



How States Can Ensure That Today's Marijuana Reforms Also Ameliorate Harms Inflicted on Past Offenders

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Legislators and the general public are expressing ever-greater concerns about the costs of the “war on drugs” – especially those laws that inflict harsh punishments on small-time criminal offenders, with effects that persist long after the end of formal punishment. Officials and voters in nearly every state are embracing reforms ranging from the decriminalization and legalization of marijuana to providing new ways for former offenders to reduce the after-effects of past convictions.

As support for these laws grows, so too do practical questions about reforms meant to ameliorate the societal and personal costs of the war on drugs. New laws decriminalizing or legalizing marijuana cannot, in themselves, help those burdened by prior convictions. New provisions for sealing prior criminal records or expunging convictions will not prove meaningful without mechanisms to ensure they are regularly used. Moreover, given the troubled history of disproportionately severe criminal justice enforcement in minority communities, marginalized groups may not take full advantage of current reforms and thus get limited benefits.

Policymakers and reform advocates should link today's marijuana reforms to remedies for past inequities and burdens of mass criminalization. Reforms should offer robust retroactive relief to people convicted for prior marijuana offenses. And a portion of the revenue generated by reform should be devoted to programs to help previously convicted offenders overcome the lingering negative effects of their encounters with the justice system.

The Shortfalls of Limited Restorative Efforts

In recent years, almost every state has sought to address the burdens former offenders face on reentry to society, but these measures often just chip away at the negative impact of criminal records. Expungement and record-sealing laws, for example, are often unduly limited. Many statutes with expungement or sealing mechanisms require long waiting periods or limit relief to the lowest level of offenders and offenses. Practical issues present further barriers. People's unfamiliarity with court procedures and the economic costs involved can make these relief mechanisms inaccessible in practice for many of those who are formally eligible. Formal court petitions may need to be submitted along with fee payments, and the filing process can be confusing and time-consuming. Public lawyers are typically not made available in this process. Yet given the complexity of pursuing relief petitions, individuals may need to hire counsel to assist in navigating the process – an unaffordable cost for many.

Inadequate efforts to ameliorate the burden of past criminal convictions are typical even for jurisdictions undertaking significant marijuana reform. Only a handful of states have enacted laws specifically designed to address the past and enduring harms resulting from marijuana convictions – and only one state, California, has made a substantial commitment in both law and practice to ensure meaningful help to those previously burdened. Even when states enact special statutes or modified expungement rules to address past marijuana offenses, emerging data suggest that only a small fraction of those who are eligible for relief seek to have their records sealed or set aside.

Reform advocates can and should address these shortcomings. Jurisdictions planning to reform their marijuana laws – and states that have already done so – ought to craft robust expungement laws that reflect present-day norms. Previous marijuana offenders should not continue to bear a scarlet letter for engaging in what citizens have now decided is now socially acceptable conduct.

Creating a Commission on Justice Restoration

Even more can and should be done beyond legal changes. For example, a new criminal justice institution could be funded by the taxes, fees, and other revenues generated by marijuana reforms and assigned the mission of developing policies and practices to minimize the economic and social burdens that persist for those previously convicted of marijuana offenses.

Ex-offenders are often saddled with collateral sanctions at the local, state, and federal levels and have to deal with the widespread availability of their criminal records. These challenges justify the establishment of a permanent restorative institution in every jurisdiction, funded by fractions of the new resources generated by the legal marijuana industry and associated taxes.

A new Commission on Justice Restoration could be a public agency mandated to address the cumulative undue harms of prior convictions. The Commission could provide a much-needed clearinghouse and site for analyzing hard-to-collect data about the collateral consequences of convictions, and provide a centralized and impartial forum for statewide policymaking to redress these collateral consequences, to conduct and disseminating research on the fiscal and social costs of these collateral consequences, and to advocate for steps that can be taken to reduce long-term harms.

The Bottom Line

The war on drugs and prohibitions on marijuana have had profound harmful effects for many Americans, and especially for persons of color. As more and more states change their marijuana laws, former offenders who have been impacted most acutely by past laws should be first in line to benefit from such reforms. Although reforms in marijuana laws can help redirect the longstanding war on drugs, reformers should push policymakers to go further than simply assuring that, in the future, nobody will be arrested or go to jail for using marijuana. Advocates should connect marijuana reform with efforts to correct harms from the past, by improving laws that allow expungement of past convictions and seizing opportunities to use new taxes on legal marijuana to create new government institutions tasked with ameliorating some of the collateral damage inflicted on millions of Americans, their families, and communities, by the excessive punishments of the past.

Read more in Douglas A. Berman, [Leveraging Marijuana Reform to Enhance Expungement Practices](#), 30 *Federal Sentencing Reporter* 305 (2018)