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**ERASING EVIDENCE OF HISTORIC INJUSTICE:
THE CANNABIS CRIMINAL RECORDS EXPUNGEMENT
PARADOX**

JULIE E. STEINER*

ABSTRACT

Cannabis prohibition and its subsequent enforcement have yielded an epic societal tragedy. The decision to criminalize cannabis was a paradigm-shifting moment in legal history because it converted lawful medicinal or intoxicant-seeking conduct into criminal activity, inviting government intrusion into matters previously self-controlled.

Scholars increasingly recognize that prohibition was built upon a decades-long, false, media-driven narrative that “marijuana” was one of society’s worst menacing enemies. Using overtly racist propaganda, the narrative successfully captured the audience, fomenting public anxiety and unfairly demonizing cannabis and its users. This misinformation campaign ultimately led to its current status as prohibited under the federal Controlled Substances Act (“CSA”) because it ostensibly has (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) a lack of accepted safety for use under medical supervision.

While the consequences of cannabis prohibition are still unfolding, unfortunately, one sobering conclusion may confidently be drawn: criminal enforcement of cannabis prohibition has been, and continues to be, irreparably marred by enforcement injustice.

Prohibition has led, and continues to lead, to arrests and disproportionately harsh punishments when compared to the severity of the underlying behavior. Moreover, as Michelle Alexander and the ACLU documented early on, enforcement has been disproportionately exercised against a discrete subset of the larger cannabis-using population. Specifically, enforcement has been disparately borne by individuals of color, particularly Black and Latinx

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individuals, and by those of lower socioeconomic means. Society is just beginning to recognize, define the scope of, and process this injustice.

The vestiges of this unjust enforcement persist through its lingering trail: an individual's cannabis criminal enforcement record. Known as "collateral consequences," these negative effects linger—some for long periods that might last generations—without some form of mitigating criminal "record relief." Expungement is widely hailed as the most fulsome of the record-relieving options because it offers complete erasure of the record.

This Essay agrees, yet posits that while expungement is a laudable and necessary remedy to mitigate individual cannabis criminal record-based harm, expungement also yields an outcome paradox: to further justice by expunging criminal records, society is erasing evidence of historic enforcement injustice. Because society needs to balance individual relief with the need to maintain a historical account of this legal enforcement era, this Essay suggests that expunging entities maintain a curated record—one that eliminates, to the extent possible, sensitive personally identifying information, while maintaining other important information of historic and legal value. Policy makers will still need to consider the (1) expungement recipients' potential future need for their criminal records, (2) data privacy principles to protect any retained expungement records, and (3) mechanisms to incentivize and fund large-scale expungement efforts.

Erase the individual's record without erasing history.

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INTRODUCTION

Cannabis¹ prohibition and its subsequent enforcement have yielded an epic societal tragedy. In the United States, cannabis is the most commonly used illicit drug² and the second most commonly used psychotropic drug after alcohol.³ And like the attempt to prohibit alcohol in the early nineteenth century, criminalizing cannabis-using behavior, involving an enforcement “war on drugs,”⁴ has been an abject failure.⁵

¹ “Marijuana” is the common (and legal) American term for the dried flowers and leaves of the plant *Cannabis sativa*, and for the plant itself. The flowers contain concentrated amounts of psychoactive (mood-altering) chemicals known as cannabinoids (produced only by this plant), terpenoids, and flavonoids; the leaves that have become the symbol of marijuana contain lesser quantities of the same chemicals. The amounts and mixtures of these molecules vary with the genetics of the plant, growing practices, and the timing of the harvest.

JONATHAN P. CAULKINS, BEAU KILMER, MARK A. R. KLEIMAN, *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 5 (2d ed. 2016). This Essay interchangeably uses the generic term “cannabis” and the legal term “marijuana” to reference the *Cannabis* plant and its psychoactive preparations.

² *Marijuana Fast Facts and Fact Sheets*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/marijuana/fact-sheets.htm> [<https://perma.cc/UF9V-EPN9>] (last visited Apr. 13, 2021).

³ *Marijuana Research Report: What Is the Scope of Marijuana Use in the United States*, NAT’L INST. ON DRUG ABUSE (July 2020) [hereinafter *Marijuana Research Report*], <https://www.drugabuse.gov/publications/research-reports/marijuana/what-scope-marijuana-use-in-united-states> [<https://perma.cc/6W96-4GWP>].

The number of Americans who self-report that they use marijuana daily or near-daily (defined as 21 or more days in the past month) has increased from 4.0 million in 2000 to 8.0 million in the 2014 survey. (Many people use less frequently, but those daily and near-daily users account for more than 80% of all marijuana consumption.)

America’s Insatiable Demand for Drugs: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affs., 114th Cong. 78 (2016) (prepared statement of Jonathan P. Caulkins, H. Guyford Stever Prof. of Operations Rsch. & Pub. Pol’y, Heinz College, Carnegie Mellon Univ.).

⁴ See Alex Kreit, *Drug Truce*, 77 OHIO STATE L.J. 1323, 1328 (2016) [hereinafter Kreit, *Drug Truce*] (“The war on drugs is one of the most familiar public policy ideas of the past four decades but it is also one of the most difficult to define. The guiding tenets of the drug war strategy have been the vision of a ‘drug free’ society and the belief that vigorous enforcement of uncompromising criminal justice measures is the most effective method for realizing it. This philosophy has manifested itself in a focus on supply-side initiatives, on the theory that these efforts will suppress the market for drugs. Policies directly aimed at demand reduction have largely followed a similar rationale by addressing drug use and addiction problems primarily within the criminal justice system.” (footnotes omitted)).

⁵ See generally DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 144-45 (1996); JOHN HUDAK, *MARIJUANA: A SHORT HISTORY* 172-73 (2016); INT’L DRUG POL’Y CONSORTIUM, *TAKING STOCK: A DECADE OF DRUG POLICY* (2018), http://fileservr.idpc.net/library/Shadow%20Report_FINAL_ENGLISH.pdf [<https://>

While the consequences of cannabis prohibition are still unfolding, unfortunately, one sobering conclusion may confidently be drawn: criminal enforcement of cannabis prohibition has been, and continues to be, irreparably marred by enforcement injustice.⁶ The cannabis prohibition era has yielded injustice of such vast penal magnitude that the exercise of identifying its consequential scope is of historic importance.

We do not precisely know how many people have been arrested for cannabis-related offenses.⁷ And what we do know is cabined by what gets reported to particular data collection banks, which is only a subset of the actual universe of

perma.cc/4EZK-DGHY]; Kreit, *Drug Truce*, *supra* note 4; Altaf Rahamatulla, *The War on Drugs Has Failed. What's Next?*, FORD FOUND. (Mar. 23, 2017), <https://www.fordfoundation.org/just-matters/just-matters/posts/the-war-on-drugs-has-failed-what-s-next/> [<https://perma.cc/4EZK-DGHY>]; Brian Root, *A Return to the Failed 'War on Drugs' in the US?: Revolving Door of Prison Will Not Solve Problematic Drug Use*, HUM. RTS. WATCH (Mar. 16, 2017, 2:22 PM) <https://www.hrw.org/news/2017/03/16/return-failed-war-drugs-us> [<https://www.perma.cc/869M-R9QV>]. *But see* Tamar Todd, *The Benefits of Marijuana Legalization and Regulation*, 23 BERKELEY J. CRIM. L. 99, 106-07 (2018); John P. Walters, Opinion, *Our Drug Policy Is a Success*, WALL ST. J., Dec. 5, 2008, at A21.

⁶ Many scholars have focused on the aggressive enforcement period linked to drug, particularly cannabis, enforcement. *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 136 (2012); Randy E. Barnett, *The Harmful Side Effects of Drug Prohibition*, 2009 UTAH L. REV. 11, 21-22; Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 748 (2016) [hereinafter Kreit, *Marijuana Legalization*]. As Kreit notes, the drug war yielded a “new era of invasive policing,” supplanting the traditional era characterized by a victim reporting a crime with the drug enforcement agency and initiating their own cases through such intrusive investigative methods as wiretaps, informants, and “controversial search and surveillance techniques.” Kreit, *Marijuana Legalization*, *supra*, at 744-46. This shifting of the burden to law enforcement, instead of victims, to uncover drug conduct “helped to make pretextual stops and overaggressive stop and frisk policies a recurring part of modern policing” and has been “especially closely linked to marijuana enforcement.” *Id.* at 746, 750. *See generally* ACLU, *A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM* 10-12 (2020), https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf [<https://perma.cc/9BQU-7VJS>].

⁷ *See, e.g.*, Jamie Fellner, *Race, Drugs and the Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 271 n.62 (2009) (“The data on the number of adult drug arrests and the race of the drug arrestees were provided to Human Rights Watch by the FBI’s Uniform Crime Reporting Program. The total number of reported arrests, 25,426,250, is less than the actual number because the arrest data only include those arrests reported by law enforcement agencies to the UCR Program and some agencies do not participate and others do not provide complete arrest data.”); German Lopez, *Marijuana Legalization Can’t Fix Mass Incarceration*, VOX (Apr. 17, 2018, 9:10 AM), <https://www.vox.com/policy-and-politics/2018/4/16/17243080/marijuana-legalization-mass-incarceration-boehner>. The often-cited ACLU statistics are largely based on federal data and, by their own admission, limited in scope. *See* ACLU, *supra* note 6, at 8-9.

such arrests.⁸ At the very least, “between 70 and 100 million—or as many as one in three Americans—have some type of criminal record.”⁹ Of these, an alarming number involve cannabis.

The ACLU, Drug Policy Alliance, and other prominent watchdogs have done important historical work compiling arrest statistics with the available information. Unsurprisingly, arrest numbers rose after the enactment of the Controlled Substances Act (“CSA”).

In 1970, when the Controlled Substances Act was passed, there were a little more than 400,000 drug arrests nationwide. This number climbed quickly during the Nixon administration, to over 600,000 by 1974, followed by a period of relative stability until 1980. Then, beginning in 1980, drug arrests rose fairly steadily and dramatically, from 581,000 to a height of almost 1.9 million in 2005. Drug arrests have declined somewhat since, with just over 1.5 million in 2013. But there are still two and a half times as many drug arrests annually today as in 1980.¹⁰

According to the data tracked by the ACLU, between 2001 and 2010, there were at least 8.2 million marijuana arrests, 88% of which were for possession only.¹¹ From just 2010 to 2018, law enforcement made more than 6.1 million marijuana arrests.¹² The ACLU further found that the number of these arrests increased from 2015 to 2018, driven by arrests in states in which marijuana was still illegal.¹³ While the total number of marijuana arrests declined in 2019, police still made 545,602 marijuana arrests, some 92% of which were for possession only.¹⁴

⁸ Fellner, *supra* note 7, at 271 n.62.

⁹ HALF IN TEN & SENTENCING PROJECT, AMERICANS WITH CRIMINAL RECORDS 1 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/9KJ9-FRHY>]. This unfortunate statistic has led commentators to lament that “America has a rap sheet.” Gary Fields & John R. Emshwiller, *As Arrest Records Mount, Consequences Last a Lifetime*, WALL ST. J., Aug. 19, 2014, at A1; *see also* Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 327.

¹⁰ Kreit, *Drug Truce*, *supra* note 4, at 1339 (footnotes omitted).

¹¹ ACLU, *supra* note 6, at 5. Earlier numbers do not neatly discern between cannabis and other drug related arrests, but the numbers rose after the enactment of the CSA. Kreit, *Drug Truce*, *supra* note 4, at 1339; *see also* Douglas A. Berman & Alex Kreit, *Ensuring Marijuana Reform Is Effective Criminal Justice Reform*, 52 ARIZ. ST. L.J. 741, 746-48 (2020).

¹² ACLU, *supra* note 6, at 5.

¹³ *Id.* Moreover, nine out of ten marijuana arrests were for possession. *Id.*

¹⁴ Kyle Jaeger, *Marijuana Arrests Decline Nationally for First Time in Four Years, FBI Data Shows*, MARIJUANA MOMENT (Oct. 1, 2020), <https://www.marijuanamoment.net/marijuana-arrests-decline-nationally-for-first-time-in-four-years-fbi-data-shows/> [<https://perma.cc/VKP6-VBW9>].

Prohibition, however, is supported by a crumbling legal foundation. Its shaky underpinnings can be traced to false claims and overtly racist propaganda designed to foment public anxiety and unfairly demonize cannabis and its users.

It has been well chronicled by historians that the United States government criminalized cannabis under false pretenses in the 1930s and from beginning to end has unfairly panned cannabis as destructive and dangerous through a widespread propaganda campaign of often overtly racist fearmongering. Prohibitionist propaganda has been so successful that anti-cannabis biases, based on untruths, survive over eighty years after they were conceived.¹⁵

This decades long misinformation campaign against cannabis ultimately led to its current status as a prohibited drug under the federal CSA.¹⁶ Schedule I ostensibly includes the most dangerous of all drugs, defined as those with (1) “a high potential for abuse,” (2) “no currently accepted medical use in treatment in the United States,” and (3) “a lack of accepted safety for use . . . under medical supervision.”¹⁷ From the CSA’s inception, and through and including today, many skilled lawyers have argued that the CSA’s scheduling of cannabis is not founded upon a rational basis.¹⁸ Yet, these arguments have not been met with legal success¹⁹ largely because: (1) the CSA grants broad discretion to

¹⁵ Jay Wexler & Connor Burns, *American Edibles: How Cannabis Regulatory Policy Rehashes Prohibitionist Fears and What to Do About It*, 44 SEATTLE UNIV. L. REV. (forthcoming 2021) (manuscript at 10) (footnote omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3811846 [<https://perma.cc/WA7V-APVR>]; see also HUDAK, *supra* note 5, at 34-71; Edward L.W. Green & Kevin F. Steinmetz, *Up in Smoke: Marijuana, Abstract Empiricism, and the Criminological Imagination*, in LEGALIZING MARIJUANA: A SHIFT IN POLICIES ACROSS AMERICA 19, 25-29 (Nancy E. Marion & Joshua B. Hill eds., 2016).

¹⁶ See HUDAK, *supra* note 5, at 34-71.

¹⁷ 21 U.S.C. § 812(b)(1). Marijuana and tetrahydrocannabinols, along with heroin, LSD, ecstasy, peyote, and mescaline, are all Schedule I drugs. *Id.* at § 812(c).

¹⁸ Since the early 1970s, numerous advocates, commentators, and prominent medical professionals have challenged the basis for this listing. The lawyers at National Organization for the Reform of Marijuana Laws (“NORML”), Dr. Lester Grinspoon, and others who took this legal issue on at a time when it was not popular, have been particularly trailblazing. See, e.g., MARK K. OSBECK & HOWARD BROMBERG, MARIJUANA LAW IN A NUTSHELL 90-91 (2017) (noting various petitions for rescheduling marijuana brought by organizations such as NORML, health care professionals, and politicians); Mary Celeste & Melia Thompson-Dudiak, *Has the Marijuana Classification Under the Controlled Substances Act Outlived Its Definition?*, 20 CONN. PUB. INT. L.J. 18 (2020); DRUG POL’Y ALL., REMOVING MARIJUANA FROM THE SCHEDULE OF CONTROLLED SUBSTANCES 2 (2019), https://drugpolicy.org/sites/default/files/marijuana-scheduling_january_2019_0.pdf [<https://perma.cc/PE69-6TM8>].

¹⁹ As competency, research, and policy develops, so too will legal understanding and historic assessment of whether the marijuana Schedule I listing and its consequential enforcement were founded upon a rational basis. See Celeste & Thompson-Dudiak, *supra*

administrative agencies to schedule controlled substances;²⁰ (2) law enforcers are highly motivated to perpetuate prohibition for compound reasons, including appeasing the public by appearing tough on crime,²¹ generating money through practices like asset forfeiture,²² controlling the public,²³ and zealously believing in the “prohibition cause” without rational foundation;²⁴ (3) the government has, until recent years, overwhelmingly denied cannabis research permits unless the research was designed to elicit the negative aspects of cannabis consequently perpetuating cannabis’s status as a prohibited Schedule I substance;²⁵ and (4) courts are constrained from meaningful review of congressional and administrative decision-making.²⁶

This is regulatory capture, plain and simple. The zealous “law and order” forces of “prohibition enforcement” have effectively captured American drug enforcement. This process began at a time when the public was amenable to being shamed for drug use, and the message of shame was driven by the powerful drug enforcer Harry Anslinger.²⁷ It represents government might built upon a sham story, and it has become an unchecked force in criminal law.²⁸

Cannabis

has been historically mythologized as a scourge of society despite the presence of less influential competing narratives. Indeed, the politics of pot have been so divisive that even scientific research on it has been shunned to varying degrees as a result of its stigma as a harbinger of delinquency and urban decay.²⁹

note 18, at 23; Gardiner Harris, *Researchers Find Study of Medical Marijuana Discouraged*, N.Y. TIMES, Jan. 19, 2010, at A14.

²⁰ OSBECK & BROMBERG, *supra* note 18, at 92.

²¹ Fellner, *supra* note 7, at 257; Kreit, *Drug Truce*, *supra* note 4, at 1333-34; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (2001).

²² Kreit, *Drug Truce*, *supra* note 4, at 1333-34.

²³ ALEXANDER, *supra* note 6, at 4.

²⁴ See JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS 294 (2015); Fellner, *supra* note 7, at 257; Wexler & Burns, *supra* note 15 (manuscript at 11).

²⁵ Celeste & Thompson-Dudiak, *supra* note 18, at 23; Harris, *supra* note 19, at A14.

²⁶ See Celeste & Thompson-Dudiak, *supra* note 18; OSBECK & BROMBERG, *supra* note 18, at 92.

²⁷ See sources cited *supra* note 15.

²⁸ See, e.g., Wexler & Burns, *supra* note 15 (manuscript at 12-18); see also HUDAK, *supra* note 5, at 34-71; Green & Steinmetz, *supra* note 15, at 19.

²⁹ Green & Steinmetz, *supra* note 19, at 19; OSBECK & BROMBERG, *supra* note 18, at 82-85.

This stigmatization has yielded selectively enforced cannabis criminalization and unjustly harsh punishment in light of the behavior involved.³⁰ This selective enforcement has been disproportionately exercised against a discrete subset of the larger cannabis-using population.³¹ Specifically, enforcement has been disparately borne by individuals of color, particularly Black and Latinx individuals, and those of lower socioeconomic means.³²

The vestiges of this unjust enforcement persist through its lingering trail: an individual's cannabis criminal enforcement record. A vast number of negative consequences derive from having a criminal record. Known as "collateral consequences,"³³ these negative effects linger—some for generations—without some form of mitigating criminal record relief.

The legal system has developed record-revising tools to regulate the content of and access to criminal record information. In certain situations, the law prohibits access to an individual's public criminal record by hiding, or "sealing," it from the view of certain entities or by eliminating, or "expunging," it altogether.³⁴

Expungement is widely hailed as the most fulsome of these record-revising options because it offers complete erasure of the record. This remedy provides critical relief by eliminating the stigmatizing record and, as a result, greatly reducing the collateral consequences associated with prior criminal enforcement. Expungement also mitigates past and ongoing unjust enforcement harm borne by those arrested.

However, while expunging cannabis criminal records in the name of justice is a laudable and necessary endeavor, this Essay suggests that expungement

³⁰ See, e.g., Fellner, *supra* note 7, at 269-70; Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 183 (2016) (noting selective enforcement).

³¹ Stark racial disparities in marijuana possession arrests have remained unchanged nationwide. Indeed, while national arrest rates were lower in 2018 than in 2010 for both Black and White individuals, racial disparities in those arrests have not improved and, in some jurisdictions, have worsened. ACLU, *supra* note 6, at 5-7; see also Fellner, *supra* note 7, at 269-70.

³² This argument is empirically demonstrated by extant historic cannabis arrest data. ACLU, *supra* note 6, at 4-5 (documenting "[e]xtreme [r]acial [d]isparities in [m]arijuana [p]ossession [a]rrests" in every state reflecting that, on average, a Black person is 3.64 times more likely to be arrested for marijuana possession than a White person, even though Black and White people use marijuana at similar rates); see also Berman & Kreit, *supra* note 11, at 746-49; Fellner, *supra* note 7, at 273; *Race and the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/race-and-drug-war> [<https://perma.cc/XAS2-8AKS>] (last visited Apr. 13, 2021) (noting heavy disparate impact of drug enforcement on Black and Latinx communities).

³³ Collateral consequences are "the legal restrictions and societal stigma that burden people with a criminal record long after their criminal case is closed." *About CCRC*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/about-the-collateral-consequences-resource-center/> [<https://perma.cc/6MBV-AB6H>] (last visited Apr. 13, 2021).

³⁴ See generally *id.*

yields an outcome paradox: to further justice by expunging criminal records, society is erasing evidence of historic enforcement injustice. Once expunged, it is as if the event never happened. Typically, expungement permits the individual to deny the existence of the record without penalty or fear of perjury.³⁵ There are few legal situations that operate to erase past events; yet expungement is a rather remarkable remedy that endeavors to do just that.

In light of this paradox, how should the legal system provide relief to those saddled with cannabis criminal enforcement records while also protecting the integrity of this historic documentation? This Essay suggests that there is a paradoxical solution to this expungement paradox: for the sake of history, society, and the individual, expunging entities must maintain limited documentation of expunged records. As a best practice in cannabis expungement policy, these entities should assure retention of select criminal record information sanitized of identifying personal information, rather than complete records eradication. Every time a cannabis enforcement record is expunged without capturing this information, it jeopardizes the historical accuracy of and accountability for this period of selective and racialized drug enforcement.³⁶

I. & MAKING A CRIMINAL: THE CRIMINAL ENFORCEMENT OF CANNABIS PROHIBITION

Society has an uncomfortable history with intoxicating behavior. Many humans seek euphoric or intoxicating experiences.³⁷ Many seek to medicate in ways that do not neatly fit within a conventional medicine paradigm.³⁸ And yet the general public has historically faced this practical human reality with a mixture of self-loathing, fear, condemnation, and outright rejection.

Vice prohibition is a legal reflection of this societal response. Prohibition casts intoxication- or euphoria-seeking conduct as lawless behavior that

³⁵ See, e.g., MASS. GEN. LAWS ch. 276, § 100N(a) (2020) (“No county agency, municipal agency or state agency shall, directly or indirectly, when determining a person’s eligibility for examination, appointment or employment with any county agency, municipal agency or state agency require the disclosure of a criminal record expunged An applicant for examination, appointment or employment with any county agency, municipal agency or state agency whose record was expunged . . . may answer ‘no record’ with respect to an inquiry herein relative to prior arrests, criminal court appearances, juvenile court appearances, adjudications, or convictions. An applicant for examination, appointment or employment with any county agency, municipal agency or state agency whose record was expunged . . . may answer ‘no record’ to an inquiry herein relative to prior arrests or criminal court appearances.”).

³⁶ This Essay agrees with existing record-revision scholarship that tends to focus on the need for individual relief to further racial and economic justice, public safety, and individual dignity, see, e.g., Roberts, *supra* note 9, at 330, and also focuses on the need for historic accuracy and accountability for unjust enforcement.

³⁷ See HUDAK, *supra* note 5, at 1, 3.

³⁸ See *id.* at 1.

conflicts with the norms of civil and decent society, an acutely negative societal condemnation of a relatively common human behavior.³⁹ By declaring cannabis use to be a crime, society pronounced the activity as blameworthy.⁴⁰ In turn, individual users were declared criminals.

For good or bad, shame is part of the criminal justice system. We post pictures of individuals accused of crimes in newspapers, we reduce the identity of incarcerated individuals to a number, and we mark them, much like the fictional Hester Prynne in Nathaniel Hawthorne's *The Scarlet Letter* was marked, with their own kind of scarlet letter. We do this not by forcing individuals to sew letters onto their clothing, but by tagging them with criminal records that follow them for life.

Yet never-ending shame is not punitive or rehabilitative; it's vindictive and holds people down. It creates second-class citizens by permanently excluding and devaluing individuals in our society regardless of their ability to change.⁴¹

The decision to criminalize cannabis was a paradigm-shifting moment in legal history. By converting lawful (if perhaps distasteful to some) conduct into unlawful activity, criminalization invited government regulation and intrusion into matters previously self-controlled.

A. *Criminalization Yielded Disproportionately Selective Enforcement*

Only a discrete subset of the population engaging with cannabis—whether for medicinal, recreational, or a combination of uses—has been subjected to criminal sanction. According to the World Health Organization, approximately 147 million people, or 2.5% of the world's population, consumes cannabis annually.⁴² It is second only to alcohol as the population's psychoactive of choice, and it is the most commonly used illicit drug.⁴³

Despite the number of users, prohibition enjoyed wide support.⁴⁴ This, too, can be explained by tracing it to the misinformation campaign that was the

³⁹ See *id.* at 36.

⁴⁰ See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 235 (1991) (describing Henry Hart's view that "[c]rime . . . , once proven, 'will incur a formal and solemn pronouncement of the moral condemnation of the community'" (quoting Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958))).

⁴¹ Emily Mooney & Arthur Rizer, Opinion, *The New Symbol of Shame: "C" for Conviction*, WASH. EXAM'R (Jan. 4, 2019, 1:53 PM), <https://www.washingtonexaminer.com/opinion/the-new-symbol-of-shame-c-for-conviction>.

⁴² *Id.*; see also *Alcohol, Drugs and Addictive Behaviours Unit*, WORLD HEALTH ORG., <https://www.who.int/teams/mental-health-and-substance-use/alcohol-drugs-and-addictive-behaviours/drugs-psychoactive/cannabis> [<https://perma.cc/BN5L-GPZ3>] (last visited Apr. 13, 2021).

⁴³ *Marijuana Research Report*, *supra* note 3.

⁴⁴ Kreit, *Drug Truce*, *supra* note 4, at 1333-34. From as far back as the 1920s, alcohol

“marijuana menace” story. Prohibition became a popular, and addictive, story. The common enemy: bad drug users. The heroes: prohibitionists. That narrative held such sway that over time it systematically entrenched itself in our culture and legal structure.⁴⁵

Indeed, numerous scholars have traced societal fear of cannabis to a deliberate misinformation campaign designed to manufacture an existential crisis; a tacit policy to foment public anxiety and ultimately justify a powerful government response.⁴⁶ The false narrative succeeded in its goal: public anger, a belief in a common cause, and complete capture of the media. The public demanded action: extinguish cannabis and other drug-related vice crime.

This is the critical moment when power shifted. The media’s popular false narrative about the “marijuana menace” convinced a duped audience that prohibitionist measures protected the endangered public. Ultimately, some local, all state, and the federal governments enacted strong drug prohibition, substantially broadening government enforcement authority over personal behavior while igniting, and then quelling, manufactured public fear.⁴⁷

Criminalization imbued the government with the legal authority to penalize cannabis use. Such legal sanction swept intoxicating conduct akin to alcohol use into the criminal sphere, thus opening the floodgates for government social control.⁴⁸ The bureaucratic power behind that social control expanded and gained in public opinion and budgetary strength.⁴⁹ And in time the real power and authority shifted to law enforcement.⁵⁰

prohibition was considered a “noble experiment.” See Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST. POL’Y ANALYSIS, No. 157 (1991), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf> [<https://perma.cc/AKL4-XP9C>]; *Prohibition: A Case Study of Progressive Reform*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/prohibition-case-study-of-progressive-reform/> [<https://perma.cc/H7JK-XCPH>]. See generally PROHIBITION (Florentine Films 2011).

⁴⁵ Wexler & Burns, *supra* note 15 (manuscript at 9-10); see also HUDAK, *supra* note 5, at 34-71; Green & Steinmetz, *supra* note 19, at 19.

⁴⁶ Green & Steinmetz, *supra* note 19, at 19, 25-38; see also HUDAK, *supra* note 5, at 34-71; Todd, *supra* note 5, at 104; Wexler & Burns, *supra* note 15 (manuscript at 9-23).

⁴⁷ See, e.g., Green & Steinmetz, *supra* note 19, at 19.

⁴⁸ See generally Coffee, *supra* note 40, at 193-94 (describing criminal law “as an instrument of social control”).

⁴⁹ See Kreit, *Drug Truce*, *supra* note 4, at 1331-32.

⁵⁰ As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate nearly unfettered power to district attorneys’ offices and police departments. Stuntz, *supra* note 21, at 508-09, 577-78 (“The anti-vice statutes of the late nineteenth and early twentieth centuries made police and prosecutors not just enforcers of criminal statutes, but makers of vice policy, with the ability to target some vices, and some groups, more than others. The cumulation of criminal prohibitions that we have seen over the

This is particularly problematic because cannabis law overwhelmingly involves victimless vice crimes. Enforcers must proactively look for such “illegal” behavior.⁵¹ In the words of Alex Kreit, Gordon Hawkins, and Franklin Zimring, “There is perhaps no clearer manifestation of the drug war ideology than the strategy of ‘seek[ing] out and punish[ing] casual, nonaddicted drug users.’”⁵²

Under the current system, police and prosecutors have extraordinary discretion over drug enforcement. William Stuntz, in describing this process, notes that

[p]olice arrest if and when they choose. Perhaps the local police believe in enforcing the ban on marijuana possession but only in some parts of town, or perhaps they believe in enforcing it only against people they don’t like. The reasons are legally irrelevant. Because the ban exists in the statute books, the arrest will be legally valid. Likewise, prosecutors prosecute if and when they choose. Perhaps the local district attorney’s office is enforcing some narrower version of the marijuana ban (e.g., punishing public use), or perhaps it uses the ban in cases where some other crime is suspected but unprovable. All these judgments are both invisible and unreviewable. The result is that police and prosecutors both define the crime and adjudicate violations, all outside the formal legal system.⁵³

Stuntz notes that criminal law is the outcome of a political system that aims to appease the public. It reflects “a set of institutional arrangements by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability.”⁵⁴ These institutional enforcement actors include the legislature, prosecutors, and police, all of which desire to

past half-century has made it ever easier for prosecutors to generate guilty pleas in street crime cases, making prosecutors the system’s prime adjudicators in such cases. . . . That is how enforcement discretion changed criminal law: legislators took control, but could not keep it; the legislative (and judicial) power have increasingly passed into the hands of law enforcers.”).

⁵¹ Any society that seeks to stamp out drugs, or gambling, or alcohol, or any other sort of behavior that involves consensual transactions, requires law enforcement that is proactive. The illegal transactions do not report themselves, so the police must go looking for them. Where they look determines what kinds of arrests they make, which in turn determines what kinds of cases prosecutors charge. Even if prosecutors had to charge everyone whom the police arrest, drug-type crime would involve an enormous amount of enforcement discretion by the police. That discretion cannot be dispensed with; it is a necessary consequence of the nature of the crime.

Stuntz, *supra* note 21, at 581-82.

⁵² See Kreit, *Drug Truce*, *supra* note 4, at 1339 (alterations in original) (quoting FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 16 (1992)).

⁵³ Stuntz, *supra* note 21, at 593-94 (footnote omitted); see also Kamin, *supra* note 30, at 183-84.

⁵⁴ Stuntz, *supra* note 21, at 528.

appear to be “tough on crime,” meting out “law and order,” or taking “popular symbolic stands . . . to give voters the sense that they are doing something” about an existential problem.⁵⁵

Certain legislative tools help achieve criminal drug enforcement goals, including broad criminalization laws, mandatory minimum sentences, “three strike” punishment schemes, asset forfeiture laws, and policies such as stop-and-frisk.⁵⁶ Law enforcement’s ability to “stack” charges—charge numerous crimes for the same conduct—loads the dice against someone accused of a crime; the enhanced sentencing threat tends to induce guilty pleas, even where the government has a weak case.⁵⁷ These tools empower the police, as the street-level law enforcement arm, to stop and seize suspects, and they make “policing cheaper, because they permit searches and arrests with less investigative work.”⁵⁸ Such policies reduce the cost of law enforcement by transferring broader discretion to prosecutors and the police.⁵⁹

If cannabis in fact enjoyed sufficient social support, why did cannabis users not speak out in protest of prohibition? Actually, there are plenty who did, from law makers and lawyers to grassroots advocates who wrote articles, lobbied, and stood on street corners collecting signatures.⁶⁰ Early advocates were quite brave to challenge the mighty prohibitionist forces.

Stigma and shame are powerful tools for social control. When society categorized cannabis behavior as “vice,”⁶¹ it condemned the behavior as socially unacceptable. It was criminal, deviant, and negative conduct. Many users accepted the shame-inducing “marijuana menace” narrative as true, even if still drawn to the activity. Still others did not believe the narrative but were hesitant for one of any number of reasons, including shame, to support cannabis legalization.

⁵⁵ *Id.* at 534; *Prosecutorial Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform> [<https://perma.cc/A66X-62PJ>] (last visited Apr. 13, 2021); Stuntz, *supra* note 21, at 580.

⁵⁶ See Stuntz, *supra* note 21, at 537.

⁵⁷ *Id.* at 594 (noting that “charge-stacking tends to transfer adjudication from the courthouse to the district attorney’s office,” which relieves the government from having to prove its case in court).

⁵⁸ *Id.* at 539.

⁵⁹ *Id.* at 537 (“To the extent those things help prosecutors charge and convict people at lower cost, that is to legislators’ advantage. Reducing the cost of policing and prosecution means getting more law enforcement for the dollar, something that legislators should find politically rewarding.”).

⁶⁰ See, e.g., OSBECK & BROMBERG, *supra* note 18, at 51-67. A full treatment of these pioneers is well deserved, and (sadly for me), beyond the scope of this Essay.

⁶¹ The Merriam-Webster dictionary defines “vice” as “(1) (a) moral depravity or corruption: WICKEDNESS[,] (b) a moral fault or falling[,] (c) a habitual and usually trivial defect or shortcoming: FOIBLE[,] (2) blemish, defect[,] (3) a physical imperfection, deformity, or taint . . .” *Vice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/vice> [<https://perma.cc/T8D2-V7JA>] (last visited May 21, 2021).

But perhaps the most compelling explanation is that most users did not truly fear arrest and incarceration because the enforcement targeted a different subset of users. This comports with what Stuntz observed about vice regulation generally: while the majority of Americans support a vice ban, a sizable minority wish to participate in the conduct.⁶² The “anti-vice crusades tend to have strong public support, but only so long as the crusades are targeted at a fairly small subset of the population.”⁶³

This both makes sense and is deeply troubling. “In a fair, equitable, and non-discriminatory criminal justice system, sanctions should be imposed equally on offending populations. Yet the racial patterns of persons arrested and incarcerated on drug charges are distantly related, at best, to racial patterns of drug offending.”⁶⁴ Of the larger population of cannabis users, those subject to enforcement are overwhelmingly and disproportionately Black and Latinx individuals and individuals of a lower socioeconomic status.⁶⁵ The ACLU reports “stark racial disparities in marijuana possession arrests” with a nearly four-fold disparate impact on Black and Latinx communities, “even though Black and white people use marijuana at similar rates.”⁶⁶

Indeed, prominent scholars like Michelle Alexander long ago recognized this phenomenon.⁶⁷ Alexander explained in her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, that drug enforcement, and the related phenomenon of mass incarceration, acts as a systemic form of racial and social control for people of color. This effect is particularly severe for Black and Latinx individuals.⁶⁸

While the numbers are down, it has not gone unnoticed that, in light of today’s flourishing state-level legal medicinal and adult-use market, continued criminalization is wrong.

[T]he injustice of the past is a harbinger for today’s marijuana market. While corporations, entrepreneurs, and governments in some jurisdictions are making millions of dollars in profits and revenues in the legal marijuana industry, poor people in other jurisdictions are stuck in handcuffs or jail cells, or with lifelong criminal records for possessing and selling miniscule fractions of what these powerful companies move daily. In some states,

⁶² Stuntz, *supra* note 21, at 573.

⁶³ *Id.*

⁶⁴ Fellner, *supra* note 7, at 278-79.

⁶⁵ This argument is empirically demonstrated by available historic cannabis arrest data. See ACLU, *supra* note 6, at 4-6, 41.

⁶⁶ *Id.* at 5. See generally ALEXANDER, *supra* note 6 (documenting the events that culminated in the eponymous “New Jim Crow”—the mass incarceration of Black people in the United States due to racist crime policies, often about drugs). Survey data consistently finds that rates of cannabis use do not significantly differ between Black and White populations. See, e.g., ACLU, *supra* note 6, at 29; Fellner, *supra* note 7, at 289.

⁶⁷ See generally ALEXANDER, *supra* note 6.

⁶⁸ See generally *id.*

there are even people serving sentences of life without parole for marijuana convictions.⁶⁹

B. *Criminalization Yielded Disproportionately Harsh Consequences*

Cannabis criminalization has been unjust because its current prohibited status lacks rationality and its “criminal brand” purposefully manipulated. This has led to disproportionately harsh consequences compared to the severity of the behavior involved.⁷⁰ Cannabis’s status as a Schedule I CSA substance, a scheduling reserved for the most dangerous of controlled substances, and the belief that cannabis is extraordinarily dangerous, is founded upon misinformation. These irrational grounds have formed the legal basis to justify federal prohibition and harsh penal consequences for cannabis use.⁷¹ While certain cannabis-related conduct should rightfully be criminalized, like driving under the influence or distributing to minors, the majority of conduct is a personal, health-related matter.⁷²

Cannabis’s Schedule I prohibited status is still stuck in what some have termed a legal “Catch-22”⁷³: “The crucial factor in classifying marijuana is whether it has currently accepted medical use. If a controlled substance has no currently accepted medical use, it must be placed in Schedule I regardless of any other factor.”⁷⁴ “[C]urrently accepted medical use,” however, is defined in such a way that it is impossible for a substance to be removed from Schedule I without rigorous testing; and, the federal government has long controlled, and withheld, testing permits.⁷⁵ In other words, because of its Schedule I status, cannabis research requires government approval, but the government has historically

⁶⁹ ACLU, *supra* note 6, at 13-14.

⁷⁰ See Fellner, *supra* note 7, at 289 (“[E]ven if the goal of combating drug abuse were untainted by racialized concerns, the means chosen to achieve that goal—heavy law enforcement in minority neighborhoods—is hardly a proportionate or necessary response”); OSBECK & BROMBERG, *supra* note 18, at 82-85.

⁷¹ See Fellner, *supra* note 7, at 289; OSBECK & BROMBERG, *supra* note 18, at 82-85.

⁷² According to the Drug Policy Alliance, “Marijuana should be removed from the Schedule of Controlled Substances because it has limited potential for abuse, established medical uses, and is safe relative to other substances. De-scheduling marijuana will facilitate medical research, ensure patient access, and remove federal prohibitions.” DRUG POL’Y ALL., *supra* note 18, at 1.

⁷³ See, e.g., *id.* at 300 (“The federal illegalization of marijuana creates a catch-22: the bans on marijuana prevent its legalized use because it is stigmatized as dangerous, and having no medical benefit, but the current regulations as they stand prevent researchers from showing consumers why marijuana *is* dangerous, and has no medical benefit.”); Marisa Taylor & Melissa Bailey, *Medical Marijuana’s “Catch-22”: Fed Limits on Research Hinder Patients’ Relief*, WASH. POST (Apr. 12, 2018, 5:15 AM), https://www.washingtonpost.com/national/health-science/medical-marijuanas-catch-22-fed-limits-on-research-hinder-patients-relief/2018/04/12/031073f6-3e32-11e8-955b-7d2e19b79966_story.html.

⁷⁴ OSBECK & BROMBERG, *supra* note 18, at 89-90.

⁷⁵ *Id.*

thwarted such research: research permits have largely been withheld except for a selection of research projects often designed to prove the negative or harmful propensities associated with the plant.⁷⁶

NIDA has stated that it is generally not in the business of funding or supporting research on the medicinal effects of marijuana. . . .

. . . Although in 2012 NIDA reported granting more than ten times as much funding to finance sixty-nine marijuana-related research projects, the majority of these studies only focused on marijuana's negative effects.⁷⁷

Yet, "marijuana" still sits on Schedule I, providing legal cover for enforcement. Cannabis prohibition holds on by its thinly threaded veil stitched by public deceit, and while one finds enforcement is slowing, cannabis prohibition is still enforced.⁷⁸ "There were a total of 545,601 marijuana arrests in 2019—representing 35 percent of all drug arrests—according to FBI's Uniform Crime Reporting program. That's down from 663,367 the prior year and 659,700 in 2017."⁷⁹

Tamar Todd explains that cannabis criminalization injures all of society because it undermines public faith in the law and government.

The bottom line is that a criminal law that is based on a rationale that most people know to be false, that criminalizes conduct that two-thirds of the people believe should be legal, and that makes half of all American adults

⁷⁶ See, e.g., CAULKINS, KILMER & KLEIMAN, *supra* note 1, at 81-84; DRUG POL'Y ALL., *supra* note 18, at 2 ("DEA and NIDA have successfully created a Catch-22 for patients, doctors and scientists by denying that marijuana is a medicine because it is not FDA-approved, while simultaneously obstructing the very research that would be required for FDA approval"); JOHN HUDAK & GRACE WALLACK, ENDING THE U.S. GOVERNMENT'S WAR ON MEDICAL MARIJUANA RESEARCH 2, 5-7 (2015), <https://www.brookings.edu/wp-content/uploads/2016/06/Ending-the-US-governments-war-on-medical-marijuana-research.pdf> [<https://perma.cc/8E38-KA6X>]; Celeste & Thompson-Dudiak, *supra* note 18, at 23; David J. Nutt, Leslie A. King & David E. Nichols, *Effects of Schedule I Drug Laws on Neuroscience Research and Treatment Innovation*, 14 NATURE REV. NEUROSCIENCE 577, 579 (2013); Harris, *supra* note 19, at A14; Elena Quattrone, Note, *The "Catch-22" of Marijuana [II]legalization*, 22 B.U. J. SCI. & TECH. L. 299, 317-18 (2016) ("[The National Institute on Drug Abuse ("NIDA")] has stated that it is generally not in the business of funding or supporting research on the medicinal effects of marijuana. . . . Although in 2012 NIDA reported granting more than ten times as much funding to finance sixty-nine marijuana-related research projects, the majority of these studies only focused on marijuana's negative effects.").

⁷⁷ Quattrone, *supra* note 76, at 317-18.

⁷⁸ See ACLU, *supra* note 6, at 7 (finding that despite many states' decriminalization efforts, "arrest rates have increased or remain unchanged"); Jaeger, *supra* note 14 ("There were a total of 545,601 marijuana arrests in 2019—representing 35 percent of all drug arrests—according to FBI's Uniform Crime Reporting program. That's down from 663,367 the prior year and 659,700 in 2017." (citations omitted)).

⁷⁹ Jaeger, *supra* note 14.

criminals is not legitimate and serves to undermine people's faith in the law and the government. A law that the vast majority of people do not believe in and refuse to comply with loses its purpose and authority.⁸⁰

It should trouble all who support our democratic legal structure that there is no rational, legitimate basis for cannabis's prohibited CSA listing. It is well beyond time to recognize and abandon prohibition policy based upon a historically false narrative—a narrative that carries with it unjustified penal consequences.

II. MITIGATING COLLATERAL CONSEQUENCES: THE NEED FOR / EXPUNGEMENT RECORD RELIEF /

Cannabis enforcement injustice persists long after the individual's arrest by virtue of their criminal record. A criminal record documents information about an individual's entanglement with law enforcement. While there is jurisdictional variation about what is included on an individual's record, generally the record documents information from arrest to disposition. Thus, an individual's criminal record documents not only criminal convictions but also arrests that never led to a conviction. The typical criminal record documents arrest and release without charge, charges dismissed by the prosecutor or court, and acquittals. Sometimes an individual's criminal record does not indicate how a criminal matter was resolved and thus appears as an outstanding matter.

The existence—and persistence—of the criminal record creates ongoing unjust enforcement harm. Rather than permitting dispositional finality, it lingers on like a permanent stain.⁸¹ Without a form of record relief, a record operates as a dark cloud on someone's personal title, branding them permanently as a criminal.⁸²

Why maintain this information on a criminal record accessible to law enforcement and other parties?⁸³ An oft-recited justification is that those with such records present a potential future threat to public safety.⁸⁴ As a result, access to such records may be granted to law enforcement, courts and peace officers, and members of the general public with a need to know. Law enforcement personnel, for example, might make enforcement and sentencing decisions based upon it. Gun distributors, landlords, and employers, among others, might make eligibility determinations based upon it.⁸⁵

⁸⁰ Todd, *supra* note 5, at 103-04.

⁸¹ Mooney & Rizer, *supra* note 41.

⁸² *Id.*

⁸³ For a thorough history of criminal record retention policy, see generally Roberts, *supra* note 9.

⁸⁴ J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2510 (2020) [hereinafter Prescott & Starr, *An Empirical Study*]. See also Roberts, *supra* note 9, for a thorough policy discussion.

⁸⁵ The empirical study by Prescott and Starr, however, found low subsequent criminal rates

As the collateral consequence scholarship documents, criminal enforcement has a litany of negative consequences. There are over “46,000 local, state, and federal civil laws and regulations . . . [that] restrict the activities of ex-offenders and curtail their liberties after they are released from confinement or their period of probation ends.”⁸⁶ These collateral effects are amplified for individuals of color and those of lower socioeconomic status.⁸⁷

Enforcement inflicts a heavy economic toll on the individual and society. If imprisoned, during the period of societal isolation, the subjects of criminal enforcement are generally un- or underemployed. After incarceration, those subject to criminal enforcement are hindered in their ability to find employment.⁸⁸ Having a record may exclude them from certain jobs, including those in law enforcement, security, or the legal system.⁸⁹ Those with criminal records might also be hampered from accessing educational opportunities because, among other ramifications, they may be prohibited from attending certain schools or receiving financial aid.⁹⁰ Housing opportunities are diminished because many landlords screen for and deny housing to those with criminal records, and having a criminal record might disqualify them from certain types of housing.⁹¹ Individuals with criminal records might not be

for this population, calling into question the basis for this “right to know” argument. *Id.* at 2512-14.

⁸⁶ John G. Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, HERITAGE FOUND. LEGAL MEMORANDUM, Mar. 2017, at 1, 1-2 (footnote omitted), <https://www.heritage.org/sites/default/files/2017-03/LM-200.pdf> [<https://perma.cc/Y58K-QFN9>]; see also ACLU, *supra* note 6, at 13.

⁸⁷ Roberts, *supra* note 9, at 331.

⁸⁸ MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE MANY ROADS TO REINTEGRATION: A 50-STATE REPORT ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION 79 (2020) [hereinafter LOVE & SCHLUSSEL, MANY ROADS TO REINTEGRATION], <https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf> [<https://perma.cc/CB4G-K4P7>].

⁸⁹ *Id.* at 48; Roberts, *supra* note 9, at 328-29 & n. 41-47 (detailing specific employment consequences codified in various state laws for drug-related offenses).

⁹⁰ See Robert Stewart & Christopher Uggen, *Criminal Records and College Admissions: A Modified Experimental Audit*, 58 CRIMINOLOGY 156 (2020) (finding that a specific set of higher education institutions were 2.5 more likely to reject applicants with felony convictions on their records than applicants without felony convictions); 34 C.F.R. § 668.40 (2020) (prohibiting students from receiving aid if convicted of a drug-related offense); *Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid.*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions> [<https://perma.cc/SZ5U-STH8>] (last visited Apr. 13, 2021).

⁹¹ See 24 C.F.R. § 982.553 (2020) (allowing public housing agencies to prohibit admission to and terminate assistance from federal housing programs because of prior criminal activity); see also LEGAL ACTION CTR. & NAT’L HIRE NETWORK, HELPING MOMS, DADS & KIDS TO COME HOME: ELIMINATING BARRIERS TO HOUSING FOR PEOPLE WITH CRIMINAL RECORDS 3 (2016), https://www.lac.org/assets/files/LAC_Helping_Moms_Dads_and_to_Kids_Come_Home-Eliminating_Barriers_to_Housing_For_People_With_Criminal_Records.pdf [<https://perma.cc/WJ8Q-4YGK>].

eligible for certain types of public welfare assistance, including food assistance.⁹²

Enforcement creates barriers to opportunity by preventing individuals with criminal records from fully engaging in society. Among other things, criminal records might prevent individuals from driving,⁹³ voting,⁹⁴ serving on a jury,⁹⁵ and owning a gun.⁹⁶ Criminal records might even prevent individuals from other types of civic engagement such as volunteering at schools.⁹⁷

Enforcement creates cross-generational, and psychological, effects. The children of parents with a criminal record experience socioeconomic barriers that might last for generations.⁹⁸ And because criminal records may be used to target noncitizens for deportation, enforcement could serve to separate family members.⁹⁹ Criminal records, moreover, create persistent stigma that leads to unhappy and traumatic life experiences.¹⁰⁰

All this for getting high?

Many scholars and policy influencers posit that because historic unjust enforcement persists in so many harmful collateral ways, there is a strong need for some type of mitigating legal relief.¹⁰¹ “Record relief” is a term comprising the “various legal authorities that revise or supplement a person’s criminal record to reduce or eliminate barriers to opportunity in civil society.”¹⁰² Record relief includes record supplementation and record revision.

⁹² See 21 U.S.C. § 862a.

⁹³ E.g., 23 U.S.C. § 164 (providing that individuals charged with driving while intoxicated more than once shall have their driving privileges suspended for a period of not less than one year).

⁹⁴ As of October 2020, 5.17 million voting-age U.S. citizens—one in forty-four citizens—were disenfranchised for the 2020 presidential election because of a felony conviction. Chris Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENTENCING PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> [<https://perma.cc/6UBB-E8NW>].

⁹⁵ 28 U.S.C. § 1865.

⁹⁶ 18 U.S.C. § 922.

⁹⁷ E.g., MASS. GEN. LAWS ch. 71, § 38r (2020).

⁹⁸ KENNY LO, CTR. FOR AM. PROGRESS, EXPUNGING AND SEALING CRIMINAL RECORDS 1 (2020), https://cdn.americanprogress.org/content/uploads/2020/04/23094720/04-23_Expunging-and-Sealing.pdf [<https://perma.cc/CT35-B72H>].

⁹⁹ *Id.*

¹⁰⁰ See Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOCIO. REV. 719, 736 (2017).

¹⁰¹ See, e.g., Alana E. Rosen, *High Time for Criminal Justice Reform: Marijuana Expungement Statutes in States with Legalized or Decriminalized Marijuana Laws 22-27* (Feb. 1, 2019) (unpublished comment), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327533 [<https://perma.cc/KX5T-8X5U>].

¹⁰² LOVE & SCHLUSSEL, MANY ROADS TO REINTEGRATION, *supra* note 88, at 23. Record relief is a term that refers to “measures that operate on the criminal record itself to reduce its negative effect” and include expungement, sealing, vacating or pardoning of convictions,

Record-supplementing relief includes additions to an existing record that revise and mitigate that record. Two common examples are executive pardons and judicial certificates of relief pardons.¹⁰³

Record-revising relief, which has gained significant traction and attention, includes sealing and expungement. Sealing refers to limiting who has access to a criminal record.¹⁰⁴ Eligibility differs among jurisdictions but often results in sealing records from the view of the general public, while still permitting limited access to law enforcement.¹⁰⁵ Sealing remedies typically provide criminal justice agencies, such as police and prosecutors, broader access to criminal records than members of the general public, such as landlords and employers.¹⁰⁶

Expungement is considered preferable to sealing because it most assures holistic elimination of collateral consequences. Expungement refers to complete destruction of the prior official criminal record.¹⁰⁷ Typically, this means the records cannot be accessed through the criminal records database by anyone, including law enforcement agencies and courts.¹⁰⁸ Moreover, emerging evidence reflects that people who obtain this record revising relief experience improved employment outcomes and have lower recidivism rates. J.J. Prescott and Sonja Starr compared Michigan expungement recipients' outcomes to those of nonexpungement recipients.¹⁰⁹ They found that those who obtain

diversion or deferral of judgments, regulation of access to records, and regulation discretionary decision-making based on access to criminal records. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE REINTEGRATION AGENDA DURING PANDEMIC: CRIMINAL RECORDS REFORMS IN 2020 (2021) [hereinafter LOVE & SCHLUSSEL, REINTEGRATION AGENDA], https://ccresourcecenter.org/wp-content/uploads/2021/01/CCRC_The-Reintegration-Agenda-During-Pandemic_2020-Reforms.pdf [https://perma.cc/QG5A-UAQ7].

¹⁰³ LOVE & SCHLUSSEL, MANY ROADS TO REINTEGRATION, *supra* note 140, at 23; *see also* Gene Johnson, *Washington Gov. Inslee to Pardon Marijuana Convictions*, AP NEWS (Jan. 4, 2019), <https://apnews.com/a57f9cd5ec4a40bcbdf7467589da617d>.

¹⁰⁴ LO, *supra* note 98, at 2.

¹⁰⁵ *What Is "Expungement?"*, ABA (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-_expungement-/ [https://perma.cc/J76N-BWTJ].

¹⁰⁶ LO, *supra* note 98.

¹⁰⁷ *What Is "Expungement," supra* note 105. "Set asides" have benefits similar to expungement, but they do not go as far. The conviction is still on the record, but it is marked as "set aside" or "dismissed" on the person's record.

¹⁰⁸ However, the Internet and certain extant files still contain references to that information.

¹⁰⁹ *Id.* at 2510-43. Note that while the Prescott and Starr study was limited to Michigan, it does provide additional support for national trends. J.J. Prescott & Sonja B. Starr, Opinion, *After Jail Time, A Clean Slate*, N.Y. TIMES, Mar. 21, 2019, at A27 [hereinafter Prescott & Starr, *A Clean Slate*] ("For many years, debates about expungement laws have been missing something critical: hard data about their effects. But this week, we released the results of the first major empirical study of expungement laws. Michigan, where our data came from, has an expungement law that exemplifies the traditional nonautomatic approach.").

expungement have extremely low subsequent crime rates, comparing favorably to the general population,¹¹⁰ and that expungement recipients gained access to more and better paying jobs.¹¹¹ Above all, expungement is a form of exoneration, and there is dignity in exoneration.¹¹²

Early sealing and expungement efforts can be traced to the 1940s in contexts other than cannabis.¹¹³ Over time, advocacy and policy groups amplified their calls for such “Clean Slate” programs.¹¹⁴

Particularized focus on cannabis expungement began in 2016; California’s legalization ballot measure included provisions authorizing record sealing, offense reduction, and the potential for those serving jail time to apply for resentencing.¹¹⁵ These and other grassroots and legislative efforts catalyzed Douglas Berman’s 2018 “Leveraging Marijuana Reform to Enhance Expungement Practices” article, in which he “urge[d] states that are reforming their marijuana laws to be particularly concerned with remedying past inequities and burdens of mass criminalization” by

offer[ing] robust retroactive ameliorative relief opportunities for prior marijuana offenses” and “dedicat[ing] resources generated by marijuana reform to create and fund new institutions to assess and serve the needs of a broad array of offenders who seek to remedy the collateral consequences of prior involvement in the criminal justice system.¹¹⁶

¹¹⁰ Prescott & Starr, *An Empirical Study*, *supra* note 84, at 2513-14.

¹¹¹ *Id.* at 2527-33; *see also* Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 48 (2017).

¹¹² Roberts, *supra* note 9, at 334; *see also* Mooney & Rizer, *supra* note 41 (“Perhaps just as significantly, individuals with criminal records will be allowed to regain their dignity . . .”).

¹¹³ Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1707-15 (2003) (tracing the legal history of sealing and expungement laws).

¹¹⁴ By 2013, every state legislature had adopted some measure to “chip away at the negative effects of a criminal record,” and some by their nature applied to cannabis. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019, at 1-2 (2020) [hereinafter LOVE & SCHLUSSEL, PATHWAYS TO REINTEGRATION], https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf [<https://perma.cc/4CEF-LK5V>].

¹¹⁵ J. RICHARD COUZENS & TRICIA A. BIGELOW, PROPOSITION 64: “ADULT USE OF MARIJUANA ACT” RESENTENCING PROCEDURES AND OTHER SELECTED PROVISIONS 6 (2017), <https://www.courts.ca.gov/documents/prop64-Memo-20170522.pdf> [<https://perma.cc/5RXT-UHJU>].

¹¹⁶ Douglas A. Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices*, 30 FED. SENT’G REP. 305, 305 (2018); *see also* LOVE & SCHLUSSEL, PATHWAYS TO REINTEGRATION, *supra* note 115, at 10-20 (surveying extant state law record relief provisions).

He also called upon policy makers and reformers to link modern cannabis reform with the expungement movement.¹¹⁷

The Collateral Consequences Resource Center (“CCRC”) “Restoration of Rights Project,” an endeavor that originated with collateral consequence scholar Margaret Colgate Love, and then expanded through the dedicated scholars at CCRC and its associated partnerships, tracks state record relief efforts including expungement and sealing. According to the CCRC, “As legalization continues to advance, the expungement of criminal records has finally attained a prominent role in marijuana reform”¹¹⁸ As of November 20, 2020, twenty-three states and the District of Columbia had enacted expungement, sealing, or set-aside laws specifically for records with marijuana convictions.¹¹⁹ Additionally, six states had developed specialized pardon programs for marijuana offenses.¹²⁰ Six states had also enacted some form of automatic expungement or record sealing.¹²¹ Each year yields additional attempts by state and the federal legislatures, citizen ballot initiatives, and executive orders to broaden access to record relief.¹²²

III. ERASING EVIDENCE OF HISTORIC INJUSTICE: THE EXPUNGEMENT / PARADOX /

Expunging cannabis criminal records to further individual justice is a critical endeavor. While expungement of the individual record is a necessary remedy, however, widespread erasure of historic injustice is an undesirable outcome. Both can be simultaneously achieved by maintaining select records prior to expunging identifying information.

Because expungement is a trend on the rise, addressing the resulting “expungement paradox” is a pressing issue. Indeed, the CCRC documents the rise in expungement efforts and calls for automatic, rather than petition-based, expungement:

¹¹⁷ *Id.*; see also David Schlusel, Note, “*The Mellow Pot Smoker*”: *White Individualism in Marijuana Legalization Campaigns*, 105 CALIF. L. REV. 885, 890 (2017); Rosen, *supra* note 101.

¹¹⁸ David Schlusel, *Marijuana Expungement Accelerates Across the Country*, COLLATERAL CONSEQUENCES RES. CTR. (Nov. 20, 2020) [hereinafter Schlusel, *Marijuana Expungement Accelerates*], <https://ccresourcecenter.org/2020/11/20/marijuana-expungement-accelerates-across-the-country/> [https://perma.cc/V7J3-DL39]. The CCRC has played a prominent role in tracking this issue.

¹¹⁹ *Id.* As of March 2019, “[a]t least 36 states [had] laws allowing expungement” of criminal records generally. Prescott & Starr, *A Clean Slate*, *supra* note 109, at A27.

¹²⁰ Schlusel, *supra* note 118. This trend continued from 2019. See generally LOVE & SCHLUSSEL, *PATHWAYS TO REINTEGRATION*, *supra* note 114, at 10-12; Prescott & Starr, *A Clean Slate*, *supra* note 109, at A27 (noting the “explosion” in expungement activity).

¹²¹ LOVE & SCHLUSSEL, *REINTEGRATION AGENDA*, *supra* note 102, at 3. ’

¹²² *Id.*; Roberts, *supra* note 9, at 322. ’

In 2021, we predict a continuing expansion of record-clearing opportunities, both for conviction and non-conviction dispositions. We also expect additional efforts to automate record relief, which will in turn necessitate . . . improved records management by courts and repositories, which should lead to better coordination of state and federal records systems

. . . .

[W]e hope Congress will work to make available to people with federal convictions the same type of statutory restoration mechanisms that are available for people with state convictions¹²³

Fully erasing history, particularly one of injustice, is dangerous. First, society does not know the full extent of the injustice. For example, a complete historical accounting for Latinx and multiracial people in the United States has not yet been completed.¹²⁴ The ACLU qualifies evidence of racial bias in its report as follows:

- Although a great body of evidence establishes that Latinx individuals face racial bias in policing and discrimination in the criminal legal system writ large, we were not able to compare marijuana arrest rates for Latinx individuals in this report.
- The FBI’s Uniform Crime Reporting arrest data is the most up-to-date and comprehensive data on arrests nationally, by state, and by county. However, similar to many federal data collection efforts, [Uniform Crime Reporting] data fails to disaggregate between Latinx individuals of different races, making it impossible to distinguish between Latinx and non-Latinx individuals in the Black and white populations. . . .
- [D]isparities for bi- or multiracial people cannot be examined with [Uniform Crime Reporting] data because the [Uniform Crime Reporting] Program employs a “check one” approach to race, and does not allow for an individual to be coded as more than one race.¹²⁵

The record system itself serves as the primary evidence of a systemic and historic pattern of unjust enforcement. Preservation protects the potential for future accountability for past unjust cannabis criminal enforcement. These records document an era of law enforcement, the foundational evidence for which is paradoxically eliminated when individual records are expunged.

In light of the rapid pace of legal expungement efforts¹²⁶—which is a positive development—the exact parameters of what this documentation should contain

¹²³ LOVE & SCHLUSSEL, REINTEGRATION AGENDA, *supra* note 154, at 5-6.

¹²⁴ Query whether it ever will be done in light of the dearth of certain historic information.

¹²⁵ ACLU, *supra* note 6, at 4; *see also* Roberts, *supra* note 9, at 326 n.26; MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 5:42 (2018).

¹²⁶ *See* Schlusssel, *Marijuana Expungement Accelerates*, *supra* note 118.

and how it should be maintained require imminent policy discussion and implementation.¹²⁷ Thus, some perhaps entirely new form of record documentation needs to be protected. From a historical perspective, entities should expunge sensitive personally identifying information, while maintaining other important information of historic and legal value. At a minimum, expunging authorities should consider maintaining a record of the geographic area where those individuals were arrested; important demographic information about the arrestee, including race, ethnicity, national origin, disability, gender, gender identity, and age demographic; and the nature of any related assets seized if known. To protect personal privacy and the sanctity of expungement, the individual's name and other personal information should be expunged. This will balance individual record relief with accountability and transparency, while still promoting future understanding of enforcement practices.¹²⁸ In many respects, this proposal requires a relatively modest adjustment to ongoing expungement efforts.

One important issue this proposed policy adjustment does not resolve is the fact that an individual whose record was expunged might elect to pursue future legal rights and remedies, and automatic, full destruction of these records could interfere with their ability to access legal relief. For example, present "best legal practice" in records relief advises expungement recipients who might apply for a visa or otherwise seek to change their immigration status to seek specialized immigration law counsel prior to expungement and, in any event, to retain a certified copy of their expunged records.¹²⁹ Recipients engaged in later civil rights, prosecutorial misconduct, or other future litigation relating to their conviction, too, might need to prove the facts of the underlying matter.¹³⁰ Additionally, agencies beyond the expunging governmental authority might still have a copy of the record, or human error might have led to incomplete expungement, and expungement recipients might later need a copy of the

¹²⁷ ACLU, *supra* note 6, at 8-9.

¹²⁸ Note that some data entities such as Code for America have begun to partner with governments and potential expungement recipients to digitally accomplish expungement. They have started "Clear My Record" and, as a data-based service, might be positioned to compile select data on expungement. *See Clear My Record*, CODE FOR AM., <https://www.codeforamerica.org/programs/clear-my-record> [<https://perma.cc/R3B9-8Q4L>] (last visited Apr. 13, 2021).

¹²⁹ *See, e.g.*, GREATER BOSTON LEGAL SERVICES EXPUNGEMENT PACKET: EXPUNGING UNDER MASS. GEN. LAWS CHAPTER 276, § 100K (2019) [hereinafter GBLS PACKET], <https://www.mass.gov/doc/greater-boston-legal-services-expungement-packet/download> [<https://perma.cc/XP4Y-BY5Z>] (advising any noncitizen to "get legal advice from an immigration lawyer about whether to expunge," and advising of the future need to show how case ended (emphasis omitted)); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., 1 POLICY MANUAL pt. E, ch. 8 (2021), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> [<https://perma.cc/YWL2-T535>].

¹³⁰ GBLS PACKET, *supra* note 129, § 100K.

expunged record history to correct system data.¹³¹ Note that this creates an issue for full and automatic expungement programs, which will need to identify a policy solution to this dilemma.

CONCLUSION

It has long been time to move past the tarnished policy relic that is cannabis prohibition. Today's population supports legalization.¹³² According to a recent poll, "Three in four American voters support either legalizing marijuana nationally or letting states decide on the policy Only 25 percent want to broadly enforce cannabis prohibition across the country."¹³³

While it is easy to get caught up in the exhilarating momentum of state-level drug legalization, federal prohibition, its ensuing enforcement, and its unjust vestiges linger. Cannabis criminalization has yielded historic injustice. Society is just beginning to recognize, define, and process this injustice. While certain truths are known—for example, it is well-documented that there has been a disproportionate impact on individuals of color—the magnitude of the injustice is not fully understood.

To begin to remedy this injustice, society is appropriately embarking on widespread individual record relief with a trend toward automatic, rather than petition-based, expungement. Overall, expungement is a well-crafted remedy that seeks to redress individual harm perpetuated by this record. Expungement, however, yields an outcome paradox. Society needs to balance alleviation of the harsh consequences for the individual with the need to maintain a historical account of this period in legal enforcement history. Our understanding of the magnitude of cannabis enforcement will take time and will unfurl, ironically, as the system identifies those in need of record relief through the process of expungement.

This enforcement history is of tremendous social consequence. As documentary stewards responsible for preserving and protecting evidence, the

¹³¹ For example, the FBI may maintain a record of a criminal matter even if the case was expunged. See *You May Be Able to Seal or Expunge Past Marijuana Cases Immediately*, MASSLEGALHELP (July 2019), <https://www.masslegalhelp.org/cori/sealing/marijuana-possession> [<https://perma.cc/K9LV-D2ZS>]. Note that some states using automatic sealing or expungement also report to the FBI and DOJ to try to sync the records. See, e.g., MASS. GEN. LAWS ch. 276, § 100C (2020). Yet, there might still be records lingering that will require future proof of expungement. *Id.* § 100D.

¹³² See Megan Brenan, *Support for Legal Marijuana Inches up to New High of 68%*, GALLUP NEWS (Nov. 9, 2020), <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx> [<https://perma.cc/49Z2-6UH6>] (reporting findings of poll taken between September 30–October 15, 2020); Kyle Jaeger, *Three in Four U.S. Voters Support Ending Federal Marijuana Prohibition, New Poll Finds*, MARIJUANA MOMENT (Apr. 1, 2021), <https://www.marijuanamoment.net/three-in-four-u-s-voters-support-ending-federal-marijuana-prohibition-new-poll-finds/> [<https://perma.cc/J853-HN2E>].

¹³³ Jaeger, *supra* note 132.

legal community and those who influence cannabis law and policy should sufficiently protect this information for the future. Expunging entities should maintain a curated record—one that eliminates, to the extent possible, sensitive personally identifying information, while maintaining other important information of historic and legal value. Policy thinkers will still need to address a solution for the expungement recipient’s later need for records, data privacy principles that protect any retained expungement records, and how to incentivize and pay for large-scale expungement.¹³⁴

Erase the individual’s record without erasing history.

¹³⁴ On a panel at this Symposium, Doug Berman suggested that this might be accomplished through a version of a “civil Gideon,” an idea worth exploring. School of Law, Boston University, *Panel 8 - Marijuana and Criminal Justice Reform*, YOUTUBE (Nov. 30, 2020), https://www.youtube.com/watch?v=ybDNEZGjZGY&list=PLjUaIPHI8K_pQZPxmRYvM6cPFSg2D0rXB&index=8.