

**HIGH TIME FOR CRIMINAL JUSTICE REFORM:
MARIJUANA EXPUNGEMENT STATUTES IN STATES
WITH LEGALIZED OR DECRIMINALIZED
MARIJUANA LAWS**

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As states continue to legalize or decriminalize recreational marijuana, there is a chasm within our society. One segment of the population can use, possess, transport, and cultivate marijuana without fear of prosecution. Another segment of the population suffers from the collateral consequences of previous marijuana-related offenses. This Article argues that any state that enacts marijuana legalization or decriminalization statutes should automatically include an expungement provision that clears the criminal record of individuals who engaged in activities now deemed lawful under the new legalization and decriminalization laws. This Article proposes model language for an expungement statute that serves as a guide for legislators, judges, and attorneys. The proposed expungement statute will help individuals obtain access to opportunities and benefits now denied them because of their marijuana-related criminal records including employment, professional licenses, financial aid, public housing, travel abroad, firearms' purchases, the right to vote, and jury service. Changes to the law will also benefit communities that have been disproportionately targeted by the War on Drugs and marijuana prohibition.

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I. INTRODUCTION

Imagine it is 2000 and a young college student named Adam is driving in a state where it is a crime to possess any usable amount of marijuana. The sun is beginning to set while Adam is driving home from a friend's house. He purchased one ounce of marijuana to share with his mother, who suffers from chronic pain. His friend also gave him one small marijuana plant, so Adam can cultivate his own marijuana. Adam does not intend to distribute marijuana; rather the marijuana produced will be for household consumption. He puts both the bag of marijuana and the plant in his trunk. He is aware he is breaking the law by driving with an illegal substance, but he believes the benefits of marijuana outweigh the risk. He tries to drive home carefully. When he fails to signal a lane change on a nearly deserted road, an on-duty police officer notices, and proceeds to pull him over.

When the police officer approaches Adam's window, the police officer thinks she smells a faint, sweet odor. From years on the police force, she is familiar with the smell of marijuana. The police officer knows she has probable cause to search the car from the scent of marijuana alone. The police officer asks Adam to step out of the car so she can conduct a search. After searching the car, the police officer finds nothing. She pops open the trunk and she discovers the bag of marijuana and the plant. She confiscates the marijuana, the plant, and begins to read Adam his *Miranda* rights.

Following his arrest, Adam is charged with and pleads guilty to a felony for possession, cultivation, and intent to distribute. The judge grants Adam felony probation where Adam is sentenced to drug treatment counseling, community service, and regular meetings with a probation officer. He must submit to random drug tests. He pays various court costs, probation fees, and fines. Because of his felony conviction, Adam loses his financial aid and cannot afford to attend the local university. He loses his right to vote, he cannot travel abroad, and he has trouble finding a job with a competitive salary. If Adam wants to try and clear his record, he has to wait several years before he is eligible, but he is unsure of when or even how to file a petition with the court. He feels hopeless, and he believes his chances for a successful life are over.

Fast forward to 2014 in this same state. Through a voter initiative, marijuana is now legal and there are dispensaries where adults over the age of twenty-one can purchase marijuana. Nick is driving down the same road Adam was pulled over on fourteen years ago. He has an ounce of marijuana that he purchased from a dispensary. Later in the day, his friend also gave him a small marijuana plant. He knows it is legal for his friend to give him the plant so long as no goods, services, or money were exchanged. Nick wants to learn how to cultivate marijuana plants so he can enter the legal marijuana industry. On his way home, he fails to come to a complete stop at a stop sign. An on-duty police officer notices this and sounds his siren to pull Nick over.

When the police officer approaches Nick's window, she can smell the faint odor of marijuana. The police officer has a flashback to several years ago when she would have confiscated the marijuana and arrested the offender. She no longer arrests individuals unless there are signs that the driver is impaired. Meanwhile, Nick is prepared to explain himself to the officer if necessary, but the police officer tells him to be more careful and lets him go with a warning. Nevertheless, Nick is shaken up by the encounter, but drives home to put his goods away. He soon forgets about the traffic stop. He does not worry about losing the right to enter the legal marijuana industry, the right to vote, to own a gun, to travel abroad, or to receive financial aid, nor is he concerned about the financial costs of being arrested and charged with a felony. Nick benefits from the state's new legalization law, while Adam continues to suffer the consequences of the now-repealed marijuana prohibition.

As more states continue to legalize, or even decriminalize, recreational marijuana, the divide will grow between individuals like Nick and Adam. Some individuals will benefit from the new marijuana laws. They can possess, use, cultivate, and even become entrepreneurs within the legal marijuana industry. Others will continue to suffer from the "collateral consequences" of the now-repealed marijuana prohibitions.¹ These individuals are denied access to employment opportunities, financial aid, public housing, the right to vote, to serve on a jury, to travel abroad, or to legally obtain a firearm.²

¹ Douglas Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices*, 30 FED. SENT'G REP. 305 (April/June 2018).

² Absent changes in federal law, expungement of state reclassified marijuana offenses may not prevent triggering the federal recidivist enhancement statute, 21 U.S.C. § 841(b)(1)(B), which raises the mandatory minimum prison term for second felony convictions from five to ten years. *United States v. Sanders*, No. 18-2165, 2018 WL 6283883, at *5–6 (7th Cir. Dec. 3, 2018) (holding it "immaterial whether a defendant's state felony conviction was reclassified as a misdemeanor after she committed a federal drug offense"); *see also*, *U.S. v. London*, No. 15-1206, 2018 WL 4189616, at *3 (3rd Cir., Aug. 31, 2018) ("The interpretation of [the enhancement statute] is a matter of federal law, rather than state law"); *U.S. v. Diaz*, 838 F3d 968, 975 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 840 (2017) (California's reclassification of a felony-drug conviction to a misdemeanor does "not retroactively make Vasquez's felony conviction a misdemeanor for purposes of *federal law*." (emphasis added)).

Moreover, individuals who are unlawful users of or addicted to any controlled substances or who have been convicted of a crime punishable by more than one year in prison may still be ineligible to purchase or possess firearms under federal statute. 18 U.S.C. §§ 922(d)(1,3), 922(g)(1,3). Similarly, individuals with marijuana-related felony convictions may still be denied access to employment, public housing, and welfare assistance, such as food stamps. *See Letter from*

This Article argues that any state that legalizes or decriminalizes recreational marijuana should automatically include a provision that expunges the record of individuals with previous marijuana-related offenses that are now considered legal under the new state laws. Erasing criminal records will allow individuals to shed the stigma of a “Scarlet-M,” start fresh, rebuild their lives, and contribute to society.

Part II explores the evolution of marijuana laws and the disproportionate enforcement on specific communities. The section focuses on the growing acceptance of marijuana at the state, national, and international level. Part II also discusses the concept of expungement and how statutes have been implemented in some states with marijuana legalization and decriminalization policies. Part III proposes a ready-to-implement model statutory expungement statute that states can and should adopt. The section provides a step-by-step legislative analysis of the statutory language and a comparison to current state statutes. Part III explores counterarguments to state-mandated expungement and answers these arguments with practical considerations for applying expungement statutes. Part IV recommends that any state that legalizes or decriminalizes recreational marijuana should automatically include an expungement provision to clear the records of individuals whose former activities are now deemed lawful under the new state laws.

II. THE EVOLUTION OF MARIJUANA LAWS

Marijuana has been a part of the American fabric since the 1840s.³ Doctors originally used the cannabis plant for medical purposes to alleviate pains associated with migraines and insomnia.⁴ Xenophobia—which existed in this country long

Benjamin T. Metcalf, Deputy Assistant Secretary for Multifamily Housing Programs, to All Multifamily Regional Center Directors, U.S. Dept. of Housing and Urban Dev. (Dec. 29, 2014) (on marijuana use in multifamily assisted properties); Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME (April 24, 2014), <http://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/>; *Students With Criminal Convictions Have Limited Eligibility for Federal Student Aid*, FED. STUDENT AID: AN OFF. OF THE U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/eligibility/criminal-convictions> (last visited Nov. 8, 2018, 11:21 AM); *Appeals and Voluntary Appeal File (VAF)* FBI, <https://www.fbi.gov/services/cjis/nics/national-instant-criminal-background-check-system-nics-appeals-vaf> (last visited Nov. 8, 2018, 11:36 AM).

³ David Schlusell, *The Mellow Pot-Smoker: White Individualism in Marijuana Legalization Campaigns*, 105 CALIF. L. REV. 885, 895 (2017).

⁴ *Id.*

before marijuana—caused white Americans to fear newly arrived immigrants who used the drug, specifically Mexican immigrants crossing the border to America.⁵ Newspaper articles depicted sensational stories about marijuana and its erratic effects on behavior.⁶ For instance, the media portrayed marijuana as a drug that caused Mexican immigrants to commit violent acts and corrupt American children.⁷ The 1936 cult classic, *Reefer Madness*, was meant to teach parents about the dangers of marijuana use.⁸ The film led viewers to believe marijuana would cause users to murder, rape, commit suicide, and ultimately, propel into madness.⁹ For the past eighty years, the federal government has portrayed marijuana as a “socially destructive drug,” working diligently to criminalize, arrest, and convict those who possess, cultivate, use, distribute, or sell marijuana.¹⁰

A. Overview of Marijuana Prohibition

The relationship between marijuana and America has a long and storied history, beginning in the early twentieth century, most notably with a man named Henry Anslinger.¹¹ Although some states had already prohibited marijuana, Anslinger, the first commissioner of the Federal Bureau of Narcotics, campaigned for Congress to pass the Marihuana Tax Act, a criminal prohibition passed under the guise of a federal tax.¹² Anslinger did not argue that a marijuana prohibition was grounded in empirical, scientific research; instead, his argument was based

⁵ *Id.* at 896.

⁶ RUDOLPH J. GERBER, LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS 3–4 (2004).

⁷ Schlüssel, *supra* note 3, at 895–96. Historically, marijuana has been spelled with both a “j” and an “h,” and it was coined by prohibition advocates who wanted to feed on American prejudices towards Mexican immigrants. Cannabis is the scientific name and is being used more often to describe the plant. This Article uses the term “marijuana.” Christopher Ingraham, ‘*Marijuana*’ or ‘*Marihuana*’? *It’s All Weed to the DEA*, WASH. POST (Dec. 16, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/12/16/marijuana-or-marihuana-its-all-weed-to-the-dea/?utm_term=.24f561fe6dc6.

⁸ *Reefer Madness* (Motion Pictures Ventures 1936), <https://www.youtube.com/watch?v=zhQlcMHhF3w>.

⁹ *Id.*

¹⁰ Berman, *supra* note 1, at 306.

¹¹ GERBER, *supra* note 6, at 3–4; See JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS 10–11 (2016).

¹² See HARI, *supra* note 11, at 10–11; Berman, *supra* note 1, at 306.

upon American patriotism.¹³ He blatantly targeted Mexicans and Blacks for using marijuana and “threatening the stability” of American culture and society.¹⁴

Later, President Richard Nixon urged Congress to pass the Controlled Substances Act (CSA) regulating controlled substances.¹⁵ On October 27, 1970, Congress added marijuana as a Schedule I drug under the Comprehensive Drug Abuse and Prevention and Control Act of 1970 (CSA).¹⁶ Schedule I drugs also included heroin, LSD, ecstasy, and peyote.¹⁷ The CSA’s sentence for simple marijuana possession was one year in prison, a fine of \$5,000, or both.¹⁸ The original CSA statute did include an expungement provision.¹⁹ The court could dismiss the proceedings and discharge individuals who did not violate the conditions of a court-ordered probation.²⁰ Upon dismissal and discharge, individuals under the age of twenty-one could seek an order of expungement.²¹ This provision was repealed in 1984.²² When it enacted the CSA, federal government defined Schedule I drugs as substances with a high potential for abuse and no medical purposes.²³

When President Jimmy Carter took office in 1977, he was more sympathetic towards those affected by the War on Drugs.²⁴ He considered tobacco worse than marijuana, but parental concern over teenage drug use was enough for the Carter

¹³ GERBER, *supra* note 6, at 4.

¹⁴ *Id.* Anslinger maintained files that were pointedly racist. For example, one file was named “Marijuana and Mexicans” and another was called “Marijuana and Jazz.” *Id.*

¹⁵ Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. §§ 801-917); *see* Berman, *supra* note 1, at 306.

¹⁶ Controlled Substances Act of 1970, Pub. L. No. 91-513, § 202(c), 84 STAT. 1249 (codified at 21 U.S.C. § 812(c)--Schedule I (c)(10)).

¹⁷ *Drug Scheduling*, DRUG ENFORCEMENT AGENCY, <https://www.dea.gov/drug-scheduling> (last visited Nov. 4, 2018, 7:09 PM). Over forty years later, this list has remained the same. *Id.*

¹⁸ Controlled Substances Act of 1970, Pub. L. No. 91-513, § 404, 84 STAT. 1264 (codified at 21 U.S.C. § 844(a)).

¹⁹ Controlled Substances Act of 1970, Pub. L. No. 91-513, § 404, 84 STAT. 1264 (codified at 21 U.S.C. § 844(a)), *amended by*, Joint Resolution making continuing appropriations for the fiscal year 1985, and for other purposes, Pub. L. No. 98-473, 98 STAT. 1837.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* The 1984 repeal was passed within an appropriations bill and no legislative history has been found to explain why.

²³ DRUG ENFORCEMENT AGENCY, *supra* note 17.

²⁴ GERBER, *supra* note 6, at 32.

Administration to avoid seeking the repeal of the marijuana prohibition.²⁵ In the 1980s, President Ronald Reagan breathed new life into the War on Drugs, increasing federal spending and expanding the federal government's drug-enforcement policy.²⁶ In the 1990s, President Bill Clinton had a heavy hand in enforcing the War on Drugs, instituting the "three-strikes law" and funneling billions of dollars into the prison system and law enforcement.²⁷ During this time, President Clinton signed legislation causing individuals with drug offenses, including marijuana, to lose access to public housing and welfare assistance.²⁸ In 2000, President Clinton's last year in office, over fifteen thousand people were in the federal prison system for marijuana-related offenses.²⁹ Marijuana-related offenses increased significantly when President George W. Bush entered office in 2001.³⁰ President Bush's administration defined marijuana use as a moral evil and federal prohibition "save[d] its citizens from hell."³¹

Over the past eighteen years, over ten million individuals have been arrested for marijuana possession.³² Racial bias has played a role in the enforcement of marijuana prohibition.³³ In 2010, "a Black person was 3.73 times more likely to be arrested for marijuana possession than a white person"³⁴ It is more common for police to patrol urban black neighborhoods where drug deals are more likely to take place in the open, than in white neighborhoods, which are typically located in

²⁵ *Id.*

²⁶ Schlusell, *supra* note 3, at 899.

²⁷ *Id.* at 899-900. The federal government passed "Three Strikes, You're Out" as a provision of the Violent Crime Control and Law Enforcement Act of 1995. Violent criminals that were convicted in a federal court of a "serious violent felony" and had at least two or more prior convictions in federal or state courts—a "serious violent felony" and a previous "serious drug offense"—would be sentenced to life without parole. Memorandum from Assistant Attorney General Jo Ann Harris to All United States Attorneys (Mar. 13, 1995) (on file with the U.S. Department of Justice).

²⁸ 24 C.F.R. § 966.4(f)(12) (West 2018); *See also* MICHELLE ALEXANDER, *THE NEW JIM CROW* 57-58 (2d ed. 2012) (explaining how the War on Drugs has disproportionately affected access to public housing for individuals in minority communities).

²⁹ GERBER, *supra* note 6, at 68.

³⁰ Berman, *supra* note 1, at 306.

³¹ GERBER, *supra* note 6, at 59.

³² Berman, *supra* note 1, at 306.

³³ ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS* 9 (2013).

³⁴ *Id.*

rural or suburban areas.³⁵ While white Americans engage in drug use, it is more difficult for police officers to monitor similar marijuana possession in white neighborhoods.³⁶ It is more costly to investigate in suburban areas, where drug deals often take place behind locked doors.³⁷ This method of law enforcement has led to a disproportionate number of arrests and imprisonment of black men.³⁸

Marijuana-related arrests and convictions have made it difficult for individuals to re-enter society as fully contributing members.³⁹ Individuals with marijuana arrests and convictions lose access to basic amenities many people take for granted.⁴⁰ They can be denied access to employment, public housing, and welfare assistance, such as food stamps.⁴¹ An individual may also be unable to vote, serve on a jury, purchase a firearm, travel abroad, obtain a professional license, and finance an education.⁴² In addition to the loss of liberty from the original drug offense, the individual still has to pay probation fees, fines, monthly drug tests, attorney's fees, and court costs.⁴³ Now, there is an opportunity for some individuals to clear their records as states begin to adopt marijuana legalization legislation.⁴⁴

B. A Push to Legalize Marijuana

Americans from coast to coast, from generation to generation, and across party lines are supporting marijuana legalization, as a resistance to harsh criminal justice policies, to promote individual freedoms, and to eliminate the illegal black market.⁴⁵ Support for marijuana legalization has doubled over the past eighteen

³⁵ *10 Reasons to Oppose "3 Strikes, You're Out,"* ACLU <https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out> (last visited Oct. 16, 2018, 8:03 PM).

³⁶ ACLU, *supra* note 33, at 9–10.

³⁷ ACLU, *supra* note 35.

³⁸ ALEXANDER, *supra* note 28, at 9.

³⁹ *Id.* at 140–78.

⁴⁰ See Berman, *supra* note 1, at 306–07.

⁴¹ See Metcalf Letter, *supra* note 2; FED. STUDENT AID, *supra* note 2.

⁴² See Rhodan, *supra* note 2; FBI, *supra* note 2.

⁴³ ALEXANDER, *supra* note 28, at 154–57.

⁴⁴ Berman, *supra* note 1, at 305–08.

⁴⁵ See *A Majority of Americans Now Support Legal Marijuana*, VOX (Aug. 20, 2018, 12:07 PM), <https://www.vox.com/cards/marijuana-legalization/-popular-opinion-changing-marijuana-legalization>; *Marijuana Has Been Legalized in Nine States and Washington, DC*, VOX (Aug. 20, 2018, 12:07 PM), <https://www.vox.com/cards/marijuana-legalization/where-is-marijuana-legal>. Producing and selling drugs is very risky, so drugs on the illegal black market are sold at a higher price, causing the crime rate to rise and taxpayer money to be spent battling the War on Drugs. See generally David R. Henderson, *A Humane*

years as more states continue to legalize it for recreational use.⁴⁶ This Article focuses on recreational marijuana legalization and does not address medical marijuana.⁴⁷

Before legalization, the possession, cultivation, and transportation of marijuana was considered a felony in many states and could “earn” the possessor a lengthy prison sentence.⁴⁸ In California, it was a felony and punishable by imprisonment to possess, cultivate, and transport marijuana plants or more than 28.5 grams (one ounce) of marijuana.⁴⁹ Now that marijuana has been legalized in California for recreational use, activities once considered felonies are now legal under the new laws.⁵⁰

1. Marijuana Trends at the National and International Level

Although this Article does not focus specifically on federal and international marijuana enforcement, there are some progressive measures taking place throughout North America. The Trump Administration’s position on marijuana legalization is uncertain; however, while former Attorney General Jeff Sessions was vehemently against marijuana legalization, President Trump recently

Economist’s Case for Drug Legalization, 24 U.C. DAVIS L. REV. 655, 655–666 (1991).

⁴⁶ Abigail Garner, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR.

(Jan. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/>. Americans are becoming comfortable enough with marijuana that television networks are creating shows about “marijuana normalcy” for mainstream audiences. For instance, Martha Stewart and Snoop Dog have a cannabis cooking show on VH1 called *Snoop and Martha’s Potluck Dinner Party*. Journalist Astre stated, “When Martha Stewart gets in on the action, you know it’s gone mainstream.” K. Astre, *How Weed Edibles Are Shedding Their Stigma In the Food World*, HUFFINGTON POST (June 29, 2018, 5:45 PM), https://www.huffingtonpost.com/entry/weed-edibles-shed-stigma_us_5b2d0539e4b0321a01d09262.

⁴⁷ *Marijuana is Legal for Medical Purposes in 30 States*, VOX (Aug. 20, 2018, 12:07 PM), <https://www.vox.com/cards/marijuana-legalization/what-is-medical-marijuana>. Thirty states allow marijuana use to treat medical problems including: inflammatory bowel disease, pain, nausea, Parkinson’s disease, epilepsy, post-traumatic stress disorder, and multiple sclerosis. *Id.*

⁴⁸ GERBER, *supra* note 6, at 68. Enforcement, legal standards, and sentencing is inconsistent state to state. *Id.* at 61–68.

⁴⁹ *Cannabis Convictions: Resentencing*, Hearing on AB 1793 Before the S. Comm. on Pub. Safety, 2018 Leg., 2017-2018 Sess. 4–6 (Ca. 2018).

⁵⁰ CAL. HEALTH & SAFETY CODE §11362.1 (West 2018).

stated that he would review and potentially support a bill that allows states to determine the best marijuana policies within their borders.⁵¹ Republican Senator Cory Gardner of Colorado and Democratic Senator Elizabeth Warren of Massachusetts introduced this new legislation in 2017.⁵² The bill, Strengthening the Tenth Amendment Through Entrusting States Act (The STATES Act), empowers states to reclassify marijuana, even though the substance would remain illegal at the federal level.⁵³ The STATES Act would grant legal marijuana companies access to banks.⁵⁴ Senator Cory Booker of New Jersey also introduced the Marijuana Justice Act of 2017, a bill that would not only legalize marijuana at the federal level, but that would expunge all marijuana possession offenses.⁵⁵ Legislative critics, however, do not believe Senator Booker's bill will pass the Republican-controlled Congress.⁵⁶

While the United States federal government is divided on this issue, our Canadian neighbors to the north just ended marijuana prohibition, a campaign promise of Prime Minister Justin Trudeau.⁵⁷ On October 17, 2018, Canada became

⁵¹ Eileen Sullivan, *Trump Says He's Likely to Back Marijuana Bill, in Apparent Break With Sessions*, N.Y. TIMES (June 8, 2018), <https://www.nytimes.com/2018/06/08/us/politics/trump-marijuana-bill-states.html>. This Act would give states the ability to legalize or decriminalize marijuana, as long as states "do so in a manner that is safe and respectful of the impacts on their neighbors." *The STATES Act*, SEN. ELIZABETH WARREN, <https://www.warren.senate.gov/imo/media/doc/STATES%20Act%20One%20Pager.pdf> (last visited Nov. 4, 2018, 2:17 PM).

⁵² Sullivan, *supra* note 51.

⁵³ Strengthening the Tenth Amendment Through Entrusting States Act, S. 18725, 115th Cong. (2018).

⁵⁴ Nik DeCosta-Klipa, *What Elizabeth Warren's Bipartisan Marijuana Bill Does—and Doesn't—Do*, BOS. GLOBE (June 7, 2018), <https://www.boston.com/news/politics/2018/06/07/elizabeth-warren-marijuana-bill>.

⁵⁵ Recently Proposed Legislation, *Drug Policy*, 131 HARVARD L. REV. 926, 930 (2018).

⁵⁶ Christopher Ingraham, *Sen. Cory Booker Puts Marijuana Legalization at the Center of His New Racial Justice Bill*, WASH. POST (Aug. 1, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/08/01/cory-booker-puts-marijuana-legalization-at-the-center-of-his-new-racial-justice-bill/?utm_term=.363adbfee444.

⁵⁷ Dan Bilefsky, *Canada Legalizes Recreational Marijuana, and a National Experiment Begins*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/world/canada/marijuana-pot-cannabis-legalization.html>.

the second country to legalize marijuana.⁵⁸ In addition to creating retail and licensing regulations, Canadians twenty-years of age and older are now allowed to possess, transport, and share up to thirty grams of marijuana, and each adult household will be permitted to possess and cultivate up to four marijuana plants.⁵⁹ Currently, the government is drafting legislation that will make it easier for Canadians with previous marijuana-related offenses to clear their records.⁶⁰ Under Canada's current pardon system, individuals must wait a minimum of five years to apply and pay a fee of \$631.⁶¹ The United States and Canada's relationship may change drastically based on this new legislation.⁶²

2. Marijuana Trends at the State Level

Despite the federal government's stance towards marijuana, citizens are voting on referendums to legalize marijuana.⁶³ Based on voter initiatives, state legislatures are enacting marijuana legalization statutes in an effort to redirect law enforcement's focus on violent crimes and to promote individual freedoms and

⁵⁸ *Id.* In 2017, Uruguay became the first country to legalize marijuana. The country requires users to purchase marijuana from a pharmacy where users are identified by their digital thumbprints. Uki Goñi, *Uruguay, the First Country Where You Can Smoke Marijuana Wherever You Like*, GUARDIAN (May 27, 2017, 2:50 PM), <https://www.theguardian.com/society/2017/may/27/marijuana-legalisation-uruguay-seen-half-measure-users>.

⁵⁹ *Cannabis Legalization and Regulation*, GOV'T OF CAN. DEP'T OF JUST., <https://www.justice.gc.ca/eng/cj-jp/cannabis/> (last visited Nov. 4, 2018, 2:25 PM).

⁶⁰ Amanda Connolly, *Canadians With Past Pot Convictions Won't Have to Pay or Wait to Apply for a Pardon*, GLOBAL NEWS (Oct. 17, 2018, 8:49 AM), <https://globalnews.ca/news/4563182/cannabis-pardon-marijuana-legalization-ralph-goodale/>. Canadians can apply for a pardon but will not have to wait a specific period of time or pay a fee. *Id.*

⁶¹ See Bilefsky, *supra* note 57; Connolly, *supra* note 60.

⁶² Greg Quinn, *Canada's Legal Weed Creates Risk for Investors at U.S. Border*, BLOOMBERG (Sept. 14, 2018, 8:46 AM), <https://www.bloomberg.com/news/articles/2018-09-14/canada-s-legal-weed-creates-risk-for-investors-at-u-s-border>. U.S. border guards have the power to ask Canadians about their current and past drug use, and if users admit to using the drug, they may lose the ability to enter the U.S for life. This is a problem for investors in the marijuana industry because border agents may determine that these individuals are conducting criminal activity and ban them. *Id.*

⁶³ *Marijuana Laws of the United States*, BALLOTPEDIA, https://ballotpedia.org/Marijuana_laws_in_the_United_States (last visited Nov. 4, 2018, 3:41 PM).

liberties.⁶⁴ Rick Steves, PBS travel guide, resident of Washington state, and advocate for the legalization of marijuana argues “I’m a hardworking, tax-paying, kid-raising, church-going citizen of the United States. And if I work hard all day long and want to go home, smoke a joint, and just stare at the fireplace for three hours—that is my civil liberty.”⁶⁵ Nine states have passed recreational marijuana legalization through voter initiative.⁶⁶ Vermont is the only state to legalize recreational marijuana directly through legislative action, rather than popular initiatives.⁶⁷ Alaska is the only state with a judicially created right to use marijuana.⁶⁸ In 1975, the Alaskan Supreme Court held that adults have a fundamental right to privacy to possess and use marijuana in the home.⁶⁹

Legalizing marijuana through voter referendum began in 2012 when Colorado voters ended the state’s prohibition by passing Amendment 64, a ballot measure to legalize and regulate marijuana.⁷⁰ The amendment’s purposes are “the interest of efficient law enforcement resources, enhancing revenue for public purposes, and individual freedom”⁷¹ The Colorado Legislature intended for Amendment 64 to eliminate underground markets through the regulation, taxation,

⁶⁴ See COLO. REV. STAT. ANN. § 16 (West 2018); ALASKA STAT. ANN. § 17.38.20 (West 2018). Here, legalization means the state allows individuals to possess, use, transport, and cultivate in regulated amounts. See *infra* Appendix A: Marijuana Legalization and Expungement Statutes Chart.

⁶⁵ Heather Irwin, *10 Reasons Why Rick Steves Should Be the Patron Saint of Pot Legalization*, EMERALD REP. (Mar. 1, 2017), <https://www.emeraldreport.com/10-reasons-rick-steves-patron-saint-pot-legalization/>.

⁶⁶ BALLOTPEdia, *supra* note 63. Citizens of Alaska, California, Colorado, Maine, Massachusetts, Oregon, and Washington voted to legalize recreational marijuana. *Id.*

Michigan recently legalized marijuana through voter initiative in November 2018. Tom Angell, *Michigan Voters Approve Marijuana Legalization*, FORBES (Nov. 6, 2018, 11:30 PM), <https://www.forbes.com/sites/tomangell/2018/11/06/michigan-voters-approve-marijuana-legalization/#3f95c9647a57>.

⁶⁷ BALLOTPEdia, *supra* note 63.

⁶⁸ *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

⁶⁹ *Id.* Before marijuana legalization in 2014, the Alaskan legislature decriminalized and recriminalized marijuana repeatedly, creating a legal conflict with the *Ravin* Doctrine. Jason Brandeis, *Ravin Revisited: Alaska’s Historic Common Law Marijuana Rule at the Dawn of Legalization*, 32 ALASKA L. REV. 309, 312–14 (2015).

⁷⁰ COLO. REV. STAT. ANN. § 16 (West 2018); Matt Ferner, *Amendment 64 Passes: Colorado Legalizes Marijuana for Recreational Use*, HUFFINGTON POST (Nov. 20, 2012), https://www.huffingtonpost.com/2012/11/06/amendment-64-passes-in-co_n_2079899.html.

⁷¹ *Id.* § 16 (West 2018).

and legalization of marijuana.⁷² Colorado legislators argued that marijuana is less harmful than alcohol and tobacco, and the regulation and criminal enforcement of marijuana possession as an illegal substance were too severe, draining state resources.⁷³ The law now permits adults who are twenty-one and older to possess up to an ounce (28.5 grams) of marijuana, six living plants, and no more than eight grams in concentrated cannabis form.⁷⁴

While a trailblazer in ending marijuana prohibition, Colorado is not the only state to legalize marijuana for recreational use.⁷⁵ Since 2012, nine more states and the District of Columbia have passed legislation legalizing recreational marijuana use.⁷⁶ The general trend among states is to legalize the possession, use, and transport of one ounce of marijuana and the personal cultivation of four to six plants.⁷⁷ Recently, Michigan became the first state in the Midwest to legalize marijuana after citizens' voted for Proposal 18–1.⁷⁸ Based on the policies of the referendum, Michigan doubled the amount of marijuana allowed per household.⁷⁹ In each of these states, it is unlawful for anyone under the age of twenty-one to possess or use marijuana, to consume marijuana in public, to possess or cultivate more than the legal amount of marijuana, or to sell or trade marijuana for goods or services outside of a licensed dispensary.⁸⁰

⁷² *Amendment 64: Use and Regulation of Marijuana*, COLO. LEG., [https://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/\\$FILE/Amendment%2064%20merged.pdf](https://www.leg.state.co.us/LCS/Initiative%20Referendum/1112initrefr.nsf/c63bdd6b9678de787257799006bd391/cfa3bae60c8b4949872579c7006fa7ee/$FILE/Amendment%2064%20merged.pdf) (last visited Oct. 16, 2018, 9:48 PM).

⁷³ *Id.*

⁷⁴ *Id.* § 16.

⁷⁵ Melia Robinson & Jeremy Berke, *Here's Where You Can Legally Consume Marijuana in the US in 2018*, BUS. INSIDER (July 20, 2018, 1:16 PM), <https://www.businessinsider.com/where-can-you-can-legally-smoke-weed-2018-1>.

⁷⁶ *See infra*, Appendix A: Marijuana Legalization and Expungement Statutes Chart. Alaska, California, Colorado, Maine, Massachusetts, Michigan, Oregon, Vermont, Washington, and Washington D.C. have legalized marijuana. Each state has different regulations for recreational use. Robinson & Berke, *supra* note 75.

⁷⁷ *See infra*, Appendix A: Marijuana Legalization and Expungement Statutes Chart.

⁷⁸ *Ballot Proposal 1 of 2018: Marijuana Initiative*, Mich. H. Fiscal Agency, 2 (2018).

⁷⁹ *Id.* Adults older than twenty-one can possess, use, consume, purchase, transport or process up to two and a half ounces of marijuana. Individuals can cultivate up to twelve marijuana plants for personal use. *Id.*

⁸⁰ *See* ALASKA STAT. ANN. § 17.38.20 (West 2018); CAL. HEALTH & SAFETY CODE §§ 11362.1, 11361.9 (West 2018); COLO. REV. STAT. ANN. §§ 16, 24-72-710 (West 2018); MASS. GEN. LAWS ANN. ch. 94G § 7 (West 2018); ME. REV. STAT. ANN. tit. 7 § 2452 (2018); Chapter 453D - Regulation and Taxation of

States commonly regulate the recreational marijuana industry through legal statutory provisions that outline the process for entrepreneurs to establish retail or cultivation businesses.⁸¹ Legal marijuana sales have already improved the economy in these states.⁸² In anticipation of marijuana legalization, states legislatures implemented strict measures to regulate marijuana businesses.⁸³ Regulations detail the process to obtain a license, including the taxes and fees, sales taxes, and excise taxes that marijuana businesses must pay to states.⁸⁴ The revenue generated from marijuana taxes is used to fund education, law enforcement, research, and public safety initiatives.⁸⁵

While many marijuana business owners are thriving, several states have banned some persons from the legal retail marijuana industry.⁸⁶ States are split on whether individuals with marijuana convictions should be able to obtain marijuana retail licenses.⁸⁷ States such as California, Colorado, and Oregon have exceptions allowing individuals with minor marijuana offenses to obtain retail establishment licenses.⁸⁸ In Oregon, the Oregon Liquor Control Commission cannot bar

Marijuana, (Nev. 2018), <https://www.leg.state.nv.us/NRS/NRS-453D.html>; OR. REV. STAT. ANN. § 475B.005 (West 2018); VT. STAT. ANN. tit. 18, § 4230 (West 2018); WASH. REV. CODE ANN. §§ 69.50.360, 69.50.4013 (West 2018).

⁸¹ See COLO. CODE REGS. § 212-2 (2018). For instance, Colorado's Administrative Code outlines the rules and regulations for those engaged in the "business of possessing, cultivating, [t]ransferring, transporting, or testing Retail Marijuana" *Id.* § 212-2.101.

⁸² See Mona Zhang, *Legal Marijuana Is a Boon to the Economy, Finds Study*, FORBES (Mar. 13, 2018, 5:34 PM), <https://www.forbes.com/sites/monazhang/2018/03/13/legal-marijuana-is-a-boon-to-the-economy-finds-study/#7e71e6f8ee9d>. As of May 2018, California made almost \$2.75 billion from recreational marijuana sales and Colorado made about \$1.56 billion. Andrew DePietro, *Here's How Much Money States Are Raking in from Legal Marijuana Sales*, FORBES, (May 4, 2018, 3:13 PM), <https://www.forbes.com/sites/andrewdepietro/2018/05/04/how-much-money-states-make-cannabis-sales/#2985b8d8f181>.

⁸³ See *Marijuana Taxes: File*, CO. DEP'T. OF REV. <https://www.colorado.gov/pacific/tax/marijuana-taxes-file> (last visited Oct. 3, 2018, 9:17 PM).

⁸⁴ *Id.*

⁸⁵ See ME. REV. STAT. ANN. tit. 28-B § 1101, 1102 (West 2018).

⁸⁶ Schlüssel, *supra* note 3, at 920–25.

⁸⁷ Compare CAL. HEALTH & SAFETY CODE § 11362.8(a) (West 2018), and COLO. REV. STAT. ANN. § 212-2.231 (West 2018), with ALASKA STAT. ANN. §306.019 (West 2018), and ME. REV. STAT. ANN. tit. 28-B § 202 (West 2018).

⁸⁸ CAL. HEALTH & SAFETY CODE § 11362.8(a); COLO. REV. STAT. ANN. § 212-2.231 (West 2018); OR. REV. STAT. ANN. § 475B.045 (West 2018).

individuals with certain marijuana convictions to access licenses.⁸⁹ Some entrepreneurs in the field are working with legislators to implement criminal justice reform legislation to help individuals with relevant experience and expertise in plant cultivation to gain access to the industry.⁹⁰ On the other hand, states such as Maine and Alaska do not even allow retail establishments to hire individuals with previous marijuana convictions, including possession charges.⁹¹ Alaska, for instance, does not allow Alaskans to work in the marijuana retail industry if they have convictions in the past five years for felony or misdemeanor marijuana offenses.⁹² These regulations bar individuals who may have relevant expertise and knowledge in this area.⁹³

C. States Inch Closer: Marijuana Decriminalization

While some states have legalized marijuana cultivation, distribution, possession, and use, other states have simply decriminalized some of these activities.⁹⁴ Thirteen states have passed laws to decriminalize marijuana.⁹⁵ States that have decriminalized marijuana still have penalties associated with possession, cultivation, and use.⁹⁶ General confusion exists about the distinction between decriminalization and legalization.⁹⁷ As discussed previously, legalization occurs

⁸⁹ OR. REV. STAT. ANN. § 475B.045 (West 2018).

⁹⁰ Mona Zhang, *Cannabis Industry Struggles with Hiring People with Past Pot Convictions*, FORBES (Oct. 4, 2017, 5:50 PM), <https://www.forbes.com/sites/monazhang/2017/10/04/cannabis-industry-hiring-people-past-pot-convictions/#50bc8c2e5cd4>.

⁹¹ ALASKA STAT. ANN. §306.019 (West 2018); ME. REV. STAT. ANN. tit. 28-B § 202 (West 2018).

⁹² DJ Summers, *Who Can Work in a Marijuana Shop?: Alaska's New Rules Could Be the Strictest in the Nation*, ALASKA J. (Oct. 21, 2016, 3:58 PM), <http://www.alaskajournal.com/2016-10-21/who-can-work-marijuana-shop#.W8jpai-ZNao>. Other controlled substances are included in this law, but those substances are outside the scope of this Article.

⁹³ See Zhang, *supra* note 90. Relevant expertise and experience relate to cultivators of the marijuana plants, rather than individuals who sold marijuana. *Id.*

⁹⁴ *13 States Have Decriminalized – But Not Legalized – Marijuana*, VOX (Aug. 20, 2018, 12:07 PM), <https://www.vox.com/cards/marijuana-legalization/what-is-marijuana-decriminalization>.

⁹⁵ *Id.* Connecticut, Delaware, Illinois, Maryland, Minnesota, Missouri, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, and Rhode Island have all decriminalized marijuana to differing degrees. *Id.*

⁹⁶ *Id.*

⁹⁷ DOUGLAS HUSAK & PETER DE MARNEFFE, *THE LEGALIZATION OF DRUGS: FOR & AGAINST* 1–14 (2005).

when an act (such as marijuana possession) once deemed criminal is made legal and can be conducted without fear of prosecution under civil or criminal law.⁹⁸ Decriminalization literally means that an individual will not be punished for an act that is no longer considered a crime under criminal law.⁹⁹ States do not incorporate the literal meaning of decriminalization within the statutory language, causing confusion as to what decriminalization really means under the new law.¹⁰⁰

Despite enacting decriminalization legislation, most of these states have retained some type of penalty for possession and use of marijuana.¹⁰¹ New York, for instance, decriminalized marijuana in 1977. First-time offenders guilty of unlawful possession of marijuana are charged with fines of no more than \$100.¹⁰² Law enforcement in New York City ignored the law until 2014 when Mayor Bill De Blasio called for enforcement of the statute.¹⁰³ New Yorkers were so excited about the enforcement of this law that actor Woody Harrelson joined the cast and crew of *Saturday Night Live* to announce the amendment.¹⁰⁴ Other states issue civil penalties for first-time offenses, with fines between \$100 to \$200.¹⁰⁵ In addition to civil penalties, some states, like Minnesota, require individuals who are found with small amounts of marijuana to participate in drug-education programs.¹⁰⁶ If a state continues to punish marijuana offenders, there should be compelling reasons to take away one's liberty or property.¹⁰⁷ The main question states legislators should ask

⁹⁸ *Id.* at 3.

⁹⁹ *Id.* at 1–14.

¹⁰⁰ See CONN. GEN. STAT. § 21a-279a (West 2018); DEL. CODE ANN. 16 § 4764 (West 2018); 720 ILL. COMP. STAT. ANN. 550/4 (West 2018); MINN. STAT. ANN. § 152.027 (West 2018); N.Y. PENAL LAW § 221.05 (McKinney 2018).

¹⁰¹ See CONN. GEN. STAT. § 21a-279a (West 2018); DEL. CODE ANN. 16 § 4764 (West 2018); 720 ILL. COMP. STAT. ANN. 550/4 (West 2018); MINN. STAT. ANN. § 152.027 (West 2018); N.Y. PENAL LAW § 221.05 (McKinney 2018).

¹⁰² N.Y. PENAL LAW § 221.05 (West 2018). Anything more than twenty-five grams is considered a Class B misdemeanor. *Id.* § 221.10.

¹⁰³ Gregory Krieg, *4 Months After Officially Decriminalizing Weed, Here's the Hellscape NYC Has Become*, MIC (Mar. 25, 2015), <https://mic.com/articles/113570/4-months-after-officially-decriminalizing-weed-here-s-the-hellscape-nyc-has-become#.hnzrCQ6IK>.

¹⁰⁴ *New Marijuana Policy*, SATURDAY NIGHT LIVE (Nov. 16, 2014), <https://www.youtube.com/watch?v=T5ei9nEWfyU>.

¹⁰⁵ See CONN. GEN. STAT. § 21a-279a (West 2018); DEL. CODE ANN. 16 § 4764 (West 2018); 720 ILL. COMP. STAT. ANN. 550/4 (West 2018); MINN. STAT. ANN. § 152.027 (West 2018);

¹⁰⁶ MINN. STAT. ANN. § 152.027 (West 2018).

¹⁰⁷ HUSAK & DE MARNEFFE, *supra* note 97, at 28.

is, “whether [the state has] good reasons to (continue to) punish people who use drugs.”¹⁰⁸

*D. Current Expungement Provisions in States with
Marijuana Legalization and Decriminalization Statutes*

As states continue to legalize and decriminalize marijuana, some state legislatures have enacted expungement provisions for individuals with previous marijuana-related offenses to start anew.¹⁰⁹ Expungement erases criminal history records, making information inaccessible because the record is destroyed.¹¹⁰ Individuals are given a fresh start to receive new employment opportunities, education funding, and other government benefits.¹¹¹ Some states choose sealing as a method of expungement, but sealing does not completely erase records.¹¹² Rather, sealing prevents public access to criminal records.¹¹³ The files continue to exist and criminal justice agencies can access the information if necessary.¹¹⁴

In the digital age, documents are eternally preserved despite sealing or erasure.¹¹⁵ Criminal records can live forever on the Internet.¹¹⁶ Commercial databases also retain the old files and the records can appear on criminal background checks.¹¹⁷ If these records come up in employment background checks, employers must follow the guidelines outlined by the Fair Credit Reporting Act.¹¹⁸

¹⁰⁸ *Id.*

¹⁰⁹ See 11 DEL. C. § 8502 (West 2018); CAL. HEALTH & SAFETY CODE § 11361.9 (West 2018); COLO. REV. STAT. ANN. § 24-72-710 (West 2018).

¹¹⁰ Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL’Y REV. 361, 362 (2016).

¹¹¹ Berman, *supra* note 1, at 312.

¹¹² Murray, *supra* note 110, at 370.

¹¹³ *Id.*

¹¹⁴ 11 DEL. C. § 8502 (West 2018); Murray, *supra* note 110, at 370. In Delaware, criminal justice agencies include, but are not limited to, the Delaware State Police, the State Department of Justice, the Division of Family Services, and the Division of Alcohol and Tobacco. *Id.* § 8502.

¹¹⁵ Murray, *supra* note 110, at 377.

¹¹⁶ See Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006),

<https://www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all>.

¹¹⁷ See Murray, *supra* note 110, at 377; Liptak, *supra* note 116.

¹¹⁸ *Background Checks: What Employers Need to Know*, U.S. EQUAL EMP. OPPORTUNITY COMM’N,

https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm (last visited Oct. 18, 2018, 9:13 PM).

For instance, hiring managers must first get the applicant's written permission to conduct the initial background check, and if adverse information is found, the applicant has the ability to review the report and provide an explanation.¹¹⁹

1. Status of Expungement Under Legalization

Some states that have legalized marijuana have already enacted specific marijuana expungement statutes.¹²⁰ Other states have proposed marijuana expungement legislation, but they have not yet enacted the bills.¹²¹ There are also states that either rely on general criminal expungement statutes or do not offer expungement at all.¹²² This Article focuses on two states that have recently enacted expungement statutes: California and Colorado.

In September 2018, Governor Jerry Brown of California signed a state-mandated expungement program, the country's most progressive marijuana expungement legislation.¹²³ The bill requires the California Department of Justice to review records that may be eligible for dismissal and sealing, resentencing, or redesignation, expediting the process to "create a path that is less onerous on the individual."¹²⁴ Although the state carries the burden to review records, some individuals must apply for certain expungement measures.¹²⁵ For instance, individuals currently serving a sentence can follow a four-step process to be resentenced as they may be eligible for dismissal or a reduced sentence.¹²⁶ Individuals that have already served sentences can qualify for redesignation; a felony can be reduced to a misdemeanor or dismissed and sealed if the conviction

¹¹⁹ *Id.*

¹²⁰ *See infra* Appendix A: Marijuana Legalization and Expungement Statutes Chart.

¹²¹ *See infra* Appendix A: Marijuana Legalization and Expungement Statutes Chart.

¹²² *See infra* Appendix A: Marijuana Legalization and Expungement Statutes Chart.

¹²³ Candice Norwood, *California's New Marijuana Law Is a First But Likely Not the Last*, GOVERNING (Oct. 1, 2018), <http://www.governing.com/topics/public-justice-safety/gov-california-marijuana-criminal-record-state.html>. California legislators estimate that between 1915 and 2016, over 2,756,778 people have been arrested for marijuana. *Cannabis Convictions*, *supra* note 49.

¹²⁴ *Cannabis Convictions*, *supra* note 49.

¹²⁵ *Id.*

¹²⁶ *Id.* A sentence includes time in prison, jail, parole, probation, mandatory supervision, community supervision. *Id.*

is no longer a crime under the new law.¹²⁷ This legislation will allow individuals to clear their records and start anew.¹²⁸ Other states have also instituted similar provisions, but not to the extent of California.¹²⁹

Colorado, the first to legalize marijuana, did not enact an expungement statute until 2017. Before Section 24-72-710 was passed, Colorado required individuals with drug arrests or convictions to wait anywhere between one and ten years before they could petition for an expungement.¹³⁰ Now, the Colorado statute permits the sealing of records of misdemeanor offenses for marijuana possession and use that are considered legal as of December 10, 2012.¹³¹ Colorado's statute requires individuals to file a petition to prove, by a preponderance of the evidence, that the offense would not have been a criminal offense on December 10, 2012.¹³²

In December 2018, Denver's mayor announced that the city plans to vacate and dismiss marijuana convictions that took place in Denver before legalization.¹³³ Vacating a conviction means that the conviction is considered null and void, as if it no longer exists.¹³⁴ The mayor will work with the Office of Marijuana Police and the City Attorney's Office to vacate and dismiss these convictions.¹³⁵ A similar initiative, "Moving On from Marijuana," has been introduced by the Boulder district attorney.¹³⁶ The purpose of both programs is to clear the records of individuals with marijuana-related charges that are now considered legal acts, so these individuals are no longer barred from employment opportunities.¹³⁷

¹²⁷ *Id.* As noted above, however, reclassification of marijuana offenses may not prevent the triggering of the federal recidivist enhancement statute. 21 U.S.C. § 841(b)(1)(B).

¹²⁸ *Cannabis Convictions*, *supra* note 49.

¹²⁹ *See* COLO. REV. STAT. ANN. § 24-72-710 (West 2018); OR. REV. STAT. ANN. § 137.226 (West 2018).

¹³⁰ Memorandum from Jessika Shipley, Principal Analyst, to Interested Persons, Colorado Legislative Council Staff (Oct. 31, 2016) (on file with Colorado General Assembly).

¹³¹ COLO. REV. STAT. ANN. § 24-72-710 (West 2018).

¹³² *Id.*

¹³³ Bobbi Sheldon et al., *Denver Mayor Announces Effort to Vacate Low-Level Marijuana Convictions*, 9NEWS (Dec. 7, 2018, 8:46 AM), <https://www.9news.com/article/news/local/denver-mayor-announces-effort-to-vacate-low-level-marijuana-convictions/73-620750941>.

¹³⁴ *United States v. Sanders*, No. 18-2165, 2018 WL 6283883, at *5 (7th Cir. Dec. 3, 2018).

¹³⁵ Sheldon, *supra* note 133.

¹³⁶ *Id.*

¹³⁷ *Id.*

2. Status of Expungement Under Decriminalization

States with legalized marijuana laws are not alone in passing expungement legislation. Some states with decriminalized marijuana laws are enacting expungement statutes for marijuana offenses that are no longer criminal under the new law.¹³⁸ Delaware, for instance, passed a mandatory expungement provision within its decriminalization statute.¹³⁹ Individuals who knowingly possess, use, and consume marijuana are guilty of an unclassified misdemeanor and fined no more than \$100.¹⁴⁰ Any adult convicted of a single offense previous to December 18, 2015 is eligible for mandatory expungement.¹⁴¹ This expungement measure seals conviction and arrest records, as long as the individual qualifies under the state's general mandatory expungement provision.¹⁴²

While states like Delaware amend legislation to include expungement provisions, some jurisdictions are departing from the traditional legislative model to a grassroots approach to clear criminal records. Leaders in New York are deviating from the plain language of their state's statute in favor of less restrictive measures.¹⁴³ The New York statute seals certain convictions, including marijuana offenses.¹⁴⁴ A defendant has to successfully complete a drug treatment program and complete the imposed sentence for the offense.¹⁴⁵ The court or the defendant can then file a motion to seal the official records of the arrest, prosecution, and conviction.¹⁴⁶ The defendant may be eligible to seal up to three prior misdemeanors.¹⁴⁷ The court will notify the district attorney, who has up to thirty days to respond and help the court determine if a case file should be sealed.¹⁴⁸ If the court moves to seal the records and the defendant is subsequently arrested or charged with any misdemeanor or felony offense, the records are unsealed immediately and forever.¹⁴⁹

Rather than applying the New York sealing statute, the Manhattan District Attorney will begin to vacate misdemeanor marijuana warrants dating back to

¹³⁸ See 11 DEL. C. § 4764 (West 2018).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Jan Ranson & Tyler Pager, *District Attorneys Dismantle Legacy of Tough Marijuana Enforcement*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/nyregion/nyc-marijuana-laws.html>.

¹⁴⁴ N.Y. PENAL LAW § 160.58 (McKinney 2018).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

1978.¹⁵⁰ The Brooklyn District Attorney, Eric Gonzalez, will also vacate and dismiss “low-level” marijuana possession convictions, and will no longer prosecute individuals arrested only for marijuana offenses.¹⁵¹ Mr. Gonzalez stated that, “[t]o fail to address these past convictions would be hypocritical and would be to turn a blind eye on all the harm caused by marijuana enforcement in prior years.”¹⁵² For instance, over the past three years in New York City, blacks were eight times more likely to be arrested for marijuana possession than whites.¹⁵³ With initiatives like these, New York City leaders are attempting to rectify racial disparities.¹⁵⁴ Judges are even vacating supervision for individuals on probation for marijuana offenses.¹⁵⁵ Although some jurisdictions are decriminalizing marijuana through non-enforcement, states should still pass expungement legislation that will clarify the law and protect every citizens’ right to expungement.

III. THE SOLUTION TO THE “SCARLET-M”

State legalization of marijuana for recreational purposes creates a chasm between citizens in this country. One group of Americans can use marijuana recreationally without fear of prosecution under the new laws, while a second group continues to suffer the “collateral consequences” of previous marijuana-related offenses.¹⁵⁶ In states that have legalized recreational marijuana possession and use, individuals with previous marijuana convictions for the same conduct still have criminal records, which drastically alter and impede their daily lives.¹⁵⁷ An individual with a criminal record may be unable to vote, serve on a jury, purchase a firearm, travel abroad, obtain a professional license, finance an education, and access public housing.¹⁵⁸ Depending on the criminal sanctions of the state, an individual has to pay probation fees, fines, monthly drug tests, attorney’s fees, and court costs.¹⁵⁹ Any state that legalizes or decriminalizes recreational marijuana

¹⁵⁰ Ranson & Pager, *supra* note 143.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *U.S. v. Trotter*, 321 F.Supp.3d 337 (E.D.N.Y. 2018) (holding for the termination of supervised release for a defendant whose only crime was his habitual marijuana use). In *United States v. Trotter*, the judge argued that with relaxed views towards marijuana, along with the storied history of minority-targeted arrests, the defendant’s continued supervision would only create an endless cycle of supervised release and prison. *Id.*

¹⁵⁶ Berman, *supra* note 1, at 306.

¹⁵⁷ *Id.* at 306–07.

¹⁵⁸ *Id.* at 305–07.

¹⁵⁹ ALEXANDER, *supra* note 28, at 154–57.

should include an expungement provision for citizens with previous marijuana convictions for activities that are now considered legal under the new law.

*A. Proposed Language for a Model Expungement Statute
and a Step-by-Step Comparative Analysis*

As states contemplate marijuana legalization for recreational purposes, legislators need to consider how these new laws will affect their citizens. Rather than allow their citizens to retain a “Scarlet-M,” states should give their people a second chance, a fresh start to rebuild their lives, and contribute to society in ways they have previously been denied.¹⁶⁰ The following language is designed as a guide for legislators, judges, and attorneys to implement as an expungement provision that will benefit members of the community.

- (1) The purpose of this legislation is to restore individual freedom and equality to American citizens who have been arrested, convicted, or charged for the use, possession, cultivation, and transportation of marijuana before it was legalized or decriminalized under the new law of this state.
- (2) On or before the [date of effective marijuana legalization/decriminalization statute], the state’s Department of Justice shall designate an independent, impartial committee of prosecutors, criminal defense attorneys, and judges to oversee the criminal records of marijuana offenders in the State of [state’s name]. The members shall examine case files to determine whether past marijuana convictions are eligible for dismissal and erasure, resentencing, or redesignation.
 - (a) The goal of this committee is to review the criminal records of individuals with marijuana-related charges that are now considered legal or no longer criminal under the new marijuana legalization or decriminalization statute. The Special Committee will be formed for [amount of time] after the [designated date] to ensure that all case files have been assessed.

¹⁶⁰ See Berman, *supra* note 1, at 305.

- (b) The Committee will determine if a case file is eligible for dismissal and erasure, resentencing, or redesignation based on the type of offense and the number of offenses on a record.
 - (i) If the case file has one marijuana-related, non-violent offense that is now considered legal or no longer criminal under the new laws, the record shall automatically be dismissed and erased.
 - (ii) If records are dismissed and erased, the records shall no longer exist and cannot be used against an individual in future criminal or civil matters.
 - (iii) The Committee has the discretion to reclassify case files that have multiple marijuana-related offenses that are considered legal or no longer criminal under the new law.
- (c) The Committee has the discretion to dismiss and erase, redesignate, resentence, or deny a case file if the offender has unrelated offenses or if the Committee believes the offender is a threat to public safety. Records that will not be eligible for expungement include, but are not limited to:
 - (i) Any crime involving a sexual offense against a minor and/or an adult;
 - (ii) Any crime involving domestic violence against a minor and/or an adult;
 - (iii) Endangering the welfare of a child;
 - (iv) A crime against a vulnerable adult;
 - (v) Any crime involving endangerment of public safety, such as driving while impaired.

- (3) Once the Committee has reviewed the case file, Special Committee Attorneys will act as liaisons between the prosecutor's office and the offender. Special Committee Attorneys will notify both the prosecutor and the offender to inform the parties of the status of the case.
 - (a) The purpose of the Special Committee Attorneys is to defuse tension between an offender and the prosecutor. The mission of the Special Committee Attorneys is to act in the best interest of the offender and the community-at-large.
 - (b) The Special Committee Attorneys have until [designated date] to dismiss and erase, resentencing, or redesignate case files.
 - (c) To avoid miscommunication on case files, the Special Committee Attorneys shall update the prosecutor's office on a monthly basis or as needed to efficiently and thoroughly reclassify case files.
 - (d) The Special Committee shall put notice of its initiative on the Internet so offenders are aware of the process. The website should contain contact information if offenders have questions about the status of their case file.
 - (e) The Special Committee Attorneys will notify the court on case file reclassifications. Both Special Committee Attorneys and the prosecutors shall inform the court if the prosecution challenges a case file.

The intent of the model expungement statute's intent is to destroy the criminal records of marijuana offenders whose crimes are now considered legal under the new law. This statute is meant to help individuals rebuild their lives. Records are erased, so the information will not be on file or used against an

individual in future civil or criminal matters.¹⁶¹ This section analyzes each part of the proposed model statute and compares the language and intent to enacted expungement statutes in California, Colorado, Delaware, and New York.

1. The Purpose of the Model Expungement Statute

The purpose of this legislation is to restore individual freedom and equality to American citizens who have been arrested, convicted, or charged for the use, possession, cultivation, and transportation of marijuana before it was legalized or decriminalized under the new law of this state.

This statute was written with the express purpose to create a fair balance between individuals as marijuana laws change. Individuals with previous marijuana-related charges that are now considered legal or no longer criminal under the new laws should not suffer from the collateral consequences of now-lawful past indiscretions. Many individuals with these criminal records are unable to fully advocate for their own rights.¹⁶² The intent behind a state-mandated marijuana expungement statute is to expedite and efficiently clear these criminal records.¹⁶³ This statute will allow individuals to obtain access to new employment opportunities, financial aid, public housing, the ability to vote, and serve on juries.¹⁶⁴ For some individuals, it will release them from their current criminal sentences in prison, jail, community supervision, or deferred adjudication.

The statute's purpose is equally applicable to states that have legalized or decriminalized recreational marijuana. California's expungement statute is expressly intended to improve the lives of those affected by prior marijuana prohibitions.¹⁶⁵ The statute assists people who may be unaware, unsure, or unable to change their records on their own through this statute.¹⁶⁶ The statute is meant to provide relief to Californians that have been barred from basic amenities and freedoms because of marijuana-related convictions.¹⁶⁷

Not all statutes include a legislative-intent provision. Where Colorado's constitutional amendment to legalize marijuana clearly stated a legislative intent;

¹⁶¹ States should also consider ancillary legislation prohibiting discrimination against persons with prior marijuana offenses in such areas as employment, education, public benefits, and housing.

¹⁶² *Cannabis Convictions*, *supra* note 49.

¹⁶³ *Id.*

¹⁶⁴ Berman, *supra* note 1.

¹⁶⁵ *Cannabis Convictions*, *supra* note 49.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

its sealing statute does not provide the same unambiguous language.¹⁶⁸ The bill on the official Colorado State Assembly website states that people convicted of misdemeanors for the use or possession of marijuana can now seal their records for actions that would not have been considered criminal offenses after December 10, 2012.¹⁶⁹ A more extensive Colorado bill introduced in 2014 would have allowed all people to seal records of marijuana possession that are no longer considered illegal.¹⁷⁰ The more progressive bill died in committee because prosecutors argued that it set a “horrible precedent by retrofitting criminal sanctions for past conduct every time a new law is changed or passed.”¹⁷¹ Section 24-72-710 was a compromise among Colorado legislators.¹⁷²

In states where marijuana has been decriminalized, some state legislatures have introduced expungement legislation for crimes that are no longer criminal under the new laws. Delaware is unique because the mandatory expungement provision exists within the decriminalization statute.¹⁷³ Even so, there is no express language within the statute to define the purpose of the legislation.¹⁷⁴ Delaware Senator Greg Lavelle, a sponsor of the legislation, stated that expungement allows people to start fresh and the new law would be efficient and guaranteed to apply to those with simple marijuana possession records.¹⁷⁵ Delaware should include a clear purpose, like the proposed model language, because it is a leader among states with decriminalized marijuana statutes, and one of the first states to implement an expungement provision within its decriminalization statute.¹⁷⁶

New York’s enacted marijuana expungement statute does not include the law’s purpose or intent. While there is no legislative authority for New York City’s *ad hoc* approach to expungement, officials implementing the program have stated a

¹⁶⁸ COLO. REV. STAT. ANN. § 16, 24-72-710 (West 2018).

¹⁶⁹ H.B. 17-1266, Seal Misdemeanor Marijuana Conviction Records, 71st Colo. Gen. Assemb., 2d Reg. Sess. <https://leg.colorado.gov/bills/hb17-1266> (last visited Nov. 16, 2018, 12:06 PM).

¹⁷⁰ Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, HUFFINGTON POST (Nov. 20, 2017, 10:09 AM), https://www.huffingtonpost.com/entry/in-these-states-past-marijuana-crimes-can-go-away_us_5a12e8e8e4b023121e0e94e3.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ 11 DEL. C. § 4373, 4764 (West 2018).

¹⁷⁴ *Id.* § 4373.

¹⁷⁵ Sophia Schmidt, *Marijuana Possession Expungement Bill Becomes Law*, DEL. PUB. MEDIA, (Sept. 3, 2018), <https://www.delawarepublic.org/post/marijuana-possession-expungement-bill-becomes-law>.

¹⁷⁶ *Id.* § 4764.

purpose.¹⁷⁷ Public advocate Letitia James states, “The cooperative, non-confrontational process of Begin Again will foster trust in the New York legal system and help numerous individuals who have been victimized by the crackdown on low-level offenses.”¹⁷⁸ Begin Again’s purpose is ideal in theory because it allows New Yorkers to start fresh, and as an effect, communities can develop trusting relationships with the criminal justice system. In practice, this system only benefits New York City residents. This is a policy that should be adopted by the New York State Legislature to benefit all New Yorkers who need guidance to clear their criminal records expeditiously.

2. The Model Statute’s Expungement Process

On or before the [date of effective marijuana legalization/decriminalization statute], the state’s Department of Justice shall designate an independent, impartial committee of prosecutors, criminal defense attorneys, and judges to oversee the criminal records of marijuana offenders in the State of [state’s name]. The members shall examine case files to determine whether past marijuana convictions are eligible for dismissal and erasure, resentencing, or redesignation.

- (a) The goal of this committee is to review the criminal records of individuals with marijuana-related charges that are now considered legal or no longer criminal under the new marijuana legalization or decriminalization statute. The Special Committee will be formed for [amount of time] after the [designated date] to ensure that all case files have been assessed.
- (b) The Committee will determine if a case file is eligible for dismissal and erasure, resentencing, or redesignation based on the type of offense and the number of offenses on record.
 - (i) If the case file has one marijuana-related, non-violent offense that is now considered legal or no longer criminal under the new

¹⁷⁷ *Begin Again Continues in 2018*, BROOKLYN DIST. ATT’Y OFF., <http://brooklynda.org/begin-again/> (last visited Nov. 19, 2018, 11:48 AM).

¹⁷⁸ *Id.*

laws, the record shall automatically be dismissed and erased.

- (ii) If records are dismissed and erased, the records shall no longer exist and cannot be used against an individual in future criminal or civil matters.
 - (iii) The Committee has the discretion to reclassify case files that have multiple marijuana-related offenses that are considered legal or no longer criminal under the new law.
- (c) The Committee has the discretion to dismiss and erase, redesignate, resentence, or deny a case file if the offender has unrelated offenses or if the Committee believes the offender is a threat to public safety. Records that will not be eligible for expungement include, but are not limited to:
- (i) Any crime involving a sexual offense against a minor and/or an adult;
 - (ii) Any crime involving domestic violence against a minor and/or an adult;
 - (iii) Endangering the welfare of a child;
 - (iv) A crime against a vulnerable adult;
 - (v) Any crime for involving the endangerment of public safety, such as driving while impaired.

The model language proposes the creation of a temporary Special Committee. The Special Committee's purpose is to establish an impartial panel of legal professionals who will create guidelines, set reclassification parameters, and uniform terminology to ensure consistency for criminal record review. The state legislature will determine how long the Special Committee should be formed based on the quantity and seriousness of criminal records. A specific timeframe to process the records ensures that the Special Committee is focused, thorough, and efficient.

If the Special Committee reviews a record where an individual only has one marijuana-related, non-violent offense that would be considered legal under the new laws, then the record is automatically dismissed and destroyed, rather than merely sealed. California only offers a sealing of records, which means the records continue to exist with the potential to be unsealed.¹⁷⁹

Although completely destroying records that exist on the Internet may be a challenge, erasure remains an available form of expungement. If a state automatically expunges records because past marijuana offenses are now considered legal, then the record should no longer exist; it should be as if the crime never happened. Individuals should be secure in the knowledge that their past will not continue to haunt them. If a criminal record emerges from a commercial background-check company database, the records cannot be used against an individual to deny housing, employment, financial aid, the ability to travel, to vote, or to serve on a jury. An expunged record cannot be used against an individual in any subsequent civil or criminal legal matters.

The automatic expungement of offenses now considered legal will expedite the process, and allow the Special Committee to spend time on more serious cases that require redesignation or resentencing. The Special Committee will adopt protocols similar to California's resentencing and redesignation guidelines. If offenders are currently serving a sentence, they must file a petition for resentencing or redesignation.¹⁸⁰ A court conducts an initial screening; holds a qualification hearing to determine the merits of the case; and if appropriate, resentsences the individual.¹⁸¹ A sentence includes time in prison, jail, parole, probation, mandatory supervision, or community supervision.¹⁸² If individuals have already served sentences, they can file a petition for redesignation. A felony may be reduced to a misdemeanor, or dismissed and sealed if the offense on which the conviction is based is no longer a crime.¹⁸³

The Special Committee has the discretion to deny an individual's case. Offenders not eligible for expungement are those who pose a threat to public safety. Sexual offenders and perpetrators of domestic violence towards children or vulnerable adults are denied expungement because these crimes put those who cannot protect themselves at risk. These crimes were specifically listed because of the heinous nature of the acts and the pain and suffering they can cause individuals and communities. Driving while impaired also puts the public at risk and is a major concern for states with legalization policies.¹⁸⁴ Initially, legislatures should be more

¹⁷⁹ *Cannabis Convictions*, *supra* note 49.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Although not necessarily linked to legalized marijuana, marijuana-related traffic fatalities have increased 40% since 2014. David Migoya, *Exclusive: Traffic*

cautious because there are few studies to determine if marijuana has caused deadly traffic accidents to increase.¹⁸⁵

Even though it was a trailblazer in legalizing marijuana, historically, Colorado has not expunged adult records for any offenses, including marijuana-related charges.¹⁸⁶ Colorado's most recent expungement statute seals misdemeanor offenses for marijuana use and possession, actions that were considered legal as of December 10, 2012.¹⁸⁷ Adults have the ability to seal their records, whereas juvenile delinquents have the ability to expunge their records.¹⁸⁸ A Colorado memorandum generated in the Colorado General Assembly states that "sealing and expungement basically refer to the same thing."¹⁸⁹ While it is true that the terms are used interchangeably based on jurisdiction, the legal effects of sealing are different than expungement because criminal justice agencies can still access sealed documents.¹⁹⁰ The general provision of the Colorado sealing statute states that any member of the general public may petition the court to unseal any sealed record if the "public interest in disclosure now outweighs the defendant's interest in privacy."¹⁹¹ Legislators must be precise with the statutory language so individuals can understand what rights they have under the law.¹⁹² Conversely, the proposed

Fatalities Linked to Marijuana Are up Sharply in Colorado. Is Legalization to Blame?, Denver Post (Aug. 25, 2017),

<https://www.denverpost.com/2017/08/25/colorado-marijuana-traffic-fatalities/>.

¹⁸⁵ *Id.*

¹⁸⁶ Shipley Memo, *supra* note 130.

¹⁸⁷ COLO. REV. STAT. ANN. § 24-72-710 (West 2018). This type of expungement process is akin to President Carter's pardon for individuals that evaded the draft during the Vietnam War. President Carter issued a Pardon Proclamation to all people who violated the Military Selective Service Act and were convicted of the offense between August 4, 1964 and March 28, 1973. If civilians were convicted of this offense, they could obtain a certificate by providing the charging document and the judgment of the conviction with the sentencing date. The United States Attorney for the district where the individual was convicted would verify this information. The Federal Bureau of Investigation was also notified of the certificate issuing the pardon so the organization could update its official records. *Vietnam War Era Pardon Instructions*, DEP'T. OF JUST., <https://www.justice.gov/pardon/vietnam-war-era-pardon-instructions> (last visited Oct. 20, 2018, 7:01 PM).

¹⁸⁸ Shipley Memo, *supra* note 130.

¹⁸⁹ *Id.*

¹⁹⁰ Murray, *supra* note 110, at 377.

¹⁹¹ COLO. REV. STAT. ANN. § 24-72-703(4)(d)(IV) (West 2018).

¹⁹² This is a similar argument regarding the meaning of decriminalization. It can be a challenge to maintain consistent language, but when an individual's liberty is

language provides options for the Special Committee to dismiss and erase, resentence, or redesignate.

Colorado citizens with misdemeanor offenses only have the option to seal their arrest or conviction records and they must follow a series of court-ordered steps.¹⁹³ Colorado's expungement statute requires an individual to file a petition to prove by a preponderance of the evidence the offense would not be considered a crime as of December 10, 2012.¹⁹⁴ To seal their marijuana criminal records, individuals must file a petition with the court and pay an initial filing fee and any additional petition and filing fees.¹⁹⁵ The state court administrator must post the petition on the website of the state court administrator for at least thirty days.¹⁹⁶ The individual must provide the sealing order to the Colorado Bureau of Investigation and any other departments who may have access to the conviction records.¹⁹⁷ This process costs an individual money and time and creates confusion. People may find it challenging to navigate Colorado's expungement process alone. The proposed model language and the California model place the burden of expungement on the state to expunge the criminal records efficiently and effectively.¹⁹⁸

Delaware is unique because the mandatory expungement provision exists within the decriminalization statute.¹⁹⁹ Section 4764 of the Delaware Code states that individuals who knowingly possess, use, or consume marijuana are guilty of an unclassified misdemeanor and fined no more than \$100.²⁰⁰ Any adult convicted of a single offense previous to December 18, 2018 is eligible for mandatory expungement.²⁰¹ Delaware's State Bureau of Identification receives and processes all expungement requests.²⁰² Individuals are eligible for expungement if they have only been convicted of one crime, which they now want to expunge.²⁰³ If the State Bureau of Identification determines that the record can be expunged, a Bureau employee must notify court and police agencies within sixty days, and these agencies must send all files to the Supervisor of the State Bureau of Identification.²⁰⁴ The court and police agencies must remove records and send

at stake, state legislators have a duty to be accurate and precise. HUSAK & DE MARNEFFE, *supra* note 97, at 28.

¹⁹³ *Id.* § 24-72-710.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* § 24-72-703.

¹⁹⁷ *Id.* § 24-72-710.

¹⁹⁸ *Cannabis Convictions*, *supra* note 49.

¹⁹⁹ 11 DEL. C. §§ 4373, 4764 (West 2018).

²⁰⁰ *Id.* § 4764.

²⁰¹ *Id.*

²⁰² *Id.* § 4373.

²⁰³ *Id.*

²⁰⁴ *Id.*

written confirmation of the case file removal to the State Bureau of Identification.²⁰⁵ Individuals who petition to clear their records do not have to disclose the offense for any reason, unless it is necessary to disclose to criminal justice agencies.²⁰⁶ This is essentially a sealing statute, similar to the Colorado and California statutes.²⁰⁷ In Delaware, criminal records are not completely destroyed, and criminal justice agencies can continue to have access to the records.²⁰⁸

Delaware's expungement statute delegates the expungement process to the State Bureau of Identification. The State Bureau of Identification is the gatekeeper to all criminal records.²⁰⁹ The State Bureau of Identification is a central repository of criminal justice records and the purpose of the organization is to ensure that all records are accurate and up-to-date.²¹⁰ The State Bureau of Identification is an independent entity, which is similar to the proposed model's autonomous Special Committee.²¹¹ Although it is still falls under a branch of the Criminal Justice Department, the State Bureau of Identification Director has the duty to establish and implement procedures to ensure the protection of the files.²¹² Like the State Bureau of Identification, the Special Committee is an autonomous organization that should be protected from outside interference and influence.

The proposed model language is distinguishable from the Delaware statute because, in Delaware, the individual is still required to apply for expungement. The State Bureau of Identification is the point of contact for the individual and for all criminal justice agencies in Delaware.²¹³ Petitioners must pay a \$100 fee to cover administrative costs, as well as an additional civil filing fee.²¹⁴ The proposed model differs from the Delaware statute because, under the proposed model, the state has the responsibility of expunging offender records. The proposed model statute will either be free to individuals or individuals may have to pay a modest fee.

While Delaware chose to incorporate the mandatory expungement provision in the original decriminalization statute, some state jurisdictions are circumnavigating state legislatures altogether. District attorneys in Manhattan and Brooklyn are bypassing the enacted New York state statute to expunge marijuana convictions through the district attorneys' office.²¹⁵ Brooklyn District Attorney Eric

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ CAL. HEALTH & SAFETY CODE § 11361.9 (West 2018); COLO. REV. STAT. ANN. § 24-72-710 (West 2018).

²⁰⁸ 11 DEL. C. § 4373 (West 2018).

²⁰⁹ *Id.*

²¹⁰ 85 DEL. C. § 8501 (West 2018).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ 11 DEL. C. § 4373 (West 2018).

²¹⁵ Ranson & Pager, *supra* note 143.

Gonzalez established “Begin Again,” which allows New York City residents to clear their records of misdemeanor marijuana convictions and dismiss outstanding warrants. Since 2015, the process to expunge the records has worked in the following way: (1) the district attorney’s office finds a venue and promotes the event; (2) individuals with misdemeanor convictions line up to meet with a defense counsel from Legal Aid Society and receive assistance to file a motion; and (3) on the same day, they enter a courtroom where a judge clears their warrants and disposes of the case.²¹⁶ In September 2018, the district attorney hosted the event in East Flatbush, Brooklyn, a diverse neighborhood with a high number of arrests for drug and gang violence.²¹⁷ This is a community where residents will directly benefit from clean records and a fresh start.²¹⁸

Begin Again is distinguishable from the proposed model language because while it is a grassroots approach to expungement, it only focuses on misdemeanor convictions.²¹⁹ The proposed model language will expunge or reclassify all previous marijuana charges, including felonies. This includes resentencing adults who may still be in jail, on probation, or enrolled in community supervision. Begin Again’s approach is also different from the proposed model language because individuals have to attend the event, whereas the proposed model language proposes a state-mandated expungement policy initiated by the Special Committee. Similar to the Begin Again program, the proposed model language tasks attorneys to manage and operate the expungement process.²²⁰

Begin Again is a cutting edge expungement experiment, but the process should be statutorily based. Without legislation codifying the program, the current Begin Again process can be abandoned by future public officials. There are many adults throughout New York state that will benefit from this method of expungement. New York’s current enacted expungement statute requires individuals to petition the court and wait a substantial amount of time for the file to cycle through the court system.²²¹ Brooklyn District Attorney Gonzalez established a process where the Legal Aid Society not only guides an individual through the

²¹⁶ *Begin Again*, *supra* note 177.

²¹⁷ *Id.*; Neighborhoods like East Flatbush will benefit from a local government’s community engagement. Stephen Groves, *Despite Historically Low Crime Across New York, East Flatbush Still Plagued by Violence*, BKLYNER, (Feb. 22, 2018), <https://bklyner.com/east-flatbush-violence/>.

²¹⁸ See Beth Fertig & Jenny Ye, *Brooklyn DA’s Pledge to Reduce Marijuana Prosecutions Makes Little Difference*, WNYC (Sept. 7, 2017), <https://www.wnyc.org/story/despite-das-change-marijuana-policy-brooklyn-defendants-still-come-court/>.

²¹⁹ Ranson & Pager, *supra* note 143.

²²⁰ *Begin Again*, *supra* note 177.

²²¹ N.Y. PENAL LAW § 221.05 (McKinney 2018).

petition forms, but brings the courtroom and a judge to the people.²²² This is an accessible and affordable way for adults to rebuild their lives.²²³ It is also a method for law enforcement to develop a more positive relationship with the surrounding community.²²⁴ It is unprecedented for a district attorney to create a program to vacate and dismiss arrests and convictions within the same day, with no fear of arrest for individuals charged with low-level marijuana possession offenses.²²⁵

3. The Role of Special Committee Attorneys

Once the Committee has reviewed the case file, Special Committee Attorneys will act as liaisons between the prosecutor's office and the offender. Special Committee Attorneys will notify both the prosecutor and the offender to inform the parties of the status of the case.

- (a) The purpose of the Special Committee is to defray tension between an offender and the prosecutor. The mission of the Special Committee Attorneys is to act in the best interest of the offender and the community-at-large.
- (b) The Special Committee Attorneys have until [designated date] to dismiss and erase, resentence, or redesignate case files.
- (c) To avoid miscommunication on case files, the Special Committee Attorneys shall update the prosecutor's office on a monthly basis or as needed to efficiently and thoroughly reclassify case files.
- (d) The Special Committee shall put notice of its initiative on the Internet so offenders are aware

²²² *Begin Again*, *supra* note 177.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Andrew Denney, *Brooklyn DA Announces Program to Expunge Thousands of Low-Level Pot Convictions*, N.Y. L. J. (Sept. 7, 2018, 5:48 PM), <https://www.law.com/newyorklawjournal/2018/09/07/brooklyn-da-announces-program-to-expunge-thousands-of-low-level-pot-convictions/?slreturn=20180922003120>.

of the process. The website should contain contact information if offenders have questions about the status of their case file.

- (e) The Special Committee Attorneys will notify the court on case file reclassifications. Both Special Committee Attorneys and the prosecutors shall inform the court if the prosecution challenges a case file.

The proposed model legislation is similar to the California model because the burden is on the state to initiate and expedite the review of current and pending cases. The proposed model language deviates from the California statute because the case files are sent to the Special Committee and Special Committee Attorneys rather than directly to the prosecutor's office.²²⁶ Special Committee Attorneys, an arm of the Special Committee, are an independent body that provides impartial adjudication. Traditionally, prosecutors have been responsible for convictions and punishment.²²⁷ Prosecutors have a dual role because they are also tasked with seeking justice for their community.²²⁸ Even so, the American adversarial process creates tension between a victory (conviction and punishment) and fairness.²²⁹ The Special Committee Attorneys will be impartial, but with an emphasis on fairness to the individual, rather than to the state.

The Special Committee Attorneys have a limited amount of time in which to coordinate with the prosecutor's office to dismiss and erase, resentence, or redesignate case files. The Committee's temporary nature underscores the need for efficiency and immediacy in the review of case files. The automatic expungement of singular, non-violent marijuana-related offenses will help reduce the case load for Special Committee Attorneys and for the prosecutors.

The Special Committee Attorneys must work with a prosecutor in the district attorney's office to ensure the reclassification of criminal records are applied to criminal records. The offices must communicate frequently so no case files fall through the cracks. This system should evenly distribute the workload between the Special Committee Attorneys and the prosecutors. Special Committee Attorneys will notify the courts regarding the reclassified case files. Both the Special Committee Attorneys and the prosecutors should notify the court if there is a challenge to a case file reclassification.

²²⁶ CAL. HEALTH & SAFETY CODE § 11361.9 (West 2018).

²²⁷ See Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1421 (2018).

²²⁸ *Id.*

²²⁹ *Id.* at 1421–22.

California does put the burden of criminal record review on the district attorney's office.²³⁰ California's expungement statute requires California prosecutors to review all cases and determine whether to challenge them by July 1, 2020.²³¹ If the prosecutors decide to challenge a case, they must inform the court and the public defender's office.²³² It is unclear from California's statutory intent whether new attorneys will be hired for this initiative or if the case file review will be added to the prosecutors' current workload. There is potential for prosecutorial abuse if prosecutors have more files than they can manage because of the state-mandated expungement process. There could also be a possibility of abuse because of prosecutors' potential conflict of interest with the individual. Or there could be a possibility of negligent classification because prosecutors have too many files to review effectively. The Special Committee Attorneys will work closely with the prosecutors, and their presence as neutral, third-parties should deter any prosecutorial abuse.

California's Department of Justice, like the Special Committee Attorneys, are required to post information on the Internet about the recall of case files.²³³ The posting notifies individuals that their criminal records may be eligible for review, and alerts individuals with current or past sentences to file a petition to be resentenced or redesignated. In Delaware, because the individual petitions the state for expungement, the State Bureau of Identification notifies the relevant criminal justice agencies.²³⁴ The individual seeking expungement does not have to post or notify anyone.²³⁵ Conversely, in Colorado, the state court administrator posts the individual's filed petition on its website.²³⁶ The petition must be posted for at least thirty days before the records can be sealed.²³⁷ New York City's *ad hoc* approach does not require any kind of notice at all.²³⁸

B. Arguments Against Marijuana Expungement Legislation

As states with legalized and decriminalized marijuana laws enact marijuana-specific expungement statutes, state legislators should anticipate opposition. Critics of marijuana expungement legislation include federal officials,

²³⁰ *Cannabis Convictions*, *supra* note 49.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ 11 DEL. C. § 4373 (West 2018).

²³⁵ *Id.*

²³⁶ COLO. REV. STAT. ANN. § 24-72-710 (West 2018).

²³⁷ *Id.*

²³⁸ *Begin Again*, *supra* note 177.

state and local police, and state legislators.²³⁹ These individuals are involved with the laws prohibiting marijuana.²⁴⁰

The most popular argument against marijuana-specific expungement is that individuals imprisoned for marijuana charges are in jail or prison for more severe charges, not just for “simple marijuana possession.”²⁴¹ It is more common for these individuals to plead to the lesser marijuana offenses than harsher sentences.²⁴² Police officers also argue that marijuana offenders violated the law and committed illegal acts when marijuana was prohibited.²⁴³ In states that have decriminalized marijuana, critics argue that marijuana is still not legal in these states, regardless of the elimination of harsher criminal penalties associated with marijuana possession and use.²⁴⁴ A mandatory expungement statute could promote marijuana possession and use, especially among the most vulnerable citizens—children.²⁴⁵ Marijuana offenders should be required to follow the expungement policies in place for general criminal charges.²⁴⁶ Traditional expungement statutes require individuals to wait a specific number of years before they can be eligible for expungement.²⁴⁷ Nevada, for instance, has a three-year waiting period before offenders can petition for expungement.²⁴⁸

²³⁹ See *What Americans Need to Know About Marijuana: Important Facts About Our Nation’s Most Misunderstood Illegal Drug*, OFF. OF NAT’L DRUG CONTROL POL’Y (2010), https://www.ncjrs.gov/ondcppubs/publications/pdf/mj_rev.pdf; Colton Lochhead, *Nevadans with Misdemeanor Pot Convictions Want Records Expunged*, LAS VEGAS REV. J. (Mar. 17, 2018 1:00 PM), <https://www.reviewjournal.com/news/pot-news/nevadans-with-misdemeanor-pot-convictions-want-records-expunged/>; *Should the State Expunge Past Marijuana Convictions from People’s Records?* BOSTON GLOBE (Feb. 17, 2017), <https://www.bostonglobe.com/metro/regionals/west/2017/02/17/should-state-expunge-past-marijuana-convictions-from-people-criminal-records/CnklbLAD6kN7k8vZXtatrO/story.html>.

²⁴⁰ BOSTON GLOBE, *supra* note 239.

²⁴¹ OFF. OF NAT’L DRUG CONTROL POL’Y, *supra* note 239.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ HUSAK & MARNEFFE, *supra* note 97, at 4–14.

²⁴⁵ *Id.* at 178–80.

²⁴⁶ Carly Sitrin, *Expunging Marijuana Records the Way to Go – Or a Big Headache for NJ Courts?*, NJ SPOTLIGHT, (Mar. 28, 2018), <https://www.njspotlight.com/stories/18/03/28/expunging-marijuana-records-the-way-to-go-or-a-big-headache-for-nj-court-system/>.

²⁴⁷ See NEV. REV. STAT. ANN. § 453.3365 (West 2018); Sitrin, *supra* note 246.

²⁴⁸ *Id.* § 453.3365.

Expungements can also be costly based on filing fees, petition fees, and attorneys' fees.²⁴⁹ Court costs range from \$200 to \$400 and attorneys' fees can cost between \$750 to \$2500.²⁵⁰ Critics also argue that the current expungement processes should not be changed to accommodate individuals who committed illegal acts.²⁵¹ Taxpayers should not shoulder the costs associated with the expungement process, especially a system that puts the burden of proof on the state.²⁵² Critics against state-mandated expungement could argue that states with decriminalized marijuana policies do not have the same tax revenue as states with legalized marijuana. States with legalized marijuana are at an advantage due to the taxes from the legal marijuana industry.²⁵³ In this case, taxpayers in states with decriminalization will be burdened even more with expungement costs, whereas the states with legalized marijuana policies can rely upon marijuana taxes.²⁵⁴ It is not fair for taxpayers to pay more because other people chose to break the law.²⁵⁵ Not only will it hurt taxpayers' pocketbooks, but it will overcrowd an already bloated court system.²⁵⁶ It may also be difficult for the state to find and fairly compensate competent attorneys that are trained properly to consistently reclassify case files.

Reclassification means that statutes are revised so acts that were once illegal are either now legal or changed to civil penalties.²⁵⁷ Misdemeanors or felonies that are now considered legal acts under the new laws will be more standard for the Special Committees to reclassify. Yet, marijuana-related crimes that are not considered legal may be more difficult to reclassify consistently when individual's petition for resentencing or redesignation. Since the reclassification is at the Special Committee's discretion it is unclear how the Special Committee will analyze each case. For instance, in the hypothetical posed in the introduction, Adam was charged

²⁴⁹ Sitrin, *supra* note 246.

²⁵⁰ *How to Get Your Criminal Record Expunged in Texas – Felony and Misdemeanor*, LAW OFF. OF SETH KRETZER (Sept. 11, 2018, 7:00 AM), <https://kretzerfirm.com/how-to-get-your-criminal-record-expunged-in-texas/>.

²⁵¹ John Gregory, *The Pros and Cons of Felony Expungement*, KET (Oct. 26, 2016, 9:00 AM), <https://www.ket.org/public-affairs/felony-records-expungement-legislation/>.

²⁵² *Id.*

²⁵³ *See generally* DePietro, *supra* note 82.

²⁵⁴ *Id.*

²⁵⁵ *See* Gregory, *supra* note 251.

²⁵⁶ Sitrin, *supra* note 246.

²⁵⁷ *See generally*, Debra Cassens Weiss, *Would Decriminalizing Minor Offenses Help Indigent Defense Crisis? ABA Committee Weighs In*, ABA J. (Jan. 8, 2013, 2:00 PM), http://www.abajournal.com/news/article/decriminalizing_minor_offenses_could_help_indigent_defense_crisis_aba_commi/.

with possession, cultivation, and intent to distribute. The intent to distribute charge is still considered illegal under the new laws in both legalized and decriminalized states. If Adam were to petition the court, the Special Committee may be less willing to clear his record or redesignate his sentence, because his convictions are not considered legal under the new law. Adam's fate would be in the hands of a select number of attorneys, who may review and deny his file before it even reaches the Special Committee Attorneys, who are meant to advocate for the individual. Limited state resources may make it difficult to help everyone within the criminal justice system.²⁵⁸

C. Practical Applications of Expungement Legislation Under Legalization

Criticisms of expungement notwithstanding, the Special Committee procedures and policies can make application of the expungement statute both practical and efficient. Law enforcement officials argue those in prison or jail for marijuana-related offenses are likely guilty of more serious offenses than just "simple marijuana possession."²⁵⁹ While many are guilty of simple marijuana possession charges, checks and balances will exist through the duration of the case-file review process for those who may have faced more serious charges and whom prosecutors permitted to plead down to a "simple marijuana possession." As section 2(c) of the proposed model statute states, the Special Committee has the discretion to resentence and redesignate case files and deny individuals who are a threat to public safety.²⁶⁰ There is an automatic denial for specific violent crimes, specifically against children and vulnerable adults, such as the elderly or those with intellectual disabilities.²⁶¹

To ensure consistent reclassification and to avoid releasing individuals who have been adequately punished by the law, the Special Committee should create guides that the Special Committee and Special Committee Attorneys will follow while reviewing files. The guides should define standard terms so reclassification is consistent. While providing some general guidance, the guides will still allow the Special Committee and Special Committee Attorneys to evaluate each file on a case-by-case basis. The Special Committee can also create a rubric that will help compare the type and number of offenses on a record to the factual circumstances

²⁵⁸ *Cannabis Convictions*, *supra* note 49. In California, there are almost 218,000 individuals in the system for marijuana-related offenses. *Id.*

²⁵⁹ OFF. OF NAT'L DRUG CONTROL POL'Y, *supra* note 239.

²⁶⁰ *See supra* Part III.A. Proposed Language for a Model Expungement Statute and a Step-by-Step Comparative Analysis and accompanying text (explaining the degree of discretion the Special Committee has during the reclassification process).

²⁶¹ *See supra* Part III.A. Proposed Language for a Model Expungement Statute and a Step-by-Step Comparative Analysis and accompanying text (detailing the circumstances when an individual's case file will be automatically denied).

of the arrests and convictions. For example, an individual who has several marijuana misdemeanors may be convicted of a felony because he has multiple marijuana offenses on his record.²⁶² The factual circumstances of a case of this kind may correlate to the prevalence of arrests in poor minority neighborhoods.²⁶³ Since the Special Committee Attorneys are serving the interests of the individual, it would be prudent for the attorneys to review all facts and circumstances. To avoid conflicts of interest among the Special Committee Attorneys, the Special Committee should apply the states' Rules of Professional Conduct to govern special conflicts between attorneys, judges, and the offenders.²⁶⁴

States will need to budget, organize, and implement Special Committees and Special Committee Attorneys. While the state will shoulder the burden of implementing a Special Committee to review and reclassify case files, costs can be covered through sales and excise taxes generated from marijuana sales. For instance, as of May 2018, California made almost \$2.75 billion from recreational marijuana sales, and Colorado collected about \$1.56 billion.²⁶⁵ States can use tax money to pay for the expungement process, and to hire and train Special Committee Attorneys. Special Committee Attorneys should be paid a competitive and fair salary since this position will be temporary. Expungement will reduce the cost of probation and imprisonment, as well as create a productive citizenry who will generate taxes. The state can build the expungement process into the budget, and the Special Committee Attorneys can be devoted to helping individuals convicted of marijuana-related offenses rebuild their lives.²⁶⁶

Expungement legislation gives individuals with previous convictions a fresh start and a clean slate. Without the weight of a criminal record, these individuals will have a greater chance to gain employment, enroll in educational or trade programs, and obtain professional licenses.²⁶⁷ Court and probation fees will no longer weigh individuals down.²⁶⁸ The proposed model language will clear records so individuals will be able to work in the marijuana retail industry. Currently, individuals with any kind of criminal record, including marijuana-related offenses, are often denied such employment.²⁶⁹

The legal marijuana retail industry should be accessible to individuals in communities that have been affected by the War on Drugs and marijuana

²⁶² Elizabeth Danquah-Brobby, *Prison for You. Profit for Me. Systemic Racism Effectively Bars Blacks from Participation in Newly-Legal Marijuana Industry*, 46 Univ. Balt. L. Rev. 523, 527 (2017).

²⁶³ *Id.*

²⁶⁴ MODEL R. OF PROF. CONDUCT § 1.7, 1.11.

²⁶⁵ DePietro, *supra* note 82.

²⁶⁶ Berman, *supra* note 1, at 305.

²⁶⁷ *See id.*

²⁶⁸ *Id.*

²⁶⁹ *See* Schluskel, *supra* note 3.

prohibition. Low-income, minority communities are more often the target of police stops because drug use is more visible in urban areas than in wealthier white communities, where drug use and deals take place behind locked doors. Because there is a higher percentage of black people arrested and convicted, it is more difficult for these individuals to break into the legal marijuana industry.²⁷⁰ People of color might be reluctant to enter the industry because they or their family or friends have been adversely affected by the criminal justice system due to a marijuana offense.²⁷¹ Today, there are few entrepreneurs of color in leadership roles in marijuana businesses.²⁷² In Denver, Colorado, for example, white people make up 84% of dispensary ownership.²⁷³ Record expungement is the first step in a broader conversation to make the legal marijuana industry more accessible to communities that have been the target of the War on Drugs.²⁷⁴

D. Practical Applications of Expungement Legislation Under Decriminalization

States with decriminalized marijuana policies will confront similar counter arguments as states that have legalized marijuana. A Special Committee guide and rubric will be necessary to ensure consistent case-file reclassification. Special Committee Attorneys in states with decriminalized marijuana policies will be held to the same level of professional responsibility.

States with decriminalized policies do not have the same tax revenue as states with legalized marijuana businesses to budget for a state-mandated expungement process. If a state implements automatic review of case files, it is unfair to ask individuals to pay. The state should undertake the cost of this project because it will give individuals a second chance. States can implement a volunteer program with local governments where individuals who are part of the expungement program can assist in the beautification of their community. The hourly commitment would be reasonable and there could be an array of projects that fit the skills and abilities of each individual. This volunteer-based approach will allow states to allocate the necessary funds to the state-mandated expungement process. It will also strengthen communities and rejuvenate depressed areas, as well as help individuals rebuild their lives.

²⁷⁰ Angela Bacca, *The Unbearable Whiteness of the Marijuana Industry*, ALTERNET (Mar. 31, 2015, 8:37 PM), <https://www.alternet.org/drugs/incredible-whiteness-colorado-cannabis-business>.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* Minorities are roughly 47% of the population in Denver. *Denver—The City*, HOME TO DENVER, http://www.hometodenver.com/stats_denver.htm (last visited Dec. 3, 2018, 4:35 PM).

²⁷⁴ Bacca, *supra* note 270.

States that apply the proposed model language can follow current programs, like Begin Again. The Brooklyn District Attorney's Begin Again program is closely connected to rebuilding New York City neighborhoods, while developing stronger relationships between the local community and law enforcement. Begin Again helps heal depressed neighborhoods that have a history of drug-related arrests, violence, and inherent distrust towards law enforcement.²⁷⁵ Expungement will allow individuals an opportunity to clear their past offenses, find new employment opportunities, access financial aid, live in public housing, travel abroad, purchase a firearm, vote, and serve on juries. These rights are taken away from an individual when they are arrested and convicted of marijuana offenses, and the denial of these opportunities break neighborhoods apart. With a blank slate, individuals can contribute to the growth and renewal of their community.

V. CONCLUSION

As states continue to legalize or decriminalize marijuana, it is unfair for one segment of the population to possess and use marijuana without fear of prosecution under the new laws, while another group continues to live with the collateral consequences of previous marijuana convictions. Individuals who have misdemeanors or felonies because of marijuana charges are denied access to basic amenities. States legislatures should ask why their citizens continue to be punished under laws that have been repealed. Marijuana prohibition laws have been repealed through voter initiatives. Americans support marijuana legalization and decriminalization because they believe law enforcement should focus on more serious crimes to person and property. Americans voting on these laws believe they should also have the individual freedom to use and possess marijuana if they are twenty-one years of age or older. These same freedoms should be extended to those who are unable to live full lives because of actions that were considered illegal under the old laws. This is especially relevant to minority communities that were disproportionately affected by marijuana prohibition. These individuals and their communities should not continue to live with the consequences of actions that are now considered legal.

States that legalize or decriminalize marijuana should automatically include expungement provisions that dismiss and erase, resentence, or redesignate the records of individuals with previous marijuana-related convictions. A clear record will allow an individual to vote, serve on a jury, travel abroad, finance education, find gainful employment, and obtain government benefits. In states where marijuana is legal, a clean record will allow individuals to access the legal

²⁷⁵ Lori Chung, *Brooklyn Forum Brainstorms Ways to Resolve Emergencies Without Possible Police Confrontations*, NY 1 (May 29, 2018, 11:33 PM), <http://www.nyl.com/nyc/brooklyn/news/2018/05/30/forum-brooklyn-brainstorms-possible-alternatives-to-calling-911-resolve-conflicts>.

marijuana industry. Access to the legal marijuana industry will help generate revenue that can be used to rebuild neighborhoods systematically targeted and affected by marijuana prohibition. Marijuana-specific expungement statutes will allow individuals to start fresh and it will create a more just society as marijuana policies in this country continue to change.

APPENDIX A: MARIJUANA LEGALIZATION AND EXPUNGEMENT STATUTES CHART

State	Legalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Alaska	<p align="center">AS § 17.38.10 Purpose and findings “(a) Allow law enforcement to focus on violent and property crimes and to enhance individual freedom for people 21 years of age and older.”</p> <p align="center">AS § 17.38.020 Personal use of marijuana</p> <ol style="list-style-type: none"> 1. Possess, use, transport one ounce or less 2. Possess, grow, process, transport no more than six plants with three or fewer being mature 3. Transfer one ounce or less and up to six immature plants to a person who is 21 years of age and older 4. Consumption 		<p align="center">2017 AK S.B. No.184 Access to Marijuana Conviction Records. The Act restricts the release of certain records of convictions as a way to reduce barriers to employment for people with low-level possession crimes that would be legal under today’s laws. This bill is currently in the Finance Committee.</p> <p align="center">2017 AK H.B. No. 316 Restrict Access Marijuana Crime Records. A person convicted before February 24, 2015 can submit a written request asking the agency to seal past conviction or current offender information for a VIA schedule controlled substance. This bill has been held and heard in the House as of April 15, 2018. H.B. 316 has been referred to the Chief Clerk for engrossment.</p>	
California	<p align="center">Cal. Health & Safety Code §11362.1 Possession of cannabis by persons 21 years of age or older</p> <ol style="list-style-type: none"> 1. Possess, process, transport, purchase, obtain or give away to persons 21 years of age or older not more than 28.5 grams 2. Possess, process, transport, purchase, obtain, or give away not more than eight grams in concentrated cannabis form 3. Possess, plant, cultivate, harvest, dry, or process not more than six living plants 4. Smoke or ingest cannabis products 5. Possess, transport, purchase, obtain, use, manufacture or give away cannabis accessories. 	<p align="center">Adult Use of Marijuana Act AB 1783 An act added to §11361.9 to the Health and Safety Code relating to cannabis. One of the most progressive pieces of legislation that will require the California Department of Justice and prosecutors to review marijuana records for potential expungement. There are almost 218,000 conviction records. Many offenses are more minor, but there may be some individuals in prison. Effective on August 22, 2018.</p>		

State	Legalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Colorado	<p>CO Const. Art. 18, §16 Personal use and regulation of marijuana</p> <p>1. Purpose and findings</p> <p>a. "In the interest of efficient law enforcement resources, enhancing revenue for public purposes, and individual freedom" marijuana is legal for people twenty-one years and older</p> <p>3. Personal use of marijuana</p> <p>a. Possess, use, display, purchase, or transport one ounce or less.</p> <p>b. Possess, grow, process, or transport six plants or less, with three or fewer being mature, flowering plants, and possession of the marijuana produced at the location. Growing must take place in a secluded and private place, and the marijuana cannot be sold.</p> <p>c. Transfer of one ounce or less to a person twenty-one years or older. Transfer cannot be used to pay for work or services.</p> <p>d. Consumption of marijuana, but not in a manner that will put others at risk.</p> <p>e. Assisting individuals twenty-one years and older.</p>	<p>C.R.S.A. § 24-72-710 Sealing of criminal conviction records information for misdemeanor offenses involving possession or use of marijuana</p> <p>This bill allows people who were convicted of misdemeanors for marijuana-related behaviors that are no longer illegal to petition for the sealing of criminal records relating to convictions.</p>		
Maine	<p>28-B M.R.S.A. § 1501 Personal adult use of marijuana and marijuana products</p> <p>1. An individual 21-years and older:</p> <p>A. Use, possess, or transport marijuana paraphernalia;</p> <p>B. Use, possess, or transport at any time up to 2.5 ounces of marijuana or 2.5 ounces of a combination of marijuana and marijuana concentrate (no more than 5 grams of marijuana concentrate);</p>			<p>Maine does not expunge or erase criminal records. The state does grant pardons, which officially forgives an individual for a crime or crimes. The record is not wiped clean, rather, the pardoned conviction is considered "confidential criminal history record information," and available under limited conditions pursuant to ME. REV. STAT. ANN. tit. 16 § 701-710.</p>

State	Legalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Massachusetts	<p>Mass. Gen. Laws Ann. ch. 94G § 7</p> <p>This statute declares the use of marijuana legal for individuals twenty-one years of age and older.</p> <ol style="list-style-type: none"> 1. Legal to possess, use, purchase one ounce or less of marijuana. 2. "A person can have up to ten ounces of marijuana, any marijuana produced by marijuana plants cultivated on the premises and possessing, cultivating or process not more than six plants for personal use so long as not more than twelve plants cultivated on the premises at once." 		<p>H.B. 2785</p> <p>An Act relative to the expungement of records of marijuana arrests</p> <p>This act would expunge records of marijuana arrest, detention, conviction and incarceration.</p> <p>This Act is currently in the House as of June 11, 2018 along with an accompanied study order H. 4585</p>	
Michigan	<p>Michigan Regulation and Taxation of Marihuana Act</p> <ol style="list-style-type: none"> 1. Allow individual twenty-one and older to possess, process, consume, or give another adult up to 2.5 ounces of marijuana, and possess up to 10 ounces and grow and process up to 12 plants in the residence. 2. Prohibit people from driving while consuming or impaired by marijuana. 3. Establish the Department of Licensing and Regulatory Affairs regarding marijuana licensing, regulation, and enforcement. 		<p>Some counties are considering expungement to clear the records of individuals with past convictions. Some prosecutors are also dismissing any pending misdemeanor cases of low-level marijuana possession.²⁷⁶</p>	

²⁷⁶ Ed White, *Marijuana Michigan News Guide Story*, EVERYTHING LUBBOCK (Dec. 6, 2018, 7:38 AM), <https://www.everythinglubbock.com/news/national/michigan-to-be-first-midwest-state-to-allow-recreational-pot/1633965503>.

State	Legalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Nevada	<p>Nev. Rev. Stat. Ann. § 453D.020</p> <p>“In the interest of public health, and public safety, and in order to better focus state and local law enforcement resources on crimes involving violence and personal property, The People of the State of Nevada find and declare that the use of marijuana should be legal for persons 21 years of age or older, and its cultivation and sale should be regulated similar to other legal businesses.”</p>			<p>Nev. Rev. Stat. Ann. § 179.245 Sealing records after conviction: Persons eligible; petition; notice; hearing; order General expungement statute</p> <p>Nev. Rev. Stat. Ann. § 453.3365 Sealing of record of person convicted of possession of controlled substance not for purpose of sale; conditions “Three years after a person is convicted and sentenced, the court may order sealed all documents, papers and exhibits in that person’s record....”</p>
Oregon	<p>Or. Rev. Stat. Ann. § 475B.005 Purposes of ORS 475B.010 to 475B.395</p> <p>“(1) The People of the State of Oregon declare that the purposes [...] are:</p> <ul style="list-style-type: none"> a. To eliminate the problems caused by the prohibition and uncontrolled manufacture, delivery, and possession of marijuana [...]; b. To protect the safety, welfare, health and peace of people of this state by prioritizing this state’s limited law enforcement resources in the most effective, consistent and rational way; c. To permit persons licensed, controlled and regulated by this state to legally manufacture and sell marijuana to persons 21 years of age and older....” 	<p>Or. Rev. Stat. Ann. § 137.226 Eligibility for order setting aside conviction; offenses in which possession, delivery, or manufacture of marijuana or marijuana item is an element</p> <p>If the offense occurred involving possession, delivery, or manufacture of marijuana before April 21, 2017, a person can file a motion to set the conviction aside pursuant to 137.225. The court will consider the offensive conduct as if it occurred on or after April 21, 2017. If the conduct is no longer a crime, the court shall consider the offense to be classified as a C Misdemeanor.</p> <p>OR. REV. STAT. ANN. § 137.225 Order setting aside conviction or record of arrest</p> <p>“(1)(a) [A]fter the lapse of three years from the date of the judgement, any defendant who has fully complied with and performed the sentence of the court and whose conviction is described in (5) by motion may apply to the court where the conviction was entered for entry of an order setting aside the conviction.”</p>		
Vermont	<p>18 V.S.A §4230</p> <p>Eliminates all penalties for possession of one ounce or less of marijuana and two mature and four immature marijuana plants for person twenty-one years of age or older.</p>		<p>H. 865 aka 13 V.S.A § 7602 Expungement and Sealing of Record, Postconviction; Procedure</p> <p>If passed, this statute will allow individuals to file a petition with the court requesting expungement for any past marijuana violation that is no longer defined as illegal under state law. Legislation is pending because the 2018 Vermont Legislature did not vote on it before the end of the session.</p>	

State	Legalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Washington	<p>Wash. Rev. Code Ann. § 69.50.4013 Possession of controlled substance – Penalty – Possession of usable marijuana, marijuana concentrates, or marijuana-infused products – Delivery “(3)(a) Possession of individual 21 years of age or older does not violate the law (4)(a) Delivery by a person 21 years of age or older to another person 21 years of age or older for noncommercial purposes is not a violation of this law or other laws:</p> <ul style="list-style-type: none"> i. One-half ounce of usable marijuana ii. Eight ounces of marijuana-infused product in solid form; iii. Thirty-six ounces of marijuana-infused product in liquid form; or iv. Three and one-half grams of marijuana concentrates.” 	<p>H. B. 1260 Wash. Rev. Code Ann. § 9.96.060 An Act Relating to misdemeanor marijuana offense convictions People convicted of a misdemeanor marijuana offenses that are twenty-one years of age or older at the time of the offense, may apply for a record expungement.</p>		

APPENDIX B: MARIJUANA DECRIMINALIZATION AND EXPUNGEMENT STATUTES CHART

State	Decriminalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Connecticut	<p align="center">§ 21a-279a</p> <p>Penalty for illegal possession of small amount of cannabis-type substance</p> <p>a. Any person who possess less than .5 ounce of cannabis-type substance will (1) be fined \$150 for the first offense, and (2) for subsequent offense be fined not less than \$200 and not more than \$500;</p> <p>b. Law enforcement shall seize the substance and destroy it in accordance with the law;</p> <p>c. Any person who, at separate times, has twice entered a plea of nolo contendere or found guilty after trial, or finding of guilty, be referred to a drug education program at the person's own expense.</p>			
Delaware	<p align="center">11 Del. C. 16 §4764</p> <p>Possession of marijuana; class B misdemeanor, unclassified misdemeanor, or civil violation</p> <p>(c) any person 21 years of age or older who knowingly or intentionally possess a person use quantity of marijuana shall be assessed a civil penalty of \$100 in addition to routine assessments necessary for the administration of civil violations and the marijuana must be forfeited.</p>	<p align="center">11 Del. C. §4764</p> <p>Possession of marijuana; class B misdemeanor, unclassified misdemeanor, or civil violation</p> <p>(j) Any person who prior to Dec. 18, 2015 was convicted of a single offense arising from an original charge under this section or law prohibiting possession, use or consumption shall be eligible for mandatory expungement of the records and all indicia of arrest pursuant to §4373 Tit. 11 (Mandatory Expungement).</p>		

State	Decriminalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Illinois	<p>Act 550 Cannabis Control Act 550/4 Possession of cannabis; violations; punishment</p> <p>It is still against the law to knowingly possess cannabis. Any person who violates the law:</p> <p>a. with no more than ten grams of any cannabis substance is guilty of a civil law and may have to pay a fine of \$100 to \$200. The fine must be paid to the clerk and the clerk must distribute the proceeds of the fine:</p> <p>1. \$10 fine to the clerk, \$10 of the fine to the law enforcement agency that issued the citation. These proceeds will be used to defer the cost of automatic expungements under §5.2 of the Criminal Identification Act.</p>	<p>20 ILCS 2630/5.2</p> <p>Expungement, sealing, and immediate sealing</p> <p>The law enforcement agency that issued the civil citation shall automatically expunge on January 1 or July 1 of each year the records of an individual who committed a civil law violation of the Cannabis Control Act.</p>		
Maryland	<p>MD. CODE ANN., CRIM. LAW § 5-601</p> <p>Possessing or administering controlled dangerous substance</p> <p>(c)(2)(i) except within the below provisions, a person who violates the use or possession of marijuana is guilty of a misdemeanor and subject to imprisonment for no longer than six months and/or a fine of \$1,000.</p> <p>(ii) 1. A first offense involving less than ten grams of marijuana is a civil offense and a fine should not exceed \$100.</p> <p>2. A second offense involving the use of less than ten grams is a civil offense and a fine should not exceed a fine of \$250.</p> <p>3. A third offense of less than ten grams is civil offense and a fine should not exceed \$500.</p> <p>4. B. In addition to a fine, a person of at least twenty-one years old who commits a violation punishable under (3) shall attend a drug education program approved by the Maryland Dept. of Health and refer the person to an assessment for a substance abuse disorder.</p>			<p>Expungement</p> <p>If the crime falls under § 5-601, the petitioner may file four years after the conviction or satisfactory completion of the sentence, including probation. Pg. 2-3.</p>

State	Decriminalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
Minnesota	<p>Minn. Stat. § 152.027 Other Controlled substance offenses Subdiv. 4. Possession or sale of small amounts of marijuana (a) A person who sells or possesses a small amount (42.5 grams) of marijuana is guilty of a petty misdemeanor and shall be required to participate in a drug education program unless the court finds that is inappropriate (b) A person who is subsequently convicted of an unlawful sale within two years is guilty of a misdemeanor and required to participate in a chemical dependency evaluation and treatment depending on the evaluation.</p>	<p>MINN. STAT. § 152.18 Discharge and dismissal Subdiv. 3 Expungement of certain marijuana offenses for offenses that took place in the 1970s.</p>		<p>MINN. STAT. § 609A.02 Subdiv. 1 Certain controlled substances offenses. “Person who violated 152.027, may petition under § 609A.03 or the sealing of all records relating to arrest, indictment, trial, and dismissal and discharge.”</p>
Missouri	<p>MO. REV. STAT. §579.015 Possession or control of a controlled substance – Penalty 3. The offense of possession of more than ten grams but thirty-five grams or less of marijuana or any synthetic cannabinoid is a class A felony. 4. The offense of possession of not more than ten grams of marijuana or any synthetic cannabinoid is a class D misdemeanor.</p>			<p>MO. REV. STAT § 610.140 Expungement of certain criminal records, petition, contents, procedure – effect of expungement on employer inquiry – lifetime limits</p>
Mississippi	<p>MISS. CODE ANN. § 41-29-139 For a first time offense, if an individual has thirty grams or less of marijuana, there will be a fine of \$100 to \$250. The offender has to show proof of identification to the arresting officer and will be given a summons to appear in court.</p>			<p>MISS. CODE ANN. § 99-19-71 Any person who has been convicted of a misdemeanor or a felony under § 41-29-139(c) or (d) is eligible for an expungement. If an individual has a felony, they are only eligible for one felony expunction.</p>
Nebraska	<p>NEB. REV. STAT. ANN. § 28-416 For first time offenders, any person intentionally possessing less than one ounce of marijuana will be guilty of an infraction, receive a citation, be fined \$300, and assigned to attend a course if the judge determines that a course is in the best interest of the individual.</p>			<p>NEB. REV. STAT. ANN. § 29-2264 When an individual is convicted of an infraction, misdemeanor, or felony, after fulfilling the conditions of the sentence and after paying any fine, the individual can petition to the court to set aside the conviction.</p>

State	Decriminalization Statute	Enacted Marijuana Expungement Statutes	Proposed Marijuana Expungement Statutes	General State Statute/No Expungement Statutes
New Hampshire	N.H. REV. STAT. ANN. § 318-B:2-c Personal Possession of Marijuana Any person who possess ¾ of an ounce or less is guilty of a violation and subject to fine of \$100. The court will waive the fee if the individual completes a substance abuse assessment with a licensed drug and alcohol counselor within sixty days of the conviction.			N.H. REV. STAT. ANN. § 651:5 Annulment of Criminal Records General annulment provision for all crimes.
New York	N.Y. PENAL LAW § 221.05 Unlawful possession of marihuana A person is guilty of unlawful possession when he knowingly possesses marijuana. It is a violation of a fine of no more than \$100. If the defendant was previously convicted of an offense committed within three years of the preceding violation, it shall be punishable of no more than \$200.			N.Y. PENAL LAW § 160.58 Conditional sealing of certain controlled substances, marihuana or specified offense convictions Defendant convicted of an offense under this chapter and who has successfully completed a judicial diversion program is eligible to have an offense sealed.
North Carolina	N.C. GEN. STAT. ANN. § 90-95(d)(4) Any person who has more than one-half of an ounce of marijuana shall be punished with a Class I misdemeanor. If the quantity exceeds one and one-half ounces of marijuana the violation shall be punishable as a Class I felony.			N.C. GEN. STAT. ANN. § 90-96 Conditional discharge for first offense For an individual with a first time misdemeanor or felony controlled substances offenses, the court will place the individual on probation, which may allow the person to participate in a drug education program. Upon completion of the probation, the counter will discharge the person and dismiss the proceedings.
Ohio	OHIO REV. CODE ANN. § 2925.11(C)(3)(a) Possession of marijuana is a misdemeanor. If the drug exceeds one hundred grams but less than two hundred grams, possession of marijuana is a misdemeanor in the fourth degree.			OHIO REV. CODE ANN. § 2953.32 Sealing of record of eligible offender; application; hearing; fee; re-examination of sealed record.
Rhode Island	21 R.I. GEN. LAWS ANN. § 21-28-4.01(e)(2) i. More than one ounce of marijuana is guilty of a misdemeanor, may be imprisoned for not more than one year or fined not less than \$200 and no more than \$500. ii. Possession of one ounce or less is considered a civil offense and liable to a civil penalty of \$150 and forfeiture of the marijuana. This applies to the first and second violations within an eighteen month period.			12 R.I. GEN. LAWS ANN. § 12-1.3-2 Motion for Expungement a. any first offender may file a motion for expungement g. A person may file a motion for expungement to an offense that has been decriminalized subsequent to the date of their conviction....