

## 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

Garrett I. Halydier

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# **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**

Garrett I. Halydier

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## **ABSTRACT**

States increasingly implement “social equity” programs as an element of new cannabis regulations; however, these programs routinely fail to achieve their goals and frequently exacerbate the inequities they purport to solve, leaving inequitable industries, high incarceration rates, and broken communities in their wake. This ineffectiveness is due to the industry’s fundamental confusion of the modern, individualized concept of “equity” with the historical, society-level concept of “social equity.” In this paper, I develop a new theory of “cannabis social equity” to integrate these concepts, and I apply that theory, first, to diagnose why current policies fall short and, second, to propose a new approach to social equity that can remedy the inequities in both the emerging industry and in the populations most adversely affected by the War on Drugs.

Through a historiography of the definition of social equity in the cannabis industry, I show how legislators, regulators, advocates, and scholars built the modern definition of social equity by replacing the rich, process-based theories of racial, social, and restorative justice with a narrow set of policies crafted more for narrative resonance than effectiveness. As I argue in a companion article published in the Fall 2023 issue of the University of Massachusetts Law Review, these policies will continue to fail to improve equity in the new industry, bring equitable justice to the previously incarcerated, redistribute resources to inequitably impacted communities, and provide equitable access to cannabis.

In contrast, the field of public administration developed the original theory of social equity in the 1970s to provide a philosophical foundation and process for using the mechanisms of program administration and public participation to address societal inequities, not just those inequities created explicitly or implicitly through policy implementation. I extend the traditional theory to include a legislative component that broadens potential solutions by centering the development of cohesive regulatory schema rather than individual policies. I apply the new theory to produce a novel solution that uses the level of legalization as an organizing principle for legislation in

pursuit of both implementation equity in the new industry and societal justice for the victims of the War on Drugs. For if all we ask for is equity, there will never be justice.

#### **AUTHOR'S NOTE**

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This paper builds on the author's previous work compiling the diverse harms of the War on Drugs and examining 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. Garrett I. Halydier, *We(ed) Hold These Truths to be Self-Evident: All Things Cannabis Are Inequitable*, 19 U. MASS. L. REV. 2, 3 n.1 (2024).

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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 below—the theoretical framework and recommendations will remain relevant both to and after any sort of federal legalization.

INTRODUCTION.....	229
I. THE INEQUITABLE HISTORY AND MODERN CONSEQUENCES OF THE WAR ON DRUGS.....	236
A. A Brief History of Cannabis Regulation in the United States .....	236
1. Pre-U.S. Regulatory History .....	236
2. Early Federal Food and Drug Regulations – The “Wiley Act” .....	238
3. The First Federal Narcotics Regulation.....	242
4. The Marihuana Tax Act of 1937 .....	244
5. A False Start and Dashed Hopes: <i>Leary v. United States</i> and Nixon’s War on Drugs.....	248
6. Militarizing the War on Drugs .....	253
7. Modern Cannabis Liberalization .....	255
B. The Current Cannabis Social Equity Movement .....	264
C. Cannabis Social Equity in the Academic Literature .....	269
1. Social Equity as a Collection of Policies.....	269
2. Early Attempts to Theorize About Cannabis Social Equity .....	282
III. DEVELOPING A NEW THEORY OF CANNABIS SOCIAL EQUITY.....	288
A. The Modern Theory of Social Equity in Public Administration .....	290
B. Towards a Theory of Cannabis Social Equity .....	295
1. The Philosophical Concern .....	296
2. The Structural Concern .....	298
3. The Legislative Concern .....	301
4. The Administrative Concern .....	305
IV. EXPLORING APPLICATIONS OF THE THEORY OF CANNABIS SOCIAL EQUITY .....	307
A. The Theory of Cannabis Social Equity and the Failure of Industry Equity Policies .....	308
B. Applying the Theory of Cannabis Social Equity to the General Illegality of Cannabis: Legitimization, Legalization, Liberalization, and Leadership.....	312
1. Legitimization .....	312

2. Legalization ..... 317

3. Liberalization ..... 318

4. Leadership ..... 319

V. CONCLUSION ..... 320

## INTRODUCTION

“Social equity” as a concept is a newcomer to the cannabis<sup>1</sup> industry and cannabis scholars, both linguistically and in practice. Linguistically, it is a literal portmanteau<sup>2</sup> of the broad, traditional theories of “social justice” developed throughout history<sup>3</sup> and the administrative notion of “equity” as policy implementations,

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<sup>1</sup> 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); *and see* Daniel G. Orenstein, *Preventing Industry Abuse of Cannabis Equity Programs*, 45 S. ILL. U. L.J. 69, 71 n.1 (2020). 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. *c.f.* Garrett I. Halydier, *We(ed) Hold These Truths to be Self-Evident: All Things Cannabis Are Inequitable*, 19 U. MASS. L. REV. 39, 41 n.1 (2024).

<sup>2</sup> *See infra* Section II.B-C and Section III.A for further details on the evolution of the term “social equity” and its eventual application to the cannabis industry. *See also* Beau Kilmer et al., *Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-offs*, 101 B.U. L. REV. 1003, 1007-09 (2021); Kenneth Sebastian Leon, *Minority-Owned Cannabis Businesses as a Social Justice Imperative*, in *MORE ON LEGALIZING MARIJUANA—ONGOING SHIFTS IN AMERICAN POLICIES* 167 (Nancy E. Marion, ed., 2019).

<sup>3</sup> *See generally* LORETTA CAPEHEART & DRAGAN MILOVANOVIC, *SOCIAL JUSTICE: THEORIES, ISSUES, AND MOVEMENTS* (2007).

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

*Id.* at 2; *and see* Elaine Walster & G. William Walster, *Equity and Social Justice*, 31(3) J. OF SOC. SCI. 21, 25 (1975) (Social justice is a broad concept describing theories of both distributive justice (rewards are distributed in proportion to merit) and equal justice (how rewards are distributed equally among all)).

without inherent ethical content, that aim to fairly distribute scarce resources within organizations while accounting for historic inequities.<sup>4</sup> In practice, approximately 85% of all news articles and over 90% of all legal academic work mentioning both “cannabis” and “social equity” appeared in the four years after January 1, 2020.<sup>5</sup>

In contrast to the administrative nature of “social equity” language widely adopted by the cannabis industry after 2020, earlier advocates and scholars almost exclusively used the substantive language of “justice” (including notions of both equality of opportunity and equality of outcome) as the organizing principle for their opposition to cannabis regulations.<sup>6</sup> Predating even the passage of the Controlled Substances Act (“CSA”) and escalating cannabis enforcement efforts in the 1970s,

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<sup>4</sup> See David K. Hart, *Social Equity, Justice, and the Equitable Administrator*, 34 PUB. ADMIN. REV. 3, 3-5, 9 (1974) (“The notion of social equity is vulnerable to the charge that it is in need of a substantive ethical content.”); H. PEYTON YOUNG, *EQUITY: IN THEORY AND PRACTICE XI-XIII* (1994) (“This book is not about equity in [the social justice] sense. Rather, it is about the meaning of equity in concrete situations that we meet every day. . . . It is strongly shaped by cultural values, by precedent, and by the specific types of goods and burdens being distributed. . . . Principles of equity are the *instruments* by which societies resolve distributive problems.”) (emphasis in original).

<sup>5</sup> Data on file with Author. See Appendix A. Author conducted searches for “cannabis” or “marijuana” within paragraph of “social equity” on LexisNexis News, Westlaw News, LexisNexis Law Reviews and Journals, and Westlaw Law Reviews and Journals. Searches were time constrained as anything before December 31, 2019, and anything between January 01, 2020, and February 29, 2024. The same searches were conducted on Google and Google News, but substituting “AROUND(75)” for “w/p” as the relevant connector. Approximately 80% of all Google results and 78% of all Google News results appear after January 1, 2020. See further Pamela Mejia, MPH, MS, et al, Berkeley Media Studies Group, Abstract of Address at American Public Health Association’s 2019 Annual Meeting and Expo (Nov. 3, 2019) (unpublished report on file with author), (finding similarly that only 7% of cannabis news articles in four California counties referenced social equity and cannabis together in the lead up to California’s legalization of cannabis on January 1, 2018).

<sup>6</sup> See e.g. LESTER GRINSPOON, *MARIHUANA RECONSIDERED* 392 (1977) (“injustices of prohibition”). See *infra* Section II.B-C and Section III.A for the historical development of western ethics that culminated in this substantive definition of “justice” as derived from JOHN RAWLS, *A THEORY OF JUSTICE* (1971) by the social equity literature. Mary E. Guy & Sean A. McCandless, *Social Equity: Its Legacy, Its Promise*, 72 PUB. ADMIN. REV. S5, S8 (2012) (“Virtually every scholar writing about modern social equity has referenced and is indebted to [Rawl’s] book”).

these theories of “racial justice,”<sup>7</sup> “restorative justice,”<sup>8</sup> and “social justice”<sup>9</sup> provided robust frameworks for the call to relax cannabis prohibitions and rectify the harms of the War on Drugs.<sup>10</sup>

Distinguishing between “equity” and “social equity” and noting the departure from the traditional use of “justice” language is not mere semantics. Coalition-building for drug policy reformation in the pursuit of justice and equity are only possible inside an accurate, specific framing derived from the history, evolution, and manipulation of drug policies reified by existing language.<sup>11</sup> Thus, it is vital to untangle the various uses of the term “social equity” so that disparate interests can effectively coordinate their efforts to imagine and implement common solutions for the many inequities of the War on Drugs.

Many organizations and scholars base their cannabis social equity proposals on a goal-oriented, top-down collection of policies purported to reduce some chosen subset of the variously defined inequities of the War on Drugs. These include policies based on racial, stigmatic, business, research, energy, sex and gender, hemp, environmental, and international inequities.<sup>12</sup> However, these policies frequently lack a

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<sup>7</sup> See e.g. Ben Sheppard, *Going for the Green: Social Equity in the Recreational Cannabis Industry*, 8(1) LINCOLN MEMORIAL U. L. REV. 280, 296-97 (2020) (advocates for decriminalization in Washington D.C. ran a campaign in 2014 focused on the language of “racial justice.” Advocates in Massachusetts did the same in 2016).

<sup>8</sup> See Amanda Reiman, *The Intersection of Cannabis Reform and Other Progressive Movements*, in THE ROUTLEDGE HANDBOOK OF POST-PROHIBITION CANNABIS RESEARCH 336, 339-40 (Dominic Corva & Joshua Meisel eds., 2021).

<sup>9</sup> Bryon Adinoff & Amanda Reiman, *Implementing Social Justice in the Transition from Illicit to Legal Cannabis*, 45(6) AM. J. OF DRUG & ALCOHOL ABUSE 673, 674 (2019).

<sup>10</sup> This language paralleled, but was distinct from, the language of “criminal justice” reform used generally by advocates for reform of the United States’ incarceration system as a whole. CAPEHEART & MILOVANOVIC, *supra* note 3 at 3 (“criminal justice” is a distinct, relatively recent subset of “social justice”); and see e.g. Natalie Fertig, *Black Lives Matter Movement Sparks ‘Collective Awakening’ on Marijuana Policies*, POLITICO (Aug. 7, 2020), <https://www.politico.com/news/2020/08/07/black-lives-matter-movement-marijuana-policies-392434> [<https://perma.cc/SC9J-NXS5>]; and see Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM L. & CRIMINOLOGY 379, 387-88 (2020).

<sup>11</sup> Hakiqee N. Virani & Rebecca J. Haines-Saah, *Drug Decriminalization: A Matter of Justice and Equity, Not Just Health*, 58(1) AM. J. OF PREV. MED. 161 (2022).

<sup>12</sup> See *infra* Section III for a discussion of current views of social equity and Halydier, *supra* note 1, at 46-83 for a recounting of the broad range of inequities generated



substantive grounding in a theory of cannabis social equity that bridges the gap between goal and policy while incorporating affected voices. Neither do these policies look to the original incarnations and applications of social equity theory (chiefly from the field of public administration) for lessons learned or the practical considerations of implementation. Rather, proponents identify a narrow subset of inequities and develop a similarly narrow set of policies crafted more for their narrative resonance with the expectations of their own supporters rather than as effective solutions to address historical inequity at scale.<sup>13</sup> While this progression is a natural outgrowth of the foundations of the recent popular cannabis social equity movement, it lacks the theoretical rigor necessary to effectively diagnose the current failures of cannabis social equity and iterate those policies to substantially reduce inequities.

For ease of reference in this endeavor, this paper systematizes current cannabis social equity policies into four categories (unless specific delineation within a category is necessary). As the historiography in Section II.B. demonstrates, these categories together comprise the modern definition of “social equity” in the cannabis industry. (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 by the War on Drugs. (2) “Criminal justice equity” includes policies that decriminalize sales or possession of

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by the War on Drugs. A collection of inequities that is remarkably unaddressed by most cannabis social equity proposals.

<sup>13</sup> For recent examples, see generally Steven W. Bender, *Racial Justice and Marijuana*, 59 CAL. W. L. REV. 223 (2023) (addressing racial justice); Emily R. O’Brien, *To Be Blunt: Weed Appreciate You Not Flying with Marijuana, But Current Conflicting Cannabis Law Leaves Things Hazy*, 11 IND. J.L. & SOC. EQUALITY 125 (2023) (addressing air transportation equity); Ryan B. Stoa, *Tribal Cannabis Agriculture Law*, 2023 UTAH L. REV. 1075 (2023) (addressing equity on Tribal lands); Lauren Williams & Samuel D. Hodge, Jr., *The Implications of Legalized Marijuana on Establishing Probable Cause for a Warrantless Search*, 66 ST. LOUIS L. J. 267 (2022) (addressing search and seizure); Daniel G. Orenstein, *The Legalization of Marijuana in Urban Communities: Article: Multiunit Housing and Cannabis: Good Laws Make Good Neighbors*, 49 FORDHAM URB. L. J. 475 (2022) (addressing multi-unit housing inequities); Charisa Smith, *Over-Privileged: Legal Cannabis, Drug Offending, & The Right to Family Integrity*, 67 S.D. L. REV. 569 (2022) (addressing inequities in family law); and Richard Spradlin, *Zoning, Natural Resources, and Reclamation: Opportunities for Environmental Justice in a Flowering Industry*, 23 VT. J. ENVTL. L. 374 (2022) (addressing environmental justice).

cannabis, apply retroactive resentencing for prior cannabis convictions, and/or expunge or clear records of previous drug convictions. (3) “Community equity” includes policies designed to directly intervene/invest in communities adversely effected by the War on Drugs. (4) “Access equity” includes policies designed to provide equitable access to legal cannabis for diverse demographics, chiefly through amending tertiary areas of law to not exclude legal cannabis users, such as employment or insurance law.<sup>14</sup>

As previous research has demonstrated, current implementations of these social equity policies routinely fail to remedy, and even exacerbate, the disproportionate harms of the War on Drugs.<sup>15</sup> 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” and supporting minority applicants (industry equity failures). 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 (criminal justice equity failures). 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 (community equity failures). Finally, direct cannabis regulations remain only tangentially associated with the employment, child-custody, housing, insurance,

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<sup>14</sup> For a considerably deeper look into the common components of each category, how they function, and why they have and will continue to prove ineffective at the implementation level, *see generally* Halydier, *supra* note 1, *passim*.

<sup>15</sup> *See, e.g.*, AMBER LITTLEJOHN & ELLANA GREEN, MINORITY CANNABIS INDUSTRY ASSOCIATION, NAT’L CANNABIS EQUITY REP. 2 (2022), <https://mjbizdaily.com/wp-content/uploads/2022/02/National-CannabisEquity-Report-1.pdf> [hereinafter MCBA REPORT 2022], <https://mjbizdaily.com/wp-content/uploads/2022/02/National-Cannabis-Equity-Report-1.pdf> [<https://perma.cc/X7VL-V4B8>]; 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://www.release.org.uk/sites/default/files/pdf/publications/Regulating-Right-Repairing-Wrongs-UK-Cannabis-Reform_Release.pdf) [<https://perma.cc/MF4S-HYBA>]; 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/5R72-BTBH>]; *See further* 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).

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 (access equity failures).<sup>16</sup>

Fundamentally, cannabis social equity advocacy organizations, state legislatures, and cannabis administrative bodies alike confuse the modern, individualized conception of “equity”<sup>17</sup> with the historical, societal level theory of “social equity”<sup>18</sup> and its implementation. Redefining “social equity” as a set of policies designed only to pursue “equity,” erases the “social” components of the traditional theory which are necessary to address the fundamentally *social* inequities resulting from the War on Drugs. Without a broader theory of social equity, the cannabis industry cannot accurately diagnose the many failures of current cannabis social equity programs and will continue to make the same mistakes.

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<sup>16</sup> See generally Halydier, *supra* note 1; William Garriott & Jose Garcia-Fuerte, *The Social Equity Paradigm: The Quest for Justice in Cannabis Legalization*, 47 SETON HALL LEGIS. J. 128, 129-31 (2023).

<sup>17</sup> On January 20, 2021, the Biden administration issued an executive order to advance equity for all, delineating “equity, civil rights, racial justice, and equal opportunity.” The executive order defines “equity” as:

consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

<sup>18</sup> See *infra* Section III.A discussing the modern definition of social equity in the field of public administration. This definition can be described as a dialogic between administrators and social groups impacted at the group level by policy implementations. This dialogic requires administrators to either directly include community participation in decision-making, or in areas too complex for efficient direct inclusion, to themselves approach implementations from the perspective of affected social groups when evaluating the distribution of goods and services between different groups. The delivery of goods and services should be explicitly deployed on behalf of the less advantaged to rectify *existing societal inequalities*, rather than to remediate individual inequities that manifest *post hoc* in administering institutions.

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

This paper contributes to the investigation and remediation of inequities resulting directly and indirectly from the United States’ War on Drugs by integrating the theories of social equity developed in the fields of public administration, philosophy, and law into a framework for imagining, implementing, and refining cannabis social equity policies. This new framework is applied to diagnose the theoretical reasons for the failure of current cannabis social equity policies and to imagine new opportunities for remediating the harms caused by cannabis regulations over the last century.

Part II provides a history of cannabis regulation in the United States that serves as the historical analysis element necessary in applying modern constitutional legal theories. Part III is a historiography and categorization of the current theory of cannabis social equity as developed over the last few years across popular and scholarly literature. Part IV uses the United States’ rich intellectual history with theories of social equity as developed in the fields of cannabis policy, public administration, philosophy, and law to propose an integrated theory of cannabis social equity for use by the cannabis industry. Finally, Part V provides two examples deploying this newly integrated social equity theory. The first demonstrates *why* current industry equity policies continue to struggle, and the second argues that the *level* of legalization is a fundamental tool and necessary foundation for any effective policy to rectify the inequities of the War on Drugs.

## I. THE INEQUITABLE HISTORY AND MODERN CONSEQUENCES OF THE WAR ON DRUGS

Most scholarly cannabis industry articles begin with broadly matching accounts of the origins, prosecution, and lasting impact of the United States' War on Drugs to provide context for readers new to the industry.<sup>19</sup> Despite the ubiquity of these accounts, the importance of historical analysis for modern constitutional law arguments necessitates a similar recounting. As such, the following history not only provides the typical, detailed account of cannabis regulation and the War on Drugs in the United States, but especially highlights the nondemocratic methods and outsized impact of the individual motivating personalities and bureaucratic capture of the modern regulatory schema.

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

#### 1. Pre-U.S. Regulatory History

Records of humanities' growth, selective breeding, and consumption of cannabis as a psychoactive substance to regulate the endocannabinoid system,<sup>20</sup> and hemp as an industrial material,<sup>21</sup> date to at least 11,700 years ago in Central Asia.<sup>22</sup> Cultures throughout Eurasia used cannabis, and records show its ceremonial use 2,500 years ago in China and in Sythia.<sup>23</sup> Egypt recorded the first topical use of cannabis for inflammation in 1500 B.C.,<sup>24</sup> and Homer may have referenced its use in assuaging the post-traumatic stress disorder and guilt of survivors

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<sup>19</sup> See, e.g., LESTER GRINSPOON & JAMES B. BAKALAR, *MARIHUANA, THE FORBIDDEN MEDICINE* (1993); Kim Hewitt, *History and Cultural Context of Marijuana in the United States*, in UNDERSTANDING MEDICAL CANNABIS 40 (2021); and David V. Patton, *A History of United States Cannabis Law*, 34 J.L. & HEALTH 1 (2020).

<sup>20</sup> Marc-Antoine Crocq, *History of cannabis and the endocannabinoid system*, 22 DIALOGUES IN CLINICAL NEUROSCIENCE 223, 224-25 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7605027/> [https://perma.cc/6CJW-FPVU].

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

<sup>22</sup> Simona Pisanti & Maurizio Bifulco, *Medical Cannabis: A Plurimillennial History of an Evergreen*, 234 J. OF CELLULAR PHYSIOLOGY 8342, 8342 (2019).

<sup>23</sup> Crocq, *supra* note 20; Andrew Lawler, *Oldest evidence of marijuana use discovered in 2500-year-old cemetery in peaks of western China*, SCI. MAG. (June 12, 2019), <https://www.science.org/content/article/oldest-evidence-marijuana-use-discovered-2500-year-old-cemetery-peaks-western-china> [https://perma.cc/2GNR-ZAFN].

<sup>24</sup> *Id.*; Crocq, *supra* note 20.

of the battle of Troy in the *Odyssey*.<sup>25</sup> The Greeks and Romans, including Herodotus and Pliny, record in both encyclopedia and pharmacopeia various instances of selective cannabis breeding to enable hemp use for rope and nets; cannabis use for inflammation, arthritis, gout; and recreational cannabis use for its psychoactive effects.<sup>26</sup>

Middle eastern countries and India reintroduced stronger psychoactive cannabis strains to Europe for medical and recreational use through trade in the 12th century where it again appeared in European pharmacopeia.<sup>27</sup> Users consumed the strains via smoking, topical application, tinctures, and edible preparations and first recorded the potential negative mental effects of these higher THC strains.<sup>28</sup> Use in Europe continued to grow until the early 20th century as all layers of society used it for pain management.<sup>29</sup>

Hemp first reached the western hemisphere in South America in the early 1500s from Spain,<sup>30</sup> and a Parisian apothecary first grew cannabis as a medical component in North America in the early 1600s.<sup>31</sup> Soon after, England called on Virginia settlers to produce hemp as a strategic resource for use in the 30 Years War in 1619, and several colonies later used hemp as currency.<sup>32</sup> In what is surely the most persuasive fact for a future constitutional law argument, many Founding Fathers grew

<sup>25</sup> Crocq, *supra* note 20.

<sup>26</sup> *Id.*; and see Theodore F. Brunner, *Marijuana in Ancient Greece and Rome? The Literary Evidence*, 9 J. OF PSYCHEDELIC DRUGS 221, 223-24 (1977).

<sup>27</sup> See generally MARTIN BOOTH, *CANNABIS: A HISTORY* 43-45, 59 (2003).

<sup>28</sup> Crocq, *supra* note 20 (compiling various primary medical sources from the period).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; Manuel Díaz-Ordóñez & Antonio Jose Rodriguez Hernandez, *Cannabis Sativa y Chile (1577-1700): Un Insumo al Servicio Del Imperio [Cannabis Sativa and Chile (1577-1700): An Input to the Empire Service]*, 6 TEMPUS MAG. IN GEN. HIST. 1, 5-7 (2017), <https://revistas.udea.edu.co/index.php/tempus/article/view/329709/20786073> [<https://perma.cc/JZ8L-Q6XB>].

<sup>31</sup> BOOTH, *supra* note 27, at 32.

<sup>32</sup> VICTOR S. CLARK, *HISTORY OF MANUFACTURES IN THE UNITED STATES: 1607-1860* 9 (1916); *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619* 218 (William Waller Hening, ed., 1969) (proceedings of the Virginia General Assembly stating that “every planter as soone as he may, provide seede of flaxe and hemepe and sowe the same” for immediate export to England’s navy); ROBERT M. HARDAWAY, *MARIJUANA POLITICS: UNCOVERING THE TROUBLESOME HISTORY AND SOCIAL COSTS OF CRIMINALIZATION* 78 (2018).

hemp, including George Washington at Mount Vernon.<sup>33</sup> Hemp remained a strategic resource with production subsidized by the U.S. government as late as World War II.<sup>34</sup> In the Civil War, U.S. government army doctors used cannabis as an effective analgesic.<sup>35</sup> Throughout the 1800s cannabis was freely available in drug stores as a patent medicine (name brand, non-generic medicine) and advertised for joint medicinal and recreational use, although smoking cannabis for strictly recreational purposes in the U.S. did not become popular until Mexican immigrants introduced the practice more widely in the early 1900s.<sup>36</sup>

## 2. Early Federal Food and Drug Regulations – The “Wiley Act”

In its earliest incarnations, cannabis regulation in the United States remained a subset of the general regulation of other psychoactive substances and their societal effects, real or imagined, with little attention paid to it as a unique substance. In the late 19th century, a majority of the states enacted “poison laws” requiring labeling and content disclosures on patent medicines<sup>37</sup> in response to growing knowledge and concerns about how certain substances could harm the body and mind (including additives such as strychnine, arsenic, and prussic acid and psychoactive substances including opiates, cocaine,

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<sup>33</sup> Benjamin M. Adams, *Seven Founding Fathers Who Farmed Hemp and Advocated For It*, HIGH TIMES (Jul. 4, 2023), <https://hightimes.com/culture/seven-founding-fathers-who-farmed-hemp-and-advocated-for-it/> [https://perma.cc/LG33-GDUX]; *Did George Washington Grow Hemp?*, MOUNTVERNON.ORG, <https://www.mountvernon.org/george-washington/farming/washingtons-crops/george-washington-grew-hemp/> [https://perma.cc/MVT6-83HH] (last visited Jan. 1, 2023).

<sup>34</sup> Patton, *supra* note 19, at 1, 4; Establishing a Domestic Hemp Production Program, 84 Fed. Reg. 58522 (Oct. 31, 2019).

<sup>35</sup> See, e.g., THE MEDICAL AND SURGICAL HISTORY OF THE WAR OF REBELLION (1861-1865), VOLUME II OF PART I 122, 133 (1875), <https://babel.hathitrust.org/cgi/pt?id=pur1.32754063891901&seq=11> [https://perma.cc/9DX3-7UEJ] (various authors as ordered by Congress and overseen by the Surgeon General) (this is only one example, the use of cannabis as an effective analgesic is reported regularly throughout the various stand-alone volumes of The Medical and Surgical History of the War of Rebellion as reported to Congress).

<sup>36</sup> BOOTH, *supra* note 27, at 93-95, 147-48; Hewitt, *supra* note 19.

<sup>37</sup> See generally Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39(1) FOOD, DRUG, & COSM. L.J. 2 (1984).

and alcohol).<sup>38</sup> While most of these laws did not explicitly name cannabis products, cannabis products were patent medicines at the time and thus subject to the various labeling requirements.<sup>39</sup> In 1906, following a few prior acts regulating adulteration in specific foods, the federal government made its first foray into the general regulation of the contents of food and drugs produced in the United States.<sup>40</sup>

Even at the inception of U.S. drug regulations, race played a key role in justifying their imposition. Congress justified the original federal import regulations on drugs by blaming adulterated foreign drugs for the excessive deaths to disease of American soldiers during the Mexican-American War in the 1840s.<sup>41</sup> The Chinese-American Angell Treaty in 1887 and Opium Exclusion Act of 1909 were each created to keep Americans away from the “seedy” behavior of “undesirable[]” Chinese immigrants.<sup>42</sup>

The 1906 Pure Food and Drugs Act was the brainchild of Dr. Harvey W. Wiley.<sup>43</sup> As shown below, he was the first in a series of individuals who used cannabis demonization and regulation as a tool to expand their

<sup>38</sup> See H.R. Rep. No. 30-664 (1848); David D. McKinney, *The Mexican-American War Brings Regulation on Drug Importation*, 3 FRONTLINE 50-51 (2010); and Angela Walch, *A Spurious Solution to a Genuine Problem: An In-Depth Look at The Import Drugs Act of 1848* (2002) (Law Thesis, Harvard Law School) (available at <https://dash.harvard.edu/bitstream/handle/1/8846790/Walch.html?sequence=2&isAllowed=y> [<https://perma.cc/C5CA-QG7V>]).

<sup>39</sup> Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42(3) PHARMACY & THERAPEUTICS 180 (2017).

<sup>40</sup> See *Milestones in U.S. Food and Drug Law*, FDA (Jan. 30, 2023), <https://www.fda.gov/about-fda/fda-history/milestones-us-food-and-drug-law> [<https://perma.cc/99DK-6NBB>].

<sup>41</sup> HARDAWAY, *supra* note 32 at 83; H.R. Rep. No. 30-664, at 20. In what will become a trend of blaming drugs for the consequences of other policies, Congress seems to have intentionally misplaced the blame onto adulterated drugs to distract from a war with the highest fatality rate from disease in U.S. history. Unseasoned volunteers without acquired immunity, hygiene habits, or sanitation training accounted for three-quarters of the deaths to disease in the Mexican-American war. See Vincent J. Cirillo, *Two Faces of Death: Fatalities from Disease and Combat in America’s Principal Wars, 1775 to Present*, 51 JOHNS HOPKINS UNIV. PRESS 121, 122-23, 125 (2008).

<sup>42</sup> HARDAWAY, *supra* note 32, at 86-89; Audrey Redford & Benjamin Powell, *Dynamics of Intervention in the War on Drugs: The Buildup to the Harrison Act of 1914*, 20(4) THE INDEP. REV. 509, 512-14 (2016).

<sup>43</sup> Wallace F. Janssen, *The Story of the Laws Behind the Labels*, FDA (June 1981), <https://www.fda.gov/media/116890/download> [<https://perma.cc/VK52-AAUJ>].



own power in the federal bureaucracy by explicitly steering the United States towards ever stricter regulations. Movement towards the new law began in the late 1800s when Wiley became head of the fledgling federal Division of Chemistry in the Department of Agriculture and its few scientists housed in a basement.<sup>44</sup> Following in the steps of his predecessor Dr. Peter Collier, Dr. Wiley emerged as a public speaker and poet on the issue to lead a national campaign of writers, national magazines, women's clubs, and the nascent consumer rights movement in opposition to preservatives and other additives.<sup>45</sup> Dr. Wiley established a much publicized "poison squad" of volunteers who consumed borax; salicylic, sulfurous, and benzoic acids; and formaldehyde over five years to demonstrate their toxic effects.<sup>46</sup> National magazines ran stories on the issue, with Collier's Weekly in particular singled out in the congressional record for their reporting which "collected from various sources extensive data on this subject."<sup>47</sup> Dr. Wiley's Division of Chemistry also published an extensive, ten-part series investigating the adulteration of foods as a basis for the law but did not mention cannabis.<sup>48</sup>

Wiley's work culminated in the passage of the Pure Food and Drug Act in 1906, referred to today by the FDA as the "Wiley Act."<sup>49</sup> In the leadup to the congressional debate on the Pure Food and Drug Act, Samuel Hopkins Adams wrote a five-part series in *Collier's* that indeed collected a harrowing assortment of examples of the health consequences of many substances like acetanilid, opium, and cocaine.<sup>50</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> Natalie Zarrelli, *Food Testing in 1902 Featured a Bow Tie-Clad 'Poison Squad' Eating Plates of Acid*, ATLAS OBSCURA (Aug. 30, 2016), <https://www.atlasobscura.com/articles/food-testing-in-1902-featured-a-tuxedo-clad-poison-squad-eating-plates-of-acid> [<https://perma.cc/84Q2-CGKZ>].

<sup>46</sup> *Id.*; Janssen, *supra* note 43.

<sup>47</sup> 40 CONG. REC. Vol. 40, Part 8, pg. 845 [8095] (May 17, 1906 to June 8, 1906).

<sup>48</sup> See, e.g., DR. HARVEY W. WILEY, BULL. NO. 13, PARTS 1-10, U.S. DEP'T OF AGRIC., DIV. OF CHEMISTRY (1887-1902), <https://archive.org/details/cu31924003566795/page/n9/mode/2up> [<https://perma.cc/C78D-R2JP>].

<sup>49</sup> See Janssen, *supra* note 43.

<sup>50</sup> See, e.g., Samuel Hopkins Adams, *The Great American Fraud*, COLLIER'S: THE NAT'L WKLY., Oct. 7, 1905, at 14, [https://archive.org/details/sim\\_colliers-the-national-weekly\\_1905-10-07\\_36\\_2](https://archive.org/details/sim_colliers-the-national-weekly_1905-10-07_36_2) [<https://perma.cc/DG4U-GWPW>]; Samuel Hopkins Adams, *Peruna and the "Bracers"*, COLLIER'S: THE NAT'L WKLY., Oct. 28, 1905, at 17, [https://archive.org/details/sim\\_colliers-the-national-weekly\\_1905-10-28\\_36\\_5](https://archive.org/details/sim_colliers-the-national-weekly_1905-10-28_36_5) [<https://perma.cc/HE3T-33WU>]; Samuel Hopkins Adams, *Liquozone*, COLLIER'S: THE NAT'L WKLY., Nov. 18, 1905, at 14, [https://archive.org/details/sim\\_colliers-the-national-weekly\\_1905-11-18\\_36\\_11](https://archive.org/details/sim_colliers-the-national-weekly_1905-11-18_36_11) [<https://perma.cc/84Q2-CGKZ>].

However, prior to the addition of cannabis to the text of the Pure Food and Drug Act in 1906, *Collier's* and Adams only mention cannabis in relation to this issue a single time, with a brief note criticizing a particular brand's effectiveness as a consumption cure (rather than any general health dangers)<sup>51</sup>—a cure which *Collier's Weekly* had itself advertised a few years earlier.<sup>52</sup> This brand, “Piso's Consumption Cure” was the only example of the “detrimental” (reported merely as ineffective by Adams) effects of cannabis listed in the congressional testimony on the issue, with the only other mentions of cannabis in the record either grouped with other drugs in the draft texts of the act or in the single anecdote of an agitated two-year old where the responding physician detected the presence of cannabis in the compound at issue by taste as the “‘booze’ of the Hindoos.”<sup>53</sup>

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org/details/sim\_colliers-the-national-weekly\_1905-11-18\_36\_8 [https://perma.cc/5V6G-WZBB]; Samuel Hopkins Adams, *The Subtle Poisons: Acetanilid, Opium, Cocaine*, COLLIER'S: THE NAT'L WKLY., Dec. 2, 1905, at 14, https://archive.org/details/sim\_colliers-the-national-weekly\_1904-12-03\_34\_10 [https://perma.cc/2RYB-PU5C]; Samuel Hopkins Adams, *Preying on the Incurables*, COLLIER'S: THE NAT'L WKLY., Jan. 13, 1906, at 19, https://archive.org/details/sim\_colliers-the-national-weekly\_1906-01-13\_36\_16 [https://perma.cc/8XUN-ZDDK].

<sup>51</sup> Equating ineffectiveness with dangerousness remains a core pillar of the DEA's approach to its administration of the CSA in general and an explicit reason for the DEA's denial of cannabis rescheduling petitions in particular. Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499 (Mar. 26, 1992) (“A determination that a drug is ineffective is tantamount to a determination that it is unsafe.”). The DEA cites to *United States v. Rutherford*, 442 U.S. 544, 545 & n.9 (1979) (and its consideration of the legislative history of the 1962 Amendments to the Food and Drug Act) for this contention, but the DEA's interpretation that ineffectiveness alone is evidence of a lack of safety misreads the Court's actual holding that the 1962 Amendments merely require the FDA to balance the relative effectiveness of a drug against the severity of safety concerns. See Scott H. Power, *The Right of Privacy in Choosing Medical Treatment: Should Terminally Ill Persons Have Access to Drugs Not Yet Approved by the Food and Drug Administration*, 20 J. MARSHALL L. REV. 694, 701, 710 (1987); Samuel Hopkins Adams, *Preying on the Incurables*, COLLIER'S: THE NAT'L WKLY., Jan. 13, 1906, at 19, https://archive.org/details/sim\_colliers-the-national-weekly\_1906-01-13\_36\_16 [https://perma.cc/8XUN-ZDDK].

<sup>52</sup> *Is Consumption Contagious*, COLLIER'S: THE NAT'L WKLY., Mar. 18, 1897, at 4, https://archive.org/search?query=sim\_pubid%3A5709+AND+volume%3A18+&sin=TEXT&sort=date [https://perma.cc/HNV9-ZBVM].

<sup>53</sup> 40 CONG. REC. (Bound) – Vol. 40, Part 8, pg. 845-46 [8095-96] (May 17, 1906 to June 8, 1906).

The release of author Upton Sinclair's book *The Jungle* concerning the U.S. meatpacking industry (also reported on by *Collier's*' Samuel Hopkins Adams)<sup>54</sup> and prior concerns about the adulteration of foods in general pushed the passage of the Wiley Act across the finish line.<sup>55</sup> The Act chiefly echoed state-level poison laws: it required labeling and disclosure of the amounts of certain substances, namely those referenced in the United States Pharmacopeia; the Act deviated from the state laws, however, when it explicitly included cannabis as one of those substances.<sup>56</sup>

The Wiley Act turned Dr. Wiley's Division (then Bureau) of Chemistry from a small diagnostic operation in a basement into a powerful enforcement agency that soon grew so large that Congress removed it from the Department of Agriculture.<sup>57</sup> It also began the trend of members of the federal executive branch instigating and controlling U.S. drug policy as a tool for amassing personal and political power.<sup>58</sup>

### 3. The First Federal Narcotics Regulation

The 20<sup>th</sup> century saw increased levels of opium addiction around the world and introduced the use of morphine and cocaine for non-medical uses. In response, Congress passed the Harrison Narcotics Tax Act of 1914.<sup>59</sup> The Supreme Court upheld the act as a legitimate Congressional use of the Article I<sup>60</sup> taxing power.<sup>61</sup> The Act placed all importers,

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<sup>54</sup> Samuel Hopkins Adams, *Meat: A Problem for the Public*, COLLIER'S: THE NAT'L WKLY., July 30, 1904, at 8, [https://archive.org/details/sim\\_colliers-the-national-weekly\\_1904-07-30\\_33\\_18/page/6/mode/2up?q=samuel+hopkins](https://archive.org/details/sim_colliers-the-national-weekly_1904-07-30_33_18/page/6/mode/2up?q=samuel+hopkins) [<https://perma.cc/T87F-F8D4>].

<sup>55</sup> See Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 985 (1970); HARDAWAY, *supra* note 32, at 83-85; *A History of Research: 1906 Pure Food & Drug Act—The Birth of the FDA*, WASH. U. SCH. OF MED. (Sept. 14, 2022), <https://obgyn.wustl.edu/a-history-of-research-1906-pure-food-drug-act-the-birth-of-the-fda> [<https://perma.cc/T6N2-NS7B>]; Janssen, *supra* note 43.

<sup>56</sup> HARDAWAY, *supra* note 32, at 85-87.

<sup>57</sup> See Janssen, *supra* note 43.

<sup>58</sup> See James Harvey Young, *Food and Drug Regulation under the USDA, 1906-1940*, 64 AGRIC. HIST. 134, 136 (1990); A. HUNTER DUPREE, *SCIENCE IN THE FEDERAL GOVERNMENT: A HISTORY OF POLICIES AND ACTIVITIES* 178-79 (1986).

<sup>59</sup> Harrison Narcotics Tax Act, Pub. L. No. 63-233, 38 Stat. 785 (1914); See HARDAWAY, *supra* note 32 at 89.

<sup>60</sup> HARDAWAY, *supra* note 32, at 90-92.

<sup>61</sup> *Id.* at 91-92; *United States v. Doremus*, 249 U.S. 86, 94 (1919).

producers, and distributors of opium or cocaine under threat of federal prosecution for failure to register with the federal government, report all transactions, and pay the new taxes.<sup>62</sup> The Harrison Narcotics Tax Act did not explicitly regulate cannabis, but it served as the United States' chief enforcement mechanism for opium and cocaine until the passage of the federal Controlled Substances Act in 1970 and as the constitutional basis for the Marihuana Tax Act of 1937.<sup>63</sup>

As with Wiley and the 1906 Pure Food and Drugs Act, an individual government actor bears chief responsibility for the Harrison Narcotics Tax Act: "Secretary of State Williams Jennings Bryan, 'a man of deep prohibitionist and missionary convictions and sympathies. He urged that the law be promptly passed to fulfill United States obligations under the new international [drug control] treaty'"<sup>64</sup> despite a complete lack of public concern or any topical news coverage.<sup>65</sup>

While the requirements of the Harrison Narcotics Tax Act were purely administrative and did not restrict the possession or distribution of any drug, the Act laid the foundation for state and federal cooperation in the criminalization of drugs.<sup>66</sup> Failure to comply with the merely administrative requirements of the Harrison Narcotics Tax Act was a federal crime, but compliance with the federal administrative requirements meant admitting to a felony under state laws which prohibited the non-medical use and distribution of opium and cocaine.<sup>67</sup> This interaction between state and federal law created *de facto* federal criminalization of opium and cocaine possession and distribution.<sup>68</sup>

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<sup>62</sup> HARDAWAY, *supra* note 32, at 90-92.

<sup>63</sup> 1937 Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1970); HARDAWAY, *supra* note 32, at 83.

<sup>64</sup> James Ostrowski, *The Moral and Practice Case for Drug Legalization*, 18 HOFSTRA L. REV. 608, 612 (1990); DEA, *The Early Years*, DEA.GOV, <https://www.dea.gov/documents/1919/1919-12/1919-12-17/dea-history-early-years> [<https://perma.cc/7CG7-X8EW>] (last visited Feb. 11, 2024).

<sup>65</sup> Ostrowski, *supra* note 64.

<sup>66</sup> Patton, *supra* note 19, at 7.

<sup>67</sup> *Id.* at 6-7; Bonnie & Whitebread II, *supra* note 55, at 989-90.

<sup>68</sup> Patton, *supra* note 19, at 6-7; Bonnie & Whitebread II, *supra* note 55, at 989-90 (asserting that the Marihuana Tax Act of 1937 (though struck down in *Leary v. United States*, 395 U.S. 6 (1969)) and the Controlled Substances Act of 1970 followed similar models of federally led cooperation in the passage of complementary state laws to meet federal prohibition goals despite the federal government's acknowledged inability to directly regulate possession or consumption (at least before the expansion of the Commerce Clause in *Gonzales v. Raich*, 545 U.S. 1 (2005)).

Those state laws again sprung from the outsized impact of individuals, specifically the New England Watch and Ward Society, led through time by Anthony Comstock, Henry Chase, and Frank Chase in both private lobbying and private enforcement of anti-drug laws, chiefly narcotics, but slipping in cannabis as an addition to the laws, first in Massachusetts, then across the country.<sup>69</sup>

#### 4. The Marihuana Tax Act of 1937

In 1930, Congress created the Federal Bureau of Narcotics under the Department of Taxation<sup>70</sup> (as narcotics regulations were still only federally enforceable under Article I), and appointed Harry J. Anslinger as commissioner—a position he occupied for the next thirty-two years.<sup>71</sup> Having served previously in the Treasury Department’s Bureau of Prohibition enforcing alcohol prohibition during the 1920s,<sup>72</sup> Anslinger did not initially oppose cannabis use, claiming that “there [is] no more absurd fallacy” than to think that the substance made people act mad or violent.<sup>73</sup> Anslinger quickly changed his tune as he soon found himself the head of an agency with an insufficient justification to exist when alcohol prohibition ended in 1933.<sup>74</sup> So began Anslinger’s adamant opposition and personal crusade against drug use of all sorts to empower his agency,<sup>75</sup> now describing cannabis thusly: “First, you will fall into

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<sup>69</sup> George Fisher, *Racial Myths of the Cannabis War*, 101 B.U. L. REV. 933, 952-62, *passim* (2021).

<sup>70</sup> HARDAWAY, *supra* note 32, at 95.

<sup>71</sup> *Id.*

<sup>72</sup> Historians are divided on how much the alcohol and drug prohibition movements were linked in the late 19<sup>th</sup> and early 20<sup>th</sup> century or merely coincided in time, but at the very least, Harry Anslinger’s personal career spanned both movements. Compare Bonnie & Whitebread II, *supra* note 55, at 1026-27 with LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 211-21 (2016); HARDAWAY, *supra* note 32; Fisher, *supra* note 69.

<sup>73</sup> JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS 15 (2015).

<sup>74</sup> HARI, *supra* note 73; see ALEXANDRA CHASIN, A KALEIDOSCOPE HISTORY OF HARRY J. ANSLINGER’S WAR ON DRUGS 173-74 (2016).

<sup>75</sup> For the purposes of this article, whether Anslinger instigated the change or took the reins of a preexisting movement is immaterial. Some historians do contest whether U.S. drug laws were an instance of moral entrepreneurship by Anslinger, with the government leading the charge, or a resulting reflection of a racist societal reaction to changing demographics. See John F. Galliher & Allynn Walker, *The Politics of Systematic Research Error: The Case of the Federal Bureau of Narcotics as a Moral Entrepreneur*, 10 CRIM. & SOC. JUST. 29, 31 (1978).

‘a delirious rage.’ Then you will be gripped by ‘dreams... of an erotic character.’ Then you will ‘lose the power of connected thought.’ Finally, you will reach the inevitable end-point: ‘Insanity.’”<sup>76</sup> His first major victory was the creation of the Uniform Narcotic Drug Act in 1932, a model statute designed to facilitate uniformity and enforcement of state drug laws that thirty-five states had adopted by 1937.<sup>77</sup> However, the broader United States public did not yet know of the “evils” of cannabis smoking,<sup>78</sup> so cannabis regulation was only an optional provision in the model law.<sup>79</sup>

In the early 1930s, smoking of cannabis was relatively new, only introduced to the United States in the early 20<sup>th</sup> century by immigrants and workers from Mexico and the Caribbean after the criminalization of opium and cocaine.<sup>80</sup> It was so new in fact, that it was not until the late 1920s that cannabis use became popular in predominantly Black areas of larger cities; and it was not until the mid-1930s that national media gave cannabis use regular attention in response to suburban America’s growing fears of Mexican immigrants and the loss of American jobs during the Great Depression.<sup>81</sup> Anslinger’s Bureau of Narcotics conducted an education campaign in 1932<sup>82</sup> “describing the drug, its identification, and its evil effects” and fostering a growing awareness of cannabis smoking in the media, public, and law enforcement.<sup>83</sup> However, despite Anslinger’s description of cannabis as a “national menace,”<sup>84</sup> he admitted that it had only spread out of the southwestern United States between 1934 and 1937.<sup>85</sup> Still, due to Anslinger’s education campaign (and potentially apocryphal coordination of that

<sup>76</sup> HARI, *supra* note 73.

<sup>77</sup> Bonnie and Whitebread II, *supra* note 55, at 1167.

<sup>78</sup> *Id.* at 1036, 1060; Hewitt, *supra* note 19, at 41.

<sup>79</sup> Bonnie and Whitebread II, *supra* note 55, at 1034, 1167-69.

<sup>80</sup> Harrison Narcotics Tax Act, *supra* note 59; *see* Hewitt, *supra* note 19.

<sup>81</sup> HARDAWAY, *supra* note 32, at 82.

<sup>82</sup> This campaign included the infamous 1936 film *Reefer Madness*. *Id.* at 98.

<sup>83</sup> *Id.* at 98, 111; *see generally* Fisher, *supra* note 69.

<sup>84</sup> Bonnie and Whitebread II, *supra* note 55, at 1035. Anslinger stated worse as well, “There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos, and entertainers...marijuana causes white women to seek sexual relations with Negroes...the primary reason to outlaw marijuana is its effect on the degenerate races...Reefer makes darkies think they’re as good as white men.” Akele Parnell, *Why Does Social Equity Matter*, in UNDERSTANDING SOCIAL EQUITY 21-22 (Christopher Nani, ed. 2020).

<sup>85</sup> HARDAWAY, *supra* note 32, at 111.

campaign by William Randolph Hearst),<sup>86</sup> the media eventually seized on the foreign origins of cannabis smoking in the late 1930s and began to publish frequent, unsubstantiated, and exaggerated accounts of crazed Mexican and Black men, high on cannabis, performing violent and depraved acts against upstanding American citizens.<sup>87</sup>

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<sup>86</sup> Hewitt, *supra* note 19, at 43.

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

Robert Solomon, *Racism and Its Effects on Cannabis Research*, 5 CANNABIS CANNABINOID RES. 2, 2 (2020).

<sup>87</sup> For example, one contemporaneous description of the effects of cannabis on the user stated:

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

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

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

ERICH GOODE, *THE MARIJUANA SMOKERS* 209 (1970) (quoting from the research and documentation of Earle Albert Rowell & Robert Rowell, *On the Trail of Marihuana: The Weed of Madness* 46, 48 (1939); and see HARDAWAY, *supra* note

Citing increasingly racialized public agitation and the wave of state laws criminalizing non-medicinal use of cannabis (as encouraged by the Federal Bureau of Narcotics' educational campaigns in support of the Uniform Narcotics Drug Act),<sup>88</sup> Anslinger successfully argued to Congress, without disclosing his knowledge of evidence to the contrary, that the states' enforcement efforts were insufficient and that federal action was necessary to address the drug's dangers.<sup>89</sup> Again tying cannabis use to unredeemable violence and racialized imagery, Anslinger told Congress:

In Persia, a thousand years before Christ, there was a religious and military order founded which was called the Assassins and they derived their name from the drug called hashish which is now known in this country as marihuana. They were noted for their acts of cruelty, and the word "assassin" very aptly describes the drug.<sup>90</sup>

Congress quickly passed the Marihuana Tax Act of 1937 on the same Article I constitutional grounds as the Harrison Tax Act.<sup>91</sup> Similar to the Harrison Tax Act, the Marihuana Tax Act's registration requirements, in conjunction with state criminalization of cannabis, functioned as a de facto criminalization of all non-medical cultivation, possession, and distribution of cannabis.<sup>92</sup>

The Marihuana Tax Act remained the principle federal tool for cannabis enforcement until 1969,<sup>93</sup> augmented by both the Boggs Act in 1951 and the Narcotics Control Act of 1956 which increased penalties, created mandatory minimum sentences, and eliminated the possibility of probation, suspension, and parole for most offenses traceable to imported cannabis.<sup>94</sup> In addition to its growing illegality, cannabis also found itself removed from the United States

32, at 40, 111; Hewitt, *supra* note 19, at 42-43; and see generally Fisher, *supra* note 69.

<sup>88</sup> Katharine Neill Harris & William Martin, *Persistent Inequities in Cannabis Policy*, 60 THE JUDGES J. 9, 10-12 (2021).

<sup>89</sup> RICHARD BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES 1049-51* (1999).

<sup>90</sup> *Taxation of Marihuana: Hearings on H.R. 6385 Before the H. Comm. on Ways & Means*, 75th Cong. 19 (1937) (statement of H.J. Anslinger, Comm'r of Narcotics, Bureau of Narcotics, Dep't of the Treasury).

<sup>91</sup> BONNIE & WHITEBREAD II, *supra* note 89, at 1053-54.

<sup>92</sup> 1937 Marihuana Tax Act, *supra* note 63.

<sup>93</sup> HARDAWAY, *supra* note 32, at 100-01.

<sup>94</sup> *Id.* at 105; NANCY E. MARION & JOSHUA B. HILL, *MARIJUANA 360: DIFFERING PERSPECTIVES ON LEGALIZATION* 22 (2019).



Pharmacopeia in 1942 on a finding that it was of no medicinal value, being only “a harmful addictive drug that caused psychoses . . . and violent behavior.”<sup>95</sup>

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

In 1969, the U.S. Supreme Court held the Marihuana Tax Act of 1937 to be unconstitutional in *Leary v. United States*, 395 U.S. 6 (1969).<sup>96</sup> While upholding the law as an appropriate use of Congress’ tax power,<sup>97</sup> the Supreme Court held that the Marijuana Tax Act’s de facto nationwide criminalization of cannabis—using federal administrative requirements to force participants to admit to state level cannabis crimes—violated Leary’s 5<sup>th</sup> Amendment right against self-incrimination.<sup>98</sup> This ruling capped a decade of societal upheaval, progress in racial equity, development of the original theory of social equity, shifting social views of cannabis, and a growing movement for legal reform that cited newly researched medical bases for the legalization of cannabis.<sup>99</sup>

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

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<sup>95</sup> Note the passage of the 1937 Marihuana Tax Act removed the circular reasoning that has plagued the relationship between cannabis illegality and medical research since cannabis from the U.S. Pharmacopeia: “there has been very little research on the medicinal value of cannabis (because cannabis is illegal to research) so cannabis should remain illegal because there is no research to show that it does have medicinal value.” See Elena Quattrone, *The Catch 22 of Marijuana [II] Legalization*, 22 B.U. J. SCI. & TECH. L. 299, 301-02 (2016). There was also a dark humor in the continuing conflation of cannabis and opioids when cannabis was documented to treat opioid addiction as early as 1891. See GRINSPOON & BAKALAR, *supra* note 19, at 6.

<sup>96</sup> HARDAWAY, *supra* note 32, at 106-07.

<sup>97</sup> A power recently reinforced by the Supreme Court’s decision upholding the taxing provisions of the Affordable Care Act as a legitimate exercise of Article I taxing and spending powers. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012).

<sup>98</sup> Cath. Univ. L. Rev., *Leary and Covington: Registration and the Fifth Amendment*, 19 CATH. UNIV. L. REV. 87, 88-89 (1970); HARDAWAY, *supra* note 32, at 107.

<sup>99</sup> GOODE, *supra* note 87, at 3-4 (a contemporaneous evaluation of the gravity of societal changes in the 1960s); HARDAWAY, *supra* note 32, at 105-06 (later review of the impact of the changing attitudes of the 1960s on the evolution of America’s regulation of cannabis).

race riots.<sup>100</sup> Consequently, the United States made substantial strides in developing the legal and programmatic basis for redressing some of the societal harms caused by years of Jim Crow laws—approving the various Civil Rights, Voting Rights, and Fair Housing Acts of the 1960s.<sup>101</sup> These movements were harnessed by President Lyndon B. Johnson and The New Left to pass many of his “Great Society” policies to reduce poverty, fight crime, abolish inequality, and improve the environment.<sup>102</sup>

Cannabis use on college campuses and amongst the middle class across the United States increased to as much as 70% of the population during this decade, reducing cannabis’s popular association with poverty and crime.<sup>103</sup> These factors fostered a growing movement for cannabis regulatory liberalization toward the end of the 1960s, bolstered by the *Leary* decision.<sup>104</sup>

Yet, the decades of reform planted the seeds of a backlash. When those seeds bloomed with the early implementation of the GOP’s “Southern Strategy” in the 1968 election of President Richard Nixon, a “law-and-order” candidate,<sup>105</sup> the new administration moved quickly to nip cannabis liberalization in the bud as a covert way of poisoning the roots of improving racial equality.<sup>106</sup> In response to the *Leary* decision, President Nixon pushed Congress to pass the Comprehensive Drug Abuse Prevention and Control Act in 1970, with Title II, the CSA, provisionally listing the cannabis plant as a Schedule I drug along with

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<sup>100</sup> Patton, *supra* note 19, at 13; Hewitt, *supra* note 19, at 44-45.

<sup>101</sup> Hewitt, *supra* note 19, at 45.

<sup>102</sup> *See id.* at 46.

<sup>103</sup> Patton, *supra* note 19, at 13; *and see* HARDAWAY, *supra* note 32, at 113; Hewitt, *supra* note 19, at 46-47.

<sup>104</sup> HARDAWAY, *supra* note 32, at 113.

<sup>105</sup> Harris & Martin, *supra* note 88; Hewitt, *supra* note 19, at 46-47; Don Gonyea, *How Trump's 'Law And Order' Strategy Differs From Nixon*, NPR (June 7, 2020, 8:01 AM), <https://www.npr.org/2020/06/07/871600378/how-trumps-law-and-order-strategy-differs-from-nixon> [<https://perma.cc/HBM9-4SRM>].

<sup>106</sup> *See* Stephen Siff, “*Why Do You Think They Call It Dope?*”: *Richard Nixon’s National Mass Media Campaign Against Drug Abuse*, 20 JOURNALISM & COMMUNIC’N MONOGRAPHS, 172, 176 (2018) (citing Matthew D. Lassiter, *Impossible Criminals: The Suburban Imperatives in America’s War on Drugs*, 102 J. OF AM. HIST. 126, 134 (2015)); Patton, *supra* note 19 at 16; Parnell, *supra* note 84, at 21-22.

the chemical compounds of drugs like heroin, LSD, and opiates.<sup>107</sup> Schedule I, the most highly restricted designation in the Act, contains substances considered to have a high potential for abuse and no accepted medical use.<sup>108</sup> The Act implemented harsh minimum sentencing requirements and no-knock warrants for Schedule I violations.<sup>109</sup>

Congress created the National Commission on Marihuana and Drug Abuse, led by Pennsylvania governor Raymond Shafer, to “determin[e] the appropriate disposition” of cannabis scheduling under the CSA.<sup>110</sup> In 1972, the “Shafer Commission” published its findings that cannabis was not associated with criminality nor a gateway drug.<sup>111</sup> This conclusion was supported by a similar report from the National Institute of Mental Health in the same year.<sup>112</sup> Yet, the decision to reschedule cannabis was administrative, and President Nixon explicitly used cannabis’ provisional scheduling as “illegal” under the CSA to justify its criminal sanction as one of the “dangerous drugs.”<sup>113</sup> President Nixon ignored the Shafer report and established the foundation for the War on Drugs against “America’s public enemy number one.”<sup>114</sup>

President Nixon’s stated intentions to defend his white, suburban voters resulted in the covert use of cannabis criminalization to disrupt anti-war protests and Black communities.<sup>115</sup> White House Chief of Staff Robert Haldeman wrote in his diary that: “[Nixon] emphasized that you have to face the fact that the whole [drug] problem is really the [B]lacks. The key is to devise a system that recognizes this while not appearing to.”<sup>116</sup> White House Domestic Affairs Advisor John D. Ehrlichman later described the Nixon administration’s justification and approach to cannabis legalization in detail.

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<sup>107</sup> Harris & Martin, *supra* note 88; HARDAWAY, *supra* note 32, at 107; *see generally* Controlled Substances Act, 21 U.S.C. §§ 801-12 (1970).

<sup>108</sup> HARDAWAY, *supra* note 32 at 107; Julia Peoples, *Reconceptualizing Cannabis 3* (Apr. 13, 2021) (Honors thesis, University of Mississippi) (eGrove); Controlled Substances Act, *supra* note 107.

<sup>109</sup> Hewitt, *supra* note 19, at 40, 47; Peoples, *supra* note 108.

<sup>110</sup> Patton, *supra* note 19, at 16-17.

<sup>111</sup> HARDAWAY, *supra* note 32 at 108.

<sup>112</sup> Patton, *supra* note 19 at 17.

<sup>113</sup> *Id.* at 18.

<sup>114</sup> *Id.* at 17.

<sup>115</sup> Siff, *supra* note 106.

<sup>116</sup> Patton, *supra* note 19, at 16.

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.<sup>117</sup>

The CSA created federal criminal penalties for possession of cannabis and, while the federal government could not require the states to enforce federal law, President Nixon successfully pushed the majority of states to adopt the identical Uniform Controlled Substances Act—making cannabis possession a criminal felony under both state and federal law.<sup>118</sup> President Nixon successfully persuaded Congress to merge the Bureau of Narcotics and Dangerous Drugs, the Office for Drug Abuse Law Enforcement, the Office of National Narcotics Intelligence, elements of the U.S. Customs Service that worked in drug trafficking intelligence and investigations, and the Narcotics Advance Research Management Team into the super-sized Drug Enforcement Authority (“DEA”) to consolidate enforcement of federal drug laws.<sup>119</sup> President Nixon also quickly provided substantial amounts of funding<sup>120</sup> and training<sup>121</sup> to state and local law enforcement agencies to enforce state cannabis regulations, primarily amongst communities of color. Federal antipathy towards cannabis intensified through the 1980s and 1990s,<sup>122</sup> resulting in progressively harsher minimum penalties for

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<sup>117</sup> *Id.* at 17; Parnell, *supra* note 84, at 21-22.

<sup>118</sup> HARDAWAY, *supra* note 32, at 107; Patton, *supra* note 19, at 1, 16.

<sup>119</sup> HARDAWAY, *supra* note 32, at 109.

<sup>120</sup> See Robert M. Hardaway, *The Cannabis Strain: Marijuana Prohibition in an Era of Police Defunding*, in STONEOVER: THE OBSERVED LESSONS AND UNANSWERED QUESTIONS OF CANNABIS LEGALIZATION 21, 32-33 (Nikolay Anguelov & Jeffrey Moyer eds., 2022); HARDAWAY, *supra* note 32, at 109; *History of the Program*, U.S. DRUG ENF'T ADMIN. (2018), <https://www.dea.gov/operations/state-and-local-task-forces> [https://perma.cc/N9Q7-DSRW].

<sup>121</sup> *The DEA Years*, U.S. DRUG ENF'T ADMIN. 30, 38 (2018), [https://www.dea.gov/sites/default/files/2021-04/1970-1975\\_p\\_30-39\\_0.pdf](https://www.dea.gov/sites/default/files/2021-04/1970-1975_p_30-39_0.pdf).

<sup>122</sup> Federal legislation increasing cannabis-related criminal penalties during this period included the Comprehensive Crime Control Act of 1984, the Anti-Drug Abuse Act of 1986, and the Anti-Drug Abuse Amendment Act of 1988. See generally MARION & HILL, *supra* note 94, at 23.

cannabis offenses, a significant surge in incarceration rates, and the introduction of civil asset forfeiture laws.<sup>123</sup>

Throughout this period, the United States pushed the United Nations to codify international requirements on drug control regulations within and between nations. Anslinger also led this effort as the U.S. representative to the U.N. Economic and Social Council: Commission on Narcotic Drugs, where he echoed his previous language to Congress, equating drugs with genocide.<sup>124</sup> Beginning in 1946 in Lake Success, New York, the Commission on Narcotic Drugs sought to build on the previous opioid conventions,<sup>125</sup> culminating in the Single Convention on Narcotic Drugs, 1961,<sup>126</sup> as amended by the 1972 Protocol;<sup>127</sup> the Convention on Psychotropic Substances, 1971,<sup>128</sup> and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.<sup>129</sup> These treaties collectively established international control measures to prevent the diversion of scheduled substances to illegal channels and required countries to criminalize the cultivation, production, possession, and trafficking of scheduled substances.<sup>130</sup> The treaties placed cannabis in Schedules I and IV as a substance considered

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<sup>123</sup> Jared Kriwinsky, *Achieving Diversity in the Marijuana Industry: Should States Implement Social Equity into Their Regimes?* (Ohio State Pub. L. Working Paper No. 503, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3452570](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452570) [<https://perma.cc/56FF-GYTH>].

<sup>124</sup> 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, 10-11 (2010).

<sup>125</sup> Robert W. Gregg, *The Single Convention for Narcotic Drugs*, 16 FOOD DRUG COSM. L.J. 187, 189-93, 197 (1961); Lines, *supra* note 124, at 3, 5-6.

<sup>126</sup> Single Convention on Narcotic Drugs of 1961, Mar. 30, 1961, 967 U.N.T.S. 105, [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) [<https://perma.cc/MWJ3-YPTZ>].

<sup>127</sup> Protocol Amending the Single Convention on Narcotic Drugs, Mar. 25, 1972, 976 U.N.T.S. 3 (1972), [https://treaties.un.org/doc/Treaties/1975/08/19750808%2007-44%20PM/Ch\\_VI\\_17p.pdf](https://treaties.un.org/doc/Treaties/1975/08/19750808%2007-44%20PM/Ch_VI_17p.pdf) [<https://perma.cc/J4D4-QBLY>].

<sup>128</sup> Convention on Psychotropic Substances, Feb. 21-Dec. 30, 1971, 1019 U.N.T.S. 175 (1971), [https://www.unodc.org/pdf/convention\\_1971\\_en.pdf](https://www.unodc.org/pdf/convention_1971_en.pdf).

<sup>129</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 493 (1988) [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf).

<sup>130</sup> Amira Armenta & Martin Jelsma, *The UN Drug Control Conventions: A Primer*, TRANSNATIONAL INST. (Oct. 8, 2015), <https://www.tni.org/en/publication/the-un-drug-control-conventions#3> [<https://perma.cc/J2BM-M4ZL>].

among the most addictive and harmful, with “particularly dangerous properties”<sup>131</sup> and no therapeutic usefulness.<sup>132</sup>

## 6. Militarizing the War on Drugs

President Ronald Reagan and George H.W. Bush’s “law and order” focused presidencies reinvigorated the Southern Strategy with its racist implementation inspired by the Nixon Campaign and GOP to offset the Democrats’ growing support amongst minorities throughout the United States.<sup>133</sup> As Reagan’s presidency kicked off, he declared anew the “War on Drugs,” to please his wife<sup>134</sup> as she sought to remake the role of first lady as one beyond just a figurehead.<sup>135</sup> Installing Carlton E. Turner as the first “Drug Czar” (in fact the first “Czar” of any sort in American history), the Reagan administration began a campaign via executive order, sponsored legislation, and extensive public relations work to change what at the time Turner referred to as the American people’s “very liberal view about drug abuse—a view that it is the right of an individual to use a drug,” especially soft drugs like “marijuana... that [were] not a matter to be concerned about.”<sup>136</sup> The resulting public relations spending orchestrated public attention, with the 2% to 6% percent of people reporting drugs as America’s number one problem in

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<sup>131</sup> Single Convention on Narcotic Drugs of 1961, *supra* note 126.

<sup>132</sup> Armenta & Jelsma, *supra* note 130.

<sup>133</sup> Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY UNIV. L. REV. 323-24 (2012); *See generally* MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 8-10 (2005).

<sup>134</sup> Noelle Skodzinski, *Former Reagan Administration Official Calls War on Drugs ‘a Terrible Mistake’*, CANNABIS BUS. TIMES (May 13, 2020), <https://www.cannabisbusinesstimes.com/news/ed-weidenfeld-reagan-war-drugs-phyto-management/> [<https://perma.cc/93F3-W5NC>].

<sup>135</sup> Lotte Berendje Rozemarijn Westhoff, *Ronald Reagan’s War on Drugs: A Policy Failure But a Political Success*, (Aug. 18, 2013) (Master thesis, Leiden University) (<https://studenttheses.universiteitleiden.nl/access/item%3A2607637/view> [<https://perma.cc/HEU2-RNLS>]); *see* Will Dunham, *Nancy Reagan: One of the Most Influential of First Ladies in U.S. History*, CHRISTIAN SCI. MONITOR (Mar. 6, 2016), <https://www.csmonitor.com/USA/Politics/2016/0306/Nancy-Reagan-One-of-the-most-influential-of-first-ladies-in-US-history> [<https://perma.cc/HGS2-ERLG>].

<sup>136</sup> Westhoff, *supra* note 135.

1985 growing to between 38% and 64% in 1989 but crashing to between 8% and 11% in 1991 when that spending slowed.<sup>137</sup>

Federal and state agencies continued to expand their internal and external reach based on Reagan's administrative campaign to change public opinion on marijuana. "Huge cash grants were made to those law enforcement agencies that were willing to make drug-law enforcement a top priority. The new system of control is traceable... to a massive bribe offered to state and local law enforcement by the federal government."<sup>138</sup> States and their local law enforcement branches used the cash grants on new prisons and military hardware.<sup>139</sup> In 1984, this state-federal bureaucratic cooperation empowered asset-forfeiture law changes.<sup>140</sup> A few years later, the U.S. Marshall's Service even proposed its own commercial real estate management unit to handle its accumulating wealth.<sup>141</sup>

The Reagan administration's policies, followed by the Bush and Clinton administrations' expansions, creatively and effectively criminalized drug addiction, including the use of cannabis.<sup>142</sup> Even though Clinton ran on a softer policy towards drug treatment in his presidential campaign, within months of taking office he reversed course at the behest of the then current Drug Czar General Barry McCarey to appear tough on crime.<sup>143</sup> Their escalating legislation

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<sup>137</sup> NAT'L RSCH. COUNCIL, PREVENTING DRUG ABUSE: WHAT DO WE KNOW? 9-10 (Dean R. Gerstein & Lawrence W. Green ed., 1993), <https://nap.nationalacademies.org/catalog/1883/preventing-drug-abuse-what-do-we-know> [<https://perma.cc/MRA7-SDVJ>]; Deena R. Trueblood, Crack as a Moral Panic: The Racial Implications Inherent to Crack and Powder Cocaine Sentencing 11-12 (Jan. 1, 1999) (Master Thesis, UNLV) (<https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1985&context=rtds>) [<https://perma.cc/Y5Q8-4J94>].

<sup>138</sup> MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 72 (rev. paperback ed. 2012).

<sup>139</sup> See generally André Douglas Pond Cummings & Steven A. Ramirez, *The Racist Roots of the War on Drugs & the Myth of Equal Protection for People of Color*, 44 U. ARK. LITTLE ROCK L. REV. 453, 468-67 (2022).

<sup>140</sup> DAVID W. RASMUSSEN & BRUCE L. BENSON, THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS 132 (1994).

<sup>141</sup> CRISTINA JACQUELINE JOHNS, POWER, IDEOLOGY, AND THE WAR ON DRUGS: NOTHING SUCCEEDS LIKE FAILURE 117-18 (1992); see generally RICHARD L. MILLER, DRUG WARRIORS AND THEIR PREY: FROM POLICE POWER TO POLICE STATE 119-22 (1996).

<sup>142</sup> See Cummings & Ramirez, *supra* note 139, at 474-75.

<sup>143</sup> *Id.*

throughout the 1980s and 1990s introduced further criminal innovations such as lowering the age of culpability to thirteen, three-strikes laws ending in life sentences, mandatory minimum sentences that removed judicial discretion, broader death penalty eligibility, and punitive parole restrictions.<sup>144</sup> This resulted in an escalating spiral of arrests and growing prison populations that law enforcement later justified as evidence of the scope of the danger to validate further increasing arrests and prison populations.<sup>145</sup> The ever increasing scope of the War on Drugs and the consequences of enforcement fell disproportionately on minority communities, creating a reinforcing cycle of nondemocratic actions that reinforced the increasing political powerlessness and disenfranchisement of affected populations.<sup>146</sup>

### 7. Modern Cannabis Liberalization

The CSA, related state laws with enforcement funded by the federal government, and compliance with its treaty obligations remain the foundation of federal United States drug law today. But again, governmental apparatus and personal opinions rather than the democratic process pushed drug policy forward. In *Gonzalez v. Raich*, 545 U.S. 1 (2005), the U.S. Supreme Court built on that foundation, giving Congress the power to regulate individual possession of cannabis under Article I's interstate commerce power.<sup>147</sup> Justice John Paul

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<sup>144</sup> *Id.* at 473-75.

<sup>145</sup> 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. 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. See LYNN ZIMMER & JOHN P. MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE 40-41 (1997); Melissa Perlman, *Reefer Blues: Building Social Equity in the Era of Marijuana Legalization*, 24 U.C. DAVIS SOC. JUST. L. REV. 94, 100-01 (2020); ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 12 (2020), [https://www.aclu.org/sites/default/files/field\\_document/marijuanareport\\_032320\\_21.pdf](https://www.aclu.org/sites/default/files/field_document/marijuanareport_032320_21.pdf) [<https://perma.cc/TP6H-CH66>] [hereinafter ACLU REPORT].

<sup>146</sup> Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' Was a 'War on Blacks'?*, 6 J. GENDER & RACE JUST. 381, 386 (2002); Bruce L. Benson et al., *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21, 24, 29 (1995).

<sup>147</sup> Notably, two of the great reaffirmations and expansions of federal congressional power in United States history were rooted in the federal government's justifications of its attempts to regulate cannabis as a tool of enforcement against minority communities. Arguably, *Gonzales* would have had a different outcome if it had been about a backyard tomato garden. *Gonzales*, 545 U.S. at 5-9.



Stevens, a consistent opponent to drug liberalization, penned the majority opinion, with left-leaning judges Sandra Day O'Connor and Chief Justice William Rehnquist dissenting due to their own personal experiences with cancer and end of life care.<sup>148</sup> The Court reasoned that Congress could regulate an entire class of individual *intrastate* commerce activities if the class of activities as a whole had a substantial impact on *interstate* commerce.<sup>149</sup> Unlike the previous Marihuana Tax Act, whose requirements were purely administrative, the *Raich* court upheld the cannabis provisions in the CSA as directly enforceable against individuals by federal law enforcement, expanding the reach of the federal government directly into local communities.<sup>150</sup>

In contrast to the increasingly strict federal approach, a gradual relaxation of state penalties and decriminalization of a few states' cannabis laws for legitimate medicinal use<sup>151</sup> began almost immediately and slowly spread between 1973 and 1990, again demonstrating the lack of public support for draconian drug regulations.<sup>152</sup> This relaxation culminated in the first ballot measures creating state programs for the legal use of medical cannabis in Alaska, California, Maine, Nevada, Oregon, and Washington in the late 1990s.<sup>153</sup> In 2000, Hawaii became the first state to create a legal medical cannabis program through its legislature.<sup>154</sup> To this day, states continue to create medical cannabis programs and decriminalize possession of various amounts of cannabis—as of February 2024, thirty-eight states, three U.S. territories, and the District of Columbia have created legal medical

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<sup>148</sup> In 2014, Justice Stevens gave an interview indicating his evolving position on the issue, stating that cannabis should not be prohibited. Marguerite Arnold, *Former Supreme Court Justice Stevens Speaks Out in Support of Cannabis Legalization*, THESTREET (May 6, 2014), <https://www.thestreet.com/personal-finance/former-supreme-court-justice-stevens-speaks-out-support-cannabis-legali-12785859> [https://perma.cc/BD2U-35WY].

<sup>149</sup> *Gonzales*, 545 U.S. at 17.

<sup>150</sup> *See generally* 1937 Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970); *and* *Gonzales*, 545 U.S. at 28.

<sup>151</sup> *See generally* GRINSPOON & BAKALAR, *supra* note 19, at 18-22.

<sup>152</sup> Robert Mikos, *The Evolving Federal Response to State Marijuana*, 26 WIDENER L. REV. 1, 3 (2020).

<sup>153</sup> National Conference of State Legislatures, *State Medical Cannabis Laws*, NCSL.ORG (updated June 22, 2023), <https://www.ncsl.org/health/state-medical-cannabis-laws> [https://perma.cc/4ZYP-RPQH].

<sup>154</sup> *Id.*

cannabis programs;<sup>155</sup> seven additional states and territories have created limited legal medical cannabis programs for CBD-only medicine;<sup>156</sup> and thirty-two states have passed full or partial decriminalization laws.<sup>157</sup> Additionally, beginning in 2012, Colorado became the first state to implement a non-medical, legalized cannabis market, and with similar programs now adopted by twenty-five states, two U.S. territories, and the District of Columbia, only six states still prohibit access to cannabis in any form.<sup>158</sup>

Despite ongoing state progress in liberalizing their cannabis regulations, federal agencies continue to maintain and fund state enforcement of existing criminal cannabis laws and continued interference in communities of color and poor communities.<sup>159</sup> This persisted until 2009, when the Department of Justice (“DOJ”) and the U.S. Treasury’s Financial Crimes Enforcement Network (“FINCEN”) issued the first<sup>160</sup> in a series<sup>161</sup> of memos, ordering federal law

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<sup>155</sup> National Conference of State Legislatures *supra* note 153; see *Marijuana Legality by State – Updated Mar. 1, 2024*, DISA, <https://disa.com/marijuana-legality-by-state> [<https://perma.cc/UDC3-RKD4>] (last visited Mar. 27, 2024).

<sup>156</sup> National Conference of State Legislatures *supra* note 153; see *Marijuana Legality by State*, *supra* note 155.

<sup>157</sup> National Conference of State Legislatures *supra* note 153; see *Marijuana Legality by State*, *supra* note 155.

<sup>158</sup> National Conference of State Legislatures *supra* note 153; see *Marijuana Legality by State*, *supra* note 155.

<sup>159</sup> Hewitt, *supra* note 19, at 40, 49-50.

<sup>160</sup> The first memo was drafted in 2009 by Deputy Attorney General David W. Ogden under the direction of Attorney General Eric Holder to deprioritize federal enforcement of federal cannabis restrictions against parties operating in compliance with state medical cannabis laws. See Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [<https://perma.cc/Y3HP-DACX>]; Patton, *supra* note 19, at 23, 27.

<sup>161</sup> Additional guidance came from two memos written by Deputy Attorney General James M. Cole and one memo provided by FINCEN. Patton, *supra* note 19, at 24-27. Cole Memo I, in 2011, noted that while enforcement was deprioritized, cannabis cultivation and distribution activities remained illegal and prosecutable under federal law, especially if there was suspicion that the money or cannabis product was making its way outside of activities authorized by state medical cannabis regulations. Cole Memo II, in 2013, further deprioritized federal enforcement actions in states with well-regulated medical cannabis markets unless the enforcement action was to prevent one of eight different activities, such as diversion to minors, interstate transport, or use on federal lands. The FINCEN

enforcement to deprioritize cannabis enforcement in states that chose to create regulated cannabis markets.<sup>162</sup> These memos directed federal agencies to prioritize eight specific areas of cannabis enforcement, including diversion to the illegal market, failure to comply with state laws, and the provision of cannabis to minors.<sup>163</sup> The essence of these memos endured, despite Attorney General Jeff Sessions eventually rescinding them,<sup>164</sup> through the enactment of the 2014 Rohrabacher-Farr amendment.<sup>165</sup> This amendment defunded federal enforcement of cannabis laws against individuals and organizations adhering to their state's cannabis regulations.<sup>166</sup> The DOJ initially misapplied this amendment to reinvigorate federal cannabis enforcement nationwide, but later court decisions forced the DOJ to almost entirely curtail cannabis enforcement in jurisdictions with medical and/or adult-use cannabis laws.<sup>167</sup> The most recent U.S. Attorneys General, William Barr

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Memo, in 2014, detailed rules for how financial institutions could engage with state-authorized medical cannabis businesses. Memorandum for United States Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [hereinafter Cole Memo I]; Memorandum for All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter Cole Memo II]; and Guidance, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014), <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf> [hereinafter FINCEN Memo].

<sup>162</sup> 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, 109-11 (2021).

<sup>163</sup> See Cole Memo I, *supra* note 161; Cole Memo II, *supra* note 161; and FINCEN Memo, *supra* note 161. MARION & HILL, *supra* note 94, at 29-36.

<sup>164</sup> Patton, *supra* note 19, at 26-28.

<sup>165</sup> The amendment has been renewed ever since under various sponsoring names. *Id.* at 1, 28-29.

<sup>166</sup> *Id.*

<sup>167</sup> The DOJ creatively argued that Congress only defunded prosecution or other legal action directly against state governments administering medical cannabis programs and thus the DOJ could continue to prosecute private individuals without interfering with a state's right to create a medical cannabis program. The court was not convinced. *United States v. McIntosh*, 833 F.3d 1163, 1176-77 (9th Cir. 2016); *DEA Internal Directive Regarding the Presence of Cannabinoids in Products and Materials Made from the Cannabis Plant*, U.S. DEP'T OF JUST. DRUG ENF'T ADMIN. DIVERSION CONTROL DIV. (May 22, 2018),

and Merrick Garland, have not deviated from this policy, deferring to Congress on cannabis regulation as a legislative matter.<sup>168</sup> Congress is currently considering various bills to legalize medical and/or adult-use consumption of cannabis at the federal level.<sup>169</sup>

In the final, but no less telling, example of bureaucratic determination of cannabis policy, the DEA uses many tools to protect the activities that justify their annual \$2.6 billion budget.<sup>170</sup> First, from its inception through modern times, the DEA has successfully opposed any actions by the federal government that would reschedule cannabis under the CSA or otherwise reduce the DEA's power or funding for the prosecution of cannabis crimes. Most recently, in 2023, President Joe Biden ordered the executive branch to evaluate the rescheduling of cannabis under the CSA.<sup>171</sup> The U.S. Department of Health and Human Services conducted a medical review of cannabis and recommended rescheduling to the DEA.<sup>172</sup> The DEA then emphasized to Congress that it retains final discretion on the issue based on its own independent review.<sup>173</sup> In past applications of that discretion, DEA administrators

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[https://www.deadiversion.usdoj.gov/schedules/marijuana/dea\\_internal\\_directive\\_cannabinoids\\_05222018.html](https://www.deadiversion.usdoj.gov/schedules/marijuana/dea_internal_directive_cannabinoids_05222018.html) [<https://perma.cc/R2TQ-MKN6>].

<sup>168</sup> Patton, *supra* note 19, at 29-30.

<sup>169</sup> See, e.g., Cannabis Administration and Opportunity Act, S. Cory Booker, Ron Wyden & Chuck Schumer, 117th Cong (2022) (discussion draft); Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2022); Secure and Fair Enforcement Banking Act of 2021, H.R. 1996, 117th Cong (2022).

<sup>170</sup> FY 2024 BUDGET REQUEST AT A GLANCE, DEA (Mar. 8, 2023), [https://www.justice.gov/d9/2023-03/dea\\_bs\\_section\\_ii\\_chapter\\_omb\\_cleared\\_3-8-23.pdf](https://www.justice.gov/d9/2023-03/dea_bs_section_ii_chapter_omb_cleared_3-8-23.pdf) [<https://perma.cc/4NPN-VD3D>].

<sup>171</sup> See Press Release, Joe Biden, President, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/> [<https://perma.cc/EJL7-LQ5A>].

<sup>172</sup> LISA N. SACCO & HASSAN Z. SHEIKH, CONG. RSCH. SERV., IN12240, DEPARTMENT OF HEALTH AND HUMAN SERVICES RECOMMENDATION TO RESCHEDULE MARIJUANA: IMPLICATIONS FOR FEDERAL POLICY (2023).

<sup>173</sup> Kyle Jaeger, *DEA Tells Congress It Has 'Final Authority' on Marijuana, Regardless of Health Agency's Schedule III Recommendation*, MARIJUANA MOMENT (Jan. 3, 2024), <https://www.marijuanamoment.net/dea-tells-congress-it-has-final-authority-on-marijuana-regardless-of-health-agencys-schedule-iii-recommendation/> [<https://perma.cc/V3VB-ZHBS>]; Letter from Michael D. Miller, Acting Chief, Off. of Cong. Aff., Drug Enf't Agency, to Earl Blumenhauer, U.S. Cong. Rep. (Dec. 19, 2023), <https://www.documentcloud.org/documents/24253753-dea-letter-to-blumenauer> [<https://perma.cc/4PP3-US3S>].

have routinely denied petitions to reschedule cannabis—going so far as to unilaterally overrule the findings of a DEA internal administrative law judge on the issue.<sup>174</sup> The DEA has used their decisions on these petitions to evolve the test for scheduling substances under the CSA from the statute’s three explicit elements (potential for abuse, accepted medical use, and safety or dependence) and eight additional criteria<sup>175</sup> to: (1) A new eight-part test for “accepted medical use,”<sup>176</sup> later voided for ambiguity by the United States Court of Appeals for the District of Columbia;<sup>177</sup> (2) A reformed five-part test for “accepted medical use;”<sup>178</sup> (3) Four “concepts” for determining potential abuse;<sup>179</sup> and (4) The previously mentioned test for “safety or dependence” equating effectiveness and safety.<sup>180</sup> Courts grant these formulations *Chevron*

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<sup>174</sup> See, e.g., Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53688 (proposed Aug. 12, 2016) (to be codified at 21 CFR chapter undef); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 76 Fed. Reg. 40552 (proposed July 8, 2011) (to be codified 21 CFR chapter undef); Notice of Denial of Petition, 66 Fed. Reg. 20038 (Apr. 18, 2001); Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499 (Mar. 26, 1992); Drug Enforcement Administration, Marijuana Rescheduling Petition, Docket No. 86-22, Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge, Francis L. Young, Administrative Law Judge, Sep. 6, 1988, <https://files.iowamedicalmarijuana.org/imm/young.pdf> (finding that marijuana should be rescheduled) *overruled by* Marijuana Scheduling Petition; Denial of Petition, 54 Fed. Reg. 53767, Dec. 29, 1989 *aff’d*, *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994).

<sup>175</sup> 21 U.S.C. § 812 (2023).

<sup>176</sup> Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10504 (Mar. 26, 1992).

<sup>177</sup> *Alliance for Cannabis Therapeutics*, 15 F.3d at 1134.

<sup>178</sup> Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10506 (Mar. 26, 1992).

<sup>179</sup> U.S. DEP’T OF JUST. DRUG ENF’T AGENCY, SCHEDULE OF CONTROLLED SUBSTANCES: MAINTAINING MARIJUANA IN SCHEDULE 1 OF THE CONTROLLED SUBSTANCES ACT 6 (2016).

<sup>180</sup> Marijuana Scheduling Petition; Denial of Petition; Remand, 57 Fed. Reg. 10499, 10504 (Mar. 26, 1992); see *United States v. Rutherford*, 442 U.S. 544 (1979).

deference,<sup>181</sup> and the complicated interactions of these tests provide the circular justification for the DEA's refusal to reschedule cannabis.<sup>182</sup>

Second, when asked by Congress to detail how much of their budget is spent on cannabis enforcement or how much of civil asset forfeiture revenues stem from cannabis enforcement, the DEA regularly refuses to disentangle the costs of its enforcement activities regarding cannabis from those regarding other drugs.<sup>183</sup> When requested, the DEA simply refers Congress to the \$17 million dollar Domestic Cannabis and Eradication/Suppression Program, which funds state eradication efforts, as the only cannabis focused enforcement program at the DEA.<sup>184</sup> The DEA does not mention, for example, the portions of the \$290 million dollar DEA High Intensity Drug Trafficking Areas program spent on state marijuana enforcement, whether joint anti-trafficking operations or the National Marijuana Initiative,<sup>185</sup> nor the money spent prosecuting federal cannabis convictions that result from general anti-trafficking operations.<sup>186</sup>

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<sup>181</sup> See, e.g., *Alliance for Cannabis Therapeutics*, 15 F.3d at 1131. Jasen B. Talise, *Take The Gatekeepers To Court: How Marijuana Research Under A Biased Federal Monopoly Obstructs The Science-Based Path To Legalization*, 47 SW. L. REV. 449, 451-55 (2018).

<sup>182</sup> See *Taxation of Marijuana: Hearings*, *supra* note 90; Quattrone, *supra* note 95.

<sup>183</sup> See, e.g., *Mixed Signals: The Administration's Policy on Marijuana, Part 2 Hearing before the H. Subcomm. on Gov't Operations of the Comm. on Oversight of Gov't Reform*, 113th Cong. 113-147 (2014) (testimony of Thomas Harrigan, Deputy Adm'r of the Drug Enf't Admin.) (DEA refusing to disaggregate the data, only referring to the Domestic Cannabis and Eradication/Suppression Program).

<sup>184</sup> See, e.g., *id.*

<sup>185</sup> *High Intensity Drug Trafficking Areas Program*, DEA.GOV, <https://www.dea.gov/operations/hidta> [<https://perma.cc/ZH45-F5YA>] (last visited Feb. 11, 2024); *National Marijuana Initiative*, THENMI.ORG, <https://www.thenmi.org/> [<https://perma.cc/KM72-2AN3>] (last visited Feb. 11, 2024).

<sup>186</sup> See generally OFF. OF NAT'L DRUG CONTROL POL'Y, CONG. BUDGET SUBMISSION, FISCAL YEAR 2024 (2024). The U.S. Sentencing Commission, not the DEA, provides information on the aggregate existence, but not budgetary commitment, of these ongoing prosecutions, which are unrelated to the Domestic Cannabis and Eradication/Suppression Program. See U.S. SENT'G COMM.'N, *WEIGHING THE CHARGES: SIMPLE POSSESSION OF DRUGS IN THE FED. CRIM. JUST. SYS.* (2016) [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609\\_Simple-Possession.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf) [<https://perma.cc/5SZC-RXZ5>]; see, e.g., *27 Indicted As A Result of Massive Marijuana Plant Seizure*, DEA.GOV (Sept. 19, 2012), <https://www.dea.gov/press-releases/2012/09/19/27-indicted-result-massive-marijuana-plant-seizure> [<https://perma.cc/XA7G-D23E>].

Third, the DEA provides extensive funding to state and federal organizations to create and disseminate anti-marijuana educational materials,<sup>187</sup> even though it has had to withdraw some of the materials for misleading statements and factual inaccuracies.<sup>188</sup> Fourth, the DEA engages with local governments and private companies to both explicitly and implicitly discourage interactions with state legal cannabis organizations.<sup>189</sup>

The DEA's reflexive opposition to preserve its own power is mirrored in the opposition of state law enforcement and justice departments that frequently testify against any new relaxations of cannabis regulations.<sup>190</sup> For instance, in Hawaii, the state Attorney

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<sup>187</sup> See, e.g., U.S. DEP'T OF JUSTICE DRUG ENF'T ADMIN, FY 2021 PERFORMANCE BUDGET CONG. BUDGET SUBMISSION, 108 (2021), [https://www.justice.gov/d9/pages/attachments/2020/02/09/fy\\_2021\\_dea\\_cj\\_revised\\_08242021.pdf](https://www.justice.gov/d9/pages/attachments/2020/02/09/fy_2021_dea_cj_revised_08242021.pdf) [<https://perma.cc/24AX-ANB3>].

<sup>188</sup> For instance, the DEA's Demand Reduction Section report "The Dangers and Consequences of Marijuana Abuse," was withdrawn after the DEA issued other statements contradicting its contents. Lisa Rough, *DEA Drops Inaccurate Cannabis Claims from Website*, LEAFLY.COM (Feb. 13, 2017), <https://www.leafly.com/news/politics/dea-drops-inaccurate-cannabis-claims-website> [<https://perma.cc/P955-RQKA>].

<sup>189</sup> See, e.g., *Georgia: DEA Sends Warning Letters to Independent Pharmacies Seeking to Dispense State-Licensed Cannabis Products*, NORML.ORG (Dec. 14, 2023), <https://norml.org/news/2023/12/14/georgia-dea-sends-warning-letters-to-independent-pharmacies-seeking-to-dispense-state-licensed-cannabis-products/> [<https://perma.cc/4FUZ-UXHG>] (explicit warning letters to discourage pharmacies from engaging in state legal activities); *Conflicts Between State and Federal Marijuana Laws, Hearing Before the S. Comm. on the Judiciary*, 113<sup>th</sup> Cong. J-113-28 (2013) (statement of Patrick J. Leahy, Chairman of the Senate Committee on the Judiciary) (implicit discouragement via questions to armored car companies regarding the legality of their activities).

<sup>190</sup> See, e.g., Michael P. Norton, *Pot Camp Fires Back as Sheriffs, Hospitals Oppose Legal Marijuana*, LOWELL SUN (Mar. 15, 2016), <https://www.lowellsun.com/2016/03/15/pot-camp-fires-back-as-sheriffs-hospitals-oppose-legal-marijuana/> [<https://perma.cc/R67F-EZ66>] (Massachusetts Sheriff's opposed legalization); Scott Bohn, *Pa. Police Chiefs: Don't Legalize Marijuana, Consider the Health and Safety Risks First*, GOERIE.COM (Feb. 7, 2022), <https://www.goerie.com/story/opinion/2022/02/08/pa-chiefs-police-legalized-marijuana-poses-health-and-safety-risks/6692920001/> [<https://perma.cc/2N8Y-8W5H>] (Police chiefs oppose legalization in Pennsylvania); see Letter from Sheriff Jeff Easter, Legislative Chair, Kansas Sheriff's Association, to House Federal and State Affairs Committee (Mar. 16, 2022), [https://www.kslegislature.org/li\\_2022/b2021\\_22/committees/ctte\\_s\\_fed\\_st\\_1/documents/testimony/20220318\\_07.pdf](https://www.kslegislature.org/li_2022/b2021_22/committees/ctte_s_fed_st_1/documents/testimony/20220318_07.pdf) [<https://perma.cc/ZH76-9UHA>] (Kansas Sheriffs oppose medical cannabis legislation); Madeleine Valera, *Police Chiefs, Honolulu Mayor*

General was tasked with drafting a recreational cannabis bill. Rather than including criminal justice equity provisions like expungements and resentencing as requested by President Biden, included in most proposed federal cannabis deregulation bills, and touted as a cornerstone reason for the deregulation of cannabis generally, the draft Hawaii bill only recommends taking three years to draft a report on the issue. The draft also perversely includes as a guiding pillar of the legislation “the continuing role of law enforcement” that it honors by creating dozens of new tax investigator, attorney general, and law enforcement positions to enforce the now lower levels of criminalization.<sup>191</sup>

As has been true in much of the rest of the country, Hawaii’s bureaucratic opposition to cannabis regulation does not reflect the long history of majority popular approval for cannabis legalization in the state.<sup>192</sup> This is why, in response to administrative and law enforcement domination of cannabis policy and legislators’ hesitation to move against established bureaucratic interests, state populations have traditionally resorted to ballot measures and other forms of direct democracy to decriminalize, regulate, or legalize cannabis (thirty-four initiatives and counting).<sup>193</sup>

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*And Prosecutor Join Forces Against Legalizing Recreational Weed*, CIVIL BEAT HONOLULU (Feb. 7, 2024), <https://www.civilbeat.org/2024/02/police-chiefs-honolulu-mayor-and-prosecutor-join-forces-against-legalizing-recreational-weed> [<https://perma.cc/TE6R-LHF5>] (Hawaii police chiefs from all counties oppose potential legalization).

<sup>191</sup> See STATE OF HAW. DEP’T OF THE ATT’Y GEN., REPORT REGARDING THE FINAL DRAFT BILL ENTITLED “RELATING TO CANNABIS” 22-23 (2024), <https://ag.hawaii.gov/wp-content/uploads/2024/01/REPORT-REGARDING-THE-FINAL-DRAFT-BILL-ENTITLED-RELATING-TO-CANNABIS-PREPARED-BY-THE-DEPARTMENT-OF-THE-ATTORNEY-GENERAL-dated-January-5-2024.pdf>; Relating to Cannabis, HB2600/SB3335, 32nd Reg. Sess. Haw. (2024).

<sup>192</sup> See, e.g., ACLU of Haw., *Economist Estimates State and Counties Stand to Save or Generate an Estimated \$20 Million Per Year Through Marijuana Legalization*, ACLU.ORG (Jan. 10, 2013), <https://www.aclu.org/press-releases/opinion-poll-hawaii-marijuana-laws-finds-voters-open-legalize-tax-regulate-strategy> [<https://perma.cc/8P7L-XGJ9>]; KITV Web Staff, *Poll: 86% of Adult Hawaii Residents Favor Legalizing Recreational Marijuana*, KITV.COM, [https://www.kitv.com/news/business/poll-86-of-adult-hawaii-residents-favor-legalizing-recreational-marijuana/article\\_e4ae2a70-a1c8-11ed-bf4c-fb0e58d3d885.html](https://www.kitv.com/news/business/poll-86-of-adult-hawaii-residents-favor-legalizing-recreational-marijuana/article_e4ae2a70-a1c8-11ed-bf4c-fb0e58d3d885.html) [<https://perma.cc/KH2H-RGCV>] (last updated Feb. 14, 2023).

<sup>193</sup> *Marijuana Laws and Ballot Measures in the United States*, BALLETOPEDIA.ORG, [https://ballotpedia.org/Marijuana\\_laws\\_and\\_ballot\\_measures\\_in\\_the\\_United\\_States](https://ballotpedia.org/Marijuana_laws_and_ballot_measures_in_the_United_States) [<https://perma.cc/TE7W-G5WU>] (last visited Feb. 11, 2024).



In the end, throughout the history of U.S. drug regulations, “politicians, elected officials, and bureaucrats making the decisions for these component parts often have more self-serving interests in mind as they make policies that affect the administration of justice” to their own benefit.<sup>194</sup> In the case of drug policy specifically, “policy changes have led public opinion” which is considered “generally irrelevant” by decision makers.<sup>195</sup> So, rather than a democratic opposition inspiring the evolutions in U.S. drug policy over time, “the ideological work of the state has been successful in shaping the extent and focus of public concern about particular drugs and the intensity of concern about these drugs at particular times” “to legitimate a vast expansion of domestic state power.”<sup>196</sup>

### **B. The Current Cannabis Social Equity Movement**

The conversation around specific equity policies in the cannabis industry as an implementation to address racial injustice first emerged in relation to the City of Oakland’s (“Oakland”) 2017 program to broadly reserve cannabis dispensary licenses for those with prior cannabis convictions.<sup>197</sup> Oakland developed their novel “cannabis equity program,” as it was dubbed, in response to a report generated by Oakland’s new Department of Race and Equity’s investigation of racial equity in the cannabis industry.<sup>198</sup> Between 2017 and 2019, other California municipalities and a few states swiftly mirrored Oakland’s program with similar industry equity policies to assist those with previous cannabis convictions.<sup>199</sup> These programs acknowledged the

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<sup>194</sup> RASMUSSEN & BENSON, *supra* note 140, at 122.

<sup>195</sup> *Id.* at 119-20.

<sup>196</sup> JOHNS, *supra* note 141, at 58, 89.

<sup>197</sup> Rebecca Brown, *Cannabis Social Equity: An Opportunity for the Revival of Affirmative Action in California*, 3 SOC. JUST. & EQUITY L.J. 205, 235 (2019); Sarah Ravani, *Oakland’s Groundbreaking Cannabis Equity Program Showing Modest Results So Far*, SAN FRANCISCO CHRON. (May 25, 2019), <https://www.sfchronicle.com/bayarea/article/Oakland-s-groundbreaking-cannabis-equity-13895654.php> [<https://perma.cc/V8T7-65QL>]; see *Become an Equity Applicant or Incubator*, CITY OF OAKLAND, <https://www.oaklandca.gov/topics/become-an-equity-applicant-or-incuabtor> [<https://perma.cc/CA3E-Z3AL>] (last visited Nov. 26, 2022).

<sup>198</sup> Ravani, *supra* note 197; Brown, *supra* note 197.

<sup>199</sup> See Adinoff & Reiman, *supra* note 9, at 673; see generally STATE MEDICAL MARIJUANA SOCIAL EQUITY PLAN COMPARISON, in COMMONWEALTH OF MASS. CANNABIS CONTROL COMM’N PUB. MEETING MINUTES (Dec. 11, 2017),

disparate racial impacts of the War on Drugs but explicitly reserved dispensary licenses based on evidence of prior convictions rather than on any race-based classification.<sup>200</sup> Through 2019, the academic and popular literature occasionally used “social equity” as shorthand for the subset of industry equity and criminal justice equity policies supporting the general accessibility of the cannabis industry by direct victims of the War on Drugs, if the term was mentioned at all.<sup>201</sup>

On May 25, 2020, several non-Black Minneapolis police officers, later convicted of murder, killed George Floyd, a Black man, while arresting him for potential counterfeiting.<sup>202</sup> This tragic incident sparked a simmering critique of racial discrimination in police enforcement,<sup>203</sup> leading to nationwide “Black Lives Matter” protests that challenged various systemic manifestations of racial inequity throughout society.<sup>204</sup>

The cannabis industry was uniquely positioned to engage with this dynamic for two reasons. First, it is well established in the public consciousness<sup>205</sup> that criminal enforcement of the War on Drugs has an incredibly racialized history in the United States. Consequently, a movement based on general inequities in police enforcement naturally gravitated towards historically racialized cannabis enforcement as one of the more widespread and explicit manifestations of those racial

<https://masscannabiscontrol.com/wp-content/uploads/2018/01/2017.12.11-Meeting-Minutes-APPROVED.pdf> [<https://perma.cc/CCU8-F9SR>].

<sup>200</sup> Emily Alpert Reyes, *L.A. Aims to Help Disadvantaged Communities Cash in on Marijuana Legalization*, L.A. TIMES (Oct. 20, 2017), <https://www.latimes.com/local/lanow/la-me-ln-marijuana-equity-20171020-story.html> [<https://perma.cc/SK69-M32Q>].

<sup>201</sup> See, e.g., Adinoff & Reiman, *supra* note 9, at 674 (equating business “equity” programs with “restorative justice” as implementations of “social justice.” “Social equity” is merely a label applied to a table of state equity programs and does not appear in the text).

<sup>202</sup> Meredith Deliso, *Timeline: The Impact of George Floyd’s Death in Minneapolis and Beyond*, ABCNEWS (Apr. 21, 2021, 3:35 PM), <https://abcnews.go.com/US/timeline-impact-george-floyds-death-minneapolis/story?id=70999322> [<https://perma.cc/S4LS-56N5>].

<sup>203</sup> See Maquita Peters, *Being Black in America: ‘We Have A Place In This World Too,’* NPR (June 5, 2020, 5:04 AM), <https://www.npr.org/2020/06/05/867060621/being-black-in-america-we-have-a-place-in-this-world-too> [<https://perma.cc/2XUU-QSWS>].

<sup>204</sup> Hardaway, *supra* note 120, at 32-33.

<sup>205</sup> Samuel DeWitt, *Achieving Social Equity in the Cannabis Industry*, 29 DRUG ENF’T AND POL’Y CTR. 1, 2 (2021); *supra* Section II.A.

inequities.<sup>206</sup> Second, the new, legal cannabis industries initiated in Colorado in 2012 and in nine other states by Spring 2020, had matured enough for the public to observe clear racial disparities in the demographics of business ownership within the industry.<sup>207</sup>

As a direct response to the Black Lives Matter protests, a number of states and municipalities implemented policies to address racial inequities, including in their cannabis licensing programs.<sup>208</sup> For instance, Colorado made near immediate changes to its cannabis licensing program with a bill introduced fifteen days after George Floyd's death and signed by the Governor just twenty days later.<sup>209</sup> These changes provided licenses, incentives, and technical assistance to individuals with prior cannabis convictions or those residing in neighborhoods adversely affected by the War on Drugs.<sup>210</sup> Other states and municipalities promptly initiated or expanded their own programs to pardon prior convictions and clear the records of those with cannabis convictions.<sup>211</sup> While governing bodies increasingly cited racial inequality as the impetus for these programs, the programs themselves only operated for those specifically harmed by the War on Drugs. They prioritized those with prior convictions for industry equity programs and focused generally on resentencing and record clearance rather than on

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<sup>206</sup> Seth Richtsmeier, *Seeing Color: An Examination of Racial Injustice in the Cannabis Industry*, CANNABIS CREATIVE (June 17, 2020), <https://cannabiscreative.com/blog/seeing-color-an-examination-of-racial-injustice-in-the-cannabis-industry/> [https://perma.cc/6LWE-2G6H]; DeWitt, *supra* note 205 at 1, 10.

<sup>207</sup> Erik Altieri, *Marijuana Legalization and the Fight for Racial Justice*, NORML (June 1, 2020), <https://norml.org/blog/2020/06/01/marijuana-legalization-and-the-fight-for-racial-justice/> [https://perma.cc/B2V9-GHMK]; see Crime and Justice News, *Racial Justice Protests Help Push Pot Reforms*, CTR. ON MEDIA CRIME & JUST. AT JOHN JAY COLL. (Aug. 7, 2020), <https://thecrimereport.org/2020/08/07/racial-justice-protests-help-push-pot-reforms/> [https://perma.cc/E6F3-4ESJ].

<sup>208</sup> Fertig, *supra* note 10.

<sup>209</sup> Sheppard, *supra* note 7, at 282; 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/BQ4A-CMMN].

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/8RKW-4JZZ]; Sheppard, *supra* note 7 at 282; See Jones, *supra* note 209.

<sup>211</sup> Fertig, *supra* note 10; Danny Reed, *Calls to Defund Police Activity Reach the Cannabis Industry*, MG MAG. (June 19, 2020), <https://mgmagazine.com/business/legal-politics/calls-to-defund-police-activity-reach-the-cannabis-industry/> [https://perma.cc/22FJ-A3YL].

any race-specific implementations.<sup>212</sup> Even as the programs themselves acknowledged the distinction between “social equity” and “social justice,” the language used in the news and academia implicitly and explicitly shifted after 2020.

As originally applied, “social equity” merely described programs meant to provide access to business ownership in the cannabis industry for those previously convicted of cannabis offenses or for those living in areas where cannabis laws were disproportionately enforced.<sup>213</sup> Popular literature explicitly contrasted these industry equity policies with other economic and non-economic policies that would more directly address racial inequities and systemic racial bias in the cannabis industry.<sup>214</sup> For example, in 2021 the Brookings Institute’s argued that the best policies for successful criminal justice reform and racial justice included criminal justice equity and government funded community equity programs.<sup>215</sup> This argument mirrored that of The Center for American Progress which distinguished between industry equity, social justice equity, and community equity programs.<sup>216</sup>

Beginning in 2020 the term “social equity” rapidly broadened in definition and application to subsume each of the more specific, traditional theories of social justice, racial justice, and restorative justice, appropriating policies previously associated with these theories. To give a few examples, High Times began to refer to social equity as

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<sup>212</sup> See, e.g., Jones, *supra* note 209 (Colorado’s new social equity program was justified as a means to oppose racial inequity in the cannabis industry, but its implementation provided for social equity licenses to go to those with prior convictions rather than using race as a selection criterion).

<sup>213</sup> See Ravani, *supra* note 197.

<sup>214</sup> See, e.g., Morgan Sung, *The Legal Cannabis Industry Must Reckon With Systemic Racism*, MASHABLE (July 8, 2020), <https://mashable.com/article/cannabis-weed-systemic-racism-black-lives-matter> [<https://perma.cc/K3LT-QGNJ>] (distinguishing industry equity policies from “legal,” “medical,” and industry-initiated economic solutions to address systemic racism); Fertig, *supra* note 10; Brandon Soderberg, *Concerned About Racial Equity in The Cannabis Industry? Consult the Accountability List*, THE OUTLAW REPORT (June 16, 2020, 4:00 AM), <https://outlawreport.com/cannabis-diversity-accountability/> [<https://perma.cc/XW63-VBZW>] (distinguishing industry equity policies from the need for broader solutions to “racial equity”).

<sup>215</sup> See John Hudak, *Reversing the War on Drugs: A Five-Point Plan*, BROOKINGS (July 7, 2021), <https://www.brookings.edu/research/reversing-the-war-on-drugs-a-five-point-plan/> [<https://perma.cc/6HVR-K49D>].

<sup>216</sup> See Akua Amaning, *The Facts on Marijuana Equity and Decriminalization*, AM. PROGRESS (Apr. 20, 2021), <https://www.americanprogress.org/article/facts-marijuana-equity-decriminalization/> [<https://perma.cc/A9RM-6WDE>].

policies that use tax money from cannabis sales to provide redistributive payments to those affected by the War on Drugs.<sup>217</sup> PEW Research now uses social justice, racial justice, and equity interchangeably to refer to decriminalization, record clearance, and other drug policies.<sup>218</sup> New Frontier Data acknowledged the initial definition of social equity as industry equity policies to redress inequality, but explicitly expanded it to include the “use of marijuana tax revenue to support low and moderate-income neighborhoods,” workforce development, licensing ownership, and entrepreneurship (community equity).<sup>219</sup>

This modern expansion of the definition of social equity is most evident in the language of cannabis legalization advocates who have adopted an inclusive, policy-oriented understanding of the term. According to the Minority Cannabis Business Association, social equity includes industry equity policies, community reinvestment, resentencing and record clearance, and equitable access.<sup>220</sup> The Cannabis Regulators of Color Coalition describe social equity as resentencing and record clearance, protections for medical patients, business ownership policies, and community reinvestment.<sup>221</sup> The National Association of Cannabis Businesses focuses on enforcing

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<sup>217</sup> See Addison Herron-Wheeler, *House of Representatives Plan Vote on MORE Act in December*, HIGH TIMES (Nov. 11, 2020), <https://hightimes.com/news/house-representatives-plan-vote-more-act-december/> [<https://perma.cc/Q3HK-R3JP>].

<sup>218</sup> See Sophie Quinton, *Policing Protests Propel Marijuana Decriminalization Efforts*, PEW STATELINE (July 2, 2020, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/02/policing-protests-propel-marijuana-decriminalization-efforts> [<https://perma.cc/92RU-C3XM>]; and see Sophie Quinton, *Pandemic, Anti-Racism Protests May Boost Marijuana Legalization*, PEW STATELINE (Oct. 29, 2020, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/10/29/pandemic-anti-racism-protests-may-boost-marijuana-legalization> [<https://perma.cc/KP3R-4SQ3>].

<sup>219</sup> See Noah Tomares, *Civil Protests Give Urgency to Cannabis Industry’s Social Equity Programs*, NEW FRONTIER DATA (July 5, 2020), <https://newfrontierdata.com/cannabis-insights/civil-protests-give-urgency-to-cannabis-industrys-social-equity-programs/> [<https://perma.cc/PD4U-7WLR>].

<sup>220</sup> MCBA REPORT 2022, *supra* note 15, at 2.

<sup>221</sup> CANNABIS REGULS. OF COLOR COAL., *Principles* (2020), <https://www.crc-coalition.org/principles> [<https://perma.cc/HR4G-KGFD>].

industry equity policies, resentencing and record clearance, and community reinvestment in its definition of social equity.<sup>222</sup>

Thus, while originally used exclusively to refer to the reservation of dispensary licenses for those with prior convictions, the definition of “social equity” has grown to now include any industry, social justice, community, or access equity policy meant to address elements of the social, cultural, economic, and political consequences of the War on Drugs.

### C. Cannabis Social Equity in the Academic Literature

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

#### 1. Social Equity as a Collection of Policies

By far the most common approach to the theory of cannabis social equity in the academic literature is to ignore the issue. Authors make the implicit assumption that policies labeled as social equity policies are in fact social equity policies before analyzing those policies using their own preferred methods. Alternatively, some authors explicitly note that there is no standard definition of social equity,<sup>223</sup> while others simply cite the general definition of equity used by Massachusetts’ Cannabis Control Commission (one of the first cannabis regulatory bodies to define equity): “Equity is the recognition and accommodation of differences through fairness to prevent the continuation of an inequitable status quo.”<sup>224</sup>

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<sup>222</sup> DISCOVER THE NACB: DRIVING THE CANNABIS INDUSTRY FORWARD THROUGH ACCESSIBILITY AND INDUSTRY CONNECTIVITY, NAT’L ASS’N OF CANNABIS BUS., <https://nacb.com/> [<https://perma.cc/5GQW-K4PY>] (last visited Jan. 24, 2024).

<sup>223</sup> See, e.g., Christopher Nani, *Preface*, UNDERSTANDING SOCIAL EQUITY 3 (Nani, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3622268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622268); Cedric Haynes, *What is Social Equity*, UNDERSTANDING SOCIAL EQUITY 13-15 (Nani, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3622268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622268); Kilmer et al., *supra* note 2, at 1003, 1009.

<sup>224</sup> Benjamin Rajotte, *Cannabusiness Ethics*, 45 S. ILL. U. L.J. 109, 110-13, n13 (2020) (quoting *Equity Programs*, CANNABIS CONTROL COMM’N, <https://mass>

*a. 2019: Early Academic Attention*

One of the first scholars to seriously approach the concept of social equity in the cannabis industry was Christopher Nani who started working on the issue in 2017. He did so at the same time as the implementation of Oakland's social equity program. Nani published an article that provides a system for evaluating the effectiveness of equity policies in January 2019.<sup>225</sup> Frequently cited as a source for the industry equity definition of social equity,<sup>226</sup> this work merely adopts the definition of social equity given by the Massachusetts Cannabis Control Commission, quoted above.<sup>227</sup>

Other works in a variety of contexts in 2019 followed suit, limiting the definition of social equity to industry equity policies. Scholar Rebecca Brown argued that industry equity policies adopted in California should explicitly be used as the social equity tool to achieve racial justice for the harms of the War on Drugs across the country.<sup>228</sup> Scholar Samuel DeWitt also took a broad look at social equity policies implemented by a number of different states, defining social equity as both the outcome of diversity within the cannabis industry itself and the industry equity policies necessary to achieve that outcome.<sup>229</sup> Similarly, in her survey of current legalization regulatory structures, scholar Maya Rahwanji discussed social equity solely in the context of the industry equity policies of the initial wave of equity programs in Oakland, Los Angeles, and Massachusetts, among others.<sup>230</sup> Addressing the cannabis industry and the rights of indigenous peoples, scholars Konstantia Koutouki and Katherine Lofts also described social equity only as

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cannabiscontrol.com/equity/social-equity-program/ (exact webpage is no longer active)); *see, e.g.*, Brown, *supra* note 197 at 205, 207-208; Kerry Cork, *Recreational Marijuana, Tobacco, & the Shifting Prerogatives of Use*, 45 S. ILL. U. L.J. 45, 53 (2020).

<sup>225</sup> Christopher Nani, *Social Equity Assessment Tool for the Cannabis Industry*, DRUG ENF'T AND POL'Y CTR. 1, 4 (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3312114](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312114) [<https://perma.cc/2PDU-D8QU>].

<sup>226</sup> *See, e.g.*, Kilmer et al., *supra* note 2, at 1009, 1009 n.23, 1011; Cork, *supra* note 224; Rajotte, *supra* note 224.

<sup>227</sup> Nani, *supra* note 225.

<sup>228</sup> Brown, *supra* note 197, at 235-36, 246.

<sup>229</sup> DeWitt, *supra* note 205, at 1-2, 6, 8.

<sup>230</sup> Maya Rahwanji, *Hashing out Inequality in the Legal Recreational Cannabis Industry*, 39 NW. J. INT'L. & BUS. 333, 342, 355-56 (2019).

industry equity policies.<sup>231</sup> Even the psychology literature defined social equity as industry equity policies explicitly contrasted with and excluding social justice equity policies.<sup>232</sup>

One outlier article by scholars Bryon Adinoff and Amanda Reiman in the 2019 public health literature did presciently incorporate almost the entire panoply of modern social equity policies (industry, criminal justice, and community equity) into a single policy-based definition, but they still chiefly used the language of social justice and restorative justice rather than social equity.<sup>233</sup>

*b. 2020: Increasing Academic Awareness*

In 2020, the definition of social equity began to vary widely amongst academic authors. Many academic authors continued to delineate industry equity programs from community equity and criminal justice equity policies. However, some authors began to explicitly tie these policies to more general racial harms, not just the specific harms to those with prior cannabis convictions.<sup>234</sup> Scholars Beau Kilmer and Erin Kilmer Neel use social equity to describe both a set of industry equity policies and the desired outcome of those policies to “help communities of color that have been and still are disproportionately affected by prohibition.”<sup>235</sup> Scholar Ben Sheppard analyzes social equity as those industry equity policies adopted by states to promote minority inclusion in the commercial industry.<sup>236</sup> Similarly, scholar Jared Kriwinsky writes about social equity programs as strictly comprised of industry equity policies, separate from both criminal law reform and community reinvestment policies, while both occur simultaneously.<sup>237</sup> Scholar Daniel J. Mallinson, writing for a regulatory audience, addresses social

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<sup>231</sup> 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, 726 (2019).

<sup>232</sup> Candice Bowling & Stanton A. Glantz, *Civic Engagement in California Cannabis Policy Development*, 51(5) J. OF PSYCHOACTIVE DRUGS 391, 396 (2019).

<sup>233</sup> Adinoff & Reiman, *supra* note 9, at 673-74.

<sup>234</sup> See, e.g., Cassia Furman & Kelsey Middleton, *Introduction to Cannabis and Social Equity*, in THE CANNABIS BUSINESS: UNDERSTANDING LAW, FINANCE, AND GOVERNANCE IN AMERICA’S NEWEST INDUSTRY 83, 145-54 (Charles S. Aloviseti & Cassia-Furman, eds., 2020).

<sup>235</sup> Beau Kilmer & Erin Kilmer Neel, *Being Thoughtful About Cannabis Legalization and Social Equity*, 19(2) WORLD PSYCHIATRY 194, 194 (2020).

<sup>236</sup> Sheppard, *supra* note 7, at 282, 295-301, *passim*.

<sup>237</sup> See Kriwinsky, *supra* note 123, at 13-16.



equity in relation to diversity amongst owners and operators in the cannabis industry and the policies addressing ownership imbalances, delineating these policies from their analysis of resentencing and record clearance policies.<sup>238</sup> Even outside the United States, Scholar Peter Yeoh, writing about the future of cannabis legalization in England, notes the complications that state-level, industry equity policies pose for future United States federal legalization and criminal justice equity.<sup>239</sup>

While scholars Mathew Swinburne and Kathleen Hoke describe the harms of the War on Drugs as a social justice issue, they appear to define it using “social equity” as a proper noun to name the industry equity provisions of state laws.<sup>240</sup> They also discuss the use of tax revenue for community reinvestment, but without the invocation of social equity.<sup>241</sup> Their work demonstrates the continued privileging of industry equity as the definition of social equity over other forms of equity. This definition is evidenced by the authors spending approximately five times the amount of space on evaluating industry equity policies compared to community equity policies.<sup>242</sup> Even when applying the developing concept of social equity to non-cannabis initiatives, scholar Mason M. Marks focused chiefly on incorporating industry equity policies into

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<sup>238</sup> Daniel J. Mallinson et al., *The Consequences of Fickle Federal Policy: Administrative Hurdles for State Cannabis Policies*, 52(4) STATE & LOCAL GOV. R. 241, 241-42 (2020).

<sup>239</sup> Peter Yeoh, *Legal Challenges for the Cannabis Industry*, 23(2) J. OF MONEY LAUNDERING CONTROL 327, 329 (2020).

<sup>240</sup> 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, 261 (2020).

<sup>241</sup> *Id.* at 275-78.

<sup>242</sup> *See generally id.*

psilocybin legislation,<sup>243</sup> with only a brief mention of community investment equity.<sup>244</sup>

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<sup>243</sup> The history of psilocybin regulation, research, stigma, enforcement, and legalization efforts roughly parallel that of cannabis. See Matthew W. Johnson et al., *The Abuse Potential of Medical Psilocybin According to the 8 Factors of the Controlled Substances Act*, 142 NEUROPHARMACOLOGY 143, 143-44 (2018). While not as popular an issue or drug as cannabis, Oregon, California, and Colorado (first Denver and then the state) have all legalized or decriminalized psilocybin for recreational use to some extent. Andrew Selzky, *Oregon Launches Legal Psilocybin Access Amid High Demand and Hopes for Improved Mental Health Care*, ASSOC. PRESS (Sep. 15, 2023, 3:54 PM), <https://apnews.com/article/psilocybin-oregon-magic-mushrooms-psychedelics-therapy-legal-6e5389b090b0c50d5c90d9574b63eca5> [<https://perma.cc/M46F-TNEQ>]. Advocates and states have begun to apply the lessons from the push for social equity in the cannabis industry to address the impacts of inequitable enforcement during the War on Drugs and inequitable industry outcomes in the psilocybin industry. See Andrew Kenney, *What to Know About Colorado's Psychedelic Law*, CPR NEWS (Jun. 21, 2023, 4:00 AM), <https://www.cpr.org/2023/06/21/colorado-psychedelic-law-for-psilocybin-mushrooms/> [<https://perma.cc/3dtv-zxxa>]; and OREGON HEALTH AUTHORITY: PUBLIC HEALTH DIVISION CENTER FOR HEALTH PROTECTION: OREGON PSILOCYBIN SERVICES, OPS SOCIAL EQUITY PLAN GUIDANCE AND RESOURCES 1-3 (2024).

Psilocybin is a psychoactive, hallucinogenic substance similar to, but distinct from LSD, ayahuasca, and others. It is the active component in mushrooms or “shrooms.” Johnson et al., *supra* at 144-46. The CSA classifies psilocybin as a Schedule I substance along with cannabis. 21 U.S.C. § 812. While studies mostly focus on its potential use in treating depression, some research points to its value in treating obsessive-compulsive disorder, alcohol use disorder, substance use disorders, smoking cessation, Alzheimer's disease, and eating disorders. Johnson et al., *supra* at 153-56; Madeline Barron, *Psilocybin and Mental Health: The Magic in the Mushrooms*, AM. SOC'Y FOR MICROBIOLOGY (Feb. 10, 2023), <https://asm.org/articles/2023/february/psilocybin-and-mental-health-the-magic-in-the-mush> [<https://perma.cc/4jhj-36jj>]. Similar to cannabis, it has a long history of use, chiefly in South America, as an ingredient in medical and religious rituals predating the arrival of the Spanish. David E. Nichols, *Psilocybin: From Ancient Magic to Modern Medicine*, 73 J. OF ANTIBIOTICS 679, 679-80 (2020). Unlike cannabis (even high-THC cannabis), psilocybin reliably induces sensory-altering psychedelic states. David Wolinsky et al., *The Psychedelic Effects of Cannabis: A Review of the Literature*, 38 J. PSYCHOPHARMACOLOGY 49, 52 (2024). Similar to cannabis, there are manageable risks of potential impairment and continuing psychological effects (confusion, delirium, psychosis, and persistent hallucinations) with few known physiological consequences and a low potential for abuse or addiction. See Kathleen Davis, *Psilocybin (Magic Mushrooms): What It Is, Effects and Risks*, MED. NEWS TODAY (Oct. 31, 2023), <https://www.medicalnewstoday.com/articles/308850> [<https://perma.cc/7krr-melu>]; and Johnson et al., *supra* at 143.

In contrast to the limited industry equity policy definition of social equity, scholar Benjamin Rajotte began the transition to a wider definition by broadly defining social equity in the business context as a response to the harms of the War on Drugs more broadly. Rajotte argued that social equity “is a concept which strengthens the fundamentality of positive multidirectional feedback loops that invest in and grow the power and wellbeing of communities.”<sup>245</sup> Despite this broader language, their definition remained limited to business ownership policies, again quoting the Massachusetts Cannabis Control Commission’s definition of social equity: “recognition and accommodation of differences through fairness to prevent the continuation of an inequitable status quo.”<sup>246</sup> Rajotte contrasts this narrower, policy-oriented definition of social equity in the business context against the procedural and substantive aspects of generalized theories of “social justice” and “environmental justice.”<sup>247</sup> According to Rajotte, these broader theories require procedural participation by affected communities in the decision-making process so that those communities feel the injustices have been addressed, as well as the substantive use of broad definitions of justice to actively identify and oppose specific political manifestations of injustice.<sup>248</sup>

Similarly, scholar Jazmin Mize incorporates traditional theories of justice and notions of procedural participation to expand the definition of social equity to a group of policies—criminal justice, industry, and community equity policies—that function as a specific implementation of reparations. She argues that social equity should involve a broader procedural process for industry equity policies: “identifying areas of impact from drug prosecutions, then designing mechanisms for prioritizing licensing for those who experienced direct or collateral impact from criminalization and prohibition.”<sup>249</sup>

While Rajotte and Mize gesture at an explicit expansion of the definition of social equity, other authors simply began to use the term interchangeably with those broader, participative theories. For instance, scholar Melissa Perlman states that “social equity is about giving people

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<sup>244</sup> Mason M. Marks, *Recent Development: Controlled Substance Regulation for the Covid-19 Mental Health Crisis*, 72 ADMIN L. REV. 649, 682-84 (2020).

<sup>245</sup> Rajotte, *supra* note 224, at 109.

<sup>246</sup> *Id.* at 111 n.13.

<sup>247</sup> *Id.* at 110-12.

<sup>248</sup> *Id.* at 109, 111 n.13.

<sup>249</sup> Jasmin Mize, *Reefer Reparations*, 3 SOC. JUST. & EQUITY L.J. 1, 22 (2020).

of color and the poor the opportunity to become financially empowered through owning their own business, and what it means to be an owner rather than just an employee.”<sup>250</sup> They used this business-policy-oriented definition of social equity interchangeably with social justice and broadened it further to include the restorative justice policies of criminal justice equity as a necessary precondition.<sup>251</sup> They also used social equity as a set of discrete policy considerations as well as a business ownership end-state where the cannabis industry is managed to “minimize racially harmful practices while supporting fair competition.”<sup>252</sup> Similarly, scholars Cassia Furman and Kelsey Middleton follow Perlman’s lead by implicitly defining “social equity” as “cannabis programs that seek to redress the disproportionate impact of the war on drugs on communities of color,” including industry, criminal justice, and community equity policies.<sup>253</sup> Both scholars Katherine Jagers and Deborah Ahrens in separate articles advocate for criminal justice equity policies under a traditional restorative justice framework rather than as social equity.<sup>254</sup> They argue that future decriminalization or legalization at the state or federal level must be tied to retroactive relief from prior criminal penalties as a way to address racial inequity.<sup>255</sup>

In addition to the implicit mixing of the language of social equity and traditional theories of social justice, authors further began to explicitly define social equity to include additional sorts of policies.<sup>256</sup> Scholars Kerry Cork begins with the Massachusetts Cannabis Control Commission’s definition of social equity as industry equity policies, but implicitly includes employment protections and housing protections as

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<sup>250</sup> Perlman, *supra* note 145, at 122.

<sup>251</sup> *Id.* at 112-13, 120-21.

<sup>252</sup> *Id.* at 99.

<sup>253</sup> Furman & Middleton, *supra* note 234, at 151-53.

<sup>254</sup> See generally Katherine Jagers, *Correcting Injustices: Expunging Prior Marijuana Convictions is Kentucky’s Next Best Step Towards Restorative Justice*, 48 N. KY. L. REV. 385 (2021); see also Ahrens, *supra* note 10.

<sup>255</sup> Jagers, *supra* note 254, at 386; Ahrens, *supra* note 10.

<sup>256</sup> For instance, Christopher Nani expanded his 2019 definition of social equity, acknowledging in 2020 that social equity is an amorphous term that does not have an agreed-upon definition. Individuals may use the term to refer to the specific act of earmarking cannabis licenses for social equity applicants, while others may more broadly use it to refer to helping communities and individuals harmed by the War on Drugs. Nani, *supra* note 223, at 3.

additional policies defining social equity.<sup>257</sup> Scholar Daniel G. Orenstein defines social equity as those programs that “provide access to grants, loans, and technical assistance and offer licensure priority or preference to businesses owned by or hiring persons from target communities. These programs justifiably seek to remediate past harms.”<sup>258</sup> Finally, scholar Navin Kumar found that corporations enter the cannabis space in part to mitigate cannabis “inequity,” which they define as providing funding for state-level criminal justice equity initiatives.<sup>259</sup>

Nothing exhibits this shift in language in 2020 more than two articles from outside the United States in 2019 and 2020 which compare U.S. social equity policies with those in New Zealand. In 2019, Scholar Marta Rychert and Chris Wilkins initially discussed the “social problems” of an unequal cannabis industry driven by profit motive.<sup>260</sup> Their language shifted in 2020 as they proposed that New Zealand’s cannabis policies support “social equity” outcomes as defined by United States jurisdictions to include industry and community equity policies.<sup>261</sup>

### *c. 2021: Moving Towards a Consistent Definition*

2021 saw the definition of social equity coalesce around a discreet set of policies promoting industry, social justice, and community equity.<sup>262</sup> Scholar Shaleen Title, in a paper specifically intended to create a comprehensive social equity approach for implementation by state regulators, defines social equity as both the goal of “remedying the injustices of the drug war” and specific industry, criminal justice, and

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<sup>257</sup> Cork, *supra* note 224, at 54-56 (2020).

<sup>258</sup> Orenstein, *supra* note 1, at 69, 71.

<sup>259</sup> Navin Kumar et al., *Understanding Motivations for Large US Cannabis Firms’ Participation in the Cannabis Space: Qualitative Study Exploring Views of Key Decision-Makers*, 39 DRUG & ALCOHOL REV. 347, 352-53 (2020).

<sup>260</sup> Marta Rychert & Chris Wilkins, *A ‘Community Enterprise’ Model for Recreational Cannabis: Lessons from Alcohol Licensing Trusts in New Zealand*, 67 INT’L. J. OF DRUG POL’Y 72, 72 (2019).

<sup>261</sup> *Compare id.*, with Marta Rychert & Chris Wilkins, “You Have to Make Some Money Before You Can Do Some Good”: Balancing the Commercial, Social and Public Health Objectives in a “Community Enterprise” Regulatory Model for Alcohol and Cannabis, 77 INT’L. J. OF DRUG POL’Y 1, 1 (2020).

<sup>262</sup> Even students writing on the topic at this time implicitly defined social equity as state-level business ownership policies, community reinvestment, and resentencing and record clearance. Peoples, *supra* note 108, at 63-64.

community equity policies.<sup>263</sup> Scholars Tilburg et al., describe “social equity” programs as industry and criminal justice equity policies.<sup>264</sup> The Collateral Consequences Resource Center, an organization concerned with criminal justice reform generally, explicitly noted that the concept of social equity in the cannabis industry had grown from industry equity programs to also include criminal justice equity policies.<sup>265</sup> In the *Judges Journal*, authors Katharine Neill Harris and William Martin describe “social equity” as the equitable implementation of both industry and community equity policies.<sup>266</sup> Demonstrating the literature’s convergence towards this policy oriented definition, law students writing during this time used industry, criminal justice, and community equity policies as the implicit definition of cannabis social equity when evaluating specific programs.<sup>267</sup>

Even when acknowledging the lack of a solid definition, writers converged on the same set of policies as a proxy definition. For instance, Scholar Ryan B. Stoa, in evaluating equity policies targeted at agricultural inequities, acknowledges that no given definition of “social equity” exists, noting that “[t]o some, equity means righting the wrongs of the past and, in the case of cannabis, the harms inflicted by the [W]ar on [D]rugs. To others, equity means a forward-facing policy framework that ensures equitable participation and distribution of benefits.”<sup>268</sup> The international literature similarly affirmed this expansion of the definition, with Scholars Peter J. Adams et al. equating by reference the explicit social equity policy approaches of the United States with the industry-initiated “public goods” seen in New Zealand’s cannabis

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<sup>263</sup> Shaleen Title, *Fair and Square: How to Effectively Incorporate Social Equity into Cannabis Laws and Regulations* 3 (Ohio State Legal Stud. Rsch. Paper No. 672, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3978766](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978766) [<https://perma.cc/YGS6-Y36Z>].

<sup>264</sup> Tilburg et al., *supra* note 162, at 110.

<sup>265</sup> David Schlusell, *Marijuana Legalization and Expungement in Early 2021*, COLLATERAL CONSEQUENCES RES. CTR. (May 7, 2021), <https://ccresourcecenter.org/2021/05/07/marijuana-legalization-and-expungement-in-early-2021/> [<https://perma.cc/3JJB-NX7C>].

<sup>266</sup> Harris & Martin, *supra* note 88, at 9, 12.

<sup>267</sup> *See generally* DeWitt, *supra* note 205.

<sup>268</sup> Stoa, *supra* note 1, at 1137.

industry, especially the common goals of economic development, employment, and criminal law reform.<sup>269</sup>

*d. 2022: A Growing Cohort of Policies*

The literature in 2022 appears to have moved away from theorizing about social equity, continuing to implicitly define it solely by referencing the policies so designated—frequently adopting definitions based on whatever policies the law under analysis named “social equity.”

From the state law perspective, scholars André Douglas Pond Cummings & Steven A. Ramirez argue, in the last of a series of articles, for expanding the scope and implementation of Illinois’ social equity provisions (which include industry, criminal justice, and community investment equity provisions) to better “unwind” the consequences of the War on Drugs, a difference in scope, not of kind.<sup>270</sup> Similarly, scholar Natalie Newell references the Illinois program but distinguishes the industry equity provisions as “social equity” apart from the criminal justice and community investment equity elements.<sup>271</sup> Scholar Lauren Devine describes social equity solely as the industry equity provisions in Ohio’s draft law.<sup>272</sup> Scholars J.M. Pedini and Cassidy Crockett-Verba, and scholar Lisa Moran McMurdo, similarly accept Virginia’s definition of social equity as industry equity while addressing resentencing and community investment as independent goals of the legislation.<sup>273</sup> Finally, Jeffrey Moyer reported how social equity

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<sup>269</sup> Peter J. Adams et al., *Policy Influence and the Legalized Cannabis Industry: Learnings from Other Addictive Consumption Industries*, 116 ADDICTION 2939, 2941 (2021).

<sup>270</sup> 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. 793, 796 (2022).

<sup>271</sup> Natalie Newell, *The Illinois Cannabis Social Equity Program: Where It Went Wrong and How It Can Be Fixed*, 97 CHI.-KENT L. REV. 601, 615 (2022).

<sup>272</sup> Lauren Devine, *The Ethics and Economics of Social Equity in the Cannabis Industry: Making a “Compelling” Case for Constitutional, Impactful, and Sustainable Inclusivity Programs in Ohio and Beyond*, 47 U. DAYTON L. REV. 341, 342-44 (2022).

<sup>273</sup> J.M. Pedini & Cassidy Crockett-Verba, *First in the South: Cannabis Legalization in Virginia*, 25 RICH. PUB. INT. L. REV. 143, 155 (2022); Lisa Moran McMurdo et al., *Judicial and Legislative Updates: Cannabis Law*, 57 U. RICH. L. REV. 9, 31-32 (2022).

implementation in Massachusetts had morphed since 2018 to include industry, criminal justice, and community equity policies.<sup>274</sup>

From the federal law perspective, scholars Lauren Williams and Samuel D. Hodge, Jr. simply adopted the definition of social equity from the federal Marijuana Opportunity Reinvestment and Expungement Act (“MORE Act”). The MORE Act includes a disparate collection of social equity policies, such as, funding a trust fund to support individuals and businesses impacted by the War on Drugs (industry equity), prohibiting the denial of federal public benefits on the basis of cannabis use or conviction (access equity), prohibiting the denial of benefits and protections under immigration law on the basis of a cannabis-related event (access equity), and establishing an expungement and rehearing process (social justice equity).<sup>275</sup>

These definitions led to a trend in the more general cannabis equity literature of implicitly limiting the definition of social equity to just industry equity policies, with several authors referring solely to industry equity provisions as social equity while separately describing social justice and community investment equity policies.<sup>276</sup> However, none of these authors presented a theory for the distinction, continuing to intermix traditional social justice terms with descriptions of equity policies as they addressed the broader federalism issues of legalization posed by industry equity provisions.<sup>277</sup>

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<sup>274</sup> See Jeffrey Moyer, *Implementing Social Equity: Opportunities and Challenges from Marijuana Legalization in Massachusetts*, STONEOVER: THE OBSERVED LESSONS AND UNANSWERED QUESTIONS OF CANNABIS LEGALIZATION 83, 103 (Nikolay Anguelov & Jeffrey Moyer eds., 2022).

<sup>275</sup> See Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2022).

<sup>276</sup> Scott Bloomberg & Robert A. Mikos, *Legalization Without Disruption: Why Congress Should Let States Restrict Interstate Commerce in Marijuana*, 49 PEPP. L. REV. 839, 844, 851-52 (2022).

<sup>277</sup> See, e.g., *id.* at 851-52 (referring solely to industry equity policies as social equity while arguing that all social justice provisions violate the Dormant Commerce Clause); H. Justin Pace, *Convergence and Divergence of Alcohol and Marijuana Regulation in a Federalist System*, 46 SETON HALL LEGIS. J. 623, 639-642 (2022) (describing the industry equity provisions of several states as “social equity” before separately discussing criminal justice and community investment equity while contrasting the federalism issues raised by cannabis and alcohol legalization); Scott Bloomberg, *Frenemy Federalism*, 56 U. RICH. L. REV. 367, 375-76 (2022) (addressing only industry equity provisions as social equity to discuss the preemption issues between state and federal regulations).



While a few noteworthy exceptions exist, they merely add policies to the definitions of the various equities, rather than theorizing about social equity. For example, scholar Charisa Smith argued for access equity issues related to family law. She theorized a reframing of social equity to include industry equity, social justice equity, reparations as a form of community investment equity, and family law protections as an element of access equity.<sup>278</sup> Scholar Richard Spradlin argues for environmental justice policies as a target of community investment equity programs.<sup>279</sup> Scholar Kerry Cork argued for rational employment policies as a form of access equity to benefit both the industry and adversely affected communities.<sup>280</sup> Finally, scholar Daniel G. Orenstein addressed the access equity issue of smoking in minority communities in public housing and argued against problematic enforcement via criminal consequences or eviction.<sup>281</sup>

Even when authors do include more general theorizing about the definition of social equity, they often merely associate social equity policies with implementation of reparations or anti-racism.<sup>282</sup> For example, scholar Amber Baylor described social equity (industry equity only) as a form of reparations, in addition to the direct reparations Evanston, Illinois paid to residents. Scholar Baylor applied the traditional reparations theory that requires an explicit acknowledgment of harm prior to investigation and compensation.<sup>283</sup> As referenced above, scholars André Cummings and Steven Ramirez completed a series of articles advocating for an expansion of social equity (industry, criminal justice, and community investment equity) as an implementation of the theory of anti-racism. However, the articles only mention anti-racism in the introduction and provide no general theory of anti-racism in which to ground their calls for expanding social equity policies.<sup>284</sup> Finally, as referenced above, scholar Jeffery Moyer used the definition of social equity provided by Massachusetts but acknowledged

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<sup>278</sup> Smith, *supra* note 13, at 574-75.

<sup>279</sup> Spradlin, *supra* note 13.

<sup>280</sup> Kerry Cork, *Marijuana Use by Employees: Drug-Free Policies and the Changing Legal Landscape*, 49 FORDHAM URB. L. J. 593, 614-15 (2022).

<sup>281</sup> Orenstein, *supra* note 13, at 475, 488-90, 497-99, 509.

<sup>282</sup> André Douglas Pond Cummings & Steven A. Ramirez, *Roadmap for Anti-Racism: First Unwind the War on Drugs Now*, 96 TUL. L. REV. 469, 490-492 (2022).

<sup>283</sup> Amber Baylor, *Criminalized Students, Reparations, and the Limits of Prospective Reform*, 99 WASH. U. L. REV. 1229, 1231 (2022).

<sup>284</sup> Cummings & Ramirez, *supra* note 282; Cummings & Ramirez, *supra* note 139.

the difficulty in defining the term. Moyer generally referred to social equity as the end state pursued by racial justice initiatives that seek to ensure that cannabis legalization benefits communities targeted by criminalization by providing economic opportunities for those with prior cannabis arrest records.<sup>285</sup> These theories, which merely associate cannabis social equity with ideas of reparations or anti-racism, do an injustice to both the breadth of potential social equity solutions and the scope of the reparations needed to effectively address racial equality.

Thus, while remaining inconsistent, the definition of social equity has grown to encompass some combination of industry, criminal justice, community investment, and access policies.

*e. 2023: The Modern Definition*

2023 saw a similar lack of explicit theorizing, with authors continuing to define social equity as a series of policies, either adopting a legislature's definition of social equity or implicitly addressing different policies as social equity.

For example, scholars M. Logan Blake and Alexander Stewart independently adopt their respective state's named social equity provisions as their definition, including industry, criminal justice, and community investment equity.<sup>286</sup> Similarly, scholars Emily O'Brien and Sierra Horton each adopt the federal Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act") and the Cannabis Administration and Opportunities Act's ("CAOA Act") definitions, which include elements of industry (business development funds), social justice (expungement and resentencing), and access equity (federal and immigration benefits protections).<sup>287</sup> Scholars continued to associate traditional frameworks of "equity and justice" and "racial equity" with the policy-based definitions of social equity.<sup>288</sup>

While not a full theory, scholars William Garriott and Jose Garcia-Fuerte go a half-step further by providing the end goal of cannabis social

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<sup>285</sup> See Moyer, *supra* note 274.

<sup>286</sup> See generally M. Logan Blake, *Greened Out: Improving Virginia's Recreational Marijuana Legislation*, 17 LIBERTY U. L. REV. 237 (2023); Alexander M. Stewart, *O-High-O: A Policy Note on Ohio's Current Push for Recreational Marijuana Legislation and How Other States Have Created Successful Recreational Marijuana Laws*, 71 CLEV. ST. L. REV. ET CETERA 1 (2023).

<sup>287</sup> See O'Brien, *supra* note 13, at 125, 148-49; Sierra Taylor Horton, *Big Bills are a Bust: Why Piecemeal Legislation is the Way to Go for Federal Cannabis Reform*, 16 ALB. GOV'T. L. REV. 134, 146-47 (2023).

<sup>288</sup> O'Brien, *supra* note 13, at 148; Bender, *supra* note 13.

equity: to remedy “the underrepresentation of people and communities of color in the legal industry, and the overrepresentation of the very same people and communities in the criminal justice system because of prohibition.”<sup>289</sup> Scholar Ryan Stoa echoed these goals when he stated that there is no definition of “equity” in the cannabis industry, although the goals of purported social equity policies likely include both correcting past harms and ensuring future equitable distributions.<sup>290</sup>

Stoa and scholar Steven Bender illustrate the ongoing linguistic confusion, with Bender arguing that “social equity” is just a way to avoid the racist undertones of “racial equity”<sup>291</sup> while Stoa merely refers to “equity” rather than “social equity” throughout their work.<sup>292</sup>

Still, in two of the most on-point articles from 2023, Garriott and Garcia-Fuerte, and Bender, explicitly describe social equity as industry, criminal justice, and community investment equity policies.<sup>293</sup> This broader definition of social equity as a set of policies now appears to be the definition of choice in the vacuum left by the lack of a formal, theoretical definition of the term.<sup>294</sup>

## 2. Early Attempts to Theorize About Cannabis Social Equity

Despite the generally haphazard development of the definition of cannabis social equity, some authors have tried to gesture at a theoretical definition of social equity in the cannabis industry. Still, they often end up with the same policy-based definitions as discussed above. For instance, in the Boston University Law Review, scholars Beau Kilmer et al. explicitly acknowledge that as of 2021, there is both a narrow and umbrella definition of social equity.<sup>295</sup> Their article chooses to apply the umbrella definition, building a definition of equity as the pursuit of policy outcomes “accounting for different starting points and the unique needs of different populations as a result of long-standing systemic and legislated barriers to opportunities to access those resources.”<sup>296</sup> They draw on a general definition of equity from a racial equity advocacy group as “fairness and justice and focuse[d] on outcomes that are most

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<sup>289</sup> Garriott & Garcia-Fuerte, *supra* note 16, at 133.

<sup>290</sup> Stoa, *supra* note 13, at 1085-90.

<sup>291</sup> Bender, *supra* note 13, at 236 n.63.

<sup>292</sup> See generally Stoa, *supra* note 1, at 101, 103; Stoa, *supra* note 13.

<sup>293</sup> Garriott & Garcia-Fuerte, *supra* note 16, at 132.

<sup>294</sup> Bender, *supra* note 13, at 236 n.63; Garriott & Garcia-Fuerte, *supra* note 16, at 132.

<sup>295</sup> Kilmer et al., *supra* note 2, at 1009.

<sup>296</sup> *Id.*

appropriate for a given group, recognizing different challenges, needs, and histories,” and an ancillary definition of “health equity” from the British Columbia Centre for Disease Control as “when everyone has a fair opportunity to achieve their full health potential without social, economic, or environmental barriers.”<sup>297</sup> Beau Kilmer et al. combine these definitions to compare the outcome-based nature of equity with the concept of equality, which “generally focuses on ensuring that everyone has access to the same resources.”<sup>298</sup> They conclude their umbrella definition of social equity with the now familiar list of cannabis social equity policies “[addressing] arrests and penalties... previous cannabis offenses, licensing preferences, diversity in the cannabis workforce, government revenues, and health.”<sup>299</sup> Thus, Kilmer et al. began to gesture at a theoretical definition of social equity in the cannabis industry but end up with the same policy-based definitions as discussed above.

Another example of social equity theorizing that simply reflects policy-based definitions comes from an edited work by Christopher Nani which collected comments on social equity from several industry participants. Author Cedric Haynes, the Director of Public Policy and Partnerships at Weedmaps, explicitly attempts to define social equity from scratch, starting with Google’s version of the Oxford English Dictionary, “the quality of being fair and impartial” and “the value of the shares issued by a company,”<sup>300</sup> yet simply ends with the City of Los

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Haynes, *supra* note 223, at 13-15. As detailed further in Section III, the choice of this version of the definition of equity further emphasizes the thinness of the concept of social equity in the cannabis industry as mere end state proportionality versus the more robust theories of equity as a theoretical tool in pursuit of broader justice. Neither definition is found in the official OXFORD ENGLISH DICTIONARY (2nd ed. 1989) or its updates through 2023 which focus on equity as an implementation of justice (“1. The quality of being equal or fair; fairness, impartiality; evenhanded dealing. ... 2. What is fair and right; something that is fair and right. ... 3. The recourse to general principles of justice to correct or supplement the provisions of the law.”).

Rather, these definitions come from Google which appears to pull them from the OXFORD DICTIONARY OF ENGLISH (Angus Stevenson, ed., 3rd ed. 2015). That dictionary changed the 2003 OXFORD AMERICAN DICTIONARY AND THESAURUS (2003) justice oriented definition of equity from “fairness” and “the application of the principles of justice to correct or supplement the law” to merely the “quality of being fair and impartial.” This new definition relegated any connection to justice as just “a branch of law that developed alongside common law and is

Angeles' version which describes social equity as the promotion of "equitable ownership and employment opportunities in the commercial cannabis industry to decrease disparities in life outcomes for marginalized communities and to address disproportionate impacts of past cannabis enforcement in those communities."<sup>301</sup> Similarly, author Eli McVey, Research Editor for Marijuana Business Daily, restricts the definition of social equity to industry equity policies but argues for a broader definition that provides industry equity proportionally to all demographics.<sup>302</sup>

A few scholars have made more concrete steps in proposing broader theories in which to ground cannabis social equity. Writing from the public health field, scholars Melissa Bone and Toby Seddon deploy a human rights perspective to argue for health equity through medical cannabis use. Their findings indicate how community involvement in the recommendation and use of medical cannabis can offer social, physical, mental, and emotional support for complex health issues.<sup>303</sup> Bone and Seddon argue that this kind of support is stronger than the traditional pharmacy model alone, especially in contrast to outright prohibition.<sup>304</sup>

Consider also author Daryl K. Henderson, a management consultant, who argued in *New Cannabis Ventures* that diversity, equity, and inclusion initiatives from the employment law context should be the governing framework for implementing social equity, though limited to industry equity. Henderson uses this framework to argue for an industry-led approach to social equity, with cannabis businesses taking responsibility for employee diversity and ownership structures.<sup>305</sup>

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concerned with fairness and justice" rather than defining equity as an element of justice itself. OXFORD DICTIONARY OF ENGLISH (Angus Stevenson, ed., 3rd ed. 2015).

<sup>301</sup> AMEC FOSTER WHEELER ENV'T & INFRASTRUCTURE, INC., CANNABIS SOCIAL EQUITY ANALYSIS REPORT (2017), <https://static.business.ca.gov/wp-content/uploads/2021/07/Cannabis-Equity-Grants-Program-for-Local-Jurisdictions-Annual-Report-to-the-Legislature-7-1-2021v2.pdf> [<https://perma.cc/QG7L-W3GU>].

<sup>302</sup> Eli McVey, *Residency*, UNDERSTANDING SOCIAL EQUITY 40 (Nani, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3622268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622268).

<sup>303</sup> See Melissa Bone & Toby Seddon, *Human Rights, Public Health and Medicinal Cannabis Use*, 26 CRITICAL PUB. HEALTH 51, 51-54, 57 (2016).

<sup>304</sup> See *id.*

<sup>305</sup> See Darryl K. Henderson, *Why the Cannabis Industry Should Embrace Diversity Equity and Inclusion*, NEW CANNABIS VENTURES (Mar. 24, 2019)

However, scholars Marty Otañez and David Vergara argue that a corporate social responsibility framework such as Henderson's cannot be implemented effectively by individual corporations or legislatures nor easily distinguished from mere marketing schemes as long as the industry remains generally unaccountable due to its hyper-localized nature and the consequences of federal legalization.<sup>306</sup>

While not necessarily a theory of social equity, scholar Christopher Nani's first article in 2019 does provide a framework for understanding the success of an industry equity program. He recommends evaluating the accessibility of a state's industry equity program and a state's additional equity policies, such as educational services and community equity policies, providing an overall social equity score.<sup>307</sup> However, this score is heavily weighted towards industry equity and efficiency in achieving that goal, comparatively undervaluing community reinvestment and ignoring almost entirely policies for resentencing and record clearance.<sup>308</sup>

Scholars Zara Snapp and Jorge Herrera Valderrábano provide what is likely the most complete theoretical framework to date by which to evaluate successful cannabis social equity policies as solutions to the unintended harms of cannabis prohibition as identified by the United Nations Office on Drugs and Crime.<sup>309</sup> They state:

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<https://www.newcannabisventures.com/why-the-cannabis-industry-should-embrace-diversity-equity-and-inclusion/> [<https://perma.cc/XQV7-UD3Y>].

<sup>306</sup> See Marty Otañez & David Vergara, *Cannabis Corporate Social Responsibility: A Critical and Mixed-Method Approach*, in *THE ROUTLEDGE HANDBOOK OF POST-PROHIBITION CANNABIS RESEARCH* 183, 183-88 (Dominic Corva & Joshua Meisel eds., 2021).

<sup>307</sup> Nani, *supra* note 225.

<sup>308</sup> See *id.*

<sup>309</sup> The United Nations Office on Drugs and Crime identified several unintended consequences of international cannabis prohibitions.

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

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

1. Actively recognizes the oppression and privilege dynamics, by understanding and confronting structural conditions;
2. Recognizes the existence of historically vulnerable groups and actively creates benefits during the production, processing and selling process for people who used to cultivate illegally, have been arrested for crimes related to drugs, or are from communities with high rates of violence;
3. Generates affirmative and retributive actions to level the balance of justice, by drafting and implementing equity programs for specific social groups; and
4. Channels resources to repair the harms caused by prohibition.<sup>310</sup>

Couched as a theory of social justice, this framework provides some goals and tools for an effective social equity program. However, when the authors applied this broad framework to evaluate current cannabis equity programs in the U.S., Canada, and Uruguay, they limited their analysis to the same set of industry, criminal justice, and community equity programs as the previous policy-based social equity theories.<sup>311</sup>

At least two works used social equity as historically defined in the field of public administration since the 1970s.<sup>312</sup> In 2020, scholars Christopher Nani included a piece in his edited work written by author Richard Ng, a social equity consultant who describes how the historic use of the term has evolved into many different definitions of social equity.<sup>313</sup> Ng then drafts his own narrow prescription for industry equity policies couched in the language provided by public administration's theories of social equity.<sup>314</sup>

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U.N. OFF. ON DRUGS & CRIME, 2008 WORLD DRUG REPORT, U.N. Sales No. E.08.XI.1 21 (2008), [https://www.unodc.org/documents/wdr/WDR\\_2008/WDR\\_2008\\_eng\\_web.pdf](https://www.unodc.org/documents/wdr/WDR_2008/WDR_2008_eng_web.pdf) [<https://perma.cc/2K7A-7XS5>].

<sup>310</sup> Zara Snapp & Jorge Herrera Valderrábano, *Regulating Cannabis in Uruguay, the United States, and Canada: Is a Social Justice Framework Possible?*, RESEARCH HANDBOOK ON INTERNATIONAL DRUG POLICY 302 (David R. Bewley-Taylor & Khalid Tinasti eds., 2020).

<sup>311</sup> See generally *id.*

<sup>312</sup> See Richard Ng, *What Is Social Equity*, UNDERSTANDING SOCIAL EQUITY 17 (Nani, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3622268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622268); and see Nicole Huberfeld, *Health Equity, Federalism, and Cannabis Policy*, 101 B.U. L. REV. 897, 902, 905, 912 (2021) (describing the same evolution of the term).

<sup>313</sup> Nani, *supra* note 223, at 3.

<sup>314</sup> *Id.*

While still limiting their analysis to the effect of industry equity policies, scholars Alfred Lee Hannah et al., did dive deeper into social equity as one of the four pillars of public administration: “effective, efficient, economical, and equitable management of public services.”<sup>315</sup> Tracing the genesis of social equity and its addition as the fourth pillar of public administration back to the 1968 Minnowbrook Conference,<sup>316</sup> Alfred Lee Hannah et al. recount the definition of social equity as currently conceptualized in the field of public administration: administrative activities governed by “procedural fairness, access, quality, and outcome” to achieve “fair treatment, justice, and equitable distribution of goods and services.”<sup>317</sup>

Alfred Lee Hannah et al used two of the four principles, efficiency and equity, from this historical framework to evaluate the implementation of a business ownership equity policy by Pennsylvania’s medical cannabis program.<sup>318</sup> Their research shows how the Pennsylvania program privileged the effectiveness of the resulting industry over equity concerns in the initial evaluation of licensed business owners, with the balance between those two metrics gradually shifting somewhat towards equity over time.<sup>319</sup> However, their application is purely descriptive of the impacts of the program and possible contributing factors. It does not use the theories from the field of public administration to evaluate the merit of industry equity policies nor imagine new solutions to the discrepancy in equity they identify.<sup>320</sup>

Even as it sits on the front lines of the public administration of cannabis programs, the Cannabis Regulators Association (which brings

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<sup>315</sup> Alfred Lee Hannah et al., *Maximizing Social Equity as A Pillar of Public Administration: An Examination of Cannabis Dispensary Licensing in Pennsylvania*, PUB. ADMIN. REV. 144, 145 (2022).

<sup>316</sup> See *infra* Section III.A. The 1968 Minnowbrook Conference was the first academic conference regarding social equity in the field of public administration. It spawned an academic and practical movement that led to the addition of “social equity” as the “fourth pillar” of public administration, along with effectiveness, efficiency, and economy. Rosemary O’Leary, *The Future of Public Administration around the World: The Minnowbrook Perspective*, ESADÉ, ESADÉ RAMON LLULL UNIV. (May 10, 2011), <https://esadepublic.esade.edu/posts/post/the-future-of-public-administration-around-the-world-the-minnowbrook-perspective> [<https://perma.cc/HDQ8-4G3W>].

<sup>317</sup> Hannah et al., *supra* note 315, at 146; see *infra* Section IV.

<sup>318</sup> Hannah et al., *supra* note 315, at 148.

<sup>319</sup> *Id.* at 157-158.

<sup>320</sup> *Id.* at 144.



together regulators from a majority of states with cannabis programs) has no formal recommendations for the successful pursuit of equity in the administration of cannabis laws.<sup>321</sup> The inability of the very administrators of cannabis social equity programs to provide clear policy guidance or organizing principle only highlights the inconsistencies in definition and approach to social equity taken by scholars and state legislatures alike in recommending and creating these programs.

This historiography shows how the definition of “social equity” has expanded to include a large, but discrete, set of policies, while simultaneously losing the procedural tools and theoretical basis of the various theories of justice that the definition supplanted. Without those tools, states tend to implement blunt, facially unconstitutional equity by fiat,<sup>322</sup> rather than working with affected populations to identify, confront, and rectify the harms of the War on Drugs.<sup>323</sup> This approach is incapable of imagining new solutions for real, structural, significant, and ongoing harms, especially when current cannabis social equity policies do not live up to their reputation.<sup>324</sup>

### III. DEVELOPING A NEW THEORY OF CANNABIS SOCIAL EQUITY

Ideas of “social equity” in the administration of government programs are new only to the cannabis industry. Historically, scholars initially based the modern theory of social equity in social contract theory and John Rawl’s theory of justice to facilitate implementation of the Civil and Voting Rights Acts of the 1960s.<sup>325</sup> The public administration literature developed the theory over the last fifty years such that social equity now joins efficiency, economy, and effectiveness to comprise the four key pillars of public administration according to

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<sup>321</sup> See generally, THE CANNABIS REGULATORS ASSOCIATION, Cann-RA.Org, <https://www.cann-ra.org> (last visited Dec. 10, 2022) [<https://perma.cc/3FBP-C2VW>].

<sup>322</sup> CHARLES S. ALOVISETTI & CASSIA FURMAN, THE CANNABIS BUSINESS: UNDERSTANDING LAW, FINANCE, AND GOVERNANCE IN AMERICA’S NEWEST INDUSTRY 148-51 (2020).

<sup>323</sup> Rajotte, *supra* note 224, at 109; Furman & Middleton, *supra* note 234.

<sup>324</sup> See, e.g., Snapp & Valderrábano, *supra* note 310, at 305; MCBA REPORT 2022, *supra* note 15, at 1-4.

<sup>325</sup> Guy & McCandless, *supra* note 6, at S8.

the National Academy of Public Administrators (“NAPA”).<sup>326</sup> In contrast to the exclusively policy-based definitions of cannabis social equity detailed earlier,<sup>327</sup> or the modern individualized definition of equity detailed by the Biden administration,<sup>328</sup> traditionally, social equity is “a habit of mind for the decision maker, [] it is an administrative goal that can be measured[,] [i]t is also a lens through which needs are identified and processes are grounded.”<sup>329</sup> In other words, social equity is a “balance between philosophy and praxis”—a rubric for how to identify inequities and devise, evaluate, and iterate policies to address those inequities.<sup>330</sup> It is not a set of predetermined policies.

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

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<sup>326</sup> See NAT’L ACAD. OF PUB. ADMIN., STANDING PANEL ON SOCIAL EQUALITY, ISSUE PAPER AND WORK PLAN 10, at 10 (Oct. 2000, amend. Nov. 2000), [https://web.archive.org/web/20041204060955/http://www.napawash.org/aa\\_social\\_equity/papers\\_publications\\_01.pdf](https://web.archive.org/web/20041204060955/http://www.napawash.org/aa_social_equity/papers_publications_01.pdf) [<https://perma.cc/5MZ2-N3XM>] (defining social equity as: “The fair, just and equitable management of all institutions serving the public directly or by contract, and the fair, just and equitable distribution of public services, and implementation of public policy.”); Nat’l Acad. of Pub. Admins., *Roundtable on Social Equity*, NAPAWASH.ORG (June 29, 2020), <https://napawash.org/grand-challenges-blog/roundtable-on-social-equity> [<https://perma.cc/GS9U-DRYD>] (stating that the National Academy of Public Administrators adopted social equity as the “fourth pillar” of public administration alongside economy, efficiency, and effectiveness in its 2005 Strategic plan as defined by the Standing Panel on Social Equity in Governance in 2000). See NAPA, STRATEGIC PLAN 7 (2005), [https://web.archive.org/web/20051229081935/http://www.napawash.org/about\\_academy/StrategicPlan2005.pdf](https://web.archive.org/web/20051229081935/http://www.napawash.org/about_academy/StrategicPlan2005.pdf); and see Nat’l Acad. of Pub. Admin., Standing Panel on Social Equality, Issue Paper and Work Plan 10, at 10 (Oct. 2000, amend. Nov. 2000), [https://web.archive.org/web/20041204060955/http://www.napawash.org/aa\\_social\\_equity/papers\\_publications\\_01.pdf](https://web.archive.org/web/20041204060955/http://www.napawash.org/aa_social_equity/papers_publications_01.pdf).

<sup>327</sup> See discussion *infra* Section III.B.

<sup>328</sup> Exec. Order No. 13,985, 86 F.R. 7009 (7009-7013) (Jan. 20, 2021).

<sup>329</sup> Guy & McCandless, *supra* note 6, at S9.

<sup>330</sup> *Id.*

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

The intellectual development of Western social contract theory through the 1950s focused chiefly on individual liberty, the protection of that liberty by the state, and the tension between the two. H. George, Frederickson the progenitor of social equity theory in public administration, traces this development back to the discourse between Plato and Aristotle.<sup>331</sup> Plato argued that laws can be applied simply as written, while Aristotle thought that laws require interpretation and equity to avoid injustice.<sup>332</sup> In this dispute, Frederickson sides with the Aristotelian interpretation, that administrators must understand the spirit of the laws they implement and “should incorporate the principle of equity, which is a concern for justice that varies appropriately by situation.”<sup>333</sup>

On the liberty side of the equation, John Locke argued for the existence of natural rights and the government’s duty to protect them.<sup>334</sup> While on the equality side, Thomas Hobbes argued that such government protection simultaneously generated inequality.<sup>335</sup> Jean-Jacques Rousseau incorporated the Aristotelian tradition and the tension between liberty and equality into social contract theory, stating, “[i]t is precisely because the force of circumstances tends always to destroy equality that the force of legislation must always tend to maintain it.”<sup>336</sup> This balance found form implicitly in the United States Constitution through its procedural and substantive mechanisms for calculating fairness, right, and justice.<sup>337</sup>

Next in the development of social equity theory, public administration scholars point to the early writings of President Woodrow Wilson, who again takes the Aristotelian view but now

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<sup>331</sup> H. GEORGE FREDERICKSON, SOCIAL EQUITY AND PUBLIC ADMINISTRATION: ORIGINS, DEVELOPMENT, AND APPLICATION 61-63 (2010) (collecting Frederickson’s essays on the topic dating back to the 1970s).

<sup>332</sup> *Id.* at 61.

<sup>333</sup> *Id.* at 63.

<sup>334</sup> Guy & McCandless, *supra* note 6, at S6, S8; FREDERICKSON, *supra* note 331, at 88.

<sup>335</sup> Guy & McCandless, *supra* note 6, at S6.

<sup>336</sup> Blue Wooldridge & Susan Gooden, *The Epic of Social Equity: Evolution, Essence, and Emergence*, 31 ADMIN. THEORY & PRAC. 222, 231 (2009).

<sup>337</sup> John Nalbandian, *Nalbandian on the Court and Social Equity*, 49 PUB. ADMIN. REV. 293, 294 (1989).

explicitly references equity rather than equality as the goal of public servants who should interpret the law with “enlightenment and equity.”<sup>338</sup> This version of equity, which merely emphasizes the human factor in governance, was first joined by the word “social,” which inserts group considerations into the otherwise liberal notion of individual equity in the 1940s and ‘50s.<sup>339</sup> However, discussions of social equity only appeared briefly in the scientific management branch of public administration, i.e., how to run an equitable organization, rather than in broader theories of policy implementation.<sup>340</sup>

The various civil rights movements and political turmoil in the 1960s, especially around the Civil and Voting Rights Acts, catalyzed governance structures and administrators across the United States to reconsider their practices that contributed, or directly caused, discrimination.<sup>341</sup> This reconsideration first found explicit voice in the work of Frederickson and a 1968 conference of young activist scholars in Minnowbrook, New York.<sup>342</sup> At this point, the movement formerly conceptualized “social equity” as an element of the following values: “Responsiveness, worker and citizen participation in decision-making, social equity, citizen choice, [and] administrative responsibility for program effectiveness.”<sup>343</sup> These values demonstrate the movement’s

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<sup>338</sup> Though the attribution is common in the public administration literature, the irony in attributing the origination of “equity” to Wilson, well-documented for his racism, is not lost on the author. See James H. Svara, *Complementarity of Politics and Administration as a Legitimate Alternative to the Dichotomy Model*, 30 ADMIN. & SOC. 676, 688 (1999) (quoting Woodrow Wilson, *The Study of Public Administration*, 2 POL. SCI. Q. 197, 198 (1887)); and Dylan Matthews, *Woodrow Wilson Was Extremely Racist—Even by the Standards of His Time*, VOX (Nov. 20, 2015), <https://www.vox.com/policy-and-politics/2015/11/20/9766896/woodrow-wilson-racist> [<https://perma.cc/RQA9-SR3L>].

<sup>339</sup> Guy & McCandless, *supra* note 6, at S6.

<sup>340</sup> *Id.* at S6-S7.

<sup>341</sup> See FREDERICKSON, *supra* note 331, at 76-78; James H. Svara & James R. Brunet, *Filling in the Skeletal Pillar: Addressing Social Equity in Introductory Courses in Public Administration*, 10 J. OF PUB. AFFAIRS EDUC. 99, 107 (2004).

<sup>342</sup> See H. George Frederickson, *Toward a New Public Administration*, TOWARD A NEW PUBLIC ADMINISTRATION: THE MINNOWBROOK PERSPECTIVE, 309 (Frank Marini, ed. 1971); see also Eric Stoken et al., *Fifty Years as the Fourth Pillar of Public Administration: A Policycentric Extension of the Social Equity Framework*, PUB. ADMIN. EARLY VIEW, 1427 (Oct. 1, 2022), <https://doi-org.eres.library.manoa.hawaii.edu/10.1111/padm.12888> [<https://perma.cc/3UV3-GGBF>].

<sup>343</sup> H. GEORGE FREDERICKSON, *THE NEW PUBLIC ADMINISTRATION* 35 tbl.2 (1980) (left-hand column under the heading “Values to be Maximized”).

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

Social equity in concept continued to mature implicitly and explicitly over the last fifty years in two analogous areas: law and public administration. In law, Ronald Dworkin implicitly developed a theory of social equity when he wrote against legal positivism, the theory that judges should simply apply the law without external consideration of fairness, justice, and equality (the Platonic model transposed into modern times).<sup>344</sup> Dworkin argues that application of the law is inherently political—incapable of objective, robotic implementation.<sup>345</sup> Judges should decide the hard cases, where the law is not clear, based on their “relatively coherent overall understanding of what principles the legal tradition as a whole embodies.”<sup>346</sup> The interpretation is limited by the community’s shared concepts of these principles and by the historical tradition of the community.”<sup>347</sup> Dworkin’s approach to legal interpretation rests on the discretionary capacity of judges to seek justice in specific cases: “balancing the equities.”<sup>348</sup>

In contrast to the legal application of equity, the necessity of applying rules broadly across populations rather than in specific cases constrains the policy implementation of equity.<sup>349</sup> In the field of public administration, the theory of social equity developed explicitly from Frederickson’s initial conception to address this constraint.<sup>350</sup> Finding a muse in John Rawls’ well-timed *A Theory of Justice*, first published in 1971, theorists built on Frederickson’s model to incorporate an element

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<sup>344</sup> See Steven J. Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109, 109, 111-12, 114 (1987).

<sup>345</sup> *Id.*; FREDERICKSON, *supra* note 331, at 61.

<sup>346</sup> FREDERICKSON, *supra* note 331, at 61.

<sup>347</sup> *Id.* at 65.

<sup>348</sup> *Id.* at 63-65; Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 502-503 (2010) (discussing the balancing of the equities in connection to Dworkin’s specific argument about balancing the property rights of people against each other); see generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (discussing Dworkin’s theory of constitutional law and its basis in theories of equitable remedies and the balance of interests rather than black/white rules).

<sup>349</sup> FREDERICKSON, *supra* note 331, at 65.

<sup>350</sup> Richard Gregory Johnson, *Social Equity as a Tool for Social Change*, 17 J. PUB. AFFS. EDUC. 163, 163 (2011).

of distributive justice as an answer to the tension between liberty and equality.<sup>351</sup> Rawls conceptualized justice in the relationship between two principles: (1) “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others,” which he argues is constrained by (2) “social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged... and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”<sup>352</sup>

These principles set up a dialogic between administrators and social groups impacted by policy implementations that requires administrators to either directly include community participation in decision-making, or in areas too complex for efficient direct inclusion, to approach implementations from the perspective of affected social groups themselves.<sup>353</sup> When evaluating the distribution of goods and services between different groups then, considered from the position of the disadvantaged group, social equity requires that delivery be explicitly deployed on behalf of the less advantaged.<sup>354</sup> In complex, population level implementations, administrators themselves should “take the role” of disadvantaged groups and devise implementations within the bounds of the law to rectify existing inequalities.<sup>355</sup>

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

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

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<sup>351</sup> See e.g. Hart, *supra* note 4, at 6-7.

<sup>352</sup> *Id.* at 7; RAWLS, *supra* note 6, at 60-61; Guy & McCandless, *supra* note 6, at S8.

<sup>353</sup> FREDERICKSON, *supra* note 331, at 69.

<sup>354</sup> Hart, *supra* note 4, at 8.

<sup>355</sup> FREDERICKSON, *supra* note 331, at 69.

protection for a person who is threatened in order to make that person equal with someone who is not threatened).<sup>356</sup>

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

In the twenty-first century, Philip J. Rutledge led the push for NAPA's inclusion of social equity as one of the four pillars of public administration (along with efficiency, economy, and effectiveness).<sup>357</sup> NAPA operationalized Frederickson's theory of social equity.<sup>358</sup> According to NAPA, social equity is a process for identifying and addressing societal imbalances using the following metrics to measure a particular implementation's success in fulfilling Fredrickson's principles:

(1) procedural fairness, involving due process, equal protection, and equal rights; (2) access, involving a review to assess access to policies, services, and practices or examine why there may be unequal access; (3) quality, ensuring consistency in existing services; and (4) outcomes, confirming policies and programs have the same impact for every group or individual in a variety of public contexts, including, but not limited to, policing, welfare, and transportation.<sup>359</sup>

These dimensions may be described generally as procedural equity (procedural fairness and access) and substantive equity (quality and outcomes),<sup>360</sup> with an obvious analogy to judicial application of procedural and substantive due process rights when evaluating the constitutionality of a particular statute.<sup>361</sup> There is one major difference. The judicial balancing of individual rights against government interests

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<sup>356</sup> Guy & McCandless, *supra* note 6, at S9; *see generally* FREDERICKSON, *supra* note 331, at 67-73.

<sup>357</sup> Guy & McCandless, *supra* note 6, at S12 n.1.

<sup>358</sup> *See* NAT'L ACAD. OF PUB. ADMIN., *supra* note 326.

<sup>359</sup> Hannah et al., *supra* note 315, at 3; James H. Svava & James R. Brunet, *Social Equity Is a Pillar of Public Administration*, 11 J. PUB. AFF. EDU. 253, 253-56 (2005), [https://www.researchgate.net/publication/249675111\\_Social\\_Equity\\_Is\\_a\\_Pillar\\_of\\_Public\\_Administration](https://www.researchgate.net/publication/249675111_Social_Equity_Is_a_Pillar_of_Public_Administration) [https://perma.cc/B676-89UW].

<sup>360</sup> Guy & McCandless, *supra* note 6, at S9.

<sup>361</sup> Beermann et al., *Supreme Court's Tilt to the Property Right: Procedural Due Process Protections of Liberty and Property Interests*, 3 PUB. INT. L. J. 9, 15 (1993); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUMBIA L. REV. 309, 331 (1993); David H. Rosenbloom, *Public Administration Theory and the Separation of Powers*, 43 PUB. ADMIN. REV. 219, 223 (1983).

is explicitly constrained by the relevant standard of scrutiny and past precedent, with the balance weighted towards the protection of individual rights.<sup>362</sup> However, public administration's procedural and substantive equity remain on ostensibly equal footing with efficiency, economy, and effectiveness, the other pillars of public administration.<sup>363</sup> Political forces relevant to any particular implementation can bring one pillar or another, most frequently efficiency, to the fore.<sup>364</sup>

Routledge also argued for the application of the theory of social equity beyond public administration. In contrast, Walter Benn Michaels advocated for restricting social equity to only address class-based inequality, rather than inequities in other sorts of diversity, to avoid legitimizing non-identity based sources of measurable inequality.<sup>365</sup> Routledge responded by emphasizing that both inequality and a lack of diversity arise from existing inequities, and citizens must use the tools of public administration, politics, and other disciplines in pursuit of a fair and just world.<sup>366</sup>

## B. Towards a Theory of Cannabis Social Equity

Per Routledge, applying social equity theory beyond the field of public administration requires a broader explication of the theory.<sup>367</sup> As previously noted,<sup>368</sup> Alfred Lee Hannah et al. do directly apply the efficiency and equity elements of NAPA's four pillars of public administration to evaluate the success of Pennsylvania's specific cannabis industry equity policy. However, while the public administration version of the theory can be used to evaluate the *implementation* of cannabis social equity policies, alone, it lacks the tools to *imagine and evaluate the structural potential* of the policies themselves. This distinction, and thus the required expansion of the theory, are necessary in an arena where both social equity policies and

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<sup>362</sup> Beermann et al., *supra* note 361, at 15, 30; Fallon, *supra* note 361, at 313.

<sup>363</sup> Kristen Norman-Major, *Balancing the Four E's; or Can We Achieve Equity for Social Equity in Public Administration?*, 17 J. PUB. AFF. EDUC. 233, 234, 237 (2011).

<sup>364</sup> James L. Regens & Robert W. Rycroft, *Measuring Equity in Regulatory Policy Implementation*, 46 PUB. ADMIN. REV. 423, 428 (1986).

<sup>365</sup> *See generally* WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* (2007).

<sup>366</sup> *See* FREDERICKSON, *supra* note 331, at 125-32; *see* Svara, *supra* note 338, at 677-78.

<sup>367</sup> *See* FREDERICKSON, *supra* note 331, at 129-32.

<sup>368</sup> *See supra* Section III.A.



the political and economic structures they are to operate within (i.e. the policies originating the nascent cannabis industry) are created *ex nihilo* and simultaneously.

Accordingly, the public administration theory of social equity must be modified to provide tools for building distributive equity directly into the structure of cannabis laws, even prior to implementation. A proper theory of cannabis social equity requires the addition of a *legislative* component to the concerns of public administration theory. The theory of cannabis social equity then “evolve[s] from a philosophical (social contract) to a structural (constitutional) [*to a legislative (political)*] to an administrative (social equity) concern.”<sup>369</sup> This amended sequence provides a map to the changes necessary for the public administration theory of social equity to develop into an effective theory for cannabis social equity. Each of the elements of this sequence also correspond directly with the operationalized dimensions of the public administration theory of social equity (procedural fairness, access, quality, and outcomes) which provide practical steps for applying the theory of cannabis social equity.

### 1. The Philosophical Concern

Beginning with the philosophical concern, “[s]ocial equity is rooted in the idea that each person is equal and has inalienable rights.”<sup>370</sup> As noted previously, the principles of equality and individual rights inherently remain in tension, so long as the relevant individual right actually exists.<sup>371</sup> Locke grounded individual equalities in the concept of natural rights before those rights went on to serve as the foundation of the U.S. Constitution.<sup>372</sup> In *Brown v. Board of Education*,<sup>373</sup> the U.S. Supreme Court first recognized the illegitimacy of segregating schools by race as a violation of individual rights. Then the Court reified the primacy of individual equalities over racial block equalities to order relief, though limited to the specific context of school desegregation.<sup>374</sup> Widespread structural applications of the Court’s expanded recognition

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<sup>369</sup> Guy & McCandless, *supra* note 6, at S6.

<sup>370</sup> *Id.* at S5.

<sup>371</sup> Wilfred U. Codrington III, *The Benefits of Equity in the Constitutional Quest For Equality*, 43 HARBINGER 105, 108 (2019).

<sup>372</sup> FREDERICKSON, *supra* note 331, at 88.

<sup>373</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>374</sup> H. George Frederickson, *Public Administration and Social Equity*, 50 PUB. ADMIN. REV. 228, 230 (1990).

of individual rights did not manifest until the various Civil Rights Acts passed in the following decades.<sup>375</sup> In both situations, a philosophical development recognizing a new right, or reinterpreting a right, necessarily presaged any structural change.

The theory of cannabis social equity requires a similarly novel recognition of an individual right at some level to serve as the initial grounding for the pursuit of equity. However, as individual rights and equality must balance, the scope of the new right determines the scope of achievable equality: just as Locke's global invention of individual rights balanced with the U.S. Constitution's view of universal equality before the law.<sup>376</sup> For instance, the *Brown* Court's elevation of individual rights above racial categories balanced with specific policies to enforce equality in schools. Thus, the first component in the theory of cannabis social equity requires balancing the nature and scope of a desired equity outcome against the extent of the rights that must be recognized to enable that outcome.

The practical exercise for the philosophical component of the theory derives from NAPA's "access" dimension.<sup>377</sup> The first step is to identify, measure, and interrogate the scope and nature of an inequality. An important element of this process is direct engagement with affected communities to balance disparities in political participation that might otherwise skew the results in favor of traditionally influential groups.<sup>378</sup> The second step is to investigate and specify the source and specific mechanisms of the inequality. The final step is to posit some aspect of an individual right that must be protected to reach a desired end state that resolves the inequality. This analytical process provides a structured approach on which to base the development of diverse and original solutions to specific inequities.

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<sup>375</sup> See generally *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, HIST., ART & ARCHIVES, U.S. H.R., <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> [<https://perma.cc/L8NL-2ZSJ>] (last visited Dec. 31, 2022).

<sup>376</sup> Donald L. Doernberg, "*We the People*": John Locke, *Collective Individual Rights, and Standing to Challenge Government Action*, 73 CALIF. LAW. REV. 52, 55-56 (1985).

<sup>377</sup> Hannah et al., *supra* note 315, at 146; Svava & Brunet, *supra* note 359, at 101.

<sup>378</sup> H. George Fredrickson, *The State of Social Equity in American Public Administration*, NAT'L CIVIC. REV. 31, 34 (2005).

## 2. The Structural Concern

The structural concern is the metaphorically physical substrate for the protection of an individual right—the level of law necessary to protect the desired individual right, whether federal or state, including constitutional amendments, legislation, executive pronouncement, administrative rules, agency decisions, enforcement priorities, judicial interpretations, or embodied policy. This concern relies on both the legal and equitable understandings of procedural and substantive due process.

Under the legal understanding, the Fifth Amendment of the U.S. Constitution codifies both the procedural and substantive due process protections of individual rights at the federal level.<sup>379</sup> The Fourteenth Amendment applied these legal protections to the states, along with equal protection of the law, superseding any state legislation that violates those rights.<sup>380</sup> According to Erwin Chemerinsky:

Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.<sup>381</sup>

Any new protection of an individual right must at least accord, if not take direct root in, these legal frameworks to pass constitutional muster. The more extensive the right to be protected, or the more likely protection of that right might run afoul of procedural or substantive due process protections or of equal protection, the higher the level of law necessary to protect the right. For instance, establishing the existence of voting rights regardless of race or gender required the 14th, 15th, and 19th Amendments to the U.S. Constitution.<sup>382</sup> While protection of an aspect of those individual rights, e.g. freedom from arbitrary literacy tests for voter registration, only needed to build on these amendments through federal legislation via the Voting Rights Act of 1965.<sup>383</sup>

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<sup>379</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501-02 (1999); U.S. CONST. amend. V.

<sup>380</sup> Chemerinsky, *supra* note 379, at 1530, 1530 n.179; U.S. CONST. amend. XIV.

<sup>381</sup> Chemerinsky, *supra* note 379, at 1501.

<sup>382</sup> See U.S. CONST. amends. XIV, XV, XIX; see generally *Constitutional Amendments and Major Civil Rights Acts*, *supra* note 375.

<sup>383</sup> See *FEDERAL PROSECUTION OF ELECTION OFFENSES* 5 (Richard C. Pilger et al, 8th ed. 2017).

Protecting the individual rights of those in specific localities from instances of election abuse merely required delegation of prosecutorial discretion to local federal law enforcement organs to achieve the desired results.<sup>384</sup>

The equitable understanding of due process extends beyond the legal understanding. The legal due process clause applies reactively to address whether a particular policy's protection abridged another individual's right to not be deprived of due process in the implementation of the law, but this application only establishes a baseline requirement for due process.<sup>385</sup> Procedural fairness extends beyond that baseline to include affirmative processes that balance equal protection and equal rights, i.e. policies that address both equality of opportunity and equality of outcome. The relative necessity of including these affirmative processes may modify the level of law required to survive constitutional challenge.

For example, a sequence of executive orders by Presidents Franklin D. Roosevelt,<sup>386</sup> John F. Kennedy,<sup>387</sup> and Lyndon B. Johnson<sup>388</sup> both complied with legal due process by prohibiting discrimination in federal contractor hiring practices (Frederickson's equality of opportunity) and constitutionally implemented affirmative equitable due process by requiring federal contractors to proportionally increase their employment of women and minorities (Frederickson's equality of outcome).<sup>389</sup> In contrast, attempts at the local state university level to directly implement equitable due process using racial quotas as an affirmative procedure for achieving the same sort of proportional representation of minorities did not comply with equal protection.<sup>390</sup>

Both the level of law and the type of equitable due process provided vary between these situations, and modifications to either could change the results. For instance, by increasing the level of authority, Congress successfully, and constitutionally, authorized what the state universities

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<sup>384</sup> *Id.*

<sup>385</sup> See generally Chemerinsky, *supra* note 379.

<sup>386</sup> Exec. Order No. 8,802, 3 C.F.R. 957 (1938–1943).

<sup>387</sup> Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963).

<sup>388</sup> Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

<sup>389</sup> See *Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 177 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); MICHAEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL & CONSTITUTIONAL INQUIRY* 163-216, 283-336 (1991).

<sup>390</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

could not: voluntary implementation of racial quotas in private hiring practices under Title VII of the Civil Rights Act of 1964.<sup>391</sup> Meanwhile, lowering the level of authority to private universities, the Supreme Court in 2023 struck down an even less restrictive type of equity policy than that of the state universities above—the Court now prohibits even the *non-exclusive* use of race as a criterion for admission in pursuit of proportional representation.<sup>392</sup> Thus, the second component in the theory of cannabis social equity requires balancing the structure of any affirmative processes proposed to protect an individual right with the level of law required to constitutionally implement those processes in pursuit of equity.

The practical exercise for this component of the theory of cannabis social equity derives from NAPA's dimension of "procedural fairness."<sup>393</sup> The first step, based on the nature of the individual right to be protected and the desired end state necessary to resolve the chosen inequality, is to explore historic approaches to the protection of similar rights and the resolution of similar inequalities. This exploration could include philosophical investigations; literature reviews; historiographies; narrative and genealogical histories; and empirical work to determine useful historical analogies for the means of protecting the right and evidence of that protection's success.

The second step is to imagine procedures and approaches to promote both the equality of opportunity and the equality of outcome necessary to achieve the goal. This dual focus broadens the topography of potential policy solutions, opening space to approach the inequality from both the bottom up and the top down, from both procedural and substantive angles. This step provides space to "think outside the box" and produce new ideas or combinations of ideas for methods to resolve the inequity. The generation of novel approaches comes from including relevant stakeholders from affected populations, the public at large, and the various levels of government in the decision-making process from the beginning.<sup>394</sup>

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<sup>391</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 197, 203-04, 208 (1979); *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (1976).

<sup>392</sup> *See Students for Fair Admissions v. Harvard*, 600 U.S. 181, 209-10, 212-13, 230-31 (2023) *overturning* *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

<sup>393</sup> Hannah et al., *supra* note 315, at 146; Svava & Brunet, *supra* note 359.

<sup>394</sup> Jitinder Kohli & Geoff Mulgan, *Capital Ideas: How to Generate Innovation in the Public Sector*, CENTER FOR AMERICAN PROGRESS 21-26 (2010), [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/07/pdf/dww\\_capitalideas.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/07/pdf/dww_capitalideas.pdf) [<https://perma.cc/YBK9-NXLB>].

The third step is to evaluate each idea through the lens of procedural fairness—adding, amending, or discarding elements so that the proposed policies comport with the legal and equitable requirements of due process, equal protection, and equal rights. This may lead to additional policy ideas. A multi-disciplinary approach is essential here, the individual right under investigation likely touches on various domains and so needs to comport with the details of those domains. For instance, plans to implement equitable distribution of housing might require knowledge from both state and federal Departments of Health and Human Services, the U.S. Department of Housing and Urban Development, the Environmental Protection Agency, local and international building codes, state and national financial institutions, construction companies, raw materials companies, real estate investors and agents, and raw materials companies. Each domain can provide information for evaluating the feasibility of a proposal, further narrow down the source of the targeted inequities, and identify whole new leverage points at which to target solutions.

The final step is to identify the appropriate level(s) of law necessary to protect the desired individual right and implement the proposed policies. The level of law to protect the desired right might include constitutional protection, a federal congressional bill, a mere spending rider, administrative rule making, regulation by enforcement, a legal test case, or state or local action at some level. Proposed solutions to protect a desired right will synergize with one or more of these options. This component of the theory of cannabis social equity provides early opportunities to analyze and resolve tensions between the individual right to be protected and the equality sought. This step takes place in the academic literature and public debate prior to any inclusion in a governing structure, and it serves as a catalyst for continuing policy evolution as potential synergies emerge.

Together, these steps provide a roadmap for developing and refining a policy position and where to enact it. Pursuing the actual implementation of a proposed and vetted policy idea at the appropriate level of law is the subject of the Legislative Concern.

### 3. The Legislative Concern

As chronicled above,<sup>395</sup> the development of public administration social equity theory proceeded directly from a philosophical concern establishing the existence of a right, to a structural concern enshrining

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<sup>395</sup> See *supra* Parts III.A and III.B.1.

that right, to an administrative concern diagnosing and remedying unequal applications and outcomes in the protection of that right.<sup>396</sup> However, a sequencing issue manifests when applying this public administration theory of social equity to the cannabis industry because the original theory is fundamentally an *administrative* theory, while the cannabis industry has itself yet to be *legislatively* established.<sup>397</sup>

In the traditional theory, the administration of legislation implementing a structurally protected right contributes to inequalities that, once recognized, administrative social equity actions can remedy.<sup>398</sup> Thus, administrative theories are fundamentally reactive and incapable of originating legislation in the first place. Even the modern theory of administrative social equity, which treats administration and politics as complementary and encourages political cooperation between administrators and politicians, recognizes that administration yet remains subordinate to political supremacy.<sup>399</sup>

The struggles to implement the Fourteenth and Fifteenth Amendments leading up to the various Civil Rights Acts of the mid-twentieth century illustrate this sequencing issue. After adopting the Fourteenth and Fifteenth Amendments to provide equal protection and voting rights in the 1800s, Congress passed the Civil Rights Act of 1875 to implement the Amendments by guaranteeing all citizens, regardless of color, equal access to accommodations, theatres, public schools, churches, and cemeteries.<sup>400</sup> The Supreme Court quickly struck down this legislation in the consolidated Civil Rights Cases,<sup>401</sup> holding that the federal government could not regulate private actions and situating the judicial branch as the (un)enforcement<sup>402</sup> mechanism of the Amendments, rather than a legislative or administrative apparatus, until

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<sup>396</sup> See *supra* Part III.B.1.

<sup>397</sup> NAT'L CANNABIS INDUS. ASS'N, ADAPTING A REGULATORY FRAMEWORK FOR THE EMERGING CANNABIS INDUSTRY 8-10, 13-14 (Oct. 2019), <https://www.congress.gov/116/meeting/house/110381/documents/HHRG-116-IF14-20200115-SD014.pdf>.

<sup>398</sup> CAPEHEART & MILOVANOVIC, *supra* note 3, at 43-44. See *supra* Part III.A; and see generally Walster & Walster, *supra* note 3.

<sup>399</sup> Svava, *supra* note 338, at 678.

<sup>400</sup> Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

<sup>401</sup> The Civil Rights Cases, 109 U.S. 3, 11 (1883).

<sup>402</sup> Compare The Civil Rights Cases, 109 U.S. at 19 (holding there is no regulation of private action to enforce equal access to public schools), with *Brown*, 347 U.S. at 495 (mandating desegregation of public schools).

the passage of the Civil Rights Act of 1957.<sup>403</sup> Without animating legislation, there was no public administration to implement the Fourteenth and Fifteenth Amendments until the mid-twentieth century. Accordingly, the field of public administration had very little to say on the matter of social equity until discrepancies between the intended and actual results of administrative implementation of the animating legislation became too unjust to ignore.

A useful theory of cannabis social equity then requires an additional element between structural protection and administrative social equity: the political development and deployment of legislation and other policies directing the contours and administration of a legal cannabis industry through a social equity lens to address preexisting cannabis inequities. This dynamic provides a unique opportunity to integrate distributive, restorative, social, and economic justice initiatives directly into legislation at the inception of the cannabis industry—an activity strictly outside the scope of the administrative theory of social equity that the cannabis social equity literature to date has implicitly adopted.<sup>404</sup>

The legislation that originated the first spate of medical and adult-use cannabis legalization regimes generally operated at a secular level without explicit policy attention directed at redressing existing cannabis inequities. The inequitable effects of these original policies in perpetuating inequalities inspired the current, ineffective cannabis social equity approaches,<sup>405</sup> which focus solely on improving preexisting programs. Administration of the few state-level legislative protections of cannabis social equity that do exist has not yet rectified existing inequities to any significant extent.<sup>406</sup> So, integrating social equity policies directly into cannabis legislation at a fundamental rather than siloed level carries the potential to resolve existing societal inequities, and, if carefully constructed, obviate the need for extensive application of administrative social equity theories to address implementation inequities *post hoc*.

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<sup>403</sup> Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W. POL. Q. 763, 774 (1965); see Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified as amended in sections of 28 and 42 U.S.C.).

<sup>404</sup> See *supra* Section III.

<sup>405</sup> See *supra* Section IV for criticism of current approaches.

<sup>406</sup> MCBA REPORT 2022, *supra* note 15, at 31.



This is especially true because current cannabis inequities resulted inversely from the explicit *illegality* of the subject.<sup>407</sup> The numerous cannabis inequities demonstrated earlier<sup>408</sup> did not result from improper implementation or administration of legislation—they were the goal. So, cannabis social equity proposals (industry equity, criminal justice equity, community equity, and access equity) which only target inequities resulting from the few current legislative protections of cannabis use fail by several orders of magnitude to address the preexisting inequities from decades of criminal cannabis enforcement. A theory of cannabis social equity then must include the legislative component, addressing current cannabis inequities directly through both structural legality and direct legislative remediation prior to shifting any great attention to inequities resulting from the administration of the new legality. An ounce of prevention is worth a pound of cure.

Operationally, this component of the theory of cannabis social equity corresponds to NAPA’s social equity dimension of “quality.”<sup>409</sup> Described as “ensuring consistency,”<sup>410</sup> this component builds on the previous two to concretize the details of cannabis policy and the political necessities of its enactment. In practical implementation, the first step is to recognize that social inequities not only emerge from implementation, but also from legislation and preexisting realities.<sup>411</sup> It is important to identify areas where policies themselves might lead to inconsistent results or exacerbate inequities and address them at the outset, rather than applying *post hoc* bandages. However, the most effective solutions require the coordination of structural protections, legislative policies, and administrative implementation across federal, state, and local governments.<sup>412</sup>

The second step is to build coalitions between executive branches, legislators, administrators, and advocates to develop legislation that emerges from the stakeholders’ collective expertise. When viewed

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<sup>407</sup> *Id.*

<sup>408</sup> *See supra* Section II.

<sup>409</sup> Hannah et al., *supra* note 315, at 146; Svava & Brunet, *supra* note 359.

<sup>410</sup> Hannah et al., *supra* note 315, at 146; Svava & Brunet, *supra* note 359.

<sup>411</sup> *See generally* Hannah et al., *supra* note 315; Svava & Brunet, *supra* note 359.

<sup>412</sup> *See* Sara Dube, *How Cross-Branch Collaboration Helps States Strengthen Evidence-Based Policymaking*, PEW CHARITABLE TRS. (Mar. 10, 2022), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/03/how-cross-branch-collaboration-helps-states-strengthen-evidence-based-policymaking> [<https://perma.cc/G229-X5XP>].

through a social equity lens, the legislative addition to the theory of cannabis social equity necessitates political engagement rather than administrative self-regulation.<sup>413</sup>

The third step is to develop public and political messaging that centers the inequity at issue and demonstrates the advantages of consistent approaches and adoption by every level of government.<sup>414</sup> It is important to provide legislators political cover and motivation to address inequities directly through legislation rather than leaving it wholly to the administrative apparatus. A vital corollary goes to the issue of funding because covering the cost of new programs, especially redistributive programs, can be politically fraught.<sup>415</sup> Policies consistent with the theory of cannabis social equity in particular will frequently require substantial outlays to address preexisting inequities, let alone fund the administration of a new industry. As funding government programs is a legislative rather than administrative concern, proposed policies at the legislative level should include politically tenable funding arrangements to support effective implementation.

The legislative component of the theory of cannabis social equity diverges the most from the current approaches to cannabis social equity that emerged from the traditional administrative theory.<sup>416</sup> Rather than appealing *post hoc* to legislation to address implementation inequities, the original legislation should be structurally formulated for consistent application to avoid creating inequities in the first place, or at least contain self-correcting mechanisms to address unforeseen outcomes.

#### 4. The Administrative Concern

The administrative component of the theory of cannabis social equity simply needs to integrate the traditional administrative theory of social equity as developed since the 1950s and previously detailed.<sup>417</sup> That is, the administrative component should serve as a rubric to

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<sup>413</sup> Hannah et al., *supra* note 315, at 146.

<sup>414</sup> *Id.*; Julie Nelson et al., *Advancing Racial Equity and Transforming Government*, THE LOC. & REG'L GOV'T ALL. ON RACE & EQUITY 10, 21-23, 27-28, 43-44, 47-49 (Sept. 2015), [https://www.racialequityalliance.org/wp-content/uploads/2015/02/GARE-Resource\\_Guide.pdf](https://www.racialequityalliance.org/wp-content/uploads/2015/02/GARE-Resource_Guide.pdf).

<sup>415</sup> Morgan Fox, *Looking Back On Ten Years Of Cannabis Reform—The Road Behind, The Struggle Ahead*, NAT'L CANNABIS INDUS. ASS'N (Aug. 20, 2019), <https://thecannabisindustry.org/looking-back-on-ten-years-of-cannabis-reform-the-road-behind-the-struggle-ahead/> [<https://perma.cc/93JA-CNQE>].

<sup>416</sup> Frederickson, *supra* note 374, at 228.

<sup>417</sup> *See supra* Section IV.A.

identify inequities resulting from program implementation and to devise, evaluate, and iterate policies to address those inequities at the administrative level. Note, however, that even at the administrative level, the theory departs from the current version of cannabis social equity which defines social equity as a *policy* rather than a *process* as described earlier.<sup>418</sup> Understanding the theory of cannabis social equity as a *process*, even at the administrative level, will prevent the petrification of cannabis policy options and provide solutions to the current criticisms of cannabis social equity detailed *supra*.

Operationally, this component corresponds to NAPA's social equity dimension of "outcomes," which involves program administrators, overseeing legislative bodies, and interested third parties "confirming policies and programs have the same impact for every group or individual in a variety of public contexts" and evolving implementations to resolve inequities created by the programs themselves.<sup>419</sup> For the practical exercise of this component of the theory of cannabis social equity, the first step is to identify and measure the impact of the programs on the inequities they were designed to address, and any other inequities exacerbated by the administration of those programs, including inequities of access, quality, consistency, outcome, and provision of services.<sup>420</sup> The second step is to design and implement administrative solutions within the bounds of authorizing legislation to address target inequities.<sup>421</sup> If the administrative solutions remain insufficient, the final step is to work with administrators, politicians, advocates, and affected populations to adjust the legislative, and possibly structural, sources of inequity.<sup>422</sup>

In sum, by contrast to exclusively policy-based definitions of social equity, the administrative component of the cannabis theory of social equity is a process by which to propose, evaluate, implement, and iterate the administration of cannabis policies. In isolation, administrative solutions are definitionally incapable of providing workable solutions to pre-existing cannabis inequities at scale.

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<sup>418</sup> See *supra* Section III.

<sup>419</sup> Hannah et al., *supra* note 315, at 146; *Round Table on Social Equity*, NAT'L ACAD. OF PUB. ADMIN. (June 29, 2020), <https://napawash.org/grand-challenges-blog/roundtable-on-social-equity> [<https://perma.cc/U32P-QHJV>] [hereinafter Round Table].

<sup>420</sup> *Round Table*, *supra* note 419.

<sup>421</sup> *Id.*; Hannah et al., *supra* note 315, at 146.

<sup>422</sup> Hannah et al., *supra* note 315, at 146; *Round Table*, *supra* note 419; Nelson et al., *supra* note 414, at 43-44.

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The public administration theory of social equity originated as a process to mediate the internal conflict between equality and liberty that animates the history of western political thought. Now, the new theory of cannabis social equity builds on this foundation a concrete set of considerations and approaches to effective policy development for the identification and affirmative rectification of cannabis inequities, especially those resulting from government's infringements on individual liberty. The theory of cannabis social equity is not a set of policies. Rather, it is a theory for developing and implementing approaches to existing and future inequities guided by the beacons of fairness, right, and justice.

Stated concisely, a proposal that complies with the new theory of cannabis social equity will recognize some new aspect of an individual right (typically in conjunction with the recognition of a corresponding inequity), structurally acknowledge or enshrine that right, enact legislative policies that explicitly protect that right, and administrate those policies to effectively reduce the targeted inequity. This theory can be used in the pursuit of cannabis social equity to evaluate the merit of both specific cannabis policies and general approaches to cannabis legalization.

#### **IV. EXPLORING APPLICATIONS OF THE THEORY OF CANNABIS SOCIAL EQUITY**

The potential solution set to cannabis inequities is extensive.<sup>423</sup> Investigating, implementing, and iterating these solutions across the states and at the federal level to address current cannabis inequities will take years. Careful application of the theory of cannabis social equity at the outset will potentially reduce the error rate, expense, and human cost of those experiments. Two examples suffice to demonstrate how the theory can effectively diagnose the reasons for current policies' unsuccessful attempts to address cannabis inequities and how the theory provides a foundation for the imagination of new solutions. The first demonstrates *why* current industry equity policies continue to struggle and are structurally incapable of addressing inequities in business ownership created by current cannabis programs, let alone the inequities resulting from decades of drug enforcement. The second applies the new theory of cannabis social equity to argue that the *level* of legalization is

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<sup>423</sup> See *supra* Section II.B for a description of the inequities.

a fundamental tool that must serve as the foundation of any effective policy that purports to address inequities arising from the War on Drugs at a societal level.

Before applying the theory in any single instance, whether a specific policy or general class of policies, such as these, it must be clear the specific question to be answered, the specific policy to be evaluated, and the specific societal inequities to be addressed. Thus, rectifying preexisting inequities requires the application of the new theory of cannabis social equity to identify an aspect of individual rights whose protection will address identified, preexisting inequities; design structural protections of that right; and develop legislation with the scope necessary to implement structural changes to protect that right so as to address preexisting inequities. Without the first three components of the new theory of cannabis social equity, successful administrative implementation is out of reach.

#### **A. The Theory of Cannabis Social Equity and the Failure of Industry Equity Policies**

As demonstrated earlier,<sup>424</sup> industry equity, the most common current definition of cannabis social equity, involves using administrative policies to increase the proportion of minority cannabis business owners. Calls for these policies emerged as state cannabis programs matured and manifested a lack of diversity in cannabis business ownership. Proponents justify these policies as direct recompense to affected communities for the War on Drugs' inequitable impacts on minority populations. Structural constraints on the attempts to implement these programs include licensing process limitations, market dynamics, and natural industry dynamics as previously discussed.<sup>425</sup> Applying the theory of cannabis social equity provides insight into *why* these policies have yet to achieve their stated objectives of proportional minority business ownership, let alone the intended broader remediation of the consequences of the War on Drugs in minority communities.

Philosophically, the pursuit of proportional minority business ownership relies on an appeal to fairness rather than to right or justice. Minority communities suffered economically, so it is fair that they now benefit economically. On the surface, this also appears to be an appeal to justice. However, this appearance is belied by the categorical

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<sup>424</sup> See *supra* Section III.

<sup>425</sup> See *supra* Section IV.A.

difference between the community-wide economic impacts of the War on Drugs and the individual economic benefits of these policies for the few licensed minority business owners. Industry equity policies also make no claim that minority business owners have a right to cannabis business ownership, only that the equitable outcome of proportional business ownership would offset the economic inequity of the War on Drugs. Direct modifications to the current illegality of cannabis, i.e. protection of individual rights to engage with cannabis commercially, are also not a precondition of these policies, merely targeted state and federal exemptions from enforcement. In the end, these policies rely on the established concept of equal protection, and an inapposite analogy to affirmative action policies (treating business ownership proportionality in the same way as minority employee proportionality), as the justifications for the proposed end state of proportional business ownership, not to the existence of some protectable right.<sup>426</sup>

Structurally, since business ownership policies rely on existing rights, rather than challenging an aspect of the current illegality of cannabis, they ostensibly require no additional structural protections. As noted earlier,<sup>427</sup> however, these policies misplace their reliance. Courts have held that some equal protection rights do apply to cannabis employees, like the protections from discrimination, harassment, and retaliation granted by Title VII of the Civil Rights Act of 1964.<sup>428</sup> However, in Ohio, courts struck down business ownership policies that rely on racial criteria to determine eligibility.<sup>429</sup> Federal courts in Maine and elsewhere struck down residency requirements that attempted to create proportionality in business ownership for violating the Dormant Commerce Clause.<sup>430</sup> While some organizations propose language to

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<sup>426</sup> MCBA REPORT 2022 *supra* note 15, at 32.

<sup>427</sup> *See supra* Sections II.B.5 & IV.A.

<sup>428</sup> *Federal Discrimination Statutes and the Cannabis Industry: An Illegal Industry Still Subject to Federal Laws*, MCGLINCHAY (Aug. 18, 2022), <https://www.mcglinchey.com/insights/federal-discrimination-statutes-and-the-cannabis-industry-an-illegal-industry-still-subject-to-federal-laws/> [<https://perma.cc/QRV4-GEWD>]; *see, e.g.*, Aichele v. Blue Elephant Holdings, LLC, 292 F. Supp. 3d 1104, 1112 (D. Or. 2017) (protecting cannabis employees from sexual harassment and retaliation under federal law); Complaint at 1, EEOC v. AMMA Investment Group, LLC, Case No. 1:20-cv-02786-DKC, 2020 WL 8181447 (D. Md. Sept. 24, 2020) (protecting cannabis employees from sex-based discrimination).

<sup>429</sup> *PharmaCann Ohio, LLC v. Williams*, No. 17-CV-10962, 2018 WL7500067, at 6 (Ohio Ct. Com. Pl. Aug. 24, 2018).

<sup>430</sup> *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 2022 U.S. App. LEXIS 22848 (1<sup>st</sup> Cir. Aug. 17, 2022); *see also* Alexander Lekhtman, *Advocates*

survive these legal challenges, courts have yet to affirm a legal use of racial criteria to determine business ownership.<sup>431</sup> Even if a policy survives the relevant strict scrutiny analysis, the required narrowly tailored language would inherently have more limitations than current programs—programs that already struggle to promote proportional minority business ownership, let alone provide relief for the greater economic inequities of the War on Drugs.<sup>432</sup>

Legislatively, even assuming that courts permit states to use racial criteria to create proportional minority cannabis business ownership by fiat, current versions of these programs will continue to encounter difficulties due to the limited nature of their licensing schemes, complications from artificial market dynamics, and challenging natural industry dynamics, as discussed earlier.<sup>433</sup> Further, because these programs are not based on a wider assertion and structural protection of a new aspect of individual rights—they do not challenge the illegality of cannabis, they merely provide exemptions—the ensuing market will only ever address inequity to the literal extent authorized. For example, in Florida, legislation extends protection to exactly one black-owned cannabis farm,<sup>434</sup> and in Arizona, legislation extends protection to no more than twenty-six minority-owned cannabis businesses out of *fifteen hundred* completed minority-owner applications.<sup>435</sup> Meanwhile,

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*Fear Chilling Effect of Lawsuits on Cannabis Equity Programs*, FILTER (Dec. 12, 2022), <https://filtermag.org/lawsuits-cannabis-equity-programs/> [<https://perma.cc/NTN8-G63S>] (describing that courts are considering Commerce Clause challenges in California and New York as well).

<sup>431</sup> See, e.g., *Race Specific Language to Benefit African American, Latinx, and Native American Communities in Cannabis Equity Legislation*, NULEAF PROJECT (2021), <https://nuproject.org/wp-content/uploads/2021/09/Guide-to-Using-Race-Specific-Language-in-Cannabis-Social-Equity-Legislation.pdf> [<https://perma.cc/6K46-WF99>].

<sup>432</sup> Lekhtman, *supra* note 430.

<sup>433</sup> See *supra* Section IV.A.

<sup>434</sup> Dara Kam, *A Black Farmer's Death Spurs a Dispute Over the 'Pigford' Marijuana License*, WUSF PUB. MEDIA (Nov. 25, 2022), <https://wusfnews.wusf.usf.edu/politics-issues/2022-11-25/a-black-farmers-death-spurs-a-dispute-over-the-pigford-marijuana-license> [<https://perma.cc/K3XP-36YR>].

<sup>435</sup> *Adult Use Marijuana Program: Submitted Social Equity Applications*, ARIZ. DEP'T OF HEALTH & HUM. SERVS. (Dec. 15, 2021), <https://www.azdhs.gov/documents/licensing/medical-marijuana/social-equity-applications.pdf> [<https://perma.cc/8U5L-WKHH>]; Ariz. Rev. Stat. Ann. § 36-2854 (2024).

Oklahoma,<sup>436</sup> which instituted a purely market-based licensing process with low license fees, no license caps (initially), and no mention of minority business ownership, produced one of the most diverse sets of cannabis business owners in the country.<sup>437</sup>

Administratively, it is not controversial to say that neither advocates, business owners, cannabis regulators, state legislators, nor local community members argue that current policies to encourage proportional minority cannabis business ownership have effectively diversified the cannabis industry.<sup>438</sup>

In sum, cannabis industry equity policies demonstrably fail to satisfy each of the components of the theory of cannabis social equity. This explains *why* current and proposed cannabis industry equity policies cannot succeed in their goal to produce proportional minority ownership of cannabis businesses, let alone contribute substantially to remediating the harms of the War on Drugs.

As shown previously,<sup>439</sup> the inequities resulting from the War on Drugs are many and varied, and current approaches have yet to make meaningful progress in rectifying those inequities.<sup>440</sup> As shown by the preceding analysis of cannabis industry equity policies which this paper builds upon, it is not enough to identify an administrative inequity and address it at that level, or via legislative fiat, to take a successful step in pursuit of social equity.<sup>441</sup> The same analysis can be applied to explain the structural ineffectiveness of the current approaches to criminal justice equity, community equity, access equity, and the many new proposals,<sup>442</sup> for similar ways to address specific inequities in the future.

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<sup>436</sup> See Halydier, *supra* note 1, at 100 (noting that Oklahoma's program has encountered economic difficulties from the natural industry dynamics).

<sup>437</sup> Matthew J. McCarthy, *Notes on Social Equity from a Former Cannabis Regulator*, DUANE MORRIS (Jul. 11, 2022), [https://www.duanemorris.com/articles/notes\\_on\\_social\\_equity\\_former\\_cannabis\\_regulator\\_0711.html](https://www.duanemorris.com/articles/notes_on_social_equity_former_cannabis_regulator_0711.html) [https://perma.cc/E6K5-5CDL].

<sup>438</sup> See generally Halydier, *supra* note 1.

<sup>439</sup> See *id.* at 46-83.

<sup>440</sup> See *id.* at 86-116.

<sup>441</sup> *Id.*

<sup>442</sup> See *id.* at 108-116.



## **B. Applying the Theory of Cannabis Social Equity to the General Illegality of Cannabis: Legitimization, Legalization, Liberalization, and Leadership**

It is not enough for a new theory to critique failed implementations of other theories, rather, a new theory must also provide internally consistent alternative solutions. Accordingly, this final section applies the new theory of cannabis social equity to generate and evaluate one of many possible solutions to the inequities caused by the War on Drugs.

Here, the chosen question is broad, investigating how to determine the appropriate *level* of legalization to provide both structural and explicit solutions for the inequities of the War on Drugs. This is not a question of the validity of legalization—rather, assuming that cannabis will or should be legalized, how legal should it be? What follows applies the new theory of cannabis social equity to this specific question, the specific policies used to implement the level of legalization in a regulatory regime, and the totality of inequities resulting from the War on Drugs to provide a roadmap for cannabis legalization through the lens of social equity. In short, policy implementations at the *level* of cannabis legalization can effectively rectify many of the preexisting inequities of the War on Drugs, and the impact of specific levels of legalization on these inequities can be evaluated by looking at the developed dimensions of Legitimization, Legalization, Liberalization, and Leadership.

### 1. Legitimization

Philosophically, cannabis social equity requires *Legitimization*. The *a priori* question when addressing cannabis illegality generally is the level of legality, or the level of protection of some individual right, necessary to prevent future inequity and rectify past inequities. Here, reducing this question to a simple matter of current, or even expanded procedural or substantive due process rights or equal protection, whether of race, gender, or other classification, ignores the breadth of inequity generated by the War on Drugs. As discussed,<sup>443</sup> the War on Drugs created social justice, industry, community, and access inequities that continue to adversely affect minorities, Native Americans, Native Hawaiians, health, stigmatization, business, research, the environment, sex and gender dynamics, hemp farming, and the international community. Although a historical analysis of civil rights protections

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<sup>443</sup> *See id.* at 46-83.

may provide a foundation<sup>444</sup> for the expansion of the administrative *theory* of social equity, that same history<sup>445</sup> does not provide guidance for the specific *application* of the theory of cannabis social equity. Similarly, President Biden's recent pardon of federal simple possession offenses does reference social inequities as motivation, but it also provides no basis in right for the pardon beyond the fact that the inequities exist.<sup>446</sup> A more general protection is required.

*a. By Analogy to Alcohol*

The history of alcohol prohibition provides some guidance. From a practical rather than social equity perspective, scholars and advocates have long analogized cannabis prohibition, legalization, and regulation to the prohibition, legalization, and regulation of alcohol.<sup>447</sup> In the recent wave of legalizations, Colorado, Washington, Illinois, and Nevada, among others, explicitly organized their cannabis regulation along the lines of their alcohol regulations.<sup>448</sup> Since the 1970s, advocates have argued that the common origins of the prohibition of both cannabis and alcohol, lesser health dangers of cannabis, and ease of public education to remediate harms justify similar legality levels for cannabis and alcohol.<sup>449</sup> Others counter either that alcohol regulations failed to protect the public from the detrimental health effects of alcohol and will do the same for cannabis<sup>450</sup> or that the analogy between cannabis and alcohol is really an inapplicable metaphor that centers

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<sup>444</sup> *Supra* Section III.B.

<sup>445</sup> *Supra* Section III.A.

<sup>446</sup> Proclamation No. 2022-22262, 87 Fed. Reg. 61441 (Oct. 12, 2022).

<sup>447</sup> *See, e.g.*, GOODE, *supra* note 87 at 71; JUDGE JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 231-34 (2001); ACLU REPORT, *supra* note 145, at 112.

<sup>448</sup> JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATIONS: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 52-53 (2015), <https://www.jstor.org/stable/pdf/10.7249/j.ctt15zc545.12.pdf>; William J. McNichol Jr., *Toward a Rational Policy for Dealing with Marijuana Impairment: Moving beyond "He Looked Buzzed to Me, Your Honor"*, 45 S. ILL. U. L.J. 1, 2 (2020); *see, e.g.*, Co. Const. art. XVIII, § 16, 2013; Wa. Initiative 502 §1, 2011; 410 Ill. Comp. Stat. 705/1-1 (2020).

<sup>449</sup> *See* Bonnie & Whitebread II, *supra* note 55; GOODE, *supra* note 87; Patton, *supra* note 19, at 1, 8; ACLU REPORT, *supra* note 145, at 112.

<sup>450</sup> Orenstein, *supra* note 1, at 69, 85.

alcohol and its health effects in the conversation, rather than the unique particulars of cannabis regulation.<sup>451</sup>

Whatever the merits of the practical reasons for analogizing the regulation of alcohol and cannabis, few discuss whether there are any social equity aspects to the end of alcohol prohibition that provide a foundation for the inclusion of similar social equity aspects in cannabis legalization. Scholar Deborah M. Ahrens' survey of post-prohibition state legislation does show that state legislatures considered pardons or limiting past convictions for alcohol prohibition offenses, but that no such legislation ever passed and only a couple of individuals received an individual pardon.<sup>452</sup> Ahrens attributes this failure to consider retroactive equity to the lesser stigma of alcohol offenses, continued state illegality of alcohol, and the frequency of dependent non-liquor offenses—i.e. unlike cannabis prohibition, any inequity that resulted from alcohol prohibition was insufficient to merit legislative attention.<sup>453</sup>

*b. Federalism*

More relevant yet to ascertaining some fundamental right that can serve as the basis for cannabis legalization, Judge James P. Gray argues that the ending of prohibition reinforced the primacy of state power over their citizens, limiting the federal government to regulating only the importation of alcohol when in violation of state laws.<sup>454</sup> This methodology is mirrored in the 2014 Rohrabacher-Farr Amendment, as regularly renewed by Congress, which defunds federal enforcement of cannabis activities unless those activities also violate state law.<sup>455</sup> Judge Gray's proposal would have the courts and Congress together, rather than a precarious spending rider, apply the same federalist methodology explicitly to cannabis regulation.<sup>456</sup> However, Judge Gray did not anticipate that the Supreme Court's decision in *Gonzalez v. Raich* would enshrine the opposite approach to cannabis regulation, asserting Congress' power to criminalize individual possession of cannabis under

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<sup>451</sup> MARION & HILL, *supra* note 94, at 155-56.

<sup>452</sup> Ahrens, *supra* note 10, at 379, 412-13, n.164.

<sup>453</sup> *Id.*

<sup>454</sup> GRAY, *supra* note 447, at 233-34.

<sup>455</sup> The amendment has been renewed ever since under various sponsoring names. *See* Patton, *supra* note 19 at 1, 28-29.

<sup>456</sup> GRAY, *supra* note 447, at 233-34.

Article I's interstate commerce power.<sup>457</sup> Responding to the usurpation of state rights to regulate their citizens could serve as the basis in right for cannabis legalization. However, it does not directly provide a basis for addressing the inequitable effects of cannabis illegality on individuals and communities.

*c. Substantive Due Process*

Although *Gonzalez v. Raich* affirms Congress' power to criminalize individual possession of cannabis, the court also aimed to safeguard individuals' rights against the federal government's expanding commerce clause power by explicitly leaving the door open for an individual to assert a due process argument.<sup>458</sup> Two cases, which remain good law, successfully challenged state alcohol prohibitions on individual rights grounds in the 1800s.<sup>459</sup> *Wynehamer v. People* may be one of the first cases to introduce the idea of substantive due process by stating that criminalization of the sale of alcoholic beverages constituted a deprivation of property without due process of law.<sup>460</sup> The New York court held:

When a law annihilates the value of property [right to sell alcoholic beverages], and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.<sup>461</sup>

The court further applied the compensation requirements of the due process clause to the deprivation of the right to sell alcoholic beverages, holding: "It is nowhere declared that, in the exercise of the admitted functions of government, private property may not receive remote and consequent injury without compensation."<sup>462</sup>

An Indiana court struck down a similar statute based on the theory that natural rights protected from state usurpation of individual property, including the right to use and sell beer, without just compensation.<sup>463</sup> The court reserved to itself the power to ascertain whether beer was

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<sup>457</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>458</sup> *Id.* at 33.

<sup>459</sup> *Bonnie & Whitebread II*, *supra* note 55, at 971, 992-93 & n.95 (1970).

<sup>460</sup> *Id.*

<sup>461</sup> *Wynehamer v. People*, 13 N.Y. 378, 398 (1856).

<sup>462</sup> *Id.* at 378, 401.

<sup>463</sup> See generally *Beebe v. State*, 6 Ind. 501 (1855).

necessarily hurtful, and if it was not, to hold that the legislature's prohibition of the consumption and sale of beer violated an individual's natural rights to private property.<sup>464</sup> According to one commentator, the court ruled that the prohibition of the sale of beer "constituted an infringement of the inalienable right of life, liberty and the pursuit of happiness rooted in the precepts of natural justice that the people reserved to themselves when they entered into the social compact."<sup>465</sup> These cases condemn explicit and implicit prohibition of a property or commercial right and instead allow for compensation and regulation of that right as the legislative alternative.

The Supreme Court recently reinvigorated the use of historical analysis to determine whether a proposed right is "deeply rooted in [our] history and tradition" and whether it is essential to this Nation's "scheme of ordered liberty."<sup>466</sup> In a related case, the Court notes that "historical analysis can sometimes be difficult and nuanced, but reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments[.]'"<sup>467</sup> The Ninth Circuit recently applied this test to determine that Hawaii's ban on butterfly knives was unconstitutional because Hawaii "cites no analogues in which Congress or any state legislature imposed an outright ban on the possession of pocketknives to remedy this problem near [the relevant time period]."<sup>468</sup> The Supreme Court has cautioned "against giving postenactment history more weight than it can rightly bear," focusing instead on "*the public understanding* . . . after its . . . [passage]."<sup>469</sup> Thus, the historical analysis from Section II comes full circle. The modern illegality of cannabis (whether the effective ban struck down in *Leary* in 1969 or the current ban that arises from federal illegality under the CSA passed in the 1970s) is clearly not "deeply rooted in [our] history and tradition," having only appeared in the mid-20th century against the great weight of historical permissiveness. Further, cannabis's current illegality, based as it was on racist tropes, individual antipathy, and bureaucratic need is also "not essential to this

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<sup>464</sup> *Id.* at 519-20.

<sup>465</sup> *Bonnie & Whitebread II*, *supra* note 55, at 971, 992-93 (paraphrasing *Beebe*, 6 Ind. at 510).

<sup>466</sup> *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 237-40 (2021).

<sup>467</sup> *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 3-4, 24-25 (2022).

<sup>468</sup> *Andrew Teter v. Anne E. Lopez*, No. 20-15948 (9th Cir. 2023).

<sup>469</sup> *Bruen*, 597 U.S. at 35-36 (emphasis in original).

Nation's 'scheme of ordered liberty.'" Rather, as demonstrated in Section II, the public understanding has consistently exhibited the opinion that cannabis should be legalized. Thus, even modern substantive due process jurisprudence confirms the philosophical basis to legitimize the wider legalization of cannabis possession and commercialization.

The philosophical case for the level of cannabis legalization directly attributes the ongoing harms of the War on Drugs to the cause of those harms: prohibition and the level of regulation (as measured by the level of compensation required to rectify the level of infringement). On a spectrum then, the lower the level of regulations on legal cannabis, the more direct the effect in rectifying social inequities. The higher the level of regulations on legal cannabis, the more obligated the governing entity is to affirmatively compensate for the resulting deprivations of right.<sup>470</sup>

Thus, there is a sound basis, grounded in due process protections and natural rights, for the existence of an individual right to engage in the cannabis industry personally and commercially, as regulated but not prohibited by law, and, more importantly, a foundation for government compensation as the remedy for the inequities resulting from the deprivation of that right (i.e. reparations).

## 2. Legalization

Structurally, cannabis social equity requires *Legalization*. Assuming the right to engage in the cannabis industry personally and commercially is acknowledged in the due process clause, under natural rights, and in analogous court cases,<sup>471</sup> then legalized cannabis should be the default state of affairs. However, explicit judicial or executive acknowledgment of this right in the context of cannabis regulation is likely a structural prerequisite, just as the 21st Amendment was needed to explicitly take alcohol prohibition out of the federal government's hands.<sup>472</sup> The question of the level of regulation of cannabis use and commercialization will only emerge when the underlying legality is instantiated as a right. Such acknowledgment would provide sufficient structural protections to undergird a call for legislation to regulate

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<sup>470</sup> *Bonnie & Whitebread II*, *supra* note 55, at 992-94 (paraphrasing *Beebe*, 6 Ind. At 501, 510) (discussing the harm that drug regulation caused and how certain acts "inevitably led to a particularly prosecutorial view of the narcotics addict.").

<sup>471</sup> *See Gonzales v. Raich*, 545 U.S. 1 (2005); *Wynehamer v. People*, 13 N.Y. 378 (1856); *and Beebe v. State*, 6 Ind. 501 (1855).

<sup>472</sup> *Bonnie & Whitebread II*, *supra* note 55 at 992-94 (paraphrasing *Beebe*, 6 Ind. at 501, 510); *GRAY*, *supra* note 447, at 233-34.

cannabis and provide retroactive compensation for the inequities caused by the abridgment of the right to possess and sell cannabis by the War on Drugs.

### 3. Liberalization

Legislatively, cannabis social equity requires *Liberalization*. The question of “how legal should cannabis be?” is simply a matter of how each state intends to regulate that legality. This Article provides grounds to advocate for legislation as broad as complete legalization (stated inversely, no regulations) and full funding for retroactive compensation programs that address every identifiable criminal justice, industry, community, and access inequity. At the same time, any lesser level of legalization or remediation of social equity that is not an outright ban would at least be a step toward social equity.

The important consequence of this analysis is that the effective way to address social equity through cannabis legislation is not via explicit “social equity provisions” but structurally through the level of legalization provided for in each aspect of any legislative scheme.<sup>473</sup> Each regulation should be analyzed for its effect on a person’s underlying right to use or commercialize cannabis. Laws restricting that right have a chilling effect on an individual’s ability to use or commercialize cannabis. Reified existing inequities should be held to the appropriate constitutional standard and be accompanied by appropriate compensation.

Examples of building such a right into the structure of cannabis legislation include the following approaches. Each approach shows the impact of the level of legalization on one of the four equities: criminal justice, industry, community, and access equity. First, laws maintaining criminal punishments for violations of possession limits defeat the purpose of pursuing criminal justice equity and, if possible, to constitutionally maintain under the new framework, should be compensated for via direct reparations and retroactive resentencing/expungement/record clearance. Second, exclusive licensing schemes reify existing inequity in cannabis industry participation and actively create the additional imbalances that instigated the need for industry equity policies in the first place. Any reduction in the stringency of commercial regulations expands legislation’s ability to structurally address both preexisting inequities by

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<sup>473</sup> See Otañez & Vergara, *supra* note 306; and Snapp & Valderrábano, *supra* note 310 at 305. MCBA REPORT 2022, *supra* note 15.

opening the industry to those previously affected by the War on Drugs and newly created inequities by short-circuiting the current licensing process limitations, managed market dynamics, and natural industry dynamics discussed earlier.<sup>474</sup> Third, legislation is necessary to specify the appropriate compensation for other legislative encroachments on the right to cannabis use and commercialization. Whether merely forward-looking compensatory schemes or retroactive reparations and reinvestment in affected populations, only affirmative legislative action can provide the relief required to pursue community equity. Administrative actions seeking equity in policy implementation are inherently insufficient to address the scope of the harm. Fourth, many tertiary elements of law implicitly chill the use and commercialization of cannabis as a direct result of its current prohibition and heavy regulation. Explicit legislative harmonization of these laws with a chosen lower level of cannabis regulation is essential to provide access equity.

Each legislative component should be evaluated in this way to address cannabis inequities to ensure continued forward progress toward an equitable future. Further, application of this approach to the level of legalization to specific social justice equity, industry equity, community equity, and access equity policies will evidence a bias towards increasing regulatory liberalization. Rather than mere regulation and compensation, this approach takes advantage of market forces and the new equality of opportunity to form a substrate on which policies of equal outcome can work effectively to remedy ongoing social inequities. This application of the new theory of cannabis social equity provides a set of tools to highlight and criticize deficiencies in current, heavily regulated approaches to cannabis legislation.

#### 4. Leadership

Administratively, cannabis social equity requires *Leadership*. Administrators, agency workers, judicial employees, advocates, community leaders, volunteer services, and others who care for those adversely affected by the War on Drugs must actively monitor and iterate the implementation of the level of legalization in the cannabis industry. Accurate data are currently hard to obtain in a highly regulated and highly black-market industry, but they are essential for administrators attempting to identify and measure the impact of programs on the inequities those programs were designed to address.

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<sup>474</sup> *Supra* Section IV.A.2.



The higher the level of legalization and the fewer the regulations, the more transparent the industry, and thus, the more accessible and accurate the data used to act in pursuit of equity. Administrators play a crucial role in identifying social inequities and implementing cannabis reforms, and the legislature should therefore give them every advantage and freedom in pursuing criminal justice, industry, community, and access equity.

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In sum, applying the new theory of cannabis social equity permits effective diagnosis of flawed policies and allows administrators to articulate new approaches to existing inequities. The theory offers the first theoretical diagnosis of the structural flaws and continuing ineffectiveness of current, misnamed social equity policies. The theory also shows the benefits of integrating policies regarding the level of legalization into future legislation: defining one of the broadest paths towards rectifying the significant adverse impacts of the War on Drugs while fostering an equitable industry into the future: Legitimization, Legalization, Liberalization, and Leadership.<sup>475</sup> Yet, much work remains to evaluate and iterate current state programs in pursuit of equity.

## V. CONCLUSION

The cannabis social equity movement has identified real, existing inequities resulting from the War on Drugs and proposed policies with the potential to positively impact those inequities. However, many of the policies that have emerged from the cannabis social equity movement and received remarkable consensus show significant ineffectiveness in impacting cannabis inequities. Additionally, the policies that attract the most public and advocacy attention often require the most administrative resources, and they are inherently limited in the amount of inequity they can redress, given the disparities in scale between the proposals and the inequities of the War on Drugs.

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<sup>475</sup> The “4 L’s” of this framework for the level of cannabis legalization, while developed independently and based in the public administration literature, can be roughly analogized as a specific implementation of the “4 R’s” of Prof. Eric Yamamoto’s restorative justice framework for interracial reconciliation at the societal level: Recognition, Responsibility, Reconstruction, and Reparation. ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA*, 1-6 (1999). Gratitude to Prof. Richard Wallsgrave for conversations on this topic after the initial presentation of this paper at the Association of American Law Schools’ annual conference in 2023.

This paper series<sup>476</sup> contributes to the investigation and remediation of inequities resulting directly and indirectly from the United States' War on Drugs by integrating the theories of social equity developed in the fields of public administration, philosophy, and law into a framework for imagining, implementing, and refining cannabis social equity policies. A brief history of cannabis policy showed the history of cannabis regulation and the ongoing and enormous scale of the inequities that the War on Drugs continues to perpetuate. A historiography of the popular theories of cannabis social equity clarified the language and definition of social equity currently used in mainstream and academic literature. A detailed review of the current inadequacies of social justice equity, industry equity, community equity, and access equity policies at improving social equity outcomes highlighted the need for a more robust approach to the development and deployment of cannabis social equity policies. An analysis of public administration's social equity theory incorporated recent historical and legal developments to produce a new theory of cannabis social equity. Finally, the new theory of cannabis social equity explained why current industry equity theories suffer in implementation and generated new ideas for future paths toward legalization and the realization of social equity based on the policies addressing the level of legalization in a regulatory regime.

The new theory of cannabis social equity, will provide insights into improvements and methods for addressing the implementation difficulties of current social equity programs. Additionally, many current but unimplemented proposals could be optimized in pursuit of equity through further application of the new theory of cannabis social equity, including: (1) top-down vs. bottom-up market-oriented solutions;<sup>477</sup> (2) direct state control of the industry;<sup>478</sup> (3) sliding scale business licensing schemes (with licensing fees growing linearly or accelerating with business size) with various levels of license costs vs. operation size and its impact on industry make-up;<sup>479</sup> (4) business licensing with low barriers to entry and low numbers of licenses vs. high barriers to entry and no license caps vs. high barriers to entry and low

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<sup>476</sup> Halydier, *supra* note 1.

<sup>477</sup> 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).

<sup>478</sup> See generally Kilmer & Neel, *supra* note 235; Rychert & Wilkins, *supra* note 260, at 72-73.

<sup>479</sup> Halydier, *supra* note 477, at 6-19.

license caps with support of equity applicants; (5) enhanced requirements for equity ownership verification and limits on equity license reselling; (6) civil asset forfeiture reform; and (7) community building of entrepreneurs,<sup>480</sup> to name but a few.

The new theory of cannabis social equity opens the door to new solutions for realizing cannabis social equity. Advocates can apply the theory to specific inequities to generate new policy ideas. Legislators can use the theory to evaluate proposals for their likely effectiveness at moving the needle on existing inequities. Administrators can employ the theory to diagnose the elements of legislation or implementation that fail to promote social equity as billed before pursuing new solutions. All can make new progress each day toward remediating the ongoing harms of the War on Drugs in pursuit of fairness, rights, justice, and equity for those in need. For if all we ask for is equity, there will never be justice.

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<sup>480</sup> Rajni Goel, *Do Women Fare Better in Female-Owned Businesses?*, 19(3) J. OF DEVELOPMENTAL ENTREPRENEURSHIP 1450017-1, 1450017-16-17 (2014).