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INCREASING EQUITY IN THE CANNABIS INDUSTRY

SIX ACHIEVABLE GOALS FOR POLICY MAKERS



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Introduction

With cannabis now fully legal for adults in ten U.S. states and the District of Columbia – and more elected officials considering legalization in other states every day – it appears as if the complete end of cannabis prohibition is nearly upon us. As we reach this milestone, we must acknowledge that cannabis prohibition was not only an attempt at preventing individuals from possessing and using cannabis, but also an accompanying criminal punishment regime that enforced this prohibition through government force. This system, like most other law enforcement regimes, did not affect everyone equally.

There is a clear history of racial disparities in cannabis arrests and convictions.¹ Arrests happen far more frequently in heavily policed areas, which are disproportionately areas where people of color reside. Punishments, which tend to be harsher for people of color even when the underlying conduct is the same, include an elaborate array of collateral consequences that can hinder or eliminate future job prospects, educational opportunities, and other avenues for legitimate financial achievement. A cannabis arrest, often a person's first interaction with the criminal justice system, starts a cycle of detrimental state action that can wreck families. When too many arrests occur in the same geographic location, the economic and social viability of entire neighborhoods can be destroyed.

Although cannabis legalization ends prohibition, it does not necessarily stop or reverse the harm created by the punishment regime. As state-level legalization spreads and the legal cannabis market expands, the individuals and communities most impacted by cannabis

prohibition have all too often been left behind. Early legalization efforts were fighting decades of stigma and the psychological linkage of cannabis and crime. To counteract this ingrained belief and create a clear difference with their illegal predecessors, new state-legal cannabis markets often feature invasive background checks, elaborate and expensive security systems, and bans on those with criminal histories from operating or even working in the industry. These laws and regulations related to entry into the industry, like cannabis prohibition before it, have disproportionately impacted people of color.

To create a legal cannabis market accessible to all, the laws need to be designed and implemented with equity and fairness in mind. Three trends recently converged to make policy makers more comfortable with this proactive approach. First, public support for cannabis legalization continues to rise.² Second, awareness of racial disparities and inequalities built into the criminal justice system has grown. Third, the evidence from early legalization states shows that a very small portion of the economic benefits resulting from legalization have gone to people of color, women, or lower-income individuals.³

These trends are leading to progress. Some states and localities are trying to implement social equity programs to help redress the situation. Massachusetts gives priority license review to entities promoting economic empowerment in communities disproportionately impacted by past law enforcement practices related to cannabis and other drugs, and has created a social equity program to build pathways into the cannabis industry.⁴ At the time of this writing, New Jersey appears poised to pass social justice

¹ See American Civil Liberties Union (2013). *The War on Marijuana in Black and White*. Available at: <https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuanablack-and-white>.

² McCarthy, J. (2018). *Two in Three Americans Now Support Legalizing Marijuana*. Gallup. Available at: <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx>.

³ See, e.g., Comeau, Z. (Jan. 7, 2019) *Left Behind: Minorities are hard to find in the legal pot industry*. *The Worcester Business Journal*. Available at <http://www.wbjournal.com/article/20190107/PRINTEDITION/301049997/left-behind-minorities-are-hard-to-find-in-the-legal-pot-industry>; Margolis, A. (Sep. 20, 2018) *The top cannabis companies are dominated by men. We must do better*. *Forbes*. Available at <https://www.forbes.com/sites/amymargolis/2018/09/20/the-top-cannabis-companies-are-dominated-by-men/#300ad50e565e>; and Marotti, A. (Mar. 9, 2019) *Illinois' largely white marijuana industry is booming, and minority-run businesses want in on it*. *The Chicago Tribune*. Available at <https://www.chicagotribune.com/business/ct-biz-illinois-marijuana-industry-diversity-20190215-story.html>.

⁴ Massachusetts Cannabis Control Commission. *Social Equity Guidance*. Available at: <http://mass-cannabiscontrol.com>. (Cont'd)

reforms like expungement alongside cannabis legalization.⁵ There is a strong push to include social equity provisions in any legalization bill in New York. California cities like Los Angeles, Oakland, Sacramento, and San Francisco are all in the process of implementing local social equity programs. Countless bills on record expungement have been filed around the country.

Additionally, some members of Congress have been fierce advocates for coupling cannabis legalization with strong social equity provisions. One of the strongest advocates is Rep. Barbara Lee (D-CA). Rep. Lee is the co-chair of the Congressional Cannabis Caucus and has filed multiple cannabis-related bills, including the Realizing Equitable & Sustainable Participation in Emerging Cannabis Trades (RESPECT) Resolution (H.Res. 163, during the 116th Congress). This resolution proposes a set of best practices to

address industry inequalities. Collectively, the best practices suggest that the legal cannabis market can be a force for justice, but only if implemented justly.

NCIA strongly supports these efforts. We have worked closely with the Minority Cannabis Business Association to create the nation's first-ever Model Municipal Social Equity Ordinance based on the recommendations in the RESPECT Resolution,⁶ and will continue to push for laws and regulations that embrace diversity and the inclusion of communities disproportionately-impacted by cannabis prohibition. The emerging cannabis industry must work for all people. Opportunities to right structural wrongs that have caused multi-generational injustice emerge infrequently and must be embraced when they arise.

(cont'd) [com/wp-content/uploads/2018/03/UPDATED-Guidance-Summary-of-Equity-Provisions-with-6th-criterionadded-1.pdf](https://www.minoritycannabis.org/wp-content/uploads/2018/03/UPDATED-Guidance-Summary-of-Equity-Provisions-with-6th-criterionadded-1.pdf).

⁵ See, e.g., Corasaniti, N. (Nov. 28, 2018) How a Push to Legalize Pot in N.J. Became a Debate on Race and Fairness. The New York Times. Available at: <https://www.nytimes.com/2018/11/28/nyregion/legalization-marijuana-newjersey.html>.

⁶ The MCBA Model Municipal Social Equity Ordinance was drafted by NCIA Board Vice Chair and MCBA Policy Committee Co-chair Khurshid Khoja; NCIA Policy Council Staff and MCBA Policy Committee Member Chloe Grossman; NCIA and MCBA Policy Committee Member Jesse Stout; and Drug Policy Alliance Attorney and MCBA Policy Committee Member Rodney Holcombe. The Ordinance is available at <https://minoritycannabis.org/wp-content/uploads/2019/03/Final-Draft-of-MCBA-Model-Municipal-Social-Equity-Ordinance-v1.pdf>

6 Key Goals for Social Equity Programs

Implementing the best practices of the RESPECT Resolution and building on the achievements of early states through social equity programs can create a fair and equitable cannabis industry. As states and localities establish systems for the production, distribution, and retail sale of cannabis, they should strive for six key goals:

1. Repair the damage to individuals caused by discriminatory enforcement of prohibition
2. Create more equitable licensing outcomes through the application process
3. Ensure the industry reflects the local community
4. Address financial barriers to market entry
5. Support companies and individuals entering the industry from disproportionately-impacted communities
6. Invest tax revenue in communities harmed by prohibition

Together these key goals create a strategy to correct the negative impacts of cannabis prohibition on low-income and minority communities and to address the under-representation of minorities, women, and other groups in the legal cannabis industry. In the remainder of the paper, we expand upon these goals and include the best practices from the RESPECT Resolution that correspond to each one.

1. Repair the damage to individuals caused by discriminatory enforcement of prohibition

RESPECT
RESOLUTION
BEST PRACTICE

6

create an automatic process, at no cost for the individual, for the expungement or sealing of criminal records for cannabis offenses that is inclusive of individuals currently on parole or under any probationary agreement, for cannabis offenses

RESPECT
RESOLUTION
BEST PRACTICE

7

establish a process for resentencing persons serving sentences for cannabis convictions and redesignating of penalties for persons previously convicted of cannabis-related crimes for which the penalties have been reduced or removed

RESPECT
RESOLUTION
BEST PRACTICE

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eliminate punishment or other penalization for persons currently under parole, probation, or other State supervision, or released on bail awaiting trial, for conduct otherwise allowed under State cannabis laws

The damage created by criminalizing cannabis use and possession can never be erased. However, the legalization moment provides an

opportunity to begin repairing the damage. The RESPECT Resolution emphasizes the need to grasp this opportunity to invest in and begin the

process of rebuilding communities. This starts with erasing the criminal sanctions remaining from the prohibition era. The criminalization of cannabis was a mistake and the government should stop punishing those harmed by that mistake. People currently incarcerated for non-violent, cannabis-related convictions should be resentenced. People with past convictions should have access to expungement so their past conviction does not continue to haunt them. Those under correctional supervision, like parole or probation, should have the terms of their supervision revised to better reflect the state laws.

This effort should be coupled with a robust

outreach effort to help the individuals affected. People need to be connected to services and assisted with cleaning up their criminal records. As Rep. Lee's Best Practice #6 notes, expungement should be automatic. Individuals who recently lost their liberty through the court system may be hesitant to reengage with that same system to expunge their record. It would also be helpful to advise individuals on how to handle questions relating to their criminal history after their records are expunged. This is vital to helping impacted individuals find jobs and live productive lives after their incarceration, whether in the cannabis industry or any other industry.

2. Create more equitable licensing outcomes through the application process

RESPECT RESOLUTION BEST PRACTICE 2

create a system where licensing is to be obtained at the city or county level and should be based on regulations determined by the local jurisdiction that meet the State's minimum requirements, which allows the community to determine the type and number of businesses, avoids arbitrary caps on licenses, and results in an industry more representative of the local market

RESPECT RESOLUTION BEST PRACTICE 5

create more equitable licensing by (A) eliminating broad felony restrictions for licensing; (B) focusing restrictions on entering the market to those, determined on a case-by-case basis for both licensees and employees, with criminal convictions that are relevant to the owning and operating of a business; and (C) prohibiting previous cannabis convictions from consideration as justification for a denial of a license

All states legalizing cannabis should strive to have a diverse industry that is representative of their consumer base and the state more broadly. To achieve this diversity, laws and regulations must not create explicit or implicit barriers that continue to disproportionately affect certain communities. Many early state cannabis programs explicitly prohibited people with criminal records from entering the industry. As noted earlier, the criminal punishment regime attached to prohibition did not affect everyone equally. People of color were disproportionately targeted under the enforcement regime and are therefore disproportionately excluded now under these new collateral consequences. The most basic step lawmakers can take is to stop banning people

with drug convictions from the cannabis industry. Society is recognizing that the punishment regime attached to prohibition was unjust and we should not carry over the harms of the previous system to the new, legal regime.

Merely refraining from banning individuals from the industry through collateral consequences, however, is far from sufficient. Licensing processes that appear facially neutral can still lead to unequal results if applicants are starting from different places. These implicit barriers are more pervasive and, thus, harder to address. While direct legal barriers only affect certain individuals, implicit barriers affect entire communities, particularly communities of color and lower-

income communities with limited access to business capital.

Systems with a limited number of licenses and competitive assessments of qualifications typically encourage large, capital-intensive operations that often do not recoup start-up costs for several years. This scale of operation and the associated capital requirements will be much harder to achieve for businesses owned by low-income individuals and victims of systemic inequality. These systems generally also require applicants to submit financial documentation or meet minimum financial requirements. Businesses with less capital or limited access to banking will look comparatively worse than a business that can provide start-up capital,

place large sums in escrow, and fulfill other financially burdensome requirements. If this sort of competitive licensing system was used in other industries, national chains would lock up most of the licenses, effectively blocking out the locally-owned, independent shops or restaurants that build character in so many neighborhoods. Any artificially limited market with competitive bid licensing will guarantee the success of the large and national over the small and local. Therefore, any licensing system intended to promote an inclusive industry should be based upon minimum standards that all applicants must meet and should grant licenses to those who can meet those standards (as well as other local considerations, such as zoning).

3. Ensure the industry reflects the local community

RESPECT RESOLUTION BEST PRACTICE 3

in States where license caps are completely unavoidable, establish local oversight and control of cannabis licenses by allowing local cities and municipalities to prioritize licenses for local citizens and residents, especially individuals most impacted by the War on Drugs, by taking into account and prioritizing (A) long-term residency within the State or locality; (B) individuals whose income is less than 80 percent of the median household income within a county; (C) individuals who have been formerly incarcerated; (D) individuals with prior drug law violations; and (E) individuals living within a jurisdiction that is heavily policed

RESPECT RESOLUTION BEST PRACTICE 12

establish cannabis regulatory and oversight bodies and commissions that reflect the racial, ethnic, economic, and gender makeup of the surrounding community

As mentioned in the previous section, an optimal system is one in which applicants are not competing against each other for licenses, but rather compete against each other as licensed businesses in a free market. If a limited license system is nevertheless required, localities should strive to advance an inclusive industry. Prioritizing long-term residents, those with lower-incomes, and those affected most by the criminal punishment systems that accompanied prohibition will create a more inclusive, local industry that

benefits the entire community.

It is worth noting a bit of caution regarding RESPECT Resolution Best Practice #3. Establishing local control of licensing does not necessarily increase diversity of the industry. In some jurisdictions, particularly Massachusetts, we are seeing that allowing local control can actually work against an inclusive industry. This happens when municipalities use local licensing caps to make companies compete for a license.

While some municipalities in Massachusetts are prioritizing social equity and local applicants, others are prioritizing aspects like revenue generation which favor large multi-state operators. The problem exists because of the artificially limited nature of the license process. In an ideal system both the small, local operator and the large, multi-state operator should be able to open, just like most towns have both chain stores and restaurants and local small businesses competing against each other. Again, it is best to allow the market to decide the number of licenses awarded. But if licenses caps are required, the preferences

should be set in such a way that will allow small businesses to compete.

Creating an industry that reflects the community goes beyond just ensuring people of color hold some of the licenses and jobs. The regulatory structure should also reflect the community. Regulatory and oversight bodies that are comprised of individuals with diverse backgrounds, experiences, and socio-economic status will create a more just system and will be less susceptible to group think.

4. Address financial barriers to market entry

RESPECT RESOLUTION BEST PRACTICE

1

establish licensing and application fees that are reasonable to cover only the costs of program implementation and necessary regulation

Probably the most significant and difficult to overcome barriers to a diverse and inclusive industry are the high costs of entry and a lack of access to capital. The RESPECT Resolution addresses this by pointing out the problem of high licensing and application fees. But policy makers should go further; the government fees are only part of the problem.

High licensing and application fees create a major barrier to entry for individuals from lower income communities. Raising government revenue through fees on applicants rather than taxes from consumers distorts the market in favor of the largest and richest companies. Those with less access to capital and banking will be kept from even applying to enter the industry. The fees should be kept low and in proportion to the costs of the program. If the government wants to raise additional revenue from legal cannabis, it should be done through taxes, so the cost burden remains proportional, allowing small companies to survive.

In addition to application fees, policy makers should avoid laws and regulations that artificially inflate costs. Again, anything that makes it more expensive to enter the market makes it difficult for small, local companies to get a foothold hold in the industry. Compliance costs associated with hyper-specific and unnecessarily burdensome regulations regarding matters such as security equipment, personnel, and facilities may be prohibitive for businesses with less access to capital. The higher the compliance costs, the more it benefits the largest operators.

Certain populations, particularly people of color, have been systematically denied employment and wealth creation opportunities for generations. In other industries, borrowing and using small business programs can help offset a lack of capital. Cannabis companies, however, have a notoriously difficult time securing banking services. They cannot obtain small business loans from major financial institutions, nor are they eligible for any federal assistance. The fact that people of color are already more likely to be

underserved by the financial services sector and are subjected to inequitable treatment in terms of fees and loan access only exacerbates the

problem.⁷ A major effort to increase access to banking is needed.

5. Support companies and individuals entering the industry from disproportionately-impacted communities

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BEST PRACTICE**

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adopt laws and implement regulations that will allow small cultivators to thrive in the legal market

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RESOLUTION
BEST PRACTICE**

11

use a percentage of tax revenue to establish a special fund to provide small business investments to support people of color entering into the legal marijuana industry

**RESPECT
RESOLUTION
BEST PRACTICE**

13

create employment and subcontracting requirements for cannabis licensees in order to use the ancillary business activity generated by the cannabis industry to employ people of color

Beyond just breaking down barriers to entry, regulations should be set up to promote inclusion in the new industry. Entering the industry in the first wave of cannabis legalization states often required a large amount of capital, an expansive network of potential investors and vendors, and advanced business skills. New regulatory structures should chip away at this by providing opportunities to low-income and minority communities. To actually give historically disadvantaged populations a fair shot at becoming owners and operators in the new, legal cannabis market, the platitudes and good intentions must be coupled with a significant financial investment in programs that support these communities.

There are many forms that this support can take and some combination of many of them will probably be necessary to establish a successful social equity program. First, the laws need

to be designed with equity in mind. This can involve specialized licenses for smaller or local businesses, employment and subcontracting requirements that ensure diversity in ancillary businesses, and a tax system that encourages diverse licensees. Second, these equity provisions should be accompanied by equity programs. Training and mentorship programs, programs to help connect prospective entrepreneurs with sources of capital, programs to help individuals procure and afford real estate, and many other forms of assistance can help prospective applicants feel comfortable moving forward with their businesses and help eliminate the head start that experienced multi-state operators have over new entrants to the industry. These programs should also be accompanied by outreach efforts so potential entrepreneurs know what kind of support exist. Part of the tax revenue generated by legal sales should go into building and

⁷ Faber, J. & Friedline, T. (2018), The Racialized Costs of Banking. New America Available at: <https://www.newamerica.org/family-centered-social-policy/reports/racialized-costs-banking/overview/>.

funding these programs. Third, legislators and regulators should be vigilant in protecting these potential entrepreneurs from bad practices like predatory lending and leases. The current federal

scheduling of marijuana should not be a license for unscrupulous actors to take advantage of potential cannabis entrepreneurs.

6. Invest tax revenue in communities harmed by prohibition

RESPECT RESOLUTION BEST PRACTICE 10

set aside a percentage of the tax revenue from cannabis sales to be reinvested in communities that have been most affected by cannabis arrests and the drug war, which most frequently have been communities of color, including programs for job training, reentry services, expungement expenses, public libraries, community centers, programs and opportunities dedicated to youth, and health education programs

State and local cannabis laws can and should provide pathways for licensed adult-use cannabis businesses to fund reinvestment in communities that lack economic opportunity, resources, or have otherwise been disproportionately impacted by the war on cannabis and other drugs. Both government-managed and private community reinvestment funds should be considered, as well as an appropriate system of incentives and mandates to generate sufficient financial resources for real impact.

One approach is for a state legislature to enact a statutory mandate requiring that all adult-use cannabis businesses contribute to a community reinvestment fund to be allocated to select communities by an appropriate government body. Tax revenues would eventually provide a reasonably stable funding stream, but initial funding would have to be borrowed or the launch of the fund could be delayed by a year or more while the regulatory system is established and operators are licensed and become operational.

Providing incentives for businesses that voluntarily contribute to a government-managed community reinvestment fund is likely to be a less controversial approach than requiring that all or some businesses contribute through taxes or special fees. Voluntary contributions may be encouraged by offering participating businesses priority application processing, reduced renewal fees for the period in which contributions are

made, and other similar benefits.

Similarly, a privately-managed community reinvestment fund could be established and supported by cannabis business contributions, whether mandated or incentivized. For example, the state could engage in a competitive procurement process in which non-profit organizations submit proposals to provide comprehensive community reinvestment fund management on a contract basis. Alternatively, states and localities could identify eligible neighborhoods (or some other geographic unit) and provide incentives for businesses that work directly with those neighborhoods to fund reinvestment efforts that target specific community concerns. The latter option gives communities more say in how the funds are used for their benefit and encourages real engagement between businesses and impacted communities.

Potential licensees could also be required to submit community reinvestment plans, describing selected reinvestment projects that fall within approved categories or impact qualified communities. A monitoring framework would be established to ensure that licensees fulfill their obligations. Though it could be beneficial to provide the option for licensees to enter into agreements with localities or pre-established community-level governing bodies to provide funds to support approved projects in target areas, policy makers must take steps to ensure

this model is not exploited by localities. This has been the case in Massachusetts, where significant demands associated with host community agreements have given businesses with deep pockets a competitive advantage. To encourage robust investment and constructive collaboration

between impacted communities and cannabis businesses, temporary fee reductions, a seat on a rulemaking working group, or other exclusive benefits could be awarded to the businesses with top scoring community reinvestment plans.

Conclusion

The activity over the next few years will shape the cannabis market for decades. Prohibition and the enforcement of that prohibition caused pain for many, particularly communities of color. While this new legal system is being developed, policy makers should strive to reach these six goals in order to ensure that those harmed the most by the system of the past have a chance to benefit from the system of the future.



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