

# PREVENTING INDUSTRY ABUSE OF CANNABIS EQUITY PROGRAMS

Daniel G. Orenstein, JD, MPH\*

## ABSTRACT

Enforcement disparities have pervaded the history of U.S. drug control laws, particularly regarding cannabis. These disparities have systemically disadvantaged persons of color and other communities. Responding to these inequities, some state cannabis legalization campaigns have emphasized social justice goals, and states and localities have adopted cannabis social equity programs directed toward communities disproportionately impacted by the War on Drugs. These programs encourage and assist individuals from target communities in entering the legal cannabis industry by offering access to grants, loans, and technical assistance and providing priority or preference in licensure, a significant advantage in a competitive industry. Equity programs serve laudable goals but must be structured to mitigate the risk of corporate abuses that threaten public health. The history of tobacco control in particular offers cautionary examples of how for-profit industries can infiltrate communities by leveraging targeted marketing, building political relationships, and operating disproportionately in underprivileged areas. Equity programs' focus on disadvantaged communities may inadvertently allow this damaging history to repeat in the cannabis industry to the detriment of the communities equity programs seek to help. This Article explores pathways that could lead to industry abuse, surveys possible restrictions within a for-profit market, and assesses options for alternative market structures, including government monopoly, mandatory nonprofit status, and mandatory public benefit company status. Among these options, compulsory public benefit status offers the best combination of current legal feasibility and advancement of social equity goals.

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\* Visiting Assistant Professor, Indiana University Robert H. McKinney School of Law.

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## INTRODUCTION

The history of cannabis<sup>1</sup> regulation in the United States is inextricably intertwined with racism and inequality, and legalization is at best a partial correction. As part of a comprehensive cannabis legalization framework, cannabis social equity programs attempt to encourage entrepreneurship and employment in the legal cannabis industry for members of communities disproportionately impacted by inequitable enforcement of the War on Drugs. Equity programs 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, but careful planning is essential to avoid a public health trap for the populations these programs seek to benefit. Legal guardrails to reduce the involvement of large corporate entities in equity programs and in the cannabis industry generally will make equity programs more effective and reduce the risk of unintended public health consequences.

Businesses owned or staffed by community members are positioned to consider and serve community interests, but larger corporate entities entering the space may threaten those interests. Among other examples, the history of tobacco control is replete with lessons demonstrating that community connections between a large for-profit industry and disadvantaged communities can precipitate substantial public health harms. In particular, tobacco industry targeting of Black communities serves as a cautionary example of how such industries can damage community health in pursuit of profit. In the cannabis industry, well-financed entities have shown willingness to abuse the intent of social equity programs by manipulating partnerships with equity-eligible persons to improve positioning for competitive licensure. Market pressures in the industry also facilitate consolidation, including acquisition of equity licensees by larger firms. Left unchecked, these dynamics will recreate other industries' damaging behavior in the nascent cannabis industry.

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<sup>1</sup> This Article uses "cannabis" to refer to the plant *Cannabis sativa* L. and all products made from it. The term "marijuana" is used primarily in North America and historically referred only to the dried flowers and leaves, typically smoked, in contrast to products made from the resin ("hashish"). Some of these distinctions remain in various state statutes. See, e.g., MONT. CODE ANN. § 50-32-101 (2019) ("Hashish", as distinguished from marijuana, means the mechanically processed or extracted plant material that contains tetrahydrocannabinol (THC) and is composed of resin from the cannabis plant."). Smoking remains the most common mode of cannabis use, but the modern cannabis industry includes a wide variety of products, such as edibles, concentrates, and extracts, and "cannabis" more accurately encompasses all such products. Additionally, as discussed *infra*, the use of "marijuana" in the United States is largely the product of early twentieth century prohibition advocacy inextricably tied to racism. However, "marijuana" (and sometimes "marihuana") remains commonly used in the U.S., both in popular media and in federal and state laws, and thus its use cannot be entirely avoided.

To mitigate the potential for larger corporate entities to exploit social equity programs, this Article argues that policymakers must consider both targeted restrictions within the for-profit adult use cannabis market and broader changes to the nature of that market. Part I provides a brief overview of the relevant health effects of cannabis, the history of racism and inequity that pervades U.S. cannabis laws, and the continuing disparities necessitating cannabis social equity programs. Part II discusses key elements of existing equity programs and their results and challenges to date. Part III details pertinent lessons from the history of tobacco industry abuse of marginalized communities, particularly the tragic and continuing history of targeting Black communities, and explains the pathways that make cannabis markets and equity programs vulnerable to similar exploitation. Part V considers a range of legal solutions to mitigate corporate abuse, including restrictions on equity programs and broader structural changes to the cannabis market. Among the latter, requiring adult use cannabis businesses to be organized as public benefit companies presents the best balance of feasibility and effectiveness under current federal law.

## I. BACKGROUND

### A. Health Effects of Cannabis

The health effects of cannabis use are understudied due to severe research restrictions imposed by the drug's illegality under federal law.<sup>2</sup> This Article generally addresses legal frameworks for adult use (also called recreational) cannabis. There are established therapeutic medical uses for cannabis and its constituent cannabinoids,<sup>3</sup> and medicinal use has been common globally for millennia.<sup>4</sup> However, it is the potential negative health effects of cannabis use that are more relevant to adult use legal frameworks.

As reported by the National Academies of Sciences, Engineering & Medicine in a landmark 2017 report, there is substantial evidence that cannabis use is associated with development of schizophrenia and other psychoses, increased risk of motor vehicle accidents, lower birth weight (for maternal cannabis smoking), and worse respiratory symptoms and more frequent chronic bronchitis episodes.<sup>5</sup> The National Academies also found moderate evidence that cannabis use is associated with increased risk of

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<sup>2</sup> NAT'L ACADS. OF SCIS., ENG'G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS 395–401 (2017), <https://www.nap.edu/catalog/24625/the-health-effects-of-cannabis-and-cannabinoids-the-current-state> (cataloging research barriers) [hereinafter NASEM Report ].

<sup>3</sup> *Id.* at 13–14 (regarding conclusions on therapeutic effects).

<sup>4</sup> For example, the earliest known written reference to the plant refers to medicinal uses in 2700 B.C.E. China. GLEN R. HANSON, PETER J. VENTURELLI & ANNETTE E. FLECKENSTEIN, DRUGS AND SOCIETY 408 (12th ed. 2015).

<sup>5</sup> NASEM Report, *supra* note 2, at 15–21.

pediatric overdose injuries, impairment of cognitive domains, increased incidence of certain mental health outcomes and conditions, and development of use disorders for cannabis and other substances.<sup>6</sup> Evidence is also suggestive for a variety of other possible health harms.<sup>7</sup> None of these associations are necessarily causal, but they nevertheless warrant attention and consideration in cannabis law and policy.

Despite evidentiary gaps regarding harms of casual cannabis consumption, the evidence is more disconcerting regarding heavy use (*i.e.*, daily or near-daily). Heavy cannabis use is associated with impaired cognitive performance, poorer educational attainment, increased risk of psychotic symptoms or diagnosis of schizophreniform psychosis, and cardiovascular risks, among other negative outcomes.<sup>8</sup> The proportion of heavy cannabis users among all users has grown substantially, from approximately one in nine in 1992 to more than one in three in 2014.<sup>9</sup> Based on experiences with tobacco and alcohol control, heavy users are likely to become the dominant consumers of cannabis in a for-profit market,<sup>10</sup> and heavy cannabis users are already responsible for the majority of cannabis consumption.<sup>11</sup>

Additionally, as further research develops, the adverse health effects from smoked cannabis, which remains the most common consumption method,<sup>12</sup> will likely be found to be analogous to those of tobacco smoke. Cannabis smoke and tobacco smoke are highly similar other than the presence of cannabinoids and nicotine, respectively,<sup>13</sup> and both contain dozens of known carcinogens and other harmful particulates.<sup>14</sup> There are indications that cannabis smoke has negative impacts on cardiovascular and

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<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g., id.* (listing conclusions of limited or insufficient evidence); *see also* WORLD HEALTH ORG., THE HEALTH AND SOCIAL EFFECTS OF NONMEDICAL CANNABIS USE § 9.1.4 (2016), [https://www.who.int/substance\\_abuse/publications/msbcannabis.pdf?ua=1](https://www.who.int/substance_abuse/publications/msbcannabis.pdf?ua=1).

<sup>8</sup> Wayne Hall & Michael Lynskey, *Assessing the Public Health Impacts of Legalizing Recreational Cannabis Use: The US Experience*, 19 WORLD PSYCHIATRY 179, 181 (2020) (cataloging studies and findings); *see also* NASEM Report, *supra* note 2, at 19 (noting highest risk for development of schizophrenia or other psychoses among most frequent cannabis users).

<sup>9</sup> NASEM Report, *supra* note 2, at 64.

<sup>10</sup> Rosalie Liccardo Pacula, *States Need to Wake Up to Public Health Risks from Cannabis*, STAT NEWS, (Jan. 21, 2020), <https://www.statnews.com/2020/01/21/states-public-health-risks-cannabis/>.

<sup>11</sup> *See* NASEM Report, *supra* note 2, at 65.

<sup>12</sup> Gillian L. Schauer, Rashid Njal & Althea M. Grant-Lenzy, *Modes of Marijuana Use – Smoking, Vaping, Eating, and Dabbing: Results from the 2016 BRFSS in 12 States*, 209 DRUG & ALCOHOL DEPENDENCE 107900 (2020).

<sup>13</sup> David Moir, William S. Rickert, Genevieve Levasseur, Yolande Larose, Rebecca Maertens, Paul White & Suzanne Desjardins, *A Comparison of Mainstream and Sidestream Marijuana and Tobacco Cigarette Smoke Produced under Two Machine Smoking Conditions*, 21 CHEMICAL RES. TOXICOLOGY 494, 494 (2008).

<sup>14</sup> *Id.*; Rajpal S. Tomar, Jay Beaumont & Jennifer C. Y. Hsieh, CAL. ENVTL. PROT. AGENCY, *Evidence on the Carcinogenicity of Marijuana Smoke* 77–78 (2009), <https://oehha.ca.gov/media/downloads/proposition-65/chemicals/finalmjsmokehid.pdf>.

respiratory health from both active and passive (*i.e.*, secondhand) use, and California lists cannabis smoke on its Proposition 65 list of substances known to cause cancer or reproductive toxicity.<sup>15</sup> These and other parallels between cannabis and tobacco are particularly worrisome given that the latter continues to produce egregious global morbidity and mortality.<sup>16</sup>

None of the preceding inventory of possible ill effects should be taken as an argument for continued criminalization, however. Cannabis use is not riskless. There is a public health interest in providing accurate health information, discouraging excessive use, reducing youth initiation, and assisting persons who develop use disorders. But cannabis criminalization has failed to achieve these public health goals and exacted a high and inequitable social price. Legalization is a better alternative, but it is not a monolithic one;<sup>17</sup> the challenge is how to legalize cannabis well.

## B. Race and U.S. Cannabis Laws

U.S. cannabis criminalization traces its roots to the early 1900s. Earlier cultivation was largely in service of hemp fiber production or medicinal use,<sup>18</sup> and drug regulation in the U.S. was generally minimal until the early 1900s.<sup>19</sup> Even at that point, initial cannabis laws dealt mostly with labeling, part of a broader effort to regulate patent medicines (often-questionable over-the-counter concoctions that frequently contained cannabis, among other potent ingredients like heroin, cocaine, or morphine).<sup>20</sup> Soon, however, a combination of racism, economic competition, and political and journalistic opportunism pushed the country toward cannabis prohibition.<sup>21</sup> Smoking

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<sup>15</sup> Tomar et al., *supra* note 14.

<sup>16</sup> See, e.g., JEFFREY DROPE, NEIL W. SCHLUGER, ZACHARY CAHN, JACQUI DROPE, STEPHEN HAMILL, FARHAD ISLAMI GOMESHTAPEH, ALEX LIBER, NIGAR NARGIS & MICHAL STOKLOSA, AM. CANCER SOC'Y & VITAL STRATEGIES, THE TOBACCO ATLAS 24–31 (6th ed. 2018), [https://files.tobaccoatlas.org/wp-content/uploads/2018/03/TobaccoAtlas\\_6thEdition\\_LoRes.pdf](https://files.tobaccoatlas.org/wp-content/uploads/2018/03/TobaccoAtlas_6thEdition_LoRes.pdf).

<sup>17</sup> See generally JONATHAN P. CAULKINS, BEAU KILMER, MARK A. R. KLEIMAN, ROBERT J. MACCOUN, GREGORY MIDGETTE, PAT OGLESBY, ROSALIE LICCARDO PACULA & PETER H. REUTER, RAND CORP., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS (2015), [https://www.rand.org/pubs/research\\_reports/RR864.html](https://www.rand.org/pubs/research_reports/RR864.html) (setting out multiple general approaches to legalization) [hereinafter RAND Report].

<sup>18</sup> Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 791–92 (2019).

<sup>19</sup> Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 361–62 (2013) [hereinafter Bender, *Joint Reform*].

<sup>20</sup> See Vitiello, *supra* note 18, at 793–94; see also Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768.

<sup>21</sup> See Bender, *Joint Reform*, *supra* note 19, at 359–62. The pattern was similar for cocaine and opiates. Associations drawn between opiates and Chinese immigrants, cocaine and Black persons, and cannabis and both Mexican immigrant and Black communities provide a telling context for the adoption of early drug control laws in the U.S. See *id.* at 361–64. See also Vitiello, *supra* note 18, at 797–800 (recounting the outsized role of racism in the rapid shift to heavy regulation of cannabis).

cannabis for non-medical purposes became associated with Mexican immigrant laborers and violent crime, a tie prohibition advocates promoted by adopting the Mexican Spanish term “marijuana” (or “marihuana”) rather than using the more common “cannabis.”<sup>22</sup> Prohibition advocates, particularly in the South, drew similarly disparaging links between cannabis, violence, and Black persons. Due in large part to racial, ethnic, and class prejudices, most states adopted cannabis prohibitions by the late 1930s.<sup>23</sup> In 1937 Congress followed suit and adopted the Marihuana Tax Act, ushering in a forceful (albeit indirect) national cannabis prohibition.<sup>24</sup>

The exaggerated cannabis rhetoric of this era is exemplified in propaganda film turned tongue-in-cheek cult classic “Reefer Madness,” its name eventually becoming shorthand for alarmist (and sometimes unintentionally humorous) arguments against cannabis use or legalization.<sup>25</sup> The film itself focuses on the drug’s supposed menace to white youth,<sup>26</sup> but the era’s racism and unsubstantiated fusion of cannabis, race, and crime was commonplace elsewhere, including state legislatures.<sup>27</sup> The most visible purveyor of overtly racist cannabis prohibition advocacy was Harry Anslinger,<sup>28</sup> the U.S.’s “most famous anti-marijuana warrior” and first head

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<sup>22</sup> See Vitiello, *supra* note 18, at 797. The origins of the Mexican Spanish term are murky, potentially including military slang for a brothel (*Maria y Juana*, meaning “Mary and Jane” and giving rise to one of the more popular American cannabis slang terms) and the Chinese name for the plant (*ma* or *ma ren hua*, used to refer to medicinal uses since at least 2700 B.C.E.), among others. MARTIN BOOTH, *CANNABIS: A HISTORY* 8 (Picador 2003); Matt Thompson, *The Mysterious History of ‘Marijuana’*, NAT’L PUB. RADIO: CODE SWITCH (July 22, 2013, 11:46 AM) <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana>.

<sup>23</sup> The racism-influenced history of cannabis prohibition is well established, but was not the sole fount of these laws. Mexico, for example, also prohibited cannabis, and did so earlier than the U.S., more likely influenced by association of cannabis use with lower social classes than by race or ethnicity. See, e.g., Thompson, *supra* note 22.

<sup>24</sup> As the name suggests, the Marihuana Tax Act did not actually prohibit cannabis possession directly, but the Act’s taxation and declaration provisions effectively banned it in combination with state law prohibitions. See Vitiello, *supra* note 18, at 794–95; 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, 237 (forthcoming), <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1318&context=jbtl>.

<sup>25</sup> See, e.g., Herbert Fuego, *Blast From the Past: Ten Hilarious Anti-Marijuana Commercials*, WESTWORD, (Mar. 16, 2018), <https://www.westword.com/marijuana/ten-funniest-anti-marijuana-ads-from-the-past-10092790>.

<sup>26</sup> See, e.g., Bender, *Joint Reform*, *supra* note 19, at 363.

<sup>27</sup> See, e.g., *id.* at 361–62.

<sup>28</sup> Anslinger made numerous public comments that were unabashedly racist (some specifically regarding cannabis). The comments do not merit repeating here but have been widely reported. See, e.g., Kyle Schmidlin, “War On Drugs” Merely Fights The Symptoms Of A Faulty System, CBS NEWS, (Sept. 13, 2008, 7:19 AM), <https://www.cbsnews.com/news/column-war-on-drugs-merely-fights-the-symptoms-of-a-faulty-system/>; Laura Smith, *How a Racist Hate-monger Masterminded America’s War on Drugs*, TIMELINE, (Feb. 27, 2018), <https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc-281189>; see also Vitiello, *supra* note 18, at 799–800; Cydney Adams, *The Man Behind the Marijuana Ban for All the Wrong Reasons*, CBS NEWS,

of the Federal Bureau of Narcotics (which later became the Drug Enforcement Administration).<sup>29</sup> Anslinger tied cannabis (and other drugs) to Mexican immigrants, the Black community, jazz culture, and other marginalized groups, and he commonly asserted that cannabis use led to psychosis and violent crime.<sup>30</sup> He served as the U.S.'s top drug control officer through five presidential administrations and also played a prominent role in installing the U.S.'s restrictive approach in the 1961 U.N. Single Convention on Drug Control.<sup>31</sup>

While the explicit racism of 1930s drug policy eventually ebbed, drug crime punishments increased in the 1950s under the Boggs Act of 1951, the Narcotics Control Act of 1956, and state-level counterparts.<sup>32</sup> This punitive approach and the less obvious “dog whistle” racism that accompanied it have continued to exert a marked influence on U.S. drug policy ever since.<sup>33</sup> In 1969, the Supreme Court invalidated key aspects of the Marihuana Tax Act,<sup>34</sup> and Congress responded by passing the Controlled Substances Act (CSA) in 1970, establishing a framework that largely remains in place.

The CSA divides controlled drugs into five schedules based on their potential for abuse or dependence, pharmacological effect, medical utility, and public health risk.<sup>35</sup> The most restrictive class, Schedule I, includes drugs deemed to have “no currently accepted medical use in treatment in the United States,” such as LSD, MDMA, peyote, and heroin.<sup>36</sup> Schedule I also includes cannabis (as “marihuana”) and its constituent cannabinoid delta-9-tetrahydrocannabinol (THC), which is responsible for the drug’s characteristic “high.”<sup>37</sup> Congress initially scheduled cannabis only provisionally, calling for more research on risks and medical utility. The resulting Shafer Commission Report recommended a public health-oriented approach, including general decriminalization of possession, but was largely ignored by the Nixon Administration.<sup>38</sup>

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(Nov. 17, 2016, 5:45 PM), <https://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/>.

<sup>29</sup> See Vitiello, *supra* note 18, at 799–800.

<sup>30</sup> See sources cited *supra* note 28.

<sup>31</sup> See Drug Enforcement Administration Museum & Visitors Center, *Harry Jacob Anslinger: The Late Years*, <https://deamuseum.org/anslinger/the-late-years/> (last visited June 4, 2020).

<sup>32</sup> Vitiello, *supra* note 18, at 800–01; Swinburne & Hoke, *supra* note 24, at 238; *Marijuana Timeline*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited June 19, 2020); *A Brief History of the Drug War*, DRUG POL’Y ALL., [drugpolicy.org/issues/brief-history-drug-war](http://drugpolicy.org/issues/brief-history-drug-war) (last visited June 19, 2020).

<sup>33</sup> Vitiello, *supra* note 18, at 801–03.

<sup>34</sup> See *Leary v. U.S.*, 395 U.S. 6 (1969); see also Swinburne & Hoke, *supra* note 24, at 238–39.

<sup>35</sup> Controlled Substances Act, 21 U.S.C. § 811(c). Obligations under international agreements are also considered, but beyond the scope of this article. *Id.* § 811(d).

<sup>36</sup> *Id.* § 812 (b)(1), (c).

<sup>37</sup> *Id.* § 812 (Schedule I)(c)(10), (17).

<sup>38</sup> Bender, *Joint Reform*, *supra* note 19, at 366; *Marijuana Timeline*, *supra* note 32.

President Nixon famously declared a “War on Drugs” in a 1971 press conference,<sup>39</sup> and the political circumstances of the era provide critical context for this approach. According to Nixon administration domestic affairs advisor (and key Watergate figure) John Ehrlichman:

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 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.<sup>40</sup>

Despite the CSA’s restrictiveness, the new law was generally less punitive than the Boggs Act and the Narcotics Control Act, which were repealed in 1970.<sup>41</sup> Incarceration rates began to grow steadily in the 1970s, but the “Just Say No” philosophy of the 1980s and “tough on crime” politics of the 1990s dramatically escalated the trend. The Anti-Drug Abuse Act of 1986 and the Comprehensive Crime Control Act of 1984 reinstated mandatory sentences for many drug crimes and increased penalties.<sup>42</sup> The U.S. prison population subsequently exploded, fueled by mandatory sentences and sentence-enhancing “three strikes” laws, disproportionately imprisoning persons of color, especially Black persons.<sup>43</sup>

Modern U.S. drug laws have never been equitably enforced, and their application to cannabis is a clear example. A 2013 American Civil Liberties Union report found that a Black person was nearly four times more likely to be arrested for a cannabis crime than a white person.<sup>44</sup> Racial arrest

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<sup>39</sup> Bender, *Joint Reform*, *supra* note 19, at 366.

<sup>40</sup> Dan Baum, *Legalize It All: How to win the War on Drugs*, HARPER’S MAGAZINE (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all/>. Baum attributed the quote to a 1994 interview with Ehrlichman, whose family has disputed the veracity of the quote. Tom LoBianco, *Report: Aide Says Nixon’s War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehlichman-richard-nixon-drug-war-blacks-hippie/index.html>. Others have argued that the quote, even if accurate, is an oversimplification over the administration’s motivations. See German Lopez, *Was Nixon’s War on Drugs a Racially Motivated Crusade? It’s a Bit More Complicated*, VOX (Mar. 29, 2016), <https://www.vox.com/2016/3/29/11325750/nixon-war-on-drugs>.

<sup>41</sup> See sources cited *supra*, note 32.

<sup>42</sup> *Marijuana Timeline*, *supra* note 32.

<sup>43</sup> See, e.g., Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980s-1996*, 26 CRIME & JUST. 17–26 (1999); Marla McDaniel, Margaret Simms, William Monson & Karina Fortuny, *Imprisonment and Disenfranchisement of Disconnected Low-Income Men*, URB. INST. AND U.S. DEP’T OF HEALTH & HUM. SERV. (2013), [https://aspe.hhs.gov/system/files/pdf/56191/rpt\\_imprisonment.pdf](https://aspe.hhs.gov/system/files/pdf/56191/rpt_imprisonment.pdf).

<sup>44</sup> *The War on Marijuana in Black and White*, AM. C. L. UNION, 4, 9 (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white> [hereinafter ACLU, *Black and White*].

disparities are pervasive, present in nearly every county with more than a minimal Black population, and these disparities actually increased between 2001 and 2010, despite legal and policy changes implemented to reduce them.<sup>45</sup> These disparities continue to persist nationally.<sup>46</sup>

Differential use rates do not explain these disparities. Studies consistently find similar reported rates of cannabis use across racial groups in the U.S.<sup>47</sup> Nor do enforcement disparities disappear following decriminalization or legalization. Overall cannabis arrest rates have declined, but Black persons remain more likely to be arrested for cannabis possession than their white counterparts in every state,<sup>48</sup> and in some states these disparities have actually become more severe.<sup>49</sup> Disparities have diminished (but not disappeared) in some states,<sup>50</sup> yet in others the disparities simply shifted. For example, following legalization of cannabis possession in the District of Columbia, possession arrests foreseeably plummeted. But this was followed shortly thereafter by a substantial increase in arrests for public consumption of cannabis that disproportionately impacted Black persons.<sup>51</sup> Similarly, cannabis arrest rates dropped significantly in Colorado following legalization in 2012, but whites experienced the greatest proportionate decrease. Colorado's cannabis arrest rate for Black persons remained double that for whites five years later.<sup>52</sup> As evidenced by their universality and persistence, racial enforcement disparities are not statistical anomalies or simply the product of individual decisions. These disparities are part of the web of systemic racism that pervades drug policy and other structures.

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<sup>45</sup> *Id.* at 4, 9.

<sup>46</sup> *A Tale of Two Countries: Racial Targeted Arrests in the Era of Marijuana Reform*, AM. C. L. UNION 4–6, 28–29, [https://www.aclu.org/sites/default/files/field\\_document/042020-marijuanareport.pdf](https://www.aclu.org/sites/default/files/field_document/042020-marijuanareport.pdf) [hereinafter ACLU, *Two Countries*] (accessed 2020).

<sup>47</sup> Based on Behavioral Risk Factor Surveillance System survey data among adults without a relevant medical condition, 8.9% of non-Hispanic white respondents report current cannabis use, compared to 10.7% of non-Hispanic Black respondents, 6.3% of Hispanic respondents, and 7.3% of respondents of other races or ethnicities. Hongying Dai & Kimber P. Richter, *A National Survey of Marijuana Use Among US Adults With Medical Conditions, 2016-2017*, 2(9) JAMA NETWORK OPEN e1911936, 3 (2019). Prevalence of daily use was also similar (4.0% Non-Hispanic white; 5.5% Non-Hispanic Black; 2.4% Hispanic; 2.5% other races/ethnicities). *Id.* at 3.

<sup>48</sup> ACLU, *Two Countries*, *supra* note 46, at 4–6, 28–29.

<sup>49</sup> *Id.* at 30–33.

<sup>50</sup> *Id.* at 34–36.

<sup>51</sup> *See Racial Disparities in D.C. Policing: Descriptive Evidence from 2013–2017*, AM. C. L. UNION: DIST. OF COLUMBIA (July 31, 2019), <https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017>.

<sup>52</sup> JACK REED, COLO. DIV. OF CRIM. JUST., DEP'T OF PUB. SAFETY, IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO 20–21 (2018), [https://cdpsdocs.state.co.us/ors/docs/reports/2018-SB13-283\\_Rpt.pdf](https://cdpsdocs.state.co.us/ors/docs/reports/2018-SB13-283_Rpt.pdf).

### C. Continuing Disparities

Collateral consequences prolong and magnify the effects of arrest disparities. Arrest and incarceration histories affect opportunities in housing, employment, and education, among numerous other areas.<sup>53</sup> This reduces economic opportunity and damages the long-term prosperity of both individuals and their communities.

Adding to these challenges, the cannabis industry presents unique difficulties for those seeking to enter the developing field as a path towards economic progress. Barriers to cannabis industry entry are significant and disproportionately affect communities subjected to inequitable drug law enforcement, stacking inequity on top of inequity. Most state cannabis legalization frameworks prohibit persons with prior drug felonies from becoming cannabis business owners or serving in various other capacities (or allow them to do so only with “rehabilitation”). Because these laws have been unequally enforced, drug convictions are more common for persons of color. Start-up costs are also exceptionally high, particularly without access to typical business loan options.<sup>54</sup> Economic inequities created by arrest and conviction disparities make it harder for persons of color to access the types of liquid capital needed to facilitate entry to the cannabis industry.<sup>55</sup> At the same time, persons of color may be justifiably wary of being targeted by law enforcement based on innumerable examples from the War on Drugs and policing generally, which may discourage industry participation.<sup>56</sup>

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<sup>53</sup> ACLU, *Black and White*, *supra* note 44. The vast array of troubling aspects of the relationship between law enforcement and communities of color, particularly Black communities, continues to be a deep wound in American life. *See, e.g.*, Kihana Miraya Ross, Op-Ed, *Call It What It Is: Anti-Blackness*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/george-floyd-anti-blackness.html>. Assessment of the full impacts of systemic racism and anti-Blackness are beyond the scope of this Article. However, this broader context further underscores both the justification for social equity programs and the importance of being mindful of potential unintended negative consequences on communities that are already burdened by an array of other enduring inequities that require attention and resolution.

<sup>54</sup> Federal law generally prohibits banks from doing business with state-legal cannabis businesses. *See* James J. Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, AM. BAR ASSOC. BUS. L. Feb. 6, 2020, [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/02/cannabis-banking/](https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking/). Even in non-cannabis industries, however, there are racial disparities in loan access. *See, e.g.*, Meera Jagannathan, *People of Color Are Reclaiming Their Place in a Cannabis Industry ‘Built on the Backs of People from Marginalized Communities’*, MARKETWATCH (Nov. 12, 2019), <https://www.marketwatch.com/story/people-of-color-are-reclaiming-their-place-in-a-cannabis-industry-built-on-the-backs-of-people-from-marginalized-communities-2019-08-05>.

<sup>55</sup> *See, e.g.*, Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 695–98 (2016) [hereinafter Bender, *Colors of Cannabis*].

<sup>56</sup> *See, e.g., id.* at 697; Tracy Jarrett, *Six Reasons African Americans Aren’t Breaking Into the Cannabis Industry*, NBC NEWS (Apr. 17, 2015), <https://www.nbcnews.com/news/nbcblk/6-reasons-african-americans-cant-break-cannabis-industry-n344486>.

The impact of these various barriers is evident in the stunning lack of diversity in the cannabis industry. A 2017 survey by trade publication *Marijuana Business Daily* found that 81% of respondents who launched or had an ownership stake in a cannabis business were white. Even this likely overstates actual control available to persons of color in the industry, as the other 19% of respondents did not necessarily have controlling interests.<sup>57</sup> Additionally, only 17% of executive positions were filled by persons of color, and these skewed toward wholesale cultivators (24.1%) and ancillary services firms (20.8%). In comparison, executives of color were less prevalent among medical or recreational retailers (13.3%), vertically integrated medical or recreational businesses (12.3%), and investors (12.2%). These lower proportions approximate the U.S. business average of 13%,<sup>58</sup> reflecting little progress in creating a more inclusive cannabis industry, let alone one that accounts for the disproportionate burdens of the War on Drugs. At the local level, a 2020 report for Denver, Colorado, similarly found that among survey respondents 75% of cannabis business owners and 68% of employees were white, while 6% of owners and employees were Black and 13% of owners and 12% of employees were Hispanic/Latinx. In comparison, about 9.5% of the city's population is Black and 30.5% is Hispanic/Latinx.<sup>59</sup> Business owners cited banking regulations and lack of access to capital as the most pressing barriers to industry participation.<sup>60</sup>

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<sup>57</sup> Eli McVey, *Chart: Percentage of Cannabis Business Owners and Founders by Race*, MARIJUANA BUS. DAILY (Sept. 11, 2017), <https://mjbizdaily.com/chart-19-cannabis-businesses-owned-founded-racial-minorities>. Notably, California, by virtue of its large and diverse population, accounts for a large proportion of the diversity in the cannabis industry. *See id.* In contrast, the first four legalizing states (Alaska, Washington, Colorado, and Oregon) do not have particularly diverse populations (60%, 68%, 68%, and 75% white, respectively). *See Population Distribution by Race/Ethnicity*, KAISER FAMILY FOUNDATION, <https://www.kff.org/other/state-indicator/distribution-by-raceethnicity/?activeTab=map&currentTimeframe=0&selectedDistributions=white&sortModel=%7B%22colId%22:%22White%22,%22sort%22:%22desc%22%7D> (last visited June 28, 2020).

<sup>58</sup> Eli McVey, *Chart: Minorities Occupy 17% of Executive Positions in Marijuana Industry*, MARIJUANA BUS. DAILY (Sept. 5, 2017), <https://mjbizdaily.com/chart-minorities-occupy-17-executive-positions-marijuana-industry/>.

<sup>59</sup> ANALYTIC INSIGHT, THE DEP'T OF EXCISE AND LICENSES, DENVER, COLO., CANNABIS BUSINESS AND EMPLOYMENT OPPORTUNITY STUDY 16 (2020) [https://www.denvergov.org/content/dam/denvergov/Portals/782/documents/Denver\\_Cannabis\\_Business\\_and\\_Employment\\_Opportunity\\_Study.pdf](https://www.denvergov.org/content/dam/denvergov/Portals/782/documents/Denver_Cannabis_Business_and_Employment_Opportunity_Study.pdf).

<sup>60</sup> *Id.* at 22–24.

## II. CANNABIS SOCIAL EQUITY PROGRAMS

### A. Key Provisions of Existing Programs

Cannabis equity programs attempt to partially address the myriad economic disparities discussed above. Legalization itself, at least theoretically, should reduce future enforcement disparities by removing many cannabis-related activities from the criminal code,<sup>61</sup> but it has no direct impact on correcting past inequities. Equity programs attempt to address this gap by encouraging industry participation by individuals from communities disproportionately affected by the War on Drugs. State and local equity programs in various jurisdictions differ in construction and qualification but share key elements.<sup>62</sup> Many provide access to grants, loans, and technical assistance, and most give preference or priority in licensing to businesses owned by or with particular programs to employ persons from target communities. Eligibility typically relies on one or more factors related to residency, income, and arrest or conviction history.<sup>63</sup>

For example, businesses are eligible for Illinois' equity program if they are at least 51% owned or controlled by one or more qualifying persons or have a workforce composed of at least 51% qualifying persons.<sup>64</sup> Qualification is based on either residence or criminal history. For residence, a person must have lived in a "disproportionately impacted area" (DIA), identified by the state's Department of Commerce and Economic Opportunity as having high cannabis-related arrest, conviction, and incarceration rates and either high poverty<sup>65</sup> or high unemployment.<sup>66</sup> For criminal history, a person or a member of their immediate family must have a prior arrest, charge, or conviction for a cannabis-related crime now eligible for expungement.<sup>67</sup> Qualifying businesses are assessed reduced license and

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<sup>61</sup> However, as many have observed, legalization alone is insufficient to remedy enforcement disparities by race due to the persistent impact of inequitable policing tactics generally. *E.g.*, Bender, *Colors of Cannabis*, *supra* note 55, at 700–03 (noting the continued role of racial profiling, "broken windows" policing, and disproportionate police presence in neighborhoods with higher proportions of persons of color in the persistent vulnerability of communities of color).

<sup>62</sup> Eli McVey, *Chart: Not All States' Cannabis Social Equity Programs Are Equal*, MARIJUANA BUS. DAILY (Aug. 20, 2019), <https://mjbizdaily.com/chart-not-all-states-cannabis-social-equity-programs-are-equal/>.

<sup>63</sup> Chris Nani, *Social Equity Assessment Tool for the Cannabis Industry 3* (June 1, 2019) (unpublished note) (on file with The Ohio State Journal of Criminal Law) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3312114](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3312114).

<sup>64</sup> 410 ILL. COMP. STAT. § 705/1-10 (2019) ("Social Equity Applicant").

<sup>65</sup> Defined as 20% or higher poverty rate, 75% or more of students participating in federal free lunch program, or 20% or more of households relying on federal food assistance programs. *Id.* ("Disproportionately Impacted Area").

<sup>66</sup> Defined as 120% or more of national average. *Id.*

<sup>67</sup> DIA-based qualification through workforce requires only that the employees currently reside in a DIA, while qualification through ownership or control without a criminal history requires living in

application fees, are eligible for low-interest loans and technical assistance, and receive a meaningful advantage in scoring on their license applications.<sup>68</sup>

License priority can be impactful. Particularly in urban areas where cannabis businesses (other than cultivators) tend to be concentrated, zoning restrictions and caps on the number of available licenses limit opportunities. Cities in legalizing states may also restrict the proximity of cannabis licensees to one another; for example, San Francisco requires cannabis businesses be at least 600 feet apart.<sup>69</sup> Combined with other restrictions (*e.g.*, proximity to schools and other sensitive locations<sup>70</sup>), a single licensee may be able to shut out rivals across an entire neighborhood or larger area.<sup>71</sup>

By some estimates, starting a cannabis business requires at least \$250,000 in capital to cover various fees, licensure, and other requirements, combined with atypical security and operating costs (as well as standard business expenses like commercial real estate).<sup>72</sup> Lacking access to customary business loans, those without considerable personal wealth or the ability and willingness to take on significant personal debt may turn to outside investors.<sup>73</sup>

The combination of capital needs and equity license priority presents one of the primary opportunities for industry abuse of social equity programs.

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a DIA for five of the past 10 years. *Id.* The latter prevents a potential owner from simply moving into an eligible area to qualify.

<sup>68</sup> Josh McGhee, *Has Weed Been Overpoliced in Your Neighborhood? Map Shows Where Entrepreneurs Could Qualify for a Boost*, CHICAGO REPORTER (Oct. 31, 2019), <https://www.chicagoreporter.com/has-weed-been-overpoliced-in-your-neighborhood-map-shows-where-entrepreneurs-could-qualify-for-a-boost/>.

<sup>69</sup> S. F., CAL., PLANNING CODE § 202.2(a)(5)(B) (2017), <https://sfbos.org/sites/default/files/o0229-17.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> See Chris Roberts, *White Weed Entrepreneurs Are Gaming Programs Meant to Help People of Color*, VICE (Jan. 30, 2020), [https://www.vice.com/en\\_us/article/3a8kev/white-weed-entrepreneurs-are-gaming-programs-meant-to-help-people-of-color\\_\(describing\\_the\\_licensure\\_of\\_cookies\\_in\\_San\\_Francisco's\\_famous\\_Haight\\_Ashbury\\_neighborhood\\_through\\_the\\_city's\\_equity\\_program\)](https://www.vice.com/en_us/article/3a8kev/white-weed-entrepreneurs-are-gaming-programs-meant-to-help-people-of-color_(describing_the_licensure_of_cookies_in_San_Francisco's_famous_Haight_Ashbury_neighborhood_through_the_city's_equity_program)).

<sup>72</sup> See Gary Cohen, *How Much Does it Actually Cost to Open a Dispensary?*, NATIONAL CANNABIS INDUSTRY ASSOCIATION BLOG (Sept. 25, 2018), <https://thecannabisindustry.org/member-blog-how-much-does-it-actually-cost-to-open-a-dispensary/>; See Nick Kovacevich, *The Hidden Costs Of The Cannabis Business*, FORBES (Feb. 1, 2019), <https://www.forbes.com/sites/nickkovacevich/2019/02/01/the-hidden-costs-of-the-cannabis-business/#6be58e717da3>. Additionally, federal law prohibits cannabis businesses from taking tax deductions for otherwise standard business expenses, further raising functional operating costs. 26 U.S.C. § 280E (1982) (prohibiting deductions for trades or businesses “trafficking in controlled substances” on Schedules I and II of the CSA).

<sup>73</sup> Government-backed loans are one approach to this problem. Illinois, for example, has pledged \$30 million in low-interest loans for equity applicants to cover startup costs. Jon Walker, *The Cannabis Equity Con*, AM. PROSPECT (July 1, 2019), <https://prospect.org/health/cannabis-equity-con/>. Oakland, California, similarly authorizes no-interest loans to equity applicants, and the California Cannabis Equity Act of 2018 provides for additional funding for loans, grants, and other support. Celene Adams, *Challenges – and Controversy – Swirl Around Marijuana Social Equity Programs in California*, MARIJUANA BUS. DAILY (Nov. 29, 2018), <https://mjbizdaily.com/controversy-marijuana-social-equity-programs-california/>.

Investors seeking faster or easier access to a competitive licensing market may partner with equity applicants to gain a licensing advantage. Standing alone, such arrangements are potentially only troubling in that they dilute actual representativeness of business ownership contrary to program intent.<sup>74</sup> But in some cases investors also impose skewed arrangements in which the equity-eligible partner does not share much if at all in profits<sup>75</sup> or lacks meaningful control over the business,<sup>76</sup> rendering them a mere figurehead. State laws or program rules sometimes prohibit such practices, but violations may be difficult to detect.<sup>77</sup> Equity applicants themselves may even seek such arrangements, willing to serve as the “face” of a cannabis business in exchange for considerable compensation.<sup>78</sup>

## B. Results and Challenges to Date

Some equity programs appear successful at targeting assistance to affected communities. For example, Oakland, California, sets aside at least half of all cannabis business permits for equity applicants. A qualifying applicant must be a city resident with an annual income 80% or less of the city’s median and must have either been arrested or convicted for a cannabis crime in the city or have lived 10 of the last 20 years within specified police beats historically subject to over-policing of cannabis crimes.<sup>79</sup> The city commissioned a comprehensive report on race and equity in medical cannabis regulations to inform the program, and the City Council adopted an explicit goal of “[p]romoting equitable ownership and employment opportunities in the cannabis industry in order to decrease disparities in life outcomes for marginalized communities of color and to address the disproportionate impacts of the war on drugs in those communities.”<sup>80</sup> Additionally, at least half of a dispensary’s staff must be Oakland residents, with half of those coming from economically disadvantaged areas.<sup>81</sup>

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<sup>74</sup> See Adams, *supra* note 73.

<sup>75</sup> See Nani, *supra* note 63, at 6.

<sup>76</sup> Hilary Bricken, “The Good, The Bad, And The Ugly: Social Equity Cannabis In Los Angeles,” ABOVE THE LAW, Aug. 13, 2018, <https://abovethelaw.com/2018/08/the-good-the-bad-and-the-ugly-social-equity-cannabis-in-los-angeles/> (last visited Feb. 27, 2020); Roberts, *supra* note 71.

<sup>77</sup> See Nani, *supra* note 63, at 6.

<sup>78</sup> Bricken, *supra* note 76.

<sup>79</sup> *Become and Equity Applicant or Incubator*, CITY OF OAKLAND <https://www.oaklandca.gov/topics/become-an-equity-applicant-or-incubator> (last visited Apr. 30, 2020).

<sup>80</sup> DARLENE FLYNN & GREG MINOR, CITY OF OAKLAND, AGENDA REPORT: EQUITY ANALYSIS AND PROPOSED MEDICAL CANNABIS ORDINANCE AMENDMENTS (2017), <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/report/oak063627.pdf>.

<sup>81</sup> *Oakland’s Marijuana Equity Permit Program: An On the Ground Update*, HARRIS BRICKEN, (March 23, 2017) <https://harrisbricken.com/cannalawblog/oaklands-marijuana-equity-permit-program-an-on-the-ground-update/>.

Oakland's approach has served as a model for other jurisdictions, including San Francisco.<sup>82</sup>

Oakland's program also has its challenges and detractors.<sup>83</sup> Among the more controversial aspects, the city also gives approval priority and fee waivers to established businesses that act as "incubators" for new equity licensees, for example by providing temporary rent-free business space. Some equity businesses claim that incubator partners have received program benefits only to renege on their agreements, leaving the equity business without essential and expected resources.<sup>84</sup> Licensure and loan delays for equity applicants have also caused some applicants to take on considerable debt merely to rent empty spaces.<sup>85</sup> Basic administrative challenges and delays also hampered the program's rollout, and even successful applicants face withering competition from larger firms.<sup>86</sup>

Other equity programs have similarly experienced errors, delays, and other functional issues, and projected outcomes have failed to materialize. The initial equity program for the City of Los Angeles, for example, resulted in Black ownership of fewer than 20 of the first 100 businesses given preferential licenses.<sup>87</sup> The involvement of overwhelmingly white and male venture capitalists<sup>88</sup> (due to the loan challenges discussed above) has also fostered criticism that political connections directly or indirectly impact the application process.<sup>89</sup> Compounding other challenges, delays and decreased capital availability due to the COVID-19 pandemic have further hindered business operations for some equity applicants.<sup>90</sup>

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<sup>82</sup> Aly Bonde, *Engineering Equity in Oakland's Cannabis Market*, BERKELEY PUB. POL'Y J. 1, 9 (Spring 2020).

<sup>83</sup> See, e.g., Otis R. Taylor, Jr., "Oakland's Pot Equity Program Withering on the Vine," S.F. CHRON. (Oct. 28, 2018) <https://www.sfchronicle.com/bayarea/otistraylorjr/article/Oakland-s-pot-equity-program-withering-on-the-13342460.php>.

<sup>84</sup> Scott Rodd, '*Cannabis Equity*' Runs Into Roadblocks, PEW STATELINE (Dec. 28, 2018) <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/12/28/cannabis-equity-runs-into-roadblocks>.

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

<sup>86</sup> See Bonde, *supra* note 82, at 7.

<sup>87</sup> Alpert Reyes, *Audit Says L.A. Took 'Reasonable' Steps to Prevent Unfairness in Cannabis Licensing*, L.A. TIMES (Mar. 31, 2020) <https://www.latimes.com/california/story/2020-03-31/los-angeles-marijuana-pot-cannabis-licensing-audit>.

<sup>88</sup> See, e.g., Roberts *supra* note 71. Among Silicon Valley venture capitalists, for example, a 2018 analysis found that 70% were white (compared to 26% Asian and just 3% Black and 1% Hispanic/Latinx) and 82% were male. Richard Kerby, *Where Did You Go To School?* NOTEWORTHY (July 30, 2018) <https://blog.usejournal.com/where-did-you-go-to-school-bde54d846188>.

<sup>89</sup> See Roberts, *supra* note 71; Reyes, *supra* note 87.

<sup>90</sup> Ally Marotti, *Legal Marijuana Was Supposed to Help Communities Hurt by the War on Drugs. But COVID-19 May Crush Efforts to Diversity Illinois' Largely White Weed Industry*, CHI. TRIB. (May 28, 2020) <https://www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-marijuana-dispensary-delays-20200527-gjbbmysiwvbedfym7r65tcyidm-story.html>. In contrast, some cannabis businesses, particularly in the medical cannabis sector, have benefitted from being deemed "essential" amidst widespread closures and stay-at-home orders. See Jeff Smith, *Marijuana Firms*

### III. LESSONS FROM TOBACCO CONTROL FOR CANNABIS REGULATION

Cannabis smoke and tobacco smoke are highly similar, and the history of tobacco control contains numerous important lessons for the future of cannabis policy. Many recreational cannabis proposals have called for “regulating cannabis like alcohol,” but modern tobacco control is likely a better model from a public health perspective. As the late Mark Kleiman sharply observed:

Regulate cannabis like alcohol” is an ugly policy. Our current alcohol laws fail spectacularly to control the harm alcohol does to drinkers and the harm drinkers do to others . . . . Why repeat that mistake when we legalize another potentially habit-forming intoxicant? What we want is the sort of “grudging toleration” the law now extends to tobacco; we should be looking for means short of prohibition to limit the number of people whose lives are made worse by cannabis.<sup>91</sup>

The history of the tobacco industry, and especially the complex relationship between the tobacco industry and the Black community, should serve as a cautionary example for cannabis regulation, including social equity programs. For-profit entities selling pleasurable but unhealthy products will act to increase profits, and destructive externalities for community health are an insufficient deterrent without the support of a comprehensive legal framework.

#### A. Community Infiltration and Targeted Marketing

The tobacco industry has a long history of marketing heavily in communities of color and in economically disadvantaged neighborhoods. Tobacco outlet density is higher in neighborhoods with larger proportions of Black or Hispanic/Latinx residents,<sup>92</sup> and tobacco advertisements are more

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*Aim to Leverage ‘Essential Business’ Status Amid COVID-19 Economic Slide*, MARIJUANA BUS. DAILY, May 15, 2020, <https://mjbizdaily.com/marijuana-firms-aim-to-leverage-essential-business-status-amid-covid-19-economic-slide/>.

<sup>91</sup> Mark A. R. Kleiman, *We’re Legalizing Weed Wrong*, SLATE (Nov. 7 2016) <https://slate.com/business/2016/11/america-is-legalizing-marijuana-wrong.html>.

<sup>92</sup> Joseph G.L. Lee, Dennis L. Sun, Nina M. Schleicher, Kurt M. Ribisl, Douglas A. Luke & Lisa Henriksen, *Inequalities in Tobacco Outlet Density by Race, Ethnicity, and Socioeconomic Status, 2012, USA: Results from the ASPIRE Study*, 71 J. EPIDEMIOLOGY AND COMMUNITY HEALTH 487 (2017) (finding association between tobacco outlet density and Black population); Daniel Rodriguez, Health A. Carlos, Anna M. Adachi-Mejia, Ethan M. Berke & James D. Sargent, *Predictors of Tobacco Outlet Density Nationwide: A Geographic Analysis*, 22 TOBACCO CONTROL 349 (2013) (finding association between tobacco outlet density and both Black and Hispanic population).

plentiful in neighborhoods with more Black residents.<sup>93</sup> Simultaneously, the tobacco industry contributes philanthropically to organizations tied to the Black community, efforts that began as early as 1891 and increased beginning in the 1950s.<sup>94</sup> As Valerie Yerger and Ruth Malone explain, however, these efforts were strictly driven by business, not beneficence:

[T]he tobacco industry has for decades meticulously cultivated relationships with virtually every leader and leadership group within the African American community, and . . . this effort was expended not merely out of generosity, but for at least three specific business reasons: to develop and increase tobacco use among African Americans; to use African Americans as a frontline force to advance and defend industry policy positions; and to defuse or obstruct tobacco control efforts arising from both within and outside the community.<sup>95</sup>

The tobacco industry similarly contributes to the Congressional Black Caucus Foundation and to Historically Black Colleges and Universities, providing themselves with substantial political access and community goodwill. Similarly, tobacco giant Altria contributed \$1 million to the Smithsonian Museum of African American History and Culture.<sup>96</sup> All of these activities,<sup>97</sup> however, are set against the backdrop of tobacco's devastating impact on individual, public, and global health, including the inequitable burden of tobacco-related disease on the Black community.<sup>98</sup>

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<sup>93</sup> Meghan Bridgid Moran, Kathryn Heley, John P. Pierce, Ray Niaura, David Strong & David Abrams, *Ethnic and Socioeconomic Disparities in Recalled Exposure to and Self-Reported Impact of Tobacco Marketing and Promotions*, 34 HEALTH COMM. 280 (2019) (finding higher self-reported exposure to tobacco advertisements among Black persons and persons of lower socioeconomic status compared to other groups); Brian A. Primack, James E. Bost, Stephanie R. Land & Michael J. Fine, *Volume of Tobacco Advertising in African American Markets: Systematic Review and Meta-Analysis*, 122 PUB. HEALTH REP. 607 (2007) (finding that markets in Black communities have higher concentration and density of tobacco advertisements compared to markets in more heavily white communities).

<sup>94</sup> Phillip S. Gardiner, *The African Americanization of Menthol Cigarette Use in the United States*, 6 NICOTINE & TOBACCO RES. S62 (2004).

<sup>95</sup> Valerie B. Yerger & Ruth E. Malone, *African American Leadership Groups: Smoking with the Enemy*, 11 TOBACCO CONTROL 336, 342 (2002).

<sup>96</sup> Natalie Rich, Op-Ed, *African-Americans Should Resist Targeted Tobacco Marketing*, NEWS & OBSERVER (Feb. 1, 2017) <https://www.newsobserver.com/opinion/op-ed/article130216034.html>.

<sup>97</sup> The tobacco industry's strategy of superficial allyship is not limited to the Black community, though it has been one of the most visible examples. Among other instances, the tobacco industry has similarly targeted the LGBTQ+ community through advertising and heavily publicized philanthropic support. See, e.g., Perry Stevens, Lisa M. Carlson & Johanna M. Hinman, *An Analysis of Tobacco Industry Marketing to Lesbian, Gay, Bisexual, and Transgender (LGBT) Populations: Strategies for Mainstream Tobacco Control and Prevention*, 5 HEALTH PROMOTION PRAC. 129S, 129S–130S (2004); Harriet A. Washington, *Burning Love: Big Tobacco Takes Aim at LGBT Youths*, 92(7) AM. J. PUB. HEALTH 1086, 1091 (2002).

<sup>98</sup> See Linda A. Alexander, Dennis R. Trinidad, Kari-Lyn K. Sakuma, Pallav Pokhrel, Thaddeus A. Herzog, Mark S. Clanton, Eric T. Moolchan & Pebbles Fagan, *Why We Must Continue to*

Within the broader context of disproportionate tobacco marketing, there is a particularly stark disparity regarding menthol products, which are heavily marketed in urban neighborhoods and those with higher Black populations.<sup>99</sup> Tobacco companies have marketed menthol disproportionately to and in Black communities for decades,<sup>100</sup> beginning in earnest in the 1970s as a function of “a nexus of ‘race, class, and place.’”<sup>101</sup> Tobacco companies drive menthol sales with ads tailored to feature and appeal to Black consumers, advertise heavily in magazines with high Black readership, and promote branded events aimed at Black youth (initially featuring jazz and later hip-hop and dance artists).<sup>102</sup> Tobacco companies also employ price discounts, signage, retail environment control, and association of menthol products with urban cultural and lifestyle elements.<sup>103</sup>

The effectiveness of this approach is regrettably evident. As described by Philip Gardiner, “the tobacco industry successfully created an attachment to menthols that still resonates in the Black community today.”<sup>104</sup> Per 2014 data, 85% of Black smokers smoke menthol cigarettes, compared to just 29% of white smokers.<sup>105</sup> Were menthol simply a flavor preference, targeting Black consumers might be distasteful but perhaps not morally troubling. But menthol is not merely a flavoring agent, and tobacco companies have long known this.<sup>106</sup> Menthol contributes to nicotine dependence by reinforcing

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*Investigate Menthol's Role in the African American Smoking Paradox*, 18 NICOTINE & TOBACCO RES. S91 (2016).

<sup>99</sup> Joseph G. L. Lee, Lisa Henriksen, Shyanika W. Rose, Sarah Moreland-Russell & Kurt M. Ribisl, *A Systematic Review of Neighborhood Disparities in Point-of-Sale Tobacco Marketing*, 105 AM. J. PUB. HEALTH e8, e8, e16 (2015).

<sup>100</sup> Valerie B. Yerger, *Menthol's Potential Effects on Nicotine Dependence: A Tobacco Industry Perspective*. 20 TOBACCO CONTROL ii29 (2011); see also Campaign for Tobacco-Free Kids, *Tobacco Company Marketing to African Americans*, <https://www.tobaccofreekids.org/assets/factsheets/0208.pdf> (discussing history of industry tactics targeting Black communities).

<sup>101</sup> Tess Boley Cruz, La Tanisha Wright & George Crawford, *The Menthol marketing Mix: Targeted Promotions For Focus Communities in the United States*, 12 NICOTINE & TOBACCO RES. S147 (2010) (citing Yerger et al. 2007); Valerie B. Yerger, Jennifer Przewoznik, & Ruth E. Malone, *Racialized Geography, Corporate Activity and Health Disparities: Tobacco Industry Targeting of Inner Cities*, 18 J. HEALTH CARE FOR THE POOR AND UNDERSERVED 10 (2007).

<sup>102</sup> Campaign for Tobacco-Free Kids, “Tobacco Company Marketing to African Americans,” <https://www.tobaccofreekids.org/assets/factsheets/0208.pdf>.

<sup>103</sup> Tess Boley Cruz, La Tanisha Wright & George Crawford, *The Menthol marketing Mix: Targeted Promotions For Focus Communities in the United States*, 12 NICOTINE & TOBACCO RES. S147 (2010).

<sup>104</sup> Gardiner, *supra* note 94.

<sup>105</sup> Andrea C. Villanti, Paul D. Mowery, Cristine D. Delnevo, Raymond S. Niaura, David B. Abrams & Gary A. Giovino, *Changes in the Prevalence and Correlates of Menthol Cigarette Use in the USA, 2004–2014*, 25 TOBACCO CONTROL ii14–ii15 (2016) [hereinafter Villanti et al., *Prevalence and Correlates of Menthol Cigarette Use*]. Smokers of other races are also more likely than white smokers to smoke menthols (38% of Asian American smokers and 47% of Hispanic smokers), but rates are highest among Black smokers by a wide margin. See *id.*

<sup>106</sup> Valerie B. Yerger, *Menthol's Potential Effects on Nicotine Dependence: A Tobacco Industry Perspective*. 20 TOBACCO CONTROL ii29, ii30–31 (2011).

smoking behavior<sup>107</sup> and encouraging breath holding (which increases nicotine exposure).<sup>108</sup> As a result, menthol smokers have more difficulty quitting.<sup>109</sup> The combined effect contributes to a profoundly inequitable health burden on the Black community. On average, Black smokers smoke fewer cigarettes and begin smoking later in life yet suffer higher rates of tobacco-related diseases.<sup>110</sup>

The tobacco industry recognized intersections between menthol cigarette use and cannabis use at least as early as the 1970s.<sup>111</sup> The overall relationship between menthol and cannabis is not yet well understood, but adolescent menthol cigarette smokers are more likely than other adolescent cigarette smokers to report past-month cannabis use,<sup>112</sup> and dual use of cannabis and menthol cigarettes has increased.<sup>113</sup> Complicating matters, menthol can be a naturally occurring terpene in some cannabis varieties,<sup>114</sup> unlike tobacco, to which menthol must be added. However, menthol cigarettes remain widely available despite prohibitions on other flavored cigarettes,<sup>115</sup> and state cannabis laws typically do not prohibit adding menthol to cannabis products.<sup>116</sup>

The connections between tobacco and cannabis extend to other flavorings, as well. Neighborhoods with a higher proportion of Black residents or lower income residents have more little cigar and cigarillo marketing and greater availability of flavored versions of these products.<sup>117</sup> Flavored wraps in particular are prized for making blunts,<sup>118</sup> which involves

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<sup>107</sup> E.g., Karen Ahijevych & Bridgette E. Garrett, *The Role of Menthol in Cigarettes as a Reinforcer of Smoking Behavior*, 12 NICOTINE & TOBACCO RES. S110 (2010).

<sup>108</sup> E.g., Samuel Garten & R. Victor Falkner, *Role of Mentholated Cigarettes in Increased Nicotine Dependence and Greater Risk of Tobacco-Attributable Disease*, 38 PREVENTIVE MED. 793 (2004).

<sup>109</sup> Andrea C. Villanti, Laruen K. Collins, Raymond S. Niaura, Stacey Y. Gagosian & David B. Abrams, *Menthol Cigarettes and the Public Health Standard: A Systematic Review*, 17 BMC PUB. HEALTH 983 (2017) [hereinafter Villanti et al., *Menthol Cigarettes and the Public Health Standard*].

<sup>110</sup> See Alexander et al., *supra* note 98; Garten & Falkner, *supra* note 108 at ii29.

<sup>111</sup> Gardiner, *supra* note 94, at S61–62.

<sup>112</sup> Grace Kong, Nisha Singh, Deepa Camenga, Dana Cavallo & Suchitra Krishnan-Sarin, *Menthol Cigarette and Marijuana Use Among Adolescents*, 15 NICOTINE & TOBACCO RES. 2094 (2013).

<sup>113</sup> Gillian L. Schauer, Erica N. Peters, Zachary R. Rosenberry & Hyoshin Kim, *Trends in and Characteristics of Marijuana and Menthol Cigarette Use Among Current Cigarette Smokers, 2005-2014*, 20 NICOTINE & TOBACCO RES. 362, (2018).

<sup>114</sup> See, e.g., *Cannabis Dictionary: Menthol*, WEEDMAPS.COM, <https://weedmaps.com/learn/dictionary/menthol/> (last visited May 4, 2020).

<sup>115</sup> Villanti et al., *Menthol Cigarettes and the Public Health Standard*, *supra* note 109.

<sup>116</sup> See, e.g., Daniel G. Orenstein & Stanton A. Glantz, *Regulating Cannabis Manufacturing: Applying Public Health Best Practices from Tobacco Control*, 50 J. PSYCHOACTIVE DRUGS 19 (2018) (discussing absence of such a provision in California law).

<sup>117</sup> Amanda Y. Kong, Tara L. Queen, Shelley D. Golden & Kurt M. Ribisl, *Neighborhood Disparities in the Availability, Advertising, Promotion, and Youth Appeal of Little Cigars and Cigarillos, United States, 2015*, 2020 NICOTINE & TOBACCO RES. (epub ahead of print; ntaa005).

<sup>118</sup> Daniel P. Giovenco, Erin J. Miller Lo, M. Jane Lewis & Cristine D. Delnevo, “*They’re Pretty Much Made for Blunts*”: *Product Features That Facilitate Marijuana Use Among Young Adult Cigarillo*

removing the interior tobacco and replacing some or all of it with cannabis.<sup>119</sup> This is a well-known practice,<sup>120</sup> so much so that these products may be extensively or even primarily used for cannabis.<sup>121</sup> Blunt use is also associated with increased menthol cigarette use.<sup>122</sup>

## B. Potential Abuse of Cannabis Equity Programs

Cannabis social equity programs seek to benefit persons from communities disproportionately harmed by the War on Drugs, particularly communities of color and communities with lower socioeconomic status. Targeting is intentional and justified in this context. Yet potential risks flow indirectly from the development of community ties with the cannabis industry and potential future exploitation of that relationship by cannabis businesses. These outcomes may facilitate targeted marketing and other tactics that leverage identification and affiliation. A for-profit private market will encourage such behaviors, which the history of tobacco marketing shows is likely to harm communities already subject to glaring health disparities.

### 1. Community Ties, Location, and Marketing

Community identification with the cannabis industry may arise through several pathways. Community members may view the industry as an opportunity for advancement for themselves and their neighbors, which is potentially consistent with equity program intent. Program eligibility tied to owner and employee residency, combined with restrictive zoning and licensing practices, is likely to result in many equity licensees locating within targeted communities. To the extent this replicates the concentration of tobacco outlets in neighborhoods with lower incomes or more Black residents,<sup>123</sup> similar effects on cannabis use rates may emerge.

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*Users in the United States*, 19 NICOTINE & TOBACCO RES. 1359 (2017); Emily Anne McDonald, Lucy Popova & Pamela M. Ling, *Traversing the Triangulum: The Intersection of Tobacco, Legalised Marijuana and Electronic Vapourisers in Denver, Colorado*, 25 BMJ i96 (2016).

<sup>119</sup> See, e.g., Danielle E. Ramo, Howard Liu & Judith J. Prochaska, *Tobacco and Marijuana Use Among Adolescents and Young Adults: A Systematic Review of Their Co-Use*, 32 CLINICAL PSYCH. REV. 105 (2012).

<sup>120</sup> *Id.*

<sup>121</sup> See, e.g., Sarah J. Koopman Gonzalez, Leslie E. Cofie & Erika S. Trapl, “*I Just Use It For Weed*”: *The Modification of Little Cigars and Cigarillos by Young Adult African American Male Users*, 16 J. ETHNICITY IN SUBSTANCE ABUSE 66 (2017); Daniel P. Giovenco, Torra E. Spillane, Christine M. Mauro & Silvia S. Martins, *Cigarillo Sales in Legalized Marijuana Markets in the U.S.*, 185 DRUG & ALCOHOL DEPENDENCE 347 (2018).

<sup>122</sup> LaTrice Montgomery, Dale S. Mantey, Erica N. Peters, Evan S. Herrmann & Theresa Winhusen, *Blunt Use and Menthol Cigarette Smoking: An Examination of Adult Marijuana Users*, 102 ADDICTIVE BEHAVIORS 153 (2020).

<sup>123</sup> Rodriguez et al., *supra* note 92.

Currently, Americans report using cannabis at roughly similar rates across racial and ethnic groups. According to a recent analysis, among respondents without a relevant medical condition, 8.9% of Non-Hispanic white adults reported current cannabis use, compared to 10.7% of Non-Hispanic Black adults, 6.3% of Hispanic adults, and 7.3% of adults of other races or ethnicities.<sup>124</sup> Reported prevalence of daily use was also similar across these groups.<sup>125</sup> Yet the tobacco industry has proven how effectively marketing can change a small difference into a large one. In the mid-20<sup>th</sup> century, the tobacco industry noted a slight preference among Black smokers for menthol cigarettes (approximately 5% vs. 2% for white smokers).<sup>126</sup> A few decades later, over 80% of Black smokers were using menthols compared to less than 30% of white smokers.<sup>127</sup>

There is little evidence to date of cannabis industry advertising targeting specific racial or ethnic groups.<sup>128</sup> However, cannabis marketing is in its infancy and thus not predictive of future behavior. Even in legalizing states, large-scale advertising options such as event sponsorship remain mostly off-limits,<sup>129</sup> but this is likely to change as legalization becomes more established. Federal prohibition likely deprives cannabis businesses of at least some commercial speech protections afforded to other products for the moment, but this would change in the event of federal legalization.<sup>130</sup> Cannabis business owners may currently wish to avoid provoking enforcement from either state or federal authorities, resulting in conservative compliance with existing restrictions and aversion to challenging them in court. Such reticence is unlikely to persist as the industry gains legal legitimacy and political clout. Among other signs of things to come, cannabis entities both licit and illicit have begun to take advantage of the rise of online and social media marketing.<sup>131</sup>

Cannabis branding also remains limited at present, constraining the utility of cannabis marketing. Due to federal law, cannabis brands lack typical federal intellectual property protections (though some state options

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<sup>124</sup> Dai & Richter, *supra* note 47, at 3.

<sup>125</sup> *Id.*

<sup>126</sup> Gardiner, *supra* note 94, at S59.

<sup>127</sup> Villanti et al., *Prevalence and Correlates of Menthol Cigarette Use*, *supra* note 105.

<sup>128</sup> There have, however, been at least some advertisements targeted at the LGBTQ+ community. See Rob Csernyik, *Is the Cannabis Community Ignoring Its LGBTQ Customers?* LEAFLY (Feb. 13, 2019) <https://www.leafly.com/news/industry/is-the-cannabis-community-ignoring-its-lgbtq-customers> (describing marketing by San Francisco-based cannabis chain The Apothecarium).

<sup>129</sup> Jennifer Rup, Samantha Goodman & David Hammond, *Cannabis Advertising, Promotion and Branding: Differences in Consumer Exposure Between 'Legal' and 'Illegal' Markets in Canada and the US*, 133 PREVENTIVE MED., April 2020, Article 106013, at 1–2.

<sup>130</sup> See, e.g., Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. 1082 (2017). Parallel state constitutional protections may currently apply, however. *Id.*

<sup>131</sup> See Rup et al., *supra* note 129, at 4–7.

exist).<sup>132</sup> Some brands have circumvented the problem by trademarking non-cannabis items (*e.g.*, clothing, cannabis accessories).<sup>133</sup> As the legal cannabis industry matures, extensive branding is a near-certainty in a for-profit framework. Most troublingly, branding that combines cultural appeals with significant financial backing may prove highly influential, as it did for menthol cigarettes. For example, family members of late reggae legend Bob Marley sell a variety of cannabis products under the brand “Marley Natural,” and the company is backed by a large investment from Privateer Holdings, one of the largest cannabis investment firms in the world.<sup>134</sup> One of the most recognizable cannabis brands, “Cookies,”<sup>135</sup> was founded by a Bay Area rap artist and cannabis entrepreneur who commands an influential and widespread social media presence and records and tours with well-known mainstream acts such as Snoop Dogg and Wiz Khalifa,<sup>136</sup> the latter of whom also lends his name to branded cannabis strains<sup>137</sup> and oils.<sup>138</sup> As the tobacco industry has shown, while race and ethnicity are important marketing variables, more nuanced segmentation using psychographic factors and cultural affiliation may serve as even more powerful marketing targets within and beyond basic demographic groups.<sup>139</sup> High profile cultural influencers and carefully cultivated branding are thus a worrisome aspect of cannabis marketing.

Current cannabis business owners may be disinterested in (or even opposed to) some types of targeted marketing, but this may not predict their future approach in a maturing and highly competitive market. Corporate entities that compete with or absorb cannabis businesses in the future are also

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<sup>132</sup> See generally Russell W. Jacobs, *Cannabis Trademarks: A State Registration Consortium Solution*, 74 WASH. & LEE L. REV. ONLINE 159 (2017).

<sup>133</sup> Chris Roberts, *Million Dollar Cookie: How Berner Built a Business Empire on Marijuana*, S.F. WKLY. (Feb. 2, 2016) <https://www.sfweekly.com/news/million-dollar-cookie-how-berner-built-a-business-empire-on-marijuana/> [hereinafter Roberts, “*Million Dollar Cookie*”].

<sup>134</sup> Taylor Soper, *Fast-growing Marijuana Investment Firm Privateer Holdings Raises Another \$58M to Fuel Expansion*, GEEKWIRE (Aug. 22, 2017) <https://www.geekwire.com/2017/fast-growing-marijuana-investment-firm-privateer-holdings-raises-another-58m-part-larger-round/>.

<sup>135</sup> “Cookies” is a shortened reference to a popular cannabis strain formerly called “Girl Scout Cookies,” which faced rather obvious intellectual property problems. See Roberts, *Million Dollar Cookie*, *supra* note 133.

<sup>136</sup> *Id.*

<sup>137</sup> Anya Sostek, *Wiz Khalifa and Other Celebrities to Market Own Brands of Legalized Marijuana*, PITTSBURGH POST-GAZETTE (Apr. 7, 2015) <https://www.post-gazette.com/news/health/2015/04/07/Wiz-Khalifa-and-other-celebrities-to-market-own-brands-of-legalized-marijuana/stories/201504070014>.

<sup>138</sup> Michael Saponara, *Wiz Khalifa Teams With Supreme Cannabis to Launch New Khalifa Kush Cannabis Oils in Canada*, BILLBOARD (June 25, 2019) <https://www.billboard.com/articles/columns/hip-hop/8517588/wiz-khalifa-cannabis-oil-khalifa-kush>.

<sup>139</sup> See, *e.g.*, Nadra E. Lisha, Jeffrey W. Jordan & Pamela M. Ling, *Peer Crowd Affiliation as a Segmentation Tool for Young Adult Tobacco Use*, 25 BMJ i83 (2016) (examining “peer crowd” marketing for tobacco to predict high-risk tobacco users).

unlikely to demonstrate the same reluctance to follow the tobacco industry playbook given the effectiveness of targeted marketing.

## 2. *The Pull of Profit*

A private, for-profit cannabis market model is not a given,<sup>140</sup> but it is the approach taken by all legalizing states as of 2020.<sup>141</sup> It is not revelatory that, within this framework, firms will use marketing approaches from other products for cannabis. As succinctly explained by one marketing firm president: “Whatever we do for other products, we’ll do for marijuana if and when it becomes totally legal. Why wouldn’t we? This is America, the land of marketing.”<sup>142</sup> Tobacco and alcohol are the most similar products to cannabis (the first because it is primarily smoked and the second because it is an intoxicant), and both have been highly profitable. It is reasonable to expect that for-profit cannabis firms will thus follow the tobacco and alcohol strategy for profit maximization: market heavily to increase the number of users and the frequency of their use.<sup>143</sup> The contradiction between this trajectory and public health is evident.

Cannabis businesses identified as part of communities of color will have a connection to these communities. If they remain owned and run by community members, there may be no significant problem from a public health standpoint. The aforementioned profit motives will still exist, but smaller companies have smaller marketing budgets, and genuine community embeddedness may check harmful practices. If, however, these businesses become part of larger corporate entities, the escalation in resources and the amoral nature of capitalism could lead to repetition of tobacco industry strategies. Consolidation has already been commonplace in cannabis and is likely to continue or accelerate if federal legalization opens pathways to larger multistate or multinational companies.<sup>144</sup>

The tobacco industry expended considerable sums to embed itself in Black communities. The industry has also expressed past and present interest in the legal cannabis market. In the 1960s and 1970s, the tobacco industry

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<sup>140</sup> See, e.g., RAND Report, *supra* note 17.

<sup>141</sup> See Daniel G. Orenstein & Stanton A. Glantz, *Cannabis Legalization in State Legislatures: Public Health Opportunity and Risk*, 103 MARQ. L. REV. 1313, 1343–44 (2020); Rachel A. Barry & Stanton A. Glantz, *Marijuana Regulatory Frameworks in Four US States: An Analysis Against a Public Health Standard*, 108 AM. J. PUB. HEALTH 914, 915 (2018); German Lopez, *9 Questions about Marijuana Legalization You Were Too Embarrassed to Ask*, VOX (Aug. 30, 2019), <https://www.vox.com/policy-and-politics/2019/8/30/20826835/marijuana-legalization-medical-decriminalization-federal-vote>.

<sup>142</sup> Sostek, *supra* note 137.

<sup>143</sup> Hall & Lynskey, *supra* note 8, at 181.

<sup>144</sup> See generally Candice M. Bowling, Amy Y. Hafez & Stanton A. Glantz, *Public Health and Medicine’s Need to Repond to Cannabis Commercialization in the United States: A Commentary*, J. PSYCHOACTIVE DRUGS, Sept.-Oct. 2020, 52 (4): 377-382.

anticipated cannabis legalization and sought internally to position itself to profit from a future market.<sup>145</sup> Unsurprisingly then, cannabis legalization in Canada has quickly precipitated tobacco company entry. Altria (Marlboro brand, etc.) purchased nearly half of major Canadian cannabis company Cronos Group,<sup>146</sup> and Imperial Brands (Kool, etc.) invested heavily in Auxly Cannabis.<sup>147</sup> Similarly, in the alcohol industry, Constellation Brands (Corona, etc.) has partnered with Canopy Growth Corporation,<sup>148</sup> Heineken (through its Lagunitas subsidiary) has produced a cannabis beverage called “Hi-Fi Hops,”<sup>149</sup> and Molson Coors has established a joint venture with Hydrophocary Corporation.<sup>150</sup> Major corporate entities, particularly those experienced in the tobacco or alcohol markets, will not hesitate to take advantage of opportunities available in the cannabis market in the event of U.S. legalization.

#### IV. PREVENTING INDUSTRY ABUSE OF EQUITY PROGRAMS

The essential and laudable goal of cannabis equity programs is to mitigate past and continuing harms of the War on Drugs. To achieve these aims, well-designed equity programs and cannabis frameworks more broadly should minimize inequitable barriers to entry, corporate abuse, and population health risks. They should also ensure that resources are channeled to targeted communities. There are a number of critical factors that define a responsible and effective social equity program, including accessibility, broad eligibility, expungement of past convictions, educational services and technical assistance, government responsiveness, and community reinvestment.<sup>151</sup> Just as importantly, however, programs must not create new inequities or exacerbate existing ones. One of many challenges is creating a

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<sup>145</sup> See generally Rachel Ann Barry, Heikki Hiilamo & Stanton A. Glantz, *Waiting for the Opportune Moment*, 92 MILBANK Q. 207 (2014).

<sup>146</sup> David Gelles, *When the Makers of Marlboro and Corona Get Into Marijuana*, N.Y. TIMES (Dec. 12, 2018) <https://www.nytimes.com/2018/12/12/business/cannabis-business-altria-canopy-constellation-cronos.html>.

<sup>147</sup> Matt Lamers, *Auxly Cannabis Closes CA\$123 Million Investment from Tobacco Giant Imperial Brands*, MARIJUANA BUS. DAILY (Sept. 26, 2019) <https://mjbizdaily.com/auxly-cannabis-closes-ca123-million-investment-from-tobacco-giant-imperial-brands/>.

<sup>148</sup> Shanti S. Nair, *Constellation Brands Exercises Canopy Growth Warrants*, REUTERS (May 1, 2020) <https://www.reuters.com/article/us-canopy-growth-stake-constellation/constellation-brands-exercises-canopy-growth-warrants-idUSKBN22D6F4>.

<sup>149</sup> Erin Brodwin, *Heineken is Betting on a Brew Made with Marijuana Instead of Alcohol, and It Could Help Give a Boost to the Struggling Beer Industry*, BUS. INSIDER (Aug. 8, 2018) <https://www.businessinsider.com/heineken-marijuana-beer-taste-photos-lagunitas-2018-8>.

<sup>150</sup> Kristine Owrarn, *Molson Coors Bets on Pot With Cannabis-Drink Joint Venture*, BLOOMBERG (Aug. 1, 2018) <https://www.bloomberg.com/news/articles/2018-08-01/molson-coors-bets-on-pot-with-cannabis-beverage-joint-venture>.

<sup>151</sup> See generally, e.g., Nani, *supra* note 63 (proposing a point-based assessment tool for equity programs based on ten factors).

system that fosters participation by adversely affected communities without embedding the newly licit industry within those communities to their future detriment.

Too much encouragement risks allowing monetary considerations to overrun the health needs of the community. For example, if members of a targeted community are induced to purchase and use more cannabis products because a community member sells them, this is a policy failure. At the same time, overregulation or unduly high barriers to entry may perpetuate and reinforce existing inequities by siphoning cannabis revenues away from the community. This is also a policy failure and a serious injustice. In addition to navigating the narrow policy corridor between these risks, a regulatory approach perceived as too heavy-handed in attempting to protect vulnerable communities is susceptible to criticism and backlash for paternalism. Public health can rightly seek to protect individuals from harm (even self-regarding harm),<sup>152</sup> but it must also respect autonomy and avoid targeting paternalistic interventions at particular communities. Broader restrictions on the cannabis industry as a whole are therefore preferable to those targeting only equity programs.

#### A. Eligibility, Control, and Transfer

Restrictions on program eligibility and control of equity businesses help maintain the integrity of cannabis social equity programs. Some existing programs mandate that equity-eligible partners own or control a minimum percentage of the business in order to prevent tokenism and gaming.<sup>153</sup> One proposed assessment tool suggests a tiered approach, with the highest tier requiring a minimum 51% business interest for social equity applicants.<sup>154</sup> A tiered approach requires that advantages in licensure, fee waivers, and other benefits be sufficient to encourage participation in the highest tier. Lower ownership thresholds (*e.g.*, under 20%) are less desirable and do not adequately limit the influence of other shareholders on management and daily operations.<sup>155</sup> Arrangements in which the equity applicant does not have a majority interest invite abuse by allowing investors who are not

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<sup>152</sup> This is true under most ethical theories, though there are competing views that condone restrictions on liberty only to prevent harm to others. However, the legal, ethical, and practical limits on how far the law may reach in preventing harm, particularly through paternalistic interventions, is beyond the scope of this Article. *See generally*, David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687 (2014); Wendy E. Parmet, *Beyond Paternalism: Rethinking the Limits of Public Health Law*, 46 CONN. L. REV. 1771 (2014) (responding to Friedman's article and offering a defense of paternalism as an exercise of self-governance).

<sup>153</sup> The Illinois program is one example. *See* 410 ILL. COMP. STAT. § 705/1-10 (2018) ("ownership and control"; "Social Equity Applicant").

<sup>154</sup> Nani, *supra* note 63, at 12.

<sup>155</sup> *Id.*

eligible for equity programs to enter the marketplace under beneficial terms by masquerading as representing disproportionately impacted communities.

Mere presence of a majority interest provision may be insufficient to facilitate timely enforcement, and extensive agency review of corporate filings may be necessary to uncover malfeasance. For example, Ohio's medical cannabis program awarded licenses under the state's equity program to a business purporting to be 51% owned and controlled by a qualifying individual who is a Black woman.<sup>156</sup> Later, a state agency investigation found that all major CEO duties were instead assigned to a wealthy white male co-founder.<sup>157</sup> The company's corporate parent, Harvest, is also emblematic of the rapid rise of large-scale, multistate cannabis operations. Harvest was founded in Arizona under the state's 2010 medical legalization. By 2019, the company had arranged to merge with an Illinois-based firm in an \$859 million deal and was positioned to acquire over 100 licenses across 16 states,<sup>158</sup> though delays caused by Department of Justice antitrust probes scuttled that deal among other major mergers in the industry.<sup>159</sup> Harvest's conquest began despite Arizona's requirement that dispensaries be nonprofits run by boards of directors. Many dispensaries outsourced operations to management companies, and Harvest negotiated to run operations for multiple licensees in exchange for control over the licenses and boards of directors.<sup>160</sup> Such manipulations highlight the industry's inclination toward corporate consolidation and the need for clear and enforceable rules.

Eligibility restrictions focused on minimum share are meaningless without limits on sale or transfer, as an investor could prearrange a sale with a qualifying individual triggered once the company has obtained the benefits of the equity program.<sup>161</sup> Accordingly, some programs explicitly restrict the

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<sup>156</sup> Jackie Borchardt, *Harvest to Pay \$500,000 to Settle Ohio Medical Marijuana Dispensary Ownership Dispute*, CINCINNATI ENQUIRER (Mar. 6, 2020) <https://www.cincinnati.com/story/news/2020/03/06/harvest-pay-500-000-settle-ohio-medical-marijuana-dispensary-ownership-dispute/4829684002/> (last visited June 10, 2020). Ohio's law required at least 15% of medical cannabis licenses be awarded to businesses owned or controlled by persons from specified disadvantaged racial and ethnic groups. *Id.* As discussed *infra*, section IV.B.1.b, the quota aspect of the program was later invalidated by an Ohio court.

<sup>157</sup> *Id.* The company, Harvest of Ohio, LLC, admitted no wrongdoing and maintains that its Ohio operations are owned and controlled as represented, but the company agreed to pay \$500,000 into the state's prescription drug reporting database and to refrain from any ownership changes until dispensaries have been open for at least 18 months. *Id.*

<sup>158</sup> Ray Stern, *Bushels of Ambition: Q&A With Steve White, CEO of Harvest*, PHOENIX NEW TIMES (Apr. 18, 2019), <https://www.phoenixnewtimes.com/marijuana/bushels-of-ambition-qanda-with-steve-white-of-harvest-11272387>.

<sup>159</sup> Greg Walters, *Trump's Justice Department Is Making Life Hell for Legal Weed*, VICE (June 30, 2020), [https://www.vice.com/en\\_us/article/akzk9b/trumps-war-on-legal-weed](https://www.vice.com/en_us/article/akzk9b/trumps-war-on-legal-weed).

<sup>160</sup> Nick Myers, *Sowing Success: Harvest of Arizona Aims to Be the Largest U.S. Cannabis Company*, PHOENIX NEW TIMES (Sept. 14, 2018), <https://www.phoenixnewtimes.com/news/harvest-of-arizona-cannabis-medical-marijuana-dispensary-10823477>.

<sup>161</sup> See Tom Schuba, *Lawmakers Warn 'Unscrupulous Businesses' Are Using Social Equity Candidates as Fronts in Bid to Get New Pot Licenses in Illinois*, CHICAGO SUN TIMES (May 12,

sale or transfer of equity program licenses or interests. However, restrictions may be limited in duration or erect only easily surmounted barriers. For example, Illinois allows sales to non-qualifying parties after five years, and sales prior to that deadline require only that the new licensee pay waived fees and the balance of state loans and grants.<sup>162</sup> In contrast, a comprehensive restriction would limit transfers to only other qualifying persons and require regulatory approval to facilitate enforcement.<sup>163</sup> Permitting sales or transfers of equity applicants' interests in some manner is essential to allow realistic businesses decisions and prevent locking applicants in without full opportunity to fully utilize their own investment. At the same time, allowing transfers to non-equity-eligible persons or entities invites corporate entity entry and consolidation.

Legalizing states may attempt to reduce market consolidation by limiting the number of available licenses a person or entity can hold overall or within each class (*e.g.*, grower, processor, distributor, retailer), and some, like California, have attempted to give smaller businesses a head start on larger competitors.<sup>164</sup> A small number of states, including Colorado and Massachusetts, have also created separate license categories for social equity businesses.<sup>165</sup> Limiting equity applicants to a small number of licenses is a best practice to reduce consolidation,<sup>166</sup> and it centers the benefits of equity program assistance where they are most needed, rather than encouraging empire-building.

All of the foregoing approaches to eligibility, control, and transfer are reasonable and likely to be beneficial. However, they are also firmly rooted in the traditional for-profit market model. This is unsurprising, as the model applies to all current U.S. adult use cannabis markets and dominates markets for most other consumer products. For states to make major strides in addressing the public health implications of legal cannabis, however, policymakers must also consider broader changes to the market itself.

## B. Market Structure

To comprehensively address problems engendered by profit motivation, cannabis legalization frameworks must fundamentally alter the structure of the legal cannabis market. Three principle options are: (1) state

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2020), <https://chicago.suntimes.com/cannabis/2020/5/12/21256290/chicago-dispensaries-marijuana-social-equity-michael-malcolm>.

<sup>162</sup> 410 ILL. COMP. STAT. ANN. § 705/7-25(a) (2018).

<sup>163</sup> Nani, *supra* note 63, at 12.

<sup>164</sup> See Swinburne & Hoke, *supra* note 24, at 257–60. Other states, such as Florida in its medical cannabis program, have instead *mandated* vertical cannabis integration. *Id.* at 260–61. This is likely be a significant barrier to the success of smaller operators or non-corporate entrepreneurs.

<sup>165</sup> See Swinburne & Hoke, *supra* note 24, at 267–70.

<sup>166</sup> Nani, *supra* note 63, at 12.

cannabis monopoly, (2) mandatory nonprofit status, and (3) mandatory benefit company status. There are meaningful advantages to each, but requiring public benefit status is the most viable under current federal law. Approaches outlined here can also be combined with those above, and should be used in tandem with other efforts to aid communities impacted by the War on Drugs, including directing cannabis tax revenue<sup>167</sup> to community programs and investment strategies.

### 1. State Cannabis Monopoly

One structural approach to protect public health and improve social equity is to establish a state cannabis monopoly. Public health experts have advocated for government monopolies or similarly strict control over cannabis markets to prevent private businesses from seeking to stimulate demand to increase profits. Many countries, states, and localities have historically operated monopolies for certain classes of products and services, and several continue to do so, including continued partial<sup>168</sup> alcohol monopolies in several states.<sup>169</sup> As Room and Örnberg explain, a government seeking to allow a legal market for a product while minimizing risks to health can either regulate the actors in the market or become a market actor itself.<sup>170</sup> There are a number of public health advantages to government monopolization of “attractive but risky” products and activities (*e.g.*, alcohol, tobacco, gambling, cannabis), such as ensuring purity or quality, simplifying tax collection, and eliminating the impact of industry lobbying.<sup>171</sup>

Because they are not beholden to profit, government monopolies can make choices that are in the public interest but that private for-profit businesses would be unlikely to make, such as forgoing advertising entirely or in particular areas, limiting product types, maintaining high prices, and

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<sup>167</sup> The complex relationship between cannabis tax policy, health, and social equity is beyond the scope of this Article. *See, e.g.*, Beau Kilmer & Erin Kilmer Neel, *Being Thoughtful about Cannabis Legalization and Social Equity*, 19 *WORLD PSYCHIATRY* 194, 194 (2020) (outlining reasons why legalization may drive down cannabis prices, thereby reducing tax revenues if they are set as a function of price; Mark Kleiman, *Is It a Problem That the Price of Legal Weed Is Falling?* *VICE* (Jan. 22, 2015), [https://www.vice.com/en\\_us/article/5gkxbq/the-price-of-legal-weed-is-falling-now-what](https://www.vice.com/en_us/article/5gkxbq/the-price-of-legal-weed-is-falling-now-what) (explaining the potential relationship between cannabis price, tax, and consumption patterns); Beau Kilmer, *Promises and Pitfalls of Cannabis Taxes*, *RAND Blog*, (Aug. 22, 2016) [rand.org/blog/2016/08/promises-and-pitfalls-of-cannabis-taxes.html](http://rand.org/blog/2016/08/promises-and-pitfalls-of-cannabis-taxes.html), accessed May 29, 2020 (discussing various possible taxation approaches).

<sup>168</sup> A pure monopoly would include production, but most government alcohol monopolies control only distribution or retail. *RAND Report*, *supra* note 17, at 60–61.

<sup>169</sup> Robin Room & Jenny Cisneros Örnberg, *Government Monopoly as an Instrument for Public Health and Welfare: Lessons for Cannabis from Experience with Alcohol Monopolies*, 74 *INT’L J. DRUG POL’Y* 223, 224–25 (2019).

<sup>170</sup> *Id.* at 223.

<sup>171</sup> *Id.* at 225–26.

avoiding appeals to youth.<sup>172</sup> Even a government monopoly can allow revenue generation to overwhelm public health interests,<sup>173</sup> but appropriate legal safeguards can mitigate such risks and eliminate incentives to increase consumption or customer base. Direct government control also avoids contentious constitutional challenges that arise when regulating private commercial speech.<sup>174</sup> Additionally, legalization tends to drive down cannabis prices by removing costs and market inefficiencies created by illegality and risk of arrest. Larger firms can take advantage of price collapse through economies of scale and technological improvements, but small businesses are unlikely to remain competitive, pushing them toward failure or consolidation.<sup>175</sup> Government monopolies allow control over price, which may insulate against price collapse, avoiding these outcomes and others, such as job losses due to businesses closures and increased use tied to sudden price drops.<sup>176</sup>

Although there are potential public health benefits of a state cannabis monopoly, there are also significant practical and legal challenges. Government monopolies are unpopular.<sup>177</sup> For alcohol, public sentiment on this point and broader social attitudes regarding alcohol use have led to partial or total privatization of several state alcohol monopolies since the 1970s and a shift among others toward a more commercial (rather than public health) emphasis.<sup>178</sup> Privatization arguments typically include general ideological opposition to state ownership and also allege hypocrisy in government sale of products known to be harmful.<sup>179</sup> Alcohol monopolies in other countries have also been eroded by corporate attacks on protectionism based in international and regional trade agreement obligations.<sup>180</sup>

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<sup>172</sup> See Rachel Ann Barry & Stanton Glantz, *A Public Health Framework for Legalized Retail Marijuana Based on the US Experience: Avoiding a New Tobacco Industry*, 13 PLOS MED. e1002131, 6 (2016); RAND Report, *supra* note 17, at 61–63; Kilmer & Neel, *supra* note 167, at 195; see also Robin Room, *Alcohol Monopolies in the U.S.: Challenges and Opportunities*, 8 J. PUB. HEALTH POL'Y 509, 518 (1987) (discussing operation of early U.S. alcohol monopolies following the end of Prohibition).

<sup>173</sup> See, e.g., Room & Örnberg, *supra* note 169, at 223–24; Barry & Glantz, *supra* note 172, at 6.

<sup>174</sup> See, e.g., Jacobs, *supra* note 130.

<sup>175</sup> Kilmer & Neel, *supra* note 167.

<sup>176</sup> See RAND Report, *supra* note 17, at 62–63 (discussing effects of price collapse).

<sup>177</sup> Pacula, *supra* note 10.

<sup>178</sup> Minghao Her, Norman Giesbrecht, Robin Room & Jurgen Rehm, *Privatizing Alcohol Sales and Alcohol Consumption: Evidence and Implications*, 94 ADDICTION 1125, 1126 (1999); Room, *supra* note 172, at 519.

<sup>179</sup> See Room, *supra* note 172, at 510.

<sup>180</sup> Barry & Glantz, *supra* note 172 at 6.

a. *Potential Federal Preemption*

In addition to practical complications, preemption is a major and potentially insurmountable barrier to state cannabis monopolies under current federal law. Most courts addressing the issue have held that the CSA does not preempt state cannabis legalization laws as a general matter because the state laws do not create positive conflict with federal law.<sup>181</sup> Such decisions have largely dealt with state law penalties and processes,<sup>182</sup> which the federal government cannot dictate,<sup>183</sup> or created only the potential for violation of federal law without explicitly authorizing it.<sup>184</sup> Direct state involvement, however, would create conflict a court could not easily overlook. For example, a state-employed cannabis retail employee could not follow instructions under state law to distribute cannabis without plainly violating federal law.<sup>185</sup>

The Supreme Court has cautioned that “[i]mpossibility preemption is a demanding defense” and that “[p]re-emption analysis should not be a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict.”<sup>186</sup> Direct state involvement in cannabis distribution appears to meet this demanding standard. Courts have found that the CSA preempts state and local laws directly establishing medical cannabis

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<sup>181</sup> *E.g.*, *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 142–43 (Ariz. 2015) (holding that a provision of Arizona’s medical cannabis law restricting probation terms prohibiting state law-compliant cannabis use was not preempted by federal law because in part because “state-law immunity . . . does not frustrate the CSA’s goals of conquering drug abuse or controlling drug traffic”); *Ter Beek v. City of Wyoming*, 846 N.W.2d 531 (Mich. 2014) (holding that Michigan’s medical cannabis law was not preempted because nothing in the law would prevent federal authorities from enforcing federal drug laws); *White Mtn. Health Ctr. v. Maricopa County*, 386 P.3d 416, 427 (Ariz. App. 2016) (“The federal government is free to enforce the CSA in Arizona and cannot require the state to enforce the CSA.”).

<sup>182</sup> *E.g.*, probation terms in *Reed-Kaliher*, 347 P.3d 136, 140, local control in *Ter Beek*, 846 N.W.2d 531.

<sup>183</sup> *See, e.g.*, *Swinburne & Hoke*, *supra* note 24, at 243–45 (discussing application of anti-commandeering doctrine to cannabis enforcement).

<sup>184</sup> *See Reed-Kaliher*, 347 P.3d at 136 (holding that permitting state law-compliant use by probationers would “not be authorizing or sanctioning a violation of federal law”); *White Mtn. Health Ctr.*, 386 P.3d at 431 (similarly holding that requiring county to issue zoning documents to medical cannabis businesses would not authorize or sanction violation of federal law and citing *Reed-Kaliher*); *see also* Kevin D. Caton, Annotation, *Preemption of State Regulation of Controlled Substances by Federal Controlled Substances Act*, 60 A.L.R. 6th 175 (2010).

<sup>185</sup> Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL’Y 5, 34–35 (2013) (“State cultivation and distribution of marijuana would clearly pose a direct conflict with the CSAIt would be physically impossible for the state employees tasked with operating a state dispensary to perform their required duties while also complying with the CSA’s prohibition against marijuana trafficking.”); *see also* RAND Report, *supra* note 17, at 72–74 (discussing potential CSA preemption).

<sup>186</sup> *Wyeth v. Levine*, 555 U.S. 555, 573, 588 (2009).

distribution centers<sup>187</sup> or requiring police to return improperly seized medical cannabis.<sup>188</sup> Similarly, courts have found that the CSA preempts explicit approval of cannabis use<sup>189</sup> or creation of affirmative state law rights, such as requiring employers to accommodate medical cannabis use under disability discrimination laws<sup>190</sup> or to reimburse workers' compensation claims for medical cannabis.<sup>191</sup> If these limited actions trigger preemption under current federal law, it is highly likely that preemption also prevents the creation of comprehensive state cannabis monopolies.<sup>192</sup>

*b. Equal Protection and Hiring Preferences*

If state cannabis monopolies survive preemption challenge, they will need to make concrete efforts to hire from disproportionately impacted communities in order to accomplish social equity goals,<sup>193</sup> but this may invite legal challenge on equal protection grounds. Because the monopolies would be part of the government, hiring preferences for members of particular communities would meet the same objections raised in response to other affirmative action programs.

To the extent hiring preferences are race-based, they would be subject to strict scrutiny, requiring a compelling government interest and narrow tailoring of the approach to serve that interest.<sup>194</sup> Racial preferences may be permissible to remediate prior discrimination if supported by a sufficient factual basis.<sup>195</sup> However, government affirmative action programs for employment are typically constitutionally valid only in response to past discrimination in the field. Other forms of discrimination may not suffice, regardless of pervasiveness or impact. The Supreme Court has rejected a

<sup>187</sup> Haumant v. Griffin, 699 N.W.2d 774 (Minn. Ct. App. 2005).

<sup>188</sup> People v. Crouse, 388 P.3d 39 (Colo. 2017).

<sup>189</sup> *Id.*

<sup>190</sup> Emerald Steel Fabricators v. Bureau of Labor and Indus., 230 P.3d 518 (Or. 2010).

<sup>191</sup> Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10 (Me. 2018); *but see* Hager v. M&K Constr., 225 A.3d 137 (N.J. Super. Ct. App. Div. 2020) (holding that requiring employer to cover medical cannabis costs under workers' compensation claim was not preempted by the CSA because it did not require the company to possess, manufacture, or distribute cannabis).

<sup>192</sup> Some have proposed as an alternative the creation of a public authority operating as sole supplier or distributor while remaining independent of the state to some degree. *See* RAND Report, *supra* note 17, at 63–64. This is an intriguing option and likely more politically palatable than government monopoly. However, it is not clear that such an entity would be distinguishable from a state agency for preemption purposes in this context if the state wields significant control. If the state does not have such control, such an entity would be far less likely to produce the desirable public health effects of a monopoly.

<sup>193</sup> *See* Jon Walker, *The Cannabis Equity Con*, AMERICAN PROSPECT (July 1, 2019), <https://prospect.org/health/cannabis-equity-con/> (“If the government wants, it can directly employ individuals from specific groups in its marijuana state monopoly or use the funds for direct job programs in the victimized areas.” The latter option is discussed *infra* in this section.).

<sup>194</sup> *See, e.g.*, 16B C.J.S. *Constitutional Law* §1286 (2020).

<sup>195</sup> *Id.*; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

general history of discrimination as sufficient justification, stating that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”<sup>196</sup>

There is abundant evidence of past discrimination in criminal law enforcement regarding cannabis, but not in the (legal) cannabis industry, which has only recently come into existence. This distinction may be critical. For example, in *Pharmacann Ohio v. Ohio Dep’t of Commerce*, a court struck down a requirement that 15% of Ohio’s medical cannabis licenses be awarded “to economically disadvantaged groups, defined as Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians.”<sup>197</sup> The state claimed a compelling interest in redressing past and present discrimination, but the court determined that only discrimination within the industry at issue was relevant and that the “newness” of the medical cannabis industry “necessarily demonstrates that there is no history of discrimination in this particular industry.”<sup>198</sup>

One possible response to the *Pharmacann* distinction is that employers commonly use criminal records to exclude applicants, and these records reflect the ubiquitous inequities of drug law enforcement. This link is more direct than reference to broader “societal discrimination” and thus may be sufficient to justify remedial action.<sup>199</sup> However, state law may be an additional barrier, as some states explicitly prohibit public employment preferences based on race and other factors. For example, California’s constitution (as amended by voters in 1996) prohibits the state from “grant[ing] preferential treatment . . . on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment . . . .”<sup>200</sup> Potential interpretation and application of such provisions in the cannabis context is uncertain.

The *Pharmacann* court also discounted evidence of disparities in other states’ cannabis industries on the grounds that those states’ programs were inherently different from Ohio’s rigid, race-based set of licenses aside.<sup>201</sup> In contrast, the court appeared to approve of Illinois’s approach, which awards points under its equity program as a “plus factor” within a comprehensive application scoring system.<sup>202</sup> This generally accords with the approach

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<sup>196</sup> *Wygant*, 476 U.S. at 276.

<sup>197</sup> *Pharmacann Ohio v. Ohio Dep’t of Commerce*, 17-CV-10962 at 1–2, 12 (Ohio Common Pleas Nov. 15, 2018), <https://lawprofessors.typepad.com/files/pharmacann-v.-ohio-17-cv-10962-grant-sj.pdf>.

<sup>198</sup> *Id.* at 11.

<sup>199</sup> However, the fact that the involved actions were clearly illegal when committed may undercut this argument, even if the laws at issue were unjustly applied.

<sup>200</sup> CAL. CONST. art. I, § 31(a).

<sup>201</sup> *Pharmacann*, 17-CV-10962 at 11–12, 20–21.

<sup>202</sup> *Id.* at 12.

courts have taken regarding more nuanced affirmative action programs,<sup>203</sup> and thus more tailored equity provisions supported by robust legislative findings are likely valid. Additionally, hiring preferences not based on race would be less likely to trigger strict scrutiny. Targeting factors used in existing equity programs (*e.g.*, prior arrest or conviction, income, or residence in an over-policed area) should trigger only rational basis review and should easily pass muster.

Even if a hiring preference is legally justified, however, a government monopoly structure lacks an important policy component because it fails to encourage the type of entrepreneurship and generational wealth-building that are among the key aims of cannabis social equity programs. Hiring from disproportionately impacted communities is an important component, and by that measure a government monopoly with a hiring preference would be similar to equity qualification based on a workforce demographics. Yet ownership of a cannabis business offers more potential for members of disproportionately impacted communities to build wealth, an indispensable component of reducing economic inequities.

## 2. *Mandatory Nonprofit Status*

Mandatory nonprofit status for cannabis businesses eases some of the legal and political challenges of state monopolies while still avoiding the unbridled capitalism of a for-profit system. Nonprofits' charters obligate them to operate in the public interest, rather than maximizing profit or value. States could dictate, among other options, that company boards include persons with public health expertise or that company charters pledge to meet only existing market demand and not promote greater use.<sup>204</sup> Conditional requirements on nonprofit entities can further facilitate socially beneficial activities. The Affordable Care Act, for example, requires nonprofit hospitals to provide "community benefit" to retain their tax-exempt status.<sup>205</sup> States could charge cannabis nonprofits with comparable obligations. A nonprofit requirement also offers more opportunity for building personal and generational wealth than a government monopoly. Despite the absence of "profit," nonprofit ownership and management positions are in some cases well compensated.<sup>206</sup>

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<sup>203</sup> See 16B C.J.S. *Constitutional Law* §1286 (2020).

<sup>204</sup> RAND Report, *supra* note 17, at 65.

<sup>205</sup> This may include mandatory community health needs assessment activities, establishment of a written financial assistance policy, and compliance with limitations on charges, billing, and collections. Julia James, *Health Policy Brief: Nonprofit Hospitals' Community Benefit Requirements*, HEALTH AFFAIRS (Feb. 25, 2016), <https://www.healthaffairs.org/doi/10.1377/hpb20160225.954803/full/>.

<sup>206</sup> For example, many nonprofit health care entities pay lavish executive salaries. See, *e.g.*, Adam Andrzejewski, *Top U.S. "Non-Profit" Hospitals & CEOs Are Racking Up Huge Profits*, FORBES,

However, nonprofit requirements are likely only viable for the adult use cannabis market with an accompanying change in federal law. Unlike advocacy groups or some medical cannabis entities, adult use cannabis businesses will not qualify for any existing nonprofit tax exemption under the federal tax code. Some cannabis advocacy groups, such as NORML, qualify for section 501(c)(3) or 501(c)(4) exemptions as social welfare organizations, charities, or foundations, provided they focus exclusively on education or civic engagement,<sup>207</sup> but this would not apply to retailers. Similarly, section 501(c)(6) applies to industry associations like business leagues and boards of trade, but not to the individual entities comprising these groups.<sup>208</sup> Cooperatives or charitable cooperatives are a theoretically viable option. For example, under California's medical cannabis system (as it existed prior to the state's 2018 adult use legalization), medical cannabis businesses operated as nonprofit cooperatives or collectives. However, these entities ultimately did not meet requirements for tax exemption under state or federal law,<sup>209</sup> and application to adult use cannabis would be less likely still.

It is not even clear that the Internal Revenue Service would allow cannabis businesses to take advantage of nonprofit status even if they appeared to qualify. The IRS issued determination letters to some industry groups affirming their eligibility under section 501(c)(6), including the National Cannabis Industry Association and the Minority Cannabis Business Association, but in 2018 the agency indicated that it would no longer issue such determination letters if the underlying business activity involves Schedule I or II controlled substances.<sup>210</sup>

Restricting licensure to nonprofit entities is possible at the state level, even if it does not accord with federal tax law. However, without federal tax exemption, operating as a nonprofit would not be an attractive business proposition. Among other challenges, nonprofits tend to grow slowly and have difficulty raising capital.<sup>211</sup> Ineligibility for typical business tax

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(June 26, 2019), <https://www.forbes.com/sites/adamandrzejewski/2019/06/26/top-u-s-non-profit-hospitals-ceos-are-racking-up-huge-profits/#1051f11919df>.

<sup>207</sup> 26 U.S.C. § 501(c)(3)–(4).

<sup>208</sup> 26 U.S.C. § 501(c)(6).

<sup>209</sup> *Cannabis Tax Law and Legislation*, CALIFORNIA FRANCHISE TAX BOARD, <https://www.ftb.ca.gov/tax-pros/law/cannabis-tax-law-and-legislation.html> (updated Jan. 7, 2020).

<sup>210</sup> Internal Revenue Bulletin: 2018-1 (Jan. 2, 2018), Rev. Proc. 2018-5 § 2.01(2), 3.02(4), [https://www.irs.gov/irb/2018-01\\_IRB#RP-2018-5](https://www.irs.gov/irb/2018-01_IRB#RP-2018-5); Sara Brittany Somerset, *Now the IRS Is Denying Nonprofit Status to Cannabis Industry Groups*, LEAFY.COM, (Mar. 29, 2018), <https://www.leafly.com/news/industry/now-the-irs-is-denying-nonprofit-status-to-cannabis-industry-groups>.

<sup>211</sup> RAND Report, *supra* note 17, at 65.

deductions<sup>212</sup> further compounds these challenges. Making the recreational cannabis industry more difficult or less lucrative is potentially beneficial from a public health perspective, but excessive barriers do not serve the entrepreneurial and employment goals of equity programs. Moreover, an unduly restrictive legal market will facilitate continued operation of a substantial illicit market.

### 3. *Mandatory Public Benefit Company Status*

Mandatory public benefit status offers a third possible structural change to reduce profit-driven incentives toward harmful cannabis industry behavior. Public benefit corporations (also known as “B Corps”) are a hybrid of nonprofit and standard commercial structures.<sup>213</sup> Public benefit companies (including B Corps and similarly designated partnerships, LLCs, etc.) do pursue profit, but they also obligate themselves to serve an identified public good and to make corporate decisions that balance these objectives. Such companies have a “triple bottom line” that includes “not just profits, but also the community and the environment.”<sup>214</sup>

For-profit corporations must act to maximize returns as part of their legal duty to shareholders. They may, and commonly do, engage in charitable or other socially beneficial activities, but the underlying objective is creation of value. For example, if charitable giving improves corporate image and improving corporate image increases profits, the actions may be justified as a business decision. There is dispute over whether such singular focus is legally required, but a network of related legal doctrines and practical realities make it undoubtedly influential.<sup>215</sup>

Public benefit companies, in contrast, insert additional missions and interests into their core business structure and thus unequivocally authorize their influence on decision-making. Several well-known companies operate as B Corps, including cleaning product manufacturer Method, outdoor clothing company Patagonia, and ice-cream producer Ben & Jerry’s.<sup>216</sup>

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<sup>212</sup> 26 U.S.C. § 280E (prohibiting deductions for trades or businesses “trafficking in controlled substances” on Schedules I and II); *see also* *Olive v. Comm’r of Internal Revenue*, 792 F.3d 1146 (9th Cir. 2015) (affirming Tax Court’s denial of business deductions for cannabis business).

<sup>213</sup> RAND Report, *supra* note 17, at 65.

<sup>214</sup> Vince Sliwoski, *Marijuana Benefit Companies*, THE CANNA LAW BLOG, (July 18, 2017), <https://harrisbricken.com/cannalawblog/marijuana-benefit-companies/>.

<sup>215</sup> *See generally*, Leo E. Strine, Jr., *Making It Easier for Directors to Do the Right Thing?* 4 HARV. BUS. L. REV. 235 (2014) (describing limitations on corporate managers’ ability to consider the interests of constituencies other than shareholders and the potential impact of benefit corporation status to facilitate this).

<sup>216</sup> FAQ, BENEFIT CORP., <https://benefitcorp.net/faq> (last visited March 5, 2020); Sliwoski, *supra* note 214.

Public benefit status imposes both specific and general requirements on business conduct. The public benefit laws of Delaware, the “incorporation capital” of America due to its business-friendly laws,<sup>217</sup> are instructive:

A ‘public benefit corporation’ is a for-profit . . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified . . . .<sup>218</sup>

The duty under Delaware’s law is enforceable by stockholders via derivative suit,<sup>219</sup> and, because it requires identification of a specific public benefit and mandates that the company “operate in a responsible and sustainable manner,” it compels a benefit corporation to act as “an overall good corporate citizen.”<sup>220</sup>

Identifying a public benefit often takes the form of committing a set sum or percentage of corporate earnings to a defined cause or group. A state may also define the types of public benefit that qualify, as Delaware does:

‘Public benefit’ means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests . . . including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.<sup>221</sup>

Model public benefit corporation legislation drafted by advocacy organization B Lab further charges directors with an obligation to consider the effects of corporate action or inaction on not only shareholders but also “community and societal factors,” “local and global environment,” the company’s work force, and “the interests of customers as beneficiaries of the general public benefit or a specific public benefit purpose of the benefit corporation,” among other factors.<sup>222</sup> Comments for this section specify the intention to require consideration of non-shareholder constituencies and

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<sup>217</sup> Jana Kasperkevic, *Forget Panama: It's Easier to Hide Your Money in the US Than Almost Anywhere*, GUARDIAN, (Apr. 6, 2016), <https://www.theguardian.com/us-news/2016/apr/06/panama-papers-us-tax-havens-delaware>.

<sup>218</sup> DEL. CODE ANN. tit. 8, § 362(a) (2015).

<sup>219</sup> DEL. CODE ANN. tit. 8, §§ 365, 367 (2015).

<sup>220</sup> Strine, *supra* note 215, at 244.

<sup>221</sup> DEL. CODE ANN. tit. 8, § 362(b) (2015).

<sup>222</sup> *Model Benefit Corporation Legislation*, BENEFIT CORP. § 301(a)(1), (Apr. 17, 2017), [https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20\\_4\\_17\\_17.pdf](https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf).

reject the common law obligation “that directors must maximize value of a corporation.”<sup>223</sup>

A majority of states already allow companies to incorporate as B Corps and B LLCs, and cannabis companies may desire to do so voluntarily for a variety of personal and business reasons.<sup>224</sup> As a means of facilitating a responsible cannabis industry, however, legalizing states should require public benefit company status as a condition of licensure. While this would not eliminate the problems of profit motivation, it would mitigate them. Among other aspects, it may reduce the appeal of acquisitions for larger firms, and, if a larger entity does acquire a public benefit company, the subsidiary may be able to retain a mission-focused approach. For example, in 2012 Ben & Jerry’s became the first wholly owned subsidiary (under parent company Unilever) to become certified as a B Corp.

Additionally, public benefit status does not inhibit generation of wealth, retaining the entrepreneurial and employment advantages of a private market that promote the goals of social equity programs. Mandatory public benefit company status is not a panacea for harmful industry behavior. These companies, like nonprofits and other entities, can still be ruthless competitors or bad actors. Nevertheless, even limited mitigation of a wholly profit-motivated mentality in the cannabis industry is desirable and will protect public health if it reduces the drive to increase users and frequency and intensity of use without regard to other considerations.

## CONCLUSION

Cannabis equity programs are a crucial part of legalizing cannabis well. The uniquely harmful history of U.S. drug laws, particularly for communities of color and especially for Black communities, make such programs essential. However, these programs must not become an avenue for a predatory industry to build community ties that ultimately harm population health. Policymakers should view cannabis legalization as an opportunity to correct ill-advised policies and demonstrate that hard-learned lessons from tobacco and alcohol control can be put to good use.

To mitigate preventable harms to the populations social equity programs seek to benefit, policymakers must consider not only elements of existing programs and best practices, but also broader structural changes to the cannabis market. Altering the cannabis industry itself will reduce the potential that businesses will enter the market through equity programs only

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<sup>223</sup> *Id.* comment to § 301 (citing *Dodge v. Ford*, 170 N.W. 688 (Mich. 1919) and *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010)).

<sup>224</sup> See Sliwoski, *supra* note 214 (“Benefit companies often help owners and investors feel good about their enterprises, and, from a branding point of view, the B Lab certification is a great look.”).

to be overtaken or consumed by larger entities with deeper pockets, more rapacious mindsets, and fewer concerns about community wellbeing.

Populating the cannabis market with government monopolies, nonprofit entities, or public benefit companies would meaningfully constrain the nascent industry and reduce potential repetition of harmful strategies drawn from the tobacco or alcohol industry's playbooks. Within the confines of existing federal law, the most feasible of these options is mandatory public benefit company status, requiring cannabis companies to consider community interests as part of their decision-making. This approach is legally and politically feasible, promotes public health, and preserves entrepreneurship and employment opportunities necessary to ameliorate damage caused by structural racism embedded in the War on Drugs.

Other broader systemic changes are necessary for genuine progress in remedying the immeasurable harms of the drug war. Social equity programs can and should be one step, but they must be structured to avoid compounding the tragedy of past harms by allowing bad actors to further damage the communities these programs seek to heal.

