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“Serving Time and It’s No Longer a Crime: An Analysis of the Proposed Cannabis Administration and Opportunity Act, its Potential Effects at the Federal and State Level, and a Guide for Practical Application by Local Government”

By: R. Allyce Bailey, Esquire

**Abstract**

There has been much recent discussion surrounding cannabis use with some researchers supporting the use of medical marijuana, some investors relishing in the recently booming cannabis and CBD industry, and some states decriminalizing marijuana and even harsh controlled substances. As it appears, at least some public opinion is changing regarding marijuana, but the law has not effectively caught up to that change. Bias in the criminal justice system has led to the over-policing of, higher conviction rates, and harsher sentences for minorities. Thus, the decriminalization of marijuana alone does not remedy the grave disproportionate negative effects on populations of color as a result of marijuana convictions.

Recognizing this, Senators Cory Booker, Ron Wyden, and Chuck Schumer have introduced the Cannabis Administration and Opportunity Act (“CAOA”) aimed to “end the decades of harm inflicted on communities of color by removing cannabis from the federal list of controlled substances and empowering states to implement their own cannabis laws.”<sup>1</sup> However, the proposed law will still recognize state law where possession, production, and distribution is concerned, which is significant because marijuana has not been decriminalized in all fifty United States. Accordingly, the bill, if passed, may have little to no effect on the tens of thousands currently incarcerated nationwide in state correctional facilities for marijuana related offenses. Additionally, excluded from relief by the proposed bill would be the immeasurable amount of people dealing with the indirect collateral consequences of marijuana related charges.

This article will address what we learned from the Prohibition Era and the failed War on Drugs; cite the societal importance of remedying the collateral consequences to minority communities stemming from marijuana convictions; and review the marketplace successes in the newly established cannabis industry. Most significantly, this article will provide a robust discussion of the successes and failures of the CAOAs amelioratory relief efforts; an analysis of the CAOAs effect, if passed, on state-level marijuana convictions; and most critically, provide a guide for practical application by state governments to implement the CAOAs and take advantage of its benefits.

**Introduction**

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<sup>1</sup> Senator Cory Booker et al., CANNABIS ADMINISTRATION AND OPPORTUNITY ACT: DISCUSSION DRAFT, Senate Democrats (Sept. 1, 2021), <https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf> (bill introduced on July 14, 2021 and closed for public comment Sept. 1, 2021).

There has been much recent discussion surrounding cannabis use with some researchers supporting the use of medical marijuana, some investors relishing in the recently booming cannabis and CBD industry, and some states decriminalizing marijuana and even harsh controlled substances.<sup>2</sup> Public opinion is changing regarding marijuana, with portions of the general public supporting marijuana legalization.<sup>3</sup> But the law has not effectively caught up to that change.<sup>4</sup> The current decriminalization of marijuana alone does not remedy the grave disproportionate negative effects on populations of color as a result of marijuana convictions. Marijuana convictions can create barriers in the realm of employment, access to housing, professional licenses, and even issues in domestic and family law matters.<sup>5</sup> This article will address the failed efforts of the decriminalization of marijuana, exploring issues like the fact that making marijuana legal *now* does

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<sup>2</sup> See generally *Marijuana Prohibition Facts*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/legalization/marijuana-prohibition-facts> (last visited Sept. 27, 2021) (listing states that have legalized medical marijuana including Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, South Dakota, Vermont, Virginia, and Washington); *Recreational Weed States - States That Have Legalized Weed*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/recreational-weed-states> (last visited Sept. 29, 2021) (mapping states that have legalized the recreational use of marijuana); Chris Morris, *Weed Wages 2021: Who Earns How Much In The Pot Industry?*, FORTUNE, (June 23, 2021, 7:30 PM) <https://fortune.com/2021/06/23/highest-paying-pot-weed-jobs-2021-cannabis-industry-legal-medical-marijuana-salaries> (last visited Sept. 29, 2021) (listing salary ranges for various marijuana industry professions); *Cannabis Studies at SUNY Morrisville*, SUNY MORRISVILLE, <https://www.morrisville.edu/cannabis> (last visited Sept. 29, 2021) (highlighting the overall push to accept marijuana as a legitimate industry).

<sup>3</sup> See generally *Marijuana Prohibition Facts*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/legalization/marijuana-prohibition-facts> (last visited Sept. 27, 2021) (citing a 2021 Gallup poll on marijuana legalization which showed that 68 percent of those surveyed supported Marijuana legalization for adults).

<sup>4</sup> See generally Robert A. Mikos, *Do (Should) State Marijuana Reforms Apply Retroactively?*, VANDERBILT UNIV., <https://my.vanderbilt.edu/marijuanalaw/2017/12/do-should-state-marijuana-reforms-apply-retroactively> (last visited Sept. 29, 2021) (outlining retroactive application of marijuana law); John Gramlich, *Four-in-ten U.S. Drug Arrests in 2018 Were for Marijuana Offenses- Mostly Possession*, PEW RSCH. CTR., <https://www.pewresearch.org/fact-tank/2020/01/22/four-in-ten-u-s-drug-arrests-in-2018-were-for-marijuana-offenses-mostly-possession> (last visited Sept. 29, 2021) (noting arrest statistics for marijuana).

<sup>5</sup> See generally *Collateral Consequences - Clergy for a New Drug Policy*, CLERGY FOR A NEW DRUG POLICY, <https://newdrugpolicy.org/reduced-collateral-consequences> (last visited Sept. 28, 2021) (noting collateral consequence of marijuana convictions); Deborah Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. OF CRIM. L. & CRIMINOLOGY 379 (2020) (discussing the impact of retroactive legality on those convicted of marijuana offenses); Elizabeth Danquah-Brobby, *Comment: Prison For You. Profit For Me. Systemic Racism Effectively Bars Blacks From Participation in Newly-Legal Marijuana Industry*, 46 UNIV. BALT. L. REV. 523 (2017) (discussing the legal impact of drug policy enforcement and how policy changes are not benefiting those impacted by the war on drugs).

not automatically release those currently incarcerated for marijuana convictions, nor does it automatically expunge the records of those with prior marijuana convictions. Making marijuana legal does not address the burdensome and cost-prohibitive nature of expungements, nor the fact that employers can still refuse to hire individuals that test positive for marijuana.<sup>6</sup>

This article is broken into six sections that are organized to layout the current incarceration problem with historic context leading to a substantive analysis of current federal legislation. Section One will explore the Prohibition Era and take stock of what historical gains we can garner from one of America's past substance restriction efforts. Additionally, Section One will explore the War on Drugs, specifically the disproportionate negative effects that drug convictions have on populations of color. Section Two will address the universal societal importance of remedying the collateral consequences to minority communities stemming from marijuana convictions. Section Three will explore the newly popular cannabis industry and the inequities presented by the majority becoming rich for marketing the same substance for which many minorities are currently serving lengthy prison sentences. Section Four will explore the draft Cannabis Administration and Opportunity Act ("CAOA"), its tentative successes, its areas of opportunity for improvement, and respond to the drafters' requests for comments. Section Five will address the CAOAs effect at the local level. Finally, Section Six will conclude with a practical plan of action guide for states to implement marijuana-specific criminal justice reform in the interim of an implemented federal statute.

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<sup>6</sup> Rebecca Beitsch, *Here's Why Many Americans Don't Clear Their Criminal Records*, PBS (2016), <https://www.pbs.org/newshour/nation/heres-why-many-americans-dont-clear-their-criminal-records> (last visited Apr. 26, 2022); Lisa Nagele-Piazza, *Marijuana and the Workplace: What's New for 2020?*, SHRM (2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/marijuana-and-the-workplace-new-for-2020.aspx> (last visited Apr. 26, 2022).

## SECTION I

### Prohibition

Marijuana is not the first substance the United States sought to regulate and eventually ban. The discussion of Prohibition is important to the conversation regarding marijuana criminal justice reform because we can learn so much from its intended goals, resulting failure at achieving those goals, and the posture and resistance of the American people. In the early 1900s, alcohol faced regulation during the Prohibition Era.<sup>7</sup> Congress's introduction of the 18th Amendment in 1917 would eventually prohibit the manufacture, transport, and sale of all intoxicating beverages.<sup>8</sup> Prohibition, as we now refer to the time, was the "legal prevention of the manufacture, sale, and transportation of alcoholic beverages in the United States from 1920 to 1933 under the terms of the 18th Amendment."<sup>9</sup> Leading up to Prohibition, in the 1820s and 1830s, as religious revivals burned through the United States, a move toward temperance increased.<sup>10</sup> By 1838, Massachusetts was the first to pass a temperance law banning liquor sales in quantities less than fifteen gallons.<sup>11</sup> Maine followed suit with state prohibition legislation in 1846, and many other states followed just prior to the Civil War in 1861.<sup>12</sup>

Many hoped for prosperous results from Prohibition that simply did not materialize. For instance, Prohibition's supporters expected clothing, household goods, and real estate sales to

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<sup>7</sup> *Prohibition*, HISTORY, <https://www.history.com/topics/roaring-twenties/prohibition> (last visited Sept. 27, 2021); Prohibition, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Prohibition-United-States-history-1920-1933> (last visited Feb. 24, 2022).

<sup>8</sup> *Id.*

<sup>9</sup> *Prohibition Definition, History, Eighteenth Amendment, & Repeal*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Prohibition-United-States-history-1920-1933> (last visited Sept. 27, 2021).

<sup>10</sup> *Supra* note 7.

<sup>11</sup> *Id.*; Franklin Dexter & B.F. Hallett, INVESTIGATION INTO THE FIFTEEN GALLON LAW OF MASSACHUSETTS, <https://archives.lib.state.ma.us/bitstream/handle/2452/802334/ocm08013270.pdf?sequence=1&isAllowed=y> (last visited Feb. 24, 2022).

<sup>12</sup> *Id.*; *Alcohol*, Maine: An Encyclopedia (2017), <https://maineencyclopedia.com/alcohol> (last visited Feb. 24, 2022).

rise.<sup>13</sup> Theatre producers were hopeful that as Americans searched for entertainment alternatives, ticket sales would increase.<sup>14</sup> Unfortunately, none of this financial increase came to fruition as a result of Prohibition.<sup>15</sup>

Instead, a host of unintended consequences resulted from Americans' resistance to the restrictions and their determination to access their desired vice. Restaurants that incorporated liquor into their offerings failed because they could no longer garner profit from drink sales.<sup>16</sup> Theatre revenue declined as well.<sup>17</sup> Bootleggers began illegally producing and selling liquor.<sup>18</sup> Underground illegal drinking spots called “speakeasies” gained prominence.<sup>19</sup> People even began mass-producing liquor at home with the origin of “moonshine” or “bathtub gin.”<sup>20</sup> One notable, and likely highly unexpected, consequence of Prohibition was the rise and criminal success of Chicago gangster, Al Capone (“Capone”).<sup>21</sup> During Prohibition, Capone gained unmatched notoriety and earned upwards of \$60 million from his bootlegging and speakeasy enterprises.<sup>22</sup> Associated with this illegal operation was a rise in gang violence including the Chicago St. Valentine’s Day Massacre in which a number of men impersonating police officers, and believed to be Capone’s associates, assassinated an enemy gang.<sup>23</sup>

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<sup>13</sup> Michael Lerner, *Unintended Consequences of Prohibition*, PBS (Feb. 27, 2022, 5:24 PM), <https://www.pbs.org/kenburns/prohibition/unintended-consequences/#:~:text=Prohibition's%20supporters%20were%20initially%20surprised,and%20household%20goods%20to%20skyrocket.&text=Restaurants%20failed%2C%20as%20they%20could,profit%20without%20legal%20liquor%20sales.>

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> HISTORY, *supra* note 7.

<sup>20</sup> *Id.*

<sup>21</sup> Kelly Erb, *Al Capone Convicted On This Day In 1931 After Boasting, ‘They Can’t Collect Legal Taxes From Illegal Money’*, FORBES (last visited Sept. 27, 2021), <https://www.forbes.com/sites/kellyphillipserb/2020/10/17/al-capone-convicted-on-this-day-in-1931-after-boasting-they-cant-collect-legal-taxes-from-illegal-money/?sh=1bbfe9f51435>; *see also supra* note 7.

<sup>22</sup> Erb, *supra* note 21; *see also supra* note 7.

<sup>23</sup> HISTORY, *supra* note 7.

Regardless of the growth of organized crime, Prohibition initially appeared to have some, although misleading, success, including fewer arrests for public drunkenness and a thirty percent decrease in overall alcohol consumption.<sup>24</sup> However, enforcement of the law in the wake of Americans' persistent consumption of alcohol was difficult.<sup>25</sup> Eventually, the unintended consequences of Prohibition proved to be more dangerous and harmful than the harm lawmakers were attempting to thwart by forcing a dry society.<sup>26</sup> The need to create jobs and stimulate the economy post the Great Depression also favored the repeal of Prohibition.<sup>27</sup> By the “roaring” 1920s, all of these negative effects eventually led to “waning support for Prohibition” and in response, Congress repealed Prohibition by ratifying the 21st Amendment in 1933.<sup>28</sup>

What happened to all of those incarcerated in the early 1900s for bootlegging could have served as a potential roadmap for modern day “ameliorative relief.”<sup>29</sup> Ameliorative relief allows those convicted of a crime to retroactively benefit from a change in the law. Without automatic ameliorative relief, most Prohibition offenders were required to carry out the full terms of their Prohibition-related incarceration.<sup>30</sup> While some were able to request government pardons, there is little historical evidence that bootleggers were released upon repeal of Prohibition.<sup>31</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* See generally Livia Gershon, *Legalizing Marijuana: Lessons from the Post-prohibition Era*, JSTOR DAILY (Mar. 3, 2015), <https://daily.jstor.org/legalizing-marijuana-lessons-from-the-post-prohibition-era>.

<sup>26</sup> HISTORY, *supra* note 7.

<sup>27</sup> Gershon, *supra* note 25.

<sup>28</sup> See *supra* note 7.

<sup>29</sup> Michelle F. Kaplin-Zhebrak, *Emerging Marijuana Legalization and Retroactive Ameliorative Relief*. MIAMI L. RACE & SOC. JUST. REV. (Feb. 26, 2020), <https://race-and-social-justice-review.law.miami.edu/emerging-marijuana-legalization-retroactive-ameliorative-relief>.

<sup>30</sup> *Dry Law Violators to Get No Leniency*, THE EVENING STAR (Mar. 1, 1933), [https://chroniclingamerica.loc.gov/data/batches/dlc\\_1chagall\\_ver01/data/sn83045462/00280600945/1933030101/0193.pdf](https://chroniclingamerica.loc.gov/data/batches/dlc_1chagall_ver01/data/sn83045462/00280600945/1933030101/0193.pdf); *Dry Era End Proclaims on Utah's Ratification*, THE LOS ANGELES TIMES (Dec. 3, 1933), <https://documents.latimes.com/repeal-day-1933>; Vicki Denig, *Were Bootleggers Released When Prohibition Ended?*, VINEPAIR (Dec. 7, 2016), <https://vinepair.com/articles/violators-prohibition-serve-full-sentence-post-repeal>.

<sup>31</sup> *Id.*

From the examination of Prohibition, America is no stranger to the implementation of governmental restrictions that ultimately fail to achieve their intended objective. Accordingly, as the nation explores restrictions on marijuana, we must determine the ultimate objective of marijuana criminalization, and evaluate whether that desired outcome is achievable, or whether the outlined objectives and resulting outcomes are actually conflicting. For instance, marijuana was not outlawed in Illinois until 1931.<sup>32</sup> In roaring '20s Illinois, due to the federal government's preoccupation or fixation with criminalizing alcohol and punishing bootleggers, marijuana remained legal, making it legal to get high but not drunk, in Chicago—a perplexing reality when analyzing the issues of the present day.<sup>33</sup> Some argue, “the arbitrary criminalization of tens of millions of Americans who consume marijuana results in a large-scale lack of respect for the law and the entire criminal justice system.”<sup>34</sup> “There is an indisputable risk that vanishes the moment an industry becomes legalized.”<sup>35</sup>

### *The War On Drugs*

While there are many similarities between the War on Drugs and Prohibition, the War on Drugs focused less on constitutionality as it developed over many decades. The Marijuana Tax Act of 1937 effectively outlawed marijuana at a time when few Americans even knew what it

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<sup>32</sup> Bruce Rushton, *The War On Weed*, ILL. TIMES (Feb. 9, 2012), <https://www.illinoistimes.com/springfield/the-war-on-weed/Content?oid=11440556>; *Was Marijuana Legal During Prohibition?*, CHICAGO DETOURS (Apr. 19, 2021), <https://chicagodetours.com/marijuana-prohibition-420>; Brendan Pedersen, *Cook County Votes Yes on Legalizing Marijuana – What's Next?*, NBC CHICAGO (Mar. 21, 2018, 5:26 PM), <https://www.nbcchicago.com/news/local/cook-county-voters-weigh-in-on-marijuana/37377>.

<sup>33</sup> *Id.*

<sup>34</sup> *Marijuana Prohibition Facts*, MARIJUANA POL'Y PROJECT, <https://www.mpp.org/issues/legalization/marijuana-prohibition-facts> (last visited Sept. 27, 2021).

<sup>35</sup> Larry Carroll, *The lessons learned from Prohibition - and how cannabis can follow their lead*, USA TODAY (Jan. 28, 2020, 6:00 AM), <https://www.usatoday.com/story/sponsor-story/rdc-collective/2020/01/28/lessons-learned-prohibition-and-how-cannabis-could-follow-their-lead/4544386002>.



was.<sup>36</sup> In a few decades following the Marijuana Tax Act of 1937, President Ronald W. Reagan (“Reagan”) championed the War on Drugs as an executive campaign.<sup>37</sup> In the 1980s, Reagan made it the mission of his administration to enforce harsher sentences for the cultivation, possession, and sale of marijuana.<sup>38</sup> Reagan also enacted the Comprehensive Crime Control Act of 1984 which provided for mandatory minimum sentences in connection with marijuana.<sup>39</sup>

Numerous reports have shown that the nation’s drug prohibition laws originated with incredible racial bias as the War on Drugs has had a disproportionate impact on people of color.<sup>40</sup> Despite data showing majority and minority groups consume and sell drugs at essentially the same rate (one study even found that White Americans are actually *more likely* to sell drugs than people of color), arrest rates are disproportionate.<sup>41</sup> For instance, President Richard Nixon’s (“Nixon”) War on Drugs, where Nixon signed the Controlled Substance Act into law in 1970 and included marijuana on Schedule I.<sup>42</sup> Schedule I drugs are defined as “drugs with no currently accepted medical use and a high potential for abuse.”<sup>43</sup>

A top Nixon aide, John Ehrlichman, later admitted:

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<sup>36</sup> Univ. of Ga. Sch. of L. Alexander Campbell King L. Libr., *Survey of Marijuana Law in the United States: History of Marijuana Regulation in the United States*, UNIV. OF GA. SCH. OF L. ALEXANDER CAMPBELL KING L. LIBR., <https://libguides.law.uga.edu/c.php?g=522835&p=3575350> (last visited Sept. 27, 2021); *supra* note 29.

<sup>37</sup> Deborah M. Ahrens, *Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform*, 110 J. CRIM. L. & CRIMINOLOGY 379 (2020).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Elizabeth Danquah-Brobby, *Comment: Prison For You. Profit For Me. Systemic Racism Effectively Bars Blacks From Participation in Newly-Legal Marijuana Industry*, 46 UNIV. OF BALT. L. REV., 523, 523-46 (2017). *See also supra* note 37; *see also infra* note 41.

<sup>41</sup> *Id.*; *Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race*, The Hamilton Project (Oct. 21, 2016), [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice); Christopher Ingraham, *White People Are More Likely To Deal Drugs, But Black People Are More Likely To Get Arrested For It*, WASH. POST (Sept. 30, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it>. *See also supra* note 37.

<sup>42</sup> ENCYCLOPEDIA BRITANNICA, *War on Drugs History & Mass Incarceration*, <https://www.britannica.com/topic/war-on-drugs> (last visited Sept. 28, 2021); *War on Drugs*, HISTORY (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs>.

<sup>43</sup> *Drug Scheduling*, DEA, <https://www.dea.gov/drug-information/drug-scheduling> (last visited Apr 26, 2022).

You want to know what this was really all about[?] The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying[?] We knew we couldn't make it illegal to be either against the war or [against] black[s], but by getting the public to associate the hippies with marijuana and blacks with heroin, and then [by] criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.<sup>44</sup>

The War on Drugs and marijuana criminalization, as John Ehrlichman's quote above shows, is based in racism, xenophobia, and can fittingly be described as the War on People of Color.<sup>45</sup> According to the United States ("U.S.") Sentencing Commission, only eleven percent of marijuana offenders convicted at the federal level were White, despite White Americans comprising more than sixty percent of the American population.<sup>46</sup> Additionally, despite accounting for a dismal thirteen percent of the U.S. population, Black people account for twenty-seven percent of drug arrests.<sup>47</sup> The statistics and comments from well-placed officials show when government officials are empowered to use their positions to craft laws for the disenfranchisement of others, like in the case of marijuana criminalization, a pathway for disproportionate community damages and unfair harassment is created.<sup>48</sup>

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<sup>44</sup> *A Brief History of the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Sept. 28, 2021); Brian Mann, *After 50 Years Of The War On Drugs, 'What Good Is It Doing For Us?'*, NPR (June 17, 2021, 5:00 AM), <https://www.npr.org/2021/06/17/1006495476/after-50-years-of-the-war-on-drugs-what-good-is-it-doing-for-us>.

<sup>45</sup> Danquah-Brobby, *supra* note 40; *see also supra* note 1.

<sup>46</sup> *Supra* note 44; Eileen Rivers, *Nation's Failed Weed War Turned Many Into Prisoners And Others Into Moguls*, USA TODAY (Apr. 23, 2020, 8:40 AM), <https://www.usatoday.com/in-depth/opinion/lifers/2019/09/04/pot-weed-war-marijuana-prison-life-sentence-lifers/2057276001>.

<sup>47</sup> Wilbert L. Cooper & Christie Thompson, *Will Drug Legalization Leave Black People Behind?*, THE MARSHALL PROJECT (Nov. 11, 2020, 1:40 PM), <https://www.themarshallproject.org/2020/11/11/will-drug-legalization-leave-black-people-behind>.

<sup>48</sup> Danquah-Brobby, *supra* note 40.

## SECTION II

### *The Societal Importance of Remediating the Collateral Consequences to Minority Communities Stemming from Marijuana Convictions: Why This Should Matter to Everyone*

In contrast with alcohol consumption, “excessive pot smoking has not been unambiguously implicated in violent behavior or poor health.”<sup>49</sup> Yet in 2019, there were more than half a million marijuana arrests.<sup>50</sup> According to one estimate, there were some 40,000 Americans serving time in either state or federal prison for marijuana-related offenses.<sup>51</sup> This results in a disconnect between the growing support for the decriminalization of marijuana and those falling through the cracks left by pre-decriminalization marijuana offenses.<sup>52</sup>

A great deal of Americans are attempting to navigate life with marijuana convictions impeding their ability to fully participate in American civil society.<sup>53</sup> This “disconnect is particularly troubling to accept when the communities harmed by the past excesses of the War on Drugs are not the same communities enjoying the benefit of [marijuana] legalization.”<sup>54</sup> This troubling disconnect is similar to a concept in the civil litigation personal injury context: the Eggshell Skull Plaintiff. Under this concept, the plaintiff is taken as they are found, and a defendant cannot escape liability or avoid making a plaintiff whole simply because the injury to that

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<sup>49</sup> Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS, (May 2014), <https://origins.osu.edu/article/illegalization-marijuana-brief-history>.

<sup>50</sup> *Supra* note 3.

<sup>51</sup> Joan Oleck, *With 40,000 Americans Incarcerated For Marijuana Offenses, The Cannabis Industry Needs To Step Up*, *Activists Said This Week*, FORBES (June 26, 2020, 3:33 PM), <https://www.forbes.com/sites/joanoleck/2020/06/26/with-40000-americans-incarcerated-for-marijuana-offenses-the-cannabis-industry-needs-to-step-up-activists-said-this-week/?sh=62dd3c6dc16f>.

<sup>52</sup> *Supra* note 37, at 384-85.

<sup>53</sup> *Id.* at 383-84.

<sup>54</sup> *Id.* at 385. See Shane Croucher, *Alexandria Ocasio-Cortez: Marijuana Prohibition Hit Black and Latino People Hardest So They Should Profit From Legalization First*, NEWSWEEK, (Feb. 14, 2019, 6:27 AM), <https://www.newsweek.com/aoc-marijuana-cannabis-profit-war-drugs-1331214>.

particular plaintiff was more significant than might typically be expected.<sup>55</sup> A similar correlation can be drawn here when the government seeks to punish the use, possession, and distribution of marijuana. Even if the punishment is for reasons that may or may not be logically sound, there are a host of intended and unintended consequences that result from the over-conviction of marijuana offenses, specifically in minority communities.

The term “collateral consequences” refers to legal sanctions imposed on individuals convicted of crimes separate from any criminal sentence.<sup>56</sup> But the consequences suffered often extend well beyond those legally imposed.

Law enforcement authorities are not the only ones seeking to punish people for smoking a joint. Civilian organizations like employers and schools have instituted extensive drug testing programs to weed out marijuana: Many employees, public as well as private, are now submitted to suspicionless urinalysis drug testings. Because its use is detectable in the body weeks after ingestion (long after the drug's psychoactive effects have ceased), and because it is such a popular drug, marijuana is the chief drug turned up by these tests. A positive test result can lead to suspension, mandatory treatment, and even firing, despite the fact that tests do not measure work impairment. As ACLU Director Ira Glasser put it, “it’s as if you were tested and fired from your job for a drink you had at a party last Saturday night.”<sup>57</sup>

Collateral consequences of marijuana convictions can include the following:<sup>58</sup>

- Restrictions on receiving food stamps,
- Restrictions to accessing public housing,
- Prohibition on some educational grants and professional licenses,
- Revocation of the right to vote or serve on a jury,
- Ineligibility for federal financial aid,

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<sup>55</sup> *Eggshell Skull Rule*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/eggshell\\_skull\\_rule](https://www.law.cornell.edu/wex/eggshell_skull_rule) (last visited Feb. 12, 2022).

<sup>56</sup> *Reduced Collateral Consequences*, CLERGY FOR A NEW DRUG POL’Y, <https://newdrugpolicy.org/reduced-collateral-consequences> (last visited Feb. 12, 2022); Am. Bar Ass’n, *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, NAT’L CRIM. JST. REFERENCE SERV., <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf>.

<sup>57</sup> *Marijuana Arrests & Punishments*, ACLU, <https://www.aclu.org/other/marijuana-arrests-punishments> (last visited Feb. 12, 2022).

<sup>58</sup> *Supra* note 56; *see also supra* note 37, at 417; *supra* note 40, at 532.

- Ineligibility for welfare and other income assistance,
- Barriers to adopting and fostering children,
- Challenges in custody disputes and family building, such as the inability of a parent to pass a background check to be able to volunteer to chaperone their child’s field trips, and
- General employment advancement barriers.

The discriminatory consequences of a prior marijuana conviction can be inescapably circular, as a marijuana conviction can bar someone from participating in the very democratic processes and government systems that enforce the penalties. Where political affiliation is concerned, a 2021 study found that sixty-three percent of conservative to moderate Democrats favor medicinal and recreational marijuana use, with eighty-two percent of liberal Democrats opining the same.<sup>59</sup> This contrasts with the thirty-nine percent of Conservative republicans favoring the legalization of medicinal and recreational marijuana use, and sixty percent of moderate to liberal Republicans believing the same.<sup>60</sup> Some authors have compared marijuana legalization to the repeal of Prohibition, noting that it could contribute to the country’s economic recovery similar to the way alcohol sales were seen as a way to help revive the U.S. economy during the Great Depression.<sup>61</sup>

The domestic issues plaguing the marginalized populations of the country will not be effectively addressed until people who may not be directly affected by those issues become as passionate and unsettled by them as if it they were happening to them or their loved ones. The

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<sup>59</sup> Ted Van Green, *Americans overwhelmingly say marijuana should be legal for recreational or medical use*; PEW RSCH. CTR., <https://www.pewresearch.org/fact-tank/2021/04/16/americans-overwhelmingly-say-marijuana-should-be-legal-for-recreational-or-medical-use> (last visited Apr. 26, 2022).

<sup>60</sup> *Id.*

<sup>61</sup> Kris Krane, *Cannabis Legalization Is Key To Economic Recovery, Much Like Ending Alcohol Prohibition Helped Us Out Of The Great Depression*, FORBES, (May 26, 2020, 8:45 AM), <https://www.forbes.com/sites/kriskrane/2020/05/26/cannabis-legalization-is-key-to-economic-recovery-much-like-ending-alcohol-prohibition-helped-us-out-of-the-great-depression/?sh=2589d70e3241>.

issue of marijuana-specific criminal justice reform should be important to everyone because justice demands an equitable society and equal advantages and opportunities afforded to all. Americans have long touted rhetoric of the United States being a nation that promotes justice for all. Therefore, it is time that those words are backed with more than idealistic sentiments. Now is the time for realistic action.

In 2019, nearly 500,000 people were arrested for marijuana possession or distribution.<sup>62</sup> Research and data shows that beyond correcting a societal wrong, marijuana criminal justice reform can also have a positive economic impact.<sup>63</sup> If these wrongs and injustices are not corrected, these direct and indirect, intended and unintended, collateral consequences of marijuana consequences will continue to rob countless Americans of access to the liberties we profess in America are fundamental rights.

In 2015, the Pew Research Center surveyed 1,500 U.S. residents over age eighteen on their opinions about legalizing marijuana.<sup>64</sup> Excluding the oldest age group surveyed (ages 70-87), support for marijuana legalization increased sharply between 2005 and 2015.<sup>65</sup> As the discussion around marijuana continues to evolve, studies continue to show that public support is increasing significantly.<sup>66</sup> For instance, a Gallup poll reported that, between 2005 and 2018, there was a thirty

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<sup>62</sup> 2019 Crime in the U.S., *Arrests for Drug Abuse Violations*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested> (marijuana possession accounted for thirty-two percent of all drug abuse violation arrests in 2019, which totaled 1,558,862).

<sup>63</sup> Caroline Kowalski, *U.S. Federal Cannabis Legalization Could Be Worth \$128.8 Billion in Taxes and 1.6 Million Jobs*, BUS. WIRE, <https://www.businesswire.com/news/home/20191002005609/en/U.S.-Federal-Cannabis-Legalization-Worth-128.8-Billion> (last visited Sept. 29, 2021); *see also* citations of “Successes” Section of this article; *see generally* Chris Huddock, *The Business of Cannabis: U.S. Federal Legalization Could Translate to \$128.8 Billion in Taxes and 1.6 Million Jobs*, NEW FRONTIER DATA, <https://newfrontierdata.com/cannabis-insights/the-business-of-cannabis-u-s-federal-legalization-could-translate-to-128-8-billion-in-taxes-and-1-6-million-jobs> (last visited Apr. 26, 2022).

<sup>64</sup> Pew Rsch. Ctr., *supra* note 59.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; *see also* Krane, *supra* note 61.

percentage point increase in the number of Americans who favored marijuana legalization; by 2018, sixty-six percent of U.S. residents favored legalization.<sup>67</sup>

Voters have approved decriminalization ten out of eleven times when it was placed on a state ballot.<sup>68</sup> Forty-one percent of Americans favor legalization for its medicinal benefits; thirty-six percent believe marijuana is no more harmful than other drugs and that marijuana use is not any more dangerous than alcohol and cigarette use.<sup>69</sup> There was almost an even split between those reporting they had ever used marijuana, with forty-nine percent reporting they had, and fifty-one percent reporting they had not.<sup>70</sup> Economic researchers estimate the U.S. government forfeited approximately \$11 billion in potential tax revenue during the time of alcohol prohibition.<sup>71</sup> In a similar vein, estimates show legalization of marijuana could render \$128.8 billion in untapped tax revenue and over a million new jobs.<sup>72</sup>

### SECTION III

#### *The Cannabis Industry*

The shift in public opinion about legal recreational marijuana use has led entrepreneurs to capitalize on the opportunity.<sup>73</sup> Nineteen states have developed and implemented laws to

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<sup>67</sup> Krane, *supra* note 61.

<sup>68</sup> *Id.*

<sup>69</sup> *See supra* note 59.

<sup>70</sup> *Id.*

<sup>71</sup> Lerner, *supra* note 13.

<sup>72</sup> Chris Huddock, *The Business of Cannabis: U.S. Federal Legalization Could Translate to \$128.8 Billion in Taxes and 1.6 Million Jobs*, NEW FRONTIER DATA, <https://newfrontierdata.com/cannabis-insights/the-business-of-cannabis-u-s-federal-legalization-could-translate-to-128-8-billion-in-taxes-and-1-6-million-jobs> (last visited Apr. 26, 2022).

<sup>73</sup> *See generally* Bill Peters, *It's Time To Get Serious About U.S. Marijuana Stocks*, INV'S. BUS. DAILY (Aug. 6, 2021, 3:54 PM), <https://www.investors.com/news/marijuana-stocks-why-its-time-to-get-serious-about-us-cannabis-industry>; Iris Dorbian, *For U.S. Legal Pot Industry In 2021, Expect To See National Brands And \$24 Billion In Sales, Says Top Researcher*, FORBES (Dec. 15, 2020, 8:01 AM), <https://www.forbes.com/sites/irisdorbian/2020/12/15/for-us-legal-pot-industry-in-2021-expect-to-see-national-brands-and-24-billion-in-sales-says-top-researcher/?sh=67d40bbd443e>; *supra* note 2.

effectively tax and regulate marijuana.<sup>74</sup> Thirteen states have eliminated the threat of incarceration for “modest amounts of marijuana.”<sup>75</sup> Thirty-seven states allow the use of marijuana for medicinal purposes.<sup>76</sup> Marijuana is legal for recreational use in eighteen states, as well as the District of Columbia, the Commonwealth of the Northern Mariana Islands, and Guam.<sup>77</sup>

Despite its current classification as a Schedule I drug at the federal level, the niche carved out for some legal sale of marijuana proved to be a \$13.6 billion industry in 2019, creating over 340,000 jobs.<sup>78</sup> With so much current controversy surrounding marijuana, it is baffling to think that there was once a time when marijuana’s origin substance, hemp, was produced with government support for the production of items like ropes, sails, and clothing.<sup>79</sup> The Congressional Research Service concluded that legalization and imposition of a \$50 per ounce tax on marijuana could result in almost \$7 billion in tax revenue.<sup>80</sup> Stockbrokers are beginning to take notice of the potential value and growth of the cannabis industry and encouraging cannabis-related stock purchases.<sup>81</sup>

Additionally, the industry has created a host of six figure ‘C-suite’ jobs, better known as executive level positions, such as Vice President of Cultivation, Director of Extraction, and Vice President of Operations.<sup>82</sup> Other lucrative non-executive positions include Plant Breeder, Chemist, Testing Lab Manager, and Dispensary Manager.<sup>83</sup> There are also newly created trade associations,

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<sup>74</sup> *Supra* note 34.

<sup>75</sup> *Id.*, See also 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>.

<sup>76</sup> *Supra* note 1.

<sup>77</sup> *Id.*

<sup>78</sup> Deborah D’Souza, *The Future of the Marijuana Industry in America*, INVESTOPEDIA (Dec. 7, 2021), <https://www.investopedia.com/articles/investing/111015/future-marijuana-industry-america.asp>.

<sup>79</sup> See *Frontline*, PBS (Sept. 29, 2021), <https://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html>.

<sup>80</sup> Jane G. Gravelle & Sean Lowry, *Federal Proposal to Tax Marijuana: An Economic Analysis*, Cong. Rsch. Serv. (Nov. 13, 2014), <https://sgp.fas.org/crs/misc/R43785.pdf>.

<sup>81</sup> Peters, *supra* note 73.

<sup>82</sup> *Supra* note 2.

<sup>83</sup> *Id.*



such as the National Cannabis Industry Association, specifically for marijuana related business professionals.<sup>84</sup> Recognizing that industry expansion in any arena requires individuals to be educated on the industry’s relevant subject matter, Morrisville at the State University of New York has established a novel academic program focused on cannabis research and study.<sup>85</sup>

Despite the rapid widespread expansion of new jobs in the cannabis industry, disproportionate access to information, resources, and capital allows the majority, or White Americans, to unfairly benefit from cannabis legalization and dominate the cannabis industry.<sup>86</sup> Accordingly, the majority of cannabis business owners identify as White, an issue the CAO A endeavors to address.<sup>87</sup>

#### SECTION IV

##### *The Cannabis Administration and Opportunity Act (CAOA)*

The decriminalization of marijuana alone does not remedy the grave disproportionate negative effects of marijuana convictions on populations of color. Recognizing this, Senators Cory Booker, Ron Wyden, and Chuck Schumer have released a discussion draft of the CAO A, which aims to “end the decades of harm inflicted on communities of color by removing cannabis from

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<sup>84</sup> *The Voice of Main Street Cannabis*, NAT’L CANNABIS INDUS. ASS’N, <https://thecannabisindustry.org> (last visited Sept. 29, 2021).

<sup>85</sup> *Cannabis Studies at SUNY Morrisville*, SUNY MORRISVILLE, <https://www.morrisville.edu/cannabis> (last visited Sept. 29, 2021).

<sup>86</sup> *Supra* note 37, at 392; *see also From Prohibition to Progress: A Status Report on Marijuana Legalization*, DRUG POL’Y ALL., [https://drugpolicy.org/sites/default/files/dpa\\_marijuana\\_legalization\\_report\\_feb14\\_2018\\_0.pdf](https://drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf) (documenting dramatic declines in marijuana arrest rates in states that have legalized); *see also Marijuana Legalization in Colorado: Early Findings*, COLO. DEP’T OF PUB. SAFETY (Mar. 2016) <https://cdpsdocs.state.co.us/ors/docs/reports/2016-SB13-283-Rpt.pdf> (noting that the arrest rates for marijuana offenses declined fifty-one percent for white residents since legalization, but declined only thirty-three percent for Hispanics and twenty-five percent for black residents).

<sup>87</sup> Eli McVey, *Chart: Percentage of cannabis business owners and founders by race*, MJ BIZ DAILY (Dec. 17, 2021), <https://mjbizdaily.com/chart-19-cannabis-businesses-owned-founded-racial-minorities> (in a survey of 389 marijuana-related business owners and founders, eighty-one percent were White, as compared to over five percent Hispanic/Latinx; over four percent Black; over two percent Asian; and over six percent other).

the federal list of controlled substances and empowering states to implement their own cannabis laws.”<sup>88</sup> The published draft by the sponsoring senators is a progressive proposal.<sup>89</sup> However, there are opportunities of improvement that would address the collateral consequences of marijuana convictions that provide equitable remedies for those impacted. While the proposed draft puts forth a host of objectives and great plans such as regard to tax incentives and the regulation of marijuana in the marketplace, this section of the article is solely focused on responding to the drafters’ solicitation for comments on numerous potential areas of opportunity for improvement while addressing the proposed bill’s effect on state-level offenses.

The CAOAs’ ambitious agenda endeavors to accomplish the following:<sup>90</sup>

- Remove cannabis from the federal controlled substance list.
- Transfer agency jurisdiction from the Drug Enforcement Agency (“DEA”) to the Food and Drug Administration (“FDA”).
- Protect the autonomy of states regarding local laws on possession, production, and distribution of cannabis.
- Establish the minimum marijuana purchase age as 21.
- Restrict retail sale to ten ounces of marijuana in one transaction.
- Instruct research on the impacts of legalization, including compilation of data on cannabis-impaired driving, violent crimes, employment statistics, rates on use, hospitalizations, deaths, poison control center calls, and more.
- Develop the Opportunity Trust Fund (“OTF”) and other Small Business Association (“SBA”) programs to provide financial assistance to non-profits offering legal aid, job

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<sup>88</sup> *Supra* note 1.

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *Id.* at 4-14.

training, and re-entry services specifically in communities most affected by the War on Drugs.

- Specifically make SBA services available to legitimate cannabis-related businesses.
- Automatically expunge and offer resentencing for non-violent marijuana charges.
- Prohibit discrimination for federal benefits like financial aid and housing assistance.
- Prohibit adverse effects for the purposes of immigration laws and deportation.
- Permit medical cannabis recommendations by the Veteran Affairs Commission and Indian Health Services.<sup>91</sup>

### Successes

First, the proposed draft primarily succeeds by removing cannabis from the Controlled Substances Act, and directs that a new definition of cannabis be developed within the Federal Food, Drug, and Cosmetic Act (“FFDCA”).<sup>92</sup> This would also transfer jurisdiction over cannabis from the DEA to the FDA.<sup>93</sup> This is a critical step because it begins the process of destigmatizing the public perception of marijuana and thus, switches the public view from seeing cannabis as a drug to defining it as a non-harmful consumable substance.

The drafters sought comments on the appropriate quantitative thresholds regarding the limit on retail sales of cannabis. Research shows that the average marijuana cigarette is rolled with only .32 grams of marijuana.<sup>94</sup> Accordingly, permitting sales in one transaction of ten ounces of marijuana is about 884 marijuana cigarettes. Albeit the opinion of someone that has never

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<sup>91</sup> *Id.* at 5-13.

<sup>92</sup> *Id.* at 5.

<sup>93</sup> *Id.* at 17.

<sup>94</sup> Niraj Chokshi, *How Much Weed is in a Joint? Pot Experts Have a New Estimate*, THE N.Y. TIMES, <https://www.nytimes.com/2016/07/15/science/how-much-weed-is-in-a-joint-pot-experts-have-a-new-estimate.html> (last visited Sept. 29, 2021).

consumed marijuana and never intends to, it appears ten ounces is an ample amount for recreational personal consumption.

Yet another success of the CAO is that it automatically expunges federal “non-violent” marijuana crimes and allows individuals currently serving time in federal prison for “non-violent” marijuana crimes to request a resentencing hearing with the court.<sup>95</sup> Additionally, the bill mandates that all records regarding the prior convictions be sealed.<sup>96</sup> Moreover, the draft succeeds in its genuine effort to ensure research, data, and statistics to support legalization. The drafters propose researching the impacts of legalization, including compiling data on cannabis-impaired driving, violent crimes, employment statistics, rates of use, hospitalizations, deaths, and poison control center calls.<sup>97</sup> It would be prudent to analyze the information gathered from this research a year from enactment to determine the need for potential re-evaluation or amendment. Significantly, the bill’s OTF, funded by legalized cannabis sales’ tax revenue, will allow for reinvestment into minority communities targeted by the War on Drugs, while offering clearer pathways for hopeful cannabis entrepreneurs of color to enter the market.<sup>98</sup>

### Areas of Opportunities

The CAO, as proposed, is undoubtedly an improvement from the lack of progressive marijuana legislation on the books. However, the proposed law still has areas of opportunity to improve to ensure maximal impact at rectifying the damage done by the War on Drugs. Notably, the drafters sought comments on whether FDA regulation of cannabis products should be funded

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<sup>95</sup> *Supra* note 1, at 56-57.

<sup>96</sup> *Id.* at 12.

<sup>97</sup> *Id.* at 31-32.

<sup>98</sup> *Id.* at 2-5.

through a user fee program or other funding model.<sup>99</sup> It is my position that FDA regulations should be funded through the revenue generated from the taxes on the sales of legalized cannabis. A user fee model would require aspiring manufacturers seeking FDA approval to remit fees to the FDA with their application for review and approval of their cannabis innovation.<sup>100</sup> This funding model runs the risk of continuing the barrier-to-access issue by potentially excluding smaller minority owned operations with less access to capital and resources.<sup>101</sup>

Another area of opportunity on which the drafters sought comments is the interaction between state minimum age laws and limitations regarding non-face-to-face transactions.<sup>102</sup> Non-face-to-face transactions should be prohibited. They should be prohibited as there is no secure means by which to ensure proper legal age of internet consumers.

An excellent area of opportunity for the bill drafters to accomplish their main goal of remedying harms done to communities of color is to follow through on the proposal to steer research funds to Historically Black Colleges and Universities (“HBCUs”). There are over 100 HBCUs in the United States with thriving research programs and bright minds eager to solve America's problems.<sup>103</sup>

While the CAO presents a host of stellar initiatives, a fundamental flaw presented by the proposed bill is the section preventing expungement for those with “aggravating role”

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<sup>99</sup> *Id.* at 6.

<sup>100</sup> Tara O’Neill Haye & Anna Catalanotto, *Primer: FDA User Fees*, AM. ACTION F., <https://www.americanactionforum.org/research/primer-fda-user-fees> (last visited Sept. 29, 2021); Joanne S. Hawana, *FDA User Fees: How Do They Work?*, THE NAT’L L. REV., <https://www.natlawreview.com/article/fda-user-fees-how-do-they-work> (last visited Sept. 29, 2021).

<sup>101</sup> C. Michael White, *Why is the FDA Funded in Part By the Companies It Regulates?*, UNIV. OF CONN., <https://today.uconn.edu/2021/05/why-is-the-fda-funded-in-part-by-the-companies-it-regulates-2> (last visited Sept. 29, 2021).

<sup>102</sup> *Supra* note 1, at 120.

<sup>103</sup> *HBCU Listing*, THE HUNDRED-SEVEN, <http://thehundred-seven.org/hbculist.html> (last visited Sept. 29, 2021).

enhancements connected to the marijuana convictions.<sup>104</sup> The proposed bill would mandate that “an individual who received an aggravating role adjustment pursuant to the U.S. Sentencing Guideline 3B1.1(a) in relation to a federal cannabis offense conviction shall not be eligible for expungement of that conviction.”<sup>105</sup> The U.S. Sentencing Commission Guidelines provide in Section 3B1.1:

### **§3B1.1 - AGGRAVATING ROLE:**

Based on the defendant’s role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.<sup>106</sup>

Courts and lawmakers recognize the varying degree of involvement criminal accomplices may have in carrying out a criminal scheme, and accordingly provide a list of factors that should be considered with regard to sentencing.

Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.<sup>107</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> U.S. Sent’g Comm’n, *Aggravating Role §3B1.1*, U.S. SENT’G COMM’N, <https://guidelines.uscourts.gov/guidelines/guidelines.uscourts.gov/gl/§3B1.1> (Nov. 1, 1993).

<sup>107</sup> *Id.*

Essentially, anyone that was the leader of an operation that caused several people to also sell marijuana would get an aggravated sentencing enhancement. The head or leader of a marijuana dealing operation would not be eligible for expungement under the CAO. As one who is not a proponent of criminal activity or even a proponent of recreational marijuana use per se, if the objective of cannabis reform and proposed legislation like the CAO is to effectively ‘reset the clock’ on drug sentences and level the playing field for those whose prior marijuana offenses held them back economically, socially, and professionally, then this caveat appears to contradict the stated objective of the bill.

The clarification provided in the sentencing guidelines regarding aggravated enhancements mentions terms like “decision making authority,” “recruitment,” “claimed right to a larger share of the fruits,” and “planning or organizing.”<sup>108</sup> In any other context, those phrases would be applauded as valuable attributes for any entrepreneur. Accordingly, this caveat penalizes entrepreneurship, leadership capability, and ingenuity. The same drug dealer that was able to organize to have others assist in their marijuana business could now, under marijuana’s legalization, channel that entrepreneurial spirit into having employees operate their dispensary. While marijuana may not be a personal choice for some, including myself, contradictory application of any law should be discouraged. If society endeavors to undo the injustices done by these past convictions, then we must undo *all* the wrongs or the logic fails and the goal is neither effective nor fully achievable.

Due to sentence enhancements, also known as “strike” rules in various states, there are countless stories of individuals of color serving life sentences essentially for nominal amounts of

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<sup>108</sup> *Id.*

a substance other citizens are now being championed for turning into capital gain.<sup>109</sup> Furthermore, the proposed bill will still recognize state laws criminalizing the possession, production, and distribution of marijuana since marijuana has not been decriminalized in all fifty United States and territories.<sup>110</sup> Although the bill may have little to no effect on the tens of thousands of people currently incarcerated nationwide for marijuana-related offenses, the bill could have many effects on the immeasurable amount of people dealing with the collateral consequences of marijuana related charges.

## SECTION V

### *The Cannabis Administration and Opportunity Act's Nil Effect at the State Level*

The million-dollar question for those sitting in jail on marijuana charges, or those out of jail who suffer from collateral consequences of prior marijuana convictions, is does this new potential law help them? The complicated answer is both yes and no.

Despite America professing to be the land of opportunity and one of the most progressive and cutting-edge countries in the world, we are one of only twenty-two countries worldwide (including Pakistan, Oman, and South Sudan) who do not provide automatic “retroactive ameliorative relief.”<sup>111</sup> If passed, the CAO will only decriminalize marijuana at the *federal* level by removing it from the controlled substance list.<sup>112</sup> It will also immediately expunge federal level

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<sup>109</sup> Elizabeth Nolan Brown, *This 38-year-old Man Will Spend Life in Prison Over 1.5 Ounces of Marijuana*, REASON, (May 13, 2021), <https://reason.com/2021/05/13/this-38-year-old-man-will-spend-life-in-prison-over-1-5-ounces-of-marijuana>; see also Bryan Schatz, *Waiting to Die in Prison-for Selling a Couple of Bags of Pot*, MOTHER JONES, <https://www.motherjones.com/politics/2015/07/life-sentence-marijuana-pot-prison-commuted> (last visited Sept. 29, 2021).

<sup>110</sup> *Supra* note 1.

<sup>111</sup> Matthew Fleischer, *Don't just legalize marijuana, free prior offenders*, LOS ANGELES TIMES, (Jan. 16, 2014), <https://www.latimes.com/opinion/la-xpm-2014-jan-16-la-ol-legalize-marijuana-free-prior-offenders-20140115-story.html>.

<sup>112</sup> See *supra* note 1.



marijuana convictions, seal the corresponding records of these charges, and allow those affected to seek resentencing.<sup>113</sup>

Unfortunately, the CAO as proposed expressly provides that it will still preserve individual states' autonomy to determine their own laws about the possession, production, and distribution of marijuana.<sup>114</sup> Furthermore, the bill neither mandates that states follow suit with the bill and remove marijuana from the state's controlled substance list, nor does it force local decriminalization of the substance.<sup>115</sup> Therefore, if one lives in one of the thirty-two states that has not decriminalized marijuana, this new federal law has no effect on prior or current state level marijuana offenses and one could still be arrested for possession, production, or distribution of marijuana.

For instance, in South Carolina, marijuana is still classified as a Schedule I "highly dangerous" drug.<sup>116</sup> Maintaining state-level criminalization of marijuana post federal decriminalization is problematic for several reasons. While it may be permissible, allowing states to maintain marijuana on their controlled substance lists makes state law unnecessarily more restrictive than the federal law. Additionally, for the same reasons decriminalization could be a positive step to take on the federal level, individual states could garner similar benefits. Secondly, this quandary of allowing states to maintain marijuana on their controlled substance lists, prevents the nation from progressing forward *collectively*. Third, and most significantly, the same collateral consequences of marijuana convictions continue because many marijuana offenders have state-level marijuana convictions.

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> S.C. Code § 44-53-190 (2013).

## SECTION VI

### *A Practical Guide for Local Government Action and Implementation*

Part of the reason why there has been much debate, yet little progression, around restorative justice and marijuana-specific criminal justice reform is because undoing decades of generational harm and dismantling biases so deeply integrated into our nation's criminal justice system is a daunting feat. Daunting as it may be, *now* is a great time to do the right thing by implementing marijuana focused criminal justice reform. To effectively address this issue both federally and at the state level, America needs "certain, automatic, immediate, and inexpensive relief."<sup>117</sup> First, states need to follow suit with federal legislators and implement local legislation mirroring the CAO. Second, states should develop a state taskforce of lawmakers, judges, lawyers, and re-entry program leaders to spearhead marijuana-specific criminal justice reform in their state. Third, the state-developed taskforce should work to apply this article's provided plan of action for states to take advantage of CAO benefits.

Due to the decades-long criminalization of marijuana, trying to undo the direct and indirect consequences of marijuana convictions is understandably overwhelming for most state court system administrators. Attached to this article is an appendix of documents geared to provide local government officials with a clear-cut plan of action for practical implementation of the CAO at the state level for meaningful change in the realm of marijuana-specific criminal justice reform.

*"No one can do everything, but everyone can do something." - Max Lucado*

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<sup>117</sup> *Supra* note 37, at 379, 440.

## APPENDIX

### PLAN OF ACTION

- States-General Assemblies → Introduce a bill mirroring the CAO A and pass it through both the State House of Representatives and State Senate.
- Have the State Department of Health, or similar agency charged with drug administration, remove marijuana from its controlled substance list.
- Inform all local and state law enforcement agencies of the new law and require update to the controlled substance list.
- Inform all state and local prosecutors and attorney generals' offices of the new law and require update to the controlled substance list.
- Develop a “marijuana-specific” Resentencing Court Division and hire appropriate staff.
- Have each court clerk pull all marijuana convictions:
  - Create a roll of marijuana offenders.
    - Purge this list of all deceased.
- Use Public Service Campaign efforts to inform public of change:
  - Need to inform the general public of the change in the law; that marijuana is no longer a controlled substance; that those with prior marijuana convictions may be eligible for expungement, resentencing, and perhaps release from prison.
  - Run TV, radio, and social media ads.
  - Newspaper publications.
  - Send letters to those affected.
    - Send letters to addresses on file for those not currently incarcerated.

- Send letters to correctional facilities (and their attorneys of record) for all those currently incarcerated.
- Create job positions for clerks and expungement personnel specifically for this project:
  - Create a special marijuana docket for resentencing hearings.
    - Specially appoint judges similar to those specially appointed to “Drug Court” and “Business Court/Complex Designation” dockets.
  - Docket to be created from former offenders/inmates that contact court requesting a resentencing hearing.
- Have clerks pull each rap sheet of a marijuana offender:
  - Judges’ law clerks work to reconfigure/recalculate the sentences and present them to judge for “approval.”
  - Court to present the proposed adjusted sentences to offender and counsel.
  - Hearing held to readjust sentence and/or expunge the record.

DRAFT BILL

*See* Discussion Draft of CAO A

<https://www.scribd.com/document/515676020/Cannabis-Administration-and-Opportunity-Act>

DRAFT FORMER OFFENDER LETTER



Date

John Doe  
123 Criminal Justice Reform Alley  
Justice, USA 12345

Dear Mr. Doe:

We are writing to inform you of your potential eligibility to have the highlighted charges on the enclosed criminal record, or “rap sheet,” expunged from your record and of the potential for you to receive a resentencing hearing to adjust your criminal sentences. For decades, the criminalization of marijuana has resulted in severe disproportionate adverse effects on populations of color due to an overabundance of marijuana convictions. Recognizing this, the federal government recently passed the Cannabis Administration and Opportunity Act (CAOA) into law. The new law specifically aims to “end the decades of harm inflicted on communities of color by removing cannabis from the federal list of controlled substances and empowering states to implement their own cannabis laws.” The CAO A resonated with local lawmakers in [state], and similar legislation has been implemented in your state that may make you eligible to be released from prison, if applicable, resentencing, and/or eligible for expungement of your marijuana related convictions. You may contact the special division of the court created to field this initiative at (\_\_\_\_) - \_\_\_\_\_ - \_\_\_\_\_ to obtain more information and to request a resentencing hearing. The state of [state] is remorseful for the immeasurable effects that decades of marijuana criminalization has had on you and those connected to you. We hope this is a step to begin remedying the situation.

Sincerely,

Clerk of Court  
Marijuana Reform Division

## Draft Job Description – Marijuana Reform Division Court Clerk

The federal government is considering the passage of the Cannabis Administration and Opportunity Act (CAOA) into law. The new proposed law specifically aims to “end the decades of harm inflicted on communities of color by removing cannabis from the federal list of controlled substances and empowering states to implement their own cannabis laws.” The proposed CAOAs resonated with local lawmakers in your state, and similar legislation has been implemented that may make some eligible for release from prison, if applicable, resentencing, and expungement of marijuana convictions. We are searching for a professional court clerk to help manage a special court docket to administer the resentencing hearings for those eligible.

As a court clerk, you will ensure that all Marijuana Reform Court processes run smoothly and effectively. The successful candidate will be skilled at multitasking and possess exceptional communication and interpersonal abilities.

- **Responsibilities:**

- Manage all court files and records to ensure they stay up-to-date and accessible.
- Answer the phone to take messages and transfer calls to the applicable colleague.
- Record the minutes of meetings and court proceedings.
- Assist in all office management and administrative processes.
- Create calendars of cases to be called.
- Prepare and distribute court orders including probation orders, sentencing information, and court summonses.
- Collect court fines and maintain records of amounts collected.
- Ensure that all legal documents submitted adhere to the law and court procedures.
- Perform basic bookkeeping tasks.
- Administer oaths and affirmations.

- **Requirements:**

- High school diploma or an equivalent qualification.
- A minimum of 2 years’ experience in a similar role.
- Superior organizational and multitasking abilities.
- Good understanding of MS Office programs.
- Outstanding communication and interpersonal skills.

## Draft Job Description – Specially Appointed Marijuana Court Judge

The federal government is considering the passage of the Cannabis Administration and Opportunity Act (CAOA) into law. The new proposed law specifically aims to “end the decades of harm inflicted on communities of color by removing cannabis from the federal list of controlled substances and empowering states to implement their own cannabis laws.” The proposed CAOAs resonated with local lawmakers in your state, and similar legislation has been implemented that may make some eligible for release from prison, if applicable, resentencing, and expungement of marijuana convictions.

The [State] Supreme Court is seeking to specially appoint [#\_\_\_\_] of lawyers as temporary judges for the sole purpose of adjudicating the administration of the CAOAs resentencing efforts. This role could be ideal for retired lawyers or judges, those aspiring to a permanent role on the bench, practitioners with flexible practices, etc..

- **Duties:**
  - Review offender criminal record.
  - Review sentencing guidelines and prepare a new proposed sentence based on CAOAs adjustment considerations.
  - Host resentencing hearings.
  - Rule on any motions presented by counsel.
  - Determine and analyze any relevant factors that might affect an otherwise eligible citizen’s threat to society at large.
  - Hire law clerks, supervise law clerks, and court Marijuana Reform Court staff.
- **Requirements:**
  - Juris Doctor degree from an accredited law school.
  - At least 5 years as a practicing attorney and member of this state’s bar.
  - Criminal court experience is a plus.



## Draft Job Description – Specially Appointed Marijuana Court Judge

The federal government is considering the passage of the Cannabis Administration and Opportunity Act (CAOA) into law. The new proposed law specifically aims to “end the decades of harm inflicted on communities of color by removing cannabis from the federal list of controlled substances and empowering states to implement their own cannabis laws.” The proposed CAOAs resonated with local lawmakers in your state, and similar legislation has been implemented that may make some eligible for release from prison, if applicable, resentencing, and expungement of marijuana convictions.

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  - Rule on any motions presented by counsel.
  - Determine and analyze any relevant factors that might affect an otherwise eligible citizen’s threat to society at large.
  - Hire law clerks, supervise law clerks, and court Marijuana Reform Court staff.
- **Requirements:**
  - Juris Doctor degree from an accredited law school.
  - At least 5 years as a practicing attorney and member of this state’s bar.
  - Criminal court experience is a plus.

## Draft Job Description – Marijuana Court Law Clerks (Expungements)

The federal government is considering the passage of the Cannabis Administration and Opportunity Act (CAOA) into law. The new proposed law specifically aims to “end the decades of harm inflicted on communities of color by removing cannabis from the federal list of controlled substances and empowering states to implement their own cannabis laws.” The proposed CAOAs resonated with local lawmakers in your state, and similar legislation has been implemented that may make some eligible for release from prison, if applicable, resentencing, and expungement of marijuana convictions. We are searching for professional law clerks or staff attorneys to help manage a special court docket to administer the resentencing hearings for those eligible.

- **Duties:**
  - Assist assigned judge with:
    - Reviewing offender criminal record.
    - Reviewing sentencing guidelines and preparing a new proposed sentence based on CAOAs adjustment considerations.
    - Research and memorandum writing to assist the judge with ruling on any motions presented by counsel.
    - Any other tasks as assigned by the judge.
- **Requirements:**
  - Juris Doctor degree from an accredited law school.
  - Service on a law review or journal is a plus.