

DISPENSING REPARATIONS FOR MARIJUANA CONVICTIONS

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I. INTRODUCTION

Despite federal law's continued prohibition of the use, distribution, and possession of marijuana for any reason,¹ forty states and the District of Columbia have all enacted laws allowing for the medical use of marijuana.² Of those states, nineteen and the District of Columbia have passed laws either legalizing or decriminalizing the use of recreational marijuana.³ The United States' growing expansion of the legalization of marijuana is a far cry from the demonization of marijuana in the 1930s.⁴ Due to the lengthy history of racial and political motives associated with marijuana criminalization devastating minority communities, reparations for past injustice are needed as states continue to legalize marijuana.⁵ While many forms of reparations have been proposed, the enforcement of these proposed reparations are needed to account for the injustices experienced by those with marijuana convictions in states that have legalized it. Those who have been convicted of marijuana related crimes, especially after

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¹ *State and Local Medical and Recreational Marijuana Laws Chart: Overview, Practical Law Practice Note Overview 7-523-7150*, PRACTICAL LAW LABOR & EMPLOYMENT, <https://us.practicallaw.thomsonreuters.com/7-523-7150> (Westlaw).

² *Id.*

³ *Id.*

⁴ Michael Vitiello, *Marijuana Legalization, Racial Disparity, and the Hope for Reform*, 23 LEWIS & CLARK L. REV. 789, 793 (2019).

⁵ *Id.* at 790.

serving a sentence, may be denied housing, government aid, and lose liberties they once had.⁶

The history of marijuana in the United States must be considered in addressing whether there should be reparations, and if so, what kind of reparations are needed for those with marijuana convictions in states that have legalized it. This Note will consider the federal and state laws pertaining to marijuana regulation and use. Today, the marijuana industry, once claimed to be “public enemy number one,”⁷ is a growing billion-dollar industry benefitting mostly White American citizens.⁸ This Note will examine the difference between the marijuana industry today and the treatment of those convicted of marijuana crimes in the past. It will present evidence that reparations are needed to make up for past injustice and what reparations have been proposed or enacted in states that have legalized marijuana. This Note will then propose reparations that should be afforded to the individual including automatic expungement, resentencing, and reclassification of marijuana crimes where it applies. It will propose that a percentage of the tax from the sale of marijuana be used as a means of distributive justice in restoring communities that have faced devastation due to the lasting effects of the War on Drugs and that steps to provide a better opportunity to participate in the legal cannabis market be implemented. Lastly, this Note will propose that each state that does legalize marijuana provide a set of uniform reparations that can be afforded to the individual and the community.

II. THE WAR ON DRUGS: HISTORICAL BACKGROUND

Marijuana criminalization started as early as 1915 when California outlawed marijuana, adversely affecting the Mexican community and setting precedent for future political tactics.⁹ Later, in 1930, Harry Anslinger became the first commissioner of the Federal Bureau of Narcotics and created the foundation for Nixon’s War on

⁶ Kamaria A. Guity, *Recreational Marijuana Legalization in New Jersey: The Formula for A Bill That Accounts for Racial Injustice*, 21 RUTGERS RACE & L. REV. 23, 25 (2020).

⁷ Mitchell F. Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 HASTINGS CONST. L.Q. 367, 376 (2020).

⁸ Tribble, K., *Reckoning with reparations: The Kush Economy is Our 40 Acres and a Mule*, KENNEDY SCHOOL REVIEW.114, 117 (2018).

⁹ Melissa Perlman, *Reefer Blues: Building Social Equity in the Era of Marijuana Legalization*, 24 U.C. DAVIS SOC. JUST. L. REV. 95, 100 (2020).

Drugs.¹⁰ He planned to rid the country of all drugs and started with sensationalizing anti-marijuana propaganda, labeling cannabis as the “gateway drug.”¹¹ Marijuana was linked to communities of color and Anslinger used this to his advantage in causing more racial divide throughout the country in the 1940s and 1950s.¹² The War on Drugs refers to a government led initiative to stop illegal drug use, distribution, and trade.¹³ The effects of the War on Drugs declared by President Richard Nixon in the 1970s are still present today.¹⁴

In the early 1970’s, the Nixon administration declared the “War on Drugs” and aimed to stop illegal drug use, distribution, and trade of certain drugs.¹⁵ Nixon signed the Controlled Substances Act into law in 1970 listing marijuana as a Schedule 1 drug.¹⁶ With this began a period of, “high arrest rates, mandatory minimum sentencing laws, the militarization of the police, and disproportionate impacts on people of color.”¹⁷ With political motives in mind, Nixon associated drug use, specifically the use of marijuana, with Black American communities and the counterculture youth.¹⁸

When Jimmy Carter, who ran on a campaign to decriminalize marijuana, became president in 1977, the Senate Judiciary Committee voted to decriminalize up to one ounce of marijuana.¹⁹ This changed in the 1980s when Ronald Reagan became president and reinforced the War on Drugs policies set in place by President Nixon.²⁰ His wife, Nancy Reagan launched the, “Just Say No” campaign in order to combat drug use.²¹ Through the Comprehensive Crime Control Act,

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *War on Drugs*, HISTORY CHANNEL (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs>.

¹⁴ Guity, *supra* note 6, at 28.

¹⁵ *War on Drugs*, *supra* note 13.

¹⁶ *Id.*

¹⁷ Guity, *supra* note 6, at 28.

¹⁸ Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 390 (2020).

¹⁹ *War on Drugs*, *supra* note 13.

²⁰ *Id.*

²¹ Perlman, *supra* note 9 at 102. “Just say no” was Nancy Reagan’s response when asked what to do if someone offers you drugs. The movement started by these three words had caused marijuana use to become so politically toxic that when Bill Clinton ran for President in 1992, fearful of running with a history of past marijuana use, he would claim he, “didn’t inhale.” *Id.*

the Anti-Drug Abuse Act, and the Anti-Drug Abuse Amendment Act, the Reagan administration enacted harsher penalties and mandatory sentences.²² While the “law and order” ideology, the prison crisis, and capital punishment predates Reagan, under his administration the criminal justice crisis had grown exponentially and left a legacy that endured.²³

Since the start of the 21st century, there has been less support for the War on Drugs and marijuana legalization has led to a growing tolerance for recreational use.²⁴ During the Obama administration in 2013, the United States Department of Justice set forth the “Cole Memorandum,” which was a policy that announced that commercial distribution of marijuana would generally be tolerated so long as violence was not involved and it was not being distributed to states where cannabis was illegal.²⁵ In 2016, the Trump administration rescinded this policy, but otherwise did not stand in the way of state legalization of recreational and medical marijuana.²⁶

In 2020, under the Biden administration, the Marijuana Opportunity, Reinvestment and Expungement Act (The MORE Act), was first introduced.²⁷ The bill was passed by the House of Representatives, but not in the Senate.²⁸ It was once again reintroduced on May 28, 2021, and if successful, will end cannabis prohibition by the federal government.²⁹

²² Crusto, *supra* note 7, at 377.

²³ Tony Platt, *U.S. Criminal Justice in the Reagan Era: An Assessment*, CRIME AND SOCIAL JUSTICE NO. 29, 58–69 (1987), <http://www.jstor.org/stable/29766345>. The death row population grew rapidly between 1980 and 1987. Many executions took place with prisoners exhausting their appeals challenging the death penalty and ultimately being rejected by the U.S. Supreme Court. There were 567 prisoners on death row in 1979 after use of the death penalty was authorized by the Supreme Court and by 1987 there were about 1,900 prisoners on death row. *Id.*

²⁴ *War on Drugs*, *supra* note 13.

²⁵ Crusto, *supra* note 7, at 378.

²⁶ *Id.*

²⁷ See Seth Goldberg & Deanna J. Lucci, *United States House Passes Bill To Legalize Marijuana At The Federal Level*, MONDAQ BUSINESS BRIEFING (Dec. 9, 2020), <https://plus.lexis.com/api/permalink/b5e57b6c-30c4-4f38-a75b-bf4197b9e79b/?context=1530671>.

²⁸ *The MORE Act*, MARIJUANA POLICY PROJECT, <https://www.mpp.org/policy/federal/the-more-act/>.

²⁹ *Id.*

III. FEDERAL AND STATE LAW

Through its interpretation of the Supremacy Clause of the United States Constitution, the United States Supreme Court, ruled in *United States v. Oakland Cannabis Buyers Cooperative*³⁰ and *Gonzales v. Raich*³¹, that the federal government has the right to regulate and criminalize marijuana.³² Therefore, state legalization of marijuana is preempted by federal laws prohibiting the use of marijuana.³³

A. The Controlled Substances Act

Under the Controlled Substances Act (“CSA”) enacted in 1970, marijuana was listed as a Schedule 1 drug and today, approximately fifty years later, it remains a Schedule 1 drug.³⁴ The CSA establishes and regulates “the importation, manufacture, possession, distribution, and use of certain stimulants, narcotics, anabolic steroids, depressants, hallucinogens, and other chemicals.”³⁵ Schedule 1 substances are found to have a high potential of abuse, have no current accepted medical use in the United States, and are unsafe to use under medical supervision.³⁶ Other Schedule 1 drugs listed alongside marijuana include LSD, heroin, and MDMA or ecstasy.³⁷ There have been numerous occasions where the DEA has refused to reclassify marijuana under another schedule.³⁸ With the proposal of the MORE Act and state legalization, many believe marijuana is likely to be excluded from the list of Schedule 1 substances in a few years.³⁹

The CSA has greatly impacted and played a large role in the structuring of our criminal justice system, as well as our criminal

³⁰ *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 499 (2001).

³¹ *Gonzales v. Raich*, 545 U.S. 1 (2005).

³² Crusto, *supra* note 7, at 377.

³³ *Id.*

³⁴ Melanie Reid, *Goodbye Marijuana Schedule I-Welcome to A Post-Legalization World*, 18 OHIO ST. J. CRIM. L. 169, 171 (2020).

³⁵ *Controlled Substances Act (CSA)*, PRACTICAL LAW GLOSSARY ITEM W-021-7947, <https://us.practicallaw.thomsonreuters.com/w-021-7947> (Westlaw).

³⁶ *Id.*

³⁷ Reid, *supra* note 34, at 171.

³⁸ Danielle Grant-Keane, *The Unattainable High of the Marijuana Industry*, 90 WISC. LAW. 14, 17 (2017).

³⁹ *Id.* at 170.

procedure case law.⁴⁰ Law enforcement including the DEA, Customs and Border Patrol, the FBI, and local law enforcement agencies have all been consumed with enforcing violations of the Controlled Substances Act.⁴¹ Law enforcement's investigations into illegal growing, importing, distributing, possessing, and selling of marijuana have become much more complex since the enactment of the CSA in 1970.⁴² These investigations have led to a great amount of cases in the court system, leading to many convictions and appeals.⁴³ The federal government's criminalization of marijuana has expanded criminal laws and broadened how law enforcement can conduct these investigations.⁴⁴

B. First States to Legalize the Recreational Use of Marijuana

In 2012, Colorado and Washington were the first states to legalize marijuana for adults over the age of 21.⁴⁵ Under the Colorado Constitution, Colorado allows for the use of medical marijuana for those with debilitating or disabling medical conditions and offers identification cards for patients.⁴⁶ Colorado law also allows for the recreational use of marijuana and does so in a way similar to alcohol regulation including that purchasers show proof of age, cannot sell, distribute, or transfer marijuana to minors, and cannot drive under the influence of marijuana.⁴⁷ CRSA Const. Art. 18, §16, also includes information pertaining to citizens of Colorado growing their own marijuana plants.⁴⁸

Under Revised Code of Washington 69.51A.005, Washington also has similar laws pertaining to medical marijuana in providing patients with medical identification cards.⁴⁹ Washington's statute

⁴⁰ Reid, *supra* note 34, at 172.

⁴¹ *Id.*

⁴² *Id.* at 177.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Colorado and Washington: Life After Legalization and Regulation*, MARIJUANA POLICY PROJECT, <https://www.mpp.org/issues/legalization/colorado-and-washington-life-after-legalization-and-regulation/> (last visited October 31, 2022).

⁴⁶ Colo. Const. art. XVIII, § 14 (Westlaw 2017).

⁴⁷ Colo. Const. art. XVIII, § 16 (Westlaw 2018).

⁴⁸ *Id.*

⁴⁹ Wash. Rev. Code Ann. § 69.51A.005 (Westlaw 2022).

allows for the use of recreational marijuana and regulates both the sale of liquor and cannabis.⁵⁰

When these states were campaigning for the legalization of marijuana, the past harms of marijuana prohibition were not as prominent as they should have been.⁵¹ In promoting this legislation, campaigners generally attempted to appeal to consumers who were white, middle-class citizens.⁵² They promoted messages and images that “implicitly suggested that marijuana consumers who are white, hardworking, middle-class, and responsible are deserving beneficiaries of legalized marijuana.”⁵³ Marijuana use was premised on racist stereotypes that were used in marijuana prohibition propaganda.⁵⁴ Campaigners further reinforced the message of the War on Drugs and redirected the focus from the injustices faced by attempting to appeal to white, middle-class citizens in their efforts to legalize cannabis.⁵⁵

C. Most Recent States to Legalize the Recreational Use of Marijuana

The most recent states to legalize marijuana for recreational use are New York, New Jersey, and Connecticut.⁵⁶ New York enacted Senate Bill S854A pertaining to the legalization of the adult use of marijuana in March 2021.⁵⁷ This bill ensures that New Yorkers with marijuana convictions that are now legal will have their records automatically expunged.⁵⁸ Following in Colorado and Washington’s footsteps, this law permits the use of recreational marijuana for

⁵⁰ Wash. Rev. Code Ann. § 69.50.345 (Westlaw 2022).

⁵¹ David Schlusell, “*The Mellow Pot-Smoker*”: *White Individualism in Marijuana Legalization Campaigns*, 105 C. L. REV. 885, 886–87 (2017).

⁵² *Id.* at 887.

⁵³ *Id.* at 889.

⁵⁴ *Id.* at 888.

⁵⁵ *Id.* at 889.

⁵⁶ Alexandra L. Simels, *The Trend of Legalization: Recent Developments in Marijuana Legalization in New York, New Jersey, and Pennsylvania*, MONDAQ BUSINESS BRIEFING (Aug. 26, 2021), <https://plus.lexis.com/api/permalink/6df8dfa5-80e1-4450-bf99-62eda04334ea/?context=1530671>; Andrea M. Strain, *United States: Update on the Legalization of Marijuana in Connecticut*, MONDAQ BUSINESS BRIEFING (July 22, 2021), <https://plus.lexis.com/api/permalink/9e17dd4a-370f-4243-a766-d7283d07d34a/?context=1530671>.

⁵⁷ Simels, *supra* note 56.

⁵⁸ *Id.*

individuals twenty-one and older to purchase and possess up to three ounces of marijuana.⁵⁹ It also expanded the number of medical uses for marijuana and allows an individual to possess up to five pounds of cannabis in their home.⁶⁰ New Jersey and Connecticut have also followed precedent in allowing for the use of recreational marijuana for those twenty-one and older.⁶¹

IV. MARIJUANA INDUSTRY TODAY V. PEOPLE PENALIZED IN THE PAST

A. The Billion Dollar Marijuana Industry

It is predicted that the global marijuana market could grow up to \$75 billion in sales by 2030.⁶² Investors in marijuana stock believe that soon the market will have a return that could be comparable to Amazon.⁶³

Ever since the first states legalized recreational marijuana, state economies have benefited from the marijuana market.⁶⁴ Colorado and Washington profited from and embraced the influx of marijuana tourism that came with legalization.⁶⁵

There was controversy about how marijuana would be taxed, but to some an upside to any kind of taxation was that the state would be generating revenue.⁶⁶ The possibility of taxing legalized recreational marijuana first became appealing to the states during the 2007-2008 financial crisis.⁶⁷ During this time, states were looking for new sources of tax revenue.⁶⁸ Marijuana being governed through the tax system meant that the state would gain revenue and less spending would be needed toward the criminal justice system.⁶⁹ While this may

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Strain, *supra* note 54.

⁶³ *Id.*

⁶⁴ Jeremy P. Gove, *Colorado and Washington Got Too High: The Argument for Lower Recreational Marijuana Excise Taxes*, 19 RICH J.L. & PUB INT. 67, 68 (2016).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Schluskel, *supra* note 51, at 889.

⁶⁸ *Id.* at 889.

⁶⁹ Gove, *supra* note 64, at 68.

be beneficial to the state, others viewed the tax on marijuana as an unwarranted redistribution of wealth.⁷⁰

Even with marijuana remaining prohibited under federal law, the industry is a growing market.⁷¹ Today, the marijuana industry is comprised of mostly white entrepreneurs and far less diverse than anticipated.⁷² African American owners in the legal marijuana industry make up a small percentage of the market nationally in comparison.⁷³ As of 2020, 81% of marijuana business owners were White, 5.7% were Hispanic, 4.3% were African American, 2.4% were Asian, and 6.7% identified as other minorities.⁷⁴ These statistics reflect those who have interest in a marijuana business, not controlling ownership.⁷⁵ Therefore, the number of minorities with a controlling interest is likely lower.⁷⁶

B. Past Penalties and Discrimination

In states that have not legalized marijuana, individuals are still being adversely affected by marijuana related arrests. For example, in *Allen M. Russell v. State of Mississippi*,⁷⁷ the defendant was sentenced to life without parole for possession of more than thirty grams, but less than two-hundred and fifty grams of marijuana by the trial court.⁷⁸ Russell's sentence was affirmed on appeal in May 2021.⁷⁹ Russell, possessed a total of 79.5 grams, the equivalent of 2.80 oz., of marijuana in his own apartment.⁸⁰ He was sentenced to life without parole due to the court's determination that he was considered a habitual offender.⁸¹

⁷⁰ *Id.*

⁷¹ H. Justin Pace, *The "Free Market" for Marijuana: A Sober, Clear-Eyed Analysis of Marijuana Policy*, 24 LEWIS & CLARK L. REV. 1219, 1221 (2020).

⁷² Guity, *supra* note 6, at 44–45.

⁷³ *Id.* at 45.

⁷⁴ Mathew Swinburne & Kathleen Hoke, *State Efforts to Create an Inclusive Marijuana Industry in the Shadow of the Unjust War on Drugs*, 15 & J. BUS. & TECH. L. 235, 255 (2020).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Russell v. State*, 346 So.3d 461, 466 (Miss. Ct. App. 2021), *aff'd* on opinion 341 So. 3d 84 (Miss. 2022).

⁷⁸ *Id.* at 463.

⁷⁹ *Id.*

⁸⁰ *Russell v. State*, 346 So.3d 435, 437 (Miss. 2022).

⁸¹ *Id.*

On appeal Russell, a 38-year-old Black American man, argued that “his sentence constituted cruel and unusual punishment and is grossly disproportionate to his felony conviction.”⁸² If Russell was living in New York today, he would not be facing a life sentence without the possibility of parole for the possession of marijuana.⁸³ In New York, adults 21 and over may possess up to three ounces of marijuana.⁸⁴ Had Russell not been a habitual offender in Mississippi, his sentence would be a maximum of 3 years imprisonment and/or a maximum \$3,000 fine.⁸⁵

Russell’s harsh sentence was reasoned by the Mississippi Court of Appeals in quoting the trial court’s statement, “In essence, the Legislature warned [Russell] and others with prior residential burglary convictions: ‘If you commit another felony, you will be subject to a sentence of life without the possibility of parole.’”⁸⁶ This seems as though the court may not have considered the nature of the crime. In Mississippi, it may not matter because the marijuana charge was considered a felony.⁸⁷

A research report detailing marijuana arrests from 2010 to 2018 revealed there were more than six million marijuana arrests during this time period.⁸⁸ In 2018, more than 43% of drug arrests were marijuana related.⁸⁹ The overall number of marijuana arrests during this time did not seem to be trending downward.⁹⁰ The number of arrests in those states that have legalized, or decriminalized marijuana have significantly lowered.⁹¹

Despite the changes due to state legalization of marijuana, racial disparities pertaining to marijuana related arrests remain unchanged across the United States.⁹² The report shows that, on average, Black Americans were 3.64 times more likely to be arrested

⁸² *Id.*

⁸³ *State and Local Medical and Recreational Marijuana Laws Chart*, *supra* note 1.

⁸⁴ *Id.*

⁸⁵ *Life Sentence for Marijuana Possession Upheld in Mississippi*, EQUAL JUSTICE INITIATIVE (May 28, 2021), <https://eji.org/news/life-sentence-for-marijuana-possession-upheld-in-mississippi/>.

⁸⁶ *Russell* 346 So.3d (2021) at 466.

⁸⁷ *Id.*

⁸⁸ Edwards, *supra* note 122, at 8.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

for marijuana possession than White Americans, even though the rate at which each group uses marijuana is similar.⁹³ While there is information regarding the racial disparity Black Americans have faced, there is little data regarding arrests of individuals of other races.⁹⁴ This is because, while the FBI Uniform Crime Report Arrest Data is the most accurate data on arrests nationwide, they do not disaggregate other races or ethnicities, such as Latinx populations, in their reports.⁹⁵ This may lead to an inaccurate number of individuals in various racial or ethnic groups being affected by bias in policing.⁹⁶

Since 2018, the FBI's Uniform Crime Report data shows that the number of arrests related to marijuana has decreased.⁹⁷ In 2019, police made about 545,602 marijuana related arrests and in 2020 there was a 36% decrease in arrests with an estimated 350,150 arrests reported.⁹⁸ This is due to the trend among states in decriminalizing and legalizing marijuana.⁹⁹ This data shows the drastic decline in arrest rates of non-violent marijuana consumers nationwide.¹⁰⁰

V. REPARATIONS

A. Individual Reparations

i. Expungement

Expungement is one form of reparations appropriate for amending the injustices stemming from marijuana in states that have legalized marijuana.¹⁰¹ Expungement, in the context of statutes, is the removal of "records and references to a particular criminal record when certain statutorily prescribed conditions are met."¹⁰²

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 11.

⁹⁶ *Id.*

⁹⁷ Norml, *FBI Report: Marijuana Arrests Plunge More Than 30 Percent in 2020* (Sept. 30, 2021), <https://norml.org/news/2021/09/30/fbi-report-marijuana-arrests-plunge-more-than-30-percent-in-2020/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Kaite Jagers, *Note: Correcting Injustices: Expunging Prior Marijuana Conviction's Is Kentucky's Next Best Step Towards Restorative*, 48 KY. L. REV. 385, 385. (2021).

¹⁰² *In re Guardianship of A.S.*, 57 A.3d 716, 722 (2012).

Expungement qualifies as a form of reparations because it is a step in helping those who have been wronged by the effects stemming from the War on Drugs by eliminating the record of a certain crime.¹⁰³ While expungement does not come in the usual form of monetary reparations, it aids in furthering the idea that if an act is no longer criminal, it would be unjust to maintain consequences for those who committed that same act that is no longer criminal.¹⁰⁴ When a charge is expunged, there is no indication that it ever existed or that the person was involved in the offense.¹⁰⁵ The offense will not show up in neither public, nor official databases.¹⁰⁶ This differs from sealed records in that sealed records still exist in the court system database, but are not available to the public.¹⁰⁷ When records are sealed they can still be viewed by police, prosecutors, and other officials.¹⁰⁸

There are two forms of expungement that states have developed.¹⁰⁹ In some states, those with marijuana convictions can apply for expungement while other states allow for marijuana convictions to be automatically expunged.¹¹⁰ Automatic expungement does not require any action to be taken by the defendant convicted of the marijuana related crime.¹¹¹ States that require an application for expungement require the defendant to take action in applying and, under some state processes, require a motion to be filed.¹¹² Benefits of having marijuana convictions expunged include that it allows for individuals affected to move forward and for some it will clear their criminal record.¹¹³

There is some opposition to the automatic expungement of now decriminalized marijuana offenses.¹¹⁴ Some believe there may be more harm than good in discarding sealed court files containing

¹⁰³ Jagers, *supra* note 101, at 395.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 397.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 395.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 396.

¹¹² *Id.*

¹¹³ *Id.* at 400.

¹¹⁴ See *Think Twice Before Asking Expunged Marijuana Records To Be Destroyed*, N.Y. LAW J. (2020).

mugshots and fingerprints.¹¹⁵ There are scenarios that may involve an individual having to prove their marijuana offense was expunged, for example, during a background check.¹¹⁶ This is mostly a concern regarding immigration where individuals may need to show that an offense was expunged for immigration purposes.¹¹⁷ This is somewhat contradictory because if the records are expunged, there is no reason for the offense to transpire. Expungement gives the individual the legal right to state that they do not have a criminal record, assuming that the only charges that they had were expunged.¹¹⁸

While expungement is beneficial, expungement alone will not rectify past injustices and missed opportunities due to marijuana convictions.¹¹⁹ Each state that has legalized marijuana should implement automatic expungement as a reparation for each individual and as a form of distributive justice. While expungement seems to be aimed toward the individual with the marijuana conviction, it also helps communities that faced hardship by allowing that individual to contribute to the community more effectively in ways they may not have been able to before due to the prior conviction.¹²⁰ Expungement also communicates to these communities as a whole that action is being taken to reform the criminal justice system.¹²¹

ii. Re-Sentencing and Reclassification

Another form of reparations that should be afforded to individuals adversely affected by marijuana convictions include resentencing and the reclassification of marijuana crimes.¹²² This should be afforded to individuals as a reparation because, like expungement, it serves to remove consequences that are no longer justified.¹²³

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2472.

¹¹⁹ Jagers, *supra* note 101, at 399.

¹²⁰ *See Id.*

¹²¹ *Id.*

¹²² Ezekiel Edwards, *A Tale of Two Countries* (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

¹²³ Guity, *supra* note 6, at 43.

When a state legalizes marijuana, individuals under probation supervision or that are incarcerated due to a now legal marijuana charge must be removed from supervision of the state government.¹²⁴ The implementation of provisions to remove probation requirements placed on those convicted of a marijuana offense that is no longer criminal will be beneficial in allowing that individual the opportunity to acquire jobs, housing, loans, or the ability to travel.¹²⁵ The majority of these opportunities are limited while the individual is on probation and are unavailable while incarcerated.¹²⁶

In addition to benefiting the individual, this also benefits the State in that it lowers the number of individuals in jails or prisons and reduces the workload for the state's probation department, most of which are overwhelmed by the large numbers of probationers.¹²⁷ As of 2020, there were almost five million adults under the supervision of probation or parole in the United States.¹²⁸

Under California's Adult Use of Marijuana Act, courts are authorized to resentencing individuals serving a prison or jail sentence for marijuana offenses that have reduced penalties.¹²⁹ The individual has the ability to petition for a resentencing or a dismissal based on a marijuana charge being reclassified as a lesser offense or an offense that is no longer a criminal charge.¹³⁰

Reclassification of marijuana at the federal level would avoid conflict between the federal government and the States.¹³¹ Although the federal law preempts state law, many states have passed legislation in anticipation of the federal government changing its position on how marijuana is classified under the CSA.¹³² Despite any changes in state law, one can still face federal prosecution for the same act.¹³³

¹²⁴ *Id.*

¹²⁵ *Id.* at 43, 44.

¹²⁶ *Id.* at 44.

¹²⁷ *Id.* at 43.

¹²⁸ *Id.*

¹²⁹ *Id.* at 44.

¹³⁰ *Id.*

¹³¹ Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PENN ST. L. REV. 333, 344 (2014).

¹³² *Id.* at 343.

¹³³ *Id.*

B. Community Reparations

i. Taxation

States such as New York and New Jersey who have recently legalized marijuana have contemplated using a portion of tax revenue from marijuana sales to redistribute back into communities that were adversely affected by marijuana related offenses.¹³⁴ Taxation on the sale of marijuana adheres to the more traditional form of reparations in being monetary reparations.¹³⁵ While reparations generally come in the form of compensation to an individual for past wrongs, the tax collected will be distributed back into the community for past harms those areas have faced.¹³⁶ Therefore, the community will be compensated.

It is believed that New Jersey will likely accrue \$300 million dollars per year in tax revenue stemming from marijuana sales.¹³⁷ It has been proposed that this tax revenue be dedicated to drug abuse prevention and treatment programs, job training programs, affordable housing programs and other related programs in communities, particularly minority communities, that have suffered disproportionately from marijuana related offenses and other drug offenses.¹³⁸

In New York, the Marijuana Regulation and Tax Act (MRTA) was signed into law on March 31, 2021.¹³⁹ Under the MRTA, the state will impose a tax on the distributor and the consumer of marijuana.¹⁴⁰ Cannabis will be taxed per milligram amount of Tetrahydrocannabinol (THC) and will depend if the marijuana is in a flower, concentrate, or edible form.¹⁴¹ The MRTA includes a section explaining that New

¹³⁴ See Amol N. Sinha, *Marijuana Legalization and Civil Rights*, N.J. LAW, Oct. 2018, at 86, 88; Aleece Burgo, *Cannabis Legalization: Social Equity Provisions Are A Sticking Point and A Selling Point*, N.Y. ST. B.J. 8, 9 (Mar. 2020).

¹³⁵ Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM L. POL'Y REP. 21, 25 (2004).

¹³⁶ ALFRED BROPHY, REPARATIONS PRO AND CON 7 (2006).

¹³⁷ *Id.* at 86, 88.

¹³⁸ *Id.*

¹³⁹ *The Marijuana Regulation and Taxation Act: A Summary*, NYSAC (Apr. 2021), https://www.nysac.org/files/MRTA_Summary.pdf.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

York State expects to accrue \$350 million in annual state revenue.¹⁴² New York has established a Cannabis Revenue Fund along with the Community Grants Reinvestment Fund and the Drug Treatment and Public Education Fund.¹⁴³ Forty percent of the tax revenue will be distributed to the Community Grants Reinvestment Fund and twenty percent will be distributed to the Drug Treatment and Public Education Fund.¹⁴⁴ Both of these sub groups are aimed at educating the community and reinvesting in communities that have been disproportionately affected by past federal and state drug policies.¹⁴⁵

ii. Access to Participate in the Legal Market

Another form of reparations is providing adversely effected and low-income communities with the opportunity to participate in the legal marijuana market and creating an inclusive industry.¹⁴⁶ State governments allowing for an inclusive legal marijuana market comes as a form of monetary reparations.¹⁴⁷ The number of marijuana sales in 2021 are projected to exceed 20.2 billion dollars.¹⁴⁸ This is also a way to amend past discrimination by including minority investors in a market that has disproportionately impacted them economically in the past.¹⁴⁹ By encouraging those who may have been involved in the underground marijuana market to participate in the legal economy there is a possibility of eliminating the illegal marijuana market and reducing crime.¹⁵⁰

Currently 81% of marijuana business owners and founders are white.¹⁵¹ Unfortunately, the same communities that have suffered due to inequitable enforcement of drug laws and deprivation of opportunity stemming from the War On Drugs are missing out on profiting from the growing marijuana industry.¹⁵² One of the major reasons for this

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See Sinha, *supra* note 134, at 86, 88.

¹⁴⁷ See Maya Rahwanji, “Hash”Ing Out Inequality in the Legal Recreational Cannabis Industry, 39 NW. J. INT’L L. & BUS. 333, 334 (2019).

¹⁴⁸ *Id.*

¹⁴⁹ Guity, *supra* note 6, at 40.

¹⁵⁰ *Id.*

¹⁵¹ Swinburne & Hoke, *supra* note 74, at 255, 256.

¹⁵² *Id.*

is because, like any other business, the cost of establishing a marijuana business is costly, requiring various applications, fees, and licensing.¹⁵³ The average cost for a retail location in the recreational marijuana business is about \$312,000 and about \$500,000 for a cannabis processing business.¹⁵⁴ Marijuana prohibition under federal law makes the process of establishing a cannabis business more difficult than the average business.¹⁵⁵ Many banks and credit unions will not provide loans or services to a cannabis business.¹⁵⁶ This leads to a majority of marijuana businesses being self-funded.¹⁵⁷

While data and policies are still new and being implemented, there are various ways that make the possibility of an inclusive market more attainable.¹⁵⁸ This can likely be achieved by creating space in the market for small businesses and implementing social equity measures to ensure minority representation in the marijuana industry.¹⁵⁹

One way to make the marijuana market more inclusive involves avoiding market consolidation and preventing only a few large companies from having control over the marijuana industry.¹⁶⁰ This can likely be done by limiting the number of licenses to process or distribute marijuana afforded to each individual or entity and limiting the number of licenses available overall.¹⁶¹ This can potentially avoid several entities having one common owner.¹⁶²

In order to keep a few larger industries from controlling the market, some states have already implemented licensing to avoid vertical integration.¹⁶³ There are various steps to selling marijuana including growing, processing, and finally, distribution.¹⁶⁴ It is believed that small companies are left out when one business holds a license for each step of the process pertaining to the sale of

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 256.

¹⁵⁵ Katherine P. Franck, *Cannabis Reform: High on the Banking Agenda*, 24 N.C. BANKING INST., 163 (2020).

¹⁵⁶ *Id.* at 167.

¹⁵⁷ Swinburne & Hoke, *supra* note 74, at 256.

¹⁵⁸ See Guity, *supra* note 6, at 50.

¹⁵⁹ Swinburne & Hoke, *supra* note 74, at 258, 261.

¹⁶⁰ *Id.* at 258.

¹⁶¹ *Id.* at 258, 259.

¹⁶² *Id.* at 260.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

marijuana.¹⁶⁵ States such as Michigan and Pennsylvania have implemented licensing policies to avoid this.¹⁶⁶ In Michigan, a marijuana safety compliance facility or a secure transporter may not also be afforded a license to grow, process, act as a retailer, or microbusiness.¹⁶⁷ A microbusiness license holder in Michigan may not be afforded any other marijuana business license.¹⁶⁸ In Pennsylvania, only up to five growers are permitted to obtain a dispensary license.¹⁶⁹ In *Fla. Dep't of Health v. Florigrown, LLC*¹⁷⁰, Florida growers sued the state in order to prevent the implementation of regulation in support of vertical integration in the marijuana market.¹⁷¹ The District Court of Appeals of Florida held that the vertical integration requirement violated the 2016 Florida constitutional amendment to legalize medical marijuana in the state.¹⁷² On appeal, the Supreme Court of Florida held that Florigrown did not have a substantial likelihood of success of its challenge to the statute's vertical integration requirement because there was no conflict with the definition of Medical Marijuana Treatment Centers (MMTC) and the statute's vertical integration requirement.¹⁷³ The Amendment requires that the MMTC "cultivate, process, transport, and dispense marijuana for medical use" and "may not

¹⁶⁵ *Id.* at 260.

¹⁶⁶ *Id.*

¹⁶⁷ Matthew Abel, *An Introduction to the Ballot Initiative of the Coalition to Regulate Marijuana Like Alcohol in Michigan*, MICH. B.J., 20, 21 (August 2018).

¹⁶⁸ *Id.*

¹⁶⁹ *Resources for Growers and Processors*, PENNSYLVANIA DEPT. OF HEALTH, <https://www.health.pa.gov/topics/programs/Medical%20Marijuana/Pages/Growers-Processors.aspx> (last visited Jan. 3, 2022).

¹⁷⁰ *Fla. Department of Health, Office of Medical Marijuana Use v. Florigrown, LLC*, 320 So.3d 195, 199 (Fla. App. 1 Dist., 2019).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Fla. Department of Health v. Florigrown, LLC*, 317 So.3d 1101, 1113 (Fla., 2021). This was overruled on statutory grounds. The Amendment defines MMTC as, "an entity that acquires, cultivates, possesses, processes . . . , transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department." This means that if an entity performs any of these functions it is considered an MMTC. The Amendment sets forth requirements in order to be licensed as a MMTC. The vertical integration requirement states the MMTC must "cultivate, process, transport, and dispense marijuana for medical use" and cannot contract with other outside entities for these purposes in order to be licensed. The court concluded that because the amendment doesn't state that if an MMTC performs one of these functions it is entitled to licensure, there is no conflict. The definition of MMTC in the Amendment alone does not give the entity the right to be licensed. The entity may still be considered a MMTC, but the entity must cultivate, process, and dispense the marijuana itself in order to become licensed. *Id.*

contract for services directly related to the cultivation, processing, and dispensing of marijuana or marijuana delivery devices.”¹⁷⁴ The court held the vertical integration statute requiring, “that an entity perform several of those functions to be licensed does not conflict with the Amendment.”¹⁷⁵ Despite whether there was a conflict with the wording of the Amendment, it is still evident that while this licensing model involving the prevention of vertical integration is somewhat untraditional, it will allow for the entry of smaller businesses to take part in the marijuana industry.¹⁷⁶

In addition to avoiding market consolidation, social equity measures that can be taken to make the marijuana industry more inclusive going forward include preferential review of license applications, exclusive licensing opportunities, financial and business training, support services, invoking fee waivers, and submissions of diversity plans.¹⁷⁷ For example, New York plans to implement a different approach to licensing with the goal of securing “an early investment into communities most impacted by the disproportionate enforcement of cannabis prohibition.”¹⁷⁸ In March of 2022 Governor Hochul announced the *Seeding Opportunity Initiative* which allows for individuals with prior cannabis-related criminal offenses to have priority in obtaining retail licenses to sell marijuana.¹⁷⁹ The Governor stated, “New York State is making history, launching a first-of-its-kind approach to the cannabis industry that takes a major step forward in righting the wrongs of the past.”¹⁸⁰ Further, the Governor has proposed *The New York Social Equity Cannabis Investment Program*, which is a 200 million dollar program that will aid in dispensary development.¹⁸¹ While controversial within the NYS Legislature, the initiative encourages participation in the legal market,

¹⁷⁴ *Id.* at 1112.

¹⁷⁵ *Id.*

¹⁷⁶ See Swinburne & Hoke, *supra* note 74, at 261.

¹⁷⁷ *Id.* at 262.

¹⁷⁸ Governor Hochul Announces The Office of Cannabis Management Seeding Opportunity Initiative (March 10, 2022), <https://www.governor.ny.gov/news/governor-hochul-announces-office-cannabis-management-seeding-opportunity-initiative>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

aids those who are less likely to be able to participate absent this licensing priority, and provides funding.¹⁸²

VI. PROPOSAL FOR UNIFORM REPARATIONS

Although there is an increasing number of states legalizing medical and recreational marijuana, it is unforeseeable that it will become legalized federally and some states will continue to follow suit of the federal government.¹⁸³ After each state legalizes marijuana, each takes a different approach to marijuana convictions.¹⁸⁴ For states that have legalized marijuana, a set of uniform reparations should be implemented based on the various state practices set forth above to amend past injustices. A combination of these reparations may not completely make up for the lasting effects of the War on Drugs but ensure a step in the right direction.¹⁸⁵ It does not make sense for an individual to possess marijuana, openly and legally, while in that same state another individual continues to face the consequence of a criminal record, government supervision, or possibly incarceration.¹⁸⁶

While there are various definitions of what reparations entail, the goal of reparations is to build something better for the future by correcting past injustice.¹⁸⁷ By administering a combination of automatic expungement, resentencing, and reclassification of marijuana charges in every state that legalizes marijuana there can be a form of reparations provided to the individual. Each individual is afforded direct atonements and be given back opportunities that were not available to them due to their marijuana conviction. For some, these reparations will not make up for all the years of missed opportunities, but it allows them to move forward without being penalized for charges that others are no longer charged for.¹⁸⁸

These reparations aimed toward the individual constitute programs that look backward, focusing on past harm and attempt to

¹⁸² Jesse McKinley & Grace Ashford, *Convictions Will Get First Retail Licenses*, NEW YORK TIMES (March 9, 2022), <https://www.nytimes.com/2022/03/09/nyregion/marijuana-sellers-licenses-hochul.html>.

¹⁸³ Guity, *supra* note 6, at 49.

¹⁸⁴ Jagers, *supra* note 101, at 385.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Brophy, *supra* note 136, at 7.

¹⁸⁸ Jagers, *supra* note 101, at 400.

correct those harms directly.¹⁸⁹ In addition to looking backward, there must also be forward looking, community-based programs in place designed to promote the welfare of the entire community with respect to how they have been affected by marijuana related crimes.¹⁹⁰ It is crucial to provide reparations to communities that have been harmed by the War on Drugs, specifically marijuana criminalization. This can be done through taxation of marijuana sales and access to participate in the legal market.¹⁹¹ New York's Marijuana Regulation Act and Taxation provides an ideal model of reparations that can benefit the community.¹⁹² Like New York, the funds from the tax on marijuana sales should be redistributed into communities and be used toward programs involving treatment and education.¹⁹³ Access to the legal marijuana market is beneficial to the community in creating job opportunities, reducing crime that was before associated with illegal marijuana sales, and creating a more diverse economic environment.¹⁹⁴

VII. CONCLUSION

There are various forms of reparations that can be implemented in order to attempt to repair past wrongs stemming from the War on Drugs.¹⁹⁵ Some are aimed at reparations for individuals with marijuana convictions, while other reparations come in the form of distributive justice to communities that have been adversely impacted.¹⁹⁶ Expungement, resentencing, and reclassification of marijuana crimes at the state and federal level are forms of reparations that can be afforded to the individual.¹⁹⁷ Redistributing funds from the tax on the sale of marijuana and creating an inclusive marijuana market are forms of reparations that can be afforded to the community.¹⁹⁸

States that legalize marijuana are now faced with the responsibility of curing past injustice throughout communities and

¹⁸⁹ Brophy, *supra* note 136, at 7.

¹⁹⁰ *Id.*

¹⁹¹ Sinha, *supra* note 134, at 86.

¹⁹² *The Marijuana Regulation and Taxation Act: A Summary*, *supra* note 139.

¹⁹³ *See Id.*

¹⁹⁴ Guity, *supra* note 6, at 50.

¹⁹⁵ See Nekima Levy-Pounds, *Going Up in Smoke: The Impacts of the Drug War on Young Black Men*, 6 ALB. GOV'T L. REV. 563, 564 (2013).

¹⁹⁶ *Id.*

¹⁹⁷ *See Guity*, *supra* note 6, at 41, 42.

¹⁹⁸ *Id.* at 23.

restoring life altering, lost liberties to individuals with marijuana convictions as they move forward in creating marijuana related policies. This can be achieved through a combination of uniform reparations for all States that legalize marijuana medically and recreationally. While each form of reparations may never be able to completely right past wrongs, it can help to change the stigma and bias against marijuana users.

In conclusion, while the States progress in policy relating to marijuana related crimes, decriminalization, and legalization, it is imperative to create cannabis policies regarding regulation and distribution that progress toward the effort of righting past wrongs. This must be done in order to continue to reduce the disproportionate harms to low income and minority communities going forward.