

We(ed) Hold These Truths to be Self Evident: All Things Cannabis Are Inequitable

Garrett I. Halydier

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We(ed) Hold These Truths to be Self-Evident: All Things Cannabis Are Inequitable

Garrett I. Halydier

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ABSTRACT

Current approaches to social equity in the cannabis industry continue to fail to promote racial equity while simultaneously exacerbating gender, environmental, and other inequities. To better understand the structural dynamics underlying this phenomenon, I first present a multi-disciplinary recounting of not only the racial inequities, but also the stigma, business, research, energy, sex and gender, hemp, and international inequities of the War on Drugs. This serves as the foundation for a compilation of the structural and theoretical reasons for how current social equity policies, whether targeting the cannabis industry, community reinvestment, social justice, or access equity, will only continue to fail to address the inequities they target.

In short, state licensing processes, managed market dynamics, and natural characteristics of the industry conspire to undercut states' attempts to address social inequity solely by reserving limited numbers of "social equity licenses." State community investment programs to address inequities are funded by taxes on the populations they are intended to help, and industry-led initiatives are treated as marketing campaigns. Retroactive pardons and expungement are routinely underfunded, hobbled by technical issues, unused by beneficiaries, and insufficiently comprehensive to provide effective resentencing solutions, all while states maintain arbitrary criminalization limits that continue to exacerbate inequity. Finally, direct cannabis regulations remain only tangentially associated with the employment, child-custody, housing, insurance, bankruptcy, environmental, and medical research issues presented by the ongoing criminality of cannabis, and the associated inequities remain unaddressed by cannabis regulatory regimes to the ongoing detriment of those most negatively impacted by the War on Drugs.

AUTHOR'S NOTE

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The author notes that all data herein is accurate through August 2023, and while some specifics regarding the industry may change—either new cannabis programs in additional states or changing market dynamics as described within—the theoretical framework and recommendations will remain relevant both to and after any sort of federal legalization.

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INTRODUCTION

At the inaugural meeting of Hawaii’s cannabis¹ legalization task force,² every single piece of verbal and written testimony

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. 1135, 1138 (2021); see Daniel G. Orenstein, *Preventing Industry Abuse of Cannabis Equity Programs*, 45 S. ILL. U. L.J. 69, 71 n.1 (2020) (noting that early advocates justified criminalization by linking Mexican immigrants and Black people to “marijuana” or “marihuana” and violent crime). *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. NAT’L PLANT GERMPLASM SYS., <https://npgsweb.ars-grin.gov/gringlobal/taxon/taxonomyspecieslist?id=2034&type=genus> [https://perma.cc/K9TK-ZEHJ] (last updated Sept. 23, 2023); Daniele Piomelli & Ethan B. Russo, *The Cannabis Sativa Versus Cannabis Indica Debate: An Interview with Ethan Russo, MD*, 1:1 CANNABIS & CANNABINOID RSCH. 44-46 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576603/> [https://perma.cc/7TDF-FF83]. “Hemp” refers to cultivars of *Cannabis sativa* with lower concentrations of psychoactive components typically used in industrial or medicinal settings. Stoa, *supra*.

“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. 75-238, 50 Stat. 551 (repealed 1970) and Act 170, 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, 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/> [https://perma.cc/3NBH-UMNM]; Colby Itkowitz, *Trump Administration Says Immigrants Working In Legal Marijuana Industry Lack ‘Moral Character’ For Citizenship*, WASHINGTON POST (Apr. 20, 2019), <https://www.washingtonpost.com/politics/2019/04/20/trump-administration-immigrants-working-legal-marijuana-industry-lack-moral-character-citizenship/> [https://perma.cc/RJ5T-72D9] (noting that federal immigration standards prohibit immigrants working in the cannabis industry from achieving citizenship); Carolina Moreno, 9

referenced “social equity” or advocated for Hawaii to implement a cannabis social equity program.³ Even individuals and organizations opposing cannabis legalization in Hawaii argued in support of cannabis social equity policies.⁴ Testifiers on both sides of the issue not only agreed about the importance of social equity policies but also that all previous states’ attempts at implementing social equity programs had ended in “complete disaster.”⁵

Outrageous Things Donald Trump Has Said About Latinos, HUFFPOST (Aug. 31, 2015), https://www.huffpost.com/entry/9-outrageous-things-donald-trump-has-said-about-latinos_n_55e483a1e4b0c818f618904b [https://perma.cc/PFP3-WN7Y] (discussing President Trump’s language towards Latinos); Orenstein, *supra* at 74-75 (discussing how the DEA continues to use historically racist spellings in its administrative rules).

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 *Dual Use of Cannabis Task Force*, STATE OF HAW., DEP’T OF HEALTH MED. CANNABIS PROGRAM, <https://health.hawaii.gov/medicalcannabis/dual-use/> [https://perma.cc/4NBB-QS7A] (last visited Aug. 10, 2022).

³ *See generally* MONDAY APRIL 25, 2022: WRITTEN TESTIMONY, STATE OF HAW., DEP’T OF HEALTH MED. 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> [https://perma.cc/2KFK-3CRE]; MONDAY APRIL 25, 2022: WRITTEN TESTIMONY RECEIVED - LATE, STATE OF HAW., DEP’T OF HEALTH MED. 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> [https://perma.cc/C6HJ-RJV5]; and HDOH MedCann, *2022 04 25 Dual Use of Cannabis Task Force Meeting*, YOUTUBE (May 20, 2022), <https://youtu.be/WLKN10Djmr0> [https://perma.cc/GZ8J-DPZM].

⁴ HDOH MedCann, *supra* note 3.

⁵ *Id.* The testifier echoed the language of NBA star Al Harrington who similarly described the implementation failures of the Los Angeles social equity program which 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 (June 10, 2020), <https://www.simplifya.com/social-equity-or-lack-thereof-in-the-cannabis-industry/> [https://perma.cc/85VD-J8PW].

There was also general agreement about the sorts of policies that constitute cannabis social equity in adult-use cannabis regulations including programs that promote diverse ownership of cannabis licensed businesses (“industry equity”),⁶ reinvest in communities adversely affected by the War on Drugs (“community equity”),⁷ decriminalize sales and possession of cannabis and expunge cannabis conviction records (“criminal justice equity”),⁸ and address barriers to participation (“access equity”)⁹ in the cannabis industry.¹⁰

By defining cannabis social equity as merely the implementation of such policies, the testifiers implied that only those policies can solve the War on Drugs’ continuing impact on the inequities amongst different groups of cannabis users.¹¹ Despite this common consensus about the sorts of harms to be redressed and the available menu of policy solutions, the testifiers also agreed that current implementations of those policies in social equity programs nationwide had yet to demonstrate any significant progress.¹²

This debate in Hawaii does not exist in isolation, but rather serves as a microcosm of a larger national conversation that exhibits a similar near consensus on the ineffectiveness of social equity programs.¹³ For instance, the Minority Cannabis Business Association

⁶ See *infra* Section III.A (discussing industry equity).

⁷ See *infra* Section III.B (discussing community equity).

⁸ See *infra* Section III.C (discussing criminal justice equity).

⁹ See *infra* Section III.D (discussing access equity).

¹⁰ 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 AMBER LITTLEJOHN & ELLANA GREEN, MINORITY CANNABIS INDUSTRY ASSOCIATION, NAT’L CANNABIS EQUITY REP. 2 (2022), <https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf> (general definition). For the agreement of the testifiers on these points, see WRITTEN TESTIMONY, *supra* note 3; WRITTEN TESTIMONY RECEIVED LATE, *supra* note 3; and HDOH MedCann, *supra* note 3.

¹¹ WRITTEN TESTIMONY, *supra* note 3 (paraphrasing the definition of “social equity” given by the Minority Cannabis Industry Association, LITTLEJOHN & GREEN, *supra* note 10). See generally HDOH MedCann, *supra* note 3.

¹² See generally WRITTEN TESTIMONY, *supra* note 3; and HDOH MedCann, *supra* note 3.

¹³ See, e.g., LITTLEJOHN & GREEN, *supra* note 10, at 31; Laura Garius et al., *Release, Regulating Right, Repairing Wrongs: Exploring Equity and Social Justice Initiatives within UK Cannabis Reform*, RELEASE 1, 12 (2022), https://www.release.org.uk/sites/default/files/pdf/publications/Regulating-Right-Repairing-Wrongs-UK-Cannabis-Reform_Release.pdf [<https://perma.cc/ZH25->

(“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, criminal justice, community, and access).”¹⁴ Their 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.¹⁵ 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 in other states with the same policies, your state will be at the forefront of cannabis social equity—your state will be the first to get it right.*¹⁶ No one challenges the merit of the policies themselves.

The cannabis social equity movement has certainly identified real, existing inequities resulting from the implementation of cannabis regulations to date, and many of its proposed policies can likely have positive impacts on those inequities.¹⁷ Even so, many of the policies for

5BJX]; 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/> [https://perma.cc/K6SJ-U5FZ].

¹⁴ LITTLEJOHN & GREEN, *supra* note 10, at 31.

¹⁵ 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.

¹⁶ *See, e.g.*, HDOH MedCann, *supra* note 3 (Marijuana Policy Project discussing Hawaii’s potential program and failure of others); WRITTEN TESTIMONY, *supra* note 3 (career national cannabis legal advocate discussing Hawaii’s potential program and failure of others); *Cf. Social Equity in Cannabis Law and Policy Podcast with Cat Packer*, ATT’Y GEN. ALL. at 26:39 (Oct. 15, 2021), <https://www.gotostage.com/channel/7ea69eab353b4fefa57462797d687e23/recording/32fbbbd288b74a889a93296abdac8134/watch> [https://perma.cc/AT8P-YE4M] (Attorney General Alliance discussing with the executive director of the Los Angeles Department of Cannabis Regulation updates to current program and failure of others); CANNABIS REGUL. OF COLOR COALITION, PRINCIPLES (2020), <https://www.crc-coalition.org/principles> [https://perma.cc/AW8K-NYRT] (providing the same equity principles to each state for which they provide policy testimony).

¹⁷ *Social Equity in Cannabis Law and Policy Podcast with Cat Packer*, *supra* note 16, at 13:47, 14:55, 16:34 (Oct. 15, 2021).

which there is the greatest consensus have at best reduced the overall magnitude of the harm without actually reducing the level of inequity.¹⁸ For example, in both 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 greatest amount of administrative resources, which inherently limits the amount of inequity the policies can actually redress given the scale of the problem.²⁰

Part I of this paper expands the literature's understanding of the sheer scope of cannabis inequity through a multi-disciplinary recounting of not only the racial inequities but also the stigma, business, research, energy, sex and gender, hemp, and international inequities caused by the War on Drugs. This recounting serves as the foundation for Part II which investigates the structural reasons for the ongoing failure of cannabis social equity programs to address the consequences of the War on Drugs. This diagnosis must presage any attempt to build a robust social equity framework that can provide both a theoretical explanation for why

¹⁸ See 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).

¹⁹ Kenneth Sebastian Leon, *Minority-Owned Cannabis Businesses as a Social Justice Imperative*, 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, 8, 21 (2016), <https://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf> [<https://perma.cc/A76Q-87F4>]; Firth et al., *supra* note 18, at 1585-86; 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> [<https://perma.cc/8K4D-PP3U>]; see generally *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio's New York*, DRUG POL'Y ALL. AND MARIJUANA ARREST RSCH. PROJECT (2017), https://drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf [<https://perma.cc/2CYZ-APNA>].

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”).

current cannabis social equity programs remain unsuccessful and a foundation for exploring new solutions.²¹

I. THE INEQUITABLE CONSEQUENCES OF THE WAR ON DRUGS

The War on Drugs created a diverse set of inequities that researchers, legislatures, and advocates are only now beginning to untangle. Efforts towards this end began on the local level in 2017, when the City of Oakland (“Oakland”) created the original social equity program to address racial injustice by reserving some cannabis dispensary licenses for those with prior cannabis convictions.²² As the first mover, Oakland’s policies and priorities heavily influenced later cannabis social equity policies, focusing the conversation primarily on racial inequities and industry ownership disparities.²³ While racial equity is by far the most studied impact of both the War on Drugs and the implementation of current cannabis regulation regimes, social equity programs focused on racial equity provide only part of the solution to a diverse set of harms that touch every aspect of society.

A. The Inequitable Impacts of the War on Drugs

The War on Drugs wasted the lives of those sentenced to years in prison, disrupted families, and devastated communities across the

²¹ For an example of an article exploring possible theoretical explanations and proposing a new theory for addressing cannabis inequities, see Garrett I. Halydier, *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*, 19 U. MASS. L. REV. (forthcoming 2024).

²² Rebecca Brown, *Cannabis Social Equity: An Opportunity for the Revival of Affirmative Action in California*, 3 SOC. JUST. & EQUITY L.J. 205, 229 (2019); Sarah Ravani, *Oakland’s Groundbreaking Cannabis Equity Program Showing Modest Results So Far*, S.F. CHRON. (May 25, 2019), <https://www.sfchronicle.com/bayarea/article/Oakland-s-groundbreaking-cannabis-equity-13895654.php> [<https://perma.cc/5GGG-BRNA>]; see *Become an Equity Applicant or Incubator*, CITY OF OAKLAND, <https://www.oaklandca.gov/topics/become-an-equity-applicant-or-incuabtor> [<https://perma.cc/4GG5-XB9Q>] (last visited Nov. 26, 2022); see DARLENE FLYNN, AGENDA REPORT: EQUITY ANALYSIS AND PROPOSED MEDICAL CANNABIS ORDINANCE AMENDMENT (Feb. 14, 2017), <https://cao-94612.s3.amazonaws.com/documents/Equity-Analysis-and-Proposed-Medical-Cannabis-Amendments.pdf> [<https://perma.cc/VL2U-G8ZG>].

²³ See, e.g. Orenstein, *supra* note 1, at 71; LITTLEJOHN & GREEN, *supra* note 10, at 31-32.

United States.²⁴ However, these disruptive effects were by no means universal, as they disproportionately and adversely impacted minority populations and communities in innumerable ways.²⁵ While others have extensively chronicled the history of the United States' War on Drugs,²⁶ details of the lasting impacts of state and federal enforcement of cannabis laws remain siloed within discrete disciplines. As state and federal governments seek to liberalize current cannabis prohibitions, some measure of redress for all of those affected must be a part of those programs. This inclusion requires a more comprehensive accounting of the harms of the War on Drugs.

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. Yet, a detailed empirical and narrative accounting is essential to effectively 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 better aim future cannabis social equity policies.

1. Racial Inequities

As early as 1970, the year in which Congress passed the Controlled Substances Act ("CSA"), critics noted the unequal enforcement of cannabis laws in minority communities of all types.²⁷ The consequences of this enforcement remain prevalent today.

²⁴ Akele Parnell, *Why Does Social Equity Matter*, UNDERSTANDING SOC. EQUITY 21, 22-23 (Christopher Nani ed.) (July 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622268.

²⁵ *Id.*

²⁶ *See, e.g.*, LESTER GRINSPON & JAMES B. BAKALAR, *MARIHUANA, THE FORBIDDEN MEDICINE* (1993); Kim Hewitt, *History and Cultural Context of Marijuana in the United States*, UNDERSTANDING MED. CANNABIS 40 (2021); David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1 (2020); *see* Garrett I. Halydier, *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*, 19 U. MASS. L. REV. (forthcoming 2024).

²⁷ Samuel DeWitt, *Achieving Social Equity in the Cannabis Industry*, 29 DRUG ENF'T AND POL'Y CTR. 1, 3 (2021). *See generally* ERICH GOODE, *THE MARIJUANA SMOKER* 34, 41, 317 (1970) (Minorities in urban areas of New York were more

a. Black and Minority Inequities

Recent cannabis social equity literature frequently cites²⁸ a periodically updated report from the American Civil Liberties Union (“ACLU”) that details racial disparities in cannabis enforcement actions.²⁹ This report obtains its statistics from the Uniform Crime Reporting Program and its replacement, the National Incident-Based Reporting System.³⁰

likely to be cannabis users and more likely to be subject to increasingly biased enforcement and negative consequences).

²⁸ David Trilling, *Marijuana Legalization: Research Review on Crime and Impaired Driving*, THE JOURNALISTIC RES. (2016), <https://journalistsresource.org/economics/marijuana-legalization-crime-driving-research/> [<https://perma.cc/QB4E-MJGU>]; see, e.g., DeWitt, *supra* note 27 (citing the 2020 version of the ACLU report); and Owusu-Bempah & Luscombe, *supra* note 19 (citing the 2013 version of the ACLU report).

²⁹ 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”] [<https://perma.cc/AD95-YXC9>].

³⁰ ACLU REPORT, *supra* note 29.

While NIBRS is designed to collect uniform data, collection processes and quality vary across agencies and warrant additional review. NIBRS does not correspond to state specific criminal laws; thus, agencies may have different interpretations of offense codes, meaning the reliability of a cannabis measure may change over time, as cannabis policies change. . . . 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[.]

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, 516 (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 [W]hite. This neglects to account for disparate treatment of this group and underestimates the Black-[W]hite disparities by inflating the number of [W]hite marijuana arrests.

Katharine Neill Harris & William Martin, *Persistent Inequities in Cannabis Policy*, 60(1) THE JUDGES’ J. 9, 11 (2021); see FBI, NATIONAL INCIDENT BASED REPORTING SYSTEM DATA, CRIME DATA EXPLORER (2022), <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend> [<https://perma.cc/9EY4-W9VC>].

According to the most recent data in the ACLU report, White and Black populations use cannabis at about the same rate.³¹ 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.³² These numbers have remained relatively stable since the mid-1990s. Despite the increasing number of states that have legalized or decriminalized cannabis possession, between 80 and 90% of all arrests are for possession each year.³³ 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.³⁴

Despite comparable 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).³⁵ While national arrest rates for possession fell gradually in the 2010s, this racial ratio of arrests has not changed. In every single state, Black people are more likely to be arrested for possession than White people.³⁶ Even in states that have legalized or decriminalized cannabis possession, this disparity remains, narrowing only slightly in some states while worsening in others.³⁷ 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

³¹ ACLU REPORT, *supra* note 29, at 29.

³² LYNN ZIMMER & JOHN P. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS 41 (1997); ACLU REPORT, *supra* note 29.

³³ 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); ZIMMER & MORGAN, *supra* note 32; ACLU REPORT, *supra* note 29.

³⁴ ACLU REPORT, *supra* note 29, at 5.

³⁵ *Id.* at 29.

³⁶ *Id.* at 35.

³⁷ Zara Snapp & Jorge Herrera Valderrábano, *Regulating Cannabis in Uruguay, the United States, and Canada: Is a Social Justice Framework Possible?*, RSCH. HANDBOOK ON INT'L DRUG POL. 305 (David R. Bewley-Taylor & Khalid Tinasti eds., 2020); Firth et al., *supra* note 18, at 1585-86 (2019); ACLU REPORT, *supra* note 29, at 35 (observing that states which 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 30, at 10 (stating that 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).

association of Black people with what remains of the illicit market after legalization.³⁸

These racial arrest disparities deepen as the arrestee moves through the judicial system. For instance, in 2019, the Mississippi Supreme Court upheld defendant Allen Russell’s life sentence for possession of 43 grams of cannabis, ruling that it was not “cruel and unusual punishment.”³⁹ 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 [W]hite defendant would for a violent crime. People of color account for 70[%] of all defendants convicted of charges with a mandatory minimum sentence.⁴⁰

The U.S. criminal justice system will imprison over 30% of all Black males at some point in their lives, and 25% of Black children will endure the incarceration of at least one parent by the time the child is fourteen years old.⁴¹ The proportion of these imprisonments due to drug crimes is only increasing.⁴² One key reason for these racial disparities in incarceration rates is the imposition of mandatory minimum sentences for drug crimes and three-strike laws.⁴³ For example, in 2015, Trent Bouhdida was twenty-one when an undercover cop caught him selling one ounce of cannabis, and the court sentenced him to sixteen years in jail due to prior convictions.⁴⁴ As told by a judge whose hands were tied by the three-strikes laws in Orange County, California, 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.⁴⁵ The

³⁸ Owusu-Bempah & Luscombe, *supra* note 19; Samuel DeWitt, *supra* note 27, at 3-4.

³⁹ 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> [<https://perma.cc/D3XW-48HF>].

⁴⁰ Perlman, *supra* note 33, at 102.

⁴¹ JUDGE JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 44 (2001); Jared Kriwinsky, *Achieving Diversity in the Marijuana Industry: Should States Implement Social Equity into Their Regimes?* 1, 5-6 (Ohio St. Pub. L., Working Paper No. 503, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452570 [<https://perma.cc/5JRS-ACH9>].

⁴² GRAY, *supra* note 41; Kriwinsky, *supra* note 41, at 1, 6.

⁴³ Krishnan, *supra* note 39.

⁴⁴ *Id.*

⁴⁵ GRAY, *supra* note 41, at 33.

math is insidious; in Massachusetts, the average mandatory minimum sentence for a drug crime is five years, and this disparity in arrest rates rapidly causes the number of Black and minority offenders incarcerated to compound compared to other demographics.⁴⁶ And yet, there is no evidence these sentencing provisions ever reduced cannabis use.⁴⁷

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.”⁴⁸ They can also expect to lose their jobs, remain on probation for years, pay for expensive lawyers, and, in some states, incur exponentially scaled taxes on the cannabis they possessed when arrested.⁴⁹ For instance, an anonymous individual from Kauai, Hawaii, has a degree in mathematics; however, despite Hawaii’s perennial shortage of teachers each year, they cannot find a teaching job due to a prior cannabis conviction for simple possession.⁵⁰ According to the Brennan Center for Justice, formerly incarcerated individuals can expect their lifetime earnings to be \$484,400 less than that of their peers.⁵¹

By the 1990s, almost 1.4 million Black people—about 13% of adult Black males in America at the time—had felony convictions. Beyond incarceration itself, many of these individuals had now lost the right to vote, could no longer serve on a jury, and could likely never adopt a child.⁵² A family member’s arrest for a drug crime can also lead

⁴⁶ *Id.* at 45.

⁴⁷ ZIMMER & MORGAN, *supra* note 32, at 46.

⁴⁸ ZIMMER & MORGAN, *supra* note 32, at 43-44. *See also* Perlman, *supra* note 33, at 108 (discussing the opportunities and benefits that incarcerated persons lose).

⁴⁹ *See* ZIMMER & MORGAN, *supra* note 32, at 43-44; DeWitt, *supra* note 27.

⁵⁰ Interview with *Anonymous*, in Kauai, Haw. (Aug. 6, 2022). *See also* *Ending Hawaii’s Teacher Shortage Crisis*, HAW. ST. TCHR. ASS’N, <https://www.hsta.org/crisis/> [<https://perma.cc/2634-GUX3>] (last visited Nov. 28, 2023).

⁵¹ TERRY-ANN CRAIGIE ET AL., *CONVICTION, IMPRISONMENT, AND LOST EARNINGS* 7 (2020).

⁵² GRAY, *supra* note 41, at 44-45 (2001); *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/reports98/vote/usvot98o.htm> [<https://perma.cc/XYK8-5W4G>] (last visited Sept. 21, 2023); Perlman, *supra* note 33, at 108. To provide context for these numbers, consider that African Americans make-up roughly one-third of the disenfranchised in America despite comprising only 13.6% of the total United States’ population. *Quick Facts: United States*, U.S.

to eviction from public housing, loss of employment, removal from extracurricular activities, suspension and expulsion from school, and denial of medical assistance, welfare, and access to homeless shelters.⁵³

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 (assuming the state *actually tracks* its instances of civil asset forfeiture).⁵⁴ In Puna, Hawaii, for example, aggressive use of civil asset forfeiture deprived residents of their homes, land, and cars, even when arrestees were innocent, sparking a U.S. Supreme Court case in 1993 to address the issue.⁵⁵ This aggressive enforcement coincided with a dramatic economic decline in Puna, with inflation adjusted median household income dropping from approximately \$69,000 in 1970, to \$54,000 in 1979, just a few years after the start of Operation Green Harvest, to today's \$45,000.⁵⁶ Local governments obtain significant

CENSUS, <https://www.census.gov/quickfacts/fact/table/US/RHI225222#RHI225222> [<https://perma.cc/6THP-UW9R>] (last visited Oct. 17, 2023).

⁵³ See M.Y. Iguchi et al., *How Criminal System Racial Disparities May Translate Into Health Disparities*, 16 J. OF HEALTH CARE FOR THE POOR AND UNDERSERVED 48, 50 (2005); ZIMMER & MORGAN, *supra* note 32, at 44-46; Perlman, *supra* note 33, at 108.

⁵⁴ GRAY, *supra* note 41, at 119-21; ZIMMER & MORGAN, *supra* note 32, at 44.

⁵⁵ See *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (holding that the ex parte pre seizure of property for marijuana possession in Puna, Hawaii, offered “little or no protection to the innocent owner”); see Bruce Voss, *Even a War Has Some Rules: The Supreme Court Puts the Brakes on Drug-Related Civil Forfeitures*, 16 U.H. L. REV. 493, 526-36 (1994); and Interview with *Anonymous*, in Hilo, Haw. (July 23, 2022).

⁵⁶ Rob Parsons, *Operation GreenHarvest*, MAUI TIMES, (Aug. 20, 2009), <https://mauitimes.org/news/operation-greenharvest/> [<https://perma.cc/9U3P-4ZB7>]. See Income Calculations on file with Author (first referencing data from IPUMS NHGIS, row 3988, in tbl.1 Aggregate Family Income, 1970 Census: Count 4Pb – Sample-Based Population Data with Race/Ethnicity Breakdown, <https://data2.nhgis.org/main> [<https://perma.cc/Y8X5-Z4TR>] (found on page 2 of the search results, after visiting the link provided and applying the topic filter “Families.” After adding to data cart, select the “County Subdivision” Geographical Level when taken to the Data Options page); then from IPUMS NHGIS, row 3561, in tbl.74 Median Family Income in 1979, 1980 CENSUS: STF 3 – SAMPLE-BASED DATA, <https://data2.nhgis.org/main> [<https://perma.cc/Y8X5-Z4TR>] (last visited Nov. 13, 2023) (found on page 3 of the search results, after visiting the link provided and applying the topic filter “Families.” After adding to data cart, select the “County Subdivision” Geographical Level when taken to the Data Options page); then from Census Reporter, *Pahoa-Kalapana CCD, Hawaii County, HI* (2021),

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.⁵⁷

The consequences for those imprisoned are direct and immediate. Repercussions from incarceration 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 human health” and flourishing.⁵⁸

b. Native American and Native Hawaiian Inequities

Just as with Black and minority communities, Native American communities continue to experience inequitable enforcement actions. As an egregious example, the DEA recently raided a hemp planting used for education and seed development operated by the College of the Menominee nation⁵⁹—a planting firmly in compliance with the 2014 Farm Bill’s legalization of hemp for research purposes.⁶⁰ This was not an isolated incident.⁶¹ Federal and state enforcement officials appeal to the morass of state, county, federal, and Native American sovereignty regulations as justification for restrictions and raids on Native American territories; but those same officials do not similarly restrict or raid nearby growers on the other side of the border.⁶² Differential enforcement not only challenges Native American sovereignty, but also has a chilling effect on Native American nations’ ability to decriminalize

pahoa-kalapana-ccd-hawaii-county-hi/ [https://perma.cc/2X3V-NQ7F]; and then converting all referenced household incomes to 2023 monetary values using CPI Inflation Calculator, <https://www.in2013dollars.com/us/inflation/> [https://perma.cc/ZKT3-6HTX]).

⁵⁷ GRAY, *supra* note 41, at 119.

⁵⁸ Nicole Huberfeld, *Health Equity, Federalism, and Cannabis Policy*, 101 B.U. L. REV. 897, 913 (2021). *See also* Perlman, *supra* note 33, at 108; DeWitt, *supra* note 27, at 1, 3-4.

⁵⁹ Courtney Lewis, *Confronting Cannabis: Legalization on Native Nation Lands and the Impacts of Differential Federal Enforcement*, 43 AM. INDIAN QUART. 408, 418-19 (2019).

⁶⁰ *Id.* at 417; Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, § 7606 (2014).

⁶¹ Lewis, *supra* note 59, at 409.

⁶² *Id.* at 409, 422, 430. *See generally* Mark J. Cowan, *Taxing Cannabis on the Reservation*, 57 AM. BUS. L.J. 867 (2020).

or legalize cannabis (or even to prevent the same in some cases)⁶³ in the same way as neighboring states.⁶⁴

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.⁶⁵ There is one positive instance of equity in this context: tribally owned cannabis businesses do not pay federal income tax.⁶⁶ Thus, they enjoy a significant tax preference relative to private cannabis businesses that cannot claim the federal 280E exemption for cost of goods sold.⁶⁷

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,⁶⁸ however, the impacts of differential enforcement are more personal and similar to those affecting Black and other minority communities. Despite only representing 10.3% of Hawaii's population in the 2020 Census,⁶⁹ in 2019, Native Hawaiian individuals made up 40% of all arrests for marijuana possession in Hawaii.⁷⁰ These numbers

⁶³ Lewis, *supra* note 59, at 419-20.

⁶⁴ *Id.* at 424.

⁶⁵ See *Id.* at 409, 421-29; 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).

⁶⁶ Cowan, *supra* note 62, at 892, 900.

⁶⁷ Cowan, *supra* note 62. Similar but more complicated dynamics exist between state taxing powers and tribally owned businesses, with states unable to tax the tribal business directly but the state being able to tax state-registered entities and customers. *Id.* at 892-93.

⁶⁸ 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.” *QuickFacts: Hawaii*, U.S. CENSUS, <https://www.census.gov/quickfacts/fact/table/HI/> [<https://perma.cc/CFN5-8D9E>] (last visited Aug. 31, 2022).

⁶⁹ *Id.* The 10.3% figure includes individuals identifying as “Other Pacific Islanders.”

⁷⁰ E-mail from Joshua J. Alvarez, PEW Rsch., to Haw. State Sen. Joy San Buenaventura, Act 169 Dual Use Task Force, Soc. Equity Permitted Interaction Grp. (July 25, 2022, 11:05 AM) (on file with author).

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 rate higher than other ethnicities, according to state data.⁷¹

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 with federal funding and national guard support.⁷² "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 \$3,000 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.⁷³ 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 officers carrying machine guns and roping down from helicopters to perform "compliance checks."⁷⁴ These checks many times lead to "avoidable deaths, gruesome injuries, demolished property, enduring trauma, blackened reputations, and multimillion-dollar legal settlements at taxpayer expense."⁷⁵ The checks can also provide probable cause for frequent but publicly inaccessible exercises of law enforcement's civil asset forfeiture powers.⁷⁶

⁷¹ OFF. OF HAW. AFF., THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 15 (2010).

⁷² Parsons, *supra* note 56; Guthrie Scrimgeour, *KPD Requests Funds for 'Green Harvest Operations'*, THE GARDEN ISLAND, (May 6, 2022, 12:05 AM), <https://www.thegardenisland.com/2022/05/06/hawaii-news/prosecutor-continues-to-de-emphasize-marijuana-prosecutions/> [<https://perma.cc/BQG5-GUWV>].

⁷³ HAW. HIGH INTENSITY DRUG TRAFFICKING AREA: DRUG MKT. ANALYSIS, DEP'T OF JUST. 3 (2011); Parsons, *supra* note 56. Note that while prices in Hawaii have doubled, some mainland cannabis wholesale prices have fallen to a weighted average well below \$1,000 per pound in 2023. MARIJUANA BUSINESS DAILY, ANNUAL MARIJUANA BUSINESS FACTBOOK 35 (2023), <https://insights.mjbizdaily.com/factbook-2023/> [<https://perma.cc/KP6H-5Q5T>].

⁷⁴ RANDY GONCE ET AL., SOCIAL EQUITY WORKING GROUP 7 (n.d.); Interview with *Anonymous*, in Kauai, Haw. (Aug. 6, 2022). See also Parsons, *supra* note 56.

⁷⁵ Elizabeth A. Bennett, *Extending Ethical Consumerism Theory to Semi-Legal Sectors: Insights from Recreational Cannabis*, 35 AGRIC. HUM. VALUES 295, 309 (2017).

⁷⁶ RANDY GONCE ET AL., SOCIAL EQUITY WORKING GROUP 15-16 (n.d.).

As with the consequences of differential enforcement on Black and minority communities, incarcerated Native Hawaiians, 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.”⁷⁷ For example, Native Hawaiians are “more likely to attend community colleges than 4-year colleges and have high dropout rates.”⁷⁸

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 around the world, patients today have very few legal options to access medical cannabis.⁷⁹

Doctors, whether in states with medical or adult-use regulations, 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.⁸⁰ 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

The Hawaii Criminal Justice Data Center holds criminal data but does not publicly track asset forfeiture data. *See* HAW. CRIM. JUST. DATA CTR., <https://ag.hawaii.gov/hcjdc/> [<https://perma.cc/C2NV-N4RK>] (last visited Nov. 28, 2023). Additionally, HRS 712A-10(12), the administrative forfeiture rules, do not have to comply with Hawaii’s Administrative Procedure, which requires publicly accessible data. HAW. REV. STAT. § 712A-10(12); HAW. REV. STAT. § 91-2(a)(1). In addition, while the legislature receives multiple reports of these civil forfeitures, it does not have to comply with Hawaii’s administrative procedure, making it difficult for the public to access these reports. HAW. REV. STAT. § 712A-16(5).

⁷⁷ *See* Jamie Kamaïlani 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).

⁷⁸ *Id.*

⁷⁹ Elena Quattrone, *The “Catch-22” of Marijuana [Il]legalization*, 22 B.U. J. SCI. & TECH. L. 299, 301 (2016).

⁸⁰ GRINSPON & BAKALAR, *supra* note 26, at 20-21.

where medical cannabis is legal.⁸¹ Doctors may only certify that a patient has a “qualifying condition.”⁸²

Doctors’ lack of involvement in the industry and the patchwork of medical cannabis regulations forces patients to uproot their lives and move across the country to treat their illnesses.⁸³ For example, in 2012, doctors ran out of options and placed Charlotte Figi, a five-year-old with Dravet’s Syndrome, into a medically induced coma to mitigate the effects of up to 300 epileptic seizures a week.⁸⁴ Her father quit his job as a Green Beret, and the family moved to Colorado soon after the state legalized cannabis to obtain legal, non-psychoactive cannabis oil that allowed Charlotte to live a normal childhood.⁸⁵ Six years later, the FDA later approved what remains the only sanctioned natural cannabis drug, Epidiolex, to treat Dravet’s Syndrome and other epileptic conditions.⁸⁶ Health insurance does not cover these expenses, so for instance, in cases of end of life care for cancer, one of the most supported cannabis use cases, patients must pay out of pocket in the last years of their life.⁸⁷

⁸¹ TODD GARVEY ET AL., CONG. RSCH. SERV., R43435, MARIJUANA: MEDICAL AND RETAIL—SELECTED LEGAL ISSUES 4, 8 (2014); *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003).

⁸² Kevin F. Boehnke et al., *Qualifying Conditions of Medical Cannabis License Holders in the United States*, 38 HEALTH AFF. 295 (2019). The 9th Circuit held this was a protected free speech right. *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003).

⁸³ Quattrone, *supra* note 79 (citing Susan K. Livio, *Medical Marijuana: NJ Child Improves as Family Finds Fewer Roadblocks in Colorado*, NJ.COM (Sept. 21, 2014, 11:00 AM), https://www.nj.com/politics/2014/09/medical_marijuana_nj_child_improves_as_family_finds_fewer_roadblocks_in_colorado.html [<https://perma.cc/V2BE-VZHK>]).

⁸⁴ Sandra Young, *Marijuana Stops Child’s Severe Seizures*, CNN, <https://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/index.html> [<https://perma.cc/7366-F7LZ>] (last updated Aug. 7, 2013, 4:13 PM); Minyvonne Burke & Associated Press, *Charlotte Figi, Girl with Severe Seizures that Inspired CBD Treatments, Dies at 13*, NBC NEWS (Apr. 8, 2020), <https://www.nbcnews.com/news/us-news/charlotte-figi-girl-severe-seizures-inspired-cbd-treatments-dies-13-n1179396> [<https://perma.cc/YZ89-YL5Q>].

⁸⁵ Young, *supra* note 84. Charlotte died in 2020 at the age of 13 from a virus. Burke, *supra* note 84.

⁸⁶ *Celebrating the Life and Legacy of Charlotte Figi*, TERRAPIN CARE STATION (Apr. 7, 2021), <https://www.terrapincarestation.com/2021-blog/celebrating-the-life-and-legacy-of-charlotte-figi/> [<https://perma.cc/7LRQ-G2WF>].

⁸⁷ ATTORNEY GENERAL ALLIANCE, CANNABIS LAW DESKBOOK § 9B:12 (2023-2024 ed.); Renad Abu-Sawwa, *Emerging Use of Epidiolex (Cannabidiol) in Epilepsy*, 25 J. PEDIATRIC PHARMACOLOGY AND THERAPEUTICS 485 (2020).

This “financial toxicity”⁸⁸ further exacerbates the financial inequities stemming from carceral interactions with the War on Drugs.

But the FDA only approved Epidiolex (cannabidiol) for a narrow use case and, aside from the synthetic dronabinol and nabilone that doctors have variously used to manage the side effects of HIV/AIDS and chemotherapy since 1985,⁸⁹ the FDA has not approved any other cannabis derived medicines.⁹⁰ And yet, parents still have to keep their children out of school in order to provide anti-epilepsy and other medications that their children need and that schools refuse to administer (citing federal restrictions despite state legalization of cannabis as medicine for minors).⁹¹ Others suffer from disparate conditions where doctors have given up and cannabis provides the only relief, such as former police officer Larry Smith who uses cannabis to control Parkinson’s tremors.⁹² As one patient bluntly put it: “It’s better to be a living cannabis criminal . . . than a dead law-abiding citizen.”⁹³

While the DEA continues to maintain that cannabis and its component chemicals exhibit no accepted medical use,⁹⁴ the U.S. Federal Government has patented the cannabis plant for a variety of

⁸⁸ Rebecca E. Olson, et al., *What Price Do You Put on Your Health?: Medical Cannabis, Financial Toxicity, and Patient Perspectives on Medication Access in Advanced Cancer*, 26 HEALTH EXPECTATIONS 160, 162 (2022).

⁸⁹ Dronabinol is sold commercially as both Marinol and Syndros and nabilone is sold commercially as Cesamet. *FDA and Cannabis: Research and Drug Approval Process*, FDA (Feb. 24, 2023), <https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process> [<https://perma.cc/76MC-7W3W>].

⁹⁰ *Id.* The DEA rescheduled dronabinol, nabilone, and cannabidiol as individual formulations to avoid making a decision about the scheduling of cannabis itself. See *Q&A on the DEA Rescheduling of Epidiolex*, EPILEPSY FOUND. (Oct. 2, 2018), <https://www.epilepsy.com/stories/qa-dea-rescheduling-epidiolex> [<https://perma.cc/Y4JE-2YE6>].

⁹¹ 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> [<https://perma.cc/GP6Q-NCQS>]; MaryAnn Tapper Strawhacker, *Medical Cannabis and School: Separating Fact from Fiction*, 2020 NASN SCH. NEWS. 43-45 (2020).

⁹² Ride with Larry, Documentary (2013), https://www.amazon.com/Ride-Larry-Smith/dp/B01M66UQR4/ref=sr_1_2?ie=UTF8&qid=1479744044&sr=8-2&keywords=Ride+with+larry.

⁹³ Melissa Bone & Toby Seddon, *Human Rights, Public Health and Medicinal Cannabis Use*, 26 CRITICAL PUB. HEALTH 51, 56 (2016).

⁹⁴ *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019).

medical uses including autoimmune disease, strokes, Alzheimer's, Parkinson's, HIV, and general inflammation.⁹⁵

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.⁹⁶ Further, in 2017, the U.S. National Academy of Sciences issued a report reviewing cannabis's medical efficacy and finding conclusive or substantial evidence for efficacy addressing chronic pain, chemotherapy-induced nausea and vomiting, multiple sclerosis spasticity symptoms; moderate evidence for efficacy addressing short-term sleep disorders, sleep apnea, and fibromyalgia; as well as limited evidence for efficacy addressing HIV weight loss, Tourette syndrome symptoms, anxiety, post-traumatic stress disorder, and better outcomes after a traumatic brain injury.⁹⁷

3. Stigmatization Inequities

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.⁹⁸ In contrast to the relatively neutral

⁹⁵ U.S. Patent No. 6, 630, 507 (filed Apr. 21, 1999).

⁹⁶ 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); Merritt Enright, et. al., *'Ridiculous' Price Of Medical Marijuana Leaves Patients Scrambling*, NBC NEWS (July 17, 2021), <https://www.nbcnews.com/news/us-news/ridiculous-price-medical-marijuana-leaves-patients-scrambling-n1274085> [<https://perma.cc/5MGA-9L4K>].

⁹⁷ NAT'L ACAD. PRESS, *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH* 128 (2017), <https://nap.nationalacademies.org/read/24625/chapter/1> [<https://perma.cc/7XEJ-LRZV>].

⁹⁸ Rachel Watson, *Panel: Cannabis Industry Needs to Improve Equity, Prosperity*, GRAND RAPIDS BUS. J. (Aug. 21, 2020), <https://www.craigslist.com/news/law/panel-cannabis-industry-needs-to-improve-equity-prosperity/> [<https://perma.cc/2XBF-KF88>]. The Bureau of Narcotics conducted an education campaign in 1932 “describing the drug, its identification, and its evil effects” and fostering a growing awareness of cannabis smoking in the media, public, and law enforcement of cannabis as a “national menace.” David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 9 (2020); ROBERT M. HARDAWAY, *MARIJUANA POLITICS: UNCOVERING THE TROUBLESOME HISTORY AND SOCIAL COSTS OF CRIMINALIZATION* 98-111 (2018). See generally George Fisher, *Racial Myths of the Cannabis War*, 101 B.U. L. REV. 933 (2021).

and malleable “stereotype,” a “stigma” distinctively refers to a devalued characteristic. Society divines, delineates, and ostracizes this characteristic through an interpersonal negotiation of norms within a culture that evaluates and judges an individual’s or group’s fit or lack of fit.⁹⁹ Stigmas “activate” a negative social judgment that discredits the subject.¹⁰⁰ 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 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.”¹⁰¹

The cannabis stigma not only prevents patients from seeking the opinions of medical professionals,¹⁰² but also forces licensed cannabis business owners out of the financial system, creates fear in licensed business owners and consumers alike who must register their illegal participation in the industry with the federal government by paying taxes, and decreases trust in the licensed industry by encouraging participants to turn each other in to law enforcement for reward money for any minor infraction.¹⁰³ Schools continually subject children, even those legally using FDA approved medicines like Epidiolex, to stigmatizing programming about their own medicine.¹⁰⁴ Cannabis stigmatization, even for verified medical patients, negatively impacts

⁹⁹ MICHELLE NEWHART & WILLIAM DOLPHIN, *THE MEDICALIZATION OF MARIJUANA: LEGITIMACY, STIGMA, AND THE PATIENT EXPERIENCE*, 174-75 (2018).

¹⁰⁰ *Id.*

¹⁰¹ GOODE, *supra* note 26, at 281-82; GRINSPOON, *supra* note 26, at 335.

¹⁰² Bennett, *supra* note 75, at 310.

¹⁰³ *Id.* at 295, 310; DeWitt, *supra* note 27, at 1, 8.

¹⁰⁴ See generally Vanessa L. Parker et al, *Changing Cannabis Policies and Social Work: Implications for Students, Families, and Schools*, 45 SCH. SOC. WORK J. 34, 46 (2021).

key aspects of everyday life. This stigma underlies why patients and other legal users fear for their jobs, register their medical use with the same authority that enforces the law against them, lose custody based on cannabis use as an adverse factor in Family Court determinations, cannot exercise their second amendment rights, and automatically do not qualify for organ transplants.¹⁰⁵

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 society.¹⁰⁶

The societal consequences of the stigma are reinforced by the seriousness of the government's enforcement,¹⁰⁷ creating a "cyclical system of disenfranchisement" that continues to wreak destruction on communities of color.¹⁰⁸ These communities fear continuing inequitable cannabis enforcement because "vestiges of racial profiling

¹⁰⁵ See *infra* Section IV.D; NEWHART & DOLPHIN, *supra* note 99, at 180-81. While it will take years for the stigma to change, especially regarding police enforcement, courts have begun to rule in favor of cannabis users' constitutional right to own guns by applying the historical precedent test from *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 2117 (2022). See, e.g. *Judge: Banning Guns for Marijuana Users Unconstitutional*, ASSOCIATED PRESS (Feb. 5, 2023), <https://apnews.com/article/us-supreme-court-oklahoma-state-government-new-orleans-city-c79d6fedc97ba657d2cab17f59354a95> [<https://perma.cc/9BEW-KC8B>]; Keegan Williams, *Texas Federal Court Rules Firearm Ban on MJ Users Unconstitutional*, HIGH TIMES (Apr. 12, 2023), <https://hightimes.com/news/texas-federal-court-rules-firearm-ban-on-mj-users-unconstitutional/> [<https://perma.cc/5NRC-JBX5>].

¹⁰⁶ NEWHART & DOLPHIN, *supra*, note 99, at 171.

¹⁰⁷ 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, 98 (2019); DeWitt, *supra* note 27, at 3; Kostas Skliamis, Annemieke Benschop, & Dirk J Korf, *Cannabis Users And Stigma: A Comparison Of Users From European Countries With Different Cannabis Policies*, 19 EUROPEAN J. OF CRIMINOLOGY 1483 *passim* (2020), <https://journals.sagepub.com/doi/10.1177/1477370820983560>.

¹⁰⁸ DeWitt, *supra* note 27, at 3.

in a legalization regime attach to offenses that survive legalization” such as driving under the influence, underage possession, and public consumption of cannabis.¹⁰⁹

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 legalization, 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.¹¹⁰ 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.¹¹¹ These tools are even further out of reach for the many who wish to participate in the legal industry but are unable to due to prior cannabis convictions.¹¹² Additionally, cannabis farmworkers and trimmers are chiefly composed of already vulnerable minority, women, and migrant populations.¹¹³ These workers, even in large, multi-state operations, are forced to work

¹⁰⁹ *Id.*

¹¹⁰ See Stoa, *supra* note 1, at 1141; 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> [<https://perma.cc/6YHR-UAMY>]; and *Anonymous*, *supra*, note 50.

¹¹¹ Harris & Martin, *supra* note 30, at 9; Paul Solman, *Marijuana Has Become Big Business. So Why Are Small Growers Struggling To Survive?*, PBS NEWS (July 11, 2023), <https://www.pbs.org/newshour/show/marijuana-has-become-big-business-so-why-are-small-growers-struggling-to-survive> [<https://perma.cc/U7Q9-4AUQ>].

¹¹² Stoa, *supra* note 1, at 1141.

¹¹³ *Id.* at 1150.

under-the-table, without minimum wage/maximum hour protections or insurance, due to their low bargaining power and the cash economy nature of the industry.¹¹⁴ 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 or worse.¹¹⁵

b. Banking Inequity

High tax and compliance costs imposed by Federal law, despite the guidance from the Financial Crimes Enforcement Network (FinCEN) deprioritizing enforcement against banks that work with the cannabis industry,¹¹⁶ continue to significantly disadvantage small operators and minority and women-owned businesses.¹¹⁷ 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.¹¹⁸ The Treasury Department also requires that banks monitor any cannabis touching clients individually with invasive and expensive compliance procedures.¹¹⁹ Since cannabis is federally illegal, banks and their leadership remain criminally liable for any compliance failures, even though interactions with the industry are deprioritized for enforcement.¹²⁰ These strictures and expenses often force cannabis businesses into the “gray economy”—paying taxes, employees, rent, suppliers, and shareholders in cash.¹²¹ The sheer volume of cash involved creates substantial—and again expensive—security risks for

¹¹⁴ *Id.*

¹¹⁵ Kathy Brady, et. al., *Immigrants and Marijuana*, IMMIGRANT. L. RES. CTR. 5-6 (May 2021), https://www.ilrc.org/sites/default/files/resources/immigrants_marijuana_may_2021_final.pdf [<https://perma.cc/XUR4-5YD2>].

¹¹⁶ DEP'T OF THE TREASURY AND FIN. CRIMES ENFORCEMENT NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf> [<https://perma.cc/P5U4-52KM>].

¹¹⁷ Robert Mikos, *The Evolving Federal Response to State Marijuana*, 26 WIDENER L. REV. 1, 12 (2020).

¹¹⁸ Colleen M. Baker, *Entrepreneurial Regulatory Legal Strategy: The Case of Cannabis*, 57 AM. BUS. L.J. 913, 922-26 (2020); Adrian F. Snead, *Banking Marijuana Business: A Primer on This Emerging Field*, 60 JUDGES' J. 17 (2021).

¹¹⁹ Mikos, *supra* note 117.

¹²⁰ Snead, *supra* note 118.

¹²¹ Baker, *supra* note 118, at 951.

every cannabis business.¹²² In addition, cannabis businesses cannot use major credit card providers to accept payment, further increasing costs.¹²³ These fixed costs contribute to the significant failure rates of small businesses, legacy operators joining the legal industry, and industry equity licensees.¹²⁴

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 Act (RICO).¹²⁵ While Congress generally defunded the Department of Justice's prosecution of federal cannabis crimes in states that have legalized cannabis, individuals still have a private right of action through RICO's civil provisions.¹²⁶ Under the statute, a private individual can bring a civil suit against any cannabis business for racketeering activity, such as growing or selling federally illegal cannabis in the market.¹²⁷ These suits only require an injury to "business or property" attributable to the racketeering activity, and they

¹²² Snead, *supra* note 118.

¹²³ 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 (2019).

¹²⁴ DeWitt, *supra* note 27, 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/> [<https://perma.cc/F5ML-Q455>].

¹²⁵ Hayley Sipes, *Weeding out Marijuana Businesses with RICO [Safe Streets Alliance v. Hickenlooper, 859 F.3d 865 (10th Cir. 2017)]*, 57 WASHBURN L.J. ONLINE 21 (2018), <https://www.washburnlaw.edu/publications/wlj/online/volume/57/sipes-marijuanaandrico.pdf> [<https://perma.cc/PL2G-WHGT>]; 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/> [<https://perma.cc/7REZ-T8MN>].

¹²⁶ Sipes, *supra* note 125; Schroyer, *supra* note 125; Mikos, *supra* note 117.

¹²⁷ Mikos, *supra* note 117, at 13; 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> [<https://perma.cc/5QGP-VKH3>] (cannabis patients sue to shutdown Arkansas medical cannabis program over allegations of collusion between dispensaries and laboratories to inflate THC levels).

provide treble damages for winning plaintiffs.¹²⁸ In fact, large cannabis businesses are increasingly using this tactic as a tool to eliminate their competition.¹²⁹ These dynamics expose businesses to company-ending lawsuits, a risk uniquely problematic for small businesses and industry equity licensees already operating on very narrow margins.¹³⁰

d. Business Ownership Inequity

In 2021, Black Americans constituted only 2% of all cannabis company owners, despite comprising 13% of the national population.¹³¹ Over 80% of cannabis businesses nationwide are predominately owned and controlled by White men, surpassing the 63% national average for all businesses.¹³² While ownership rates vary by state for minorities, women, and veterans in the cannabis industry, they consistently fall below the national average for all businesses.¹³³ This inequity exists for many of the reasons enumerated above such as 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.¹³⁴ These challenges, coupled with the historical adverse impacts of incarceration on entire communities, have negatively affected those communities' human capital reserves and the workforce capacity necessary to effectively start and run a large proportion of successful businesses in a highly regulated industry.¹³⁵ Entrenching these same disparities, White business owners

¹²⁸ Mikos, *supra* note 117, at 13-14.

¹²⁹ Schoyer, *supra* note 125.

¹³⁰ See Gerald Arth & Joshua Horn, *RICO Threat Looms Over Cannabis Businesses*, FOX ROTHSCHILD (Oct. 21, 2019), <https://www.foxrothschild.com/publications/rico-threat-looms-over-cannabis-businesses> [<https://perma.cc/PK7F-ZJCP>].

¹³¹ LITTLEJOHN & GREEN, *supra* note 10, at 32.

¹³² Courtney Connley, *Cannabis is Projected to Be \$70 billion market by 2028—Yet Those Hurt Most By the War on Drugs Lack Access*, CNBC (July 1, 2021, 11:30 AM), <https://www.cnbc.com/2021/07/01/in-billion-dollar-cannabis-market-racial-inequity-persists-despite-legalization.html> [<https://perma.cc/B463-PK8V>]; JP MORGAN CHASE & CO INST., *SMALL BUSINESS OWNER RACE, LIQUIDITY, AND SURVIVAL 12* (July 2020), <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-small-business-owner-race-report.pdf> [<https://perma.cc/7Q4F-QU9K>].

¹³³ Stoa, *supra* note 1, at 1140.

¹³⁴ Edwards et al., *supra* note 5.

¹³⁵ See Ryan C. Reaves, *Women & Equity in the Emerging Commercial Cannabis Industry*, NORML WOMEN'S ALL. 1, 41 (Apr. 2019),

engage in “regulatory entrepreneurship” to further strengthen their interests by advocating for favorable regulatory changes.¹³⁶

The issue of ownership inequities has animated cannabis social equity conversations since the very first attempts to address social equity in Oakland.¹³⁷ Industry equity policies typically reserve small amounts of business licenses for “social equity licensees” and sometimes provide other financial and technical support to those licensees.¹³⁸ The general consensus, however, is that these policies have thus far failed to achieve their desired results and in some cases actively facilitate the growth of White-owned, multi-state operators who either buy licenses from failed social equity licensed businesses at a steep discount or partner with social equity licensees to own and operate the license in all but name.¹³⁹ 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 industry equity programs.¹⁴⁰ Additionally, federal courts have begun to uphold interstate commerce and equal protection challenges. Courts have struck down numerous state programs that prohibit out-of-state business

https://www.researchgate.net/publication/334023388_Women_Equity_in_the_Emerging_Commercial_Cannabis_Industry [https://perma.cc/CPX3-BFRV].

¹³⁶ See generally Baker, *supra* note 118, at 913 (developing a theory of “regulatory entrepreneurship” whereby well-funded businesses make changes to current law for the benefit of their business strategy and costs).

¹³⁷ See Ravani, *supra* note 22.

¹³⁸ See generally Leon, *supra* note 19, at 167; Edwards et al., *supra* note 5; 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, 11:47 AM), <https://www.benzinga.com/markets/cannabis/21/07/22247544/green-thumb-industries-cannabis-co-to-open-leap-new-business-accelerator-for-illinois-social-equ> [https://perma.cc/AZ2R-3877].

¹³⁹ 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/> [https://perma.cc/ZAD2-AYKX]; Kris Kane, *What’s Killing Social Equity in Business*, FORBES (Aug. 1, 2023), <https://www.forbes.com/sites/kriskrane/2023/08/01/whats-killing-social-equity-in-cannabis-lack-of-banking/?sh=388dad8f5a9f> [https://perma.cc/G6NT-L4JE]; Edwards et al., *supra* note 5.

¹⁴⁰ 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> [https://perma.cc/66QM-WS5C]; LITTLEJOHN & GREEN, *supra* note 10; Edwards et al., *supra* note 5.

ownership, programs that directly require minority ownership of some number of cannabis businesses, or that narrow broader equity programs to only include those with prior drug convictions.¹⁴¹ Despite these challenges, the promotion of minority cannabis business ownership remains one of the four pillars of cannabis social equity programs in the states and municipalities with such programs, as championed by the many organizations advocating for cannabis social equity.¹⁴² Whatever the effectiveness of these programs, current business ownership statistics speak for themselves, demonstrating clear inequities in the business of cannabis.¹⁴³

5. Research Inequities

To support its absolute denial that cannabis has any medical benefit, the DEA creates barriers to the development of a sufficiently robust body of peer-reviewed scientific studies that would effectively argue to the contrary. Researchers must navigate a labyrinthine regulatory process to study the effects of cannabis. They must obtain (1) an investigational new drug approval from the FDA, (2) an administrative letter about the processing facilities and strains used in the research, (3) DEA registration and site licensure in accordance with Schedule I drug restrictions, (4) state-controlled substance certificates from state boards of medical examiners and law enforcement agencies regulating narcotics, (5) any additional state-level approvals, (6) approval of security provisions by the DEA, and (7) approval for human

¹⁴¹ See, e.g. *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 43 F.4th 542 (1st Cir. 2022) (striking down Maine’s law prohibiting non-resident cannabis business licensees for violating interstate commerce); *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); *PharmaCann Ohio, LLC v. Ohio Dep’t of Commerce*, No. 17-CV-10962 (Ohio Ct. Com. Pl. Nov. 15, 2018) (striking down Ohio’s law preferencing business ownership using racial criteria for violating the Equal Protection Clause); Anthony Izaguirre, *Veterans’ Lawsuit Shuts Down New York Pot Industry on Argument That Only Drug Convicts Are Getting Licenses*, FORTUNE (Aug. 8, 2023), <https://fortune.com/2023/08/08/new-york-recreational-marijuana-pot-cannabis-veterans-lawsuit-drug-convictions/> [<https://perma.cc/S8DM-WKD6>] (striking down New York’s licensing preference for prior convicts).

¹⁴² See, e.g., LITTLEJOHN & GREEN, *supra* note 10, at 2.

¹⁴³ See *infra* Section III.A.2 for further discussion of the effectiveness of these programs.

trials from an institutional review board.¹⁴⁴ Despite these research restrictions, slow progress has been made, building on the work of Israeli researcher Dr. Raphael Mechoulam, who, perversely, has received funding from the U.S. National Institute of Health every year since the 1970s to isolate and identify the active components of cannabis.¹⁴⁵

Further contributing to the difficulty of researching the effects of cannabis in the United States, until recently, the U.S. Federal Government had only authorized a single entity in the last fifty years to grow cannabis for research purposes. The Research Institute of Pharmaceutical Sciences at the University of Mississippi School of Pharmacy grows a limited amount of cannabis for research,¹⁴⁶ a portion of which is already designated for the FDA's compassionate Investigational New Drug program.¹⁴⁷ Since 1982, this program has provided over three hundred pre-rolled cannabis joints per month to a small number of patients.¹⁴⁸ Follow-up research on these patients has

¹⁴⁴ See NAT'L ACAD. PRESS, *supra* note 97; Quattrone, *supra* note 79 at 317-18.

¹⁴⁵ 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> [<https://perma.cc/4XCK-BANT>] (“Israel has . . . become the United States’s unofficial offshore medical marijuana research center.”).

¹⁴⁶ 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. In 2021, the DEA began to allow other organizations to obtain permission to grow cannabis for research use. *DEA Continues to Prioritize Efforts to Expand Access to Marijuana for Research in the United States*, DEA (May 14, 2021), <https://www.dea.gov/stories/2021/2021-05/2021-05-14/dea-continues-prioritize-efforts-expand-access-marijuana-research> [<https://perma.cc/E86K-QXH5>]; see also NAT'L ACAD. PRESS, *supra* note 97; Britt E. Erickson, *Cannabis Research Stalled by Federal Inaction*, CHEMICAL & ENGINEERING NEWS (June 29, 2020), <https://cen.acs.org/biological-chemistry/natural-products/Cannabis-research-stalled-federal-inaction/98/i25> [<https://perma.cc/4AXE-XVWF>]; Sydney Slotkin Dupriest, *Federally Funded Marijuana Turns 50*, OLE MISS NEWS (Dec. 5, 2018), <https://news.olemiss.edu/federally-funded-marijuana-turns-50/> [<https://perma.cc/2JSQ-Q6GA>].

¹⁴⁷ GRINSPOON & BAKALAR, *supra* note 26, at 21-22; Daniel Oberhaus, *The US Government Has Sent This Guy 300 Joints Each Month for 34 Years*, VICE (Sept. 9, 2016, 4:00 AM), <https://www.vice.com/en/article/dp3e4y/the-us-government-has-sent-this-guy-300-joints-each-month-for-34-years> [<https://perma.cc/8PWH-43LV>].

¹⁴⁸ Oberhaus, *supra* note 147.

demonstrated the medical effectiveness of the program, yet the program has not admitted any new patients since the 1990s.¹⁴⁹ While the FDA has begun to loosen these restrictions in the past couple of years, and the DEA has announced partnerships with several new research partners beyond the University of Mississippi, 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.¹⁵⁰

6. Energy Inequities

In 2012, legal cannabis businesses consumed an estimated 1% of all electricity used in the United States (10% of all agricultural industry emissions), releasing an even higher percentage of total carbon gas emissions.¹⁵¹ As more states legalize, those numbers will continue to grow as indoor cannabis cultivation operations start up across the

¹⁴⁹ See Ethan Russo et al., *Chronic Cannabis Use in the Compassionate Investigational New Drug Program: An Examination of Benefits and Adverse Effects of Legal Clinical Cannabis*, 2 J. OF CANNABIS THERAPEUTICS 3 (2002).

¹⁵⁰ Quattrone, *supra* note 79, at 318-19. See discussion *supra* note 146 (The DEA continues to drag its feet in facilitating any meaningful results from the program); see, e.g. MMJ International Holdings, *Appeals Court Orders DEA on MMJ Marijuana Lawsuit*, YAHOO! FIN. (Oct. 3, 2023), <https://finance.yahoo.com/news/appeals-court-orders-dea-mmj-100000998.html> [<https://perma.cc/XMM8-XMM5>] (9th Circuit Court of Appeals orders DEA to respond to charges that it is purposefully delaying the approval for its licensed research growers to conduct clinical trials for developed cannabis medicines); Madison Hisey, *DEA Marijuana Ruse on American Public - DEA Stifling President Biden's Research Act Mandate*, MARKETWATCH (Nov. 1, 2023), <https://www.marketwatch.com/press-release/dea-marijuana-ruse-on-american-public-dea-stifling-president-bidens-research-act-mandate-4d2199c7> [<https://perma.cc/H7WF-454A>] (DEA research licensees are not growing enough cannabis to meet research demands or conducting any FDA clinical trials).

¹⁵¹ Natalie Fertig & Gavin Bade, *An Inconvenient Truth (About Weed)*, POLITICO (Aug. 10, 2021, 4:30 AM), <https://www.politico.com/news/2021/08/10/weed-cannabis-legalization-energy-503004> [<https://perma.cc/3DRQ-R6HN>]; see also Jared Wolf, *The Surprising Reason Why Cannabis Farms Use Carbon Offsets*, SUSTAINABLE REVIEW (Feb. 6, 2023), <https://sustainablereview.com/the-surprising-reason-why-cannabis-farms-use-carbon-offsets/#:~:text=Cannabis%20farms%20around%20the%20US,the%20purchase%20of%20carbon%20credits> [<https://perma.cc/9DGB-F7F4>]; Jason Quinn & Hailey Summers, *What's the Carbon Footprint of Cannabis? Surprisingly High*, IDEAS.TED.COM (Apr. 16, 2021), <https://ideas.ted.com/whats-the-carbon-footprint-of-cannabis-surprisingly-high/> [<https://perma.cc/YP36-QBV9>] (“In Colorado . . . the weed industry accounts for 1.3 percent of the state’s total annual carbon emissions”).

country, concentrated in the cities and states that cannot support profitable outdoor cannabis agriculture.¹⁵² As the country moves to full legalization, the amount of energy required for cannabis agriculture could grow to 3% of U.S. energy use, as currently true in California, and even more if international export becomes a reality.¹⁵³ Some municipalities require cannabis businesses to buy credits to offset their carbon production.¹⁵⁴ A few cannabis businesses also claim to invest heavily in renewables, though none at a scale to significantly reduce their emissions.¹⁵⁵ This only raises prices further in comparison to the legacy market.

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.¹⁵⁶ These two facts combined lead to dramatically higher energy prices in poor and minority neighborhoods and present direct health consequences for those neighborhoods.¹⁵⁷ This inequity is

¹⁵² See Gina S. Warren, *Hotboxing the Polar Bear: The Energy and Climate Impacts of Indoor Marijuana Cultivation*, 101 B.U. L. REV. 979 (2021).

¹⁵³ Evan Mills, *The Carbon Footprint of Indoor Cannabis Production*, 46 ENERGY POL’Y 58, 61 (2012); Jocelyn Durkay & Duranya Freeman, *Electricity Use in Marijuana Production*, NAT’L CONF. OF STATE LEGS. (Aug. 1, 2016), <https://www.ncsl.org/research/energy/electricity-use-in-marijuana-production.aspx> [<https://perma.cc/TGD5-DKKT>].

¹⁵⁴ *Energy Impact Offset Fund*, BOULDERCOLORADO.GOV, <https://bouldercolorado.gov/services/energy-impact-offset-fund> [<https://perma.cc/MT24-QEUK>] (last visited Aug. 16, 2023).

¹⁵⁵ See Evan Mills, *The Incompatibility of Cannabis Factory Farming with the Principles of ESG Risk Management and Impact Investment*, 3 J. OF IMPACT & ESG INV. 109 (2022).

¹⁵⁶ Solmaz Amiri et al., *How Does the Growth of Washington State’s Cannabis Industry Relate to Neighborhood Socioeconomic Characteristics?*, COM. HEALTH & SPATIAL EPIDEMIOLOGY LAB (Sept. 2019), <https://www.chaselab.net/Cannabis/Cannabis.htm> [<https://perma.cc/7EWA-SMG4>]; Jon Murray, *The Marijuana Industry’s 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/> [<https://perma.cc/NN8S-82AP>]; Kip Hill, *WSU Study Links Cannabis Businesses to Poorer Neighborhoods, as Local Laws Limit Locations*, THE SPOKESMAN-REVIEW (Dec. 4, 2019, 7:25 PM), <https://www.spokesman.com/stories/2019/dec/04/wsu-study-links-cannabis-businesses-to-poorer-neig/> [<https://perma.cc/NAK5-L4NV>].

¹⁵⁷ 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); Dianna Benjamin, *Environmental and Racial Justice in Cannabis*,

further exacerbated by the environmental and climate-related consequences of increased energy usage which are primarily borne by lower socioeconomic communities.¹⁵⁸

7. Sex and Gender Inequities

This 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 end there. The unique experiences and statistics of women and gender non-conforming 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

Data shows that since 1970 men are considerably more likely to use cannabis and participate in the illegal market.¹⁵⁹ 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.¹⁶⁰ Yet, between 1986 and 1996, the number of women incarcerated for drug offenses increased by 888%, compared to a 129% increase for non-drug related offenses.¹⁶¹ 76% of incarcerated women in this period were imprisoned for non-violent, chiefly possession-based offenses.¹⁶² Current data from the U.S. Department of Justice shows 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

MARIJUANA MATTERS, <https://marijuanamatters.org/greenlightblog/environmental-and-racial-justice-in-cannabis> [https://perma.cc/9V8Z-EL6N] (last visited Oct. 14, 2023).

¹⁵⁸ See generally U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT VOL. 2 (2017), <https://nca2018.globalchange.gov/> [https://perma.cc/U8K3-B4E4]; 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> [https://perma.cc/TE6Y-WCEA].

¹⁵⁹ GOODE, *supra* note 27, at 32.

¹⁶⁰ *Exploring Cannabis Consumer Trends & Demographics in 2021*, HEADSET (Jan. 31, 2022), <https://www.headset.io/industry-reports/exploring-cannabis-consumer-trends-demographics-in-2021> [https://perma.cc/E3RB-AFRL].

¹⁶¹ GRAY, *supra* note 41, at 43.

¹⁶² *Id.*

state prisoners and 45.6% of male federal prisoners.¹⁶³ The intersection of race and sex only exacerbates these statistics, with Black, Hispanic, and Native American and Alaskan Native females imprisoned at 1.7, 1.26, and 4.3 times the rate of White females, respectively.¹⁶⁴ These statistics diverge further for younger demographics where every single tracked minority demographic has a higher female imprisonment rate than White females.¹⁶⁵

b. Family Inequity

The raw data 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 those 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.¹⁶⁶ Additionally, about 75% of female prisoners are single parents whose incarceration means they legally abandoned their children, forcing these children to enter the child dependency system.¹⁶⁷

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.¹⁶⁸

Children taken out of the home experience notably poorer long-term social and economic outcomes, at the margin, than children who remain in the home, with the greatest risks for the already high-risk children of minorities and those in poverty.¹⁶⁹ Children of minorities enter the child dependency system at a rate twice that of White

¹⁶³ E. ANN CARSON, PRISONERS IN 2020 – STATISTICAL TABLES, BUREAU OF JUST. STATS. 1, 28-32 (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

¹⁶⁴ *Id.* at 23.

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* Section II.B.1.a.

¹⁶⁷ GRAY, *supra* note 41, at 43.

¹⁶⁸ Recalled from an unrecorded interview with *Anonymous* conducted by the author.

¹⁶⁹ *See* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007).

children.¹⁷⁰ All children in the system have higher mortality rates than the outside population (both during and post-care), as well as higher post-care incarceration rates.¹⁷¹ These statistics were originally 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 due to the greater rates of incarceration for drug offenses.¹⁷² Family courts frequently remove children from their homes as well, without imprisoning the parents, due to courts' antipathy towards a failed cannabis drug test and the mere existence of cannabis in the home, irrespective of any explicit statutory custody-determination protections for legal medical cannabis use.¹⁷³ Even service plans intended to

¹⁷⁰ INST. OF MED. & NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., *NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH* 213-14 (2014) ("Although it depends on the specific indicator of interest . . . and on the region of the country one examines, children of color generally have greater involvement with the foster care system than [W]hite children"). MOVEMENT FOR FAM. POWER, *HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR* (June 2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf>.

¹⁷¹ See Richard P. Barth & Melissa Jonson-Reid, *Outcomes After Child Welfare Services: Implications for the Design of Performance Measures*, 22 *CHILD. & YOUTH SERVS. REV.* 763, 774-76 (2000) (post-care children have higher incarceration rates); Emily T. Murray et al., *Association of Childhood Out-of-Home Care Status with All-Cause Mortality up to 42-Years Later: Office of National Statistics Longitudinal Study*, 20 *BMC PUB. HEALTH* 735 (2020) ("Those who had been in care in childhood were, at any given time point during the [42-year] follow-up period, 70% more likely to die (Hazard ratio 1.70;95% CI 1.49, 1.93) than those who had not been in care."); Barbara H. Chaiyachati, *All-Cause Mortality Among Children in the U.S. Foster Care System, 2003-2016*, 174 *JAMA PEDIATRICS* 896 (2020) (Black children have a 20% higher rate of dying in foster care than White children (43.8 v. 35.3 per 100,000 person-years). And both have a higher in-care mortality rate than non-foster children (Black children at 28% higher (43.8 v. 34.1 per 100,000 person-years) and White children at 50% higher (35.3 v. 23.6 per 100,000 person-years))).

¹⁷² See Doyle, *supra* note 169, at 1583.

¹⁷³ *NEWHART & DOLPHIN, supra*, note 99, at 172-74, 180-81; N.J. Div. of Child Prot. & Permanency v. V.E., 153 A.3d 941 (N.J. Super. App. Div. 2017); Jasmine Harris, *Child Abuse and Cannabis Use: How a Prima Facie Standard Mischaracterizes Parental Cannabis Consumption as Child Neglect*, 41 *CARDOZO L. REV.* 2761, 2786, 2789-90 (2020); Charisa Smith, *Over-Privileged:*

demonstrate a parent's fitness disproportionately impact minority and single-parent families by imposing time-consuming and costly obligations on the parent(s). In one recent example, the parent's honest admission of cannabis use to CPS resulted in a child neglect proceeding and a court-ordered "service plan" so expensive that she had to quit her job in order to remain in compliance. Some of the requirements under the service plan included:

parenting classes (though there was no evidence that she was a neglectful person), anger management classes (though there was no evidence she had anger management issues), parenting classes for children with special needs (though she did not have children with special needs), participation in a drug treatment program (though there was no evidence that she had a substance use disorder), submission to drug screenings (id.), refraining from drinking alcohol (id.), submission to unannounced visits from CPS during which she had to allow full access to the apartment for inspection, and participation in all family court proceedings and conferences (regardless of her work schedule).¹⁷⁴

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. In a recent survey style study of 73,551 women, researchers found that cannabis use in states with legalized recreational cannabis increased significantly among women before and after pregnancy, but not during the pregnancy itself.¹⁷⁵ 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 in their findings and the regulatory infeasibility of conducting a related medical study under current DEA and FDA restrictions.¹⁷⁶

Legal Cannabis, Drug Offending & the Right to Family Integrity, 67 S.D. L. REV. 569, 575-76 (2022).

¹⁷⁴ *How the Foster Care System Has Become Ground Zero for the U.S. Drug War*, MOVEMENT FOR FAM. POWER (June 2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> [<https://perma.cc/2THX-8NRG>].

¹⁷⁵ Kara R. Skelton et al., *Association of Recreational Cannabis Legalization With Maternal Cannabis Use in the Preconception, Prenatal, and Postpartum Periods*, JAMA NETWORK OPEN (Feb. 25, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2776901> [<https://perma.cc/7WVZ-XHER>].

¹⁷⁶ *Id.*

The few existing medical studies show that sex-related biological factors interact with cannabis use to influence male and female bodies differently.¹⁷⁷ Despite men using cannabis more frequently and in greater quantities, females are more susceptible to cannabis use disorder and severe cannabis use disorder,¹⁷⁸ and they report lower quality of life than similarly situated males, even when controlling for greater rates of depression in females.¹⁷⁹ Females also exhibit higher withdrawal intensity,¹⁸⁰ more co-occurring mental health issues like anxiety and depression,¹⁸¹ and a higher frequency of days spent in poor physical health.¹⁸² As with many other areas of medicine,¹⁸³ females are also more likely to be underdiagnosed or incorrectly diagnosed for cannabis-related health issues compared to men.¹⁸⁴

d. Stigma and Gender Inequity

There may also be a gendered component to sex-based differences in cannabis health outcomes.¹⁸⁵ Women experience greater

¹⁷⁷ Lorraine Greaves & Natalie Hemsing, *Sex and Gender Interactions on the Use and Impacts of Recreational Cannabis*, 17 INT'L. J. OF ENV'T. RES. & PUB. HEALTH 509 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7014129/> [<https://perma.cc/53RM-BBGC>].

¹⁷⁸ Katina C. Calakos et al., *Mechanisms Underlying Sex Differences in Cannabis Use*, 4 CURRENT ADDICTION REP. 439 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5828236/> [<https://perma.cc/926L-YG5Y>].

¹⁷⁹ Greaves & Hemsing, *supra* note 177.

¹⁸⁰ Nicholaz J. Schlein et al., *Cannabis Withdrawal: A Review of Neurobiological Mechanisms and Sex Differences*, 4 CURRENT ADDICTION REP. 75 (2017), <https://pubmed.ncbi.nlm.nih.gov/29057200/> [<https://perma.cc/2P2K-YF2X>].

¹⁸¹ Calakos, *supra* note 178. *See also* Liana Fattore & Walter Fratta, *How Important Are Sex Differences in Cannabinoid Action?*, 160 BRIT. J. OF PHARMACOLOGY 544, 545 (2010).

¹⁸² Greaves & Hemsing, *supra* note 177. *See also* Evan S. Herrmann et al., *Sex Differences in Cannabis Withdrawal Symptoms Among Treatment-Seeking Cannabis Users*, 23 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 415 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4747417/> [<https://perma.cc/M9RQ-AAVQ>] (females experiencing withdrawal are more likely to report gastrointestinal symptoms such as nausea and stomach pain).

¹⁸³ *See, e.g.* Sonya N. Burgess, *Understudied, Under-Recognized, Underdiagnosed, and Undertreated: Sex-Based Disparities in Cardiovascular Medicine*, 15 CIRCULATION: CARDIOVASCULAR INTERVENTIONS 127, 127 (2022).

¹⁸⁴ Greaves & Hemsing, *supra* note 177.

¹⁸⁵ Silje Louise Dahl & Sveinung Sandberg, *Female Cannabis Users and New Masculinities: The Gendering of Cannabis Use*, 49 SOCIO. 696 (2015),

stigma and discrimination when they use substances of any kind, and they report a greater emotional toll experienced from their substance use. Specifically, these women will describe their cannabis use in terms of guilt, shame, and minimization of consequences.¹⁸⁶ Evidence suggests that traditional gender roles restrict women's use of cannabis—even for medicinal use—by requiring females to adopt a form of heightened masculinity to earn the approval of male users.¹⁸⁷ 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.¹⁸⁸

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.”¹⁸⁹ Transgender women in particular are more likely to internalize this stigma and increase their cannabis use to potentially dangerous levels, even when controlling for demographics, sexual orientation, and gender incongruence.¹⁹⁰ Moreover, transgender men who identify as pansexual or queer are significantly more likely than heterosexual-identified individuals to engage in cannabis use, and transgender men reportedly engage in a significantly higher frequency of cannabis use than transgender women.¹⁹¹ The stigmas around cannabis use, historically nurtured

https://www.researchgate.net/publication/282792148_Female_Cannabis_Users_and_New_Masculinities_The_Gendering_of_Cannabis_Use [https://perma.cc/95AQ-X33E].

¹⁸⁶ Greaves & Hemsing, *supra* note 177.

¹⁸⁷ Dahl & Sandberg, *supra* note 185.

¹⁸⁸ Greaves & Hemsing, *supra* note 177; NEWHART & DOLPHIN, *supra*, note 99, at 172-74, 180-81.

¹⁸⁹ Greaves & Hemsing, *supra* note 177.

¹⁹⁰ 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 J. OF PRIMARY PREVENTION 419 (Aug. 1, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5516932/> [https://perma.cc/9XPN-7U36] (compared to the risk associated with persons of heterosexual orientation and of cisgender or closeted transgender identities).

¹⁹¹ *Id.*

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.¹⁹²

e. Business Inequity

In the cannabis business sphere, women entrepreneurs face all of the same challenges that both minority male business owners and previously incarcerated male business owners encounter when attempting to enter the cannabis industry.¹⁹³ 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.¹⁹⁴ Across industries, women-owned firms have lower profits, lower sales, worse survival rates, fewer employees, less starting capital, and less debt and equity.¹⁹⁵ 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.¹⁹⁶

Women tend to leave the industry as it transitions from a black market—or less regulated medical market—to a more regulated legalization regime.¹⁹⁷ The percentage of women executives declined by 39% over the last six years, from 36% in 2015 to 22.1% in 2021,

¹⁹² Ryan Ruppert et al., *Review: Prevalence of Addictions among Transgender and Gender Diverse Subgroups*, 18 INT'L J. OF ENV'T RES. & PUB. HEALTH 8843 (2021), <https://www.mdpi.com/1660-4601/18/16/8843> [<https://perma.cc/2224-NHZ5>]. See also Madeline C. Frost et al., *Disparities in Documented Drug Use Disorders Between Transgender and Cisgender U.S. Veterans Health Administration Patients*, 15 J. OF ADDICTION MED. 334 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8384140/> [<https://perma.cc/J7EU-CMLW>].

¹⁹³ Reaves, *supra* note 135, at 35-41.

¹⁹⁴ Michael J. McManus, *Women's Business Ownership: Data from the 2012 Survey of Business Owners*, ISSUE BRIEF NO. 13, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC. 1, 2-3, 13-14 (May 31, 2017), <https://advocacy.sba.gov/wp-content/uploads/2017/05/Womens-Business-Ownership-in-the-US.pdf> [<https://perma.cc/TU8L-JHHU>]; Reaves, *supra* note 135, at 34.

¹⁹⁵ McManus, *supra* note 194.

¹⁹⁶ Reaves, *supra* note 135, at 34-35.

¹⁹⁷ *Id.* at 40-42.

dropping well below the nearly 30% national average of executive positions filled by women.¹⁹⁸ 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 and profit margins.¹⁹⁹ 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.²⁰⁰ Minority woman-owned businesses constitute less than 5% of the companies in the entire industry.²⁰¹ 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.²⁰² Compounding gendered ownership 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.²⁰³

¹⁹⁸ Jenel Stelton-Holtmeier, *Women & Minorities in the Cannabis Industry*, MJBIZDAILY 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 [<https://perma.cc/U5NQ-ELB7>]; 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/> [<https://perma.cc/8TUF-R47B>].

¹⁹⁹ Stelton-Holtmeier, *supra* note 198, at 6.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 9.

²⁰² *Exploring Cannabis Consumer Trends & Demographics in 2021*, *supra* note 160 (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> [<https://perma.cc/8W86-T5V3>] (Gen Z women experience 151% growth in retail sales); *see also* Mattio, *supra* note 198 (companies must adjust their strategies and marketing to account for this growth in female-driven cannabis sales).

²⁰³ Pat Roberson-Saunders et al., *Do Women Fare Better in Female-Owned Businesses?*, 19 J. OF DEV. ENTREPRENEURSHIP 1450017 (2014), <https://web.s.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=0&sid=37d4d885-d150-4a91-898c-736c74673c99%40redis> [<https://perma.cc/MCP9-8UT7>].

8. Hemp Inequities

Until 2014, the CSA labeled both hemp and cannabis as a Schedule I drug.²⁰⁴ There was no legal differentiation because hemp and cannabis are different names for the same plant, and they can both describe a single plant at different times in that particular plant's life.²⁰⁵ 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.²⁰⁶ The 2018 Farm Bill completely legalized hemp at the federal level by merely changing the definition of cannabis; thus, by semantic fiat, Congress removed cannabis that contains less than 0.3% THC content from the CSA's definition and approved the transport of hemp in interstate commerce.²⁰⁷ Most states followed suit.²⁰⁸ Hemp and its extracts, chiefly cannabidiol ("CBD"), are now used for everything from industrial materials and soil remediation²⁰⁹ to workout recovery drinks²¹⁰ and topical pain relief creams.²¹¹

Inequity in the hemp market arises as a direct result of complications from the ongoing categorization of cannabis as a

²⁰⁴ Lisa Pittman, *The Rise of Hemp Litigation and the Primary Jurisdiction Doctrine*, 60 JUDGES' J. 37 (2021), https://www.americanbar.org/groups/judicial/publications/judges_journal/2021/winter/the-rise-hemp-litigation-and-primary-jurisdiction-doctrine/ [<https://perma.cc/UK3S-ED3C>].

²⁰⁵ *Id.*

²⁰⁶ Agricultural Act of 2014, Pub. L. No. 113-79, § 7606, 128 Stat. 649 (2014).

²⁰⁷ Agricultural Improvement Act of 2018, Pub. L. No. 115-34, § 10113, 132 Stat. 4908 (2018); Marian J. Lee, *The Legalization of Hemp*, FOOD AND DRUG L. INST. <https://www.fdpi.org/2019/02/the-legalization-of-hemp/> [<https://perma.cc/83LC-APSU>] (last visited Nov. 13, 2023).

²⁰⁸ *State Industrial Hemp Statutes*, NAT'L CONF. OF STATE LEG. (Apr. 16, 2020), <https://test.ncsl.org/agriculture-and-rural-development/state-industrial-hemp-statutes> [<https://perma.cc/NP56-D3KE>].

²⁰⁹ Pittman, *supra* note 204.

²¹⁰ *CBD Seltzer for Post-Workout Recovery: How It Can Help with Muscle Soreness*, DAY ONE (Mar. 21, 2023), <https://www.drinkdayone.com/blogs/cbd-water/cbd-seltzer-for-post-workout-recovery-how-it-can-help-with-muscle-soreness> [<https://perma.cc/Q94T-F5MK>].

²¹¹ Anna Myers, *How to Build CBD Into Your Daily Routine*, DANDY, (Aug. 10, 2020), <https://www.dandy-wellness.com/blogs/health/apothem-x-dandy-how-to-build-cbd-into-your-daily-routine> [<https://perma.cc/S3RB-UVGD>].

Schedule I drug in the CSA.²¹² Specifically, states that have not legalized hemp continue to prosecute the War on Drugs against hemp growers.²¹³ Even states with hemp programs enforce the CSA against any harvest with suspected THC content higher than .3% (no matter how small the excess),²¹⁴ and the FDA has yet to issue regulations concerning hemp-derived CBD products.²¹⁵

In 2019, Idaho State Police seized 6,701 lbs. of cannabis product being transported from Oregon to Colorado.²¹⁶ 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).²¹⁷ In what is not an isolated incident, the truck driver pled down to avoid a five-year mandatory minimum sentence and \$15,000 fine, leaving him with a

²¹² Maya Rahwanji, "Hash"ing Out Inequality in the Legal Recreational Cannabis Industry, 39 NE. J. OF INT'L L. & BUS. 333, 344-45 (2019), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1847&context=njilb> [<https://perma.cc/JJM2-EX55>].

²¹³ *Hello FDA? The Industrial Hemp Industry Would Like to Have a Word With You!*, ROGOWAY L. GROUP (June 21, 2022), <https://www.rogowaylaw.com/fda-regulations-industrial-hemp/> [<https://perma.cc/D7Z2-BEBK>].

²¹⁴ Rahwanji, *supra* note 212; *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap*, CONG. RSCH. SERV. (Apr. 7, 2022), <https://crsreports.congress.gov/product/pdf/R/R44782> [<https://perma.cc/Y5BV-3PPP>].

²¹⁵ John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS (Dec. 14, 2018), <https://www.brookings.edu/articles/the-farm-bill-hemp-and-cbd-explainer/> [<https://perma.cc/27C9-4GYE>]; *FDA's Oversight of Hemp-Derived Compounds*, CONG. RSCH. SERV. (Aug. 18, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF12477> [<https://perma.cc/UH4G-F48V>].

²¹⁶ 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> [<https://perma.cc/KQW4-P2B5>].

²¹⁷ *Id.* See also *Big Sky Sci. LLC v. Idaho State Police*, No. 19-CV-00040-REB, 2019 U.S. Dist. LEXIS 18758, at *3-9 (D. Idaho 2019).

criminal record and more than \$3,000 in restitution and fees.²¹⁸ The hemp was impounded and not returned.²¹⁹

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 officers 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?"²²⁰

If a farmer's hemp product does test higher than .3%, it must be destroyed immediately,²²¹ but such tests are not always accurate or reproducible.²²² Additionally, factors beyond the hemp farmer's control, such as a rainstorm that postpones harvesting by a few days or a drought

²¹⁸ *Truck Drivers Sentenced for Transporting Hemp Through Idaho*, KTVB (Sept. 26, 2019, 3:56 PM), <https://www.ktvb.com/article/news/crime/truck-drivers-sentenced-for-transporting-hemp-through-ada-county-idaho/277-48d9ec07-b224-4623-b556-2291f5bcd3b> [<https://perma.cc/TB5W-LRP7>]; Murphy, *supra* note 216; see also Lynn Garcia & Peter Stout, *Hemp or Marijuana? The Importance of Accurate and Reliable Forensic Analysis to the Fair Administration of Justice*, 60 JUDGES' J. 22 (2021), https://www.americanbar.org/groups/judicial/publications/judges_journal/2021/winter/hemp-or-marijuana-importance-accurate-and-reliable-forensic-analysis-the-fair-administration-justice/ [<https://perma.cc/256M-J3MN>].

²¹⁹ Suzie Trigg et al., *Sourcing Cannabis Lawfully for CBD Consumer Products*, FOOD & DRUG L. INST. (2021), https://www.fdi.org/2021/03/sourcing-cannabis-lawfully-for-cbd-consumer-products-and-clinical-research-challenges-and-opportunities/#_ftn67 [<https://perma.cc/K6FU-VMYU>].

²²⁰ Interview with *Anonymous*, Honolulu Hemp Farmer, in Kona, Haw. (July 23, 2022).

²²¹ *Consequences of Producing Non-compliant Hemp*, DLA PIPER, <https://www.dlapiper.com/en-us/insights/publications/2020/07/consequences-of-producing-non-compliant-hemp> [<https://perma.cc/E7ZM-FCV7>] (last updated Jan. 25, 2021); Garcia & Stout, *supra* note 218.

²²² Nick Jikomes & Michael Zoorob, *The Cannabinoid Content of Legal Cannabis in Washington State Varies Systematically Across Testing Facilities and Popular Consumer Products*, 8 SCI. REPS. 1, 1 (2018), <https://www.nature.com/articles/41598-018-22755-2>. See also Garcia & Stout, *supra* note 218, at 3.

inducing heatwave, can increase the THC content in a plant at the time of testing above acceptable levels and require its destruction.²²³

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.²²⁴ 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.²²⁵ The FDA's continued reticence to issue any 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.²²⁶ 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.²²⁷

²²³ *THC Levels in Cannabis and Harvest Dates*, ENCORE LABS (June 13, 2019), <https://www.encore-labs.com/thc-levels-in-cannabis-and-harvest-dates> [<https://perma.cc/7M2P-TQ78>]; Deron Caplan et al., *Increasing Inflorescence Dry Weight and Cannabinoid Content in Medical Cannabis Using Controlled Drought Stress*, 54 AM. SOC'Y FOR HORT. SCI. 964, 967 (2019), <https://journals.ashs.org/hortsci/view/journals/hortsci/54/5/article-p964.xml>.

²²⁴ U.S. FOOD & DRUG ADMIN., 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 (Dec. 20, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys> [<https://perma.cc/W78B-7WBG>]. See also Pittman, *supra* note 204, at 3 (state health departments vary in their own follow-up regulations banning or regulating hemp infusions in food).

²²⁵ *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, U.S. FOOD & DRUG ADMIN. (updated Sept. 28, 2023), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> [<https://perma.cc/9KBC-6GPT>].

²²⁶ Pittman, *supra* note 204, at 3.

²²⁷ *Id.* See, e.g., *Snyder v. Green Rds. of Fla. LLC*, 430 F. Supp. 3d 1297, 1309 (S.D. Fla. 2020) (concluding the case must be stayed until the FDA provides regulations regarding the marketing of hemp products).

9. International Inequities

The War on Drugs did not create merely domestic inequities. The U.S. led the creation of the current battery of international drug control conventions, with consequences at home and abroad.²²⁸ The treaties criminalize access to cannabis except in very limited circumstances and justify the U.S. federal government's domestic commodity and penal regulations of cannabis.²²⁹ 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 underlie the entire modern international legal system.²³⁰

Even the language of the drug control treaty regime has deep roots in historically racist stigmatization in the United States. 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 to 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.”²³¹ 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 biotechnologies that are increasing the THC potency and its yields by many multiples, with plants grown indoors—in booby-trapped urban properties.”²³²

²²⁸ For examples of the global impact of these conventions, see *supra* Section II *passim*.

²²⁹ Bone & Seddon, *supra* note 93, at 52.

²³⁰ Roojin Habibi & Steven J. Hoffman, *Legalizing Cannabis Violates the UN Drug Control Treaties, but Progressive Countries like Canada Have Options*, 49 OTTAWA L. REV. 427, 434, 444-45 (2017).

²³¹ U.N. ESCOR, 3d Sess., 69th mtg. at 160-61, U.N. Doc. E/CN.7/155 (Feb. 16, 1949); 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, 10 (2010).

²³² Antonio Maria Costa, Exec. Dir. of the U.N. Off. 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); Lines, *supra* note 231, at 11.

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.²³³ 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:

[T]he 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 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.²³⁴

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.”²³⁵ However, the only ways forward are difficult or politically dangerous in the international community: rescheduling cannabis within the treaties, reforming and rewriting the treaties, allowing individual country reservations of specific exceptions for cannabis, or outright denouncing the treaties.²³⁶

Additional inequities created by the U.S.-led international drug control regime involve indigenous rights and intellectual property

²³³ Lines, *supra* note 231, at 11-2; Habibi & Hoffman, *supra* note 230, at 436, 446.

²³⁴ Lines, *supra* note 231, at 4; *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> [<https://perma.cc/L35K-YGE2>]; 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> [<https://perma.cc/9294-LM9M>]; *Not Enough Graves: The War on Drugs, HIV/AIDS, and Violations of Human Rights*, HUM. RTS. WATCH (July 7, 2004), <https://www.hrw.org/report/2004/07/07/not-enough-graves/war-drugs-hiv/aids-and-violations-human-rights> [<https://perma.cc/XSG7-5CY8>]; Danilo A. Reyes, *The Spectacle of Violence in Duterte’s “War on Drugs”*, 35 J. CURRENT SE. ASIAN AFFS. 111, 112-13 (2016), <https://journals.sagepub.com/doi/10.1177/186810341603500306>.

²³⁵ Peter Yeoh, *Legal Challenges for the Cannabis Industry*, 23 J. MONEY LAUNDERING CONTROL 327, 335-36 (2020); Habibi & Hoffman, *supra* note 230, at 447-48.

²³⁶ Habibi & Hoffman, *supra* note 230, at 435, 450-57.

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. 1989.²³⁷ 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.²³⁸ While peyote is still allowed for some religious use by Native American tribes in the United States, cannabis is not.²³⁹

On the intellectual property front, bad faith actors have already registered many current U.S. cannabis trademarks in China or started producing counterfeit merchandise and other manufactured elements of the industry. Combating these bad actors imposes additional costs that disproportionately burden small businesses in the industry.²⁴⁰ On a different front, any country that legalizes cannabis and leaves the international drug control regime (officially or not), such as Canada, will foster a domestic industry that develops any number of patents and copyrights in the genetics, strains, cultivation and manufacturing processes, traditional knowledge, and marketing of cannabis.²⁴¹ 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 to enforce their patent and copyright ownership to devastate any new industry that

²³⁷ *Single Convention on Narcotic Drugs, 1961*, 520 U.N.T.S. 151 (March 30, 1961); See Robert W. Gregg, *The Single Convention for Narcotic Drugs*, 16 FOOD DRUG COSM. L.J. 187, 203 (1961).

²³⁸ Lewis, *supra* note 59, at 422, 430. See generally Cowan, *supra* note 62.

²³⁹ *Compare* Emp. Div. Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 874 (1990), with *Oklevueha Native Church of Haw., Inc. v. Lynch*, 828 F.3d 1012 (9th Cir. 2016), *cert. denied*, 580 U.S. 1000 (2016).

²⁴⁰ Fred Rocafort, *Cannabis Brands and China: An Emerging IP Challenge*, HARRIS-SLIWOSKI.COM: CHINA L. BLOG (Aug. 28, 2023), <https://harris-sliwoski.com/chinalawblog/cannabis-brands-and-china-an-emerging-ip-challenge/> [https://perma.cc/RK3F-PQP6].

²⁴¹ *TRIPS—Trade-Related Aspects of Intellectual Property Rights*, WTO, https://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited Nov. 16, 2023) [https://perma.cc/XX59-LP9A]; Hughie Kellner, *Mitigating the Effects of Intellectual Property Colonialism on Budding Cannabis Markets*, 28 IND. J. GLOB. LEGAL STUD. 377, 392-93 (2021).

another country may later attempt to start²⁴²—“intellectual property colonialism.”²⁴³

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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.²⁴⁴

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

In the face of the inequities described above, though almost exclusively in response to racial inequity, states and advocacy organizations have settled on a discrete set of policy prescriptions designed to address inequities in the cannabis industry, local communities, the criminal justice system, and access to medicine.²⁴⁵ Not only are these policies narrower in scope than the inequities they seek to address, their implementation so far demonstrates a number of structural reasons for why each category of policy will continue to fail to address the consequences of the War on Drugs.²⁴⁶

For ease of reference in analyzing these policies, as mentioned in the Introduction, this Section systematizes current cannabis social equity policies into four categories (unless specific delineation within a category is necessary). These categories together comprise the modern definition of “social equity” in the cannabis industry.²⁴⁷ (1) “Industry equity” includes policies to promote diverse ownership of cannabis licensed businesses by reserving “equity” licenses and/or by providing technical training and fiscal assistance to applicants adversely affected

²⁴² 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 *ASIAN-PAC. L. & POL. J.* 86, 96-98 (2012).

²⁴³ Kellner, *supra* note 241, at 388; *See also* Perlman, *supra* note 33.

²⁴⁴ Perlman, *supra* note 33, at 104.

²⁴⁵ LITTLEJOHN & GREEN, *supra* note 10, at 8-9.

²⁴⁶ The data used in this Section [hereinafter Dataset] was compiled by and remains on file with the author. Data is accurate as of August 2023. *See* note explaining the future relevance of this article, despite changing data, in the Author’s bio, *supra* note *. Data gathered from state regulator websites; state statutes and administrative rules; MJBiz Factbook 2023, *supra* note 73; *State Medical Cannabis Laws*, NAT’L CONF. OF LEG. <https://www.ncsl.org/health/state-medical-cannabis-laws> (last updated June 22, 2023) [<https://perma.cc/P4RK-ZRM4>].

²⁴⁷ *See* LITTLEJOHN & GREEN, *supra* note 10, at 2.

by the War on Drugs. (2) “Community equity” includes policies designed to directly intervene/invest in communities adversely affected by the War on Drugs. (3) “Criminal justice equity” includes policies that decriminalize sales or possession of cannabis, apply retroactive resentencing for prior cannabis convictions, and/or expunge or clear records of previous drug convictions. (4) “Access equity” includes policies designed to provide equitable access to legal cannabis for diverse demographics, chiefly through amending tertiary areas of law, such as employment or insurance law, to not exclude legal cannabis users.

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 affected by the War on Drugs.²⁴⁸ As of 2023, thirty-eight states now maintain medical cannabis programs, with twenty-three of those states also authorizing legal adult-use cannabis.²⁴⁹ Sixteen of the adult-use states and one medical only state include explicit industry equity provisions.²⁵⁰ States tend to look to

²⁴⁸ *Cannabis Equity*, DEP’T OF CANNABIS CONTROL CAL., <https://cannabis.ca.gov/resources/equity/> [<https://perma.cc/8ZGL-E4E9>] (last visited Oct. 19, 2023). See generally CITY OF ALBUQUERQUE, UNITED STATES CANNABIS SOCIAL EQUITY PROFILE, https://www.cabq.gov/office-of-equity-inclusion/documents/united-states-cannabis-social-equity-profile_.pdf [<https://perma.cc/NB3F-BG9Q>] (last visited Nov. 29, 2023).

²⁴⁹ *State Medical Cannabis Laws*, NAT’L CONF. OF LEG., <https://www.ncsl.org/health/state-medical-cannabis-laws> (last updated Nov. 8, 2023) [<https://perma.cc/P4RK-ZRM4>]. States with both medical and adult-use programs include: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, 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, Florida, Hawaii, Kentucky, Louisiana, Mississippi, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and West Virginia. See also *Marijuana Legality by State*, DISA (Oct. 30, 2023), <https://disa.com/marijuana-legality-by-state> [<https://perma.cc/KV68-HLAB>].

²⁵⁰ Adult-use programs with social equity provisions include: Arizona, California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, Nevada, Rhode Island, Vermont, Virginia, and Washington. Pennsylvania is now the sole medical only program with social equity provisions. See, e.g., Dataset, *supra* note 246. See also, e.g., Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis, Conn. Pub. Act No. 21-1 (2021),

industry equity policies first, often exclusively, as the proper tool for addressing social inequity, following the lead of the initial set of racial equity policies implemented in the cannabis industry by Oakland's 2017 program.²⁵¹ These programs have proven ineffective for structural reasons that will require a new theory of social equity to properly address the problem.

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.²⁵² Other criteria that states traditionally use include income, state residency, and residency in qualifying neighborhoods with a history of disproportionate drug enforcement.²⁵³ A few of the more recent

00001-R00SB-01201SS1-PA.PDF (providing equity provisions for an adult-use state).

²⁵¹ *City Announces First Cannabis Dispensary Permit Recipients Under Equity Program*, ROOT'D IN THE 510, <https://rootd510.com/press/city-announces-first-cannabis-dispensary-permit-recipients-under-equity-program> [<https://perma.cc/4CAE-HRXG>] (last visited Sept. 19, 2023).

²⁵² *See, e.g., Become an Equity Applicant or Incubator*, *supra* note 22; *Social Equity Campaign*, ARIZ. DEP'T OF HEALTH SERV., <https://www.azdhs.gov/licensing/marijuana/social-equity/index.php#about> [<https://perma.cc/BS97-M3DR>] (last visited Oct. 18, 2023); *Adult Use Marijuana Program: Social Equity Application Checklist*, ARIZ. DEP'T OF HEALTH SERV. (Nov. 17, 2021), <https://www.azdhs.gov/documents/licensing/medical-marijuana/seq-app-checklist.pdf> [<https://perma.cc/RQ6M-HCCN>]; Kylie Cochrane, *26 Marijuana Dispensary Licenses Available Through Arizona Equity Program*, CRONKITE NEWS (Nov. 2, 2021), <https://cronkitenews.azpbs.org/2021/11/02/marijuana-dispensary-licenses-available-arizona-equity-program/> [<https://perma.cc/F5QT-EFT8>]; Ariz. Sec'y of State, *An Initiative Measure Relating to the Responsible Adult-use, Regulation and Taxation of Marijuana*, Ballot Initiative Prop (2019), <https://www.azcourts.gov/Portals/0/Prop%20207/Arizona-Prop-207-Ballot-Initiative-Measure.pdf?ver=2021-06-01-194330-600> [<https://perma.cc/5BA8-5ZWZ>].

²⁵³ *See, e.g. H.B. 20-1424 Social Equity Licensees In Regulated Marijuana*, 2d. Assemb. Reg. Sess. (Colo. 2020), <https://leg.colorado.gov/bills/hb20-1424> [<https://perma.cc/7YXG-MM6C>] (income); *Getting Started*, MASS. CANNABIS CONTROL COMM'N, <https://masscannabiscontrol.com/equity/getting-started/> [<https://perma.cc/DT42-DP6L>] (last visited Sep. 21, 2023) (state residency); *Illinois Adult-Use Cannabis Social Equity Program*, ILL. DEP'T OF COM. & ECON. OPPORTUNITY, <https://dceo.illinois.gov/cannabisequity.html> [<https://perma.cc/B2JP-2SCX>] (last visited Oct. 20, 2023) (disproportionately enforced neighborhoods).

programs also provide social equity licensee status to veterans, women, distressed farmers, Native Americans, and Asian or Pacific Islanders.²⁵⁴ In the wake of the growing public awareness of racial disparity in cannabis business ownership, some states have also explicitly included race as a criterion for social equity status.²⁵⁵

Qualifying social equity applicants, depending on the state, are entitled to either licensing priority for cannabis business ownership, exclusive business types reserved only for social equity applicants (like delivery businesses), or a certain number or percentage of licenses set aside for such applicants.²⁵⁶ The application fees for cannabis business licenses can reach over \$100,000, so many programs provide social equity applicants with application fee waivers or reductions.²⁵⁷ Some states also provide social equity applicants access to some combination of startup capital, low-interest business loans, license application support, and technical training.²⁵⁸

2. Industry Equity Limitations

Cannabis scholars and advocates have yet to hail an industry equity program that effectively achieves its goal of fostering a more diverse cannabis industry.²⁵⁹ The reasons for the ineffectiveness of

²⁵⁴ See LITTLEJOHN & GREEN, *supra* note 10, at 14 (New York, Pennsylvania, Virginia, New Jersey, and Illinois use some combination of these as criteria for social equity licenses).

²⁵⁵ See, e.g. OHIO REV. CODE ANN. § 3796.09 (LexisNexis 2022).

²⁵⁶ See, e.g., *id.* (15% of all licenses reserved for social equity applicants); *Licensing Process*, MASS. CANNABIS CONTROL COMM'N <https://masscannabiscontrol.com/licensing-process/> [<https://perma.cc/WUQ4-7A6S>] (last visited Oct. 20, 2023) (licensing priority and reservation of delivery and social consumption licenses for social equity applicants).

²⁵⁷ See generally MJBIZDAILY, ANNUAL MARIJUANA BUSINESS FACTBOOK (2022), https://mjbizdaily.com/wp-content/uploads/2022/04/MJBiz_Factbook_2022.pdf [<https://perma.cc/G8QN-EX88>]; see, e.g. *Cannabis Equity*, *supra* note 248.

²⁵⁸ See, e.g. *Social Equity Cannabis Loan Program*, ILL. DEP'T OF COM. & ECON. OPPORTUNITY, <https://dceo.illinois.gov/cannabisequity/loaninfo.html> [<https://perma.cc/649N-X2G3>] (last visited Oct. 20, 2023); *Technical Assistance for Social Equity Applicants*, ILL. DEP'T OF COM. & ECON. OPPORTUNITY, <https://dceo.illinois.gov/cannabisequity/technicalassistance.html> [<https://perma.cc/WF4D-N2J3>] (last visited Oct. 20, 2023); *Investor for \$200 Million New York Cannabis Fund Finally Found*, MJBIZDAILY (last updated July 5, 2023), <https://mjbizdaily.com/investor-for-200-million-new-york-cannabis-fund-finally-found/> [<https://perma.cc/7DTA-TZBD>].

²⁵⁹ See André Douglas Pond Cummings & Steven A. Ramirez, *The Illinois Cannabis Social-Equity Program: Towards a Socially Just Peace in the War on Drugs?*, 53

these industry equity programs are diverse. That said, one can broadly group these limitations 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 that hinder, directly or indirectly, the program’s purpose in facilitating cannabis business ownership by and employment of 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, the maximum number of available medical dispensary licenses in Illinois is sixty, meaning there is an average of one medical dispensary license per 207,960 Illinois residents.²⁶⁰ A few states allow for unlimited licenses.²⁶¹ However, many of these “unlimited licensing” states permit local restrictions or outright bans on cannabis licensing, resulting in low

LOY. U. CHI. L. REV. 791, 806-07 (2022); LITTLEJOHN & GREEN, *supra* note 10, at 31-32; and *Industry Experts Discuss Social Equity in the Cannabis Market*, UNIV. MIA. SCH. L. (Oct. 20, 2021), <https://news.miami.edu/law/stories/2021/10/industry-experts-discuss-social-equity-in-the-cannabis-market.html> [<https://perma.cc/FB2D-5KKN>].

²⁶⁰ 410 ILL. COMP. STAT. ANN. 130/115(a) (LexisNexis 2023). See *Illinois Population 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/states/illinois-population> [<https://perma.cc/3BLS-VLN6>] (last visited Oct. 19, 2023) (stating the population of Illinois is 12,477,595). Georgia may only issue up to six production licenses and a total of thirty dispensing licenses, i.e. one dispensary per 368,000 residents. GA. CODE ANN. § 16-12-206 & 211-12 (2023). See *Georgia Population 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/states/georgia-population> [<https://perma.cc/94F6-ZXDR>] (last visited Dec. 3, 2023) (stating the population of Georgia is 11,037,723).

²⁶¹ Alaska, California, Colorado, Kentucky, Massachusetts, Michigan, Montana, Oklahoma, Oregon, Washington, and South Dakota do not place limits on the number of medical dispensaries. Dataset, *supra* note 246. See, e.g., CAL. BUS. & PROF. CODE § 26012(a) (Deering 2023) (“[T]he department shall have the sole authority to create, issue, deny, renew, discipline, condition, suspend, or revoke licenses for commercial cannabis activity.”)

numbers of licenses overall.²⁶² States with social equity programs reserve an even smaller number or percentage of these licenses for social equity operators if any at all.²⁶³

States also create additional barriers to licensing by incorporating difficult financial requirements into the application process. Application fees for dispensary-only licenses range from \$250 to \$125,000 per application, yet only some states provide license fee waivers or reductions for social equity applicants.²⁶⁴ Many states require that license applicants, including social equity applicants, provide proof of start-up capital ranging from \$100,000 to \$2,000,000.²⁶⁵ Some programs require that applicants show proof of a lease or other guarantee that they have already secured a location that complies with local zoning and building codes before even accepting the license application.²⁶⁶ Some applications also require a certificate of occupancy for the proposed property as part of the license application.²⁶⁷ All these factors work together to drive up the demand

²⁶² 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/> [<https://perma.cc/A36V-6FDJ>] (last visited Nov. 29, 2023).

²⁶³ Arizona is one of the only currently functioning programs that directly reserves licenses for social equity applicants, reserving 26 of 130 vertically integrated licenses. MJBIZDAILY, *supra* note 257, at 28.

²⁶⁴ See, e.g., Or. Liquor & Cannabis Comm'n et al., *Business Readiness Guidebook for OLCC Marijuana Operations* 6 (Mar. 21, 2018), https://www.oregon.gov/olcc/marijuana/Documents/BusinessReadinessGuide_RecreationalMarijuana.pdf [<https://perma.cc/W6QF-2AQL>] (\$250 adult-use dispensary application fee in Oregon); OFF. OF CANNABIS REGUL., R.I. DEPT. OF BUS. REGUL., APPLICATION FOR HYBRID CANNABIS RETAILER LICENSE (Oct. 6, 2022), https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fdbr.ri.gov%2Fsites%2Fg%2Ffiles%2Fkgbur696%2Ffiles%2F2022-10%2F2022-10-06%2520-%2520Hybrid%2520Cannabis%2520Retailer%2520License%2520Protected_0.docx&wdOrigin=BROWSELINK [<https://perma.cc/64VB-Q7UX>] (\$125,000 hybrid dispensary application fee in Rhode Island); MCL Admin, *Get Reduced Michigan Marijuana Licensing Fees*, MICH. CANNABIS L. BLOG (May 19, 2020), <https://www.micannabislawyer.com/marihuana-licensing/reduced-marijuana-licensing-fees/> [<https://perma.cc/HD7Z-ZZJN>] (Michigan is an example of a fee reduction state).

²⁶⁵ LITTLEJOHN & GREEN, *supra* note 10, at 24.

²⁶⁶ *Id.* at 23.

²⁶⁷ See, e.g. CANNABIS REG. AGENCY, SOCIAL EQUITY PROGRAM QUALIFYING CRITERIA (2023), <https://www.michigan.gov/cra/-/media/Project/Websites/cra/Social-Equity-Program/Social-Equity-Program-Criteria-Infographic-Revised--->

for licenses and the amount 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.²⁶⁸

The licensing decision-making process further exacerbates these issues, as neither merit-based nor lottery systems address these concerns.²⁶⁹ Under either system, applicants must meet all of the application requirements before their applications become eligible.²⁷⁰ Merit-based systems have been notoriously opaque and frequently subject to legal challenges that dramatically increase the time and expense of obtaining and maintaining a license prior to the start of business operations.²⁷¹ Lottery systems are ostensibly fairer to adversely affected applicants, but 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.²⁷²

Other limitations that hinder the effectiveness of industry equity programs in achieving their goals of diversifying the legal cannabis industry include statutory disqualification of both potential applicants

July-2023.pdf?rev=7e9a13aa5c884c9d86983c84ef259f36 [https://perma.cc/WM6Y-X79K]; CANNABIS REG. AGENCY, SOCIAL EQUITY APPLICATION (2023), https://www.michigan.gov/cra/-/media/Project/Websites/cra/Social-Equity-Program/Social-Equity-Application/CRA_Social-Equity-Paper-Application.pdf?rev=082b7d6b2c8d402fbcc387241c9fffe4&hash=921A560FB68E9FEBFEEB75D29924D40E [https://perma.cc/GXN2-BGE8].

²⁶⁸ Orenstein, *supra* note 1, at 82-83; Cam Wade, *Capitalizing on Missed Opportunities: An Overview of Cannabis Fundraising Disparities* (Ohio State Legal Stud. Rsch. Paper No. 694, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4063072 [https://perma.cc/8U85-MVMK] (social equity applicants and small cannabis businesses struggle to obtain capital).

²⁶⁹ Shaleen Title, *Fair and Square: How to Effectively Incorporate Social Equity into Cannabis Laws and Regulations* (Ohio State Legal Stud. Rsch. Paper No. 672, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978766 [https://perma.cc/FCT4-6H7C].

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Garius et al., *supra* note 13; Neill Harris & Martin, *supra* note 30 at 11; Mary Ellen Godin, *Single Applicants Worry Marijuana License Lottery Favors Larger Players*, MYRECORDJOURNAL.COM, (June 11, 2022, 5:00 AM), <https://www.myrecordjournal.com/News/Meriden/Meriden-News/Single-applicants-worry-marijuana-license-lottery-favors-larger-players.html> [https://perma.cc/XE5G-FJ7S].

and employees with prior felony convictions. While some states explicitly reserve their social equity licenses for those with prior cannabis convictions,²⁷³ other states exclude applicants with non-cannabis related felonies,²⁷⁴ and most states exclude all applicants with prior felonies.²⁷⁵ Similar rules also bar those with prior cannabis felonies from employment in the industry.²⁷⁶ 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.²⁷⁷ 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 in implementing industry equity programs.²⁷⁸ Additionally, the limited number of equity licenses means that the small number of direct beneficiaries of these programs stands in

²⁷³ See LITTLEJOHN & GREEN, *supra* note 10, at 10, 15. See also *e.g.*, MASS. ANN. L. CH. 94G, §4(a½)(iii) (LexisNexis 2023); MASS. ANN. L. CH. 94G, §14A(a) (LexisNexis 2023).

²⁷⁴ See, *e.g.*, Cannabis Control Bd., State of Vt., Rule 1: Licensing of Cannabis Establishments 1.11.2 (2022), <https://ccb.vermont.gov/sites/ccb/files/2022-02/Final%20Proposed%20Rule%201%20-%20Licensing%20of%20Cannabis%20Establishments.pdf> [<https://perma.cc/6DTA-88XS>].

²⁷⁵ See, *e.g.*, ALASKA STAT. § 17.38.200 (excluding all felonies with convictions where less than 5 years have passed).

²⁷⁶ See, *e.g.*, *How To Work At A Dispensary In Florida*, VANGST, <https://vangst.com/reports/state-requirements/florida> [<https://perma.cc/V9VM-96G7>] (last visited Nov. 14, 2023); *Florida Expands Medical Marijuana Regulations and Background Check Requirements*, PRE-EMPLOY (Aug. 16, 2023), <https://www.pre-employ.com/newsblog/hb-1387-florida-expands-medical-marijuana-regulations-and-background-check-requirements/> [<https://perma.cc/LA5V-G8CN>] (now prohibiting employees from working in the industry for at least three years following the completion of felony sentence).

²⁷⁷ Orenstein, *supra* note 1, at 82-84.

²⁷⁸ See, *e.g.* *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542 (1st Cir. 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 Com.*, 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).

stark contrast to the widespread impacts of the War on Drugs and the scope of industry inequity.²⁷⁹

Some states have implemented programs to provide application assistance, technical business training, mentorship by established companies, business incubators or accelerators, and low-cost startup loans to industry equity applicants.²⁸⁰ These programs help with various aspects of obtaining a license such as applications, business plans, regulatory compliance, financial management and accounting, recruitment, marketing, and the process of raising capital.²⁸¹ At this time, these state programs have not yet matured sufficiently to evaluate their success in improving industry equity.²⁸²

b. Limitations Due to Managed Market Dynamics

Either the authorizing legislation or the implementing regulatory body determines the literal extent of the legal cannabis industry. The necessary result of this central planning is 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 in anticipation of future market opportunities.²⁸³ Perversely, despite the intention of industry equity policies to impart these attributes to those adversely affected by the War on Drugs, these attributes are preconditions for success in the legal cannabis industry, not results.²⁸⁴

In addition to license caps, many state cannabis industries feature vertical integration requirements,²⁸⁵ high annual license fees ranging from \$1,000 to \$220,000, and cannabis-specific tax rates

²⁷⁹ Kilmer et al., *supra* note 20, at 1026-31.

²⁸⁰ See, e.g., N.Y. STATE OFF. OF CANNABIS MGMT., NEW YORK SOCIAL AND ECONOMIC EQUITY PLAN (2023), <https://cannabis.ny.gov/system/files/documents/2023/09/nys-see-plan-english.pdf> [<https://perma.cc/N5RB-B2MW>].

²⁸¹ See, e.g. California, Colorado, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Washington. Dataset, *supra* note 246.

²⁸² Kilmer et al, *supra* note 20, at 1019.

²⁸³ Orenstein, *supra* note 1; Jeff Smith, *Illinois' Marijuana Social Equity Program Labors to Become Operational*, MJBIZDAILY (May 17, 2022), <https://mjbizdaily.com/illinois-marijuana-social-equity-program-labors-to-become-operational/> [<https://perma.cc/9RNV-2LM8>].

²⁸⁴ Orenstein, *supra* note 1, at 81.

²⁸⁵ 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. Dataset, *supra* note 246.

ranging from 0% (medical only) to 37% (plus state sales tax).²⁸⁶ These elements significantly increase fixed costs for operating cannabis businesses on top of the costs already associated with operating in a highly regulated industry.²⁸⁷ Vertical integration requires additional startup costs to implement all levels of the supply chain in a single business but results in lower operating costs over time—savings that single license industry equity licensees cannot attain. Organizations with the resources to out-scale these costs predictably dominate each state’s legal cannabis industry.²⁸⁸ Failure to limit the resale of industry equity licenses to similarly qualified owners or license rules that permit large operators to use industry equity applicants as a mere figurehead for obtaining a license²⁸⁹ further contributes to the corporate consolidation evident in most current legal cannabis markets.

Some states provide industry equity applicants with exclusive access to “micro-licenses” or single-location dispensary or delivery licenses.²⁹⁰ These licenses require fewer resources to obtain and implement and provide accessible on-ramps for industry equity applicants.²⁹¹ However, by their very nature as micro-businesses, these licenses merely create second-class businesses. By definition, and in practice, micro-businesses cannot accomplish the stated goals of

²⁸⁶ See, e.g., Washington which exempts medical patients from a cannabis specific tax, but imposes a 37% excise tax plus 8.8% sales tax. *Cannabis retailers*, DEP’T OF REVENUE WASH. STATE, <https://dor.wa.gov/cannabis-retailers> [<https://perma.cc/PL4K-EVBB>] (last visited Nov. 14, 2023); *2023 List of Washington Local Sales Tax Rates*, SALES TAX HANDBOOK: WASH., <https://www.salestaxhandbook.com/washington/rates> [<https://perma.cc/RH3D-4N2D>] (last visited Nov. 14, 2023).

²⁸⁷ Orenstein, *supra* note 1, at 82.

²⁸⁸ 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.

²⁸⁹ Brendan J. Lyons, *‘This Ruined My Life’: Impact of N.Y.’s Botched Cannabis Rollout Aired*, TIMES UNION (Sept. 12, 2023), <https://www.timesunion.com/state/article/this-ruined-life-n-y-cannabis-meeting-reveals-18361515.php> [<https://perma.cc/KXQ9-4D3W>]; Catherine R. Salerno, *To Put it Bluntly: A Criticism of Social Equity Cannabis Licensing Schemes*, 20-21 (2022) (Student work, Seton Hall Law School) (on file with author).

²⁹⁰ See, e.g., LITTLEJOHN & GREEN, *supra* note 10, at 15.

²⁹¹ Jeff Smith, *States Escalate Microbusiness Cannabis Licenses as ‘Hedge’ Against MSOs*, MJBIZDAILY (Dec. 7, 2021), <https://mjbizdaily.com/states-escalate-microbusiness-cannabis-licenses-as-hedge-against-msos/> [<https://perma.cc/JKS5-5AGZ>].

industry 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.²⁹²

The sequencing and timing of cannabis licensing implementation can also detrimentally affect the success of industry equity licensees in the legal cannabis industry.²⁹³ Many states implemented social equity provisions in follow-up legislation to previously established legal cannabis markets.²⁹⁴ In such cases, social equity applicants find themselves at a disadvantage. Social equity applications lose any potential first-mover advantage and face the prospect of breaking into a competitive industry where corporate licensees and the legacy market have already picked over the low-hanging fruit as far as location, employees, branding, partnerships, and

²⁹² See Omar Sacirbey, *Cannabis Microbusiness License Holders Say Lower Cost of Entry Tempered By Risk of Failure*, MJBIZDAILY (Oct. 4, 2022), <https://mjbizdaily.com/cannabis-microbusiness-license-holders-say-low-cost-tempered-risk-failure/> [https://perma.cc/Y826-GXQF] (Interviews with microbusiness license holders show that they cannot compete in price with multi-state operators that benefit from economies of scale. Saving a few thousand dollars on licensing costs does not make up the difference. The ‘micro’ inherently limits any potential scale or revenue benefits and necessitates obtaining several licenses to make up the difference. Microbusiness licenses have yet to stem the failure rate of small cannabis businesses); and see generally ANGELA HAWKEN & JAMES PRIEGER, *ECONOMIES OF SCALE IN THE PRODUCTION OF CANNABIS* (2013), https://lcb.wa.gov/publications/Marijuana/BOTEC%20reports/5c_Economies_Scale_Production_Cannabis_Oct-22-2013.pdf [https://perma.cc/8PNE-WGXN] (cannabis businesses benefit greatly from economies of scale).

²⁹³ JONATHAN P. CAULKINS ET AL., *CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS* 96 (2015).

²⁹⁴ H.B. 20-1424, *supra* note 253; Ben Sheppard, *Going for the Green: Social Equity in the Recreational Cannabis Industry*, 8(1) LINCOLN MEM’L UNIV. L. REV. 280, 282 (2020); Diana Novak Jones, *Colorado Gov. Signs Cannabis Social Equity Bill Into Law*, LAW360 (June 30, 2020, 8:25 PM), <https://www.law360.com/articles/1288074/colorado-gov-signs-cannabis-social-equity-bill-into-law> [https://perma.cc/PBP2-SSTL]; Natalie Fertig, *Black Lives Matter Movement Sparks ‘Collective Awakening’ on Marijuana Policies*, POLITICO (Aug. 7, 2020, 4:30 AM), <https://www.politico.com/news/2020/08/07/black-lives-matter-movement-marijuana-policies-392434> [https://perma.cc/P7AJ-E3MB]; 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/> [https://perma.cc/L7P6-ZJ8S].

more are concerned.²⁹⁵ This dynamic also exists in medical cannabis only states when they implement adult-use legislation by giving current medical licensees exclusive access to the adult-use market for several years while the state puts the adult-use licensing and industry equity programs in place.²⁹⁶ Even in states that adopted industry equity programs as part of the legislation first authorizing their legal cannabis industry, the additional requirements necessary to administer industry equity programs result in those programs frequently taking a backseat to the initial commercial licensing processes. This exacerbates the first mover advantages of the larger commercial entities that obtained their licenses under the initial process.²⁹⁷

c. Limitations Due to Natural Industry Dynamics

In addition to program limitations and statutorily created market dynamics, industry 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, noncompliant product destruction processes, quality control and consumer protection procedures, advertising restrictions, and, in many states, expensive indoor grow facilities and equipment.²⁹⁸ This results in large startup costs, ranging from \$1,000,000 to \$6,000,000, and sometimes much higher, that legal cannabis businesses must repay just to break even.²⁹⁹

At the same time, licensed cannabis businesses must compete with cheaper and more diverse products from the legacy market, as well

²⁹⁵ Unger et al., *supra* note 157.

²⁹⁶ See, e.g., Susan R. Miller, *Rhode Island Adult-Use Cannabis Sales Will Start by Year-End*, NEW CANNABIS VENTURES (June 24, 2022, 1:56 PM), <https://www.newcannabisventures.com/rhode-island-adult-use-cannabis-sales-will-start-by-year-end/> [https://perma.cc/XW6S-HM5A].

²⁹⁷ 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/crains-forum-cannabis/no-easy-path-sharing-marijuana-wealth> [https://perma.cc/32UD-B9M8].

²⁹⁸ See generally MJBIZDAILY, *supra* note 73.

²⁹⁹ Wade, *supra* note 268, at 4.

as out-of-state programs with lower levels of industry regulation.³⁰⁰ These regulations and competition dynamics create a challenging environment for the most well-funded and sophisticated operators, let alone for industry equity applicants who definitionally lag behind other licensees with respect to those attributes.³⁰¹

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.³⁰² These local municipalities are more susceptible to regulatory capture through both legitimate means and illegal bribery³⁰³ by larger industry players.³⁰⁴ Due to the ongoing stigmatization of the cannabis industry,³⁰⁵ state and community leaders fail to engage in the explicit and concentrated intervention efforts necessary to prevent such regulatory capture.³⁰⁶ This ongoing stigmatization also motivates effective, local community opposition from residents who inaccurately fear that cannabis businesses will bring crime to their neighborhood area.³⁰⁷ Whether from corporate or community-initiated opposition,

³⁰⁰ Ryan B. Stoa, *Emerging Issues in Cannabis Law: 2022 and Beyond*, 46 SETON HALL LEGIS. J. 469 (2022).

³⁰¹ Seth Colby, *Getting too High?: Levels of Taxation and Potential Public Revenue from a Legalized Cannabis Market in Hawaii*, TAX WORKING GRP. OF THE DUAL USE OF CANNABIS TASK FORCE, STATE OF HAW. 16, 34 (2022).

³⁰² William C. Bunting & James M. Lammendola, *Why Localism is Bad for Business: Land Use Regulation of the Cannabis Industry*, 17 N.Y.U. J.L. & BUS. 267, 272, 273 (2021).

³⁰³ Adam Elmahrek, Rubin Vives, & Robert J. Lopez, ‘\$250,000 cash in a brown paper bag.’ *How legal weed unleashed corruption in California*, LOS ANGELES TIMES (Sep. 15, 2022), <https://www.latimes.com/california/story/2022-09-15/cannabis-corruption-threats-secret-financial-deals-politicians> [<https://perma.cc/H5T2-XDYX>].

³⁰⁴ Navin Kumar, *Understanding Motivations for Large US Cannabis Firms’ Participation in the Cannabis Space*, 39 DRUG & ALCOHOL REV. 347, 348 (2020); Bryon Adinoff & Amanda Reiman, *Implementing Social Justice in the Transition from Illicit to Legal Cannabis*, 45(6) AM. J. OF DRUG & ALCOHOL ABUSE 673, 684 (2019); A Peter J. Adams et al., *Policy Influence and the Legalized Cannabis Industry: Learnings from Other Addictive Consumption Industries*, 116 ADDICTION 2939, 2944 (2021).

³⁰⁵ Ekaterina Moiseeva, *The Logic of NIMBYism: Class, Race, and Stigma in the Making of California’s Legal Cannabis Market*, L. & SOC. INQUIRY 1, 21 (2023).

³⁰⁶ Benjamin Rajotte, *Cannabusiness Ethics*, 45 S. ILL. U. L.J. 109, 112 (2020).

³⁰⁷ Tom Y. Chang & Mireille Jacobson, *Going to Pot? The Impact of Dispensary Closures on Crime*, 100 J. URBAN ECON. 120 (2017) (noting that despite popular conception, dispensary locations actually reduce local crime rates); Xiuming

cannabis business licensees often face expensive, drawn-out battles during their start-up stage which further disadvantages equity applicants.³⁰⁸ This particular industry dynamic significantly contributes to location inequities by pushing cannabis operations and dispensaries into neighborhoods or municipalities adversely targeted by the War on Drugs,³⁰⁹ as well as exacerbating cannabis health inequities by creating dispensary “deserts” where medical patients have no access to licensed dispensaries.³¹⁰

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 commercialization costs, plays a large role in the disparity.³¹¹ 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 prices.³¹²

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 cannabis

Dong & Justin Tyndall, *The Impact of Recreational Marijuana Dispensaries on Crime: Evidence from a Lottery Experiment*, THE ANNALS OF REG'L SCI. (Oct. 2023).

³⁰⁸ 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/> [<https://perma.cc/E9AB-9AMF>].

³⁰⁹ See *supra* Section II.A.6. See also, Moiseeva, *supra*, note 309, at 22.

³¹⁰ Kyle Jaeger, *A Dozen California Marijuana Bills, Including Allowing Medical Cannabis Deliveries Statewide, Head to Governor*, MARIJUANA MOMENT (Aug. 31, 2022), <https://www.marijuanamoment.net/a-dozen-california-marijuana-bills-including-allowing-medical-cannabis-deliveries-statewide-head-to-governor/> [<https://perma.cc/BV39-T9FZ>].

³¹¹ See generally Colby, *supra* note 301.

³¹² Take, for example, Georgia and Ohio (grow facility sq. ft. restrictions); Hawaii (cultivation facility plant count restrictions); and New Mexico (license fees scale by plant count). See ANGELA HAWKEN & JAMES PRIEGER, ECONOMIES OF SCALE 3 (2013) (noting lower costs from economies of scale); GA. CODE ANN. § 16-12-211 (2023); GA. CODE ANN. § 16-12-212 (2023); OHIO ADMIN. CODE ANN. § 3796:1-1-01 (2023); HAW. REV. STAT. § 329D-2 (2023); N.M. STAT. ANN. § 26-2C-9 (2023).

industry.³¹³ The industry has already seen prices fall significantly in states that permit grow operations and production facilities at scale or that do not limit the number of available grow licenses like Oklahoma and Oregon.³¹⁴ Some estimates put the future price of cannabis at as little as 15% of current legal market prices.³¹⁵ This price shock, even if it evolves gradually, will provide consistent headwinds for all current cannabis businesses, especially for those who base their business models and capital investments on current product prices.³¹⁶ This industry dynamic, in addition to increased interstate competition as states deregulate at different rates, will negatively impact the viability of many industry equity licensees because these businesses will not be able to sustain product pricing that creates long-term profitability.³¹⁷

Program limitations, managed market dynamics, and natural industry dynamics conspire to reduce the effectiveness of industry equity programs. Despite the prevalence of industry equity policies as the most common component of cannabis social equity programs across the country, legal industry statistics have yet to identify a definable

³¹³ Wayne Hall, *The Costs And Benefits Of Cannabis Control Policies*, 22 DIALOGUES IN CLINICAL NEUROSCIENCE, 281, 284 (2020); *see also*, Halydier, *supra*, note 245 (observing that lower industry regulations for pharmaceutical industries result in lower product pricing due to competition between new and old market participants).

³¹⁴ Bart Schaneman, *Bottoming Out: Adult-use Cannabis Prices Nosedive in Massachusetts as Market Hits Oversaturation Point*, MJBIZDAILY (Dec. 23, 2022), <https://mjbizdaily.com/massachusetts-recreational-marijuana-prices-nosedive-in-oversaturated-market/> [<https://perma.cc/9F4C-WNTG>].

³¹⁵ *See* Colby, *supra* note 301, at 16, 34; Matt Lamaers, *Canadian Wholesale Cannabis Prices Are Off More Than 40% In 2022*, MJBIZDAILY (Feb. 15, 2023), <https://mjbizdaily.com/canadian-wholesale-cannabis-prices-fall-more-more-than-40-percent-in-2022/> [<https://perma.cc/A88Z-G2JK>] (observing that Canada's experience as a relatively open market has resulted in prices dropping 41% in 2022 alone due to increased competition and oversupply); *and see generally* ROBIN GOLDSTEIN & DANIEL SUMNER, CAN LEGAL WEED WIN? 139-69 (2022) (predicting that cannabis prices in California can fall to approximately less than ten percent of current market prices).

³¹⁶ MARK A.R. KLEIMAN ET AL., INTERVIEWS WITH CANNABIS LICENSEES IN WASHINGTON STATE, WA. STATE LIQUOR & CANNABIS BD., 1, 4 (2019).

³¹⁷ Memorandum from Thomas B. Modica, City Manager, to Mayor and Members of the City Council of Long Beach, California (Oct. 1, 2021), <https://www.longbeach.gov/globalassets/city-manager/media-library/documents/memos-to-the-mayor-tabbed-file-list-folders/2021/october-1--2021---cannabis-equity-retail-storefront--dispensary--feasibility-analysis> [<https://perma.cc/FU58-JC7D>].

positive impact to justify the levels of institutional and attentional resources dedicated to this element of cannabis social equity.³¹⁸

B. Community Equity

Community equity refers to policies based in traditional restorative justice proposals for some form of direct investment as reparations for the inequities of the War on Drugs. Community equity programs fall into two categories: either direct investment by the state in programs for adversely affected communities or state requirements for licensed industry participants to provide similar programs. States fund these programs through cannabis tax revenue, general appropriations, or by direct contributions from licensed industry participants. Advocates have proposed these community equity policies for many years, but states have only recently started to investigate their potential and little data on program effectiveness exist.³¹⁹

Due to the direct relationship between the investment and the targeted inequity, community equity policies can be deceptively straightforward in description and easy for legislatures and regulatory agencies to publicly support. Yet, few states have successfully implemented community equity policies at scale, with many state legislatures simply diverting cannabis tax revenues intended to support these initiatives directly into their state's general fund.³²⁰ After all, while social equity is a public relations winner, the need to actually spend money on community equity policies directly contradicts the frequent political justification for legalization that states will increase their coffers via new tax revenue.³²¹ Currently, eight states' cannabis programs include provisions for state-led community equity programs.³²² A few states require licensed industry participants to

³¹⁸ Ben Sheppard, *Going for the Green: Social Equity in the Recreational Cannabis Industry*, 8 LINCOLN MEM'L U. L. REV. 280, 284-5 (2020).

³¹⁹ See Adinoff & Reiman, *supra*, note 304, at 684; Kilmer et al, *supra* note 20, at 1027-28; Jasmin Mize, *Reefer Reparations*, 3(2) SOC. JUSTICE & EQUITY J. 1, 27-28 (2020).

³²⁰ See Adinoff & Reiman, *supra*, note 304 at 684; Kilmer et al, *supra* note 20, at 1027-28; Mize, *supra* note 319.

³²¹ 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 (2022).

³²² See LITTLEJOHN & GREEN, *supra* note 10 (California, Colorado, Delaware, Illinois, Maryland, New Jersey, New York, and Virginia).

provide community equity opportunities, and some businesses provide these opportunities on their own initiative.³²³

1. Direct Investment Programs

Very few states use direct community equity policies to provide money to programs that seek to ameliorate the harms of the War on Drugs or to promote public health and safety.³²⁴ 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.³²⁵ New York adopted an extensive list of potential targets for ameliorative reinvestment,³²⁶ including 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.³²⁷ However, many states only fund general public health and public education activities, such as public awareness campaigns for proper cannabis safety and drug rehabilitation programs.³²⁸

Measured by fiscal support, Illinois has implemented one of the more successful³²⁹ direct community equity programs.³³⁰ While it is too early to evaluate the success of its impacts, since 2021, Illinois has used

³²³ *The Complete Guide to Social Equity Programs for Dispensaries*, FLOWHUB, <https://flowhub.com/cannabis-social-equity-programs-complete-guide> [https://perma.cc/RD83-6EFW] (last visited Dec. 14, 2022).

³²⁴ Mize, *supra* note 319.

³²⁵ Orenstein, *supra* note 1.

³²⁶ See *supra* Section II.A for broad coverage of these inequities.

³²⁷ *What is in the Law Social and Economic Equity*, N.Y. OFF. OF CANNABIS MGMT. (Feb. 2, 2022), https://cannabis.ny.gov/system/files/documents/2022/02/cannabis-management-fact-sheet-social-equity_0_0.pdf [https://perma.cc/6EHM-7ZKY].

³²⁸ Mize, *supra* note 319.

³²⁹ 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, 811-12 (2022); and see 410 ILL. COMP. STAT. 705/10-40 (2019); R3 Restore. Reinvest. Renew., STATE OF ILL., <https://r3.illinois.gov/> [https://perma.cc/6Q2B-SQDV] (last visited Dec. 14, 2022).

³³⁰ R3 Restore. Reinvest. Renew., *supra* note 329.

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.³³¹ 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%).³³² Illinois identifies target communities for aid by looking at community level statistics for gun injuries, child poverty, unemployment, and incarceration rates.³³³ Uniquely, Evanston, Illinois intends to implement a program providing direct racial reparation payments to adversely affected populations.³³⁴

In 2021, New York passed what appeared on paper as one of the most progressive community reinvestment programs.³³⁵ The program established an independent board tasked with distributing a designated 40% of cannabis tax revenue in a community grants reinvestment fund to community organizations.³³⁶ New York designated the remainder of cannabis tax revenue for public education (40%) and drug treatment (20%).³³⁷ New York's cannabis program remains in its early stages, and only in time will its community equity program produce usable data for evaluation. That said, the comprehensiveness of New York's social

³³¹ 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/> [<https://perma.cc/X25K-LFXV>]; R3 Restore. Reinvest. Renew., *supra* note 329.

³³² 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> [<https://perma.cc/N57W-548M>].

³³³ R3 Restore. Reinvest. Renew., *supra* note 329.

³³⁴ 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> [<https://perma.cc/HU9A-F8A6>].

³³⁵ *What is in the Law Social and Economic Equity*, *supra* note 327.

³³⁶ *Id.*

³³⁷ Aleece Burgio, *New York Cannabis Law Prioritizes Social, Economic Equity*, BLOOMBERG L. (Apr. 28, 2021), <https://news.bloomberglaw.com/cannabis/new-york-cannabis-law-prioritizes-social-economic-equity> [<https://perma.cc/44XJ-4RUE>].

equity legislation provides the most diverse list of potential targets for community equity policies.³³⁸

California, Colorado, Washington, and Arizona funnel cannabis tax revenue into their general funds, with occasional earmarks for general education, job reentry training for individuals with prior cannabis convictions, and public health funding.³³⁹ For example, the California Governor's Office funds California's Community Reinforcement Grants Program to remediate the harms of the War on Drugs generally by funding substance use disorder and mental health treatments.³⁴⁰ 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.³⁴¹

Scholars have made several general critiques of these community equity programs, even though data is not yet available to verify their effectiveness empirically. First, and most obviously, too few of the thirty-eight states with either medical or adult-use cannabis programs have implemented community equity programs.³⁴² 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 benefit adversely affected

³³⁸ Jeff Smith, *New York's Marijuana Social Equity Program Eyed as Possible Game Changer*, MJBIZDAILY, (Apr. 23, 2021), <https://mjbizdaily.com/new-yorks-marijuana-social-equity-program-a-possible-game-changer/> [<https://perma.cc/83F5-2XUX>].

³³⁹ Kilmer et al., *supra* note 20, at 1018-19; Adinoff & Reiman, *supra* note 304, 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); Kilmer et al., *supra* note 20, at 1019.

³⁴⁰ See *California Community Reinvestment Grants Program*, STATE OF CAL. (Sep. 16, 2022), <https://business.ca.gov/california-community-reinvestment-grants-program/> [<https://perma.cc/2N6G-RY8T>]; *California Community Reinvestment Grant*, HEALTHRIGHT360, <https://www.healthright360.org/program/california-community-reinvestment-grant-ca-crg>, (last visited Dec. 14, 2022) [<https://perma.cc/9NCQ-6L2D>].

³⁴¹ 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> [<https://perma.cc/5QJZ-F4AY>].

³⁴² Kilmer et al., *supra* note 20, at 1018-19; LITTLEJOHN & GREEN, *supra* note 10 at 2. See generally Section III.A.

communities.³⁴³ Third, even when data on these programs becomes available, without established metrics for what defines success, evaluating the effectiveness of community equity programs and improving them will remain difficult.³⁴⁴ 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.³⁴⁵ 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.³⁴⁶ Sixth, the projected decline in cannabis prices and industry profitability directly translates into shrinking tax revenue for community equity programs.³⁴⁷ This will negatively impact legislative support for community equity programs that cannot pay for themselves, let alone operate at the scale of the inequities.³⁴⁸

Finally, and more broadly, is a critique of scope—not the scope of the target populations for reinvestment, but rather the scope of available funds in the face of the extensive harms of the War on Drugs.³⁴⁹ States fund these community equity programs solely from a percentage of cannabis tax revenue, rather than as steady appropriations from a general fund.³⁵⁰ On its face this revenue is clearly insufficient; for example, in its 2022 round of grants, California distributed

³⁴³ Adinoff & Reiman, *supra* note 304, at 681-82; Salerno, *supra* note 339; Kojo Koram, *The Legalization of Cannabis and the Question of Reparations*, 25 J. OF INT’L ECON. LAW 294, 304-08 (2022).

³⁴⁴ Kilmer et al., *supra* note 20, at 1019.

³⁴⁵ Victor Vasquez, *Cannabis Social Equity: The Battle to Compete in a Competitive Marketplace*, UC BERKELEY 1 (2022); Casey, *supra* note 341.

³⁴⁶ *See supra* Section II.A; Steven W. Bender, *Racial Justice and Marijuana*, 59 CAL. W. L. REV. 223 (2023).

³⁴⁷ *Cannabis Tax Revenue in States that Regulate Cannabis for Adult Use*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/issues/legalization/cannabis-tax-revenue-states-regulate-cannabis-adult-use/#:~:text=Reasons%20for%20declining%20tax%20revenue,reducing%20demand%20from%20visitors%20in> [<https://perma.cc/67ML-E5KJ>] (last visited Sept. 22, 2023); Jason P. Brown et. al., *Economic Benefits and Social Costs of Legalizing Recreational Marijuana*, FED. RSRV. BANK OF KAN. CITY, 1, 3-4 (2023).

³⁴⁸ *See infra* Section III.

³⁴⁹ *See* Kilmer et al., *supra* note 20.

³⁵⁰ *Id.*

\$48,000,000 in the face of \$484,000,000 in grant requests.³⁵¹ Similarly, Illinois currently provides around \$45,000,000 a year in community equity funds while spending an estimated \$560 million a year in the prosecution and incarceration of drug offenses.³⁵² Current community equity funding is not proportionate to either the harms of the War on Drugs or to the billions of dollars in savings that states see from reduced police, court, and prison expenses.³⁵³ 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 as states further deregulate cannabis.

Thus, the relative paucity of direct community equity programs and their resources in relation to the number of states with legal cannabis industries, whether for adult-use or medical purposes, demonstrates the recentness of the integration of restorative justice policies into cannabis social equity. It also highlights the growing disparity between the funds available for these programs and the scale of the inequities they seek to address.

2. Industry-Led Investment Programs

As a substitute for state-led community equity policies, many cannabis programs require general license holders to engage in community equity activities as a condition of their license.³⁵⁴ Some non-social equity license holders and other industry participants also advertise voluntary, self-described social equity activities that support industry equity licensees.³⁵⁵ These activities typically include business mentorship, funding and technical assistance with the application process, startup capital, privately-run business accelerators, and

³⁵¹ *California Community Reinvestment Grants Program*, STATE OF CAL. (Sep. 16, 2022), <https://business.ca.gov/california-community-reinvestment-grants-program/> [https://perma.cc/R6TH-7S9N].

³⁵² 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.J. 793, 811-12 (2022).

³⁵³ Adinoff & Reiman, *supra* note 304, at 683.

³⁵⁴ See Kriwinsky, *supra* note 41, at 12, 13.

³⁵⁵ See, e.g., 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> [https://perma.cc/PU2V-23C2]; *Gage Cannabis to Make Grants in 'Social Equity' Cities*, 35 CRAIN'S DETROIT BUS. 34 (Sept. 16, 2019).

discounts on commercial products and services like seed-to-sale tracking software.³⁵⁶

Many California jurisdictions give licensing priority to general license applicants who agree (or in Long Beach are required), as a condition of their license, to provide incubation services to industry equity applicants.³⁵⁷ However, these relationships are fraught with accusations that general licensees do not provide the required services, that industry equity licensees steal from or abuse the programs, and that general licensees will divest industry equity licensees of their licenses.³⁵⁸ 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 assisting industry equity applicants before either using them as a figurehead to meet state requirements or forging agreements to buy the license after it is awarded.³⁵⁹

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—many disappear into the ether, and operating beneficiaries are almost non-existent.³⁶⁰ The same is true in jurisdictions that require general license applicants to submit plans describing how they intend to benefit

³⁵⁶ 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, <https://flowhub.com/cannabis-social-equity-programs-complete-guide> [<https://perma.cc/Y6WT-2VEU>] (last visited Dec. 14, 2022).

³⁵⁷ Become an Equity Applicant or Incubator, City of Oakland, <https://www.oaklandca.gov/topics/become-an-equity-applicant-or-incubator> [<https://perma.cc/M5PK-LLN8>] (last visited Nov. 26, 2022).

³⁵⁸ *See* Kriwinsky, *supra* note 41, at 12-13.

³⁵⁹ *See* Orenstein, *supra* note 1, at 82-83; Salerno, *supra* note 339, at 20-21; *see, e.g., Jackie Borchart, 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/> [<https://perma.cc/6M3F-QYJS>]; Brendan J. Lyons, *'This Ruined My Life': Impact of N.Y.'s Botched Cannabis Rollout Aired*, TIMES UNION (Sept. 12, 2023), <https://www.timesunion.com/state/article/this-ruined-life-n-y-cannabis-meeting-reveals-18361515.php> [<https://perma.cc/5RAT-GVM4>].

³⁶⁰ *See* Orenstein, *supra* note 1, at 82-83 (explaining that incubator partners leave business ownership equity applicants without support after receiving government funding).

neighboring communities or to develop a diverse workforce that includes those adversely affected by the War on Drugs.³⁶¹ 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.³⁶²

In the end, these industry-led programs are subject to the same critiques as direct governmental community equity programs, but magnified by the necessarily small scale of any particular corporate program, lack of accountability and enforcement, and profit motive.³⁶³ 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 cannabis industry currently lack the scale and political will to begin to redress the harms of the War on Drugs.³⁶⁴

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.³⁶⁵ Criminal justice reform developed in opposition to the steep rise in incarceration rates across the United States that began in the 1970s.³⁶⁶ Proponents for reform diagnose this rise as the result of policies characterized as part of the “War on Drugs” or as “tough on crime,” such as mandatory minimum

³⁶¹ See GOVERNOR’S OFF. OF BUS. AND ECON. DEV., CANNABIS EQUITY GRANTS PROGRAM FOR LOCAL JURISDICTIONS ANNUAL REPORT TO LEGISLATURE (2021) (explaining that California jurisdictions require submittal of community investment plans); see, e.g., CONN. GEN. STAT. § 21a-420u (2021) (requiring licensees to engage in workforce development in adversely impacted communities).

³⁶² Kumar, *supra* note 304, at 352-53.

³⁶³ Dianna Benjamin, *Social Equity in Cannabis FAQ*, MARIJUANA MATTERS, <https://marijuanamatters.org/greenlightblog/social-equity-in-cannabis-faq> [<https://perma.cc/Q6SD-D2ES>] (last visited Sept. 22, 2023).

³⁶⁴ See Salerno, *supra* note 339, at 20-21.

³⁶⁵ See *supra* Section II.A.1; 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).

³⁶⁶ Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 433-34 (2020).

sentencing, increased preference for life without parole sentences, and support for private, for-profit prisons.³⁶⁷ 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.³⁶⁸ 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.³⁶⁹

Before the current, thin definition of cannabis social equity came to dominate the conversation, 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.³⁷⁰ Their work formed the foundation for the many individual states' efforts since the 1970s to decriminalize cannabis as a direct response to the passage of the CSA. The influence of this framework can also be seen in the majority of states that have enacted some form of medical and/or adult-use decriminalization or legalization of cannabis.³⁷¹ Additionally, the contributions of these scholars and advocates played a role in the Biden administration's 2022 pardon for

³⁶⁷ See Linder, *supra* note 365.

³⁶⁸ See Ahrens, *supra* note 366, at 435-36.

³⁶⁹ 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 27; JACOB HERBERT, THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE, 3 SAGE CRIMINAL JUSTICE SYSTEM ANNUALS (1974); GRINSPOON & BAKALAR, *supra* note 26, at 22; GRAY, *supra* note 41; STONEOVER: THE OBSERVED LESSONS AND UNANSWERED QUESTIONS OF CANNABIS LEGALIZATION (Nikolay Anguelov & Jeffrey Moyer eds., 2022); Yvon Dandurand, *Criminal Justice Reform and the System's Efficiency*, 25 CRIM. L. F. 383 (2014); Ahrens, *supra* note 366, at 421-22; Katherine Jagers, *Correcting Injustices: Expunging Prior Marijuana Convictions is Kentucky's Next Best Step Towards Restorative Justice*, 48 N. KY. L. REV. 385 (2021); 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); Jennifer L. Doleac, *Encouraging Desistance from Crime*, 61 J. OF ECON. LIT. 383, 383-427 (2023).

³⁷⁰ See Ahrens, *supra* note 366, at 393-97, 411-13 (chronicling the long history of thought on cannabis decriminalization and legalization).

³⁷¹ *Id.*

all those convicted of simple possession of cannabis under federal law since 1992.³⁷²

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)³⁷³ and individual cultivation of a small number of plants for personal use.³⁷⁴ It also removes criminal penalties for licensed corporate production, manufacture, and retail activities.³⁷⁵ 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.³⁷⁶

This distinction creates facially inequitable dynamics. For instance, someone may now receive a warning for the same offense for which another person remains incarcerated. Similarly, a person continues to face arrest and a felony conviction for possessing one too many grams over the legal limit; yet, they now do so while standing 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.³⁷⁷ These inequitable dynamics magnify the traditional arguments for, and political salience of, criminal justice reform. Thus, when managed effectively, criminal justice equity policies consistently remain a politically popular and broadly impactful element of cannabis social equity.³⁷⁸

³⁷² 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 David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1, 28-29 (2020).

³⁷³ Michael Hartman, *Cannabis Overview*, NAT'L CONF. OF STATE LEGIS. (May 31, 2022), <https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview> [<https://perma.cc/J4UT-V3Q3>].

³⁷⁴ *Id.*

³⁷⁵ *Id.* See 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)).

³⁷⁶ See, e.g. COLO. REV. STAT. § 44-10-701 (2022).

³⁷⁷ Alana E. Rosen, *High Time For Change: Cannabis Expungement Statutes*, 60(1) THE JUDGES' J. (2021).

³⁷⁸ Kilmer et al., *supra* note 20, at 1026-31; Ahrens, *supra* note 366, at 405.

Some states also apply the new decriminalization or legalization standards to the records of those with prior criminal convictions for now legal activities.³⁷⁹ 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.³⁸⁰ While 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.³⁸¹

Generally, states have adopted two ways to address convictions for prior offenses retroactively. 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.³⁸² In contrast, Colorado gave the governor power to automatically pardon all offenses for possession of up to two ounces without individual initiation.³⁸³ Other states do not require a pardon, legislatively authorizing the direct expungement of all records relating to qualifying convictions.³⁸⁴ As with pardons, this process can be automatic or manually initiated by an individual.³⁸⁵ 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.³⁸⁶ In New Jersey,

³⁷⁹ Kilmer et al., *supra* note 20, at 1026-31.

³⁸⁰ *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION OF RIGHTS PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/> [<https://perma.cc/N2LS-5EEE>] (last visited Sept. 22, 2023).

³⁸¹ Ahrens, *supra* note 366, at 406-10.

³⁸² Jagers, *supra* note 369, at 396; *see also* State Appellate Defender, *Cannabis Expungement Information and Forms*, STATE OF ILL., <https://www2.illinois.gov/osad/Expungement/Pages/Cannabis-Expungement.aspx> [<https://perma.cc/L8FT-279V>] (last visited Dec. 17, 2022).

³⁸³ *See* Colorado Bureau of Investigation, *Marijuana Pardons*, STATE OF COL., <https://cbi.colorado.gov/sections/biometric-identification-and-records-unit/marijuana-pardons> [<https://perma.cc/H7K9-Q8NB>] (last visited Dec. 17, 2022).

³⁸⁴ *50-State Comparison: Expungement, Sealing & Other Record Relief*, *supra* note 380.

³⁸⁵ *Id.*

³⁸⁶ *See* California Courts, *Proposition 64: The Adult-use of Marijuana Act*, COURTS.CA.GOV, <https://www.courts.ca.gov/prop64.htm> [<https://perma.cc/G3M4-LK9Z>] (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),

qualifying single offenses are automatically identified and expunged without prosecutorial discretion, but individuals must initiate review and expungement for multiple offenses.³⁸⁷ 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.³⁸⁸

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, where potential employers, landlords, and law enforcement officers can still use the records as the basis for ongoing stigmatization.³⁸⁹ 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.³⁹⁰

<https://supremecourt.nmcourts.gov/wp-content/uploads/sites/3/2022/06/Order-No.-22-8500-027.pdf> [<https://perma.cc/73MM-344M>].

³⁸⁷ New Jersey Courts, *Expungement of Certain Marijuana or Hashish Cases*, NJCOURTS.GOV, <https://www.njcourts.gov/courts/municipal/marijuana-expungement> [<https://perma.cc/6WZK-D85Z>] (last visited Dec. 17, 2022); *50-State Comparison: Expungement, Sealing & Other Record Relief*, *supra* note 385.

³⁸⁸ Governor Ned Lamont, *Governor Lamont Announces Thousands of Low-Level Cannabis Possession Convictions To Be Cleared for Connecticut Residents*, STATE OF CONN. (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> [<https://perma.cc/ZE58-2Q4V>]; New York State Unified Court System, *Cannabis (Marihuana) and Expungement Under New York State Law*, STATE OF N.Y., <https://www.nycourts.gov/courthelp/criminal/marihuanaExpunge.shtml> [<https://perma.cc/8RKT-RW4B>] (last visited Dec. 17, 2022); Office of the Governor, *Governor McKee Signs Legislation Legalizing and Safely Regulating Recreational Cannabis in Rhode Island*, STATE OF R.I., (May 25, 2022), <https://www.ri.gov/press/view/43626> [<https://perma.cc/AKE9-4WLX>]; VT. STAT. ANN. tit. 13 § 7601 (2022).

³⁸⁹ 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).

³⁹⁰ Ahrens, *supra* note 366. See California Courts, *Proposition 64: The Adult-use of Marijuana Act*, COURTS.CA.GOV, <https://www.courts.ca.gov/prop64.htm> [<https://perma.cc/C9RD-BWWX>] (last visited Dec. 17, 2022); New York State Unified Court System, *Cannabis (Marihuana) and Expungement Under New York State Law*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/criminal/>

While these programs represent a significant step forward, scholars highlight common hurdles that inhibit the effectiveness of these policies in achieving criminal justice equity. Pardons, in particular, raise specific issues. First, even though the infrastructure is already in place, because pardons require direct governmental intervention in each case, there is no political cover for the legislature or governor if a specific instance results in untoward consequences.³⁹¹ Further, the public interprets pardons as mercy or forgiveness, so they are less likely to respect such individual grants of clemency, and public stigmatization of pardoned individuals will continue.³⁹²

Second, qualified individuals are less likely to 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.³⁹³ 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.³⁹⁴ As with other forms of cannabis social equity, the industry needs additional data to analyze the effectiveness of recent attempts to modify these policies.³⁹⁵ The structure of expungement policies also affect the rate of applicant

marihuanaExpunge.shtml (last visited Dec. 17, 2022) [<https://perma.cc/HV7L-7N8W>].

³⁹¹ Ahrens, *supra* note 366, at 427-28.

³⁹² *Id.* According to Ahrens, the pardon power has its basis in a request for mercy from deserved punishment for a crime rather than in a request for a declaration of innocence of the crime in the first place. Thus, a grant of mercy for what was originally an unjust punishment is not mercy at all. Public perception of pardons as mercy maintains the stigma on recipients—they still deserved their punishment because they committed the crime. The pardon does not remove their criminal record which remains as evidence of their “crime.” One manifestation of the continuing stigma concerns employers and landlords who routinely deny services to individuals with such records. See American Bar Association, *What Is “Expungement”*, AMERICANBAR.ORG (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-expungement/ [<https://perma.cc/A4DN-ELXX>] (pardons do not remove criminal records); see also Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY: AN INTERDISCIPLINARY J. 387 (2016) (explaining that criminal records remain sources of stigma and reasons for denying employment, housing, and education).

³⁹³ McAleese, *supra* note 389, at 626-27; Ahrens, *supra* note 366, at 432-33.

³⁹⁴ Capuder, *supra* note at 389, 516-17; Ahrens, *supra* note 366, at 432-33.

³⁹⁵ See Yvon Dandurand, *Criminal Justice Reform and the System’s Efficiency*, 25 CRIM. L. F. 383, 396-97 (2014).

success. For example, California, Illinois, and New Mexico provide for automatic expungement subject to prosecutorial discretion. This reduces the number of successful expungements as prosecutors and judges reflexively oppose most instances of resentencing for any cases more complicated than simple possession.³⁹⁶ In contrast, New Jersey's short public education campaign promoted awareness of their expungement program, which allows individual applications, but the extent of the use of this program is unknown due to the limited campaign materials available.³⁹⁷

Third, policies that only expunge simple possession charges do not account for individuals with 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 have subjected them to.³⁹⁸ This is due to the fact that these new laws do not provide guidance to the courts for how to

³⁹⁶ See California Courts, *Proposition 64: The Adult-use of Marijuana Act*, COURTS.CA.GOV, <https://www.courts.ca.gov/prop64.htm> [https://perma.cc/4VLP-D4VT] (last visited Dec. 17, 2022); State Appellate Defender, *supra* note 382; 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> [https://perma.cc/WNY7-WSYC]. See generally Curtis Segarra, *New Mexico Reviewing Thousands of Cannabis Cases For Expungement*, KRQE NEWS (Aug. 8, 2022), <https://www.krqe.com/news/marijuana/new-mexico-reviewing-thousands-of-cannabis-cases-for-expungement> [https://perma.cc/RJY5-KBFC]; Elise Kaplan, *New Mexico Law Allows Cannabis Cases to be Expunged. Thousands Are Still Waiting*, ALBUQUERQUE J. (May 15, 2023), https://www.abqjournal.com/news/local/new-mexico-law-allows-cannabis-cases-to-be-expunged-thousands-are-still-waiting/article_f90ff121-967b-5f4a-983c-0cb9b05f5af4.html [https://perma.cc/B5GK-SAB4]; Jack Karp, *Old Pot Felonies Hard to Erase Despite NY's New Law*, LAW360 (May 5, 2023), <https://www.law360.com/articles/1602708/old-pot-felonies-hard-to-erase-despite-ny-s-new-law> [https://perma.cc/M4J3-2F9T]; Dan Adams, *'An Utter Failure': Law Meant to Clear Old Convictions, Including for Marijuana Possession, Helps Few*, BOS. GLOBE (November 8, 2021), <https://www.bostonglobe.com/2021/11/28/marijuana/an-utter-failure-law-meant-clear-old-convictions-including-marijuana-possession-helps-few> [https://perma.cc/K5JK-STZB].

³⁹⁷ See, e.g. State Appellate Defender, *supra* note 382; 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) [https://perma.cc/C9ZP-C69Q].

³⁹⁸ Ahrens, *supra* note 366, at 395.

approach resentencing.³⁹⁹ For example, a state with a three-strikes rule might expunge the first two possession charges, but what about the third charge, which was for more than the newly legalized limit and not eligible for expungement because it 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, if an individual is serving time for a felony weapons charge based on a now expungable possession charge, is the weapons charge expungable as well?⁴⁰⁰ 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. Furthermore, prosecutors frequently oppose each request, increasing costs for individuals and judiciaries.⁴⁰¹

Finally, state judicial and law enforcement record systems vary dramatically in their sophistication and ability to locate qualifying offenses in the first place, let alone remove them from the system in a timely manner.⁴⁰² This is one reason some states rely on individual initiated expungement rather than an automatic process.⁴⁰³ California counties and some states work with several non-profit organizations to

³⁹⁹ 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> [https://perma.cc/62WL-QF8L]. See, e.g., Lamont, *supra* note 388.

⁴⁰⁰ This may be more easily addressed now that gun possession, despite cannabis use, is likely constitutional. See *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019); Alexis Kelly, *Three Strikes Laws and Habitual Offenders*, NOLO, (July 12, 2022), <https://www.criminaldefenselawyer.com/resources/three-strikes-law.htm/> [https://perma.cc/WL3S-W7UH].

⁴⁰¹ See, e.g., *New Jersey Courts*, *supra* note 385.

⁴⁰² See, e.g., David Abbott, *Arizona Expunging Only a Small Fraction of Minor Pot Convictions*, PHX. NEW TIMES (Dec. 16, 2021), <https://www.phoenixnewtimes.com/marijuana/arizona-is-slow-to-clear-pot-convictions-12624963> [https://perma.cc/V694-39M7]; 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/> [https://perma.cc/68NK-FFMR].

⁴⁰³ Murphy, *supra* note 403; Jagers, *supra* note 369, at 396.

implement technical solutions,⁴⁰⁴ but these programs continue to suffer from a lack of funding.⁴⁰⁵

The language regarding criminal justice 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.⁴⁰⁶ Future progress will require these different theories to find a common language of equity capable of facing an uphill battle against bureaucratic inertia that favors incremental steps and contentless political salience as cover to maintain the status quo.⁴⁰⁷ This incremental approach exacerbates the inconsistent 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 disparate issues that directly or indirectly

⁴⁰⁴ Rosen, *supra* note 377; *Automatic Record Clearance: Working with Communities and Government to Fundamentally Transform the Process of Clearing Records*, CODE FOR AM., <https://codeforamerica.org/programs/criminal-justice/automatic-record-clearance/> (last visited Dec. 17, 2022) [<https://perma.cc/RN5J-CYPX>].

⁴⁰⁵ 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> [<https://perma.cc/TXD5-FB8X>].

⁴⁰⁶ For a broad overview of the relevant perspectives expressed by those critiquing the evolving social justice equity policies, see COLLATERAL CONSEQUENCES RES. CTR. & DRUG ENF'T & POL'Y CTR., *MARIJUANA LEGALIZATION AND EXPUNGEMENT IN EARLY 2021* (2021); Ahrens, *supra* note 366; Jagers, *supra* note 372; McAleese, *supra* note 389; Rosen, *supra* note 377; *State Policy Priorities*, LAST PRISONER POL'Y PROJECT, https://irp.cdnwebsite.com/08efa45c/files/uploaded/Updated%20SPP%20Pager_%20Oct%2022.pdf [<https://perma.cc/L4L6-ZM2M>] (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 HAW. 8-15 (2022).

⁴⁰⁷ McAleese, *supra* note 389, at 627-28.

impede an individual's ability to participate in the legal cannabis market as a customer or business owner.⁴⁰⁸ Access equity issues usually emerge at the intersection of state legality and federal illegality, leaving consumers and new cannabis businesses in a legal limbo, which can increase barriers to entry and reduce participation in the cannabis industry. Yet, state governments,⁴⁰⁹ advocacy organizations,⁴¹⁰ and academics⁴¹¹ tend to address these issues in isolation, if at all, leading to a patchwork of policies. This patchwork leaves no organizing principle for imagining or evaluating potential solutions.⁴¹² Thus, the panoply of barriers preventing access equity require a broad overview of the various issues and the approaches that states may take in pursuit of equity.

Beginning with the workplace, adult-use cannabis is the least protected form of consumption. For example, among the approximately twenty states that provide employment protections for off-duty medical cannabis use,⁴¹³ very few extend such protections to the adult-use market.⁴¹⁴ Zero-tolerance office drug policies remain the norm, and in

⁴⁰⁸ See also LITTLEJOHN & GREEN, *supra* note 10, at 2.

⁴⁰⁹ 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).

⁴¹⁰ See, e.g., REST. L. CTR., CANNABIS & STATE EMPLOYMENT LAWS (Jan. 15, 2020), https://restaurantlawcenter.org/wp-content/uploads/2020/10/RLC-Compliance_Cannabis-State-Laws-FINAL-PDF.pdf [<https://perma.cc/AQS8-KXAP>] (the only cannabis related issue tracked by this think tank).

⁴¹¹ 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).

⁴¹² LITTLEJOHN & GREEN, *supra* note 10, at 2.

⁴¹³ Arizona, Arkansas, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, and West Virginia. Dataset, *supra* note 246. See, e.g., Sachi Clements, *State Laws on Off-Duty Marijuana Use*, NOLO, <https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html> [<https://perma.cc/72UE-CXUU>] (last visited Nov. 4, 2023) (noting Maine's protection of off-duty medical and recreational use).

⁴¹⁴ Delaware, Maine, Montana, Nevada, New Jersey, New York, Oregon, and Virginia. Dataset, *supra* note 246. See, e.g., Lisa Nagele-Piazza, *Some New Marijuana Laws Protect Off-Duty Recreational Use*, SHRM (May 13, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/some-new-marijuana-laws-protect-off-duty-recreational-use.aspx> [<https://perma.cc/ZPV5-S87Y>] (discussing New Jersey's and New York's protection of off-duty recreational use); Catherine A. Cano, *Montana Will Protect*

many states, even medicinal patients do not receive accommodations for their licensed, off-duty cannabis consumption.⁴¹⁵ States that have addressed this issue require that medical cannabis patients not be discriminated against for their status as a registered patient or for off-duty cannabis use.⁴¹⁶ However, most states 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, lose money, or lose licensing-related benefits under federal law.⁴¹⁷ Even union membership provides little assistance. Many cannabis industry employees now find that their union was a fraud that their employer setup either to discourage legitimate organizing⁴¹⁸ or to simply meet state cannabis business licensing requirements.⁴¹⁹

Off-Duty Use of Marijuana Next Year, JACKSONLEWIS: DRUG & ALCOHOL TESTING L. ADVISOR, (Jun. 8, 2021), <https://www.drugtestlawadvisor.com/2021/06/montana-will-protect-off-duty-use-of-marijuana-next-year/#:~:text=Montana%20citizens%20voted%20to%20legalize%20recreational%20marijuana%20in,based%20on%20the%20use%20of%20marijuana%20while%20working> [<https://perma.cc/V8UX-PQRN>] (discussing Montana's protection of off-duty use beginning in January, 2022).

⁴¹⁵ *HRW Client Alert: Marijuana And The Workplace*, HIRSCH ROBERTS WEINSTEIN LLP, <https://massnonprofitnet.org/wp-content/uploads/2017/02/Client-Alert-Marijuana-and-the-Workplace.pdf> [<https://perma.cc/ED5V-4VQV>] (last visited Sep. 13, 2023); *Employment Rights of Medical Patients and Adult Users—Protections Against Employment Discrimination for Medical Patients, Cannabis Law Deskbook* § 9B:3 (2023-2024 ed.).

⁴¹⁶ *Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37, 41 (2017); *Cannabis Law Deskbook*, *supra* note 415.

⁴¹⁷ For a list of examples, *see* *Clements*, *supra* note 413.

⁴¹⁸ Chris Roberts, *Alleged Fake Marijuana Unions Are Expanding Foothold Across United States*, MJBIZDAILY (Oct. 30, 2023), <https://mjbizdaily.com/alleged-fake-marijuana-unions-are-expanding-foothold-across-united-states/> [<https://perma.cc/PZR9-QV4Z>]; Aaron Pelley, *California Cannabis Union Scandal*, CULTIVA L. (Sept. 14, 2023), <https://cultivalaw.com/california-cannabis-union-scandal/> [<https://perma.cc/Y2CW-TEBU>].

⁴¹⁹ Chris Roberts, *At least 10 Fake Unions Identified in California Marijuana Industry*, MJBIZDAILY (Aug. 31, 2023), <https://mjbizdaily.com/at-least-10-fake-unions-identified-in-california-marijuana-industry/> [<https://perma.cc/2LUN-C76S>].

Several states with legalized cannabis offer some protection for cannabis users in child custody cases.⁴²⁰ These states⁴²¹ provide, either legislatively⁴²² or through the courts,⁴²³ that cannabis use alone is insufficient to decide child custody disputes. Rather, as with alcohol, cannabis use must be shown to have a substantial adverse effect on the child.⁴²⁴ Despite these protections, many states' family law trial judges continue to order the "cessation of medicine, random and regular drug testing, coerced drug rehabilitation programs, limited or discontinued visitation time for the non-custodial parent (or only supervised visitation), the non-using parent granted sole custody, and reported to Child Protective Services (CPS) by family court."⁴²⁵ This is true even in states with explicit protections.⁴²⁶

Comparatively, only twelve states provide protections for cannabis users as tenants,⁴²⁷ and half of these states provide only a

⁴²⁰ See, e.g., Zaina Afrassiab, *Are Qualified Patients Unqualified Parents?*, NAT'L L. REV., (Jun. 8, 2020) (citing Alice Kwak, *Medical Marijuana and Child Custody: The Need to Protect Patients and their Families from Discrimination*, 28 HASTINGS WOMEN'S L.J. 119, 120 n.7 (2017)), <https://www.natlawreview.com/article/are-qualified-patients-unqualified-parents> [<https://perma.cc/U4J5-TRLS>] (listing a few examples of applicable medical use states, such as Arizona, Delaware, Hawaii, Illinois, Maine, Michigan, Minnesota, New Hampshire, New York, and Washington). See also Dataset, *supra* note 246.

⁴²¹ Arizona, California, Colorado, Illinois, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, and New York. Dataset, *supra* note 246. Some states, like Illinois, also offer parents protection against discrimination for their recreational use of cannabis. See 410 ILL. COMP. STAT. ANN. 705 / 10-30(a) (LexisNexis 2023).

⁴²² See, e.g. MICH. COMP. LAWS § 333.27955 (2018).

⁴²³ 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).

⁴²⁴ Tyler Burk, *How Does Legal Marijuana Use Affect Custody and Parenting Time?*, GREWAL L. (Feb. 22, 2022), <https://www.4grewallaw.com/blog/2022/february/how-does-legal-marijuana-use-affect-custody-and/> [<https://perma.cc/X9MG-NKG9>].

⁴²⁵ Sara Arnold, *Marijuana and Child Custody*, FLCA, <https://flcalliance.org/writing/marijuana-child-custody/> [<https://perma.cc/67D4-MLJK>] (last visited Oct. 14, 2023).

⁴²⁶ *Id.* (giving Maine and Washington, both of which have protective statutes, as examples); NEWHART & DOLPHIN, *supra* note 99, at 172-74, 180-8.

⁴²⁷ See *Medical Cannabis Laws and Anti-Discrimination Provisions*, MARIJUANA POL'Y PROJECT (last updated Feb. 7, 2022), <https://www.mpp.org/issues/medical-marijuana/medical-marijuana-laws-anti-discrimination-provisions/> [<https://perma.cc/PNL3-RG9E>] (states with full or partial tenant protections against

partial protection based on the individual cannabis user's patient-status.⁴²⁸ As an element of their medical programs, these states allow patients to grow and consume permitted amounts of cannabis on their personal property, subject to property-specific limitations on smoking and vaping per general "smoke free" policies (while other methods of consumption are generally allowed).⁴²⁹ 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.⁴³⁰ Public housing agencies are required to deny admission to anyone using a controlled substance, although the federal Department of Housing and Urban Development rules give public housing authorities discretion in whether to evict tenants for using a controlled substance.⁴³¹ Neither the FHA nor the ADA provide housing protections for cannabis users.⁴³²

No state provides protections for workers or cannabis businesses attempting to attain insurance policies or to make claims under those policies, even when insurance is required to obtain a dispensary license.⁴³³ For worker's compensation insurance, some states explicitly

landlord discrimination include: Arizona, Connecticut, Delaware, Hawaii, New York, Oregon, Rhode Island, Illinois, Maine, Minnesota, New Jersey, Oklahoma).

⁴²⁸ *Id.* Arizona, Delaware, Hawaii, Montana, New York, and Oregon. Dataset, *supra* note 246.

⁴²⁹ *See, e.g., Medical Cannabis Use & Restrictions*, STATE OF HAW. MEDICAL CANNABIS REGISTRY PROGRAM, <https://health.hawaii.gov/medicalcannabisregistry/patients/restrictions/> [https://perma.cc/E7T9-WDQG] (last visited Dec. 28, 2022).

⁴³⁰ *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).

⁴³¹ Afua S. Akoto, *From High to Homeless: The Cost of Smoking Marijuana in Federally Funded Public Housing*, 31 CONN. J. INT'L L. 257, 267-72 (2016); U.S. Dep't of Hous. & Urban Dev., *Opinion Letter on Medical Marijuana Use in Public Mousing and Housing Choice Voucher Programs*, HUD (Feb. 10, 2011), <http://portal.hud.gov/hudportal/documents/huddoc?id=med-marijuana.pdf> [https://perma.cc/YC3T-4V9T].

⁴³² Akoto, *supra* note 432, at 271.

⁴³³ *Summary of HB 305: The Delaware Marijuana Control Act*, DEL. CANNABIS POL'Y COAL., <https://www.delawarecannabispolicy.org/why-regulate/summary->

exempt workers' compensation insurance companies from the necessity of providing reimbursements for cannabis-related expenses; some states outright prohibit workers' compensation insurance companies from providing reimbursements for cannabis related expenses; and in some states statutes exempt health insurance carriers from providing reimbursements for any cannabis related costs, but do not explicitly apply that exemption to workers' compensation insurance, allowing courts in those states the room to allow workers' compensation claims for cannabis related costs.⁴³⁴

Business insurance for cannabis companies is expensive, and courts frequently allow insurance companies to successfully exercise the following exclusions, even after the insurance company knowingly agrees to grant the policy to a plant-touching cannabis business: controlled substances, cannabis/hemp/marijuana plants, procedural safeguards, increased hazard, intentional acts, concealment/misrepresentation/fraud, pollution, void against federal law/policy,⁴³⁵ 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.⁴³⁶

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

of-hb-305-the-delaware-marijuana-control-act/#:~:text=Employers%20and%20Private%20Property,non%2Dsmoked%20use%20of%20cannabis [https://perma.cc/KF5T-BTTR] (last visited Oct. 14, 2023); *see also* DEL. CODE TIT. 4 § 1308.

⁴³⁴ JAMES LYNCH & LUCIAN MCMAHON, HAZE OF CONFUSION: HOW EMPLOYERS AND INSURERS ARE AFFECTED BY A PATCHWORK OF STATE MARIJUANA LAWS, INS. INFO. INST. 11-14 (2019).

⁴³⁵ 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 L., <https://www.amystewartlaw.com/news-and-blog/up-in-smoke-marijuana-related-insurance-considerations> [https://perma.cc/FZD4-YZEJ] (last visited Dec. 28, 2022).

⁴³⁶ 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/ [https://perma.cc/EJ8B-T32B].

subject to forfeiture under federal law.⁴³⁷ The federal government may rarely enforce 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.⁴³⁸ Tenants find it difficult to obtain rental insurance and mortgages, and selling properties previously used for cannabis activities comes with unique and expensive limitations, such as increased utility costs for shared meters, nuisance complaints, and mold issues.⁴³⁹ 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 to entry to the industry.⁴⁴⁰

Only a few states explicitly provide for state-level alternatives to federal bankruptcy.⁴⁴¹ Federal bankruptcy protections do not apply to any plant-touching business,⁴⁴² 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.⁴⁴³

⁴³⁷ 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/> [https://perma.cc/CRX3-M7EK].

⁴³⁸ *Id.*

⁴³⁹ Rinat B. Klier-Erlich, *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/> [https://perma.cc/ZJ9V-9SXW] (last visited Dec. 28, 2022).

⁴⁴⁰ *Cannabis Real Estate 101*, CANNA LAW BLOG (Feb 12, 2022), <https://harris-sliwoski.com/cannalawblog/want-a-successful-cannabis-business-real-estate-is-key/> [https://perma.cc/2JSQ-YWLM].

⁴⁴¹ Charles S. Aloviseetti, et al., *Introduction to Cannabis and Bankruptcy Law in* CHARLES S. ALOVISETTI & CASSIA FURMAN, *THE CANNABIS BUSINESS: UNDERSTANDING LAW, FINANCE, AND GOVERNANCE IN AMERICA'S NEWEST INDUSTRY* 76 (2020).

⁴⁴² 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 [https://perma.cc/9J95-2JBM].

⁴⁴³ *Cannabis Startup Failure Rate to Exceed 97% According to This Accelerator CEO*, NEW CANNABIS VENTURES (Dec. 12, 2016, 1:15 PM), <https://www.newcannabisventures.com/cannabis-startup-failure-rate-to-exceed-97-according-to-this-incubator-ceo/> [https://perma.cc/67XG-9K4Q]. Nearly all 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.>

States addressing this issue provide state receivers to administer cannabis businesses to either rescue or wind-up the company.⁴⁴⁴ 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.⁴⁴⁵

Nine states provide cannabis specific banking protections to address the business banking inequities previously discussed.⁴⁴⁶ Unlike federally insured banks, state chartered banks providing financial services to cannabis businesses may not violate federal law, and the number of banks that serve cannabis clients continues to grow.⁴⁴⁷ However, the reporting and compliance costs associated with providing those financial services are prohibitive to most banks and to even more cannabis businesses.⁴⁴⁸ Examples of different regulatory approaches include: California which provides state charters for banks intending to serve the cannabis industry;⁴⁴⁹ Michigan which only protects banks from state enforcement actions based on interactions with the cannabis industry;⁴⁵⁰ and Illinois which protects banks from state enforcement

northbaybusinessjournal.com/article/industrynews/survey-37-of-us-cannabis-operators-say-theyre-not-profitable/ [https://perma.cc/94R5-AKG7].

⁴⁴⁴ See, e.g. Elisabeth M. Von Eitzen & Robert A. Hendricks, *Help for Distressed Cannabis Businesses*, GRAND RAPIDS BUS. J. (Mar. 19, 2021), <https://grbj.com/opinion/guest-column/help-for-distressed-cannabis-businesses/> [https://perma.cc/QR6R-RAB5] (analyzing Michigan’s receivership program).

⁴⁴⁵ *Id.*

⁴⁴⁶ California, Illinois, Michigan, Nevada, New Jersey, Ohio, Oregon, Utah, and Virginia. Dataset, *supra* note 246. See *supra* Section II.A.4.b.

⁴⁴⁷ Mark Parker, *Inside the Risky World of Marijuana Banking*, CATALYST (July 6, 2022), <https://stpetecatalyst.com/inside-the-risky-world-of-marijuana-banking/> [https://perma.cc/PG48-VCMN].

⁴⁴⁸ Jeffrey Miron & Nicholas Anthony, *Cannabis Banking: A Clash Between Federal and State Laws*, CATO INST. (May 27, 2022), <https://www.cato.org/blog/cannabis-banking-clash-between-federal-state-laws> [https://perma.cc/R3V3-69VA].

⁴⁴⁹ 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/> [https://perma.cc/AZV7-KDGT].

⁴⁵⁰ *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/> [https://perma.cc/3SRU-XHZZ].

actions and provides discounted capital to banks to encourage them to provide basic banking services to the industry.⁴⁵¹ 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.⁴⁵²

California explicitly applies its environmental policies to cannabis business licensees.⁴⁵³ The cannabis industry may cause a variety of impacts on the environment, including carbon dioxide emissions, effects on air and water quality, land runoff, and soil quality issues, high local energy consumption, and waste disposal concerns.⁴⁵⁴ Compliance with general, existing environmental regulations already imposes substantial costs on the industry.⁴⁵⁵ Without further regulation, these externalities will negatively affect the environment. However, 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.⁴⁵⁶ The federal government has 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

⁴⁵¹ *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/> [<https://perma.cc/BP3B-SNG2>].

⁴⁵² Paul Dunford, *What to Know About Cannabis Banking in 2022*, BANK DIR. (Oct. 15, 2021), <https://www.bankdirector.com/issues/regulation/what-to-know-about-cannabis-banking-in-2022/> [<https://perma.cc/M7M5-KWRM>]; Miron & Anthony, *supra* note 448.

⁴⁵³ *California Cannabis and CEQA Collide*, BROWNSTEIN (Mar. 4, 2022), <https://www.bhfs.com/insights/alerts-articles/2022/california-cannabis-and-ceqa-collide> [<https://perma.cc/Z9X7-ZJGZ>].

⁴⁵⁴ ENVIRONMENTAL SUSTAINABILITY IN THE CANNABIS INDUSTRY, NAT'L CANNABIS INDUS. ASSOC. POL'Y COUNCIL 5-6 (2020).

⁴⁵⁵ Marc Ross, *The Cannabis Industry's Environmental Compliance Conundrum*, VICENTE (Sept. 14, 2021), <https://vicentellp.com/insights/cannabis-industry-environmental-compliance/> [<https://perma.cc/J4P8-D5T4>].

⁴⁵⁶ LITTLEJOHN & GREEN, *supra* note 10.

interaction with veterans regarding cannabis use.⁴⁵⁷ Seniors and those with disabilities, mobility issues, or other impairments struggle to access cannabis in states that disallow delivery services,⁴⁵⁸ and seniors pay more for cannabis than younger demographics.⁴⁵⁹ Hospices also rarely allow the consumption of cannabis as they cannot prescribe it under federal regulations.⁴⁶⁰ Social Security Disability Insurance and Americans with Disabilities Act accommodations do not protect illegal drug use, so cannabis use can result in claim denial.⁴⁶¹ Only Nevada statutorily requires employers to provide reasonable accommodations at work for disabled persons using medical cannabis.⁴⁶² Finally, immigration officials can deem an immigrant inadmissible, deportable,

⁴⁵⁷ *VA and Marijuana—What Veterans Need to Know*, U.S. DEPT. OF VETERANS AFF., <https://www.publichealth.va.gov/marijuana.asp> [<https://perma.cc/S26G-B4SF>] (last visited Dec. 28, 2022).

⁴⁵⁸ Isabelle Lichtenstein, *How Can We Ensure the Disabled Community Has Equal Access to Cannabis*, AM. FOR SAFE ACCESS (Nov. 9, 2018), https://www.safeaccessnow.org/how_can_we_ensure_the_disabled_community_has_equal_access_to_cannabis [<https://perma.cc/N4EM-RGPX>]; Margo Amala, *Cannabis & Seniors: Overcoming Cannabis Stigma*, URB. FARMACY, <https://www.urbanfarmacypdx.com/cannabis-seniors-overcoming-cannabis-stigma/> [<https://perma.cc/7U7D-WBAZ>] (last visited Dec. 28, 2022); Vanessa Salvia, *Special Deliveries: Some Local Dispensaries Bring Marijuana to Customers' Doors, Making Accessibility Easy for Those Who Need It*, THE REGISTER-GUARD (updated Apr. 29, 2018, 3:06 PM), <https://www.registerguard.com/story/news/drugs/marijuana/2017/10/18/special-deliveries-local-dispensaries-bring-marijuana-customers-doors-making-accessibility-those/12362018007/> [<https://perma.cc/JR58-J4RH>].

⁴⁵⁹ Abbie Rosner, *Seniors Pay Premium For Cannabis But Don't Have To*, FORBES (Mar. 29, 2019, 11:36 AM), <https://www.forbes.com/sites/abbierosner/2019/03/29/seniors-pay-premium-for-cannabis-but-dont-have-to> [<https://perma.cc/8H6N-6AVB>].

⁴⁶⁰ Larry Beresford, *Navigating Medical Cannabis Is Continuing Challenge in Hospice and Palliative Care*, SHILEY HAYNES INST. FOR PALLIATIVE CARE (Feb. 16, 2021), <https://csupalliativecare.org/navigating-medical-cannabis-is-continuing-challenge-in-hospice-and-palliative-care/> [<https://perma.cc/B5KD-V3XR>].

⁴⁶¹ *Considering Cannabis for Patients with Disabilities*, DUBER MED. (Dec. 14, 2021), <https://www.dubermedical.com/considering-cannabis-for-patients-with-disabilities/> [<https://perma.cc/6BXZ-KEEG>].

⁴⁶² NEV.REV.STAT.ANN. §678C.850(3) (LexisNexis 2023). As with workers compensation, some state courts have found the lack of an explicit prohibition means that employers have at least a minimal duty to provide reasonable accommodations. *See, e.g. Paine v. Ride-Away, Inc.*, 274 A.3d 554, 558 (N.H. 2022).

or prevent naturalization for any cannabis conviction or admission of any prior possession, use, growing, buying, or selling of cannabis (state-level medical certification cards are evidence of such possession and use).⁴⁶³

Access equity issues make up the least common subjects of social equity policies. 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,⁴⁶⁴ regulatory capture,⁴⁶⁵ market dynamics between the legal and legacy markets,⁴⁶⁶ and older elements of state law that contradict new cannabis regulations.⁴⁶⁷

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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 resulting from the War on Drugs. In the best case, they ineffectively provide small-scale solutions for the problems they attempt to solve, and, in many cases, these programs worsen disparities. 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 they cannot work at scale to address the scope of the inequities they are billed to solve.

III. CONCLUSION

The cannabis social equity movement has identified real, existing inequities resulting from the War on Drugs and has proposed policies with the potential to positively impact those inequities. However, many policies for which there is the greatest consensus demonstrate the greatest ineffectiveness. Additionally, the policies that attract the most public and advocacy attention often require the most

⁴⁶³ See generally KATHY BRADY ET AL., IMMIGRANTS AND MARIJUANA (2021).

⁴⁶⁴ Christopher Nani, *Social Equity Assessment Tool for the Cannabis Industry*, DRUG ENF'T AND POL'Y CTR. 1, 8 (2019).

⁴⁶⁵ Navin Kumar, *supra* note 304, at 348; Adinoff & Reiman, *supra* note 304, at 683.

⁴⁶⁶ Adinoff & Reiman, *supra* note 304, at 679-681.

⁴⁶⁷ J. Stephanie Domitrovich, *State Courts Coping with Medical Marijuana Legislation: Discerning Strife or Harmony?*, AM. BAR ASS'N (Jan. 15, 2021), https://www.americanbar.org/groups/judicial/publications/judges_journal/2021/winter/state-courts-coping-medical-marijuana-legislation-discerning-strife-or-harmony/ [https://perma.cc/4Z8N-L9D8].

administrative resources and are inherently limited in the amount of inequity they can redress, given the disparities in scale between the potential effects of the proposals and the very real 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 first bringing together research from a number of disciplines to uniquely enumerate the ongoing and enormous scale of the inequities that the War on Drugs continues to perpetuate, including racial, stigma, business, research, energy, sex and gender, hemp, and international inequities. And second, by providing a novel analysis of the current inadequacies of industry equity, social justice equity, community equity, and access equity policies to improve those inequities.

However, descriptive analysis of inequity and these failed solutions does not alone provide a way forward. This research was designed to serve as both a wake-up call and a plea for the industry to imagine something new. Applying the same policies to each new state program while hoping for more effective implementation is an exercise in futility. Multidisciplinary cooperation can investigate in more detail the empirical results of new policies and highlight the commonalities underlying the inequities of the War on Drugs as a starting place for multidimensional solutions.

The industry needs both further research and an honest self-evaluation by those supporting current cannabis equity policies. Social equity itself may not be the appropriate theory for approaching these inequities.⁴⁶⁸ The industry, advocates, and legislatures should return their attention to the robust, existing theories of social justice, restorative justice, and racial justice as the inspiration for new policy approaches.

⁴⁶⁸ Halydier, *supra* note 21.