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"Hash"ing Out Inequality in the Legal Recreational Cannabis Industry

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“Hash”ing Out Inequality in the Legal Recreational Cannabis Industry

*Maya Rahwanji**

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I. INTRODUCTION

Marijuana. Pot. Hash. Weed. Ganja. Green. What about the green rush? That’s what people are calling the booming recreational marijuana industry – “the green rush.” In 2016, marijuana sales in the United States amounted to \$6.7 billion,¹ and by 2021, sales are projected to exceed \$20.2 billion, which projects growth larger and faster than the dot-com era.² Currently, twenty-five states have some form of legalized marijuana,³ and eight states have legalized marijuana for recreational use.⁴ According to a 2016 poll conducted by the Pew Research Center, 57% of U.S. adults say that marijuana should be made legal, compared to only 32% in 2006.⁵

¹ Debra Borchardt, *Marijuana Sales Totaled \$6.7 Billion in 2016*, FORBES (Jan. 13, 2017, 9:00 AM), <https://www.forbes.com/sites/debraborchardt/2017/01/03/marijuana-sales-totaled-6-7-billion-in-2016/#3e463a3975e3>.

² *Id.* (citing *The State of Legal Marijuana Markets, 5th Ed., Executive Summary*, THE ARCVIEW GROUP, https://arcviewgroup.com/documents/report/5thedition/es/executive-summary_the-state-of-legal-marijuana-markets_5th-edition_22qxqmRQPyp7R.pdf).

³ *State Info*, NORML, <http://norml.org/states> (last visited Mar. 9, 2018). Those states include: Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, and Vermont.

⁴ *See* NORML, *supra* note 3. Those states include: Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington.

⁵ Abigail Geiger, *Support for Marijuana Legalization Continues to Rise*, PEW RESEARCH CENTER (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>; *see also* Jennifer DePinto, et al., *Marijuana Legalization Support at All-Time High*, CBS NEWS (Apr. 20, 2017, 11:57 AM), <https://www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high/?ftag=CNM-00-10aab7e&linkId=36695112>. The poll notes that 61% of Americans think marijuana use should be legal (a 5-point increase from 2016), 88% favor medical marijuana use, and 71% oppose the federal government’s efforts to stop marijuana sales and its use in states that have legalized it. It also notes that according to the same poll in July 1979, only

Nevada dispensaries, a state that only just passed its recreational marijuana initiative on election day of 2016, sold \$27.1 million worth of marijuana in their first month of operation, which is “almost double what both Colorado and Oregon sold in their first months . . . [and] almost seven times what Washington sold.”⁶ In a study published by the Marijuana Policy Group, in 2015, Colorado’s newly legalized marijuana industry created a total of 18,005 full-time employment jobs.⁷ By 2020, New Frontier predicts that the industry in Colorado has the ability to produce 300,000 jobs.⁸

It is without doubt that this new industry is profitable and creates many job opportunities, but the first question we must ask is whether this new and booming industry is profitable and accessible to everyone? Unfortunately, the answer to that question is no. In states where recreational marijuana is legal, five of the eight have some type of prohibition against the issuance of licenses to operate recreational facilities to people who have a felony conviction. In the three states⁹ where a felony conviction does not expressly prohibit obtaining a license, one’s prior felony conviction may still affect the applicant’s ability to obtain the necessary license. On its face, prohibiting those with felony convictions from obtaining licenses to operate recreational marijuana facilities does not seem like an issue at all. Rather, it seems obvious that the voters of the states who passed these recreational marijuana initiatives would not want felons opening these facilities, as it would be seen as dangerous and possibly violent to the community. But what about those people who were previously convicted of felonies for marijuana possession or distribution? What about people who were convicted prior to the passage of these recreational marijuana initiatives? Should these people be prohibited from gaining access to a new booming and profitable industry for a conviction involving a drug that is now legal in that state?

The second question we must ask is whether the prohibition of licenses

27% thought marijuana use should be legal and 69% opposed its legality.

⁶ Jenny Kane, *Nevada Marijuana Sales Hit \$27 Million in First Month*, RENO GAZETTE JOURNAL (Sept. 28, 2017, 11:31 AM), <http://www.rgj.com/story/news/marijuana/2017/09/28/nevada-marijuana-sales-hit-27-million-in-first-month-state-makes-10-million/713886001/>.

⁷ *The Economic Impact of Marijuana Legalization in Colorado*, MARIJUANA POLICY GROUP (Oct. 2016), <http://mjpolicygroup.com/pubs/MPG%20Impact%20of%20Marijuana%20on%20Colorado-Final.pdf>; see also Bruce Barcott & Gage Peake, *Special Report: Cannabis Jobs in America, 2017, Part 2, How Many Jobs Depend on Legal Cannabis in 2017?*, LEAFLY (Jan. 5, 2017), <https://www.leafly.com/news/politics/many-jobs-depend-legal-cannabis-math> (estimating that there are currently 122,814 full-time legal cannabis jobs in the United States).

⁸ Debra Borchardt, *Marijuana Industry Projected To Create More Jobs Than Manufacturing by 2020*, FORBES (Feb. 22, 2017, 10:51 AM), <https://www.forbes.com/sites/debraborchardt/2017/02/22/marijuana-industry-projected-to-create-more-jobs-than-manufacturing-by-2020/#272cef053fa9>.

⁹ California, Oregon, Washington.

to those with felony marijuana convictions affects the population equally, as the data shows that “marijuana use is roughly equal among whites and blacks.”¹⁰ The answer to this question is a resounding no. Despite roughly equal usage rates, blacks are 3.73 times more likely to be arrested for marijuana possession.¹¹ Because of this heightened likelihood of arrest for blacks, it follows that conviction rates for blacks are also higher.¹² Therefore, blacks and other minorities are significantly more likely to be affected by these statutory restrictions refusing to grant licenses to those with felony convictions.¹³ Because of the disparate and discriminatory enforcement of marijuana arrest rates, minorities are effectively blocked from entering this new market.

The third question we must ask is how can we solve this inequality. This comment examines various solutions to tackle this exact question. In this comment, I will explain and examine the specific state regulations and novel approaches to the issuance of these licenses, as seen in Colorado, Oregon, and Washington. I also will examine international legal marijuana frameworks used in Uruguay and in the Netherlands, where I will attempt to apply these regimes to the eight states where marijuana is legal. At the end of this comment, I will conclude that the best solution is one that would legalize recreational marijuana nationwide, under federal law, but allow the states to control sales within their states so as to continue to profit from the sales.

¹⁰ ACLU, *Report: The War on Marijuana in Black and White*, ACLU (June 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white>. “[M]arijuana arrests have increased between 2001 and 2010 and now account for over half (52%) of all drug arrests in the United States, and marijuana possession arrests account for nearly half (46%) of all drug arrests.”

¹¹ *Id.*

¹² See generally Josh Salman & Emily Le Coz, *Gainesville’s War on Drugs*, HERALD TRIBUNE (Dec. 12, 2016), <http://projects.heraldtribune.com/bias/alachua/> (noting that in Gainesville, in 2014 and 2015, “three-quarters of those arrested for misdemeanor pot by the Gainesville Police Department in 2014 and 2015 were Black.” Once in court, only five in ten—compared to eight in ten whites—are offered pretrial division “which allows them to avoid jail through a drug program or probation.”; *Code Switch: A Weed Boom but for Whom*, NATIONAL PUBLIC RADIO (Sept. 18, 2017, 3:41 PM) (downloaded using iTunes). “In a place like Louisiana, you still have people like Corey Ladd who received a 17-year sentence for possessing half an ounce of marijuana. You still have someone like Fate Winslow who acted as a go-between in a sale of two small bags of marijuana worth \$10, who received a sentence because of recidivist statutes of life without parole.”

¹³ See NEKIMA LEVY-POUNDS, *Going Up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV’T L. REV. 563, 567-68 (2013).

II. BACKGROUND AND GROWTH OF THE LEGAL RECREATIONAL MARIJUANA INDUSTRY

A. *Legal Status of Marijuana in the United States*

The election of 2012 was a historic one. The United States re-elected President Barack Obama, its first Black president; however, the re-election of President Obama was not the only major victory on the night of November 9. For the first time in history, two states, Colorado and Washington, voted to legalize recreational marijuana. This was not only an electoral first for the United States, but also one for the world.¹⁴ A little more than one year later, on January 1, 2014, Colorado officially opened its first recreational dispensaries.¹⁵

Despite the passage of these initiatives and the creation of state-run regimes, marijuana remains illegal under federal law. Under the Controlled Substances Act, ‘marihuana’¹⁶ is classified as a Schedule I drug, and it is illegal to possess, use, and distribute the drug.¹⁷ Therefore, the dispensary openings based on newly enacted state recreational marijuana laws lead to questions and uncertainty.

On August 29, 2013, then-Deputy Attorney General James M. Cole released a memorandum, hereinafter known as the “Cole Memo,” for all United States Attorneys that described guidelines created by the Department of Justice regarding marijuana enforcement.¹⁸ In summary, the Cole Memo indicated that federal prosecutors and law enforcement agents should focus their enforcement resources, efforts, and prosecutions to prevent particular marijuana-related conduct like, “preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels.”¹⁹ The Cole Memo then explains the traditional use of state and

¹⁴ *Ballot Measures, A liberal drift*, THE ECONOMIST (Nov. 10, 2012), <https://www.economist.com/news/united-states/21565972-local-votes-suggest-more-tolerant-country-but-not-more-left-wing-one-liberal-drift>.

¹⁵ Jack Healy, *Up Early and in Line for a Marijuana Milestone in Colorado*, THE NEW YORK TIMES (Jan. 1 2014), <https://www.nytimes.com/2014/01/02/us/colorado-stores-throw-open-their-doors-to-pot-buyers.html> (noting that Washington’s regime would not be fully up-and-running until June 2014).

¹⁶ 21 U.S.C. § 812(c)(10)(2012)(noting that this is spelling used in the federal statute).

¹⁷ *Id.* Schedule I [encompasses] “(A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.”

¹⁸ U.S. DEPT. OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., MEM. LETTER (Aug. 29, 2013) <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹⁹ *Id.* In total, the memo mentions eight specific marijuana enforcement priorities that are particular important to the federal government which include: “preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; preventing state-

local law enforcement agencies to address marijuana activity in each respective state and that should a state choose to enact its own marijuana laws, the federal government should exercise its discretion by not interfering with these state-run regimes or enforcement, unless the state marijuana regime threatens one of the particular marijuana-related conduct considerations mentioned in the memorandum.

Since the issuance of the Cole Memo, the administration has changed, as has its approach to state marijuana regimes. Most recently, Attorney General Jeff Sessions rescinded the Cole Memo, announcing that the Justice Department would be returning to the rule of law and would pursue prosecutions of marijuana pursuant to the Controlled Substances Act of 1970.²⁰ In an attempt to downplay the effect of this decision, Sessions explained that the memo “simply directs all U.S. Attorneys to use previously established prosecutorial principles . . . to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime. . . .”²¹ This change was not only inconsistent with Attorney General Sessions’s previous statements,²² but also the President’s.²³ Attorney General Sessions attempted to reconcile this inconsistency by clarifying that the Justice Department has limited resources and that DOJ prosecutors must decide what cases to bring forward by considering “all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution,

authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and preventing marijuana possession or use on federal property.”

²⁰ U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTORNEY GEN., MEM. LETTER (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

²¹ *Id.*

²² Tom Angell, *Sessions Says Obama Marijuana Memo is Valid*, MASSROOTS (March 17, 2017), <https://www.massroots.com/news/sessions-says-obama-marijuana-memo-is-valid/>. “[T]he Cole Memorandum set up some policies under President Obama’s Department of Justice about how cases should be selected in those states and what would be appropriate for federal prosecution, much of what I think is valid . . . [T]he federal government would not be able to enforce its remaining marijuana prohibition laws across the board in states with legislation.”

²³ Matt Zapotosky, et al., *Use of legalized marijuana threatened as Sessions rescinds Obama-era directive that eased federal enforcement*, THE WASHINGTON POST (Jan. 4, 2018), https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175_story.html?utm_term=.452e742fac94 (quoting <https://twitter.com/BrandonRittiman/status/759153294476386304>) “Even President Trump had said in 2016 that he would not use federal authority to shut down sales of recreational marijuana and instead believed the matter should be left up to the states.”

and the cumulative impact of particular crimes on the community.”²⁴

Despite this rescission, it is unclear whether U.S. Attorneys will change their current practices in marijuana enforcement;²⁵ however, there has been bipartisan Congressional support criticizing Sessions’ rescission²⁶ arguing that this infringes on states’ rights, as well as has the potential to impact economic development and harm “jobs, small businesses, state infrastructure, consumers, minorities, and patients.”²⁷ While only time will show how this rescission affects marijuana policy and enforcement, there is still strong bipartisan support, as well as public support, for the continuing expansion of recreational and medicinal marijuana.

B. Profitability of the Legal Recreational Marijuana Industry

The support for marijuana legalization comports with the “laboratories of democracy” principle which reasons that “[A] . . . State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁸ The legalization of recreational marijuana in these eight states is exactly that. It is an experiment that allows the states to foster innovation, create jobs, and importantly to increase revenue both for the states and for their citizens. Therefore, naturally people were excited—not only about the opportunity to purchase and use marijuana but also about the opportunity to profit from this new regime. In its first year in Colorado, the legal marijuana industry was valued at \$700 million, with retailers selling \$313 million for purely recreational purposes.²⁹ The possibility for profit is astounding.³⁰ Since its

²⁴ See U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTORNEY GEN., MEM. LETTER (Jan. 4, 2018), *supra* note 20.

²⁵ Phil Fairbanks, *Federal Prosecutor Unlikely to Pursue Low-Level Marijuana Crimes Despite Sessions Memo*, THE BUFFALO NEWS (Jan. 27, 2018), <http://buffalonews.com/2018/01/27/federal-prosecutor-unlikely-to-pursue-low-level-marijuana-crimes-despite-sessions-memo/>; U.S. Attorney James P. Kennedy Jr., a Sessions appointee, stated that the memo is “simply telling us [U.S. Attorneys] to do our jobs” and that his office will continue to focus on “the worst of the worst.”; see also Rebecca Savransky, *Colorado Governor Looking into Dismissing Convictions for Nonviolent Pot Offenders*, THE HILL (Feb. 5, 2018), <http://thehill.com/homenews/state-watch/372374-colorado-governor-looking-into-dismissing-convictions-for-non-violent>. “The U.S. Attorney for the District of Colorado said . . . his office wouldn’t change how it prosecutes marijuana-related offenses, despite changes to the federal guidance.”

²⁶ Letter from Members of Congress of the United States, to President Donald Trump (Jan. 25, 2018)(on file with Congress of the United States) https://www.warren.senate.gov/files/documents/2018_01_25%20Letter%20to%20Trump%20on%20Sessions%20withdrawal%20of%20the%20Cole%20memo.pdf

²⁷ *Id.*

²⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁹ Christopher Ingraham, *Colorado’s Legal Weed Market: \$700 Million in Sales Last Year, \$1 Billion by 2016*, THE WASHINGTON POST (Feb. 12, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/02/12/colorados-legal-weed-market-700-million-in-sales-last-year-1-billion-by-2016/?utm_term=.b3f3e1f3e90a.

legalization in these eight states, research shows that in 2021, the expected spending in North America on legal cannabis will be \$14.9 billion,³¹ and estimates a 25% compound growth rate from 2016 to 2021.³² In the 2015-2016 period, 135 companies, both public and private, completed a total of \$2 billion in capital raises in the marijuana industry.³³ The industry is growing so rapidly that in August 2017, Vangst Talent Agency launched Vangster.com, i.e., “the Monster.com of weed.”³⁴ The job site serves as a platform for cannabis employers to connect and to find potential employees.³⁵ The opportunities within the industry are not only vast but also profitable. However, while the “American Dream” tells us to dream big and work hard, for some people, it is not that easy.

III. STATUTORY REQUIREMENTS TO START A LEGAL RECREATIONAL MARIJUANA FACILITY IN STATES WHERE RECREATIONAL MARIJUANA IS LEGAL

In order to profit from this new and exciting industry, for a person seeking to open a dispensary, she needs a license to legally operate a commercial marijuana business in the state.³⁶ While the licensing laws vary

³⁰ See Joshua Miller, *In Colorado, a Look at Life after Marijuana Legalization*, THE BOSTON GLOBE (Feb. 22, 2016), <https://www.bostonglobe.com/metro/2016/02/21/from-colorado-glimpse-life-after-marijuana-legalization/rccuzhMDWV74UC4IxXIYJ/story.html>. “Sally Vander Veer, president of one of the state’s largest dispensaries and cultivation operations . . . has 70 employees and a payroll of about \$3.8 million a year.”

³¹ See The Arcview Group, *The State of Legal Marijuana Markets, 5th Ed., Executive Summary*, THE ARCVIEW GROUP, https://arcviewgroup.com/documents/report/5thedition/es/executive-summary_the-state-of-legal-marijuana-markets_5th-edition_22qxqmRQPyp7R.pdf. In 2016, the average sales of recreational dispensaries in Colorado, Oregon, and Washington were \$1.98 million, \$ 672 thousand, and \$1.55 million, respectively. *Id.* at 17.

³² See *id.* (noting that the only industry that has exceeded this compound growth rate in the last 30 years is the broadband internet industry which saw a 29% compounding growth rate).

³³ *Id.* See also Richard Pollack, *Silicon Valley Sees Mega-Profits in Marijuana’s ‘Green Rush’*, THE DAILY CALLER (Jan. 6, 2016), <http://dailycaller.com/2016/01/06/silicon-valley-sees-mega-profits-in-marijuanas-green-rush/> (noting that ArcView, a California based capital investment group, has “\$61 million available for marijuana start-ups”).

³⁴ See Tristan Greene, *Vangsters is the Monster.com of Weed*, THE NEXT WEB (Sept. 1, 2017), <https://thenextweb.com/tech/2017/08/31/cannabis-industry-gets-an-indeed-for-weed-with-vangsters/>; see also VANGSTERS, <https://www.vangsters.com> (last visited Jan. 24, 2018).

³⁵ See Courtney Connely, *Meet the 24-Year-Old Founder Behind the Career Site for Cannabis Jobs*, CNBC (Oct. 18, 2017), <https://www.cnn.com/2017/10/18/meet-the-24-year-old-founder-behind-the-career-site-for-cannabis-jobs.html>. “There are 12,000 candidates, 53 companies, and roughly 200 jobs openings on the platform [since launching the site in August 2017].”

³⁶ See SETTING UP A LEGAL MARIJUANA BUSINESS: STATE LAWS TO KNOW, <http://smallbusiness.findlaw.com/business-laws-and-regulations/setting-up-a-legal-marijuana-business-state-laws-to-know.html> (last visited Mar. 9, 2018); STATE OF ALASKA, DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT, ALCOHOL AND

among the states, all eight states either have created, or are in the process of creating, a local board or commission to review commercial marijuana applications and issue the appropriate license.

A. *Alaska*

In Alaska, a marijuana establishment will not be registered to a person who is an owner, officer, or agent of the marijuana establishment that has been convicted of a felony.³⁷

B. *California*

California, one of the most recent states to allow the sale of recreational marijuana, takes a particularly progressive approach to its issuance of licenses. In submitting an application for a license, one must provide “a detailed description of the . . . operating procedures,³⁸ . . . a detailed diagram of the premises,³⁹ [and] fingerprint images and related information . . . [to her] record of state or federal convictions and arrests.”⁴⁰ While an applicant is required to provide information regarding her criminal history, with respect to drug-related felony convictions, an application will be denied⁴¹ only if the conviction was for drug trafficking of substances containing “heroin, cocaine base, cocaine, methamphetamine, amphetamine, or phencyclidine.”⁴² Specifically excluded from the drug-related felony convictions is marijuana. This approach is unique to California, and legislative history shows that it was included to address

MARIJUANA CONTROL OFFICE, <https://www.commerce.alaska.gov/web/amco/Home.aspx> (last visited Mar. 9, 2018); CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS, BUREAU OF CANNABIS CONTROL, <http://www.bcc.ca.gov> (last visited Mar. 9, 2018); COLORADO, DEPARTMENT OF REVENUE, MARIJUANA ENFORCEMENT DIVISION <https://www.colorado.gov/pacific/enforcement/marijuanaenforcement> (last visited Mar. 9, 2018); MASSACHUSETTS, CANNABIS CONTROL COMMISSION <https://www.mass.gov/orgs/cannabis-control-commission> (last visited Mar. 9, 2018); MAINE, DIVISION OF PUBLIC HEALTH SYSTEMS, <http://www.maine.gov/dhhs/mecdc/public-health-systems/mmm/index.shtml> (last visited Mar. 9, 2018); STATE OF NEVADA, DEPARTMENT OF TAXATION, https://tax.nv.gov/FAQs/Marijuana_Proposed_Temporary_Regulation_T002-17/ (last visited Mar. 9, 2018); OREGON LIQUOR CONTROL COMMISSION, <http://www.oregon.gov/olcc/marijuana/Pages/default.aspx> (last visited Mar. 9, 2018); WASHINGTON STATE LIQUOR AND CANNABIS BOARD, <https://lcb.wa.gov> (last visited Mar. 9, 2018).

³⁷ ALASKA STAT. § 17.38.200(i) (2018). “A marijuana establishment may not be registered ... if a person who is an owner, officer, or agent of the marijuana establishment has been convicted of a felony and either 1) less than five years have elapsed from the time of the person’s conviction; or 2) the person is currently on probation or parole for that felony.”

³⁸ CAL. BUS. & PROF. CODE § 26051.5(b) (2017).

³⁹ *Id.* at (c).

⁴⁰ *Id.* at (a)(1).

⁴¹ *Id.* at (c).

⁴² CAL. HEALTH & SAFETY CODE §§ 11370.4, 11054 (2017).

“racially, ethnically, and economically diverse populations.”⁴³

C. Colorado

In Colorado, a person who has been convicted of a felony within five years of their license application date will be denied the license.⁴⁴

D. Maine

In Maine, the statute does not explicitly prohibit those who have criminal records from obtaining licensure, but it notes that a person who has been convicted of a “disqualifying drug offense” within the past ten years will be denied licensure.⁴⁵ In issuing the applicable licensure, the state licensing authority and municipality may have access to an applicant’s criminal history record, which it may take into consideration; however, if it does, it must also consider other evidence and information provided by the applicant regarding such criminal history record.⁴⁶

E. Massachusetts

In Massachusetts, the license will be issued so long as “an individual who will be a controlling person of the proposed marijuana establishment has not been convicted of a felony.”⁴⁷

⁴³ S.B. 94, 2017-2018 Reg. Sess. (Cal. 2017).

⁴⁴ COLO. REV. STAT. § 12-43.4-306(g)(I)-(II) (2016). “A person who: (I) Has discharged a sentence for a conviction of a felony in the five years immediately preceding his or her application date; or (II) Has discharged a sentence for a conviction of a felony pursuant to any state or federal law regarding the possession, distribution, manufacturing, cultivation, or use of a controlled substance in the ten years immediately preceding his or her application date or five years from May 28, 2013, whichever is longer; except that the licensing authority may grant a license to a person if the person has a state felony conviction based on possession or use of marijuana or marijuana concentrate that would not be a felony if the person were convicted of the offense on the date he or she applied for licensure.”

⁴⁵ 7 M.R.S.A. § 2447(1)(B) (Maine Jan. 2017) “A person who has been convicted of a disqualifying drug offense may not be a licensee. For purposes of this paragraph, “disqualifying drug offense” means a conviction for a violation of a state or federal controlled substance law that is a crime punishable by imprisonment for 5 years or more. “Disqualifying drug offense” does not include an offense for which the sentence, including any term of probation, incarceration or supervised release, was completed 10 or more years prior to application for licensure or an offense that consisted of conduct that is permitted under this chapter.”

⁴⁶ § 2447(2) “In the event the state licensing authority or municipality considers the applicant’s criminal history record, the state licensing authority or municipality shall also consider any information provided by the applicant regarding such criminal history record, including, but not limited to, evidence of rehabilitation, character references and educational achievements, especially those items pertaining to the time between the applicant’s last criminal conviction and the consideration of the application for a license.”

⁴⁷ M.G.L.A. 94G § 5(b)(4) (Mass. Dec. 2016). The license will be issued so long as “an individual who will be a controlling person of the proposed marijuana establishment has not been convicted of a felony, or convicted of an offense in another state that would be a felony

F. Michigan

In November 2018, Michigan became the first state in the Midwest to legalize recreational marijuana. The Michigan legislature has passed some initial legislation with respect to the overall framework of regulating and taxing recreational cannabis,⁴⁸ but it has not yet finalized the regulations and the state has neither started allowing sales of recreational marijuana nor has issued licenses for operating legal dispensaries.⁴⁹ Therefore, Michigan's laws will not be discussed in this note.

G. Nevada

In Nevada, the state expects that its permanent regulations will govern the adult-use marijuana program beginning in early 2018, but the state has passed temporary regulations to govern until that time. Those temporary regulations state that one of the conditions for approval is that the owner of the marijuana establishment must not have been convicted of an "excluded felony offense,"⁵⁰ and must not have served as an owner for a medical marijuana establishment that had its license revoked.⁵¹

in the commonwealth, except a prior conviction solely for a marijuana offense or solely for a violation of section 34 of chapter 94C of the General Laws."; M.G.L.A. 94C § 34 ("No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. . . Any person who violates this section by possession of more than one ounce of marihuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. . . . any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not previously been convicted of any offense pursuant to the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed), unless the offense involved distribution of a controlled substance, including marijuana, to a minor."

⁴⁸ M.C.L.A. 333.27951 (Dec. 2018).

⁴⁹ Larry Gabriel, *Pot is Legal in Michigan this Week, but There's Nowhere to Buy It*, DETROIT METRO TIMES (Dec. 5, 2018), <https://www.metrotimes.com/detroit/pot-is-legal-in-michigan-this-week-but-theres-nowhere-to-buy-it/Content?oid=18493578>.

⁵⁰ N.R.S. c.453D.030(6) (Nev. 2017) "Excluded felony offense" means a conviction of an offense that would constitute a category A felony if committed in Nevada or convictions for two or more offenses that would constitute felonies if committed in Nevada. "Excluded felony offense" does not include: (a) A criminal offense for which the sentence, including any term of probation, incarceration, or supervised release, was completed more than 10 years ago; or (b) An offense involving conduct that would be immune from arrest, prosecution, or penalty pursuant to chapter 453A of NRS, except that the conduct occurred before the effective date of chapter 453A of NRS (October 1, 2001), or was prosecuted by an authority other than the State of Nevada."

⁵¹ N.R.S. c.453D.210(f)(1)-(2) (Nev. 2017) "The persons who are proposed to be

H. Oregon

Unlike all the other state statutes, Oregon's marijuana statute does not deny a license solely because an applicant has a felony. Additionally, it carves out specific instances where the commission cannot consider past convictions when deciding whether to grant a license. The commission may refuse to issue a license or may issue a restricted license to an applicant if the commission makes a finding that the applicant has been convicted of violating a federal law, state law, or local ordinance if the conviction is substantially related to the fitness and ability of the applicant to lawfully carry out activities under the license.⁵²

I. Washington

Washington's procedure is similar to Oregon's in that their application review process is more holistic. When the Washington State Liquor Control Board (WSLCB) processes a criminal history check on an applicant, it uses a point system to determine if the person qualifies for a license.⁵³ The WSLCB will not normally issue a marijuana license or renew a license to an applicant who has accumulated eight or more points as indicated.⁵⁴

While the states differ on the specificities and requirements of the licensure procedure, the majority of states do consider a prior felony conviction enough to warrant a denial of an application.

IV. RACIAL EXCLUSION OF MINORITIES WITHIN THE LEGAL RECREATIONAL MARIJUANA INDUSTRY

A. Racist Roots of Marijuana Prohibition and Racial Disparities in Its Enforcement

The cannabis plant, also known as hemp, has been grown in the United

owners, officers, or board members of the proposed marijuana establishment:

- (1) Have not been convicted of an excluded felony offense; and
- (2) Have not served as an owner, officer, or board member for a medical marijuana establishment or a marijuana establishment that has had its registration certificate or license revoked."

⁵² O.R.S. § 475B.045(3) (Ore. 2017). "Notwithstanding subsection (2)(d) of this section, in determining whether to issue a license or a restricted license to an applicant, the commission may not consider the prior conviction of the applicant or any owner, director, officer, manager, employee, agent or other representative of the applicant for: (a) The manufacture of marijuana, if (b) The delivery of marijuana to a person 21 years of age or older, if: (A) The date of the conviction is two or more years before the date of the application; and (B) The person has not been convicted more than once for the manufacture or delivery of marijuana; or (c) The possession of marijuana."

⁵³ Washington has an extensive marijuana license application process where it investigates each applicant individually. The details are set forth in WAC 314-55-020 (Wash. 2017).

⁵⁴ WAC 314-55-040(1)-(3) (Wash. 2017).

States as early as the time of the Founding Fathers.⁵⁵ Primarily it was used to make fabric or rope, or it was ingested for medicinal purposes; however, beginning in the early 1900s, in Texas border-towns, people began to smoke it. From the outset, marijuana was classified as a drug that was not only dangerous but also connected to minorities, specifically people of color.⁵⁶ This sparked the start of a campaign and eventual ban of marijuana led by then commissioner of the Federal Bureau of Narcotics Harry Anslinger. Anslinger claimed that marijuana 1) caused insanity; 2) pushed people to commit horrible and violent crimes; and 3) is seriously addictive;⁵⁷ and he pushed for harsh penalties that included mandatory minimum sentences at both the federal and state level.⁵⁸

Believing that drug trafficking and usage had reached a new high, Congress declared a “war on drugs” and enacted the Anti-Drug Abuse Acts of 1986 and 1988, and the Sentencing Reform Act of 1984 in order to reduce the flow of drug trafficking and get tough on crime.⁵⁹ While the laws were enacted to sentence kingpins and high-level dealers, as Congress believed punishing those would serve as a deterrence to others, the reality was that the majority of people sentenced to mandatory minimums were those who committed lower-level nonviolent offenses.⁶⁰ These mandatory minimums put in place by the “war on drugs” have caused excessive incarceration rates, causing the United States to have the highest

⁵⁵ *Fresh Air: How The Cannabis Catch-22 Keeps Marijuana Classified As a Harmful Drug*, NATIONAL PUBLIC RADIO (Oct. 12, 2016), <http://www.npr.org/templates/transcript/transcript.php?storyId=497586908>.

⁵⁶ Brent Staples, *The Federal Marijuana Ban Is Rooted in Myth and Xenophobia*, THE NEW YORK TIMES, Opinion (July 24, 2014), <https://www.nytimes.com/2014/07/30/opinion/high-time-federal-marijuana-ban-is-rooted-in-myth.html>; see also MATTHEW A. CHRISTENSEN, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. L. & POL’Y REV. 229, 232 (Winter 2010) “Marijuana was associated with Mexicans, and whites feared that it predisposed them to crime. Indeed, racial prejudice against Mexicans and a lack of objective analysis were key factors in the passage of the first federal anti-marijuana legislation in 1937.”

⁵⁷ *Id.* See also GENE TARAS, Note, *High Time for Change: How Legalizing Marijuana Could Help Narrow the Racial Divide in the United States*, 24 CARDOZO J. INT’L & COMP. L. REV. 565, 568, (Spring 2016) “In front of Congress, Anslinger . . . claim[ed] that there are 100,000 total marijuana smokers in the US, and most are Negroes, Hispanics, Filipinos, and entertainers. Their Satanic music, jazz and swing, result from marijuana usage. This marijuana usage causes white women to seek sexual relations with Negroes, entertainers, and any others.”

⁵⁸ See CHRISTENSEN *supra* note 56, at 232 (citing RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *The Marijuana Conviction: A History of Marijuana Prohibition in the United States*, at xi (2d ed., The Lindesmith Center 1999) (1974) (noting that Anslinger’s claims were not based on science but rather “shameless propaganda, racism, and xenophobia”).

⁵⁹ NEKIMA LEVY-POUNDS, *Going Up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV’T L. REV. 563, 567-68 (2013).

⁶⁰ *Id.* at 568.

incarceration in the world.⁶¹

In *U.S. v. Booker*, the Supreme Court held unconstitutional the federal sentencing statute that makes the Federal Sentencing Guidelines mandatory and instead found that the statute made the Guidelines “effectively advisory.” While this was seen as a win for the end of mandatory minimum sentencing, the ruling applies to prospective sentences only and does not address any person who was previously sentenced under the prior regime.⁶² Therefore, a person who was previously convicted for felony marijuana possession and was sentenced to the mandatory minimum sentence cannot claim any relief under the holding from *Booker*.

B. Arrest and Conviction Data Disparity Between Whites and Minorities

People of color make up sixty percent of the people in U.S. prisons compared to their white counterparts who account for only thirty-nine percent.⁶³ Despite using and selling drugs at similar, or lower rates to whites, minorities, specifically blacks and Latinos, are significantly more likely to be arrested for drug charges.⁶⁴ In a report published by the ACLU,

⁶¹ Michelle Ye Hee Lee, *Yes U.S. Locks People up at a Higher Rate than Any Other Country*, THE WASHINGTON POST (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.d8024c95ac90.

⁶² *United States v. Booker*, 543 U.S. 220, 245 (2005).

⁶³ Center for American Progress, *8 Facts You Should Know About the Criminal Justice System and People of Color*, CENTER FOR AMERICAN PROGRESS (June. 28, 2015) <https://www.americanprogress.org/issues/race/news/2015/05/28/113436/8-facts-you-should-know-about-the-criminal-justice-system-and-people-of-color/> (citing Prison Policy Initiative <https://www.prisonpolicy.org/profiles/US.html#disparities>) (noting that blacks make up 13% of the population but 40% of those incarcerated; Latinos make up 16% of the population but 19% of those incarcerated; Whites make up 64% of the population but 39% of those incarcerated.).

⁶⁴ See generally Human Rights Watch, *US: Drug Arrests Skewed by Race, National Data on 1980-2007 Cases Show Huge Disparities*, HUMAN RIGHTS WATCH, (Mar. 2, 2009), <https://www.hrw.org/news/2009/03/02/us-drug-arrests-skewed-race>. The report noted that from 1980 through 2007, adult African Americans were arrested on drug charges 2.8 to 5.5 times as high as their white counterparts; Kristin Samuelson, *Among Delinquent Teens, Whites More Likely than Blacks to Abuse Hard Drugs*, NORTHWESTERN UNIVERSITY (Mar. 17, 2016), <https://news.northwestern.edu/stories/2016/03/race-delinquent-youth-substance-use-disorder>. In the study, which lasted for 12 years following a person’s juvenile detention, researchers found “that African Americans are less likely than other racial/ethnic groups to abuse hard drugs. Yet, African Americans are disproportionately incarcerated for drug crimes.”; The Editorial Board, *Race and Marijuana Arrests*, THE NEW YORK TIMES (Nov. 25, 2016), https://www.nytimes.com/2016/11/25/opinion/race-and-marijuana-arrests.html?_r=0. The article discussed that Mayor Bill DeBlasio’s efforts to cut back the police’s efforts in arrests for possession of minimal amounts of marijuana, racial disparity in marijuana arrests in New York City are still present. It noted that “about 85% of those arrested over trivial amounts of marijuana in the first nine months of this year [2016] were Black or Latino.”; ACLU, *A Living Death, Life Without Parole for Nonviolent Offenses*, ACLU (Nov. 2013), <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=158>. According to the report, in the federal system, of all the inmates sentenced to Life Without

the data showed that “marijuana use is roughly equal among blacks and whites, yet blacks are 3.73 times more likely to be arrested for marijuana possession.”⁶⁵ This report found that the racial disparities in arrests for marijuana possession are as staggering regardless of state or city.⁶⁶ “The differences can be found only in their degrees of severity.” Despite changes in public opinion regarding marijuana, as seen through the passage of state marijuana legalization for both recreational and medicinal use, minorities have consistently higher arrest and conviction rates for marijuana possession.⁶⁷

C. Effect on the Recreational Marijuana Industry

Michelle Alexander explains the irony of marijuana legalization and the growth of the profitable new industry:

Here are white men poised to run big marijuana businesses, dreaming of cashing in big—big money, big businesses selling weed—after 40 years of impoverished black kids getting prison time for selling weed, and their families and futures destroyed. Now, white men are planning to get rich doing precisely the same thing.⁶⁸

Aside from needing money to start and grow a marijuana dispensary, something many minorities lack, as I previously discussed in Part III, every state with a legalized marijuana regime either precludes one with a prior felony conviction from being able to open a dispensary, or takes a prior

Parole for nonviolent crimes, which accounted for 77.1% of the crimes, 60% of inmates were black, 21.1% were Latino, compared to only 16.4% of inmates who were white.

⁶⁵ ACLU, *The War on Marijuana in Black and White*, *supra* note 10, at 9.

⁶⁶ *Id.* “In 2010, the black arrest rate for marijuana possession was 716 per 100,000, while the white arrest rate was 192 per 100,000. . . . The racial disparities are as staggering in the Midwest as in the Northeast, in large counties as small, on city streets as on country roads, in counties with high median family incomes as in counties with low median family incomes. . . . The racial disparities in marijuana arrest rates are ubiquitous.”; *see also* Salman & Le Coz, *supra* note 12 (noting that in Gainesville, in 2014 and 2015, “three-quarters of those arrested for misdemeanor pot . . . were black” and once in court, only five in ten—compared to eight in ten whites—are offered pretrial diversion, which allows them to avoid jail through a drug program or probation.” Based on the arrest reports, the police arrested at least one person between the ages of 18-30 per day.).

⁶⁷ Richy Rosario, *Marijuana Related Arrests Skyrocket In Colorado For Black and Latino Minors*, VIBE (May 11, 2016), <https://www.vibe.com/2016/05/marijuana-arrests-colorado-skyrocket-black-latino/> (reporting that despite Colorado and Washington’s legalization of marijuana in 2012, from 2012-2014, there was an 8% decrease in juvenile arrests of white children aged 10-17 but a 58% increase in black children of the same age and a 29% of Latino children. The article also noted that in 2014, black adults were arrested for marijuana related crimes at almost triple the number of whites.).

⁶⁸ April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (March 16, 2014), <https://www.alternet.org/drugs/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison>.

felony conviction into consideration when reviewing an application for a license.⁶⁹ The irony here is that many minorities with felony convictions were charged with a crime that is now legal—selling marijuana. Grassroots initiatives are attempting to address this issue and help minorities enter the industry.⁷⁰ The Minority Cannabis Business Association has proposed new model state legislation that takes these issues into account to help alleviate some of the barriers to entry for minorities.⁷¹ While these initiatives and organizations do help increase awareness and bring attention to inequality in the industry, they have not ignited substantive legal change in the eight states that have legalized cannabis. These states are not the only places in the world where cannabis is legally sold—both the Netherlands and Uruguay have extensive and historic cannabis regimes that I believe may shed light on approaches that these eight states could take to combat the current inequality in the legalized cannabis industry.

⁶⁹ See generally Valerie Vande Panne, *Where Are Pot Inc.'s Minorities?*, THE DAILY BEAST (April 23, 2015), https://www.thedailybeast.com/where-are-pot-incs-minorities_ The article interviews Larry Gabriel, a Detroit-based marijuana writer, who notes that “in addition to states having high application fees to be involved in the business, they also preclude those convicted of a felony. In . . . many . . . African American communities, there are a very high proportion of people with felony convictions on their record. If you have a felony, you can’t get into the marijuana business” (internal citations omitted). The Associated Press, *Booming Pot Industry Offering Breaks to Entice Minority Entrepreneurs*, FORTUNE (May 31, 2017), <http://fortune.com/2017/05/31/pot-industry-minority-entrepreneurs/>. “The lack of diversity [in the recreational marijuana industry] . . . can be traced to multiple factors: rules that disqualify people with prior convictions from operating legal cannabis businesses; lack of access to banking services and capital to finance startup costs”

⁷⁰ See generally THE HOOD INCUBATOR, <http://www.hoodincubator.org/about-us> (last visited Mar. 9, 2018). “The mission of The Hood Incubator is to increase the participation of Black and Brown communities in the legal cannabis industry—as investors, owners, workers, patients, and consumers.” Specifically, the organization lobbies for marijuana policy reform that “addresses the needs and interests communities most affected by the war on drugs.”; Linda Dishman, *This Weed Warrior Is Breaking Barriers in The Marijuana Movement*, FAST COMPANY (Oct. 18, 2017), https://www.fastcompany.com/40479691/weed-warrior-wanda-james-is-breaking-barriers-in-the-marijuana-movement_ The article covers Wanda James, the owner of the first Black-owned cannabis dispensary in Colorado. Wanda discussed her brother’s prior felony conviction for marijuana possession, and because in Colorado those with prior felony convictions are unable to work in the industry, she had to fire her own brother. Wanda is an activist and politician for racial equality in the marijuana industry.; THE MINORITY CANNABIS INDUSTRY ASSOCIATION, <https://www.minoritycannabis.org/what-we-do> (last visited Mar. 9, 2018). The Minority Cannabis Business Association works to increase the number of minorities in the cannabis industry, improve cannabis perception among minorities as one that is profitable, not illegal, and inform minorities about cannabis access for both recreational and medicinal use.

⁷¹ See The Associated Press, *supra* note 69. “The Minority Cannabis Business Association has drafted model legislation for states considering new or revised marijuana laws, including language to expunge pot-related convictions and to encourage racial and gender diversity among cannabis businesses.”

V. INTERNATIONAL COMPARISON: THE NETHERLANDS AND URUGUAY

A. *The Netherlands' Approach to Recreational Marijuana*

Seen as a bucket-list destination by cannabis users worldwide, the Netherlands has allowed the sale and usage of cannabis since 1976 by making the distinction between “hard” and “soft” drugs.⁷² While it must be made clear that cannabis is not legal in the Netherlands, in 1976, after making this hard/soft distinction, the Dutch government declared a “toleration” policy regarding “soft” drugs, like cannabis, and allowed coffee shops to sell cannabis.⁷³ Under this toleration policy, while the sale of cannabis is technically illegal,⁷⁴ the Netherlands Public Prosecution Service does not prosecute coffee shops for this offense so long as they follow the laws and procedures set forth by the Dutch government.⁷⁵ Additionally, under this tolerance policy, a person will not be prosecuted for possession of small quantities of soft drugs,⁷⁶ and instead the Dutch government will focus its law enforcement and prosecution on large-scale drug operations, specifically the sale and trafficking of “hard” drugs.⁷⁷ The regulations that govern coffee shops’ sale of cannabis include the prohibition of: selling or consuming alcoholic beverages; selling to minors under the age of eighteen; selling or possessing any hard drugs; advertising the drugs; and limiting the sale of cannabis to five grams, or less.⁷⁸ Absent from the Netherlands regulations is any mention of a prior felony conviction; therefore, so long as the owner abides by the regulations of the municipality, there is no barrier to entry to the coffee shop market solely because the owner has a prior felony conviction.

⁷² JOHN FAUBION, *Reevaluating Drug Policy: Uruguay’s Effort to Reform Marijuana Laws*, 19 L. & BUS. REV. AM. 383, 386 comment (Summer 2013) (explaining that the Dutch government considers “soft” drugs, like cannabis and hash, as “less harmful to both consumer health—and society as a whole—because of their status as sedatives”).

⁷³ *Id.* (explaining that the reason the Dutch government implemented this tolerance policy because it knew that total prohibition would be ineffective and that people would use drugs regardless whether they were illegal or not).

⁷⁴ Ducan Robinson, *Dutch Parliament Votes to Permit Cannabis Cultivation*, FINANCIAL TIMES (Feb. 21, 2017), <https://www.ft.com/content/2bdd68fc-f84c-11e6-bd4e-68d53499ed71>. The Dutch Parliament passed a bill that would allow for the legal cultivation of cannabis in the Netherlands, which would allow the coffee shops to supply their shops with their own cannabis. This is the first expansion the Netherlands has seen since its creation of the tolerance policy in 1976. While the bill’s passing is a victory for cannabis proponents, it still needs to be approved by the Dutch senate.

⁷⁵ *Toleration policy regarding soft drugs and coffee shops*, GOVERNMENT OF THE NETHERLANDS, <https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> (last visited Feb. 25, 2018).

⁷⁶ *Id.* Specifically, five grams or less of marijuana or five plants or less.

⁷⁷ *See id.*

⁷⁸ *Id.* The Dutch government notes that local municipalities may impose additional rules regarding coffee shop operations.

B. Uruguay's Approach to Marijuana

Uruguay is the first country in the world to fully legalize personal recreational use of marijuana.⁷⁹ Uruguay is unique in that possession of reasonable amounts of drugs for personal use has never been a crime.⁸⁰ The impact of the illegal drug trade in South America was a central reason behind the government's decision to legalize marijuana.⁸¹ Despite Uruguay's relatively low violent crime rate, the country began to see an increase in violent crime related to the Colombian and Mexican drug-cartels, who used Uruguay to launder their money.⁸² Additionally, public concern about the increased presence and involvement of harder drugs, like cocaine, contributed to the government's decision to legalize marijuana.⁸³ The Uruguayan government's construction of the law is unique in that the government of Uruguay supplies the marijuana.⁸⁴ According to Julio Calzada, one of their public health officials who designed the regulatory model, the goal of the Uruguayan government in doing this is to avoid a competitive pot-peddling industry, like in Colorado.⁸⁵ The government created the Institute for the Regulation and Control of Cannabis (IRCCA) to facilitate the sale and distribution of cannabis to Uruguayans.⁸⁶ In order to purchase cannabis, a citizen, eighteen years or older, must register with a government database run by the IRCCA, and then may purchase up to forty grams per month from the state-run pharmacies.⁸⁷ While this approach does not permit the establishment of commercial recreational marijuana businesses and thus does not provide the same economic incentives as the eight U.S. states' approach or the Netherlands' approach, the full legalization solves the massive racial disparity of marijuana arrests and

⁷⁹ Uki Goñi, *Uruguay, the First Country Where You Can Smoke Marijuana Wherever You Like*, THE GUARDIAN (May 27, 2017), <https://www.theguardian.com/society/2017/may/27/marijuana-legalisation-uruguay-seen-half-measure-users>.

⁸⁰ Laura Graham, Note, *Legalizing Marijuana in the Shadows of International Law: The Uruguay, Colorado, and Washington Models*, 33 WIS. INT'L L.J. 140, 144–45 (Spring 2015).

⁸¹ *Id.* at 145.

⁸² *Id.*

⁸³ *Id.* at 146 (explaining that the strategy behind the law was to “steer residents away from more dangerous drugs like crack cocaine”).

⁸⁴ Nick Miroff, *In Uruguay's marijuana experiment, the government is your pot dealer*, THE WASHINGTON POST, (July 7, 2017), https://www.washingtonpost.com/world/the_americas/in-uruguays-marijuana-experiment-the-government-is-your-pot-dealer/2017/07/07/6212360c-5a88-11e7-aa69-3964a7d55207_story.html?utm_term=.5c6059fc38ff; see also GRAHAM, *supra* note 80, at 147 (“The underlying goal of the law ... [is] to undermine the illegal drug trade.”).

⁸⁵ See Miroff, *supra* note 84. “Uruguayans say their model is designed to strike a balance between prohibition and the kind of exuberant marijuana economy emerging in some U.S. states, where well-funded businesses may have incentives to encourage consumption.”

⁸⁶ *Id.*

⁸⁷ *Id.* See also Institute for the Regulation and Control of Cannabis <http://www.ircca.gub.uy> (last visited Feb. 25, 2018).

convictions in the United States.

VI. SOLUTIONS TO ENCOURAGE AND PROMOTE EQUALITY AMONG ALL: PEOPLE SEEKING TO PROFIT FROM THE GROWING RECREATIONAL MARIJUANA INDUSTRY

A. *Maine's Licensure Approach*

In Maine, the statute allows for some holistic review of applicants who have previously been convicted of a drug crime, so long as the crime did not involve a violation of a state or federal controlled substance law punishable by imprisonment for five or more years.⁸⁸ When reviewing the licensure application, the statute provides that if the state licensing authority takes into consideration a person's criminal history, it shall also consider other evidence and information provided by the applicant regarding such criminal history record.⁸⁹ This caveat allows a person with a criminal record an opportunity to explain their conviction, provide evidence of rehabilitation, and share character references as well as educational and professional achievements. This approach helps alleviate the barrier to entry to the recreational marijuana industry for those minorities who have prior felony convictions. While this consideration may help some minorities with prior felony convictions enter the market, the statute does not require that the state licensing committee grant the licensure to those applicants—the statute only states that the committee shall consider explanatory or additional evidence.

B. *Washington State's Individualistic Application Approach*

Under Washington's administrative code, the commission granting licenses for the operation of recreational marijuana facilities considers licenses on an individual basis.⁹⁰ The commission considers applications on a variety of factors and assigns applicants points when they meet certain positive criteria, or have certain negative factors, like a prior criminal record.⁹¹ This approach would significantly help those minorities with felony convictions to obtain the requisite license to open and operate recreational marijuana facilities. However, this individualistic application process may be less lenient regarding felony convictions than the administrative code may suggest. In *Haines-Marchel v. Washington State Liquor & Cannabis Board*,⁹² the appellant applied for a retail marijuana license and was selected as a first priority applicant. She then informed the

⁸⁸ See M.R.S.A. § 2447(1)(B) (Maine Jan. 2017).

⁸⁹ *Id.* at § 2447(2).

⁹⁰ See Wash. Admin. Code § 314-55-040(1)-(3) (2017).

⁹¹ *Id.*

⁹² *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 406 P.3d 1199 (Wash. Ct. App. 2017).

Board that her husband was a felon incarcerated in Washington state prison. Upon learning this information, the Board denied her license as it “assessed his criminality to her.”⁹³ Her husband filed “a written and absolute rejection of all his interest in the business in an effort to pacify the Board, but the renunciation was rejected.”⁹⁴ The Superior Court found in favor of the Board, noting the government’s interest in “removing any theoretical interest criminals may have in the marijuana business.”⁹⁵ In light of these cases, Washington’s application of an individualistic approach to issuing licenses seemingly has the same practical effect as those states with a blanket ban for those with felony convictions, even when the felony conviction involved the distribution of marijuana.

C. Post-Conviction Relief, and/or Expungement for Marijuana Related Drug Crimes

While recreational and medicinal marijuana use has become increasingly more accepted, and the push for legalization has become more public, the reality is that many American citizens, particularly minorities, still have felony convictions for marijuana possession or distributions on their records—convictions that under new state statutory law would not stand. Absent clear legislative intent, statutory construction of newly enacted legislation should be interpreted prospectively.⁹⁶ This statutory construction poses an issue unique to those seeking to obtain a license for a recreational marijuana facility. The United States is rather unique in declining to provide retroactive ameliorative relief.⁹⁷

The Colorado Supreme Court held that the State, on appeal, may not continue to prosecute possession of small amounts of marijuana of which are now legal under Amendment 64 to the Constitution of Colorado as the

⁹³ *Id.* Brief for Appellant at 5, *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 406 P.3d 1199 (Wash. Ct. App. 2017) (No. 75669-9-I).

⁹⁴ *Id.*

⁹⁵ *Id.* at 676; *see also* Opening Brief at 6, *Matter of Botany Unlimited Design and Supply, LLC*, 291 P.3d 605 (Wash. Ct. App. 2017) (No. 34202-6-III) (denying Botany’s license renewal citing Botany’s disclosure that one of its owners had a federal felony for a conspiracy to manufacture/distribute marijuana).

⁹⁶ 82 C.J.S. *Statutes* §§ 582-83, Westlaw (database updated Mar. 2019). (2017). “As a general rule, statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts or by necessary or unavoidable implication. . . . In the absence of anything in the statute to overcome it, the presumption is that a statute operates prospectively only.”

⁹⁷ Elizabeth Danquah-Brobby, Comment, *Prison for You. Profit for Me. Systemic Racism Effectively Bars Blacks from Participation in Newly-Legal Marijuana Industry*, 46 U. BALT. L.REV. 523, 528 (2017)(noting that despite the U.S.’s participation in the International Covenant on Civil and Political Rights (ICCPR), it is the only country in the ICCPR [which consists of 168 countries] that does not adhere to the ICCPR’s framework which “allows individuals, as a right, to benefit from lighter penalties if laws change after they have been convicted.”).

Amendment renders the prior statute inoperative.⁹⁸ While this helps those convicted of misdemeanors of small amounts of marijuana that are now legal under the statute, it fails to ameliorate those convicted of felony marijuana charges.⁹⁹ Therefore, we must address the review of post-felony convictions under the Amendment as well.

Oregon's approach to post-conviction relief seems more progressive. It has passed legislation regarding an applicant's prior convictions that states the Oregon Liquor Control Commission may not consider the prior conviction of an applicant for 1) the manufacture of marijuana, if the conviction was more than two years old prior to the application, and the applicant has only been convicted once; 2) the delivery of marijuana to a person twenty-one or older at least two years prior to the application, and the applicant has not been convicted more than once for the manufacture or delivery of marijuana.¹⁰⁰ While the Commission may still refuse to issue a license upon findings of the applicant's felony convictions,¹⁰¹ the statute limits the collateral consequence of conviction for manufacture and delivery to only two years. This would allow those—primarily minorities—to enter in the recreational marijuana industry two years after a conviction of possession of marijuana. According to Jenny Roberts, a law professor specializing in criminal law and sentencing, “Oregon is one of the first states to really grapple with the issue of what do you do with record of something that used to be a crime and no longer is.”¹⁰² However, it must be remembered that this is only proposed legislation and that the Oregon legislature may choose not to enact it.

⁹⁸ *People v. Boyd*, 387 P.3d 755, 757-58 (Colo. 2017) (finding that following the passage of Amendment 64, the respondent's timely appeal of her conviction of possession of 1 ounce of marijuana—which occurred prior to the passage of the Amendment—nullified the State's authority to continue to prosecute Boyd on appeal); *see also* *Russell v. People*, 387 P.3d 750, 752-53 (Colo. 2017) (holding that “once Amendment 64 became effective, the State no longer had authority to continue to prosecute Russell for her marijuana possession charge during her appeal” because the Amendment renders the criminalization of possession of less-than-one-ounce of marijuana concentrate inoperative and Russell possessed less than one ounce of concentrate).

⁹⁹ Matthew Fleisher, *Don't Just Legalize Marijuana, Free Prior Offenders*, THE LOS ANGELES TIMES (Jan. 16, 2014, 5:00 AM), <http://www.latimes.com/opinion/opinion-la/la-ol-legalize-marijuana-free-prior-offenders-20140115-story.html>. “The decision by activists not to include leniency for previous offenders in the Colorado marijuana ballot initiative (even if it would have been good policy) made perfect political sense. It's far easier to sell voters on the financial benefits of creating a lucrative new marijuana industry than it is to persuade them to open up the prison gates and set convicts free.”

¹⁰⁰ OR. REV. STAT. § 475B.045(3) (2017).

¹⁰¹ OR. REV. STAT. § 475B.045(2)(d) (2017).

¹⁰² Kirk Johnson, *Oregon's Legal Sale of Marijuana Comes With Reprieve*, THE NEW YORK TIMES (Sept. 20, 2015), https://www.nytimes.com/2015/09/21/us/oregons-legal-sale-of-marijuana-comes-with-reprieve.html?rref=collection%2Fbyline%2Fkirk-johnson&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=search&contentPlacement=5&pgtype=collection.

D. The Netherlands' "Omission" Approach

The Netherlands take a much more holistic approach to the creation and operation of coffee shops. As long as a coffee shop owner abides by the state regulations¹⁰³ and the additional local regulations, if there are any, any person—regardless of past convictions—may run a coffee shop. This approach would significantly help the prior conviction issue that many minorities face in entering the recreational marijuana industry because their prior criminal records would not be relevant. Ideally, the Netherlands approach would be the best approach; however, their stance is based on many years of a tolerance policy toward soft drugs like marijuana. Comparatively, in the United States, only eight states out of fifty have legalized marijuana for recreational use, and the drug is still illegal under federal law.¹⁰⁴ I do not believe the Netherlands' approach would be realistic unless marijuana was legalized by the federal government—which, based on the current administration's stance on marijuana,¹⁰⁵ I do not believe is likely.

E. Uruguay's Full Legalization Approach

As previously discussed, in 2017, Uruguay fully legalized the possession and distribution of marijuana through a state-sponsored

¹⁰³ See THE GOVERNMENT OF THE NETHERLANDS, *supra* note 75. Coffee shops may sell cannabis so long as they 1) do not sell or allow the consumption of 1) alcoholic drinks; 2) do not advertise the cannabis; 3) do not possess or sell hard drugs; 4) do not cause a nuisance; 5) do not allow minors to enter the premises or sell soft drugs to them; and 6) do not sell more than five grams of soft drugs per transaction.

¹⁰⁴ See Maria Perez, *Jeff Sessions is Being Sued Over U.S. Marijuana Policy by a 12-Year-Old Girl*, NEWSWEEK (Nov. 11, 2017, 5:03 PM), <http://www.newsweek.com/jeff-sessions-sued-marijuana-policy-12-year-old-girl-708951>. The Plaintiff, Alexis Bortell, a 12-year-old girl with epilepsy, claims that the federal prohibition on marijuana is unconstitutional. Bortell, who moved from Texas to Colorado to benefit from the state's medicinal marijuana statutes, uses THC oil to control her seizures. Bortell's attorney argues that currently marijuana is classified as a Schedule I drug meaning that it has no medicinal benefits and "as it pertains to cannabis, the Controlled Substances Act is irrational and thus unconstitutional." *Id.*

¹⁰⁵ See generally Kate McKee Simmons, *Trump Spokesman Predicts Greater Enforcement of Federal Marijuana Laws*, WESTWORD (Feb. 23 2017, 2:50 PM), <http://www.westword.com/news/trump-spokesman-predicts-greater-enforcement-of-federal-marijuana-laws-8823783> (writing that previous White House press secretary, Sean Spicer, said during a White House Press Briefing that he believes the administration will pursue greater enforcement of federal marijuana laws); John Wagner and Matt Zaptosky, *Spicer: Feds Could Step Up Enforcement Against Marijuana Use in States*, THE WASHINGTON POST (Feb. 23, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/23/spicer-feds-could-step-up-anti-pot-enforcement-in-states-where-recreational-marijuana-is-legal/?utm_term=.d408bf9407e8. However, the article notes that Spicer also said during the White House Press Briefing, "President Trump sees a big difference between use of marijuana for medical purposes and for recreational purposes. . . . [S]tates' allowance of marijuana for medical purposes is something the Department of Justice, I think, will be looking into." *Id.*

regulatory regime.¹⁰⁶ If applied in the United States, while this approach would address the disparities in arrests and convictions for marijuana possession and distribution between minorities and whites, it does not address minorities' ability to profit from the growing marijuana industry, as under Uruguay's approach, all facilities are state-run.¹⁰⁷ Not only does Uruguay's approach pose issues to creating and fostering opportunities for minorities to enter the lucrative recreational marijuana business, it would also require the federal government to legalize marijuana under federal law. While this may become reality at some point in the future, our Attorney Generals have been fiercely against the legalization of marijuana and some have been quoted extensively on the subject.¹⁰⁸

Aside from the unlikelihood of federal legalization, Uruguay's model undermines the already-existing billion-dollar recreational marijuana industry present in the United States. This note argues for the expansion of that industry by promoting and encouraging minority entry. Therefore, Uruguay's state-run operation defeats this note's argument.

F. California's Marijuana Exemption

As previously discussed, California, when considering a marijuana license application, does not consider an applicant's prior felony conviction for marijuana.¹⁰⁹ The effect of this provision serves as a way for the State itself to help disproportionately affected minorities gain access to the lucrative industry. For example, Oakland, California created a cannabis dispensary equity program whose goal was to "address past disparities in the cannabis industry by prioritizing victims of the war on drugs and minimizing barriers of entry into the industry."¹¹⁰ To qualify as an equity applicant, one must be an Oakland resident who has a prior cannabis conviction, and has an income at, or less than, eighty percent of Oakland's Average Medium Income.¹¹¹ In the city's first round of issued dispensary permits, "two of the four [dispensaries were] equity-owned businesses,"

¹⁰⁶ See Goñi, *supra* note 79.

¹⁰⁷ *Id.*

¹⁰⁸ See Tom Agnell, *Jeff Sessions Slams Marijuana Legalization (Again)*, FORBES (Sept. 20, 2017), <https://www.forbes.com/sites/tomangell/2017/09/20/jeff-sessions-slams-marijuana-legalization-again/#53083b0f27d1> ("I've never felt that we should legalize marijuana. . . . Federal law remains in effect."); see also Tim Marcin, *What Jeff Sessions Has Said About Marijuana*, NEWSWEEK (Mar. 1, 2017), <http://www.newsweek.com/jeff-sessions-marijuana-quotes-about-pot-570177> ("Good people don't smoke marijuana.").

¹⁰⁹ See Cal. Bus. & Prof. Code § 26051.5 (a)(10)(b) (2017).

¹¹⁰ Press Release, City of Oakland California, *City Announces First Cannabis Dispensary Permit Recipients Under Equity Program: Groundbreaking Program Aims to Correct Past Disparities, Remove Barriers* (Jan. 31, 2018), <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/pressrelease/oak068879.pdf>.

¹¹¹ CITY OF OAKLAND CALIFORNIA, *BECOME AN EQUITY APPLICANT OR INCUBATOR*, <http://www2.oaklandnet.com/government/o/CityAdministration/cannabis-permits/OAK068455> (last visited Mar. 9, 2018).

and “50% of all employees will be formerly incarcerated.”¹¹²

Not only is Oakland’s approach innovative and emphasizes inclusion, but also other cities have taken notice of its effects.¹¹³ In addition to cities’ efforts in addressing the disproportionate effect of marijuana enforcement, a group of House Democrats introduced a bill which proposes to legalize marijuana at the federal level and expunge convictions for use or possession.¹¹⁴

Based on California’s efforts to help relieve the disproportionate effects of marijuana enforcement, and its emphasis on encouraging and growing minority involvement within the newly legalized industry, I think that this approach would be best, as it provides a framework for other states, as well as the federal government, to follow.

VII. CONCLUSION

“Legalizing marijuana sounds revolutionary, but with every day that passes, the same class of rich white men that control all other industries are tightening their grip on this one.”¹¹⁵ Approximately 1% of all the legal marijuana dispensaries operated in the United States are currently owned by black people,¹¹⁶ despite representing 13.3% of the American population.¹¹⁷

¹¹² See Press Release, City of Oakland California, *supra* note 111.

¹¹³ See The Associated Press, *States Offer Breaks to Minority Marijuana Entrepreneurs*, US NEWS (May 31, 2017), <https://www.usnews.com/news/best-states/colorado/articles/2017-05-31/states-offer-breaks-to-minority-marijuana-entrepreneurs>. Ohio passed a law requiring at least fifteen percent of Ohio medicinal marijuana licenses go to “the businesses of one of four economically disadvantaged minority groups— blacks, Hispanics, Asians, or Native Americans.”; see also Lee V. Gaines, *How California is Leading the Way on Marijuana Criminal Justice Reform*, PACIFIC STANDARD (Nov. 27, 2017), <https://psmag.com/social-justice/how-california-is-leading-the-way-on-marijuana-criminal-justice-reform>. Maryland changed the wait time for those convicted of marijuana possession to apply for expungement from ten years to four years after the completion of their sentence.

¹¹⁴ Jeremy Berke, *House Democrats Introduce a Bill to Legalize Marijuana and Provide ‘Restorative Justice’ to Communities Impacted by the War on Drugs*, BUSINESS INSIDER (Jan. 17, 2018), <http://www.businessinsider.com/marijuana-justice-act-marijuana-legalization-bill-introduced-in-house-2018-1>. “[T]he bill proposes . . . to provide ‘restorative justice’ to communities disproportionately affected by marijuana arrests and convictions and create an ‘inclusive industry from the ground up.’”; see also Alyana Alfaro, *New Jersey Sen. Cory Booker introduced a bill to do away with the federal ban on marijuana*, BUSINESS INSIDER (Aug. 1, 2017), <http://www.businessinsider.com/cory-booker-introduced-a-bill-to-end-the-federal-ban-on-marijuana-2017-8>. Booker proposed the Marijuana Justice Act, which legalizes marijuana on the federal level and allows judges to retroactively review sentences for marijuana-related crimes.

¹¹⁵ Amanda Chicago Lewis, *How Black People are Being Shut Out of America’s Weed Boom*, BUZZFEED (Mar. 16, 2016), https://www.buzzfeed.com/amandachicagolewis/americas-white-only-weed-boom?utm_term=.jkGzyOM3L#.gyaw1enPL.

¹¹⁶ *Id.* (explaining that “fewer than three dozen of the 3,200 to 3,600 storefronts” are owned by black people).

¹¹⁷ UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045216> (last visited Mar. 9, 2018).

White sellers of cannabis are characterized as innovators and entrepreneurs, taking advantage of a new industry; in contrast, minorities selling cannabis are stereotyped and stigmatized as drug dealers that should be incarcerated. While this note has evaluated possible methods to address this inequality, one conclusion is absolute – states with legalized cannabis industries must implement measures to address this imbalance by encouraging and helping minorities gain access to profit from this billion-dollar, and growing, industry.

