

CORRECTING INJUSTICES: EXPUNGING PRIOR MARIJUANA CONVICTIONS IS KENTUCKY'S NEXT BEST STEP TOWARDS RESTORATIVE JUSTICE

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I. INTRODUCTION

Imagine a society that allows one person to openly and legally possess a substance while another person serves a prison sentence after being convicted of the crime of having that same substance. This society exists today in Kentucky, and the unfairness this causes could become even starker going forward.

As public opinion towards marijuana use shifts, more states around the country are taking steps to decriminalize or fully legalize the use of marijuana.¹ After the transition, states have taken many different approaches to address individuals with prior marijuana convictions.² While Kentucky has not decriminalized marijuana, it has shifted towards allowing medical use in certain circumstances and several counties have decriminalized possession.³ Experts project more states will decriminalize marijuana in coming years, possibly as soon as 2021.⁴ Notably, in December 2020, the United States House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, which would decriminalize marijuana and expunge federal records.⁵ As decriminalization becomes more likely on the state level, Kentucky must develop a clear plan for addressing prior convictions to right the wrong of marijuana

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1. See *50-State Comparison: Marijuana Legalization, Decriminalization, Expungement, and Clemency*, RESTORATION OF RTS. PROJECT (July 2020) <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-marijuana-legalization-expungement/>.

2. Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379, 425 (2020).

3. Joe Sonka, *House Passes Medical Marijuana in First Approval of its Kind in Kentucky*, COURIER-J. (Feb. 20, 2020), <https://www.courier-journal.com/story/news/politics/ky-legislature/2020/02/20/kentucky-house-passes-medical-marijuana-bill-historic-vote/4819639002/>.

4. Alicia Wallace, *Why More States Could Legalize Cannabis in 2021*, CNN BUSINESS (June 25, 2020), <https://www.cnn.com/2020/06/24/business/cannabis-legalize-2021-recession/index.html>.

5. Alex Gangitano, *House Passes Sweeping Reform Bill to Decriminalize Marijuana*, THE HILL (Dec. 4, 2020), <https://thehill.com/homenews/house/528787-house-passes-sweeping-reform-bill-to-decriminalize-marijuana>.

criminalization and bring fairness back to the communities who have been most harmed by criminalization. As a matter of public policy, any process developed should be designed to elevate and remove barriers for people convicted of marijuana offenses.

This note will examine Kentucky's policing of marijuana use, the changing attitudes in Kentucky toward marijuana use, and the steps toward decriminalization that Kentucky has taken in recent years. Next, this note will analyze the various approaches other states have taken to remove prior convictions, including: 1) relying on the executive branch to pardon prior convictions; 2) designing a process for people to apply for expungement or legislating automatic expungement; and 3) sealing the records of people with prior convictions. Finally, this note will lay out a plan for Kentucky to implement automatic expungement in conjunction with any legislation passed to decriminalize marijuana.

II. BACKGROUND

Understanding the history of cannabis law in Kentucky is critical to analyzing the best way to handle prior convictions. Whether the state decides to decriminalize marijuana or not, they could still address many issues by creating a process for relief for people holding prior convictions for low-level marijuana offenses. Mass incarceration continues to be a nationwide problem and a severe problem for Kentucky, specifically.⁶ Racial disparities in marijuana convictions are extreme in the state.⁷ Decriminalization would help curb both issues, and expungement would create a process for relief from prior convictions that would be a valuable step in the meantime. This section will provide a brief overview of cannabis law history, mass incarceration, and the war on drugs in Kentucky, and will examine Kentucky's recent steps towards decriminalization.

The United States and Kentucky have not always outlawed marijuana use.⁸ In the 17th century, the colonial governments encouraged the production of hemp to produce rope, sails and clothing.⁹ Hemp was exchanged as legal tender in

6. *Kentucky Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/KY.html> (last visited May 25, 2021).

7. *Report: Black Kentuckians Nearly 10x More Likely to be Arrested for Marijuana Possession than White Kentuckians*, ACLU Ky. (Apr. 20, 2020, 1:30 PM), <https://www.aclu-ky.org/en/2020marijuanadata>.

8. *Marijuana Timeline*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Feb. 27, 2021).

9. *Id.*

several states at the time.¹⁰ During the 19th century, it was a popular ingredient in medicinal products and even certain foods.¹¹ Marijuana became widely used recreationally in the early 20th century.¹²

However, attitudes soon changed as broader societal issues began to influence public opinion of marijuana use. After the Mexican Revolution of 1910, many Mexican immigrants came to America, bringing marijuana with them.¹³ The drug became associated with fear and prejudice towards immigrants and many started attributing criminal activity to the use of marijuana.¹⁴ By the 1920s, the Great Depression and other societal pressures, including massive unemployment, led to increased public resentment toward Mexican immigrants, and in turn instigated public opinion and research that seemed to connect marijuana with violence and crime.¹⁵ By 1931, twenty-nine states outlawed marijuana.¹⁶

Despite the shift in public opinion, Kentucky became known for growing hemp throughout the 20th century.¹⁷ The particular climate and soil of central and northern Kentucky is ideal for growing hemp, making it one of Kentucky's more successful crops, along with tobacco and cotton.¹⁸ A 1914 USDA report noted that, "Practically all of the hemp grown in the United States is from seed produced in Kentucky."¹⁹ The crop dominated as the chief cash crop in the state for decades until criminalization halted growth.²⁰ While the economic benefit was powerful, Kentucky became influenced by stronger societal pressures that led to criminalization.

10. *Id.*

11. *Id.*

12. *Id.*

13. PBS, *supra* note 8.

14. *Id.* See also Richard J. Bonnie and 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, 1012 (1970).

15. PBS, *supra* note 8.

16. *Id.*

17. *Yearbook of the United States Department of Agriculture*, U.S. DEP'T OF AGRIC. (1914), <https://archive.org/details/yearbookuniteds03agrigoog/page/n342/mode/2up>.

18. *Id.*

19. *Id.*

20. JAMES F. HOPKINS, *A HISTORY OF THE HEMP INDUSTRY IN KENTUCKY* (University Press of Kentucky, ed. 1998).

The rest of the country began to see broad shifts in public opinion throughout the 20th century from sharp swings to conservative perspectives in some decades to progressive acceptance of recreational use in others. In 1937, Congress passed the Marijuana Tax Act, which criminalized marijuana federally.²¹ This essentially ended hemp production, and soon after, federal laws imposed mandatory sentences for drug-related offenses.²² A first-offense marijuana possession carried a minimum sentence of two to ten years with a fine of up to \$20,000.²³ The criminalization of marijuana created collateral criminal activity, as people engaged in illicit drug trade and violence ensued.²⁴ In 1970, attitudes again began to change as marijuana use became popular in the counterculture.²⁵ Congress repealed many of the mandatory minimum sentences because many believed that they were ineffective and unduly harsh.²⁶ In response, the War on Drugs began as many feared the implications of widespread marijuana use.

Throughout the 1970s and 1980s, public opinion about recreational use swung back in the other direction.²⁷ President Nixon commenced the “war on drugs” in 1971 and established the U.S. Drug Enforcement Administration.²⁸ In the 1980s, President Reagan signed the Anti-Drug Abuse Act, reinstating mandatory sentencing, and First Lady Nancy Reagan launched her “Just Say No” anti-drug campaign.²⁹ These measures grouped marijuana with other drugs and narcotics and deepened public fear about recreational use.³⁰

Despite criminalization and legalization in some states by the 1990s, the War on Drugs continued, costing billions in police spending, court costs, and prison

21. PBS, *supra* note 8.

21. *Id.*

22. *Id.*

23. *Id.*

24. See, e.g., Jamie Doward, *Legal Marijuana Cuts Violence Says U.S. Study, as Medical Use Laws See Crime Fall*, GUARDIAN (Jan. 13, 2018), <https://www.theguardian.com/world/2018/jan/14/legal-marijuana-medical-use-crime-rate-plummets-us-study>.

25. PBS, *supra* note 8.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

expenditures, not to mention the social costs.³¹ The U.S. prison population grew from 330,000 in 1980 to about 1.6 million by 2013, primarily due to the War on Drugs.³² Nationwide, between 2001 and 2010, there were 8.2 million marijuana arrests and over seven million of those were for possession, while the others were for sale or distribution.³³ In Kentucky alone, there were 7,600 marijuana arrests in 2018, the vast majority of which were for possession.³⁴

The racial disparities in marijuana rates are even higher in Kentucky than the rest of the country.³⁵ Nationwide, a Black person was over 3.7 times more likely to be arrested for marijuana possession than a white person, despite comparable marijuana usage rates.³⁶ In Kentucky, the situation is even worse than the national average. A 2018 report showed that Kentucky ranked second in the nation for the largest racial disparities in marijuana possession.³⁷ Police are 9.4 times more likely to arrest Black Kentuckians than white Kentuckians for marijuana possession despite having similar usage rates.³⁸

These issues have snowballed, creating more problems for Kentucky and its citizens, notably in regard to mass incarceration. Even among the high rates of incarceration in America,³⁹ Kentucky stands out.⁴⁰ For every 100,000 people in Kentucky, 869 are incarcerated, including prisons, jails, immigration detention, and juvenile justice facilities (the national average is 698 per 100,000).⁴¹ The problem is so severe that in August 2019, several experts warned the Kentucky General Assembly that they must take steps to address the overcrowding of local

31. Amanda Goff Connors, Note, *Public Policy Arguments for Enacting Kentucky Cannabis Freedom Act*, 9 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 237, 242 (2017).

32. See Gary S. Becker & Kevin M. Murphy, *Have We Lost the War on Drugs?*, WALL ST. J. (Jan. 4, 2013, 8:39 PM), <http://www.wsj.com/articles/SB10001424127887324374004578217682305605070>.

33. *The War on Marijuana is a Failure*, ACLU KY., (Aug. 28, 2019) <https://www.aclu-ky.org/en/news/war-marijuana-failure>.

34. *Report: Black Kentuckians Nearly 10x More Likely to be Arrested for Marijuana Possession than White Kentuckians*, ACLU KY., *supra* note 7.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. See Ben Wolfgang, *Obama Calls for Overhaul of Prison System, End of Mandatory Minimum Sentences*, WASH. TIMES (Jul. 14, 2015), <http://www.washingtontimes.com/news/2015/jul/14/obama-calls-for-overhaul-of-prison-system-end-of-m/?page=all>.

40. PRISON POL'Y INITIATIVE, *supra* note 6.

41. *Id.*

jails, or else courts may intervene in the next few years and order the mass release of inmates.⁴² The recent coronavirus pandemic increased the urgency to address the overcrowding problem.⁴³ As of July 2020, three correctional facilities saw outbreaks, resulting in at least six inmate deaths, 770 infected inmates, and 108 infected employees.⁴⁴

People in Kentucky today are facing heavy consequences from marijuana-related convictions, often with life-altering punishments. Possession charges can result in incarceration of up to forty-five days or fines of \$250.⁴⁵ Cultivation charges can result in a Class D felony, which is punishable by one to five years imprisonment or a fine of \$1,000 to \$10,000.⁴⁶ Most remarkably, trafficking five or more pounds on a second or subsequent offense can result in a Class B felony for trafficking, which carries potential fines of up to \$10,000 or ten to twenty years of imprisonment.⁴⁷ These sentences alone can be enough to reshape the direction of someone's life.

Along with these formal punishments, many collateral consequences follow a conviction even after a fine is paid or time is served, particularly for indigent defendants.⁴⁸ Through these collateral consequences, courts also indirectly impose barriers to future employment,⁴⁹ the right to vote or hold office,⁵⁰ and in some cases, the right to child custody and visitation.⁵¹ Often a general distrust

42. John Cheves, *Reduce Jail Overcrowding Before a Judge Orders Mass Release, Experts Warn Lawmakers*, LEXINGTON HERALD LEADER (Aug. 23, 2019), <https://www.kentucky.com/news/politics-government/article234273842.html>. See also William L. Newman & Charles L. Scott, *Brown v. Plata: Prison Overcrowding in California*, 40 J. AM. ACADEMY PSYCHIATRY & L. 547, 547-52 (2012) (discussing a Ninth Circuit decision ordering California to release 46,000 inmates to address overcrowding).

43. PRISON POL'Y INITIATIVE, *supra* note 6.

44. John Cheves, *COVID-19 Sweeps Through Another Kentucky Prison, Killing 3 and Infecting 182*, LEXINGTON HERALD LEADER (July 21, 2020, 1:27 PM), <https://www.kentucky.com/news/coronavirus/article244374692.html>.

45. KY REV. STAT. ANN. § 218A.1422 (West 2021).

46. KY REV. STAT. ANN. §§ 218A.1423, .1421 (West 2021).

47. KY REV. STAT. ANN. § 218A.1421 (West 2021).

48. See Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> (describing the collateral impact of criminal convictions on individuals in different financial and social positions).

49. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1108 (2013).

50. MARGARET COLGATE LOVE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE §§1:2, 1:11 (NACDL Press & Thompson Reuters eds., 2013).

51. Ahrens, *supra* note 2, at 418.

from community members can make reentering society difficult.⁵² For others, conviction could even result in deportation.⁵³ In some cases, these implicit consequences have much more long-term adverse effects than the punishment explicitly assigned by courts.⁵⁴ When courts impose a punishment, they do not always consider the collateral negative consequences that follow.⁵⁵ Because of this, people carrying prior convictions on their record may fully serve their court-imposed sentence but continue to face punishment from society.⁵⁶

Kentuckians have recognized the problems of these collateral consequences in recent years and are taking steps to remove them. In 2019, Governor Andy Beshear signed an executive order that returned voting rights to more than 140,000 residents who completed sentences for nonviolent felonies.⁵⁷ While this was a positive step, Beshear's order acted only as a pardon. Kentucky's constitution denies the vote to any person with a felony conviction but allows exceptions by executive pardons.⁵⁸ Even so, the order shows a willingness to restore rights to people with prior convictions.

III. STEPS TOWARD DECRIMINALIZATION IN KENTUCKY

As laws around the country have evolved, so have the laws in Kentucky.⁵⁹ In 2013, Kentucky enacted a statute that allowed farmers to grow industrial hemp (now repealed),⁶⁰ and in 2014, Congress signed the Federal Farm Bill into law, which legalized industrial hemp nationally.⁶¹ In 2014, Kentucky passed a law permitting doctors at several universities to research and treat certain patients

52. David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1313-14 (2009).

53. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

54. See Logan, *supra* note 49, at 1107-09.

55. *Id.*

56. *Id.*

57. Michael Wines, *Kentucky Gives Voting Rights to Some 140,000 Former Felons*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html>.

58. KY. CONST. § 145(1) (1891).

59. See Connors, *supra* note 31, at 250-53.

60. KY REV. STAT. ANN § 260.854 (repealed 2017).

61. Jessica Firger, *The Great Kentucky Hemp Experiment*, NEWSWEEK (Oct. 11, 2015, 10:05 AM), <http://www.newsweek.com/2015/10/23/great-kentucky-hemp-experiment-381870.html>.

with a substance derived from cannabis plants called cannabidiol (“CBD”) because it can help treat children with seizures.⁶²

Most recently, Kentucky House Bill 136 passed in the House but, due to COVID-19 delays, has not been heard by the Senate.⁶³ The bill would allow doctors to prescribe cannabis to patients who may obtain it at approved dispensaries.⁶⁴ The bill has a strong chance of passing in the Senate as public opinion in Kentucky favors access to medical marijuana use.⁶⁵ Nine in ten Kentuckians support legalizing marijuana for medical use, and six in ten say it should be legalized under any circumstance.⁶⁶ These public opinion numbers have grown considerably over the last decade.⁶⁷ Several Kentucky counties have essentially decriminalized the use of marijuana by announcing that they will no longer prosecute the possession of small amounts of the substance. Jefferson County Attorney General, Mike O’Connell, cited racial disparities as his reason for this decision, saying, “for me to truly be a minister of justice, I cannot sit idly by when communities of color are treated differently.”⁶⁸

These steps illustrate the likelihood that Kentucky may follow in the footsteps of other states and decriminalize marijuana in the near future. When Kentucky does take that step, there are several options available to address prior convictions.

62. John Cheves, *Kentucky Lawmakers Discuss Medical Marijuana Bill, but No Vote is Planned*, LEXINGTON HERALD LEADER (Feb. 12, 2015, 2:47 PM), <http://www.kentucky.com/living/health-and-medicine/article44553690.html>.

63. Joe Sonka, *Medical Marijuana in Kentucky? Senate leader not sure if he’ll allow a hearing or a vote* (Mar. 4, 2020, 7:17 AM), COURIER-J., <https://www.courier-journal.com/story/news/politics/ky-legislature/2020/03/04/kentucky-medical-marijuana-bill-faces-tough-climb-senate-committee/4939182002/>.

64. *Id.*

65. *Id.*

66. *Kentucky Health Issues Poll: Support for Medical Marijuana in Kentucky Jumps to 90 Percent*, FOUND. FOR A HEALTHY KY. (Feb. 5, 2020), <https://www.healthy-ky.org/newsroom/news-releases/article/415/kentucky-health-issues-poll-support-for-medical-marijuana-in-kentucky-jumps-to-90-percent>.

67. *Id.*

68. *Id.*

IV. KENTUCKY'S OPTIONS FOR ADDRESSING PRIOR CONVICTIONS

Jurisdictions have many rationales for decriminalizing marijuana.⁶⁹ For many, it is about merely giving people access to a substance with medicinal benefits.⁷⁰ For others, it is about limiting the use of valuable state resources that currently go to policing, prosecuting, and incarceration.⁷¹ Still for others, the criminalization of marijuana was wholly unjust to begin with because the people who faced the worst consequences were generally poor members of minority communities.⁷²

These perspectives are important to identify at the outset because they shape how society addresses prior convictions. If decriminalization is about acknowledging that a law was unjust to begin with, the logical argument is that there should be a clear path to removing any prior convictions because the conviction was unfair from its inception. States have taken many different approaches, revealing their deeper impression of the prohibition of cannabis. While a handful of states have done virtually nothing, leaving prior convictions on records and people in prison, that has been the exception.⁷³ The three main options are 1) executing pardons, 2) expungement or automatic-expungement, and 3) record-sealing.⁷⁴ States have used each of these or a combination of all three to address prior marijuana convictions.⁷⁵

A. Pardons

Pardons can be an effective solution to addressing prior convictions because the executive branch has broad authority and can proceed without extra procedural steps.⁷⁶ Mass pardons have played vital roles several times throughout American and Kentucky history. Traditionally, they are used on a case-by-case basis, but occasionally executives have used the pardon power to broadly remove all convictions of one specific crime. For example, in 1977,

69. Ahrens, *supra* note 2, at 413.

70. *Id.* See also, e.g., Michael Pollan, *Living With Medical Marijuana*, N.Y. TIMES (July 20, 1997), <https://www.nytimes.com/1997/07/20/magazine/living-with-medical-marijuana.html>.

71. *Id.*

72. Ahrens, *supra* note 2, at 413. See also Christopher Ingraham, *Sen. Cory Booker Puts Marijuana Legalization at the Center of his New Racial Justice Bill*, WASH. POST (Aug. 1, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/08/01/cory-booker-puts-marijuana-legalization-at-the-center-of-his-new-racial-justice-bil/>.

73. RESTORATION OF RTS. PROJECT, *supra* note 1.

74. *Id.*

75. *Id.*

76. Ahrens, *supra* note 2, at 426.

President Jimmy Carter gave unconditional pardons to hundreds of thousands of men who had evaded the draft during the Vietnam War.⁷⁷ The move was controversial at the time, but it effectively ended the prosecution of draft evaders.⁷⁸ On the surface, it appears that with the snap of his finger, a president or governor can erase prior convictions. That is, of course, not the case.

A more common use of pardoning power involves a panel who comb through prior convictions and independently review each application. Many state executives have created boards or put other infrastructure in place to streamline and regulate the pardoning process at this level.⁷⁹ The streamlined process would be one practical way to handle the volume of pardons needed to cover all those with prior marijuana convictions in any state.⁸⁰

Several states, including some who still criminalize marijuana, have developed pardoning programs specifically to handle prior marijuana convictions.⁸¹ For example, Pennsylvania has not decriminalized marijuana but has created an Expedited Review Board through the Pennsylvania Board of Pardons that allows people with non-violent marijuana-specific offenses to apply for a pardon.⁸² In Washington, where marijuana is fully legal and decriminalized, Governor Inslee developed the Marijuana Justice Initiative.⁸³ Under the initiative, people who have a single marijuana conviction on their criminal record can submit an online application to the governor's office, starting with a pardon request.⁸⁴ These options provided direct paths to pardoning for people with marijuana convictions.

77. See Andrew Glass, *President Carter Pardons Draft Dodgers, Jan. 21, 1977*, POLITICO (Jan. 21, 2018), <https://www.politico.com/story/2018/01/21/president-carter-pardons-draft-dodgers-jan-21-1977-346493>.

78. *Id.*

79. Ahrens, *supra* note 2 at 427.

80. *Id.*

81. See RESTORATION OF RTS. PROJECT, *supra* note 1; See Jack Dura, *North Dakota Pardon Advisory Board still seeking more applicants under new marijuana policy*, BISMARCK TRIB. (Feb. 10, 2020), https://bismarcktribune.com/news/local/crime-and-courts/north-dakota-pardon-advisory-board-still-seeking-more-applicants-under/article_7fa40ea7-5355-50a4-aaa4-9dcff9551fc3.html.

82. *Expedited Review Program*, PA. Bd. OF PARDONS, <https://www.bop.pa.gov/Apply%20for%20Clemency/Pages/Expedited-Review-Program.aspx> (last viewed Aug. 16, 2020) (describing a system of review for “non-violent marijuana-specific convictions”).

83. *Marijuana Justice Initiative*, WASH. OFF. OF THE GOVERNOR, <https://www.governor.wa.gov/marijuanajustice> (last viewed Aug. 14, 2020).

84. *Id.*

In Kentucky, the governor has even broader discretion to use pardoning powers.⁸⁵ For example, last year Governor Matt Bevin pardoned more than 600 people, just before leaving office.⁸⁶ Most cases involved low-level drug offenses, but others were more serious.⁸⁷ Although the specific cases were recommended to him by a panel, each decision ultimately came down to his independent discretion.⁸⁸ While some states give a pardoning board power to determine who the executor should pardon, Kentucky is one of twenty-nine states where boards can make recommendations, but the governor is not obligated to accept them.⁸⁹ Kentucky's constitution gives the governor the power to commute sentences and grant pardons as long as he files a public application stating the inspection.⁹⁰

B. Expungements

Expungements are another option available to legislators. Most states, including Kentucky, already offer a process for removing past convictions from criminal records.⁹¹ Outside of formal criminal constraints, most jurisdictions recognize that a criminal record carries many other collateral disadvantages.⁹² Therefore, some see expungements as a fair way to effectively end the retributive process and allow people to move on with their lives.⁹³

In the context of decriminalization, it is even more critical to create a process for expungement. If society has decided that an act is no longer criminal, it is inherently unfair to maintain consequences for those who committed that same act.⁹⁴ Thus, many states have developed thorough processes to apply for expungement or for marijuana convictions to be automatically expunged.

85. See KY. CONST. § 77 (1891).

86. Mark Berman, *Kentucky's Governor Granted Clemency to More Than 600 People. Then Came a Firestorm.*, WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/national/kentuckys-governor-issued-more-than-600-pardons-then-came-a-firestorm/2019/12/21/33e09ce4-2342-11ea-a153-dce4b94e4249_story.html.

87. *Id.*

88. *Id.*

89. *Id.*

90. See KY. CONST. § 77 (1891).

91. See Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2839-41 (2017).

92. *Id.*

93. *Id.*

94. Ahrens, *supra* note 2, at 384.

In California, the state legislature created a process that required the Department of Justice to review all records through the criminal database and notify the prosecution of all those cases where a person carried a sentence for a conviction, which they would not have been guilty of under the recently passed Regulate and Tax Adult Use of Marijuana Act.⁹⁵ The prosecution then had a year to review all those cases and decide whether to challenge the recall or dismissal.⁹⁶ The only grounds for challenging the sentence are if the person did not meet the criteria to challenge the conviction or if the person would present an unreasonable risk to public safety.⁹⁷ This process works as an almost automatic way for sentences to be dismissed by not requiring any action on the part of the convicted person.⁹⁸

Other states require the person carrying the conviction to apply for expungement without any sort of automatic review.⁹⁹ While this relieves pressure on the jurisdiction's justice department and prosecutors, it can require people to navigate a complicated process that sometimes involves filing motions with the court.¹⁰⁰ Because the process can be daunting, many people do not even attempt to seek expungement. The Drug Policy Alliance found that in Oregon, about 78,000 people would have qualified for their relief program, but the courts only received 388 requests in cases that involved a marijuana charge in 2015, 453 in 2016, and 365 in 2017.¹⁰¹ This could be because people did not know about the program or how to navigate the process.¹⁰² Additionally, many fear that because their records are more complicated due to longer criminal histories, they will not qualify, which is sometimes the case.¹⁰³

One argument in favor of this system is that it puts the responsibility on the individual to seek a solution. Therefore, if they do not apply, they must not face

95. CAL. HEALTH & SAFETY CODE § 11361.9 (West 2021).

96. *Id.*

97. *Id.*

98. See 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>.

99. See VT. STAT. ANN. tit. 13 § 7602(a)(1)(B), (d) (West 2021); WASH. REV. CODE ANN. § 9.96.060(5) (West 2021); HAW. REV. STAT. § 706-622.5(5) (West 2021).

100. Ahrens, *supra* note 2 at 431.

101. See Sophie Quinton, *In These States, Past Marijuana Convictions Can Go Away*, THE PEW FOUND.: 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>.

102. *Id.*

103. *Id.*

any consequences from their convictions, or they must see the consequences to be so minor that they are not worth seeking a solution.¹⁰⁴ However, these complicated processes create barriers that often leave behind people in underprivileged communities who are not aware of their options or cannot afford to seek the help they need to navigate the system.¹⁰⁵ Ultimately, an application process for expungement is a positive step but does not do enough to help the people affected.

In Kentucky, a person can apply for misdemeanor and felony expungement in certain instances after five years have passed since they have completed their sentence, probation, or parole—whichever is later.¹⁰⁶ The process requires a party to request an expungement certification by paying \$40 and mailing a request form to the Administrative Office of the Courts, wait for approval from that office and the Kentucky State Police, then submit that certification to the Office of the Circuit Court Clerk, pay a \$300 filing fee, allow a prosecutor to review and possibly raise objections, and then wait for a judge to review and grant the application.¹⁰⁷ The complicated steps prevent many from actually completing the process.

C. Record Sealing

It is vital to distinguish expungement from record sealing in this context, although the definitions can vary by jurisdiction. Generally, expungement means that all traces of involvement in a crime vanish, and no indication is left behind that the person was involved in the offense in either public or official databases.¹⁰⁸ When courts seal records, they still exist in the system but are hidden from the public, meaning any employers, landlords, or school officials would not be able to find evidence of a criminal record, but police officers, prosecutors and other officials could still access them.¹⁰⁹ In this way, record sealing reestablishes people's right to enter society without prior conviction, but it still can affect future outcomes if a person ever comes in contact with the criminal justice system again.¹¹⁰ To some, this is a fair method because it allows

104. *Id.*

105. *Id.*

106. KY REV. STAT. ANN. § 431.073 (West 2021).

107. *Id.*

108. Nicola J. Pagonis, *Criminal Records: Sealing and Expungement*, in MASS. CONTINUING LEGAL EDUC., CRIME AND CONSEQUENCES: THE COLLATERAL EFFECTS OF CRIMINAL CONDUCT § 18.2.1 (2013).

109. *Id.*

110. *Id.*

police officers, prosecutors, and other officials to consider past criminal activity when assessing the seriousness of a crime and the potential risk the person may have towards society.¹¹¹

When addressing record sealing in the decriminalization of marijuana, many states and jurisdictions have found this to be a straightforward solution. In Washington D.C., a person arrested for, charged with, or convicted of a criminal offense that was decriminalized or legalized after the date of the charge on conviction may file a motion to seal the record at any time.¹¹² Other states have similar record sealing statutes that allow for the application of record sealing, either specifically for marijuana convictions or in general for crimes that have since been decriminalized or even for prior convictions in general.¹¹³ The issues with record sealing are similar to expungement. When states put the responsibility on the individual to apply, it often creates barriers that are hard for many people to overcome.¹¹⁴ On top of that, record sealing does not go far enough to restore justice and dignity to those who have prior marijuana violations.¹¹⁵

Kentucky only recognizes record sealing as a component of expungement, so there is no separate process for only sealing records to the public but leaving them in the system.¹¹⁶ That means to have records sealed, a Kentucky citizen would need to go through the process to expunge their record entirely.¹¹⁷ In July 2020, Kentucky passed a law that creates an automatic process of record sealing and expungement for those who the courts have acquitted of a crime.¹¹⁸ Under this new standard, the court shall order law enforcement to fully expunge the records within 30 days of the acquittal or dismissal of charges.¹¹⁹ This recent change shows the potential for the Kentucky system to process expungements on a broad scale. While an automatic process of this type for prior marijuana

111. *Id.*

112. D.C. CODE § 16-803.02 (2021).

113. See COLO. REV. STAT. § 24-72-710 (2021); MASS. GEN. LAWS ANN. ch. 276 § 100A (West 2021).

114. Ahrens, *supra* note 2 at 432.

115. *Id.*

116. See generally KY. REV. STAT. ANN. §§ 431.076-0.795 (West 2021).

117. Jason Riley, *Kentucky lawmakers look to ease process for erasing criminal records*, WDRB (Mar. 3, 2020), https://www.wdrb.com/in-depth/sunday-edition-kentucky-lawmakers-look-to-ease-process-for-erasing-criminal-records/article_c3d4d596-5a64-11ea-b665-3bfc0f4e7db3.html.

118. KY REV. STAT. ANN § 431.076 (West 2020).

119. *Id.*

convictions would be more time-consuming than the occasional acquittals, it still shows the state can remove the records thoroughly.

Of the options outlined above, states have used various combinations of all three to address prior convictions.¹²⁰ Others have not created any process to relieve those with convictions.¹²¹ Because more states have taken steps in this direction, Kentucky will learn from the advantages and disadvantages of each system.

V. THE SOLUTION

Keeping all of these approaches in mind, upon decriminalization, Kentucky should establish automatic expungement of any marijuana-related charges, including possession, sales and trafficking, and cultivation. Despite any action that the federal government may take to erase prior federal convictions or to decriminalize marijuana, it is essential that Kentucky makes its own statement to its citizens and frees them from the barriers of prior conviction. This section will analyze why expungement is necessary, outline the best execution, and address counterarguments.

Kentucky needs to adopt automatic expungement of marijuana convictions for several reasons. First, Kentucky has a history of racially motivated policing of marijuana that disadvantages communities of color. While all states deal with this issue to varying degrees, the numbers show that Kentucky is one of the gravest offenders.¹²² The Commonwealth needs to recognize its history and take steps to acknowledge and repair the damage it caused to Black communities. Marijuana expungement would be one step on that road to racial reconciliation.¹²³ Expungement alone removes dozens of barriers to people with prior convictions and communicates that the system was wronged. Expungement alone does not fully right the wrongs of Kentucky's history of racism,¹²⁴ but it is a valuable step in the right direction.

Expungement also simplifies, clarifies, and increases fairness in an area of law which has frequently changed in recent decades. During the 20th century, the law shifted from full legalization and open commercial use to strict

120. RESTORATION OF RTS. PROJECT *supra* note 1.

121. *Id.*

122. ACLU Ky., *supra* note 7.

123. *See generally id.*

124. *See supra* notes 35 to 38 and accompanying text.

decriminalization.¹²⁵ In last decade alone, contradictions in legality, criminality, and sentencing between different states and counties has made marijuana law more convoluted.¹²⁶ As both Kentucky and the national government look to legalize or decriminalize marijuana, they must consider the lingering impact on those carrying prior convictions. Expunging records creates a clean slate for those affected individuals, and the state itself, to move forward and resolve the numerous issues surrounding cannabis legality.

Automatic expungement is a better option for Kentucky than record sealing or pardons. Automatic expungement is the only option that leaves no burden on the convicted individual. Adding extra barriers that require people to navigate a system that has already disadvantaged them is irrational. The purpose of establishing an expungement process is to eliminate not just the court-imposed sentences, but also the collateral consequences of prior convictions that linger for many. The extra steps involved include added fines, complicated paperwork (that often requires legal consultation), and appearances in court during normal work hours.¹²⁷ If Kentucky decides to remove prior convictions, automatic expungement is the best way to do so.

While similar, there are critical differences between record sealing and expungement that make expungement the better choice for Kentucky. Record sealing does not erase all evidence of their existence, meaning it would fail to remove many of the collateral consequences of prior convictions. Thus, this would still result in unfair bias from police officers who would be able to view prior convictions, even if sealed.¹²⁸

Also, record sealing would also be harder to integrate because Kentucky does not have a record sealing process outside of the scope of expungement. More importantly, sealing is not the best way to restore justice and equal rights to those with prior convictions. As a public policy matter, leaving a viewable record communicates that marijuana use is wrong—something that conflicts with the state's message that marijuana crimes must be forgiven.¹²⁹ If Kentucky legislators seek to truly resolve and restore justice to those with prior convictions, entirely expunging records is a better step than record-sealing.

The expungement route also has advantages over pardons or establishing a pardoning panel. Kentucky gives full autonomy to the governor to grant or deny

125. See PBS, *supra* note 8.

126. See *generally* Part II.

127. See Ahrens, *supra* note 2, at 431.

128. *Id.*

129. *Id.* at 433.

pardons without placing any legal weight on a review board's recommendations.¹³⁰ Leaving this critical task in one person's hands would inevitably lead to injustices and result in many people falling through the cracks or allowing personal bias an outsized effect.¹³¹ Pardons are vulnerable to changes in the current executive's political attitudes. While pardoning boards and initiatives offer a more structured process, governors generally create these programs themselves.¹³² Therefore, when an administration leaves, the pardoning structure may leave with it,¹³³ resulting in conflicting execution. If Kentucky decriminalized marijuana tomorrow and developed a process for pardoning, it would still take years for every affected person to apply, risking inherent unfairness with different administrations handling the applications.

Even so, one plausible option would be for Kentucky's Governor to follow the model of Jimmy Carter and issue a broad pardon for any person with a prior marijuana conviction.¹³⁴ However, under the current Kentucky expungement policy, the law still requires a person to individually apply and pay a fine after being pardoned, which leaves the burden on individuals to navigate the complicated process.¹³⁵

A more important argument against pardons is more theoretical than practical: a pardon communicates that an executive is granting mercy for a person who engaged in socially harmful behavior.¹³⁶ With decriminalization, this is an inherently flawed way to view why a person deserves relief. Instead, society is looking at the policies around marijuana convictions and recognizing the injustices that historically played a role.¹³⁷ Thus, pardons would not communicate society's changing attitudes towards those with prior marijuana use. Ultimately,

130. KY. CONST. § 77 (1891).

131. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991) (arguing to move the process of granting clemency for retributive fairness away from unguided executive discretion).

132. See Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26, 27 (2009).

133. *Id.* See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT'G REP. 125, 125 (2001).

134. See Glass, *supra* note 78.

135. Ahrens, *supra* note 2 at 429, 430. See also Margaret Colgate Love, *The Debt That Can Never Be Paid A Report Card on the Collateral Consequences of Conviction*, 21 CRIM. JUST. 16, 22 (2006).

136. *Id.* See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 217 (1989).

137. Ahrens, *supra* note 2, at 429, 430.

pardoning powers are subject to the executive branch and are not the fairest option to guarantee justice for those with prior convictions.

For these reasons, automatic expungement is the most elegant response to removing prior convictions. Automatic expungement effectively communicates that the state is admitting fault and fully restoring rights. It does so without imposing additional barriers on those who are affected, and it creates a process for handling prior convictions going forward so there is unity across the board.

Kentucky should mirror states who have successfully implemented automatic expungement. California and Illinois have both laid out models for automatic expungement¹³⁸ that would be effective and enforceable in Kentucky. The model will likely be even more straightforward in Kentucky because of its smaller population and lower numbers of marijuana offenses. Under this plan, Kentucky legislators would give a deadline of one to two years after decriminalization for the Kentucky Department of Justice to develop a list of people eligible for expungement.¹³⁹ To develop this list, the department will search its records for any marijuana-related charges, including possession, sales and trafficking, and cultivation.¹⁴⁰ The list should not include any marijuana-related convictions connected to another, more serious crime, such as carrying a weapon in connection with a drug offense. The list would then be presented to the attorney general to allow state prosecutors to review each case.¹⁴¹ The prosecution would have a year to decide if they will deny any case.¹⁴² Reasons for denial would include either failure to meet the proper criteria for expungement or a showing that expungement for that individual would pose a legitimate and severe risk of danger to society.¹⁴³ The courts should expunge any cases that were not challenged by the prosecution and notify all parties that their prior conviction is no longer valid.¹⁴⁴ While this process may be time-consuming, it is a one-time event and, after its completion, would result in a clean slate for the state to move forward without addressing prior marijuana convictions in the future.

Several objections to this plan do exist. A primary theme in those objections is that past criminal behavior is an indicator of future criminal behavior.

138. See CAL. HEALTH & SAFETY CODE § 11361.9 (West 2021); 410 ILL. COMP. STAT. ANN. § 705/10-5 (West 2021).

139. See *supra* note 138.

140. See *supra* note 138.

141. See *supra* note 138.

142. See *supra* note 138.

143. See *supra* note 138.

144. See *supra* note 138.

Therefore, it is essential to maintain records of criminal behavior for future law enforcement purposes.¹⁴⁵ A tension does exist between the states interest in protecting the public and the best result for the convicted individual.¹⁴⁶ However, recent research has found that the vast majority of people with criminal records eventually stop committing crimes, especially in connection with age and employment.¹⁴⁷ Experts have found that about 85% of people will stop committing crime by the time they are twenty-eight.¹⁴⁸ Crime numbers decline with age, even for active offenders.¹⁴⁹ Despite these numbers, prior convictions remain on the records of many people who have not committed criminal activity in decades.¹⁵⁰ Further, using records of past criminal convictions does not acknowledge racial disparities in arrests which made an individual more likely to face charges in the first place. When these factors are taken into account, this argument is unpersuasive. The value of maintaining these records does not outweigh the harm caused. Holding someone accountable for a criminal offense that others can now legally participate in would itself undermine the legitimacy of Kentucky law.

Another argument under this theory is that expunging marijuana convictions could have a windfall effect and relieve those who committed more severe offenses but accepted plea deals that removed all but the marijuana offense.¹⁵¹ For instance, the state may charge an individual with marijuana possession in conjunction with a more serious offense, like carrying a weapon connected with a drug offense. To reach agreement, the state may offer a plea deal to drop the more serious offense if the person agrees to plead guilty to marijuana possession.¹⁵² A new expungement process could result in that person being free from any marijuana charge and, therefore, having the appearance of a clean record when applying for jobs or if they come in contact with law enforcement again.¹⁵³ However, this argument has several holes. First, the reason a prosecutor

145. Ahrens, *supra* note 2, at 437.

146. See Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1338 (2017).

147. *Id.*

148. *Id.* See also Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331 (2009).

149. See Radice, *supra* note 146, at 1338. See also TONY WARD & SHADD MARUNA, *REHABILITATION: BEYOND THE RISK PARADIGM* 8 (2007).

150. See *supra* note 149.

151. Ahrens, *supra* note 2, at 422.

152. *Id.* See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 (2004).

153. Ahrens, *supra* note 2, at 422.

may have offered a plea deal in the first place is often because they do not believe they could prove the charges at trial.¹⁵⁴ Prosecutors often overcharge with this in mind.¹⁵⁵ Second, in most cases, a person in this situation has already experienced the criminal consequences for their actions, whether through incarceration, fines, or probation, and that consequence was decided upon by the court in agreement with the prosecution.¹⁵⁶ Finally, the value of maintaining a criminal record for future law enforcement purposes¹⁵⁷ does not outweigh the value of restoring justice to those with prior convictions.¹⁵⁸

Another counterargument relates to the common practice of private data companies obtaining criminal records and making them available online to independent parties, which may include potential landlords and employers.¹⁵⁹ If private companies can publicize records anyway, some ask whether expunging state records is even productive.¹⁶⁰ This is an ineffective argument because it raises a separate issue entirely. Kentucky should, of course, be doing all it can to stop private companies from sharing criminal data and there are several options available to do so.¹⁶¹ However, fully expunging criminal records is a necessary first step. It sets the stage for broader progress in removing prior conviction records in all contexts. Just because the automatic expungement system would not be perfect does not mean it should be tossed aside. Further, by initiating this process, Kentucky will make it more difficult for those private companies to access criminal data going forward.

Ultimately, the goal of automatic expungement is to restore fairness to communities who have historically been harmed by marijuana criminalization. Removing these records is a step in the right direction, and automatic expungement is a simple, elegant solution to a complicated area of law that has

154. *Id.*

155. *Id.*

156. *Id.* at 438.

157. See Radice, *supra* note 154, at 1338 (discussing why past criminal activity is not a valid indicator of future behavior).

158. Ahrens, *supra* note 2.

159. See NAT'L ASS'N OF CRIM. DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME (2014). <https://www.nacdl.org/getattachment/4a1f16cd-ec82-44f1-a093-798ee1cd7ba3/collateral-damage-america-s-failure-to-forgive-or-forget-in-the-war-on-crime-a-roadmap-to-restore-rights-and-status-after-arrest-or-conviction.pdf> (discussing the problems of lingering data on prior convictions).

160. *Id.*

161. *Id.* See also IND. CODE § 35-38-9-10 (Indiana law prohibiting unlawful discrimination against a person whose record has been expunged).

seen public opinion swing back and forth for decades. The vast majority of people with criminal records have successfully reentered society and become law-abiding citizens after marijuana convictions.¹⁶² The goal is to create an opportunity for more people to follow in their footsteps. Most importantly, it is unfair to maintain a criminal record for those who violated a law that society has since deemed unjust.¹⁶³

VI. CONCLUSION

Historically, major discrepancies have existed in how Kentucky punishes its citizens for marijuana offenses. While a citizen in one county may openly possess marijuana today and face no consequences, another citizen may face arrest and long-term consequences for that exact behavior. At the same time, Black Kentuckians are nearly 10 times more likely than white Kentuckians to face arrest for marijuana-related charges.¹⁶⁴ These extreme differences in the way marijuana use is treated results in unfair punishment, lingering collateral consequences, and ultimately undermines the legitimacy of Kentucky law. Upon decriminalization, Kentucky must prioritize automatic expungement and start the process of restoring justice to those carrying the weight of a law, unjustly enforced from its inception. Automatic expungement is the best path forward, as it will act quickly, place the burden on the state, and communicate the shift in public attitudes toward marijuana use.

162. See Radice, *supra* note 146, at 1338.

163. See Ahrens, *supra* note 2, at 398.

164. ACLU Ky., *supra* note 7.