MARIJUANA SYMPOSIUM

MARIJUANA LEGALIZATION, RACIAL DISPARITY, AND THE HOPE FOR REFORM

by

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The criminalization of marijuana is rooted in a deeply racist history and has devastated minority communities. Studies show that usage of the drug is consistent across racial groups, but arrests of minorities are nevertheless higher than arrests of white offenders. Indeed, those kinds of disparities have persuaded some voters and policy makers to support legalization of marijuana.

California’s initiative, Proposition 64, passed in November 2016 and is now being implemented statewide. Drafters of Proposition 64 were aware of the racial disparity in enforcement of marijuana laws and attempted to offer a remedy. This Article asks whether Proposition 64 can achieve the goal of abating the disproportionate impact of marijuana laws on minority communities. The author is agnostic about whether California will achieve its goal of addressing inequity, certainly not without major changes in current regulations and costs of entry to the business.

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I. INTRODUCTION

America’s war on marijuana has a long and ugly racist history.\(^1\) Early appeals to criminalize marijuana were unabashedly racist.\(^2\) Those involved in more modern efforts to punish marijuana offenders have been more subtle in their appeals to racist sentiment.\(^3\) Nonetheless, the War on Drugs has devastated minority communities.\(^4\)

Numerous studies demonstrate that marijuana usage is consistent across racial groups.\(^5\) Despite that, arrests of minorities are consistently higher than arrests of white offenders.\(^6\) Indeed, those kinds of disparities have persuaded some voters and policy makers to support the legalization of marijuana.\(^7\) That included proponents of Proposition 64—California’s initiative that passed in November 2016 and is now being implemented statewide.\(^8\)

Major legislative reform requires a broad coalition of interest groups to achieve such changes.\(^9\) That certainly has been the case in California, where marijuana users and growers joined environmentalists and social justice reformers to pass Proposition 64.\(^10\) The challenge, of course, is to enact legislation that advances the interests of the various stakeholders and then to implement policies that assure that they work.\(^11\) Hence, the focus of this Article: will Proposition 64 in California address reformers’ goal of abating the disproportionate impact of marijuana laws on minor-


\(3\) See infra Part III; Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Wrecked the Middle Class 24 (2014).

\(4\) Alexander, supra note 1, at 67.


\(8\) Sasha Brodsky, Does Prop 64 Threaten, Diminish, or End Medical Cannabis? (Nov. 6, 2016), https://www.brodsky.law/Blog/VoteNoOnProp64.html.


\(10\) Mark Baldassare, California’s Marijuana Majority, PUB. POL’Y INST. CAL. (Dec. 16, 2016), http://www.ppic.org/blog/californias-marijuana-majority/.

\(11\) Id.
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Ity communities? As developed below, one should be agnostic about whether California will achieve its goal of addressing inequity, certainly not without major changes in current regulations and costs of entry to the business.12

First, this Article focuses on the early history of marijuana regulations in the United States, with a special focus on appeals to racism.13 Thereafter, it turns to more recent disparate impacts on minority communities.14 Further, it explores the ways in which the drafters of Proposition 64 hoped to alleviate the racial disparity.15 Despite those hopes, as developed below, racial disparity continues.16 This Article focuses on some efforts to address those concerns.17 Finally, it considers whether those efforts are too little, too late.18

II. FROM MEDICINAL MARIJUANA TO EVIL WEED

Cultivation of hemp dates back several thousand years in western China.19 By the tenth century, it had spread to India and much of the Muslim world.20 Over 2,700 years ago, medical practitioners in China prescribed cannabis for a variety of conditions, including pain, cramps, convulsions, and insufficient appetite.21 Though hemp did not arrive in Europe until later, it certainly did by the late eighteenth century when Napoleon brought it back from Egypt.22

Hemp had numerous uses. Until nylon became available, hemp was the principal source for rope.23 It was used to make sails for ships and it provided material for tents and clothing.24 Urban mythology states that the Declaration of Independence and the Constitution were written on hemp paper.25 While that is untrue, it

12 See infra Part VI.
13 See infra Part II.
14 See infra Part III.
15 See infra Part IV.
16 See infra Part III.
17 See infra Part III.
18 See infra Part V.
23 Warf, supra note 19, at 416.
24 Id.; PIERRE BOULOC, HEMP: INDUSTRIAL PRODUCTION AND USES 23 (2013).
was available in Jamestown and Plymouth starting in the early colonial period.\textsuperscript{26} Also doubtful is that the founding fathers smoked marijuana to get high, but some, like George Washington, did grow hemp to produce an array of products.\textsuperscript{27}

Medical practitioners in the United States did not recognize the medicinal value of cannabis until much later than practitioners elsewhere.\textsuperscript{28} But by the mid- and late nineteenth century, the medical profession had recognized many of its benefits.\textsuperscript{29} First listed in the \textit{United States Pharmacopeia} in the middle of the nineteenth century, marijuana was used in patent medicines for various conditions, including pain, convulsions, menstrual cramps, lack of appetite, depression, and other mental illnesses.\textsuperscript{30} In 1889, an article appearing in the medical journal \textit{Lancet} touted cannabis as a treatment for opium addiction, a claim that had a particularly modern ring to it.\textsuperscript{31}

It is unclear when Europeans and Americans began using it as an intoxicant.\textsuperscript{32} Certainly, though, some Europeans used marijuana to get stoned in the nineteenth century, and Americans were using it by the twentieth century.\textsuperscript{33}

Given that brief history, one might ask how marijuana became the “demon weed” by the 1930s.\textsuperscript{34} To get a measure of how significantly attitudes changed, consider this fact: at the end of the Civil War, tea was subject to more regulation than cannabis.\textsuperscript{35} At the height of the War on Drugs, many states incarcerated some offenders found guilty of marijuana possession for many years.\textsuperscript{36} And while many


\textsuperscript{27} Dwyer, \textit{supra} note 26, at 1157.

\textsuperscript{28} \textit{See} Lecia Bushak, \textit{A Brief History of Medical Cannabis: From Ancient Anesthesia to the Modern Dispensary}, MED. DAILY (Jan. 21, 2016, 8:00 AM), https://www.medicaldaily.com/brief-history-medical-cannabis-ancient-anesthesia-modern-dispensary-370344.


\textsuperscript{31} \textit{Booth, supra} note 22, at 93.


\textsuperscript{33} History of Marijuana, HIST. CHANNEL (Nov. 2, 2018), http://www.history.com/topics/history-of-marijuana.

\textsuperscript{34} \textit{The History of Demon Weed}, AGATE DREAMS, https://www.agatedreams.com/history-demon-weed/.

\textsuperscript{35} \textit{See} Mark K. Osbeck & Howard Bromberg \textit{in} \textit{Marijuana Law in a Nutshell} 2017, at 35 (2017).

\textsuperscript{36} \textit{See infra} Part III.
states are in transition towards a more tolerant stance on incarceration for such offenses, some states and the United States still impose harsh sentences on marijuana offenders (though usually only for those involved in large-scale distribution of marijuana).

As with other major cultural and legal shifts, various factors contributed to the demonization of marijuana and its users. For example, the passage of the Eighteenth Amendment ushered in Prohibition, and prohibitionists included those with legitimate and illegitimate goals in making marijuana illegal.

The first efforts to regulate marijuana were part of broader and unquestionably legitimate efforts to regulate the contents of patent medicines. The Industrial Revolution saw a large population shift from the countryside to the city and a large influx of immigrants. Consumers no longer produced their own food and prepared their own medicinal remedies, nor did they know who did produce their food and medicines. “Snake oil salesmen” pedaled a variety of patent medicines that promised miracle cures. Consumers had no idea of the contents of the medicine. Often, those medicines included addictive drugs like morphine, laudanum, cocaine, and cannabis. Remedies peddled to parents for their colicky babies may have included alcohol or morphine in their formulas. Most often women, many of them middle class, became addicted to their “medicines.”

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39 Id.
40 Okrent, supra note 9, at 241.
42 Id. at 15.
The earliest efforts to regulate the use of drugs were laws requiring that labels include dangerous ingredients. By the early 1900s, some states had passed such laws. Many of them included marijuana as an ingredient that had to be identified, despite the fact that it is less likely to lead to addiction. The first federal foray into regulating drugs was a similar labeling law called the Pure Food and Drug Act of 1906.

Until well into the twentieth century, the Supreme Court took an extremely narrow view of the Commerce Clause. From a modern perspective, an act like the Pure Food and Drug Act seems so obviously within the Clause’s scope. In the early 1900s, although a divided Court upheld the Act, the widely held view was that regulation of food and drugs was part of the police power of the states, guaranteed by the Tenth Amendment.

When Congress began to regulate addictive narcotics more aggressively, it did so in reliance on its taxing authority under Article I, § 8 of the U.S. Constitution. Despite Congress’s reliance on its taxing authority to justify passage of the Harrison Narcotics Tax Act of 1914 (the “Harrison Act”), the Court was narrowly divided 5-4 in upholding the law. While the Harrison Act did not include a prohibition against marijuana, its framework would become the model for Congress’s first efforts to criminalize marijuana.

Certainly, from a modern perspective, federal intervention to limit labeling and distribution of dangerous products seems like sound policy. But that tells only part of the story.

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49 Milestones in U.S. Food Law, N.D. ST. UNIV. (2018), https://www.ag.ndsu.edu/foodlaw/overview/history/milestones (explaining that some states revised their laws in order to align with federal law regulating "misbranded" and "adulterated" foods).
50 Swann, supra note 48, at 272.
51 Pure Food and Drugs Act, ch. 3915, 384 Stat. 768 (1906).
53 See Gonzalez v. Raich, 545 U.S. 1, 16–17 (2005).
56 U.S. CONST. art. I, § 8; H.R. 6282, 63d Cong. ch. 1 (1914).
59 Today, the FDA requires many warning labels on both food and drug products. For a list of them, see A Food Labeling Guide: Guidance for Industry, FOOD & DRUG ADMIN. (Jan. 2013),
Although marijuana got swept up into the Pure Food and Drug Act of 1906, Congress did not have much interest in including it in the Harrison Act. Hemp was still widely in use and marijuana still provided relief for a number of medical conditions. Several factors contributed to the sea change that made marijuana the “demon weed.”

Worth noting are some of the developments that eroded interest in marijuana for medical purposes and hemp for many of its practical uses. As they still do today, proponents of medical marijuana faced the challenge of producing a standardized product. Potency of the plant varied greatly, which is a problem that persists today because of the difficulty of engaging in cannabis research. Reaction to ingested marijuana was (and remains) highly unpredictable. By the end of the nineteenth century, Big Pharma entered the scene.

Some of the biggest names in Big Pharma were established long before the mid-nineteenth century. For example, Merck dates its origins to 1668 and GlaxoSmithKline dates its origins to 1715. But the Civil War in the United States helped advance modern pharmaceuticals. Pfizer, founded in 1849, expanded its business dramatically during the Civil War when demand for painkillers and antiseptics soared. Eli Lilly was a colonel in the Union Army and would go on to set up a pharmaceutical business in 1876. Edward Robinson Squibb served in the Mexican-American War and set up a laboratory in 1858 that would become profitable by supplying the Union Army during the Civil War.

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61 A Social History of America’s Most Popular Drugs, FRONTLINE, https://www.pbs.org/wgbh/pages/fron
tline/shows/drugs/buyers/socialhistory.html.
63 Id.
64 Id.
65 Robin Walsh, A History of the Pharmaceutical Industry, PHARMAPHORUM (Oct. 1, 2010),
https://pharmaphorum.com/articles/a_history_of_the_pharmaceutical_industry/.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
Apart from problems evaluating marijuana’s proper dosage, its utility was undercut by the arrival of competing products. Notably, opiates could be injected because they were water soluble, unlike cannabis,71 and more predictable in their effects than was cannabis.72 Other patentable, and thus profitable, drugs appeared on the market.73 Aspirin, for example, arrived on the market around 1900.74 I need not elaborate on its impact on pain management.

In light of the emergence of Big Pharma (along with its advertisements and political clout),75 interest in marijuana as medicine waned.76 Similarly, Big Agriculture’s emergence eroded interest in hemp.77

Anyone familiar with Civil War history knows that cotton was king in the South. But in its early history, cultivation was labor-intensive.78 In addition, given many natural pests, cotton production was limited.79 That would change during the Industrial Revolution and into the twentieth century.

Commercial fertilizers and pesticides increased yields.80 The completion of the transcontinental railroad opened up markets.81 Developments like the tractor, cotton harvester, and other technologies helped reduce the labor intensity and increased

71 GRINSPOON & BAKALAR, supra note 62, at 7.
73 GRINSPOON & BAKALAR, supra note 62, at 7. Other drugs that appeared at this time included barbiturates and chloral hydrate. Id.
76 GRINSPOON & BAKALAR, supra note 62, at 7.
77 The People’s History, supra note 26.
80 Wasim Aktar et al., Impact of Pesticides Use in Agriculture: Their Benefits and Hazards, 2 INTERDISC. TOXICOLOGY 1, 2 (2009).
yields for cotton. They also produced large fortunes for cotton barons. Thus, cotton emerged as a ready substitute for hemp in producing many products, such as cloth.

Developments at DuPont and similar companies also eroded hemp’s market utility elsewhere. For example, nylon would replace hemp in the production of rope and similar products.

These developments do not explain how marijuana became the “demon weed.” Enter racism.

States began regulating drug use during the end of the nineteenth and beginning of the twentieth centuries. Much of the impetus to criminalize marijuana dates to the influx of Mexicans during the Mexican Revolution. Advocates of criminalizing marijuana often made overtly racist appeals. Even the name “marihuana” or “marijuana” reflects a subtle racist appeal: until the influx of Mexicans, “cannabis” was the usual term of art. Mexicans referred to it as “marihuana” and used it for recreational purposes. Often, politicians used the term “marijuana” or “marihuana” when they described the new drug menace that they claimed was taking over

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84 Nadra O. Hashim, Hemp and the Global Economy 129 (2017); Timothy Curtis Jacobson & George David Smith, Cotton’s Renaissance: A Study in Market Innovation 201 (2001) (“The results confirmed ‘scientifically’ what believers in cotton had long held by faith and known by anecdotal experience. People were simply more comfortable when clothed in cotton.”).
86 Id.
89 Chris Bennett, Early/Ancient History, in THE POT BOOK: A COMPLETE GUIDE TO CANNABIS 31 (Julie Holland ed. 2010).
90 Emily Gelmann, Drink a Pint Smoke a Joint: The Importance of Distinguishing Between Substance Use and Substance Abuse in Custody Cases, MD. B.J., Nov. 2017, at 19, 20.
the country. Anti-marijuana advocates made extravagant, unverified claims about marijuana and often did so with explicitly racist language.

The most famous anti-marijuana warrior was Harry J. Anslinger. Anslinger entered government service in the late 1920s when he served as an agent in the Treasury Department’s Bureau of Prohibition. Towards the end of Prohibition, Anslinger received an appointment as the founding Commissioner of the Treasury Department’s Federal Bureau of Narcotics.

In Anslinger’s early years of service, he did not see marijuana as an evil. Indeed, he debunked the idea that it led to violence—or, as he said, “[t]here is probably no more absurd fallacy” than the claim that it led to violence. Nor did he believe that it caused harm to users. Critics suggest that Anslinger’s moment of enlightenment came towards the end of Prohibition when his job security might have been at risk. Whatever the motivation, Anslinger’s conversion to an anti-marijuana warrior was complete.

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92 See Bennett, supra note 89, at 31. The United States was hardly unique in its racist language. See Warf, supra note 19, at 428.


95 Ransom, supra note 93, at 18.


98 Brand, supra note 96.

99 Id.
William Randolph Hearst’s newspapers supported Anslinger’s efforts to demonize marijuana.\textsuperscript{100} Hearst, the master of yellow journalism, hated Mexican immigrants.\textsuperscript{101} His newspapers included lurid stories about crazed Mexicans who committed violent crimes while under the influence of marijuana.\textsuperscript{102} When Anslinger turned his attention to getting federal legislation passed that would effectively illegalize marijuana, Hearst routinely applauded Anslinger’s efforts.\textsuperscript{103}

Finding racist quotations attributed to Anslinger is easy and a reminder of how ingrained racist language was in this country.\textsuperscript{104} Here are a few choice quotations: “Reefer makes darkies think they’re as good as white men”;\textsuperscript{105} “Marihuana influences Negroes to look at white people in the eye, step on white men’s shadows and look at a white woman twice”;\textsuperscript{106} and “There are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others.”\textsuperscript{107} You can readily find additional quotations as well.\textsuperscript{108}

While some of his comments were not overtly racist, Anslinger tapped into fears about crime and violence: “Marijuana is the most violence-causing drug in the history of mankind”;\textsuperscript{109} “Marijuana is an addictive drug which produces in its users insanity, criminality, and death.”\textsuperscript{110}

\textsuperscript{100} Some commentators have connected real or imagined dots between the facts and have argued that the DuPonts, their financial backer Andrew Mellon (who was President Hoover’s Secretary of the Treasury and Harry Anslinger’s uncle-in-law), and William Randolph Hearst engaged in a conspiracy to demonize marijuana because hemp competed with their products. See JEFF DITCHFIELD & MEL THOMAS, THE MEDICAL CANNABIS GUIDEBOOK (2014), https://saltonverde.com/wp-content/uploads/2017/09/14-The_Medical_Cannabis_Guidebook.pdf. Even if one does not subscribe to such a conspiracy theory, no one can deny that Anslinger and Hearst joined forces to demonize marijuana and did so based on racist claims.


\textsuperscript{102} Id.

\textsuperscript{103} Bennett, supra note 89, at 31.


\textsuperscript{105} Id.

\textsuperscript{106} DAVID E. NEWTON, MARIJUANA: A REFERENCE HANDBOOK 163 (2013) (ebook).


\textsuperscript{108} See DITCHFIELD & THOMAS, supra note 100, at 6–9.

\textsuperscript{109} Id. at 6.

\textsuperscript{110} Id.
Many Americans had little experience with marijuana and uncritically accepted such extravagant claims. At the same time, as the Depression deepened, they may have been more willing to believe propaganda aimed at Mexicans, whom they feared were undercutting wages and taking away their jobs.

By 1937, most of the country had bought into the anti-marijuana rhetoric and the majority of state legislatures had outlawed marijuana. Anslinger backed efforts to expand federal law to outlaw marijuana. During his testimony supporting the Marihuana Tax Act of 1937, Anslinger made overt appeals to racism. For example, he claimed before the U.S. House Committee on Ways and Means that “[a] Negro raped a girl eight years of age. Two Negroes took a girl fourteen years of age and kept her for two days in a hut under the influence of marihuana. Upon recovery she was found to be suffering from syphilis.” Anslinger’s tactics worked when Congress enacted the law. Few believe that the law would have passed without Anslinger’s efforts, based on his racism and lack of any scientific support for his extravagant claims about the harmful effects of marijuana.

Even in the years after enactment of the 1937 Act, some commentators, including politicians, tried to counter the racist and unscientific claims that led to demonizing marijuana. Their voices were largely ignored. Indeed, although the rhetoric during the 1950s was less overtly racist, Congress increased punishment for marijuana offenses.

III. DOG WHISTLES

A great deal changed between the 1950s and present day.

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113 Siff, supra note 111.
115 Bennett, supra note 89, at 31.
118 Grinspoon & Bakalar, supra note 62, at 11–12.
Unless we are in a memory care ward, Baby Boomers like me remember how marijuana’s image changed during the 1960s. When I lecture on changes in attitudes about marijuana, I share the following anecdote: when my older brothers were growing up, had they seen Reefer Madness, they most likely would have given credence to its “demon weed” message. By the time I saw the movie in an art film cinema in 1970 (where one could have gotten a contact high), the movie was “camp,” leaving many viewers in the aisles. By the end of the 1960s, almost half of all college students had tried marijuana and most, no doubt, had inhaled.

That cultural shift—marijuana use among middle class (often white) college students—almost led to a radical reexamination of the nation’s marijuana laws. Even prior to Richard Nixon’s election as President, Congress had begun examining the nation’s drug laws, numbering over 200, and was developing a unified approach to regulating legal and illegal drugs. Many called for decriminalizing marijuana. When the Supreme Court struck down key provisions of the 1937 Act, Congress had incentive to reexamine the nation’s approach to drugs generally. As the Controlled Substances Act of 1970 was working its way through Congress, President Nixon appointed a commission to study possible reforms to the federal marijuana law. His appointment of the well-respected former Pennsylvania Governor Raymond Shafer seemed to signal a moderate approach to the question. In what was certainly a compromise, Congress completed the Controlled Substances Act before publication of the Shafer Commission Report by agreeing to include marijuana as a Schedule I drug, the classification of drugs for which there is no recognized medical use. Some members of Congress and the public expected

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120 *Reefer Madness* (George Hirliman 1936).
123 Osbeck & Bromberg, *supra* note 35, at 47.
124 *Id.* at 76.
126 Siff, *supra* note 111.
128 Gettman, *supra* note 125.
130 *Id.*
rescheduling in light of the commission’s report, but when the report recommended decriminalizing marijuana and using other, non-criminal, approaches to marijuana use, Nixon ignored it.

At least in retrospect, Nixon’s response makes sense in terms of raw and racist politics. Nixon ran on a “law and order” platform. The openly racist Alabama Governor George Wallace sought to outflank Nixon on the right. By the end of the 1960s, many Americans shunned overt appeals to race. Instead, Nixon used the increasingly frequent “dog whistle” appeal to racial animus; most listeners understood that “law and order” meant clamping down on African Americans, whose demands for equality often led to inner city riots. Somewhat reminiscent of then-candidate Trump’s appeals to racism and nativism, Nixon was able to chip away at the Democrats’ advantage among white working class voters. Years later, former Nixon Domestic Policy Chief John Ehrlichman reportedly confirmed Nixon’s motivations for launching his war on drugs; among his most hated opponents were antiwar activists and African Americans. Maintaining federal drug laws allowed Nixon to demonize his enemies, and his enemies included the minority community.

132 Id.
133 Id.
139 LÓPEZ, supra note 3, at 25–26; see also John Stoehr, Democrats Need the White Working Class, U.S. NEWS (Apr. 11, 2017, 7:00 AM), https://www.usnews.com/opinion/thomas-jefferson-street/articles/2017-04-11/the-democrats-were-wrong-they-need-working-class-whites.
Yet despite declaring a war on drugs, Nixon did sign the Controlled Substances Act, which reduced many of the punishments for marijuana offenses.\textsuperscript{142} That reversed some of the more extreme punishments enacted during the 1950s.\textsuperscript{143} More severe punishment had to await the Reagan Administration.\textsuperscript{144}

President Reagan’s War on Drugs made Nixon’s war look like a skirmish. Incarceration of non-violent drug offenders spiraled between 1980 and 1997, and over a third of the drug felons in federal prison were low-level nonviolent offenders.\textsuperscript{145} Much of this was driven by Reagan-era sentence enhancements, including many mandatory minimum sentences for nonviolent offenders.\textsuperscript{146} While much of the national attention focused on drugs other than marijuana, Reagan-era legislation did ratchet up penalties for marijuana offenses, including even the death penalty for drug kingpins.\textsuperscript{147} Like Nixon, Reagan did not use overtly racist language, relying instead on the increasingly common dog whistle. The most famous example is Reagan’s portrayal of Linda Taylor, the infamous “Welfare Queen,” as a symbol of the failed welfare state.\textsuperscript{148} Although Taylor’s racial identity was somewhat uncertain, no one missed the intended stereotype of the “indolent black woman, living off the largesse of taxpayers.”\textsuperscript{149} Reagan’s War on Drugs demonstrated a similar racial theme. Turning away from drug treatment and towards incarceration was made more palatable by targeting crack cocaine.\textsuperscript{150} Who could object to criminalizing

\begin{thebibliography}{99}
\bibitem{143} Joseph A. Califano, \textit{Non-Medical Marijuana: Rite of Passage or Russian Roulette?}, CASA (July 1999), https://www.centeronaddiction.org/addiction-research/reports/non-medical-marijuana-rite-passage-or-russian-roulette.
\bibitem{145} Punishment and Prejudice: Racial Disparities in the War on Drugs, HUM. RIGHTS WATCH, https://www.hrw.org/reports/2000/usa/Recdrg00-03.htm#P222_42059 (last visited Mar. 20, 2019).
\bibitem{146} WAYNE DAWKINS, RUGGED WATERS: BLACK JOURNALISTS SWIM THE MAINSTREAM 31 (2003).
\bibitem{149} Id.
\end{thebibliography}
mothers who gave birth to crack-addicted babies. Indeed, who could resist increasing punishment for crack cocaine well beyond punishment for powdered cocaine in light of crack’s highly addictive quality?

The problem, of course, was that crack was not more addictive than powdered cocaine. And stories about “crack babies” were largely exaggerated. Many Democrats supported increased punishment and many journalists accepted such assertions about crack without question. Indeed, Bill Clinton continued many Reagan-era drug policies during his administration, despite his softer rhetoric. Despite shared responsibility among Democrats and Republicans, no one could miss Reagan’s subtext. By the 1980s, the Nixon strategy of appealing to white working class voters, especially in the South, had effected a permanent shift.

Examining how drug policy has worked on the streets confirms the racial bias in the United States. Studies are consistent: for example, different racial groups use

151 Id.

152 See Kimbrough v. United States, 552 U.S. 85, 95–96 (2007) (“Congress apparently believed that crack was significantly more dangerous than powder cocaine in that: (1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers’ drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack’s potency and low cost were making it increasingly popular.”).


155 ALEXANDER, supra note 1, at 5; LINDA K. MANCILLAS, PRESIDENTS AND MASS INCARCERATION 70 (2018).


marijuana at about the same rates. That is true for the sale of marijuana as well. That data is consistent around the country. For example, liberal Mayor Bill de Blasio has recently called for a change in policing practices in regard to arrest and citation for possession of marijuana. He has done so because of the clear racially disparate impact of current practices.

Yet despite the similar marijuana rates of use and sales rates across racial lines, arrest and incarceration rates for marijuana are not similar; police are far more likely to arrest, prosecutors to prosecute, and judges to incarcerate minorities than white offenders for marijuana offenses. These disparities have many explanations. No doubt, in some instances, officials act out of sheer racial animosity. How often government actors act out of racist motivation is elusive. Other factors may play into the net disparate impact: for example, some have argued that minorities are more likely than their white counterparts to smoke or sell drugs in public. New York officials have attempted to explain the disparity based on frequency of calls to the police; calls come into the


160 Rates of Drug Use, supra note 159.


162 Id.


165 Id.; see also Berman, supra note 6.


167 Even in the face of facts that strongly suggest racial profiling, the Supreme Court has held it will not address this question. See Whren v. United States, 517 U.S. 806, 813 (1996) (holding that the subjective intentions of the officers were irrelevant to whether the police conduct violated the objective reasonableness standard of the Fourth Amendment).

police more frequently from black and Latino neighborhoods. Similarly, some explain the disparity by the fact that police presence in those communities is greater than in white communities. As a result, police routinely see drug activity in minority communities.

These kinds of disparities lead to significant setbacks for minority youth, especially. Some states’ punishment for even a small amount of marijuana are quite severe. For example, two cases from Louisiana have made national headlines. In one, an offender with a prior criminal record was sentenced to thirteen years in prison for his final strike: possession of about two joints worth of marijuana. National attention to that case resulted in the offender’s release on parole, but only after serving more than seven years in prison. In a similar case, a Louisiana trial court sentenced the offender to eighteen years in prison—a sentence that the Louisiana Supreme Court upheld, over a strong dissent by its Chief Justice.

Granted, the Louisiana sentences no longer represent the national approach to marijuana offenses. But even short of long-term imprisonment, a person found guilty of a marijuana offense may face any number of disadvantages. Assume that police arrest a young minority male for a marijuana offense, even in a state where he does not do prison time. As a result, the offender may face a host of new challenges. Employment opportunities are fewer for applicants with criminal records, which limits access to a decent living. Convicted of, say, felony sale or even felony possession, the offender may lose his right to vote. Congress has embedded a variety of setbacks for offenders in thousands of federal statutes, from the loss of the right


172 Id.


to live in federally-subsidized housing to the loss of the right to receive food stamps and student aid.\textsuperscript{177}

Even if the offender avoided prison time, his prior conviction may come back to haunt him in other ways as well. Sentencing guideline systems include a host of factors in assessing an appropriate prison term.\textsuperscript{178} Quite commonly, an offender’s prior criminal history is relevant on the theory that a first-time offender is at a lower risk of committing additional crimes than a person who has already had contact with the criminal justice system.\textsuperscript{179} The hypothetical offender thus risks incarceration upon a second conviction, even in circumstances where that offender would not have been subject to imprisonment but for the marijuana conviction. That term of imprisonment may be criminogenic for an offender who now faces even fewer opportunities and who may become a member of the criminal class.\textsuperscript{180} This kind of downward spiral has led authors like Professor Michelle Alexander to call the nation’s drug policy the “New Jim Crow.”\textsuperscript{181}

Many Americans oppose these kinds of racially discriminatory policies.\textsuperscript{182} Indeed, at least some voters favor legalizing marijuana as a way to remedy this inequity.\textsuperscript{183} Quite troubling, however, has been the experience in states that have legalized marijuana.\textsuperscript{184} Colorado and Washington are case studies.


\textsuperscript{181} ALEXANDER, supra note 1.


In November, 2012, Colorado became the first state in the United States to authorize recreational use of marijuana. Since then, the number of marijuana related arrests has, not surprisingly, declined. But racial disparity continues; indeed, the disparity has increased. That is especially true for minors. Since legalization, arrests have risen more than 50% for black youth, and more than 20% for Latino youth. The arrest rates for white youth declined by nearly 10%.

Washington, which legalized marijuana at the same time, has not done much better than Colorado. The total number of arrests also declined but racial disparity remained. According to a study published in 2016, blacks were still twice as likely as whites to be arrested. In addition, there is a disparity in Washington’s legal marijuana industry. It is dominated by white, middle class individuals. As reported in 2015, few minorities had ownership stakes in retail stores in Washington. Fewer than 3% were black and fewer than 4% were Latino.

Explaining those data poses difficulties. Disparate arrest rates have a number of causes. A study in 2013 suggested that some of the disparity is based on racial bias. Another explanation for the disparity is that many minorities have not moved out of the black market and into the legal market. Colorado “has nearly 1,000 licensed dispensaries and nearly 1,500 cultivation licenses. African Americans make up less than a handful of license holders.” The same is true for other minority groups.

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185 COLO. CONST. art. XVIII, § 16.
186 Lopez, supra note 184.
188 Markus, supra note 183.
189 Id.
190 Id. (noting the increasing arrest rates for minority youth).
192 Jenkins, supra note 72.
194 Id.
196 Mitchell & Caudy, supra note 72, at 22–23.
who remain out of the legal marijuana economy. In addition, Washington excludes individuals with recent felony convictions from owning licenses. Access to capital remains a substantial hurdle for prospective minority owners.

The high arrest rates and lack of access to capital are intertwined. Not surprisingly, Colorado and Washington voters favored legalization in large part because of promised tax benefits. Absent continued enforcement of marijuana laws against illegal market participants, promised tax benefits may be illusory.

By the time proponents of California’s Proposition 64 got their initiative on the ballot, drafters and other policy makers had the advantage of watching implementation in Colorado and Washington. Clearly, they learned lessons from those states and added provisions in the law to address concerns like those posed above. But are those provisions going to work?

IV. PROPOSITION 64

Proposition 64 was over 30 pages long and addressed numerous concerns. Some of the provisions named the agencies that would implement and oversee regulations governing the industry. It addressed a wide array of concerns, such as testing marijuana to assure the purity of the product, allocation of tax revenues, allocation of authority among state, county and local governmental entities, kinds

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199 Cougar-Bogue, supra note 195.
200 Id.
201 Infra Part IV.
207 Id. §§ 26100–26106.
208 Id. §§ 26210–26211.
209 Id. §§ 26200–26202.
of licenses, and the creation of a track and trace program. It earmarked funds for the Highway Patrol to study issues related to marijuana-intoxicated drivers and for youth education among other specific goals. It also allowed limitations on advertising aimed at adolescents.

The drafters of the proposition took advantage of a thoughtful report produced by Lieutenant Governor Gavin Newsom’s Blue Ribbon Commission. Further, a close reading of the proposition suggests that its drafters included many of its provisions to satisfy various stakeholders. But for purposes of this Article, a few provisions addressed issues related to racially disparate impact.

The initiative’s drafters were aware of the racial disparity. Indeed, even after California reduced possession of small amounts of marijuana to an infraction, and arrests for marijuana offenses plummeted, racial disparity continued. In recent years, felony arrests for marijuana offenses have gone from 13,300 in 2014 to 8,886 in 2015. Misdemeanor arrests remained relatively constant. In 2014, there were 6,411 misdemeanor arrests involving marijuana and in 2015, there were 6,267. In Oakland, police continued to search black suspects more often than they did white suspects. Even though they were no longer arrested for possession of marijuana, black offenders were fined at higher rates than their white counterparts.

According to a 2015 study, the arrest rate for blacks was three and a half times

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210 Id. §§ 26100–26106.
213 Id. §§ 26150–26156.
215 See Adult Use of Marijuana Act, 2016 Cal. Legis. Serv. at A-111 (explaining that individuals convicted of a felony are not automatically disqualified from obtaining a license and provisions earmarking funds for specific entities).
216 Nittle, supra note 72.
217 Id.
220 Jenkins, supra note 72.
greater than for whites for marijuana-related crimes.222 As elsewhere, prior to Proposition 64, very few minorities had been able to enter the legal market for medical marijuana. The medical marijuana industry helped produce some fortunes for dispensary owners, but most of them were white.223

Above, I described some of the ways in which prior convictions, even for minor marijuana offenses, have had a negative impact on minorities.224 For example, a prior conviction may limit employment and educational opportunities. Further, under many laws, prior felony convictions disable those individuals from holding a variety of licenses.225 Proposition 64’s drafters included provisions to alleviate those harms.

Specifically, Proposition 64 included a provision allowing individuals to petition to have their criminal records reduced or expunged.226 The law requires expungement if the offender’s conduct giving rise to the conviction is no longer criminal under Proposition 64.227 Similar provisions allow prior convictions to be adjusted in light of the current characterization of the offender’s conduct. For example, an offender whose conduct was a felony under prior law can petition to have a retroactive reduction of the offense to a misdemeanor.228 To allow greater access to licenses for those with prior convictions, Proposition 64 rejected a blanket prohibition that would prevent someone with a prior felony conviction from securing a license.229 It also treats as an infraction what would have been a felony or misdemeanor under the previous law if committed by a juvenile, thus preventing arrest


224 See, e.g., Jenkins, supra note 72; Mitchell & Caudy, supra note 72; Nittle, supra note 72.


228 RGB L. GROUP, supra note 227.

229 RACHAEL APPEL ET AL., IMPLEMENTING PROPOSITION 64: MARIJUANA POLICY IN CALIFORNIA 5 (Stan. L. Sch. L. & Pol’y Lab, 2017); Hilary Bricken, California’s AUMA: What You Need to Know Now to Have a Recreational Marijuana Business Later, HARRIS BRICKEN: CANNA
with all of its collateral consequences.\textsuperscript{230} Instead of criminal sanctions, juvenile offenders should receive drug education and community service.\textsuperscript{231} Finally, the proposition limited police discretion in charging certain offenses. Prior to Proposition 64, an officer had discretion over whether to charge an offender in possession of over an ounce of marijuana with possession (a misdemeanor) or possession with intent to distribute (a felony).\textsuperscript{232} Data revealed an increased likelihood that an offender would be charged with a felony charge if he was black than if he was white.\textsuperscript{233} The law takes away that discretion. In theory, all of these provisions reflect the hopes of the drafters and voters to ameliorate some of the historic inequities of the nation and state’s drug policies.\textsuperscript{234}

At the same time, Proposition 64 included a provision giving priority to applicants who were currently in the marijuana business when California adopted the new law.\textsuperscript{235} The policy makes sense: current producers and sellers need an incentive to come into the legal market.\textsuperscript{236} Leaving them out in the black market undercuts efforts to raise taxes and to achieve other important goals such as abating environmental harm and increasing product safety.\textsuperscript{237}

Yet another provision of the law seemed to prevent large organizations from entering the market. For example, Proposition 64 included limits on the size of a marijuana growing facility, seemingly to prevent Big Weed from dominating the market and leaving smaller producers out of the legal market.\textsuperscript{238} Currently, the topic

\textsuperscript{230}See Cal. Health & Safety Code § 11357(a)(1)(A)–(B) (eliminating the possibility of minors serving jail time).

\textsuperscript{231}Id.


\textsuperscript{234}It’s Not Legal Yet, supra note 5.


of litigation in state court is the Bureau of Cannabis Control’s regulation that allows a grower to hold multiple licenses.239

Proposition 64 had its critics.240 But many of those who voted for Proposition 64 recognized its drafters’ sincere efforts to address major policy concerns, including its efforts to abate a host of social harms caused by the War on Drugs and the unregulated illegal market for marijuana.241 Now is the time to ask whether Proposition 64 can achieve its goals.

V. UNFULFILLABLE EXPECTATIONS?

Major legislation often requires coalescence of varied interest groups.242 But achieving the goals of the various interest groups may present policy makers with an impossible task. Elsewhere, I have written about how the goals of various marijuana advocates may be in conflict.243 For example, advocates for reform may not be able to deliver on promised tax revenues and reduced law enforcement and incarceration costs at the same time.244 Similarly, one ought to be agnostic about whether California’s adoption of Proposition 64 will achieve the hoped-for abatement of environmental harms.245 The jury is still out on whether the law will effectively eliminate the black market in the production and sale of marijuana.246 Thus far, despite high

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241 Marchini & Parino, supra note 219, at 11; Matt Ferner, California’s Marijuana Legalization Aims to Repair Damage from the War On Drugs, HUFFPOST (Jan. 2, 2018), https://www.huffingtonpost.com.entry/california-marijuana-legalization-war-on-drugs_us_5a3c1303e4b025f99e15b738.

242 The Eighteenth Amendment ushering in Prohibition brought together suffragettes, Evangelical Protestants, owners of manufacturing companies concerned about worker safety, anti-immigrant groups, and the Ku Klux Klan. See OKRENT, supra note 9, at 86; Prohibition, HIST. CHANNEL (2009), https://www.history.com/topics/prohibition.


244 Vitiello, Pot of Gold?, supra note 243, at 1376–77.

245 Vitiello, Overblown Promise?, supra note 243, at 773.

246 Vitiello, supra note 237, at 968.
hopes, whether Proposition 64 will abate the disproportionate impact on minorities remains an open question.

Some provisions of Proposition 64 have a good chance of succeeding. Steering juvenile offenders into drug education and community service may work, depending on the quality of drug education and the ability to find meaningful community service. So too may the provision of the law eliminating discretion of an officer to choose between charging an offender with felony possession with intent to distribute or misdemeanor possession of more than one ounce.

Expungement may work, but many offenders may be unaware of the law’s provision. Depending on the community, even offenders who are aware of the provision may not have the resources to petition the court. Some counties impose filing fees and hiring an attorney makes the financial challenge even greater.

District Attorneys in some counties have taken a proactive position. For example, San Francisco District Attorney George Gascón has decided to throw out all marijuana misdemeanor convictions dating back to 1975.

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247 **CAL. HEALTH & SAFETY CODE § 11362.4(a).**


249 See Bender, supra note 2, at 19 (discussing how all individuals face the same penalty under Proposition 64).


252 *Id.*


waived filing fees. In some areas, nonprofit organizations and attorneys working pro bono have set up free expungement clinics.

While one ought to applaud efforts to facilitate expungement, at least for older offenders, it is likely to come too late. Convictions carry direct and collateral consequences that can put an offender on a downward spiral. A thirty-year-old ex-offender will have a hard time making up educational and other advantages lost over time.

At the same time, for some unknown number of ex-offenders, the law should have benefits. Cases that made headlines, demonstrating the ongoing harm of prior convictions, may be ones where expungement opens up opportunities for ex-offenders.

The most challenging question about Proposition 64 is whether minorities will gain access to the industry. Many proponents of legalization touted the economic benefits of legalizing marijuana. While some of those projections seem wildly optimistic, some dispensary owners and providers of medical marijuana have made fortunes. Some entrepreneurs in other states have made substantial incomes in the business. Investors have already pumped billions of dollars into the industry.


Kerry Close, Pot Shops Make More Money Per Square Foot than Whole Foods, MONEY (June 28, 2016), http://time.com/money/4385243/pot-shops-whole-foods-sales/.


The track record in California, post-Proposition 215 (allowing the use of medical marijuana), is not encouraging. The benefits of that law seem to have gone largely to white participants in the industry. Nationwide data is not available, but Buzzfeed published a story estimating that black ownership accounts for only 1% of marijuana dispensaries.

Other aspects of Proposition 64 will determine whether minorities share in the marijuana dividend. One provision in the law works against minority access. By necessity, the drafters of Proposition 64 built in a preference for those already in the business. They included that provision in order to undercut the black market. Participants in the pre-legalized market would have access to customers and could continue to function as they have in the black and grey markets without an incentive to come into the legal market. But given the predominance of white ownership—a grandfathering clause will likely skew the racial composition of license holders.

The grandfathering clause is less troubling than two other factors. The cost of entry into the legal market has proven to be enormous. According to one industry consultant, starting a marijuana business costs at least $250,000. That estimate may be conservative, with some estimates running even higher.

The second factor that may squeeze out minority entrepreneurs is the Bureau of Cannabis Control’s decision to allow an entity to own more than one license. Such a decision invites larger, better capitalized entities to dominate the legal industry.

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265 See Romero, supra note 223 (noting the lack of racial diversity in dispensary ownership under Proposition 215).


267 Schneiderman, supra note 235.


270 Chicago Lewis, supra note 266.


272 CAL. BUS. & PROF. CODE § 26053(c) (2019).

One can make good arguments for allowing large-scale operations into the industry. For example, large farmers may gain economies of scale, allowing them to stay in business in a period where the price of the product seems to be declining because of oversupply.\(^{274}\) Further, as a student in my Marijuana Seminar argued in her paper, users are shifting from smoked marijuana to concentrate cannabis products.\(^{275}\) Producing concentrate cannabis products requires the expensive process of converting the plant to usable oils.\(^{276}\) Big farms can produce the large crops of marijuana plants needed to produce sufficient quantities of oil.\(^{277}\) Large farmers are also used to complying with labeling laws controlling pesticides and herbicides.\(^{278}\) Given their investments in land and equipment, they may be less willing to skirt legal rules as well. For example, one commentator familiar with large farming operations describes how some farmers employ one person to assure that the company complies with all governmental regulations.\(^{279}\)

Despite arguments that may support allowing large scale operations, Big Weed presents a host of different policy challenges.\(^{280}\) If California’s marijuana business flourishes, it stands to be a white-dominated business. The War on Drugs—along with many other discriminatory practices—has left many members of minority communities without ready access to the cash needed to set up businesses.\(^{281}\) Minority family wealth is roughly one half that of white Americans.\(^{282}\) Absent existing


\(^{275}\) Jessica Chance, A Farm Girl’s Statutory Interpretation of Proposition 64, at 30 (unpublished student paper) (on file with Lewis & Clark Law Review).


\(^{279}\) See Chance, supra note 275, at 29.

\(^{280}\) Vitiello, supra note 237, at 968, 977.


resources from some other income stream, would-be business owners do not have the cash to enter the marijuana business.\textsuperscript{283} Even if traditional bank loans were available, discriminatory lending practices are notorious.\textsuperscript{284}

While minority communities may not experience the economic benefits of a successful marijuana industry, they will continue to suffer some of the costs of that industry.\textsuperscript{285} Marijuana advocates must concede that marijuana use has cleanup costs.\textsuperscript{286} While for many users marijuana does not cause harm, heavy marijuana users tend to remain trapped in poverty, limiting opportunities for their children.\textsuperscript{287} Marijuana taxation is regressive, imposing extra costs on less affluent users.\textsuperscript{288} Given that marijuana use remains consistent across racial groups, the net effect of low participation in the profits of the marijuana industry means that minority communities bear many of the costs—but not the benefits—of legalization.\textsuperscript{289}

Minority communities are likely to bear another disproportionate cost as well. Data from states like Colorado demonstrate continued disproportionate arrest and conviction rates for minority offenders.\textsuperscript{290} Only some of that results from racial policing.\textsuperscript{291} Some of the disparity comes from the fact that minority participants in the industry do not have the resources to enter the legal market.\textsuperscript{292} As long as they remain in the illegal market, law enforcement must arrest them if the state is going to receive the tax and other benefits promised by proponents of the law.\textsuperscript{293} Once again, competing policy goals are at odds.

\textsuperscript{283} Hackman, supra note 281.
\textsuperscript{285} Hackman, supra note 281.
\textsuperscript{286} Id.
\textsuperscript{289} Hackman, supra note 281.
\textsuperscript{291} Id.
\textsuperscript{293} Fimrite, supra note 268.
Some activists have called for equity programs to address the kinds of problems raised here.\textsuperscript{294} Notably, Oakland has developed a program intended to assist those who suffered from the War on Drugs.\textsuperscript{295} Under Oakland’s proposal, an applicant who meets certain income requirements and has lived in an area with a high level of marijuana arrests or has been arrested for a marijuana-related offense since November 5, 1996, qualifies for that city’s program.\textsuperscript{296} Meeting those requirements gives the qualifying applicant priority to get a marijuana business license.\textsuperscript{297} Beyond that, Oakland’s program provides qualified applicants “with entrepreneurial mentors, technical assistance (for business plan prep and municipal regulations compliance), and help with other procurement needs.”\textsuperscript{298} It also provides “zero-interest small business loans, and conditional approval for equity applicants even if they don’t have all of their financing or real estate secured upfront.”\textsuperscript{299} The funding for that part of the program comes from licensing fees paid by those able to pay without assistance.\textsuperscript{300} Setting its criteria based on income, rather than race, probably immunizes Oakland’s equity program from an equal protection challenge.\textsuperscript{301}

Other liberal cities have followed Oakland’s lead in creating an equity program.\textsuperscript{302} Notably, San Francisco, Los Angeles and Sacramento have sought to address equity issues with reforms similar to Oakland’s equity program.\textsuperscript{303}

\textsuperscript{294} Amanda Duberman, Women Are Leading the Charge for Racial Justice in Legal Weed, HUFFPOST (Jan. 18, 2018), https://www.huffingtonpost.com/entry/women-racial-justice-legal-marijuana_us_5a5df6d5e4b04f3c55a5db01.

\textsuperscript{295} Become an Equity Applicant or Incubator, CITY OF OAKLAND, http://www2.oaklandnet.com/government/o/CityAdministration/cannabis-permits/OAK068455 (last visited Apr. 14, 2019).

\textsuperscript{296} Id.


\textsuperscript{298} Id.

\textsuperscript{299} Id.

\textsuperscript{300} Id.

\textsuperscript{301} See Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that a university’s affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment).


Whether programs like these will be enough to balance the equities will be an open question for several years. Wealthy investors have already pumped billions of the dollars into the industry and have a running start.\textsuperscript{304} That suggests that equity programs may be too little, too late. A trump card may be the (probable) election of Gavin Newsom as the new governor.\textsuperscript{305} He took a leadership role in moving California towards legalizing recreational marijuana and has advocated for equity in the business.\textsuperscript{306} But he and other elected officials may yield to the temptation likely to be offered by wealthy investors who already have a head start in the industry.\textsuperscript{307}

VI. CONCLUDING THOUGHTS

The marijuana industry is here to stay. We are closer to a national solution to marijuana law now than at any point in modern history.\textsuperscript{308} Federal forbearance during the Obama Administration allowed medical and eventually recreational marijuana businesses to flourish, leading to the flow of capital into the industry.\textsuperscript{309} Former Attorney General Jeff Sessions’s decision to rescind the Obama-era Cole Memorandum (giving states latitude to develop their recreational marijuana businesses) backfired.\textsuperscript{310} For the first time, members of Congress on both sides of the aisle have voiced support for a national solution to the marijuana issue.\textsuperscript{311} Members of both parties have put a number of bills into the hopper, bills that are steadily gaining support.\textsuperscript{312} Contributions are flowing into congressional members’ coffers and now

\textsuperscript{304} Hasse, supra note 264.
\textsuperscript{311} Higdon, supra note 308.
\textsuperscript{312} Id.; Michael Liszewski, \textit{Unprecedented Action in Congress Sends Signals that Ending Federal Marijuana Prohibition Could Finally Become Reality}, \textit{Drug Pol’y Alliance} (June 28, 2018),
disproportionately to those of Republican members.313 But what will that industry look like? No one knows.

Advocates for social justice should be vigilant. Legislators targeted minority communities throughout the history of marijuana regulation with long-term consequences.314 An unregulated market in marijuana is not likely to remedy those historic inequities. The flow of capital into politicians’ hands cuts against racial reme- diation: white investors already have the upper hand in the marijuana business.315 They are not likely to advocate for equity programs, but instead are likely to favor business-friendly legislation.316 We already know what that economic system looks like.

California has a chance to address equity issues. Certainly, Proposition 64’s drafters included some provisions that can help. California needs more: the best hope is for aggressive leadership to expand equity programs statewide. Without such efforts, we face the same old, same old.


314 Nick Wing, Marijuana Prohibition Was Racist from the Start. Not Much Has Changed., HuffPost (Jan. 25, 2014), https://www.huffingtonpost.com/2014/01/14/marijuana-prohibition-racist_n_4590190.html; Chicago Lewis, supra note 266.

315 Chicago Lewis, supra note 266.