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West Egg Versus East Egg: The Superficial Distinctions and Double Standards of Cannabis Use

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On April 1, 2022, celebrity influencer Kourtney Kardashian hosted a weekend event—Camp Poosh—promoting the third birthday of her lifestyle and wellness brand, “Poosh.” The event took place at a luxurious estate located in Palm Desert, California and invoked an elevated summer camp vibe. Kardashian treated her guests of Instagram influencers, models, and fellow socialites to a bevy of merchandise from brands like Clarins, slip, Paul Mitchell, and even Samsung Galaxy cellphones.

But what is a summer camp without fun activities? Kardashian spared no expense in providing her guests with an array of experiences including facials, archery, painting, tattoos, piercings, and . . . “bubbles and blunts.”¹ The Drew Martin Company, a California dispensary, supplied and rolled the blunts.² The company’s website features its founder, Drew Martin, and dives into his credentials as “an herbalist, James-Beard award-winning mixologist, and wanderer” who blends cannabis with “worldly botanicals” and “complex aromas and flavors.”³ Drew Martin provided the Camp Poosh guests with various curated strands of weed and perfectly-rolled joints using pastel-colored rolling papers: a modern day wine tasting, but with weed.

Cut to Bernard Noble, a 49-year-old black man and father of seven who was arrested in 2010 and sentenced to 13 years and four months of prison without parole for possessing 2.8 grams of weed, which is approximately enough to roll two joints.⁴ Noble was released when he was almost 60 years old.⁵ Not only did he have a record that would impact every area of his life

¹ Poosh (@Poosh), INSTAGRAM (Apr. 1, 2022).

² *Id.*

³ Meet Drew Martin, DREW MARTIN CO., <https://drewmartin.co/our-story> (last accessed Apr. 3, 2022).

⁴ GRASS IS GREENER (Netflix 2019).

⁵ *Id.*

including housing and employment, but he lost contact with his kids and missed out on his daughters' childhoods while incarcerated.⁶

This paper discusses the history of cannabis regulation in the United States and examines the racial and economic stereotypes and biases that have influenced and shaped cannabis policy in this country. Part I discusses the introduction of recreational cannabis from Mexico and how the U.S. government created a correlation between cannabis use, immigration, and crime. Additionally, Part I parallels the treatment of Mexican-immigrants and cannabis to that of Asian-Americans and opium.

Part II focuses on Harry Anslinger, the first Commissioner of the Bureau of Narcotics, and explains how he successfully engineered a cannabis crisis that subsequently intensified the racial divide in America. Part III provides a historical background of federal cannabis regulation and details how the criminalization of cannabis has led to the disproportionate targeting of people of color by the criminal justice system. Part IV examines the country's disparate treatment of drug users based on racial and economic classifications, and subsequent public and policy responses.

Part V explores the growing cannabis business in the United States and discusses how people of color are overwhelmingly barred from entering this industry because of lack of economic resources and criminal record prohibitions: remnants from the racial and class stereotypes and subsequent policies implemented years ago. Part VI highlights and critiques the cannabis regulation schemes recently adopted by states. Part VI concludes this paper by proposing policy changes aimed at helping the communities that have been consistently dehumanized and disadvantaged by our historic war on drugs.

⁶ *Id.*

I. “Marijuana Menace”

The United States Pharmacopeia⁷ (USP) included cannabis as early as 1850, yet American concern about the plant remained relatively dormant until the early twentieth century.⁸ The USP thoroughly documented descriptions of the cannabis plant, and provided instructions regarding the preparation of the plant for medicinal uses.⁹ The inclusion of cannabis in the USP is particularly significant because it serves as evidence that at some point in this country’s history, medical professionals and scientists acknowledged that cannabis possessed medicinal properties. However, the narrative surrounding cannabis as a medical advancement drastically changed when the U.S. Government realized that cannabis could be used as a tool in their propaganda arsenal to scapegoat and criminalize immigrant populations. Following the Mexican Revolution of 1910, a wave of Mexican immigrants flooded into United States.¹⁰ Scholars maintain that Mexican immigrants introduced American culture to the recreational use of cannabis,¹¹ and that racial prejudice catalyzed American prohibition efforts.¹² In addition to government-promulgated cannabis regulations, other less formal tactics were employed to demonize the plant as well as the individuals who used it. For instance, the U.S. government and news outlets referred to the plant

⁷ FAQs: USP and its Standards, U.S. PHARMACOPEIA, <https://www.usp.org/frequently-asked-questions/usp-and-its-standards#:~:text=The%20United%20States%20Pharmacopeial%20Convention,Articles%20II%2C%20and%20VII> (last accessed Apr. 28, 2022). (“The United States Pharmacopeial Convention (USP) is a nonprofit scientific organization founded in 1820 in Washington, D.C., that develops and disseminates public compendial quality standards for medicines and other articles”).

⁸ Robert Solomon, *Racism and Its Effect on Cannabis Research*, 5 CANNABIS & CANNABINOID RES. 2-5, 2 (Feb. 27, 2020), <https://www.liebertpub.com/doi/epdf/10.1089/can.2019.0063>.

⁹ Appendix – C, U.S. PHARMACOPEIA, <http://antiquecannabisbook.com/Appendix/AppendixC.htm> (last accessed Apr. 28, 2022).

¹⁰ *Marijuana Timeline*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last accessed Apr. 3, 2022).

¹¹ *Id.*

¹² Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689-706, 690 (2016).

as “marijuana” instead of cannabis to emphasize its foreign-ness, further fueling anti-immigration sentiments.¹³

Racial prejudice was especially persistent in southern and southwestern states because these areas saw the largest influx of Mexican immigrants.¹⁴ For example, in the early 1900s a Texas Senator announced that “[a]ll Mexicans are crazy, and this [marijuana] is what makes them crazy.”¹⁵ Texas law enforcement officials further perpetuated this racialized perception of cannabis, asserting that cannabis incites violent crime, a lust for blood, and gives users superhuman strength.¹⁶

Government employees also engaged in the spread of misinformation about cannabis by contributing to American journals. In 1931, Eugene Stanley, the then-District Attorney of the Parish of Orleans, published a journal article in *The American Journal of Police Science* titled “Marihuana as a Developer of Criminals.”¹⁷ The article provided an overview of the origin of cannabis, explained the effects of the drug’s use, and discussed the government’s attitude toward cannabis, including the drug’s likely inclusion in the Harrison Anti-Narcotic Law.¹⁸ Stanley compared the effects of cannabis to that of alcohol and morphine, writing that cannabis causes, among other things, “a rapid flow of ideas of a sexual nature . . . psychomotor activity with a tendency to willful damage and violence, with a temporary amnesia of all that has transpired.”¹⁹

¹³ Jacquie Miller, *Here’s why you shouldn’t use the word marijuana anymore*, OTTAWA CITIZEN (Nov. 3, 2017), <https://ottawacitizen.com/news/local-news/word-marijuana-has-racist-past-say-those-who-want-it-banished-from-the-lexicon>.

¹⁴ Bender, *supra* note 3, at 690.

¹⁵ *Id.*

¹⁶ Matt Thompson, *The Mysterious History of ‘Marijuana,’* NPR (Jul. 22, 2013, 11:46 AM), <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana>.

¹⁷ Eugene Stanley, *MARIHUANA AS A DEVELOPER OF CRIMINALS*, 2 AM. J. OF POLICE SCI., 252-261 (1993) <https://www.jstor.org/stable/1147208>.

¹⁸ *Id.*

¹⁹ *Id.* at 255.

The article further claims that continued use of cannabis leads to impotency.²⁰ Notably, the article reinforces the correlation between cannabis use and crime, stating:

[T]he underworld has been quick to realize the value of this drug in subjugating the will of human derelicts to that of a master mind. Its use sweeps away all restraint, and to its influence may be attributed many of our present day crimes. It has been the experience of the Police and Prosecuting Officials in the South that immediately before the commission of many crimes the use of marihuana cigarettes has been indulged by criminals, so as to relieve themselves from the natural restraint which might deter them from the commission of criminal acts.²¹

This campaign of misinformation planted the seeds in the minds of Americans that cannabis was dangerous and those who used it were immoral and out of control. It did not matter what the actual prevalence of cannabis use was among Mexican immigrants. It did not matter that such use was not widespread, or that arrests for Mexican cannabis users were *de minimis*.²² What mattered was the *perception* of cannabis use was widespread among this group. The tactics used by government officials and journalists to create a narrative that cannabis use was rampant successfully convinced the American public that the country faced a drug problem. This manufactured crisis paved the way for the government to later come in and strictly regulate cannabis with little resistance under the Controlled Substances Act (CSA) of 1970.

Fake News

News outlets worked in tandem with the government to create and perpetuate the narrative that cannabis threatened the public safety and welfare. Enter William Randolph Hearst, the king

²⁰ *Id.* at 256.

²¹ *Id.*

²² Isaac Campos, *Mexicans and the Origins of Marijuana Prohibition in the United States: A Reassessment*, 32 SOC. HIST. OF ALCOHOL & DRUGS 6-32, 14 (2018), <https://doi.org/10.1086/SHAD3201006> (Cannabis use was mostly concentrated among prisoners and soldiers. In fact, a crime study from the 1930s that measured crime in California from 1910-1936, yet “did not include a single mention of marijuana despite dedicating an entire section to crime committed by immigrants. Another crime study in and around Los Angeles, supposedly a hotbed of Mexican marijuana use, found that, between 1928 and 1932, police arrested only a few dozen Mexican marijuana users per year in a county that included about 90,000 Mexican residents”).

of yellow journalism.²³ Hearst cornered the journalism industry in the 1920s and produced a steady stream of articles that sensationalized cannabis and amplified the hysteria surrounding the drug.²⁴ Hearst's papers referred to cannabis as a "murder drug" and reported that smoking the plant would land the user in an "insane asylum."²⁵ One of Hearst's papers claimed that a single window box of cannabis would be enough to "drive the whole population of the United States stark, raving mad."²⁶

These claims, however, were hollow. Although this narrative was completely unsupported by any facts, it was enough to convince Americans that cannabis, and Mexican immigrants, were a threat to society. In 1938, *Insider Magazine* ran a story entitled "Marihuana MANIAC" about a man named Victor Licata who murdered his family with an ax.²⁷ The crime was immediately linked to marijuana and the claim that use of the drug drove Licata to depraved insanity.²⁸ In reality however, Victor Licata was a trouble schizophrenic and *not* driven to madness by cannabis.²⁹ In fact, there was no evidence whatsoever that cannabis played any role in the Licata family murder.³⁰ The Licata case serves as yet another example of perception trumping reality.

"Oriental Otherness"

History always repeats itself. Before the hysteria of the "Marijuana Menace," there was "Oriental Otherness."³¹ Late 19th century physicians, in fact, wrote at length about the dangers of American opium use with their main concern being racial degradation.³² In particular, Dr. Samuel Collins warned Americans of a literal racial transformation in his 1887 story entitled

²³ Solomon, *supra* note 1, at 2.

²⁴ *Id.*

²⁵ *Id.* at 1.

²⁶ *Id.* at 2.

²⁷ GRASS IS GREENER, *supra* note 4.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Timothy A. Hickman, *Drugs and Race in American Culture: Orientalism in the Turn-of-the-Century Discourse of Narcotic Addiction*, 41 AM. STUD., 71–91, 73 (2000) <http://www.jstor.org/stable/40643117>.

³² *Id.* at 75.

“Mrs. Jones.”³³ The story followed an average, Anglo-Saxon American woman, Mrs. Jones, who was an opium user.³⁴ Collins wrote: “the opium was yellow, she lived in a yellow house, and she had a yellow skin.”³⁵ The literal yellowing of Mrs. Jones’ skin signified a racial degradation; that Mrs. Jones had assimilated to or joined the “inferior” Chinese race.³⁶ Articles like “Mrs. Jones” exploited the relationship between the Chinese and opium, depicting them both as a foreign threat to the “hard-working but dangerously susceptible American public.”³⁷

Labor Competition

Scholars have argued that the attacks on Chinese and Mexican immigrants stemmed not from racism, but rather from labor competition.³⁸ This theory merits acknowledgment as Chinese and Mexican immigrants experienced similar treatment upon their arrival to America. The Chinese began immigrating to the United States during the 19th century and they were initially viewed as just another group brought in to assist building railroads.³⁹ As economic depression quickly turned the Chinese into a labor surplus, however, they became perceived as a threat to American workers.⁴⁰ Chinese people were thereafter met with much hostility in an attempt to drive them out, or, at the very least, to marginalize them.⁴¹ American medical doctors labeled Chinese immigrants “addicts” and thus incompetent and unable to participate in the job market alongside “honest workers.”⁴²

³³ *Id.* at 77.

³⁴ *Id.*

³⁵ *Id.* at 78.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Campos, *supra* note 20, at 13.

³⁹ DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL 206-208 (1973).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Hickman, *supra* note 23, at 73, 77.

The treatment of Chinese immigrants parallels that of Mexican immigrants during the early 1900s as discussed above. Shortly after both Chinese and Mexican immigrants came to the United States, the country experienced economic downturn. Both served as sources of cheap labor, and Mexican immigrants were willing to work for lower wages in the United States.⁴³ Similar to Chinese immigrants, Mexican people did not pose a threat to white Americans until the 1930s when jobs were scarce during the Great Depression.⁴⁴ The argument that social class and labor competition drove the associations between immigrant groups and substances is compelling, and provides some insight as to why the government and large society exercised and endorsed racist policies that severely harmed Chinese and Mexican immigrants and hampered their ability to succeed in this country.

II. The Godfather of Marijuana Prohibition

One of the most notorious anti-cannabis government officials was Harry J. Anslinger.⁴⁵ Appointed as the Commissioner of the Federal Bureau of Narcotics (FBN) in 1930, Anslinger made it his mission to abolish all drugs within the United States—including cannabis.⁴⁶ He preyed upon Americans’ fear and anxiety of Mexican immigrants and African Americans to inextricably link drug usage, generally and cannabis use, more specifically, with these groups and, thereby, reinforced class- and race-based stereotypes and biases.⁴⁷

Anslinger played an instrumental role in introducing and passing the Marihuana Tax Act (“MTA”) of 1937, which criminalized the importation, cultivation, possession and/or distribution of cannabis.⁴⁸ The MTA preceded modern federal laws categorizing cannabis as a Schedule I drug

⁴³ Campos, *supra* note 20, at 13.

⁴⁴ *Id.*

⁴⁵ GRASS IS GREENER, *supra* note 4.

⁴⁶ Solomon, *supra* note 1, at 3.

⁴⁷ GRASS IS GREENER, *supra* note 4.

⁴⁸ Mike Vuolo et al., *Marijuana’s Moral Entrepreneurs, Then and Now*, 16 SAGE J. 20–25, 22 (2018) <https://doi.org/10.1177/1536504217742387>.

by effectively banning even medical cannabis use.⁴⁹ Law enforcement, however, targeted mostly people of color. After the MTA was enacted, people of color made up 78% of all cannabis arrests in just New York City alone.⁵⁰

While race underscored Anslinger's "relentless warfare"⁵¹ on drugs, scholars have posited that what truly fueled his anti-cannabis stance was moral entrepreneurship. The phrase "moral entrepreneur" refers to individuals who use the power of their positions to influence others to follow their moral stances.⁵² These individuals "construct deviance and contribute to the labeling of rule breakers as social 'outsiders.'"⁵³ Anslinger particularly excelled in creating the "other" and this talent can be seen in the way he successfully correlated this allegedly dangerous drug with communities of color and the way his rhetoric remains popular today.

This begs the question: why did Anslinger embark on a moral crusade against cannabis? The answer is self-preservation. Moral entrepreneurs are motivated by self-preservation; they are the "rule creators who typically argue that their cause is for the betterment of individuals and society and whose vested interest in that cause maintains their political power or position."⁵⁴ Before he was appointed to the FBN, Anslinger was an associate in the prohibition department.⁵⁵ The 18th Amendment to the U.S. Constitution, which was enacted in 1920 and prohibited alcohol throughout the country, was repealed by the 21st Amendment on December 5, 1933—three years after the FBN was established.⁵⁶

⁴⁹ Bender, *supra* note 3, at 691.

⁵⁰ GRASS IS GREENER, *supra* note 4.

⁵¹ *Id.*

⁵² Vuolo et al., *supra* note 46 at 21.

⁵³ *Id.* at 22.

⁵⁴ *Id.* at 21.

⁵⁵ GRASS IS GREENER, *supra* note 4.

⁵⁶ Presidential Proclamation 2065, NAT'L ARCHIVES (Dec. 5, 1933), <https://www.archives.gov/historical-docs/today-doc/?doddate=1205#:~:text=On%20December%205%2C%201933%2C%20the,and%20the%2018th%20Amendment.>

Thus, Anslinger was “working in the context of the failure of alcohol prohibition” during the early 1930s.⁵⁷ Given the alcohol prohibition timeline, it comes as no surprise that Anslinger concocted a cannabis misinformation vendetta to preserve his newfound position as FBN director. He needed to manufacture a new crisis to preserve his newfound position of authority, especially in the wake of the prohibition repeal. In short, Anslinger ensured that he and his colleagues would have a purpose going forward.

Reefer Madness

The cult 1936 film *Reefer Madness* echoed Anslinger’s anti-cannabis rhetoric.⁵⁸ The movie depicted upstanding white teenagers driven to death, sexual debauchery, suicide, and ultimately “madness” because of their cannabis use.⁵⁹ The *Reefer Madness* propaganda served as a warning to dissuade teenagers from “falling into the pitfalls of marijuana.”⁶⁰

What’s the Harm in Harlem?

In the 1920s, Harlem was the epicenter of jazz music . . . and also cannabis.⁶¹ For most white teenagers from Brooklyn and Queens, visits to Harlem marked their first exposures to black culture: it was a place that facilitated integration.⁶² Anti-cannabis folk and racists advanced the unfounded theory that jazz music and cannabis made white women let their guard down, dance, have fun, and have sexual relations with black men.⁶³ As jazz music began to grow in popularity, black jazz musicians became household names.⁶⁴ There was a resulting anxiety that too much jazz music (i.e., black people) and too much cannabis would “blacken” American culture: an impending

⁵⁷ GRASS IS GREENER, *supra* note 4.

⁵⁸ Eric Schlosser, *Reefer Madness*, THE ATLANTIC (Aug. 1994), <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/> (last accessed Apr. 3, 2022).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ GRASS IS GREENER, *supra* note 4.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

threat to segregation.⁶⁵ This strong desire to maintain racial segregation underscored the drafting and enforcement of federal drug policy, as this paper discusses below.

III. Cannabis Policies of Presidents Past and Present

To understand modern debates about cannabis, it is important to first examine the evolution of federal cannabis policy. After the Marihuana Tax Act of 1937 was signed into law, there was little movement on cannabis at the federal level until 1951, when Congress passed the Boggs Act. Nine years later, in 1960, Congress passed the Eisenhower Narcotics Act.⁶⁶ Both acts created federal mandatory minimum drug laws, which meant that even individuals arrested for low-level drug offenses, such as possession of cannabis, could be convicted crimes that carried prison terms of 20 years or more.⁶⁷ The enforcement of these laws paved the way for President Nixon's war on drugs and beyond.⁶⁸

Public Enemy Number One (No, It's Not James Cagney)

President Nixon called for an all-out war against drugs when he took office and vowed to implement tougher penalties against drugs and against crime.⁶⁹ Just as Anslinger acted out of self-preservation in pushing his anti-cannabis rhetoric, Nixon similarly feared that social and political movements at the time threatened his presidency, and his subsequent decisions stemmed from self-interest.⁷⁰ His first attack on drugs was the Controlled Substances Act (CSA), which he signed into law on October 27, 1970.⁷¹

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

The CSA classifies certain drugs, substances, and other chemicals into five distinct schedules based on their acceptable medical use and abuse or dependency potential.⁷² Schedule I drugs have a high propensity for abuse, a high potential to cause severe psychological and/or physical dependence, and no currently accepted medical use.⁷³ Cannabis was, and remains to this day, a Schedule I drug according under the CSA.⁷⁴ Other Schedule I drugs include heroin, ecstasy, methaqualone, and lysergic acid diethylamide (LSD).⁷⁵

To bolster the legitimacy of the CSA, Nixon asked the Shafer Commission to draft a report outlining the dangers of cannabis.⁷⁶ Unfortunately for Nixon, the Shafer Report findings regarding cannabis were balanced and fair.⁷⁷ Three of the Report's authors, in fact, held a televised conference to share their results with the public in an effort to "demythologize" the drug.⁷⁸ The Schafer Report contended that cannabis had largely been mischaracterized by misinformation and false statements.⁷⁹ It concluded that the occasional use of cannabis does *not* cause any physical harm and may not even cause any psychological harm.⁸⁰ Most controversially, the Report stated that the realities that attend to cannabis use had become so blurred because the plant had become so politicized.⁸¹ The Report recommended the decriminalization small amounts of cannabis, which completely undermined the CSA scheduling system and Nixon's position.⁸² Instead of following

⁷² *Drug Scheduling*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/drug-information/drug-scheduling> (last accessed Apr. 3, 2022).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ GRASS IS GREENER, *supra* note 4.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

the advice of the study, however, Nixon completely disregarded it and doubled down on his mission to thwart all efforts to legalize cannabis.⁸³

Legal Limbo

There has been some ebb and flow in the rigor with which American presidents have dealt with cannabis reform since Nixon, but little has changed in any meaningful legal way at the federal level. The CSA still presides, and cannabis remains an illicit, Schedule I drug. Because the federal government has not amended cannabis' CSA classification, states have taken matters into their own hands and enacted legislation legalizing medical—and, in some states, —recreational cannabis.

In response to state legalization, the federal government issued a series of memorandums to clarify its role in enforcing the CSA's cannabis prohibitions. The Ogden Memorandum, which was issued in 2009 under the Obama Administration, sought to provide federal prosecutors with guidance and clarification regarding the enforcement of the CSA in states that had legalized medical cannabis use.⁸⁴ That memorandum stated that the Department of Justice was “committed to making efficient and rational use of its limited investigative and prosecutorial resources,” and, as such, would be directing its efforts to prosecute “significant traffickers of illegal drugs, including marijuana,” and not “individuals whose actions are in clear and unambiguous compliance with existing state law providing for the medical use of marijuana.”⁸⁵ The Ogden Memo made clear, however, that it should not be construed to either “legalize marijuana or provide a legal defense to a violation of federal law.”⁸⁶ While the memo did not change the status of

⁸³ *Id.*

⁸⁴ MEMORANDUM FROM DAVID W. OGDEN, DEPUTY ATT'Y GEN., TO U.S. ATTORNEYS 1, U.S. DEP'T OF JUSTICE (Oct. 19, 2009), <http://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

cannabis at the federal level, it provided some comfort to states by announcing that the federal government would not intervene in marijuana legalization states unless high-profile drug trafficking occurred within a state's borders.

Two years later in 2013, the Department of Justice issued yet another memorandum (the Cole Memorandum) updating the Ogden Memo in response to the increase in state ballot initiatives legalizing small amounts of cannabis and providing for the regulation of cannabis production, processing, and sale under state law.⁸⁷ The Cole Memorandum refined the Ogden Memo by specifically enumerating the enforcement priorities that were “particularly important to the federal government,” and, therefore, might warrant U.S. Attorney intervention.⁸⁸ Notably, the Cole Memorandum announced that, outside its enumerated enforcement priorities, the federal government would defer to the “states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics law.”⁸⁹ Consequently, the Cole Memo marked a significant step away from the country's historically strict stance in favor of cannabis prohibition.

The Cole Memo remained in place until 2018 when the Department of Justice issued yet another memorandum (the Sessions Memorandum). The Sessions Memo rescinded the Cole Memo in its entirety, calling previous nationwide guidance “unnecessary.”⁹⁰ The Trump Administration's rescission of the Cole Memo caused great concern among cannabis business

⁸⁷ MEMORANDUM FROM JAMES M. COLE, DEPUTY ATT'Y GEN., TO U.S. ATT'YS (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁸⁸ *Id.* The list of enforcement priorities included: “(1) Preventing the distribution of marijuana to minors; (2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) Preventing the diversion of marijuana from where it is legal under state law in some form to other states; (4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) Preventing marijuana possession or use on federal property.”

⁸⁹ *Id.*

⁹⁰ MEMORANDUM FROM JEFFERSON B. SESSIONS, DEPUTY ATT'Y GEN., TO U.S. ATT'YS (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

owners, investors, and elected officials because it insinuated that the federal government was going to start cracking down on the cannabis legalization states.⁹¹ The return of the draconian federal drug enforcement efforts of the 1960s through the 1980s, however, never materialized.⁹²

In December 2018, eleven months after the issuance of the Sessions Memo, then-President Donald Trump signed the Farm Bill into law.⁹³ That legislation removed hemp and derivatives of cannabis with extremely low concentrations of delta-9-tetrahydrocannabinol (THC) from the CSA's definition of cannabis.⁹⁴ Removing hemp and low THC cannabis derivatives from the CSA extended to hemp farmers more expansive cultivation opportunities, permitted the transfer of hemp-derived products across state lines, and lifted restrictions on the sale, transport, or possession of hemp-derived products.⁹⁵

The 2018 Farm Bill also delegated to the Federal Drug Administration (FDA) the authority to regulate and standardize hemp products just like other "food, dietary supplements, human and veterinary drugs, and cosmetics."⁹⁶ While the Farm Bill broadened the available research and commercial opportunities for hemp, it left unchanged the status of cannabis under the CSA. While the Farm Bill is not a victory for THC, it might bolster the decriminalization and legalization of cannabinoids. Hemp contains low levels of THC. As such, if researchers can demonstrate that those low levels of THC serve or aid some medical purpose, policymakers and lobbyists supporting

⁹¹ Kyle Jaeger, *One Year After Jeff Sessions Rescinded A Federal Marijuana Memo, The Sky Hasn't Fallen*, MARIJUANA MOMENT (Jan. 4, 2019), <https://www.marijuanamoment.net/one-year-after-jeff-sessions-rescinded-a-federal-marijuana-memo-the-sky-hasnt-fallen/>.

⁹¹ *Id.*

⁹² *Id.* (explaining that the Sessions Memo inadvertently helped advance the legalization agenda and precipitated an "outpouring of condemnation and vows to protect legal states against federal interference").

⁹³ Testimony of Amy Abernethy, Md, Phd., Principal Deputy Comm'r, Office of the Comm'r, Food & Drug Admin., Dep't of Health & Human Services before the Sen. Comm. on Agriculture, Nutrition, & Forestry, 116th Cong (July 25, 2019) <https://www.fda.gov/news-events/congressional-testimony/hemp-production-and-2018-farm-bill-07252019>.

⁹⁴ *Id.*

⁹⁵ John Hudak, *The Farm Bill, hemp legalization and the status of CBD: An explainer*, BROOKINGS INST. (Dec. 14, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer/>.

⁹⁶ *Hemp Production*, *supra* note 84.

the legalization of cannabis would have solid footing to mount additional decriminalization arguments.

IV. Let's Be Blunt: "It's All in the Skin"

The racial inequity of the War on Drugs is undeniable. Despite studies showing that white youths use cannabis at the same rate as Black and Latino youths, people of color nevertheless account for most of the arrests for unlawful possession of cannabis in the United States.⁹⁷

The disparity in cannabis policing exists even on an international scale. In Summer 2021, the United States Anti-Doping Agency (USADA) suspended Sha'Carri Richardson, an American sprinter, from competing in the 2021 Summer Olympics due to a positive marijuana test.⁹⁸ USADA complies with the rules and regulations promulgated by the World Anti-Doping Agency (WADA).⁹⁹ In 2021, the World-Doping Code classified THC as a "Substance of Abuse."¹⁰⁰ As a result of this classification, athletes who test positive for a Substance of Abuse are subject to a three-month sanction if the athlete establishes that their use of the THC occurred out of competition.¹⁰¹ However, completion of a Substance of Abuse treatment program approved by USADA can reduce the three-month suspension to one month.¹⁰² Because USADA operates in compliance with WADA rules, it insisted that its "hands were tied" when doling out Richardson's penalty.¹⁰³

⁹⁷ Bender, *supra* note 3, at 691.

⁹⁸ Kyle Jaeger, *Sha-Carri Richardson, Suspended Over Marijuana, Suggests Racist Double Standard After Olympics Lets Russian Skater Compete Amid Doping Scandal*, MARIJUANA MOMENT (Feb. 14, 2022), <https://www.marijuanamoment.net/shacarri-richardson-suspended-over-marijuana-suggests-racist-double-standard-after-olympics-lets-russian-skater-compete-amid-doping-scandal/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *U.S. Track & Field Athlete Sha'Carri Richardson Accepts Sanction for Anti-Doping Rule Violation*, USADA (Jul. 2, 2021) <https://www.usada.org/sanction/shacarri-richardson-accepts-doping-sanction/>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Jaeger, *supra* note 96.

However, athlete doping incidents during the 2022 Winter Olympics called the motivation for Richardson’s suspension into question.¹⁰⁴ Kamila Valieva, a 15-year-old Russian Olympic ice-skating sensation, tested positive for trimetazidine, a banned substance known to increase exercise duration and improve cardiac performance.¹⁰⁵ Despite Valieva testing positive for a performance-enhancing drug in the middle of the Olympic games, the Court of Arbitration for Sport (CAS) permitted her to compete in the Olympics.¹⁰⁶ Her “punishment”? A mere slap on the wrist: the CAS determined that no medal ceremony would be held for Valieva in the event that she placed in the top three in any competition.¹⁰⁷ Valieva went on to help her team win a gold medal in a team skating event.¹⁰⁸

While CAS contended that Valieva’s age played a dispositive role in its decision, because minors are “protected persons” who are subject to a different standard under the WADA, Richardson proposed an alternative rationale for its decision: race.¹⁰⁹ In response to the decision allowing Valieva to continue competing in Beijing, Richardson tweeted: “Can we get a solid answer on the difference of [Valieva’s] situation and mines? . . . The only difference I see is I’m a black young lady.”¹¹⁰ Richardson second tweet reiterated: “It’s all in the skin.”¹¹¹ Even though a different regulating body decided the fate of Richardson’s Olympic presence at the Summer 2021

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Sha’Carri Richardson (@itskerrii), TWITTER (Feb. 14, 2022, 8:03 AM), https://twitter.com/itskerrii/status/1493209274457153536?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwtterm%5E1493209274457153536%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.marijuanamoment.net%2Fsha-carri-richardson-suspended-over-marijuana-suggests-racist-double-standard-after-olympics-lets-russian-skater-compete-amid-doping-scandal%2F.

¹¹¹ Sha’Carri Richardson (@itskerrii), TWITTER (Feb. 14, 2022, 10:19 AM), https://twitter.com/itskerrii/status/1493209274457153536?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Cwtterm%5E1493209274457153536%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.marijuanamoment.net%2Fsha-carri-richardson-suspended-over-marijuana-suggests-racist-double-standard-after-olympics-lets-russian-skater-compete-amid-doping-scandal%2F.

Olympics, she nevertheless raises a valid argument given that black people have historically been over-policed and regulated, especially as it relates to drugs.¹¹²

A stark dichotomy appears to exist between the public perception of white and affluent drug users and that of racial minorities and low-income drug users. One study researching the effect of media and print portrayals of drug users on public response and policy interventions argues that racial coding has created a “narcotic apartheid,” whereby more affluent—typically white—drug users are generally viewed as blameless victims who use drugs to combat escalating demands from work and school, while black and brown drug users are depicted as violent and criminal.¹¹³

One of the major findings of that study was the lack of stories about drug use in black and Latino urban communities.¹¹⁴ Even when drug use in communities of color was the subject of a report, those accounts were short and simply stated the criminal charges, the amount of drugs seized, and the names of the individuals arrested.¹¹⁵ As the study noted, in most reported urban drug stories, “there are no details provided about the lives, families and backstories of the people involved,” and that the reports about urban communities have a “mundane, detached quality.”¹¹⁶

Drug use in suburban communities where there is a high population of white residents, on the other hand is frequently reported as “surprising and novel.” The individuals profiled in those accounts receive a “kind of consideration, details, backstory, and exposition.”¹¹⁷ In fact, the media makes it a habit to paint white drug users as blameless victims who simply “fell into the wrong

¹¹² Jaeger, *supra* note 96.

¹¹³ Julie Netherland & Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," and Race in Media Coverage of Prescription Opioid Misuse*, 40 *CULTURE MED. & PSYCHIATRY* 664–686, 665 (2016) <https://doi.org/10.1007/s11013-016-9496-5>.

¹¹⁴ *Id.* at 671.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 672.

¹¹⁷ *Id.* at 672, 673.

crowd,” creating a distance between the drug use and the drug user’s culpability.¹¹⁸ This biased style of reporting dehumanizes black and Latino drug users while simultaneously creating and emphasizing a link of violence and criminality to those communities.¹¹⁹ The study authors argue that the perpetuation of the blameless white drug user image works to

“ . . . insidiously further distinguish white from black (and brown) suffering, white from black culpability, and white from black deservingness . . . [and has] helped to carve out a separate space for white opioid use in the popular American imagination, one that leads to racially stratified therapeutic intervention and works to further insulate white communities from black and brown drug threats, leaving intact law enforcement crackdowns on black and brown urban residents in the name of public safety.¹²⁰

The study also draws a parallel involving the crack cocaine and powder cocaine distinction of the 1980s-90s.¹²¹ Crack cocaine was generally used by people of color while powder cocaine was typically used by white folks.¹²² Despite their nearly identical chemical makeup, the federal criminal sentencing for crack cocaine possession was 100:1.¹²³ The result of this disparity led to high incarceration rates of black and Latino people for possession and sale of crack cocaine.¹²⁴ There was no similar criminalization of white suburbanites for their illegal use of powder cocaine.¹²⁵ Given these findings, is it understandable that Sha’Carri Richardson would suspect that race played a role in her suspension from the Olympics, because race has *always* been a factor in the “constructions of and responses to drug scares.”¹²⁶

¹¹⁸ *Id.* at 673.

¹¹⁹ *Id.* at 671.

¹²⁰ *Id.* at 665.

¹²¹ *Id.* at 669.

¹²² *Id.* at 670.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 668.

V. Gatekeeping: Obstacles for People of Color Entering the Legal Cannabis Industry Locked up to Locked Out

Consistent with this history, the legal cannabis industry is not diverse. As Amber Littlejohn, attorney and executive director of nonprofit Minority Cannabis Business Association, puts it, the lack of diversity in the cannabis industry is “particularly acute . . . since Black and other minority populations have borne the brunt of cannabis prohibition and the decades-long ‘war on drugs,’ while the economic benefits of legalization have mainly gone to white men.”¹²⁷ In fact, white men comprise 70% of the C-suite at the fourteen largest publicly traded cannabis companies by market value in the US and Canada.¹²⁸

Scholars have pointed to several factors that may be responsible for this disparity. First, there is a reluctance among banks to provide loans to cannabis entrepreneurs given cannabis’ ongoing illegal status under federal law.¹²⁹ Due to the lack of those financing options, cannabis entrepreneurs must resort to using their personal financial resources or borrow from friends and business associates.¹³⁰ The wealth inequality of this country coupled with the high start-up costs of the industry effectively and disproportionately lock people of color out of this business.¹³¹ Second, cannabis retailers are usually required to have a “clean” criminal record.¹³² As discussed above, communities of color tend to be over-policed and over-represented in our prison systems.¹³³ Second, state laws legalizing cannabis sales are in direct conflict with federal prohibition. As such,

¹²⁷ Jeremy Berke & Yeji Jesse Lee, *Top executives at the 14 largest cannabis companies are overwhelmingly white men, an Insider analysis shows*, BUSINESS INSIDER (Jun. 30, 2021, 9:30 AM) <https://www.businessinsider.com/cannabis-industry-diversity-executives-are-white-male-insider-inequity-analysis-shows-2021-6>.

¹²⁸ *Id.*

¹²⁹ Bender, *supra* note 3, at 696.

¹³⁰ *Id.* at 696, 697.

¹³¹ *Id.* at 697.

¹³² *Id.*

¹³³ *Id.*

the clean record requirement disproportionately disqualifies racial minorities.¹³⁴ A 2020 ACLU Research Report found that racial disparities in arrests persist even in states that have legalized or decriminalized cannabis.¹³⁵ Accordingly, there remain significant barriers for racial minorities to enter the above ground cannabis market.¹³⁶

Follow the Money

Because legal recreational cannabis is heavily taxed, cannabis sold in the underground market is usually cheaper.¹³⁷ The price of recreational cannabis also varies widely across the states. An ounce of high-quality cannabis can range anywhere between \$210 and almost \$600.¹³⁸ Middle- and high-income buyers are better positioned to afford the higher price tag of legal cannabis.¹³⁹ But for low-income buyers—who are predominantly people of color—the high price of legal cannabis effectively pushes them toward the underground market that remains criminalized.¹⁴⁰ Not only are there significant barriers to entry to operate in the legal market for people of color, they often have to opt out of the legal market even as consumers because of these economic dynamics.¹⁴¹

The price and tax rates of cannabis are especially problematic for those who use medical cannabis. Because cannabis remains illegal at the federal level, Medicare and Medicaid does not cover medical cannabis use.¹⁴² For some individuals, legal cannabis is simply unaffordable, and

¹³⁴ *Id.*

¹³⁵ ACLU RESEARCH REPORT, A TALE OF TWO COUNTRIES, RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 1-100, 9 (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

¹³⁶ Bender, *supra* note 3, at 697.

¹³⁷ *Id.* at 699. (“The State of Washington taxes recreational marijuana at 37% with an additional 19.5% sales tax”).

¹³⁸ Ed. Staff, *The Average Cost of Marijuana by State*, OXFORD TREATMENT CTR. (Mar. 9, 2022), <https://oxfordtreatment.com/substance-abuse/marijuana/average-cost-of-marijuana/>.

¹³⁹ Bender, *supra* note 3, at 699.

¹⁴⁰ *Id.* at 670.

¹⁴¹ *Id.*

¹⁴² Merrit Enright, Nigel Chiwaya & Robin Muccari, ‘Ridiculous’ price of medical marijuana leaves patients scrambling, NBC NEWS (Jul. 17, 2021, 6:00 AM), <https://www.nbcnews.com/news/us-news/ridiculous-price->

those people are left with the unfortunately choice of either turning to the underground market or foregoing treatment entirely.¹⁴³

VI. Current Cannabis Reform Schemes and Recommendations

As this paper demonstrates, the history of cannabis regulation in the United States has been rooted in racism and classism. Legalization, therefore, does not and cannot end the cannabis conversation. As one scholar pointed out, vestiges of racial profiling may nevertheless persist in a legalization regime.¹⁴⁴ For example, even though some states have legalized recreational use of cannabis, public consumption remains a crime.¹⁴⁵ While this type of regulation might appear neutral on its face, the definition of “public” becomes less clear in the context of a private resident porch or driveway, or a vehicle passenger using cannabis while on a public street.¹⁴⁶ Public consumption prohibition therefore raises concerns about how legalization might impact low-income individuals, usually people of color, who spend time outside of the home most of the day as a result of overcrowding within the home or live in public housing.¹⁴⁷

As things currently stand, individual with access to private residence may consume cannabis without fear of law enforcement interference. Poor residents who engage in the same otherwise legal behavior, on the other hand, remain subject to criminalization not because they wish to defy the law, but because they cannot afford to participate in the luxury of home ownership. This scenario is not outside of the realm of possibility, as evidenced by a recent report published by the Colorado Division of Criminal Justice.

medical-marijuana-leaves-patients-scrambling-n1274085 (The price of a medical marijuana card can cost up to \$200 per year).

¹⁴³ *Id.*

¹⁴⁴ Bender, *supra* note 3, at 701.

¹⁴⁵ *Id.* at 702.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 703.

In July 2021, the Colorado Division of Criminal Justice published a report documenting the impacts of marijuana legalization within the state.¹⁴⁸ It discloses that, while the total number of marijuana arrests decreased across all races in the state since legalization, White individuals saw the largest decrease in arrests (72%), followed by Black people (63%), and Hispanic individuals (55%).¹⁴⁹ In fact, the arrest rate for Black Coloradans (160 per 100,000) was more than double that of their white counterparts (76 per 100,000) in 2019.¹⁵⁰

The report also explains that the overall number of juvenile marijuana arrests decreased by 37% from 2012 to 2019.¹⁵¹ Here again, though, white juveniles experienced the largest decrease in arrests (47%), followed by Black minors (41%), and Hispanic youth (26%).¹⁵² The report ultimately concedes that the disparity in arrest rates between white cannabis users and Black and Hispanic cannabis users “. . . has not changed in any meaningful way since legalization.”¹⁵³ While the report does not provide an explanation for the ongoing disparity in arrest rates, it is likely a result of racial profiling, over-policing of communities of color, and lack of legally acceptable areas to participate in legal cannabis consumption. Cannabis criminalization is so intertwined with race and class in the United States that it is imperative that states place social equity at the forefront of their regulation schemes. Otherwise, they risk perpetuating the same racist, classicist regime that has driven cannabis regulation in this country from its inception.

Some states have implemented explicit social equity frameworks into their legalization regulatory schemes to aid and rebuild communities that have historically been harmed by the war

¹⁴⁸ COLO. DIV. OF CRIMINAL JUSTICE, DEP’T OF PUB. SAFETY, IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO: A REPORT PURSUANT TO C.R.S. 24-33.4-516 (July 2021), https://cdpsdocs.state.co.us/ors/docs/reports/2021-SB13-283_Rpt.pdf.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

on drugs. New Jersey has been especially conscious of racial equity in its cannabis laws. In December 2019, New Jersey Governor Phil Murphy signed S4154 into law.¹⁵⁴ S4154 provides justice-involved individuals the chance to rejoin and fully participate in society by eliminating fees for expungement applications and creating a petition process for “clean slate” expungement.¹⁵⁵ The key provision of S4154 is its requirement that New Jersey courts seal low-level marijuana convictions upon case disposition.¹⁵⁶ That sealing requirement prevents prior cannabis convictions from being used against individuals in the future when it comes to, among other things, employment, housing, and eligibility for loans.¹⁵⁷ This legislation directly responds to the problem of people of color getting locked out of the cannabis industry due to their “unclean” criminal records, and, in theory, will eliminate one of the obstacles preventing people of color from being eligible and applying for a state cannabis license.

On February 22, 2021, Governor Murphy signed several cannabis reform bills into law that directly address social inequity.¹⁵⁸ Murphy opined that “[m]aintaining a status quo that allows tens of thousands, disproportionately people of color, to be arrested in New Jersey each year for low-level drug offenses is unjust and indefensible.”¹⁵⁹ The first—A21—legalizes and regulates marijuana use and possession for adults 21 years and older.¹⁶⁰ The second—A1897—decriminalizes cannabis and hashish possession.¹⁶¹ The third—S3454—clarifies state marijuana and cannabis use and possession penalties for persons under the age of 21 years old.¹⁶²

¹⁵⁴ Press Release, *Governor Murphy Signs Major Criminal Justice Reform Legislation*, NJ.GOV (Dec. 18, 2019), <https://www.nj.gov/governor/news/news/562019/approved/20191218a.shtml>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Press Release, *Governor Murphy Signs Historic Adult-Use Cannabis Reform Bills Into Law*, NJ.GOV (Feb. 22, 2021), <https://www.nj.gov/governor/news/news/562021/20210222a.shtml>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

A21 aims to achieve social equity in the arena of cannabis business ownership. It includes a provision stating that 70%¹⁶³ of all tax revenues from cannabis sales will be directed toward “impact zones.” It also created the Office of Minority, Disabled Veterans, and Women Medical Cannabis Business Development, whose responsibility is to promote participation in both the medical and recreational cannabis industry by individuals from socially and economically disadvantaged communities.¹⁶⁴

As of March 24, 2022, the New Jersey Cannabis Regulatory Commissioners had approved 68 conditional license applications for recreational cannabis cultivators and manufacturers.¹⁶⁵ Of those 68 licenses, 33 applicants identified as Black, nine identified Latinx, and four identified as Asian.¹⁶⁶ While establishing an Office to ensure that minorities and other marginalized groups are represented in the state’s cannabis industry is good in theory, the Office should consider setting a goal percentage of minority ownership in the cannabis industry by a certain date.¹⁶⁷ Establishing a specific number and deadline will instill accountability within the individuals holding positions in the Office. It also will convey to people of color that New Jersey has its boots on the ground and is putting in the work to effectuate tangible, meaningful change.

¹⁶³ N.J. Laws H.B. A21 (2020-2021). (70% of all tax revenues on retail sales of cannabis items will be invested via grants, loans, reimbursements of expenses to municipalities defined as an “impact zone.” Direct financial assistance will also be provided to qualifying persons residing in those impact zones).

¹⁶⁴ *Id.* (The office is tasked with developing, recommending, and implementing policies and practices. It is “. . . designed to promote the formulation of medical cannabis business entities and personal use cannabis establishments, distributors, and delivery services and participation in the medical cannabis [industry] and personal use cannabis industries by persons from socially and economically disadvantaged communities, including by promoting applications for, and the issuance of, medical cannabis cultivator, medical cannabis manufacturer, medical cannabis dispensary, and clinical registrant permits, and cannabis [grower] cultivator, cannabis [processor] manufacturer, cannabis wholesaler, cannabis distributor, cannabis retailer, and cannabis delivery services licenses, to certified minority, women’s, and disabled veterans’ businesses”).

¹⁶⁵ *NJ Cannabis Regulatory Commissioners approve first recreational cannabis business applications*, N.J. CANNABIS REG. COMM’N, N.J.GOV (Mar. 25, 2022) <https://www.nj.gov/cannabis/about/news-events/approved/archives.shtml>.

¹⁶⁶ *Id.*; see Kyle Jaeger, *Colorado Meets Marijuana Industry Diversity Goal Ahead of Schedule*, MARIJUANA MOMENT (Jan. 24, 2022), <https://www.marijuanamoment.net/colorado-meets-marijuana-industry-diversity-goal-ahead-of-schedule/> (explaining that Colorado surpassed goal of at least 16.8 percent minority ownership in the cannabis sector by June 30, 2022—nearly 17 percent of cannabis licenses have been granted to racial minorities).

¹⁶⁷ *Id.*

Of course, a policy like this raises potential Constitutional concerns if implemented incorrectly. States drafting quotas or numerical goals should avoid using race as a factor, or otherwise risk running afoul of the Equal Protection Clause. Instead, decisionmakers should facilitate licensing minority applicants using factors other than race, for example: geographic location with a certain annual crime percentage rate, annual income, or incarceration rate. By entirely excluding race as a factor in the application review process, states will be able to facilitate licensing minority applicants and circumvent 14th Amendment attacks.

In addition, the Office ought to consider adopting one of the methods embraced by California to further promote diverse participation in the cannabis industry: license fee waivers. In California, applicants can have their license fee waived if they satisfy two basic requirements.¹⁶⁸ First, the cannabis business must have a gross revenue of no more than \$1.5 million per year. Second, at least 50% of the business must be owned by people who meet at least one of the state's equity owner criteria.¹⁶⁹ California's criteria for license fee waivers are specifically crafted to allow historically disadvantaged and marginalized communities the opportunity to enter this industry by removing a burdensome financial hurdle.

A21 is a big step in the right direction regarding social equity in the cannabis industry, but there is still more work to do. New Jersey's scheme to distribute 70% of tax revenue made from recreational cannabis sales to "impacted zones" essentially serves as politically viable

¹⁶⁸*Equity Fee Waivers*, CAL. DEP'T OF CANNABIS CONTROL, CA.GOV <https://cannabis.ca.gov/applicants/equity-fee-waivers/> (last accessed Mar. 29, 2022).

¹⁶⁹ *Id.* (A person may qualify for a fee waiver in California if: they were convicted or arrested for the sale, possession, use, manufacture, or cultivation of cannabis; if the person lived in a place for at least five years between 1980 and 2016 that was in the top 25% nationally for unemployment and poverty, 1-parent or nonfamily households, the bottom 25% nationally for high school graduation rates, a California Opportunity Zone, or a California county with drug arrest rates that were higher than the state average drug arrest; or the individual's household income is no more than 60% of the area's median income, or the individual is eligible to receive financial aid through programs like CalFresh, MediCal, CalWORKS, supplemental security income, or social security disability).

reparations.¹⁷⁰ It also signals to individuals whose lives and communities have been disrupted by the war on drugs that the state government acknowledges its wrongdoing. This will hopefully begin to lay the foundation for a new chapter of trust between folks living in urban areas and the state government. Current New Jersey law, however, does not dictate how those tax revenues should be spent on once distributed to impact zones. New Jersey ought to mandate that a portion of that tax revenue be used as financial assistance for people of color to pay for cannabis license applications because, as discussed above, the process is very costly, banks are unwilling to provide financial services and loans for these enterprises, and people of color generally have less disposable income to dedicate to such business opportunities in comparison to their white counterparts.

A1897 focuses on cannabis in the criminal law context. It converts the possession of 50 grams or less of cannabis or five grams or less of hashish as a disorderly persons offense.¹⁷¹ It also makes clear that the smell of cannabis or hashish, or burnt cannabis or hashish, cannot constitute articulable suspicion to justify a search.¹⁷² This is extremely groundbreaking given that law enforcement has historically used “the smell of cannabis” as a pretext to search individuals for contraband and other illegal activity.¹⁷³ A1897 will force officers to change course and rely on other evidence to search motorists and their vehicles. Hopefully, this law will result in the reduction of interactions people of color have with law enforcement while driving.

¹⁷⁰ See Audie Cornish, *Recent Polling Data Shows Why Nearly 2/3 of Americans Oppose Cash Reparations*, NPR (June 18, 2021, 4:30 PM), <https://www.npr.org/2021/06/18/1008196317/recent-polling-data-shows-why-nearly-2-3-of-americans-oppose-cash-reparations> (Recent polling shows that the most frequent explanation for why people oppose reparations is that African Americans and descendants of slaves are undeserving of the cash payments. . . And the “second-most popular reason is that it’s impossible to place a monetary value on the impact of slavery.” People with this latter point of view tended to be progressives, young people, Democrats and Biden voters).

¹⁷¹ N.J. Laws H.B. A1897 (2020-2021).

¹⁷² *Id.*

¹⁷³ Bender, *supra* note 3, at 702; see also *A Tale of Two Countries*, *supra* note 120, at 44 (noting that the criminalization of cannabis has served as a pretext for the criminalization of Black and Brown people).

Finally, S3454 addresses ambiguities in the penalties the state can impose on persons between the age of 18 and 21 for using or possessing cannabis.¹⁷⁴ If anyone in that age range is found to possess, without legal authority, any cannabis item in any school, public place, or motor vehicle, they are subject to a \$250 fine. Further, if these individuals are found to have consumed any cannabis item, they are subject to a fine not less than \$500.

It is important to note that S3454 is silent regarding to the use and consumption of cannabis by individuals under 18. On January 1, 2021, Governor Murphy signed S3319 into law, which eliminated certain juvenile justice fines, fees, costs, and other monetary penalties related to cannabis use and possession.¹⁷⁵ The law also vacated any unpaid outstanding balances of statutory or court ordered fines, fees, costs, or other monetary penalties assessed or imposed upon a juvenile or a juvenile's parent or guardian.¹⁷⁶ S-3319 aims to mitigate the discriminatory impact of future criminal legislation as it pertains to juveniles. This is especially crucial considering that, in New Jersey, Black youth are 17.5 times more likely to be detained or committed to a youth facility than

¹⁷⁴ N.J. Laws H.B. S3454 (2020-2021). (Anyone between 18 years old and under 21 years old who “knowingly possesses without legal authority or who knowingly consumes marijuana, hashish, or any cannabis item in a ny school, public conveyance, public place, or place of public assembly, or motor vehicle, is guilty of a petty disorderly persons offense” and will be fined not less than \$250 subject to a civil penalty of up to \$50 if based upon a probable cause finding of a violation by a law enforcement officer. Additionally, if anyone “under the legal age to purchase cannabis items who is under 18 years of age, and who knowingly possesses without legal authority or knowingly consumes marijuana, hashish, or any cannabis item, or who knowingly consumes any cannabis item in a school, public conveyance, public place, or place of public assembly, or motor vehicle, is guilty of a disorderly persons offense, and shall . . . be fined not less than \$500”).

¹⁷⁵ N.J. Laws H.B. S3319 (Dec. 13, 2021). (The bill specifically eliminates the following fees, fines, costs, and other monetary penalties: “(1) The Drug Enforcement and Demand Reduction (DEDR) penalty required pursuant to N.J.S.2C:35-15 when the court dismisses a complaint against a juvenile who has made a satisfactory adjustment during a period of continuance of up to 12 months; (2) The costs of the juvenile s serological test for acquired immune deficiency syndrome (AIDS), infection with the human immunodeficiency virus (HIV), or other related virus identified as a probable causative agent of AIDS when a law enforcement officer, victim, or other person suffered a prick from a hypodermic needle or had contact with the juvenile which involved or was likely to involve the transmission of bodily fluids; (3) The costs of an approved remedial education or counseling program to which a juvenile is diverted by the court; (4) The civil penalty of at least \$2,000 or actual costs, whichever is higher, incurred by law enforcement and emergency services in responding to a false public alarm; (5) The \$25 forensic laboratory fee imposed on juveniles adjudicated delinquent; (6) The \$15 Law Enforcement Officers Training and Equipment Fund fee imposed on juveniles adjudicated delinquent; (7) The \$30 monthly penalty imposed on juvenile sex offenders”).

¹⁷⁶ *Id.*

white youth.¹⁷⁷ S3454 extends S-3319’s social equity objectives and aims to break the cycle of incarceration and poverty that has disproportionately impacted youths of color by preventing them from becoming involved in the criminal justice system at such a young, vulnerable age.

New Jersey also enacted the Jake Honig Compassionate Use Medical Cannabis Act in July of 2019.¹⁷⁸ The Jake Honig Act seeks to expand patient access to medical cannabis, especially for patients that are terminally ill or under hospice care.¹⁷⁹ Prior to the passage of the Act, medical cannabis patients were limited to two ounces of cannabis in any a 30-day period.¹⁸⁰ The Act raised that limit to three ounces over an 18 month period.¹⁸¹ It also eliminated any monthly cap for terminally ill and hospice care patients¹⁸² and extended the authorization period from 90 days to one year.¹⁸³ Before the Honig Act became law, New Jersey cannabis patients were only authorized to a 90-day supply and had to be physician re-certified every three months.¹⁸⁴

The Jake Honig Act will significantly reduce the number of physicians visits a patient must undertake to be eligible for access to medical cannabis. The law also expands the pool of medical professionals that can authorize medical cannabis to include physician assistants and advanced

¹⁷⁷ See YOUTH 4 JUSTICE NEW JERSEY CAMDEN YOUTH COUNCIL, MAKING THEM PAY: THE DEVASTATING IMPACT OF FINES AND FEES ON OUR YOUTH (2021), https://d3n8a8pro7vhm.cloudfront.net/njsj/pages/706/attachments/original/1639067798/Fines_and_Fees_Whitepaper_Final_12.9.21.pdf?1639067798. (Fines and fees tie youths—and their families—to the carceral system, that paying the fines and fees negatively impacts the youths’ mental and emotional health, and that the youths did not gain any positive development or support after paying off a fine or fee. The report notes that youths living in low-income communities are at a higher risk of entering the juvenile court system. As such, the court system was extorting money that these youths simply did not have. Even youths that had jobs found it difficult to pay off their fines because they earned, at most, minimum wage. Further, the report stated that in most cases, the youth’s family would shoulder the cost of the fine and was subsequently placed in the position of choosing between paying for living expenses or paying the fine).

¹⁷⁸ Press Release, *Governor Murphy Signs Legislation to Dramatically Reform New Jersey’s Medical Marijuana Program, Expand Patient Access*, N.J. GOV (Jul. 2, 2019), <https://www.nj.gov/governor/news/news/562019/20190702d.shtml>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

practice nurses.¹⁸⁵ Another highlight of the Act is the provision that phases out sales tax for medical cannabis.¹⁸⁶ The bill notes that, unlike most forms of medication, medical marijuana is subject to sales tax.¹⁸⁷ At the time the Act was passed, the sales tax rate imposed on medical cannabis was 6.625%.¹⁸⁸ The phase-out plan became effective on July 1, 2020 and reduced the sales tax on medical cannabis to 4%.¹⁸⁹ The sales tax again decreased to 2% on July 1, 2021.¹⁹⁰ Moreover, beginning July 1, 2022, the state sales tax on medical cannabis will drop to 0%.¹⁹¹ The elimination of medical cannabis tax marks a monumental change in the medical cannabis arena. As discussed earlier, one of the biggest obstacles for medical cannabis patients, especially poor patients, is the cost of their medication. Overall, the Honig Act in theory will broaden the accessibility of medical cannabis by removing the hypothetical “hoops” that patients in pain needed to jump through in order to get their medication and feel relief.

The State of New York similarly centered its recent cannabis regulations around social equity. On February 22, 2022, Governor Kathy Hochul signed into law a Conditional Cannabis Cultivation Bill.¹⁹² That law sets out of a pathway for existing New York hemp farmers to apply for a conditional license to grow cannabis starting in Spring 2022 for the impending adult-use cannabis market.¹⁹³ New York state hemp farmers that are granted a conditional license will be permitted to grow outdoors or in a greenhouse for up to two years from the date of issuance of that

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Sales Tax Rate Change for Sales of Medical Marijuana, N.J. DIVISION OF TAX’N (Updated Jan. 5, 2022), <https://www.state.nj.us/treasury/taxation/marijuanasalestaxchangenotice.shtml#:~:text=NJ%20Taxation&text=Beginning%20July%201%2C%202020%2C%20the,2021%2C%20and%20June%2030%2C%202022>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Press Release, *Governor Kathy Hochul Signs Conditional Cannabis Cultivation Bill*, NY.GOV (Feb. 22, 2022), <https://www.governor.ny.gov/news/governor-hochul-signs-conditional-cannabis-cultivation-bill>.

¹⁹³ *Id.*

license and manufacture and distribute cannabis flower products without holding an adult-use processor or distributor license until June 1, 2023.¹⁹⁴

New York cultivators will be limited to one acre of flowering canopy outdoors or 25,000 square feet in a greenhouse and may use up to 20 artificial lights.¹⁹⁵ In addition, they can split between outdoor and greenhouse grows with a maximum total canopy of 30,000 square feet so long as greenhouse flowering canopy remains under 20,000 square feet.¹⁹⁶ Most importantly, in order to qualify for a conditional license, cultivators must, among other things, participate in a social equity mentorship program to provide training in cannabis cultivation and processing for social and economic equity partners and, thereby, prepare them for potential roles in the industry.¹⁹⁷ While details about what the mentorship program will entail have yet to be disclosed, the new law has much promise. Merely directing funds to communities of color and individuals that have suffered from the overcriminalization of cannabis is not enough. New York's law takes New Jersey's 70% tax revenue plan a step further by providing impacted communities with the cultivation and business skills needed to successfully navigate this industry.

A few weeks after passing the Cannabis Cultivation bill, Governor Hochul launched the Seeding Opportunity Initiative on March 10, 2022.¹⁹⁸ This first-in-the-nation initiative allows individuals with previous cannabis-related criminal offenses to be the first to open and make sales of the impending adult-use cannabis market within the state.¹⁹⁹ The Seeding Opportunity Initiative

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Press Release, *Governor Hochul Announces the Office of Cannabis Management Seeding Opportunity Initiative*, NY.GOV (Mar. 10, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-office-cannabis-management-seeding-opportunity-initiative>.

¹⁹⁹ *Id.*

comprises of three programs: Equity Owners Lead Program, Farmers First Program, and The New York Social Equity Cannabis Investment Program.²⁰⁰

The Equity Owners Lead Program gives licensing priority to equity-entrepreneur applicants who had a cannabis-related offense prior to the passage of the Marijuana Regulation and Tax Act (MRTA) on March 31, 2021.²⁰¹ What makes this program so groundbreaking is that it extends priority licensing status to applicants that have a parent, guardian, child, spouse, or dependent with a pre-MRTA cannabis offense in New York.²⁰² Generations of families have been severely disrupted by this county's historically biased war on drugs. Affording equity applicants the first bite at the apple in the recreational cannabis industry will facilitate diversity *before* the market becomes too saturated. By broadening the pool of priority-status applicants, New York state is affording those individuals (and their families) access to capital that they would otherwise be denied.

The Farmers First Program reiterates the Conditional Cannabis Cultivation Bill discussed above, by requiring New York hemp farmers to partake in sustainability and equity mentorship programs.²⁰³ The New York Social Equity Cannabis Investment Program provides funding for equity entrepreneurs in the adult-use cannabis market.²⁰⁴ The Dormitory Authority of the State of New York (DASNY) would provide leasing and construction services to site dispensaries and renovate them to meet health, safety, and security requirements.²⁰⁵ This program remains under discussion with the state legislature.²⁰⁶ The New York state legislature is likely hesitant to give its stamp of approval because of the program's financial cost. The projected cost to implement just

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

this alone program is \$200 million.²⁰⁷ While this is a large sum of money, should the initiative be implemented as planned, New York state will be positioned to recoup that initial \$200 million investment because there will be more active participants in the state economy and hence, more sales tax for New York state to claim.

The cannabis industry is a new, untapped market and it would be wise for New York to approve an initiative that has the potential for a financial windfall for the state. Aside from the economic profit New York state would gain from this initiative, the importance in investing in communities and affording otherwise ineligible individuals from having a seat at the table in this context cannot be underestimated, especially when those communities and individuals bore the brunt of the harsh and biased criminalization of cannabis.

Conclusion

For decades, the government has tried and succeeded in distinguishing white drug use from black and brown drug use. For decades, generations of families have been irreparably disrupted by the draconian War on Drugs policies implemented by politicians who were more concerned about preserving their position in government than promoting the best interests of the people they were called to serve. Because the federal government has not budged in de-scheduling and legalizing cannabis, it is up to the states to create policy with equity at the forefront.

²⁰⁷ *Id.*