

# Marijuana Legalization and Automatic Criminal Record Expungement

Nyron N. Crawford and Daniel Confalone  
Department of Political Science, Temple University

Automatic expungements of criminal records are critical to achieving race equity in the outcomes of marijuana legalization. Expungement, or record clearance, is a court-ordered process to “seal” an arrest or a criminal conviction from review or to remove it altogether. However, while current marijuana reforms have emphasized the need to reduce racial disparities stemming from the so-called “War on Drugs,” few states have included record-clearance in their policy design. Of those states that do include expungements, most require potential beneficiaries of the policy to petition to have their records cleared. This requirement leads to low levels of take-up of the policy, particularly among Black and Latino record-holders. Expungement, when included as a part of the legislative language allowing recreational marijuana use, has the potential to correct racially-disparate outcomes from unequal law enforcement during the era of marijuana prohibition. To best realize this potential, expungements must be processed automatically.

Too few people of color arrested or convicted for marijuana-related crimes have benefited from reform. Policy changes predicated on reducing racial disparities are on the path to reproducing them. Not only are justice-involved individuals locked out of the

## Highlights

- **Administrative burdens prevent too many eligible individuals from participating in expungement programs for past marijuana offenses.**
- **Racial disparities in enforcement of previous drug laws means expungement policies could disproportionately benefit people of color with past justice involvement.**
- **However, administrative burdens disproportionately exclude people of color from participating in expungement programs.**
- **We recommend that marijuana reform efforts include automatic expungement programs at no cost to applicants to increase program take-up and to achieve more racially equitable outcomes in marijuana legalization efforts.**

Learning Barriers	Limited ability to define the term and process; Limited appraisal of process and opportunity; Eligibility (e.g., waiting periods)
Psychological Barriers	Distrust and suspicion of criminal justice system; Frustration with state; Uncertainty of outcome; Stigma
Compliance Barriers	Filing fees; Court debts must be satisfied before petition; Word count; Number of questions on petition/application; Background check; Fingerprints; Payment of fines and fees

*Table 1. Barriers in Expungement*  
 Source: Authors; see also Herd and Moynihan 2019<sup>5</sup>

burgeoning billion-dollar cannabis industry because of a criminal record, often for marijuana-related crimes, petition-based expungement imposes unique administrative costs that disproportionately burden people of color otherwise eligible to have their records cleared.

Black and Latino people have been disproportionately arrested for marijuana-related crimes. The American Civil Liberties Union (ACLU) reports that Black people in Pennsylvania were three times more likely than White people to be arrested for marijuana possession. The disparity is similar in the neighboring states of Delaware (where Black people were 4.15 times more likely than White people to be arrested) and New Jersey (3.45 times more likely).<sup>1</sup>

These arrests have collateral consequences beyond the penalties imposed by the criminal legal system. They are "...legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing... rights, benefits, and opportunities."<sup>2</sup> People with a criminal record can therefore be disqualified from social welfare benefits (e.g., public housing), civic participation (e.g., voting), and a range of economic opportunities (e.g., employment; licensures).

Record clearance is intended to mitigate the collateral consequences of a criminal record.

Previous research suggests clearance is related to increased employment opportunities, reduced recidivism, higher wages, and diminished stigma related to carceral contact. However, low levels of participation in expungement programs raise important questions about how well these goals are achieved.

Only a small percentage of those eligible for expungement petition for one. For example, in Michigan, an estimated 6.5 percent of eligible record-bearers petitioned for relief.<sup>3</sup> If expungement promises some relief from the negative effects of a criminal record, why do so few petition for expunction? One reason is that the process of petition-based expungement introduces too many administrative burdens to the targeted population.<sup>4</sup> These burdens impose three types of costs: learning, psychological, and compliance.<sup>5</sup> Table 1 displays these costs in terms of criminal record expungement. There are learning barriers in that it is not always easy to get information about expungement programs' existence or what is required to apply. There are psychological barriers in that the process requires one to revisit painful past experiences. Finally, the application steps themselves involve compliance barriers in the form of extensive paperwork and onerous bureaucratic hurdles.

In this brief, we focus on this third type of barrier and examine how application compliance

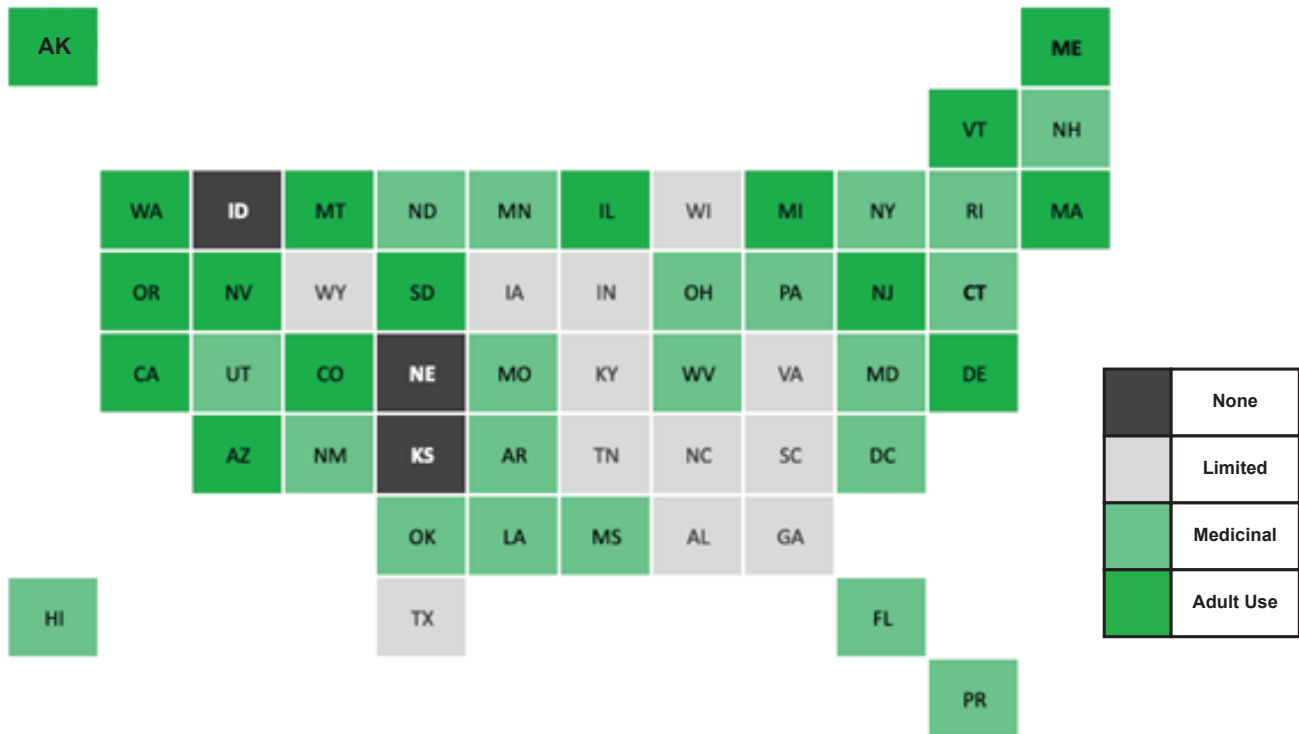


Figure 1. Marijuana Policy State Map  
Map: Authors; Source: National Cannabis Industry Association

costs contribute to the “difference between eligibility and delivery of second chance relief” (“second chance gap”).<sup>6</sup> Blacks and Latinos are especially likely to be burdened by these costs because they are overrepresented in the criminal legal system, more likely to experience poverty, to suffer from low wages, and to have monetary sanctions imposed on them by the court.<sup>7</sup> Cannabis policy reform should, therefore, include automatic expungement for certain marijuana-related crimes to achieve more racially equitable outcomes in legalization efforts.

### Race and Marijuana’s Incomplete Reform

Efforts to reform cannabis prohibition (i.e., legalization or decriminalization) have been met typically with popular approval. Bipartisan majorities in the United States support laws allowing for recreational and medicinal marijuana use.<sup>8</sup> Many voters and state

legislatures, moreover, have adopted allowance policies through ballot initiatives or legislative decrees (Figure 1) Reform has introduced a policy window for criminal record expungement programs to move to undo some of the effects of institutional and structural racism—the structures, policies, and behaviors that led to disproportionate and unequal enforcement of marijuana prohibitions. However, many of these reforms have been passed without mechanisms to address the consequences of prior arrests or convictions for marijuana-related crimes (e.g., expungement). Where such policy options have been included, the process is mired in administrative burdens that may discourage participation.

Administrative burdens from petition-based expungement disproportionately impact Black and Latino people with criminal records. While racial justice was a prominent frame of the

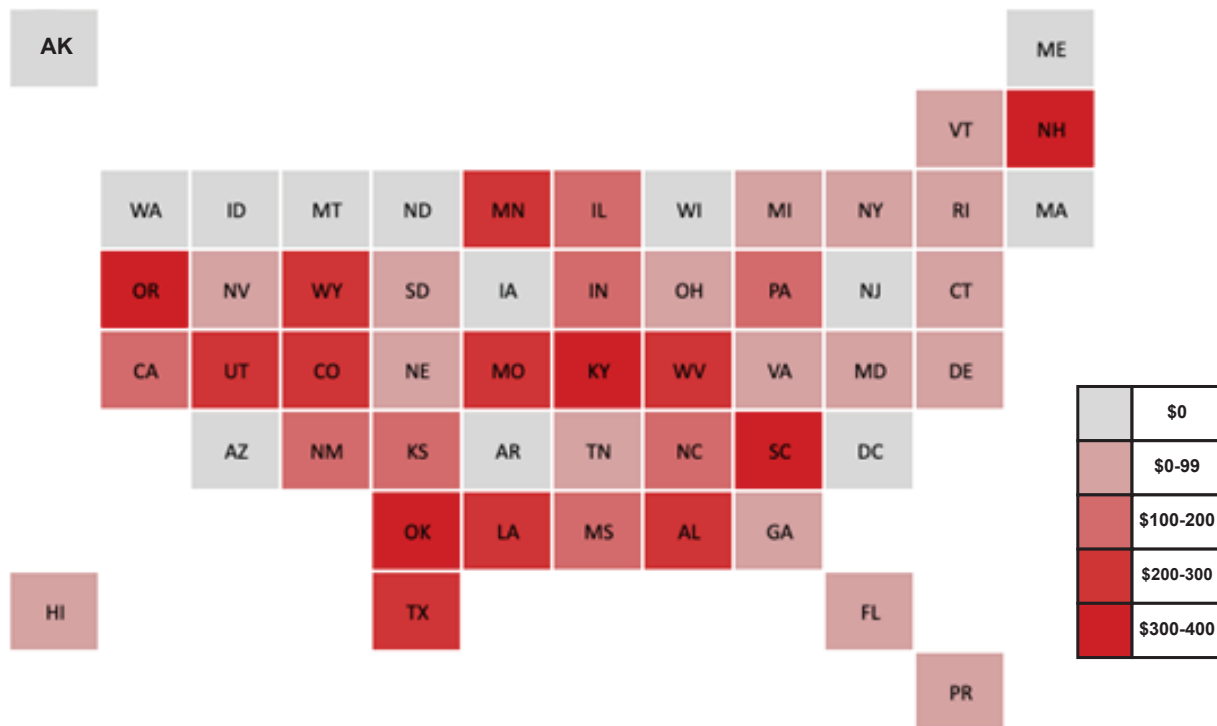


Figure 2. Filing Cost State Map  
Source: Authors

issue rhetoric used to rationalize and to promote reform, few changes to state law have included strong policy instruments to facilitate such an effect.<sup>9</sup> In early 2021, for example, Governor Phil Murphy of New Jersey signed executive orders that created a framework for the state’s regulation scheme and defined penalties for underage use. In a statement, Murphy noted that the outgoing law “stained the records of many residents and short-circuited their futures, and... disproportionately hurt communities of color.”<sup>10</sup> This acknowledgment, however, did not include an immediate or formal method to address the carceral history of marijuana prohibition during legalization efforts. After legalization, moreover, advocates claimed no Black-owned cannabis businesses were granted a license to sell.<sup>11</sup>

### Application Compliance Burdens

Not all reform states allow for past marijuana

convictions to be expunged. Where record clearance for non-specific offenses is allowed, record bearers must petition the court for relief. This petition-based expungement process requires petitioners to fulfill many requirements to keep or bring their application into compliance. Filing fees are the first application compliance burden petitioners encounter. Costs to file for record clearance vary by state. Figure 2 maps the approximate amounts charged for petition-based record clearance of non-specific offenses as a statutory practice. Although petitioners can file for free in some states, several require petitioners to pay between \$10 and \$400. For example, there is no filing fee for expungement in New Jersey and Montana, but the fee in Oregon and Oklahoma is more than \$300. While some states provide waivers for indigent relief, or a “motion for permission to proceed as a poor person,” several do not.

Monetary requirements are not responsive to the economic position of most individuals with criminal records. Consider that most Americans cannot afford a \$400 emergency expense using cash or an equivalent<sup>12</sup> and that the “average formerly imprisoned person will earn fifty-two percent less than a similarly situated person who was never imprisoned.”<sup>13</sup> Filing fees for expungements can also be especially prohibitive since individuals with criminal records often struggle with unemployment or underemployment which contribute to loss of earnings. Even in circumstances where the petitioner can satisfy the filing fee, some states require that they also pay other fines like restitution or child support before a review of their application. Monetary sanctions are widespread for justice-involved individuals with two-thirds (sixty-six percent) of prison inmates surveyed in 2004 reporting they owe debts to the court.<sup>14</sup> Therefore, even in states where filing fees are zero or low, a non-trivial number of individuals with criminal marijuana offense records may be ineligible for expungement until their debts to the court are paid. This does not include other costs remitted to vendors for ancillary materials like background checks, police reports, and fingerprinting which most states require be included in an application.

### Linking Marijuana Legalization and Automatic Expungement

How might marijuana reform help achieve racially equitable outcomes? In this new era of marijuana reform, too little has been done to address racial disparities produced by earlier prohibitions and the so-called “War on Drugs.” While reformers often draw on the language of racial justice to motivate support for legalization, how or whether justice is achieved has received far less concern. Vacating certain marijuana-related convictions with free, automatic expungement is one pathway

to increase race-based equity through policy design. If expungement promises relief from the collateral consequences of a criminal record, application compliance burdens—requiring filing fees and payment of outstanding fines; ordering fee-based background checks, police reports, and fingerprints—undermine the policy’s objective. Making record clearance automatic and free of charge to the record holder in the case of marijuana-related arrests and convictions is an important policy linkage to help ease administrative burden. Otherwise, too few of those who are already eligible for expungement may take up the program. Low take-up rates can acutely affect Black and Latino record-bearers.

California, Illinois, and New York offer useful models. In Illinois, possession of cannabis for adult recreational use is legal as of January 2020. The law permits automatic expungement for certain arrests related to “minor cannabis offenses.” For example, arrest records for possessing or dealing thirty grams or less of cannabis will automatically be expunged from an individual’s criminal record. However, those not only arrested but also convicted of “minor cannabis offenses” must proceed through a longer process including a formal request for a gubernatorial pardon. In conjunction with this law, the state established a publicly-funded nonprofit called New Leaf Illinois to help individuals assess their status and petition the court in cases where they are not eligible for automatic expungement. California partnered with Code for America, a non-profit “civic hacking” group, to identify, dismiss, or reduce thousands of cannabis convictions across the state.<sup>15</sup> Other states have taken a different approach to address social equity concerns in their legislative design. Most recently, New York legalized marijuana and included legislative language for automatic expungement. In addition, the state announced that the first one hundred licenses to sell marijuana in the state

will be reserved for justice-involved individuals with marijuana-related convictions.<sup>16</sup>

## Conclusion

Marijuana legalization now occupies a legitimate position in policy discourse. Reforming cannabis laws can achieve racially-equitable outcomes related to the criminal legal system. By including language that directly addresses prior convictions, states can take an affirmative step in providing relief to justice-involved individuals by removing costly compliance burdens. Legalization cannot be equitable without redressing past harms of racist, disproportionate drug enforcement actions in Black and Latino communities.

Too few individuals arrested and convicted for marijuana offenses directly benefit from reform. Expungement programs offer one path to address racial and ethnic inequality produced by past policy. However, when expungement is not automatic, costs create barriers to take-up of the benefit for people of color with criminal records. States pursuing the liberalization of cannabis laws should adopt clean slate initiatives, which provide free, automatic criminal record expungement for certain prior drug offenses.

## References

1. American Civil Liberties Union. (2020). *A tale of two countries: Racially targeted arrests in the era of marijuana reform*. <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>
2. National Inventory of Collateral Consequences of Conviction. (2022). *What are collateral consequences?* <https://niccc.nationalreentryresourcecenter.org/>
3. Prescott, J.J. & Starr, Sonja B. (2019, March 20). The case for expunging criminal records. *The New York Times*. <https://www.nytimes.com/2019/03/20/>
4. Burden, B. C., Canon, D. T., Mayer, K. R., & Moynihan, D. P. (2012). The effect of administrative burden on bureaucratic perception of policies: Evidence from election administration. *Public Administration Review*, 72(5), 741–751. <https://doi.org/10.1111/j.1540-6210.2012.02600.x>
5. Herd, P. & Moynihan, D. P. 2019. *Administrative burden: Policymaking by other means*. Russell Sage Foundation.
6. Chien, C. (2020). America's paper prisons: The second chance gap. *Michigan Law Review*, 119(3), 519-612. <https://doi.org/10.36644/mlr.119.3.america>
7. Harris, A., Evans, H., & Beckett, K. (2010). Drawing blood from stones: Legal debt and social inequality in the contemporary United States. *American Journal of Sociology*, 115(6), 1753–1799. <https://doi.org/10.1086/651940>
8. Daniller, A. (2019, November 14). Two-thirds of Americans support marijuana legalization. *Pew Research Center*. <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization>
9. Hill, J. B. 2016. Marijuana and the media: Changes in bias. In N. E. Marion & J. B. Hill (Eds.), *Legalizing Marijuana: A Shift in Policies Across America*. Carolina Academic Press.
10. Hernandez, J. (2021, February 22). Low-level marijuana arrests to stop in N.J. as Murphy signs legal weed bills. *WHYY*. <https://whyy.org/articles/low-level-marijuana-arrests-to-stop-in-n-j-as-murphy-signs-legal-weed-bills/>
11. Rep. Donald M. Payne Jr. (2022, January 28). Rep. Payne, Jr.'s statement on New Jersey's denial of cannabis licenses to Black-owned businesses [Press release]. Retrieved from <https://payne.house.gov/media/press-releases/rep-payne-jr-s-statement-new-jersey-s-denial-cannabis-licenses-black-owned>

12. Board of Governors of the Federal Reserve System. (2019). *Report on the economic well-being of U.S. households in 2018*. <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf>

13. Craigie, T., Grawart, A., Kimble, C., & Stiglitz (2020). Conviction, imprisonment, and lost earnings: How involvement with the criminal justice system deepens inequality. *Brennan Center for Justice*. <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>

14. Ibid. n. 6

15. Garcia-Navarro, L. & Bowman, E. (2020, February 23). Algorithm targets marijuana convictions eligible to be cleared. *NPR*. <https://www.npr.org/2020/02/23/808575012/algorithm-targets-marijuana-convictions-eligible-to-be-cleared>

16. McKinley, J. & Ashford, G. (2022, March 9). New Yorkers with marijuana convictions will get first retail licenses. *The New York Times*. <https://www.nytimes.com/2022/03/09/nyregion/marijuana-sellers-licenses-hochul.html>