

MARIJUANA SYMPOSIUM

MARIJUANA LEGALIZATION, RACIAL DISPARITY, AND THE HOPE FOR REFORM

by
Michael Vitiello*

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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* Distinguished Professor of Law, University of the Pacific, McGeorge School of Law; University of Pennsylvania, J.D., 1974; Swarthmore College, B.A., 1969. I want to extend a special thank you to Professor Susan Mandiberg for helping to develop this symposium; to James Vitiello for his editing suggestions; and to my research assistants, Amy Gassner Seilliere and Alison Southard, for their excellent research assistance.

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-

¹ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 60 (rev. ed. 2012).

² Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690 (2016).

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.

⁵ *It's Not Legal Yet: Nearly 500,000 Californians Arrested for Marijuana in Last Decade*, DRUG POL'Y ALLIANCE (Aug. 2016), http://www.drugpolicy.org/sites/default/files/California_Marijuana_Arrest_Report_081816.pdf.

⁶ *Id.*; Douglas A. Berman, *Reminders of Realities of Marijuana Arrest Rates*, MARIJUANA L., POL'Y & REFORM (July 8, 2018), https://lawprofessors.typepad.com/marijuana_law/2018/07/reminders-of-realities-of-marijuana-arrest-rates.html.

⁷ Jennifer De Pinto et al., *Marijuana Legalization Support at All-Time High*, CBS NEWS (Apr. 20, 2017, 11:57 AM), <https://www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high/>.

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

⁹ See DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 41–42 (2010).

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.*

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.

¹⁹ Barney Warf, *High Points: An Historical Geography of Cannabis*, 104 GEOGRAPHIC REV. 414, 419 (2014).

²⁰ Antonio Waldo Zuardi, *History of Cannabis as a Medicine: A Review*, 28 REVISTA BRASILEIRA DE PSIQUIATRIA [REV. BRAS. PSIQUIATR.] 153, 155 (2006) (Braz.).

²¹ Leah Spicer, *Historical and Cultural Uses of Cannabis and the Canadian "Marijuana Clash,"* SENATE CAN. (Apr. 12, 2002), <https://sencanada.ca/content/sen/committee/371/ille/library/spicer-e.htm>.

²² See MARTIN BOOTH, CANNABIS: A HISTORY 76–77 (2003).

²³ Warf, *supra* note 19, at 416.

²⁴ *Id.*; PIERRE BOULOC, HEMP: INDUSTRIAL PRODUCTION AND USES 23 (2013).

²⁵ *Busting Some Myths About the Founding Fathers and Marijuana*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Nov. 9, 2012), <https://constitutioncenter.org/blog/busting-some-myths-about-the-founding-fathers-and-marijuana/>.

was available in Jamestown and Plymouth starting in the early colonial period.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.²⁷

Medical practitioners in the United States did not recognize the medicinal value of cannabis until much later than practitioners elsewhere.²⁸ But by the mid-and-late nineteenth century, the medical profession had recognized many of its benefits.²⁹ First listed in the *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.³⁰ In 1889, an article appearing in the medical journal *Lancet* touted cannabis as a treatment for opium addiction, a claim that had a particularly modern ring to it.³¹

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

Given that brief history, one might ask how marijuana became the “demon weed” by the 1930s.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.³⁵ At the height of the War on Drugs, many states incarcerated some offenders found guilty of marijuana possession for many years.³⁶ And while many

²⁶ Susan David Dwyer, *The Hemp Controversy: Can Industrial Hemp Save Kentucky?*, 86 KY. L.J. 1143, 1156 n.102 (1997–1998); *The People's History*, THISTLE (Oct. 2000), <https://www.mit.edu/~thistle/v13/2/history.html>.

²⁷ Dwyer, *supra* note 26, at 1157.

²⁸ See Lecia Bushak, *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>.

²⁹ Lester Grinspoon & James B. Bakalar, *Marihuana as Medicine: A Plea for Reconsideration*, 273 JAMA 1875, 1875 (1995).

³⁰ CANNABIS IN MEDICAL PRACTICE: A LEGAL, HISTORICAL AND PHARMACOLOGICAL OVERVIEW OF THE THERAPEUTIC USE OF MARIJUANA 37–38 (Mary Lynn Mathre ed. 1997); ISSUES FOR DEBATE IN AMERICAN PUBLIC POLICY: SELECTIONS FROM CQ RESEARCHER 61 (17th ed. 2017).

³¹ BOOTH, *supra* note 22, at 93.

³² Mark Hay, *Marijuana's Early History in the United States*, VICE (Mar. 31, 2015, 9:00 PM), https://www.vice.com/en_us/article/xd7d8d/how-marijuana-came-the-united-states-456.

³³ *History of Marijuana*, HIST. CHANNEL (Nov. 2, 2018), <http://www.history.com/topics/history-of-marijuana>.

³⁴ *The History of Demon Weed*, AGATE DREAMS, <https://www.agatedreams.com/history-demon-weed/>.

³⁵ See Mark K. Osbeck & Howard Bromberg in MARIJUANA LAW IN A NUTSHELL 2017, at 35 (2017).

³⁶ See *infra* Part III.

states are in transition towards a more tolerant stance on incarceration for such offenses,³⁷ some states and the United States still impose harsh sentences on marijuana offenders³⁸ (though usually only for those involved in large-scale distribution of marijuana).³⁹

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,⁴⁰ and prohibitionists included those with legitimate and illegitimate goals in making marijuana illegal.⁴¹

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.⁴² 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” peddled a variety of patent medicines that promised miracle cures.⁴³ Consumers had no idea of the contents of the medicine.⁴⁴ Often, those medicines included addictive drugs like morphine, laudanum, cocaine, and cannabis.⁴⁵ Remedies peddled to parents for their colicky babies may have included alcohol or morphine in their formulas.⁴⁶ Most often women, many of them middle class, became addicted to their “medicines.”⁴⁷

³⁷ Sam Stebbins et al., *The Next 11 States to Legalize Marijuana*, USA TODAY (Aug. 19, 2015, 1:25 PM), <https://eu.usatoday.com/story/money/business/2015/08/18/24-7-wall-st-marijuana/31834875/>.

³⁸ *NORML Report on Sixty Years of Marijuana Prohibition in the U.S.*, NORML (July 12, 2003), <http://norml.org/library/item/part-iii>.

³⁹ *Id.*

⁴⁰ OKRENT, *supra* note 9, at 241.

⁴¹ Michael F. Linden, *Seeing Through the Smoke: The Origins of Marijuana Prohibition in the United States*, at 5 (Apr. 2015) (unpublished thesis, Wesleyan University), https://wesscholar.wesleyan.edu/cgi/viewcontent.cgi?article=2464&context=etd_hon_theses.

⁴² *Id.* at 15.

⁴³ Lakshmi Gandhi, *A History of “Snake Oil Salesmen,”* NPR (Aug. 26, 2013, 11:55 AM), <https://www.npr.org/sections/codeswitch/2013/08/26/215761377/a-history-of-snake-oil-salesmen>.

⁴⁴ Ashlee Kieler, *Snake Oil Was a Real Thing & 3 Other Things You Should Know About Sham Medicines*, CONSUMERIST (July 28, 2016, 5:15 PM), <https://consumerist.com/2016/07/28/snake-oil-was-a-real-thing-3-other-things-you-should-know-about-sham-medicines/index.html>.

⁴⁵ David F. Musto, *Opium, Cocaine and Marijuana in American History*, SCI. AM., July 1991, at 40, 40–42.

⁴⁶ *History of Patent Medicine*, HAGLEY, <https://www.hagley.org/research/digital-exhibits/history-patent-medicine>.

⁴⁷ Michael R. Aldrich, *Historical Notes on Women Addicts*, CNS PROD., INC., <https://www.cnsproductions.com/pdf/Aldrich.pdf>.

The earliest efforts to regulate the use of drugs were laws requiring that labels include dangerous ingredients.⁴⁸ By the early 1900s, some states had passed such laws.⁴⁹ 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.⁵⁰ The first federal foray into regulating drugs was a similar labeling law called the Pure Food and Drug Act of 1906.⁵¹

Until well into the twentieth century, the Supreme Court took an extremely narrow view of the Commerce Clause.⁵² From a modern perspective, an act like the Pure Food and Drug Act seems so obviously within the Clause's scope.⁵³ In the early 1900s, although a divided Court upheld the Act,⁵⁴ 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.⁵⁵

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.⁵⁶ 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.⁵⁷ 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.⁵⁸

Certainly, from a modern perspective, federal intervention to limit labeling and distribution of dangerous products seems like sound policy.⁵⁹ But that tells only part of the story.

⁴⁸ See John P. Swann, *The History of Efforts to Regulate Dietary Supplements in the USA*, 8 DRUG TESTING & ANALYSIS 271, 271–72 (2015).

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).

⁵² LAWRENCE M. FRIEDMAN & GRANT M. HAYDEN, *AMERICAN LAW: AN INTRODUCTION* 134–35 (3d ed. 2017).

⁵³ See *Gonzalez v. Raich*, 545 U.S. 1, 16–17 (2005).

⁵⁴ *United States v. Johnson*, 221 U.S. 488, 507 (1911).

⁵⁵ See Lyle Denniston, *Constitution Check: Does the Government Have Authority to Ban Trans Fat?*, NAT'L CONST. CTR.: CONST. DAILY BLOG (Nov. 14, 2013), <https://constitutioncenter.org/blog/constitution-check-does-the-government-have-authority-to-ban-trans-fat>.

⁵⁶ U.S. CONST. art. I, § 8; H.R. 6282, 63d Cong. ch. 1 (1914).

⁵⁷ *United States v. Doremus*, 249 U.S. 86, 94 (1919).

⁵⁸ See *Harrison Act: What Happened Next...*, L. LIB., <http://law.jrank.org/pages/12357/Harrison-Act-What-happened-next.html> (last visited Mar. 2, 2019).

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.⁶⁰ Hemp was still widely in use and marijuana still provided relief for a number of medical conditions.⁶¹ 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.⁶² Potency of the plant varied greatly,⁶³ 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.⁶⁴ By the end of the nineteenth century, Big Pharma entered the scene.⁶⁵

Some of the biggest names in Big Pharma were established long before the mid-nineteenth century.⁶⁶ For example, Merck dates its origins to 1668 and GlaxoSmithKline dates its origins to 1715.⁶⁷ 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 anti-septics soared.⁶⁸ Eli Lilly was a colonel in the Union Army and would go on to set up a pharmaceutical business in 1876.⁶⁹ 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.⁷⁰

<https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-food-labeling-guide> (follow “Download the Labeling Guide” hyperlink).

⁶⁰ David F. Musto, *The Marihuana Tax Act of 1937*, 26 ARCHIVES GEN. PSYCHIATRY 419, 422 (1972).

⁶¹ *A Social History of America’s Most Popular Drugs*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/buyers/socialhistory.html>.

⁶² See LESTER GRINSPOON & JAMES B. BAKALAR, MARIJUANA: THE FORBIDDEN MEDICINE 7 (1993).

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.

⁷² See Austin Jenkins, *Legalizing Marijuana: It Changes Policing, but May Leave Racial Disparities*, NPR (Sept. 24, 2016, 5:30 PM), <https://www.npr.org/2016/09/24/492111945/legalizing-marijuana-it-changes-policing-but-may-leave-racial-disparities>; Ojmarrh Mitchell & Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, JUST. QUARTERLY 22–23 (2013), <https://www.gmuace.org/documents/publications/2013/examining.pdf>; Nadra Nittle, *Legalizing Pot: Is Prop. 64 Really a Civil Rights Issue?*, CALMATTERS (Nov. 3, 2016), <https://calmatters.org/articles/legalizing-pot-is-prop-64-really-a-civil-rights-issue/>.

⁷³ GRINSPOON & BAKALAR, *supra* note 62, at 7. Other drugs that appeared at this time included barbiturates and chloral hydrate. *Id.*

⁷⁴ Alan Wayne Jones, *Early Drug Discovery and the Rise of Pharmaceutical Chemistry*, 3 DRUG TESTING & ANALYSIS 337, 342 (2011).

⁷⁵ Eric Schewe, *How Did Big Pharma Get Big?*, JSTOR DAILY (Mar. 19, 2017), <https://daily.jstor.org/how-did-big-pharma-get-big/>.

⁷⁶ GRINSPOON & BAKALAR, *supra* note 62, at 7.

⁷⁷ *The People's History*, *supra* note 26.

⁷⁸ See *Historical Timeline – Farm Machinery & Technology*, GROWING A NATION, https://www.agclassroom.org/gan/timeline/farm_tech.htm (last visited Mar. 20, 2019).

⁷⁹ BENEDETTO GIULIANO & EMILIA J. VINCI, COTTON CULTIVATION, VARIETIES AND USES 2 (2012).

⁸⁰ Wasim Aktar et al., *Impact of Pesticides Use in Agriculture: Their Benefits and Hazards*, 2 INTERDISC. TOXICOLOGY 1, 2 (2009).

⁸¹ THE ASHGATE COMPANION TO THE HISTORY OF TEXTILE WORKERS, 1650–2000, at 538–39 (Lex Heerma Van Voss et al. eds., 2010).

yields for cotton.⁸² They also produced large fortunes for cotton barons.⁸³ Thus, cotton emerged as a ready substitute for hemp in producing many products, such as cloth.⁸⁴

Developments at DuPont and similar companies also eroded hemp's market utility elsewhere.⁸⁵ For example, nylon would replace hemp in the production of rope and similar products.⁸⁶

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.⁸⁷ Much of the impetus to criminalize marijuana dates to the influx of Mexicans during the Mexican Revolution.⁸⁸ 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.⁸⁹ Mexicans referred to it as "marihuana" and used it for recreational purposes.⁹⁰ Often, politicians used the term "marijuana" or "marihuana" when they described the new drug menace that they claimed was taking over

⁸² John McL. Bennett et al., *Advances in Cotton Harvesting Technology: A Review and Implications for the John Deere Round Baler Cotton Picker*, 19 J. COTTON SCI. 225, 242 (2015).

⁸³ STEPHEN YAFA, *BIG COTTON: HOW A HUMBLE FIBER CREATED FORTUNES, WRECKED CIVILIZATIONS, AND PUT AMERICA ON THE MAP* 112–13 (2005).

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.").

⁸⁵ Stuart Miller, *Hemp: How One Little Plant Could Boost America's Economy*, *GUARDIAN* (Feb. 4, 2017), <https://www.theguardian.com/society/2017/feb/04/hemp-plant-that-could-boost-americas-economy>.

⁸⁶ *Id.*

⁸⁷ Marc T. Law, *History of Food and Drug Regulation in the United States*, *ECON. HIST. ASS'N*, <http://eh.net/encyclopedia/history-of-food-and-drug-regulation-in-the-united-states/> (last visited Mar. 20, 2019).

⁸⁸ Matt Thompson, *The Mysterious History of "Marijuana"*, *NPR* (July 22, 2013, 11:46 AM), <https://www.npr.org/sections/codeswitch/2013/07/14/201981025/the-mysterious-history-of-marijuana>.

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.⁹¹ Anti-marijuana advocates made extravagant, unverified claims about marijuana and often did so with explicitly racist language.⁹²

The most famous anti-marijuana warrior was Harry J. Anslinger.⁹³ Anslinger entered government service in the late 1920s when he served as an agent in the Treasury Department's Bureau of Prohibition.⁹⁴ Towards the end of Prohibition, Anslinger received an appointment as the founding Commissioner of the Treasury Department's Federal Bureau of Narcotics.⁹⁵

In Anslinger's early years of service, he did not see marijuana as an evil.⁹⁶ 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.⁹⁷ Nor did he believe that it caused harm to users.⁹⁸ Critics suggest that Anslinger's moment of enlightenment came towards the end of Prohibition when his job security might have been at risk.⁹⁹ Whatever the motivation, Anslinger's conversion to an anti-marijuana warrior was complete.

⁹¹ Christopher Ingraham, “*Marijuana*” or “*Marihuana*”? *It's All Weed to the DEA*, WASH. POST (Dec. 16, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/12/16/marijuana-or-marihuana-its-all-weed-to-the-dea/?utm_term=.436bcf0b5aac.

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.

⁹³ Jesse J. Ransom, “Anslingerian” Politics: The History of Anti-Marijuana Sentiment in Federal Law and How Harry Anslinger's Anti-Marijuana Politics Continue to Prevent the FDA and Other Medical Experts from Studying Marijuana's Medical Utility 7 (Apr. 20, 1999) (unpublished paper, Harvard University), <https://dash.harvard.edu/bitstream/handle/1/8965561/Ransom.pdf?sequence=1>.

⁹⁴ John C. McWilliams, *Unsung Partner Against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930–1962*, PA. MAG. HIST. & BIOGRAPHY, Apr. 1989, at 207, 214–15.

⁹⁵ Ransom, *supra* note 93, at 18.

⁹⁶ Craig Brand, *USA: Protecting Unnecessary Federal Drug War Budgets & Pharmaceutical Hegemony: Sessions Resurrects the Ghost of Anslinger*, CANNABIS L.J., <https://journal.cannabislaw.com/report/usa-protecting-unnecessary-federal-drug-war-budgets-pharmaceutical-hegemony-sessions-resurrects-the-ghost-of-anslinger/>.

⁹⁷ Rebecca Carroll, *Under the Influence: Harry Anslinger's Role in Shaping America's Drug Policy*, in FEDERAL DRUG CONTROL 61, 76 (Jonathon Erlen & Joseph F. Spillane eds., 2006).

⁹⁸ Brand, *supra* note 96.

⁹⁹ *Id.*

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

Finding racist quotations attributed to Anslinger is easy and a reminder of how ingrained racist language was in this country.¹⁰⁴ Here are a few choice quotations: "Reefer makes darkies think they're as good as white men";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";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."¹⁰⁷ You can readily find additional quotations as well.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";¹⁰⁹ "Marijuana is an addictive drug which produces in its users insanity, criminality, and death."¹¹⁰

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.

¹⁰¹ See Christen D. Shepherd, *Lethal Concentration of Power: How the D.E.A. Acts Improperly to Prohibit the Growth of Industrial Hemp*, 68 UMKC L. REV. 239, 249 (1999).

¹⁰² *Id.*

¹⁰³ Bennett, *supra* note 89, at 31.

¹⁰⁴ See Lynn Walker, *A War on Reason*, MIT: CULTURE SHOCK MAG (2009), <http://web.mit.edu/cultureshock/fa2009/Walker2.html>.

¹⁰⁵ *Id.*

¹⁰⁶ DAVID E. NEWTON, *MARIJUANA: A REFERENCE HANDBOOK* 163 (2013) (ebook).

¹⁰⁷ Alex Halperin, *Marijuana: Is It Time to Stop Using a Word with Racist Roots?*, *GUARDIAN* (Jan. 29, 2018), <https://www.theguardian.com/society/2018/jan/29/marijuana-name-cannabis-racism>.

¹⁰⁸ See DITCHFIELD & THOMAS, *supra* note 100, at 6–9.

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.*

Many Americans had little experience with marijuana and uncritically accepted such extravagant claims.¹¹¹ 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.¹¹²

By 1937, most of the country had bought into the anti-marijuana rhetoric and the majority of state legislatures had outlawed marijuana.¹¹³ Anslinger backed efforts to expand federal law to outlaw marijuana.¹¹⁴ 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.”¹¹⁵ 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.¹¹⁶

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.¹¹⁷ Their voices were largely ignored.¹¹⁸ Indeed, although the rhetoric during the 1950s was less overtly racist, Congress increased punishment for marijuana offenses.¹¹⁹

III. DOG WHISTLES

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

¹¹¹ Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS (May 2014), <http://origins.osu.edu/article/illegalization-marijuana-brief-history>.

¹¹² Erin Blakemore, *The Brutal History of Anti-Latino Discrimination in America*, HIST. CHANNEL (Sept. 27, 2017), <https://www.history.com/news/the-brutal-history-of-anti-latino-discrimination-in-america>.

¹¹³ Siff, *supra* note 111.

¹¹⁴ RICHARD DAVENPORT-HINES, *THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS* 346 (First Am. ed. 2002).

¹¹⁵ Bennett, *supra* note 89, at 31.

¹¹⁶ Cydney Adams, *The Man Behind the Marijuana Ban for All the Wrong Reasons*, CBS NEWS (Nov. 17, 2016, 5:45 PM), <http://www.cbsnews.com/news/harry-anslinger-the-man-behind-the-marijuana-ban/>.

¹¹⁷ MAYOR’S COMMITTEE ON MARIHUANA, *THE MARIHUANA PROBLEM IN THE CITY OF NEW YORK* 214 (New York Academy of Medicine 1973) (1944).

¹¹⁸ GRINSPOON & BAKALAR, *supra* note 62, at 11–12.

¹¹⁹ Jim Telesmanich et al., *The United States War on Drugs*, EDGE (1999), https://web.stanford.edu/class/e297c/poverty_prejudice/paradox/htele.html.

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*,¹²⁰ 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 marijuana¹²¹ and most, no doubt, had inhaled.¹²²

That cultural shift—marijuana use among middle class (often white) college students—almost led to a radical reexamination of the nation's marijuana laws.¹²³ Even prior to Richard Nixon's election as President, Congress had begun examining the nation's drug laws, numbering over 200,¹²⁴ and was developing a unified approach to regulating legal and illegal drugs.¹²⁵ Many called for decriminalizing marijuana.¹²⁶ When the Supreme Court struck down key provisions of the 1937 Act,¹²⁷ Congress had incentive to reexamine the nation's approach to drugs generally.¹²⁸

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.¹²⁹ His appointment of the well-respected former Pennsylvania Governor Raymond Shafer seemed to signal a moderate approach to the question.¹³⁰ 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.¹³¹ Some members of Congress and the public expected

¹²⁰ REEFER MADNESS (George Hirliman 1936).

¹²¹ See Harrison et al., *The Nature and Extent of Marijuana Use in the United States*, CEDRO (1995), <http://www.cedro-uva.org/lib/harrison.cannabis.03.html>.

¹²² But of course not including Bill Clinton. See Olivia B. Waxman, *Bill Clinton Said He "Didn't Inhale" 25 Years Ago—But the History of U.S. Presidents and Drugs Is Much Older*, TIME (Mar. 29, 2017), <http://time.com/4711887/bill-clinton-didnt-inhale-marijuana-anniversary/>.

¹²³ Osbeck & Bromberg, *supra* note 35, at 47.

¹²⁴ *Id.* at 76.

¹²⁵ Jon Gettman, *Controlling Marijuana: A Brief History*, HIGH TIMES (Dec. 16, 2017), <https://hightimes.com/culture/controlling-marijuana-brief-history/>.

¹²⁶ Siff, *supra* note 111.

¹²⁷ *Leary v. United States*, 395 U.S. 84, 52–53 (1969).

¹²⁸ Gettman, *supra* note 125.

¹²⁹ Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?*, in 42 CRIME & JUSTICE IN AMERICA, 1975–2025, at 75, 86 (Michael Tonry ed., 2013).

¹³⁰ *Id.*

¹³¹ John Hudak, *How Racism and Bias Criminalized Marijuana*, WASH. POST (Apr. 28, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana/?utm_term=.3aa63dc3a0ec.

rescheduling in light of the commission's report,¹³² but when the report recommended decriminalizing marijuana and using other, non-criminal, approaches to marijuana use, Nixon ignored it.¹³³

At least in retrospect, Nixon's response makes sense in terms of raw and racist politics. Nixon ran on a "law and order" platform.¹³⁴ The openly racist Alabama Governor George Wallace sought to outflank Nixon on the right.¹³⁵ By the end of the 1960s, many Americans shunned overt appeals to race.¹³⁶ 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.¹³⁷ Somewhat reminiscent of then-candidate Trump's appeals to racism and nativism,¹³⁸ Nixon was able to chip away at the Democrats' advantage among white working class voters.¹³⁹ While many members of the white middle class, even among Republicans, favored a new approach to marijuana regulation, Nixon's rejection of the Shafer Commission recommendation was a sop to his base.¹⁴⁰ 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.¹⁴¹

¹³² *Id.*

¹³³ *Id.*

¹³⁴ MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S*, at 173–74 (2005).

¹³⁵ See JOSEPH E. LOWNDES, *FROM THE NEW DEAL TO THE NEW RIGHT* 119 (2008).

¹³⁶ Robert Brent Toplin, *Dog-Whistle Politics: It's a Tradition with the GOP*, HIST. NEWS NETWORK (Dec. 10, 2015), <https://historynewsnetwork.org/article/161448>.

¹³⁷ Julia Azari, *From Wallace to Trump, the Evolution of "Law and Order,"* FIVETHIRTYEIGHT (Mar. 13, 2016, 5:41 PM), <https://fivethirtyeight.com/features/from-wallace-to-trump-the-evolution-of-law-and-order/>; Tanner Colby, *Affirmative Action: It's Time for Liberals to Admit It Isn't Working*, SLATE (Feb. 10, 2014, 11:52 PM), http://www.slate.com/articles/life/history/features/2014/the_liberal_failure_on_race/affirmative_action_it_s_time_for_liberals_to_admit_it_isn_t_working.html.

¹³⁸ Dan Balz, *How Attitudes About Immigration, Race and Religion Contributed to Trump Victory*, WASH. POST (June 13, 2017), https://www.washingtonpost.com/politics/how-attitudes-about-immigration-race-and-religion-contributed-to-trump-victory/2017/06/13/6c2c1892-506f-11e7-b064-828ba60fbb98_story.html.

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>.

¹⁴⁰ BRUCE BARCOTT, *WEED THE PEOPLE* 41–43 (2015).

¹⁴¹ Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html>.

Yet despite declaring a war on drugs, Nixon did sign the Controlled Substances Act, which reduced many of the punishments for marijuana offenses.¹⁴² That reversed some of the more extreme punishments enacted during the 1950s.¹⁴³ More severe punishment had to await the Reagan Administration.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.¹⁴⁵ Much of this was driven by Reagan-era sentence enhancements, including many mandatory minimum sentences for nonviolent offenders.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.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.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."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.¹⁵⁰ Who could object to criminalizing

¹⁴² Michael L. Hutchings, Case Note, 1978 BYU L. REV. 179, 181 (1978).

¹⁴³ Joseph A. Califano, *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>.

¹⁴⁴ RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 32 (2004).

¹⁴⁵ *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RIGHTS WATCH, https://www.hrw.org/reports/2000/usa/Rcedrg00-03.htm#P222_42059 (last visited Mar. 20, 2019).

¹⁴⁶ WAYNE DAWKINS, RUGGED WATERS: BLACK JOURNALISTS SWIM THE MAINSTREAM 31 (2003).

¹⁴⁷ Gerald M. Boyd, *Reagan Proposes Stiffer Drug Laws*, N.Y. TIMES (Sept. 16, 1986), <https://www.nytimes.com/1986/09/16/us/reagan-proposes-stiffer-drug-laws.html>.

¹⁴⁸ Gene Demby, *The Truth Behind the Lies of the Original "Welfare Queen"*, NPR (Dec. 20, 2013, 5:03 PM), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen>.

¹⁴⁹ *Id.*

¹⁵⁰ Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control"*, FRONTLINE (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>.

mothers who gave birth to crack-addicted babies?¹⁵¹ Indeed, who could resist increasing punishment for crack cocaine well beyond punishment for powdered cocaine in light of crack's highly addictive quality?¹⁵²

The problem, of course, was that crack was not more addictive than powdered cocaine.¹⁵³ And stories about "crack babies" were largely exaggerated.¹⁵⁴ Many Democrats supported increased punishment and many journalists accepted such assertions about crack without question.¹⁵⁵ Indeed, Bill Clinton continued many Reagan-era drug policies during his administration, despite his softer rhetoric.¹⁵⁶ 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.¹⁵⁷ Like Nixon, Reagan appealed to his base with the implicitly racist rhetoric of the War on Drugs.¹⁵⁸

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.").

¹⁵³ Craig Reinerman, *5 Myths About that Demon Crack*, WASH. POST (Oct. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/09/AR2007100900751.html>.

¹⁵⁴ See *Watch: Ronald Reagan and His "War on Drugs,"* TIMELINE (June 26, 2017), <https://timeline.com/ronald-nancy-reagan-war-on-drugs-crack-baby-just-say-no-cia-communism-racial-injustice-fcfeadb3548d>.

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

¹⁵⁶ Joseph B. Treaster, *Clinton Continues Old Drug Policies*, N.Y. TIMES (Apr. 12, 1993), <https://www.nytimes.com/1993/04/12/nyregion/clinton-continues-old-drug-policies.html>.

¹⁵⁷ James Boyd, *Nixon's Southern Strategy*, N.Y. TIMES (May 17, 1970), <https://www.nytimes.com/1970/05/17/archives/nixons-southern-strategy-its-all-in-the-charts.html>.

¹⁵⁸ Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 17 (2013).

marijuana at about the same rates.¹⁵⁹ That is true for the sale of marijuana as well.¹⁶⁰ 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.¹⁶¹ He has done so because of the clear racially disparate impact of current practices.¹⁶²

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,¹⁶³ prosecutors to prosecute,¹⁶⁴ and judges to incarcerate minorities than white offenders for marijuana offenses.¹⁶⁵

These disparities have many explanations. No doubt, in some instances, officials act out of sheer racial animosity.¹⁶⁶ How often government actors act out of racist motivation is elusive.¹⁶⁷ 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.¹⁶⁸ New York officials have attempted to explain the disparity based on frequency of calls to the police; calls come into the

¹⁵⁹ AM. C.L. UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 21 (2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>; Drew W. Edwards, *Facts About Marijuana Use*, PSYCH CENT. (Oct. 8, 2018), <https://psychcentral.com/lib/facts-about-marijuana-use/>. The same is true for use of other drugs in general. *See Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, HAMILTON PROJECT (Oct. 21, 2016), http://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice (hereinafter *Rates of Drug Use*).

¹⁶⁰ *Rates of Drug Use*, *supra* note 159.

¹⁶¹ Sonia Moghe & Susannah Cullinane, *NYC Mayor de Blasio Tells Police to End Arrests for Marijuana Smoking*, CNN (May 21, 2018, 1:32 AM), <https://www.cnn.com/2018/05/21/us/new-york-de-blasio-marijuana/index.html>.

¹⁶² *Id.*

¹⁶³ AM. C.L. UNION, *supra* note 159, at 17–20.

¹⁶⁴ Brendan Cheney, *For Non-White New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO N.Y. (May 9, 2017, 5:06 AM), <https://www.politico.com/states/new-york/city-hall/story/2017/05/04/racial-disparities-in-marijuana-convictions-in-all-five-boroughs-111807>.

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

¹⁶⁶ Ralph Ellis, *Former Kentucky Police Official Allegedly Sent Racist Messages to Recruit*, CNN (Jan. 22, 2018, 10:25 PM), <https://www.cnn.com/2018/01/22/us/kentucky-officer-urged-recruit-to-shoot-blacks/index.html>.

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).

¹⁶⁸ Scott H. Greenfield, *The Weed Numbers, Explained*, SIMPLE JUST.: A CRIM. DEF. BLOG (May 14, 2018), <https://blog.simplejustice.us/2018/05/14/the-weed-numbers-explained/>.

police more frequently from black and Latino neighborhoods.¹⁶⁹ Similarly, some explain the disparity by the fact that police presence in those communities is greater than in white communities.¹⁷⁰ 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.¹⁷¹ National attention to that case resulted in the offender's release on parole, but only after serving more than seven years in prison.¹⁷² 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.¹⁷³

Granted, the Louisiana sentences no longer represent the national approach to marijuana offenses.¹⁷⁴ 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.¹⁷⁵ Convicted of, say, felony sale or even felony possession, the offender may lose his right to vote.¹⁷⁶ Congress has embedded a variety of setbacks for offenders in thousands of federal statutes, from the loss of the right

¹⁶⁹ Benjamin Mueller, *Using Data to Make Sense of a Racial Disparity in NYC Marijuana Arrests*, N.Y. TIMES (May 13, 2018), <https://www.nytimes.com/2018/05/13/insider/data-marijuana-arrests-racial-disparity.html>.

¹⁷⁰ Benjamin Mueller et al., *Surest Way to Face Marijuana Charges in New York: Be Black or Hispanic*, N.Y. TIMES (May 13, 2018), <https://www.nytimes.com/2018/05/13/nyregion/marijuana-arrests-nyc-race.html>.

¹⁷¹ Matt Sledge, *13 Years? New Orleans Man Paroled from "Incredibly Long" Sentence over Marijuana Possession*, NEW ORLEANS ADVOC. (Feb. 20, 2018, 4:05 PM), https://www.theadvocate.com/new_orleans/news/courts/article_2a16588c-168a-11e8-b84c-1f79733f748d.html.

¹⁷² *Id.*

¹⁷³ *State of La. v. Howard*, 226 So.3d 419 (La. 2017).

¹⁷⁴ *See, e.g.*, Steve Harrison, *Following National Trend, CMPD Eases Punishment for Marijuana*, CHARLOTTE OBSERVER (Feb. 12, 2016, 9:55 PM), <https://www.charlotteobserver.com/news/local/crime/article60169651.html>.

¹⁷⁵ Peter Leasure, *Misdemeanor Records and Employment Outcomes: An Experimental Study*, CRIME & DELINQ., Oct. 2018, at 1; Adele Peters, *It's Hard for People with Criminal Records to Get a Job—This New Job Site Can Help*, FAST CO. (Aug. 4, 2017), <https://www.fastcompany.com/40448610/its-hard-for-people-with-criminal-records-to-get-a-job-this-new-job-site-can-help>.

¹⁷⁶ AM. C.L. UNION, VOTING WITH A CRIMINAL RECORD 3 (2008).

to live in federally-subsidized housing to the loss of the right to receive food stamps and student aid.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.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.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.¹⁸⁰ This kind of downward spiral has led authors like Professor Michelle Alexander to call the nation's drug policy the "New Jim Crow."¹⁸¹

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

¹⁷⁷ See Eli Hager, *Six States Where Felons Can't Get Food Stamps*, MARSHALL PROJECT (Feb. 4, 2016), <https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps>; Simon Montlake, *How Cities Are Helping Former Felons Get Stable Housing*, CHRISTIAN SCI. MONITOR (July 19, 2017), <https://www.csmonitor.com/USA/Justice/2017/0719/How-cities-are-helping-former-felons-get-stable-housing>; *Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid*, FED. STUDENT AID: U.S. DEP'T EDUC., <https://studentaid.ed.gov/sa/eligibility/criminal-convictions#probation-parole> (last visited Apr. 14, 2019).

¹⁷⁸ *Factors Considered in Determining Sentences*, FINDLAW, <https://criminal.findlaw.com/criminal-procedure/factors-considered-in-determining-sentences.html> (last visited Apr. 14, 2019).

¹⁷⁹ Richard S. Frase, *Prior Record Enhancements: High Costs, Uncertain Benefits*, ROBINA INST. CRIM. L. & CRIM. JUST. (Oct. 16, 2017), <https://robinainstitute.umn.edu/news-views/prior-record-enhancements-high-costs-uncertain-benefits>.

¹⁸⁰ Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1061 (2009).

¹⁸¹ ALEXANDER, *supra* note 1.

¹⁸² See Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), <https://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html>.

¹⁸³ Tom James, *The Failed Promise of Legal Pot*, ATLANTIC (May 9, 2016), <https://www.theatlantic.com/politics/archive/2016/05/legal-pot-and-the-black-market/481506/>; Ben Markus, *As Adults Legally Smoke Pot in Colorado, More Minority Kids Arrested for It*, NPR (June 29, 2016, 4:50 AM), <https://www.npr.org/2016/06/29/483954157/as-adults-legally-smoke-pot-in-colorado-more-minority-kids-arrested-for-it>.

¹⁸⁴ German Lopez, *Marijuana Legalization Didn't Eliminate Racial Disparities in Colorado's Pot Arrests*, VOX (Mar. 26, 2015, 2:20 PM), <https://www.vox.com/2015/3/26/8295679/marijuana-legalization-colorado-racism>.

In November, 2012, Colorado became the first state in the United States to authorize recreational use of marijuana.¹⁸⁵ Since then, the number of marijuana-related arrests has, not surprisingly, declined.¹⁸⁶ But racial disparity continues; indeed, the disparity has increased.¹⁸⁷ That is especially true for minors.¹⁸⁸ Since legalization, arrests have risen more than 50% for black youth, and more than 20% for Latino youth.¹⁸⁹ The arrest rates for white youth declined by nearly 10%.¹⁹⁰

Washington, which legalized marijuana at the same time,¹⁹¹ 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.¹⁹² In addition, there is a disparity in Washington's legal marijuana industry.¹⁹³ It is dominated by white, middle class individuals.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ 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."¹⁹⁷ The same is true for other minority groups

¹⁸⁵ COLO. CONST. art. XVIII, § 16.

¹⁸⁶ Lopez, *supra* note 184.

¹⁸⁷ Christopher Ingraham, *Here's How Legal Pot Changed Colorado and Washington*, WASH. POST (Oct. 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/10/13/heres-how-legal-pot-changed-colorado-and-washington/?utm_term=.c42fcf48ccaa.

¹⁸⁸ Markus, *supra* note 183.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (noting the increasing arrest rates for minority youth).

¹⁹¹ Maia Szalavitz, *Two U.S. States Become First to Legalize Marijuana*, TIME (Nov. 7, 2012), <http://healthland.time.com/2012/11/07/two-u-s-states-become-first-to-legalize-marijuana/>.

¹⁹² Jenkins, *supra* note 72.

¹⁹³ Trevor Hughes, *California City to Use Pot Shops to Fight Racial Inequities*, USA TODAY (Aug. 1, 2017, 6:51 PM), <https://www.usatoday.com/story/news/nation/2017/07/31/marijuana-oakland-california-shop-owners/507008001/>.

¹⁹⁴ *Id.*

¹⁹⁵ Tobias Coughlin-Bogue, *Rigged Game: Inequality on the Rise in Legal Pot Industry*, CROSSCUT (Sept. 26, 2016), <http://features.crosscut.com/rigged-game-legal-pot-marijuana-industry-washington-racial-inequality>.

¹⁹⁶ Mitchell & Caudy, *supra* note 72, at 22–23.

¹⁹⁷ Tracy Jan & Fenit Nirappil, *Battling the Racial Roadblocks to Joining the Legalized Marijuana Trade*, WASH. POST (June 2, 2017), https://www.washingtonpost.com/business/economy/battling-the-racial-roadblocks-to-joining-the-legalized-marijuana-trade/2017/06/02/7321de02-416f-11e7-9869-bac8b446820a_story.html?utm_term=.440e86958c09.

who remain out of the legal marijuana economy.¹⁹⁸ In addition, Washington excludes individuals with recent felony convictions from owning licenses.¹⁹⁹ Access to capital remains a substantial hurdle for prospective minority owners.²⁰⁰

The high arrest rates and lack of access to capital are intertwined.²⁰¹ Not surprisingly, Colorado and Washington voters favored legalization in large part because of promised tax benefits.²⁰² Absent continued enforcement of marijuana laws against illegal market participants, promised tax benefits may be illusory.²⁰³

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.²⁰⁴ 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.²⁰⁵ Some of the provisions named the agencies that would implement and oversee regulations governing the industry.²⁰⁶ It addressed a wide array of concerns, such as testing marijuana to assure the purity of the product,²⁰⁷ allocation of tax revenues,²⁰⁸ allocation of authority among state, county and local governmental entities,²⁰⁹ kinds

¹⁹⁸ Angela Bacca, *The Unbearable Whiteness of the Marijuana Industry*, ALTERNET (Apr. 1, 2015), <https://www.alternet.org/drugs/incredible-whiteness-colorado-cannabis-business>.

¹⁹⁹ Coughlin-Bogue, *supra* note 195.

²⁰⁰ *Id.*

²⁰¹ *Infra* Part IV.

²⁰² Matt Ferner, *Amendment 64 Passes: Colorado Legalizes Marijuana for Recreational Use*, HUFFPOST (Nov. 20, 2012), https://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co_n_2079899.html; Katie Zezima, *Study: Legal Marijuana Could Generate More than \$132 Billion in Federal Tax Revenue and 1 Million Jobs*, WASH. POST (Jan. 10, 2018), https://www.washingtonpost.com/national/2018/01/10/study-legal-marijuana-could-generate-more-than-132-billion-in-federal-tax-revenue-and-1-million-jobs/?utm_term=.62c7b6014755.

²⁰³ Brad Branan, "This Is an Industry in Crisis." *High Taxes, Black Market Threaten Pot Businesses*, SACRAMENTO BEE (Mar. 21, 2018, 7:14 AM), <https://www.sacbee.com/news/state/california/california-weed/article206090989.html>.

²⁰⁴ See Scott Johnstone, *Five Years In: The Effects of Legalization in Colorado and Washington State*, LIFT NEWS (Nov. 13, 2017), <https://news.lift.co/five-years-effects-legalization-colorado-washington-state/>.

²⁰⁵ Adult Use of Marijuana Act, 2016 Cal. Legis. Serv. A-92 (West) (codified in scattered sections of the California Codes).

²⁰⁶ CAL. BUS. & PROF. CODE §§ 26010–26018 (2017).

²⁰⁷ *Id.* §§ 26100–26106.

²⁰⁸ *Id.* §§ 26210–26211.

²⁰⁹ *Id.* §§ 26200–26202.

of licenses,²¹⁰ and the creation of a track and trace program.²¹¹ It earmarked funds for the Highway Patrol to study issues related to marijuana-intoxicated drivers and for youth education among other specific goals.²¹² It also allowed limitations on advertising aimed at adolescents.²¹³

The drafters of the proposition took advantage of a thoughtful report produced by Lieutenant Governor Gavin Newsom's Blue Ribbon Commission.²¹⁴ Further, a close reading of the proposition suggests that its drafters included many of its provisions to satisfy various stakeholders.²¹⁵ 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.²¹⁶ Indeed, even after California reduced possession of small amounts of marijuana to an infraction, and arrests for marijuana offenses plummeted, racial disparity continued.²¹⁷ In recent years, felony arrests for marijuana offenses have gone from 13,300 in 2014 to 8,886 in 2015.²¹⁸ Misdemeanor arrests remained relatively constant. In 2014, there were 6,411 misdemeanor arrests involving marijuana and in 2015, there were 6,267.²¹⁹ In Oakland, police continued to search black suspects more often than they did white suspects.²²⁰ Even though they were no longer arrested for possession of marijuana, black offenders were fined at higher rates than their white counterparts.²²¹ According to a 2015 study, the arrest rate for blacks was three and a half times

²¹⁰ *Id.* §§ 26100–26106.

²¹¹ Adult Use of Marijuana Act, 2016 Cal. Legis. Serv. A-122 (West) (repealed 2017).

²¹² CAL. BUS. & PROF. CODE §§ 26210–26211 (2017).

²¹³ *Id.* §§ 26150–26156.

²¹⁴ BLUE RIBBON COMM'N ON MARIJUANA POL'Y, PATHWAYS REPORT: POLICY OPTIONS FOR REGULATING MARIJUANA IN CALIFORNIA (2015).

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.*

²¹⁸ David Downs, *Felony Marijuana Arrests Drop in California*, EAST BAY EXPRESS (July 7, 2016), <https://www.eastbayexpress.com/LegalizationNation/archives/2016/07/07/felony-marijuana-arrests-drop-in-california>.

²¹⁹ Patrick McGreevy, *Before Proposition 64, Simple Possession of Marijuana Was Already Decriminalized*, L.A. TIMES, (Nov. 3, 2016), <http://www.latimes.com/politics/la-pol-ca-proposition-64-marijuana-legalization-crime-snap-20161103-story.html>; Gage Marchini & Brian Parino, *Proposition 64: Marijuana Legalization*, 2016 CAL. INITIATIVE REV. 1, 4 (2016).

²²⁰ Jenkins, *supra* note 72.

²²¹ Rebecca McCray, *The Incomplete Story Told by California's Declining Juvenile Arrest Rates*, HUFFPOST (Feb. 11, 2013), https://www.huffingtonpost.com/rebecca-mccray/california-juvenile-marijuana-arrests_b_2285844.html/.

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

²²² Dennis Romero, *Despite Liberal Pot Laws, California Has Seen Nearly a Half-Million Weed Arrests*, LA WEEKLY (Aug. 19, 2016, 7:01 AM), <http://www.laweekly.com/news/despite-liberal-pot-laws-california-has-seen-nearly-a-half-million-weed-arrests-7277852>.

²²³ See Dennis Romero, *Will Marijuana Legalization Benefit People of Color?*, LA WEEKLY (Oct. 25, 2016, 7:31 AM), <http://www.laweekly.com/news/will-marijuana-legalization-benefit-people-of-color-7535839> (noting that only one third of dispensary owners were minorities).

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

²²⁵ Sophie Quinton, *To Help Ex-Offenders Get Jobs, Some States Reconsider Licenses*, PEW CHARITABLE TR. (Mar. 8, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/08/to-help-ex-offenders-get-jobs-some-states-reconsider-licenses>; Letter from David R. Miller, Deputy Director for Research, Ill. Gen. Ass. Legis. Research Unit, to Tom Johnson, Senator (Feb. 8, 2012), <http://www.icjia.state.il.us/IERTF/pdf/LegislativeResearchUnitDocuments/Licensing%20restrictions.pdf>.

²²⁶ CAL. HEALTH & SAFETY CODE § 11361 (2016).

²²⁷ *Id.*; *Expunging a Marijuana Conviction Under Prop 64*, RGB L. GROUP, <https://www.convictionfree.com/prop64-expunge-marijuana-conviction/#prop-64-marijuana-expungement-faq>.

²²⁸ RGB L. GROUP, *supra* note 227.

²²⁹ RACHAEL APFEL 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.²³⁰ Instead of criminal sanctions, juvenile offenders should receive drug education and community service.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).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.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.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.²³⁵ The policy makes sense: current producers and sellers need an incentive to come into the legal market.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.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.²³⁸ Currently, the topic

L. BLOG (May 12, 2016), <https://www.cannalawblog.com/californias-auma-what-you-need-to-know-now-to-have-a-recreational-marijuana-business-later/>.

²³⁰ See CAL. HEALTH & SAFETY CODE § 11357(a)(1)(A)–(B) (eliminating the possibility of minors serving jail time).

²³¹ *Id.*

²³² Brooke Staggs, *If Prop 64 Passes, What Happens to Prisoners Convicted of Marijuana Charges?*, ORANGE COUNTY REG. (Nov. 7, 2016, 7:50 AM), <http://www.ocregister.com/2016/11/07/if-prop-64-passes-what-happens-to-prisoners-convicted-of-marijuana-charges/>.

²³³ MIKE MALES, MISDEMEANOR MARIJUANA ARRESTS ARE SKYROCKETING 6 (2011), http://www.cjcj.org/uploads/cjcj/documents/Misdemeanor_marijuana_arrests.pdf.

²³⁴ *It's Not Legal Yet*, *supra* note 5.

²³⁵ Josh Schneiderman, *Haze Surrounding California Marijuana Regulations Is Starting to Clear*, L.A. BIZ (Aug. 30, 2017, 3:30 PM), <https://www.bizjournals.com/losangeles/news/2017/08/30/haze-surrounding-california-marijuana-regulations.html>.

²³⁶ Lisa M. Krieger, *Why California's Cannabis Growers Are Staying in the Shadows*, CANNIFORNIAN (Feb. 19, 2018), <http://www.thecannifornian.com/cannabis-are/californias-cannabis-growers-staying-shadows/>.

²³⁷ Michael Vitiello & Rosemary Deck, *Legalizing Marijuana: A View from Among the Weeds*, 69 HASTINGS L.J. 961, 968 (2018).

²³⁸ *Buying & Growing Illegal Weed in California - 2018*, 420 EVALUATIONS ONLINE (Oct. 1, 2017), <https://420evaluationsonline.com/health-and-news/buying-growing-illegal-weed-in-california-2018->; Chris Robert, *California's Limit on Big Growers Just Vanished. Here's Why*,

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

LEAFLY (Dec. 6, 2017), <https://www.leafly.com/news/politics/californias-limit-on-big-growers-just-vanished-heres-why>.

²³⁹ *Cases to Watch: California Growers Association vs. California Department of Food and Agriculture*, VAND. U.L. SCH.: MARIJUANA L. POL'Y & AUTHORITY (Feb. 3, 2018), <https://my.vanderbilt.edu/marijuanalaw/2018/02/cases-to-watch-california-growers-association-vs-california-department-of-food-and-agriculture/>.

²⁴⁰ Christopher Cadelago, *Marijuana Foes Report \$1.3 Million in Contributions – from 1 Donor*, SACRAMENTO BEE (Sept. 9, 2016), <https://www.sacbee.com/news/politics-government/capitol-alert/article100879087.html>.

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>.

²⁴³ Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold?*, 2009 WIS. L. REV. 1349, 1349 (2009) [hereinafter Vitiello, *Pot of Gold?*]; Michael Vitiello, *Legalizing Marijuana and Abating Environmental Harm: An Overblown Promise?* 50 U.C. DAVIS L. REV. 773, 775 (2016) [hereinafter Vitiello, *Overblown Promise?*].

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,²⁴⁷ depending on the quality of drug education and the ability to find meaningful community service.²⁴⁸ 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.²⁴⁹

Expungement may work, but many offenders may be unaware of the law's provision.²⁵⁰ Depending on the community, even offenders who are aware of the provision may not have the resources to petition the court.²⁵¹ Some counties impose filing fees,²⁵² and hiring an attorney makes the financial challenge even greater.²⁵³

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 1975.²⁵⁴ Some counties have

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

²⁴⁸ See Brigid McKeon, *Effective Sex Education*, ADVOCES. FOR YOUTH (2006), <https://www.advocatesforyouth.org/wp-content/uploads/storage/advfy/documents/fssexcur.pdf> (explaining that the effectiveness of sex education depends on its quality); DOUGLAS THOMAS & MARY HUNNINEN, MAKING THINGS RIGHT: MEANINGFUL COMMUNITY SERVICE FOR JUVENILE OFFENDERS 3–4 (2008), https://victimsofcrime.org/docs/restitution-toolkit/e2_ncjj-juvenile-community-service-2008.pdf (explaining that the efficacy of rehabilitation via community service depends on how meaningful it is to its participants).

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

²⁵⁰ Chris McGuinness, *California's Legal Pot Law Is Helping Give Felons Their Lives Back*, VICE (June 12, 2017, 6:53 AM), https://www.vice.com/en_us/article/59z5qz/californias-legal-pot-law-is-helping-give-felons-their-lives-back.

²⁵¹ Rebecca Beitsch, *Here's Why Many Americans Don't Clear Their Criminal Records*, PBS (June 8, 2016, 10:12 AM), <https://www.pbs.org/newshour/nation/heres-why-many-americans-dont-clear-their-criminal-records>.

²⁵² *Id.*

²⁵³ *Fees for California Expungement Cases*, RECORD-CLEAR (2018), <https://www.record-clear.com/Usual-Fees>.

²⁵⁴ James Doubek & Richard Gonzales, *San Francisco to Dismiss Thousands of Marijuana Convictions*, NPR (Feb. 1, 2018, 5:33 AM), <https://www.npr.org/sections/thetwo-way/2018/02/01/582336999/san-francisco-to-dismiss-thousands-of-marijuana-convictions>.

waived filing fees.²⁵⁵ In some areas, nonprofit organizations and attorneys working pro bono have set up free expungement clinics.²⁵⁶

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.²⁵⁷ 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.²⁵⁸ Cases that made headlines, demonstrating the ongoing harm of prior convictions, may be ones where expungement opens up opportunities for ex-offenders.²⁵⁹

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.²⁶⁰ While some of those projections seem wildly optimistic,²⁶¹ some dispensary owners and providers of medical marijuana have made fortunes.²⁶² Some entrepreneurs in other states have made substantial incomes in the business.²⁶³ Investors have already pumped billions of dollars into the industry.²⁶⁴ Will minorities share the wealth?

²⁵⁵ *Overview of California Cannabis Equity Programs*, BUREAU OF CANNABIS CONTROL (Mar. 1, 2018), https://bcc.ca.gov/about_us/meetings/materials/20180301_equ_overview.pdf; see also, Becca Habegger, *Sac City Council Unanimously Approves Cannabis Policies*, ABC10 (Nov. 29, 2017, 6:04 AM), <https://www.abc10.com/article/news/local/sac-city-council-unanimously-approves-cannabis-policies/103-495329698>.

²⁵⁶ Beitsch, *supra* note 251.

²⁵⁷ Pritikin, *supra* note 180, at 1061.

²⁵⁸ Katherine Katcher, *Opinion: State Licensing Boards Block Inmate Re-Entry Opportunities*, MERCURY NEWS (Dec. 15, 2017, 4:10 AM), <https://www.mercurynews.com/2017/12/14/opinion-state-licensing-boards-block-inmate-re-entry-opportunities/>.

²⁵⁹ *Id.*

²⁶⁰ Peter Hecht, *Study: Sacramento Region's Pot Economy Could Soar with Legalization*, SACRAMENTO BEE (Nov. 3, 2016, 2:20 PM), <https://www.sacbee.com/news/state/california/california-weed/article108656277.html>.

²⁶¹ Martha C. White, *Growing Like a Weed? California Marijuana Market Off to Slow Start*, NBC NEWS (Apr. 20, 2018, 12:15 PM), <https://www.nbcnews.com/business/business-news/growing-weed-california-marijuana-market-slow-start-n867871>.

²⁶² 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/>.

²⁶³ MeiMei Fox, *2 Cannabis Entrepreneurs Share Their Secrets for Success*, FORBES (Apr. 20, 2018, 8:03 AM), <https://www.forbes.com/sites/meimeifox/2018/04/20/two-cannabis-entrepreneurs-share-their-secrets-for-success/#12e966e64fbd>.

²⁶⁴ Javier Hasse, *Investing in Marijuana: Cannabis Industry Gets \$2 Billion in 60 Days*, BENZINGA (Mar. 12, 2018, 3:56 PM), <https://www.benzinga.com/trading-ideas/long-ideas/18/03/11344413/investing-in-marijuana-cannabis-industry-gets-2-billion-in-6>.

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.²⁶⁵ Nationwide data is not available, but BuzzFeed published a story estimating that black ownership accounts for only 1% of marijuana dispensaries.²⁶⁶

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.²⁶⁷ They included that provision in order to undercut the black market.²⁶⁸ 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.²⁶⁹ But given the predominance of white ownership—for example, in medical dispensaries—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 \$250,000.²⁷⁰ That estimate may be conservative, with some estimates running even higher.²⁷¹

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.²⁷² Such a decision invites larger, better capitalized entities to dominate the legal industry.²⁷³

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

²⁶⁶ Amanda Chicago Lewis, *How Black People Are Being Shut Out of America's Weed Boom*, BUZZFEED NEWS (Mar. 16, 2016, 10:01 PM), https://www.buzzfeed.com/amandachicago/lewis/americas-white-only-weed-boom?utm_term=.lyJYmvQJO#.dqvz2DI14.

²⁶⁷ Schneiderman, *supra* note 235.

²⁶⁸ Peter Fimrite, *Police Crack Down on Black-Market Pot to Protect Regulated Growers*, S.F. CHRON. (Sept. 11, 2017, 11:18 AM), <https://www.sfchronicle.com/news/article/Amid-pot-legalization-push-new-focus-on-12185361.php>.

²⁶⁹ Paul Roberts, *California Growers: Four Paths Out of Prohibition: Part 4, in California, Many Growers Will Stay Underground*, LEAFLY (June 19, 2017), <https://www.leafly.com/news/industry/california-many-growers-will-stay-underground>.

²⁷⁰ Chicago Lewis, *supra* note 266.

²⁷¹ Gary Cohen, *How Much Does it Cost to Open a Cannabis Dispensary?*, COVA (May 17, 2017), <https://www.covasoftware.com/blog/the-true-cost-of-opening-a-cannabis-dispensary>.

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

²⁷³ Scott Rodd, *Handful of California Cannabis Growers Control 30% of "Small" Grower Licenses*, SACRAMENTO BUS. J. (Feb. 5, 2018, 2:48 PM), <https://www.bizjournals.com/sacramento/news/2018/02/05/handful-of-california-cannabis-growers-control-30.html>.

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

²⁷⁴ Geoffery Mohan, *What Would a Recreational Market in California Look Like?*, L.A. TIMES (Nov. 10, 2016, 3:50 PM), <http://www.latimes.com/business/la-fi-marijuana-market-20161110-story.html>; Joseph Schumpeter, *The Marlboro of Marijuana*, ECONOMIST (Nov. 8, 2014), <https://www.economist.com/business/2014/11/08/the-marlboro-of-marijuana>.

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

²⁷⁶ Lindsey Bartlett, *Colorado Company LEVO Launches Home Oil-Infusion Machine*, WESTWORD (Apr. 7, 2017, 6:59 AM), <https://www.westword.com/marijuana/levo-oil-launches-at-home-cannabis-oil-infusing-machine-8914784>.

²⁷⁷ *Large Scale Greenhouse Production Meets Craft Cannabis in Emerald Health and Village Farms Joint Venture*, MDA PATIENT SERVICES (July 28, 2017, 1:33 PM), <http://mdapatientsservices.com/large-scale-greenhouse-production-meets-craft-cannabis-in-emerald-health-and-village-farms-joint-venture/>.

²⁷⁸ Kerrie Badertscher & Kurt Badertscher, *Are You Ready for California's Pesticide Regulations?*, CANNABIS BUS. TIMES (Mar. 7, 2018), <http://www.cannabisbusinesstimes.com/article/are-you-ready-for-californias-pesticide-regulations/>.

²⁷⁹ See Chance, *supra* note 275, at 29.

²⁸⁰ Vitiello, *supra* note 237, at 968, 977.

²⁸¹ Rose Hackman, *A Billion-Dollar Industry, a Racist Legacy: Being Black and Growing Pot in America*, GUARDIAN (June 15, 2017), <https://www.theguardian.com/us-news/2017/jun/15/legal-marijuana-industry-racism-portland-jesse-horton>.

²⁸² Adrian Florido, *Black, Latino Two-Parent Families Have Half the Wealth of White Single Parents*, NPR (Feb. 8, 2017, 1:06 PM), <https://www.npr.org/sections/codeswitch/2017/02/08/514105689/black-latino-two-parent-families-have-half-the-wealth-of-white-single-parents>.

resources from some other income stream, would-be business owners do not have the cash to enter the marijuana business.²⁸³ Even if traditional bank loans were available, discriminatory lending practices are notorious.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.²⁸⁵ Marijuana advocates must concede that marijuana use has cleanup costs.²⁸⁶ While for many users marijuana does not cause harm, heavy marijuana users tend to remain trapped in poverty, limiting opportunities for their children.²⁸⁷ Marijuana taxation is regressive, imposing extra costs on less affluent users.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.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.²⁹⁰ Only some of that results from racial policing.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.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.²⁹³ Once again, competing policy goals are at odds.

²⁸³ Hackman, *supra* note 281.

²⁸⁴ J.D. Harrison, *Black, Hispanic Entrepreneurs Discriminated Against When Seeking Small Business Loans*, WASH. POST (June 3, 2014), https://www.washingtonpost.com/business/on-small-business/black-hispanic-entrepreneurs-discriminated-against-when-seeking-small-business-loans/2014/06/03/70059184-ea86-11e3-9f5c-9075d5508f0a_story.html?utm_term=.737b172900d1.

²⁸⁵ Hackman, *supra* note 281.

²⁸⁶ *Id.*

²⁸⁷ Christopher Ingraham, *What Makes Marijuana Users Different from Everyone Else*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/14/what-makes-marijuana-users-different-from-everyone-else/?utm_term=.967d0cd44936.

²⁸⁸ Patrick Glennon, *Marijuana Tax for Good? It's Still Regressive*, KEY ELEMENTS GROUP (May 18, 2016), <https://keyelementsgroup.com/nonprofitpromedia/marijuana-tax-good-still-regressive/>.

²⁸⁹ Hackman, *supra* note 281.

²⁹⁰ Arijeta Lajka, *Cops Are Still Disproportionately Arresting People of Color for Pot Crimes in Colorado*, VICE NEWS (Mar. 26, 2015), <https://news.vice.com/article/cops-are-still-disproportionately-arresting-people-of-color-for-pot-crimes-in-colorado>.

²⁹¹ *Id.*

²⁹² Reese Brown, *Comment: Blacks Have Paid Unfair Price for Marijuana Use, but Aren't Benefiting from Legal Weed Boom*, PHX NEW TIMES (Apr. 20, 2017, 10:00 AM), <https://www.phoenixnewtimes.com/news/after-years-of-imprisonment-for-weed-why-arent-african-americans-now-part-of-marijuana-boom-9240774>.

²⁹³ Fimrite, *supra* note 268.

Some activists have called for equity programs to address the kinds of problems raised here.²⁹⁴ Notably, Oakland has developed a program intended to assist those who suffered from the War on Drugs.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.²⁹⁶ Meeting those requirements gives the qualifying applicant priority to get a marijuana business license.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."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."²⁹⁹ The funding for that part of the program comes from licensing fees paid by those able to pay without assistance.³⁰⁰ Setting its criteria based on income, rather than race, probably immunizes Oakland's equity program from an equal protection challenge.³⁰¹

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

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.

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).

²⁹⁶ *Id.*

²⁹⁷ Brentin Mock, *The Case for Weed Reparations*, CITYLAB (Apr. 27, 2017), <https://www.citylab.com/life/2017/04/the-case-for-reparations-paid-in-marijuana/524370/>.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

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).

³⁰² See *Cannabis Equity Programs: Updates from Oakland and San Francisco*, HARRIS BRICKEN: CANNA L. BLOG (Jan. 25, 2018), <https://www.cannalawblog.com/cannabis-equity-programs-updates-from-oakland-and-san-francisco/>.

³⁰³ See Ryan Lillis, *Sacramento to Help Launch Minority Pot Businesses in Struggling Neighborhoods*, SACRAMENTO BEE (Aug. 9, 2018, 6:41 PM), <https://www.sacbee.com/news/local/news-columns-blogs/city-beat/article216414155.html>; Zack Ruskin, *S.F. Approves Its First Equity Program Dispensary*, SF WEEKLY (Feb. 20, 2019, 12:54 PM), <http://www.sfweekly.com/news/s-f-approves-its-first-equity-program-dispensary/>; *Everything You Need to Know About Los Angeles' Cannabis Social Equity Program*, CAL. CANNABIS CPA (Aug. 7, 2018), <https://www.californiacannabiscpa.com/blog/everything-you-need-to-know-about-los-angeles-cannabis-social-equity-program>.

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.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.³⁰⁵ He took a leadership role in moving California towards legalizing recreational marijuana and has advocated for equity in the business.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.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.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.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.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.³¹¹ Members of both parties have put a number of bills into the hopper, bills that are steadily gaining support.³¹² Contributions are flowing into congressional members' coffers and now

³⁰⁴ Hasse, *supra* note 264.

³⁰⁵ Katy Steinmetz, *California Lt. Gov. Gavin Newsom on Marijuana Legalization: "Our Purpose Is Social Justice,"* TIME (June 21, 2016), <http://time.com/4377239/california-lt-gov-gavin-newsom-marijuana-legalization-social-justice/>.

³⁰⁶ BLUE RIBBON COMM'N, *supra* note 214, at ii; K.M. McFarland, *The Reefer Revolution: Democratic Rising Star Gavin Newsom Explains Passing Prop 64 with the Music Industry's Help,* BILLBOARD (Jan. 19, 2017, 12:03 PM), <https://www.billboard.com/articles/news/magazine-feature/7662284/gavin-newsom-prop-64-legalization-marijuana>.

³⁰⁷ Jeff Horseman, *Cannabis Business, and Cannabis' Political Clout, Are Growing Up Quickly,* ORANGE COUNTY REG. (Feb. 19, 2018, 11:26 AM), <https://www.ocregister.com/2018/02/19/cannabis-business-and-cannabis-political-clout-are-growing-up-quickly/>.

³⁰⁸ James Higdon, *Legal Marijuana's Big Moment,* POLITICO (Apr. 24, 2018), <https://www.politico.com/magazine/story/2018/04/24/pot-marijuana-2018-congress-218069>.

³⁰⁹ Sadie Gurman, *Justice Department Ending Obama Policy that Let Legal Pot Flourish,* CHI. TRIB. (Jan. 4, 2018, 4:05 PM), <http://www.chicagotribune.com/business/ct-biz-sessions-legal-marijuana-policy-20180104-story.html>.

³¹⁰ John Hudak, *Why Sessions Is Wrong to Reverse Federal Marijuana Policy,* BROOKINGS (Jan. 4, 2018), <https://www.brookings.edu/blog/fixgov/2018/01/04/why-sessions-is-wrong-to-reverse-federal-marijuana-policy/>.

³¹¹ Higdon, *supra* note 308.

³¹² *Id.*; Michael Liszewski, *Unprecedented Action in Congress Sends Signals that Ending Federal Marijuana Prohibition Could Finally Become Reality,* 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 remediation: 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.

<http://www.drugpolicy.org/blog/unprecedented-action-congress-sends-signals-ending-federal-marijuana-prohibition-could-finally>.

³¹³ Trevor Hughes, *Marijuana Money Increasingly Flowing to Republican Lawmakers*, USA TODAY (Jan. 21, 2018, 1:51 PM), <https://www.usatoday.com/story/news/2018/01/21/marijuana-money-increasingly-flowing-republican-lawmakers/1042239001/>.

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.

³¹⁶ See Chris Arsenault, *The Politics of Pot Lobbying*, VICE MONEY (Jan. 26, 2018), https://news.vice.com/en_ca/article/yw548b/the-politics-of-pot-lobbying-in-canada; Reid Wilson, *Marijuana Lobby Goes Mainstream*, THE HILL (Feb. 1, 2017, 6:00 AM), <http://thehill.com/homenews/state-watch/317175-marijuana-lobby-goes-mainstream>.