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Cannabis Law Practice: Lessons for the Legal Profession in the Twenty-First Century

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CANNABIS LAW PRACTICE: LESSONS FOR THE LEGAL PROFESSION IN THE TWENTY-FIRST CENTURY

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ABSTRACT

The gradual, state-driven legalization of marijuana—first medicinal, later recreational—combined with decreased enforcement of federal law, has led to the emergence and growth of the marijuana industry and, with it, increased demand for marijuana legal services. This Article is one of the first to study marijuana law practice in the United States. In addition to answering fundamental questions about this growing area of law practice, including who marijuana lawyers are, where they practice, and what ethical challenges they face, the Article also investigates the insights marijuana law practice reveals and the lessons it teaches about the evolution and growth of the American legal profession.

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†Following state-led legalization, the marijuana industry has grown and, with it, demand for legal services and the rise of marijuana law practice. As this new area of law practice matured, negative stereotypes associated with it subsided, and its reputation grew; lawyers shed the old, negatively-associated term "marijuana," replacing it with the more respectful-sounding term, "cannabis." This change has not been semantic. Rather, it reflects a significant transformation in the perception and status of the industry and its lawyers. To track this significant development, this Article uses the term marijuana to describe regulatory developments in the nineteenth, twentieth, and early twenty-first centuries, as well as the first generation of marijuana lawyers, and switches to the term cannabis to refer to the second generation of lawyers in the field consistent with contemporary usage.

I. INTRODUCTION

Lawyers in the United States belong to a mature legal profession. They are independent,[1] work within the confines of a stable legal system, and follow and support a well-defined rule of law.[2] Lawyers are well-regulated and benefit from a monopoly over the provision of legal services.[3] They earn well and enjoy elevated professional, social, and cultural status.[4]

Over the years, law practice in the United States has clustered around two hemispheres: a corporate hemisphere, which serves predominantly large entity clients and their business needs and is populated by elite law school graduates practicing in large elite law firms or prestigious in-house legal departments and earning top pay; and an individual hemisphere, which serves mostly individual clients and their various legal needs, and is populated by non-elite law school graduates practicing in small law firms and making significantly less than their corporate hemisphere counterparts.[5] Mobility between the

1. *See generally* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

2. Limor Zer-Gutman & Eli Wald, *Is the Legal Profession Too Independent?*, 105 MARQ. L. REV. 341, 350–53 (2021); RICHARD L. ABEL, COMPARATIVE SOCIOLOGY OF LAWYERS, 1988-2018—THE PROFESSIONAL PROJECT, *in* 1 LAWYERS IN 21ST-CENTURY SOCIETIES 879, 895–97 (Richard L. Abel et al. eds., 2020); Eli Wald, *The Role of Lawyers in Mature Democracies When the Rule of Law Is Under Attack, in* RSCH. HANDBOOK ON THE SOCIO. OF LEGAL ETHICS (Ole Hammerslev et al. eds., Elgar Publ'g 2025).

3. MODEL RULES OF PRO. CONDUCT pmbl. cmts. 10, 12 (AM. BAR ASS'N 2023) ("The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. . . . The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.").

4. THOMAS PAINE, COMMON SENSE 36 (Peter Eckler Publishing Co. 1914) (1776) (observing "that in America *the law is king*"); Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1879-1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 53 (Gerald W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 302–11 (Arthur Goldhammer trans., Library of Am. 2004) (1835) (discussing the status of lawyers as America's aristocracy); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. SCH. ROUNDTABLE 381, 421 (2001).

5. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319–20 (1982) (finding that the legal profession consists of two groups of lawyers whose practice settings, socioeconomic and ethno-religious backgrounds, education, and clientele differ considerably); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 538–541 (1994).

hemispheres has been limited[6] and is implicitly, but heavily, guarded by "Big Law"—the nation's largest, most prestigious, and wealthiest law firms—which are concerned with maintaining their elite status atop the profession.[7]

In interesting and revealing ways, marijuana law practice, a new field of law emerging following the legalization of medicinal and recreational marijuana in the early twenty-first century, is challenging what we know about the American legal profession. Dominated early on by individual hemisphere lawyers—criminal defense lawyers and marijuana advocates—marijuana law practice has now become of interest to large law firms and their corporate hemisphere lawyers, a move that has the potential to blur the traditional line between the hemispheres and disrupt the traditional demarcations of power and status in the legal profession.[8]

This Article is organized as follows. Part II summarizes the evolution of marijuana regulation and the growth of the marijuana industry in the United States over the past century. Part III examines the rise of marijuana law practice following the ongoing de facto legalization of marijuana. Part IV explores the lessons cannabis law practice offers about the present and future of law practice in the United States.

II. MARIJUANA LAW, REGULATIONS, AND THE EVOLVING INDUSTRY

Since 1970, marijuana has been listed as a Schedule I narcotic by the Controlled Substances Act (CSA).[9] Schedule I drugs, substances, and chemicals are defined as having no currently accepted medical use and a high potential for abuse,[10] and their cultivation, production, sale, and consumption are criminally prohibited.[11] Accordingly, no lawful marijuana industry has existed in the United States since the passage of the CSA, and no marijuana law practice has existed, with the exception of advocates calling for a change in the regulatory approach to marijuana and criminal defense attorneys (and prosecutors), specializing in defending (and prosecuting) those accused of violating the provisions of

6. Sida Liu, *The Profession as a Social Process: A Theory on Lawyers and Globalization*, 38 LAW & SOC. INQUIRY 670, 671 (2013) ("[T]he structural differentiation of the legal profession closely corresponds to the differentiation of lawyers' client types. Lawyers serving corporations occupy distinct structural positions within the profession from those serving individual clients, in terms of social origins, values, and prestige. Consequently, the bar is divided into two hemispheres (i.e., corporate and personal) with little mobility between them."); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 29–47 (2005) (documenting that lawyers work in two fairly distinct hemispheres—individual and corporate—and that mobility between these hemispheres is relatively limited).

7. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991) (describing large law firms' growth patterns and referring to them as Big Law); *see also* MILTON C. REGAN, JR., & LISA ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM (2021).

8. *Infra* Part II.

9. 21 U.S.C. § 812.

10. *Id.* "The [CSA] places all substances which were in some manner regulated under existing federal law into one of five schedules. This placement is based upon the substance's medical use, potential for abuse, and safety or dependence liability." *The Controlled Substances Act*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/drug-information/csa (last visited July 17, 2024). According to the Drug Enforcement Administration (DEA), "Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse." *Drug Scheduling*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/drug-information/drug-scheduling (last visited July 17, 2024).

11. *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap*, CONG. RSCH. SERV. 2 (last updated April 7, 2022), https://crsreports.congress.gov/product/pdf/R/R44782.

the CSA and other related drug laws.[12] This regulatory approach has been in flux since 1996, when California became the first state to legalize the cultivation and use of small amounts of medicinal marijuana.[13] Even more change has occurred since 2012, when Colorado and Washington became the first to legalize recreational marijuana.[14]

A. The Regulation of Marijuana

Medicinal marijuana, used around the world for centuries, became more common in the United States in the nineteenth century. "For example, by the mid-nineteenth century, the *United States Pharmacopeia* recommended marijuana for several [medical] conditions, including pain, convulsions, menstrual cramps, lack of appetite, depression, and other mental illnesses."[15] Consistent with the state of scientific knowledge at the time, federal regulation did not prohibit medicinal marijuana, instead focusing on "accurate labeling for products sold in interstate commerce."[16] An example of this approach was the 1906 Pure Food and Drug Act, which did not outlaw marijuana but did label it "addictive" and "dangerous."[17]

In the early twentieth century, in response to waves of immigrants fleeing the Mexican Revolution, southwestern states began criminalizing marijuana, denouncing it as a "demon" drug associated with immigrants' violence and crime.[18] The campaign to demonize marijuana gained momentum, fueled by racial bias against Hispanic people and economic fears about increased competition for labor by Mexican workers.[19] Similarly, racial animus against Black people and anxiety about the ascent of African Americans and the civil rights movement fueled public outcry to regulate "evil" marijuana.[20] Congress responded by adopting the Marihuana Tax Act of 1937, under which the sale of marijuana was taxed, and the possession and distribution of marijuana were restricted to medical and

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12. *See, e.g.*, Nat'l Org. for Reform of Marijuana L. (NORML) v. Drug Enf't Admin, 559 F.2d 735 (D.C. 1977); All. for Cannabis Therapeutics v. Drug Enf't Admin., 930 F.2d 936 (D.C. Cir. 1991) (cases brought by organizations calling for the rescheduling of marijuana under the CSA scheme).

13. *California's Cannabis Law*s, DEP'T CANNABIS CONTROL, https://cannabis.ca.gov/cannabis-laws/laws-and-regulations/ (last visited July 17, 2024). *See generally* CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West, Westlaw current through Ch. 156 of 2024 Reg. Sess.).

14. Aaron Smith, *Marijuana Legalization Passes in Colorado and Washington*, CNN BUS. (Nov. 8, 2012, 11:46 AM), https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html. *See generally* COLO. CONST. art. 18, § 16 (legalizing marijuana for personal use pursuant to Colorado Amendment 64); Initiative Measure No. 502, Wash. Legis. Serv. (2011), https://www2.sos.wa.gov/_assets/elections/initiatives/i502.pdf.

15. Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 CLEV. ST. L. REV. 441, 447 (2021) (citing Michael Aldrich, *History of Therapeutic Cannabis*, in CANNABIS IN MEDICAL PRACTICE: A LEGAL HISTORICAL AND PHARMACOLOGICAL OVERVIEW OF THE THERAPEUTIC USE OF MARIJUANA 37–38 (Mary Lynn Mathre ed., 1997)); William Wanlund, *Marijuana Industry*, *in* ISSUES FOR DEBATE IN AMERICAN PUBLIC POLICY: SELECTIONS FROM CQ RESEARCHERS 61 (17th ed. 2017)).

16. *Id.* at 447; *Part I: The 1906 Food and Drugs Act and Its Enforcement*, U.S. FOOD & DRUG ADMIN. (Apr. 24, 2019), https://www.fda.gov/about-fda/changes-science-law-and-regulatory-authorities/part-i-1906-food-and-drugs-act-and-its-enforcement.

17. The statute, known as the "Wiley Act," also established the Food and Drug Administration (FDA). *See Part I: The 1906 Food and Drugs Act and Its Enforcement*, *supra* note 16.

18. Vitiello, *supra* note 15, at 448.

19. *Id.* at 449.

20. *Id*; *see also* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81–90 (2015); Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders*, 91 OR. L. REV. 869, 872–75 (2013).

industrial purposes—disallowing recreational use.[21] Notably, the campaign to vilify marijuana succeeded above and beyond getting Congress to tax and restrict the uses of the drug; it popularized and established a name for marijuana that was negatively associated with criminal activity, stoked concerns about immigration, and inflamed majoritarian fears about the rise of people of color[22]—a legacy that would haunt legalization efforts for many years to come. Over the next thirty years, states continued to regulate marijuana, and the federal government replaced the Pure Food and Drug Act with the Federal Food, Drug, and Cosmetic Act of 1938, which expanded the FDA's powers and launched a new era of federal regulation centered on the premise that new drugs must be shown to be safe before they could be advertised and sold. The result was an often inconsistent maze of two hundred laws regulating legal and illegal drugs,[23] a reality made even more confusing when the United States adopted "treaties requiring scheduling of drugs for more uniform international" regulation.[24]

Congressional regulatory action was needed, and the Nixon administration appointed a commission to comprehensively investigate and recommend a regulatory framework for marijuana. Against the background of a slew of inhospitable state laws and the demonization of marijuana, some feared further federal crackdown, while other marijuana advocates were cautiously optimistic when President Nixon appointed former Pennsylvania Governor Raymond Shafer, a respected Republican moderate, to chair the commission.[25] Congress, however, enacted the Controlled Substances Act of 1970 before the commission issued its recommendations, designating marijuana as a Schedule I narcotic, one "for which there is no recognized medical use and a high potential for abuse."[26] Even after this setback, advocates were hopeful that Congress might reconsider its harsh stance should the Shafer commission take a more lenient approach to marijuana regulation.[27] Yet, when the commission did in fact endorse a policy course reversal—decriminalizing possession of marijuana—President Nixon, who was campaigning on a law-and-order

21. Vitiello, *supra* note 15, at 447–49; *Did You Know… Marijuana Was Once a Legal Cross-Border Import?*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about/history/did-you-know/marijuana (last modified Dec. 20, 2019).

22. Marijuana, originally spelled "marihuana" or "mariguana," derives from Nahuatl (Mexico) Spanish's mallihuan, meaning "prisoner." Booth argues that the modern negatory term marijuana was popularized by Harry Anslinger in the 1930s, during his campaigns against the drug. MARTIN BOOTH, CANNABIS: A HISTORY, 130–35, 148–49, 179–80 (2005).

23. Vitiello, *supra* note 15, at 450.

24. *Id*. at 450 (citing MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 72 (2017)).

25. Vitiello, *supra* note 15, at 450–51 (citing Peter Reuter, *Why Has US Drug Policy Changed So Little over 30 Years?*, 42 CRIME & JUST. AM. 75, 86 (2013)).

26. *Id.* at 451 (citing Stephen Siff, *The Illegalization of Marijuana: A Brief History*, Origins (May 2014), https://origins.osu.edu/article/illegalization-marijuana-brief-history; John Hudak, *How Racism and Bias Criminalized Marijuana*, WASH. POST. (Apr. 28, 2016), https://washingtonpost.com/news/in-theory/wp/2016/04/28/how-racism-and-bias-criminalized-marijuana; *Drug Scheduling*, DRUG ENF'T ADMIN., *supra* note 10).

27. *Id.* (citing Hudak, *supra* note 26).

platform that included a war-on-drugs agenda, dismissed the recommendation.[28] Marijuana, by then long negatively associated with immigrants, people of color, and criminal activity, and now also with anti-Vietnam protesters, college campus liberals, civil rights advocates, and Black militants, was to remain a Schedule I narcotic.[29]

Marijuana did not fare better in the 1980s under President Reagan, whose drug policies "dramatically increased penalties for marijuana and other drug offenses"[30] as part of the war-on-drugs campaign. Many states followed the CSA's lead by criminalizing the cultivation and consumption of marijuana and cooperated with the increased federal law enforcement efforts of the CSA.[31]

Ironically, it was one state's strict adherence to the federally pursued war-on-drugs policies that led to a sea of change. During the height of the HIV/AIDS epidemic, "activists in California pushed for legislation allowing the use of marijuana for enumerated medical conditions."[32] After the measure was vetoed by Governor Pete Wilson, disappointed proponents of medical marijuana introduced Proposition 215.[33] Approved by California voters as the Compassionate Use Act of 1996, Proposition 215 included a provision pursuant to which "a physician could recommend marijuana for any qualifying condition," a loose standard that subsequently became the norm for states legalizing medical marijuana.[34] Instead of the narrowly-tailored "enumerated medical conditions," the much broader "any qualifying condition" became the standard for state-led legalization of "medicinal" marijuana. In 1998, Alaska, Oregon, and Washington legalized medical marijuana, followed by Colorado, Hawaii, Maine, and Nevada shortly thereafter.[35] As of January 1, 2024, thirty-eight states, as well as Washington, D.C., Guam, and Puerto Rico, have taken measures to legalize medical marijuana.[36]

In 2012, Colorado and Washington legalized the use of marijuana for adult recreation.[37] As of January 1, 2024, twenty-four states and Washington, D.C. have legalized

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28. *Id*. (citing Hudak, *supra* note 26). Notably, however, after the Shafer Commission's endorsement of decriminalization in 1972, Oregon became the first state to decriminalize cannabis in 1973, followed by ten more states by late 1978. *Five Decades of Marijuana Decriminalization*, OHIO STATE UNIV. MORITZ COLL. L., https://moritzlaw.osu.edu/faculty-and-research/drug-enforcement-and-policy-center/research-and-grants/policy-and-data-analyses/five-decades-marijuana-decrim (last visited July 17, 2024).

29. *See* Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 801–02 (2019).

30. *Id.* at 803; Vitiello, *supra* note 15, at 452 (explaining the extent to which the Reagan administration increased penalties, such as sentence enhancements, mandatory minimum sentences, and even the death penalty for drug kingpins).

31. Vitiello, *supra* note 15, at 453 (citing OSBECK & BROMBERG, *supra* note 24, at 82).

32. *Id.* at 464 (citing Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J. L. REFORM 707, 759 (1998)) [hereinafter *De Facto Legislation*].

33. Vitiello, *De Facto Legalization*, *supra* note 32, at 714 (citing Greg Lucas, *Bill Flow Slows as Senate, Assembly Fight Over Funds*, S.F. CHRON., Sept. 13, 1995, at A16).

34. Vitiello, *supra* note 15, at 464–65 (citing CAL. HEALTH & SAFETY CODE §11362.5(b)(1)(A) (West 1998); *Hung Jury Frees Man in Pot-Growing Case: Podiatrist Claims Plants Were Medicinal*, SACRAMENTO BEE, Aug. 22, 1997, at B3).

35. *State Medical Marijuana Laws,* NAT'L CONF. OF STATE LEGIS. (July 20, 2024), ncsl.org/research/health/state-medical-marijuana-laws.aspx.

36. *Id.*

37. Michael Vitiello, *Joints or the Joint: Colorado and Washington Square off Against the United States*, 91 OR. L. REV. 1009, 2012 (2013) (discussing Colorado Assembly Bill 64 and Washington Initiative 502). *See also* Sam Kamin, *Colorado Marijuana Regulation Five Years Later: Have We Learned Anything at All?*, 96 DENV. L. REV. 221, 224 (2019).

recreational marijuana, with seven additional states decriminalizing recreational marijuana use, replacing criminal enforcement with civil penalties.[38]

Importantly, while the legalization reform movement has spread relatively swiftly across the United States in the twenty-first century, the regulatory approaches introduced by the states have varied greatly, resulting in a patchwork of inconsistent and ever-evolving regulatory messes. One should not understate the complexity and costs stemming from the great variety between and among states' regulatory regimes, as well as complications caused by varying regional regulations within states. The differences extend far beyond regulation of medical and recreational marijuana and include vastly different approaches in terms of the number of licenses issued, conditions for and restrictions on licenses, tax regimes, policies distinguishing personal cultivation and commercial use, as well as restrictions on out-of-state players.[39] This inconsistent patchwork impacts the marijuana marketplace; for example, the number of licenses issued determines the number of dispensaries and, in turn, whether the market will feature many small businesses or fewer bigger actors,[40] and leads to unstable fragmented marijuana markets with different products sold at different prices in lieu of a national uniform marketplace.[41]

The federal government first responded to these state-led deregulatory efforts by attempting to strictly enforce the provisions of the CSA. The Clinton administration, for example, carried out raids on a number of medical marijuana providers, leading to the filing of civil and criminal charges, and threatened to criminally prosecute physicians who prescribed marijuana loosely, ban them from participating in Medicare and Medicaid, and revoke their prescription-writing privileges.[42] In *Conant v. Walters*, the Court of Appeals for the Ninth Circuit "upheld an injunction limiting the federal government's authority to investigate doctors for recommending medical use of marijuana,"[43] de facto endorsing the "any qualifying condition" standard. The Bush administration similarly vigorously enforced the CSA, complete with highly-publicized, paramilitary-style raids on dispensaries and the targeting of landlords renting commercial space to medical marijuana facilities.[44] Federal raids increased during the early years of the Obama administration, but, in 2009, the administration began to reverse course with the issuance of the Ogden Memorandum.[45] In the memo, Deputy Attorney General David Ogden wrote to U.S. Attorneys around the country, providing them with enforcement priority guidance in light of changing laws in

38. *State Medical Marijuana Laws,* NAT'L CONF. OF STATE LEGIS., *supra* note 35.

39. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1431–32 (2009); Adam R. Scott, Comment, *The Governing Dynamics of State Marijuana Legislation: Game Theory and the Need for Interstate Cooperation*, 124 PENN ST. L. REV. 769, 781–83 (2020).

40. *See* CANNABIS PUBLIC POLICY CONSULTING, LICENSE CAPS FOR STATE CANNABIS PROGRAMS, https://www.cannabispublicpolicyconsulting.com/wp-content/uploads/2024/01/LicenseCapMemo.pdf.

41. *See* Ryan Stoa, *The Next Wave of Legal Drug Production: What the Psychedelics Legalization Movement Can Learn from a Decade of Cannabis Regulation*, 60 TULSA L. REV. 25 (2024) [hereinafter *The Next Wave*].

42. *Clinton Plan Attacks Medical Marijuana Initiatives, Targets Doctors*, NORML (Jan. 2, 1997), https://norml.org/news/1997/01/02/clinton-plan-attacks-medical-marijuana-initiatives-targets-doctors.

43. Conant v. Walters, 309 F.3d 629, 635 (9th Cir. 2002).

44. David Johnston & Neil Lewis, *Obama Administration to Stop Raids on Medical Marijuana Dispensers*, N.Y. TIMES (Mar. 18, 2009), https://www.nytimes.com/2009/03/19/us/19holder.html.

45. Vitiello, *supra* note 15, at 467 (citing Lucia Graves, *Obama Administration's War on Pot: Oaksterdam Founder Richer Lee's Exclusive Interview After Raid*, Huff. Post (Apr. 18, 2012, 10:15 AM), https://www.huffpost.com/entry/obama-war-on-weed-richard-lee-oaksterdam-raid_n_1427435).

the states: "As a general matter," wrote Ogden, "pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[46] As Chemerinsky et al. explain:

> Although the Ogden memorandum was loaded with cautionary language, many took it, perhaps too optimistically, as the announcement of a hands-off policy to enforcing federal marijuana laws in those states authorizing the drug under state law. The reaction on the ground to these statements was swift. In Colorado, for example, the number of marijuana dispensaries, which were not specifically authorized by state law, increased from a handful to as many as a thousand in the 2009 calendar year. In California, a largely unregulated medical marijuana industry expanded just as quickly, with giant dispensaries emerging to serve thousands of marijuana patients. Yet it quickly became apparent that the federal government was not comfortable with the rapid expansion of marijuana entrepreneurship in the states. In 2010, Attorney General Holder weighed in as California considered becoming the first state in the nation to legalize marijuana not just for patients, but for any adult user. With the legalization initiative, Proposition 19, leading in the polls, Holder warned Californians in highly publicized statements that while the federal government had tolerated their experiment with medical marijuana, a move to fully legalize the drug would not be met with such leniency. After Holder's threats, public support for Proposition 19 dropped and it ultimately failed by a vote of 53.5 percent to 46.5 percent.[47]

In 2011, Deputy Attorney General James M. Cole sent a new memorandum to U.S. Attorneys around the country.[48] The new memo insisted that the 2009 Ogden Memorandum was being adhered to but clarified that its protections applied only to individual patients and not commercial operations.[49] Federal raids continued following the release of the Cole Memorandum.[50] The second Obama administration, however, embraced a bolder course reversal. In August 2013, following the legalization of recreational marijuana in Colorado and Washington, the Justice Department issued a new Cole memo, setting forth eight conditions under which federal law would be enforced.[51] Regarding the medical use of marijuana, the memo was considered to take a significantly more deferential approach toward the states (compared to the 2011 Cole Memorandum), similar in nature to how the

46. Memorandum from David Ogden, Deputy Att'y Gen., on Investigations & Prosecutions in States Authorizing the Med. Use of Marijuana to Selected U.S. Att'ys 1–2 (Oct. 19, 2009) (on file with the U.S. Dep't of Just.).

47. Chemerinsky et al., *supra* note 20, at 86–87.

48. Memorandum from James M. Cole, Deputy Att'y Gen., on Guidance Regarding the Ogden Memo on Jurisdictions Seeking to Authorize Marijuana for Med. Use to U.S. Att'ys (June 29, 2011) (on file with U.S. Dep't of Just.).

49. *Id.*

50. Sarah Trumble & Nathan Kasai, *The Past—and Future—of Federal Marijuana Enforcement*, THIRD WAY (May 12, 2017), https://www.thirdway.org/memo/the-past-and-future-of-federal-marijuana-enforcement (describing federal law enforcement policies following the Cole Memorandum).

51. Dina Titus, *Puff, Puff, Pass . . . That Law: The Changing Legislative Environment of Medical Marijuana Policy*, 53 HARV. J. ON LEGIS. 39, 43 (2016).

2009 Ogden Memorandum was originally widely interpreted.[52] Federal enforcement efforts were further scaled back with the enactment of the Rohrabacher-Farr Amendment in December 2014, prohibiting the Justice Department "from spending funds to interfere with the implementation of state medical marijuana laws."[53] The Cole Memorandum remained in effect until January 2018, when it was symbolically rescinded by Attorney General Jeff Sessions, but no federal crackdown followed.[54] Since then, Congress has passed several measures protecting state-legal marijuana activities.[55]

One might be tempted to understand the regulatory landscape as one of state-level legalization tolerated by the federal government's decision not to prioritize enforcement of the CSA's provisions, but the tenuous, complex nature of this status quo should not be understated. As the uncertainty surrounding the Sessions' announcement in 2018 revealed,[56] a status quo that relies in part on the federal government's self-imposed policy not to enforce federal laws is susceptible to the federal government unilaterally changing its mind and is thus unstable, even though the massive state tax revenues render it increasingly unlikely that the federal government will reverse course.[57]

More importantly, as long as marijuana continues to be a Schedule I narcotic, even in the absence of enforcement of the CSA, its criminal status leads to many federal-level restrictions and industry disruptions, including curtailed access to banking services,[58] the

52. Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1111–12 (2014) (explaining how states were largely left to their own devices and discretion with regard to enforcement of state regimes).

53. Vitiello, *supra* note 15, at 468. This restriction has been reimposed by Congress since 2014 annually via the Appropriation Act. *See, e.g.*, Consolidated Appropriations Act of 2021, H.R. 133, 116th Cong. (2021), https://www.congress.gov/bill/116th-congress/house-bill/133/text (restricting the Department of Justice from appropriating funds to marijuana prosecutions that otherwise comply with applicable state laws).

54. *Id.* (citing Memorandum from Jeff B. Sessions, III, Att'y Gen., on Marijuana Enf't to U.S. Att'ys (Jan. 4, 2018) (on file with U.S. Dep't of Just.)).

55. For example, the 2018 Farm Bill lifted most of the federal restrictions on hemp, a non-psychoactive cannabis plant used in a variety of industrial products such as fiber and animal feed. *See* Agricultural Improvement Act of 2018, H.R. 2, 115th Cong. (2018). *See generally* Tom Angell, *Congress Votes to Block Feds from Enforcing Marijuana Laws in Legal States*, FORBES (June 20, 2019), https://www.forbes.com/sites/tomangell/2019/06/20/congress-votes-to-block-feds-from-enforcing-marijuana-laws-in-legal-states; Joanna R. Lampe, *Recent Developments in Marijuana Law*, CONGRESSIONAL RESEARCH SERVICE: LEGAL SIDEBAR (Dec. 6, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10859.

56. Jill Beathard, *Keep Calm and Follow State Law: Marijuana Attorneys React to Sessions Memo*, 95 DENV. L. REV. ONLINE 112, 117 (2018) (noting the confusion of U.S. attorneys after Attorney General Sessions issued his memorandum).

57. Adam Hoffer, *Cannabis Taxation: Lessons Learned from U.S. States and a Blueprint for Nationwide Cannabis Tax Policy*, TAX FOUNDATION (Dec. 14, 2023), https://taxfoundation.org/research/all/state/cannabis-tax-revenue-reform (finding that "[s]tates collected nearly $3 billion in marijuana revenues in 2022," and estimating that [n]ationwide legalization could generate $8.5 billion annually for all states").

58. Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. REV. 1043 (2021); Stephanie Geiger-Oneto & Robert Sprague, *Cultivating Deviance in the Marijuana Industry*, 46 SETON HALL LEGIS. J. 661, 677–85 (2022).

securities markets,[59] tax treatment,[60] bankruptcy protections,[61] and intellectual property protections,[62] not to mention the ability to sue and be sued in federal courts.[63]

Most recently, the Biden administration announced its intention to reclassify marijuana as a Schedule III narcotic.[64] Such a reclassification would not be insignificant. It would acknowledge that marijuana has an accepted medical use in treatment in the U.S., and that it has a risk of low or moderate physical dependence in people who abuse it.[65] Reclassification would likewise open the doors to regulated marijuana research, which may lead to the development of national consumption standards, reduce criminal penalties for some offenses under the CSA, and would allow marijuana businesses to deduct business expenses on federal tax filings.[66] However, recreational marijuana would remain illegal under federal law. Importantly, even use of marijuana for medical purposes would need to comply with FDA and DEA requirements related to the approval of drug products and regulation of controlled substances—onerous rules that are likely to preclude compliance by some medicinal dispensaries.[67]

Notably, while the federal government is taking steps toward legalizing marijuana, some states are rethinking their more liberal drug policies. Oregon, for example, which decriminalized the personal consumption of most drugs in 2020, is considering reversing course by reinstating light criminal penalties for personal drug possession, following a spike in public drug use and overdoses.[68]

While the bill purports to target deadly drugs like fentanyl, it also bans non-clinical

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59. Luke Scheuer, *The Green Rush: The Public Marijuana Securities Market*, 26 WIDENER L. REV. 53 (2020).

60. Geiger-Oneto & Sprague, *supra* note 58, at 685–91.

61. Jessica Lowen, *Budding Solutions: Weeding Out Obstacles to Bankruptcy Protections for Marijuana Ventures*, 12 PENN ST. J. L. & INT'L AFF. 146 (2023); Ryan C. Griffith, *Cannabis Receiverships: The Alternative for State Legal Cannabis Businesses Seeking Financial Rehabilitation Locked Out of Bankruptcy Court by the Controlled Substances Act*, 45 SEATTLE U. L. REV. 1107 (2022); Danny O'Connor, *Declaring Bankruptcy: Exploring Avenues for Relief for Debtors Involved with Cannabis*, 91 U. CIN. L. REV. 541 (2022); Peter C. Alexander, *Up in Smoke: Bankruptcy and Cannabis*, 43 U. ARK. LITTLE ROCK L. REV. 81 (2020).

62. Viva R. Moffat et al., *Cannabis, Consumers, and the Trademark Laundering Trap*, 63 WM. & MARY L. REV. 1939 (2022); Kyle R. Brady, *Patent Pending? Exploring the Patentability of New Cannabis Strains and the Legal Challenges It Presents,* 26 WIDENER L. REV. 41 (2020); Celena Dyal, *Cannabis IP: How Federal Inconsistencies Have Stifled a Budding Industry*, 16 J. BUS. & TECH. L. 163 (2021). *See also* Jillian Gosser, *Comparative Intellectual Property Protection for Marijuana: United States vs. the European Union*, 11 GLOBAL BUS. L. REV. 78 (2022).

63. Eli Wald et al., *Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, 44(8) COLO. LAW. 61 (2015).

64. Ashley Wallace, et al., *Justice Dept Plans to Reschedule Marijuana as a Lower-risk Drug*, CNN (Apr., 30, 2024), https://www.cnn.com/2024/04/30/economy/dea-marijuana-rescheduling/index.html. *See generally* Statement from President Biden on Marijuana Reform (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform.

65. Joanna R. Lampe, *Legal Consequences of Rescheduling Marijuana*, CONGRESSIONAL RESEARCH SERVICE: LEGAL SIDEBAR (May 1, 2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11105.

66. *Id.*

67. Rachel K. Gillette, *Cannabis Remains an 'Industry Interrupted' Without Federal Change*, REUTERS LEGAL NEWS (Dec. 20, 2023), https://www.reuters.com/legal/litigation/cannabis-remains-an-industry-interrupted-without-federal-change-2023-12-20. *See generally* Robert A. Mikos, *The False Promise of Rescheduling*, 60 TULSA L. REV. 1 (2024).

68. *See* H.R. 4002, 2024 Leg., Reg. Sess. (Or. 2024) (enrolled); *see* Conrad Wilson, *Oregon Governor Signs Bill Criminalizing Drug Possession*, OR. PUB. BROAD. (Apr. 1, 2014), https://www.opb.org/article/2024/04/01/drug-possession-oregon-kotek-sign-bill (detailing the purpose and effects of House Bill 4002 and its relation to Measure 110).

use of psychedelics, drugs that are seemingly unconnected to the current overdose epidemic and the public displays of drug use.[69]

At the end of the day, while marijuana legalization has been a "wildly celebrated" success story in terms of its relative speed and extensive spread—it has taken less than a quarter century for some form of legalization reform to reach the vast majority of Americans—clear uniform regulatory frameworks have proven to be more elusive.[70] The state-led patchwork of regulatory approaches—including inconsistent regulation of medical and recreational marijuana; different conditions imposed on the varying number of licenses issued across states; different approaches to the regulation of personal cultivation and commercial use; and inconsistent restrictions on out-of-state players—results in a fragmented national market featuring inconsistent products at inconsistent prices.[71] Indeed, as Professor Ryan Stoa astutely points out, the regulatory mess produced by the states also results in inequities—the "byzantine nature" of the inconsistent regulatory landscape disproportionately impacts small businesses and dispensaries owned by people of color—and undercuts the ability of legal marijuana markets to gain market share and gradually replace legacy illicit black markets.[72]

Yet there may be a light at the end of the regulatory tunnel. As Professor Robert Mikos argues, while from an historical perspective state experimentation and variation was understandable—indeed, perhaps, inevitable, given the refusal of the federal government to rescind the CSA and develop a comprehensive, consistent regulatory framework for marijuana—some states' restrictions, especially those excluding out-of-state actors from their locally regulated markets, likely violate the Dormant Commerce Clause and will not withstand judicial scrutiny.[73] If so, gradual nationalization and harmonization may be the not-too-distant future of marijuana regulation, irrespective of the fate of the pending federal government's rescheduling efforts.[74]

B. Evolution and Growth of the Marijuana Industry

Notwithstanding the complex regulatory landscape, marijuana has become a significant, booming industry.[75] As of 2024, "some things are clear[:] Demand for cannabis products is high and consumer spending is likely to continue; for that reason, the cannabis industry will continue to thrive."[76] According to Statista, a global data and business intelligence platform, marijuana revenue in the United States will reach approximately $43 billion in 2024, more than doubling since 2019.[77] It is projected to hit $50 billion by

69. Oshan Jarow, *Psychedelics Are About to Become a Casualty of Oregon's Opioid Crisis*, VOX (Mar. 16, 2024), https://www.vox.com/future-perfect/24102102/psychedelics-oregon-opioid-crisis-decriminalization-war-drugs-fentanyl-house-bill-4002.

70. Stoa, *The Next Wave*, *supra* note 41, at 26, 28–29.

71. *Supra* notes 39–41 and accompanying text.

72. Stoa, *The Next Wave*, *supra* note 41, at 35–40.

73. Robert A, Mikos, *Interstate Commerce in Cannabis*, 101 B.U. L. REV. 857 (2021).

74. Mikos, *The False Promise of Rescheduling*, *supra* note 67.

75. *See* Sam Kamin, *Marijuana Law Reform in 2020 and Beyond: Where We Are and Where We're Going*, 43 SEATTLE U. L. REV. 883, 900 (2020).

76. Stoa, *The Next Wave*, *supra* note 41, at 36.

77. Revenue in the Cannabis Market in the United States, STATISTA (last visited Aug. 14, 2024), https://www.statista.com/outlook/hmo/cannabis/united-states.

2029.[78] California boasts the largest marijuana market in terms of sales, followed by Colorado and Washington.[79]

Correspondingly, marijuana taxation has become a significant source of revenue for states.[80] Tracking and understanding states' tax revenue is a complicated affair because—unlike alcohol and tobacco—marijuana "markets have not evolved standardized products,"[81] and therefore tax regimes and rates vary greatly. For example, where taxes can be levied by cigarette packs, the intoxicating ingredient in marijuana, THC, is not "as easily measured as alcohol content for an appropriately targeted tax."[82] Most states tax products based on their price, adding "a percentage tax to the price of a transaction."[83] "Price-based taxes can be applied at any location in the supply chain, but are most commonly applied to either wholesale transactions or retail sales."[84] Because "state tax laws and regulations vary . . . there is no [national standard] for revenue collection from medical or recreational dispensaries."[85] Still, some "states keep consistent records on their taxation of both recreational and medical marijuana, which illustrate how they tax the drug and distribute the revenues."[86] The first five states to legalize recreational marijuana—Colorado, Washington, Alaska, Oregon, and California—together "generated a record-setting $2.78 billion in revenue from taxes on cannabis sales [in 2021], marking the highest income level since tax collection began in 2014."[87]

While marijuana is a thriving, multi-billion dollar industry, it continues to be segmented, unstable, and unequal. State-based restricted regulatory apparatuses inhibit the rise of national actors offering uniform products at uniform prices nationally, and states with uncapped numbers of licenses result in markets with ample small business owners. This, however, does not mean greater equality and equity in such markets, as small business owners rushing to participate in the "green rush" often times fail given the costly and onerous regulatory structures and insufficient access to traditional capital sources.[88] Against this background, increased competition often leads over time to a decrease in the number of dispensaries, falling prices, and struggles for some businesses.[89]

78. *Id.*; *see also Projected US Legal Medical and Recreational Cannabis Market Size*, MARIJUANA BUS. DAILY (Apr. 2023), https://mjbizdaily.com/us-cannabis-sales-estimates (indicating similar projections).

79. *U.S. Cannabis Sales by State*, MARIJUANA BUS. DAILY (Feb. 6, 2023), https://mjbizdaily.com/us-cannabis-sales-by-state.

80. Hoffer, *Cannabis Taxation: Lessons Learned from U.S. States and a Blueprint for Nationwide Cannabis Tax Policy*, *supra* note 57.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *How Much Revenue Do States Make from Marijuana Taxes?*, USAFACTS (Sept. 19, 2023), https://usafacts.org/articles/how-much-revenue-do-states-make-from-marijuana-taxes.

86. *Id.*

87. *Id.*

88. Stoa, *The Next Wave*, *supra* note 41, at 36–40.

89. *See* Katy Marquardt Hill, *Colorado's Mellowing Marijuana Industry*, CU BOULDER TODAY (Jan. 2, 2024), https://www.colorado.edu/today/2024/01/02/colorados-mellowing-marijuana-industry; Stoa, *The Next Wave*, *supra* note 41.

III. THE EVOLUTION OF MARIJUANA LAW PRACTICE

Before California launched the gradual state-driven legalization of medicinal and recreational marijuana, and while the CSA reigned supreme, all marijuana markets were illicit. Since marijuana actors in the industry were all engaged in criminal activities, which lawyers cannot counsel or assist,[90] marijuana law practice as such did not exist. As states increasingly legalized marijuana and the industry became legitimate, demand for legal advice and services grew.[91]

Understanding and mapping the rise and evolution of marijuana law practice is somewhat hindered by the piecemeal nature of the state-based legalization movement. For example, assessing the national state of affairs by simply aggregating the number of marijuana lawyers and surveying their respective practices would result in comparing apples to oranges: assessing experienced lawyers in mature marijuana legal markets to newcomers in new and emerging marijuana markets. Moreover, describing national growth patterns in marijuana law practice along a timeline is complicated by the fact that newer legal markets do not necessarily follow in the footsteps of first-mover markets, even with similar regulatory landscapes. Nonetheless, the rise and evolution of marijuana law practice over its first quarter century in jurisdictions with uncapped number of licenses, such as California and Colorado,[92] reveal intriguing tentative patterns.

A. First-Generation Marijuana Lawyers, 1996-2015

As states began to relax their statutes and legalize marijuana, demand for marijuana-related legal services soared. Attorneys helped clients navigate the complex and dynamic interplay between the CSA, other federal laws, and changing state laws, as well as the relationship between state laws and municipal laws.[93] Demand for legal services also included advice about complex permitting and licensing regulations as well as a mix of business law needs that included commercial real estate law, business formation and corporate law, tax law, labor and employment law, and contract and commercial law, in addition to compliance with a fast and ever-changing state-based regulatory apparatus.[94]

In this nascent era—no attorneys had expertise and experience representing marijuana clients while the industry was illicit—two groups of lawyers were well-positioned to crossover from their practice areas to this new field of law. Elsewhere, I discuss crossover to describe the movement of lawyers amass from one area of law to another.[95] Just as

90. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2023).

91. Peter A. Joy & Kevin C. McMunigal, *Lawyers, Marijuana, and Ethics*, 34 GPSOLO 72, 72–73 (July/Aug. 2017).

92. CANNABIS PUBLIC POLICY CONSULTING, LICENSE CAPS FOR STATE CANNABIS PROGRAMS, *supra* note 40.

93. Joy & McMunigal, *supra* note 91 (discussing lawyers' need for guidance regarding the extent of services they may provide due to conflicting laws); Karen E. Boxx, *Tiptoeing Through the Landmines: The Evolution of States' Legal Ethics Authority Regarding Representing Cannabis Clients*, 43 SEATTLE U. L. REV. 935, 935–36 (2020); Francis J. Mootz III, *Ethical Cannabis Lawyering in California*, 9 ST. MARY'S J. LEGAL MAL. & ETHICS 2, 24–25 (2018) (describing the clash between federal law and state-based regulations).

94. Kelly Hayes, *Cannabis Law*, 41 GPSOLO, 15, 15–17 (Mar./Apr. 2024).

95. *See* Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1833–41 (2008); Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?* 76 UMKC L. REV. 885, 914–18 (2008).

Jewish law firms crossed-over in the second half of the twentieth century from protected pockets of practice—low prestige areas of law scorned by the elite law firms of the era, including litigation, takeover law, and commercial real estate—to desirable business law areas such as corporate governance, securities law, and mergers and acquisitions,[96] so, too, did criminal defense lawyers and marijuana law advocates crossover and were among the first to provide legal advice to marijuana clients in the emerging industry.[97] Such crossovers were an organic response to growing client demand. Already advising clients about the CSA and other drug-related laws and regulations, criminal defense counsel and marijuana law advocates were increasingly fielding questions about other aspects of marijuana state regulation and business law.[98]

Two characteristics of this emerging field of marijuana law are worth noting. First, it had low prestige—not only because marijuana was still negatively associated with criminal activity (and early on it was, in fact, criminal anywhere outside of California), but because first-generation marijuana lawyers practiced law in the low-prestige, individual hemisphere, as opposed to the high-prestige, corporate hemisphere.[99] Put differently, putting aside the demonization of marijuana, the lawyers who crossed-over to the field from criminal defense and marijuana advocacy brought with them the perception of low prestige associated with the individual hemisphere.[100]

Criminal defense, with the exception of Big Law white collar practice, has long been considered part and parcel of the individual hemisphere:[101] Criminal defense traditionally entails the representation of individuals, not large entity clients. Many clients hail from low socioeconomic backgrounds, as opposed to being well-endowed, and cannot afford the fees of large law firms in the corporate hemisphere. Accordingly, a successful practice necessitates a relatively large caseload, inconsistent with the typical small caseload of the corporate hemisphere. Thus, most criminal defense attorneys practice as solo practitioners or in small firms in the individual hemisphere.[102] When these lawyers crossed over to constitute the first-generation cohort of marijuana lawyers, they bought with them the low-prestige stigma of the individual hemisphere to the field.[103]

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96. Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 95, at 1833–34.

97. *See* Jason Krause, *Growing Practices*, 92 A.B.A. J. 22, 22 (2006).

98. *See id.* at 22–23 (discussing complex permit and zoning matters as examples of issues first-generation marijuana attorneys encountered).

99. *See* sources cited *supra* note 5; Eli Wald, *Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement*, 89 UMKC L. REV. 685, 693–94 (2021).

100. *See* HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR, *supra* note 6, at 93–97 (finding that the lawyers surveyed in the study held criminal defense work in low professional esteem); Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM. B. FOUND. RES. J. 155, 166–67 (lawyers rated criminal defense as a low prestige legal specialty). Of course, criminal defense is not a monolith. Some types of criminal defense work—for example, capital cases—might be considered prestigious as opposed to typical criminal defense work.

101. *See, e.g.*, David B. Wilkins, *Who Should Regulate Lawyers?* 105 HARV. L. REV. 799, 865–66, 876 (1992) (discussing effective means of regulating defense counsel given the characteristics of their practice in the individual hemisphere).

102. *See generally* Nicole Martorano Van Cleve, *Reinterpreting the Zealous Advocate: Multiple Intermediary Roles of the Criminal Defense Attorney, in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 293 (Leslie C. Levin & Lynn Mather eds., 2012).

103. Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1177–78, 1209-1210 (2008) (exploring mechanisms that reproduce low professional status of lawyers in the individual hemisphere, including criminal defense counsel).

Second, the new, emerging field was especially attractive to less established defense counsel with capacity to handle the demand, as well as to other new and less-established lawyers in the individual hemisphere who were not especially troubled by upsetting existing clients and experiencing a reputational backlash among prospective clients concerned with the perception of marijuana being associated with criminal conduct.[104] Consequently, initially less-experienced, solo, and small-firm lawyers dominated the emerging field.[105]

These first-generation marijuana lawyers—on average less experienced, less credentialed, younger members of the bar—were certainly competent to address the needs of marijuana clients. American Bar Association (ABA) Model Rules of Professional Conduct Rule 1.1, entitled "Competence," states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[106] Comment 1adds that,

> in determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.[107]

Although criminal defense attorneys and marijuana advocates—by virtue of their specializations—generally had little previous experience in relevant fields such as business law, tax law, commercial real estate law, and labor and employment law, many matters—like LLC formation—were relatively straightforward, and lawyers were able to adequately prepare and gain competency in the needed areas of law.[108] Moreover, because marijuana law was new—before legalization the entire industry was illicit—and fast changing, there were no expert or experienced lawyers in the field to whom the matters could be referred.[109]

Comment 1 further states, directly on point, that "[i]n many instances, the required proficiency is that of a general practitioner."[110] While "[e]xpertise in a particular field of

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104. *See, e.g.*, Krause, *supra* note 97, at 22 (noting that junior attorneys began leaving their jobs to start their own marijuana law practices).

105. *Id.* ("I've got cases in almost every county, all on this marijuana stuff[.] Last week I was only home on Saturday. I think I've stayed at every Best Western in every small town in this state.") (quoting a first-generation marijuana attorney who left his position to found a new law office in the field).

106. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

107. *Id.* at cmt. 1.

108. Arguably, many of the legal questions that dispensary owners had could have also been answered by knowledgeable non-lawyers, if the legal profession did not have a monopoly over the provisions of legal services. In the first quarter of the twenty-first century, in response to robust evidence regarding insufficient access to lawyers by those who cannot afford to pay for legal services, several jurisdictions have experimented with allowing non-lawyers to provide routine, straightforward legal tasks. *See* Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 146 (2024). Some access to justice advocates have argued that such reform is especially needed to assist small business owners with their routine legal needs, including business formation. *See*, *e.g.*, Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 929 (2012); David Nows, *Supporting Rural Entrepreneurship with Legal Technology*, 17 N.Y.U. J. L. & BUS. 391 (2021). To date, the reform has not reached and does not cover marijuana legal services.

109. *See* sources cited *supra* notes 90–91 and accompanying text.

110. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2023).

law may be required in some circumstances," expertise in marijuana law did not exist because, while the CSA reigned supreme, the marijuana industry was illicit and lawyers were unable to assist clients in what was deemed criminal activity.[111] Comment 2adds that "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar."[112] Indeed, in reference to junior lawyers and marijuana advocates flocking to meet the new demand, Comment 2 notes that "[a] newly admitted lawyer can be as competent as a practitioner with long experience," with adequate preparation and study.[113] The comment further explains that

> some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.[114]

The comment concludes, again directly on point, that "[a] lawyer can provide adequate representation in a wholly novel field through necessary study."[115]

Over time, and as a growing number of states legalized medicinal marijuana, marijuana lawyers gained experience and expertise, increasingly specializing in this evolving area of law. By 2012, when Colorado and Washington legalized recreational marijuana and ushered in a new era of increased demand for a fast-growing industry, first-generation marijuana lawyers became the more experienced, relatively well-established group of solo practitioners and small law firm lawyers specializing in marijuana law.

B. Second-Generation Marijuana Lawyers, 2016-Present

The emerging marijuana industry gave pause to more established business lawyers, including those in Big Law, for several related reasons. To begin with—notwithstanding legalization of medical and recreational marijuana in a growing number of states—federal law, namely the CSA, continued to define marijuana as a Schedule I narcotic.[116] Thus, as a matter of the law in the books, the marijuana industry was a criminal enterprise.[117] Early on, before the Justice Department circulated the Ogden and Cole memos, significant uncertainty surrounded the industry and the risk of federal law enforcement, with consequences for lawyers advising and assisting clients' criminal conduct, was real.[118] For lawyers, assisting clients entailed the risk of being charged by U.S. Attorneys for aiding and abetting a crime by violating the CSA.[119] Moreover, even as the number of states legalizing marijuana has grown and the threat of federal enforcement of the CSA declined, the

111. *Id. See supra* notes 90–91 and accompanying text.
112. *Id.* at cmt. 2.
113. MODEL RULES OF PRO. CONDUCT cmt. 2 (AM. BAR ASS'N 2023).
114. *Id.*
115. *Id.*
116. 21 U.S.C. § 812(c)(10).
117. Kamin & Wald, *supra* note 20, at 870–71 ("Even in those states decriminalizing marijuana, every sale of marijuana, every plant that is grown, is a serious violation of federal law.").
118. *Id.*
119. 18 U.S.C. § 2.

shadow of the CSA continued to loom large, for example, restricting dispensaries' access to banking services.[120]

Next, separate and distinct from the risk of federal law enforcement efforts, lawyers early on faced the threat of discipline for violating state rules of professional conduct. Most states follow ABA Model Rule 1.2(d), which states in relevant part that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal."[121] Since marijuana clients' conduct was technically criminal—it violated the CSA—lawyers who assisted them seemingly violated the plain language of Rule 1.2(d). Over time, though, the risk of disciplinary enforcement subsided. For example, many disciplinary agencies in states with legalized marijuana have indicated that enforcing their Rule 1.2(d) counterpart against lawyers who assist clients with conduct that is permitted by state law would not be a priority.[122] Similarly, a number of state supreme courts revised their rules of professional conduct to expressly permit such assistance.[123]

Still, one should not underestimate the uncertainty that once surrounded discipline for violating Rule 1.2(d) and the impact it had on lawyers willing to enter the field in the nascent era. Colorado voters, for example, approved a state constitutional amendment to permit medicinal marijuana in 2000 and approved recreational marijuana in 2012. Yet the Colorado Supreme Court first revised Comment 14 to Colorado Rule of Professional Conduct 1.2 to allow Colorado lawyers to assist clients in the state-authorized marijuana industry only on March 24, 2014.[124] Indeed, as late as October 2013, the Colorado Bar Association Ethics Committee issued Ethics Opinion 125, titled *The Extent to Which Lawyers May Represent Clients Regarding Marijuana-Related Activities*, finding that a plain reading of the state's Rule 1.2(d) prohibited lawyers from assisting clients in criminal activities prohibited by the CSA, and called on the Colorado Supreme Court to revise the rule. When the state supreme court revised Comment 14, the Colorado Ethics Committee withdrew its opinion.[125] Thus, for the majority of the nascent era, from 2000-2012, first-generation

120. Kamin & Wald, *supra* note 20, at 884–85; James Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, A.B.A., (Feb. 2020), https://www.americanbar.org/groups/business_law/resources/business-law-today/2020-february/cannabis-banking-proceed-with-caution.

121. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2023).

122. Joy & McMunigal, *supra* note 91, at 73.

123. *Id*. States such as Ohio and Oregon amended the language of their Rule 1.2(d) counterparts, and other states, including Colorado, Nevada, and Washington, amended their comments. *Id. See generally* Kamin & Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, *supra* note 20.

124. Colo. RPC 1.2, cmt. 14 ("A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIll, secs. 14 & 16, and the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them, as they may be amended from time to time. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.").

125. *See* Formal Ethics Opinion, Colo. Bar Ass'n, https://www.cobar.org/ethicsopinions.

marijuana lawyers in Colorado were operating under conditions of uncertainty and some threat of disciplinary enforcement.[126]

In contrast, in the current, second, era, only minor disciplinary uncertainty remains primarily for marijuana lawyers who also practice before federal courts. For example, the U.S. District Court for the District of Colorado, which generally follows the Colorado Rules of Professional Conduct, declined to adopt Comment 14 to Colorado Rule 1.2(d) because the CSA is still in effect.[127] Similarly, for marijuana lawyers with a practice that cuts across state lines, traversing jurisdictions that have both legalized and not legalized marijuana, the threat of discipline has also diminished significantly.[128] The reduced threat of liability for aiding and abetting clients' criminal conduct, combined with the diminished exposure for discipline for violating the Rules of Professional Conduct, created a *Conant* moment for lawyers, making more attorneys willing to enter marijuana law practice.[129] Just as the *Conant* decision reduced risk of discipline for California doctors serving marijuana patients, so did reduced enforcement of the CSA provisions in states that legalized marijuana, and disciplinary rule revisions reduced the risk of discipline for lawyers assisting marijuana clients in states that legalized the drug.

Finally, as previously discussed, the regulation and practice of marijuana was in a state of flux in its nascent era. A sea of prospective clients—many of whom were first-time, solo, small-business owners—flooded into a fast-changing and complex regulatory landscape. This was not the usual clientele of long-standing, established Big Law. Over time, the industry stabilized and grew, the pace of new regulations decreased, experience increased, and the number of applications and dispensaries stabilized, with some larger entity clients emerging in some jurisdictions. For example, in those jurisdictions with caps on licenses, the practice realities that previously deterred experienced and established lawyers—large law firms included—from entering marijuana law practice changed.

These developments set the stage for a new era in marijuana law practice. Moreover, the reduced threat of criminal law enforcement and discipline against marijuana lawyers, combined with growing stability and maturation of the industry, eased stigma and stereotypes about clients and the types of lawyers representing them.[130] As a growing number of states moved to legalize medicinal and recreational marijuana, American public opinion

126. By contrast, after Colorado voters approved Proposition 122 in November 2022 to legalize some cultivation and use of psychedelic mushrooms, the Colorado Supreme Court promptly revised comment 14 to rule 1.2, offering Colorado lawyers clear guidance about their ability to assist clients with conduct permitted by state law, significantly decreasing the uncertainty surrounding the emerging psychedelic law practice. *See* Rule Change 2024(02): Colorado Rules of Professional Conduct, COLO. LAW. (2024), https://cl.cobar.org/from-the-courts/rule-change-202402; s*ee also* Andrew Kenney, *What to Know About Colorado's Psychedelic Law*, COLO. PUB. RADIO NEWS (Jun. 21, 2023), https://www.cpr.org/2023/06/21/colorado-psychedelic-law-for-psilocybin-mushrooms; *see generally* Stoa, *The Next Wave*, *supra* note 41 (exploring the lessons the regulators of the psychedelic industry can learn from the regulation of marijuana).

127. Wald et al., *Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, *supra* note 63.

128. *Id*.

129. *See generally* Conant v. Walters, *supra* note 43.

130. As late as 2013, writing what, at the time, was among the first examinations of the emerging marijuana law practice, Professor Sam Kamin and I titled our article *Marijuana Lawyers: Outlaws or Crusaders? See generally* Kamin & Wald, *supra* note 20. Today, many think of cannabis lawyers as neither outlaws nor crusaders, rather, they are just marijuana lawyers.

shifted, with a majority of Americans favoring legalization.[131] New marijuana law bar associations, national and local, were established, further reducing negative stigma for practitioners in the field.[132] New industry publications also emerged,[133] and law schools began offering coursework in marijuana law.[134]

This confluence of circumstances ushered in a new era—the second generation of marijuana law practice. This contemporary cohort consists of experienced marijuana lawyers, veterans of the first generation, such as the Vicente law firm. Formed in Denver, Colorado, in 2010, before the state legalized recreational marijuana, by recent law school graduates, the firm represented medical marijuana clients and advocated for more effective, less onerous regulations and further legalization.[135] Since then, the firm has grown into the "premier cannabis and psychedelics law firm" in the United States, with over three-dozen lawyers practicing out of offices throughout the country.[136] These experienced marijuana lawyers are joined by more experienced and established business lawyers, now less afraid to enter the more respectable field. In particular, these second-generation marijuana lawyers include two types of lawyers that were mostly absent from the first generation—in-house counsel and Big Law firms.

First, as marijuana entity clients grew and stabilized, some needed in-house counsel, which were drawn from the ranks of the now experienced, first-generation marijuana

131. *See Most Americans Favor Legalizing Marijuana for Medical, Recreational Use*, PEW RSCH. CNTR. (Mar. 26, 2024) ("An overwhelming share of U.S. adults (eighty-eight percent) say marijuana should be legal for medical or recreational use. Nearly six-in-ten Americans (fifty-seven percent) say that marijuana should be legal for medical and recreational purposes, while roughly a third (thirty-two percent) say that marijuana should be legal for medical use only. Just eleven percent of Americans say that the drug should not be legal at all."), https://www.pewresearch.org/politics/2024/03/26/most-americans-favor-legalizing-marijuana-for-medical-recreational-use.

132. *See*, *e.g.*, *Cannabis Law & Policy*, A.B.A. TIPS, https://www.americanbar.org/groups/tort_trial_insurance_practice/committees/cannabis_law_and_policy (last visited Aug. 15, 2024) ("The [American Bar Association's] Cannabis Law and Policy Committee are professionals across the country from all legal disciplines who are applying their skills to the continually expanding state cannabis laws and federal hemp laws."); Dan Kittay, *Emerging Field of Cannabis Law Sparks New Specialty Bar*, 40 BAR LEADER (Sept. 2015), https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2015-16/september-october/emerging-field-cannabis-law-sparks-new-specialty-bar; International Cannabis Bar Association, https://incba.org (last visited Aug. 15, 2024); Colorado Bar Association Cannabis Law Section, https://www.cobar.org/For-Members/Sections/Cannabis-Law-Committee (last visited Aug. 15, 2024).

133. *See, e.g.*, Cannabis L. J., https://journal.cannabislawreport.com (last visited Aug. 15, 2024); CANNABIS L. REP., https://cannabislaw.report (last visited Aug. 15, 2024).

134. Julianne Hill, *Budding Cannabis Law Courses Are Growing—But Not Fast Enough*, A.B.A. J. (Apr. 15, 2024) ("In the 2022-2023 academic year, 45 law schools—or about 22% of the 197 ABA-accredited schools—offered a combined total of 47 cannabis law courses . . . an increase of 24 schools compared to four years earlier in the 2018-2019 academic year."), https://www.abajournal.com/web/article/budding-cannabis-law-courses-growingbut-not-fast-enough; David Migoya, *University of Denver Adds Pot Business to Law School Curriculum*, DENV. POST (Jan. 16, 2015), https://www.denverpost.com/2015/01/16/university-of-denver-adds-pot-business-to-law-school-curriculum.

135. *See* VICENTE, https://vicentellp.com/about/profile (last visited Oct. 27, 2024).

136. *Id*.

lawyers.[137] Second, Big Law firms formed marijuana practice groups and departments,[138] quickly rising to the top of rankings by Chambers and the Legal500.[139] As industry commentators note, "[g]one are the days when small, boutique law offices were the only attorneys willing to represent marijuana clients. Today, some of the country's largest and most respected law firms are venturing into the world of weed."[140] Capturing and reflecting the changing public and legal perceptions of the industry, these new practice groups were often called "cannabis," as opposed to "marijuana," law groups, shedding the negatively associated latter term.[141] Moreover, the mere fact that Chambers—a leading sought-after Big Law ranking—ranked these practice groups shortly after they were formed is revealing in and of itself.[142] Rather than shying from advertising their marijuana law groups, large law firms were delighted to feature their Chambers rating for their cannabis law groups.[143]

Large law firms generally pursued one of two growth strategies, either recruiting experienced, first-generation marijuana practitioners with established books of business, or pooling together existing expertise from within the firm, including partners with subject matter expertise in business formation, corporate law, regulatory compliance, tax, banking, labor and employment, etc.[144] Such cannabis practice groups were either stand-alone

137. Boxx, *Tiptoeing Through the Landmines*, *supra* note 93, at 951.

138. *See* Ally Marotti, *As Marijuana Gains Acceptance, Law Firms Cultivate New Pot-Specific Practices*, CHI. TRIB. (Apr. 19, 2017), http://www.chicagotribune.com/business/ct-medical-marijuana-lawyers-0420-biz-20170418-story.html; Justin Henry, *Cannabis Law Is Changing, and Big Law Is Taking Over the Space*, AM. LAW. (May 20, 2021, 5:25 PM), https://www.law.com/thelegalintelligencer/2021/05/20/cannabis-law-is-changing-and-big-law-is-taking-over-the-space ("Toward the middle of the last decade, Akerman, Duane Morris, Goodwin Procter, Fox Rothschild, Troutman Pepper and Cozen O'Connor and others in the Am Law 200 started organizing practices around the nascent cannabis industry.").

139. When large law firms began to grow exponentially in the middle of the twentieth century, they were initially ranked by the total number of lawyers they had because the size of the law firm was a proxy for its financial health and growth. As compensation transparency grew, rankings increasingly paid attention to total firm revenues and profits-per-partners. As mile markers further expanded to track associate compensation, lateral movements, and diversity, equity and inclusiveness values, rankings like Chambers and the Legal500 rose to prominence, purporting to rank the best and most prestigious law firms along these multiple criteria, including feedback from clients. *See USA—Nationwide Cannabis Legal Rankings*, CHAMBERS & PARTNERS, https://chambers.com/legal-rankings/cannabis-law-usa-nationwide-5:2815:12788:1 (last visited Aug. 15, 2024); *Cannabis Law Practice Rankings in the United States*, LEGAL500, https://www.legal500.com/c/united-states/industry-focus/cannabis (last visited Aug. 16, 2024).

140. Gina Tincher, *Marijuana: At the Crossroads of Law, Science, and Technology*, 13 A.B.A. SCITECH L. 4, 4 (2017).

141. *See, e.g.*, Cannabis Practice, AKERMAN, https://www.akerman.com/en/work/services/practices/government-affairs-public-policy/regulated-substances.html (last visited Aug. 16, 2024); *Cannabis Law*, FOX ROTHSCHILD, https://www.foxrothschild.com/cannabis-law (last visited Aug. 16, 2024); Cannabis Industry Team, COZEN O'CONNOR, https://www.cozen.com/industries/cannabis (last visited Aug. 16, 2024).

142. *See* CHAMBERS & PARTNERS, *supra* note 139. *See generally What are the Chambers Rankings?*, CHAMBERS & PARTNERS, https://chambers.com/info/the-rankings-explained (last visited Aug. 16, 2024).

143. *See* CHAMBERS & PARTNERS, *supra* note 139.

144. *See* Henry, *supra* note 138; Justin Henry, *DEA's Rescheduling Plan Has Law Firms High on Expanding Relationships with Cannabis Clients*, AM. LAW. (May 2, 2024, 3:50 PM), https://www.law.com/americanlawyer/2024/05/02/deas-marijuana-rescheduling-plan-has-law-firms-high-on-expanding-relationships-with-cannabis-clients.

departments or closely aligned with other highly regulated industries, such as tobacco, alcohol, and gambling.[145]

In sum, the first generation of marijuana lawyers included criminal defense counsel and marijuana advocates crossing-over to address the needs of clients no longer operating in an illicit industry, as well as other relatively inexperienced solo and small firm lawyers. The second generation of marijuana—now known as cannabis—lawyers includes experienced, first-generation veteran marijuana lawyers, as well as more experienced and established business lawyers who are willing to provide legal services to cannabis clients now that the risk of criminal prosecution for aiding and abetting a crime, and the risk of disciplinary action, have significantly declined, the negative association of the drug has diminished, and a majority of Americans approve of its legalization. Notably, among this constituent of established lawyers entering the field in the second generation are elite, large law firm lawyers.

A concluding, apples-and-oranges caveat echoing the one in the beginning of this Part[146]—or, more accurately, a first-generation marijuana lawyers versus a second-generation cannabis lawyers' caveat—is in order. The generational distinction best fits mature cannabis markets, where legalization occurred years ago, and industry lawyers had time to grow their practice and experience. In contrast, in jurisdictions in which legalization is more recent, some industry lawyers are experiencing first-generation conditions. Moreover, the mature industry versus the evolving, recently legalized market difference does not map perfectly onto the second versus the first generational distinction. On the one hand, mature jurisdictions are home not only to experienced, first-generation marijuana lawyers and experienced business attorneys now serving cannabis clients, but also to recent graduates attracted to the field (admittedly better trained now that law schools regularly offer cannabis classes), and relatively inexperienced criminal defense and other lawyers crossing-over to cannabis law practice. On the other hand, evolving jurisdictions are home not only to criminal defense counsel and cannabis advocates crossing over, but also to more experienced business lawyers now willing to serve cannabis clients because the industry has grown more respectable and less associated with negative stereotypes, as well as experienced first-generation lawyers, the likes of Vicente, expanding their practices from mature to evolving jurisdictions.

IV. CANNABIS LAW PRACTICE AND THE LEGAL PROFESSION IN THE TWENTY-FIRST CENTURY

At first glance, the rise of in-house legal departments in cannabis businesses and the entry of large law firms into cannabis law practice seems like unremarkable phenomena—a mere supply-side adjustment to an increased demand for legal services by a growing industry, in the context of reduced risk and increased reward for lawyers.

The "return" of in-house lawyers has been a well-documented phenomenon in the

145. Patrick Smith, *Cannabis Has Big Law Seeing Green, But the Am Law 50 Are Skipping the Party*, AM. LAW. (July 28, 2019), https://www.law.com/americanlawyer/2019/07/28/cannabis-has-big-law-seeing-green-but-the-am-law-50-are-skipping-the-party/?slreturn=20201004135628; Joyce E. Cutler, *Cannabis Practices Sprout as Big Law Firms Follow the Money*, BLOOMBERG L. (Sept. 21, 2021), https://news.bloomberglaw.com/business-and-practice/Cannabis-practices-sprout-as-big-law-firms-follow-the-money.

146. *Supra* note 92 and accompanying text.

last quarter of the twentieth century.[147] By the twenty-first century, in-house practice had shed its second-class reputation and became a respectable—even desirable—area of law practice.[148] The same reasons that led to the return of in-house counsel and the increased popularity of in-house legal departments at the expense of outside counsel—including the curtailing of legal spending, providing specialized, proactive legal expertise, and advising on compliance matters—apply with the same force in the cannabis industry as they do outside of it.[149]

Similarly, Big Law's move into cannabis law practice seems like an obvious development. Beginning in the second half of the twentieth century, the dominant culture of Big Law gradually changed, increasingly emphasizing the financial bottom line over other traditional aspects of status and professionalism. As the "eat what you kill" culture—one in which superstar rainmakers, known as finders, reached the top of the compensation chain at the expense of grinders[150]—rose to prominence,[151] large law firms increasingly emphasized profitability and the financial bottom line, abandoned lockstep compensation in favor of structures reflective of partners' books of business, and split the old partnership tier into income and equity partners to better reward top performers.[152] Meanwhile, professional journals replaced rankings grounded in the number of lawyers with those measuring profits per partner and, later, profits per equity partner (alongside rising associate salaries).[153] In such a day and age, it seems hardly a surprise that, as the cannabis industry matured to offer significant financial rewards for lawyers, Big Law would follow the big money.

A. Follow What Money? Big Law in a Holding Pattern

Upon further scrutiny, however, the Big Law venture into cannabis law practice is less intuitive than it first appears. Big Law tends to represent large entity clients with business needs, shying away from individuals and small businesses.[154] Large entity clients tend to supply a steady diet of legal business work, some of which is complex in nature,

147. *See generally* Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L. J. 479 (1989); Robert W. Gordon, *The Return of the Lawyer-Statesman?* 69 STAN. L. REV. 1731 (2017); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457 (2000); Eli Wald, *Getting In and* Out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers, 88 FORDHAM L. REV. 1765 (2020). *See generally* BEN W. HEINEMAN JR., THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION 317–57 (2016).

148. Wald, *supra* note 147, at 1776; Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 438.

149. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 775, 788, 798–99 (summarizing the reasons for the "return" and rise of in-house legal departments at the expense of Big Law).

150. ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 9 (1988) (describing the role and status of different types of partners as finders, minders and grinders).

151. *See generally* MILTON C. REGAN JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (The University of Michigan Press 2007).

152. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1875–77 (2008); William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691 (2006); Wald, *supra* note 147, at 1785.

153. Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2259 (2010); Wald, *supra* note 147, at 1793.

154. HEINZ & LAUMANN, CHICAGO LAWYERS, *supra* note 5; HEINZ ET AL., URBAN LAWYERS, *supra* note 6.

and those entities generally pay well for the services they consume.[155] In contrast, many cannabis business clients, and perhaps still the typical cannabis client, especially in jurisdictions that do not cap the number of dispensary licenses they grant such as California and Colorado, is a small business, which may not always be able to afford Big Law rates,[156] let alone open a bank account from which they can conveniently pay fees.[157] Consequently, Big Law partners specializing in cannabis law may need to serve a larger roster of smaller clients, with a corresponding higher rate of nonpayment compared with the paradigmatic Big Law large entity clients—all practice realities that large law firms are not well-suited to deal with.

Moreover, the specialized, state-based nature of cannabis law practice limits the inherent synergies common, and often essential to, the practice of large law firms.[158] Big Law structure and organization builds on and lends itself to internal referrals.[159] Large law firm business grows when existing client needs expand and the "relationship partner"—the finder—introduces the client to subject-matter experts within the firm—minders and grinders—who can help serve the client's legal needs and grow the relationship in new directions.[160] This internal referral mechanism is less likely to be effective in an area of law that is state and regional based—and is still criminal at the federal level—raising the probability that cannabis law practice groups would be siloed within firms. For example, the ability of partners to send cannabis-related work to other partners, subject-matter experts at the firm such as tax and IP colleagues, who are unfamiliar with the specifics of cannabis law would be limited. Their ability to feed work to associates in other departments would likewise be reduced because the specialized knowledge of cannabis law practice would limit the ability to use associates from the corporate, litigation, and real estate departments.

Relatedly, the highly localized nature of cannabis law practice—which varies both across and within states—makes it harder to practice nationally and globally by dampening the economies of scale, which traditionally gives Big Law an advantage in the corporate legal services market. For example, one equity partner's cannabis practice is likely to be state-based or regional as opposed to national. Put differently, large law firms are not well-organized or designed to flourish in highly segmented and localized markets. As Professor

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155. Dennis Curtis, *Can Law Schools and Big Law Firms be Friends*, 74 S. CAL. L. REV. 65, 71 (2000) ("Big [Law], these days, means big enough to offer a very wide array of expertise in order to attract *big, well-paying clients*.") (emphasis added)). *See, e.g.,* Dan Roe, *Top Big Law Partners are Earning More Than $2,400 Per Hour, as Rates Continue to Climb*, Am. Law. (Jan.10, 2024 at 5:00 AM), https://www.law.com/americanlawyer/2024/01/10/top-restructuring-partners-are-earning-more-than-2400-per-hour-as-rates-continue-to-climb (discussing the hourly rates of Big Law attorneys specializing in bankruptcy law).

156. *See* Stoa, *The Next Wave*, *supra* note 41 (discussing the plight of small cannabis businesses, which struggle to meet the costs of regulatory compliance and legal fees).

157. *Supra* note 58.

158. *See* Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 909 (1994) ("The large law firm offers clients 'one-stop' expertise and an internal, 'bonded' referral market. Clients with multifaceted problems are able to address those problems with the help of a single entity.").

159. Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 3, 6; Russell G. Pearce & Eli Wald, *The Relational Infrastructure of Law Firm Regulation: Is the Death of Big Law Greatly Exaggerated?*, 42 HOFSTRA L. REV. 109, 113, 124–25 (2013).

160. Burk & McGowan, *supra* note 159, at 14–15, 75, 79. *See generally* NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM, *supra* note 150.

Mikos points out, the days of state restrictions may be numbered because they violate the Dormant Commerce Clause,[161] but, as long as they continue to be the norm, segmented state regulations are inconsistent with the organization and business model of Big Law.

Next, although large law firms are well-situated to monitor and address conflict of interests, their experience is with a large, sophisticated client base.[162] Expanding their client base to include many more, smaller clients would increase the probability of conflicts of interest arising, with a lower probability of obtaining informed consent and resolving the conflicts. This is because smaller, relatively unsophisticated clients tend to expect a thicker notion of loyalty and are less likely to waive conflicts.[163] Moreover, cannabis law partners are likely to find themselves facing intra-firm pressure vis-à-vis partners frustrated with the prospect of more unresolvable conflicts, and, as newer partners with smaller books of business, they are less likely to prevail in these power struggles.[164]

Finally, despite its evolution and growth, the cannabis industry is not yet big money. Or, more accurately, it is not yet Big Law kind of big money. With the exception of jurisdictions with licensing caps where only a few relatively large, well-connected, elite, well-capitalized cannabis businesses have emerged and have multi-state operations,[165] the industry features small businesses as opposed to repeat players and larger entities pursuing big cannabis deals at a global or even a national level. The industry may be growing in terms of overall sales and tax revenue for states, but the clients are not the ones Big Law can easily serve, even if they had lawyers with the relevant expertise.

In sum, even if Big Law wanted to serve cannabis clients in the growing industry, the identity of typical relatively small cannabis clients and the specialized nature of the work would be a poor fit for the traditional large law firm. Thus, a revised explanation for Big Law's entry into cannabis law is that large firms made an entry into the field before it made economic sense for them to do so and are now, essentially, in a holding pattern, awaiting federal decriminalization or, perhaps, a judicial finding that state-based restrictions violate the Dormant Commerce Clause.[166] Once restrictions are removed, the industry consolidates, bigger entity clients become the norm, and the big money is there

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161. *Supra* notes 73–74 and accompanying text.

162. Jonathan M. Epstein, Note, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002).

163. *See* Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 St. Mary's L.J. 909, 950 (2009) ("[B]roader attorney loyalty to clients might be more appropriate in the representation of individual clients by solo practitioners, as opposed to the representation of entity clients by large law firms.").

164. *See generally* NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM, *supra* note 150.

165. Team Stash, *The 12 Largest Cannabis Companies in 2024*, STASH (Aug. 9, 2024), https://www.stash.com/learn/largest-cannabis-companies (discussing multi-state-operators—or, STOs); MULTI-STATE-OPERATORS, CANNABIS BUS. RES., https://cannabusinessresources.com/multi-state-operators (defining and discussing STOs).

166. Schedule III reclassification, contemplated by the Biden Administration, is a move in the right direction for Big Law, but it is likely to prove insufficient. While the move will recognize the accepted medical use of marijuana, ease tax treatment for marijuana clients, and remove some criminal penalties (for the types of clients Big Law is unlikely to represent), many cumbersome and costly restrictions will remain in effect for medical marijuana dispensaries, and the reclassification will have little impact on recreational marijuana businesses. Accordingly, the rise of "Big Cannabis" and national and global entity clients seeking Big Law representation, and the corresponding flow of big money, are still uncertain future propositions. *See supra* notes 64–67 and accompanying text; *supra* note 73.

for the taking,[167] Big Law would be well-positioned, have a suitable infrastructure, and have the lawyers on hand to take immediate advantage of the situation.

B. Status and Power in the Legal Profession: The Two Hemispheres and Cannabis Law Practice

Explaining large law firms' move into cannabis law practice in terms of being proactive, agile, innovative, early-mover institutions makes ample sense, except for one thing: It contradicts everything known about Big Law culture and how it operates.

Large law firms are traditionally known as slow-moving, change-resisting, bureaucratic organizations that are slow to adopt or adapt their business models, even in the face of compelling incentives to do so.[168] Ample ink has been spilled explaining these features of Big Law.[169] Lawyers in general, and Big Law in particular, thrive on maintaining, sustaining, and legitimizing the status quo, serving the corporate powers that be. It is in Big Law clients' interests, and in the interest of Big Law itself, to resist change—and resist change they do.[170]

Moreover, the conservative nature of large law firms is not merely a reflection of their clients' interests.[171] Historically, the Big Law concept of merit, excellence, and professional success depended on their resisting change, upholding their traditional culture, excluding newcomers to the legal profession, and refusing to expand into new practice areas.[172] The rise of large law firms in the late nineteenth century, and their successful campaign to attain elevated professional standing, relied on successfully translating White Anglo-Saxon Protestant (WASP), elite, white-shoe status and values into professional status and values.[173]

To effectuate this move, the large, WASP Wall Street law firms stuck to respectable, white-shoe business and corporate law practice and refused to represent clients in seemingly lucrative, yet low-status, areas of law, including litigation, hostile takeovers and defense, and commercial real estate. This conduct led to the creation of protected pockets of practice in these low-esteem areas of law practice, in which Jewish and Catholic law firms dominated free of competition. Later, Jewish and Catholic law firms—having proven themselves to large entity clients as competent and, indeed, excellent lawyers—were able

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167. The Canadian experience suggests, however, that a Big Cannabis national regulatory approach may result in the rise of large cannabis clients, including publicly traded entities, which large law firms may be happy to serve, but not necessarily in financial stability for the industry. *See* Nadine Yousif, *Canadian Cannabis Market Struggles Five Years After Legalisation*, BBC (Oct. 17, 2023), https://www.bbc.com/news/world-us-canada-67126243.

168. NELSON, *supra* note 150 (discussing large law firms' tendency toward bureaucratic organization and management); William D. Henderson, *From Big Law to Lean Law*, 38 INT'L REV. L. & ECON. 5 (2014).

169. *Id.* Of particular note are complaints about the resistance of Big Law to change related to diversity, equity, and inclusiveness initiatives. *See* David B. Wilkins*, From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004); Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

170. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2020).

171. *See* Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 95, at 1821–22.

172. *Id.* at 1821.

173. *Id.* at 1813–23; Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, *supra* note 95, at 889.

to crossover and compete with the WASP elite for business and corporate work of large entity clients.[174]

Early on, the conduct of large WASP law firms was not irrational or stubborn. Rather, their professional culture and values were based on more than objective merit and excellent service.[175] The old elite, to be sure, did offer its clients excellent service. At the same time, however, Big Law's sense of professional worth and status depended on separating themselves from the lower ranks of the profession (Jews, Catholics, immigrants, and—fitting for the era—women and lawyers of color) and the areas of law in which they practiced.[176] What it meant to be an elite lawyer at a large law firm was to be a graduate of an elite law school, a provider of excellent, one-stop-shop business legal services, and a statesman who exercised practical wisdom on behalf of clients. Importantly, it also meant being a WASP man, hailing from a white-shoe upbringing, who practiced in "dignified" areas of law, separate and distinct from the riffraff of the profession.[177]

The days of WASP, Jewish, and Catholic law firms, complete with explicit, overt ethnoreligious, gender, and race-based discrimination are, fortunately, gone.[178] The exclusionary culture and values of Big Law have given way to new professional ideologies grounded in merit and competitiveness, even hyper-competitiveness.[179] The gradual decline of systematic explicit discrimination in the post-WWII through the 1980s era led some commentators to express cautious optimism about the prospects for greater equality in the legal profession. Some spoke of the new "no problem" problem era: Because explicit discrimination was a thing of the past, once women and lawyers of color were admitted to and graduated from law schools in representative numbers, they would rise through the ranks of the legal profession based on merit.[180] Others asserted that competitive forces in the legal services market, including the "economics of discrimination" market reasoning[181] and the "business case for diversity,"[182] would usher in greater equality, diversity, equity, and inclusivity in Big Law's positions of power and influence because discriminating law firms would forgo talent and increasingly diverse clients. Yet that cautious optimism has faded way.[183]

Glass ceilings—the underrepresentation of women, lawyers of color, and other

174. Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 95, at 1833–36.

175. *Id*. at 1812.

176. *Id*. at 1812–15.

177. *Id.* at 1821–25; *See generally* ERWIN O. SMIGEL, THE WALL STREET LAWYER (1969); JEROLD S. AUERBACH, UNEQUAL JUSTICE 24–25, 71–73, 99–101 (1976) ("There was 'little room for young aspirants outside the favored groups.'") (quoting CHARLES EVANS HUGHES, THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 76 (David J. Danelski & Joseph S. Tulchin eds., 1973)).

178. Ruth Bader Ginsburg, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 20–21 (2013).

179. Wald, *Glass Ceilings and Dead Ends*, *supra* note 153, at 2272.

180. *See* Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 Yale L.J. 1731, 1744–46 (1991).

181. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); Eli Wald, *Jewish Lawyers and the U.S. Legal Profession: The End of the Affair?* 36 TOURO L. REV. 299, 315–17 (2020).

182. *See* Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business," supra* note 169, at 1591–92.

183. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1041 (2011); Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession*, *supra* note 169, at 1079–80.

previously discriminated groups in positions of power and influence in the legal profession—have persisted and even intensified. The reasons for the persistence of inequality include implicit bias, the legacy of lasting institutional barriers, stereotypes, unequal social and cultural capital endowments, and inhospitable professional ideologies.[184] As it turned out, glass ceilings were neither a "no problem," nor a self-correcting problem. Minimizing implicit bias incidents and their impact have proven to be persistent challenges without a quick, cheap fix. Even those Big Law firms committed to investing in diversity, equity, and inclusion (DEI) initiatives like installing diversity officers and implementing DEI policies discovered that questioning and reforming their old institutional culture and structures, which were premised on implicit biases, traditional networks of social capital, and unequal endowments of cultural capital, was easier said than done.[185]

At the individual level, implicit bias is hard to overcome because it is grounded in a person's upbringing, culture, and values.[186] It allows us to think and act fast.[187] At the institutional level, including at law firms, implicit bias constitutes a significant challenge because the individual biases of lawyers and other actors taint hiring, assessment, retention, and promotion decisions.[188] At the collective professional level, the challenge is compounded by the fact that often no one is responsible for tackling it. Bar associations may get involved with some aspects of implicit bias—for example, sponsoring DEI CLE presentations as part of the campaign to educate lawyers about implicit bias or promulgating rules of professional conduct that address some types of bias—but not with others, such as status bias.

Big Law's position atop the corporate hemisphere has long been more than a reflection of the identity of its large entity clients, the areas of practice and nature of the work, and the inherent internal synergies leading to increased profits.[189] Maintaining the line between high-prestige corporate hemisphere practice and low-prestige individual hemisphere practice has been a reliable source of status for Big Law for generations.[190] Indeed, exactly when large law firms transitioned from their exclusionary and overtly discriminatory era to a more competitive era grounded in merit, holding the status line between the hemispheres became more, rather than less, important.[191]

In the past, the hemispheres were a proxy for exclusionary values and status—elite versus riffraff, white-shoe WASP versus Jewish and Catholic. Exactly when the practice of law was understood to be increasingly about true merit, distinguishing the (corporate) elite from the (individual) average was instrumental to maintaining the elevated status of Big Law atop the profession, a way to distinguish the best from the rest for purposes of

184. *See* Swethaa Ballakrishnen et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2431 (2015); Eli Wald, *Big Law Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2512–13 (2015); Wald, *Glass Ceilings and Dead Ends*, *supra* note 153, at 2245–46.

185. Ballakrishnen, *Difference Blindness vs. Bias Awareness*, *supra* note 184, at 2409–11.

186. *Id.*

187. DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

188. Ballakrishnen, *Difference Blindness vs. Bias Awareness*, *supra* note 184.

189. *See* Cramton, *supra* note 5, at 539.

190. *See id.*

191. *See id.* at 538–41.

recruiting and retaining the top talent out of law schools and attracting and retaining the best clients.[192]

Historically, Big Law have minded the line, for example, by predominantly recruiting from among the graduates of elite law schools and laterally recruiting from other large law firms.[193] Even when their entry-level recruitment needs called for hiring a larger number of associates than Harvard, Yale, and Colombia law schools, and later other elite law schools could satisfy, Big Law continued to focus their recruiting attention on elite law schools and the top graduates of non-elite law schools.[194] Similarly, lateral hires not available within the ranks of other Big Law firms, for example, when large law firms wanted to boast the ranks of their litigation departments with experienced trial attorneys, were sought from within the ranks of experienced government lawyers, not plaintiffs' lawyers.[195] Holding the line between the hemispheres sustained the perception of large law firms as the elite atop the profession. It stoked status implicit bias favoring Big Law.

Similarly, even when Big Law expanded their subject matter expertise, first from business law to litigation and commercial real estate, and later to traditional individual hemisphere areas such as criminal law, trust and estates, and even immigration, they have done so judiciously.[196] Large law firms represent defendants in white collar crime cases, not the full gamut of criminal law matter.[197] They help corporate executives and well-to-do individuals manage their wealth,[198] and they help entity clients with the immigration matters of their executives.[199] Minding the line between the hemispheres—even when the line no longer purports to separate elite from riffraff, white-shoe WASP from Jewish and Catholic lawyers—has become a means for sustaining the elite status of Big Law.

Against this particular backdrop, laterally recruiting first-generation marijuana

192. *See id*.

193. *See* Karen Sloan, *Large U.S. Law Firms Love Hiring from These Schools*, REUTERS, https://www.reuters.com/legal/legalindustry/large-us-law-firms-love-hiring-these-schools-2023-04-28 (last visited July 13, 2024).

194. Initially, large law firms recruited recent law school graduates meeting their prescribed path of excellence: attendance at an elite law school like Harvard, Yale, or Columbia; top-of-the-class credentials; and law review editorship. AUERBACH, UNEQUAL JUSTICE, *supra* note 177, at 24; 2 ROBERT T. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS: 1819-1947 748 (1946) (stating that eighty-five percent of Cravath partners graduated from either Harvard, Columbia, or Yale law schools as of 1948). However, as recruiting needs increased over time, Big Law firms have invested in broadening the pool by screening candidates attending other elite law schools. *See* Joyce Sterling et al., *The Changing Social Role of Urban Law Schools*, 36 SW. U. L. REV. 389, 411–12 (2007); David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 436 (2007); *see also* Tom Ginsburg & Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 FLA. ST. U. L. REV. 909, 921–22 (2004).

195. Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1254 (2011) ("Our data also confirm what we have understood anecdotally: most white-collar and internal investigation partners at large law firms are former government lawyers, especially federal prosecutors.").

196. *See* Ellen S. Podgor, *100 Years of White Collar Crime in "Twitter,"* 30 REV. LITIG. 535, 537–38 (2011) (stating that fifty years ago it was common for large law firms to refer out white collar criminal work, but now there is significant acceptance of white collar crime defense work at large law firms).

197. *Id*.

198. *See* CHAMBERS & PARTNERS, PRIVATE WEALTH LAW: HIGH NET WORTH RANKING, https://chambers.com/legal-rankings/private-wealth-law-usa-nationwide-21:2633:12788:1.

199. *See, e.g.*, Ann Bartow, *Inventors of the World, Unite! A Call for Collective Action by Employee-Inventors*, 37 SANTA CLARA L. REV. 673, 682–83 (1997). In addition, immigration law is a favorite pro bono area for Big Law. *See* Jayanth K. Krishnan, et al., *Big Law's Immigration Advocates*, 2024 U. ILL. L. REV. 447.

lawyers—who practice within the paradigmatic individual hemisphere—with relatively non-transferable books of business featuring small business clients is far from intuitive, suggesting two important insights.[200]

i. The Present and Future of the American Legal Profession: The Two Traditional Hemispheres, or a More Integrated, Inclusive Profession

The embrace of cannabis law practice may reveal that large law firms are entering a new era, one committed to merit and objective criteria, measuring success in dollars.[201] Big Law willingness to recruit and embrace first-generation marijuana practitioners hailing from the individual hemisphere, and move swiftly into a "less dignified" area of law practice—cannabis law—may indicate that large law firms are increasingly ready to embrace a culture and values grounded in merit and excellence measured in terms of revenue and profits with less regard to other traditional facets and indicia of professional status, such as elite professional status and traditional notions of professional respectability.[202]

In this sense, the welcoming of cannabis law and lawyers into Big Law is qualitatively different than the welcoming of Jewish and Catholics lawyers into the elite club half a century ago.[203] The WASP law firms did not openly and voluntarily welcome these "new" lawyers into their midst.[204] Quite the contrary; they continued to adhere to the old discriminatory status quo, allowing Jewish and Catholic law firms to rise, compete with them, crossover to their respectable areas of business law practice, and force a change.[205] In contrast, Big Law's recent welcoming of individual hemisphere cannabis lawyers has taken place with relatively little internal resistance and seemingly with open arms.[206]

To be sure, this blurring of the line between the corporate and individual hemispheres is not, in and of itself, a new phenomenon. As Professor David Wilkins points out, several contemporary forces—increased mobility, the rise of information technology and artificial intelligence, the use of unbundling and repackaging of legal tasks, the deregulation of organizational forms through which law can be practiced, the institutionalization of pro bono, and globalization—contribute to the muddling of the traditional line between

200. *See* Cramton, *supra* note 5, at 539–40 (discussing the structural divide between individual-client service and corporate representation, reflected in the different tasks that lawyers perform, the identity of their clients, the nature of the attorney-client relationships, and the types of fee arrangements lawyers and clients agree to).

201. *See id*.; Jeremy Berke, *Meet the Bigshot Lawyers who are Turning Weed into a $194 Billion Industry*, BUSINESS INSIDER, https://www.businessinsider.com/cannabis-industry-best-lawyers-2019-1 (last visited July 14, 2024) (stating "[o]nce reluctant, some of the biggest law firms, like Duane Morris, Baker Botts and Dentons, are building out specialized cannabis practice groups as the industry continues to grow in profitability and complexity.").

202. *See* Cramton, *supra* note 5, at 539–40; Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 95, at 1826–28 (discussing the historical "elite professional status" of large law firms).

203. *See* Berke, *supra* note 201 (discussing the profitability of the marijuana business and how large law firms are starting to embrace this practice area); Wald, *The Rise of the Jewish Law Firm*, *supra* note 95, at 904 (describing how, as late as the 1950s, some partners at large law firms would not even consider having a Jewish partner).

204. *See* Wald, *The Rise of the Jewish Law Firm*, *supra* note 95, at 892.

205. *Id.* at 892 (stating "[i]n fact, the Jewish firms were Jewish by discriminatory default: due to the discriminatory hiring and promotion practices at the elite WASP firms, many Jewish attorneys flocked to the "Jewish" firms, thus constituting these firms Jewish."); Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 95, at 1833–36, 1858–61 (stating that "discriminatory hiring and promotion practices at WASP firms help[ed] define a 'by default' religious identity for the Jewish firms").

206. *See* Berke, *supra* note 201.

the hemispheres.[207] Certainly, smaller boutiques, which are not traditional members of the corporate hemisphere, have been trying to compete with bigger firms using technology and artificial intelligence to compensate for their smaller size and relative lack of people power.[208] Nonetheless, the Big Law move into cannabis law practice is significant because it reflects a willingness by some large law firms to undermine the perception of their own elite professional status to pursue new markets and potential revenue streams, as opposed to remaining caught up in external forces or responding to conduct by competitors outside of the corporate hemisphere.

Three important caveats, however, are in order. First, the recruitment of cannabis lawyers into large law firms may reflect an inflection point in the life of the profession, a blurring of the traditional line between the corporate and individual hemispheres initiated willingly by Big Law. In this sense, cannabis law practice may represent a sign of things to come. Perhaps further blurring of the line between the hemispheres is on the horizon, including Big Law recruitment of family law attorneys (beyond those representing wealthy litigants), or the representation of plaintiffs (beyond corporate entities suing other corporate entities), or the incorporation of individual hemisphere fee arrangements traditionally foreign to the corporate hemisphere such as contingency fees.[209] Yet the extent of Big Law objectives and intentions is unclear, and they may not be set in stone.

The degree of Big Law reform may be quite limited. Wishing to put in place an infrastructure and build their capacity to hit the ground running and serve large marijuana entity clients when federal law is revised and cannabis is legalized, large law firms may have been willing to pay the prestige price and recruit the only experienced cannabis lawyers in town—individual hemisphere veterans—as a temporary gap filler, with the expectation that, once provided with the Big Law platform, people power, and internal expertise and referral mechanisms, these transplants will adjust, gradually decrease the number and types of clients they serve, and follow the traditional large law firm mold. Similarly, embracing first-generation marijuana lawyers may not be about embracing all of cannabis law practice, but rather trying to pick off the best and largest cannabis clients and transactions—akin to the limited manner in which Big Law offer criminal law defense, wealth management, and immigration law services.[210] Interestingly enough, large law firms themselves may not know, let alone control, this particular future. Time, the pace of regulatory reform, and the emergence of large cannabis entity clients will tell.

Second, even if Big Law are now, or will be in the future, willing to embrace new types of lawyers, clients, and areas of law practice, they face significant hurdles for doing so successfully—a feasibility constraint. Large law firms are organized around the service of large, sophisticated, rich entity clients. Although in the aggregate Big Law serve many

207. David B. Wilkins, *Some Realism About Legal Realism for Lawyers*, in LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 25, 33–42 (Leslie C. Levin & Lynn Mather eds., 2012).

208. *See, e.g.*, Gary E. Marchant, *Artificial Intelligence and the Future of Legal Practice*, 14 NO. 1 ABA SCITECH LAW 20, 23 (2017).

209. Douglas R. Richmond, *Turns of the Contingent Fee Key to the Courthouse Door*, 65 BUFF. L. REV. 915, 918 (2017) (stating "large law firms are warming to contingent fee engagements because some cases are potentially much more lucrative on a contingent fee basis than they would be if the firm billed by the hour."); David B. Wilkins, *Teams of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010).

210. *See supra* notes 196–199 and accompanying text.

clients and many matters, their lawyers have relatively small caseloads, lending themselves to complex and yet manageable conflict-checking and conflict-management policies. Revising these structures and policies to enable the representation of a larger client base of different characteristics may prove to be impractical and unmanageable.[211]

Third, the desirable demise of exclusionary and discriminatory WASP values and white-shoe culture has left large law firms and the legal profession in a vacuum of sorts.[212] Liberal values, including justice, equality, fairness, access to lawyers, and a commitment to the rule of law—as opposed to a particular conception of justice, equality, or fairness—are a promising alternative to WASP values; and a culture of excellence, merit, equity, and inclusivity is an alluring alternative to white-shoe culture.[213] To the extent that Big Law openness to and embrace of first-generation marijuana lawyers is part of a gradual shift to inclusive meritocracy, that would constitute a notable first step in the right direction.

Yet liberal values and a culture of inclusive meritocracy are not the only alternative to WASP values and white-shoe culture. Serving entity clients' interests constrained only loosely by the law, complete with a client-centered, around-the-clock service ethos in a "eat what you kill" culture is another.[214] To the extent that the Big Law embrace of cannabis lawyers is driven predominantly by entity client service and profit maximization, the move may not reflect a greater shift toward a more inclusive culture committed to combating implicit bias, institutionalized barriers, stereotypes, unequal social and cultural capital endowments, and inhospitable professional ideologies.

ii. Monoliths and Nuanced Understandings of the Profession

The sheer size of the American legal profession—approaching a million and a half lawyers[215]—and the diversity and richness of law practice, make it hard to study the profession and often necessitate generalizations and simplifications. Early seminal empirical studies of the profession, including *Tournament of Lawyers*[216] and *Chicago Lawyers*[217] tended to focus on large law firms, explained in part by practical considerations: large law firms were easier to study and track over time than solo practitioners and small law firms,

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211. David B. Wilkins, *Doing Well By Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 22 n.84 (2004) ("The flip side of the fact that lawyers in government gain valuable experience more quickly than their counterparts in firms is the crushing caseloads under which many government lawyers are forced to practice. This is one of the reasons . . . that large law firms sometimes hesitate before hiring former government lawyers—especially those coming from state and local offices where caseload issues are often especially severe. Whether the combination of quick experience, low supervision, and high caseloads that characterizes many government law offices is optimal for achieving the mission these offices are designed to serve is, to say the least, an important question.").

212. David B. Wilkins, *Partner, Shmartner! EEOC v. Sidley, Austin, Brown & Wood*, 120 HARV. L. REV. 1264 (2007).

213. *See* Eli Wald, *A Liberal Theory of Legal Education*, 75 ALA. L. REV. 563 (2024).

214. Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601 (2016) (contrasting an atomistic client-centered approach with a relational approach to law practice).

215. ABA PROFILE OF THE LEGAL PROFESSION 2023, , https://www.abalegalprofile.com/demographics.html (stating that "[t]here are more than 1.3 million lawyers in the United States. To be more precise, there were 1,331,290 active lawyers as of Jan. 1, 2023, according to the ABA National Lawyer Population Survey, a tally of lawyers in every U.S. state and territory.").

216. GALANTER & PALAY, TOURNAMENT OF LAWYERS, *supra* note 7.

217. Heinz & Laumann, *supra* note 5.

and their size allowed for revealing statistical analyses. Moreover, for a while, in the second half of the twentieth century, the large law firm universe was relatively small, stable, and, for purposes of initial analysis, relatively cohesive and uniform.[218] Consequently, commentators tended to understandably generalize the findings talking in broad terms about Big Law as if the large law firm universe was a monolith. Similarly, early studies conceived of the individual hemisphere in broad strokes, often in contrast to the corporate hemisphere. Indeed, the same kind of generalized approach has been deployed to study new cohorts of lawyers when they first emerged. For example, early studies of the in-house movement understandably assumed the in-house counsel universe was a monolith.[219]

Recent legal profession scholarship has begun to question and refine earlier findings and generalizations. Instead of treating Big Law as a monolith—assuming most large law firms followed the traditional tournament theory model with its leveraged ratios of partners to associates and focus on business law areas—scholars have documented the richness and diversity of business and organizational models within the Big Law universe. Such studies have documented and revealed new insights about competing models such as the "old elite," following the traditional (but not universal) tournament model with its levered partner-to-associate ratio, "regional Big Law" firms with closer to a one-to-one partner-to-associate ratio and a more diverse approach to areas of law practice, and "global" firms focusing on serving clients all over the world.[220] In the individual hemisphere, subsequent inquiries have paid increased attention to context, and the meaningful differences between, for example, plaintiffs' attorneys and rural lawyers, and between criminal defense counsel and immigration lawyers.[221] Even in the in-house universe, attention has been called to the differences between powerful Chief Legal Officers and General Counsel of Fortune 500 companies and general counsel heading a legal department of one.[222]

The fact that some Big Law firms chose to laterally recruit first-generation marijuana practitioners, whereas others formed cannabis law practice groups by pooling together existing partners with relevant subject-matter expertise (but no experience in cannabis law), demonstrates and drives home the point about needing to avoid monolithic, simplistic thinking and focus instead on a nuanced, contextual understanding of the profession. The point is not merely that Big Law firms are no longer a monolith (and have not been for a while). Rather, it is that future research needs to explore which law firms followed what cannabis law strategy and why, and track achievements and consequences in context.[223]

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218. Wald, *Getting In and Out of the House*, *supra* note 147.

219. Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, *supra* note 147.

220. *See, e.g.*, Eli Wald, *The Other Legal Profession and the Orthodox View of the Bar: The Rise of Colorado's Elite Law Firms*, 80 U. COLO. L. REV. 605 (2009); Eli Wald, *Smart Growth: The Large Law Firm in the 21st Century*, 80 FORDHAM L. REV. 2867 (2012).

221. *See, e.g.*, LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 293 (Leslie C. Levin & Lynn Mather eds., 2012), *supra* note 102.

222. Wald, *supra* note 148, at 422 ("[T]he in-house counsel universe is quite diverse. Comparing large in-house legal departments with solo and small departments might not only compare apples and oranges but also obscure important [differences].").

223. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 473, 476, 515–19 (1990) ("The importance of taking context into account is clear when we reexamine how lawyers actually interpret and apply legal rules."). *See also* Wilkins, *Who Should Regulate Lawyers?, supra* note 101, at 814–19; David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993).

Similarly, scholars would need to pay close attention to the rise of in-house cannabis lawyers. After "returning" and establishing itself as a prestigious segment of the legal profession, in house practice has been put on a pedestal of sorts, at least by large law firm lawyers eager to escape the daunting practice realties of high billable hour expectancies and need to develop and expand lucrative books of business. Some debunking of these in-house myths is already underway.[224] Future studies of the actual practice realities of in-house lawyers will include the impact of in-house cannabis lawyers on the reputation and prestige of in-house practice in general, as well as the differences between the practice realities and ethical challenges experienced by, for example, Chief Legal Officers and elite General Counsel of large cannabis entities on the one hand, and General Counsel of small cannabis companies on the other.

V. CONCLUSION

For at least three decades, from the passage of the Controlled Substances Act until California legalized medical marijuana, no legal market for marijuana existed in the United States. Since the number of states regulating medicinal marijuana and, subsequently, recreational marijuana increased significantly, and as the federal government for over a decade has, by and large, refrained from attempting to enforce federal law in states legalizing marijuana, legal markets for marijuana have emerged and grown considerably, and negative stereotypes associated with marijuana have gradually declined.

Demand for legal services in the field has reflected the changed legal status and growth of the industry. While the industry was illicit, marijuana law practice did not exist as a field. Rather, criminal defense attorneys represented those accused of violating federal and state drug laws, and law reform advocates called for decriminalizing marijuana laws.

The gradual state-based legalization movement created a new field of practice. First-generation marijuana lawyers included criminal defense counsel and marijuana advocates who were well-positioned to crossover to provide comprehensive legal services to marijuana clients in areas as diverse as compliance, corporate, labor and employment, tax, banking, intellectual property, securities, and real estate law. The first-generation cohort also included relatively less-established, less-experienced, junior lawyers practicing predominantly in the individual hemisphere, who had less to fear about existing clients' backlash while marijuana was still demonized and associated with criminal conduct.

As marijuana gained greater respectability in American culture and the legal profession, as more states legalized medicinal and recreational marijuana, and as fears of criminal law enforcement for aiding and abetting violations of the CSA, and of disciplinary enforcement for violating the rules of professional subsided, the field entered a new era. Second-generation cannabis lawyers, replacing marijuana with cannabis to denote the new elevated status of the field, included not only experienced first-generation marijuana lawyers, but also, notably, newcomers hailing from the corporate hemisphere, Big Law lawyers and in-house counsel.

To an extent, the entry of corporate hemisphere lawyers into cannabis law practice seems unremarkable. As the industry has grown, matured and stabilized, as negative

224. Wald, *supra* note 148.

stereotypes surrounding it have declined, and general acceptance of it in American society has increased, and as the risk of criminal and disciplinary enforcements has also declined, it seemed intuitive that the supply of Big Law and in-house lawyers would follow increased demand for their legal services. Moreover, as large law firms have grown more competitive and more openly willing to pursue the financial bottom line as opposed to traditional notions of professionalism and status, it seemed obvious that they would seek to gain a share of the growing market for cannabis legal services. Slight wrinkles—insular state-based regulatory apparatuses led to segmented cannabis markets, and states with no licensing caps resulted in markets with many small clients, both features that are inconsistent with Big Law's traditional business model—could have been explained by large law firms positioning themselves for when the industry matured and consolidated.

Yet the willingness of large law firms to enter the practice of cannabis law ahead of robust demand for their services should not be taken for granted. Big Law firms thrive not only on the quality of their lawyers—recruiting, promoting, and retaining the best lawyers money can buy—but also on the perception of elite status to sustain their position atop the legal profession. Large law firms' reputations in part derive from their ability to credibly portray themselves as engaged in the most respectable, professional, and complex areas of law practice in the corporate hemisphere, as distinguished from the riffraff of the bar populating the individual hemisphere. Whereas in the explicitly discriminatory era of the profession, Big Law were able to rely on and translate implicit (but familiar) markers of elite status—WASP values and white-shoe culture—into elite professional status to distinguish themselves from the riffraff practicing in the "undignified" individual hemisphere, the contemporary competitive, meritorious era forecloses such a maneuver. Rather, sustaining elite professional status depends on simultaneously pursuing a reality and cultivating a perception of merit, sophistication, complexity, high-end service, and specialized expertise, to be distinguished from mass-produced, standardized, fungible legal services produced in the individual hemisphere.

Against this background, the willingness of Big Law to enter the field of cannabis law before the rise of big entity clients and the materialization of big money, recruiting experienced, first-generation marijuana lawyers at the risk of blurring the line between the hemispheres, reveals a possible sea-change in the profession, one in which competitive forces, client service, and maximization of profits-per-equity-partners drive out old, traditional notions of professionalism and respectability.[225] The legal profession may be on the cusp of the demise of the two traditional hemispheres and the rise of a more integrated, inclusive practice. Such a market-driven change can be a desirable development to the extent it replaces the discriminatory and exclusionary foundations of legal professionalism. Yet it can quickly end up reconstituting and legitimizing familiar power structures and trajectories, hiding the impact and realities of implicit bias, stereotypes, and unequal endowments of social, cultural, economic, and identity capital behind a thin pretense of market-driven merit, competitiveness, and client service.

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225. *See generally* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 185–211 (1999) (on market forces demystifying monopolistic notions of professionalism).