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COMMENT

RE-ASSESSING MASS INCARCERATION IN LIGHT OF THE DECRIMINALIZATION OF MARIJUANA IN MARYLAND

By: Matthew R. Braun*

I. INTRODUCTION

It took the United States 160 years to imprison its first million people but only 12 years to lock up their next.¹ From 1829 to the mid 1970's, the number of Americans who were incarcerated rose in rough tandem with the overall population.² Through punitive federal and state drug laws, and increased political and monetary incentives, the United States choose to condemn drug users as criminals rather than approach them from a public health and addiction perspective.³ The alarming reality is that one in every fifteen Americans born in 2001 can expect to spend at least one year in prison.⁴ The overwhelming number of drug possession offenses can be attributed to one drug: marijuana.⁵ While African Americans are no more likely to commit a drug offense than a white person, they are disproportionately arrested and thus

* J.D. Candidate, 2018, University of Baltimore School of Law. I would like to thank my faculty advisor, Nancy Forster, for her knowledge, guidance, and overall support during the comment process. I would also like to thank the staff of the *University of Baltimore Law Forum* for all their hard work throughout the drafting process. Lastly, a special thanks to my family and friends for their unwavering support and confidence in me throughout law school.

¹ Eric Lotke & Jason Zledenberg, *Tipping Point: Maryland's Overuse of Incarceration and the Impact on Public Safety* 4 JUST. POL'Y INST. (March 2005), http://www.justicepolicy.org/uploads/justicepolicy/documents/05-03_rep_mdtippingpoint_ac-md.pdf.

² *Id.* at 3.

³ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 207 (rev. ed. 2012).

⁴ Lotke & Zledenberg, *supra* note 1, at 3.

⁵ Melissa K. Reimer, *Weighing the Charges: Simple Possession of Drugs in the Federal Criminal Justice System* 5 U.S. SENTENCING COMMISSION (Sept. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf (“As can be seen, the explosive increase in the number of simple possession offenders was entirely accounted for by an increase in the number of simple possession offenses of a single drug type—marijuana. . . Marijuana offenders, who accounted for 53.7 percent of simple possession offenders in fiscal year 2008, accounted for nearly all simple possession offenders by fiscal year 2013 (93.8%)”) (This comment will use the terms marijuana and cannabis interchangeably.).

trapped inside both federal and state criminal justice systems.⁶ The use of prisons as crime deterrents does not lead to safer communities but rather creates the very environment that sustains criminal activity.⁷

This comment will analyze the steps Maryland has taken to remedy some of the harm inflicted on communities by using the criminal justice system to address drug activity, particularly marijuana, instead of a public health approach. As medical cannabis becomes more widespread throughout the state, this comment will examine the effects that provisions in the Justice Reinvestment Act (“JRA”) and Md. Code Ann., Crim. Proc. § 10-105 will have on those who have already been convicted of marijuana possession. Part II will discuss the history of both Maryland and Federal drug laws as they pertain to the explosion of prison rates. Part III will discuss the disproportionate effect these laws have had on both low-income and minority communities, as well as the political and economic incentives provided to arrest and convict defendants of drug crimes.

Part IV will propose increasing funding for legal services, such as legal service providers and public defender offices, so that individuals convicted of marijuana possession have access to services that help expunge their records and potentially restore some of their rights as citizens. Part IV will also encourage creating legislation that protects individuals convicted of a marijuana related crime, and medical cannabis users, from discrimination for public housing. Finally, it will advocate for both government and private programs that offer treatment and rehabilitation rather than the inefficient programs currently used by prisons.

II. HISTORICAL DEVELOPMENT

A. *History of Drug Laws in the United States*

1. Federal

In 1970, President Richard Nixon declared a modern day “War on Drugs” in America, and within 10 years the nation’s prison populations began to rise exponentially.⁸ Presidents have immense power to shape the direction the

⁶ John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* 47 (2017) (“The incarceration rates for drug offenses are 34 per 100,000 for non-Hispanic Whites, 74 per 100,000 for Hispanics, and 193 per 100,000 for Blacks.”).

⁷ Barack Obama, *Commentary: The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017); *see also* Lotke and Zledenberg, *supra* note 1, at 14 (“High levels of incarceration concentrated in impoverished communities has a destabilizing effect on community life, so that the most basic underpinnings of informal social control are damaged. This, in turn, reproduces the very dynamic that sustain crime.”).

⁸ Pfaff, *supra* note 6, at 27.

criminal justice system takes with regard to drug policy.⁹ During the early 1960's, illegal use of drugs such as marijuana, crack cocaine, and powder cocaine were associated with rebellion, political dissent, and contempt for society.¹⁰ Every administration since Richard Nixon's has relied significantly on using the United States criminal justice system to further this narrative in an attempt to curb and control drug use.¹¹

Prior to the 1960's, the United States enacted legislation aimed to combat and deter illicit drug use. In 1951, the Boggs Act was passed which implemented mandatory minimum sentences for individuals convicted of any type of drug charge, including simple possession.¹² The Comprehensive Drug Abuse Prevention and Control Act ("CDAPCA") was passed in 1970 and it repealed those mandatory sentences.¹³ CDAPCA distinguished marijuana from other drugs, such as narcotics and opioids, while also including a civil forfeiture provision.¹⁴ President Richard Nixon proclaimed that drugs were "public enemy #1," and in 1973 he established, by executive order, the Drug Enforcement Agency.¹⁵ Congress then passed the 1986 Anti-Drug Abuse Act which reinstated mandatory minimum sentences for powder cocaine offenses and implemented even harsher punishments on crack cocaine offense.¹⁶

President Bill Clinton pushed for, and signed, the Quality Housing and Work Responsibility Act ("QHWRA") of 1998 which allowed public housing agencies to automatically evict a convicted felon.¹⁷ QHWRA also permitted the agencies to disqualify applicants for public housing who were merely suspected of using drugs.¹⁸ In 2010, Congress passed the Fair Sentencing Act (FSA) which in part allowed the retroactive application of new sentencing guidelines for those convicted of crack cocaine offenses.¹⁹ Nevertheless,

⁹ Obama, *supra* note 7, at 812.

¹⁰ See generally The Drug Policy Alliance, *A Brief History on the Drug War*, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Oct. 2, 2018).

¹¹ Jason Ziedenberg & Jason Colburn, *Efficacy & Impact: The Criminal Justice Response to Marijuana Policy in the United States* 4 JUST. POL'Y INST. (Aug. 25, 2005), http://www.justicepolicy.org/images/upload/05-08_REP_EfficacyandImpact_AC-DP.pdf.

¹² Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT. R. 55 (Oct. 2008).

¹³ Alexander, *supra* note 3, at 207.

¹⁴ *Id.*

¹⁵ *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007), <https://www.npr.org/templates/story/story.php?storyId=9252490>.

¹⁶ See Ziedenberg & Colburn, *supra* note 11.

¹⁷ Alexander, *supra* note 3, at 145.

¹⁸ *Id.*

¹⁹ *Fair Sentencing Act*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act> ("In another step toward fairness, in 2011, the U.S. Sentencing Commission voted to retroactively apply the new FSA Sentencing Guidelines to individuals sentenced before the law was enacted. This

approximately every 25 seconds an individual is arrested in the United States for simply possessing drugs for personal use.²⁰ The executive and legislative response to drugs over the past 70 years has resulted in an astonishing boom of incarceration rates nationwide²¹, which continues to have a disproportionately negative impact on minorities.²²

2. The Drug Exception to the Fourth Amendment

The Fourth Amendment of the United States Constitution, in its entirety, states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.²³

Recent Supreme Court jurisprudence has in essence done away with the Fourth Amendment's warrant requirement by paving a path for police to seize people virtually anywhere based solely on an objective officer's "reasonable articulable suspicion" that the person is engaged in criminal activity and poses a danger.²⁴ The Court in *Whren v. United States*, granted police officers unlimited discretion to stop a car for *any* motor vehicle violation.²⁵ Rulings such as these have undoubtedly led to an increase in the very thing the Fourth Amendment was designed to protect against: Pretext Stops.

In *Ohio v. Robinette*, the Court rejected the rule from the Ohio Supreme Court²⁶ which would have required police to inform motorists of their right to

decision will help ensure that over 12,000 people — 85 percent of whom are African-Americans — will have the opportunity to have their sentences for crack cocaine offenses reviewed by a federal judge and possibly reduced. (Even though people sentenced before the FSA can benefit from the retroactive Sentencing Guideline amendments, they remain subject to pre-FSA statutory mandatory minimums)") (last visited Oct. 3, 2018).

²⁰ Brian Stauffer, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HRW (Oct. 2016), https://www.aclu.org/sites/default/files/field_document/usdrug1016_web.pdf.

²¹ Alexander, *supra* note 3, at 11.

²² Pfaff, *supra* note 6, at 2.

²³ U.S. CONST. AMEND. IV.

²⁴ *Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("...in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

²⁵ Alexander, *supra* note 3, at 67-68. (emphasis added).

²⁶ *State v. Robinette*, 653 N.E.2d 695, 699 (1995) (The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer

leave after a routine traffic stop.²⁷ The Court instead implemented a fact specific reasonableness standard under the totality of the circumstances.²⁸ Yet, as Justice John Paul Stevens noted in his dissenting opinion,²⁹ police inherently have an aura of authority and therefore a reasonable person does not feel free to leave if questioning continues beyond the scope of the stop.³⁰ During the war on drugs,³¹ the Court's jurisprudence has empowered the government to use routine traffic stops as a pretext for drug searches and this disproportionately affects minorities.³²

3. Maryland

The progression of drug laws in Maryland have essentially mirrored federal trends over the past 70 years.³³ The implementation of mandatory minimum

when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.").

²⁷ *Ohio v. Robinette*, 519 U.S. 33, 34 (1996) ("The Ohio Supreme Court erred in holding otherwise. It would be unrealistic to require the police to always inform detainees that they are free to go before a consent to search may be deemed voluntary.").

²⁸ *Id.* ("The Fourth Amendment does not require that a lawfully seized defendant be advised that he is "free to go" before his consent to search will be recognized as voluntary. The Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances. In applying this test, the Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Indeed, in rejecting a *per se* rule very similar to one adopted below, this Court has held that the voluntariness of a consent to search is a question of fact to be determined from all the circumstances.")

²⁹ *Id.* at 45.

³⁰ *Id.* at 46. ("The Ohio Supreme Court was surely correct in stating: "Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.")

³¹ Pfaff, *supra* note 6.

³² Lynn Langton, Ph.D. and Matthew Durose, *Police Behavior during Traffic and Street Stops*, 2011 3 U.S. DEP'T OF JUST. BUREAU OF JUST. STAT. (2013) ("A lower percentage of white drivers stopped by police were searched (2%) than black (6%) or Hispanic (7%) drivers.")

³³ Timothy Roche, Nastassia Walsh & Jason Ziedenberg, *Maryland's Mandatory minimum Drug Sentencing Laws, Their Impact on Incarceration, State Resources and Communities of Color* 3 JUST. POL'Y INST. (February 2007), http://www.justicepolicy.org/uploads/justicepolicy/documents/07-02_rep_mdmandatoryminimums_dp-md.pdf.

sentences for drug related offenses increased in the 1980s.³⁴ Similar to federal rates, Maryland disproportionately incarcerates African Americans for marijuana. In 2010, African Americans made up roughly 30 percent of Maryland's overall population but 58 percent of all marijuana possession arrests.³⁵

In 2015, the Maryland Medical Cannabis Commission was established to promulgate rules and regulations for medical cannabis throughout the state.³⁶ Following this, Governor Larry Hogan signed Senate Bill 1005, or the Justice Reinvestment Act ("JRA"), which implemented sweeping reform to Maryland's criminal justice system.³⁷ The JRA, in part, set forth new sentencing guidelines for drug crimes and allowed judges to retroactively resentence defendants for less time than required by the previous mandatory minimums sentences.³⁸

Additionally, Md. Code Ann., Crim. Proc. §10-105 was reformed in October 2017.³⁹ Under section(a)(11) an individual can expunge his record if the crime, and the act on which the conviction was based upon, is no longer a crime.⁴⁰ Under section (a)(12), a person can have a marijuana possession conviction expunged from his record under Md. Code Ann., Crim. Law § 5-601.⁴¹ The petition for expungement cannot be filed within 4 years after the conviction, or sentence, is completed.⁴²

III. ISSUE

A. *The Politics of "Drugs."*

The glaring reality is that drug use is a universal problem, capable of affecting all persons regardless of race or socioeconomic status. Yet, incarceration rates for drug offenses are disproportionately higher for minorities.⁴³ During the 1990s, marijuana was the driving force behind an

³⁴ Roche, *et al.*, *supra* note 33.

³⁵ *The Maryland War on Marijuana in Black and White*, ACLU (2013), http://www.aclu-md.org/uploaded_files/0000/0470/aclu_marijuana_in_md_report_whitecover.pdf.

³⁶ MD. CODE ANN., HEALTH-GEN. § 13-3302.

³⁷ Maryland Justice Reinvestment Coordinating Council, *Practitioner Guide to SB 1005* (January 2017), <https://www.harcobar.org/site/wp-content/uploads/2017/09/MD-Practitioners-Guide-FINAL.pdf>.

³⁸ Roche, *et al.*, *supra* note 33.

³⁹ MD. CODE ANN., CRIM. PROC. § 10-105.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Pfaff, *supra* note 6, at 47 ("The incarceration rates for drug offenses are 34 per 100,000 for non-Hispanic Whites, 74 per 100,000 for Hispanics, and 193 per 100,000 for Blacks.").

explosion in drug arrests.⁴⁴ In 2005, four out of five drug arrests⁴⁵ were for simple possession.⁴⁶ Likewise, from 2008 to 2013, the total number of federal simple possession offenders increased by 396.6 percent.⁴⁷ Marijuana was almost exclusively the reason for the growth.⁴⁸ While marijuana use by minority and white communities is fairly similar,⁴⁹ African Americans are four times more likely to be arrested for it.⁵⁰ To compound the problem, many criminal defendants are indigent and must therefore rely on public defenders who are underfunded and overworked.⁵¹

Throughout the War on Drugs, politicians have continuously characterized addicts as responsible for their own conditions.⁵² They have also placed blame on drug users for the problems afflicting urban areas such as social and economic distress.⁵³ The 1951 Boggs Act was enacted because politicians pushed a narrative that marijuana was used by African Americans and Mexican Americans.⁵⁴ The Act made first time possession a two to five-year prison sentence.⁵⁵ Ten years later, the national perception adjusted to show that white middle class individuals also used marijuana.⁵⁶ Politicians were quick to act. The Comprehensive Drug Abuse Prevention and Control Act of 1970 distinguished marijuana from other drugs and lowered federal

⁴⁴ Alexander, *supra* note 3, at 60.

⁴⁵ *Id.*

⁴⁶ Reimer, *supra* note 5, at 1 (“The simple possession of illegal drugs is a criminal offense under federal law and in many state jurisdictions. The offense occurs ‘when someone has on his or her person, or available for his or her use, a small amount of an illegal substance for the purpose of consuming or using it but without the intent to sell or give it to anyone else.’ Simple drug possession is a misdemeanor under federal law which provides that an offender may be sentenced to a term of imprisonment of not more than one year, fined a minimum of \$1,000, or both. However, if an offender is convicted of simple possession after a prior drug related offense has become final, the offender can be charged with a felony simple possession offense.”).

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* (“This growth, however, is almost entirely accounted for by the substantial growth in simple possession offenses involving marijuana. The number of offenders sentenced for simple possession of marijuana during this time period increased by 803.8 percent.”).

⁴⁹ *Marijuana Arrests By The Numbers*, ACLU, <https://www.aclu.org/gallery/marijuana-arrests-numbers> (last visited Oct. 3, 2018).

⁵⁰ *Id.*

⁵¹ Pfaff, *supra* note 6, at 137-138.

⁵² Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 119 (2014).

⁵³ *Id.*

⁵⁴ Alexander, *supra* note 3, at 202.

⁵⁵ *Id.*

⁵⁶ *Id.* at 207.

penalties.⁵⁷ When marijuana was associated with minority communities the penalties were harsh, but when the association shifted to white communities, those policies changed.⁵⁸ Reactions like this from legislators perfectly demonstrate the politics surrounding drugs in America. These political ploys have shifted the public's opinion on drug use in ways that only perpetuate the growing problem.

B. Society's Growing Prison Fixation

In 1980, the United States had a population of 226.5 million people.⁵⁹ During this time the prison population was 315,974.⁶⁰ By 2015, the total population of the U.S. increased to 323.1 million while the prison population nearly quintupled to 1,476,847.⁶¹ The war on drugs fueled the United States prison boom.

“The percentage of drug arrests that result in prison sentences (rather than dismissal, community service, or probation) has quadrupled, resulting in a prison-building boom the likes of which the world has never seen. In two short decades, from 1980 and 2000, the number of people incarcerated in our nation's prisons and jails soared from roughly 300,000 to more than 2 million. By the end of 2007, more than 7 million Americans – or one in every 31 adults – were behind bars, on probation, or on parole.”⁶²

One out of fifteen Americans born in 2001 can expect to serve at least one year incarcerated at some point during their lives.⁶³ However, this number is disproportionately higher for minorities.⁶⁴

Throughout the recent history of the United States, politicians have been quick to portray themselves as “tough on crime” in an attempt to appeal to voters.⁶⁵ These three political buzz words are so often pushed by both politicians and interest groups because they “believe” that an increase in prison

⁵⁷ Alexander, *supra* note 3, at 207.

⁵⁸ *Id.*

⁵⁹ U.S. CENSUS BUREAU, *A Look at the 1940 Census 4* https://www.census.gov/newsroom/cspan/1940census/CSPAN_1940slids.pdf, at 4 (last visited Oct. 5, 2018).

⁶⁰ State-By-State Data, THE SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=BWR> (last visited Sep 2, 2018).

⁶¹ *Id.*

⁶² See Alexander, *supra* note 3, at 60.

⁶³ Lotke & Ziedenberg, *supra* note 1, at 3.

⁶⁴ Thomas Bonczar, *Prevalence of Imprisonment in the United States Population, 1974-2001*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT. (August 2003) (“About 1 in 3 black males, 1 in 6 Hispanic males, and 1 in 17 white males are expected to go to prison during their lifetime, if current incarceration rates remain unchanged.”).

⁶⁵ Pfaff, *supra* note 6, at 88.

populations will boost economic growth in their districts.⁶⁶ The idea is that tougher crime laws will increase the number of prisons which in turn will increase economic output, in the form of revenue and government grants, for the host communities.⁶⁷ These notions have been challenged empirically.⁶⁸ Prisons are predominantly located in rural communities, yet those benefiting financially are mainly part of the prison industrial complex and not local residents.⁶⁹ Additionally, in all but four states, the U.S. census counts prisoners as living in the area in which they are imprisoned.⁷⁰ This incentivizes politicians to distort reality by pushing “tough on crime” platforms in an attempt to prevent their districts from shrinking which in turn boosts their chances of staying in office.⁷¹

The prison industrial complex refers to private prisons and the numerous private companies that contract with the state to provide prisoners with food, clothes, and other essentials.⁷² In 1979, Congress passed the Justice System Improvement Act (“JSIA”), which reintegrated private corporations with the criminal justice system.⁷³ This led to an influx of money into lobbying and elections, to persuade officials into supporting legislation that enhanced criminal penalties⁷⁴ and allowing for the use of prisoners as a means of cheap

⁶⁶ Pfaff, *supra* note 6, at 89.

⁶⁷ *Id.* at 88.

⁶⁸ See Amy K. Glasmeir & Tracey Farrigan, *The Economic Impacts of the Prison Development Boom on Persistently Poor Rural Places*, 30 INT’L REG’L SCI. REV. 274, (2007) (“Our analysis suggests that prisons have had no significant economic effect on rural places in general, but that they may have had a positive impact on poverty rates in persistently poor rural counties, while also associated with diminishing transfer payments and increasing state and local government earnings in places with relatively good economic health. However, we found little evidence to support the conclusion that prison impacts were significant enough to foster structural economic change.”); Gregory Hooks, Clayton Mosher, Thomas Rotolo & Linda Lobao, *The Prison Industry: Carceral Expansion and Employment in US Counties, 1969-1994*, 85 Soc. Sci. Q. 38, 54 (2004) (“There is a widespread belief that prisons spur local growth—a belief that is reinforced by newspaper articles and political leaders. Although social scientists have been skeptical of this belief, there are few empirical studies of the consequences of carceral expansion. We hope that our surprising finding that prisons impede growth in rural counties that were already growing slowly will spark additional studies of the local consequences of this prison boom.”).

⁶⁹ See Pfaff, *supra* note 6, at 88.

⁷⁰ *Id.* at 89 (“Politicians in rural areas with prisons will therefore fight reform efforts, if only to prevent their districts – and thus their party’s power – from shrinking.”).

⁷¹ *Id.* at 87-90.

⁷² *Id.* at 90.

⁷³ Heather Ann Thompson, *The Prison Industrial Complex: A Growth Industry in a Shrinking Economy*, 21 New Lab. F., 38, 38-47 (2012).

⁷⁴ *Id.* at 41.

labor.⁷⁵ Prisons have become ingrained in the national economy with powerful corporations and individual investors.⁷⁶ While the prison industrial complex was not the initial catalyst for mass incarceration, it has created political incentives to resist criminal justice system reform and provided major financial incentives to increase arrests and detention.

C. *A Stacked Deck*

1. Pre-Trial Detention and the Plea Deal

Pretrial detentions, specifically for drug cases, are one of the leading contributing factors of mass incarceration in the United States.⁷⁷ In 2014, there were roughly 64,000 people detained, per day, prior to trial for a drug offense.⁷⁸ Broken bond systems keep those who cannot afford to pay bail in jail and provide prosecutors with immense leverage during plea negotiations.⁷⁹ The massive number of people stuck in prison because of their economic status has led to a swelling in our prison populations.⁸⁰

Virtually all criminal cases are resolved through plea bargaining because prosecutors are the most powerful and influential players within the criminal justice system.⁸¹ Prosecutors are able to use any legislatively enacted

⁷⁵ *Prison Labour is a Billion-dollar Industry, with Uncertain Returns for Inmates*, THE ECONOMIST (March 16th, 2017), <https://www.economist.com/news/united-states/21718897-idaho-prisoners-roast-potatoes-kentucky-they-sell-cattle-prison-labour> (“At the federal level, the Bureau of Prisons operates a programme known as Federal Prison Industries that pays inmates roughly \$0.90 an hour to produce everything from mattresses, spectacles, road signs and body armour for other government agencies, earning \$500m in sales in fiscal 2016.”).

⁷⁶ See *Generally Form 10K for the fiscal year ended Dec. 31, 2005*, U.S. SECURITY AND EXCHANGE COMMISSION, CORRECTIONS CORPORATION OF AMERICA, <https://www.sec.gov/Archives/edgar/data/1070985/000119312515061839/d853180d10k.htm> (“Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities. This possible growth depends on a number of factors we cannot control, including crime rates and sentencing patterns in various jurisdictions and acceptance of privatization. The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them.”); see also Alexander, *supra* note 3, at 231.

⁷⁷ Stauffer, *supra* note 20, at 82.

⁷⁸ *Id.*

⁷⁹ Stauffer, *supra* note 20, at 82.; see also Obama, *supra* note 7, at 843-44.

⁸⁰ Stauffer, *supra* note 20, at 82.

⁸¹ See Alexander, *supra* note 3, at 87.

punishment and therefore have immense discretion to choose which charges to bring against a defendant.⁸² This permits them to bring the charges that they believe they can prove, or the charges they can convince the defendant they are capable of proving.⁸³ In 2009, over 99 percent of people convicted of a drug possession, in the seventy-five largest counties, pled guilty.⁸⁴

2. Mandatory Minimum Sentences

The passing of the Anti-Drug Abuse Act in 1986 established harsh federal mandatory minimum sentences for drug possession offenses.⁸⁵ The Maryland legislature followed Congress's lead and enacted state level mandatory minimums for drug crimes.⁸⁶ Mandatory minimum sentences limit judicial discretion. They assume all parties in a drug enterprise are equally culpable which prevents judges from analyzing the facts of each case, such as age and criminal history, when implementing a sentence.⁸⁷ Maryland took substantial corrective steps when the JRA took effect in 2017.⁸⁸ Nevertheless, when faced with the choice between sitting in jail, facing steep punishments for minor crimes,⁸⁹ or accepting a guilty plea in order to go home to their families, the vast majority of people choose the latter.⁹⁰

⁸² See Pfaff, *supra* note 6, at 133.

⁸³ See Pfaff, *supra* note 6, at 133.

⁸⁴ *Id.*

⁸⁵ Roche, *et al.*, *supra* note 33, at 4 (“In the 1980s, use of mandatory minimum sentences began to escalate on federal and state levels. Stoked in part by the drug-related death of University of Maryland basketball star Len Bias, the U.S. Congress passed legislation that year 1986 requiring mandatory prison sentences for a wide range of drug offenses.”); See also Alexander, *supra* note 3, at 53.

⁸⁶ MARYLAND'S MANDATORY MINIMUM DRUG SENTENCING LAWS, THEIR IMPACT ON INCARCERATION, STATE RESOURCES AND COMMUNITIES OF COLOR at 4 (“States, including Maryland, quickly followed suit. Throughout the country, these laws were toughened in the 1980s and 1990s to apply to drug offenses, certain gun crimes, and other offenses, depending on the jurisdiction.”).

⁸⁷ *Id.*

⁸⁸ Justice Reinvestment Initiative Brings Sentencing Reforms in 21 States, PEW CHARITABLE TR., (Mar. 16, 2017), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment>. (“Created a tiered penalty structure for drug possession and subsequent offenses and increased access to residential treatment services; Eliminated mandatory minimums for commercial drug offenders, excluding volume dealers; Allowed retroactive application of the safety-valve mechanism for mandatory minimum sentences, which gives judges the ability to sentence a convicted offender to less than the mandatory minimum term if certain conditions are met.; Created parity between sentences for crack and powder cocaine offenses.; Removed penalty enhancements for repeat low-level commercial drug offenders.”).

⁸⁹ See Pfaff, *supra* note 6, at 133.

⁹⁰ Stauffer, *supra* note 20, at 82.

D. Mass Incarceration's Effect on Local Communities and Economies

In 2014, the United States Department of Justice reported that there were 570,767 people on probation for drug law violations.⁹¹ In Maryland, around 2.5 percent of the population is trapped within some part of the criminal justice system.⁹² The effects of mass incarceration have been the most detrimental to African Americans.⁹³ As of 2005, Maryland was home to 95,271 African American men.⁹⁴ On any given day, 10,739 of these men were incarcerated and another 20,265 were on probation or parole.⁹⁵

The United States has the largest prison population in the world.⁹⁶ By the 1990s, an average of one new prison or jail was being opened every week.⁹⁷ Each year, \$200 billion is spent on state and federal criminal justice systems and another \$50 billion is spent on incarcerating individuals.⁹⁸ The cost of incarceration does not end here. In most states, law enforcement has been the fastest rising expenditure since 1977, and in 2001, the United States spent over \$165 billion on the criminal justice system.⁹⁹ Yet higher incarceration rates have actually been found to reduce community safety.¹⁰⁰ Individuals who have been arrested are forever subject to legal and economic barriers which make it extremely difficult to reintegrate back into society.¹⁰¹

1. The After Effects of Incarceration: The Walls Remain

When an individual enters the criminal justice system he is forever branded as a second-class citizen. After serving his sentence, a convicted felon faces significant legal and economic barriers. The conditions of parole and probation often exacerbate these challenges.¹⁰² Roughly one out of every five incarcerations is for violations of probation.¹⁰³

⁹¹ Stauffer, *supra* note 20, at 19.

⁹² See Lotke & Zledenberg, *supra* note 1, at 6.

⁹³ See Pfaff, *supra* note 6, at 133.

⁹⁴ Lotke & Zledenberg, *supra* note 1, at 8.

⁹⁵ *Id.*

⁹⁶ Obama, *supra* note 7, at 816.

⁹⁷ Lotke and Zledenberg, *supra* note 1, at 4.

⁹⁸ Pfaff, *supra* note 6, at 233.

⁹⁹ Lotke and Zledenberg, *supra* note 1, at 4.

¹⁰⁰ Lotke and Zledenberg, *supra* note 1, at 13 (citing Clear, Todd R, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-income Communities.*).

¹⁰¹ *Id.* at 7.

¹⁰² *Id.*

¹⁰³ *Id.* at 6.

A major limitation on those with criminal records is that employers are reluctant to hire returned citizens.¹⁰⁴ In Maryland, employers are permitted to ask about arrests even if they did not lead to a conviction.¹⁰⁵ This barrier to entry back into the labor market is often times insurmountable for those with criminal records.¹⁰⁶ However, employers are not permitted to inquire about arrests or convictions that have been expunged.¹⁰⁷

The conditions of probation in the United States are sometimes harsher than serving prison sentences.¹⁰⁸ They often include terms that seem designed to keep the person in the claws of the system rather than integrated back into society as contributing members. For example, those on probation are usually required to meet with officers, attend meetings, not drink alcohol, submit urinalysis, and even not live in certain areas.¹⁰⁹ Having to meet with probation officers can sometimes force individuals to make the tough choice between work or meeting with their probation officer.¹¹⁰ They have to weigh the possibility of violating their probation by going to work or being fired for missing work to go to the meeting.¹¹¹ People who return to society after being incarcerated usually lack the skills required to re-enter the fast changing technology based labor market.¹¹² Individuals with criminal records who cannot find, or who have found and then lose, employment may resort to criminal activities, like drug dealing, in order to support themselves and their families.¹¹³

Moreover, a criminal record can make an individual ineligible for public housing and other social services. When the QHWRA was signed into law in 1998, public housing agencies were able to automatically evict individuals with a criminal conviction.¹¹⁴ The QHWRA also permits public housing agencies to exclude applicants who are only suspected of using drugs.¹¹⁵ Under federal law, individuals who are convicted of a drug

¹⁰⁴ Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 258 (The National Academies Press 2014).

¹⁰⁵ *Id.*

¹⁰⁶ See Lotke & Zledenberg, *supra* note 1, at 6.

¹⁰⁷ Md. Dep't of Labor, Licensing, and Regulation, GUIDELINES FOR PRE-EMPLOYMENT INQUIRIES TECHNICAL ASSISTANCE GUIDE - INTERVIEWS AND APPLICATIONS FOR EMPLOYMENT - OFFICE OF FAIR PRACTICES, <http://www.dllr.maryland.gov/oeope/preemp.shtml> (last visited Sep. 28, 2018).

¹⁰⁸ Stauffer, *supra* note 20, at 10-11.

¹⁰⁹ See Lotke & Zledenberg, *supra* note 1, at 6.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Lotke & Zledenberg, *supra* note 1, at 7; see generally, Daveport and Kirby, Only Humans need apply winners and losers in the Age of Smart Machines.

¹¹³ See Travis, Western & Redburn, *supra* note 107, at 128.

¹¹⁴ Reimer, *supra* note 5.

¹¹⁵ *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007),

possession may be barred from receiving welfare assistance, educational loans, and even a driver's license.¹¹⁶

2. Money Well Spent?

From 1977 to 2001, government spending on corrections increased by 1,101 percent, while spending on education increased by 448 percent and spending on health and hospitals increased by 482 percent.¹¹⁷ Spending on corrections have exploded, while spending on other essential social services and government programs has either fallen or stayed constant.¹¹⁸ The criminal justice system has become one of the leading providers for healthcare, substance abuse treatment, mental healthcare, job training, and education for one of the most disenfranchised populations: African Americans.¹¹⁹

From 1990 to 1999, the per capita spending on corrections in Maryland increased by two thirds.¹²⁰ In 2005, the State of Maryland spent \$280 million to incarcerate 12,773 people from the Baltimore area.¹²¹ Mass incarceration that is condensed in disadvantaged communities destabilizes them so much so that it produces the very things that sustain criminal activity.¹²² Additionally, using prisons as a means of deterring future criminal activity has taken funds from programs that could be used to help break the cycle of incarceration.¹²³ Legislative bodies should instead allocate funds to programs designed to help convicted felons reintegrate, allowing them to contribute to society and to their local economies.¹²⁴

IV. SOLUTION

There is no single solution to reform our criminal justice system but Maryland has taken steps in the right direction. The JRA lowered penalties¹²⁵ for those convicted for a marijuana related crime under CR §5-601.¹²⁶ Additionally, 2017 reforms to Md. Code Ann., Crim. Proc. § 10-105 created

<https://www.npr.org/templates/story/story.php?storyId=9252490>.

¹¹⁶ Stauffer, *supra* note 20.

¹¹⁷ Lynn Bauer & Steven D. Owens, *Justice Expenditure and Employment in the United States, 2001*, BUREAU OF JUSTICE STATISTICS, (May 2004), <https://www.bjs.gov/content/pub/pdf/jeeus01.pdf>.

¹¹⁸ Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 314 (The National Academies Press, 2014).

¹¹⁹ *Id.* at 314-15.

¹²⁰ See Lotke and Zledenberg, *supra* note 1, at 10.

¹²¹ *Id.* at 10-11.

¹²² *Id.* at 10.

¹²³ *Id.* at 4-5.

¹²⁴ Obama, *supra* note 7, at 833.

¹²⁵ Maryland Justice Reinvestment Coordinating Council, *supra* note 37.

¹²⁶ MD. CODE ANN., CRIM. LAW § 5-601 (LexisNexis 2018).

an opportunity for individuals to file a petition with the court to expunge a CR §5-601 conviction from their record.¹²⁷ However, §10-105(c)(8) sets forth time requirements for filing this motion.¹²⁸ There were 23,663 arrests for marijuana possession in Maryland between 2001 and 2010.¹²⁹ It is clear that there will be a significant increase in the number of individuals who will seek expungement as a form of relief in the coming future. Optimistically, this may result in a decrease in Maryland's incarceration rate, and in particular, among African American men.¹³⁰

Nevertheless, barriers will remain even for the individuals who obtain relief through §10-105. Pursuant to the Controlled Substances Act ("CSA"), marijuana is still designated as a Schedule I drug which means that using or possessing cannabis, even with a State-approved medical card, is illegal under federal law.¹³¹ This dichotomy produces collateral consequences for Marylanders. Individuals who have been convicted under §5-601, but obtain relief through §10-105, can still be denied public housing.¹³² Additionally, citizens who have been incarcerated generally have less education, vocational skills, and work experience than the rest of the population.¹³³ To exacerbate these disadvantages, people must cope with the social stigma that is associated with both drug use and a criminal conviction.

Marylanders would be greatly served if the legislature enacted a statute that protected those with convictions under §5-601, and patients who qualify for medical cannabis, from housing discrimination.¹³⁴ Additionally, the State should shift greater resources to the courts and to 501(c)(3) public interest organization as they attempt to cope with the potential influx of §10-105

¹²⁷ MD. CODE ANN., CRIM. PROC. § 10-105(a)(12) (LexisNexis 2018).

¹²⁸ MD. CODE ANN., CRIM. PROC. § 10-105(c)(8) (LexisNexis 2018) ("A petition for expungement based on the conviction of a crime under subsection (a)(12) of this section may not be within 4 years after the conviction or satisfactory completion of the sentence, including probation, that was imposed for the conviction, whichever is later").

¹²⁹ ACLU, *supra* note 35.

¹³⁰ *Id.*; See also, Lotke and Zledenberg, *supra* note 1, at 3.

¹³¹ 21 U.S.C.S. § 812 (LexisNexis 2018).

¹³² University of Maryland Francis King Carey School of Law, Legal Resource Center for Public Policy (Sept. 17, 2015), https://www2.law.umaryland.edu/programs/publichealth/documents/Medical_Cannabis_in_Housing_Memorandum.pdf.

¹³³ Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs that Provide Education to Incarcerated Adults*, RAND Corp., xv (2013).

¹³⁴ George W. Bush, *STATE OF THE UNION ADDRESS*, (Jan. 20, 2004) <https://georgewbushwhitehouse.archives.gov/news/releases/2004/01/20040120-7.html> ("Tonight I ask you to consider another group of Americans in need of help. This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work or a home or help, they are much more likely to commit crime and return to prison.").

motions. Finally, the State should better fund programs that have been proven to rehabilitate and reintegrate prisoners back as productive members of society. These programs include educational and vocational training, addiction treatment, and mentorships.

A. *The Practical Implications of Decriminalizing Marijuana in Maryland.*

From 2001 to 2010, Maryland arrested, and subsequently incarcerated, more people for marijuana possession than for all violent crimes combined.¹³⁵ The vast majority of Americans, if charged with a crime, do not have the financial means to hire a private attorney to represent them.¹³⁶ Therefore most defendants, and subsequently offenders, are indigent and must rely on an overworked and underfunded public defender office.¹³⁷ More resources will need to be shifted to the courts, Public Defender offices, legal service providers, and other 501(c)(3) public interest organization so that they can keep up with the increase in demand for the expungement process. It is critical that resources be allocated to enable the expungement process, under CR § 10-105, because in Maryland, potential employers are not free to question a person about arrests or convictions that have been expunged.¹³⁸ This will make it easier for those individuals to find employment.

Over 10,000 people are released from state and federal prisons every week.¹³⁹ It is essential that Maryland further fund and develop programs that give prisoners the skills to obtain, and maintain, gainful employment upon release. Individuals who have lawful employment are less likely to recidivate and end up back in the criminal justice system.¹⁴⁰ A 2003 study reported that prisoners who participate in educational programs had a 43 percent lower recidivism rate than those who did not participate.¹⁴¹ A three-state study, that included Maryland, showed that those who participated in education programs were paid higher wages than nonparticipants.¹⁴² Additionally, participants of

¹³⁵ ACLU, *supra* note 35.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Lotke & Zladenberga, *supra* note 1, at 6.

¹³⁹ Prisoners and Prisoner Re-Entry, The United States Department of Justice, The U.S. Dep't of Justice, PRISONERS AND PRISONER RE-ENTRY, https://www.justice.gov/archive/fbci/progmenu_reentry.html (last visited Sep. 28, 2018).

¹⁴⁰ Bush, *supra* note 135.

¹⁴¹ Lois M. Davis, et al., *EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS*, RAND CORP. xvi (2013).

¹⁴² Stephen J. Steurer & Linda G. Smith, Education Reduces Crime: Three-State Recidivism Study Executive Summary, CORRECTIONAL EDUC. ASS'N (Feb.2003), <https://files.eric.ed.gov/fulltext/ED478452.pdf> ("The mean yearly wages for participants was 7,775.03 in year one, 9,53.24 in year two, and 10,628.78 in year

substance abuse programs, while incarcerated, were found to be between 4 and 9 percent less likely to recidivate and that the benefits outweighed the costs.¹⁴³

Providing hard and soft-skill job training opportunities for individuals is essential. Maryland should consider offering the private sector economic incentives, in the form of tax breaks, if they partner with prisons to create mentorship programs. These mentorship programs do not need to necessarily provide the prisoners with employment upon release. The skills gained from working with a local mechanic, barbershop, or nail salon will give individuals some of the experience employers look for in a job applicant. Furthermore, these types of experiences will benefit both the individual, by providing them with employability skills, and society, by reducing recidivism rates.¹⁴⁴

B. *Enact Legislation Prohibiting HUD Discrimination Against Individuals Who File for Relief under §10-105(a)(12).*

Under the QHWRA, applicants for public housing must automatically be denied if they have a criminal conviction or are suspected of drug use.¹⁴⁵ Additionally, pursuant to section 577 of QHWRA, landlords who receive federal funds are required to deny applicants who they believe use a controlled substance, but they may use personal discretion on eviction of current tenants.¹⁴⁶ This creates an avenue for discriminating against applicants who

three. The mean yearly wages for non-participants was 5,980.63 in year one, 8,491.75 in year two, and 9,557.92 in year three.”).

¹⁴³ WASH. ST. INST. FOR PUB. POL’Y, CHEMICAL DEPENDENCY TREATMENT FOR OFFENDERS: A REVIEW OF THE EVIDENCE AND BENEFIT-COST ANALYSIS (Dec. 2012)
http://www.wsipp.wa.gov/ReportFile/1112/Wsipp_Chemical-Dependency-Treatmentfor-Offenders-A-Review-of-the-Evidence-and-Benefit-Cost-Findings_Full-Report.pdf (“Thus, while this analysis allows us to conclude that a variety of chemical dependency programs lower recidivism and save money, the existing research literature does not enable us to peer into the “black box” to determine whether treatment dosage or aftercare are key elements of effective chemical dependency programs.”).

¹⁴⁴ Davis, *supra* note 141.

¹⁴⁵ Ziedenberg & Colburn, *supra* note 11.

¹⁴⁶ Memorandum from Benjamin T. Metcalf, Deputy Assistant Sec’y for Multifamily Housing Programs, Dep’t of Housing and Urban Dev., “Use of Marijuana in Multifamily Assisted Properties” (Dec. 29, 2014), <http://portal.hud.gov/hudportal/documents/huddoc?id=useofmarijinmfassistpropy.pdf>. (“With regard to questions concerning the use of marijuana in Multifamily assisted properties in states that have decriminalized the use of marijuana, the controlling authority is section 577 of the Quality Housing and Work Responsibility Act of 1998 (QHWRA), P.L. 105-276 (October 21, 1998), 42 U.S.C. Section 13663. Owners of federally assisted housing are required

have been convicted, or simply charged, with a drug offense, but have obtained relief under CR §5-601. Additionally, this puts the rights of patients in Maryland, who have qualified for medical cannabis, in conflict with the rights of landlords and public housing agencies who prohibit the use of medical cannabis on the property.

Pursuant to the doctrine of preemption through the Supremacy Clause of Article VI of the Constitution, States are usually prohibited from enacting legislation that is in direct conflict with federal law.¹⁴⁷ However, Congress did not intend for the CSA to remove a state's role in regulating controlled substances such as marijuana.¹⁴⁸ Therefore, Maryland should prioritize enacting a statute that shields individuals, who obtain relief through §10-105(a)(12), from public housing discrimination. The statute will have to be drafted in a way that would not create a positive conflict with current federal law.¹⁴⁹ This can be accomplished by narrowly tailoring the statute in a way that prohibits landlords, who receive government funding, from inquiring about an applicant's criminal record with respect to marijuana or a conviction under §5-601.

V. CONCLUSION

The approach towards drugs, specifically marijuana, that legislators have taken over the past 50 years has had dire consequences on communities. From shockingly high incarceration rates to an opioid epidemic, the criminalization of marijuana has left communities in dismal situations. Minority communities continue to be disproportionately harmed by the after effects of these policies. In order to move forward with remedying these harms, Maryland must continue to not only protect medical cannabis patients from the federal government, but also offer relief for individuals who have previously been convicted of marijuana offenses. The expungement processes for a marijuana offense, pursuant to §10-105(a)(12), is a step in the right direction. It is critical that the State be proactive, rather than reactive at the expense of its citizens, by pushing funding to the courts and to 501(c)(3) public interest organization. Furthermore, it is as equally important to further employee programs designed

by QHWRA to deny admission to any household with a member who the owner determines is, at the time of application for admission, illegally using a controlled substance as that term is defined by the CSA.”).

¹⁴⁷ U.S. Const. art. VI, cl. 2.

¹⁴⁸ Todd Garvey, Brian Yeh, State Legalization of Recreational Marijuana: Selected Legal Issues, CONG. RES. SERV., Jan. 13, 2014 (“Yet Congress intended that the CSA would not displace all state laws associated with controlled substances, as it wanted to preserve a role for the states in regulating controlled substances. States thus remain free to pass laws relating to marijuana, or any other controlled substance, so long as they do not create a “positive conflict” with federal law, such that the two laws ‘cannot consistently stand together.’”).

¹⁴⁹ *Id.*

at reintegrating these individuals back as contributing members of the community.