

# Criminal Records for Marijuana Possession: Is Eligibility for a Pardon Enough?

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C O L T O N F E H R \*

## ABSTRACT

Prior to the *Cannabis Act*, possession of marijuana was illegal in Canada. Despite legalization, Parliament is requiring the thousands of Canadians convicted of mere possession to pursue a legal pardon. This process has proven cumbersome and inefficacious. Alternative calls to grant automatic expungements for prior convictions for marijuana possession have nevertheless been rejected. Parliament's rationale turns in part on the constitutionality of the prior prohibition. Unlike recently expunged criminal convictions for those engaging in homosexual sex, the prohibition against possessing marijuana survived *Charter* scrutiny. The limited scope of that challenge nevertheless failed to address the fact that the impugned prohibition widely violated *Charter* standards given its history of prohibiting medicinal marijuana use and discriminatory enforcement. This creates a more complex regime where many people were convicted despite using marijuana for a morally or legally innocent purpose. This should be sufficient to result in expungements being made available to these categories of accused. Difficulties in determining which users were convicted for legitimate criminal law purposes nevertheless provides a justification for requiring those who were unjustly convicted to apply for an expungement. To the contrary, expungements for those convicted of crimes involving homosexual sex should be automatic given the ease with which such unjust convictions may be identified.

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**Key Words:** Pardons; Expungements; Unjust Convictions; Marijuana Possession; Discriminatory Policing; Buggery.

## I. INTRODUCTION

With Parliament’s adoption of the *Cannabis Act*,<sup>1</sup> possessing marijuana for personal consumption became legal in Canada for the first time in nearly a century.<sup>2</sup> During the period of criminalization, the Public Prosecutions Service of Canada estimates that over 250,000 Canadians were convicted for mere possession of marijuana.<sup>3</sup> After decriminalization, many Canadians would like to strike marijuana possession from their criminal records. For some, this would result in the individual not having a criminal record at all. For others, striking marijuana possession from their record would at least reduce its length which could have implications in various aspects of their lives, including work, education, and travel.<sup>4</sup>

Shortly after adopting the *Cannabis Act*, Parliament addressed the issue of criminal records for marijuana possession by passing *An Act to Provide No-Cost, Expedited Record Suspensions for Simple Possession of Cannabis*.<sup>5</sup> As the title implies, the *Suspensions Act* amended the *Criminal Records Act*<sup>6</sup> to allow for a free and expeditious “record suspension” (commonly known and hereafter referred to as a “pardon”) for those convicted of marijuana possession. Others opposed relying upon a pardon system and instead suggested that all convictions for marijuana possession should be expunged. Although Member of Parliament Murray Rankin introduced a private member’s bill

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<sup>1</sup> *Cannabis Act*, SC 2018, c 16.

<sup>2</sup> Marijuana was first criminalized in 1923. See *Act to Prohibit the Improper Use of Opium and other Drugs*, SC 1923, c 22.

<sup>3</sup> See Elizabeth Raymer, “Pardons for Pot Possession” *Canadian Lawyer* (13 May 2019), online: <[www.canadianlawyermag.com/practice-areas/criminal/pardons-for-pot-possession/276096](http://www.canadianlawyermag.com/practice-areas/criminal/pardons-for-pot-possession/276096)> [perma.cc/2WAW-LAN2]. Others observe that those convicted of marijuana possession may be as high as 500,000. See Benjamin Kates and Pam Hrick, “Pardons don’t Go Far Enough. Convictions for Cannabis Possession Must be Expunged” *CBC News* (29 October 2018), online: <[www.cbc.ca/news/opinion/cannabis-convictions-1.4876783](http://www.cbc.ca/news/opinion/cannabis-convictions-1.4876783)> [perma.cc/N3QM-344P].

<sup>4</sup> For instance, a person left with only something like an impaired driving conviction may more readily be able to travel than a person with a drug conviction.

<sup>5</sup> *Suspensions Act*, SC 2019, c 20 [*Suspensions Act*].

<sup>6</sup> *Criminal Records Act*, RSC 1985, c C-47 [CRA].

to this effect,<sup>7</sup> the bill did not succeed past second reading. Others such as Senator Kim Pate have subsequently made similar recommendations.<sup>8</sup>

The government's rationale for rejecting expungements for marijuana possession records was partially explained by comparing the criminalization of marijuana possession to Parliament's then-recent decision to grant expungements for historically unjust crimes pertaining to homosexual sex. In the *Expungement of Historically Unjust Convictions Act*,<sup>9</sup> Parliament admitted the obvious: continuing to condemn people by preserving their criminal records for engaging in homosexual sex is wrong as such conduct is morally innocent.<sup>10</sup> As convicting the morally innocent is contrary to the principles of fundamental justice, any such conviction would today violate section 7 of the *Canadian Charter of Rights and Freedoms* ("Charter").<sup>11</sup> The prohibition against homosexual sex also would clearly violate other rights such as the right to equality protected under section 15 of the *Charter*.<sup>12</sup> As a result, the government concluded that an expungement was an appropriate response.<sup>13</sup>

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<sup>7</sup> See Bill C-415, *An Act to Establish a Procedure for Expunging Certain Cannabis-Related Convictions*, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 2019.

<sup>8</sup> See e.g. Kim Pate, "Let's Fix Broken System for Suspending Criminal Records", *Toronto Star* (12 November 2019), online: <[www.thestar.com/opinion/contributors/2019/11/12/lets-fix-broken-system-for-suspending-criminal-records.html](http://www.thestar.com/opinion/contributors/2019/11/12/lets-fix-broken-system-for-suspending-criminal-records.html)> [perma.cc/2VFM-UP]7 [Pate, "Broken System"]. See also Kim Pate's broader proposals here: Bill S-214, *Criminal Records Act*, 2<sup>nd</sup> Reading, (20 February 2020), online: <[sencanada.ca/en/senators/pate-kim/interventions/535580/26](http://sencanada.ca/en/senators/pate-kim/interventions/535580/26)> [perma.cc/2NQU-W9EZ] (proposing a "streamlined system of record expiry... after two or five years pass without new convictions or pending charges").

<sup>9</sup> *Expungement of Historically Unjust Convictions Act*, SC 2018, c 11 [*Unjust Convictions Act*].

<sup>10</sup> *Ibid*, Preamble. The relevant offences include buggery and acts of "indecency" involving members of the same sex. Notably, anal intercourse more generally was also recognized as an historically unjust crime. However, as the former offences were more likely to be enforced due to prejudice against homosexuals, I will simply refer to all the expungable crimes in the *Unjust Convictions Act* as relating to homosexual sex.

<sup>11</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; see e.g. *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486, [1985] SCJ No 73 [*Motor Vehicle Act Reference*].

<sup>12</sup> The law clearly drew a distinction based on sexual orientation and did so for a blatantly discriminatory purpose. Sexual orientation was found to be an "analogous ground" in *Egan v Canada*, [1995] 2 SCR 513, [1995] SCJ No 43. For recent developments of the law on section 15, see *Fraser v Canada (Attorney General)*, 2020 SCC 38.

<sup>13</sup> See *Unjust Convictions Act*, *supra* note 9, Preamble.

For the government, marijuana possession does not raise the same degree of historical wrong as the prior prohibitions against homosexual sex.<sup>14</sup> In addition, it maintained that there was no “practical difference” between granting a pardon and expungement and expressed concern over the resources it would take to expunge all records for prior marijuana convictions.<sup>15</sup> If there are important differences between pardons and expungements—a point that I establish below—then it must be asked: were all of those convicted of marijuana possession convicted in accordance with *Charter* standards? The Supreme Court of Canada (the Supreme Court)’s decision to uphold the marijuana possession offence in *R v Malmo-Levine; R v Caine*<sup>16</sup> suggests this question ought to be answered in the affirmative. There are nevertheless two circumstances where unjust historical convictions widely accrued despite clear *Charter* violations: (i) those using marijuana for medicinal purposes; and (ii) convictions resulting from race-based policing.

If the government aspires to be consistent in its policy making, then the widespread existence of historically unjust convictions for marijuana possession ought to result in prior records being expunged in circumstances where their conviction was unjust. The difficulty in identifying the aforementioned types of unjust convictions nevertheless provides good reason for the government to require those unjustly convicted to apply for an expungement as opposed to automatically expunging all marijuana convictions. The latter approach would require far too many resources given the need to determine not only whether a possession conviction was for marijuana,<sup>17</sup> but also whether the conviction was for medicinal use or derived from improper police investigation tactics. A procedure allowing applicants to apply for expungement (for those unjustly convicted) or pardon (the remainder of the population) would therefore best serve the government’s fiscal interests while ensuring a consistent policy towards historically unjust convictions. Applying this rationale, however, I further contend that there are good reasons to require automatic expungements in

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<sup>14</sup> See Bill C-415, *An Act to Establish a Procedure for Expunging Certain Cannabis-Related Convictions*, 1st Session, 42nd Parliament, 2019 (11 April 2019), online: <[openparliament.ca/bills/42-1/C-415/](http://openparliament.ca/bills/42-1/C-415/)> [perma.cc/9ATQ-FGR6] (comments of the Honourable Karen McCrimmon).

<sup>15</sup> *Ibid.*

<sup>16</sup> *R v Malmo-Levine; R v Caine*, 2003 SCC 74 [*Malmo-Levine*].

<sup>17</sup> See *Bill C415*, *supra* note 14. This point will be unpacked further below.

cases where convictions were uniformly unjust, as was the case with convictions for acts such as consensual anal sex and buggery.

The article unfolds as follows. In Part II, I explain the differences between granting a pardon and an expungement. I then detail in Part III why many have been unjustly convicted for marijuana possession. Not only were those who used marijuana medicinally previously convicted for marijuana possession, many minority communities were targeted in a manner that would violate their right not to be arbitrarily detained or illegally searched. Although it was open to these accused to attempt to avoid convictions, I contend that there were many barriers that made such challenges unlikely to succeed. This in turn resulted in many morally innocent (those convicted for non-wrongful conduct) and legally innocent (those convicted by relying on inadmissible evidence) accused being unjustly convicted. I conclude by offering an approach for determining whether an individual ought to be required to apply for a pardon or expungement, or, due to the nature of their actions, have a historical conviction automatically expunged.

## II. PARDONS AND EXPUNGEMENTS

The government's claim that there is "no practical difference"<sup>18</sup> between a pardon and an expungement glosses over several important differences. First, a pardon does not result in the applicant's record being destroyed as occurs when a record is expunged. Instead, the CRA only requires that the record be held separately from other criminal records which ensures that the record remains accessible to government.<sup>19</sup> Second, it is possible for a pardon to be revoked should the applicant commit a new indictable offence or limited summary conviction offences, is no longer maintaining "good conduct," or is determined to have initially been ineligible to receive a pardon.<sup>20</sup> Although the CRA was amended to prevent revocation of pardons relating to the offence of possessing marijuana,<sup>21</sup> the prior record of

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<sup>18</sup> *Ibid.*

<sup>19</sup> See *Criminal Records Act*, *supra* note 6, ss 2.3(b), 6. The latter provision requires that the Minister of Public Safety and Emergency Preparedness approve any use of a pardoned criminal record.

<sup>20</sup> *Ibid.*, ss 7(a), 7(b), 7(c). Such circumstances in which an individual was initially ineligible arise where the individual made a false statement in their application or concealed material relevant to the application.

<sup>21</sup> *Ibid.*, s 4.1(1.2).

conviction will still remain in the hands of the federal government. Moreover, a criminal record may still be used in criminal proceedings by provincial governments. This follows because a pardon only applies to the federal Canadian Police Information Centre (CPIC) database which excludes other databases documenting criminal behaviour. As the federal government admits on its website, not all provincial and municipal criminal justice agencies restrict access to criminal records once a pardon has been granted.<sup>22</sup> A pardon therefore does not guarantee that a criminal record will no longer adversely impact an individual. An expungement may also be ignored by provincial government agencies as federal legislation is not binding on them. However, the fact that expungements declare the conviction to be unjust should place greater pressure on other governments to update the relevant criminal records.

The federal government's pardon program for marijuana convictions nevertheless does away with a further potential difference with respect to expungements and pardons: application costs.<sup>23</sup> Whereas expungements may be made automatic, pardons have historically required relatively significant resources to obtain and involved lengthy wait times. The government's revised process for pardoning past marijuana possession convictions is both free and expedited.<sup>24</sup> There are nevertheless other barriers in place for receiving a pardon. As Catherine Latimer cautions, if a pardon is not automatic, the process will inevitably "[penalize] people with cognitive impairments, people who are marginalized, people who are poor, or people who are illiterate" because of the complexity of the application process.<sup>25</sup> Senator Pate explains this differential treatment by noting that the pardon process "still requires applicants to spend time and money having their fingerprints taken, obtaining RCMP record checks and

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<sup>22</sup> See Government of Canada, "What is a Record Suspension?" online: <[www.canada.ca/en/parole-board/services/record-suspensions/what-is-a-record-suspension.html](http://www.canada.ca/en/parole-board/services/record-suspensions/what-is-a-record-suspension.html)> [perma.cc/DA3K-X3UZ].

<sup>23</sup> Notably, the prior fee of \$644.88 was recently lowered to the more reasonable sum of \$50. See Parole Board of Canada, "Application Fee Reduction—Record Suspension (Pardon)" online: <[www.canada.ca/en/parole-board/services/record-suspensions/record-suspension-pardon-application-fee-reduction.html](http://www.canada.ca/en/parole-board/services/record-suspensions/record-suspension-pardon-application-fee-reduction.html)> [perma.cc/36HB-WREK].

<sup>24</sup> See *Suspensions Act*, *supra* note 5.

<sup>25</sup> See Julia Nicol, "Legislative Summary of Bill C-93: An Act to Provide No-Cost, Expedited Record Suspensions for Simply Possession of Cannabis" online: <[lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/LegislativeSummaries/421C93E#txt46](http://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/421C93E#txt46)> [perma.cc/M7ZF-76QJ].

locating original documents from record keepers in the jurisdiction where charges were originally laid.”<sup>26</sup> These factors likely explain the limited use of the marijuana possession pardon program to date. After the first two years of the program’s operation, only 484 people received a pardon despite the federal government receiving 780 applications.<sup>27</sup> Of those applications, 288 were returned “due to ineligibility or incompleteness.”<sup>28</sup> More importantly, these numbers are significantly lower than the 10,000 Canadians the government estimated would be eligible to receive such a pardon.<sup>29</sup>

The government nevertheless offered two reasons for employing pardons over expungements. First, it observed that the expungement process has only been employed for those convicted of homosexual activity which raised different issues than those relating to marijuana possession.<sup>30</sup> The latter crime was upheld under the *Charter*,<sup>31</sup> while the criminalization of homosexual sex today would stand no chance of surviving constitutional scrutiny.<sup>32</sup> Requiring that an expungement be granted in the latter type of case strikes me as good policy given the morally innocent nature of such conduct. An expungement acknowledges that the conviction ought not to have entered, while a pardon excuses a prior wrongful action. However, as I explain in the next section, it is not difficult to find instances where convictions for marijuana possession were widespread despite involving morally or legally innocent accused.

Second, the government took the position that expunging records for marijuana possession would require significant resources. In its view, “[g]oing through all those records to find all the drug possession convictions and then digging into the details of each conviction to determine whether

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<sup>26</sup> See Pate, “Broken System,” *supra* note 8.

<sup>27</sup> See Peter Zimonjic, “Only 484 Marijuana Pardons have been Granted Since Program Started in 2019” *CBC News* (31 October 2021), online: <[www.cbc.ca/news/politics/pot-pardons-still-low-484-1.6230666](http://www.cbc.ca/news/politics/pot-pardons-still-low-484-1.6230666)> [perma.cc/WKN8-TKBS].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* Notably, this number is also likely low because pardons are currently available to those with only possession charges on their criminal records. See Kathleen Harris, “Just 257 Pardons Granted for Pot Possession in Program’s 1<sup>st</sup> Year” *CBC News* (9 August 2020), online: <[www.cbc.ca/news/politics/cannabis-record-suspension-pardon-pot-1.5678144](http://www.cbc.ca/news/politics/cannabis-record-suspension-pardon-pot-1.5678144)> [perma.cc/KGK4-557E] [Harris, “Pardons”].

<sup>30</sup> *Ibid.*

<sup>31</sup> See *Malmo-Levine*, *supra* note 16.

<sup>32</sup> *Supra* notes 11-12.

the substance involved was cannabis is a process that would take years.”<sup>33</sup> Similarly, trying to identify whether every accused was either a medical user or subject to race-based policing would involve even more significant use of government resources. However, this issue only addresses the preferred procedure for granting a pardon or expungement, not whether an expungement is a more appropriate order than a pardon. If policy consistency dictates that expungements be issued for at least some convictions for marijuana possession, then the government’s resource-based argument should only determine whether the state should bear the burden of automatically expunging prior convictions or accused should be required to apply for such a remedy.

### III. MARIJUANA POSSESSION AND THE *CHARTER*

Despite the Supreme Court’s decision to uphold the possession offence, there are at least two categories of offenders who historically possessed a clear defence to marijuana possession charges. However, for reasons related to the inequities of the criminal justice system, both types of offenders were widely convicted. That there were clear categories of morally and legally innocent individuals convicted under the prior marijuana possession laws undermines the government’s position that expungements are not an appropriate remedy for these people. If convictions for homosexual sex must be expunged because they targeted innocent conduct, then I maintain that a similar remedy should follow for any morally or legally innocent person convicted for possession of marijuana. Before expanding upon those arguments, however, it is necessary to explain the limits of the main challenge to the marijuana possession offence.

#### A. *R v Malmo-Levine*

The two accused in *Malmo-Levine* challenged the constitutionality of the possession of marijuana for the purpose of trafficking and simple possession offences found in what was then the *Narcotic Control Act*.<sup>34</sup> The accused contended that the marijuana prohibitions violated both sections 7 and 15 of the *Charter*. Although the section 15 challenge was readily dismissed,<sup>35</sup>

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<sup>33</sup> See Bill C-415, *supra* note 14.

<sup>34</sup> *Narcotic Control Act*, RSC 1985, c N-1, s 3 [NCA].

<sup>35</sup> This provision provides a general right to equality. The appellants maintained that “users have a ‘substance orientation’ which is a personal characteristic analogous to



the section 7 challenge was much more forceful. The latter section provides everyone with the “right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” As each law came with the possibility of imprisonment, the liberty interests of the accused were clearly engaged.<sup>36</sup> This raised the question of whether each law was consistent with the “principles of fundamental justice.”

The Supreme Court in *Malmo-Levine* rejected the accused’s main contention that John Stuart Mill’s harm principle constituted a principle of fundamental justice. This principle provides that only conduct that harms another individual may be subject to criminal sanction.<sup>37</sup> In the Supreme Court’s view, the harm principle failed to meet any of the requirements for qualifying as a principle of fundamental justice.<sup>38</sup> Most importantly, the Court concluded that “the harm principle is not a manageable standard against which to measure deprivation of life, liberty, and security of the person.”<sup>39</sup> As it explained, “[i]n the absence of any agreed definition of ‘harm’... allegations and counter-allegations of non-trivial harm can be marshalled on every side of virtually every criminal law issue.”<sup>40</sup> The debate thus engages only whether Parliament struck a reasonable balance among competing harms, an exercise which calls for significant deference from the courts.<sup>41</sup> The Court also rejected the argument that there was adequate “societal consensus” that the harm principle was fundamental to justice.<sup>42</sup> The fact that “harm” in the sense described by Mill was unnecessary for criminalizing some conduct (bestiality, incest, cruelty to animals, etc.) prevented the harm principle from qualifying as a principle of fundamental justice.<sup>43</sup>

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other s. 15 grounds such as sexual orientation.” The Court rejected this argument given that “[a] taste for marihuana is not a ‘personal characteristic’ in the sense required to trigger s. 15 protections”. See *Malmo-Levine*, *supra* note 16 at paras 184-85.

<sup>36</sup> *Ibid* at para 84.

<sup>37</sup> *Ibid* at para 90 citing John Stuart Mill, *On Liberty and Considerations on Representative Government* (Oxford: Basil Blackwell, 1946).

<sup>38</sup> Elsewhere I contend that the Court erred in rejecting the harm principle. See Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022) at 21-25.

<sup>39</sup> See *Malmo-Levine*, *supra* note 16 at paras 127-29.

<sup>40</sup> *Ibid* at para 127.

<sup>41</sup> *Ibid* at para 129.

<sup>42</sup> *Ibid* at paras 115-26.

<sup>43</sup> *Ibid* at paras 117-18.

The Court nevertheless confirmed the constitutional status of a different principle of fundamental justice designed to strike down laws that strike an inappropriate balance between its positive and negative effects: gross disproportionality.<sup>44</sup> This principle prohibits laws that result in effects that are grossly disproportionate when compared to the objective of the law.<sup>45</sup> In arguing that the prohibition on possessing marijuana violated this principle, the accused pointed to the effects of invoking the criminal process more broadly on accused. These included the inevitable stigma and criminal record resulting from conviction which can undermine a person's ability to obtain employment, education, and travel.<sup>46</sup> Requiring the accused to attend court also imposes significant time commitments that may result in missing work or incurring expenses relating to travel and childcare.<sup>47</sup> Despite these consequences, the Court rightly observed that marijuana use in rare cases can have serious and unpredictable effects on some users. Balancing the competing harms, it determined that the impugned law's objective of protecting public health and safety by deterring marijuana use did not violate the gross disproportionality principle.<sup>48</sup>

Finally, the appellants attempted to employ a different principle of instrumental rationality prohibiting "arbitrary" laws. The Court clarified in *Malmo-Levine* that this principle requires that a law possess no connection whatsoever to its objective before it will be declared arbitrary.<sup>49</sup> The appellant's first argument that a law is arbitrary if the legislature chooses to criminalize one act (marijuana possession) but not an act with similar harms (alcohol possession) necessarily failed as a result.<sup>50</sup> The sole question was whether the prohibition against possessing marijuana furthered its objective of protecting public health and safety. As the Court concluded after a review of the medical evidence, "[v]ulnerable groups are at particular risk, including adolescents with a history of poor school performance, pregnant women and persons with pre-existing diseases."<sup>51</sup> As it is difficult to identify at-risk individuals in advance, the Court concluded that Parliament acted in a

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<sup>44</sup> *Ibid* at para 169.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid* at para 172.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at paras 172-83.

<sup>49</sup> *Ibid* at paras 135-37.

<sup>50</sup> *Ibid* at paras 138-40.

<sup>51</sup> *Ibid* at para 135.

manner that furthered its legitimate criminal law objective of protecting public health and safety.<sup>52</sup>

## B. Gaps in the *Charter* Challenge

### 1. Medicinal Marijuana

In *R v Parker*,<sup>53</sup> the Ontario Court of Appeal faced a constitutional challenge to the provision prohibiting possession of marijuana under the *Controlled Drugs and Substances Act*<sup>54</sup> and its corresponding regulations limiting medical exemptions.<sup>55</sup> As Justice Rosenberg concluded, “[i]t has been known for centuries that, in addition to its intoxicating or psychoactive effect, marijuana has medicinal value.”<sup>56</sup> Although an active ingredient or “cannabinoid” known as tetrahydrocannabinol (“THC”) gives marijuana a psychoactive effect, another cannabinoid known as cannabidiol (“CBD”) is known to have therapeutic value “for treating a number of very serious conditions including epilepsy, glaucoma, the side effects of cancer treatment and the symptoms of AIDS.”<sup>57</sup> The minimal, if any, side effects of marijuana use for these users were further contrasted with the dramatic side effects of mainstream medicines for diseases such as epilepsy. In addition to being less effective, Justice Rosenberg observed that available medications may result in sedation and drowsiness, gingival hyperplasia (overgrowth of the gums), brain and liver damage, and may adversely affect the fetus of pregnant women.<sup>58</sup>

The Court further found that medicinal marijuana was not practically available in Canada when *Parker* was decided in 2000. Although a synthetic form of THC known as Marinol was available via prescription, the drug was found to be much less capable of treating the numerous medical conditions at issue.<sup>59</sup> The Court further found that “while it would be open to a physician to prescribe marijuana, the Canadian government would not look favourably upon a physician who did so and, in any event, no pharmacy

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<sup>52</sup> *Ibid* at para 140.

<sup>53</sup> *R v Parker*, (2000), 188 DLR (4<sup>th</sup>) 385, 146 CCC (3d) 193 (ONCA) [*Parker*].

<sup>54</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19, s 4(1) [CDSA].

<sup>55</sup> *Ibid*, s 56.

<sup>56</sup> See *Parker*, *supra* note 53 at para 2.

<sup>57</sup> *Ibid* at paras 2, 5, 46.

<sup>58</sup> *Ibid* at paras 47-48.

<sup>59</sup> *Ibid* at paras 34, 49, 52, 58.

could legally fill the prescription.”<sup>60</sup> Although it was theoretically possible for the Minister to grant an exemption for personal use under s. 56 of the CDSA, only two out of a known 30 applications for an exemption had been granted at the time of trial.<sup>61</sup> Regardless, relying upon the unfettered discretion of the federal government to grant an exemption provides little comfort to those relying upon marijuana for medicinal purposes.

Given the available scientific evidence and legal barriers to accessing medicinal marijuana, the Court concluded that the prohibition on marijuana engaged Parker’s liberty and security of the person interests protected under section 7 of the *Charter*. The liberty interest was not only engaged by virtue of the possession prohibition threatening incarceration, but also because the ability to take necessary medicine to treat a severe condition is a decision of “fundamental personal importance.”<sup>62</sup> Similarly, requiring a person who relies upon medicinal marijuana to abstain from use engaged the security interest because failing to take necessary medicine would result—especially for accused like Parker who suffer from epilepsy—in severe medical consequences.<sup>63</sup> Evidence with respect to a variety of other medicinal uses of marijuana suggested it would vastly improve quality of life which was also found to be adequate to engage a person’s security interests.<sup>64</sup>

The prohibition on marijuana possession was further found to be inconsistent with the principles of fundamental justice. Although Justice Rosenberg found the prohibition violated the arbitrariness principle,<sup>65</sup> he explicitly abstained from using a more directly relevant principle of fundamental justice: the morally innocent must not be convicted.<sup>66</sup> In his view, “[m]any would consider it immoral to keep medicine from a patient with a serious illness. Others might consider it unethical to expose anyone to the potential harm from a drug where the expert opinion is unanimous that further research is required.”<sup>67</sup> In my view, using the lack of definitive research with respect to side effects of marijuana use to do away with the claim that the accused’s decision to take necessary medicine is morally

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<sup>60</sup> *Ibid* at para 58.

<sup>61</sup> *Ibid* at para 65.

<sup>62</sup> *Ibid* at paras 81, 92, 102.

<sup>63</sup> *Ibid* at paras 84, 105-11.

<sup>64</sup> *Ibid* at para 84.

<sup>65</sup> *Ibid* at para 113.

<sup>66</sup> See *Motor Vehicle Act Reference*, *supra* note 11.

<sup>67</sup> See *Parker*, *supra* note 53 at para 112.

innocent is imprudent. Moral decisions may be made within imperfect information environments. Indeed, the law of criminal defences often determines conduct to be “justified,” “rightful,” and therefore “morally innocent” in imperfect information environments.<sup>68</sup> In my view, the serious harms averted by allowing some people to use medicinal marijuana drastically outweigh any risks of some unknown harm to this group of users.

The importance of marijuana to medicinal users is directly relevant to pleading a necessity defence. As the Supreme Court held in *R v Latimer*,<sup>69</sup> a necessity defence requires that the accused first prove that breaking the law was necessary to avoid clear and imminent peril.<sup>70</sup> As outlined earlier, for those who use marijuana medicinally, such action is generally necessary to avoid an internal threat of severe bodily harm that may present itself at any time. A court would therefore likely find this state of affairs sufficiently imminent and perilous to satisfy the first prong of the necessity defence. Second, the necessity defence requires that no reasonable legal alternative to breaking the law exists.<sup>71</sup> Again, at the time *Parker* was decided, substitutes for marijuana were unavailable to those who required medicinal marijuana. Although applying for an exemption under s. 56 of the CDSA provided one legal means to possess marijuana, relying on the unfettered discretion of a federal minister to grant an exemption is not a “reasonable alternative” given the infrequency with which such exemptions were granted.<sup>72</sup> Finally, there must be proportionality between the harm caused and averted by the accused’s actions.<sup>73</sup> As explained earlier, the ability to prohibit medicinal marijuana to seriously undermine the health and safety interests of some users must drastically outweigh any potential but yet to be proven harms caused from these particular users consuming medicinal marijuana.

My suggestion that those who use medicinal marijuana act in a morally innocent manner must nevertheless be reconciled with the Supreme Court’s position that the necessity defence excuses wrongful conduct based

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<sup>68</sup> See e.g. *Perka v The Queen*, [1984] 2 SCR 232 at 246, [1984] SCJ No 40. For a more detailed review of these types of cases and the theory underlying criminal defences, see Colton Fehr, “(Re-)Constitutionalizing Duress and Necessity” (2017) 42 Queen’s Law Journal 99 [Fehr, “(Re-)Constitutionalizing”]; Colton Fehr, “Self-Defence and the Constitution” (2017) 43 Queen’s Law Journal 85 [Fehr, “Self-Defence”].

<sup>69</sup> *R v Latimer*, 2001 SCC 1 [Latimer].

<sup>70</sup> *Ibid* at para 29.

<sup>71</sup> *Ibid* at para 30.

<sup>72</sup> See *Parker*, *supra* note 53 at para 65.

<sup>73</sup> See *Latimer*, *supra* note 69 at para 31.

on the “morally involuntary” nature of the accused’s actions.<sup>74</sup> To the contrary, the Court initially concluded in *Perka v The Queen*<sup>75</sup> that, as a matter of moral philosophy, necessity could be pleaded as both a justification and excuse.<sup>76</sup> As I explain elsewhere,<sup>77</sup> the reason that the Court did not develop a common law necessity defence as a justification is simple: it is impermissible under s. 8(3) of the *Criminal Code*. The latter provision allows courts to develop common law defences to the extent that they are not “inconsistent” with federal statutes. Given the high degree of similarity between the duress and necessity defences,<sup>78</sup> and the fact that s. 17 labels duress an “excuse,” it would have been inconsistent for the Court to develop the law of necessity as a justification-based defence under the common law.

Given the Court’s decision to constitutionalize the substantive principles underlying the criminal law,<sup>79</sup> these statutory provisions cannot prevent courts from employing the principles of fundamental justice to come to a more robust moral conclusion. A basic balancing of the harms caused and averted and the general need for some people to use medicinal marijuana renders it simple to conclude that those using medicinal marijuana act in a morally innocent manner. The fact that the Supreme Court in *R v Khill*<sup>80</sup>—citing my general theory of criminal defences—recently implied that a broader moral rationale might underlie criminal defences strongly suggests that courts should be more open to considering the actual moral basis of an accused’s actions when applying the *Charter* to their conduct.<sup>81</sup>

Despite the existence of such a defence, it is widely accepted that the law on necessity has been developed in a piecemeal and confusing manner

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<sup>74</sup> Most extensively, see *R v Ruzic*, 2001 SCC 24.

<sup>75</sup> *Supra* note 68.

<sup>76</sup> *Ibid* at 245.

<sup>77</sup> See Colton Fehr, “The Moral Foundation of Criminal Defences and the Limits of Constitutional Law” (2023) 69 McGill Law Journal (forthcoming).

<sup>78</sup> See *R v Hibbert*, [1995] 2 SCR 973 at 1017, [1995] SCJ No 63 (“[the] similarities between the [duress and necessity defences] are so great that consistency and logic requires that they be understood as based on the same juristic principles.”)

<sup>79</sup> See generally *Motor Vehicle Act Reference*, *supra* note 11.

<sup>80</sup> *R v Khill*, 2021 SCC 37 [*Khill*].

<sup>81</sup> *Ibid* at paras 47-49 citing Fehr, “Self-Defence”, *supra* note 68.

in Canada.<sup>82</sup> This strongly suggests that litigants would have been unsure about the merits of such a defence. Although there was some precedent for a necessity defence to medicinal marijuana usage,<sup>83</sup> many users were surely deterred from taking on such complex and difficult litigation when faced with a charge for possessing marijuana. As Justice Rosenberg held in *Parker*, “[t]he fact that he might succeed in defending a prosecution on the basis of a necessity defence, as he had in 1987, was no answer since each prosecution entailed financial cost, stress, uncertainty, arrest and loss of his stock of marijuana and marijuana plants thus interfering with his security of the person.”<sup>84</sup> No doubt many would-be litigants would have been deterred by such barriers thereby leading many people to have been convicted despite acting in a morally innocent manner.

Fortunately, Parliament followed the *Parker* decision in 2001 by passing the *Marihuana Medical Access Regulations*.<sup>85</sup> These regulations and subsequent legislation enabled individuals to obtain authorization from their health care provider to access dried marijuana for medical purposes.<sup>86</sup> Nevertheless, medicinal marijuana users who received a criminal record pre-

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<sup>82</sup> For the expansive critiques of the Supreme Court’s jurisprudence, see e.g. Fehr, “(Re-)Constitutionalizing”, *supra* note 68; Benjamin Berger, “A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity” (2002) 39 *Alberta Law Review* 848 at 863; Benjamin Berger, “Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences” (2006) 51 *McGill Law Journal* 99; Stanley Yeo, “Revisiting Necessity” (2010) 56 *Criminal Law Quarterly* 13 at 15; David Paciocco, “No-One Wants to Be Eaten: The Logic and Experience of the Law of Necessity and Duress” (2010) 56 *Criminal Law Quarterly* 240; Colton Fehr, “The (Near) Death of Duress” (2015) 62 *Criminal Law Quarterly* 123; Paul Schabas, “Justification, Excuse and the Defence of Necessity: A Comment on *Perka v. The Queen*” (1985) 27 *Criminal Law Quarterly* 278 at 281–82; Donald Galloway, “Necessity as a Justification: A Critique of *Perka*” (1986) 10 *Dalhousie Law Journal* 158 at 169.

<sup>83</sup> *Parker* refused to put forward the necessity defence in the constitutional case despite having succeeded earlier with such a defence. See *Parker*, *supra* note 53 at paras 17, 26. Notably, however, the defence was not affirmatively recognized by the Supreme Court until *Perka*, *supra* note 68 in 1984. Thus, any medicinal users before that time would have faced a significant legal barrier to pleading the defence.

<sup>84</sup> See *Parker*, *supra* note 53 at para 68.

<sup>85</sup> *Marihuana Medical Access Regulations*, SOR/2013-119 [MMAR].

<sup>86</sup> For a review of this history and the current governing scheme, see Government of Canada, “Understanding the New Access to Cannabis for Medical Purposes Regulations” (August 2016), online: <[www.canada.ca/en/health-canada/services/publications/drugs-health-products/understanding-new-access-to-cannabis-for-medical-purposes-regulations.html](http://www.canada.ca/en/health-canada/services/publications/drugs-health-products/understanding-new-access-to-cannabis-for-medical-purposes-regulations.html)> [perma.cc/8DC7-34QM].

MMAR are highly likely to have been convicted despite having acted in a morally innocent manner. Given Parliament's conclusion that an expungement was justified for prior convictions for morally innocent acts such as homosexual sex, it is difficult to see why an expungement ought not result given the similar impact of the marijuana laws on those who use marijuana medicinally. Although convictions for medicinal marijuana use and homosexual sex are different in kind, the fact that they both involve convicting people for morally innocent conduct should result in both types of offences being treated the same.<sup>87</sup>

## 2. *Discriminatory Enforcement*

It is widely known that drug use between minority communities and non-minority communities is approximately the same. Yet law enforcement far more often directs their drug use investigations toward minority communities. As a result, it should not be surprising that minority communities have much higher rates of drug conviction. As Murray Rankin observed in his speech to Parliament, the empirical evidence demonstrates that “[i]f someone is [I]ndigenous in Regina, they are nine times more likely to be charged and have a record for cannabis than non-[I]ndigenous people; and seven times more likely in Vancouver”.<sup>88</sup> Rankin observed a similar trend for Black people in various parts of the country, noting that “if someone is [B]lack in Halifax, they are five times more likely to be charged and have a record [for marijuana possession]; and three times more likely if they live in Toronto.”<sup>89</sup>

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<sup>87</sup> While both actions are clearly of an innocent nature, I do not think that it is fruitful to discuss which act is more right, fundamental, or important. I would think sexual autonomy would prove more important when compared to some cases of medicinal marijuana use. However, for those like Mr. Parker, his marijuana use was fundamental to preserving any meaningful liberty at all.

<sup>88</sup> See Bill C-415, *supra* note 14. See also Jenna Valleriani, Jennifer Lavalley, and Ryan McNeil, “A Missed Opportunity? Cannabis Legalization and Reparations in Canada” (2018) 109 *Canadian Journal of Public Health* 745; Rachel Browne, “Black and Indigenous People are Overrepresented in Canada’s Weed Arrests” *Vice News* (18 April 2018), online: <[www.vice.com/en/article/d35eyq/black-and-indigenous-people-are-overrepresented-in-canadas-weed-arrests](http://www.vice.com/en/article/d35eyq/black-and-indigenous-people-are-overrepresented-in-canadas-weed-arrests)> [perma.cc/VQY5-YMHH]; Jim Rankin, “‘The Reality of Racism’: TPS Data on Marijuana Arrests Reveals Stark Racial Divide” *Toronto Star* (6 July 2017), online (pdf): <[www.falconers.ca/wp-content/uploads/2017/07/The-reality-of-racism.-TPS-data-on-marijuana-arrests-reveals-stark-racial-divide-Metro-News-July-6-2017.pdf](http://www.falconers.ca/wp-content/uploads/2017/07/The-reality-of-racism.-TPS-data-on-marijuana-arrests-reveals-stark-racial-divide-Metro-News-July-6-2017.pdf)> [perma.cc/6NAH-WYS8].

<sup>89</sup> *Ibid.*



These stark statistics suggest a strong bias against Indigenous and Black peoples in terms of policing for drug possession. This is consistent with the generally accepted position that these populations are over policed in relation to crime more generally.<sup>90</sup> Although some of these investigations of minorities were surely justified, the statistics suggest that many of these people would have been subject to a violation of their right to be free from arbitrary detention as any detention based on race clearly violates section 9 of the *Charter*. Similarly, any search conducted as a result of an arbitrary detention—typically searches conducted pursuant to an investigative detention<sup>91</sup> or incident to an arrest<sup>92</sup>—would be tainted by the race-based rationale of the detention thereby violating section 8 of the *Charter*.

In its seminal decision in *R v Grant*,<sup>93</sup> the Supreme Court determined that whether evidence ought to be excluded under s. 24(2) of the *Charter* turns on a balancing of three factors.<sup>94</sup> First, courts must consider the seriousness of the *Charter*-infringing state conduct.<sup>95</sup> As the Court observed in *Grant*, “[t]he more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct.”<sup>96</sup> Second, courts must consider the impact of the state conduct on the *Charter* interests of the accused.<sup>97</sup> The more serious the infringement’s impact on the dignity interests of the accused the more this factor weighs in favour of exclusion.<sup>98</sup> Finally, courts must consider society’s interest in pursuing a trial on the merits.<sup>99</sup> The reliability of the evidence sought to be excluded is the most important aspect of this inquiry.<sup>100</sup>

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<sup>90</sup> See e.g. Adam Cotter, *Perceptions of and Experiences with Police and the Justice System among the Black and Indigenous Populations of Canada* (16 February 2022), online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00003-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00003-eng.htm)> [perma.cc/KJ55-MYJE].

<sup>91</sup> See *R v Mann*, 2004 SCC 52.

<sup>92</sup> See *R v Caslake*, [1998] 1 SCR 51, [1998] SCJ No 3.

<sup>93</sup> *R v Grant*, 2009 SCC 32.

<sup>94</sup> *Ibid* at para 71.

<sup>95</sup> *Ibid* at para 72.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid* at para 76.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Ibid* at para 79.

<sup>100</sup> *Ibid* at para 81.

Race-based detentions must inevitably result in exclusion of evidence. The seriousness of such state-infringing conduct cannot be described as anything but a “wilful or reckless disregard of *Charter* rights.”<sup>101</sup> As a result, the state conduct must be strongly denounced which weighs heavily in favour of excluding evidence retrieved pursuant to such detentions. Similarly, the impact of a race-based detention on the *Charter* interests of the accused is serious. It is difficult to think of a *Charter* infringement that more profoundly undermines a person’s human dignity than to detain and search an accused because of their skin colour. Although any discovered marijuana pursuant to such a search would be reliable evidence, it seems implausible that society’s limited interest in prosecuting a relatively insignificant crime could outweigh the strong need to exclude evidence received pursuant to a race-based detention. Even in cases where the searching officer found enough marijuana to sustain a possession for the purpose of trafficking charge, but the accused pleaded out to a possession offence, it seems implausible that the extreme nature of the *Charter* violations could ever result in the inclusion of evidence under s. 24(2).<sup>102</sup>

The inevitable exclusion of evidence suggests that many minorities convicted of marijuana possession were legally innocent. Again, however, it may not always have been reasonable to expect such a person to challenge the charges in court for two reasons. First, proving that a police officer’s intentions were to detain based on race will often require something explicit about the officer’s conduct. As David Tanovich observes, however, “[p]olice officers are adept at ensuring that their notes and testimony conform to expected standards of conduct” and in some cases “the officer may fabricate evidence in order to disguise the true reason for the stop.”<sup>103</sup> In other cases, the officer may not even be aware that race played a role in the stop.<sup>104</sup> Even if the accused claimed that the officer made racist remarks during a

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<sup>101</sup> *Ibid* at para 74.

<sup>102</sup> I thank one of the external reviewers for this observation. The reviewer is correct to point out that many possession for the purpose of trafficking offences may well have been plead out as possession offences. In my view, however, the heightened seriousness of the former charge is insufficient to outweigh the profound impact of the state conduct on the *Charter*-protected interests of minority communities and the abhorrent nature of the state conduct.

<sup>103</sup> See David Tanovich, “Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002) 40 *Osgoode Hall Law Journal* 145 at 181.

<sup>104</sup> *Ibid* citing *R v Brown*, [2002] OJ No 295 at 299, 48 CR (5<sup>th</sup>) 291 (ONSC) .

detention or search, the burden of proving so rests with the accused on a balance of probabilities.<sup>105</sup> It is no doubt difficult, at least historically, to convince a court to believe an alleged criminal over an officer of the law. This was especially true before the proliferation of cameras began widely exposing instances of police misconduct.<sup>106</sup>

Second, the ability of criminal accused to challenge charges must be viewed in light of the realities of the criminal justice system. Indigenous and Black accused are disproportionately impoverished and therefore unlikely to be able to afford to hire a lawyer. Although Legal Aid provides services for the poorest in society, it is widely known that the Legal Aid cut-off has historically been far below what is necessary to ensure adequate representation for this class of citizens.<sup>107</sup> Even with a trajectory of mostly funding increases over Legal Aid's history,<sup>108</sup> funding is still widely considered inadequate to service those in need of legal advice.<sup>109</sup> The reality is that many people charged with simple possession of marijuana would not be eligible for Legal Aid services and could not reasonably be expected to bring a *Charter* challenge in court. It stands to reason that many minorities were unjustly convicted of possessing marijuana despite having a feasible (though economically unattainable) defence.

#### IV. A COHERENT EXPUNGEMENT POLICY

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<sup>105</sup> See e.g. *R v Collins*, [1987] 1 SCR 265 at para 21, [1987] SCJ No 15.

<sup>106</sup> See e.g. Ajay Sandhu, "Camera-friendly Policing: How the Police Respond to Cameras and Photographers" (2016) 14 *Surveillance & Society* 78 at 78 citing various sources.

<sup>107</sup> See e.g. Ab Currie, "Legal Aid Expenditures Over Time in Canada" *Slaw* (2 October 2019), online: <[www.slaw.ca/2019/10/02/legal-aid-expenditures-over-time-in-canada-a-complex-story/](http://www.slaw.ca/2019/10/02/legal-aid-expenditures-over-time-in-canada-a-complex-story/)> [perma.cc/ZWY7-27DD].

<sup>108</sup> *Ibid.*

<sup>109</sup> See e.g. Shawn Logan, "Defence Lawyers Say Legal Aid 'Neglected and Degraded' in Alberta" *Calgary Herald* (30 April 2018), online: <[calgaryherald.com/news/local-news/defence-lawyers-says-legal-aid-suffering-from-funding-crisis-in-alberta](http://calgaryherald.com/news/local-news/defence-lawyers-says-legal-aid-suffering-from-funding-crisis-in-alberta)> [perma.cc/6M24-KSCJ]; Lauren Krugel, "Alberta Defence Lawyers Demand Boost to Legal Aid Funding" *The Globe and Mail* (17 April 2018), online: <[www.theglobeandmail.com/canada/alberta/article-calgary-defence-lawyers-group-demands-boost-to-legal-aid-funding/](http://www.theglobeandmail.com/canada/alberta/article-calgary-defence-lawyers-group-demands-boost-to-legal-aid-funding/)> [perma.cc/RVN7-9JPG]; Ian Burns, "B.C. Budget Boosts Legal Aid Funding but it's still 'Woefully Underfunded,' Women's Equality Group says" *The Lawyer's Daily* (26 February 2018), online: <[www.thelawyersdaily.ca/articles/5971/b-c-budget-boosts-legal-aid-funding-but-it-s-still-woefully-underfunded-women-s-equality-group-says](http://www.thelawyersdaily.ca/articles/5971/b-c-budget-boosts-legal-aid-funding-but-it-s-still-woefully-underfunded-women-s-equality-group-says)>.

The government's conclusion that expungements are required for those previously convicted of crimes relating to homosexual sex is prudent given the morally innocent nature of such conduct.<sup>110</sup> However, those who use marijuana medicinally are also morally innocent. It is therefore difficult to defend a policy that expunges the first category of offender but not the latter. Given the Supreme Court's conclusion in *Malmo-Levine* that Parliament possessed legitimate criminal law purposes in prohibiting marijuana,<sup>111</sup> those subject to improper police investigations cannot claim moral innocence such that their conduct was non-wrongful. They are nevertheless legally innocent given the clear need to exclude any evidence relating to a relatively non-serious crime obtained under racist pretenses.

The ability to receive a pardon for morally innocent conduct is inadequate for the same reason that a right to an excuse-based defence is inadequate when the accused's conduct was justified: it undermines the accused's dignity interests.<sup>112</sup> Whereas a person who is excused is told that their conduct was wrongful but cannot result in a conviction, a person who is justified is told that their conduct is rightful, or at least permissible.<sup>113</sup> Similar to an excuse, a pardon maintains that a person's conduct was wrongful but there is no utility in continuing to sanction the accused's conduct.<sup>114</sup> On the other hand, an expungement maintains that the conviction was never just because the person's conduct ought to have been declared permissible or rightful when the impugned act was committed. Telling someone that their action was wrongful but excused/pardoned when their act was morally innocent fails to respect that person as a moral agent.

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<sup>110</sup> See *Unjust Convictions Act*, *supra* note 9.

<sup>111</sup> See *Malmo-Levine*, *supra* note 16 at paras 73-79.

<sup>112</sup> For a more detailed review of this point, see John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) at 133.

<sup>113</sup> *Ibid.* See also *Khill*, *supra* note 80 at paras 48-50 citing Fehr, "Self-Defence", *supra* note 68.

<sup>114</sup> Obviously, there are significant differences between excuses and pardons. An excuse-based defence claims the conduct was wrongful but normatively involuntary and therefore grants a defence based on the nature of the act at the time it occurred. A pardon admits the wrongfulness of the act and purports that it is no longer necessary to impose the consequences of a criminal record based on the accused's good conduct after the offence occurred. Although this temporal difference is important, my point nevertheless stands that both admit the wrongness of the act even if they utilize different means to avoid the consequences of a criminalized act.

The analogy is admittedly less persuasive when considering a legally innocent accused. This category of accused still committed what has been held to be a legitimate criminal offence and thus must be assumed to be morally blameworthy for their actions.<sup>115</sup> Nevertheless, a person who is subject to a race-based investigation ought not to have been convicted for their crime. Although their defence is based on improper state conduct, I think it would be better to allow such accused to receive an expungement rather than a pardon. The latter remedy allows the state to persist in its allegation of wrongdoing despite its agents' own wrongdoing dwarfing that of the accused. Expunging the conviction therefore serves a greater denunciatory effect and may play a role in rehabilitating relations between minority populations and the state.

Regardless of whether a person ought to receive a pardon or expungement, the government maintains a legitimate interest in ensuring that it expends resources efficiently when determining whether each individual case warrants such a remedy. In the context of marijuana laws, a possession charge may not indicate the type of drug the offender possessed.<sup>116</sup> In my view, it is unreasonable to expect the government to wade through the evidence relating to all possession convictions to determine whether the substance at issue in any given case was marijuana. For similar reasons, it is also difficult for the government to determine whether there was a reasonable basis for concluding that any given case involved medicinal marijuana use or race-based policing. Such a difficult task provides good reason to avoid making any expungement or pardon automatic for marijuana possession.

Presumably, resource allocation is also the reason the government required those subjected to unjust convictions for engaging in homosexual sex to apply for an expungement.<sup>117</sup> Yet it is much less clear that ridding criminal records of such offences requires engaging with significant volumes of evidence. Charges for acts such as consensual anal intercourse or buggery are inherently illegitimate and could readily be expunged without looking into the details of the crime. Although "acts of indecency" involving homosexual sex may require more research into the nature of the charge, it is unlikely that many such convictions exist compared to those relating to

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<sup>115</sup> See generally *Malmo-Levine*, *supra* note 16.

<sup>116</sup> In my experience as a Crown prosecutor, this was not always clear from viewing a criminal record.

<sup>117</sup> See *Unjust Convictions Act*, *supra* note 9, ss 7-8.

marijuana possession. Given the injustice these convictions imposed, it is difficult to utilize the minimal resources it would take to rid these people of their criminal records as a policy justification for requiring that each individual accused be burdened with having to apply for an expungement. As explained earlier, requiring accused to apply for such a remedy will deter many people from pursuing justice given the personal expense and complexity of applying for expungements. Automatically expunging these convictions ensures justice for all.

In summary, then, a coherent policy that respects the dignity interests of those historically subject to unjust convictions would allow all morally (and potentially legally) innocent accused to be eligible for an expungement. Whether the accused would be required to apply for an expungement should turn on the practical realities of the crime under investigation. In my view, expungements should be automatic if the crime itself was inherently illegitimate as was the case with the prohibitions on consensual anal sex and buggery. However, if the conduct requires any significant investigation to determine the merits of an accused's claim that they were morally or legally innocent, then the accused should be required to apply for an expungement. In so doing, Parliament's policy of reducing wait times and waiving fees is commendable. More should nevertheless continue to be done to ensure that people from all sectors of society are aware of the ability to apply for expungements and pardons and are practically capable of so doing.<sup>118</sup>

This approach is not without its shortcomings. Importantly, my approach contains no means to compel both federal and provincial governments to pardon or expunge a criminal record. As discussed earlier, the current federal pardon and expungement laws are not capable of compelling provincial governments to destroy or set aside data pertaining to criminal convictions. Absent a reason to constitutionally impose an expungement for historically unjust crimes—an argument fraught with difficulty<sup>119</sup>—improper record keeping by provinces and local courthouses will inevitably persist. It can only be hoped that these institutions will follow Parliament's lead in recognizing the problematic nature of convicting

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<sup>118</sup> For a description of the initial efforts of the federal government, see Harris, "Pardons", *supra* note 29. Those efforts likely need to be continued to ensure enough people are aware of the existing provisions.

<sup>119</sup> This approach requires a retroactive application of law in many cases which courts would be hesitant to employ.

morally and legally innocent accused and thus choose to expunge convictions in unison with the federal government.

My approach may also be criticized because it arguably implies that accused must be permitted to apply for expungements or pardons for any crime if the accused feels that they were improperly treated by police. I do not think this critique is forceful. As the state has a significant financial interest in not allowing litigants to effectively relitigate past convictions, it is appropriate to require those accused convicted outside of the contexts considered above to address their grievances via other channels, namely, applications to overturn isolated wrongful convictions and the more general pardon process. Expungements should be reserved for clear categories of accused who were subject to unjust convictions because of the legal norms that existed at the time the accused was convicted. Pardons may be utilized for those who commit legitimate criminal offences but nevertheless have adequately been rehabilitated such that a criminal record is no longer an appropriate consequence for their criminal conduct.

## V. CONCLUSION

Parliament's attempt to craft an expedited and free procedure for those convicted of marijuana possession to dispose of their charges is laudable. However, in so doing, it did not attempt to create a coherent framework for determining whether a pardon or expungement is the appropriate response to prior convictions for marijuana possession. Instead, Parliament's legislation overlooked the fact that medicinal marijuana users and minority populations had widely been unjustly convicted for marijuana possession. As with those unjustly convicted for homosexual acts, medicinal marijuana users are morally innocent actors. Parliament's recognition that the former category of offence warrants expungement is prudent. However, the problematic categories of accused convicted for marijuana possession maintain similar claims of innocence. Pardoning such conduct fails to respect the dignity interests of these marijuana users because such a remedy maintains that their actions were wrongful when in fact their actions were morally (or at least legally) innocent. Although there are good policy reasons to require marijuana users to apply for an expungement, a pardon is an insensitive remedy that fails to consider the moral underpinnings of their actions. Similar policy reasons do not exist for refusing to automatically expunge prior convictions for acts such as consensual anal sex or buggery.

Given the limited effort required to uncover such convictions, such a remedy should be granted automatically to avoid the inevitable injustice that will accrue to some accused from requiring that they navigate a complex and time-consuming application process.