



# WASHTENAW COUNTY

## OFFICE OF THE PROSECUTING ATTORNEY

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### POLICY DIRECTIVE 2021-05: POLICY REGARDING CANNABIS & MARIJUANA

#### I. Introduction and Background

##### A. The History of Marijuana Criminalization and its Disparate Effects

America's long experiment with cannabis criminalization has failed. For nearly 100 years, cannabis has been functionally illegal in the United States—tethering countless Americans to the criminal justice system, and imposing severe collateral consequences. The costs of cannabis criminalization, moreover, have not been borne equally. Instead, those costs have been borne disproportionately by Black and indigenous people of color.

Importantly, though, it was not always so. A bit of history is in order. For centuries, “American production of hemp (the cannabis plant) was *encouraged* by the government . . . for the production of rope, sails, and clothing.”<sup>1</sup> Following the Civil War, changing market circumstances led to a decline in the domestic production of industrial hemp. But cannabis remained “a popular ingredient in many medicinal products and was sold openly in pharmacies.”<sup>2</sup> Through the early 20<sup>th</sup> century, then, cannabis was widely accepted by Americans, both for medical usage and for usage as an industrial textile.<sup>3</sup>

That state of affairs began to change in the early 1900s. In the aftermath of the Mexican Revolution, America “saw an influx of immigration from Mexico into states like Texas and Louisiana.”<sup>4</sup> Those “new Americans brought with them their native language, culture and customs”—including the “use of cannabis as a medicine and relaxant.”<sup>5</sup> Mexican immigrants referred to the cannabis plant as “marihuana.”<sup>6</sup> At the time, Americans were already “very familiar with the ‘cannabis’” that was “present in almost all tinctures and medicines.”<sup>7</sup>

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<sup>1</sup> Alexander Campbell King Law Library, University of Georgia School of Law, *Survey of Marijuana Law in the United States: History of Marijuana Regulation in the United States*, available at

<https://libguides.law.uga.edu/c.php?g=522835&p=3575350> (emphasis added). Indeed, “hemp was such an important resource” that it was “illegal not to grow hemp” in Jamestown, Virginia, in 1619. Hemp Frontiers, *History of Hemp in America* (Aug. 22, 2005), available at <https://hempfrontiers.com/history-of-hemp-in-america/>.

<sup>2</sup> Alexander Campbell King Library, *supra* n. 1.

<sup>3</sup> Matt Thompson, *Code Switch: The Mysterious History of ‘Marijuana’*, National Public Radio (July 22, 2013), available at <https://libguides.law.uga.edu/c.php?g=522835&p=3575350>.

<sup>4</sup> Malik Burnett and Amanda Reiman, *How Did Marijuana Become Illegal In The First Place?*, Drug Policy Alliance (Oct. 8, 2014), available at <https://www.drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place>.

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

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

<sup>7</sup> *Id.*

“Marihuana,” however, was a foreign term, and one that was unknown to most Americans. Media outlets thus began to play on anti-immigrant sentiment by running sensationalized stories about Mexican immigrants who were under the influence of “marihuana.” A representative 1925 headline from the *New York Times* read: “*Mexican, Crazyed by Marihuana, Runs Amuck With Butcher Knife.*”<sup>8</sup>

Anti-immigrant sentiments thus helped turn public opinion against “marihuana”—even though cannabis was a substance many Americans “already had in their medicine cabinets.”<sup>9</sup> “The drug became associated with immigrants and . . . in turn, prejudice about the newcomers became associated with marijuana.”<sup>10</sup> In parts of the country, anti-marijuana crusaders also piggybacked on racism against Black Americans. In New Orleans, for example, “newspaper articles associated the drug with African-Americans, jazz musicians, [and] prostitutes.”<sup>11</sup>

These xenophobic, racist attitudes around marijuana were paired with effective propaganda campaigns geared towards convincing Americans that marijuana was a particularly dangerous drug. Most famously, the 1936 film *Reefer Madness* depicted marijuana as a “demon drug” that was “worse than heroin, cocaine, or any other recreational substance.”<sup>12</sup> The film suggests that “several puffs on a marijuana cigarette” can cause teenagers to “feel the uncontrollable urge to bug out their eyes, laugh maniacally, dance wildly, cheat on their girlfriends, listen to hot jazz, drive at breakneck speeds, and possibly commit murder.”<sup>13</sup> Today, *Reefer Madness* is appreciated ironically as “one of the most entertainingly bad movies ever made.”<sup>14</sup> At the time, however, it reflected the sensationalized propaganda campaign against marijuana.<sup>15</sup>

In 1937, Congress passed the Marijuana Tax Act, which effectively banned marijuana nationwide.<sup>16</sup> Yet contemporaneous medical research demonstrated that marijuana was not nearly as dangerous as *Reefer Madness*-type propaganda suggested. In 1944, the New York Academy of Medicine issued an exhaustive report “concluding that marijuana did not cause violent behavior, provoke insanity, lead to addiction, or promote opioid use.”<sup>17</sup> The report, however, was disregarded by Harry Anslinger, head of the Federal Bureau of Narcotics, who “angrily dismissed its authors as ‘dangerous’ and ‘strange.’”<sup>18</sup>

In the decades that followed, policymakers repeatedly ignored scientific evidence about

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<sup>8</sup> Thompson, *supra* n. 3.

<sup>9</sup> Burnett & Reiman, *supra* n. 4.

<sup>10</sup> Alexander Campbell King Library, *supra* n. 1.

<sup>11</sup> Eric Schlosser, *Reefer Madness*, *The Atlantic* (Aug. 1994), available at <https://www.theatlantic.com/magazine/archive/1994/08/reefer-madness/303476/>.

<sup>12</sup> Keith Phipps, *Reefer Madness*, *The A.V. Club* (Mar. 29, 2002), available at <https://film.avclub.com/reefer-madness-1798195449>.

<sup>13</sup> *Id.*

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

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

<sup>16</sup> Burnett & Reiman, *supra* n. 4.

<sup>17</sup> Schlosser, *supra* n. 11.

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

marijuana’s pharmacological effects, instead following a predetermined path towards prohibition. In the 1970s, Congress passed the Controlled Substances Act, “which established Schedules for ranking substances according to their dangerousness and potential for addiction.”<sup>19</sup> Cannabis was placed in the most restrictive category, Schedule I—alongside highly addictive and dangerous drugs such as heroin.<sup>20</sup> The inclusion of cannabis on Schedule I was supposedly a “place holder” until then-President Richard Nixon could receive advice from an independent body known as the Shafer Commission.<sup>21</sup> The Shafer Commission’s report ultimately recommended that marijuana not be criminalized at all. It concluded that “cannabis was as safe as alcohol, and recommended ending prohibition in favor of a public health approach.”<sup>22</sup> But President Nixon—who “saw pot prohibition as a way to destroy the antiwar left”—ignored the Shafer Commission’s recommendations, and instead kept cannabis as a Schedule I drug.<sup>23</sup> In “clandestine recordings made by Nixon in the White House,” he is heard advocating for the dismissal of a public health-informed approach.<sup>24</sup> “I want a goddamn strong statement on marijuana,” Nixon said. “Can I get that out of this sonofabitching, uh, domestic council? . . . I mean one on marijuana that just tears the ass out of them.”<sup>25</sup>

Though the Shafer Commission’s recommendations were ignored by federal policymakers, its report found traction at the state level. In the 1970s, “eleven states, containing a third of the country’s population, decriminalized marijuana . . . and most other states weakened their laws against it.”<sup>26</sup> Yet the 1970s decriminalization movement proved short-lived. In the 1980s, as part of the so-called War on Drugs, Congress passed a series of laws that resulted in huge increases in “federal penalties for marijuana possession, cultivation, and trafficking.”<sup>27</sup> “State marijuana laws were also toughened during the 1980s.”<sup>28</sup> By the early 1990s, tens of thousands of Americans were incarcerated “primarily for a marijuana offense.”<sup>29</sup> Today, despite recent reforms, recreational marijuana consumption remains a criminal offense at the federal level, and in most states.

As with so much in the criminal justice system, the costs associated with the criminalization of marijuana have not been borne equally. Black Americans and white Americans use marijuana at roughly equal rates.<sup>30</sup> Nationwide, however, Black people are “3.6

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<sup>19</sup> Burnett & Reiman, *supra* n. 4.

<sup>20</sup> Schlosser, *supra* n. 11.

<sup>21</sup> Burnett & Reiman, *supra* n. 4.

<sup>22</sup> David Downs, *The Science Behind the Long War on Marijuana*, *Scientific American* (Apr. 19, 2016), available at <https://www.scientificamerican.com/article/the-science-behind-the-dea-s-long-war-on-marijuana/>.

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.*

<sup>26</sup> Schlosser, *supra* n. 11.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> American Civil Liberties Union, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (Apr. 17, 2020), available at <https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/>.

times more likely than white people to be arrested for marijuana.”<sup>31</sup> The disparities are even more pronounced in Washtenaw County. In 2018, Black people in Washtenaw County were 4.7 times as likely to be arrested for marijuana than white people.<sup>32</sup>

To be sure, people today rarely serve jail or prison time for marijuana possession alone. But the cascading consequences of a marijuana related conviction are severe. A marijuana conviction can preclude a person from obtaining a job, from securing student loans or grants, or from living in public housing.<sup>33</sup> A marijuana conviction can also render a non-citizen deportable.<sup>34</sup> Cannabis-related convictions, then, can severely disrupt—or ruin—a person’s life. And Black people, and people of color, are far more likely to suffer these adverse consequences than white people.

All of this has taken place against “the clear consensus of science that marijuana is far less harmful to human health than most other banned drugs and is less dangerous than the highly addictive but perfectly legal substances known as alcohol and tobacco.”<sup>35</sup> Marijuana does not cause fatal overdoses.<sup>36</sup> Its addictive properties are low.<sup>37</sup> The “myth that it leads users to more powerful drugs has long since been disproved.”<sup>38</sup> And “[t]here is little evidence that it causes cancer.”<sup>39</sup>

What is more, the criminalization of marijuana has not meaningfully deterred people from using cannabis. “[A]pproximately half of Americans, some 78 million people, claimed to have used marijuana at some point in their lifetime.”<sup>40</sup> The vast majority of those people will never face criminal charges. But for an unlucky few, the commonplace decision to engage in marijuana use can result in a conviction, a criminal record, and a lifetime of collateral consequences. And again: Black people, and people of color, are far more likely to face these consequences than white people.

## **B. Recent Steps Towards Legalization**

In recent years, state and local policymakers have begun taking a more health-informed approach to marijuana. Though marijuana remains illegal at the federal level, it is either fully legal or decriminalized—either for recreational or medical use—in the vast majority of states.

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

<sup>32</sup> American Civil Liberties Union, *Michigan* (Apr. 17, 2020), available at <https://graphics.aclu.org/marijuana-arrest-report/MI>.

<sup>33</sup> See Marijuana Policy Project Foundation, *Federal Consequences for Marijuana Convictions*, available at <https://www.mpp.org/issues/criminal-justice/federal-collateral-consequences-for-marijuana-convictions/>.

<sup>34</sup> See 8 U.S.C. § 1227(a)(2)(B)(i).

<sup>35</sup> Philip M. Boffey, *What Science Says About Marijuana*, *The New York Times* (July 30, 2014).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

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

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

<sup>40</sup> National Center for Drug Abuse Statistics, *Marijuana Addiction: Rates & Usage*, available at <https://drugabusestatistics.org/marijuana-addiction/>.

Today, just eight states categorically criminalize marijuana under state law.<sup>41</sup>

Michigan has positioned itself as a leader in the marijuana legalization movement. In 2018, Michigan voters adopted Proposal 1, a ballot initiative which legalized the use and possession of small amounts of marijuana for recreational use. Importantly, though, possession of more than a small amount of marijuana remains subject to criminal penalties. By way of example: under Proposal 1, a person may possess only up to 2.5 ounces of marijuana outside of their home.<sup>42</sup> Up to 10 ounces may be kept in one’s residence—but any amount over 2.5 ounces must be secured “with locks or other functioning security devices.”<sup>43</sup> What is more, a person may only cultivate, for personal use, up to 12 marijuana plants.<sup>44</sup> And marijuana use and possession remains illegal for people under the age of 21.<sup>45</sup>

Proposal 1 goes a long way towards prospectively preventing many of the harms wrought by marijuana criminalization. But it also results in some arbitrariness. Under Michigan law, for example, a person can lawfully possess 2.5 ounces of marijuana outside of the home, or 10 ounces in the home. Possession of more than 5 ounces of marijuana outside the home, however, can still lead to criminal penalties, even for a first offense.<sup>46</sup>

In addition, Proposal 1 does not provide for automatic expungement of criminal records for people who were previously convicted of marijuana-related crimes. By contrast, California passed a law which allows for automatic expungement of old marijuana-related convictions—thus undoing previous harms imposed as a result of marijuana criminalization.<sup>47</sup>

Recently—as part of a broader package of bills expanding eligibility for expungement of criminal records—Governor Whitmer signed into law HB 4982, which provides a “rebuttable presumption” that any misdemeanor marijuana-related offense should be expunged.<sup>48</sup> Under that law, if an application for expungement is filed, a prosecuting attorney may prevent expungement only by demonstrating “that the conduct on which the applicant’s conviction or convictions were based” remain illegal.<sup>49</sup> Though HB 4982 does not provide for *automatic* expungement, it at least provides that expungements should presumptively be granted for marijuana-related crimes that are no longer on the books.

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Given this factual and legal background, the Washtenaw County Prosecutor’s Office does not believe that it is appropriate to impose criminal sanctions for the use or possession of

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<sup>41</sup> See DISA, *Map of Marijuana Legality by State*, available at <https://disa.com/map-of-marijuana-legality-by-state>.

<sup>42</sup> MCL 333.27955.

<sup>43</sup> MCL 333.27954.

<sup>44</sup> MCL 333.27955.

<sup>45</sup> MCL 333.27954.

<sup>46</sup> See MCL 333.27965

<sup>47</sup> Lindsay Schnell, *Marijuana Reform: New California Law Gives People With Records a Do-Over*, USA Today (Oct. 2, 2018), available at <https://www.usatoday.com/story/news/2018/09/30/california-passes-landmark-marijuana-law-residents-reclaim-lives/1340729002/>.

<sup>48</sup> MCL 780.621e (eff. Apr. 11, 2021).

<sup>49</sup> *Id.*

marijuana—regardless of precise amount at issue. Marijuana is not nearly as dangerous as other controlled substances. It does not generally lead to violent or destructive behavior. Use of marijuana is widespread, and it is widely accepted in our community.<sup>50</sup> It thus makes little sense to sanction an unlucky few who were caught with “too much” marijuana. That is particularly true given (1) the observed racial disparities in marijuana-related criminal consequences, and (2) the collateral consequences that people can suffer as a result of a marijuana conviction.

Accordingly, and as outlined in further detail below, it will be the policy this Office not to charge marijuana use or possession cases, small-scale distribution of marijuana, or cases that technically violate the parameters outlined in Proposal 1.

Under this Policy, then, the Prosecutor’s Office will decline to file criminal charges for the use or possession of marijuana—*whatever the amount at issue*. As the Shafer Commission concluded nearly a half-century ago, cannabis is “as safe as alcohol.”<sup>51</sup> It is therefore no more appropriate to charge someone with for having “too much” marijuana than it is to charge someone for having “too many” bottles of wine.

In addition, the Prosecutor’s Office will generally decline to file criminal charges related to the manner in which someone stores marijuana, or the manner in which they cultivate it. Thus, for example, the Prosecutor’s Office will not generally authorize charges alleging that a person violated the requirements of Proposal 1 by failing to store their marijuana “in a container or area equipped with locks or other functioning security devices.”<sup>52</sup> Nor will the Prosecutor’s Office generally authorize charges that stem from cultivating marijuana in a manner where “the plants are visible from a public place.”<sup>53</sup>

Furthermore, the Washtenaw County Prosecutor’s Office believes that those who have *previously* been convicted of a marijuana related offense should have every opportunity to clear their records. Simply put: people should no longer bear the stigma of a criminal record for activity that is no longer a crime. Accordingly, the Washtenaw County Prosecutor’s Office will not contest any application for expungement where the underlying offense was for use, possession, cultivation, or distribution of marijuana.

In enacting this Policy, the Prosecutor’s Office is cognizant of the fact that cannabis strains have grown more potent over time—and that there are some concerns that these more potent strains can lead to health issues.<sup>54</sup> The Prosecutor’s Office therefore believes that marijuana should be regulated (much like alcohol and tobacco), and that commercial actors should not seek to skirt legal limits on marijuana sales and distribution. Accordingly, nothing in

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<sup>50</sup> The famed “Hash Bash,” for example, has been celebrated annually in Ann Arbor—Washtenaw County’s largest jurisdiction—for nearly a half-century. *See, e.g., The History of the Ann Arbor Hash Bash, available at* <https://hashbash.com/history.html>.

<sup>51</sup> Downs, *supra* n. 22.

<sup>52</sup> MCL 333.27954.

<sup>53</sup> *Id.*

<sup>54</sup> *See, e.g.,* Alex Berenson, *What Advocates of Legalizing Pot Don’t Want You To Know*, The New York Times (Jan. 4, 2019); The Marshall Project, *How Dangerous is Marijuana, Really?* (Jan. 14, 2019), *available at* <https://www.themarshallproject.org/2019/01/14/how-dangerous-is-marijuana-really>.



this Policy should be read to prohibit the filing of charges against commercial actors who unlawfully distribute marijuana, or cannabis related products. Nor should anything in this Policy be interpreted to prohibit the filing of charges where public safety is compromised, including, but not limited to, charges related to operating a vehicle while under the influence of marijuana.

## II. Policy Directive

**1. Use and Possession:** The Washtenaw County Prosecutor’s Office will no longer file criminal charges for unauthorized use or possession of marijuana or cannabis, regardless of the amount at issue. Assistant Prosecuting Attorneys (APAs) are prohibited from authorizing any such charges.

**2. Storage and Cultivation:** The Washtenaw County Prosecutor’s Office has a general presumption against filing criminal charges relating to the manner in which marijuana is stored or cultivated. Such charges may only be filed if the factual circumstances of the case indicate a willful disregard for the safety and well-being of others (for example, if a person repeatedly stores marijuana without a lock or safety device where that person knows, or should know, a child can access it). Any such charges require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney.

**3. Distribution:** The Washtenaw County Prosecutor’s Office has a general presumption against filing criminal charges relating to the small-scale sale or distribution of marijuana or cannabis. Many members of our community have, at one point or another, sold marijuana to friends or acquaintances, without being subject to criminal penalties. Filing criminal charges against small-scale distributors thus perpetuates the roulette wheel that subjects only a few unlucky people to criminal consequences. That arbitrariness is particularly unacceptable given the observed racial disparities in marijuana arrests.

The Washtenaw County Prosecutor’s Office may, however, file charges against large-scale, profit-seeking distributors who are evading health regulations through their sale of marijuana or cannabis. Every case is different, and the Prosecutor’s Office is opting not to adopt inflexible criteria to determine when distribution charges are appropriate. Factors to consider include, but are not limited to:

- (a) The amount of cannabis at issue;
- (b) The sophistication and number of people involved in the distribution operation;
- (c) The amount of money at issue;
- (d) The potency of the cannabis products at issue; and
- (e) The clientele to whom cannabis was being sold.

In considering the last factor outlined above—“the clientele to whom marijuana was being sold”—several points should be considered. As an initial matter, distribution charges are less likely to be appropriate if a person was selling cannabis to friends, family, or acquaintances. Distribution charges are, however, more likely to be appropriate if the alleged distributor is selling to a broad swath of clientele with whom they do not have a personal relationship.

In addition, distribution charges are more likely to be appropriate if the alleged distributor is an adult selling to minors. APAs should not, however, adopt an inflexible age-based standard. A 21-

year-old senior in college (an adult) who is caught selling marijuana to a 17-year-old freshman (a minor) should not be treated the same way as a 40-year-old who is selling marijuana to middle schoolers.

All marijuana distribution charges require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney prior to being authorized.

**4. Other Substances:** Nothing in this Policy should be interpreted to prohibit charges relating to other controlled substances. If, for example, the evidence demonstrates that a person possessed, sold or manufactured marijuana that is laced with fentanyl, an APA may authorize charges, if they are supported by the evidence and in the interests of justice.

**5. Operating Under the Influence:** Nothing in this Policy should be interpreted to prohibit charges relating to operating a motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of cannabis. Such charges may be filed if they are supported by the evidence and in the interests of justice.

**6. Forensic Processing and Confiscation:** Nothing in this Policy shall be interpreted to prohibit or discourage the forensic processing, or confiscation and destruction, of any contraband seized as a result of any law enforcement action.

**7. Other Charges Not Covered By This Policy:** Nothing in this Policy shall be interpreted to prohibit or discourage the filing of charges that are not covered by this Policy.

For example: if, following a lawful search of an automobile, an officer discovers marijuana and also discovers a weapon that links a suspect to a homicide, the Prosecutor's Office may, consistent with this Policy, file homicide charges if the evidence dictates.

**8. Charges Should Be Supported by Evidence and in the Interests of Justice:** Nothing in this Policy shall be interpreted to mandate or encourage the filing of charges that are not covered by this Policy. If an APA believes that filing charges other than those covered by this Policy are not supported by the evidence, or are not in the interest of justice, the APA should not file those charges.

**9. Provision of Addiction-Related Services:** Nothing in this Policy shall be interpreted to preclude the provision of treatment or resources to individuals who possess, use, or sell marijuana, including, but not limited to, through a Law Enforcement Assisted Diversion (LEAD) program.

**10. Expungement:** The Prosecutor's Office will not contest any application for expungement where the underlying charge was for the possession, use, cultivation, or distribution of marijuana. This policy applies both to marijuana-related conduct that is now lawful in the aftermath of 2018's Proposal 1, as well as marijuana-related conduct that is not.

**11. No Substantive Rights Created:** This Policy is an exercise of discretion by the Washtenaw County Prosecuting Attorney's Office. Nothing in this Policy purports to affect the legality or propriety of any law enforcement officer's actions. Nothing in this Policy shall be interpreted to create substantive or enforceable rights.



**12. Exceptions:** Requests for deviations from this Policy shall be made in writing, and require the approval of the Chief Assistant Prosecuting Attorney or the Prosecuting Attorney. A deviation from this Policy will be granted only in exceptional circumstances, and where public safety requires that deviation.



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