DISTRIBUTED OWNERSHIP OF THE U.S. CANNABIS INDUSTRY

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To Redress Decades of Drug War Harms, Start by Distributing Cannabis Industry Ownership to Those Most Harmed, Before Funding Additional Social Equity Licensing Programs

How Governments Could Trade Cannabis Operators Tax Relief for Company Stock, and Use the Profits to Fund Restitution to Nonviolent Cannabis Offenders

Though they were originally devised to redress the harms of past cannabis prohibition and distribute the economic benefits of legalized cannabis more equitably to victims of the Drug War,[2] many existing social equity efforts have effectively become small business assistance programs for MWBEs in the cannabis industry. The primary focus of current social equity programs on *business licensure* — to the exclusion of other remedies for individually-imposed injuries and injustices — has left the vast majority of directly affected Drug War victims without meaningful remedies.[3] These victims will continue to be left behind, unless we prioritize relief to those who were objectively *most harmed* by prohibitionist policies, namely individuals who (irrespective of their race or geography) were actually subjected to criminal penalties — including arrest, conviction, incarceration, forced separation of families and a myriad of other economic, social and political sanctions) — for nonviolent cannabis offenses (hereinafter, "nonviolent cannabis offenders" or "NCOs").

Restitution Through Direct Cash Payments. One way to prioritize such relief is to award direct cash payments as restitution to individual NCOs and their families. While too few jurisdictions have taken this laudable approach to advancing social

[2] While Oakland, California's landmark social equity licensing legislation was a response to the ongoing arrest of black NCOs as Oakland was licensing white-owned medicinal cannabis dispensaries, it's worth noting that the legislation proposed by Councilwoman Desley Brooks did not initially include city residents who had been arrested for cannabis offenses among its contemplated beneficiaries, but rather, Brooks' constituents (and only Brooks' constituents). NCOs were only added as beneficiaries as a last minute political compromise brokered to assure passage of Brooks' legislation. See the video from the 5/3/16 Oakland City Council Meeting from 6:43:30 to 7:18:30 available at https://oakland.granicus.com/player/clip/1981?view_id=2&redirect=true&h=9910fa00caeffb5565ff3412cb87ca0e

[3] Khurshid Khoja, "D.C. Marijuana Bill's Approach To Drug War Reparations Isn't Perfect, But It's A Start," *Marijuana Moment*, February 2, 2023, accessed June 26, 2023 at https://www.marijuanamoment.net/d-c-marijuana-bills-approach-to-drug-war-reparations-isnt-perfect-but-its-a-start-op-ed/.

equity, there is positive movement in this direction with both Washington, DC[4] and Washington state[5] leading the way for other states and local jurisdictions. My hope is that California will follow suit, reimbursing "pay-to-stay" jail fees and other legal costs that were collected from NCOs both before and after passage of Prop 64 (and before "pay-to-stay" jail fees and other court and administrative fees imposed on NCOs and other criminal defendants were outlawed in January 2022 with the enactment of AB 177). While this relief need not completely replace social equity licensing programs, serious thought should be given as to whether the lion's share of *already scarce* public resources allocated to advancing social equity should continue to be directed toward awarding business licenses to a few lucky applicants, many of whom are not NCOs.

Distributing Ownership to Those Most Harmed. Another way to target relief to those most harmed would be to distribute cannabis industry ownership (and any resulting profit interests) broadly to *every last one* of those individuals. This method would not only deliver targeted remedies to NCOs and their families, it would also realize the stated ideal of most social equity licensing advocates who seek to diversify industry ownership to include NCOs, and would do so far more equitably than existing social equity licensing efforts. The inclusion of a long list of qualified applicants for social equity licenses who have not suffered criminal penalties, in order to redress harms against those who *did suffer* these criminal penalties, make social equity licensing programs much less effective and vulnerable to moral, political and judicial challenges — especially where those programs explicitly include any constitutionally suspect qualifying criteria: race, gender, and/or residency in jurisdictions that experienced disproportionate enforcement of criminal penalties against cannabis.

Trading Long Term Cannabis Business Tax Credits to Acquire Cannabis Company Stock Today. A practical and politically viable way to generate and fairly distribute Drug War restitution (without creating any unfunded mandates or raising additional taxes), would be for government to acquire a minority shareholder stake in *all* licensed cannabis companies in exchange for long term cannabis tax credits. This minority stake would be held for the beneficial interest of

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[4] Kyle Jaeger, "Despite Congressional Blockade, D.C. Lawmakers File Marijuana Sales Bill With Reparations Funding For Criminalization Victims," *Marijuana Moment*, January 25, 2023, accessed June 26, 2023 at https://www.marijuanamoment.net/despite-congressional-blockade-d-c-lawmakers-file-marijuana-sales-bill-with-reparations-funding-for-criminalization-victims/.

[5] Kyle Jaeger, "Washington Spends $100 Million To Vacate 350,000 Marijuana/Drug Convictions And Reimburse People Criminalized By Unconstitutional Law," *Marijuana Moment*, June 14, 2023, accessed June 26, 2023 at https://www.marijuanamoment.net/washington-spends-100-million-to-vacate-350000-marijuana-drug-convictions-and-reimburse-people-criminalized-by-unconstitutional-law/.

all NCOs,[6] with any dividends or other shareholder distributions[7] funding a perpetual stream of restitution payments to be distributed pro rata among all NCOs as restitution for their specific injuries — all without forcing NCOs to compete for a cannabis business license just to receive justice. More specifically, a state or local[8] government choosing to implement the foregoing plan (an "implementing government") could grant long term tax credits to incentivize existing and future companies licensed by their jurisdiction to voluntarily grant 10% (or more) of the authorized stock in their companies *today*[9] directly to a trust which would hold the pool of cannabis stocks for the beneficial interest of all NCOs in their jurisdiction (the "Trust Fund" or "Trust"), as a cannabis industry index fund of sorts (the "Trust Fund Asset Pool" or "Pool"). The accumulated shareholder distributions from donor companies with stock in the Pool would create and fund a stream of on-going restitution payments for the Trust's NCO beneficiaries. Licensed companies would make such voluntary stock grants in exchange for a 10-year cannabis tax credit equal to 10% of the total stock grant's *then*-current fair market value *in each of the applicable tax years* in which the credit is claimed.[10] These tax credits could then be used to pay off future cannabis taxes or even past tax debt owed (*e.g.*, unpaid IRC 280E exposure, if implemented at the federal level), and would be worth more than the stock traded for them (presuming, of course, that the participating company's stock grows in value over time).

Initially, title to the pooled stock would be held in trust for NCO beneficiaries, who would be entitled to receive a pro-rata share[11] of any profit distributions declared by the cannabis companies with stock in the Pool. NCOs would not be required to do anything else to receive their fair share of these distributions. No need to incur any debt, mortgage any assets, or raise any capital. No need to publicly disclose their identity as an NCO post-expungement, or disclose any other

[6] Or the direct descendants and/or designated heirs of an NCP deceased before legalization. This would allow the formation of intergenerational wealth, notwithstanding the death of the NCP to whom restitution is due.

[7] Restitution would include dividends as well as any other distributions from the proceeds of any mergers, acquisitions and liquidations, hereinafter, "distributions".

[8] This proposed plan for Drug War restitution assumes the pre-existence of lawful, licensed cannabis businesses in the implementing jurisdiction; it couldn't be implemented at a federal level until cannabis is descheduled, but could be implemented at the state level within the US until then—especially in those states where current social equity efforts are flailing.

[9] These companies would also need to be legally bound not to increase the amount of authorized stock or otherwise unfairly dilute the value of the stock contributed to the pool, for at least ten years.

[10] Provided the stock's value increased, the tax credit would also increase beyond what the contributing company granted to this pooled stock fund.

[11] This would be based on the time served for a cannabis offense, and (for Drug War restitution executed by a state or local government) where they were served, among other factors that substantiate greater constitutional injury.

private personal information to qualify for a license. No need to calculate or pay capital gains taxes, as that would be done by the Trust. And likely no need to pay income taxes on the receipt of the beneficial ownership of the stock in the Pool, as restitution payments are not deemed taxable income by the IRS.

Distributed Ownership Overcomes First Mover Advantage in Established Markets. Additionally, jurisdictions where pre-social equity ventures already gained market dominance prior to the introduction of social equity measures may be able to overcome the first mover advantage of these already established players through distributed ownership of the local industry—if so desired. Early-movers of medicinal and adult-use cannabis laws (like California, Oregon, Colorado and Washington) should consider individual restitution and distributed ownership as a complement to social equity licensing — which would give NCOs ownership of some of the biggest cannabis companies, not just a single start-up struggling to gain market share and survive.

Distributed Ownership Leap Frogs Other Current Obstacles to Successful Social Equity Efforts. State and local governments can also leapfrog the roadblocks that are currently undermining their social equity efforts and the entrepreneurs and enterprises they support. Put differently, the solution proposed here would also work despite the presence of large, publicly-traded, multistate operators, the head start enjoyed by medical cannabis operators, the scarcity of real estate, the lack of access to finance, complicated licensing regimes and other obstacles that have stymied existing social equity licensing programs.

Remedying Concrete Injuries Will Address Racial Injustice. Thankfully, we don't need to wait for disparity studies to begin doing right by NCOs. By delivering restitution to those individuals who actually suffered criminal penalties — the overwhelming majority of whom were black, brown, poor, and/or political dissidents — we automatically deliver social equity in a constitutionally defensible manner, and without need for any other qualifying criteria that could trigger judicial scrutiny.[12] The ultimate result would be the fair distribution of ownership and profits in existing and future U.S. cannabis companies to every nonviolent cannabis offender in America.

[12] Race-neutral criteria (such as income, educational attainment) should also continue to be used to qualify for social equity licensing, even if residency in a disproportionately impacted area doesn't ultimately survive current judicial scrutiny.