Atty's Should Stop Using 2 Common Cannabis Industry Terms
by Joshua Mandell, Nicole Phillum and Yvette McDowell (July 13, 2020, 12:50 PM EDT)

Attorneys understand the words we use matter. We speak and write with precision because communication is a critical part of our profession. Our job is to find the right words to communicate on any number of issues in any number of circumstances. For example, we craft contracts to avoid vagueness, we write briefs to persuade judges and we act as storytellers for juries.

Of course, our language evolves and changes to reflect the times we live in and the values we share. The Declaration of Independence declares that all “men” are created equal, but we understand women are included, too. It is doubtful the declaration would be written the same way today. Today, statutes and contracts are written to remove gender references because we understand referring to men only is sloppy at best and sexist at worst.

The words we use to discuss and describe the cannabis industry are no different. Although we are not discussing the differences between the terms reefer, grass, pot or weed, your choice of slang may immediately identify you as belonging to a particular generation from the 1950s to today. We instead draw upon the work of industry stakeholders, advocates and activists to examine the terms "marijuana" and "black market" and encourage the use and understanding of industry-preferred alternatives.

Adopting the industry-preferred alternatives will help practitioners show that they are both up-to-speed on current terminology but also mindful and sensitive to historic negative connotations associated with some terms used to refer to aspects of the industry. Adopting the preferred new terminology honors the work being done to remedy the historical and systemic harm done by the war on drugs, particularly against people of color.

"Marihuana" Also Known As "Marijuana"

Within the hierarchy of biological classifications, cannabis is a plant genus that includes up to three domesticated species with a wide range of uses.[2] Cannabis has existed in the U.S. since the 1700s, when the new American government first began encouraging the production of hemp. Between the 1700s and the American Civil War, new products displaced industrial hemp production, but cannabis production for medicinal and recreational purposes was readily available and rapidly began to grow.

For over two centuries, medicinal cannabis use was permitted in the U.S. without significant restriction. However, the American government became increasingly hostile to cannabis, which it began referring to as "marihuana" following the surge of Mexican refugees who fled to the U.S. around 1910, following the Mexican Revolution.

It was during this time that "resentment toward Mexicans and Mexican immigrants exploded."[3] In "Marijuana — A Short History," the Brookings Institute explains that it was easy to blame the new immigrants for a variety of problems in society, including crime. One stereotype was of "Mexicans using marihuana" and media outlets began reporting crimes by Mexican immigrants using that image.[4]

Harry Anslinger, the head of the U.S. Bureau of Narcotics from 1930 to 1962, made it his mission to outlaw drugs and he "wholeheartedly embraced 'marihuana' for its 'Mexican-ness.'"[5] Anslinger's "racism was no secret. His words were laden with fear, vilification and xenophobia."[6]

Anslinger did not save his ire for Mexicans. He is widely quoted as saying: "There are 100,000 total marijuana smokers in the U.S., and most are Negroes, Hispanics, Filipinos and entertainers. Their Satanic music, jazz and swing result from marijuana use. This marijuana causes white women to seek sexual relations with Negroes, entertainers and any others."[7]

Under Anslinger's leadership of the Bureau of Narcotics, criminalization followed on a federal level with the Marihuana Tax Act of 1937.

In 1969, the U.S. Supreme Court found the Marihuana Tax Act was unconstitutional.[8] Undeterred, Congress repealed the Marihuana Tax Act and implemented the Comprehensive Drug Abuse Prevention and Control Act of 1970, now known as the Controlled Substances Act, or CSA.[9] Even today, the CSA uses the old phonetic spelling as it declares "marihuana"[10] a Schedule I illicit drug for which there is "no currently accepted medical use in the U.S., a lack of accepted safety for use under medical supervision and a high potential for abuse."

Unequal Enforcement

Since 1970, the modern war on drugs has continued to decimate and disproportionately harm communities of color. The war on drugs has been described as the new Jim Crow.[12] According to a 2009 study by The Sentencing Project, as of 2005, Black people represented 12% of the total population of drug users, but 34% of drug offense arrests and 45% of those incarcerated for a drug offense.[13]

In the 1980s and 1990s, Congress declared a war on drugs and enacted the Anti-Drug Abuse Acts of 1986 and 1988 and the Sentencing Reform Act of 1984 in order to reduce the flow of drug trafficking and get tough on crime, which introduced the concept of the "mandatory minimum."[14] While the laws were enacted to deter kingpins and high-level traffickers, the majority of people sentenced to mandatory minimums were those who committed lower-level nonviolent offenses.[15]

After nearly four decades of "war," the U.S. now is home to 25% of the world's incarcerated population, despite comprising only 5% of the world's population at large.
More recently, as noted by the California Cannabis Industry Association’s Diversity, Inclusion and Social Equity Committee, information published by California’s Department of Justice shows that from 2006 to 2015, Black people in California were two times more likely to be arrested for cannabis misdemeanors and five times more likely to be arrested for cannabis felonies than white people.[15]

During the same period, Latinos in California were 35% more likely to be arrested for cannabis crimes than white people, even though the rates of cannabis use are roughly equal among all groups.[17]

**Cannabis Industry Stakeholders Speak**

Against this backdrop, many cannabis industry stakeholders now reject the term "black market."

Although the term 'black market' has been used in myriad circumstances without reference to race, including within the cannabis industry, today industry stakeholders reject the black-white dualism of the term as connoting negative racial and ethnic overtones to imply criminality, illegality, shame and ill-repute.[18]

Controversy recently erupted within the legal cannabis industry upon the release of the "BLK MKT" cannabis brand that included an ad campaign playing on sexual stereotypes about black men that announced "Once You Go BLK."[19]

Review of recent government press releases — even in state legal jurisdictions — confirms widespread use of the term black market, often by regulatory agencies or prosecutors, to refer to enforcement actions and criminal cases in the cannabis industry, without regard for its racist implications.[20]

Indeed, the U.S. Department of Justice, which has recently come under fire for documented anti-cannabis bias,[21] often uses the term black market in press releases announcing prosecutorial victories against unlicensed cannabis operators.[22]

To draw contrasts between those participating within the state and local regulated or legal cannabis marketplaces and those operating illegally within those jurisdictions, industry stakeholders suggest using the preferred terms "unregulated," "illicit" or "legacy" to describe the illegal marketplace and its operators.[23]

The term marijuana is decidedly more complex and the subject of continuing debates. First, as the industry became decriminalized and legalized in many states, some in the industry sought new terminology to help shed old stereotypes associated with “stoners” and elevate the plant's medicinal qualities.

At the same time, many within the industry also want to shed the language intentionally racialized by Harry Anslinger "to emphasize its foreignness and to polarize particular groups of color during a time of racial segregation."[24]

Thus, there has been an increasing preference for using cannabis as a neutral and all-inclusive term rooted in science. Indeed, numerous state and local statutes have substituted the term cannabis for marijuana. Similarly, the nation's largest trade association is the National Cannabis Industry Association.

To be certain, the industry continues to straddle this change as many use the terms interchangeably, and some stakeholders, particularly in the policy and advocacy space, have advocated for reclaiming the word marijuana. For example, Marijuana Business Magazine, a leading industry publication, bills itself as providing "insights for cannabis executives, investors and entrepreneurs" and the Marijuana Policy Project continues to lead state ballotting measures nationwide.

Policy advocates at the National Organization for the Reform of Marijuana Laws, or NORML, point to opinions polls using the word marijuana, as further proof of public support the proposition that "[a] solid majority of the American public now agree with NORML that responsible marijuana smokers should not be treated like criminals."[25]

Lawyers in the cannabis industry should understand that reclaiming language is often used as a tool of restorative justice and narrative power, which for some includes the normalization of the word marijuana in the industry, even while others reject it.

**Moving Forward**

Lawyers writing and speaking about the cannabis industry should listen to the voices of stakeholders and adapt their language accordingly. While some view the industry as just another business opportunity or "green rush," many important leaders and stakeholders remain focused on the work of social equity and restorative justice. Anyone who has spent time working within the industry knows how complicated this can be.

The words we use are full of symbolic meaning. Using preferred terminology costs nothing and communicates that you understand or have heard those voices calling for change and equity. Continuing to use disfavored terminology in a new era may very well communicate that you are stuck in the past and unwilling to confront the historic racism that has disproportionately impacted people of color.

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[15] Id.


[17] Id.

[18] Id. at 2. The rejection of 'black market' by the cannabis industry is not unique. For example, the National Institute of Standards and Technology, whose publications form the basis for federal activities on everything from cybersecurity to time measurement, will stop using common computer security terms with racist connotations, including 'blacklist' and 'whitelist'. Eric Geller, "Agency to end use of technology terms such as 'master' and 'slave' over racist associations" (June 25, 2020) available at https://www.politico.com/news/2020/06/25-agency-ends-use-technology-terms-racist-associations-339880.


