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# RACIAL JUSTICE AND MARIJUANA

STEVEN W. BENDER\*

## ABSTRACT

*Current legalization approaches for recreational marijuana fall short of performing and delivering racial justice as measured by materiality and outcomes rather than promises of formal legal equality. As a small first step for unwinding the War on Drugs, this Article considers how legalizing recreational marijuana can help move law and society toward true racial justice, measured by material and actual outcomes for systemically subordinated groups. In the same way that criminalization of marijuana was one of the tools for racial control, legalization of marijuana can be a revenue-based tool toward an anti-subordination future of material equality. While recognizing the shortcomings of reparations initiatives to deliver equality, this Article explores and details how reparations from tax revenue can begin to confront longstanding racial damage. It concludes that reparation initiatives must be race conscious rather than colorblind. The War on Drugs was, and is still, being disproportionately waged against people of color. As such, measures to confront the damage must be race conscious too.*

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## I. INTRODUCTION

Since the advent of the wave of state legalizations of recreational marijuana in 2012,<sup>1</sup> scholars have addressed its racial justice implications.<sup>2</sup> Early on, the shortcomings of the initial legalization measures in failing to address the expungement of previous criminal convictions for possession were highlighted.<sup>3</sup> Obstacles to licensing, such as financial obstacles, ensured that newly legal businesses of growing and selling recreational marijuana would be predominantly white-owned and operated.<sup>4</sup> Although states have made some progress on these fronts in recent years,<sup>5</sup> these shortcomings and obstacles are still the low-hanging fruit of racial justice reform.

Here, this Article aims higher in the tree of racial justice. First, this Article identifies the goal of racial justice, and how attainment can be measured. Second, this Article addresses how, if at all, the current legalization approaches for recreational marijuana measure up to the goal of racial justice. Finally, this Article tackles what is needed to achieve the goal—which remains unmet under current law—and how to overcome the weighty legal and societal impediments to deliver meaningful racial justice. In short, marijuana's initial criminalization was steeped in rac-

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1. As of early 2022, nineteen American states (including the most populous state of California) and the District of Columbia had legalized recreational marijuana for adults, while thirty-eight states and the District of Columbia had done so for medical marijuana. Jeremy Berke et al., *Marijuana legalization is sweeping the US. See every state where cannabis is legal*, INSIDER (May 27, 2022, 11:34 AM), <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

2. I have also researched the racial justice implications regarding the state legalization of recreational marijuana use. See, e.g., Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689 (2016) [hereinafter Bender, *Colors of Cannabis*]; Steven W. Bender, *The Colors of Cannabis: Reflections on the Racial Justice Implications of California's Proposition 64*, 50 U.C. DAVIS L. REV. ONLINE 11 (2017) [hereinafter Bender, *Reflections on Racial Justice*]; 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 (2013) [hereinafter Bender, *Joint Reform*].

3. See Bender, *Colors of Cannabis*, *supra* note 2, at 695–98; Bender, *Reflections on Racial Justice*, *supra* note 2, at 18.

4. *Id.*

5. See *infra* Part III. See also Bender, *Colors of Cannabis*, *supra* note 2, at 705–06 (describing Oregon experience of its legislature enacting expungement legislation after the voter-enacted legalization).

ism.<sup>6</sup> However, its legalization offers the opportunity to both redress the harm that criminalization imposed on minority communities, and provide a remedial model for undoing the much broader framework of systemic injustice that existed before marijuana's criminalization. In the same way that criminalization of marijuana was one of the tools of racial control, legalization of marijuana can be a tool toward an anti-subordination future.<sup>7</sup>

## II. GOAL OF RACIAL JUSTICE

The goal of racial justice differs depending on whose perspective is employed. From the top—the viewpoint of societal elites reinforced by law enmeshed and tolerated in recent decades by an interest convergence<sup>8</sup>—racial justice is equality in law and legal treatment.<sup>9</sup> Under such formal legal equality, racial justice is seen as being delivered with the mere declaration of legal promises and pronouncements of equal opportunity.<sup>10</sup>

The judicial outcome in *Brown v. Board of Education*,<sup>11</sup>—the most celebrated proclamation of equal opportunity, ending legal segregation in public education—led the *Washington Post* to declare that, “[n]ow, at last, the equality of opportunity which is a fundamental premise of the American society is to become a fact in regard to education—which is,

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6. See Bender, *Colors of Cannabis*, *supra* note 2, at 690.

7. See Francisco Valdes & Steven W. Bender, *LatCrit Praxis in Teaching, Scholarship, and Practice: Linking Academic Activism to “Advocacy Projects” and Legal or Local Communities*, in OXFORD COMPANION TO RACE AND THE LAW (Devon Carbado et al., eds.) (forthcoming 2023) (discussing the anti-subordination principle as an alternative analytical framework offered by critical theorists to counter the prevailing judicial antidiscrimination approach that treats discrimination as atomized wrongdoing between individuals rather than as a systemic group caste problem, among other antidiscrimination shortcomings that are untrue to the intent of the Fourteenth Amendment).

8. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 526 (1980) (explaining the outcome in *Brown* of formal legal equality as aligned with prevailing white interests).

9. See generally FRANCISCO VALDES ET AL., CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY 107–11 (2021) [hereinafter CRITICAL JUSTICE].

10. *Id.* at 86.

11. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

after all, the key to [economic] opportunity.”<sup>12</sup> However, when judged by societal outcomes from the perspective of the bottom societal caste, “glittering generalities”<sup>13</sup> on paper in judicial opinions and law fall far short, like for the potential of *Brown*.<sup>14</sup>

Measured by both individual and group outcomes—actual outcomes—racial justice has not been delivered, or in some cases even advanced. These “on the ground” outcomes span the breadth of meaningful opportunity: opportunity toward true equality of education leading to gainful employment; opportunity for employment with equal job security, work conditions, and income; opportunity for equal housing; opportunity for health equality; opportunity toward equality in intergenerational wealth; and opportunity for all of the benefits of income and wealth for advances in education, housing, employment/retirement, and health. In each of these settings, Blacks, Latinxs, and other subordinated societal groups lag (way) behind.<sup>15</sup>

To measure and deliver true racial justice, the textbook, *Critical Justice*, suggests that one must look to actual group outcomes for those at the societal bottom.<sup>16</sup> The outcomes that matter are those steeped in materiality<sup>17</sup>—actual income and intergenerational wealth, and actual job, educational, health, and housing equality. Rather than being explained by individual and group shortcomings—as formal legal equality sug-

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12. Abby Phillip, *How the Washington Post Covered Brown v. Board of Education in 1954*, WASH. POST (May 16, 2014, 1:11 PM), <https://www.washingtonpost.com/news/post-nation/wp/2014/05/16/how-the-washington-post-covered-brown-v-board-of-education-in-1954/> (citing *Equal Education for All*, WASH. POST (May 19, 1954)).

13. *Rice v. Cayetano*, 528 U.S. 495, 527 (2000) (Stevens, J., dissenting).

14. See Robert S. Chang & Jerome M. Culp, Jr., *Business as Usual? Brown and the Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181, 1200 (2004) (“Fifty years after *Brown*, . . . if the past is any indication, we predict that *Brown*’s promise will remain unfulfilled on its hundredth anniversary.”).

15. See *id.* (detailing these aspects of life as part of an inequality cycle entrenched by systems or social institutions). For a recent example of the entrenchment and operation of inequality in the health setting, see Dayna Bowen Matthew, *Structural Inequality: The Real COVID-19 Threat to America’s Health and How Strengthening the Affordable Care Act Can Help*, 108 GEO. L.J. 1679, 1682 (2020).

16. See CRITICAL JUSTICE, *supra* note 9, at 86.

17. *Id.*

gests—the material inequalities that remain salient in everyday life remain the product of structural racism.<sup>18</sup>

These ongoing and everyday inequalities were no doubt aggravated and enforced by the War on Drugs, with marijuana playing a key role.<sup>19</sup> As a small first step for unwinding the War on Drugs, this Article considers how legalizing recreational marijuana can help move law and society toward true racial justice, as measured from material and actual outcomes for systemically subordinated groups.

### III. DOES LEGALIZATION TO DATE DELIVER MATERIAL RACIAL JUSTICE?

Initial legalization measures did little to redress societal inequalities.<sup>20</sup> Those measures ignored past injustices, focused on future revenue production, and did nothing to repair the damage the War on Drugs caused individuals and communities. Those arrested and prosecuted for marijuana possession offenses suffered disruptions of family, and potentially of their housing,<sup>21</sup> current and future employment,<sup>22</sup> higher (and other) education,<sup>23</sup> and more.<sup>24</sup> Early legalization measures did little to redress those harms, nor did they apologize by admitting the government was wrong to have criminalized and enforced marijuana laws that critical history revealed were steeped in stereotypes and racism.<sup>25</sup> Any such

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18. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1383 (1988) (explaining how the race neutrality of formal legal equality “creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass;” instead “class disparities appear to be the consequence of individual and group merit within a supposed system of equal opportunity.”).

19. See Bender, *Colors of Cannabis*, *supra* note 2, at 691–92; Chang & Culp, Jr., *supra* note 14, at 1191–92 (situating the criminal justice system as part of the cycle of inequality that has intergenerational wealth consequences).

20. See Bender, *Colors of Cannabis*, *supra* note 2, at 700–05.

21. See *id.* at 700 n.51.

22. See *id.* at 704.

23. *Id.* at 700.

24. For example, immigration consequences. See *id.* at 692.

25. See *id.* at 693–95 (discussing the early legalization campaigns and resulting whitewashed laws).

apology was lost in policy rationales that focused on generating tax revenue.<sup>26</sup>

Later legalization approaches addressing the fringes of racial justice—albeit sometimes without explicitly mentioning race (even in areas where race was salient)—appear scripted in a racially neutral manner. For example, California’s Proposition 64 provided for expungement or reduction of prior marijuana offenses,<sup>27</sup> and allocated some of the expected marijuana tax revenue toward services in “communities disproportionately affected by past federal and state drug policies.”<sup>28</sup> However, it only explicitly mentioned race in its allocation of funds to research licensed marijuana businesses created under the law and their demographic data, including licensee “race, ethnicity, and gender.”<sup>29</sup> As detailed below, race consciousness is needed in legalization measures to better point toward anti-subordination outcomes.

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26. See Bender, *Colors of Cannabis*, *supra* note 2, at 693–95; David Schlusell, “*The Mellow-Pot Smoker*”: *White Individualism in Marijuana Legalization Campaigns*, 105 CALIF. L. REV. 885, 887 (2017) (describing how campaigners in the early legalizations “depict[ed] marijuana consumers who [were] white, middle-class, and ‘responsible’ as worthy beneficiaries of legalized marijuana.”). Earlier legalizations of medical marijuana, which preceded recreational marijuana reform, failed to deliver racial justice—only the second generation of legalized recreational marijuana laws began to give better attention to racial justice.

27. See Bender, *Reflections on Racial Justice*, *supra* note 2, at 18.

28. *Control, Regulate and Tax Adult Use of Marijuana Act*, OFF. ATT’Y GEN. CAL. (Dec. 7, 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)\\_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf).

29. *Id.* In contrast, proposed federal legislation, the Marijuana Opportunity Reinvestment and Expungement Act of 2021, includes findings such as “[a] legacy of racial and ethnic injustices, compounded by the disproportionate collateral consequences of 80 years of cannabis prohibition enforcement, now limits participation in the [legal marijuana] industry,” as well as “[p]eople of color have been historically targeted by discriminatory sentencing practices resulting in Black men receiving drug sentences that are 13.1 percent longer than sentences imposed for White men and Latinos being nearly 6.5 times more likely to receive a Federal sentence for cannabis possession than non-Hispanic Whites,” and “[f]ewer than one-fifth of cannabis business owners identify as minorities and only approximately 4 percent are black.” H.R. 3617, 117th Cong. § 2 (2021).



#### IV. MARIJUANA LEGALIZATION AS AMELIORATION, NOT TRANSFORMATION

*After we legalize adult-cannabis use, will we see an end to discriminatory policing against communities of color and other marginalized groups? No.*

– Erik Altieri<sup>30</sup>

Assessing existing legalization initiatives on whether material racial justice is furthered reveals that these initiatives are only a first step on the long road to justice. Legalizing possession of small amounts of marijuana may potentially reduce the reach of the criminal justice system in the lives of marginalized (and other) groups.<sup>31</sup> However, that reduction is muted by remaining categories of still unlawful personal use of marijuana.<sup>32</sup> These areas almost uniformly carved out of legalization initiatives—driving under the influence of marijuana, possession by youth, and public consumption—are gateways to confrontation with law enforcement.<sup>33</sup> Each is rife with racial intersections, including familiar phrases like “driving while Black or Hispanic” and the “school-to-prison pipeline,” as well as the constraints of poverty which disproportionately affect minority groups’ housing and can lead to public consumption outside the home.<sup>34</sup>

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30. Erik Altieri, *Marijuana Legalization and the Fight for Racial Justice*, NORML (June 1, 2020), <https://norml.org/blog/2020/06/01/marijuana-legalization-and-the-fight-for-racial-justice/>.

31. Alexis Moulton, *The Intersection of Drug Law and Racial Justice*, THE STATE PRESS (Nov. 19, 2020, 8:41 PM), <https://www.statepress.com/article/2020/11/specho-the-intersection-of-drug-law-and-racial-justice> (racial disparities will remain, but overall arrests will drop with legalization).

32. See Bender, *Colors of Cannabis*, *supra* note 2, at 701–03.

33. *Id.* at 701.

34. See *id.* at 701–03. The ACLU recommends that legalization initiatives include public consumption spaces for those living in public housing or rental units that ban marijuana consumption or any smoking. See ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 42 (2020), [https://www.aclu.org/sites/default/files/field\\_document/marijuanareport\\_03232021.pdf](https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf) [hereinafter ACLU REPORT]; Daniel G. Orenstein, *Nowhere to Now, Where? Reconciling Public Cannabis Use in a Public Health Legal Framework*, 126 PENN. ST. L. REV.

The consequences of these intersections are already seen in post-legalization studies that reveal the discriminatory impact of conduct still policed in legalization jurisdictions. An early study in the aftermath of Colorado's legalization found Blacks are "more than twice as likely as white people to be charged with public consumption of marijuana."<sup>35</sup> Another post-legalization study found Colorado schoolchildren arrest rates are even more racially disproportionate than before legalization.<sup>36</sup> In 2020, the American Civil Liberties Union ("ACLU") released a study that revealed stark racial disparities in the outcomes of policing of marijuana crimes across the United States, even in legalized jurisdictions.<sup>37</sup> The study found almost 700,000 marijuana arrests in 2018; most of them, as in prior years, were for possession.<sup>38</sup> Racial disparities in possession arrests existed in every state. For example, a nationwide statistic conveyed a Black person was 3.64 times more likely to be arrested for possession than a white user, despite similar usage rates.<sup>39</sup> Legalization was no panacea for racial disparities. Although marijuana possession arrest disparities between Black and white users were lower in legalization states than elsewhere,<sup>40</sup> racial disparities existed in every legalization

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59 (2021) (arguing for the same legal public consumption spaces as tobacco use, citing New York's 2021 legalization law as a unique example).

35. Kristen Wyatt, *Report: Racial Disparities in Drug Arrests Persist After Colorado Legalizes Marijuana*, U.S. NEWS & WORLD REP. (Mar. 25, 2015, 1:57 PM), <https://www.usnews.com/news/us/articles/2015/03/25/report-racial-disparities-in-arrests-persist-with-legal-pot> (finding that, post-legalization, Blacks were much more likely than whites to face arrest in Colorado for illegal cultivation of marijuana or possession beyond the legal limit).

36. Amanda Chicago Lewis, *Marijuana Arrests Down in Colorado for White Teens, Up for Black and Latino Teens*, BUZZFEED NEWS (May 10, 2016, 3:09 PM), <https://www.buzzfeed.com/amandachicagolewis/marijuana-arrests-down-in-colorado-for-white-teens-up-for-bl?utmterm=.hw375zMOR#.ke2o48VR2> (finding that between 2012 and 2014, marijuana arrests of Colorado youths aged 10–17 were down for whites and up significantly for Blacks and Latinas/os/x).

37. ACLU REPORT, *supra* note 34.

38. *Id.* at 5 (finding that nine of ten arrests between 2010 and 2018 were for possession).

39. *Id.* The ACLU Report focused on Black and white disparities rather than those for Latina/o/x people (and other groups such as Arab and Middle Eastern people, as FBI data did not treat these groups as a distinct racial group). *Id.* at 9.

40. *Id.* at 6, 8 (questioning whether legalization made any difference as the legalization states also had lower racial disparities in 2010 before any had legalized recreational marijuana).

state, and some disparities were even larger in 2018 than before legalization.<sup>41</sup>

Another offense that survives and thrives, even in legalization jurisdictions, is the so-called black market of producing, trafficking, and selling outside licensed venues.<sup>42</sup> Key reasons for the illegal market's continuing vitality is the higher cost of legal marijuana—sold at expensive-to-operate brick and mortar stores, and heavily taxed by both special taxes and general state or locality sales taxes.<sup>43</sup> Many poor buyers, who are disproportionately buyers of color, are priced out of the legal market and fuel the illegal channels that survive legalization.<sup>44</sup>

The absence of, and obstacles to, diversity in owning licensed marijuana production and sales signifies that there are few opportunities for entrepreneurs (and employees) of color in the legal industry. Obstacles include the high entry cost of licenses, the absence of traditional bank or Small Business Administration financing given marijuana's illegality under federal law,<sup>45</sup> and the bar from licensure in some states of those

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41. *Id.* at 8 (also finding the disparities lessened since 2010, while still existing, in other legalization states such as California and Nevada).

42. See Amanda Chicago Lewis, *California legalized weed five years ago. Why is the illicit market still thriving?*, THE GUARDIAN (Nov. 2, 2021), <https://www.theguardian.com/us-news/2021/nov/02/california-legal-weed-cannabis-industry-economy> (reporting that about 80% to 90% of the California marijuana market remains illicit, pointing to factors that include high taxes and regulatory costs, as well as the power under California's legalization law for municipalities to ban marijuana as they wish); Times Editorial Board, *Californians overwhelmingly supported legalizing marijuana. Why is it still a mess?*, L.A. TIMES (Dec. 26, 2021, 5:00 AM), <https://www.latimes.com/opinion/story/2021-12-26/editorial-californians-overwhelmingly-supported-legalizing-marijuana-so-why-is-it-still-a-mess-five-years-later> (supplying a different figure of roughly 75% of California marijuana sales from unlicensed sellers). The discussion herein of the use of tax revenues toward racial justice assumes a more optimal balance can be found through attention and experimentation as to how reducing the overall tax rate increases the market share of legal marijuana to deliver more revenue.

43. See generally Jeremy P. Gove, *Colorado and Washington Got Too High: The Argument for Lower Recreational Marijuana Excise Taxes*, 19 RICH. PUB. INT. L. REV. 67, 93 (2016) (recognizing the perpetuation of the black market in Colorado and Washington as reflective of marijuana excise taxes set at too high of a rate).

44. See Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 818 (2019) (noting how marijuana taxation is regressive and imposes extra costs on less affluent users, who are disproportionately minority communities that bear the costs but not the benefits of legalization).

45. Jeremy Berke & Yeji Jesse Lee, *Top executives at the 14 largest cannabis companies are overwhelmingly white men, an Insider analysis shows*, BUSINESS

convicted of marijuana or other crimes.<sup>46</sup> Even if reform reduces these obstacles, the marijuana industry is far too small alone to bridge gaps in income and wealth for communities of color.

A 2017 survey found that 19% of respondents launching a legal marijuana business or having an ownership stake in a licensed company were racial minorities.<sup>47</sup> Still, that response included those who have any ownership stake, which may fall short of a controlling stake. Another survey found the percentage of minorities with executive positions in legal marijuana businesses at 17%—somewhat higher than the average for all U.S. businesses.<sup>48</sup> Other studies are even less favorable. A study of the fourteen largest publicly traded U.S. and Canadian cannabis companies found only 7% of the executives self-identified as Black.<sup>49</sup> A Washington survey from the state's Liquor and Cannabis Board found 4% of retail marijuana stores were Black-owned, and 1% of the producer and processor side were Black-owned.<sup>50</sup> The gap is stark given how Blacks

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INSIDER (June 30, 2021, 6:30 AM), <https://www.businessinsider.com/cannabis-industry-diversity-executives-are-white-male-insider-inequity-analysis-shows-2021-6>; 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, 256–60 (2020) (also discussing the barriers posed by the limited number of licenses available and already claimed for growing or processing marijuana); Vitiello, *supra* note 44, at 816–17 (discussing additional obstacles to licensure and competing in the legal marijuana industry including allowances of multiple licenses that invite domination by larger, better capitalized entities, and the user shift from smoking to consuming marijuana in other forms that are capital intensive to produce).

46. Maya Rahwanji, “Hash”ing Out Inequality in the Legal Recreational Cannabis Industry, 39 NW. J. INT’L L. & BUS. 333, 335 (2019) (finding at the time that five of the eight initial states to legalize recreational marijuana used prior felonies to bar or impede obtaining a marijuana business license). One of those states, Washington, eased its prohibition in 2021. See Washington State Liquor and Cannabis Board Rule-Making Order CR-103P (Dec. 2017), <https://lcb.wa.gov/sites/default/files/publications/rules/2021%20Proposed%20Rules/WSR-21-18-125.pdf>.

47. Eli McVey, *Chart: Percentage of cannabis business owners and founders by race*, MARIJUANA BUSINESS DAILY (Sept. 11, 2017), <https://mjbizdaily.com/chart-19-cannabis-businesses-owned-founded-racial-minorities/>.

48. Eli McVey, *Chart: Minorities occupy 17% of executive positions in marijuana industry*, MARIJUANA BUSINESS DAILY (Sept. 5, 2017), <https://mjbizdaily.com/chart-minorities-occupy-17-executive-positions-marijuana-industry/>.

49. Berke & Lee, *supra* note 45.

50. Sarah Kahle, *Washington cannabis bill seeks to make industry more diverse, equitable*, SEATTLE TIMES (Feb. 11, 2022, 6:33 AM), <https://www.seattletimes.com/seattle-news/politics/wa-house-bill-aims-to-make-cannabis-industry-more-racially->

and other racial minorities disproportionately suffer the brunt of criminal marijuana enforcement efforts, but now lag behind after its legalization by some states.

A number of states and localities have started implementing programs to increase the diversity of marijuana licensees.<sup>51</sup> The most publicized example is Oakland, California, which requires at least half of that city's licenses to be allocated to people with lower incomes (80% or less of the city median) who were either convicted of marijuana crimes, or resided ten of the last twenty years in neighborhoods of historic over-policing.<sup>52</sup> Similarly, Long Beach, California's marijuana equity program focuses on low-income applicants who are long-time residents, had a past marijuana arrest there, or receive unemployment benefits as a new

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equitable/ (in contrast, 81% of stores were white-owned, as was 85% of the producer business). See also Courtney Connley, *Cannabis is projected to be a \$70 billion market by 2028—yet those hurt most by the war on drugs lack access*, CNBC (July 1, 2021, 11:30 AM), <https://www.cnbc.com/2021/07/01/in-billion-dollar-cannabis-market-racial-inequity-persists-despite-legalization.html> (reporting that only 1.2% of Massachusetts marijuana businesses are owned by minorities, and none of the eighty-nine Illinois dispensaries are minority-owned).

51. Some of these state social equity licensing programs provide financial relief to social equity applicants, as do Illinois and Virginia in their license application fees. Patrice Worthy, *The cannabis industry is booming, but for many black Americans the price of entry is steep*, GUARDIAN (Sept. 7, 2021), <https://www.theguardian.com/society/2021/sep/07/cannabis-industry-black-americans>. Massachusetts has a fee waiver program for social equity and economic empowerment applicants. Swinburne & Hoke, *supra* note 45, at 273. Washington's 2021 law provides grants to social equity applicants who resided in disproportionately impacted areas (based on poverty and marijuana enforcement) or have (or are a family member of someone who has) a drug conviction. H.B. 1443, 67th Leg. (Wash. 2021), <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/House%20Passed%20Legislature/1443-S.PL.pdf?q=20220329105959>. The Colorado program has a license category for cultivators that provides a marijuana conviction cannot be the sole basis for license denial. Swinburne & Hoke, *supra* note 45, at 268. One commentator suggests that states set aside a portion of marijuana tax revenue toward zero interest loans and a state-sponsored venture accelerator for minority-owned businesses. Melissa Perlman, *Reefer Blues: Building Social Equity in the Era of Marijuana Legalization*, 24 U.C. DAVIS SOC. JUST. L. REV. 95, 123 (2020). See also Beau Kilmer et al., *Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-offs*, 101 B.U. L. REV. 1003, 1014–15 (2021) (detailing the slowness of progress under the social equity licensing programs).

52. Daniel G. Orenstein, *Preventing Industry Abuse of Cannabis Equity Programs*, 45 S. ILL. U. L. J. 69, 83 (2020) (additionally, at least half of an Oakland dispensary staff must be residents, with half of those residents coming from economically disadvantaged areas).

resident.<sup>53</sup> Additionally, the California cities of Los Angeles and Sacramento have similar marijuana equity programs to assist poor residents impacted by the War on Drugs.<sup>54</sup>

A key impediment to racial equity in licensing has been the reluctance of state and local governments to rely on explicitly racial criteria to award licenses, as a form of affirmative action that acknowledges the reality of the legacy of racialized policing in the War on Drugs and otherwise. Those jurisdictions are no doubt wary of the Supreme Court's antidiscrimination jurisprudence that treats anti-subordination measures toward equality as potential unlawful reverse discrimination against whites.<sup>55</sup> Couching equality in terms of facially race-neutral poverty and the geography of over-policing stands a better chance of surmounting legal challenge.

In the specific context of marijuana licensing, overt race-based measures have been contested, with an Ohio court striking down that state's medical marijuana licensing program that reserved 15% of licenses to "economically disadvantaged groups, defined as Blacks or African Americans, American Indians, Hispanics or Latinos, and Asians."<sup>56</sup> The court rejected the government's argument that it was trying to repair past racial discrimination against those groups, ruling that discrimination in drug crime enforcement did not equate to past discrimination in the legalized medical marijuana industry.<sup>57</sup>

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53. Connley, *supra* note 50 (also noting since the program launched in 2018, only one participant in that equity program has received a license, citing financial barriers). To be watched is litigation challenging residency requirements for marijuana licensing as constitutional violations. *See, e.g.,* *Lowe v. City of Detroit*, 544 F.Supp.3d 804, 806 (E.D. Mich. 2021) (city ordinance granting preferential treatment to long-time residents in awarding marijuana dispensary licenses was economic protectionism that violated the dormant Commerce Clause); *Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542 (1st Cir. 2022) (medical marijuana dispensary licensing law limiting owners and operators to state residents violates the dormant Commerce Clause).

54. Brentin Mock, *California's Race to the Top on Cannabis*, BLOOMBERG CITYLAB (Feb. 5, 2018, 7:26 AM), <https://www.bloomberg.com/news/articles/2018-02-05/trading-cannabis-for-racial-equity-in-california>.

55. *See* CRITICAL JUSTICE, *supra* note 9, at 397–99.

56. *Pharmacann Ohio, LLC v. Williams*, No. 17CV010962, 2018 WL 7500067, at \*7 (Ohio Com. Pl. Nov. 15, 2018).

57. *Id.* at \*9–11 (noting the newness of the medical marijuana industry demonstrated there was no history of discrimination in that particular industry). The court distinguished approaches of other states to supply equity, such as Illinois which allots points toward licensing for applicants that are 51% owned by a minority, woman, veter-

In addition to the Supreme Court's colorblind antidiscrimination jurisprudence,<sup>58</sup> some state-level jurisdictions inhibit progress by stifling race consciousness in programs meant to overcome bias in the enforcement of drug laws. In some legalization states, such as California, Michigan, and Washington, state law bans preferential treatment based on race, color, ethnicity, and other identity-based categories in public contracting, employment, and education.<sup>59</sup> Both federal and state courts have upheld these laws.<sup>60</sup> Arguably, however, these laws do not reach marijuana legalization initiatives that are race conscious in licensing, and in remedying for past racialized enforcement. In the case of licenses, operators may not be seen as public employees or engaged in public contracting.<sup>61</sup> In the case of tax revenues distributed to individuals or communities in a race conscious manner, those allocations may not be "public contracting" either.<sup>62</sup>

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an, or disabled person. *Id.* See also Brett Mulligan, *Cannabis Equity and the Promise of Reparations for the War on Drugs*, GREEN LIGHT LAW GROUP (Dec. 10, 2021), <https://greenlightlawgroup.com/blog/cannabis-equity-and-the-promise-of-reparations-for-the-war-on-drugs> (discussing the Ohio court's reliance on Supreme Court jurisprudence in government licensing and contracts allowing race-based preferences only on a showing of historic discrimination within that particular industry, but arguing the racial motivation behind the War on Drugs supplies the requisite compelling governmental interest, as does the prospective benefits of increased market diversity).

58. The Supreme Court is expected to apply its colorblind approach in Spring 2023 to reject affirmative action in college admissions in the cases of *Students for Fair Admissions (SFFA) v. Harvard* and *Students for Fair Admissions (SFAA) v. University of North Carolina*. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) cert. granted, 142 S. Ct. 895 (2022) (No. 20-1199, 2022 Term); *Students for Fair Admissions, Inc. v. Univ. North Carolina*, 143 S.Ct. 52 (2022) (No. 21-707, 2022 Term) (granting cert. and unconsolidating case from *SFFA v. Harvard*).

59. See, e.g., CAL. CONST. art. 1, § 31(a).

60. See, e.g., *Schuetz v. Coal. to Def Affirmative Action*, 572 U.S. 291 (2014) (upholding Michigan constitutional amendment and rejecting an equal protection challenge); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (upholding California's Proposition 209); *Coral Constr., Inc. v. City and County of San Francisco*, 50 Cal. 4th 315 (2010).

61. But see Rebecca Brown, *Cannabis Social Equity: An Opportunity for the Revival of Affirmative Action in California*, 3 WILL. SOC. JUST. & EQUITY J. 205, 224 (2019) ("As licensing is a function of the city government, it seems intuitive that Proposition 209 would apply.").

62. See CAL. CONST. art. 1, § 31(a) ("The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color,

Reluctance to use race conscious language<sup>63</sup> leads to a variety of proxies that, while ostensibly race neutral and therefore better positioned to surmount these obstacles, are flawed measures toward racial justice. For example, legalization programs allocating licenses or marijuana tax revenue toward individuals and/or communities based on characteristics (such as low income and neighborhood over-policing) are incomplete or overbroad. Income-based qualifications fail to account for wealth disparities: “low income standing alone does not accurately reflect the economic impact of generational government discrimination, as this discrimination is better reflected in disparities in community wealth.”<sup>64</sup> Community-based standards based on over-policing, whether policing in general or in enforcing the War on Drugs, fail to account for gentrification.<sup>65</sup>

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ethnicity, or national origin in the operation of public employment, public education, or public contracting.”). Moreover, these laws do not apply where federal law compels race conscious relief as a remedy for discrimination. See Bruce Appleyard, *Written Testimony of Eric J. Miller Professor of Law and Leo J O’Brien Fellow Loyola Marymount University Before the California Reparations Taskforce AB 3121 Reparations Hearings on December 7, 2021*, <https://oag.ca.gov/system/files/media/task-force-materials-p3-120721-120821.pdf> (last visited Nov. 1, 2022) (“There is, however, another important set of limitations on Proposition 209: it does not apply to situations in which race-based remediation is *necessary* under federal law. Thus, where the Equal Protection clause requires race-based remediation, the Prop. 209 cannot prevent it. This is referred to in *Coral Construction, Inc.*, as the ‘federal compulsion’ doctrine.”).

63. Even the dialogue and formal naming around considerations of repairing damage from the War on Drugs in the context of legalized marijuana reflect the preference for colorblind language—equity programs are typically referred to as social equity rather than as racial equity programs. See, e.g., *Illinois Adult-Use Cannabis Social Equity Program*, ILLINOIS DEPARTMENT OF COMMERCE & ECONOMIC OPPORTUNITY, <https://www2.illinois.gov/dceo/CannabisEquity/Pages/default.aspx> (last visited Nov. 1, 2022).

64. OR. LEG., OREGON CANNABIS EQUITY ACT LEGISLATIVE REPORT 55 (2021), <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/CommitteeMeetingDocument/242802>.

65. See *id.* at 53 (“Gentrification, especially in Portland where much of Oregon’s minority population resides, has displaced residents from areas that experienced disparate arrest rates in the past. Many areas that would qualify as ‘areas of disproportionate impact’ are now inhabited by residents who did not bear the brunt of prohibition.”); Kilmer et al., *supra* note 51, at 1032 (describing the Seattle gentrification experience that mutes geographic definitions of cannabis enforcement harm). Evasion through gentrification can be minimized by adding longevity/timing restrictions to the criteria—as San Francisco did by its equity factor of having “lived in San Francisco census tracts for a total of 5 years from 1971 to 2016 where at least 17% of the households had incomes at or below the federal poverty level.” *Steps to Become an Equity Applicant*, SAN



Finally, in those jurisdictions that provide for expungement of past marijuana crimes,<sup>66</sup> justice is incomplete. Some jurisdictions put the onus on the convicted individual to navigate the process to clear their own record, while others more equitably provide for automatic expungement.<sup>67</sup> Still, those convicted individuals have already suffered the brunt of a police encounter, imprisonment, or a fine, and collateral consequences of a conviction that might include being barred from employment or housing opportunities. As one commentator put it, “expungement only fixes one day in a person’s life: the day he or she is convicted of a crime.”<sup>68</sup> Expungement is too late because it does not include compensation for material (especially education and economic opportunities), psychological, or other damages caused by encounters with the criminal justice system, nor compensation to the defendant’s family. A more substantial and material solution would be reparations.<sup>69</sup>

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FRANCISCO OFF. OF CANNABIS, <https://officeofcannabis.sfgov.org/equity/applicant> (last visited Nov. 1, 2022). Still, marijuana licensing restrictions based on local residency have faced constitutional challenge. *See* cases cited *supra* note 53.

66. Some legalization laws did not address expungement, as for example Oregon and Washington’s initial voter-approved legalization, although both later enacted expungement legislation.

67. Michigan and California have authorized expungement or sealing of criminal records only by defendant petition, while states such as Illinois, New York, and Vermont provided for automatic expungement. Sabina Morris et al., *State cannabis reform is putting social justice front and center*, BROOKINGS (Apr. 16, 2021), <https://www.brookings.edu/blog/fixgov/2021/04/16/state-cannabis-reform-is-putting-social-justice-front-and-center/>. Expungement initiatives have also been undertaken in localities, such as in San Francisco and Seattle. *See City of Seattle to Nullify All Misdemeanor Marijuana Possession Convictions from Years Prior to Legalization*, DRUG POLICY ALLIANCE (Feb. 8, 2018), <https://drugpolicy.org/press-release/2018/02/city-seattle-nullify-all-misdemeanor-marijuana-possession-convictions-years>. *See also* Mitchell F. Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 HASTINGS CONST. L.Q. 367 (2020) (contending that past marijuana offenders have a constitutional right to retroactive application of any legalization laws).

68. Morris et al., *supra* note 67.

69. *See infra* Part V.

## V. CONNECTING LEGALIZATION MEASURES TO TRANSFORMATIVE ENDS

In sum, legalization has not leveled the drug enforcement playing field going forward for users or for drug dealers convicted for what is now legal through licensure. Nor has it redressed the damage done from past racialized enforcement of drug law. But there is still opportunity in the movement to legalize marijuana. This Section discusses how legalization, despite being incomplete and a mere drop in the racial justice bucket, is nonetheless an important step toward racial justice. Specifically, this Section details how legalization initiatives can be better connected to the material ends of racial justice.

As described in *Critical Justice*, achieving racial justice and equality for other subordinated groups turns on how well legal and societal change efforts incorporate three integral strategies. The first strategy is what is often gained in successful lawyer—and court—centered legal remedies on behalf of individuals—amelioration that wins technical, “band-aid” fixes to discrete social problems.<sup>70</sup> The second strategy or goal is building organized bottom-up group power.<sup>71</sup> The third strategy is shifting consciousness and culture, including mainstream societal culture, around the social problem faced.<sup>72</sup> In concert, these moves, gains, and strategies build what is needed to move the systemic needle toward the goals of bottom groups, or in this case, towards racial justice and material, lived equality. As discussed in *Critical Justice*, elites often tolerate lesser ameliorative fixes and “reform,” particularly when that reform (such as formal legal equality) might derail transformative solutions that change on-the-ground material realities as measured by actual outcomes.<sup>73</sup> The key is to create change and deliver justice beyond mere amelioration. This can be accomplished by attention, and the intentionality to connect amelioration to group organizing and culture shifts that may bring more sustained and meaningful redress.

When judged against the attainment of, and attention to, these advocacy goals, the existing legalization approaches are ameliorative, while nonetheless failing to deliver transformative change toward equality in

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70. See *CRITICAL JUSTICE*, *supra* note 9, at 612.

71. See *id.* at 612–13.

72. See *id.* at 612.

73. *Id.*

fact. Legalization required law enacted by democratic means, whether by the voters or the legislature, which followed an organized and strategic campaign, and a shift in societal culture around the perceived harm of marijuana.<sup>74</sup> That grassroots campaign<sup>75</sup> seized on the gradual evolution in law from the time of ramped up criminalization accompanying the announcement of a War on Drugs.<sup>76</sup> This was followed by decriminalization efforts started by Oregon in 1973, which was soon joined by California and other states,<sup>77</sup> then to legalization of medical marijuana starting with California in 1996,<sup>78</sup> eventually reaching thirty-eight states and the District of Columbia, and now to recreational marijuana legalization.<sup>79</sup>

Moreover, the cultural and legal shift around marijuana can be attributed to several factors that converged in the past decade to change the societal view of marijuana and its criminalization. One key factor was

74. Coinciding with, and contributing to, the wave of legalizations is the statistic that from 1999 to 2019, public sentiment for legalizing marijuana in the United States went from 63% opposing legalization to two-thirds supporting it. Moulton, *supra* note 31 (citing Andrew Daniller, *Two-thirds of Americans support marijuana legalization*, PEW RESEARCH CENTER (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/>).

75. Grassroots organizing is evident in the campaigns around state and local ballot measures and legislative proposals for legalization. See Kyle Jaeger, *Ohio Lawmakers Will Be Forced to Consider Marijuana Legalization as State Validates Activist Signatures*, MARIJUANA MOMENT (Jan. 28, 2022), <https://www.marijuanamoment.net/ohio-lawmakers-will-be-forced-to-consider-marijuana-legalization-as-state-validates-activist-signatures/> (discussing activist campaign to legalize marijuana in Ohio); Rachel Sugar, *A Better Green Boom. The activists and entrepreneurs intent on making New York's new cannabis industry more equitable, less corporate*, GRUB STREET (Apr. 27, 2021), <https://www.grubstreet.com/2021/04/cannabis-weed-industry-nyc.html> (describing the lobbying efforts resulting in legalization and equity measures composed of a “grassroots coalition of activists, lawyers, businesspeople, growers, patients, and wonks who believe that legalization is less about weed than about equity and restitution”).

76. See Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 396–97 (2017) (describing New York's 1973 “Rockefeller Drug Laws” imposing harsh mandatory sentences on drug sellers). Ramping up occurred at the federal as well as the state level, with the placement of marijuana as a Schedule One federal drug offense. See Bender, *Joint Reform*, *supra* note 2, at 365.

77. See Bender, *Joint Reform*, *supra* note 2, at 369–70.

78. *Id.* at 371.

79. See Stemen, *supra* note 76, at 377 (surveying the history of increased penalties beginning in the 1970s, usually in the form of mandatory sentencing, followed by a shift away from harsh laws with legalization of marijuana at the fore).

introducing the cultural mainstream of voices, narratives, and framings from the societal bottom group (Blacks) who told a story of injustice with the War on Drugs, and more generally the criminal justice system. As David Cole explains, works by authors like Michelle Alexander in *The New Jim Crow*<sup>80</sup> have helped change culture by sharing perspectives of bottom societal groups who detail unjust outcomes under otherwise cherished systems.<sup>81</sup> Another key factor was the interest convergence of depleted government budgets looking for additional revenue sources at a time of anti-tax sentiment—marijuana taxation was an easy sell to voters and legislators, particularly when compared against revenue otherwise lost to the illicit market. Another factor was the opioid epidemic that decimated white families and helped shift public consciousness around drugs to a personal, public health issue rather than one for the criminal justice system.<sup>82</sup>

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80. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

81. David Cole, Nat'l Legal Dir. of the ACLU, Remarks on the Civil Rights Litigation Panel at the Pili ka Mo'o: Celebrating Chuck Lawrence's Legacy on Struggles for Justice Conference (Mar. 5, 2022).

82. See Christine Minhee & Steve Calandrillo, *The Cure for America's Opioid Crisis? End the War on Drugs*, 42 HARV. J.L. & PUB. POL'Y 547 (2019) (arguing for legal treatment of opioid addiction as a public health rather than a criminal matter); Leslie E. Scott, *Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework for Ending the "War on Drugs,"* 48 N. KY. L. REV. 267 (2021) (arguing for broadscale drug decriminalization to tackle the opioid crisis as well as the United States' mass incarceration epidemic); Portugal's broadscale decriminalization was preceded by a cultural shift around drugs as a public health issue with addicts seen as needing treatment, not criminal penalties. Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model?*, 15 U. D.C. L. REV. 1, 26–28 (2011); American culture seems to be changing around drugs beyond marijuana and opioids toward a public health framework, either through legalization or decriminalization (which can mean reducing penalties from imprisonment to an administrative fine) of specific drugs or all narcotics. Oregon voters, for example, chose to decriminalize all drugs in 2020. See Natasha Lennard, *Oregon's Decriminalization Vote Might Be Biggest Step Yet to Ending War on Drugs*, THE INTERCEPT (Nov. 4, 2020, 12:23 PM), <https://theintercept.com/2020/11/04/oregon-drugs-decriminalization/>. On the related subject of decriminalization or legalization of psilocybin, see Dustin Marlan, *Beyond Cannabis: Psychedelic Decriminalization and Social Justice*, 23 LEWIS & CLARK L. REV. 851 (2019) (surveying the social, although not necessarily racial, justice implications of legalizing psychedelic drugs including psilocybin—"magic mushrooms"). Oregon was the first state to legalize psilocybin administered in therapeutic settings. Chris Roberts, *Oregon Legalizes Psilocybin Mushrooms and Decriminalizes All Drugs*, FORBES (Nov. 4, 2020, 1:25 AM),

Thus far, the fruits of organizing and culture shifts have not fully redressed the current and past harms of marijuana criminalization. In addition to the shortcomings described above, recreational marijuana remains illegal in most states, including the second and third most populous states of Texas and Florida.<sup>83</sup> Furthermore, it is still illegal at the federal level. While the federal government has not actively intervened to pursue personal possession crimes, it continues to actively enforce trafficking laws, thereby deterring minorities from entering any legal licensed business market for marijuana production and sales:

African Americans know that whenever something is in a gray area of the law they will feel more vulnerable, and for good reason since statistically minorities are more likely to be targeted or seen as suspects. . . . It may be that . . . racism and racial disproportionality in law enforcement around drugs can make minorities queasy about entering an area which is not fully legal.<sup>84</sup>

To ease the threat of enforcement, legalization must be secured federally and in the remaining states.

Moreover, the existing legalized marijuana states must examine and critique how their initiatives advance or impede racial justice—especially when racial justice was not a salient goal of legalization. Subsequent measures to advance racial justice could include programs to expand the

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<https://www.forbes.com/sites/chrisroberts/2020/11/04/oregon-legalizes-psilocybin-mushrooms-and-decriminalizes-all-drugs/?sh=43f22a7b4b51>. At the same time that the opioid addiction crisis has helped change culture toward treating drugs as a public health issue, the concurrent reality that cocaine-related overdose deaths among Blacks are equivalent to the number of whites dying of opioid use has drawn less societal attention. See Susan Scutti, *Cocaine deaths among blacks on par with opioid deaths among whites*, CNN (Dec. 4, 2017, 8:17 PM), <https://www.cnn.com/2017/12/04/health/cocaine-opioids-fatal-overdoses-study/index.html> (noting that increases in Black deaths receive less attention than white overdose deaths).

83. Berke et al., *supra* note 1.

84. See Tracy Jarrett, *Six Reasons African Americans Aren't Breaking into Cannabis Industry*, NBC NEWS (Apr. 19, 2015, 5:14 PM), <https://www.nbcnews.com/news/nbcblk/6-reasons-african-americans-cant-break-cannabis-industry-n344486> (citing remarks of Ethan Nadelmann, Director of Drug Policy Alliance). Relatedly, an Oregon lawyer who is an expert in marijuana equality measures added the additional risk factor that many state cannabis regulators were former police officers, and continue to act like law enforcement, which is chilling entry into the legalized marketplace by minorities). Email from Brett Mulligan, Green Light Law Grp. (Feb. 28, 2022, 10:57 AM) (on file with author).

diversity of licenses by reducing entry costs or providing for affirmative action measures that are race conscious. Additionally, providing automatic expungement of prior criminal convictions for now legal conduct and reducing (or eliminating) penalties for remaining offenses that do not imperil the health or safety of others such as public consumption or use by minors. Others have urged expungement beyond mere possession crimes to encompass past offenses for what is now legal for licensees—the cultivation, transport, and sale of large quantities of marijuana<sup>85</sup>—mindful that enforcement efforts against traffickers have been racially skewed.

What emerges in this analysis of the goal of racial justice being steeped in outcomes that erase material inequalities is that legalization approaches must go far beyond the steps outlined above and consider material repair on at least three fronts: (1) redress for harm caused by the war on marijuana on individuals, families, and communities; (2) more generally helping to repair the harm caused by the broader War on Drugs against other narcotics; and (3) even more generally, beginning to redress the harm caused by systemic injustice beyond the War on Drugs and beyond the reaches of the criminal justice system. In the interest of undoing intergenerational damage of systemic social ills, specifically racism, income flowing to the state from the legal marijuana industry must be re-directed toward redress, and must not be used as a stopgap to fund the state's general operating budget or programs unrelated to material racial equality. The following Section uses a racial justice lens to examine various existing approaches—both race neutral and race conscious—to allocate revenues from legalized marijuana toward community or racial group or individual repair.

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85. See, e.g., Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 386–87 (2020) (arguing for retroactive legality in marijuana legalization jurisdictions that encompasses felony convictions for trafficking as a “concrete first step towards a form of restorative justice for the War on Drugs;” citing California’s allowance of reclassification of certain felony marijuana convictions as misdemeanors as preferable to leaving the convictions untouched, but still incomplete, particularly as many jurisdictions bar such individuals from entering the legal marijuana business).

## VI. REPARATION MEASURES FOR DRUG WAR VICTIMS

The War on Drugs devastated individuals, their families, and whole communities with imprisonment, fines, and the collateral consequences of conviction.<sup>86</sup> Although there have been some instances where expungement of past criminal convictions were provided, marijuana legalization measures typically do not provide compensation to those ensnared for what is now legal behavior. Those that do compensate rely on racially colorblind approaches, and payments to trusted nonprofits or government entities, rather than directly to those harmed.

California's Proposition 64 allocated some of the marijuana tax revenue, in the nature of reparations, to the communities most damaged by the War on Drugs; those described as having been "disproportionately affected by past federal and state drug policies."<sup>87</sup> This "Community Reinvestment" program funds local health departments and disburses "at least 50% [of its annual funds toward grants] to qualified Community-based Nonprofit Organizations to support job placement, mental health treatment, substance use disorder treatment, system navigation services, legal services to address barriers to reentry, and linkages to medical care."<sup>88</sup>

Similarly, New York's Marijuana Regulation & Taxation Act, passed in 2021, allocates 40% of the resultant marijuana tax revenue to a Community Reinvestment Grant Fund.<sup>89</sup> Under that fund, qualified community-based nonprofit organizations and local governments are eligible to receive funding to support community revitalization efforts, including, but not limited to:

- Job placement and skills services
- Adult education
- Mental health treatment
- Substance use disorder treatment

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86. See MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2002) (ebook).

87. Cal. Proposition 64, § 7 (allocating an initial \$10 million, increased annually until it reaches a \$50 million annual community investment fund).

88. *Id.* (adding section 34019 to the Revenue and Taxation Code).

89. *What is in the Law: Social and Economic Equity*, NEW YORK OFF. OF CANNABIS MGMT., [https://cannabis.ny.gov/system/files/documents/2022/02/cannabis-management-fact-sheet-social-equity\\_0\\_0.pdf](https://cannabis.ny.gov/system/files/documents/2022/02/cannabis-management-fact-sheet-social-equity_0_0.pdf) (last visited Nov. 1, 2022).

- Housing
- Financial literacy
- Community banking
- Nutrition services
- Services to address adverse childhood experiences
- Afterschool and childcare services, system navigation services
- Legal services to address barriers to reentry
- Linkages to medical care, women’s health services and other community-based supportive services
- To further support the social and economic equity program, furthering participation of equity applicants in the cannabis industry.<sup>90</sup>

Illinois’s recreational legalization law allocates 25% of the tax revenue to the Restore, Reinvest, and Renew Program, which supplies grants to nonprofit organizations, local governments, faith-based organizations, businesses, and other community or neighborhood associations for use toward civil legal aid, economic development, reentry, violence prevention, and youth development.<sup>91</sup> The grants are awarded in eligible communities “identified, in part, by their [high] rates of gun injuries, child poverty, unemployment and incarceration.”<sup>92</sup>

Introduced in the United States House of Representatives, the Marijuana Opportunity Reinvestment and Expungement Act of 2021<sup>93</sup> provides for federal taxation of marijuana produced or imported in the United States, with some of the proceeds funding a Community Reinvestment Grant Program to “provide eligible entities with funds to administer services for individuals adversely impacted by the War on Drugs,”<sup>94</sup> including:

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90. *Id.*

91. R3 RESTORE. REINVEST. RENEW, <https://r3.illinois.gov/> (last visited Aug. 27, 2022).

92. *Id.*

93. An earlier version passed the United States House of Representatives in late 2020.

94. Defined as anyone (i) who reports an income below 250% of the Federal Poverty Level for at least five of the past ten years; and (ii) who has been arrested for or convicted of the sale, possession, use, manufacture, or cultivation of cannabis (except for a conviction involving distribution to a minor), or whose parent, sibling, spouse, or child has been arrested for or convicted of such an offense. H.R. 3617, 117th Cong. § 6(b)(3)(B) (2022).



- (1) job training;
- (2) reentry services;
- (3) legal aid for civil and criminal cases, including expungement of cannabis convictions;
- (4) literacy programs;
- (5) youth recreation or mentoring programs; and
- (6) health education programs.<sup>95</sup>

Other marijuana revenue programs are explicitly race conscious. A local example of race conscious community-oriented repair initiatives is Portland, Oregon’s seed grant program, funded by a 3% local tax on licensed marijuana sales in the city. In 2016, a voter-approved tax ballot measure allocated funds that prioritized “historically excluded for-profit and non-profit business owners and/or projects, programs or services that support economic and educational development of Black, Indigenous and Latin communities, which were the most impacted by cannabis prohibition.”<sup>96</sup> Portland’s 2022 call for grants sought proposals<sup>97</sup> in the priority

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95. *Id.* at § 3056(a). Eligible entity is defined as a “nonprofit organization . . . that is representative of a community or a significant segment of a community with experience in providing relevant services to individuals adversely impacted by the War on Drugs in that community.” *Id.* at § 3058. The proposed federal legislation also provides for Small Business Administration grants in a program called the “Equitable Licensing Grant Program,” to “provide any eligible State or locality funds to develop and implement equitable cannabis licensing programs that minimize barriers to cannabis licensing and employment for individuals adversely impacted by the War on Drugs.” *Id.* at § 6(b)(2).

96. Historically excluded business owners are defined as “Minority, Women, LGBT+, Veterans and/or Disabled individuals.” *Funding Opportunity for 2022 Social Equity and Educational Development (SEED) Grant Fund*, OFF. OF CMTY. & CIVIC LIFE, [https://www.portland.gov/sites/default/files/2021/2022-seed-grant-fund-foa-final\\_0.pdf](https://www.portland.gov/sites/default/files/2021/2022-seed-grant-fund-foa-final_0.pdf) (last visited Nov. 1, 2022) [hereinafter *Seed Grant*]. In contrast to this wording, legislation (Senate Bill 1579) enacted in Oregon in 2022 that emerged from marijuana equity organizing and advocacy apportioned \$15 million annually to Business Oregon (Oregon’s Economic Development agency) to fund grants to “culturally-responsive,” community-based organizations. As an Oregon marijuana equity advocate explained, the use of racially neutral language of culturally responsive organizations is “a great new path to get general economic development funds to communities of color most impacted by the War on Drugs, without running into Equal Protection issues.” See Mulligan, *supra* note 84.

97. Among those encouraged to apply for the 2022 grants, which totaled \$1 million, were “multi-entity collaborations, coalitions and/or consortium efforts.” See *Seed Grant*, *supra* note 96.

areas of education, entrepreneurship and economic justice, and expungement and criminal justice, with these more specific examples:

#### **EDUCATION**

- Youth Training & Development
- Workforce Development
- Community Education
- Health Education
- STEAMM Education (Science, Technology, Engineering, Agriculture, Math or Medical)

#### **ENTREPRENEURSHIP & ECONOMIC DEVELOPMENT**

- Business incubation & acceleration
- Business Support for Entrepreneurs
- Co-working Spaces
- Networking & Mentorship

#### **EXPUNGEMENT & CRIMINAL JUSTICE**

- Criminal justice reform projects and services
- Legal services and case management support
- Re-entry housing support and services<sup>98</sup>

In 2019, the city of Evanston, Illinois, took a related but different approach in its establishment of a reparations fund financed by the college town's 3% tax on marijuana sales.<sup>99</sup> The first fund initiative was directed at housing for Black residents who qualified for \$25,000 in reparations towards a down payment on a home purchase, or assistance in existing mortgage payments, or for home repairs.<sup>100</sup> Unlike directing revenue toward facially race-neutral community initiatives like most in-

98. *Id.*

99. Will Jones, *Hundreds of people have applied for Evanston's 1st reparations initiative*, ABC7 CHICAGO (Nov. 5, 2021), <https://abc7chicago.com/evanston-reparations-evaonston-il-news-housing/11202739/>.

100. *Id.* But see Rachel Treisman, *In Likely First, Chicago Suburb of Evanston Approves Reparations for Black Residents*, NPR (Mar. 23, 2021, 2:36 PM), <https://www.npr.org/2021/03/23/980277688/in-likely-first-chicago-suburb-of-evanston-approves-reparations-for-black-reside> (discussing the lone dissenting vote of a Black councilwoman who objected, among other grounds, to the lack of autonomy in the program to recipients who are not allowed to decide how to spend the money best for themselves; noting further that the recipients would be liable for federal and state income taxes).

terventions do, this program targets explicitly African American/Black individuals.

Although these fledgling reparation efforts are dwarfed by the enormity of material inequalities that exist, they are still important. These programs offer “valuable laboratories of equity-building and community reinvestment in the states,” which Congress can build on by funding “meaningful moves toward equity through its spending powers.”<sup>101</sup> Thus far, the marijuana tax collections allocated toward social or racial justice measures are impactful, but generally only a portion of the total tax collected.<sup>102</sup> For example, at the same time it was allocating marijuana tax revenues toward racial equity, Portland was contributing that tax revenue toward its police budget, at least until that allocation came under attack from the Oregon Cannabis Association.<sup>103</sup> At minimum, all the business revenue collected, less the costs of oversight of the legal marijuana industry, should be allocated toward racial justice initiatives.<sup>104</sup> Moreover, those initiatives should be specifically tailored toward means and ends that the government is not already doing, or should be doing. For example, the government should already be providing mental health services and several of the other community revitalization projects that New York’s marijuana tax revenues will fund. The Evanston initiative, in contrast, is unique and goes beyond what the government has ordinarily done for impacted communities and individuals. More initiatives such as

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101. Morris et al., *supra* note 67.

102. This discussion assumes legalized marijuana tax revenues will be the primary source of any remedial payments. Licensing revenues, in contrast, are needed to offset the administrative costs of legalized marijuana; moreover, increasing those fees to raise revenue sufficient to supply remedial relief may further skew the existing racial and income-based exclusions from licensing.

103. Brendan Bures, *Portland plans to stop using marijuana tax revenue to fund police*, CHICAGO TRIBUNE (June 12, 2020, 12:55 PM), <https://www.chicagotribune.com/marijuana/sns-portland-police-marijuana-tax-police-20200612-flx6w5pf6fefxbddf6vdatrz3a-story.html>. In addition to the controversy and opportunities over how to allocate marijuana tax revenue, it is important to remember that taxation is responsible at least in part for the black market that survives legalization, which in turn fuels policy arguments for additional resources to confront that illegal network.

104. See Katelyn Johnson, *Legal Weed is Great, But Black and Brown Communities Can't Be Left Behind*, IN THESE TIMES (Jan. 11, 2019), <https://inthesetimes.com/article/legal-weed-black-brown-racism-marijuana-chicago-rahm-emanuel-pensions> (“[U]sing marijuana revenue to fill budget gaps and backlogged debt does a grave disservice to the decades of inequity faced by communities of color as a result of the War on Drugs.”).

these should be pursued as racial justice laboratories at the state and local level, and as amelioration of the harm of the War on Drugs, while not diverting monies toward less controversial initiatives.

Importantly, reparations initiatives must be race conscious rather than colorblind—the War on Drugs was, and is, still being disproportionately waged against people of color, so measures to confront the damage must take account of race. Rather than the funding being allocated to government or trusted nonprofits for community programs, reparations styled as compensation to individuals under the Evanston model are important to compensate individuals and their families. Unlike the familiar rebuttal of slavery reparations proposals that question the connection between past generations of slaves and recipients of remedial relief today,<sup>105</sup> compensation to victims of the War on Drugs avoids the causation question.<sup>106</sup> Moreover, as Michelle Alexander has documented, victims of the War on Drugs are victims of a modern performance of yesterday's slavery as a potent form of racialized control and domination.<sup>107</sup> That control is color conscious, so remedies must be too.

There is room for flexibility in the laboratory of racial remedies. Marijuana enforcement victimized individuals, but whole communities suffered too as individual impacts reverberated through families and beyond.<sup>108</sup> As evident in the societal tensions around welfare programs,<sup>109</sup>

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105. See, e.g., Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 739–41 (2003) (suggesting the considerations involved in determining the proper beneficiaries of reparations for historical wrongs); see also Jane Kim, *Black Reparations for Twentieth Century Federal Housing Discrimination: The Construction of White Wealth and the Effects of Denied Black Homeownership*, 29 B.U. PUB. INT. L.J. 135, 149 (2019) (detailing critique of proposed federal reparations bill based on the passage of time since the “ancient injustice”).

106. Under the Evanston housing reparations model, recipients were required to be an African American or Black resident of Evanston sometime between 1919 and 1969, the direct descendant of such resident, or someone who can “prove they [experienced] housing discrimination due to [Evanston] city policies or practices after 1969.” Treisman, *supra* note 100.

107. See ALEXANDER, *supra* note 80.

108. See April M. Short, *Michelle Alexander: White men get rich from legal pot, black men stay in prison*, ALTERNET (Mar. 16, 2014), <http://www.alternet.org/drugs/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison> (describing the drug war as one that “decimated families [and] spread despair and hopelessness through entire communities.”).

a constraint on approving individualized reparations payments is the prevailing social stereotype that recipients would make poor choices with the funds.<sup>110</sup> Even a reparations program as seemingly revolutionary as the Evanston model reveals this tension in its compromise approach. As the lone dissenting voice of the proposal, a Black councilwoman voiced her objection to what she saw as an absence of autonomy:

Instead of [unrestricted] cash payments, which respect the humanity and self-determination of Black people and allow them to decide what's best for themselves, this housing program is restrictive and only allows limited participation. . . . [The proposal] is based on a white paternalistic narrative that Black folks are unable to manage their own monies.<sup>111</sup>

Even when communities receive reparation payments, individuals ultimately benefit. The distinction comes down to whether societal reparations programs need the layer of the so-called trusted intermediary to distribute and oversee the fruits of the program, or whether payments can be made direct to individuals, either with or without constraints on how they can use the money to repair their lives.<sup>112</sup>

The Evanston model, which focuses on repair for Black residents, suggests the possibility of controversy in selecting a single racial group, rather than the variety of racial bottom groups affected by the War on Drugs for reparations.<sup>113</sup> Some argue that the “government must provide

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109. For societal perceptions of rampant welfare fraud, abuse, and waste, see Mark Robert Rank et al., *Welfare fraud is actually rare, no matter what the myths and stereotypes say*, SALON (Apr. 4, 2021, 6:30 AM), <https://www.salon.com/2021/04/04/welfare-fraud-is-actually-rare-no-matter-what-the-myths-and-stereotypes-say/>.

110. See Vincent M. Southerland, *Toward a Just Future: Anticipating and Overcoming a Sustained Resistance to Reparations*, 45 N.Y.U. REV. L. & SOC. CHANGE 427, 450–51 (2021) (discussing reactions in the context of public assistance that scrutinize and question the spending choices and lifestyles of recipients).

111. Cicely Fleming, *Statement on Resolution 37-R-27*, CICELY L. FLEMING (Mar. 22, 2021), <https://www.cicelyfleming.com/blog/reparations>.

112. Direct payments might be taxed at the federal, state, or local level, unless excluded from such taxation in authorizing legislation. Among the possibilities for a relatively intermediary-free model of distribution of reparations funds is an income tax credit.

113. Posner & Vermeule, *supra* note 105, at 723. The authors articulate this argument, but reject that singling out a subordinated group is constitutionally suspect:

reparations (or, for that matter, any benefit) to all victims simultaneously or to none at all; it may not pick and choose.”<sup>114</sup> But the Black Lives Matter movement and the public attention it drew informs us that time, and timing, matter.<sup>115</sup> Some groups need to be elevated in the struggle for racial justice at key moments of interest convergence, group or societal consciousness, or when opportunity for progress arises. There is enough room in the laboratory of racial justice for a focus on one or any combination of the racialized groups disproportionately affected by the War on Drugs.

## VII. CONCLUSION

*Justice requires apology and monetary payments to all victims of [injustice]. And even if we do apologize, and do pay, it will not be enough. Reparation is a process, not an end.*

– Mari J. Matsuda<sup>116</sup>

As transformative in theory as reparations seem, they fall short. Even assuming they are paid in more than a few local laboratories of social/racial justice, they carry a built-in flaw—they may compensate for some of the past harm, but fail to account for future harm. Using the Evanston example, reparations may help a few Black families with the down payment needed to buy a home, with their mortgage payments for several months, or enable repairs for a home they already own—but do not account for tomorrow. Reparations payments will not account for the next repairs, the next payments, or—in the case of a new home pur-

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A cash reparations scheme, or remedial affirmative action program, that provides redress to some but not all similarly situated victim groups [should] not . . . be seen as arbitrarily different treatment of similarly situated claimants. Rather it [should] be seen as just another instance of the government’s prerogative, familiar from the domain of economic legislation, to proceed “one step at a time,” prioritizing its remedial programs in light of budget constraints and other policy considerations.

*Id.* at 722.

114. *Id.*

115. *Id.*

116. Mari J. Matsuda, *Foreword: McCarthyism, the Internment, and the Contradictions of Power*, 40 B.C. L. REV. 9, 36 (1998).

chase—the first home payments due under the purchase mortgage loan. In the same way that stagnant and inadequate wages were a prescription for disaster with exotic, subprime mortgages trying to bridge the affordability and qualification gap,<sup>117</sup> a lack of income, job stability, and intergenerational wealth imperils the meaningful equality of reparations recipients going forward. Rather, the payment of reparations may be seen as having solved the problem, and in fact might have solved the wrong problem. Critical scholar Natsu Saito suggests the limits of reparations that treat injustice as an aberration capable of being compensated, rather than as something structural and ongoing.<sup>118</sup> She invites us to envision social and legal structures less likely to reproduce the same wrongs that reparations seek to address.<sup>119</sup> Reparations, despite being amelioratory, must be part of a larger, ongoing transformative process: a process to transform the criminal justice system and all the related systems<sup>120</sup> to point toward equality in outcomes for racial groups.

By 2030, the market value of the U.S. cannabis industry, despite its limited legality, is expected to reach \$72 billion.<sup>121</sup> Although this seems staggering for a single plant and brims with reparative opportunity to fund social and racial justice initiatives, consider that on the housing front alone, the U.S. housing stock is worth some \$43.4 trillion dollars.<sup>122</sup> Regardless of the disparity in value, race consciousness repair at the state and local level can build momentum for federal reform that both legalizes—but also uses—marijuana revenue as a model to fund progress toward the material equality of an anti-subordination future.

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117. See STEVEN W. BENDER, *TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING*, ch. 5 (2010).

118. Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resistance*, 1 *HASTINGS RACE & POVERTY L.J.* 27 (2003).

119. *Id.*

120. See Chang & Culp, Jr., *supra* note 14, at 1188–92 (describing the various interconnected systems in the inequality cycle).

121. Adam Uzialko, *Cannabis Industry Growth Potential for 2022*, *BUS. NEWS DAILY* (Dec. 21, 2021), <https://www.businessnewsdaily.com/15812-cannabis-industry-business-growth.html>.

122. *U.S. housing market has doubled in value since the Great Recession after gaining \$6.9 trillion in 2021*, *CISION PR NEWswire* (Jan. 27, 2022, 8:00 AM), <https://www.prnewswire.com/news-releases/us-housing-market-has-doubled-in-value-since-the-great-recession-after-gaining-6-9-trillion-in-2021—301469460.html> (based on Zillow valuations).

