

Reefer Blues: Building Social Equity in the Era of Marijuana Legalization

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Abstract

This article is inspired by the convergence of entrepreneurship as a way to build social and economic value and the need for the equity conversation. Diversity in the market is what keeps it running, but the barriers to entry for minority entrepreneurs often prevent them from participating in the mainstream economy. With marijuana legalization on the horizon, this is quickly becoming another example of minority business owners being left out of the market. Politically marijuana legalization is a double-edged sword that both past and present Presidents were not willing to wield for differing reasons but the climate is changing. Presently, marijuana legalization has profited those that once claimed it was America's enemy number one, which does not seem right in my eyes and is what led me to write this piece. Importantly, states as well as the federal government need to be mindful of the social impact this will have on minority communities across the country.

Each state that chooses to legalize marijuana should have social equity at the forefront of their decision making because the legalization of marijuana could end up just being another chance for the white majority to bar Black and Brown communities from getting a fair chance. Not to mention how the War on Drugs has persecuted and locked up so many Black and Brown men for the very substance that the white man now sees to make a profit, hand over fist. The War on Drugs has just been another way for the federal government to police minority communities, and its failed attempts at lowering drug use rates have instead only really been successful in spreading propaganda about marijuana and its users. Michele Alexander refers to effects of the War on Drugs on minority communities as the New Jim Crow in her book, so appropriately titled: *The New Jim Crow*.

To right the wrongs of the War on Drugs and encourage minority entrepreneurs to participate in the new legalized marijuana market, the federal government needs to remove marijuana from the schedule one list, which is noted in Cory Booker's Marijuana Justice Act, and each state that decides to legalize should require certain portion of minority applications for marijuana business licenses before opening the market up to the rest of the community and with the tax revenue from marijuana a percentage should be put towards a fund for zero interest loans to continue to promote minority business ownership. California has legalized marijuana and has created both legislative relief as well as economic support for minority run marijuana businesses through a venture accelerator that not only provides financial assistance but also business acumen. Ameliorative relief is another important action for the states that decide to legalize to somehow make amends with those that have previous marijuana charges. But, none of this

will get done unless equity is part of the legalization conversation from the beginning, and it is now on us to ensure we do not let our country's racist tendencies to continue hindering the lives of our minority communities. And, our minority communities deserve better.

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Reefer Blues

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“The power of the white world is threatened whenever a Black man refuses to accept the white world’s definitions.” James Baldwin

The criminalization of marijuana has a complex history. The discussion below looks to portions of this historical record and critiques the current regulatory design that is informing marijuana’s inevitable commercialization. It contends that marijuana’s licensing regimes will establish market entry requirements that preserve racial inequity, albeit in reconstituted form. High licensing fees, delayed rights of market entry for registrants with criminal histories, and other barriers disfavor African-Americans and Latinos seeking to participate in a newly legalized marketplace with enormous economic potential. The specific combination of these entry requirements warrants inquiry into their true intent. What was the logic behind such requirements and how do they exploit the racially problematic history of American drug enforcement? The penal system is among the most consequential expressions of state power. Criminalizing certain conduct offers an institutional mechanism for sanctioning particular kinds of behavior, uses incarceration to animate particularly invasive expressions of government, and cements into place a set legacy effects on its targets and their families long past the period of criminal involvement. The racially harmful aspects of these institutional practices are reflected in the history of marijuana’s criminalization, which facilitated opportunistic policing of African-American communities. The commensurate effects of a drug-related criminal record on prospects for employment, housing, intergenerational transfers of wealth, and other vehicles for upward economic mobility were predictable—even as they reinforced the systemic pressures feeding the drug trade itself. This cyclical system of disenfranchisement has been especially harmful to America’s Black communities, which continue to experience gaps in education, income, employment, access to housing, and criminal justice involvement.

As will be discussed further below, legalization of marijuana marks a significant cultural, legal, and commercial shift insofar as it will profoundly alter structural relationships between communities of color and law enforcement. While decriminalization seems to facially change one of law enforcement’s gateways into policing Black communities, it will give rise to other problematic arrangements governing access to lawful marijuana. Importantly, as registration and licensing requirements exclude prospective market participants with limited means and criminal histories, the emerging regulatory frameworks will do little to dismantle cyclical systems of disenfranchisement which disproportionately harm communities of color.

This note is organized as follows: Part I briefly summarizes the history of marijuana criminalization, which dates back to the early 1900's. Part II discusses the emergence of marijuana's status as a countercultural symbol, juxtaposing state rights and individual sovereignty against the mighty, all-powerful federal government. Part III discusses the compounding collateral consequences of criminalization for communities of color. Part IV discusses the cultural shift in societal attitudes towards marijuana use and focuses on the necessity of social equity to ensure justice in enacting legislation. The note concludes by calling for a comprehensive restricting of the entire cannabis industry so as to minimize racially harmful practices while supporting fair competition.

I. Part I

A. *Historical Basis for Criminalization*

As our nation begins to overcome the rhetoric of the War on Drugs, which demonized marijuana and its users over the last century, the resulting systematic oppression can no longer go unnoticed. Surprisingly enough, marijuana was not stigmatized in the U.S. until it was targeted by prohibitionists during the early 20th century as an “alien scourge.”¹ Marijuana was then often associated with “landless [vagrants,] bandits, bootleggers, prisoners, and [others of the like, which] made marijuana the perfect scapegoat for deep-rooted social inequities.”² Moreover, those in power began to blame the problems of the less fortunate on the use of marijuana. And, while most recognize the Nixon and Reagan administrations as when marijuana criminalization began, it can be linked back to as early as 1915 when California outlawed marijuana as pre-textual move to harassing the Mexican community, which is the same tactic state governments have used to disenfranchise minority groups throughout American history.³ Prohibiting marijuana has never been about health and safety, but rather marginalizing despised minorities.

In 1930, Harry Anslinger, who would eventually be deemed “the Godfather of modern drug prohibition,”⁴ became the first commissioner of the Federal Bureau of Narcotics. After losing the war against prohibition in 1933, Anslinger “was aware of the weakness of his new position,” but also

¹ MARTIN A. LEE, *SMOKE SIGNALS* 37 (2012).

² *Id.* at 39.

³ *Id.* at 42.

⁴ Jolene Forman & Suchitra Rajagopalan, *The new 4/20: Beyond legalizing it*, CNN NEWS (Apr. 20, 2018, 11:09 AM), <https://www.cnn.com/2018/04/19/opinions/marijuana-black-and-brown-communities-opinion-forman-rajagopalan/index.html>.

of the potential power that it could offer. As a result, he went on a crusade to rid the country of all drugs, starting with marijuana, and it was not a coincidence that marijuana was linked communities of color.⁵ Anslinger provided the foundation for what would later become the War on Drugs. He sensationalized anti-marijuana propaganda as an “assassination of youth” in magazines and films, which led to Congress banning marijuana with the Marihuana Tax Act of 1937.⁶ Anslinger used marijuana to play off the racial tensions in the country to create fear in the American people. As drug use began to rise in the late 40’s into the 50’s (especially heroin), Anslinger began his second wave of propaganda to hype marijuana as a “gateway drug...that had to be controlled because it would eventually lead its users to heroin.”⁷ The legacy of his 32 year reign as the nation’s first Drug Czar includes the popularization of reefer madness films, the gateway drug theory, and the association of cannabis use with psychosis.⁸ Today, prisons are overcrowded with nonviolent cannabis offenders, the cost of which totals into billions of taxpayer dollars.⁹ Anslinger effectively used his position and the country’s racial divide to mobilize the War on Drugs to create a way to legally discriminate against people of color, undercutting the effectiveness of The Civil Rights Act of 1964 that would arrive 30 years later. Harry Anslinger planted the first “seed of the marijuana ‘menace’ in the public mind,” and each administration that followed him continued to nurture its growth.¹⁰

B. *The War on Drugs*

The Nixon administration declared the War on Drugs in 1971, making drug abuse public enemy number one, and the Reagans followed up

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

⁶ Gene Johnson, *The Time Nancy Reagan Invented 'Just Say No' And Other Great Moments In Pot History*, BUSINESS INSIDER (Dec. 9, 2012, 1:56PM), <https://www.businessinsider.com/the-history-of-marijuana-2012-12>.

⁷ *Id.*

⁸ Etelka Lehoczky, *Beyond 'Reefer Madness': Box Brown's Graphic History Tells Story Of A Maligned Plant*, NPR (Apr. 3, 2019), <https://www.npr.org/2019/04/03/709482030/beyond-reefer-madness-box-browns-graphic-history-tells-story-of-a-maligned-plant>.

⁹ American Civil Liberties Union, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, 4, (last updated Sept. 11, 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

¹⁰ *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, AM. CIV. LIBERTIES UNION (Sept. 11, 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

with an expansion of the drug policy that had previously been enacted by creating a zero tolerance policy for drug use, which created mandatory minimum penalties for drug offenses.¹¹ The mandatory minimum penalties are “increasingly criticized for promoting significant racial disparities in the prison population because of the differences in sentencing for crack and powder cocaine,” and these penalties also heavily influenced the discriminatory policing practices of the Black community.¹² Due to their low income status, minority groups were targets under these new drugs laws; “possession of crack, which [was] cheaper, [resulted] in a harsher sentence,” and marijuana had the same appeal since it was even cheaper than crack.¹³ Nancy Reagan’s legacy lives on in three simple words: “just say no.”¹⁴ On one of her school visits, Nancy Reagan was asked, “Mrs. Reagan, what do you do if somebody offers you drugs?”¹⁵ And she simply replied, “Well, you just say no.”¹⁶ Those three little words spread across the nation like wildfire; a movement was born.¹⁷ According to the Ronald Reagan Presidential Foundation and Library, more than 12,000 “Just Say No” clubs and school programs had been formed by 1988.¹⁸ Marijuana use had become so politically toxic that when Bill Clinton ran for president in 1992, he was so fearful of the political backlash and smear campaigns that could ensue around his past marijuana use that he made the bizarre claim that he “didn’t inhale.”¹⁹

C. *The “Justice” System’s Role in Criminalization*

People of color are disproportionately targeted in the criminalization of marijuana. In spite of equivalent usage rates, “Black Americans are nearly four times more likely to be arrested for marijuana than their white

¹¹ John Burnett, *Timeline: America’s War on Drugs*, NPR (Apr. 2, 2007), <https://www.npr.org/templates/story/story.php?storyId=9252490>.

¹² NICOLE HORNING, DRUG TRAFFICKING: A GLOBAL CRIMINAL TRADE 14 (2017).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Her Causes*, THE RONALD REAGAN PRESIDENTIAL FOUNDATION AND INSTITUTE, <https://www.reaganfoundation.org/ronald-reagan/nancy-reagan/her-causes/> (last visited April 1, 2020).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Olivia B. Waxman, *Bill Clinton Said He ‘Didn’t Inhale’ 25 Years Ago—But the History of U.S. President and Drugs is Much Older*, TIME (Mar. 29, 2017), <https://time.com/4711887/bill-clinton-didnt-inhale-marijuana-anniversary/>.

peers.”²⁰ Moreover, “Black Americans make up nearly 30 percent of all drug-related arrests, despite accounting for only 12.5 percent of all substance users.”²¹ And, what is even more jarring is that Black Americans are “nearly six times more likely to be incarcerated for drug-related offenses than their white counterparts. . . .”²² In 2017, 91% of marijuana-related arrests were “for possession alone (as opposed to manufacturing or trafficking) and 47% of those [seized] were Black or Latino.”²³ The justice system is additionally riddled with racial disparity and injustice for people of color:

Almost 80 percent of people serving time for a federal drug offense are [B]lack or Latino. In state prisons, people of color make up 60 percent of those serving time for drug charges In the federal system, the average [B]lack defendant convicted of a drug offense will serve nearly the same amount of time as a white defendant would for a violent crime People of color account for 70 percent of all defendant convicted of charges with a mandatory minimum sentence. Prosecutors are twice as likely to pursue a mandatory minimum sentence for a [B]lack defendant than a white defendant charged with the same offense, and [B]lack defendants are less likely to receive relief from mandatory minimums.²⁴

The racially disproportionate pattern of police searches and arrests breeds fear and mistrust of police and of the society that tolerates or condones such behavior. All these numbers are hard evidence that the cat is out of the bag; Black America “found out their country don’t love them.”²⁵ The war against marijuana is based on false claims to keep alive a government agency that has snowballed into a “waste of resources” and that has “[fallen] most harshly and most unfairly on racial minorities and the

²⁰ Betsy Pearl, *Ending the War on Drugs: By the Numbers*, CENTER FOR AMERICAN PROGRESS (Jun. 27, 2018), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/06/27/452819/ending-war-drugs-numbers/>.

²¹ *Id.*

²² *Id.*

²³ Brian Geddes, *Cannabis Social Equity Programs are Imperfect but Critically Important*, GREENWICH TIME (Feb. 27, 2019), <https://www.greenwichtime.com/news/article/Cannabis-Social-Equity-Programs-Are-Imperfect-but-13646592.php>.

²⁴ Pearl, *supra* note 20.

²⁵ Ta-Nehisi Coates, *Fear of a Black President*, THE ATLANTIC (Sept. 15, 2012), <https://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/>.

poor.”²⁶ On its face, the prohibition of marijuana is not discriminatory in its purpose, but rather produces racially disparate results.²⁷ The Supreme Court has ruled “that there is no constitutional right to be free from the disparate impact of facially neutral policies,” but enforcement of those drug laws is in no way neutral, unbiased, nonpartisan or indifferent—it is plain unjust. Decriminalizing marijuana means giving Black Americans their freedom back. It is the first step of many to help people of color build equity in today’s America.

D. Status Criminalization on the Black Community Today

History has structured our nation’s society to accept the Black community as less than, and Black Americans have been trapped by that notion ever since. The War on Drugs perpetuates the racial caste system in the modern era.²⁸ The white world is desperate to keep its power and position in society, and consequently conditioned the Black community to expect to be treated as second rate so that moving up in society’s standing seems unattainable. The fear of a Black uprising prompted the white world to weaponize the justice system. Criminalizing marijuana has allowed society to discriminate against people of color, but because it is masked under the cloak of the justice system, it is “the law.” Remarkably, a criminal has “scarcely more rights, and arguably less respect, than a Black man living in Alabama at the height of Jim Crow.”²⁹ Simply put, the criminalization of marijuana has resulted in an elimination of access to basic needs for predominately communities of color. Now, “the old forms of discrimination—employment discrimination, housing discrimination, denial of the right vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal.”³⁰ “In each generation new tactics have been used for achieving the same goals”—the very same goals shared by the founding fathers.³¹ So let’s go ahead and call it what it is—legalized racism.

²⁶ Cynthia S. Duncan, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701, 1721 (2009).

²⁷ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[We] have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”).

²⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 3 (2d ed. 2011).

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.* at 1.

E. Assessing Criminalization

Despite the fact that people of color are arrested every day for possession, marijuana has been normalized as part of our culture. This has exacerbated the white world's fear that they will someday lose control, which is why the "War on Drugs" has been deemed a failure. The only thing the "War on Drugs" has been successful in is reducing is the number of Black Americans able to walk freely amongst their peers. The United States government spent over \$1 trillion on the "War on Drugs" since 1971, but society's attitude towards drugs and how we should treat addiction is changing.³² The federal government is spending two times more on enforcement than on education and prevention, but education and prevention are how illegal drug use is actually reduced.³³ The Drug Enforcement Administration (DEA) is responsible for upholding the nation's drug laws, but they have obviously been unsuccessful.³⁴ When assessing the DEA, the Office of Management and Budget found that the DEA has failed to reduce illegal drug use due to "a lack of specificity of targets and timeframes for achieving strategic goals and objectives, and DEA managers were not held accountable for achieving results."³⁵ And, the National Drug Intelligence Center (NDIC) reported "that there has been a sharp rise in domestic production of marijuana since 2000."³⁶

Despite the numerous federal agencies put in place to reduce illegal drug use, "marijuana continues to be the most widely used and readily available drug in the United States."³⁷ Enforcement is easier to measure since it produces actual numbers in terms of arrest rates and incarceration rate.³⁸ And, since education and prevention are much harder to measure, less effort has been put towards these areas.³⁹ Marijuana prohibition has helped support and elevate the authority of the federal drug enforcement agencies, and has almost single handedly kept state and local prisons filled, which feeds the privatization of the prison system. Since prisons are now privatized, the private contracts that states have with their prisons are now informing public policy to keep marijuana illegal. But as the national

³² Richard Branson, *War on Drugs a Trillion-Dollar Failure*, CNN (Dec. 7, 2012), <https://www.cnn.com/2012/12/06/opinion/branson-end-war-on-drugs/index.html>.

³³ See Coates, *supra* note 26, at 1713.

³⁴ *Id.* at 1714.

³⁵ *Id.*

³⁶ *Id.* at 1715.

³⁷ *Id.* at 1716.

³⁸ See Peter Andreas, *U.S. Drug Control and Policy*, INSTITUTE FOR POLICY STUDIES (Nov. 1, 1996), https://ips-dc.org/us_drug_control_policy/.

³⁹ Duncan, *supra* note 26, at 1716.

attitude moves towards legalization, the enforcement, education, and prevention programming around marijuana is no longer necessary, and the nation has wasted enough money on this failed endeavor. The effort now should be placed on the development of ameliorative relief in the justice system for those with previous marijuana charges and towards building social equity for minority communities to participate in the legal cannabis industry.

II. Part II

A. *The States' Counterculture Uprising*

In light of the growing demand for the decriminalization of marijuana, more and more states are taking on their own legalized rebellion against the War on Drugs—an exemplary illustration of federalism. Federalism is a magical thing, is it not? The states at the end of the day have the ability to do as they please—within reason of course. Ultimately, the purpose of the Constitution is to ensure states can regulate their citizens, their way. Federal law will almost always preempt state law, but it is times when states exercise their power to do as they please that we really see how our nation's government should operate. Marijuana Moment, a well-regarded cannabis news site, notes that “there are currently 1,005 cannabis related bills under review between state and federal government;” furthermore, for state governments, the legalization of marijuana is a pressing issue that will be transformative in the next decade.⁴⁰ Modern day federalism is exemplified by the movement by states for the legalization of marijuana.

B. *Federal Implications to Legalization*

Marijuana remains a Schedule 1 drug on the federal government's controlled substance list. Yet, by the handful, states are legalizing marijuana; often, first comes medical marijuana, which is then followed by recreational marijuana. The Supreme Court has not yet ruled that states that have already legalized marijuana in some form or decriminalized it are in violation of the Constitution, but the Department of Justice may attempt to obtain a ruling that federal marijuana laws are preemptory, which would

⁴⁰ Carmin Chappell, *Cory Booker Introduces Bill to Legalize Marijuana Nationwide, with Support from 2020 Candidates*, CBS (Feb. 28, 2019), <https://www.cnbc.com/2019/02/28/cory-booker-introduces-bill-to-legalize-marijuana-nationwide.html>.

render those state laws void.⁴¹ In *Gonzales v. Raich*, the Supreme Court held that “federal prosecution of persons who complied with state medical marijuana laws is lawful under the Commerce and Supremacy Clauses.”⁴² Based on this ruling, some experts have noted that as long as federal law criminalizes marijuana possession, “state laws that do not are invalid;” however, state laws that decriminalize, legalize, or medicalize marijuana are not “[authorizing] anyone to violate federal law nor are they requiring anyone to do anything contrary to federal law.”⁴³ No Supreme Court decision holds that the federal government may compel states to criminalize and prosecute people who violate federal criminal law.⁴⁴ On the contrary, the Supreme Court has held in several decisions that they are in fact barred from doing so.⁴⁵ However, if the federal government suddenly decided to enforce the existing federal laws criminalizing cannabis and prosecute users, growers, and distributors, it would have a chilling effect on the progress being made towards legalization.

C. Current Legalization Statistics

The federal government could almost instantaneously nullify the state laws and put an end to marijuana reform as we know it, but this has not prevented the rise of state legalization. Looking at a map of the United States, 11 states have legalized recreational marijuana and 13 states have decriminalized marijuana.⁴⁶ During the 2018 midterm election, at least 21 major party gubernatorial nominees on the U.S ballots supported legalizing marijuana.⁴⁷ By the end of 2019, it is estimated that another nine states will move to legalize marijuana.⁴⁸ The governor-elect of Connecticut said during his campaign that “the time has come” for marijuana legalization and that it

⁴¹ Steven B. Duke, *The Future of Marijuana in the United States* 91 OR. L. REV. 1301, 1305 (2013).

⁴² *Id.*; *Gonzales v. Raich*, 545 U.S. 1, 29-33 (2005).

⁴³ Coates, *supra* note 26.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Tom Angell, *These States Are Most Likely to Legalize Marijuana in 2019*, FORBES (Dec. 26, 2018), <https://www.forbes.com/sites/tomangell/2018/12/26/these-states-are-most-likely-to-legalize-marijuana-in-2019/#62211035adda>.

⁴⁷ Tom Angell, *Marijuana in The Governor’s Mansion: Record Number of Candidates Say Legalize It*, FORBES (Nov. 1, 2018), <https://www.forbes.com/sites/tomangell/2018/11/01/marijuana-in-the-governors-mansion-record-number-of-candidates-say-legalize-it/#459cce5f2e93>.

⁴⁸ *See Id.* (noting the likelihood of Connecticut, Illinois, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, and Vermont passing legislation to legalize cannabis)

will be one of his priorities in 2019.⁴⁹ Incoming Governor J.B. Pritzker of Illinois made legalizing marijuana a centerpiece of his campaign and says it will be something he will start working on right away.⁵⁰ The Governors of Minnesota, New Hampshire, New Jersey, New York, New Mexico, and Rhode Island are too joining the legal weed party.⁵¹ Kansas, Wisconsin, Pennsylvania, and Texas are close behind, as they are poised to potentially legalize and/or decriminalize marijuana.⁵²

D. What's Coming Next for Legalization

Looking ahead to 2020, states like Arizona, Florida, Ohio, and North Dakota could consider ballot measures to fully legalize marijuana, while Mississippi, Nebraska, and South Dakota could see medical cannabis go before voters in the current election cycle.⁵³ Lawmakers across the country are coming out of the woodwork in favor of legalization in its many forms. Every state that moves to deregulate marijuana is putting more and more pressure on the federal government to remove marijuana from the Schedule 1 controlled substances list. The states have spoken, and the nation is ready for marijuana reform.

III. Part III

A. Societal Barriers Due to Marijuana Prohibition

One by one, states are realizing that marijuana is not the villain that Nancy and Ronald made it out to be. Misconceptions have been refuted and the attitude towards marijuana is becoming increasingly tolerant as the acknowledgement of marijuana's benefits exponentially outweigh its negative associations. The country is just more educated on the matters of marijuana. Prohibition is too expensive, and the consequences of marijuana prohibition on communities of color go far beyond imprisonment. "An individual need not have spent time behind bars or even had a conviction in order to face tremendous barriers due to having a criminal record; even a minor criminal record now creates barriers to nearly all the basic building blocks of economic security . . ." ⁵⁴ Consequently, the War on Drugs "locked

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Angell, *supra* note 46.

⁵⁴ Lottie Joiner & National Journal, *How Families Pay the Never-Ending Price of a Criminal Record*, THE ATLANTIC (Dec. 15, 2015) (quoting Carmel Martin of the Center for

many [Black men] out of the college classroom.”⁵⁵ “Decreased college enrollment has life-long consequences,” not only on the individual, but on society as a whole.⁵⁶ The effects of a criminal record have a lifelong ripple effect. “Without a college degree, steady employment, and support services, formerly incarcerated people struggle to rebuild their life.”⁵⁷ Some of “the collateral sanctions [that] attach at arrest...include: loss of professional licenses, barriers to employment opportunities, ‘loss of educational aid, driver’s license suspension, and bars on adoption, voting, and jury service.”⁵⁸ And, when it comes to the charge, the quantity of marijuana is somewhat irrelevant because “those individuals convicted of low-level possession are subject to many of the same collateral sanctions as those convicted for dealing in large quantities.”⁵⁹ This is why “fifty percent of felons are rearrested [and] twenty-five percent are re-incarcerated within eight years of their initial release from prison.” “Access to education could lower these high recidivism rates,” but more importantly, the main takeaway here should be that this country needs to build equity in its citizens—each and every one of them.⁶⁰

Losing these opportunities and other public benefits are already a present fear for people of color without the added pressure of marijuana prohibition. Unfortunately, in today’s society, it is almost inherent that minorities will have a more difficult time making ends meet because their starting point is many steps behind their white counterparts. Minority communities are keeping afloat from food stamps and public housing, and “[the] loss of public assistance, or any sanction that interferes with the ability to work or to drive, can have a more burdensome impact on low-income and minority families.”⁶¹ Every aspect of a family’s sense of well-being is negatively affected, but “removing barriers to employment, housing and education is not only necessary for individuals with criminal records to get a fair shot in life, it’s also critical to ensuring that a parent’s criminal record does not determine their child’s life chances.”⁶² The lasting

American Progress), <https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641/>.

⁵⁵ Tamara G. Borr, *How the War on Drugs Kept Black Men Out of College*, THE ATLANTIC (May 15, 2019), <https://www.theatlantic.com/education/archive/2019/05/war-drugs-made-it-harder-black-men-attend-college/588724/>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Coates, *supra* note 26, at 1723.

⁵⁹ *Id.* at 1724.

⁶⁰ Angell, *supra* note 46.

⁶¹ *Id.*

⁶² Joiner, *supra* note 54.

effects of marijuana prohibition make it even more difficult for the poor and minority population to have a fair chance in society. Even when marijuana is finally legalized, the resulting tax revenue will not come close to matching the amount lost over the “War on Drugs,” and that revenue should be going to the communities that the failed war disenfranchised for the past century. Marijuana prohibition has caused too much harm—completely out of proportion to the purported harm it set out to prevent, and it is time to put an end to this marijuana witch hunt.⁶³

B. Economic Impact of Criminalization on Minority Communities

The “War on Drugs” narrative has variously reinforced or worsened structural problems in the related spheres of employment and criminalization. When the Nixon administration declared the War on Drugs in 1971, the unemployment rate had jumped three percent from two years prior.⁶⁴ For the next decade, the unemployment rate fluctuated between 4.9 percent and 8.5 percent, and remained in that volatile state until 1982 when it reached 10.8 percent.⁶⁵ “Unemployment [swings mirror] the business cycle”; moreover, “slow growth causes high unemployment.”⁶⁶ Consequently, jobless workers are more likely and willing to commit crimes to sustain their financial needs.⁶⁷ High unemployment is often linked to drug use and high crime rates, but it is important to note that causality is working in all directions.⁶⁸ Communities with poverty, high arrest rates, and distrust of those outside the community are associated with a history of alcohol and drug abuse.⁶⁹ These communities are more often than not communities of color. Furthermore, “up until the early 1980’s, an annual minimum-wage income — after adjusting for inflation — was enough to keep a family of two above the poverty line.”⁷⁰ “The falling minimum wage is also a major

⁶³ Shaleen Title, Letter to the Editor, *Is Legalizing Marijuana Too Risky?*, N.Y. TIMES (Jan. 13, 2019), <https://www.nytimes.com/2019/01/13/opinion/letters/marijuana-legalization.html>.

⁶⁴ Kimberly Amadeo, *Unemployment Rate by Year Since 1929 Compared to Inflation and GDP*, THE BALANCE (Feb. 28, 2019), <https://www.thebalance.com/unemployment-rate-by-year-3305506>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Suhaib Kebhaj et al., *Collateral Damage & The War on Drugs: Estimating the Effect of Zero Tolerance Policies on Drug Arrest Rates, 1975-2002*, 11 *The Public Purpose* 1, 8-9 (2013).

⁶⁸ *Id.* at 2.

⁶⁹ *Id.*

⁷⁰ David Cooper, *The Minimum Wage Used to be Enough to Keep Workers Out of Poverty—It’s Not Anymore*, ECONOMIC POLICY INSTITUTE (Dec. 4, 2013), <https://www.epi.org/publication/minimum-wage-workers-poverty-anymore-raising/>.

contributor to poverty and inequality,” and that paired with high unemployment creates the breeding ground for nefarious activity: drug dealing.⁷¹ And, consequently, the choice between barely getting by and making money hand over fist is a no-brainer. However, while drug dealing can be profitable, it is not in the way that the media portrays it.⁷² The drug dealers in these communities are typically the entrepreneurial leaders of their neighborhoods. Often the drug dealers on the corner are part of a larger enterprise that mimics the corporate structure that of a McDonald’s franchise.⁷³ As drug markets become increasingly concentrated in these poorer areas, this has led to a rise in both drug use and drug arrests, which has only perpetuates poverty in minority communities. It’s a cyclical oppression.

C. *The Need for Marijuana Justice Reform*

Legalization will allow the criminal justice system to use its already scarce resources in a more effective manner. Merely decriminalizing marijuana is not enough to “ensure the end of racially biased searches and arrests, and more importantly it “does not address restitution toward the [B]lack and brown communities disproportionately harmed by the [W]ar on [D]rugs.”⁷⁴ For police to make a drug arrest, they need only to conduct a search of a person, which can happen either incident to a valid arrest or merely because the officer fears that he is “in danger” pursuant to *Terry v. Ohio*.⁷⁵ *Terry v. Ohio* established that an officer may stop someone and ask them questions about what they are doing; if this happens in a rough area, that gives the officer enough cause to search the person so that the officer ensures his safety and the safety of the community.⁷⁶ If the officer finds drugs, they have a prima facie case to make a drug arrest, and people of color are more at risk to be taken advantage of in this way since communities of color tend to live in high crime areas as a result of being pushed out due to the gentrification of cities across the country.⁷⁷ And now,

⁷¹ *Id.*

⁷² STEPHEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 83 (William Morrow eds., 1st ed. 2005)

⁷³ *Id.* at 89.

⁷⁴ Angell, *supra* note 46.

⁷⁵ *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968)

⁷⁶ *Id.* at 30.

⁷⁷ See Christopher Coble, *Legal Options for Marijuana Users Convicted Before Decriminalization*, FindLaw Blotter (Jul. 17, 2015, 3:58PM), <https://blogs.findlaw.com/blotter/2015/07/legal-options-for-marijuana-users-convicted-before-decriminalization-1.html>.

for many for whom that risk was actualized, their conduct is no longer a crime under new state laws.⁷⁸

Although it is a move in the right direction, new state laws decriminalizing or legalizing marijuana often do not do anything for those convicted under the old regime. This raises the issue of what can be done for those that were convicted under the old law.⁷⁹ This is important because often no one explained to these individuals the ripple effect a conviction will have on them now and in the future; their conviction will follow them to every job interview, school application, and aid program request that they attempt. So, “as the government spent more money sending Black men to prison, it devoted fewer resources to programs that would have helped the formerly incarcerated reenter society after they were released,” and that inadequacy is felt even more so now as state and local governments choose to decriminalize or legalize marijuana.⁸⁰ Moreover, a “law decriminalizing a crime cannot be used to decrease or end a conviction that occurred prior to the new law’s passage unless the law has retroactive amelioration clause.”⁸¹ Currently, California is one of the first states with real ameliorative relief for past offenders.⁸² California’s Proposition 36 “amends the three strikes law to impose life sentences only when a third felony conviction is serious or violent,” and it “also allows courts to re-sentence offenders currently serving life sentences for non-violent third strike convictions.”⁸³ Also, California’s Proposition 64 decriminalized marijuana and allotted for ameliorative relief for some conviction.⁸⁴ New on the scene is Illinois where the newly elected Governor Pritzker passed legislation to wipe out “low-level convictions and arrest for marijuana possession.”⁸⁵ The law “provides for automatic expungement of arrest records for marijuana

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Eileen L. Morrison, *Resurrecting The Amelioration Doctrine: A Call To Action For Courts And Legislatures*, 95 BU L.R. 335 (2015); see also <http://ccresourcecenter.org/2019/03/28/updated-report-on-2018-fair-chance-and-expungement-reforms/>.

⁸³ *Id.*

⁸⁴ *The Control, Regulate and Tax Adult Use of Marijuana Act*, Proposition 64 (Nov. 8, 2016), <https://post.ca.gov/proposition-64-the-control-regulate-and-tax-adult-use-of-marijuana-act>.

⁸⁵ Robert Mccoppin, *Getting Marijuana Convictions Expunged in Illinois: What You Need to Know About the Process*, Chicago Tribune (Aug. 30, 2019), <https://www.chicagotribune.com/marijuana/illinois/ct-cb-weed-conviction-expunged-illinois-20190917-o2jrwf43trefbnb54efohdmwzu-story.html>.

possession under 30 grams.”⁸⁶ This legislation will absolve the records of “hundreds of thousands of people” and give them back the freedom to live their lives.⁸⁷ The hope is that more states will follow suit. Without ameliorative relief, the only way for those with current conviction to seek relief is by applying for a pardon from their state’s governor, but “applying for and receiving a pardon is a very hard process with a rare success.”⁸⁸ Even though states are decriminalizing marijuana, that does nothing for the thousands of American citizens of color that have been marked by a marijuana conviction, and the relief that does exist is not really relief since it is not accessible to most. It may seem that decriminalization is the easy way out, but if the goal is to truly help and support the disenfranchised communities of color, then retroactive legalization is the answer.

D. Attempting Restorative Justice

Marijuana reform should not just be about ensuring that the “War on Drugs” is finally stopped, but directing the legislature and justice system to assist those previously convicted. “New laws decriminalizing or legalizing marijuana cannot, in themselves, help those burdened by prior convictions.”⁸⁹ “New provisions for sealing prior criminal records or expunging convictions will not prove meaningful without mechanisms to ensure they are regularly used.” Given the troubled history of violence and discrimination between law enforcement and people of color, minorities communities “will likely not take full advantage of current reforms and thus get limited benefits and relief.”⁹⁰ The criminal justice system has conditioned communities of color to fear police and distrust the validity of the system. Any reform that may come down the line needs to be easily accessible and be based in the communities that it is meant to support because the government has to somehow get people of color to buy into this new system. “Reforms should offer robust retroactive relief to people convicted for prior marijuana offenses.”⁹¹ Often, expungement and record-sealing laws are “unduly limited, require long waiting periods, or limit relief to the lowest level of offenders and offenses.”⁹² Regardless of their

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Kebhaj, *supra* at note 67.

⁸⁹ Douglas A. Berman, *How States Can Ensure That Today’s Marijuana Reforms Also Ameliorate Harms Inflicted on Past Offenders*, SCHOLARS (Aug. 30, 2018), <https://scholars.org/brief/how-states-can-ensure-todays-marijuana-reforms-also-ameliorate-harms-inflicted-past-offenders>.

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *Id.*

experience with the criminal justice system, people of color do not have a full understanding of how the system operates, nor do they have the financial means to seek out these types of relief.⁹³

Even in jurisdictions undertaking significant marijuana reform, it is not surprising that the efforts to ameliorate the burden of past marijuana charges are inadequate for the population they are meant to serve.⁹⁴ And, “even when states enact special status or modified expungement rules to address past marijuana offenses, emerging data suggests that only a small fraction of those who are eligible for relief seek to have their records sealed or set aside . . . [ex-offenders] should not have to continue to bear a scarlet letter for engaging in what citizens have now decided is socially acceptable.”⁹⁵ They should not be the ones righting this wrong; this should be done for them. It is really the least that their government can do for them at this point in history. The future of marijuana reform needs to be crafting expungement laws that reflect present-day norms for the group of people that the laws are written for. There seems to be a disconnect between those that are trying to write these laws and the group of the people they are meant to help. Just because we are having the right conversations, this does not mean the right actions are coming of them. Here is where we can see our nation again trying to play the white man savior card as we have so many times in the past. The white world feels guilty about what they have done and now are attempting to put on band aids where there should be stiches to promote real healing. The old adage that “something is better than nothing” really has no place here.

IV. Part IV

A. *No Legalization Without Social Equity*

Some of those in power like Cory Booker and Bernie Sanders are now using their privilege for good to speak out about how marijuana legalization should be about communities of color being put right. Social equity is shaping the face of marijuana legalization. “Social equity programs serve to ensure that a percentage of the local permits that are required to operate in the cannabis industry are allocated to individual who have been disproportionately impacted by the War on Drugs.”⁹⁶ The

⁹³ *See id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Zack Ruskin, *How Cannabis Equity Programs Are Shaping the Industry's Future*, 420 INTEL (Jan. 3, 2019), <https://420intel.com/articles/2019/01/03/how-cannabis-equity-programs-are-shaping-industry%E2%80%99s-future>.

programs are well intentioned, but may not be meeting the needs of those they're meant to help. So far there have been "staffing and funding shortfalls for the programs," but more importantly, "there is a growing concern about provisions in the regulations related to outside investors."⁹⁷ There is a fear that "investors with big pockets can potentially partner with minority applicants as a way into the industry, then take advantage via bad contracts or financial pressure."⁹⁸ This is the concern when creating diversity legislation within marijuana legalization. Limits or oversight must be given great deference, because so far in the legalized marijuana industry, the key players have been white wealthy men.

Recently, "representative Alexandria Ocasio-Cortez attacked what she called the racial 'injustice' that allowed companies operating private prisons, which she said profited from mass incarceration under the War on Drugs, to theoretically be among the first to profit from the legalization of marijuana."⁹⁹ Ocasio-Cortez made these remarks during a subcommittee hearing on "banking services for America's burgeoning cannabis industry" where she questioned cannabis business owner Corey Barnette about the racial disparity associated with movement to legalize marijuana.¹⁰⁰ She "asked if the marijuana industry was 'compounding the racial wealth gap right now' by allowing wealthy white-dominated companies, including those that profited from mass incarceration, to gain an early advantage over others," as this is contrary to the point of creating social equity programs in the states that are legalizing marijuana.¹⁰¹ She additionally questioned whether "this industry is representative of the communities that [built it and] have historically borne the greatest brunt of injustice based on the prohibition of marijuana," to which Barnette answered, "absolutely not."¹⁰² Opportunities need to be created, "including affirmative licensing laws, 'that prioritize frontline communities and communities that are most impacted'" so they "become [the] first movers in the industry, which could help them to 'reap the benefits or recoup some segment of costs that they

⁹⁷ Brian Geddes, *Cannabis Social Equity Programs Are Imperfect But Critically Important*, GREEN ENTREPRENEUR (Feb. 27, 2019), <https://www.greenentrepreneur.com/article/329024>.

⁹⁸ *Id.*

⁹⁹ Shane Croucher, *Alexandria Ocasio-Cortez: Marijuana Prohibition Hit Black and Latino People Hardest so They Should Profit from Legalization First*, NEWSWEEK (Feb. 14, 2019, 6:27 AM), <https://www.newsweek.com/aoc-marijuana-cannabis-profit-war-drugs-1331214>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

bore . . . during the [W]ar on [D]rugs.”¹⁰³

B. The Barriers to Enter the Legal Cannabis Market for Minority Communities

As of 2017, “73 percent of cannabis executives were men and 81 percent were white.”¹⁰⁴ The cannabis industry is projected to be “worth more than \$20 billion nationally by 2020.”¹⁰⁵ Without adequate and effective social equity programming “the very people who built the cannabis industry in America may miss out on its now-legal profits.”¹⁰⁶ As it is, the marijuana industry is struggling to attract employees and entrepreneurs of color to join in the legal marketplace; furthermore, the diversity statutes put in place to help these communities are beginning to stunt the industry’s growth because the qualifications are not being meant.¹⁰⁷ Communities of color have the leverage here, but the wounds of the War on Drugs are still fresh. The minority community is afraid. People of color do not feel that they can trust the government, but are no more at ease in the private sphere. Since the key players in the marijuana industry thus far are white, people of color do not see familiar faces in what has always been their industry.

Once this hurdle is overcome, there is still a danger that the narrative of the stoned Black gangster will undercut the success of Black-owned legal marijuana businesses. The stigma surrounding cannabis and people of color make it more difficult for them to make headway in the industry, which creates even more obstacles for people of color as they try to enter the business world. When trying to build a business, people of color “lack access to capital, advisers, and networks, as well as discrimination from banks while applying for small business loans” and in the end it all “boils down to finances.”¹⁰⁸ The fear is that even if marijuana is legalized, because these social equity programs are lackluster and diversity statutes make the barriers to entry unattainable to the majority, the marijuana industry will

¹⁰³ *Id.*

¹⁰⁴ Jones, *infra* note 139.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Aaron Schachter, *Growing Marijuana Industry Struggles to Attract Employees of Color*, NPR (Feb. 21, 2019), <https://www.npr.org/2019/02/21/695999248/growing-marijuana-industry-struggles-to-attract-employees-of-color>.

¹⁰⁸ Jones, *infra* note 139.

operate both in the legal marketplace and the “black” market.¹⁰⁹ “None of the 10 states or Washington ensured that minority communities would share in any economic windfall of legalization.”¹¹⁰ We cannot have ethical marijuana without having social equity, and the two are becoming mutually exclusive on the national landscape, which is why the country needs to figure out what the best way to both allow the marijuana industry to grow and prosper and bring people of color into the fold.

C. *The Executive “Gateway” to Legalization*

As cliché as it sounds, timing truly is everything, which is especially relevant when trying to understand the game of chicken the federal government has been playing with the state governments around legalizing marijuana. Since the president’s job is setting the nation’s agenda, when Barack Obama was elected President in 2008, the idea of legalizing marijuana on a federal level became something more than just a pipe dream. Unlike Bill Clinton, “it was no secret that” Obama had a history of past marijuana use.¹¹¹ Clinton was President at a time when marijuana was still viewed as something that would tarnish one’s public image, but during Obama’s campaign, it came out that he had smoked marijuana as a teen with a group of his peers called the “Choom Gang” and “had even thanked his drug dealer Ray in his yearbook.”¹¹² Obama was open and honest with the nation about his past marijuana use, and this was likely a product of the times, as marijuana use was hardly the political death sentence that it had been for Clinton.

Obama, of course, was held to a stricter standard than Clinton, but at the same time he was able to be more relatable because of who he was—a Black man. The stereotypical juxtaposition of Black men and marijuana allowed Obama “to get real” with nation, in a way that Bill Clinton never could. Obama’s greatest fear during his campaign was not his past marijuana use, but the fact that he was the first Black man running for president in a country where racism was still alive and well in many pockets of the nation, which is something Bill Clinton never had to face as a white man from Arkansas.

¹⁰⁹ Vince Beiser, *Building a Legal Marijuana Industry from the Ground Up*, PAC. STANDARD (Jun. 14, 2017), <https://psmag.com/social-justice/washington-state-building-legal-marijuana-industry-58996>.

¹¹⁰ Jones, *infra* note 139.

¹¹¹ 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/>.

¹¹² *Id.*

Obama got the ball rolling for the normalization of recreational marijuana use. This is important for the situation at hand, because beyond being the first president to be honest about his marijuana use, he is also the first Black president. And, what's even more significant is the fact that in his presidency, Obama was more comfortable with his discussing his relationship with marijuana than he was talking about his relationship with his racial identity.¹¹³ The Age of Obama marks a time of historic breakthroughs, but for the purposes of this discussion the attention must be shifted away from "the racial symbol of America's achievement to the actual substance of America's shame: the massive use of state power to incarcerate hundreds of thousands of precious poor, Black, male (and increasingly female) young people in the name of the bogus 'War on Drugs.'" ¹¹⁴

Going into his presidency, the nation expected Obama to be able to fix the racial divide in America, but when things got worse rather than better, many thought that the messages of "hope" and "change" were mere false promises to get him into office.¹¹⁵ Honestly, Obama never had a chance. No matter what he did or did not do, he would have been scrutinized to the highest degree. This is not unlike his predecessors to office, but Obama was different in one significant way: he was the first Black president.¹¹⁶ As such, every Black president post-Obama will be compared to him.¹¹⁷ Obama was very much aware of this legacy, and it played a significant role in his administration's approach to marijuana policy.

D. Weed and the Future of the White House

Obama set the stage for diversity in government.¹¹⁸ It is something the country benefits from today with the most diverse House of Representatives in history.¹¹⁹ That would not have happened without Obama, but everyone knows that with light comes darkness; it is the dark

¹¹³ Coates, *supra* note 25.

¹¹⁴ Cornel West, *Foreword* to MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, xlviii (2d. ed. 2011)

¹¹⁵ Charles Krauthammer, *Barack Obama's State of the Union was as spent as his presidency*, TELEGRAPH (Jan. 15, 2016), <https://www.telegraph.co.uk/news/worldnews/northamerica/12101271/Obamas-terrible-legacy.html>.

¹¹⁶ Coates, *supra* note 25.

¹¹⁷ *Id.*

¹¹⁸ Julian Zelizer, *Cory Booker, the 2020 Race and Obama's Legacy*, CNN (Feb. 1, 2019), <https://www-m.cnn.com/2019/02/01/opinions/cory-booker-obama-legacy-zelizer/index.html>.

¹¹⁹ *Id.*

side of Obama's presidency that continued to allow the "War on Drugs" to take the lives of young Black men and women. However, it is not his entirely his fault. The nation may have been ready to elect its first Black president, but he would have "to be twice as good and half as Black."¹²⁰ And, what does this mean? Well, "the irony of Barack Obama is this: he has become the most successful Black politician in American history by avoiding the radioactive racial issues of yesteryear, by being 'clean' (as Joe Biden once labeled him)—and yet his indelible Blackness irradiates everything he touches."¹²¹ Again, this is not his fault— "this irony is rooted in the greater ironies of the country he leads;" democracy is to represent all citizens, but people of color are always the last invited to the party.¹²²

Obama "[peppered] his speeches with nods to ideas originally held by conservatives," and this was most evident "in the very sphere where he holds singular gravity—race."¹²³ Obama was a symbol of "hope" and "change" for people of color. The government that once refused to count them as citizens or allow them the right to vote had elected one of their own to lead the nation. Our nation's government has not given communities of color a reason to trust it, but seeing a familiar face in the White House was a start. Arguably, Obama's greatest triumphs while in office "has been the expansion of the Black imagination to encompass this: the idea that a man can be culturally Black and many other things also— . . . intellectual, cosmopolitan, temperamentally conservative, [and] presidential."¹²⁴ And, it is this idea that makes Cory Booker possible. Unfortunately for Obama, during his time in office, "a Black president signing a bill into law might as well sign his own death certificate," and his presidency is a historical moment for the Black community that will reap more benefits in the future than legalizing weed would have done.¹²⁵ So, if Obama is the model, then Booker is his prodigy. Booker is able to do the things that Obama always wanted to do but could not.

E. The Politics of Legalization

Marijuana has found its way into the 2020 election by way of the democratic candidates running for office. Cory Booker announced his presidential bid on February 1, 2019, which was just weeks before he moved

¹²⁰ Coates, *supra* note 25.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

to re-introduce his bill to legalize marijuana nationwide.¹²⁶ Kamala Harris, Bernie Sanders, and Elizabeth Warren, Booker’s fellow Democrats running for office in 2020, joined him in sponsoring the bill, which tells the nation that decriminalizing marijuana is part of Democratic ticket’s agenda for the upcoming election.¹²⁷ In 2019, the United States has a Black man and Black woman running for president who are also trying to legalize weed—what a time to be an American, is it not? The Marijuana Justice Act of 2019, if passed, would remove marijuana from the schedule of controlled substance, remove the prohibition on import and export of marijuana, withhold funding from states that have yet to legalize marijuana that have a disproportionate arrest rate or a disproportionate incarceration rate for marijuana offenses, and expunge marijuana offense convictions, among other things.¹²⁸ The bill also puts aside funds to invest in creating equity programming in the spheres of job training and social service to assist the underrepresented minorities negatively affected by the “War on Drugs.”¹²⁹ The bill comes as increasing numbers of states are legalizing marijuana on the local level and public opinion has shifted in favor of legalization. The Marijuana Justice Act is somewhat revolutionary not only in its contents, but also in its sponsors. Now is a time where Black people are experiencing a kind of privilege previously unimaginable. Not only are Black cultural practices and tropes being validated on the national stage, but social equity for the Black community in terms of marijuana legalization is becoming an issue for the 2020 election.¹³⁰

Obama’s presidency was too polarizing politically for him to touch marijuana policy because he would have only been remembered as “the Black guy that legalized weed,” which is why he was likely so evasive on the topic. “The myth of ‘twice as good’ that [made] Obama possible also [smothered] him,” and that is exactly what happened when it came to marijuana legalization.¹³¹ Obama thought as he was leaving office at the end of his presidency that one of his last moves was going to be decriminalizing marijuana on the federal level; but then Trump got elected.¹³² Since Trump has entered the Oval Office, the only clear agenda he seems to stick to is

¹²⁶ Chappell, *supra* note 40.

¹²⁷ *Id.*

¹²⁸ See Marijuana Justice Act of 2019, H.R. 1456, 116th Cong. (1st Sess. 2019).

¹²⁹ Chappell, *supra* note 40.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Kyle Jaeger, *New Book: Obama Considered Decriminalizing Marijuana, But Then Trump Won*, MARIJUANA MOMENT, (Sept. 12, 2018), <https://www.marijuanamoment.net/new-book-obama-considered-decriminalizing-marijuana-but-then-trump-won/>.

reversing the programs and initiatives that are reminiscent of the Obama administration.¹³³ If Obama had moved to decriminalize marijuana, it is likely that Trump would have quickly shut it down.¹³⁴ Obama punted the issue of decriminalizing marijuana and left it for the next guy (or gal). Cory Booker does not have to distance himself from his racial identity as Obama did in the past. Obama laid down the groundwork for candidates like Cory Booker and Kamala Harris to be able to be authentically Black. Barack opened the door, and now it is up to today's political regime to do the rest.

F. Making Room for Social Justice in the Legalization Conversation

It has been seven years since Colorado and Washington legalized recreational marijuana, and in that time the industry has been “controlled largely by white men.”¹³⁵ With marijuana legalization around the corner for many states in the coming year, the “‘growing emphasis on the economic aspect of marijuana legalization’ [has] replaced an ‘overemphasis on social justice.’”¹³⁶ As New York weighs whether or not to move to legalize marijuana, “the question of economic return for those communities has emerged as a defining issue.”¹³⁷ Black lawmakers have threatened to block the legislation if their communities don't benefit.¹³⁸ The fear is that if it is “not required in the statute then it won't happen.”¹³⁹ These lawmakers have no reason “to trust that at the end of the day, these communities would be invested in,” and based on history they are not wrong.¹⁴⁰

Governor Cuomo of New York has stated that the provisions involving social equity would be written after legalization has passed, but that seems a little backwards.¹⁴¹ It shows the communities of color in New York that they continue to be an afterthought in the saga of the War on Drugs. New Jersey is also in the same boat in terms of legalization, and advocates there are also “pushing for legalization only if tied to community

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Liz Posner, *The Green Rush is Too White*, PACIFIC STANDARD, (Dec. 10, 2018), <https://psmag.com/economics/the-green-rush-is-too-white-hood-incubator-race-weed>.

¹³⁶ Vivian Wang & Jeffery C. Mays, *Black Lawmakers to Block Legalized Marijuana in N.Y. if Their Communities Don't Benefit*, THE NEW YORK TIMES, (Mar. 11, 2019), (quoting Representative Hakeem Jeffries), <https://www.nytimes.com/2019/03/11/nyregion/marijuana-legalization-african-americans.html>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

reinvestment.”¹⁴² In Colorado, where marijuana has been recreationally legal for the past seven years, “Black entrepreneurs said they were banned from winning licenses because of marijuana-related convictions.”¹⁴³ Black entrepreneurs hold a handful of the thousands of cultivation and dispensary licenses there, and “continue to be arrested on marijuana-related charges at almost three times the rate of white people.”¹⁴⁴

The emerging social equity programs need to not only account for changes to the criminal justice system, but also economic ones. Pennsylvania is another state poised to legalize marijuana, but like New York, the concern is that when marijuana is finally legalized that “people of color will get to legally smoke marijuana, but the bulk of the estimated \$581 million in annual state marijuana revenue would go to white organizations instead of the entrepreneurs of color who made marijuana a multibillion-dollar enterprise.”¹⁴⁵ The legalization of marijuana could likely be a part of some sort of economic bait and switch where “Blacks create an industry that has value—whether through legal or illegal means—and white folks change the rules, change the language, and change the perception in order to bring about a change in ownership.”¹⁴⁶ There is a case for the bait and switch theory, for the companies that have jumped on marijuana legalization are the medical companies, and as a result medical marijuana is being legalized first.¹⁴⁷ In the grand scheme of legalization, numerous interest groups stand to benefit from the tax revenue windfall of marijuana legalization, but “revenue might not materialize without a robust economic equity plan.”¹⁴⁸

G. Solving the Equity Problem

The first place the marijuana revenue should go is to community investment to keep paying off the debt of the War on Drugs, since it was not just those charged or convicted that were impacted, but the whole minority community at large. California has made the best effort thus far where equity programs have been introduced retroactively, the most notable of them being Hood Incubator out of Oakland. Oakland “requires at least

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Solomon Jones, *Legalizing Marijuana Won't Benefit People of Color*, PHILA. INQUIRER, Jan. 1, 2019, <https://www.philly.com/opinion/commentary/marijuana-sales-black-brown-dollars-wealth-column-solomon-jones-20190102.html>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

half of licenses to go to people with a cannabis-related conviction . . .”¹⁴⁹ Marijuana legalization brings with it not only opportunities for investment, but for employment. Hood Incubator is a project that “provides a free crash-course in business and networking to people of color aspiring to cannabis entrepreneurship.”¹⁵⁰ Often, the people involved in the marijuana industry prior to legalization have the experience needed to be successful in the now legal market, but they do not know how to translate their skills to the legal landscape, so Hood Incubator works to bring the green rush back to people of color. It focuses on “three main areas: economic development, policy and advocacy work, and community organizing.”¹⁵¹ The program’s first cohort began in January of 2017, and ten businesses were able to launch.¹⁵² Hood Incubator is able to partner new ventures with local companies to grow the venture for a designated amount of time in return for getting priority access for their own permits.¹⁵³ It is a way for people of color to get the first bite at the apple with the help of their community members. In doing this, the incubator in building equity in the community where it likely did not exist before.

As of September 2018, six of those ten businesses are still in operation.¹⁵⁴ The marijuana industry is likely to bring a lot more jobs than business owners, and as a result, Hood Incubator is piloting a program to “place people of color in apprenticeship programs to jump-start their careers in cannabis.”¹⁵⁵ The Incubator also played a role in advocating for the Cannabis Equity Program, “which prioritizes Oakland residents with prior convictions for marijuana crimes for business permits.”¹⁵⁶ The Hood Incubator model “will need to go viral to spread its impact nationally.”¹⁵⁷ What is most important here is that social equity programs prioritize the communities around them and the socio-economic status of the people within them. Social equity is about giving people of color and the poor the opportunity to become financially empowered through owning their own business, and what it means to be an owner rather than just an employee. The time for equity to shape the marijuana industry has never been greater.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Conclusion

Marijuana legalization will allow people of color to “smoke fear away...roll that mother****er up... And...take two puffs” as Kendrick Lamar put it in his song “Fear”. “They will get to forget—if even for a few hours at a time—that we live in an age where racism is on the rise, where racial inequality is widely accepted, and where Black lives remain in danger.” And, for these reasons, we have to change the narrative of the Black man in America. The first step has been making social equity what marijuana legalization is truly about, but the next step is actually acting on it. Beyond California, states for the most part thus far have not effectively developed policies or procedures that alleviate the burden of the War on Drugs or prioritize the communities of color in allowing them to become equal stakeholders in the nation’s legal marketplace. To ensure that this happens, it is my recommendation to remove marijuana from the Schedule 1 controlled substance list as proposed in Senator Booker’s Marijuana Justice Act of 2019 as a first step. The federal government should then decriminalize marijuana on a national level in order to prepare the country for legalized marijuana. During the decriminalization period, the country will be able to work on the retroactive relief for those with marijuana crimes on their record. Once expungement or a program of the like wipes those records clean and those people are able to access public assistance again, the country can then take a look at legalizing marijuana. Furthermore, the proportion of money that was going to enforcement, education, and prevention should be redistributed into educating and supporting people of color to access what they need to participate in the marijuana industry.

Minority communities need more than just opportunity; they need guidance and assistance to get them to where they want to be. Each state should require a minimum of 25 percent of license holders be a person of color. It is also my recommendation that in each state, a portion of tax revenue made off of marijuana be set aside for 1) zero-interest loans for minority owned ventures and 2) a state-sponsored venture accelerator for minority owned marijuana businesses. The state-sponsored venture accelerator should mirror the Hood Incubator out of Oakland. And, as each state creates their accelerator, it will build a national network. The Hood Incubator serves as the model example for what to do when considering legalization in a new place. And, with each state having their own incubator like program, the reversal of the effects of the War on Drugs is likely to happen sooner than expected since the whole nation would be on the same page. These accelerators across the country would be in place not only to assist in the marijuana industry for the communities of color, but also serve as a genuine community building entity. And, building community means

lifting up every individual regardless of where they come from or what they have. It is on us now to make a difference in the equity conversation.