The alternative use of residency or race-based selection criteria instead of prior cannabis convictions has only resulted in successful legal challenges and further delays for the implementation of business ownership equity programs.⁴¹³ Additionally, the limited number of equity licenses means that the small number of direct beneficiaries of these programs stands in stark contrast to the widespread impacts of the War on Drugs.

Some states have implemented programs to provide application assistance, technical business training and mentorship by established companies, business incubators or accelerators, and low-cost startup loans to business ownership equity applicants. These programs variously help with license applications, business plans, regulatory compliance, financial management and accounting, recruitment, marketing, and the process for raising capital.⁴¹⁴ At this time, these state programs have not yet matured sufficiently to evaluate their success in improving industry equity.⁴¹⁵

b. Limitations Due to Managed Market Dynamics

Authorizing legislation or implementing regulatory bodies determine the literal extent of the legal cannabis industry. The necessary result of this central planning are market dynamics that favor large, sophisticated commercial entities with experience operating in heavily regulated industries, political connections to protect and expand their regulatory moat, and deep pockets to fund money-losing current operations

⁴¹¹ See e.g. Alabama, Alaska, Arkansas, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maine (Medical), Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York (medical), North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Virginia (Medical), Vermont (Medical), West Virginia.

⁴¹² See e.g. Colorado, Connecticut, Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, Utah, and Washington.

⁴¹³ See e.g. *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 2022 U.S. App. LEXIS 22848 (1st Cir. Aug. 17, 2022) (striking down Maine's law prohibiting non-resident cannabis business licensees for violating the Dormant Commerce Clause); *Original Invs., LLC v. Oklahoma*, No. CIV-20-820-F, 2021 U.S. Dist. LEXIS 50142 (W.D. Okla Mar. 17, 2021) (striking down Oklahoma's law prohibiting non-resident cannabis business licensees because of the federal illegality of cannabis without reaching the merits); and *PharmaCann Ohio, LLC v. Ohio Dep't of Commerce*, No. 17-CV-10962 (Ohio Ct. Com. Pl. Aug. 24, 2018) (striking down Ohio's law preferencing business ownership using racial criteria for violating the Equal Protection Clause).

⁴¹⁴ See e.g. California, Colorado, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Washington.

⁴¹⁵ Kilmer et al., *supra* note 20, at 1019.

in anticipation of future market opportunities. Perversely, despite the intention of industry equity policies to impart these attributes to those adversely affected by the War on Drugs, these attributes are pre-conditions for success in the legal cannabis industry, not results.

In addition to license caps, many state cannabis industries feature vertical integration requirements,⁴¹⁶ high annual license fees ranging from \$1,000 to \$220,000 and cannabis specific tax rates ranging from 0% (medical only) to 37% (plus state sales tax).⁴¹⁷ These elements significantly increase fixed costs for operating cannabis businesses, on top of the costs already associated with operating in a highly regulated industry. Vertical integration requires additional startup costs to implement all of the levels of the supply chain in a single business, but it results in lower operating costs over time, savings that single license business ownership equity licensees cannot attain. Organizations with the resources to out-scale these costs predictably come to dominate each state's legal cannabis industry.⁴¹⁸ Failure to limit the resale of business ownership equity licenses to similarly qualified owners or license rules that permit large operators to use business ownership equity applicants as a mere figurehead for obtaining a license⁴¹⁹ further contribute to the corporate consolidation evident in most current legal cannabis markets.

Some states do provide business ownership equity applicants with exclusive access to “micro-licenses” or single location dispensary or delivery licenses.⁴²⁰ These licenses require fewer resources to obtain and implement and provide accessible onramps for business ownership equity applicants. However, by their very nature as micro-businesses, these licenses do not actually accomplish the stated goals of business ownership equity programs: increasing diversity in the cannabis industry as a whole and providing ownership and employment opportunities with concomitant fiscal results to uplift local communities and repair the generational harms of the War on Drugs.⁴²¹

⁴¹⁶ See e.g. Arizona, Connecticut, Delaware, Florida, Hawaii, Maine (medical), Minnesota, New Hampshire, New Jersey, New Mexico (medical), New York (medical), Vermont (medical), and Virginia.

⁴¹⁷ See e.g. Washington which exempts medical patients from a cannabis specific tax, but imposes a 37% excise tax plus 9.6% sales tax.

⁴¹⁸ Mathew Swinburne, & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 J. BUS. & TECH. L. 235, 260-70 (2020); Orenstein, *supra* note 1, at 96 n.164.

⁴¹⁹ Catherine R. Salerno, To Put it Bluntly: A Criticism of Social Equity Cannabis Schemes, 21-22 (2022) (Student work, Seton Hall Law School) (on file with author).

⁴²⁰ See e.g. California, Connecticut, Massachusetts, Michigan, New York, and Oregon.

⁴²¹ See generally ANGELA HAWKEN & JAMES PRIEGER, *ECONOMIES OF SCALE* (2013) (cannabis businesses benefit greatly from economies of scale).

The sequencing and timing of cannabis licensing implementation can also detrimentally affect the success of business ownership equity licensees in the legal cannabis industry.⁴²² Many states implemented social equity provisions in follow-up legislation to earlier legislation first establishing legal cannabis markets. In such cases, social equity applicants have already lost any potential first-mover advantage, and they face the prospect of breaking into and competing in an industry where corporate licensees and the legacy market have already picked over the low-hanging fruit as far as location, employees, branding, partnerships, and more.⁴²³ This dynamic also exists in medical only states which implement adult use legislation giving current medical licensees exclusive access to the adult use market for several years while the state puts the adult use licensing program in place.⁴²⁴ Even in states that adopted business ownership equity programs in the legislation that first authorized their legal cannabis industry, the additional requirements necessary to administer business ownership equity programs result in those programs frequently taking a backseat to the initial commercial licensing processes, exacerbating the lead time of larger commercial entities.⁴²⁵

c. Limitations Due to Natural Industry Dynamics

In addition to program limitations and statutorily created market dynamics, business ownership equity licensees also face significant headwinds from the natural dynamics of operating in a heavily regulated and stigmatized industry. State programs mandate extensive testing requirements, retail location restrictions, packaging and labeling rules, physical security equipment, deep background checks, tracking software, manufacturing restrictions, product type and content limits, unused product destruction processes, quality control and consumer protection procedures, advertising restrictions, and, in many states, expensive indoor grow facilities and equipment.⁴²⁶ This results in large startup costs for any legal

⁴²² JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATIONS: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 96 (2015).

⁴²³ Unger et al., *supra* note 215.

⁴²⁴ See e.g. Susan R. Miller, *Rhode Island Adult-Use Cannabis Sales Will Start by Year-End*, NEW CANNABIS VENTURES (June 24, 2022), <https://www.newcannabisventures.com/rhode-island-adult-use-cannabis-sales-will-start-by-year-end/>.

⁴²⁵ Kriwinsky, *supra* note 81, at 3-4; John Pletz, *High Stakes: With Recreational Marijuana, Illinois Promises to Share the Wealth and Repair Past Harms from the War on Drugs. Can it Succeed Where All Others Stumbled?*, CHICAGOBUSINESS.COM (Nov. 28, 2019), <https://www.chicagobusiness.com/craigslist-forum-cannabis/no-easy-path-sharing-marijuana-wealth>.

⁴²⁶ See generally MARIJUANA BUSINESS DAILY, *supra* note 387.

cannabis business, ranging from \$1,000,000 to \$6,000,000 (and sometimes much higher prior to breakeven).⁴²⁷

At the same time, licensed cannabis businesses must compete with cheaper and more diverse products from the legacy market and out of state programs with lower levels of industry regulation. These regulations and competition dynamics create a challenging environment for the most well-funded and sophisticated operators, let alone for business ownership equity applicants who definitionally lag behind other licensees with respect to those attributes.⁴²⁸

Many states give municipalities at various levels the ability to either exclude cannabis business locations, restrict the number of locations, or implement additional zoning restrictions on top of state requirements. These local municipalities are more susceptible to regulatory capture by larger industry players⁴²⁹ absent explicit and concentrated intervention from state and community leaders⁴³⁰—intervention in short supply in many localities due to ongoing stigmatization of cannabis businesses. The ongoing stigmatization of cannabis businesses also motivates effective local community opposition from neighborhoods (inaccurately) fearful of cannabis businesses bringing crime to their area.⁴³¹ Whether corporate or community-initiated opposition at the local level, cannabis business licensees often face expensive, drawn-out battles during the location and start-up stage which further disadvantage business ownership equity applicants.⁴³² This particular industry dynamic also significantly contributes to location inequities by pushing cannabis operations and dispensaries into neighborhoods or municipalities adversely targeted by the War on Drugs detailed *supra* Section II(B)(6).

Finally, as cannabis is a highly regulated industry with artificially constrained supply, product prices in the legal industry reflect the resulting increased costs of production and compliance. This pricing is significantly higher than comparable legacy market products, which indicates that regulatory compliance, rather than industry specific production or

⁴²⁷ Wade, *supra* note 406, at 4.

⁴²⁸ SETH COLBY, GETTING TOO HIGH?: LEVELS OF TAXATION AND POTENTIAL PUBLIC REVENUE FROM A LEGALIZED CANNABIS MARKET IN HAWAII, TAX WORKING GROUP OF THE DUAL USE OF CANNABIS TASK FORCE, STATE OF HAWAII 16, 34 (2022).

⁴²⁹ Kumar, *supra* note 356, at 348; Adinoff & Reiman, *supra* note 301, at 684; Adams et al., *supra* note 364, at 2944.

⁴³⁰ Rajotte, *supra* note 329, at 112.

⁴³¹ Tom Chang & Mireille Jacobson, *Going to Pot? The Impact of Dispensary Closures on Crime*, 100 J. URBAN ECON. 120 (2017) (Despite popular conception, dispensary locations actually reduce local crime rates).

⁴³² Unger et al., *supra* note 215.

commercialization costs, plays a large role in the disparity.⁴³³ For example, many states cap the size of production or manufacturing facilities, not just the number of licenses, which artificially raises operating expenses and resulting product pricing.⁴³⁴

The trend towards both state, and possibly federal, relaxation of cannabis regulations over time, especially deregulation for the purpose of promoting viable industry competition with the legacy market, will contribute to significant price declines for products in the legal industry. The industry has already seen prices fall significantly in states that permit grow operations and production facilities at scale. Some estimates put the future price of cannabis at as little as 15% of current legal market prices.⁴³⁵ This price shock, even if it evolves gradually, will operate as consistent headwinds for all current cannabis businesses, especially those who base their business models and capital investments on current product prices.⁴³⁶ This industry dynamic, in addition to increased interstate competition as states deregulate at different rates, will negatively impact the viability of many business ownership equity licensees.

Program limitations, managed market dynamics, and natural industry dynamics will conspire to reduce the effectiveness of business ownership equity programs. Despite the prevalence of business ownership equity policies as the most common cannabis social equity program components across the country, legal industry statistics have yet to identify a definable positive impact to justify the levels of institutional and attentional resources dedicated to this element of cannabis social equity.

B. *Community Equity*

Community reinvestment policies incorporate into the modern conception of cannabis social equity those policies adopted from more traditional theories of restorative justice that states intend to directly address the harms of the War on Drugs through various forms of direct investment into adversely affected communities. These policies can be deceptively straight forward in description and easy for legislatures and regulatory agencies to publicly support, though with varying levels of actual enactment as it is easy to propose specific programs while still accepting cannabis tax revenues into a state's general fund.⁴³⁷ Advocates have made proposals for

⁴³³ See generally COLBY, *surpa* note 428.

⁴³⁴ See e.g. Georgia and Ohio (grow facility sq. ft. restrictions); Hawaii (cultivation facility plant count restrictions); New Mexico (license fees scale by plant count); and see HAWKEN & PRIEGER, *surpa* note 421 (lower costs from economies of scale).

⁴³⁵ See generally ROBIN GOLDSTEIN & DANIEL SUMNER, CAN LEGAL WEED WIN? 139-69 (2022); and COLBY, *surpa* note 428.

⁴³⁶ MARK A.R. KELIMAN ET AL., INTERVIEWS WITH CANNABIS LICENSEES IN WASHINGTON STATE 4 (2019).

⁴³⁷ Adinoff & Reiman, *surpa* note 301, at 681; and see Kilmer et al., *surpa* note

states to adopt community investment policies for many years, but direct applications of these policies to righting various inequities of the War on Drugs are quite new in practice and not much data is available on their effectiveness.⁴³⁸

Community reinvestment programs fall into two categories, either direct distribution of funds by the state or state requirements for licensed industry participants to provide community reinvestment opportunities. These programs are funded out of cannabis tax revenue, general appropriations, or by licensed industry participants directly. At present, six states' cannabis programs include provisions for state-led community reinvestment programs. Fewer states require licensed industry participants to provide community reinvestment opportunities, though many businesses do provide community opportunities on their own initiative.

1. Direct Investment Programs

Very few states use direct community reinvestment policies to provide money to programs that seek to ameliorate the harms of the War on Drugs or to promote public health and safety. Amelioration programs attempt to identify specific populations disproportionately harmed by the War on Drugs and provide funding for diverse community services, direct loans, and neighborhood redevelopment efforts among other things. The most extensive list of potential targets for ameliorative reinvestment that addresses many of the inequities listed *supra* Section II(B), comes from New York and includes funding for: job placement and skills services, adult education, mental health treatment, substance use disorder treatment, housing, financial literacy, community banking, nutrition services, services to address adverse childhood experiences, afterschool and childcare services, system navigation services, legal services to address barriers to reentry, linkages to medical care, women's health services and other community-based supportive services.⁴³⁹ However, many states instead simply fund general public health and public education activities such as public awareness campaigns of proper cannabis safety and drug rehabilitation programs.

Illinois appears to have implemented one of the more successful direct community reinvestment programs measured by fiscal support with its Restore, Reinvest, and Renew (R3) Program.⁴⁴⁰ While too early to

20, at 27-28; Mize, *supra* note 348, at 27-28.

⁴³⁸ Kilmer et al., *supra* note 20, at 1019.

⁴³⁹ *What is in the Law Social and Economic Equity*, NEW YORK OFFICE OF CANNABIS MANAGEMENT (Feb. 2, 2022), https://cannabis.ny.gov/system/files/documents/2022/02/cannabis-management-fact-sheet-social-equity_0_0.pdf.

⁴⁴⁰ Cummings & Ramirez, *supra* note 397, at 811-12; and see 410 ILL. COMP. STAT. 705/10-40 (2019); R3 RESTORE. REINVEST. RENEW., STATE OF ILLINOIS,

evaluate the success of its impacts, since 2021, Illinois has used 25% of its cannabis tax revenue to provide a total of \$80 million in grants to community groups that offer civil legal aid, economic development assistance, reentry programs for the previously incarcerated, violence prevention funding, and youth development programs.⁴⁴¹ Illinois designates additional funding from cannabis taxes for substance abuse and mental health services (20%), law enforcement grants (8%), and the state's drug treatment fund (2%).⁴⁴² Illinois identifies target communities for aid by looking at community level statistics for gun injuries, child poverty, unemployment, and incarceration rates.⁴⁴³ Uniquely, Evanston, Illinois intends to implement a program providing direct racial reparation payments to adversely affected populations.⁴⁴⁴

On paper, in 2021 New York passed one of the most progressive community reinvestment programs, establishing an independent board tasked with distributing a designated 40% of cannabis tax revenue in a community grants reinvestment fund to community organizations.⁴⁴⁵ The remainder of cannabis tax revenue is designated for public education (40%) and drug treatment (20%).⁴⁴⁶ As of late 2022, New York's cannabis program is in its early stages, and it will be a few years before the results of its community investment program can be analyzed, but it provides the most diverse list of potential targets for community reinvestment.

California, Colorado, Washington, and Arizona funnel cannabis tax revenue into their general funds, with occasional earmarks for general education, job reentry training for cannabis, or public health funding.⁴⁴⁷ For example, the California Governor's Office funds California's Community Reinforcement Grants Program to remediate the harms of the War on Drugs

<https://r3.illinois.gov/> (last visited Dec. 14, 2022).

⁴⁴¹ Mike Miletich, *R3 Grant Recipients Tell Illinois Lawmakers about Success, Challenges*, WGEM.COM (Jan. 10, 2022), <https://www.wgem.com/2022/01/10/r3-grant-recipients-tell-illinois-lawmakers-about-success-challenges/>; R3 RESTORE. REINVEST. RENEW., *supra* note 440.

⁴⁴² Shepard Price, *Illinois Marijuana Sales Rebounded in March*, THE EDWARDSVILLE INTELLIGENCER (Apr. 25, 2022), <https://www.theintelligencer.com/news/article/Illinois-marijuana-sales-rebounded-in-March-17124974.php>.

⁴⁴³ R3 RESTORE. REINVEST. RENEW., *supra* note 440.

⁴⁴⁴ Jonah Meadows, *Future Weed Revenue Will Fund Evanston's New Reparations Program*, PATCH (Nov. 27, 2019), <https://patch.com/illinois/evanston/evanston-recreational-cannabis-tax-fund-referendum-program>.

⁴⁴⁵ *What is in the Law Social and Economic Equity*, *supra* note 439.

⁴⁴⁶ Aleece Burgio, *New York Cannabis Law Prioritizes Social, Economic Equity*, BLOOMBERG LAW (Apr. 28, 2021), <https://news.bloomberglaw.com/cannabis/new-york-cannabis-law-prioritizes-social-economic-equity>.

⁴⁴⁷ Kilmer et al., *supra* note 20, at 1018-19.

generally by funding substance use disorder and mental health treatments.⁴⁴⁸ Similarly, Arizona uses some money from cannabis tax revenue to provide grants for public health nonprofits and direct funding for state and county health department activities.⁴⁴⁹

While these programs are too new to be evaluated for their specific effectiveness, scholars have made several general critiques. First, and most obviously, there are too few of these programs given the thirty-seven states with either medical or adult-use cannabis programs. Second, legislatures use these programs as performative talking points, before enacting legislation to instead support existing education, health, and law enforcement programs that do not target adversely affected communities.⁴⁵⁰ Third, even when data on these programs becomes available, without established metrics for what defines success, there will be significant issues in evaluating the effectiveness of programs and improving them.⁴⁵¹ Fourth, in states like California and Arizona, state grants given to local municipalities to implement social equity policies contribute to a lack of accountability by the administering state organizations who find political cover behind the (in)effectual implementation of local governments.⁴⁵² Fifth, the focus of many states on funding general public health and education rather than direct community investment activities does very little to remediate the many inequities of the War on Drugs described *supra* Section II(B).

Finally, and more broadly, is a critique of scope, not of the scope of the target populations for reinvestment, but of the scope of available funds in the face of the extensive harms of the War on Drugs.⁴⁵³ States fund these community reinvestment programs solely from a percentage of cannabis tax revenue, rather than as steady appropriations from a general fund. On its face this revenue is clearly insufficient, for example, in its 2022 round of

⁴⁴⁸ See *California Community Reinvestment Grants Program*, STATE OF CALIFORNIA (Sep. 16, 2022), <https://business.ca.gov/california-community-reinvestment-grants-program/>; *California Community Reinvestment Grant*, HEALTHRIGHT360, <https://www.healthright360.org/program/california-community-reinvestment-grant-ca-crg>, (last visited Dec. 14, 2022).

⁴⁴⁹ Matthew Casey, *Arizona Set Aside Marijuana Revenue for Justice Reinvestment Programs. But Millions Remain Unspent*, KJZZ91.5 (Nov. 17, 2022), <https://kjzz.org/content/1824732/arizona-set-aside-marijuana-revenue-justice-reinvestment-programs-millions-remain>.

⁴⁵⁰ Adinoff & Reiman, *supra* note 301, at 681-82; Catherine R. Salerno, To Put it Bluntly: A Criticism of Social Equity Cannabis Schemes, 13-14 (2022) (Student work, Seton Hall law School) (on file with author).

⁴⁵¹ Kilmer et al., *supra* note 20, at 1019.

⁴⁵² VICTOR VASQUEZ, CANNABIS SOCIAL EQUITY: THE BATTLE TO COMPETE IN A COMPETITIVE MARKETPLACE 1 (2022); Casey, *supra* note 449.

⁴⁵³ Kilmer et al., *supra* note 20, at 1026-31.

grants, California will distribute \$48,000,000 in the face of \$458,000,000 in grant requests.⁴⁵⁴ Similarly, Illinois currently provides around \$45,000,000 a year in community reinvestment funds while spending an estimated \$560 million a year in the prosecution and incarceration of drug offenses.⁴⁵⁵ Current community reinvestment funding is not proportionate to either the harms of the War on Drugs nor to the billions of dollars in savings that states see from reduced police, court, and prison expenses.⁴⁵⁶ This disproportion will likely grow as cannabis prices, and thus sales numbers and tax revenue earmarked for social equity, continue to drop across the industry when states further deregulate cannabis.

Thus, the relative paucity of direct community investment programs and their resources in relation to the number of states with legal cannabis industries, adult use or medical, demonstrates both the relative recent incorporation of restorative justice policies into cannabis social equity and the disparity between the funds available for these programs and the scope of the harms they seek to address.

2. Industry-Led Investment Programs

In contrast to state-led community reinvestment policies, many cannabis programs require general license holders to engage in community reinvestment activities as a condition of their license.⁴⁵⁷ Some non-social equity license holders and other industry participants also advertise voluntary, self-described social equity activities that support business ownership equity licensees.⁴⁵⁸ These activities typically include business mentorship, funding and technical assistance with the application process, startup capital, privately-run business accelerators, and discounts on commercial products and services like seed-to-sale tracking software.⁴⁵⁹

Many California jurisdictions require general license applicants to provide incubation services to business ownership equity applicants as a condition of their license. However, these relationships are fraught with accusations that general licensees do not provide the required services, that business ownership equity licensees steal or abuse the programs, and the

⁴⁵⁴ *California Community Reinvestment Grants Program*, *surpa* note 448.

⁴⁵⁵ Cummings & Ramirez, *surpa* note 397, at 811-12.

⁴⁵⁶ Adinoff & Reiman, *surpa* note 301, at 683.

⁴⁵⁷ Kriwinsky, *surpa* note 81, at 12-13.

⁴⁵⁸ See e.g. Martinovic, *surpa* note 200; *Gage Cannabis to Make Grants in 'Social Equity' Cities*, CRAIN'S DETROIT BUSINESS (Sep. 16, 2019), <https://www.crainsdetroit.com/marijuana/gage-cannabis-grant-nearly-1-million-companies-social-equity-cities>.

⁴⁵⁹ Many organizations keep track of both current state required and industry-led initiatives, see e.g. *The Complete Guide to Social Equity Programs for Dispensaries*, FLOWHUB.COM, <https://flowhub.com/cannabis-social-equity-programs-complete-guide> (last visited Dec. 14, 2022).

belief that general licensees will divest business ownership equity licensees of their licenses.⁴⁶⁰ This last issue is more than an accusation—due to the low number of licenses available in many jurisdictions, multi-state operators have further incentive to use these programs in a predatory manner by providing assistance to business ownership equity applicants before either using them as a figurehead to meet state requirements or forging agreements to simply buy the license after the award.⁴⁶¹

Press releases and other advertising materials constitute the most frequent evidence of industry-led programs. The news is replete with announcements of new programs, but very little data exists about the actual implementation, let alone effectiveness, of these programs.⁴⁶² The same is true in jurisdictions that require general license applicants to submit plans describing how they intend to benefit neighboring communities or to develop a diverse workforce that includes those adversely affected by the War on Drugs.⁴⁶³ A recent academic survey of industry-led programs confirms this dedication to profit motive, finding that corporations talk about social equity and donate to or cooperate with non-profits only to the extent it is useful for their bottom-line, freely jettisoning programs or populations when they no longer benefit the corporation.⁴⁶⁴

In the end, these industry-led programs are subject to the same critiques as the direct governmental community reinvestment programs—critiques magnified by the small scale of any particular corporate program, lack of accountability and enforcement, and profit motive. Whether led by the government or the industry, direct actions to implement the traditional theories of restorative justice under the banner of social equity in the

⁴⁶⁰ Kriwinsky, *supra* note 81, at 12-13.

⁴⁶¹ Orenstein, *supra* note 1, at 82-83; Catherine R. Salerno, To Put it Bluntly: A Criticism of Social Equity Cannabis Schemes, 20-21 (2022) (Student work, Seton Hall law School) (on file with author); and see e.g. Jackie Borchardt, *Harvest to Pay \$500,000 to Settle Ohio Medical Marijuana Dispensary Ownership Dispute*, CINCINNATI ENQUIRER (Mar. 6, 2020), <https://www.cincinnati.com/story/news/2020/03/06/harvest-pay-500-000-settle-ohio-medical-marijuana-dispensary-ownership-dispute/4829684002/>; Chris Casacchia, *Marijuana Social Equity Applicants Nationwide Face Similar Challenges*, MJBIZDAILY (Sep. 27, 2022), <https://mjbizdaily.com/marijuana-social-equity-applicants-nationwide-face-similar-challenges/>.

⁴⁶² Martinovic, *supra* note 200 (Press release announcing new accelerator, program is now limited to short webinars and direct assistance for up to three participant licensees); Orenstein, *supra* note 1, at 82-83 (Incubator partners leave business ownership equity applicants without support after receiving government funding).

⁴⁶³ See GOVERNOR'S OFFICE OF BUSINESS AND ECONOMIC DEVELOPMENT, CANNABIS EQUITY GRANTS PROGRAM FOR LOCAL JURISDICTIONS ANNUAL REPORT TO LEGISLATURE (2021) (California jurisdictions requiring submittal of community investment plans); and see e.g. CONN. GEN. STAT. § 21a-420u (2021) (Connecticut statutes requiring workforce development from adversely impacted communities).

⁴⁶⁴ Kumar, *supra* note 356, at 352-53.

cannabis industry currently lack the scale and political will to sufficiently begin to redress the harms of the War on Drugs.

C. *Criminal Justice Equity*

Cannabis social equity now also incorporates policies from the more traditionally conceptualized theories of social justice, or criminal justice reform, contrasting these policies with the historic retributive justice model of the War on Drugs,⁴⁶⁵ *supra* Section II(A)(4). Criminal justice reform developed in opposition to the steep rise in incarceration rates across the United States that began in the 1970s. Proponents for reform diagnosed this rise as the result of policies characterized as part of the “War on Drugs” or as “tough on crime,” such as mandatory minimum sentencing, increased preference for life without parole sentences, and support for private, for-profit prisons. Reformers argue that the rise in incarceration did not reduce crime rates, but did alienate the incarcerated from society, impose health and fiscal costs on their families and communities, reinforce racial disparities between communities, and cost the federal and state governments billions in policing, judicial, and correctional department costs annually.⁴⁶⁶ Proposed solutions for criminal justice reform include alternatives to incarceration like mental health support or rehabilitation programs, eliminating mandatory minimum sentences, bail reform, civil asset forfeiture reform, reentry education and training programs, probation and parole reform, and drug policy reform.⁴⁶⁷

Prior to its sublimation into the current definition of cannabis social equity, scholars and advocates spent decades developing a social justice framework to propose and evaluate the results of efforts to decriminalize or legalize cannabis as an element of criminal justice reform.⁴⁶⁸ Their work formed the foundation for the many individual states since the 1970s that made efforts to decriminalize cannabis as a direct response to the passage of the CSA; for the majority of states enacting some version of medical

⁴⁶⁵ Lindsey Linder, *Expanding the Definition of Dignity: The Case for Broad Criminal Justice Reform That Accounts for Gender Disparities*, 58 U. LOUISVILLE L. REV. 435, 436 (2020).

⁴⁶⁶ See generally, *Id.*

⁴⁶⁷ For a more detailed recapitulation of the prior, comprehensive, multi-disciplinary work on the value and mechanisms of criminal justice reform, see e.g. GOODE, *supra* note 52; JACOB HERBERT, THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE (1974); GRINSPOON & BAKALAR, *supra* note 22; JUDGE GRAY, *supra* note 125, at 45; Dandurand, *supra* note 467; Ahrens, *supra* note 302, at 420-21; Jagers, *supra* note 344; STONEOVER: THE OBSERVED LESSONS AND UNANSWERED QUESTIONS OF CANNABIS LEGALIZATION (Nikolay Anguelov & Jeffrey Moyer eds., 2022); Virani & Haines-Saah, *supra* note 303; Jennifer L. Doleac, *Encouraging Desistance from Crime*, J. OF ECON. LIT. (Forthcoming 2023).

⁴⁶⁸ See Ahrens, *supra* note 302, at 393-97, 411-13 (chronicles the long history of thought on cannabis decriminalization and legalization).

and/or adult use decriminalization or legalization of cannabis, *supra* Section II(A)(5);⁴⁶⁹ and for the Biden administration's 2022 pardon for everyone convicted of simple possession under federal law since 1992.⁴⁷⁰

Today, state decriminalization or legalization of cannabis typically removes criminal liability for the personal possession of small amounts of cannabis (legal amounts vary between one and ten ounces)⁴⁷¹ and individual cultivation of a small number of plants for personal use (legal numbers vary between two and twelve flowering plants).⁴⁷² It also removes criminal penalties for licensed corporate production, manufacture, and retail activities. However, private possession or cultivation of cannabis over these amounts, and any corporate possession, transportation, and distribution activities outside of a state licensing system, remain felonies.⁴⁷³

This creates a dynamic where one year a person is stopped with a warning for the same offense that another person received a multi-year prison sentence for a few years earlier, or where an individual can be arrested and convicted of a felony for possession of one too many grams over the legal limit on the street directly in front of a licensed retail location that makes a million dollars a month selling the exact same product by the pound.⁴⁷⁴ This dynamic is facially inequitable in a way that magnifies the traditional arguments for, and political salience of, criminal justice reform. Thus, when managed effectively, criminal justice equity policies consistently remain the most politically popular and broadly impactful element of cannabis social equity.⁴⁷⁵

Some states also apply the new decriminalization or legalization standards to the records of those with prior criminal convictions for now legal activities. State policies to address current and prior convictions can include gubernatorial pardons and expungement of offenses, resentencing of dependent offenses, and clearing or sealing records of offenses. While

⁴⁶⁹ *Id.* at 393-97.

⁴⁷⁰ Proclamation No. 2022-22262, 87 Fed. Reg. 61441 (Oct. 12, 2022). The Biden pardon however does not actually decriminalize cannabis possession at the federal level. It functions as de facto decriminalization in conjunction with Congress's regular renewal of the Rohrabacher-Farr spending amendment that defunds enforcement of federal cannabis laws for citizens operating in compliance with state cannabis laws. *See* Patton, *supra* note 22, at 28-29.

⁴⁷¹ Alexia P. Bullard, *Is It Legal to Grow Cannabis in My State*, GROWCASTPODCAST.COM, <https://growcastpodcast.com/is-my-state-legal-to-grow-cannabis-in/> (last visited Dec. 15, 2022).

⁴⁷² *Id.*

⁴⁷³ *See e.g.* COLO. REV. STAT. § 44-10-701 (2022) (Violations of cannabis rules are subject to the Colorado Controlled Substances Act, COLO. REV. STAT. § 18-18 (2022)).

⁴⁷⁴ Alana E. Rosen, *Cannabis Expungement Statutes*, 60(1) THE JUDGES' J. 33 (2021).

⁴⁷⁵ Kilmer et al., *supra* note 20, at 1026-31; Ahrens, *supra* note 302, at 405.

every state faces unique hurdles in implementing these criminal justice reform policies for cannabis offenses, those hurdles do emerge from commonalities across state judicial systems.⁴⁷⁶

States have adopted two general ways to retroactively address convictions for prior offenses. Several states use gubernatorial pardons as the catalyst for expungement, for instance, Illinois requires individuals to file a petition with the Prisoner Review Board that then recommends the pardon to the Governor.⁴⁷⁷ In contrast, Colorado gave the governor power to automatically pardon all offenses for possession of up to two ounces without individual initiation.⁴⁷⁸ Other states do not require a pardon, allowing for the direct expungement of all records relating to qualifying convictions. As with pardons, this process can be automatic or individual initiated. California and New Mexico, provide for automatic identification of records that qualify for expungement, but leave expungement decisions on each record to the discretion of local prosecutors.⁴⁷⁹ In New Jersey, qualifying single offenses are automatically identified and expunged without prosecutorial discretion, but individuals must initiate review and expungement for multiple offenses.⁴⁸⁰ Connecticut, New York, Rhode Island, and Vermont generally provide for their courts to automatically identify and expunge all qualifying offenses without prosecutorial discretion or the need for individual initiation.⁴⁸¹

⁴⁷⁶ Ahrens, *supra* note 302, at 406-10.

⁴⁷⁷ Jagers, *supra* note 344, at 395-96; and see State Appellate Defender, *Cannabis Expungement Information and Forms*, ILLINOIS.GOV, <https://www2.illinois.gov/osad/Expungement/Pages/Cannabis-Expungement.aspx> (last visited Dec. 17, 2022).

⁴⁷⁸ See Colorado Bureau of Investigation, *Marijuana Pardons*, COLORADO.GOV, <https://cbi.colorado.gov/sections/biometric-identification-and-records-unit/marijuana-pardons> (last visited Dec. 17, 2022).

⁴⁷⁹ See California Courts, *Proposition 64: The Adult Use of Marijuana Act*, COURTS.CA.GOV, <https://www.courts.ca.gov/prop64.htm> (last visited Dec. 17, 2022); In the Matter of the Automatic Expungement of Certain Cannabis-Related Court Records Under the Criminal Record Expungement, N.M. Sup. Ct. Ord. No. 22-8500-027 (June 10, 2022), <https://supremecourt.nmcourts.gov/wp-content/uploads/sites/3/2022/06/Order-No.-22-8500-027.pdf>.

⁴⁸⁰ New Jersey Courts, *Expungement of Certain Marijuana or Hashish Cases*, NJCOURTS.GOV, <https://www.njcourts.gov/courts/municipal/marijuana-expungement> (last visited Dec. 17, 2022).

⁴⁸¹ Governor Ned Lamont, *Governor Lamont Announces Thousands of Low-Level Cannabis Possession Convictions To Be Cleared for Connecticut Residents*, PORTAL.CT.GOV (Dec. 12, 2022), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2022/12-2022/Governor-Lamont-Announces-Thousands-of-Low-Level-Cannabis-Possession-Convictions-To-Be-Cleared>; New York State Unified Court System, *Cannabis (Marihuana) and Expungement Under New York State Law*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/criminal/marihuanaExpunge.shtml> (last visited Dec. 17, 2022); Office of the Governor, *Governor McKee Signs Legislation*

Pardons and expungements provide legal relief from prior convictions, but those convictions remain on an individual's publicly accessible court record and law enforcement databases, discoverable by potential employers, landlords, and law enforcement and the basis for ongoing stigmatization.⁴⁸² In response, a few states also institute a process for record sealing or record clearance to remove pardoned or expunged records from court and law enforcement databases entirely.⁴⁸³

While scholars acknowledge the significant step forward that these programs represent, they highlight some common hurdles that inhibit the effectiveness of these policies in achieving criminal justice equity. First, states may be unenthusiastic about pardons specifically, even though the infrastructure is already in place, because pardons require direct governmental intervention in each case, so there is no political cover for the legislature or governor if a specific instance results in untoward consequences.⁴⁸⁴ Further, the public interprets pardons as mercy or forgiveness, so the public is less likely to respect such individual grants of clemency, and the public stigma of pardoned individuals will continue.⁴⁸⁵

Second, only an estimated 4-8% of qualified individuals will ever use the pardon or expungement system in states that require individuals to initiate the process rather than providing automatic removal and record clearance for qualifying offenses.⁴⁸⁶ Individual initiated processes also place the cost and attentional burden of righting the inequity of past drug laws on the victims rather than on the state.⁴⁸⁷ As with other forms of cannabis social equity, the industry needs additional data to analyze the effectiveness of modifications to these policies.⁴⁸⁸ That said, systems, like that of California, Illinois, and New Mexico which provide for automatic expungement subject to prosecutorial discretion can only reduce the number

Legalizing and Safely Regulating Recreational Cannabis in Rhode Island, GOVERNOR.RI.GOV (May 25, 2022), <https://www.ri.gov/press/view/43626>; VT. STAT. ANN. tit. 13 § 7601 (2022).

⁴⁸² Kimberley E. Capuder, *Can a Person's "Slate" Ever Really be "Cleaned"?* *The Modern-Day Implications of Pennsylvania's Clean Slate Act*, 94(2) ST. JOHN'S L. REV. 501, 507-16 (2021); Samantha McAleese, *Suspension, Not Expungement: Rationalizing Misguided Policy Decisions Around Cannabis Amnesty in Canada*, 62(4) CAN. PUB. ADMIN. 612, 613 (2019).

⁴⁸³ Ahrens, *supra* note 302, at 433-34; and see *Proposition 64: The Adult Use of Marijuana Act*, *supra* note 479; *Cannabis (Marihuana) and Expungement Under New York State Law*, *supra* note 481; *Governor McKee Signs Legislation Legalizing and Safely Regulating Recreational Cannabis in Rhode Island*, *supra* note 481; tit. 13 § 7601.

⁴⁸⁴ Ahrens, *supra* note 302, at 427-28; Jagers, *supra* note 344, at 395-96.

⁴⁸⁵ Ahrens, *supra* note 302, at 427-28.

⁴⁸⁶ McAleese, *supra* note 482, at 626-27; Ahrens, *supra* note 302, at 432-33.

⁴⁸⁷ Capuder, *supra* note 482, at 516-17; Ahrens, *supra* note 302, at 432-33.

⁴⁸⁸ See Dandurand, *supra* note 467, at 396-97.

of successful individual applications.⁴⁸⁹ In contrast, New Jersey's short public education campaign to promote awareness and participation in the program will likely increase the number of successful individual applications.⁴⁹⁰

Third, policies that only expunge simple possession charges do not account for individuals who have multiple offenses or dependent offenses. These policies can leave individuals with criminal records or enhanced sentences for offenses that the new decriminalization or legalization regime would not subject them to, yet for which there is no law to address the impact of removing the possession charge.⁴⁹¹ For example, a state with a three-strikes rule might expunge the first two possession charges, but the third charge, which was for more than the newly legalized limit and not eligible for expungement, depended in part on the first two as justification for both the arresting officer's initial stop and the enhanced sentencing, is the third charge expungable? Or, an individual is serving time for a felony weapons charge based on a now expungable possession charge, is the weapons charge expungable as well? A few states provide for individual initiation of judicial review in these cases, but very few specific guidelines exist for resentencing or partial expungement of such offenses, further increases costs for individuals and judiciaries.⁴⁹²

Finally, state judicial and law enforcement record systems vary dramatically in their sophistication and thus ability to locate qualifying offenses in the first place, let alone remove them from the system in a timely manner.⁴⁹³ This is one reason some states rely on individual initiated expungement rather than an automatic process.⁴⁹⁴ California counties, and

⁴⁸⁹ See *Proposition 64: The Adult Use of Marijuana Act*, *supra* note 479; *Cannabis Expungement Information and Forms*, *supra* note 477; In the Matter of the Automatic Expungement of Certain Cannabis-Related Court Records Under the Criminal Record Expungement, N.M. Sup. Ct. Ord. No. 22-8500-027 (June 10, 2022), <https://supremecourt.nmcourts.gov/wp-content/uploads/sites/3/2022/06/Order-No.-22-8500-027.pdf>.

⁴⁹⁰ See e.g. *Cannabis Expungement Information and Forms*, *supra* note 477; *Expungement of Certain Marijuana or Hashish Cases*, *supra* note 480.

⁴⁹¹ Mariah Woelfel, *How Is Marijuana Expungement Working In Illinois?*, NPR (Oct 17, 2019, <https://www.npr.org/local/309/2019/10/17/770701388/how-is-marijuana-expungement-working-in-illinois>); See e.g. Governor Lemont, *supra* note 481.

⁴⁹² See e.g. *Expungement of Certain Marijuana or Hashish Cases*, *supra* note 480.

⁴⁹³ See e.g. David Abbott, *Arizona Expunging Only a Small Fraction of Minor Pot Convictions*, PHOENIX NEW TIMES (Dec. 16, 2021), <https://www.phoenixnewtimes.com/marijuana/arizona-is-slow-to-clear-pot-convictions-12624963>.

⁴⁹⁴ Kevin Murphy, *Record Expungement Is a Necessary Component of Cannabis Legalization*, FORBES (Mar. 5, 2020), <https://www.forbes.com/sites/kevinmurphy/2020/03/05/record-expungement-is-a-necessary-component-of-cannabis-legalization/>.

some states, do work with several non-profit organizations to implement technical solutions,⁴⁹⁵ but these programs continue to suffer from underfunding.⁴⁹⁶

The language regarding criminal reform equity still jumps awkwardly between the different theories of social justice, equity, reform, criminal justice, and restorative justice, however, the relevant scholarship as a whole has generally reached a consensus that state-initiated, automatic expungement and record clearance policies without prosecutorial discretion will successfully bring equity to those with qualifying cannabis offenses.⁴⁹⁷ Future progress will require these different theories to find a common language of cannabis criminal justice equity around which coalitions can be marshalled to face an uphill battle against bureaucratic inertia that favors incremental steps with visible political salience which, in practice, merely maintain the status quo.⁴⁹⁸ This incremental approach exacerbates the schizophrenic enforcement and resulting inequities in arrest rates caused by the hard cutoff levels between legal and illegal cannabis possession—leaving millions subject to the ongoing harms of cannabis convictions for now legal activities.

D. Access Equity

Access equity is the least cohesive element of the modern conception of cannabis social equity. A general definition might state: Access equity addresses a disparate set of issues that directly or indirectly impede an individual's ability to participate in the legal cannabis market as a customer or business owner.⁴⁹⁹ The panoply of issues and policies described as necessary for access equity, but not included in the prior

⁴⁹⁵ Rosen, *supra* note 474; *Automatic Record Clearance: Working with Communities and Government to Fundamentally Transform the Process of Clearing Records*, CODE FOR AMERICA, <https://codeforamerica.org/programs/criminal-justice/automatic-record-clearance/> (last visited Dec. 17, 2022).

⁴⁹⁶ McCune Wright Arevalo, LLP, *McCune Wright Arevalo, LLP, Files Lawsuit Against State of California Regarding Inadequate Funding for Marijuana-Related Expungements*, PRNEWswire (Aug 1, 2022), <https://www.prnewswire.com/news-releases/mccune-wright-arevalo-llp-files-lawsuit-against-state-of-california-regarding-inadequate-funding-for-marijuana-related-expungements-301597181.html>.

⁴⁹⁷ See e.g. COLLATERAL CONSEQUENCES RESOURCE CENTER & DRUG ENFORCEMENT AND POLICY CENTER, *supra* note 361; Ahrens, *supra* note 302; Jagers, *supra* note 344; McAleese, *supra* note 482; Rosen, *supra* note 474; *State Policy Priorities, LAST PRISONER POLICY PROJECT*, https://irp.cdn-website.com/08efa45c/files/uploaded/Updated%20SPP%20Pager_%20Oct%2022.pdf (last visited Dec. 17, 2022); GARRETT I. HALYDIER, SOCIAL EQUITY WORKING GROUP REPORT, SOCIAL EQUITY WORKING GROUP OF THE DUAL USE OF CANNABIS TASK FORCE, STATE OF HAWAII 8-15 (2022).

⁴⁹⁸ McAleese, *supra* note 482, at 627-28.

⁴⁹⁹ See also MCBA REPORT, *supra* note 9, at 2.

elements of cannabis social equity, require such a broad definition to encapsulate the diverse approaches applied to the more specific inequities described *supra* Section II(B). State governments,⁵⁰⁰ advocacy organizations,⁵⁰¹ and academics⁵⁰² tend to address these issues in isolation, if at all, leading to a patchwork of policies without organizing principle from which to imagine and evaluate potential solutions. Access equity issues usually emerge at the intersection of state legality and federal illegality, leaving consumers and new cannabis businesses in legal limbo, increasing barriers to entry, and reducing participation in the cannabis industry.

Eighteen states provide employment protections for off-duty cannabis use,⁵⁰³ and only seven of those provide protections for the adult-use market.⁵⁰⁴ Zero-tolerance office drug policies remain the norm, and even medicinal patients in many states do not receive accommodations for their licensed, off-duty cannabis consumption. States that have addressed this issue chiefly provide that medical cannabis patients cannot be discriminated against for their status as a registered patient or for off-duty cannabis use. However, all states do allow adverse employment actions for possession or use of cannabis at the workplace, for operating under the influence of cannabis during work hours, and in cases where allowances for off-duty cannabis use would cause the employer to violate federal law or lose money or licensing-related benefits under federal law.⁵⁰⁵

Twenty-one states,⁵⁰⁶ including ten adult use states,⁵⁰⁷ provide some protection for cannabis users in child custody cases. These states provide,

⁵⁰⁰ See e.g. 2019 NEV. REV. STAT. § 613.132 (2019) (general employment statute, unrelated to other cannabis regulations, passed via Act 2019 Nev. Stat. 2725, solely devoted to employment protections for the use of cannabis).

⁵⁰¹ See e.g. CANNABIS & STATE EMPLOYMENT LAWS, RESTAURANT LAW CENTER (Jan. 15, 2020), https://restaurantlawcenter.org/wp-content/uploads/2020/10/RLC-Compliance_Cannabis-State-Laws-FINAL-PDF.pdf (the only cannabis related issue tracked by this think tank).

⁵⁰² See e.g. Connor P. Burns, *I Was Gonna Get a Job, But Then I Got High: An Examination of Cannabis and Employment in the Post-Barbuto Regime*, 99 B.U. L. REV. 643 (2019) (law review article devoted solely to employment protections).

⁵⁰³ Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, and West Virginia.

⁵⁰⁴ Maine, Montana, Nevada, New Jersey, New York, Oregon, and Virginia.

⁵⁰⁵ For a list of examples, see Sachi Clements, *State Laws on Off-Duty Marijuana Use*, NOLO, <https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html> (last visited Dec. 28, 2022).

⁵⁰⁶ Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, and Pennsylvania.

⁵⁰⁷ Arizona, California, Colorado, Illinois, Massachusetts, Michigan, Nevada,

either legislatively⁵⁰⁸ or through the courts,⁵⁰⁹ that cannabis use alone is insufficient to decide child custody disputes, rather, as with alcohol, the use must be shown to have a substantial adverse effect on the child.⁵¹⁰ Despite these protections, in many states, even those with explicit protections, family law trial judges continue to order the “cessation of [cannabis] medicine, random and regular drug testing, coerced drug rehabilitation programs, limited or discontinued visitation time for the non-custodial parent or only supervised visitation,” or the non-using parent is granted sole custody while the using parent is reported to Child Protective Services.⁵¹¹

Only six states provide protections for cannabis users related to housing,⁵¹² and no state provides protections for users in the adult-use market. As an element of their medical programs, these states allow patients to grow and consume the permitted amounts of cannabis on their personal property, subject to property specific limitations on smoking and vaping per general “smoke free” policies (other methods of consumption are allowed).⁵¹³ No state provides explicit protections for cannabis use in public assisted housing or Section 8 housing, and courts have generally ruled that federal illegality excludes both medical patients and adult-use consumers from these programs.⁵¹⁴

No state provides protections for workers or cannabis businesses attempting to attain insurance or make claims under those policies. For worker’s

New Jersey, New Mexico, and New York.

⁵⁰⁸ See e.g. MICH. COMP. LAWS § 333.27955 (2018).

⁵⁰⁹ See e.g. New Jersey Div. of Child Prot. and Permanency v. D.H., 469 N.J. Super. 107 (N.J. Super. Ct. App. Div. 2021).

⁵¹⁰ Tyler Burk, *How Does Legal Marijuana Use Affect Custody and Parenting Time?*, GREWAL LAW (Feb. 22, 2022), <https://www.4grewallaw.com/blog/2022/february/how-does-legal-marijuana-use-affect-custody-and-/>.

⁵¹¹ Sara Arnold, *Marijuana and Child Custody*, FAMILY LAW AND CANNABIS ALLIANCE, <https://flcalliance.org/writing/marijuana-child-custody/> (last visited Dec. 28, 2022) (giving Maine and Washington, both of which have protective statutes, as examples); NEWHART & DOLPHIN, *supra* note 170, at 172-74, 180-81.

⁵¹² Arizona, Delaware, Hawaii, Montana, New York, and Oregon.

⁵¹³ See e.g. *Medical Cannabis Use & Restrictions*, STATE OF HAWAII MEDICAL CANNABIS REGISTRY PROGRAM, <https://health.hawaii.gov/medicalcannabisregistry/patients/restrictions/> (last visited Dec. 28, 2022).

⁵¹⁴ *Compare* Nation v. Trump, 818 F. App’x 678 (9th Cir. 2020) (requiring exhaustion of administrative remedies, i.e. filing an appeal with the DEA. The DEA has yet to grant any cannabis related appeal.) *with* Cease v. Hous. Auth. of Indiana Cty., 247 A.3d 57, 61 (Pa. Commw. Ct.), *appeal denied*, 263 A.3d 243 (Pa. 2021) (Pennsylvania state courts held that federal law was ambiguous regarding “illegally using a controlled substance” as a reason to deny public housing assistance and allowed a patient to remain, pending any federal appeal from the housing authority).

compensation insurance, some states explicitly exempt worker's compensation insurance companies from the necessity of providing reimbursements for cannabis related expenses; some states outright prohibit worker's compensation insurance companies from providing reimbursements for cannabis related expenses; and in some states there is ambiguity arising from statutes that exempt health insurance carriers from providing reimbursements for any cannabis related costs, but do not specifically apply that exemption to worker's compensation insurance.⁵¹⁵

Business insurance for cannabis companies is very expensive, and courts frequently allow insurance companies to successfully exercise the following exclusions: controlled substances, cannabis/hemp/marijuana plants, procedural safeguards, increased hazard, intentional acts, concealment/misrepresentation/fraud, pollution, void against federal law/policy,⁵¹⁶ sale/manufacture/delivery of marijuana, growing plants, vandalism, mold, violation of ordinance or law, contraband, outdoor plants, criminal acts, employee dishonesty, health hazard, vaping, fungus, RICO, and intoxication.⁵¹⁷

No state provides explicit protections for consumer or commercial real estate transactions. Real estate lenders can lose their collateral since real estate used for cannabis business activities remains subject to forfeiture under federal law. The federal government rarely enforces against cannabis businesses operating in compliance with state laws, but that compliance is in the hands of the cannabis operator, not the lender or landowner, enhancing the risk, and thus the costs, of real estate.⁵¹⁸ Tenants find it difficult to obtain rental insurance and mortgages, and selling properties previously used for cannabis activities comes with unique, and expensive

⁵¹⁵ JAMES LYNCH & LUCIAN MCMAHON, INSURANCE INFORMATION INSTITUTE, *HAZE OF CONFUSION: HOW EMPLOYERS AND INSURERS ARE AFFECTED BY A PATCHWORK OF STATE MARIJUANA LAWS* 11-14 (2019).

⁵¹⁶ A couple of states, including Oregon and Colorado, have passed legislation providing that contracts dealing with cannabis, including insurance contracts, are not void as against public policy, though federal courts in those states have held the opposite regarding insurance contracts, *compare* Mann v. Gullickson, 15 CV03630 (N.D. Cal. Nov. 2, 2016) *with* Green Earth Wellness Center v. Atain Specialty Insurance Co., 163 F.Supp.3d 821 (D. Colo. 2016). *See generally*, Katie Glenn, *Up in Smoke: Marijuana-Related Insurance Considerations*, AMY STEWART LAW, <https://www.amystewartlaw.com/news-and-blog/up-in-smoke-marijuana-related-insurance-considerations> (last visited Dec. 28, 2022).

⁵¹⁷ Lisa L. Pittman, *Cannabis Coverage Issues*, ABA TORTSOURCE (May 11, 2022), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/tortsource/2022/spring/cannabis-coverage-issues/.

⁵¹⁸ Joseph Cioffi et al., *Fortune or Forfeiture: Real Estate Lending in the Cannabis Space*, REUTERS (Feb. 8, 2022), <https://www.reuters.com/legal/litigation/fortune-or-forfeiture-real-estate-lending-cannabis-space-2022-02-08/>.

risks such as increased utility costs for shared meters, nuisance complaints, and mold issues.⁵¹⁹ Cannabis businesses must also comply with local zoning ordinances and write custom rental and purchase agreements to account for the activity's illegality, further raising barriers of entry to the industry.⁵²⁰

Only nine states provide for state-level alternatives to federal bankruptcy.⁵²¹ Federal bankruptcy protections do not apply to any cannabis touching business,⁵²² but as a new industry, the many new businesses need to find alternative wind-up arrangements to attract potential investors and resolve creditor disputes when they fail.⁵²³ States addressing this issue provide state receivers to administer cannabis businesses to either rescue or wind-up the company. However, in contrast to federal bankruptcy, these procedures do not offer discharge protections or reorganization options for debtors, an automatic stay to assist with corporate turnaround, or robust creditor protections.⁵²⁴

Nine states also provide cannabis specific banking protections to address the business banking inequities discussed *Supra* Section II(B)(4)(b).⁵²⁵ Unlike bankruptcy, providing financial services to cannabis businesses is not federally illegal, and the number of banks that serve cannabis clients has grown to 553 banks and 202 credit unions.⁵²⁶ However,

⁵¹⁹ Rinat B. Klier-Erich, *How to Manage Your Risk When Dealing with Real Estate Sellers, Buyers, or Tenants Involved in a Cannabis Business*, CRES, <https://www.cresinsurance.com/how-to-manage-risk-when-dealing-with-real-estate-sellers-buyers-tenants-involved-in-cannabis-business/> (last visited Dec. 28, 2022).

⁵²⁰ *Cannabis Real Estate 101*, CANNA LAW BLOG (Feb 12, 2022), <https://harrisbricken.com/cannalawblog/want-a-successful-cannabis-business-real-estate-is-key/>.

⁵²¹ California, Illinois, Michigan, Nevada, New Jersey, Ohio, Oregon, Utah, and Virginia.

⁵²² Clifford J. White III & John Sheahan, *Why Marijuana Assets May Not Be Administered in Bankruptcy*, U.S. Dept. of Justice (Dec. 2017), https://www.justice.gov/ust/file/abi_201712.pdf/download.

⁵²³ As many of 97% of cannabis businesses will fail and 37% of current cannabis businesses are running at a loss. Susan Wood, *Survey: 37% of US Cannabis Operators Say They're Not Profitable*, N. BAY BUS. J. (Mar. 14, 2022), <https://www.northbaybusinessjournal.com/article/industrynews/survey-37-of-us-cannabis-operators-say-theyre-not-profitable/>

⁵²⁴ See e.g. Elisabeth M. Von Eitzen & Robert A. Hendricks, *Help for Distressed Cannabis Businesses*, GRAND RAPIDS BUSINESS JOURNAL (Mar. 19, 2021), <https://grbj.com/opinion/guest-column/help-for-distressed-cannabis-businesses/> (analysis of Michigan's receivership program).

⁵²⁵ California, Illinois, Michigan, Nevada, New Jersey, Ohio, Oregon, Utah, and Virginia.

⁵²⁶ Mark Parker, *Inside the Risky World of Marijuana Banking*, CATALYST (Jul. 6, 2022), <https://stpetecatalyst.com/inside-the-risky-world-of-marijuana-banking/>.

the reporting and compliance costs associated with providing those financial services are prohibitive to most banks and to even more cannabis businesses.⁵²⁷ Examples of different regulatory approaches include: California which provides state charters for banks intending to serve the cannabis industry;⁵²⁸ Michigan which only protects banks from state enforcement actions based solely on interactions with the cannabis industry;⁵²⁹ and Illinois which protects banks from state enforcement actions and provides discounted capital to banks to encourage them to provide basic banking services to the industry.⁵³⁰ These protections are responsible for the recent growth in financial institutions serving cannabis businesses, yet many businesses continue to find themselves without access to affordable banking services.⁵³¹

California is the only state with explicit application of its environmental policies to licenses cannabis businesses.⁵³² The cannabis industry creates a number of environmental externalities, including the industry's carbon dioxide emissions; effects on air and water quality; land runoff and soil quality issues; high local energy consumption; and waste disposal concerns.⁵³³ Compliance with general, existing environmental regulations already imposes substantial costs on the industry.⁵³⁴ Without

⁵²⁷ Jeffrey Miron & Nicholas Anthony, *Cannabis Banking: A Clash Between Federal and State Laws*, CATO INSTITUTE, (May 27, 2022), <https://www.cato.org/blog/cannabis-banking-clash-between-federal-state-laws>

⁵²⁸ Mike Kennedy, *What California's Department of Business Oversight Says About Cannabis Banking*, GREEN CHECK (Oct. 7, 2019), <https://greencheckverified.com/what-californias-department-of-business-oversight-says-about-cannabis-banking/>.

⁵²⁹ *Michigan Program Overview, Michigan Banking Stats & Guidance*, GREEN CHECK (Apr. 26, 2022), <https://greencheckverified.com/knowledge-center/state-by-state-federal-guide/state-programs/michigan/>.

⁵³⁰ *Illinois Program Overview, Illinois Banking Stats & Guidance*, GREEN CHECK (Apr. 26, 2022), <https://greencheckverified.com/knowledge-center/state-by-state-federal-guide/state-programs/illinois/>.

⁵³¹ Paul Dunford, *What to Know About Cannabis Banking in 2022*, BANKDIRECTOR.COM (Oct. 15, 2021), <https://www.bankdirector.com/issues/regulation/what-to-know-about-cannabis-banking-in-2022/>.

⁵³² Brownstein Client Alert, *California Cannabis and CEQA Compliance*, BROWNSTEIN (Mar. 4, 2022), <https://www.bhfs.com/insights/alerts-articles/2022/california-cannabis-and-ceqa-collide>.

⁵³³ NCIA POLICY COUNCIL, ENVIRONMENTAL SUSTAINABILITY IN THE CANNABIS INDUSTRY 4-8 (2020), <https://thecannabisindustry.org/wp-content/uploads/2020/11/NCIA-Environmental-Policy-BMP-October-17-final.pdf>.

⁵³⁴ Marc Ross, *The Cannabis Industry's Environmental Compliance Conundrum*, JD SUPRA (Sep. 15, 2021), <https://www.jdsupra.com/legalnews/the-cannabis-industry-s-environmental-6561400/>.

further regulation, these environmental externalities will negatively affect the environment, but the premature application of stringent environmental regulations beyond current general rules will further increase costs for cannabis businesses and consumers.

Finally, cannabis patients and consumers often find themselves unable to access cannabis either because federal programs will not pay for their medicine or because they risk losing their veteran, senior, or disabled persons benefits or their immigration status.⁵³⁵ In 2017, the federal government made some progress in protecting veteran's benefits, clarifying that cannabis use would not disqualify veterans from veterans benefits, yet maintaining employment drug testing rules, VA grounds consumption exclusions, and prohibitions on most types of physician interaction with veterans regarding cannabis use.⁵³⁶ Seniors and those with disabilities, mobility issues, or other impairments struggle to access cannabis in states that disallow delivery services,⁵³⁷ and seniors pay more for cannabis than younger demographics.⁵³⁸ Hospices also rarely allow the consumption of cannabis as they cannot prescribe it under federal regulations.⁵³⁹ Social Security Disability Insurance and Americans with Disabilities Act accommodations do not protect illegal drug use, so cannabis use can result in claim denial.⁵⁴⁰ Only Nevada allows employers to provide reasonable accommodations at work for disabled persons using medical cannabis.⁵⁴¹ Finally, immigration officials can deem an immigrant inadmissible, deportable, or prevent naturalization for any cannabis conviction or admission of any prior possession, use, growing, buying, or selling of

⁵³⁵ MCBA REPORT, *supra* note 9, at 2.

⁵³⁶ *VA and Marijuana—What Veterans Need to Know*, PUBLIC HEALTH, U.S. DEPT. OF VETERANS AFF., <https://www.publichealth.va.gov/marijuana.asp> (last visited Dec. 28, 2022).

⁵³⁷ *How Can We Ensure the Disabled Community Has Equal Access to Cannabis*, AMERICANS FOR SAFE ACCESS (Nov. 9, 2018), https://www.safeaccessnow.org/how_can_we_ensure_the_disabled_community_has_equal_access_to_cannabis; Margo Amala, *Cannabis & Seniors: Overcoming Cannabis Stigma*, URBAN FARMACY, <https://www.urbanfarmacypdx.com/cannabis-seniors-overcoming-cannabis-stigma/> (last visited Dec. 28, 2022).

⁵³⁸ Abbie Rosner, *Seniors Pay Premium For Cannabis But Don't Have To*, FORBES (Mar. 29, 2019), <https://www.forbes.com/sites/abbierosner/2019/03/29/seniors-pay-premium-for-cannabis-but-dont-have-to>.

⁵³⁹ Larry Beresford, *Navigating Medical Cannabis Is Continuing Challenge in Hospice and Palliative Care*, SHILEY HAYNES INSTITUTE FOR PALLIATIVE CARE (Feb. 16, 2021), <https://csupalliativecare.org/navigating-medical-cannabis-is-continuing-challenge-in-hospice-and-palliative-care/>.

⁵⁴⁰ *Considering Cannabis for Patients with Disabilities*, DUBER MEDICAL (Dec. 14, 2021), <https://www.dubermedical.com/considering-cannabis-for-patients-with-disabilities/>.

⁵⁴¹ NEV. REV. STAT. § 453A.800 (2021).

cannabis (state level medical certification cards are evidence of such possession and use).⁵⁴²

Access equity issues make up the least common subjects of social equity policies. However, in their discreteness, access equity issues most lend themselves to administrative, rather than legislative solutions, pending further legalization. In addition to the specific barriers to access equity listed *supra*, general barriers to implementing solutions for these access issues include regulatory hesitance to act due to a specific state's political atmosphere,⁵⁴³ regulatory capture,⁵⁴⁴ market dynamics between the legal and legacy markets,⁵⁴⁵ and older elements of state law that contradict new cannabis regulations.⁵⁴⁶

It is evident that current social equity programs, implementing some combination of industry equity, criminal justice equity, community equity, or access equity policies, do not address the majority of the inequities chronicled *supra*. In the best case, they ineffectively provide large scale solutions for the problems they do attempt to solve, and, in many cases, these programs make the disparities worse. It is not that the programs do not help some individuals, but they are insufficient to help those most deeply affected by the War on Drugs and cannot work at scale to address the scope of the disparities resulting from the War on Drugs.

V. DEVELOPING A NEW THEORY OF CANNABIS SOCIAL EQUITY

Ideas of social equity in the administration of government programs are only new to the cannabis industry. Historically, scholars initially based the modern theory of social equity in social contract theory and John Rawl's Theory of Justice to facilitate implementation of the Civil and Voting Rights Acts of the 1960s.⁵⁴⁷ The public administration literature developed the theory over the last fifty years such that social equity now joins efficiency, economy, and effectiveness to comprise the four key pillars of public administration according to the National Academy of Public Administrators ("NAPA").⁵⁴⁸ In contrast to the exclusively policy-based definitions of

⁵⁴² See generally KATHY BRADY ET AL., IMMIGRANT LEGAL RESOURCE CENTER, IMMIGRANTS AND MARIJUANA (2021), https://www.ilrc.org/sites/default/files/resources/immigrants_marijuana_may_2021_final.pdf.

⁵⁴³ Nani, *supra* note 330, at 4.

⁵⁴⁴ Kumar, *supra* note 356, at 348; Adinoff & Reiman, *supra* note 301, at 684.

⁵⁴⁵ Adinoff & Reiman, *supra* note 301, at 674.

⁵⁴⁶ Judge Stephanie Domitrovich, *State Courts Coping with Medical Marijuana Legislation: Discerning Strife or Harmony?*, 60(1) JUDGES' J. 30 (2021).

⁵⁴⁷ Mary E. Guy & Sean A. McCandless, *Social Equity: Its Legacy, Its Promise*, 72(S1) PUB. ADMIN. REV. S5, S8 (2012).

⁵⁴⁸ See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, STANDING PANEL ON

cannabis social equity detailed *supra* Section III(B), traditionally, social equity is “a habit of mind for the decision maker, [] it is an administrative goal that can be measured[,] [i]t is also a lens through which needs are identified and processes are grounded.”⁵⁴⁹ In other words, social equity is a “balance between philosophy and praxis”—a rubric for how to identify inequities and devise, evaluate, and iterate policies to address those inequities.⁵⁵⁰ It is not a set of predetermined policies.

This definition of social equity can be built upon to define a theory of cannabis social equity that moves beyond implementation to facilitate the imagination of new cannabis social equity policies and the evaluation of their structural potential to redress current cannabis inequities.

A. *The Modern Theory of Social Equity in Public Administration*

The intellectual development of western social contract theory through the 1950’s focused chiefly on individual liberty, the protection of that liberty by the state, and the tension between the two. H. George Fredrickson, the progenitor of social equity theory in public administration, traces this development back to the discourse between Plato and Aristotle.⁵⁵¹ Plato argued that laws can be applied simply as written, while Aristotle thought that laws require interpretation and equity to avoid injustice.⁵⁵² In this dispute, Fredrickson sides with the Aristotelian interpretation, that administrators must understand the spirit of the laws they implement and “should incorporate the principle of equity, which is a concern for justice that varies appropriately by situation.”⁵⁵³

On the liberty side of the equation, John Locke argued for the existence of natural rights and government’s duty to protect them.⁵⁵⁴ While on the equality side, Thomas Hobbes argued that such government protection simultaneously generated inequality.⁵⁵⁵ Jean-Jacques Rousseau incorporated the Aristotelian tradition and the tension between liberty and equality into social contract theory, stating that “[i]t is precisely because the force of circumstances tends always to destroy equality that the force of

SOCIAL EQUALITY, ISSUE PAPER AND WORK PLAN (Oct. 2000, amend. Nov. 2000).

⁵⁴⁹ Guy & McCandless, *supra* note 547, at S10.

⁵⁵⁰ *Id.*

⁵⁵¹ H. GEORGE FREDRICKSON, SOCIAL EQUITY AND PUBLIC ADMINISTRATION: ORIGINS, DEVELOPMENT, AND APPLICATION 61 (2010) (collecting Fredrickson’s essays on the topic dating back to the 1970s).

⁵⁵² *Id.* at 61-63.

⁵⁵³ *Id.* at 63.

⁵⁵⁴ Guy & McCandless, *supra* note 547, at S6; FREDRICKSON, *supra* note 551, at 88.

⁵⁵⁵ Guy & McCandless, *supra* note 547, at S6; DAVID JOHNSTON, A BRIEF HISTORY OF JUSTICE 104-05 (2011).

legislation must always tend to maintain it.”⁵⁵⁶ This balance found form implicitly in the United States constitution through its procedural and substantive mechanisms for calculating fairness, right, and justice.⁵⁵⁷

Next in the development of social equity theory, public administration scholars point to the early writings of President Woodrow Wilson, who again takes the Aristotelian view, but now explicitly references equity rather than equality as the goal of public servants who should interpret the law with “enlightenment and equity.”⁵⁵⁸ This version of equity, which emphasizes the human factor in governance, was first joined by the word “social,” which inserts group considerations into the otherwise liberal notion of individual equity, in the 1940s and ‘50s.⁵⁵⁹ However, during this time, discussions of social equity only appeared in the scientific management branch of public administration, i.e. how to run an equitable organization, rather than in broader theories of policy implementation.⁵⁶⁰

The various civil rights movements and political turmoil in the 1960s, especially the Civil and Voting Rights Acts, catalyzed governance structures and administrators across the United States to reconsider their practices that contributed, or directly caused, discrimination.⁵⁶¹ This reconsideration first found explicit voice in the work of Fredrickson and a 1968 conference of young activist scholars that took place in Minnowbrook, New York.⁵⁶² At this point, the movement formerly conceptualized social equity as: “Responsiveness, worker and citizen participation in decision-making, social equity, citizen choice, [and] administrative responsibility for program effectiveness.”⁵⁶³ These elements demonstrate the movement’s

⁵⁵⁶ Blue Wooldridge & Susan Gooden, *The Epic of Social Equity: Evolution, Essence, and Emergence*, 31(2) ADMIN. THEORY & PRAC. 222, 231 (2009).

⁵⁵⁷ John Nalbandian, *Nalbandian on the Court and Social Equity*, 49(3) PUB. ADMIN. REV. 293, 294 (1989).

⁵⁵⁸ James H. Svara, *Complementarity of Politics and Administration as a Legitimate Alternative to the Dichotomy Model*, 30(6) ADMIN. & SOC. 676, 688 (1999) (quoting Woodrow Wilson, *The Study of Public Administration*, 2 POL. SCI. Q. 197, 198 (1887)).

⁵⁵⁹ Guy & McCandless, *supra* note 547, at S6.

⁵⁶⁰ *Id.* at S6-S7.

⁵⁶¹ See FREDRICKSON, *supra* note 551, at 76-78; James H. Svara & James R. Brunet, *Filling in the Skeletal Pillar: Addressing Social Equity in Introductory Courses in Public Administration*, 10(2) J. OF PUB. AFFAIRS EDUC. 99, 107 (2004).

⁵⁶² See H. George Fredrickson, *Toward a New Public Administration*, in TOWARD A NEW PUBLIC ADMINISTRATION: THE MINNOWBROOK PERSPECTIVE 309 (Frank Marini, ed. 1971); and Eric Stoken et al., *Fifty Years as the Fourth Pillar of Public Administration: A Policycentric Extension of the Social Equity Framework*, PUB. ADMIN. EARLY VIEW (Oct. 6, 2022), <https://doi-org.eres.library.manoa.hawaii.edu/10.1111/padm.12888>.

⁵⁶³ H. GEORGE FREDRICKSON, *THE NEW PUBLIC ADMINISTRATION* 35 tbl.2 (1977).

growing emphasis on creating and managing *mechanisms* for evaluating inequities to balance liberty and equality in policy implementation.

Social equity in concept continued to mature implicitly and explicitly over the last fifty years in two analogous arenas, law and public administration. In law, Ronald Dworkin implicitly developed a theory of social equity when he wrote against legal positivism, the theory that judges should simply apply the law without external consideration of fairness, justice, and equality (the Platonic model transposed into modern times). Dworkin argued that application of the law is inherently political—incapable of objective, robotic implementation. Judges should decide the hard cases, where the law is not clear, based on their “relatively coherent overall understanding of what principles the legal tradition as a whole embodies. The interpretation is limited by the community’s shared concepts of these principles and by the historical tradition of the community.”⁵⁶⁴ Dworkin’s approach to legal interpretation rests on the discretionary capacity of justice to seek justice in specific cases: “balancing the equities.” In contrast to the legal application of equity, policy implementation of equity is constrained by the necessity of applying rules broadly across populations rather than in specific cases.⁵⁶⁵

In the field of public administration, the theory of social equity developed explicitly from Fredrickson’s initial conception to address this constraint. Finding a muse in John Rawl’s well timed *A Theory of Justice*, first published in 1971, theorists built on Fredrickson’s model to incorporate an element of distributive justice as an answer to the tension between liberty and equality.⁵⁶⁶ Rawl’s conceptualized justice in the relationship between two principles: (1) “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”; which is constrained by (2) “social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged... and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”⁵⁶⁷

These principles setup a dialogic between administrators and social groups impacted by policy implementations that requires administrators to either directly include community participation in decision-making, or in areas too complex for efficient direct inclusion, to themselves approach implementations from the perspective of affected social groups.⁵⁶⁸ When

⁵⁶⁴ FREDRICKSON, *supra* note 551, at 65.

⁵⁶⁵ FREDRICKSON, *supra* note 551, at 65.

⁵⁶⁶ See e.g. David K. Hart, *Social Equity, Justice, and the Equitable Administrator*, 34(1) PUB. ADMIN. REV. 3 (1974).

⁵⁶⁷ JOHN RAWLS, *A THEORY OF JUSTICE* 60 (1971); Hart, *supra* note 566, at 7; Guy & McCandless, *supra* note 547, at S7.

⁵⁶⁸ FREDRICKSON, *supra* note 551, at 69.

evaluating the distribution of goods and services between different groups then, considered from the position of the disadvantaged group, social equity requires that delivery be explicitly deployed on behalf of the less advantaged.⁵⁶⁹ In complex, population level implementations, administrators themselves should “take the role” of disadvantaged groups and devise implementations within the bounds of the law to rectify existing inequalities.⁵⁷⁰

Fredrickson’s compound theory of social equity provides a language to identify competing categories of “equalities”.

First, there are simple individual equalities, meaning one person, one vote, or Kant’s categorical imperative. Second is segmented equality, in which there is equality within segments but not equality between segments. Third, there are block equalities, in which there is equality between groups and subclasses. Fourth, there are domains of equality in which goods, services, or benefits are distributed. Fifth, there are equalities of opportunity, such that there is an equal opportunity for a job if both have the same probability of getting a job and the same means (talent). Finally, there is the value of equality in which only the individual can judge which or what pleases him or her. A rule-based distribution of shares is based on non-neutral judgments about each person’s needs (e.g., more police protection for a person who is threatened in order to make that person equal with someone who is not threatened).⁵⁷¹

Successful public administration through a social equity lens applies these principles to pursue a balance of equalities in the implementation of government policies.

In the twenty-first century, Philip J. Rutledge led the push for NAPA’s inclusion of social equity as one of the four pillars of public administration (along with efficiency, economy, and effectiveness).⁵⁷² NAPA operationalized Fredrickson’s theory of social equity along four dimensions: procedural fairness, access, quality, and outcomes.⁵⁷³ According to NAPA, social equity is a process for identifying and addressing societal imbalances using the following metrics to measure a particular implementation’s success in fulfilling Fredrickson’s principles:

⁵⁶⁹ Hart, *supra* note 566, at 9 (1974).

⁵⁷⁰ FREDRICKSON, *supra* note 551, at 67-73.

⁵⁷¹ Guy & McCandless, *supra* note 547, at S8; and see FREDRICKSON, *supra* note 551, at 67-73.

⁵⁷² Guy & McCandless, *supra* note 547, at S12 n.1.

⁵⁷³ See NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *supra* note 548.

(1) procedural fairness, involving due process, equal protection, and equal rights; (2) access, involving a review to assess access to policies, services, and practices or examine why there may be unequal access; (3) quality, ensuring consistency in existing services; and (4) outcomes, confirming policies and programs have the same impact for every group or individual in a variety of public contexts, including, but not limited to, policing, welfare, and transportation.⁵⁷⁴

These dimensions may be described generally as procedural equity (procedural fairness and access) and substantive equity (quality and outcomes),⁵⁷⁵ with obvious analogy to judicial application of procedural and substantive due process rights when evaluating the constitutionality of a particular statute. There is one major difference. The judicial balancing of individual rights against government interests is explicitly constrained by the relevant standard of scrutiny and past precedent, with the balance weighted towards the protection of individual rights. However, public administration's procedural and substantive equity remain on equal footing with efficiency, economy, and effectiveness, the other pillars of public administration. Political forces relevant to any particular implementation can bring one pillar or another, most frequently efficiency, to the fore.⁵⁷⁶

Routledge also argued for the application of the theory of social equity beyond public administration. In contrast, Walter Benn Michaels advocated for restricting social equity to only address class-based inequality, rather than inequities in other sorts of diversity, to avoid legitimizing non-identity based sources of measurable inequality.⁵⁷⁷ Routledge responded by emphasizing that both inequality and a lack of diversity arise from existing inequities, and citizens must use the tools of public administration, politics, and other disciplines in pursuit of a fair and just world.⁵⁷⁸

B. *Towards a Theory of Cannabis Social Equity*

Per Routledge, applying social equity theory beyond the field of public administration requires a broader explication of the theory.⁵⁷⁹ As

⁵⁷⁴ Hannah et al., *supra* note 379, at 3; James H. Svara & James R. Brunet, *Social Equity Is a Pillar of Public Administration*, 11(3) J. PUB. AFF. EDU. 253, 256-57 (2005).

⁵⁷⁵ Guy & McCandless, *supra* note 547, at S9.

⁵⁷⁶ James L. Regens & Robert W. Rycroft, *Measuring Equity in Regulatory Policy Implementation*, 46(5) PUB. ADMIN. REV. 423 (1986).

⁵⁷⁷ *See generally* WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* (2007).

⁵⁷⁸ *See* FREDRICKSON, *supra* note 551, at 125-132; *and see* Svara, *supra* note 558.

⁵⁷⁹ *See* FREDRICKSON, *supra* note 551, at 129-132.

noted *supra* Section III(B), Alfred Lee Hannah et al. do directly apply the efficiency and equity elements of NAPA's four pillars of public administration to evaluate the success of Pennsylvania's specific cannabis industry equity policy. However, while the public administration version of the theory can be used effectively to evaluate the *implementation* of cannabis social equity policies, alone it lacks the tools to *imagine and evaluate the structural potential* of the policies themselves. This distinction, and thus the required expansion of the theory, are necessary in an arena where both social equity policies and the political and economic structures they are to operate within (i.e. the policies originating the nascent cannabis industry) are created *ex nihilo* and simultaneously.

Accordingly, the public administration theory of social equity must be modified to provide tools for building distributive equity directly into the structure of cannabis laws, even prior to implementation. A proper theory of cannabis social equity requires the addition of a legislative component to the concerns of public administration theory. The theory of cannabis social equity then "evolve[s] from a philosophical (social contract) to a structural (constitutional) [*to a legislative (political)*] to an administrative (social equity) concern."⁵⁸⁰ This amended sequence provides a map to the changes necessary for the public administration theory of social equity to develop into an effective theory for cannabis social equity. Each of the elements of this sequence also correspond directly with the operationalized dimensions of the public administration theory of social equity (procedural fairness, access, quality, and outcomes) which provide practical steps for applying the theory of cannabis social equity.

1. The Philosophical Concern

Beginning with the philosophical concern, "[s]ocial equity is rooted in the idea that each person is equal and has inalienable rights."⁵⁸¹ As noted previously, the principles of equality and individual rights inherently remain in tension, so long as the relevant individual right actually exists. Locke grounded individual equalities in the concept of natural rights before those rights found purchase as the foundation of the U.S. Constitution.⁵⁸² In *Brown v. Board of Education*,⁵⁸³ the U.S. Supreme Court first recognized the illegitimacy of segregating schools by race as a violation of individual rights. Then the Court reified the primacy of individual equalities over racial block equalities to order relief, though limited to the specific context of school desegregation.⁵⁸⁴ Widespread structural applications of the

⁵⁸⁰ Guy & McCandless, *supra* note 547, at S7.

⁵⁸¹ Guy & McCandless, *supra* note 547, at S5.

⁵⁸² FREDRICKSON, *supra* note 551, at 88.

⁵⁸³ *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁵⁸⁴ H. George Fredrickson, *Public Administration and Social Equity*, 50(2) PUB.

Court's expanded recognition of individual rights did not manifest until the various Civil Rights Acts passed in the following decades.⁵⁸⁵ In both situations, a philosophical development recognizing a new right, or reinterpreting a right, necessarily presaged any structural change.

The theory of cannabis social equity requires a similarly novel recognition of an individual right at some level to serve as the initial grounding for the pursuit of equity. However, as individual rights and equality must balance, the scope of the new right determines the scope of achievable equality: Locke's global invention of individual rights balanced with the U.S. Constitution's view of universal equality before the law. The Brown Court's elevation of individual rights above racial categories balanced with specific policies to enforce equality in schools. Thus, the first component in the theory of cannabis social equity requires balancing the nature and scope of a desired equity outcome against the extent of the rights that must be recognized to enable that outcome.

The practical exercise for the philosophical component of the theory derives from NAPA's "access" dimension.⁵⁸⁶ The first step is to identify, measure, and interrogate the scope and nature of an inequality. An important element of this process is direct engagement with affected communities to balance disparities in political participation that might otherwise skew the results in favor of traditionally influential groups.⁵⁸⁷ The second step is to investigate and specify the source and specific mechanisms of the inequality. The final step is to posit some aspect of an individual right that must be protected to reach a desired end state that resolves the inequality. This analytical process provides a structured approach on which to base the development of diverse and original solutions to specific inequities.

2. The Structural Concern

The structural concern is the metaphorically physical substrate for the protection of an individual right—the level of law necessary to protect the desired individual right, whether federal or state, including constitutional amendments, legislation, executive pronouncement, administrative rules, agency decisions, enforcement priorities, judicial

ADMIN. REV. 228, 230 (1990).

⁵⁸⁵ See generally *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> (last visited Dec. 31, 2022).

⁵⁸⁶ Hannah et al., *supra* note 379, at 3; Savara & Brunet, *supra* note 561, at 256-57.

⁵⁸⁷ H. George Fredrickson, *The State of Social Equity in American Public Administration*, NAT. CIVIC. REV. 31, 34 (Winter 2005).

interpretations, or embodied policy. This concern relies on both the legal and equitable understandings of procedural and substantive due process.

Under the legal understanding, the Fifth Amendment of the U.S. Constitution codifies both the procedural and substantive due process protections of individual rights at the federal level.⁵⁸⁸ The Fourteenth Amendment applied these legal protections to the states, along with equal protection of the law, superseding any state legislation that violates those rights.⁵⁸⁹ According to Erwin Chemerinsky:

Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.⁵⁹⁰

Any new protection of an individual right must at least accord, if not take direct root in, these legal frameworks to pass constitutional muster. The more extensive the right to be protected, or the more likely protection of that right might run afoul of procedural or substantive due process protections or of equal protection, the higher the level of law necessary to protect the right. For instance, establishing the existence of voting rights regardless of race or gender required the 14th, 15th, and 19th Amendments to the U.S. Constitution.⁵⁹¹ While protection of an aspect of those individual rights, i.e. freedom from arbitrary literacy tests for voter registration, only needed to build on these amendments through federal legislation via the Voting Rights Act of 1965.⁵⁹² Protecting the individual rights of those in specific localities from instances of election abuse merely required delegation of prosecutorial discretion to local federal law enforcement organs to achieve the desired results.⁵⁹³

The equitable understanding of due process extends beyond the legal understanding. The legal due process clause applies reactively to

⁵⁸⁸ Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501-02 (1999); U.S. CONST. amend. V.

⁵⁸⁹ Chemerinsky, *supra* note 588, at 1530 & n.179; U.S. CONST. amend. XIV.

⁵⁹⁰ Chemerinsky, *supra* note 588, at 1501.

⁵⁹¹ See U.S. CONST. amends. XIV, XV, XIX; and see generally *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, *supra* note 585.

⁵⁹² See *FEDERAL PROSECUTION OF ELECTION OFFENSES 5* (Richard C. Pilger et al, eds., 2017).

⁵⁹³ See *Id.* at 8-9, 197-201.

address whether a particular policy's protection abridged another individual's right to not be deprived of due process in the implementation of the law, but this application only establishes a baseline requirement for due process. Procedural fairness steps beyond that baseline to include affirmative processes to balance equal protection and equal rights—facilitating both equality of opportunity and equality of outcome in the pursuit of equality. The necessity of including these affirmative processes may modify the level of law required to survive constitutional challenge.

For example, a sequence of executive orders by Presidents Franklin D. Roosevelt,⁵⁹⁴ John F. Kennedy,⁵⁹⁵ and Lyndon B. Johnson⁵⁹⁶ both complied with legal due process by prohibiting discrimination in federal contractor hiring practices (Fredrickson's equality of opportunity) and constitutionally implemented affirmative equitable due process by requiring federal contractors to proportionally increase their employment of women and minorities (Fredrickson's equality of outcome).⁵⁹⁷ In contrast, attempts at the local state university level to directly implement equitable due process using racial quotas as an affirmative procedure for achieving the same sort of proportional representation of minorities did not comply with equal protection.⁵⁹⁸

Both the level of law and the type of equitable due process provided vary between these situations, and modifications to either could change the results. For instance, Congress successfully, and constitutionally, authorized voluntary implementation of racial quotas in private hiring practices under Title VII of the Civil Rights Act of 1964,⁵⁹⁹ and state universities may now constitutionally adopt race as a non-exclusive criterion for admission in pursuit of proportional representation.⁶⁰⁰ Thus, the second component in the theory of cannabis social equity requires balancing the structure of any affirmative processes proposed to protect an individual right with the level of law required to constitutionally implement those processes in pursuit of equity.

The practical exercise for this component of the theory of cannabis social equity derives from NAPA's dimension of "procedural fairness."⁶⁰¹

⁵⁹⁴ Exec. Order No. 8,802, 3 C.F.R. 957 (1938–1943).

⁵⁹⁵ Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963).

⁵⁹⁶ Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

⁵⁹⁷ See *Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); and see MICHAEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL & CONSTITUTIONAL INQUIRY* 163-216, 283-336 (1991).

⁵⁹⁸ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁵⁹⁹ *United Steelworkers v. Weber*, 443 U.S. 193 (1979); and see Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (1976).

⁶⁰⁰ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁶⁰¹ Hannah et al., *supra* note 379, at 3; Svava & Brunet, *supra* note 574, at 256-

The first step, based on the nature of the individual right to be protected and the desired end state necessary to resolve the chosen inequality, is to explore historic approaches to the protection of similar rights and the resolution of similar inequalities.

The second step is to imagine procedures and approaches to promote both the equality of opportunity and the equality of outcome necessary to achieve the goal. This dual focus broadens the topography of potential policy solutions, opening space to approach the inequality from both the bottom up and the top down, from both procedural and substantive angles. This step provides space to “think outside the box” and produce new ideas or combinations of ideas for methods to resolve the inequity. Including relevant stakeholders from affected populations, the public at large, and various levels of government further contributes to the generation of novel approaches.

The third step is to evaluate each idea through the lens of procedural fairness—adding, amending, or discarding elements so that the proposed policies comport with the legal and equitable requirements of due process, equal protection, and equal rights. This may lead to additional policy ideas. The final step is to identify the appropriate level(s) of law necessary to protect the desired individual right and implement the proposed policies. This component of the theory of cannabis social equity provides early opportunities to analyze and resolve tensions between the individual right to be protected and the equality sought. It serves as a catalyst for continual policy evolution.

3. The Legislative Concern

As chronicled above, the development of public administration social equity theory proceeded directly from a philosophical concern establishing the existence of a right, to a structural concern enshrining that right, to an administrative concern diagnosing and remedying unequal applications and outcomes in the protection of that right. However, a sequencing issue manifests when applying this public administration theory of social equity to the cannabis industry because the original theory is fundamentally an *administrative* theory, while the cannabis industry has itself yet to be *legislatively* established.

In the traditional theory, administration of legislation implementing a structurally protected right contributes to inequalities that, once recognized, administrative social equity actions can remedy. Thus, administrative theories are fundamentally reactive and incapable of originating legislation in the first place. Even the modern theory of administrative social equity, which treats administration and politics as complementary and encourages political cooperation between

administrators and politicians, recognizes that administration yet remains subordinate to political supremacy.⁶⁰²

The struggles to implement the Fourteenth and Fifteenth Amendments leading up to the various Civil Rights Acts of the mid-twentieth century illustrate this sequencing issue. After adopting the Fourteenth and Fifteenth Amendments to provide equal protection and voting rights in the 1800s, Congress passed the Civil Rights Act of 1875 to implement the Amendments by guaranteeing all citizens, regardless of color, equal access to accommodations, theatres, public schools, churches, and cemeteries.⁶⁰³ The Supreme Court quickly struck down this legislation in the consolidated Civil Rights Cases,⁶⁰⁴ holding that the federal government could not regulate private actions and situating the judicial branch as the (un)enforcement⁶⁰⁵ mechanism of the Amendments, rather than a legislative or administrative apparatus, until the passage of the Civil Rights Act of 1957.⁶⁰⁶ Without animating legislation, there was no public administration to implement the Fourteenth and Fifteenth Amendments until the mid-twentieth century. Accordingly, the field of public administration had very little to say on the matter of social equity until discrepancies between the intended and actual results of administrative implementation of the animating legislation began to manifest.

A useful theory of cannabis social equity then requires an additional element between structural protection and administrative social equity: the political development and deployment of legislation and other policies directing the contours and administration of a legal cannabis industry through a social equity lens to address preexisting cannabis inequities. This dynamic provides a unique opportunity to integrate distributive, restorative, social, and economic justice initiatives directly into legislation at the inception of the cannabis industry—an activity strictly outside the scope of the administrative theory of social equity that the cannabis social equity literature to date has implicitly adopted as shown *supra* Section III.

The legislation that originated the first spate of medical and adult-use cannabis legalization regimes generally operated at a secular level without explicit policy attention directed at redressing existing cannabis inequities. The inequitable effects of these original policies in perpetuating

⁶⁰² Svava, *supra* note 558, at 678.

⁶⁰³ Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

⁶⁰⁴ The Civil Rights Cases, 109 U.S. 3 (1883).

⁶⁰⁵ Compare The Civil Rights Cases, 109 U.S. 3 (1883) (no regulation of private action to enforce equal access to public schools) with *Brown v. Board of Education*, 347 U.S. 483 (1954) (mandating desegregation of public schools).

⁶⁰⁶ Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18(4) W. POL. Q. 763, 774 (1965); and see Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified as amended in scattered sections of 28 and 42 U.S.C.).

inequalities inspired the current, ineffective cannabis social equity approaches, criticized *supra* Section IV, which focus solely on improving preexisting programs. Administration of the few state-level legislative protections of cannabis social equity that do exist have not yet reified existing inequities to any significant extent. So, integrating social equity policies directly into cannabis legislation carries the potential to resolve existing inequities, and, if carefully constructed, obviate the need for extensive application of administrative social equity theories to address implementation inequities later.

This is especially true because current cannabis inequities resulted inversely from the explicit *illegality* of the subject. The numerous cannabis inequities demonstrated *supra* Section II did not result from improper implementation or administration of legislation. So, cannabis social equity proposals (industry equity, criminal justice equity, community equity, and access equity) which target inequities resulting from the few current legislative protections of cannabis use fail by several orders of magnitude to address the preexisting inequities from decades of criminal cannabis enforcement. A theory of cannabis social equity then must include the legislative component, addressing current cannabis inequities directly through both structural legality and direct legislative remediation prior to shifting any great attention to inequities resulting from the administration of the new legality. An ounce of prevention is worth a pound of cure.

Operationally, this component of the theory of cannabis social equity corresponds to NAPA's social equity dimension of "quality."⁶⁰⁷ Described as "ensuring consistency" this component builds on the previous two to concretize the details of cannabis policy and the political necessities of its enactment. In practical implementation, the first step is to recognize that social inequities not only emerge from implementation, but also from legislation and preexisting realities. Thus, effective solutions require the coordination of structural protections, legislative policies, and administrative implementation across federal, state, and local governments. It is important to identify areas where policies might lead to inconsistent results or exacerbate inequities and address them at the outset.

The second step is to build coalitions between executive branches, legislators, administrators, and advocates to develop legislation that emerges from the stakeholders' combined expertise, viewed through a social equity lens, because the legislative addition to the theory of cannabis social equity necessitates political engagement rather than administrative self-regulation.

The third step is to develop public and political messaging that centers the inequity at issue and demonstrates the advantages of consistent approaches and adoption by every level of government. It is important to

⁶⁰⁷ Hannah et al., *supra* note 379, at 3; Svava & Brunet, *supra* note 574, at 256-57.

provide legislators political cover and motivation to address inequities directly through legislation rather than leaving it wholly to the administrative apparatus. A vital corollary goes to the issue of funding because covering the cost of new programs, especially redistributive programs, can be politically fraught. Policies consistent with the theory of cannabis social equity in particular will frequently require substantial outlays to address preexisting inequities, let alone fund the administration of a new industry. As funding government programs is a legislative rather than administrative concern, proposed policies at the legislative level should include politically tenable funding arrangements to support effective implementation.

The legislative component of the theory of cannabis social equity diverges the most from the current approaches to cannabis social equity that emerged from the traditional administrative theory. Rather than appealing to legislation to address implementation inequities, the original legislation should be formulated for consistent application to avoid creating inequities in the first place, or at least contain self-correcting mechanisms to address unforeseen outcomes.

4. The Administrative Concern

The administrative component of the theory of cannabis social equity need simply integrate the traditional administrative theory of social equity as developed since the 1950s and detailed *supra* Section V(A). That is, it should serve as a rubric to identify inequities resulting from program implementation and to devise, evaluate, and iterate policies to address those inequities at the administrative level. Note however, that even at the administrative level, the theory departs from the current version of cannabis social equity which defines social equity as a *policy* rather than a *process* as described *supra* Section III. Understanding the theory of cannabis social equity as a *process* will prevent the petrification of cannabis policy options and provide solutions to the current criticisms of cannabis social equity.

Operationally, this component corresponds to NAPA's social equity dimension of "outcomes," which involves program administrators, overseeing legislative bodies, and interested third parties "confirming policies and programs have the same impact for every group or individual in a variety of public contexts" and evolving implementations to resolve inequities created by the programs themselves. For the practical exercise of this component of the theory of cannabis social equity, the first step is to identify and measure the impact of programs on the inequities they were designed to address, and any other inequities exacerbated by administration of those programs, including inequities of access, quality, consistency, outcome, and provision of services. The second step is to design and implement administrative solutions within the bounds of authorizing legislation to address target inequities. The final step, if the administrative solutions remain insufficient, is to work with administrators, politicians,

advocates, and affected populations to adjust the legislative, and possibly structural, impetus for the inequity.

To reiterate, in contrast to exclusively policy-based definitions of social equity, the administrative component of the cannabis theory of social equity is a process by which to propose, evaluate, implement, and iterate the administration of cannabis policies. In isolation, administrative solutions are definitionally incapable of providing workable solutions to pre-existing cannabis inequities at scale.

* * * *

The public administration theory of social equity originated as a process to mediate the internal conflict between equality and liberty that animates the history of western political thought. Now, the theory of cannabis social equity as developed *supra* includes a concrete set of considerations and approaches to effective policy development for the identification and affirmative rectification of cannabis inequities, especially those resulting from government's infringements on individual liberty. The theory of cannabis social equity is not a set of policies, it is a theory for developing and implementing approaches to existing and future inequities guided by the beacons of fairness, right, and justice.

Stated concisely, a proposal that complies with the new theory of cannabis social equity will recognize some new aspect of an individual right (typically in conjunction with the recognition of a corresponding inequity), structurally acknowledge or enshrine that right, enact legislative policies to protect that right, and administrate those policies to effectively reduce the targeted inequity. This theory can be used in the pursuit of social equity to evaluate the merit of both specific cannabis policies and general approaches to cannabis legalization.

VI. EXPLORING APPLICATIONS OF THE THEORY OF CANNABIS SOCIAL EQUITY

The potential solution set to the cannabis inequities described *supra* Section II(B) is extensive. Investigating, implementing, and iterating these solutions across the states and at the federal level to address current cannabis inequities will take years. Careful application of the theory of cannabis social equity will potentially reduce the error rate, expense, and human cost of those experiments. Two examples suffice to demonstrate how the theory can effectively diagnose the reasons for current policies' unsuccessful attempts to address cannabis inequities and how the theory provides a foundation for the imagination of new solutions.

A. *The Theory of Cannabis Social Equity and the Failure of Industry Equity Policies*

As demonstrated *supra* Section III, industry equity, the most common current approach to cannabis social equity, involves the use of administrative policies to increase the proportion of minority cannabis

business owners. Calls for these policies emerged as state cannabis programs matured and manifested a lack of diversity in cannabis business ownership. Proponents justify these policies as direct recompense to affected communities for the War on Drugs' inequitable impacts on minority populations. Structural constraints on the attempts to implement these programs include licensing process limitations, market dynamics, and natural industry dynamics as discussed *supra* Section IV(A). Applying the theory of cannabis social equity provides insight into *why* these policies have yet to achieve their stated objectives of proportional minority business ownership and remediation of the consequences of the War on Drugs in minority communities.

Philosophically, the pursuit of proportional minority business ownership relies on an appeal to fairness rather than to right or justice. Minority communities suffered economically, so it is fair that they now benefit economically. On the surface, this also appears to be an appeal to justice, but this appearance is belied by the categorical difference between the community-wide economic impacts of the War on Drugs and the individual economic benefits of these policies for the few licensed minority business owners. Business ownership policies also make no claim that minority business owners have a right to cannabis business ownership, only that the equitable outcome of proportional business ownership would offset the economic inequity of the War on Drugs. Direct modifications to the current illegality of cannabis, i.e. protection of individual rights to engage with cannabis commercially, are also not a precondition of these policies, merely targeted state and federal exemptions from enforcement. In the end, these policies rely on the established concept of equal protection, and an analogy to affirmative action policies (treating business ownership proportionality in the same way as minority employee proportionality), as the justifications for the proposed end state of proportional business ownership.⁶⁰⁸

Structurally, since business ownership policies rely on existing rights, rather than challenging an aspect of the current illegality of cannabis, they ostensibly require no additional structural protections. As noted *supra* Sections II(B)(5) & IV(A) however, these policies misplace their reliance. It is true that courts have held that some equal protection rights do apply to cannabis employees, like the protections from discrimination, harassment, and retaliation granted by Title VII of the Civil Rights Act of 1964.⁶⁰⁹

⁶⁰⁸ MCBA REPORT, *supra* note 9, at 32.

⁶⁰⁹ *Federal Discrimination Statutes and the Cannabis Industry: An Illegal Industry Still Subject to Federal Laws*, MCGLINCHY.COM (Aug. 18, 2022), <https://www.mcglinchey.com/insights/federal-discrimination-statutes-and-the-cannabis-industry-an-illegal-industry-still-subject-to-federal-laws/>; and see e.g. *Aichele v. Blue Elephant Holdings, LLC*, 3:16-cv-02204-BR, 292 F. Supp. 3d 1104 (D. Or. Nov. 13, 2017) (protecting cannabis employees from sexual harassment and retaliation under federal law) and *EEOC v. AMMA Investment Group, LLC*, Case No. 1:30cv2786 (D. Md. Sept. 24,

However, in Ohio, courts struck down business ownership policies that rely on racial criteria to determine eligibility.⁶¹⁰ And federal courts in Maine struck down residency requirements, implemented to create proportionality in business ownership, for violating the Dormant Commerce Clause.⁶¹¹ While some organizations propose language to survive these legal challenges, courts have yet to affirm a legal use of racial criteria to determine business ownership.⁶¹² Even should a policy survive the relevant strict scrutiny analysis, the required narrowly tailored language would inherently have more limitations than current programs—programs which already struggle to promote proportional minority business ownership, let alone provide relief for the greater economic inequities of the War on Drugs.

Legislatively, even assuming that courts permit state legislation to use racial criteria to create proportional minority cannabis business ownership, current legislative construction of these programs will continue to encounter difficulties due to the limited nature of their licensing schemes, complications from artificial market dynamics, and challenging natural industry dynamics, as discussed *supra* Section IV(A). Further, because these programs are not based on a wider assertion and structural protection of a new aspect of individual rights—they do not challenge the illegality of cannabis, they merely provide exemptions—the ensuing market will only ever address inequity to the literal extent authorized. For example, in Florida, legislation extends protection to exactly one black-owned cannabis farm,⁶¹³ and in Arizona, legislation extends protection to no more than twenty-six minority-owned cannabis businesses out of *fifteen hundred* completed minority-owner applications.⁶¹⁴ Meanwhile, Oklahoma, which instituted a purely processed based licensing program with low license fees, no license caps (initially) and no mention of minority business ownership,

2020) (protecting cannabis employees from sex-based discrimination).

⁶¹⁰ *PharmaCann Ohio, LLC v. Ohio Dep't of Commerce*, No. 17-CV-10962 (Ohio Ct. Com. Pl. Aug. 24, 2018).

⁶¹¹ *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 2022 U.S. App. LEXIS 22848 (1st Cir. Aug. 17, 2022).

⁶¹² See e.g. NULEAF PROJECT, RACE SPECIFIC LANGUAGE TO BENEFIT AFRICAN AMERICAN, LATINX, AND NATIVE AMERICAN COMMUNITIES IN CANNABIS EQUITY LEGISLATION (2021), <https://nuproject.org/wp-content/uploads/2021/09/Guide-to-Using-Race-Specific-Language-in-Cannabis-Social-Equity-Legislation.pdf>.

⁶¹³ Dara Kam, *A Black Farmer's Death Spurs a Dispute Over the 'Pigford' Marijuana License*, WUSF PUBLIC MEDIA (Nov. 25, 2022), <https://wusfnews.wusf.usf.edu/politics-issues/2022-11-25/a-black-farmers-death-spurs-a-dispute-over-the-pigford-marijuana-license>.

⁶¹⁴ *Adult Use Marijuana Program: Submitted Social Equity Applications*, ARIZONA DEPARTMENT OF HEALTH AND HUMAN SERVICES (Dec. 15, 2021), <https://www.azdhs.gov/documents/licensing/medical-marijuana/social-equity-applications.pdf>.

produced one of the most diverse sets of cannabis business owners in the country.^{615 616}

Administratively, *supra* Sections I, II(B), III, & IV(A), it is uncontroversial to say that no advocate, business owner, cannabis regulator, state legislator, or local community member argues that current policies to encourage proportional minority cannabis business ownership have effectively accomplished that goal.

In sum, cannabis industry equity policies demonstrably fail to satisfy each of the components of the theory of cannabis social equity. This explains *why* current and proposed cannabis industry equity policies will not succeed in their goal to produce proportional minority ownership of cannabis businesses and will not substantially contribute to remediating the harms of the War on Drugs.

As shown *supra* Section II(B), the inequities resulting from the War on Drugs are many and varied, and, *supra* Section (IV), current approaches have yet to make meaningful progress in rectifying those inequities. As the preceding analysis of cannabis industry equity policies shows, it is not enough to identify an administrative inequity and address it at that level to take a successful step in pursuit of social equity. Rectifying preexisting inequities requires application of the theory of cannabis social equity to: (1) identify an aspect of individual rights whose protection will address the inequities, (2) design structural protections of that right, and (3) develop the resulting scope of legislative implementation necessary to protect that right so as to address the preexisting inequities. The same applies to both current approaches to social justice equity, community equity, and access equity, and to the many new proposals, *infra* Section VII, for future ways to address specific inequities. Without the first three components of the theory of cannabis social equity, successful administrative implementation is out of reach.

B. *Applying the Theory of Cannabis Social Equity to the General Illegality of Cannabis: Legitimization, Legalization, Liberalization, and Leadership*

At a larger scale, applying the theory of cannabis social equity to cannabis illegality generally, the War on Drugs, and the totality of resulting inequities provides a roadmap for cannabis legalization through the lens of social equity: Legitimization, Legalization, Liberalization, and Leadership.

⁶¹⁵ Matthew J. McCarthy, *Notes on Social Equity from a Former Cannabis Regulator*, DUANEMORRIS.COM (Jul. 11, 2022), https://www.duanemorris.com/articles/notes_on_social_equity_former_cannabis_regulator_0711.html.

⁶¹⁶ Note that Oklahoma's program has encountered economic difficulties from the natural industry dynamics discussed *supra* Section IV(A)(II)(C).

Philosophically, cannabis social equity requires legitimization. The *a priori* question when addressing cannabis illegality generally is the level of legality, or the level of protection of some individual right, necessary to prevent future inequity and rectify past inequities. Here, reducing this question to a simple matter of current, or even expanded procedural or substantive due process rights or equal protection, whether of race, gender, or other classification, ignores the breadth of inequity generated by the War on Drugs. *Supra* Section II(B), the War on Drugs created social justice, industry, community, and access inequities that continue to adversely affect minorities, Native Americans, Native Hawaiians, health, stigmatization, business, research, the environment, sex and gender dynamics, hemp farming, and the international community. While analysis of the history of civil rights protections in the United States proved fruitful, *supra* Section V(B), for expanding the administrative theory of social equity, that same history, as shown *supra* Section VI(A), does not provide a useful analogy on which to base any *application* of the theory of cannabis social equity. Similarly, President Biden's recent pardon of federal simple possession offenses does reference social inequities as motivation, but it also provides no basis in right for the pardon beyond the fact that the inequities exist.⁶¹⁷ A more general protection is required.

The history of alcohol prohibition provides some guidance. From a practical rather than social equity perspective, scholars and advocates have long analogized cannabis prohibition, legalization, and regulation to the prohibition, legalization, and regulation of alcohol.⁶¹⁸ In the recent wave of legalizations, Colorado, Washington, Illinois, and Nevada, among others, explicitly organized their cannabis regulation along the lines of their alcohol regulations.⁶¹⁹ Since the 1970s, advocates have argued that the common origins of the prohibition of both cannabis and alcohol, lesser health dangers of cannabis, and ease of public education to remediate harms justifies similar legality levels for cannabis and alcohol.⁶²⁰ Others counter that alcohol regulations failed to protect the public from the detrimental health effects of alcohol and will do the same for cannabis,⁶²¹ or that the analogy between cannabis and alcohol is really an inapplicable metaphor that centers

⁶¹⁷ Proclamation No. 2022-22262, 87 Fed. Reg. 61441 (Oct. 12, 2022).

⁶¹⁸ See e.g. Goode, *supra* note 52, at 71; Judge Gray, *supra* note 125, at 23, 231-34; ACLU Report, *supra* note 112.

⁶¹⁹ CAULKINS ET AL., *supra* note 422, at 52-53; William J. McNichol Jr., *Toward a Rational Policy for Dealing with Marijuana Impairment: Moving beyond "He Looked Buzzed to Me, Your Honor"*, 45 S. ILL. U. L.J. 1, 2 (2020); and see e.g. Co. Const. art. XVIII, §16, 2013; Wa. Initiative 502 §1, 2011; 410 Ill. Comp. Stat. 705/1-1 (2020); and Nev. Rev. Stat. 453D.020 (3).

⁶²⁰ See Bonnie & Whitebread II, *supra* note 28 (1970); GOODE, *supra* note 52, at 71 (1970); Patton, *supra* note 22, at 8 (2020); ACLU REPORT, *supra* note 112 (2020).

⁶²¹ Orenstein, *supra* note 1, at 85.

alcohol and its health effects in the conversation, rather than the unique particulars of cannabis regulation.⁶²²

Whatever the merits of the practical reasons for analogizing the regulation of alcohol and cannabis, few discuss whether there are any social equity aspects to the end of alcohol prohibition that provide a foundation for the inclusion of similar social equity aspects in cannabis legalization. Deborah M. Ahrens' survey of post-prohibition state legislation does show that state legislatures considered pardons or limiting past convictions for alcohol prohibition offenses, but that no such legislation ever passed and only a couple of individuals received an individual pardon.⁶²³ Ahrens attributes this failure to consider retroactive equity to the lesser stigma of alcohol offenses, continued state illegality of alcohol, and the frequency of dependent non-liquor offenses—i.e. unlike cannabis prohibition, any inequity that resulted from alcohol prohibition was insufficient to merit legislative attention.⁶²⁴

More relevant yet to ascertaining some element of right to serve as the basis for cannabis legalization, Judge James P. Gray argues that the ending of prohibition reinforced the primacy of state power over their citizens, limiting the federal government to regulating only the importation of alcohol when in violation of state laws.⁶²⁵ This methodology is mirrored in the 2014 Rohrabacher-Farr Amendment, as regularly renewed by Congress, which defunds federal enforcement of cannabis activities unless those activities also violate state law.⁶²⁶ Judge Gray's proposal would have the courts, rather than a precarious spending rider, apply the same methodology explicitly to cannabis regulation. However, Judge Gray did not anticipate that the Supreme Court's decision in *Gonzalez v. Raich* would enshrine the opposite approach to cannabis regulation, asserting Congress' power to criminalize individual possession of cannabis under Article I's interstate commerce power.⁶²⁷ Responding to the usurpation of state rights to regulate their citizens could serve as the basis for cannabis legalization, but it does not directly provide a basis for addressing inequitable effects of cannabis illegality on individuals and communities.

Gonzalez v. Raich however explicitly left open the door for a due process argument to balance the protection of individual rights against the

⁶²² MARION & HILL, *supra* note 56, at 155-56.

⁶²³ Ahrens, *supra* note 302, at 412-13, & n.164.

⁶²⁴ *Id.*

⁶²⁵ JUDGE GRAY, *supra* note 125, at 233-34.

⁶²⁶ The amendment has been renewed ever since under various sponsoring names. See Patton, *supra* note 22, at 28-29.

⁶²⁷ See *Gonzalez v. Raich*, 545 U.S. 1 (2005).

federal government's expanding commerce clause powers.⁶²⁸ Two cases, which remain good law, successfully challenged state alcohol prohibitions on individual rights grounds in the 1800s.⁶²⁹ The first, in what may also be the first case to introduce the idea of substantive due process,⁶³⁰ held that criminalizing the sale of alcoholic beverages constituted a deprivation of property without due process of law. The New York court held:

When a law annihilates the value of property [right to sell alcoholic beverages], and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.⁶³¹

The court further applied the compensation requirements of the due process clause to the deprivation of the right to sell alcoholic beverages, holding: "It is nowhere declared that, in the exercise of the admitted functions of government, private property may not receive remote and consequent injury without compensation."⁶³²

An Indiana court struck down a similar statute based on the theory that natural rights protected from state usurpation individual property, including the right to use and sell beer, without just compensation.⁶³³ The court reserved to itself the power to ascertain whether beer was necessarily hurtful and, if not, that the legislature's prohibition of the consumption and sale of beer as necessarily hurtful violated an individual's natural rights to private property.⁶³⁴ According to one commentator, the court ruled that the prohibition of the sale of beer "constituted an infringement of the inalienable right of life, liberty and the pursuit of happiness rooted in the precepts of natural justice that the people reserved to themselves when they entered into the social compact."⁶³⁵

These alcohol prohibition cases provide a sound basis, grounded in due process protections and natural rights, for the existence of an individual right to engage in the cannabis industry personally and commercially, and,

⁶²⁸ *Id.* at 33.

⁶²⁹ *Bonnie & Whitebread II*, *supra* note 28, at 992-93 & n.95.

⁶³⁰ *Id.*

⁶³¹ *Wynehamer v. People*, 13 N.Y. 378, 398 (1856).

⁶³² *Id.* at 401.

⁶³³ *See generally* *Beebe v. State*, 6 Ind. 501 (1855).

⁶³⁴ *Id.* at 519-20.

⁶³⁵ *Bonnie & Whitebread II*, *supra* note 28, at 992-93 (paraphrasing *Beebe v. State*, 6 Ind. 501, 510 (1855)).

more importantly, provide a foundation for government compensation as the remedy for the inequities resulting from the deprivation of that right.

Structurally, cannabis social equity requires legalization. The right to engage in the cannabis industry personally and commercially already exists in the due process clause, under natural rights, and in analogous court cases described *supra*. This is legally sufficient to form the basis for enacting implementing legislation. However, explicit judicial or agency acknowledgment of this right in the context of cannabis regulation is likely a prerequisite, just as the 21st Amendment was needed to explicitly take alcohol prohibition out of the federal government's hands. Such acknowledgement would provide sufficient structural protections to undergird a call for legislation to provide retroactive compensation for the inequities caused by the abridgement of the right to possess and sell cannabis by the War on Drugs.

Legislatively, cannabis social equity requires liberalization. On the structural basis above, the question of "how legal should cannabis be?" becomes a moot point—it will be legal, it is just a matter of how each state intends to regulate that legality. There are grounds to advocate for legislation as broad as complete legalization (or inversely, no regulations) and full funding for retroactive compensation programs that address every identifiable social justice, industry, community, and access inequity. At the same time, any lesser level of protection or remediation of social equity that is not an outright ban could also be justified as an appropriate regulation. So, the theory of cannabis social equity should be applied to each proposed regulation and each policy to address cannabis inequities to ensure continued forward progress towards an equitable future. This cannabis theory of social equity provides a set of tools to highlight and criticize deficiencies in current, heavily regulated approaches to cannabis legislation. Application of the theory of cannabis social equity to social justice equity, industry equity, community equity, and access equity policies will likely evidence a bias towards regulatory liberalization that takes advantage of market forces and the new equality of opportunity to form a substrate on which policies of equal outcome can work effectively to remedy ongoing social inequities.

Administratively, cannabis social equity requires leadership. Administrators, agency workers, judicial employees, advocates, community leaders, volunteer services, and others who care for those adversely affected by the War on Drugs must actively monitor and iterate the implementation of the legal cannabis industry.

In sum, applying the theory of cannabis social equity to the general case of cannabis illegality demonstrates one of the broadest paths towards rectifying the significant adverse impacts of the War on Drugs while fostering an equitable industry into the future: Legitimization, Legalization, Liberalization, and Leadership. Much work remains to be done in the interim to evaluate and iterate current state programs in the pursuit of equity.

VII. CONCLUSION

The cannabis social equity movement identified real, existing inequities resulting from the War on Drugs and many proposed policies contain the potential to positively impact those inequities. However, many of the policies for which there is the greatest consensus demonstrate poor track records. Additionally, the policies that attract the most public and advocacy attention often require the most administrative resources and are inherently limited in the amount of inequity they can actually redress given the disparities in scale between the proposal and the inequities of the War on Drugs.

This paper contributes to the investigation and remediation of inequities resulting directly and indirectly from the United States' War on Drugs by integrating the theories of social equity developed in the fields of public administration, philosophy, and law into a framework for imagining, implementing, and refining cannabis social equity policies. A brief history of cannabis policy showed the history of cannabis regulation and the ongoing and enormous scale of the inequities that the War on Drugs continues to perpetuate. A historiography of the popular theories of cannabis social equity clarified the language and definition of social equity as currently used across the popular and academic literature. A detailed review of the current inadequacies of social justice equity, industry equity, community equity, and access equity policies at improving social equity outcomes highlighted the need for a more robust approach to the development and deployment of cannabis social equity policies. An analysis of public administration social equity theory incorporated recent historical and legal developments to produce a new theory of cannabis social equity. Finally, the new theory of cannabis social equity explained why current industry equity theories suffer in implementation and generated new ideas for future paths towards legalization and the realization of social equity.

Evaluating the programs currently in process across the industry, using the theory of cannabis social equity, will provide insights into improvements and methods for addressing the implementation difficulties discussed *supra* Section IV. Additionally, many current, but unimplemented proposals would benefit from further application of the theory of cannabis social equity, including: (1) the impact of top-down vs. bottom-up market-oriented solutions on both social equity and market outcomes;⁶³⁶ (2) direct state control of the industry;⁶³⁷ (3) sliding scale business licensing schemes (with licensing fees growing linearly or accelerating with business size) with various levels of license costs vs. operation size and its impact on

⁶³⁶ HALYDIER, *supra* note 497, at 8-15.

⁶³⁷ See generally Kilmer & Neel, *supra* note 340; Rychert & Wilkins, *supra* note 357, at 72-73.

industry make-up;⁶³⁸ (4) business licensing with low barriers to entry and low numbers of licenses vs. high barriers to entry and no license caps vs. high barriers to entry and low license caps with support of equity applicants; (5) enhanced requirements for equity ownership verification and limits on equity license reselling; (6) civil asset forfeiture reform; and (6) community building of entrepreneurs,⁶³⁹ to name but a few.

The new theory of cannabis social equity opens the door to new solutions for the realization of cannabis social equity. Advocates can apply the theory to specific inequities to generate new policy ideas. Legislators can use the theory to evaluate proposals for their likely effectiveness at moving the needle on existing inequities. Administrators can employ the theory to diagnose the elements of legislation or implementation that fail to promote social equity as billed before pursuing new solutions. All can make new progress each day towards remediating the ongoing harms of the War on Drugs in pursuit of fairness, right, justice, and equity for those in need.

⁶³⁸ GARRETT I. HALYDIER, MARKET STRUCTURE WORKING GROUP REPORT, MARKET STRUCTURE WORKING GROUP OF THE DUAL USE OF CANNABIS TASK FORCE, STATE OF HAWAII (2022).

⁶³⁹ Rajni Goel, *Do Women Fare Better in Female-Owned Businesses?*, 19(3) J. OF DEVELOPMENTAL ENTREPRENEURSHIP 1450017-1, 1450017-16-17(2014), <https://www.worldscientific.com/doi/10.1142/S1084946714500174>.