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MARIJUANA LEGALIZATION IN THE UNITED STATES: A SOCIAL INJUSTICE

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INTRODUCTION

The United States is currently sitting at a crossroads in regard to drug policy. Historically, the movement to liberalize marijuana policies has focused on lobbying policymakers at the state and federal level. After years of failing to change policy by pressuring lawmakers, the monied interests behind legalization efforts shifted tactics to mobilize behind petition-driven ballot initiatives. In 2012, Colorado and Washington State became the first states to “legalize” the recreational use of marijuana after massive amounts of money were spent to pitch the proposals to the general public.¹ In the years since, a total of eleven states have “legalized” the recreational use of the drug, with all but one taking the additional step in allowing for its commercial sale.

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¹ Throughout, the use of the word “legal” or “legalize” will be placed in quotations due to the fact that, while a state may have chosen to relax its marijuana laws, the drug remains a Schedule I substance under the Controlled Substances Act of 1970 and therefore is illegal to grow, possess, or consume under federal law. 21 U.S.C. § 812(c), sched. I (c)(17) (2018).

Many proponents of legalization have championed legalization as a solution for real issues that disproportionately affect communities of color. They cite the prevalence of minority groups jailed for minor possession charges as reason enough to “legalize” recreational marijuana. They insist that “legalizing” marijuana would, in part, reduce the number of people of color who are jailed for minor possession. These arguments are predicated on a mythology that woefully misrepresents the impact of marijuana through the lens of social justice.

I. COMMON MISCONCEPTIONS ABOUT MARIJUANA ARREST RATES

Due to the aforementioned efforts of legalization advocates and the nascent industry which has been established, many erroneously believe that marijuana legalization will result in a reduction of the number of minorities imprisoned or arrested for marijuana-related crimes. Proponents have worked to paint the cause as a social justice issue, arguing that without full legalization, these populations will continue to be targeted disproportionately by law enforcement. This argument, however, shows a superficial understanding of the complex issues of systemic racism in our criminal justice system, and, accordingly, legalization has shown no significant results towards that end.

In all “legalized” states, the disproportionate impact of drug arrests, including for marijuana, remains stubbornly high, contrary to what legalization proponents suggest. The charge that marijuana legalization will eliminate racial bias in the justice system is unfounded. The opposite has been proven.

Our nation’s capital of Washington D.C. provides a perfect example. Between 2015 and 2017 (the years immediately following legalization), although total marijuana-related arrests decreased, distribution and public consumption arrests nearly quadrupled.² Among adults, 84.8% of marijuana distribution or public consumption arrestees were African Americans.³

Additionally, the 2017 marijuana-related African American arrest rate in Colorado was nearly twice that of Caucasians (233 in 100,000 versus 118 in 100,000).⁴ In Colorado, 39% of African American marijuana-related arrests in 2017 were made without a warrant, while only 18% of Caucasians

² *Marijuana Arrest Data*, D.C. METRO. POLICE DEP’T (2018), <https://mpdc.dc.gov/node/1347766> [<https://perma.cc/6UGH-C7MX>] (click on “Marijuana Arrest Data (Excel)” hyperlink).

³ *Id.*

⁴ JACK K. REED, COLO. DEP’T OF PUB. SAFETY, IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO: A REPORT PURSUANT TO SENATE BILL 13-283 I (2018), https://cdpsdocs.state.co.us/ors/docs/reports/2018-SB13-283_Rpt.pdf [<https://perma.cc/5JME-EPB8>]. The Colorado crime data is sourced from an official report by the Colorado Division of Criminal Justice. However, due to issues with the reporting of marijuana-related crimes in Denver between 2012 and 2014, it is likely that the number of marijuana arrests made in the pre-legalization period are underestimated. *Id.* at 22-23.

were arrested without one.⁵ In Denver, the average number of annual Hispanic arrests for marijuana has increased by 98% since legalization (107 average annual arrests pre-legalization versus 212.25 post-legalization); the average number of arrests for African Americans increased 100.3% from 82.5 per year to 165.25 per year.⁶

An objective study of the data shows the high promises of social justice have failed to come to fruition. In states that have “legalized” recreational marijuana under the premise of reducing social injustice, arrest rates for certain marijuana-related offenses have increased, particularly for young minority groups.

Across Colorado, minority juveniles suffered. The average number of marijuana-related arrests among Hispanic juveniles increased 7.3% (770/year to 825/year), and the average number of marijuana-related arrests among African American juveniles increased 5.9% (230/year to 243.5/year).⁷ Additionally, drug suspension rates in Colorado schools with 76% or more students of color are over two times higher compared to Colorado schools with fewer than 25% students of color.⁸ Colorado schools that had 25% or fewer youth of color had 313 marijuana-related suspensions per 100,000 students compared to 658 marijuana-related suspensions per 100,000 students for schools comprised of populations with 76% or more youth of color.⁹ In Washington, D.C., juvenile marijuana-related arrests increased 114% between the years leading up to and following marijuana “legalization.”¹⁰

II. ECONOMIC IMPACT ON COMMUNITIES OF COLOR

The burgeoning marijuana industry has increasingly exploited minority communities with disastrous outcomes. Several consequences are borne of this.

First, higher crime rates follow areas in which marijuana stores are established. In 2017, the number of court filings containing charges under the Colorado Organized Crime Control Act related to marijuana offenses increased 284% since 2012.¹¹ A study highlighted by the National Institutes of Health (NIH) showed that the density of marijuana dispensaries was linked to increased

⁵ *Id.* at 23.

⁶ *Id.* at 178.

⁷ *Id.* at 124.

⁸ *Id.*

⁹ JACK K. REED, COLO. DEP'T OF PUB. SAFETY, MARIJUANA LEGALIZATION IN COLORADO: EARLY FINDINGS—A REPORT PURSUANT TO SENATE BILL 13-283, at 129 (2016), <https://cdps.docs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf> [<https://perma.cc/74SD-PLVP>].

¹⁰ D.C. METRO. POLICE DEP'T, *supra* note 2.

¹¹ JACK K. REED, *supra* note 4, at 2.

property crimes in nearby areas.¹² Researchers found that in Denver, Colorado, neighborhoods near marijuana businesses saw 84.8 more property crimes each year than neighborhoods without a dispensary nearby.¹³

Second, the marijuana industry sees lower-income and minority communities as profit centers. Just as Big Tobacco and liquor stores have targeted lower-income communities as an important consumer-base,¹⁴ the marijuana industry seeks a similar base to establish addiction- for-profit businesses. According to Truth Initiative, an organization dedicated to exposing the truth about Big Tobacco, tobacco companies have historically targeted and advertised to lower-income communities and communities of color.¹⁵ Borrowing the playbook of Big Tobacco, the marijuana industry is actively doing the same.

It is easy to see this in “legalized” states. An overlay of socioeconomic data with the geographic location of pot shops in Denver shows marijuana stores are located disproportionately in disadvantaged neighborhoods.¹⁶ In Oregon, an analysis by the Oregon-Idaho High Intensity Drug Trafficking Area found that marijuana sites were disproportionately concentrated among low-income and historically disenfranchised communities.¹⁷

¹² Bridget Freisthler et al., *From Medical to Recreational Marijuana Sales: Marijuana Outlets and Crime in an Era of Changing Marijuana Legislation*, 38 J.PRIMARY PREVENTION 249, 258 (2017).

¹³ *Id.*

¹⁴ See Stephen Smith, *Tobacco Signs Still Target City’s Poorer Areas*, BOS. GLOBE (Aug. 30, 2010), http://archive.boston.com/news/health/articles/2010/08/30/tobacco_signs_still_target_citys_poorer_areas/?page=2 [<https://perma.cc/9ZX4-7DR5>] (citing a Harvard Public Health study that found that, in the tobacco industry, “ad dollars are disproportionately spent in poorer neighborhoods”).

¹⁵ See *Tobacco is a Social Justice Issue: Low-income Communities*, TRUTH INITIATIVE (Jan. 31, 2017), <https://truthinitiative.org/research-resources/targeted-communities/tobacco-social-justice-issue-low-income-communities> [<https://perma.cc/QF2U-APYH>] (“Low-income neighborhoods have denser concentrations of tobacco retailers and therefore face more exposure to point-of-sale marketing, which Big Tobacco spent a total of more than \$8 billion on in 2014.”).

¹⁶ Kevin Hamm, *Marijuana in Denver: Map of Pot-related Businesses by Neighborhood with Income Data, School Locations*, DENVER POST (Jan. 2, 2016, 4:24 PM), <https://www.denverpost.com/2016/01/02/marijuana-in-denver-map-of-pot-related-businesses-by-neighborhood-with-income-data-school-locations/> [<https://perma.cc/XXC7-6LKB>].

¹⁷ See OR.-IDAHO HIGH INTENSITY DRUG TRAFFICKING AREA, AN INITIAL ASSESSMENT OF CANNABIS PRODUCTION, DISTRIBUTION, AND CONSUMPTION IN OREGON 2018—AN INSIGHT REPORT 13 (2018), <http://oridhidta.org/cannabis-production-distribution-consumption-assessment> [<https://perma.cc/M3WU-N38R>] (“Currently in Oregon, analysis indicates that there are higher concentrations of state-sanctioned cannabis distributors in lower-income communities and historically disenfranchised areas—a potentially temporary trend.”); see also Eli McVey, *Chart: Recreational Marijuana Stores are Clustered in Low-income Areas of Denver, Seattle*, MARIJUANA BUS. DAILY (July 31, 2017), <https://mjbizdaily.com/chart-recreational-marijuana-stores-clustered-low-income-areas-denver-seattle/> [<https://perma.cc/V56S-ET42>] (finding that “40% of rec shops in Seattle and nearly 45% of rec stores in Denver

So, while these stores are heavily concentrated in disadvantaged areas, their ownership does not mirror the communities. In fact, nationally, less than 2% of all pot shops are owned by minorities of any community.¹⁸ Massachusetts allows even greater insight into this phenomenon as it requires all “Marijuana Agents,” persons who work at marijuana businesses, to register with the state.¹⁹ Demographic analysis revealed that of 1,306 agents who applied in the city of Boston, 73% were Caucasian, 6% were Hispanic, and 4% were African American.²⁰ This is wholly unrepresentative of the city’s population. According to recent census estimates, Caucasians comprise 44.9% of the population of Boston; Hispanics 19.4%; and African Americans 25.3%.²¹ The economic opportunities and social equities touted by the industry are missing in practice.

In some of the states in which marijuana has either been “legalized” (Massachusetts) or efforts to “legalize” are underway (New York), a stark irony is present. States such as Massachusetts have long battled the tobacco industry in efforts to curb advertisements near schools.²² Though attempts to restrict the ability of Big Tobacco to advertise to children floundered in court, the states understood what was at stake.²³ Also at stake, even years later, were lower-income communities, a consumer group that Big Tobacco actively pursued.²⁴

Now, as communities attempt to impose barriers and distance marijuana from young people, the sentiment is changed. When the Kansas City government moved to restrict marijuana dispensaries from setting up shop within 750 feet of these same areas, marijuana advocates protested that the dispensaries ought to be treated like “any other retailer or pharmacy.”²⁵

are located in parts of each city where average earnings fall in the bottom 25th percentile”); Phillip Smith, *Why Are Pot Shops Mainly in Poor Neighborhoods?*, THE DAILY CHRONIC (Aug. 9, 2017), <http://www.thedailychronic.net/2017/75557/pot-shops-mainly-poor-neighborhoods> [<https://perma.cc/QP9G-ENQF>] (describing Marijuana Business Daily’s analysis that marijuana business locations were driven by lack of nimbyism, availability of affordable retail space, the reluctance of affluent property owners to rent to a federally illegal business).

¹⁸ Shira Schoenberg, *Boston Grapples with Lack of Diversity in Marijuana Industry*, MASSLIVE (Jan. 29, 2019), https://www.masslive.com/politics/2018/12/boston_grapples_with_lack_of_d.html [<https://perma.cc/Y6JC-4VQD>].

¹⁹ *Id.*

²⁰ *Id.*

²¹ *QuickFacts: Boston City, Massachusetts*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/bostoncitymassachusetts/RHI225218#RHI225218> [<https://perma.cc/6W8W-Z3ZC>].

²² Smith, *supra* note 14.

²³ *Big Tobacco Wins in Court*, CBS NEWS (June 28, 2001, 9:49 AM), <https://www.cbsnews.com/news/big-tobacco-wins-in-court/> [<https://perma.cc/W2XK-92TP>].

²⁴ Smith, *supra* note 14.

²⁵ See John Pepitone, *Not Everyone Happy with KC’s Proposed Rules for Medical Marijuana Dispensaries*, FOX4KC (June 27, 2019, 5:47 PM), <https://fox4kc.com/2019/06/27/not-everyone->

III. THE PUBLIC HEALTH IMPACT OF MARIJUANA IN LOWER-INCOME COMMUNITIES

In addition to the financial consequences for minority groups, minority women and children face a new risk. A study by the American College of Obstetricians and Gynecologists reported that young, urban women from lower income levels have a 15–28% rate of marijuana use during pregnancy.²⁶ Between 34% and 60% of pregnant marijuana users continue marijuana use throughout pregnancy due to a decreased perception of risk and stigma.²⁷ The misrepresentation of marijuana’s effects has disproportionately impacted pregnant women in lower-income communities. The American Academy of Pediatrics and the United States Surgeon General have both stated that pregnant women should not use marijuana due to potential health harms associated with use.²⁸

An alarming myth pedaled by the marijuana industry is that “marijuana-legal” states have seen a correlated decrease in opioid-related deaths. This claim is based on a 2014 study that recently has been thoroughly debunked by researchers at Stanford University.²⁹ The opioid epidemic has disproportionately

happy-with-kcs-proposed-rules-for-medical-marijuana-dispensaries [https://perma.cc/W9EB-XXRY] (describing Kansas City residents’ objections to an ordinance that would prevent marijuana dispensaries from operating within 750 feet of churches, schools, and childcare centers).

²⁶ *Marijuana Use During Pregnancy and Lactation*, 130 AM. C. OBSTETRICIANS AND GYNECOLOGISTS e205, e205 (2017).

²⁷ *Id.*

²⁸ See Sheryl A. Ryan, et al., *Counsel Against Marijuana Use in Pregnancy, Breastfeeding*, AAP NEWS (Aug. 27, 2019), <https://www.aappublications.org/news/2018/08/27/marijuana082718> [https://perma.cc/8N44-AKQU] (reporting that the APP advises “adolescents and women of childbearing age to abstain from marijuana use while pregnant or breastfeeding due to potential adverse consequences to the fetus, infant or child”); *U.S. Surgeon General’s Advisory: Marijuana Use and the Developing Brain*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Aug. 29, 2019), <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html> [https://perma.cc/A3TS-V4P2] (stating that the American College of Obstetricians and Gynecologists and American Academy of Pediatrics recommend that women discontinue marijuana use during pregnancy).

²⁹ See Chelsea L. Shover et al., *Association Between Medical Cannabis Laws and Opioid Overdose Mortality Has Reversed over Time*, 116 PNAS 12624, 12625 (2019) (failing to reproduce the findings of Marcus A. Bachhuber et al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999–2010* 174 [J]AMA INTERNAL MED. 1667 (2014), regarding a purported inverse correlation between marijuana legalization and opioid deaths).

impacted lower-income communities.³⁰ According to the Brookings Institution, this disproportionate impact is owed in part to the lack of education and the lack of treatment centers in these communities.³¹ By taking over the messaging, the marijuana industry capitalizes on the vulnerability of the communities hit hardest by the epidemic.

The health risks of marijuana are lost amid confusing and misleading advertisements that target communities that lack educational resources. Today's high-potency marijuana is addictive,³² linked with serious mental health illnesses such as psychosis,³³ and lowers educational outcomes, especially for those who use it heavily.³⁴ Lower-income communities face a new threat to their health with inadequate resources to combat these effects.

For years, lawmakers allowed the giants of Big Tobacco to operate largely unabated. Of course, the result was a massive public health crisis we are still dealing with to this day. It took years of congressional investigations and class action lawsuits before the general public was able to fully understand the dangers of smoking. Now, while many are moving away from cigarette and other forms of tobacco use, these titans of addiction are not going away. They are heavily investing in marijuana companies and putting resources into vaping technology.³⁵

Late last year, Altria, parent company of Phillip Morris and maker of Marlboro cigarettes, invested nearly \$2 billion into a Canadian marijuana

³⁰ See Elizabeth Kneebone & Scott W. Allard, *A Nation in Overdose Peril: Pinpointing the Most Impacted Communities and the Local Gaps in Care*, BROOKINGS INST. (Sep. 25, 2017), <https://www.brookings.edu/research/pinpointing-opioid-in-most-impacted-communities/> [<https://perma.cc/8EK2-2GAS>] (“Among high-poverty countries—those with poverty rates of 20 percent or higher—41 percent (342 of 829) reported above-average death rates due to drug poisoning in 2015.”).

³¹ *Id.*

³² See Dan Wagener, *Marijuana Addiction Facts: Is Marijuana Physically Addictive?* AM. ADDICTION CTRS. (June 21, 2019), <https://americanaddictioncenters.org/marijuana-rehab/is-it-addictive> [<https://perma.cc/7ZPL-GQRE>] (nothing that both the National Institute on Drug Abuse and the DSM-5 regard marijuana as addictive).

³³ See Marta Di Forti et al., *The Contribution of Cannabis Use to Variation in the Incidence of Psychotic Disorder Across Europe (EU-GEI): a Multicentre Case-control Study*, 6 LANCET PSYCHIATRY 427, 427-33 (2019) (finding a four times increase in the likelihood of psychosis among European populations of high-potency daily cannabis users).

³⁴ See David M. Fergusson & Joseph M. Boden, *Cannabis Use and Later Life Outcomes*, 103 ADDICTION 969, 972-74 (2008) (“High levels of cannabis use are related to poorer educational outcomes, lower income, greater welfare dependence.”).

³⁵ See Sara Brittany Somerset, *Marlboro Modernizes Its Method of Peddling Death to Kids*, FORBES (Dec. 23, 2018, 7:12 AM), <https://www.forbes.com/sites/sarabrittanyosomerset/2018/12/23/marlboro-modernizes-its-method-of-peddling-death-to-kids/#beb95e13d045> [<https://perma.cc/PC29-YDLE>] (discussing recent investments by Altria, one of the world's largest tobacco companies, in Juul Labs and Cronos Group).

cultivator and spent around \$12 billion to secure a minority stake in Juul, the vaping giant at the heart of a current epidemic.³⁶ In July, Imperial Brands, the fourth largest tobacco company in the world, announced a \$100 million investment into Auxly, another Canadian marijuana company.³⁷ While the stake is lower than that of Altria's investment, Auxly and Imperial Brands will team up to develop new proprietary vaping technology for marijuana concentrate delivery.³⁸

It doesn't stop with just the tobacco industry either. Constellation Brands—a massive alcohol conglomerate that produces Corona beer, Robert Mondavi wine, and Svedka vodka—has invested \$4 billion into Canopy Growth, another Canadian cultivator.³⁹ What's more, we have even seen Big Pharma begin to explore the marijuana space: John Stewart, the man responsible for developing the marketing strategy of Oxycontin, went from being the head of Purdue Pharma to heading up a marijuana company.⁴⁰

As this marriage between the marijuana industry and industries responsible for more than half a million deaths per year in the United States alone continues, we must consider the lawsuits that assuredly lay just over the horizon.⁴¹

³⁶ *Id.*

³⁷ Joe Tenebruso, *Imperial Brands to Invest CA \$123 Million in Auxly Cannabis Group*, MOTLEY FOOL (July 25, 2019, 8:57 PM), <https://www.fool.com/news/2019/07/25/imperial-brands-to-invest-ca123-million-in-auxly-c.aspx> [<https://perma.cc/FM7S-KMPN>].

³⁸ Sean Williams, *This Marijuana Penny Stock Just Earned a Major Investment from Big Tobacco*, MOTLEY FOOL (July 30, 2019, 7:21 AM), <https://www.fool.com/investing/2019/07/30/this-marijuana-penny-stock-just-earned-a-major-inv.aspx> [<https://perma.cc/8FPL-ZYMT>].

³⁹ See Michael J. de la Merced, *What Corona Owner's \$4 Billion Bet on a Marijuana Firm Says About Pot's Future*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/business/dealbook/constellation-canopy-cannabis.html> [<https://perma.cc/ZPW9-Y3XP>] (describing Constellation's investment as an example of “just how far traditional alcoholic beverage companies are willing to go to find growth”).

⁴⁰ See Jessica Murphy, *Ex-Big Pharma Executive Behind OxyContin Sells Medical Marijuana*, BBC NEWS (Nov. 25, 2016), <https://www.bbc.com/news/world-us-canada-38083737> [<https://perma.cc/W4U3-SRK6>] (describing how Mr. Stewart “left Purdue Pharma in 2013 and is now a co-founder of Emblem, a medical marijuana company based in Paris, Ontario”).

⁴¹ Tobacco use is responsible for at least 480,000 deaths annually. See *Smoking & Tobacco Use*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm [<https://perma.cc/VCD2-6HZM>] (last updated Feb. 6, 2019). Excessive drinking is associated with at least 88,000 deaths annually. *Alcohol and Public Health: Alcohol-Related Disease Impact (ARDI). Average for United States 2006–2010 Alcohol-Attributable Deaths Due to Excessive Alcohol Use*, CTR. FOR DISEASE CONTROL & PREVENTION (2013), https://nccd.cdc.gov/DPH_ARDI/Default/Report.aspx?T=AAM&P=f6d7eda7-036e-4553-9968-9b17ffad620e&R=d7a9b303-48e9-4440-bf47-070a4827e1fd&M=8E1C5233-5640-4EE8-9247-1EC A7DA325B9&F=&D=https://perma.cc/N2JF-2PXR. Prescription opioids are responsible for at least 16,000 deaths annually. Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths—United States, 2013–2017*, MORBIDITY & MORTALITY WEEKLY REP., Jan. 4, 2019, at 1420.

CONCLUSION

In the end, we must dispel the false dichotomy that there are only two options when it comes to drug policy: legalization or incarceration. The overall goal of drug policy should be to reduce drug use and connect those who are suffering from substance abuse with recovery resources. Instead, due to the lobbying and public relations efforts of the marijuana industry, lawmakers believe the only options on this front are to either continue locking users up or allow for the creation of an addiction-for-profit industry.

As evidenced by New York state's recent legislation, decriminalization and legalization are not inextricably linked in the way that marijuana industry proponents have claimed they are. In June, New York passed legislation to decriminalize the drug without legalizing it for recreational use.⁴² By inappropriately perpetuating the idea that social justice cannot be addressed without full-scale legalization, proponents have ensured confusion around the underlying issue of social justice, seeking to legitimize legalization and commercialization by tacking it on to an entirely separate issue.

The full legalization and commercialization of marijuana would spawn Big Tobacco 2.0—and, because of today's highly intoxicating THC levels, would result in far worse consequences for social justice within at-risk communities.

⁴² See S.B. 6579-A, 2019–2020 Reg. Sess. (N.Y. 2019) (proposing decriminalizing possession of marijuana); Assemb. B. 8420-A, 2019-2020 Reg. Sess. (N.Y. 2019) (same); *see also* N.Y. PENAL LAW pt. 3, tit. M, art. 221 (McKinney 2019) (decriminalizing possession of fewer than two ounces of marijuana but stopping short of legalization).