

Leveraging Marijuana Reform to Enhance Expungement Practices

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State legislators and the general public have begun expressing ever-greater concerns about the economic and social costs of the “war on drugs” and the punitive treatment of less serious criminal offenders. These concerns have recently led elected officials and voters in nearly every state to embrace a wide array of new policies and practices intended to reduce incarceration levels and to ameliorate the lasting punitive impact of a criminal conviction.¹ This paper spotlights and seeks to link two particular recent state reform trends: revisions of criminal marijuana prohibitions and expanded opportunities for expunging criminal records. Though new marijuana laws and enhanced expungement regimes may seem like disparate concerns, reform momentum in both arenas often emerges from similar concerns about the injustices and enduring harms of mass criminalization. Moreover, the potential import and impact of new marijuana policies and expungement practices can be enhanced if advocates and policymakers effectively link these reform movements.

The modern reform of marijuana laws has received no shortage of public attention. But while concerns about the social and economic costs of the drug war have often been integral to advocacy and support for state marijuana reforms, new marijuana laws enacted by voter initiative and legislatures have not consistently sought to redress past and enduring harms resulting from marijuana criminalization and its punitive enforcement. Meanwhile, recent reforms focused on reducing the burdens of a past criminal conviction have not often received extensive public attention, but the breath of state legislative action in this space, and the bipartisan support such actions have garnered from a wide array of elected officials and advocates, represents a remarkable modern criminal justice reform story. As detailed in one recent report, “since 2013, almost every state has taken at least some steps to chip away at the negative effects of a criminal record on an individual’s ability to earn a living, access housing, education and public benefits, and otherwise fully participate in civil society.”²

¹ See generally Nicole D. Porter, The Sentencing Project, *State Advances in Criminal Justice Reform, 2016* (2017); Nicole D. Porter, The Sentencing Project, *The State of Sentencing 2015: Developments in Policy and Practice* (2016).

² Collateral Consequences Resource Center, *Four Years of Second Chance Reforms, 2013-2016: Restoration of Rights & Relief from Collateral Consequences 1* (2017); see also Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, Vera Institute of Justice, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014*, at 4

Even with the recent election of a President who campaigned on a law-and-order platform, the general public and legislators in both political parties seem likely to continue to view marijuana prohibition as poor use of limited criminal justice resources³ and to understand it can be unjust and counterproductive to subject less serious criminal offenders to punitive and enduring collateral consequences. But even as support for these types of legal reforms persist, so to do questions about the efficacy and impact of recent reforms in ameliorating the societal and personal costs of the “war on drugs” and punitive treatment of less serious criminal offenders. New laws decriminalizing or legalizing marijuana use which do not include mechanisms for remedying past convictions cannot and will not meaningfully impact the lives of those previously caught up and burdened by punitive enforcement of marijuana criminalization. New expungement statutes that do not provide means and resources to facilitate their regular use cannot and will not meaningfully help significant populations. Moreover, given the history of disparate criminal justice enforcement across a range of marginalized communities, the racial and economic factors subjecting certain disadvantaged populations to disproportionate criminal justice harms may also limit and distort who can and will take full advantage of ameliorative modern reforms.

With an eye on the past and future of criminalization and reform movements, this Article argues that states reforming their marijuana laws should be particularly concerned with remedying the past inequities and burdens of mass criminalization. State marijuana reforms should not only offer robust retroactive ameliorative relief opportunities for prior marijuana offenses, but also use new resources resulting from marijuana reform to create and fund new institutions to serve the needs and interests of a broad array of low-level offenders looking to remedy the collateral consequences of prior involvement in the criminal justice system. Unfortunately, the majority of states that have reformed their marijuana prohibition have made only limited formal and practical efforts to enable and ensure the erasure of marijuana convictions. In addition to encouraging all marijuana reform states to

(Dec. 2014) (noting that from “2009 through 2014, forty-one states and the District of Columbia enacted 155 pieces of legislation to mitigate the burden of collateral consequences for people with certain criminal convictions.”).

³ In late February 2017, a Quinnipiac University national poll reported that voters supported marijuana legalization by a margin of 59 to 36 percent, supported legalized marijuana for medical purposes if prescribed by a doctor by a margin of 93 to 6 percent, and said the federal government should not enforce federal laws against marijuana in states that have legalized medical or recreational marijuana use by 71 to 23 percent. *See* Quinnipiac University, Press Release, *Republicans Out Of Step With U.S. Voters On Key Issues, Quinnipiac University National Poll Finds; Most Voters Support Legalized Marijuana* (Feb 23, 2017), at <https://poll.qu.edu/national/release-detail?ReleaseID=2432>

follow California's lead in enacting broad ameliorative legislation, I urge legislators and other policy makers (as well as a range of advocates) to recognize the value of synergistically linking and leveraging the commitments and spirit of modern marijuana reform and expungement movements. Specifically, and to be especially concrete, I propose the creation of a new criminal justice institution, a Commission on Justice Restoration, to be funded by the taxes and fees and other revenues generated by marijuana reforms and to be tasked with proactively working on policies and practices designed to minimize and ameliorate undue collateral consequences for people with criminal convictions.