

# Cannabis Equity Initiatives: Progress, Problems, and Potentials

Y. Tony Yang, ScD, LLM, MPH, Carla J. Berg, PhD, MBA, and Scott Burris, JD

## ABOUT THE AUTHORS

Y. Tony Yang is with School of Nursing, Milken Institute School of Public Health, GW Cancer Center, the George Washington University, Washington, DC. Carla J. Berg is with Milken Institute School of Public Health, GW Cancer Center, the George Washington University. Scott Burris is with the Center for Public Health Law Research at the Beasley School of Law, Temple University, Philadelphia, PA.

As of November 9, 2022, 37 states and the District of Columbia have authorized medical cannabis, 21 of which also authorized recreational cannabis.<sup>1</sup> The ongoing dismantling of cannabis “prohibition” follows public opinion expressed in polls and ballot initiatives.<sup>2</sup> While it also reflects the failure of criminalization as a mechanism to regulate cannabis, experience with alcohol and tobacco shows that public health law can and should play a powerful role in minimizing harms to health and civility.<sup>3</sup>

Of all the regulatory challenges posed by a burgeoning industry, none has greater moral weight than addressing racial inequities caused by cannabis regulation. Prohibition of cannabis had more roots in racism than epidemiology.<sup>4</sup> Despite roughly equal usage rates, Blacks are 3.73 times more likely than Whites to be arrested for cannabis possession, suffering both the individual and community harms of criminal justice involvement.<sup>5</sup> Even today, as the cannabis industry transitions from criminal enterprise to legal business, inequities persist with more than 80% of cannabis business owners being White.<sup>6</sup> Society has an opportunity now

to ensure that a fair proportion of the benefits of the new industry accrue to individuals and communities harmed by prohibition. Recent legalization efforts try to address these disparities through social and economic equity requirements; however, clear and reproducible efficacy remains to be seen. This commentary discusses three major governmental approaches to accomplish this, along with their problems and potentials.

## EXPUNGEMENT OF PAST CONVICTIONS

A drug-related criminal record carries life-long consequences, affecting the convicted person’s employment opportunities, eligibility for loans, rental options, and child custody, for example. Most states prohibit people with prior drug felonies from becoming cannabis business owners or serving in other leadership roles, blocking their entry into the industry.

In October 2022, President Biden issued a blanket pardon of federal convictions for simple cannabis possession.<sup>7</sup> Twenty-one states have enacted legislation explicitly permitting or facilitating the

process of having select cannabis convictions expunged, vacated, or otherwise sealed from public view.<sup>8</sup> While some states (e.g., Illinois, Vermont, New York) have local jurisdictions automatically perform the review and expungement process, other states require that those with past convictions actively petition their officials for an expungement.<sup>8</sup>

These actions are helpful, but clearing a criminal record for possession of cannabis does not redress missed economic, educational, and social opportunities. It does nothing for people who also have convictions for other minor drug possession felonies or who were also charged as dealers. Yet, the logic of addressing the harms of criminalization and overincarceration—and the practicalities of removing the burdens a record places on socioeconomic reintegration—apply to these convictions as well: a person whose record included convictions for cocaine or illicit opioid possession will still be subject to the same legal disabilities, including a ban from working in the cannabis industry, no matter how long ago or minor their crime was.

In a context of large-scale criminalization of lower-income Black people, removing one conviction will not have a significant population effect. There are at least two ways to better redress the harms of failed drug policies and curtail future harms. The first is to extend pardons and expungement to all crimes of simple possession under controlled substances law and to follow Oregon’s lead by eliminating future criminal penalties for simple drug possession.<sup>9</sup> Oregon reclassified personal possession of small amounts of drugs from a Class A misdemeanor to no more than a violation; instead of arrest, possession results in either a \$100 fine or a health assessment, including substance use disorder screening.<sup>9</sup>

The second is to systematically remove state and federal postconviction socioeconomic limitations and disabilities; this would allow currently law-abiding people with past drug convictions to enter the cannabis business and foster their reintegration into their communities. These remedies provide critical relief by eliminating the stigmatizing record and, as a result, greatly reduce the collateral consequences associated with previous unjust enforcement.

## LICENSING AND EMPLOYMENT PREFERENCES

Several cannabis equity programs include a preferential licensure scheme to benefit businesses with owners from marginalized communities negatively impacted by the War on Drugs. Oakland, California, for example, sets aside half of its cannabis business permits for equity applicants who are city residents with an annual income of 80% or less than the city's median and who were either arrested or convicted for cannabis-related crime in the city or lived 10 out of the last 20 years in historically over-policed areas.<sup>10</sup> The scheme avoids race as a criterion and any mention of a "quota," sidestepping strict limits on affirmative action in racial matters set by the Supreme Court.<sup>11</sup> By contrast, two courts struck down Ohio's 2016 licensing system specifying that 15% of its licenses be granted to racial minorities, stating that it violated the Equal Protection Clause.<sup>12</sup>

States with these programs require (or permit) applicants to include a diversity or social equity plan in their applications. Once they receive these plans, the states add additional application points to an applicant's "score" depending on qualifiers including an

applicant's previous cannabis arrests, convictions, or adjudications, as well as their residency; income; racial, cultural, or ethnic background; and if they are female or a veteran. Some states consider additional factors—for instance, whether the majority of employees live in designated disadvantaged areas or the extent of the diverse business owners' ownership and control.

Equity initiatives also address staffing. Oakland, for example, requires that at least half of a dispensary's staff be city residents, half of whom must be from lower-income sections of the city.<sup>10</sup> Advocates argue that residency requirements are necessary to ensure that residents reap the benefits of legalization, but such requirements also face legal challenges. In Detroit, Michigan, a policy allocating 50% of licenses to entrepreneurs who satisfied a residency requirement with social equity components was struck down as a likely violation of the Dormant Commerce Clause, which forbids state laws that interfere with interstate commerce.<sup>13</sup>

Preferential licensing programs have unfortunately not demonstrated significant success. In New York State, half of all cannabis licenses are designated for social equity applicants, but in 2019, only two social equity applicants were approved.<sup>14</sup> In Massachusetts, only 27 out of 122 applicants were given priority by regulators in 2018, and only eight of those received licenses.<sup>15</sup> This is not surprising. By some estimates, starting a cannabis business requires at least \$250,000 in capital for fees, licensure, and other requirements, combined with atypical security and operating costs.<sup>16</sup> Because cannabis remains federally illegal, banks are unable to grant typical business loans to start-ups, and equity entrepreneurs must compete with more established, well-resourced

players, potentially increasing predatory business practices.<sup>17</sup> Legal limitations and the momentum of market developments severely restrict the capacity of states and cities to influence the composition of the cannabis ownership class, which is now dominated by White business owners and larger cannabis companies.

## TAX REVENUE FOR EQUITY

Some state and local programs require governmental reinvestments of cannabis-related tax revenue into disproportionately impacted communities. This varies significantly by program, but typically includes directed grant programs. For example, in New York State, 40% of cannabis tax revenue funds education, mental health services, substance abuse treatment, and economic development grants.<sup>18</sup> In Portland, Oregon, its 3% cannabis sales tax funds business development and social justice program grants.<sup>18</sup> In California, cannabis tax revenue funds grants to disadvantaged communities, with 50% dedicated to local nonprofits.<sup>18</sup> In Illinois, 25% of cannabis tax revenue must fund grants for violence prevention, reentry, youth development, economic development, or legal aid services.<sup>18</sup>

Taxes can generate significant funding. In California, for example, grants are expected to reach \$50 million in 2023.<sup>19</sup> Moreover, long-term, consistent funding for community programs holds promise for addressing the harms of both drugs and drug prohibition. A hypothetical analysis suggested that earmarking a quarter of cannabis tax revenue could improve structural determinants of mental health among Black and Hispanic communities.<sup>20</sup> In Washington, for example, this would

add \$117 million a year to the state's mental health budget, increasing it by an estimated 11%.<sup>20</sup> However, grant programs generally have high upkeep costs and are limited in their potential impact on the basis of the performance of individual grantees and duration of funding. In addition, there is always the concern that dedicated funds will replace, rather than supplement, traditional appropriations.

## CONCLUSION

Addressing past harms of the War on Drugs relies on serious ongoing efforts, informed by past and current experiences as policies evolve. Currently, state and local cannabis equity legislation lacks substance, in part because of insufficient attention to—and research about—how these policies are implemented and evolving, and their limited impact so far. While clearing criminal records of cannabis possession convictions benefits a few in terms of redressing prohibition's harms, a serious attempt at undoing the harms of prohibition would encompass all low-level drug possession records. Affirmative action in the licensing and operation of cannabis businesses could be a powerful form of redress, but the current Supreme Court majority has signaled opposition to race-conscious policies.<sup>21</sup> Regardless, equity programs do not address the economic challenges to entering the industry. Dedicating cannabis tax revenue to community reinvestment in places historically harmed by prohibition is perhaps the most promising approach, but it depends on enough money being sent to the right recipients for a sufficient number of years. *AJPH*

## CORRESPONDENCE

Correspondence should be sent to Y. Tony Yang, 1919 Pennsylvania Ave NW, Ste 500, Washington,

DC 20006 (e-mail: [tyyang@gwu.edu](mailto:tyyang@gwu.edu)). Reprints can be ordered at <https://ajph.org> by clicking the "Reprints" link.

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## CONTRIBUTORS

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The authors have no conflicts of interest.

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