

Today, 36 states and Washington D.C. have legalized cannabis for either medical or recreational use. This growing trend of decriminalization and legalization demonstrates a [sea change in our nation's attitudes](#) towards cannabis. However, legalization has deeper implications than simply the right to consume.

For example, while possessing up to an ounce of cannabis is legal in several states, what about the millions of arrests and the hundreds of thousands of convictions for possession that occurred before legalization?

It is this very question that has much of the legalization discussion focused on criminal-justice reform—namely, our country's failed policy of mass incarceration and its wide-ranging negative effects on individuals and communities. According to a report released by the [Global Commission on Drug Policy](#), low-level drug offenses are the primary cause of mass incarceration in the United States (numbered around 2.3 million), and 40% of those arrests are for simple possession of cannabis. In 2015 alone, the number of people arrested for cannabis was [643,121](#), with almost 9 in 10 just for possession.

What makes these numbers stand out even more is the obvious racial disparity. A study by the [American Civil Liberties Union](#) tracked the number of cannabis arrests by race and county in all 50 states, including D.C, and found that despite the rate of equal use of cannabis by black and white Americans, blacks are nearly 4 times as likely to be arrested, and a [report by Human Rights Watch](#) showed that blacks are 10.1 times more likely to enter prison for drug-related offenses.

This is a “cruel paradox,” as stated by law professor Michelle Alexander. While entrepreneurs and big business seek to secure economic advantages with the legalization of cannabis, hundreds of thousands of individuals (mostly black and Hispanic) remain imprisoned or burdened by 40 years of the grossly unsuccessful “War on Drugs.”

Not only that, harsh punitive measures for low-level drug offenses do not reduce crime. In fact, as the [Brennan Center for Justice](#) pointed out, mass incarceration and long prison sentences not only have a limited impact on eliminating crime, these practices can actually increase the likelihood of re-offense. The combined effect of little to no rehabilitative programs while in prison, paired with lack of support and diminished opportunities once released, leaves individuals vulnerable and more likely to return to crime. Those who are only charged with a misdemeanor still have the arrest and conviction marring their record, resulting in a lifetime of obstacles to employment, housing, traveling, or obtaining certain loans and services.

Retroactive Clemency

There may be help for some individuals with retroactive clemency. Advocates of retroactive clemency make the argument that with legalization comes the acceptance and agreement that small amounts of cannabis should not be illegal and those with prior convictions should get a second chance through expungement (i.e., wiping clean) of their records.

With cannabis-related crimes off one's record, the doors to employment, housing, travel, and student loans are opened, which can have far-reaching, positive effects not only on individuals but on local communities and economies.

Unfortunately, retroactive clemency is not a guaranteed right in the United States, and each state is handling this question differently.

The Case Against

In 2012, Colorado was the first state to legalize recreational cannabis with Amendment 64; however, there was no provision to forgive convictions incurred before its approval. So even though charges may have [decreased 77 percent](#) in the year following legalization, [more than 100](#) cannabis offenders are still imprisoned in the Colorado State system. Adding to the incarcerated are the more than [210,000 individuals](#) arrested for cannabis possession in between 1986-2010 who still have highly searchable arrest records.

In March of 2014, a glimmer of hope for those with past convictions appeared. The Colorado Court of Appeals overturned the 2011 conviction of a woman who was arrested for possession of less than an ounce of cannabis (which had been made legal under Amendment 64). However, the court suggested its ruling would only apply to those who were still in the appeals process when cannabis became legal, and analysis by the [Denver Post](#) has found that fewer than 100 cases could fit within this time frame (and an even smaller number where cannabis was the only charge).

So, while state law allows individuals to appeal their convictions if they can show “justifiable excuse or excusable neglect,” appellate attorney Patrick Mulligan comments that the case law has made it “very, very difficult” for defendants to fit within those statutory definitions. This gives a wide berth for prosecutors to oppose appeals, especially if a past cannabis conviction is complicated by other crimes on one’s record.

UCLA drug policy expert Mark Kleiman explains the issue further: “It’s entirely possible that a guy was charged with possession with intent to distribute cocaine and cannabis, and the plea bargain he pled to was just the cannabis charge.”

This debate continues in Massachusetts, which voted to legalize recreational cannabis in 2016. Now, Senator Jamie Eldridge and supporters are working to introduce a bill to release people convicted of cannabis possession, as well as erase prior possession convictions from individual records.

However, [Gov. Charlie Baker argued](#) that because Massachusetts decriminalized possession of small amounts of cannabis in 2008, most people arrested for possession are “major drug dealers.” He went on to say that he would never agree to rewrite laws retroactively, saying, “Most people know what the laws are, and they’re expected to abide by it.”

Alaska, who voted to legalize cannabis in 2014, also does not allow for expungement of past convictions. According to Alaska Department of Law Criminal Division Director John Skidmore, “The only way to remove a crime from one’s record is by a pardon. Only the governor can grant a pardon.”

In Washington, state Rep. Joe Fitzgibbon introduced a bill in 2013 that would have cleared the records of people with misdemeanor cannabis convictions, but it died in the legislature. He hopes to revisit the issue once the legalization “dust has settled.”

Expungement in Oregon

Oregon voted to legalize cannabis in 2014, and expungement legislation was immediately put into action, making Oregon one of the first states to deal with what law professor Jenny M. Roberts states as “the issue of what do you do with a record of something that used to be a crime and no longer is.”

Oregon’s Legislature quickly passed two laws: The first holds that courts must use “the standards of current law” (i.e., recreational cannabis legalization) when considering applications for record-expungement; the second law allows faster record-expungement for individuals who were under 21 when they were convicted.

Now, individuals with low-level, misdemeanor cannabis charges at least 10 years old can apply to have their records cleared. “In criminal law reform on marijuana, Oregon has gone further than anyone else,” commented Portland attorney, Leland R. Berger.

That is, until last November.

California’s New Standard

With the passage of Prop 64 in 2016, California is slated to set the national standard for the fate of nonviolent cannabis offenders caught up in the prison system.

The law is the first to downgrade cannabis penalties retroactively, reducing harsh sentencing, offering greater leniency to minors, and allowing those with past cannabis offenses to have their records expunged.

This means the 6000 plus individuals currently incarcerated in California for cannabis could have their sentences shortened, or in some cases, even be released. And the hundreds of thousands with prior cannabis-related felonies or misdemeanors can petition for their criminal records to be cleared. Others held in county jails because they couldn’t make bail are being released since they have already served more time than they would have if convicted of what is now a misdemeanor.

While this groundbreaking law is effective immediately, it will take time for counties to catch up with retroactive convictions. For example, [San Mateo County](#) has already begun receiving petitions to expunge cannabis charges from individual records dating as far back as 1970, and its District Attorney, Steve Wagstaffe commented, “They’ll be dropped one at a time as they come up in court.”

Looking Forward

The good news from California might be the only good news for a while. Legalization and retroactive clemency is a difficult legislation issue, one that some activists have avoided so as to not jeopardize cannabis reform, as acknowledged by Allen St Pierre of NORML, “We have assiduously tried to stay away from this discussion. The morality from our view is clear, but political pragmatism makes it hard to embrace.”

So, while the country’s changing attitudes toward cannabis gives hope that our past policy wrongs can be remedied, retroactive relief, like the legalization of recreational cannabis, will not be something that happens overnight.