

# Ensuring Marijuana Reform Is Effective Criminal Justice Reform

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## INTRODUCTION

In less than a decade, marijuana legalization has gone from unthinkable to seemingly unstoppable. The idea was viewed as so far outside the mainstream in 2009 that President Barack Obama's first drug czar Gil Kerlikowske dismissively told a reporter that "[l]egalization [was] not in the President's vocabulary."<sup>1</sup> When California voters rejected the first major state-wide marijuana legalization ballot initiative in November 2010, the Obama administration celebrated the result.<sup>2</sup> Fast forward just six years, and voters in eight states had approved full adult-use legalization laws and Obama was telling *Rolling Stone* that he thought marijuana should be treated "as a public-health issue, the same way we do with cigarettes or alcohol."<sup>3</sup> Today, marijuana legalization enjoys broad bipartisan support. Sixty-seven percent of Americans favor legalizing marijuana according to a late-2019 Pew

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1. Nick Gillespie, "Legalization Is Not in the President's Vocabulary . . . Marijuana Is Dangerous and Has No Medicinal Benefit," *Love, Obama's Drug Czar*, REASON (July 23, 2009, 2:23 PM), <http://reason.com/blog/2009/07/23/legalization-is-not-in-the-pre> [<https://perma.cc/32TG-Y3AV>].

2. See Matthew T. Hall, *Proposition 19 Loses in California*, SAN DIEGO UNION-TRIB. (Nov. 2, 2010, 7:09 PM), <https://www.sandiegouniontribune.com/sdut-proposition-19-in-early-returns-2010nov02-htmlstory.html> [<https://perma.cc/PE4A-59BZ>] (reporting Kerlikowske's comments that "[t]he Obama Administration has been clear in its opposition to marijuana legalization because research shows that marijuana use is associated with voluntary treatment admissions for addiction, fatal drugged driving accidents, mental illness, and emergency room admissions.").

3. Jann S. Wenner, *The Day After: Obama on His Legacy, Trump's Win and the Path Forward*, ROLLING STONE (Nov. 29, 2016, 2:00 PM), <https://www.rollingstone.com/politics/politics-features/the-day-after-obama-on-his-legacy-trumps-win-and-the-path-forward-113422/> [<https://perma.cc/SA64-J6UC>]; Katy Steinmetz, *These States Just Legalized Marijuana*, TIME (Nov. 10, 2016, 4:59 PM) <https://time.com/4559278/marijuana-election-results-2016/> [<https://perma.cc/B8N6-DELC>].

Research Center survey<sup>4</sup>—up from 32% in 2006.<sup>5</sup> Following the 2020 election, a full fifteen states have now legalized the possession, sale, and manufacture of marijuana for all adult uses.<sup>6</sup> In addition, Washington, D.C. has legalized the possession and cultivation of small amounts of marijuana, although commercial manufacture and sale remain prohibited.<sup>7</sup>

Arizona has become one of the latest states to legalize marijuana via ballot initiative.<sup>8</sup> This November, Arizonans voted on a legalization ballot measure called the Smart and Safe Arizona Act.<sup>9</sup> In 2016, Arizona voters narrowly rejected a legalization initiative with 48.7% voting in favor.<sup>10</sup> As national polling trends and early state polling<sup>11</sup> indicated, this year's measure appeared likely to pass and a full 60% of Arizona voters ultimately supported legalization in 2020.<sup>12</sup> The measure's impact on Arizona's criminal justice system will depend in no small part on how the law is implemented. The proposal's expungement provision, for example, requires people with eligible convictions to petition in order to clear their record.<sup>13</sup> The experience in other states suggests that policymakers and other criminal justice actors will wield

4. See Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [<https://perma.cc/H94C-AY5B>].

5. See A.W. Geiger, *Support for Marijuana Legalization Continues To Rise*, PEW RSCH. CTR. (Oct. 12, 2016), <https://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/> [<https://perma.cc/Z777-RGWL>].

6. See Clara Geoghegan, *Marijuana's 2020 Election Sweep Means Fifteen States Have Legalized*, WESTWORD (Nov. 4, 2020, 8:59 AM) <https://www.westword.com/marijuana/marijuana-2020-election-sweep-fifteen-states-legalized-11836084> [<https://perma.cc/LAG2-X8AB>].

7. See Metro. Police Dep't, *The Facts on DC Marijuana Laws*, DC.GOV, <https://mpdc.dc.gov/marijuana> [<https://perma.cc/ZYC3-HRHD>].

8. Ray Stern, *Arizona Just Legalized Marijuana—Now What?*, PHX. NEW TIMES (Nov. 5, 2020, 6:00 AM), <https://www.phoenixnewtimes.com/marijuana/arizona-legal-marijuana-faq-answers-experts-legalization-prop-207-law-11510843> [<https://perma.cc/L8FT-9Q7U>].

9. Smart and Safe Arizona Act, Initiative Petition Serial Number I-23-2020 (proposed amendment 2019), <https://apps.arizona.vote/info/assets/18/0/BallotMeasures/I-23-2020.pdf> [<https://perma.cc/FP3H-UBHG>]; *Vote YES on Prop. 207 This November!*, SMART & SAFE ARIZ., <https://smartandsafeaz.com/> [<https://perma.cc/R4MR-5J6X>].

10. See *Arizona Marijuana Legalization, Proposition 205 (2016)*, BALLOTEDIA, [https://ballotpedia.org/Arizona\\_Marijuana\\_Legalization,\\_Proposition\\_205\\_\(2016\)](https://ballotpedia.org/Arizona_Marijuana_Legalization,_Proposition_205_(2016)) [<https://perma.cc/C3L5-UN5B>].

11. Kyle Jaeger, *Two-Thirds of Arizona Voters Support Marijuana Legalization Ballot Measure, Poll Shows*, MARIJUANA MOMENT (June 2, 2020), <https://www.marijuanamoment.net/two-thirds-of-arizona-voters-support-marijuana-legalization-ballot-measure-poll-shows/> [<https://perma.cc/7F5Y-38Q5>].

12. *Arizona Proposition 207, Marijuana Legalization Initiative (2020)*, BALLOTEDIA, [https://ballotpedia.org/Arizona\\_Proposition\\_207,\\_Marijuana\\_Legalization\\_Initiative\\_\(2020\)](https://ballotpedia.org/Arizona_Proposition_207,_Marijuana_Legalization_Initiative_(2020)) [<https://perma.cc/VJ4P-4YR9>].

13. See Smart and Safe Arizona Act, *supra* note 9, § 36-2862 (discussed *infra* Part II).

substantial influence over the number of people who benefit from this expungement provision.<sup>14</sup> Similarly, the extent to which legalization might reduce racially disparate policing practices like pretextual car stops will depend more on implementation than on the text of the initiative itself.

This essay—written for a special issue on improving Arizona’s criminal justice system—discusses how Arizona should best advance marijuana legalization so that it can significantly improve Arizona’s criminal justice system. Now that Arizona has legalized marijuana via ballot initiative, we do not wade too deeply into the arguments for and against legalization or the criminal justice impact inherent in the repeal of prohibition (such as reductions in marijuana arrests and sentences). Instead, we focus on steps that Arizona policymakers and advocates who are interested in improving the criminal justice system can take to ensure that legalization best advances this goal. First, we set the stage in Part I with a brief history of marijuana prohibition, its role in criminal enforcement today, and the movement to enact state legalization laws. In Part II, we turn our attention to Arizona, beginning with a description of marijuana reform efforts in Arizona and key facets of the Smart and Safe Arizona Act. We then provide recommendations for policymakers and other concerned parties about how to ensure modern marijuana reforms in Arizona (and elsewhere) can and should help build a reform infrastructure that could not only ensure record relief to redress past marijuana convictions but also address broader criminal justice issues that historically intersect with marijuana prohibition. Part III concludes.

## I. A BRIEF HISTORY OF MARIJUANA PROHIBITION AND STATE LEGALIZATION LAWS

### A. *The Rise of Marijuana Prohibition*

Marijuana prohibition laws in the United States date back to the early 1900s, with the first state laws criminalizing marijuana coming in the mid-

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14. See Katie Zezima, *Cities, States Work To Clear Marijuana Convictions, Calling It a States’ Rights Issue*, WASH. POST (Feb. 1, 2018, 4:15 P.M.), <https://www.washingtonpost.com/national/2018/02/01/cities-states-work-to-clear-marijuana-convictions-calling-it-a-states-rights-issue/> [https://perma.cc/AP4N-BESS]; Mariah Woelfel, *How is Marijuana Expungement Working in Illinois?*, NPR (Oct. 17, 2019), <https://www.npr.org/local/309/2019/10/17/770701388/how-is-marijuana-expungement-working-in-illinois> [https://perma.cc/7982-F5YA].

1910s.<sup>15</sup> By early 1931, twenty-two states—but not Arizona—had adopted marijuana prohibition laws.<sup>16</sup> Later that year, Arizona joined the group of prohibition states with the passage of the Arizona Narcotic Control Act, which criminalized the possession and sale of marijuana.<sup>17</sup> In 1932, marijuana made its way into the model legislation for state drug prohibition laws, the Uniform Narcotic Drug Act; in 1935, Arizona revised its drug laws to mirror the Uniform Narcotic Drug Act.<sup>18</sup> It was not until 1937 that marijuana prohibition was enacted at the federal level, with passage of the Marihuana Tax Act.<sup>19</sup>

By the end of the 1930s, marijuana prohibition was effectively national policy.<sup>20</sup> But the federal Marihuana Tax Act was inefficient and difficult to enforce. Specifically, because of the Supreme Court’s constrained view of Congress’s interstate commerce power, the Marihuana Tax Act did not criminalize the drug directly. Instead, like other federal drug prohibition laws of the era,<sup>21</sup> it was based on a “cumbersome system of taxes.”<sup>22</sup> Partly because

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15. Richard J. Bonnie & Charles H. Whitebread, II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970). This section draws heavily from Alex Kreit, *Marijuana Legalization*, in 1 REFORMING CRIMINAL JUSTICE 115 (Erik Luna ed., 2017).

16. U.S. SURGEON GEN., STATE LAWS RELATING TO THE CONTROL OF NARCOTIC DRUGS AND THE TREATMENT OF DRUG ADDICTION 14 (1931) (reporting that twenty-one states had prohibited the sale of cannabis “except upon the prescription of a licensed physician, dentist, or veterinary surgeon” and that Wyoming had barred its sale entirely; only four of those states prohibited marijuana cultivation). For a discussion of Arizona’s drug laws at the time, see *id.* at 40–43 (reporting that “Arizona was one of the first jurisdictions to enact legislation permitting the control of the distribution and use of narcotic drugs,” but “among the defects of [its] current laws are the lack of provisions defining *Cannabis indica* as a restricted habit-forming narcotic drug”).

17. *Stoudamire v. Simon*, 141 P.3d 776, 778 (Ariz. Ct. App. 2006) (citing Arizona Narcotic Control Act of 1931, ch. 36, § 3, 1931 Ariz. Sess. Laws 61–72).

18. Michael D. Moberly & Charitie L. Hartsig, *The Arizona Medical Marijuana Act: A Pot Hole for Employers?*, 5 PHX. L. REV. 415, 426 (2012).

19. Marihuana Tax Act of 1937, ch. 553, 50 Stat. 551 (repealed 1970).

20. See Richard J. Bonnie, *The Surprising Collapse of Marijuana Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 573, 577 (2016) (“Pretty much the whole country was already covered by state drug prohibitions before the Marihuana Tax Act was enacted.”); see also U.S. SEC’Y OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30 1937, at 176 (1938) (reporting that “[a]ll of the States and the Territory of Hawaii now have laws for the control and suppression of the traffic in marihuana or cannabis” and that Arizona had adopted the Uniform Narcotic Drug Act).

21. Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 CATH. U. L. REV. 586, 593 (1973) (explaining that Congress’ decision in the 1914 Harrison Act to regulate drugs through its taxing power and not its power to regulate interstate commerce was due to the fact that “the interstate commerce clause was still read rather restrictively by the courts”).

22. *Id.* at 606; see also *id.* at 600 (describing how the Marihuana Tax Act operated).

of the Marihuana Tax Act's awkward tax-based structure, there was comparatively little federal enforcement of the law.

This all changed in 1970, with passage of the federal Controlled Substances Act (CSA).<sup>23</sup> By that time, changes in the Supreme Court's Commerce Clause jurisprudence allowed Congress to replace its tax-stamp-based prohibition with an outright ban on marijuana manufacturing, distribution, and simple possession.<sup>24</sup> The CSA, which is still in force today, regulates substances via a five-tiered scheduling system.<sup>25</sup> Substances in Schedule I are banned except for use in approved research projects, while substances in Schedules II through V can be manufactured and distributed for medical use.<sup>26</sup> When Congress wrote the CSA, it placed marijuana in Schedule I,<sup>27</sup> where the substance has remained ever since—despite ongoing efforts of advocates to have it rescheduled.<sup>28</sup>

In an effort to maintain consistency between state and federal drug laws, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Controlled Substances Act.<sup>29</sup> Nearly every state, including Arizona, has adopted a version of the Uniform Controlled Substances Act.<sup>30</sup> In Arizona's case, the legislature replaced its drug laws with the Arizona Uniform Controlled Substances Act in 1979.<sup>31</sup>

These changes to the law precipitated a more vigorous approach to enforcement. Not long after passage of the CSA, President Richard Nixon declared a “war” against drugs.<sup>32</sup> This led to a sharp increase in federal involvement in drug enforcement, including the formation of the Drug Enforcement Administration and, in the 1980s, the rise of lengthy federal

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23. See Nat'l Org. for the Reform of Marijuana L. v. Bell, 488 F. Supp. 123, 126–28 (D.D.C. 1980) (explaining that the CSA “ended the patchwork federal effort against drug abuse and signaled a national commitment to deal with this problem by committing federal funds for rehabilitation programs”).

24. Indeed, Congress had already passed drug legislation based on its commerce power prior to the Controlled Substances Act. Quinn & McLaughlin, *supra* note 21, at 602–03.

25. 21 U.S.C. § 812(b)(1).

26. *Id.*

27. *Id.*

28. *E.g.*, Washington v. Barr, 925 F.3d 109, 113 (2d Cir. 2019) (“This is the latest in a series of cases that stretch back decades and which have long sought to strike down the federal government’s classification of marijuana as a Schedule I drug under the Controlled Substances Act.”).

29. GERALD F. UELMEN & ALEX KREIT, DRUG ABUSE AND THE LAW SOURCEBOOK § 1:30 (2019) (providing an overview of state enactment of the Uniform Controlled Substances Act).

30. *Id.*; Moberly & Hartsig, *supra* note 18, at 426–27.

31. Moberly & Hartsig, *supra* note 18, at 426–27.

32. See Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1328–35 (2016) (providing a brief history of the war on drugs).

mandatory minimum drug penalties.<sup>33</sup> During this period, the federal government also took steps to encourage states to ramp up their own drug enforcement.<sup>34</sup> As discussed below, the drug war saw a dramatic rise in marijuana enforcement, especially arrests.

### *B. Marijuana Prohibition, Arrests, and Incarceration*

Drug arrests climbed steadily beginning in the 1970s. When the CSA was passed in 1970, there were just over 400,000 drug arrests across the country.<sup>35</sup> By 1974, that number had jumped to 600,000.<sup>36</sup> Arrest numbers remained relatively stable during the Carter administration before rising to a height of almost 1.9 million in 2005.<sup>37</sup> Drug arrests have declined somewhat since then, but the 1.65 million in 2018 were still more than four times as many as in 1970.<sup>38</sup>

Marijuana arrests, in particular, rose sharply starting in the 1990s. In 1990, there were 327,000 marijuana arrests in the United States.<sup>39</sup> A decade later, there were 734,000 marijuana arrests.<sup>40</sup> Marijuana arrests continued to rise in the 2000s, with a total of 889,133 in 2010—“300,000 more than arrests for all violent crimes combined—or one every 37 seconds.”<sup>41</sup> Marijuana arrests have declined somewhat since then, due at least in part to state legalization and local decriminalization reforms.<sup>42</sup> Still, in 2018, there were over 663,000 arrests for marijuana offenses; “92% of marijuana arrests were for possession

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33. *Id.*

34. *Id.* at 1333.

35. See RYAN S. KING, THE SENT’G PROJECT, DISPARITY BY GEOGRAPHY: THE WAR ON DRUGS IN AMERICA’S CITIES 5 (2008), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Disparity-by-Geography-The-War-on-Drugs-in-Americas-Cities.pdf> [<https://perma.cc/ES2M-CG6G>] (reporting statistics from 1970 to 2005).

36. See *id.* at 4–5.

37. *Id.*

38. *Crime in the United States 2018*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-29> [<https://perma.cc/UEA2-2R67>].

39. Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3 HARM REDUCTION J. 6, 8 (2006) <http://harmreductionjournal.biomedcentral.com/articles/10.1186/1477-7517-3-6> [<https://perma.cc/6BY5-2S9V>].

40. *Id.* at 7.

41. ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 8–9 (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-re11.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-re11.pdf) [<https://perma.cc/HKW9-7VPJ>].

42. ERIN J. FARLEY & STAN ORCHOWSKY, MEASURING THE CRIMINAL JUSTICE SYSTEM IMPACTS OF MARIJUANA LEGALIZATION AND DECRIMINALIZATION USING STATE DATA iv (2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/253137.pdf> [<https://perma.cc/WY7J-WW39>] (reporting that “legalizing the recreational use of marijuana resulted in fewer marijuana related arrests and court cases”).

and 8% were for selling or manufacturing.”<sup>43</sup> And the total number of 2018 marijuana arrests nationwide was “more than 21 percent higher than the total number of persons arrested for the commission of violent crimes.”<sup>44</sup>

State and local police are responsible for the great majority of marijuana arrests.<sup>45</sup> In Arizona’s case, arrest data are quite comparable to the national story. In 2018, according to an annual report compiled by the Arizona Department of Public Safety, there were more than 15,400 arrests for marijuana offenses in the state, and only about 5% of those arrests were for sale or manufacturing.<sup>46</sup> These numbers represent a modest decline from 2008, when Arizona had over 20,000 marijuana-offense arrests, of which about 7% were for sale or manufacturing.<sup>47</sup>

The story of marijuana enforcement is a bit different when it comes to incarceration. As noted above, the great majority of marijuana arrests are for simple possession—92% in 2018. In most states, marijuana possession is treated as a misdemeanor, and even in states that continue to classify simple possession as a felony, convictions may not result in a prison sentence. Even when a marijuana conviction exposes a defendant to the possibility of a lengthy prison sentence, as in the case of some trafficking offenses, judges are often able to and are generally inclined to use their discretion to impose probation or only a short period of confinement.<sup>48</sup> As a result, “[F]ew marijuana cases result in prison time . . . even for distribution, and most drug offenders serve relatively short terms in prison.”<sup>49</sup>

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43. John Gramlich, *Four-in-Ten U.S. Drug Arrests in 2018 Were for Marijuana Offenses—Mostly Possession*, PEW RSCH. CTR. (Jan. 22, 2020), <https://www.pewresearch.org/fact-tank/2020/01/22/four-in-ten-u-s-drug-arrests-in-2018-were-for-marijuana-offenses-mostly-possession/> [https://perma.cc/LL6D-GVAM].

44. *FBI: Marijuana Arrests Rise for Third Year in a Row, Outpace Arrests for All Violent Crimes*, NORML (Oct. 3, 2019), <https://norml.org/news/2019/10/03/fbi-marijuana-arrests-rise-for-third-year-in-a-row-outpace-arrests-for-all-violent-crimes> [https://perma.cc/WC9E-CEW4].

45. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1463–64 (2009).

46. ARIZ. DEP’T OF PUB. SAFETY, *CRIME IN ARIZONA 2018*, at 74 (2019), [https://www.azdps.gov/sites/default/files/media/Crime%20in%20Arizona%202018\\_0.pdf](https://www.azdps.gov/sites/default/files/media/Crime%20in%20Arizona%202018_0.pdf) [https://perma.cc/TDZ3-KAXN].

47. ARIZ. DEP’T OF PUB. SAFETY, *CRIME IN ARIZONA 2008*, at 63 (2009), [https://www.azdps.gov/sites/default/files/media/Crime\\_In\\_Arizona\\_Report\\_2008.pdf](https://www.azdps.gov/sites/default/files/media/Crime_In_Arizona_Report_2008.pdf) [https://perma.cc/Q93F-LLYA]; see also Gary Michael Smith, *Letters from Marijuana Land—the First Decade*, ARIZ. ATT’Y, Mar. 2020, at 26, 28 (noting decline in Arizona arrests for marijuana possession between 2010 and 2018).

48. See generally ARIZ. CRIM. JUST. COMM’N, 2019 ENHANCED DRUG AND GANG ENFORCEMENT (EDGE) REPORT 17 (2019) (detailing that the most common sentence received by all drug defendants in Arizona is probation).

49. John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 203 (2015).

Arizona law notably allows possession of any amount of marijuana to be charged as a felony,<sup>50</sup> though prosecutors have and exercise broad discretion not to charge any crime or charge only a misdemeanor after an arrest.<sup>51</sup> Despite this, relatively few people are in prison for simple marijuana possession in Arizona. A December 2019 publication from the Arizona Department of Corrections noted that, among current inmates serving time for drug possession in November 2019, a total of 218 “Marijuana Only” offenders were serving prison time in the state, around 0.5% of Arizona’s prison population.<sup>52</sup> But this publication did not specify the number of inmates in Arizona state prison for marijuana sales, nor did it report on how many might be serving short terms in Arizona’s local jails for marijuana offenses. A policy report by the group FWD.us indicated that 253 persons were admitted to prison for marijuana possession offenses in Arizona in fiscal year 2017.<sup>53</sup> And a different policy report from the American Friends Service Committee indicated that, as of 2016, nearly 2,000 inmates were serving time in Arizona prisons for marijuana trafficking offenses.<sup>54</sup> In other words, while prison time is the exception rather than the rule for the many thousands of Arizonans arrested for marijuana offenses each year, persons being sent to prison for marijuana offenses is not all that rare in the state.

Although few marijuana prosecutions result in lengthy sentences of incarceration, incarceration is just one of the potential consequences of a marijuana conviction. Convictions often result in fines and court fees, which can be quite costly—for a minimum-wage worker, a \$200 fine “could consume the take-home pay from the better part of a full week of work.”<sup>55</sup> Marijuana offenses also trigger a range of collateral consequences, ranging from the revocation of a professional license to a bar on receiving food stamps or adopting a child.<sup>56</sup> Collateral consequences are often most severe for

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50. ARIZ. REV. STAT. ANN. § 13-3405 (2020).

51. See Shaila Dewan, *Caught with Pot? Get-Out-of-Jail Program Comes with \$950 Catch*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/us/marijuana-diversion-program-maricopa-arizona.html> [https://perma.cc/3Q4D-9HBT].

52. See ARIZ. DEP’T OF CORR., CORRECTIONS AT A GLANCE: NOVEMBER 2019 (2019), <https://corrections.az.gov/sites/default/files/REPORTS/CAG/2019/cagnov19.pdf> [https://perma.cc/Z5US-EMYV].

53. FWD.US, ARIZONA’S IMPRISONMENT CRISIS: THE HIGH PRICE OF PRISON GROWTH 12 (2018), <https://36shgf3jsufe2xojr925ehv6-wpengine.netdna-ssl.com/wp-content/uploads/2018/09/The-High-Price-of-Prison-Growth.pdf> [https://perma.cc/2JG3-XYL7].

54. See REBECCA FEALK ET AL., DRUG SENTENCING IN ARIZONA: A PRESCRIPTION FOR FAILURE 11 (2017), <https://afscarizona.files.wordpress.com/2017/07/drug-sentencing-in-arizona-prescription-for-failure.pdf> [https://perma.cc/VF6P-P3GK].

55. JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 42 (2015).

56. See RICHARD GLEN BOIRE, LIFE SENTENCES: THE COLLATERAL SANCTIONS ASSOCIATED WITH MARIJUANA OFFENSES 2 (2007).

felony convictions, which can result from mere marijuana possession in Arizona.<sup>57</sup> But even misdemeanors create formal and informal barriers to employment or access to housing, and these consequences can continue for life.<sup>58</sup> This is particularly true for drug offenses, which typically carry a larger number of collateral consequences than other offenses.<sup>59</sup> For example, the CSA gives state judges the discretion to make a person convicted of simple possession of a controlled substance—including marijuana—“ineligible for *any or all* Federal benefits for up to one year” as part of her sentence.<sup>60</sup>

### C. Race and Marijuana Prohibition

One long-standing and well-grounded criticism of drug prohibition generally, and marijuana prohibition in particular, is the relationship between race and enforcement.<sup>61</sup> Race and inequities have been integral to drug prohibitions long before the modern war on drugs. In fact, many early drug laws were enacted expressly for the purpose of discriminating against minority populations. In the late 1880s, laws against opium were driven by anti-Chinese prejudice; in the early 1900s, laws against cocaine resulted in part from the racist fear that “Negro cocaine users might become oblivious to their prescribed bounds and attack white society.”<sup>62</sup> Ethnic bias—specifically, anti-German sentiment in connection with World War I—even

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57. See ARIZ. REV. STAT. ANN. § 13-3405 (2020); BOIRE, *supra* note 56, at 2–3; see also Anne Snyder, *Arizona’s Marijuana Laws and the Impact They Have on Students*, ST. PRESS (Nov. 25, 2019, 7:04 PM), <https://www.statepress.com/article/2019/11/spmagazine-marijuana-laws-impact-arizona-criminal-justice-system-punishments> [https://perma.cc/UG2L-WDGX].

58. See BOIRE, *supra* note 56, at 2–3; see also Douglas A. Berman, *Leveraging Marijuana Reform To Enhance Expungement Practices*, 30 FED. SENT’G REP. 305, 306–07 (2018) (stressing that “even a misdemeanor marijuana offense [which is] often perceived as the most minor of criminal justice matters can still have profound personal, professional, and societal consequences”); *Federal Collateral Consequences for Marijuana Convictions*, MARIJUANA POL’Y PROJECT FOUND., <https://www.mpp.org/issues/criminal-justice/federal-collateral-consequences-for-marijuana-convictions/> [https://perma.cc/3SNB-B58E].

59. See Nora V. Demleitner, “*Collateral Damage*”: *No Re-Entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1033 (2002) (“Drug offenders suffer from [collateral consequences] disproportionately because many collateral consequences target them specifically.”); Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 251 n.120 (2018) (“For state and federal drug offenses, collateral consequences are at issue in every sentencing.”).

60. 21 U.S.C. § 862(b)(1)(A)(i) (emphasis added).

61. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

62. DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 6 (3d ed. 1999).

played a role in the adoption of alcohol prohibition.<sup>63</sup> In his seminal history of drug control in the United States, David Musto observed that “[t]he most passionate support for legal prohibition of narcotics has been associated with fear of a given drug’s effect on specific minority.”<sup>64</sup>

This was true for early marijuana laws as well, where “racial prejudice against both African Americans and Mexicans merged to prompt states and local governments to outlaw usage.”<sup>65</sup> At the time early marijuana prohibition laws were passed,

[N]ot only did few middle-class Americans know about marijuana and its use, but what little ‘information’ was available provoked an automatic adverse association of the drug with Mexican immigration, crime and the deviant life style in the Black ghettos. Naturally, the impending drug legislation . . . became entangled with society’s views of these minority groups.<sup>66</sup>

This dynamic was exacerbated in the late 1920s, in the aftermath of the Great Depression. Suddenly, Mexican immigrants “who had been welcomed by at least a fraction of the communities in which they lived, became an unwelcome surplus in regions devastated by unemployment.”<sup>67</sup>

A prominent anti-immigration advocate from that era made racist warnings that “Mexican peddlers have been caught distributing sample marijuana cigarets [sic] to school children” and described marijuana as “perhaps now the most insidious of our narcotics . . . a direct by-product of unrestricted Mexican immigration.”<sup>68</sup> These kinds of racist sentiments made their way into legislative hearings on marijuana prohibition laws. In a 1929 hearing at the Montana Legislature on marijuana prohibition, for example, a doctor testified,

When some beet field peon takes a few rares of this stuff . . . [h]e thinks he has just been elected president of Mexico so he starts out to execute all his political enemies. I understand that over in Butte where the Mexicans often go for the winter they stage imaginary

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63. See DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION 100* (2010) (“‘We have German enemies across the water,’ a dry politician named John Strange told the *Milwaukee Journal* that month. ‘We have German enemies in this country too. And the worst of all our German enemies, the most treacherous, the most menacing, are Pabst, Schlitz, Blatz, and Miller.’”).

64. MUSTO, *supra* note 62, at 294.

65. Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690 (2016).

66. Bonnie & Whitebread, *supra* note 15, at 1037.

67. MUSTO, *supra* note 62, at 219–20.

68. *Id.* at 220.

bullfights in the ‘Bower of Roses’ or put on tournaments for the favor of ‘Spanish Rose’ after a couple of whiffs of Marijuana.<sup>69</sup>

In this era, the head of the Federal Bureau of Narcotics, Harry Anslinger, also cast marijuana as a socially destructive drug using distinctly racialized advocacy, and he helped propel Congress to pass the Marihuana Tax Act in 1937.<sup>70</sup>

Although the sort of overt racism that fueled the passage of early marijuana prohibition laws is mostly (though not entirely)<sup>71</sup> absent from discussions about marijuana laws today, startling racial disparities continue to plague marijuana enforcement. As put succinctly by the Director of the National Institute on Drug Abuse, “Whites and Black/African Americans use drugs at similar rates, but it is overwhelmingly the latter group who are singled out for arrest and incarceration.”<sup>72</sup> A landmark 2013 report by the American Civil Liberties Union (ACLU) found that a Black person is 3.73 times as likely to be arrested for possession of marijuana as a white person and that the disparity had increased 32.7% between 2001 and 2010.<sup>73</sup> When the ALCU updated its landmark study in 2020, it found that, despite declines in marijuana arrests due to legalization in some states, still in “every single state, Black people were more likely to be arrested for marijuana possession, and in some states, Black people were up to six, eight, or almost 10 times more likely to be arrested.”<sup>74</sup> The ACLU reported that the disparity in marijuana arrests was lower in Arizona than in most other states—still, Black people in Arizona were just over *three times as likely* to be arrested for

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69. Bonnie & Whitebread, *supra* note 15, at 1014.

70. See JOHN HUDAK, MARIJUANA: A SHORT HISTORY 25–26 (2016); see also Steven W. Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreational Marijuana and the Failed War on Drugs*, 6 ALB. GOV’T L. REV. 359, 360–64 (2013) (detailing how “[p]rejudices against both blacks and Mexicans” were catalysts for early marijuana criminalization efforts).

71. See Luke Darby, *Kansas Republican Lawmaker: Black People Abuse Marijuana Because of Their “Character Makeup” and “Genetics,”* GQ (Jan. 9, 2018), <https://www.gq.com/story/kansas-republican-marijuana-racist> [<https://perma.cc/YX7L-73U6>] (reporting on a Kansas State Representative’s remarks that one of the reasons for the enactment of marijuana and other early drug prohibition laws was that “African-Americans were basically users and they basically responded the worst to all those drugs because of their character makeup, their genetics”).

72. Nora D. Volkow, *A Message from the Director on Racially Motivated Violence*, NAT’L INST. ON DRUG ABUSE: NORA’S BLOG (June 4, 2020), <https://www.drugabuse.gov/about-nida/noras-blog/2020/06/message-director-racially-motivated-violence> [<https://perma.cc/73U9-7M32>].

73. ACLU, *supra* note 41, at 9.

74. ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 8 (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform> [<https://perma.cc/9BZ2-6K5C>].

marijuana possession as whites.<sup>75</sup> (The ACLU was “not able to compare marijuana arrest rates for Latinx individuals” because the Federal Bureau of Investigation data that served as the basis for their reports “does not identify Latinx populations as a distinct racial group.”<sup>76</sup>)

#### D. *The Rise of State Marijuana Legalization Laws*

After decades of waging war on marijuana, voters in many states have come to see marijuana prohibition as a failure and believe that legalization is a better option. The Pew Research Center has been polling attitudes about marijuana legalization since 1969, when just 12% of Americans believed marijuana should be made legal.<sup>77</sup> Its most recent survey, released in November 2019, found that 67% of U.S. adults favor legalizing marijuana—an increase of ten points since just 2016, when 57% supported legalization.<sup>78</sup>

Although state laws legalizing marijuana for all adult use are less than a decade old, state medical marijuana laws date back to 1996, when Californians approved the first statewide medical marijuana legalization law via ballot measure.<sup>79</sup> (Notably, as discussed more in the next section, Arizona voters passed a medical marijuana ballot initiative of their own that year, although it was never implemented.) Until the beginning of President Obama’s first term, the federal government actively worked to block the implementation of state medical marijuana laws with measures including raids and prosecutions of medical marijuana dispensaries<sup>80</sup> and two United States Supreme Court appeals.<sup>81</sup> Despite these efforts, more and more states passed medical marijuana laws throughout the 2000s.<sup>82</sup> Resource constraints explain the federal government’s inability to stop the implementation of state marijuana legalization laws. Although the federal government has the legal

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75. *Id.* at 32 tbl.7.

76. *Id.* at 8–9.

77. Daniller, *supra* note 4.

78. *Id.*

79. *See* *People v. Mower*, 49 P.3d 1067, 1070 (Cal. 2002) (discussing California’s Compassionate Use Act).

80. AMS. FOR SAFE ACCESS, WHAT’S THE COST?: THE FEDERAL WAR ON PATIENTS 3, 37 (2013), <https://american-safe-access.s3.amazonaws.com/documents/WhatsTheCost.pdf> [<https://perma.cc/TXE8-6D4H>] (“Over the past 17 years, the Justice Department has carried out over 500 aggressive SWAT-style raids on medical cannabis patients and providers, arrested nearly 400 people, and prosecuted more than 160 cases.”).

81. *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001).

82. Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 559 (2010) (listing state medical marijuana laws passed between 1996 and 2010).

authority to prosecute any marijuana offense, including simple possession,<sup>83</sup> the overwhelming majority of marijuana enforcement is carried out by state and local police.<sup>84</sup> As a result, federal enforcement efforts did relatively little to deter dispensary operators. To be sure, a number of unlucky medical marijuana operators were subjected to federal raids and prosecutions; some even received lengthy federal prison sentences.<sup>85</sup> But the risk of prosecution was not great enough to keep people from openly operating medical marijuana dispensaries in states with legalization laws, especially after the Obama Administration in 2009 issued its first memorandum signaling that it would not prioritize prosecution of state-compliant medical marijuana users.<sup>86</sup>

By the time Colorado and Washington voters passed the first ballot initiatives legalizing marijuana for all adult use in 2012,<sup>87</sup> the futility of the federal government's efforts to block state marijuana reforms was clear to most observers. The U.S. Department of Justice (DOJ) acknowledged as much in late 2013 with the issuance of a memorandum advising federal law enforcement officials not to use scarce resources to go after people in compliance with state marijuana laws.<sup>88</sup> Donald Trump's selection of the notoriously anti-marijuana Senator Jeff Sessions<sup>89</sup> to be his first Attorney

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83. *Gonzales*, 545 U.S. at 32–33.

84. Mikos, *supra* note 45, at 1463–67 (arguing that the federal government did not succeed in blocking state medical marijuana laws because of its limited law enforcement resources).

85. Sarah Trumble & Nathan Kasai, *The Past—and Future—of Federal Marijuana Enforcement*, THIRD WAY (May 12, 2017) <https://www.thirdway.org/memo/the-past-and-future-of-federal-marijuana-enforcement> [<https://perma.cc/2KNT-REMZ>].

86. See Vijay Sekhon, *Highly Uncertain Times: An Analysis of the Executive Branch's Decision To Not Investigate or Prosecute Individuals in Compliance with State Medical Marijuana Laws*, 37 HASTINGS CONST. L.Q. 553, 559–60 (2010).

87. German Lopez, *Marijuana Has Been Legalized in 11 States and Washington, DC*, VOX (June 25, 2019, 12:22 PM), <https://www.vox.com/identities/2018/8/20/17938336/marijuana-legalization-states-map> [<https://perma.cc/A7SC-FSLL>].

88. Memorandum from James M. Cole, Deputy Att'y Gen., to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/5DTV-VSRD>]. The Department of Justice had issued memos related to marijuana enforcement in 2009 and 2011, which curtailed federal enforcement in some medical marijuana states, although in other states enforcement continued more or less as it had before. For a discussion of these memos, see, for example, Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 MCGEORGE L. REV. 109, 115–18 (2012).

89. Arlen Gharibian, *Weed Whacking Through the Tenth Amendment: Navigating a Trump Administration Threat To Withhold Funding from Marijuana-Friendly States*, 52 LOY. L.A. L. REV. 275, 283–84 (2019) (describing Sessions' views on marijuana and noting that “[h]e has stated that ‘good people don’t smoke marijuana,’ and that the effects of marijuana are ‘only

General raised questions about whether the federal government's hands-off approach would continue. In early 2018, it seemed as though those fears might be realized when Sessions rescinded the DOJ's 2013 non-enforcement memorandum.<sup>90</sup> This action did not result in a resurgence of federal prosecutions of state-legal marijuana activity, however. And Sessions's replacement, William Barr, said during his confirmation hearing that he did not plan to interfere with state legalization laws.<sup>91</sup>

The fact that the DOJ did not move to block state marijuana legalization laws under Jeff Sessions's watch has led most observers to conclude that states face very little risk of federal interference, notwithstanding the federal prohibition. States have responded accordingly. Since Colorado and Washington voters legalized marijuana, numerous more states have followed suit. By the start of 2020, it was legal to manufacture, distribute, and possess marijuana in Alaska, California, Colorado, Illinois, Maine, Michigan, Massachusetts, Nevada, Oregon, and Washington.<sup>92</sup> Notably, in 2019, Illinois became the first state to legalize marijuana manufacture and sale through the legislature, rather than by ballot measure.<sup>93</sup> And the 2020 election saw a clean sweep of successful passage of medical and recreational marijuana reform initiatives in a diverse array of states nationwide.<sup>94</sup> These developments suggest ever-increasing support for legalization across the political spectrum and among elected officials which could portend continued expansion of legalization in the coming years at both the state and federal levels.

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slightly less awful' than those of heroin" (quoting Rick Anderson, *Sessions Says He Has 'Serious Concerns' About Legal Marijuana. Now States Wonder What's Next*, L.A. TIMES (Aug. 9, 2017, 7:50 PM), <http://www.latimes.com/nation/la-na-sessions-marijuana-20170809-story.html> [<https://perma.cc/2HLL-KMH6>])).

90. Memorandum from Jefferson B. Sessions, III, Att'y Gen., to All U.S. Att'ys, Marijuana Enforcement (Jan. 4, 2018) [hereinafter Sessions Memo], <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/3YXK-FV36>].

91. Brandi Kellam, *Trump's Attorney General Nominee May Shift Policy on Marijuana Enforcement*, CBS NEWS (Jan. 18, 2019, 2:25 PM), <https://www.cbsnews.com/news/william-barr-on-marijuana-legalization-attorney-general-nominee> [<https://perma.cc/28RB-5TLG>].

92. Sarah Rense, *Here Are All the States that Have Legalized Weed in the U.S.*, ESQUIRE (Feb. 7, 2020), <https://www.esquire.com/lifestyle/a21719186/all-states-that-legalized-weed-in-us/> [<https://perma.cc/JZ5H-TZFL>].

93. Amber Phillips, *How Illinois Became the First State Legislature to Legalize Marijuana Sales*, WASH. POST (June 4, 2019, 7:09 AM), <https://www.washingtonpost.com/politics/2019/06/04/how-illinois-became-first-state-legislature-legalize-marijuana-sales/> [<https://perma.cc/YP9B-ZHYE>].

94. Alicia Victoria Lozano, *'A Tipping Point': Psychedelics, Cannabis Win Big Across the Country on Election Night*, NBC NEWS (Nov. 4, 2020, 6:18 PM), <https://www.nbcnews.com/politics/2020-election/tipping-point-psychedelics-cannabis-win-big-across-country-election-night-n1246469> [<https://perma.cc/U6JA-7MGX>].

## II. EXPUNGING MARIJUANA CONVICTIONS IN ARIZONA AND ADVANCING CRIMINAL JUSTICE REFORM MORE BROADLY: LESSONS FROM OTHER STATES

### A. Marijuana Reform Efforts in Arizona

Arizona is one of the few states to see a marijuana legalization ballot fail since 2012. Voters in Arizona narrowly rejected Proposition 205 in 2016<sup>95</sup>—that same year, legalization measures passed in California, Maine, Massachusetts, and Nevada.<sup>96</sup> Although Arizonans rejected marijuana legalization in 2016, they were early supporters of medical marijuana.<sup>97</sup> In 1996—the same year as California’s landmark medical marijuana law—Arizona voters passed an initiative of their own, Proposition 200, to legalize medical marijuana. In fact, Arizona’s 1996 ballot measure was in some ways much more ambitious than California’s in that it was not limited to marijuana. Instead, “Proposition 200 purported to authorize Arizona physicians, under certain specified conditions, to prescribe not only marijuana, but over 100 other Schedule I drugs including heroin and LSD, to seriously or terminally ill patients.”<sup>98</sup> The measure’s cumbersome prescribing mechanism, in combination with actions of the legislature to try to block its implementation, effectively rendered it inoperative from the beginning, however.<sup>99</sup> It was not until 2010 that Arizonans approved a functional medical marijuana law, passing Proposition 203 by the slimmest of margins—50.1% of the vote.<sup>100</sup>

Arizona legalized marijuana via ballot initiative by a vote of 60% in November 2020.<sup>101</sup> The initiative, the Smart and Safe Arizona Act, is similar to existing legalization laws in other states in most respects. Like most other legalization laws to date, it permits adults twenty-one and older to possess up to an ounce of marijuana and contemplates a licensing and regulatory system

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95. *Arizona Marijuana Legalization, Proposition 205 (2016)*, *supra* note 10.

96. ACLU, *supra* note 74, at 25 tbl.5.

97. Moberly & Hartsig, *supra* note 18, at 430.

98. *Id.* at 430–31.

99. *See id.* at 431–34. Among the defects in Proposition 200 was that it hinged on prescriptions, which the federal government directly regulates. *Id.* at 435–36. By contrast, California’s medical marijuana law relied on *recommendations*, which the Ninth Circuit held were protected by the First Amendment. *Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002) (discussing the difference between a “prescription” of a controlled substance and a “recommendation” of a controlled substance).

100. Daniel G. Orenstein, *Voter Madness? Voter Intent and the Arizona Medical Marijuana Act*, 47 ARIZ. ST. L.J. 391, 394 (2015).

101. *Arizona Proposition 207 Election Results: Legalize Recreational Marijuana*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-arizona-proposition-207-legalize-recreational-marijuana.html> [<https://perma.cc/5CV2-MDFW>].

for manufacture and sale of the substance.<sup>102</sup> It also seeks to actively address some of the harms done by marijuana prohibition, with provisions to allow the expungement of certain marijuana convictions, reserve some licenses for people who have been disproportionately impacted by prohibition, and create a Justice Reinvestment Fund.<sup>103</sup> As with most ballot measures, the Smart and Safe Arizona Act's overall impact will depend in large part on its implementation.

### B. Ensuring Effective Expungement Efforts

As of early 2020, nearly three dozen U.S. jurisdictions had created comprehensive medical marijuana programs, and eleven states and D.C. had fully legalized marijuana use for all adults.<sup>104</sup> But amidst all of these state-level legal reforms allowing marijuana use, reforms which typically facilitate the widespread commercialized manufacture and sale of a range of marijuana products, less than half of these reform jurisdictions have enacted new statutes or modified existing expungement mechanisms in order to make it expressly easier for past offenders to have prior marijuana convictions sealed or expunged.<sup>105</sup> Despite legal reforms often propelled and justified by ever-growing public concerns about the punitive consequences of the drug war, new laws to enable individuals to seal criminal records or reclassify past marijuana convictions are still the exception, not the rule, among states that have legalized marijuana activities.

Early marijuana legalization efforts generally steered clear of proposals to expunge past marijuana arrests and convictions, perhaps as part of a political strategy to downplay marijuana's historically illicit status and racialized

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102. *Arizona Proposition 207, Marijuana Legalization Initiative (2020)*, *supra* note 12.

103. *Id.*

104. See *State Medical Marijuana Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/M34D-MUDM>]; *Marijuana Overview*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 17, 2019) [hereinafter NAT'L CONF. OF ST. LEGISLATURES, *Marijuana Overview*], <https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx> [<https://perma.cc/669A-RBMY>]

105. The National Conference of State Legislatures, which tracks state marijuana reform legislation, reports that "at least fifteen states have passed laws addressing expungement of certain marijuana convictions. [And often] . . . expungement measures pair with other policies to decriminalize or legalize." NAT'L CONF. OF ST. LEGISLATURES, *Marijuana Overview*, *supra* note 104. David Schlüssel at the Collateral Consequences Resource Center has written that "[s]eventeen states and D.C. have enacted expungement, sealing, or set-aside laws specifically for marijuana, or targeted more generally to decriminalized or legalized conduct." David Schlüssel, *Legalizing Marijuana and Expunging Records Across the Country*, COLLATERAL CONSEQUENCES RES. CTR. (Mar. 12, 2020), <https://ccresourcecenter.org/2020/03/12/legalizing-marijuana-and-expunging-records-across-the-country/> [<https://perma.cc/84CA-U3HG>].

overtones.<sup>106</sup> But, in recent years, advocates for marijuana reform have begun more regularly pushing for, and legislators have been more inclined to advance, proposals to remove or reduce past marijuana convictions. In 2019, for example, Illinois, Nevada, New Hampshire, and Washington all enacted legislation related to vacating or expunging records.<sup>107</sup> There is good reason to expect more jurisdictions to include forms of record relief in marijuana reform efforts, but experiences to date highlight the importance of ensuring that expungement provisions and practices are impactful and expansive.

Disconcertingly, even when states enact distinct statutes or modify existing expungement provisions to address past marijuana offenses, sometimes only a very small number of persons with eligible marijuana convictions will seek to have them sealed or set aside. In Connecticut, for example, a decriminalization law enacted in 2011 allowed thousands of lower-level past offenders to seek record expungement.<sup>108</sup> But, despite a state-court ruling bringing attention to the issue,<sup>109</sup> only a few dozen individuals had petitioned the courts for relief in the years that followed.<sup>110</sup> Similarly, in Oregon, after the state legislature provided for certain marijuana records to be sealed following the 2014 ballot initiative that legalized recreational marijuana, only a few hundred persons petitioned for relief each year even though an estimated 78,000 convictions could be eligible for sealing.<sup>111</sup> Continuing this pattern, in the state of Washington, only a small handful of past marijuana offenders applied for an announced gubernatorial pardon plan.<sup>112</sup>

Recognizing that practical barriers can impede widespread use of expungement provisions—such as fees or unfamiliarity with application

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106. See David Schlusell, *'The Mellow Pot-Smoker': White Individualism in Marijuana Legalization Campaigns*, 105 CALIF. L. REV. 885, 890 (2017).

107. NAT'L CONF. OF ST. LEGISLATURES, *Marijuana Overview*, *supra* note 104; see also Schlusell, *supra* note 106, at 922–26 (detailing evolution in marijuana record relief).

108. See CONN. GEN. STAT. § 21a-279a (2011).

109. See *State v. Menditto*, 110 A.3d 410 (Conn. 2015).

110. See Dave Collins, *Connecticut Judges Erasing Pot Convictions at High Rate*, HARTFORD COURANT (May 31, 2015, 10:01 AM), <https://www.courant.com/breaking-news/hc-connecticut-judges-erasing-pot-convictions-at-high-rate-20150531-story.html> [<https://perma.cc/H4JZ-47ML>].

111. Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, PEW: STATELINE (Nov. 20, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/20/in-these-states-past-marijuana-crimes-can-go-away> [<https://perma.cc/5APW-2EQT>].

112. See Jim Brunner, *Inslee Pardons Pot Convictions of 13 Washington Residents. Now Lawmakers May Clear Criminal Records for 200,000 More.*, SEATTLE TIMES (Feb. 10, 2019, 1:25 PM), <https://www.seattletimes.com/seattle-news/politics/inslee-pardons-13-marijuana-convictions-in-a-month-as-lawmakers-consider-expunging-hundreds-of-thousands-more/> [<https://perma.cc/JYT8-XHEX>].

procedures<sup>113</sup>—many reform advocates and justice officials have sought to move toward an automatic model for removing past marijuana convictions. California’s 2016 marijuana legalization ballot initiative included provisions authorizing courts to seal records (and resentenced incarcerated persons) upon request; in 2018, the California legislature established an automatic sealing process in which the state searched criminal history information and notified local prosecutors of all eligible expungement cases in their jurisdiction.<sup>114</sup> In 2019, Illinois authorized automatic expungement of “minor cannabis offenses” as part of its broad marijuana legalization reform, and that same year both New Jersey and New York enacted automatic record clearing provisions even as they failed to advance broad legalization reforms.<sup>115</sup>

Usefully, the Smart and Safe Arizona Act includes an express expungement provision, but that provision requires people with eligible convictions to file a petition in order to clear their record.<sup>116</sup> The experiences in other states suggest that only a small portion of former offenders may take advantage of this expungement provision absent proactive efforts to help ensure broad use of remedial measures. Barriers to the widespread use of petition-based expungement provisions like the one in the Smart and Safe Arizona Act are considerable: the petition process can be unclear, time consuming, and intimidating; public defender offices typically do not assist with expungement petitions; and those eligible to petition for an expungement may not even know that they qualify.<sup>117</sup> To its credit, the Smart and Safe Arizona Act seeks to address some of these challenges by earmarking four million dollars in grant money for “qualified nonprofit entities that will provide outreach to individuals who may be eligible to file petitions for expungement.”<sup>118</sup> Such grants will help to increase the number of eligible people who file a petition for expungement; but any petition process will inevitably miss some—likely many—of those who are eligible.

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113. See generally Berman, *supra* note 58, at 307–09 (discussing the history and momentum of marijuana criminalization reforms and expungement provisions and noting that “only a small fraction of persons with eligible marijuana convictions” seek to have them set aside).

114. See Jason Hanna, *Nearly 66,000 Marijuana Convictions in Los Angeles County Will Be Dismissed, District Attorney Says*, CNN (Feb. 13, 2020, 4:25 PM), <https://www.cnn.com/2020/02/13/us/california-los-angeles-marijuana-convictions/index.html> [<https://perma.cc/FV5Z-BGTW>].

115. See Schluskel, *supra* note 105 (detailing provisions in these states).

116. Smart and Safe Arizona Act, Initiative Petition Serial Number I-23-2020, § 36-2862 (proposed amendment 2019), <https://apps.arizona.vote/info/assets/18/0/BallotMeasures/I-23-2020.pdf> [<https://perma.cc/XU8C-EB3K>].

117. See J.J. Prescott & Sonja B. Starr, *The Power of a Clean Slate*, 43 REGUL. 28, 31–32 (2020) (discussing the reasons for the expungement uptake gap).

118. Smart and Safe Arizona Act § 36-2817(D)(5).

Now that Arizona voters have legalized marijuana via ballot initiative, legislators in Arizona should consider following the lead of states like California and Illinois by developing processes for automatic expungement of at least some number of prior marijuana offenses. A centralized expungement process is the only way to ensure that everyone who qualifies for an expungement receives one, and it is preferable to a petition process for a number of reasons.<sup>119</sup>

First, an automatic expungement process places the redress burden where it should belong—with the state. Most expungement provisions involving still-criminal conduct are intended to give people with past convictions who have rehabilitated themselves a chance at a clean slate.<sup>120</sup> In that context, putting the onus on the individual to petition for an expungement makes more sense. But the calculus is different when a state legalizes (and even supports the commercialization of) conduct that was previously against the law. When a state legalizes marijuana, it is deciding that arresting, prosecuting, convicting, incarcerating, and stigmatizing persons for possessing and selling marijuana is poor public policy. A determination that conduct does not warrant criminal punishment in the present suggests it was problematic for the state to impose punishment for that conduct in the past and surely wrongful for persons to continue to suffer stigma and harm for the same conduct that others now do with the state's blessing and support. As one scholar puts it, "Relief from the burden of conviction should be granted, not because the individual has somehow personally earned it, but because the conviction never should have existed in the first place, as we now understand."<sup>121</sup> Consistent with this general outlook on record relief, though the Smart and Safe Arizona Act requires people to petition to expunge past convictions, relief is not discretionary, and petitioners do not need to prove that they have taken any particular steps toward rehabilitation. Instead, the Act provides that courts will be *required* to grant the expungement petition

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119. See Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 386 (2020) (arguing that "all jurisdictions where marijuana has been legalized should expunge prior misdemeanor convictions and should do so through automatic mechanisms"); see also Mitchell F. Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 HASTINGS CONST. L.Q. 367, 420 (2020) (arguing that "past pot offenders have a constitutional right to retroactive amelioration, in States that have legalized marijuana . . . [and that] amnesty is a practical, comprehensive means to provide remedial action in a swift and certain manner").

120. Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-violent Federal Offenders*, 79 U. CIN. L. REV. 155, 155 (2011) (arguing that "individuals who have served their sentences and abided by the law for some period afterward should be given the opportunity to rid their slates of their criminal histories" through expungement provisions).

121. Ahrens, *supra* note 119, at 430.

of anyone who was convicted of a qualifying offense.<sup>122</sup> Given this sound approach to expungement, it would seem more appropriate for the state to bear the burden of vacating past convictions in order to ensure record relief is broadly applied.<sup>123</sup>

Second, a petition-based process carries a significant risk of exacerbating the racial disparities that plague marijuana enforcement. Racial disparities in marijuana enforcement are driven by a number of systemic factors, “including demographics, the extent of community complaints, police allocation of resources, racial profiling, and the relative ease of making drug arrests.”<sup>124</sup> Some comparable factors to those that drive disparities in marijuana arrests are likely to result in disparities in the petition process. People who can afford to hire a private attorney to file a petition will be better positioned to take advantage of the expungement process than those who cannot. Likewise, people from overpoliced communities may be more hesitant to file a petition because of negative experiences with the criminal justice system. Although outreach efforts by nonprofit organizations can help reduce systemic barriers to access to the expungement process, these groups cannot and should not be expected to redress an array of structural inequities in access to justice.

Third, expungements will benefit the state as well as the individual. The collateral consequences of past convictions harm the community by making it harder for individuals to attain economic self-sufficiency. As a 2019 report by the United States Commission on Civil Rights explained, reducing collateral consequences can help people “lead more productive lives, secure gainful employment, [and] find housing” which, in turn, “may benefit the economy overall.”<sup>125</sup> A recent study in Michigan found that, for all offenses, “expungement recipients’ recidivism rates compare favorably with those of the Michigan population as a whole,”<sup>126</sup> and that there were “large gains in

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122. Safe and Smart Arizona Act § 36-2862(B)(3) (stating that “the court shall grant the petition unless the prosecuting agency establishes by clear and convincing evidence that the petitioner is not eligible for expungement”).

123. Ahrens, *supra* note 119, at 385 (arguing that the onus for implementing marijuana legalization expungement provisions should be on the state “as the collective representative of the forces that imposed an unjustifiable and imbalanced coercive regime, rather than on the individual already operating under the weight of these cumulative sanctions and disadvantages”).

124. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 270 (2009).

125. U.S. COMM’N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 5 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/8LBV-ABRF>].

126. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2466 (2020).

both employment rates and wages following an individual's receipt of an expungement."<sup>127</sup> Automatic expungements can help ensure the benefits of this form of record relief are widespread.

A strong argument can be made that many collateral consequences serve as a disproportionate form of punishment for many offenders.<sup>128</sup> And the standard justifications for imposing collateral consequences or limiting expungements in other settings, such as deterring criminal conduct or protecting the public or encouraging rehabilitation, do not meaningfully apply to convictions based on past conduct that is no longer criminally prohibited and is now being promoted through legal reforms. As a result, in the context of a marijuana legalization expungement provision, a failure to address the collateral consequences of expungement-eligible convictions continues to impose costs and create injustices—to both the individual and for various communities—without any offsetting benefits.

For these reasons, Arizona's legislators should consider adopting an automatic expungement provision to function similar to what California and Illinois have adopted as part of their marijuana legalization laws. In addition, Arizona legislators should seriously consider expanding the reach of the expungement provision in the Smart and Safe Arizona Act while also providing for resentencing of persons convicted of more serious marijuana offenses who are still incarcerated. As written, the expungement provision only applies to small-quantity marijuana offenses ("two and one-half ounces or less of marijuana" and "not more than six marijuana plants").<sup>129</sup> But the theoretical and pragmatic arguments for expunging low-level convictions extend to offenses involving large quantities of marijuana given that the Smart and Safe Arizona Act envisions creating a large-scale marijuana industry in which many thousands of persons will be regularly involved in the manufacture and sale of large quantities of marijuana.<sup>130</sup> Perhaps if a state were only taking steps to decriminalize marijuana use and still did not permit manufacture or sale, preserving penalties and criminal records for past

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127. *Id.* at 2523.

128. See generally Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. (forthcoming 2020) (arguing that connecting expungement with retributivism can supplement expungement reforms that "already recognize the disproportionate effects of a criminal record").

129. Smart and Safe Arizona Act, Initiative Petition Serial Number I-23-2020, § 36-2862 (A)(1)–(2) (proposed amendment 2019), <https://apps.arizona.vote/info/assets/18/0/BallotMeasures/I-23-2020.pdf> [<https://perma.cc/XU8C-EB3K>].

130. See *id.* § 36-2858; Ahrens, *supra* note 119, at 386 (arguing that "[m]ass expungement for felony convictions" is required whenever a jurisdiction "embrace[s] . . . the cannabis industry as an engine of economic development and the construction of a regime of laws and government institutions supporting that industry").

manufacture or sale might be justifiable. But once a state has decided that such activities should be legal and actively regulated by the state, preserving the current harms of past penalties and records for this behavior lacks a compelling justification.

One final technical point about the expungement process warrants mention here: Arizona law does not generally provide for “expungements” but rather permits most persons with state offenses to have their convictions “set aside” or “vacated,” and the charges against them dismissed, upon successful completion of probation or sentence and discharge.<sup>131</sup> The Smart and Safe Arizona Act does set forth a series of qualifications, procedures, and requirements for expungement, but legislators in Arizona may wish to follow up with more detailed legislation to ensure the goals of this expungement provision are fully realized and effectively integrated with other record relief provisions in Arizona law.<sup>132</sup>

### C. *Advancing Criminal Justice Reform More Broadly*

Criminal justice reform advocates can and should be thinking about ways to advance systemic and enduring changes in conjunction with marijuana reforms that go beyond providing robust retroactive ameliorative relief opportunities for prior marijuana offenses. Marijuana legalization in other states has generated significant government revenues,<sup>133</sup> and these monies can and should be invested not only in the project of redressing the injustices and enduring harms of marijuana criminalization but also in broader criminal justice reform efforts. To its credit, the Smart and Safe Arizona Act includes the creation of what it calls a “Justice Reinvestment Fund,” which is to receive 10% of monies from tax revenues and other sources and which is to pay out monies to advance public health needs and decarceration and crime reduction efforts in disadvantaged communities.<sup>134</sup> Disappointingly, less money is allocated to this fund than is earmarked for law enforcement,<sup>135</sup> but

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131. See ARIZ. REV. STAT. ANN. § 13-905(A) (2020).

132. See generally Prescott & Starr, *supra* note 126 (conducting a detailed empirical study on expungement provisions).

133. See ULRIC BOESEN, TAX FOUND., A ROAD MAP TO RECREATIONAL MARIJUANA TAXATION 13 (Rachel Shuster ed., 2020), <https://files.taxfoundation.org/20200608144852/A-Road-Map-to-Recreational-Marijuana-Taxation.pdf> [<https://perma.cc/9J2Z-Q5SA>] (reporting on tax revenue in multiple states and noting, *inter alia*, that Colorado’s excise tax revenue was over \$250,000,000 in fiscal year 2019).

134. Smart and Safe Arizona Act, Initiative Petition Serial Number I-23-2020, § 36-2856(D)(4), § 36-2863 (proposed amendment 2019), <https://apps.arizona.vote/info/assets/18/0/BallotMeasures/I-23-2020.pdf> [<https://perma.cc/XU8C-EB3K>].

135. See *id.* § 36-2856(D)(2).

the proposed creation of the fund in the Smart and Safe Arizona Act is still a development to be applauded.

Critically, though earmarked resources can prove beneficial in numerous ways, structural support for criminal justice reform may often be more important and impactful than financial support. Because the ballot initiative passed, state legislators should consider an institutional response in the form of an administrative infrastructure to help implement and assess marijuana reform and related criminal justice issues on an on-going basis. A dedicated institution, which might be called a Justice Restoration Commission or even just a Justice Reform Commission (JRC) and which can be funded by various revenue sources including perhaps the Justice Reinvestment Fund, should be created by the Arizona legislature and tasked with proactively working on and evaluating policies and practices related to criminal justice reform issues that intersect with marijuana reform and broader drug policies.

As discussed above, implementation of effective and impactful expungement provisions can prove challenging, as will be ensuring the efficacy of initiatives and programs focused on public health needs and decarceration and crime reduction efforts that are supposed to be funded by the new Justice Reinvestment Fund. A permanent government institution is needed and justified to help tackle all these critical issues as an on-going concern, and the new resources being generated by the marijuana industry and associated taxes can and should play a foundational role in helping to create such an institution. The JRC here envisioned could and would be an independent public agency with a mission and mandate that includes not only seeking broad application of remedies like expungement for addressing enduring social harms resulting from marijuana prohibition, but also proactively working on policies and practices designed to address the cumulative undue harms of inequitable application of criminal laws and other persistent challenges like collateral consequences in the criminal justice system.

Though detailed exploration of the possible structures and activities of this kind of a restoration commission are beyond the scope of this essay, its basic work and mission can be readily outlined: the JRC would study all aspects and effects of Arizona's marijuana reform efforts (and perhaps other drug reforms) with an eye on issues like collateral consequences, monitor the impact and reach of the new mechanisms for expungement, and then make assessments and recommendations for needed changes to existing laws, policies, and practices to limit the punitive and undue consequences and past inequities and burdens of mass criminalization.

Importantly, as we have seen in other jurisdictions, legalizing the sale and use of marijuana by persons over twenty-one does not entirely eliminate all

aspects of marijuana criminalization or its potentially problematic history. Though many advocate for public health approaches to marijuana use and all drug activity, experiences in reform states demonstrate that criminal enforcement tools and realities remain ever-present even after legalization. This reality flows from the fact that activities like underage marijuana possession, driving under the influence, and public marijuana use remain unlawful and policed, and racial and other disparities persist in enforcement patterns.<sup>136</sup> A recent ACLU report detailed that “in every state that has legalized or decriminalized marijuana possession, Black people are still more likely to be arrested for possession than white people” and that in “some legalized states, such as Maine and Massachusetts, the racial disparities in marijuana possession arrests were larger in 2018 than in 2010” before legalization.<sup>137</sup> In other words, Arizona cannot and should not expect disparities in marijuana enforcement to disappear now that Arizona voters have legalized marijuana via ballot initiative through the Smart and Safe Arizona Act. And, of course, racial disparities in drug enforcement generally remains a pervasive problem. Consequently, Arizonans can and should be prepared to direct resources generated by the Smart and Safe Arizona Act to a permanent government agency that can monitor and advocate for equitable marijuana enforcement practices after legalization, and equitable drug enforcement more broadly.

A JRC could help to address these issues by, for example, rethinking the practice of pretextual car stops after marijuana legalization. Pretextual stops and searches are one of the enforcement practices that have fueled racial disparities in drug enforcement.<sup>138</sup> In a pretextual stop, “[A]n officer who lacks reasonable suspicion of criminal activity uses a minor traffic violation as a pretext for conducting a stop and fishing for drugs or other

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136. See, e.g., Josh McGhee, *Black and Brown Men Still Being Arrested for Possession as Marijuana Legalization Takes Off*, CHI. REP. (Jan. 3, 2020), <https://www.chicagoreporter.com/black-and-brown-men-still-being-arrested-for-possession-as-marijuana-legalization-takes-off/> [<https://perma.cc/66F5-6D9P>]; Jesse Marx, *Post-Legalization, Marijuana Enforcement Still Hits Minorities Harder*, VOICE SAN DIEGO (Dec. 3, 2019), <https://www.voiceofsandiego.org/topics/public-safety/post-legalization-marijuana-enforcement-still-hits-minorities-harder/> [<https://perma.cc/5S2U-J3ZQ>]; Steven Nelson, *Colorado Pot Arrests Still Have Racial Disparity*, U.S. NEWS & WORLD REP. (Mar. 25, 2015, 2:14 PM), <https://www.usnews.com/news/articles/2015/03/25/colorado-pot-arrests-still-have-racial-disparity> [<https://perma.cc/WL4R-R2JX>]; Amanda Chicago Lewis, *Marijuana Arrests Down in Colorado for White Teens, Up for Black and Latino Teens*, BUZZFEED NEWS (May 10, 2016, 6:09 PM), <https://www.buzzfeednews.com/article/amandachicagolewis/marijuana-arrests-down-in-colorado-for-white-teens-up-for-bl> [<https://perma.cc/L43H-9LMC>].

137. ACLU, *supra* note 74, at 8.

138. See, e.g., Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 754–57 (2016) (discussing the relationship between racial disparities and pretextual car stops).

contraband.”<sup>139</sup> This policing tactic became widespread during the height of the war on drugs and has been particularly linked with marijuana enforcement.<sup>140</sup> The Drug Enforcement Administration even developed a training program—Operation Pipeline—to train state and local officers on “how to lengthen a routine traffic stop and leverage it into a search for drugs by extorting consent or manufacturing probable cause.”<sup>141</sup> Because police lack reasonable suspicion of drug activity in a pretextual stop, they often rely on intuition to decide who to pull over and investigate—often, “ethnicity consciously or unconsciously factors” into the calculus.<sup>142</sup>

Marijuana legalization provides a unique opportunity to reconsider the practice of pretextual stops because it will make it more difficult to conduct them and reduce their efficacy from the perspective of law enforcement. Legalization makes it more difficult to conduct pretextual stops because it undermines the legal underpinnings of many pretextual car stops and searches. When marijuana possession is legal, the scent of marijuana alone may no longer provide the police probable cause to search a car.<sup>143</sup> Indeed, Arizona case law in the medical marijuana setting suggests that the Arizona Supreme Court would likely hold that the scent of marijuana does not provide probable cause to search post-legalization.<sup>144</sup> Similarly, once marijuana is no

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139. *Id.* at 756 n.90; see also David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249 (“Police use traffic violation stops as a way to gain consent, plain view, or other justification for a search or seizure.”).

140. Kreit, *supra* note 138, at 745–54 (discussing how the war on drugs and the war on marijuana led to the widespread use of pretextual stops).

141. Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 761 (2007).

142. Kreit, *supra* note 138, at 756; see also David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 560–69 (1997).

143. See, e.g., *Commonwealth v. Craan*, 13 N.E.3d 569, 574 (Mass. 2014) (holding that because marijuana possession was no longer a crime following enactment of a state decriminalization law, the odor of marijuana does not “give rise to probable cause to search a vehicle under the automobile exception to the warrant requirement”). For a discussion of the impact of federal prohibition on probable cause to search in a marijuana legalization state, see Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 HARV. L. REV. 471, 478–82 (2018).

144. In *State v. Sisco*, 373 P.3d 549, 556 (Ariz. 2016), the Arizona Supreme Court held that the odor of marijuana did still provide probable cause to search despite the state’s medical marijuana law. The opinion’s reasoning suggests that the outcome would be different if marijuana were made legal for all adult use, however. Specifically, the court emphasized that marijuana possession remained generally prohibited and found that “the general proscription of marijuana in Arizona and AMMA’s limited exceptions thereto support finding probable cause based on the smell or sight of marijuana alone unless, under the totality of the circumstances, other facts would suggest to a reasonable person that the marijuana use or possession complies with AMMA.” *Id.*

longer considered contraband, the police may no longer be permitted to conduct suspicionless drug dog sniffs using dogs that are trained to detect marijuana.<sup>145</sup> With respect to the effectiveness of pretextual stops, legalization is likely to significantly reduce the hit rate of suspicionless searches. Marijuana is by far the most commonly used illegal drug, and it accounts for roughly half of all drug arrests nationwide.<sup>146</sup> “Removing the possibility of a marijuana arrest or marijuana-related forfeiture . . . means a much smaller percentage of pretextual stops will generate an arrest” or lead to the forfeiture of assets.<sup>147</sup> A JRC could help to promote a conversation about using these changed dynamics to reduce racially disproportionate pretextual stops—both in continuing marijuana enforcement and drug enforcement more broadly. For example, a JRC could lead a discussion about whether some or all drug-sniffing dogs that are trained to detect the odor of marijuana should simply be retired following legalization, as opposed to replaced or retrained.

A JRC can and should provide a centralized and impartial forum for statewide policy development and planning with respect to marijuana reform implementation as well as collateral consequences and their amelioration; it can and should conduct and disseminate research on the fiscal and social justice impacts of marijuana reform and collateral consequences; and it can and should provide a much-needed legal and statistical clearinghouse for assembling and assessing hard-to-collect data concerning these elements of modern criminal justice systems. A JRC in Arizona would be a specialized agency well positioned to develop, monitor, assess, and revise laws, policies, and practices designed to help repair not only the societal and personal costs of the drug war and marijuana prohibition, but also other lasting and undue harms of collateral consequences and mass criminalization.

#### CONCLUSION

One of the driving forces behind the legalization movement has been the impact of marijuana prohibition on the criminal justice system. Legalization

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at 555. This holding suggests that if marijuana possession were made legal for all adults in Arizona, then the mere odor of marijuana would no longer provide probable cause to search. For a critique of the *Sisco* decision, see Madeline Mayer, Comment, *The Proper Future of the Plain Smell Doctrine in Arizona: Concerns After State v. Sisco*, 51 ARIZ. ST. L.J. 799 (2019).

145. See *People v. McKnight*, 446 P.3d 397, 410 (Colo. 2019) (“Because a sniff from a dog trained to detect marijuana (in addition to other substances) can reveal lawful activity, we conclude that sniff is a search under article II, section 7 and must be justified by some degree of suspicion of criminal activity.”).

146. Kreit, *supra* note 138, at 770.

147. *Id.* at 770–71.

would immediately and drastically reduce marijuana arrests in Arizona, but to address the lingering effects of marijuana prohibition, more will be required. The Smart and Safe Arizona Act is not ignorant of this fact; it includes a relatively robust expungement provision and earmarks money for a Justice Reinvestment Fund. In this essay, we have considered some ideas for going even further in implementing legalization in a way that advances the goals of reducing reliance on criminal enforcement and addressing inequities in the criminal justice system. Our contribution is intended only as a starting point and does not address many other important related issues, such as achieving equity in the legal marijuana industry itself.<sup>148</sup> Whatever approach policymakers in Arizona take to these issues, now that the voters have approved the Smart and Safe Arizona Act, they should be mindful of the importance in the particulars of its implementation.

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148. For a discussion of this issue, see, for example, 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 (2020).