EQUITY IN CANNABIS AGRICULTURE

RYAN B. STOA[*]

ABSTRACT

Many celebrate cannabis legalization as a long-overdue rectification of a drug policy that has oppressed and incarcerated people in vulnerable communities for decades. But as the legalization era continues and the legal cannabis industry starts to take shape, legalization advocates and industry stakeholders must reckon with a sobering reality: the benefits of legalization are not being equitably shared, and vulnerable communities that were hit the hardest during the war on drugs are not well represented in legal cannabis markets.

This reality is as true for stakeholders of cannabis agriculture as it is for other sectors of the cannabis industry. As the first step in the supply chain, the cultivation of cannabis sets the tone for the industry as a whole. A well-regulated, equitable, and sustainable cannabis agriculture industry has significant catalytic potential for downstream market participants. Unfortunately, however, the cannabis agriculture industry suffers from many equity shortfalls.

This Essay will explore three of these shortfalls: (1) access to agricultural lands and start-up capital, (2) cultivation licenses and state distribution of benefits, and (3) labor standards and farmworker protections. While there are many more equity issues facing cannabis agriculture, this Essay shines a light on these three while identifying areas of concern for future research. It is clear that stakeholders of cannabis agriculture, including regulators and business owners, can and should prioritize equity and participation in the development of their industry.

[*] Visiting Professor of Law, Southern University Law Center. I am grateful to Professor Jay Wexler and the *Boston University Law Review* for putting together an insightful Symposium, "Marijuana Law 2020: Lessons from the Past, Ideas for the Future," and for inviting me to write this Essay. I am also grateful to Symposium copanelists Jessica Owley and Gina Warren for their participation in the development of these ideas. Finally, I would like to thank Marla Dickerson, Managing Fellow of the Southern University Law Center's Cannabis Compliance, Law, and Policy Institute, for giving me a platform to explore my research and for her invaluable feedback and perspective on the cannabis industry.

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INTRODUCTION

Cannabis legalization movements and policy reforms are rightfully celebrated for righting the wrongs of a misguided prohibition on cannabis and the persecution of nonviolent people and communities involved in the historic cannabis market. As of this writing, thirty-six states have legalized the medicinal use of cannabis.[1] An additional fifteen states have legalized cannabis products with limited psychoactive properties.[2] Only three states still maintain a more or less traditional prohibition on cannabis.[3] There is still a long road ahead for legalization advocates, as only fifteen states allow recreational cannabis use, and the federal prohibition presents significant obstacles to the growth of the industry.[4]

Nonetheless, the tide is turning toward legal cannabis markets, and with it, the need to scrutinize how, exactly, states are legalizing and regulating their industries. As these new markets begin to take shape, there are at least two aspects that merit attention. The first is cannabis agriculture, the first step in the supply chain. Cannabis cultivation is still haphazardly understood and inconsistently regulated. The second is justice and equity in the cannabis industry. The first wave of legal cannabis businesses do not represent the demographics of communities hit the hardest by prohibitionist policies.

This Essay will briefly explore the nexus of these two concerns. While there are many equity challenges in the cannabis agriculture industry, three are introduced and explored here. First, this Essay identifies the ways in which access to farmland and agricultural start-up capital disproportionately excludes communities of color. Second, it scrutinizes the role that state governments play in licensing agricultural businesses and distributing the benefits of legalization. Finally, it highlights and analyzes the experiences of and hardships faced by cannabis farmworkers. This Essay concludes with some thoughts on paths forward for cannabis agriculture industry stakeholders.

I. EVOLVING CONCEPTIONS OF EQUITY IN CANNABIS

This Essay attempts to address equity in cannabis agriculture despite the author's acknowledgment that neither the author nor the industry at large have settled on a definitive conception of what "equity" means. Nor does the author purport to write with authority or experience on this question. To some, equity means righting the wrongs of the past and, in the case of cannabis, the harms inflicted by the war on drugs. To others, equity means a forward-facing policy framework that ensures equitable participation and distribution of benefits. A broad understanding of equity surely incorporates both, and a holistic approach to equity in cannabis agriculture will require a multidimensional and evolving

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[1] *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/V7XZ-9Y83] (last updated Apr. 5, 2021).

[2] *Id.*

[3] *Id.*

[4] *Id.*

understanding of what equity means and, perhaps more importantly, what equity requires.

A. *Nomenclature*

I have been researching, writing, and speaking about cannabis since 2015. In that short time, the language of cannabis has transformed and reimagined itself many times. The nomenclature used by cannabis industry stakeholders is not yet agreed upon or solidified. In many ways, though, the terminology used should reflect notions of equity, history, and heritage.

My first articles on cannabis used the term "marijuana" to refer to psychoactive strains.[5] I used this term in part to distinguish psychoactive strains from their nonpsychoactive relatives, commonly referred to as "hemp."[6] Together, marijuana and hemp strains could be referred to as "cannabis." Several times, stakeholders, including a nonprofit growers' association, asked me to stop using the word "marijuana" in favor of the word "cannabis." The rationale was twofold. First, as an advocacy group for cannabis businesses, the group felt that "cannabis" comes across as more professional, thereby helping to legitimize the legal industry. Second, "marijuana" had largely been used derisively during the war on drugs era, and it was necessary to move past that era's stigmatized language.

Happy to oblige, I started using "cannabis" to refer to the industry instead. This provoked pushback from two other groups. The first was hemp farmers and hemp farming advocacy groups, who clarified that because hemp is also cannabis, it is somewhat illogical and confusing to use the word "cannabis" when referencing only psychoactive strains. The second group was cannabis industry stakeholders of Mexican heritage, who pointed out the Hispanic and Mexican origins of the word "marijuana." To them, abandoning the word "marijuana" would neglect and dishonor the roots of the North American cannabis industry.

To be clear, I do not suggest here that the conversations I have had around this topic represent the definitive views of any group in particular. Rather, I share these anecdotes to demonstrate that the very words used in the discourse around the cannabis industry are not yet agreed upon and that much of these disagreements have equity at the heart of their concerns.

To use a second example, there is growing agreement in my view that the term "black market" should no longer be used to refer to nonlegal markets for cannabis. This term associates illicit activity with the Black community, a community disproportionately affected by the war on drugs. Accordingly, I have started making a distinction between legal markets and illicit markets, to which one commentator observed that the word "illicit" may come across as harsh when applied to unlicensed small businesses doing their best to navigate an often overwhelming regulatory landscape. Perhaps now the best terminology to use is

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5 *E.g.*, Ryan B. Stoa, *Weed and Water Law: Regulating Legal Marijuana*, 67 HASTINGS L.J. 565, 572 (2016).

6 *See id.*

a distinction between licensed and unlicensed markets?

The takeaway here is that the language of cannabis continues to evolve, and just like the broader evolution of the industry as a whole, the evolution of language here is not particularly organized, centralized, or approved of by all stakeholders. Nonetheless, when thinking about equity in the cannabis industry, it is worth considering that here, as elsewhere, words matter.

B. *Righting the Wrongs of the War on Drugs*

As mentioned above, I do not claim to be an expert on exactly what equity means or requires in the cannabis context (or any context for that matter). However, a strong theme in the push for equity in the cannabis industry is the desire to use the catalytic potential of legalization to right the wrongs of the war on drugs. This conception of equity points out that, because low-income and minority communities were hit the hardest—and disproportionately—by prohibitionist policies, legalization efforts should first attempt to rehabilitate or acknowledge these communities by ensuring that they enjoy some of the benefits of legalization.

The war on drugs has negatively and disproportionately impacted communities of color.[7] This is true of cannabis prohibition.[8] Even when White communities report similar or higher rates of cannabis use, Black or Brown communities experience much higher rates of arrest or conviction for cannabis possession.[9] In Buffalo, for example, total arrest rates for cannabis possession were cut in half from 2017 to 2018, but arrest rates for people of color during the same time period increased.[10]

The full extent of the impact of cannabis prohibition on communities of color is outside the scope of this Essay, but if the cannabis industry is going to enjoy an equitable future, it must reckon with its inequitable past. Efforts to do this tend to fall into two camps—those focused on restorative justice and revitalizing communities hit hardest by prohibitionist policies and those focused on inclusion and minority participation in a more general sense.

Many advocates recognize the hypocrisy of operating a legal cannabis market while inmates languish in state prisons for crimes that would no longer violate the law.[11] An equitable cannabis industry would therefore need a holistic expungement mechanism to address the disproportionately low-income and

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7 *Race and the Drug War*, DRUG POL'Y ALL., https://drugpolicy.org/issues/race-and-drug-war [https://perma.cc/9Y7L-PBUS] (last visited Apr. 13, 2021).

8 *See generally* Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689 (2016).

9 Crystal Peoples-Stokes, Opinion, *People of Color Were Targeted by the War on Drugs. They Must Benefit from Marijuana Legalization*, NEWSWEEK (Apr. 8, 2019, 6:00 AM), https://www.newsweek.com/people-color-marijuana-legalization-opinion-1381990.

10 *Id.*

11 *See, e.g.*, Eileen Rivers, Opinion, *Nation's Failed Weed War Turned Many into Prisoners and Others into Moguls*, USA TODAY (Apr. 23, 2020, 8:40 AM), https://www.usatoday.com/in-depth/opinion/lifers/2019/09/04/pot-weed-war-marijuana-prison-life-sentence-lifers/2057276001/ [https://perma.cc/SQA4-ELXL].

minority populations serving time for cannabis-related offenses.[12] In addition, while it is important to prioritize the participation of businesses of color in the newly legal cannabis industry (discussed further below),[13] it may be necessary to target specific communities that continue to suffer from prohibitionist policies.

One think tank, for example, has proposed that state or federal funding for community development, possibly generated by cannabis tax revenue, be channeled to communities based on the severity of disproportionate incarceration.[14] Illinois, for example, has identified "Disproportionately Impacted Areas" based on factors such as cannabis arrest and incarceration rates, unemployment rates, and poverty rates.[15] Whatever factors are appropriate in a given context to determine disproportionate impact of prohibitionist policies, it may be necessary for cannabis legalization laws to target those communities hit the hardest by prohibitionist policies.

C. *Representation and Equitable Distribution of Legalization Benefits*

A second strong theme in the cannabis equity discourse focuses on what the cannabis industry of the future will look like and how its benefits will be distributed. This theme sees that the winners of early legalization efforts tend to be well capitalized, White, and/or male. An equitable cannabis industry surely requires broad participation and representation across demographic spectrums.

Early trends of representation show that legal cannabis businesses are predominantly owned by White men. A 2019 report on women and minorities in the cannabis industry revealed a startling lack of diversity in legal markets.[16] In Massachusetts, for example, only 1.2% of permitted cannabis businesses are owned by racial and ethnic minorities, compared to 11.5% of businesses in other industries.[17] Only 4.7% of cannabis businesses are owned by women in the state, compared to 19.3% of businesses in other industries.[18] In Maryland, none of the state's fifteen initial licenses for cultivation was awarded to minority businesses.[19] Today, 15.3% of cultivation licenses are held by racial and ethnic minority owners, while 23.1% of cultivation license holders are women.[20]

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[12] MAKADA HENRY-NICKIE & JOHN HUDAK, BROOKINGS INST., IT IS TIME FOR A CANNABIS OPPORTUNITY AGENDA 2-3 (2020), https://www.brookings.edu/wp-content/uploads/2020/03/Big-Ideas_HenryNickieHudak_CannabisOpportunityAgenda.pdf [https://perma.cc/EVU8-B6V5].

[13] *See infra* Section IV.C.

[14] HENRY-NICKIE & HUDAK, *supra* note 12, at 3.

[15] *Id.*

[16] *See generally* MARIJUANA BUS. DAILY, WOMEN & MINORITIES IN THE CANNABIS INDUSTRY (2019), https://mjbizdaily.com/wp-content/uploads/2019/07/women-and-minorities_FINAL.pdf [https://perma.cc/P67S-VDBC].

[17] *Id.* at 4.

[18] *Id.* at 6.

[19] *Id.* at 7.

[20] *Id.*

Among others, two of the most significant reasons for these disparities are historic incarceration rates and a lack of access to capital. First, many minority communities may not be participating in the legal cannabis industry because historic cannabis business owners are incarcerated or were incarcerated at disproportionate rates.[21] Many states that have legalized cannabis refuse to issue permits to individuals with past drug convictions, which will naturally limit the ability of communities of color to participate. Second, the federal prohibition on cannabis dramatically limits access to traditional capital-raising measures.[22] Accordingly, cannabis businesses will in most cases need to be funded by an individual's own wealth or that of their personal network. This, too, disadvantages historically low-income communities.[23]

II. Access to Agricultural Lands and Start-Up Capital

Though agriculture may be the first step in the cannabis supply chain, agricultural production cannot begin without access to agricultural lands and start-up capital. The cannabis agriculture industry is currently split between two or three agricultural models. On one hand, indoor grows feature large warehouses under controlled conditions. On the other, outdoor farms utilize more traditional agricultural methods. In between, mixed-light or greenhouse operations attempt to obtain some of the benefits of both approaches. Each of these models presents barriers to entry that contribute to inequities in the cannabis industry.

A. *Access to Start-Up Capital*

Regardless of the agricultural approach, cannabis agriculture businesses require start-up capital. In most industries, individuals would expect to have access to traditional financing sources, such as private loans or public small business loans and grants. But even in these more traditional cases, there is evidence of inequities.[24] A 2016 report found that Black entrepreneurs are three times more likely than White entrepreneurs to have the profitability of their business hurt by lack of access to capital.[25] Some evidence suggests that these

[21] *See* Ja'Nel Johnson, *How Marijuana Prohibition Blocks People of Color from Getting into the Legal Cannabis Industry*, ABC 10 (Dec. 13, 2019, 2:25 PM), https://www.abc10.com/article/money/business/how-marijuana-prohibition-blocks-people-of-color-from-getting-into-the-legal-cannabis-industry/103-580cbee7-63d0-4981-b516-ab9ab2d23c0a.

[22] *See* Sam Kamin, *Marijuana Law Reform in 2020 and Beyond: Where We Are and Where We're Going*, 43 Seattle U. L. Rev. 883, 889 (2020) ("[W]hen marijuana businesses are unable to gain banking services, they must pay things like payroll, taxes, and licensing fees in cash . . . .").

[23] *See* Johnson, *supra* note 21.

[24] *See generally, e.g.*, Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 St. Louis U. L.J. 419 (2018).

[25] Alicia Robb & Arnobio Morelix, Ewing Marion Kauffman Found., Startup Financing Trends by Race: How Access to Capital Impacts Profitability (2016), https://www.kauffman.org/wp-content/uploads/2019/12/ase_brief_startup_financing_by

disparities have significant negative impacts not just on communities of color but also on the national economy as a whole.[26]

The disparities in access to start-up capital are even more severe in the cannabis industry because the federal prohibition eliminates banks and government programs as potential sources of funding. As a result, the only viable source of funding for a new cannabis business is the owner's personal wealth or the collective wealth of the owner's personal network. Naturally, this provides an advantage to affluent communities.

In 2019, 84% of cannabis business start-up capital came from the business owner's own savings or personal debt.[27] Only 1% of funding came from bank loans or state agency loans.[28] Consider also that cannabis businesses, particularly cannabis agricultural businesses, have relatively high start-up costs. An outdoor farm requires, at a minimum, agricultural land, irrigation equipment, growing-quality soil, fertilizers and pest control solutions, tools and other farming equipment, and labor. In states that require vertically integrated cannabis businesses (discussed in detail below), the start-up costs can reach $2.5 million.[29] Without outside funding sources to even attempt to level the playing field, it is not surprising that legal cannabis markets are being dominated by the wealthy.

B. *Access to Outdoor Farmland*

The primary inequity impacting outdoor cannabis agriculture is that farmland is disproportionately owned by White landowners. Between 2012 and 2014, White farmers owned 98% of all farmland in the United States and enjoyed 98% of all farming-related income.[30] The sources of these inequities are varied, including the lasting impacts of slavery, the federal Homestead Act's divestment of western lands into largely White hands, and twentieth-century policies and practices that channeled subsidies and farm loans to White farmers at the expense of farmers of color.[31]

Data regarding racial disparities in ownership of outdoor cannabis farms is lacking. However, the author's unscientific survey of farmers in Northern California, a traditional hotspot for outdoor cultivation, suggests that most landowners are White and male. The Emerald Triangle, comprised of Humboldt,

_race.pdf [https://perma.cc/4JP7-AZUC].

[26] Lydia Dishman, *The Racial Gap in Entrepreneurship Is Costing the U.S. Economy Billions*, FAST CO. (Apr. 20, 2016), https://www.fastcompany.com/3059093/the-racial-gap-in-entrepreneurship-is-costing-the-us-economy-billions.

[27] MARIJUANA BUS. DAILY, *supra* note 16, at 10.

[28] *Id.*

[29] *Id.*

[30] Megan Horst & Amy Marion, *Racial, Ethnic and Gender Inequities in Farmland Ownership and Farming in the U.S.*, 36 AGRIC. & HUM. VALUES 1, 1 (2019).

[31] *See generally* Megan Horst, *How Racism Has Shaped the American Farming Landscape*, EATER (Jan. 25, 2019, 2:25 PM), https://www.eater.com/2019/1/25/18197352/american-farming-racism-us-agriculture-history.

Trinity, and Mendocino Counties, became a popular cannabis growing region during the "back-to-the-land movement" of the 1960s and 1970s, driven largely by White migrants to rural areas.[32]

That legacy of landownership is easy to see in today's outdoor cannabis cultivation hotspots such as Northern California, Oregon, and Washington. As many states and municipalities require that outdoor cannabis farms be zoned in agricultural areas, White farmers will likely continue to dominate this segment of the cannabis agriculture industry.

C. *Access to Indoor Grows*

Indoor grows present their own unique inequities. Indoor grows typically take place in large warehouses capable of controlling growing conditions such as light, temperature, humidity, and soil moisture. In 2020, approximately 60% of cultivators grew cannabis indoors.[33] While indoor cannabis typically sells at higher prices than outdoor cannabis, the costs of production are significantly higher as well.

Compared to outdoor farms, indoor farms have much higher start-up and operating costs.[34] According to a 2017 estimate, the typical start-up costs for an indoor facility with 10,000 square feet of plant canopy were roughly $750,000. Annual operating costs for the same facility were nearly $1.3 million.[35] Those costs are offset by higher revenues—indoor grows can harvest year-round, and indoor marijuana fetches the highest prices on the market. But the high start-up and operating costs are a barrier to entry for many small-scale farmers, and it is not clear if indoor marijuana will continue to receive the higher prices necessary to offset these production costs.

Of course, the figures above are only estimates, and in an industry still operating in a legal gray area, accurate estimates are notoriously elusive. In addition, the single largest operating cost for an indoor farm is the cost of its energy use, which in the United States varies widely by location. In July 2017, Washington had the lowest industrial electricity costs in the nation, at under $0.05 per kilowatt-hour.[36] Electricity costs were almost five times more

[32] *See, e.g.*, Kate Daloz, *How the Back-to-the-Land Movement Paved the Way for Bernie Sanders*, ROLLING STONE (Apr. 19, 2016, 5:17 PM), https://www.rollingstone.com/culture/culture-news/how-the-back-to-the-land-movement-paved-the-way-for-bernie-sanders-65188/ [https://perma.cc/AA4R-K6R8].

[33] Michelle Simakis, *Indoors, Greenhouses or Outdoors: Where Are Cannabis Cultivators Growing?*, CANNABIS BUS. TIMES (June 26, 2020), https://www.cannabisbusinesstimes.com/article/cannabis-cultivation-facility-trends-industry-research/ [https://perma.cc/3XHT-SBQ3].

[34] Data from this Section adapts material from the author's 2018 book on cannabis agriculture. RYAN STOA, CRAFT WEED: FAMILY FARMING AND THE FUTURE OF THE MARIJUANA INDUSTRY (2018).

[35] ARCVIEW MARKET RESEARCH, CANNABIS INTELLIGENCE BRIEFING 24 (5th ed. 2017).

[36] U.S. ENERGY INFO. ADMIN., ELECTRIC POWER MONTHLY WITH DATA FOR JULY 2017, at 130 (2017), https://www.eia.gov/electricity/monthly/ (click "Previous Issues"; then click "2017"; and then select "September PDF").

expensive in Hawaii, the most expensive state, at nearly $0.23 per kilowatt-hour.[37]

Through no fault of the farmer, then, the financial viability of an indoor facility will be heavily dependent on its location. In California ($0.145 per kilowatt-hour),[38] indoor production costs may be prohibitive, especially when faced with competition from the state's resolute outdoor-farming community. But in Washington or Oregon ($0.065 per kilowatt-hour), electricity is relatively cheap and may support an indoor farming sector.[39]

One potential advantage of indoor cultivation is that warehouses can be located in or close to low-income communities and communities of color. While the above discussion noted that farmland in the United States has traditionally been owned by White landowners, indoor grows do not require land zoned for agricultural use in many jurisdictions.[40] Accordingly, indoor grows may be a more versatile and approachable cultivation method for people and communities in densely populated areas.

III. CULTIVATION LICENSING AND STATE DISTRIBUTIONS OF BENEFITS

Many inequities in the cannabis industry are symptoms of larger societal inequities and are not directly caused or controlled by cannabis industry stakeholders such as government regulators. These complexities will make it challenging for stakeholders to comprehensively dismantle the sources of inequity in the industry. However, when it comes to the influence that cannabis regulations have in determining the industry's winners and losers, stakeholders have more control. The licensing of cannabis businesses, for example, is directly responsible for the distribution of benefits that come from legalization. The extent to which regulations are feasible for small businesses to adhere to is influential as well. Finally, states can and should enact policies that ensure that underrepresented communities are not left out of legal cannabis markets. These possibilities make it all the more imperative that state regulators prioritize notions of equity when creating their regulatory frameworks and distribute the spoils of legalization fairly and equitably.

A. *Exclusive Versus Open Licensing*

One choice that regulators must face when creating their legal cannabis markets is whether to limit the number of cultivation licenses available.[41] Many states do not limit the number of cultivators that can operate in the state, allowing anyone with enough resources and regulatory expertise to meet the state's standards for permitting. One of the downsides to this approach is that it creates

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See supra* notes 30-31 and accompanying text.

[41] This Section adopts and adapts material from my previous research. *See* Ryan B. Stoa, *Marijuana Agriculture Law: Regulation at the Root of an Industry*, 69 FLA. L. REV. 297, 321-23 (2017).

a large regulatory burden for the state. In response, several states have considered regulations that would limit cannabis cultivation to a select group of well-connected businesses.

While California struggles to regulate tens of thousands of marijuana farms, states like Florida,[42] New York,[43] and Ohio[44] initially limited cultivation licenses to less than a dozen. This approach allows the state to carefully select responsible cultivators, makes it easy to monitor cultivation, and buys time before a state presumably can shift to a more expansive model. With so few cultivators, states can lavish regulatory attention on the licensees to ensure compliance or craft site-specific rules depending on the needs and cultivation infrastructure of the operation.[45] And, in a sense, the system is predictable by making it clear that only a select number of businesses may cultivate cannabis.

Unfortunately, these schemes are rarely equitable. Too often, the few privileged licensees are well-connected, well-capitalized businesses; therefore, the benefits of legalization get channeled into the hands of a few. Although limiting cultivation licenses might reduce the regulatory burden, it is hard to find equity or public support when the state permits only a small handful of cultivators to participate in the market. Ohio's 2015 constitutional amendment initiative to legalize cannabis included a list of landowners who would have had exclusive rights to cultivate cannabis in the state.[46] This attempt to control the market prompted some legislators to introduce a constitutional amendment of their own that would prohibit the state's constitution from being used to create economic monopolies.[47] Voters rejected the legalization monopoly initiative

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[42] Compassionate Medical Cannabis Act of 2014, ch. 2014-157, 2014 Fla. Laws 158.

[43] Assemb. B. 6357, 2013 Leg., Reg. Sess. (N.Y. 2013); *see also* Catherine Rafter, *New York State Just Granted Five Medical Marijuana Licenses*, OBSERVER (July 31, 2015, 3:00 PM), https://observer.com/2015/07/new-york-state-just-granted-five-medical-marijuana-licenses/ [https://perma.cc/7HPW-K8RA].

[44] OHIO DEP'T OF COM. & OHIO MED. MARIJUANA CONTROL PROGRAM, CULTIVATOR APPLICATION – REQUEST FOR APPLICATIONS (RFA) / INSTRUCTIONS PACKET (MMCP-C-1000) 2 (2017), https://medicalmarijuana.ohio.gov/Documents/Cultivation/Cultivator%20Application/Cultivator%20Application%20Instructions.pdf [https://perma.cc/QLV5-3GCK].

[45] In principle, states can tailor any number of water or agricultural permits, but there is a limit to how extensive the specifications can be when administering large volumes of permit applications. *See* Gary D. Lynne, J.S. Shonkwiler & Michael E. Wilson, *Water Permitting Behavior Under the 1972 Florida Water Resources Act*, 67 LAND ECON. 340, 348 (1991).

[46] The amendment's text includes the tax parcel numbers of the properties in question:

> Subject to the exceptions set forth herein, there shall be only ten [Marijuana Growth, Cultivation, and Extraction] facilities, which shall operate on the following real properties: (1) Being an approximate 40.44 acre area in Butler County, Ohio, identified by the Butler County Auditor, as of February 2, 2015, as tax parcel numbers Q6542084000008 and Q6542084000041 . . . .

Ohio Marijuana Legalization Initiative, Issue 3 (2015), BALLOTPEDIA, https://ballotpedia.org/Ohio_Marijuana_Legalization_Initiative,_Issue_3_(2015) [https://perma.cc/S7VR-GLBK] (last visited Apr. 13, 2021) (click "show" Amendment to Section 12 of Article XV of the Ohio Constitution).

[47] H.R.J. Res. 4, 131st Gen. Assemb., Reg. Sess. (Ohio 2015).

(which lacked support from some prolegalization groups) while approving the anti-monopoly amendment.[48]

Even if the state transitions to a more permissive model eventually, the previously licensed cultivators will have a government-given leg up on the competition. And, while the state may have developed the capacity to create site-specific regulations under the restrictive model, that capacity would be less relevant when cultivation proliferates and a more comprehensive regulatory approach is needed.

An alternative method of regulatory oversight regarding cultivation requires the chain of supply to be vertically integrated. In other words, cannabis producers must sell what they grow, and dispensaries must grow what they sell. For regulators, the advantage of vertical integration is that it reduces the number of cannabis businesses in operation and makes it easier to track the supply chain from seed to sale. There can be advantages for cannabis businesses that can pull this off—vertical integration increases profit margins by reducing the number of profit-seeking firms in the supply chain while allowing for more control over inventory. Vertical integration is or has been mandatory in states such as Colorado,[49] Massachusetts,[50] Maine,[51] New Hampshire,[52] New Jersey,[53] and New Mexico.[54]

Like limited licensing, however, mandatory vertical integration presents inequities. It is significantly more expensive to finance a business that incorporates the cultivation, postproduction, and retail sale of cannabis. By some estimates, it can be three to ten times more expensive to establish a vertically integrated cannabis business than a retail dispensary.[55] More expertise is required to handle a diversity of business activities. And, by wedding each stage

[48] Matt Pearce, *Ohio's Pot Vote Failed for Unique Reasons*, L.A. TIMES, Nov. 5, 2015, at A10.

[49] Act of July 1, 2010, ch. 355, 2010 Colo. Sess. Laws 1648 (repealed 2018); *see also CO Welcomes New Rec Applicants, Prepares to End Vertical Integration Rule*, MARIJUANA BUS. DAILY (July 1, 2014) [hereinafter *CO Welcomes New Rec Applicants*], https://mjbizdaily.com/colorado-welcomes-new-rec-entrepreneurs-abandons-vertical-integration/ [https://perma.cc/9A5T-U8XK].

[50] 105 MASS. CODE REGS. 725.105(B) (2017).

[51] Maine Medical Use of Marijuana Program, 10-144-122 ME. CODE R. § 7.V.4.6 (LexisNexis 2021) (requiring that applicant submit detailed information about distribution and growing facility to gain license to operate a medical marijuana dispensary).

[52] N.H. REV. STAT. ANN. § 126-X:8 (2020).

[53] New Jersey Compassionate Use of Marijuana Act, ch. 307, § 24:6I-7, 2009 N.J. Laws 2267, 2274 (permitting approved medical marijuana alternative treatment centers to cultivate, grow, harvest, and sell their own marijuana).

[54] N.M. CODE R. § 7.34.4.8(A)(2) (LexisNexis 2-21) (focusing on the amount of plants a nonprofit producer is permitted to grow but not allowing for usable cannabis trade from other licensed producers).

[55] Whit Richardson, *Pros and Cons of Vertical Integration*, MEDIUM (Mar. 14, 2017), https://medium.com/4front-advisors/pros-and-cons-of-vertical-integration-3ce4bbed7572 [https://perma.cc/4SSZ-96HG].

of the supply chain together, risk is increased: failure in any one aspect of the business is likely to affect the other aspects as well. In general, it is unusual to require vertical integration, and the cannabis industry is one of the only sectors in which this occurs.[56]

In Washington, vertical integration is prohibited.[57] Cultivators cannot hold dispensary licenses, and dispensaries cannot hold cultivation licenses. The model is similar to regulation of the alcohol industry, where there is a mandatory delineation between producers, distributors, and retailers.[58] The idea is that by breaking up supply chain integration, businesses have less incentive to promote alcohol or drug abuse, and each group can focus on providing goods and services in their area of specialization. The model has had limited success in the alcohol industry, where distributors have become powerful middlemen and may be dampening the potential for innovation.

Other states, recognizing the costs and benefits, have opted to allow, but not require, vertical integration. Nevada has adopted this approach,[59] and Colorado abandoned its initial vertical integration requirement.[60] Considering the nascent state of the cannabis industry, it may be useful to allow a diversity of approaches in order to collect evidence on how the industry might grow and stabilize in the future. However, it is important that these experiments not come at the cost of equity, fairness, and participation.

Unfortunately, vertical integration may increase market consolidation and push out smaller businesses. The financial and human resources needed to establish an integrated cannabis business and navigate each supply chain component's regulatory requirements may create such a high barrier to entry that small-scale farmers are shut out, leaving only a select few capital-rich businesses to dominate the market. In the early years of Colorado's medical marijuana market, when vertical integration was required, the regulatory requirements were so onerous that over a third of operators went out of business.[61] By increasing start-up costs and operation expenses, vertical integration makes it more difficult for small businesses to participate in the cannabis industry and instead promotes market consolidation and the growth of a few large companies.

[56] *Id.*

[57] WASH. REV. CODE § 69.50.328 (2021).

[58] *See id.*

[59] S.B. 374 § 3.3, 2017 Leg., 79th Reg. Sess. (Nev. 2017); *see also, e.g.*, NEV. REV. STAT. § 678C.650 (2021).

[60] John Ingold, *Colorado Lawmakers Question Proposed Marijuana Business Rules*, DENVER POST (Apr. 30, 2016, 5:19 AM), https://www.denverpost.com/2013/03/21/colorado-lawmakers-question-proposed-marijuana-business-rules/; *see also CO Welcomes New Rec Applicants*, *supra* note 49.

[61] *See CO Welcomes New Rec Applicants*, *supra* note 49; Tim Sprinkle, *For Cannabis Entrepreneurs, Industry Expansion Brings Growing Pains*, YAHOO! FIN. (Mar. 11, 2013), https://finance.yahoo.com/news/marijuana-industry-faces-growing-pains-amid-consolidation--growth-214432335.html [https://perma.cc/M74N-4Y3E].

B. *The Inequities of Regulatory Complexity*

The nascent state of the cannabis industry presents an opportunity for stakeholders to create a regulatory framework that promotes their values. Every state is experimenting with new regulations, and in many cases regulators do not have experience in regulating cannabis, including cannabis agriculture. From the perspective of many cultivators, however, states are introducing far too much complexity into the regulatory process.

There is strong evidence that California, for example, has created a regulatory system so opaque and unpredictable that farmers who initially expressed enthusiasm for legalization and applied for licenses have since given up.[62] It is becoming clear that if states create unrealistic regulatory burdens for small businesses that cannot afford teams of lawyers and consultants, those businesses will not be capable of operating in the legal market. In order to create equity in the cannabis agriculture industry, therefore, regulators must create regulatory frameworks that small businesses can navigate.

In 2018, the *San Francisco Chronicle* characterized the first year of California's legal cannabis market—and the impact of its byzantine regulatory landscape—as a "death by a thousand cuts."[63] The article highlights the frustrating experiences of small businesses that are being pushed out of the industry (or back on the illicit market) due to an unrealistic regulatory challenge required of them.[64] By 2020, the state's Cannabis Advisory Committee recognized that regulatory complexity was hampering the legal market and recommended that regulators loosen regulations and lower taxes.[65] The Committee's report provided detailed suggestions for cutting back on regulatory requirements, though it remains to be seen if the state's regulators will implement any changes.[66]

Regulatory complexity in the cannabis industry has reached national mainstream consciousness as well. The 2020 report revealed a startling pattern of corruption cases being brought against local officials overseeing cannabis legalization and licensing.[67] It notes that because so many states put regulatory

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[62] *See* Natalie Fertig, *How Legal Weed Is Killing America's Most Famous Marijuana Farmers*, POLITICO MAG. (June 4, 2019), https://www.politico.com/magazine/story/2019/06/04/humboldt-county-marijuana-farmers-regulations-227041/.

[63] Peter Fimrite, *'Death by a Thousand Cuts:' California's First Year of Legalized Pot Is No Smooth Trip*, S.F. CHRONICLE (Dec. 28, 2018, 10:14 AM), https://www.sfchronicle.com/news/article/Death-by-a-thousand-cuts-California-s-13494193.php [https://perma.cc/R9NV-QSFU].

[64] *Id.*

[65] *See* CAL. CANNABIS ADVISORY COMM., 2020 ANNUAL REPORT 5-22 (2020), https://bcc.ca.gov/about_us/documents/cac_annual_report_2020.pdf [https://perma.cc/2LTL-BWH3]; *see also* Patrick McGreevy, *Panel Wants Looser Rules on Selling Pot As Industry Lags*, L.A. TIMES, Dec. 11, 2020, at B1.

[66] CAL. CANNABIS ADVISORY COMM., *supra* note 65, at 5-22.

[67] Mona Zhang, *How State Marijuana Legalization Became a Boon for Corruption*, POLITICO (Dec. 27, 2020, 6:50 AM), https://www.politico.com/news/2020/12/27/marijuana-legalization-corruption-450529 [https://perma.cc/9BU8-VDF8].

authority over cannabis in the hands of local officials, the fate of a billion dollar industry—including its winners and losers—is being decided by relatively low-level officials.[68] So far, there are many instances in which licenses are being awarded or regulations are being ignored due to favoritism or corruption. An equitable cannabis industry must create a regulatory framework that is realistic for small businesses to navigate while avoiding undue influence over regulators.

C. *Prioritizing Equity in Licensing*

While the permitting process may become a system that excludes or frustrates all but the largest, wealthiest cannabis businesses, regulators can also harness it to address and reverse inequities in the industry. Already there are some states experimenting with licensing programs that prioritize underrepresented groups such as low-income and minority communities. In these jurisdictions, priority in licensing is given to communities hit hardest by prohibitionist policies. These permitting programs can serve as a model for other states to enact similar policies that ensure that the cannabis industry is represented by a diversity of voices and communities.

In Massachusetts, for example, regulators have given priority of review to license applicants who qualify as "Economic Empowerment Applicants."[69] Applicants must meet certain criteria, such as majority ownership by an individual living in a community disproportionately impacted by the prohibition era.[70]

In addition, Massachusetts has developed a social equity program for cannabis business owners.[71] The program provides training and technical assistance to would-be licensees in order to understand the regulatory process and move through it effectively. The program recognizes that navigating the regulatory landscape is challenging to begin with and that many applicants might require assistance in order to demonstrate that their business meets regulatory requirements.

California and its local jurisdictions have taken admirable steps in this regard as well. In 2020, the state set aside $23 million to be disbursed directly to low-income and minority licensees in the form of low- or no-interest loans or grants.[72] Loan or grant programs such as this one may be necessary in order to address the lack of start-up capital available in the cannabis industry, particularly for low-income or minority-owned start-up businesses.

The city of Oakland has committed to issuing half of all cannabis business

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[68] *Id.*

[69] Press Release, Massachusetts Cannabis Control Comm'n, Cannabis Control Commission Approves 204 Potential Licensing Applicants to Receive Priority Review (May 22, 2018), https://mass-cannabis-control.com/5619-2/ [https://perma.cc/NM6H-AFX7].

[70] *Id.*

[71] *Equity Programs*, COMMONWEALTH OF MASS. CANNABIS CONTROL COMM'N, https://mass-cannabis-control.com/equityprograms/ [https://perma.cc/9GDP-S7YL] (last visited Apr. 13, 2021).

[72] CAL. CANNABIS ADVISORY COMM., *supra* note 66, at 6.

licenses to "Equity Applicants."[73] These are applicants who were convicted of a cannabis crime or reside in the hardest hit areas of the city during the prohibition era and whose income is below 80% of the city's median income.[74] The program represents one of the strongest commitments to allocating the benefits of legalization to those hit hardest by the prohibition era.

These early attempts to use state or local government licensing authority to address inequities in emerging legal cannabis markets should be applauded. There may be evidence or rumors of foul play as future applicants may try to abuse the system. And, of course, more is needed to address these inequities.[75] But these programs, by providing regulatory assistance, start-up capital, or simply priority in licensing, offer a promising toolkit for regulatory authorities across the country.

IV. CANNABIS FARMWORKERS AND LABOR PROTECTIONS

The cannabis industry, like any other, has its share of vulnerable communities. When it comes to the agricultural sector of the industry, cannabis farmworkers merit thoughtful protections. Farmworkers are a traditionally vulnerable community in the best of agricultural markets. In a quasilegal industry such as cannabis, where even licensed cultivators still operate in a cash environment where under-the-table agreements prosper, farmworkers are particularly susceptible to harsh working conditions. Equity in cannabis agriculture will require a holistic appraisal of labor markets in the sector in an effort to improve working conditions for farmworkers. This may require nontraditional expectations for labor standards.

A. *Trimmers and Migrant Labor in Cannabis Agriculture*

Perhaps the most numerous and most vulnerable type of cannabis farmworker is the seasonal trimmer. After the psychoactive buds have been harvested and dried, they must be trimmed of their leaves and stems. As legal markets for cannabis have flourished, so too have the standards for quality buds. Accordingly, trimmers are a critical component of the agricultural process. While trimming machines do exist, the quality is considered low by many and most cultivators still prefer their buds to be trimmed by hand. This tends to be true even for large production operations.[76]

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[73] *Become an Equity Applicant or Incubator*, CITY OF OAKLAND, https://www.oaklandca.gov/topics/become-an-equity-applicant-or-incuabtor [https://perma.cc/NQ5B-KZAU] (last visited Apr. 13, 2021).

[74] *Id.*

[75] *See, e.g.*, Melissa Hanson, *'We're Talking About Restorative Justice;' Marijuana Business Applicants, Advocates Call Out for More Equity in the Massachusetts Cannabis Industry*, MASS LIVE (July 16. 2020), https://www.masslive.com/marijuana/2020/07/were-talking-about-restorative-justice-marijuana-business-applicants-advocates-call-out-for-more-equity-in-massachusetts-cannabis-industry.html [https://perma.cc/4MXA-B4FK].

[76] *See* Rich Blake, *'Big Cannabis' Technologically Ahead of Its Times, but Post-Harvest Automation Remains Elusive*, FORBES (Jan. 10, 2020, 8:00 AM), https://www.forbes.com

Trimmers are a vulnerable working group for several reasons. Demographically, they tend to be women, minorities, and/or migrant workers. The so-called trim scene of northern California is dominated by undocumented or seasonal workers who come to the region for several months during the fall harvest, earn relatively large amounts of cash, and return to their homes abroad or send money back to their families.

Women and undocumented or migrant agricultural workers are a notoriously vulnerable community.[77] Often these groups are forced to work under-the-table so that their employers may avoid minimum-wage or maximum-hour laws and/or to avoid triggering tax or benefits implications for their employers.[78]

Migrant workers are particularly vulnerable in the cannabis industry as well, largely because many farms operate on the illicit market, and there is little documentation or regulation of cannabis farmworker labor.[79] At least in other agricultural contexts, state regulators might be aware that a farm operation exists, and, in many cases, farmworker advocacy groups can provide lobbying for protections or direct services to workers. These resources scarcely exist in the cannabis industry.

In addition, trimmers are almost always still paid in cash, and rarely receive benefits such as health insurance. There is anecdotal evidence that even licensed cultivators still primarily pay their trimmers under-the-table, in part because the industry's reliance on the cash economy makes it so easy to do so relative to traditional employment models.

B. *The Spectrum of Existing Standards for Trimmers*

The existing standards for trimmers are not uniformly problematic. For many workers, their relationship with the landowner or operator is positive, and the farm or operation may provide adequate housing facilities. In many cases the potential earnings are significant as well. At a typical rate of $100-150 per pound of trimmed cannabis, workers who can trim one pound per day or more, while living frugally at the same time, can accrue cash savings at a rapid pace. It bears acknowledging that many trimmers have found a regular farm to come back to

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/sites/richblake1/2020/01/10/big-cannabis-technologically-ahead-of-their-times-post-harvest-automation-remains-elusive/?sh=2d6bef62ab9b [https://perma.cc/V5LF-RFDD].

[77] *See* EUR. PARLIAMENT, THE VULNERABILITY TO EXPLOITATION OF WOMEN MIGRANT WORKERS IN AGRICULTURE IN THE EU 66 (2018), https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604966/IPOL_STU%282018%29604966_EN.pdf [https://perma.cc/N92R-K9UW]; Ella Haley, Susana Caxaj, Glynis George, Jenna L. Hennebry, Eliseo Martell & Janet McLaughlin, *Migrant Farmworkers Face Heightened Vulnerabilities During COVID-19*, J. AGRIC. FOOD SYS. & CMTY. DEV., Spring 2020, at 35, 36; Janet McLaughlin & Anelyse M. Weiler, *Migrant Agricultural Workers in Local and Global Contexts: Towards a Better Life?*, 17 J. AGRARIAN CHANGE 630, 635 (2017) (book review).

[78] The following anecdotal information is derived from the author's in-person interviews with anonymous trimmers and landowners in Humboldt and Siskiyou Counties in California and Baton Rouge, Louisiana in June, July, and December 2020.

[79] *See* Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, DEPAUL J. FOR SOC. JUST., Spring 2016, at 1, 1.

that pays well and treats trimmers fairly. For some, the status quo is a welcome source of reliable income.

In a market that is relatively unregulated, however, there do not exist uniform working standards for trimmers, and horror stories abound. Though anecdotal, the author has heard evidence of exploitative working conditions in which trimmers are overworked, given inadequate working or housing facilities, or terminated unfairly. It is probably fair to say that there are more seasonal workers who come to the Emerald Triangle every harvest than there are well-paying, fairly treated employment opportunities. As a result, some farms can take advantage of the labor surplus by exploiting vulnerable trimmers.[80]

Thus far, the cannabis agriculture industry has developed its norms and expectations for trimmers informally, and to some extent that has worked to create a consistent expectation for compensation and living standards. But working conditions are inconsistent at best. Where some farms provide a nurturing community, others are cutthroat. As the industry continues to mature, some reckoning with the inconsistent experiences of trimmers warrants attention.

C. *Realistic Paths to Fair Labor in Cannabis Agriculture*

The existing model for trimmer labor is not necessarily a problem for many trimmers. Some come to the United States on tourist visas, prefer to be paid in cash, and do not mind the vagabond lifestyle or working conditions. The model also works well for many cultivators who typically have plentiful access to cash and would prefer to pay their workers with it while avoiding cumbersome labor laws. This Essay is not arguing that the existing framework does not work for any trimmers or cultivators.

However, it is clear that there are stark differences in labor conditions from one farm to another. The question is how farms, farmworkers, and government regulators can address these inconsistencies so that trimmers are treated fairly while not creating unrealistic expectations for small businesses that further exacerbate the regulatory burden detailed above.

It will likely be necessary for states and municipalities to experiment in this area, just as they have other areas of cannabis regulation. In a jurisdiction where cultivation takes place primarily outdoors, for example, farmworkers may often live on the premises. In these cases, establishing a baseline of living standards may be warranted. In a jurisdiction where cultivation takes place indoors, the regulators may devote more attention to the working facilities, ensuring that workers are not exposed to excessive heat or poor air quality. It may be worthwhile for jurisdictions to develop pilot programs that address trimmer well-being, much like the programs that address social equity and business

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80 *See, e.g.*, Kelly Schirmann, *What It's Like to Be a 'Trim Bitch' on an Illegal Weed Farm*, VICE (Aug. 2, 2016, 11:15 AM), https://www.vice.com/en/article/qkggyp/what-its-like-to-be-a-trim-bitch-on-an-illegal-weed-farm-women-in-cannabis ("The gender roles are distinct and historic: Men grow, women trim. While the men are fixtures—usually property owners—the women are interchangeable, expendable labor.").

owners.

Finally, industry stakeholders should encourage the emergence and development of trimmer advocacy groups. These groups could, like other farmworker protection groups, provide resources and assistance to trimmers, lobby for trimmer welfare policies and keep an eye out for particularly bad actors.

CONCLUSION

Much is needed to create an equitable cannabis industry. The same can be said more specifically about cannabis agriculture. Though a consensus is lacking on what equity is or how it must be defined, it is clear that there is work to be done.

This Essay has highlighted three areas of concern for cannabis agriculture stakeholders. The first regards access to start-up capital, farmland, and growing facilities. If start-up capital and agricultural space is reserved for the privileged few, cannabis agriculture will not be diversely represented or a feasible growth opportunity for small businesses.

Second, cultivation licensing must cease giving small numbers of well-connected businesses exclusive operating licenses, and regulators must be thoughtful about striking the appropriate balance concerning regulatory complexity. Moving forward, regulators should consider the potential of equity programs that target cannabis agriculture, including priority in licensing, grants and loans, and technical assistance.

Third, farmworkers in the cannabis industry must not be forgotten. Trimmers and other workers often labor under difficult conditions, and cannabis agriculture stakeholders would benefit from a fairly treated and collaborative trimming workforce.

There are many more challenges ahead, and in addition to further exploring the concerns outlined above, future research must identify additional obstacles to equity in cannabis agriculture. Crucially, as well, stakeholders and future research must begin to experiment with solutions to these challenges. While other areas of the cannabis industry may receive more attention, the agricultural sector of cannabis warrants awareness so that the cannabis farm of the future is not only well regulated and sustainable but also equitable as well.