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“Good moral characters”: how drug felons are impacted under state marijuana legalization laws

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ABSTRACT
This article examines how drug felons will be impacted by marijuana legalization in the United States. What will happen to drug felons whose charges would be legal under current law? Can drug felons work in the newly developing legal marijuana industries? In this article we will overview the statistics on arrests and convictions with their high rates of racial disparities. The war on drugs has inspired the development of more repressive criminal justice tactics such as asset forfeiture, high rates of re-incarceration during parole for marijuana violations, drug courts and their further reach into lifestyles, and the difficulties of prisoner reentry, especially for drug felons, who are barred from many jobs and social services. We will look at the regulations of felony offenders working in the cannabis industry. And we will consider the outcomes of retroactive ameliorative relief for this case of marijuana possession felonies under legalization.

After 40 years of impoverished black men getting prison time for selling weed, white men are planning to get rich doing the same things. So that’s why I think we have to start talking about reparations for the war on drugs. How do we repair the harms caused? Alexander (2014)

Introduction: from criminal to consumer
On June 21st, 2015, a Harris County Sheriff’s deputy pulled over Charnesia Corley, a twenty-year old woman living in Houston, Texas, for allegedly running a stop sign while she was driving to the store to shop for her sick mother (Quinn, 2015). Once he engaged with Charnesia, he said he ‘smelled marijuana,’ a common tactic to establish probable cause to justify a vehicle search. However, after searching Corley’s car and not finding the cause of the smell, he then argued that the smell was coming from her body. He then requested a female officer backup in order to conduct a cavity search. This invasive physical search was conducted in the parking lot next to her car. When Corley took a moment to submit to this humiliation, which to her, felt like a sexual assault, the female officer threatened to break her legs. In the end of the ordeal, the deputy claimed to have found 0.02 oz of marijuana. He charged her with resisting arrest and possession of marijuana. This interaction came on the heels of the nationally covered incident where Texas state trooper Brian Encinia pulled...
over Sandra Bland for allegedly not using a turn signal to change lanes, arrested her, imprisoned her for three days, after which she was found dead in her jail cell. While marijuana was not an initial charge, after Bland’s death, it was reported to the media that she had an unusually large amount of marijuana in her system, which she would have had to ingest during her imprisonment, authorities argued. The implication was that the marijuana could have triggered her alleged suicide. And one year before, in Ferguson, Missouri police officer Darren Wilson shot Michael Brown, claiming that the eighteen-year-old ‘had the most intense aggressive face’ and looked like a ‘demon,’ likening the teenager to professional wrestler Hulk Hogan (Sullum, 2014). When the toxicology report stated that Brown’s blood contained 12 nanograms of active THC per milliliter, marijuana was blamed in a typical reefer madness style by Wilson’s lawyers, claiming that the substance could have ‘made Brown unhinged enough to behave in the suicidally irrational manner described by Wilson’ (Sullum, 2014). Marijuana continues to provide a convenient justification for the police to continue to stop, search, arrest, abuse, and murder black and brown people in the United States. The use of draconian drug laws against black and brown people at higher rates than whites (American Civil Liberties Union, 2013) is, in part, what Michelle Alexander (2010) has dubbed ‘the new Jim Crow.’ Xenophobia and institutionalized racism is inherent in drug war policies: from the Opium Exclusion Act of 1909 applied to the Chinese (coming after the Chinese Exclusion Act of 1882), Harry Anslinger’s association and then demonization of Mexicans and marijuana use, and continuing with Nixon’s 1972 war on drugs based on his stigmatization of communities of color. Because of this established connection of drug policies targeting communities of color, the move to decriminalize, and legalize, marijuana can assist racial justice. Yet even under these policies, the rules and regulations regarding consumption can continue to disproportionately impact communities of color. And the dire need for retroactive ameliorative relief to be included in the new laws cannot be overstated (i.e. people in jail and prison are not impacted by new legalization policies).

Individuals that have been convicted of a drug felony are barred from working in the legal marijuana industry, often more harshly than those who have received a non-drug felony (i.e. in some states, felons are allowed consideration for employment after ten years, but drug felons may be barred for life). Nearly 80% of drug felons are for possession (American Civil Liberties Union, 2013), with one fifth or less for distribution or trafficking. However, there is some minor overlap in those that may have a drug felony, have experience working with the marijuana plants, and would like to transition their black market experience into the legal industry. These individuals will not be able to redeem themselves through such a course.

In this article, against the backdrop of the structural racism of the historic war on drugs, I will discuss some of the implications of the shift towards decriminalizing and legalizing marijuana for adult-use, in particular. First I provide a context of racially biased arrest rates for marijuana and how these convictions and prison terms can impact felons, especially as they reenter society, perhaps looking for a job in the newly legal industry of marijuana. However, they will find that these jobs are closed to them, as state laws include ‘good moral character’ clauses, which prevents felons, especially drug felons, from working in the industry. For those who continue to have a marijuana conviction on their record, I include a section on retroactive ameliorative relief, which details the states’ responses to the tension between legalization and those potentially remaining behind bars. Finally, I also review the laws in closer detail to point out the continued restrictions for marijuana possession amounts and consumption, which could continue to penalize the most vulnerable consumers.
The war on drugs is a war on (black and brown) people

When Dan Baum interviewed John Ehrlichman in 1994 for his (1997) book *Smoke and Mirrors: The War on Drugs and the Politics of Failure*, the former Nixon domestic-policy adviser, who had served prison time for Watergate involvement, was shockingly frank:

> I started to ask Ehrlichman a series of earnest, wonky questions that he impatiently waved away. “You want to know what this was really all about?” he asked with the bluntness of a man who, after public disgrace and a stretch in federal prison, had little left to protect. “The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did”. (Baum, 2016)

Even with such blunt admission from the masterminds themselves, the nearly century old policies have the power of inertia. Once institutions are established, it is nearly impossible to dismantle them, especially when they have captured a percentage of the budget. This war has been expensive: the 2012 national drug control budget request at $26.2 billion, was an increase of $322.6 million since 2010 (Office of National Drug Control Policy, 2012). Marijuana continues to be at the forefront of drug arrests, and the tensions between the federal government policies that continue to classify marijuana as a Schedule I narcotic (no medical use, high potential for abuse), and states that are increasingly legalizing medical marijuana, decriminalizing possession, and even legalizing adult-use, continue to be antagonistic, but are showing signs of respecting the different jurisdictions. On 29 August 2013, the Department of Justice (2013) released a memo stating that the federal government would not interfere with state jurisdiction to regulate their own marijuana laws and programs. And passing in 2014, the House Amendment 272, or The Hinchey-Rohrabacher Medical Marijuana Amendment, was the first federal victory for marijuana advocates, which mandated that no funding from the Department of Justice would be used to prevent states from implementing their own laws regarding medical marijuana. This is a significant victory, especially for California dispensaries, which have continued to be targeted by DEA raids (White, 2015).

Finally, the War on Drugs has been ineffective in eradicating drug use. The United States continues to lead the world in drug use. According to The National Survey on Drug Use and Health (NSDUH) for 2014, an estimated 10.2% of the population is a current user, or an estimated 27.0 million people aged 12 or older; of which 22.2 million are current marijuana users (Center for Behavioral Health Statistics & Quality, 2015, p. 5). Of those, approximately 2.5% are arrested for possession (Caulkins, Hawken, Kilmer, & Kleiman, 2012, p. 43). Marijuana usage has proven to be fairly benign, when compared against other drugs classified under Schedule I (Earleywine, 2005). Indeed, the most harmful aspect is the risk of involvement with the criminal justice system (Williams & Lyons, 2014, p. 31).

Whites and blacks in the United States consume cannabis at similar rates, yet the arrest, sentencing, and imprisonment rates diverge greatly based on race (American Civil Liberties Union, 2013, p. 21). This outcome is related to the racially charged initiation of such policy, beginning in 1914 with the Harrison Narcotics Act (Musto, 1987). By the 1970s, legal scholar
Jesse Norris (2011–12) demonstrates that Richard Nixon’s ‘Southern strategy’ aimed to appeal to... voters’ racial anxieties and prejudices with tough on crime policies. Close Nixon advisor H.R. Haldeman wrote that President Nixon “emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to.” (p. 503)

Tara Herivel and Paul Wright argue (2003) that it is a ‘technique for controlling dangerous populations internal to the country and doesn’t have much to do with drugs’ (p. 57). More pragmatically, Caulkins et al. (2012) point to the difference between whites purchasing and consuming drugs in their residence, while low-income people of color participating in public drug markets more visible to police, especially in neighborhoods that attract a heavy police presence (p. 51). All of these contribute to differential arrest and conviction rates.

**Arrest and imprisonment rates for marijuana violations**

The war on drugs has been the largest manufacturer of the exponential prison population growth, with marijuana comprising over half of such drug arrests (Mears & Cochran, 2015, p. 28; Provine, 2007, p. 18). The American Civil Liberties Union (2013) has documented this exponential rise in drug arrests and imprisonment rates in their report *The War On Marijuana In Black and White*, which demonstrates some startling conclusions:

- 88% of marijuana arrests are for simple possession and account for 52% of all drug arrests in the United States in 2010
- Blacks are 3.73 times more likely than whites to be arrested for marijuana possession
- Over the last ten years these disparities have increased
- Blacks and whites use marijuana at similar rates

In 2009, there were 850,000 people arrested for marijuana violations, the second highest year ever (Caulkins et al., 2012, p. 42; Michelson & Tafoga, 2014, p. 118). In 2010, California had 16,585 felony marijuana arrests, and for misdemeanor arrests, there were 54,849 (Caulkins & Kilmer, 2014, p. 17). For both state and federal inmates, approximately 40,000 have a conviction involving marijuana, and for half of them, this may be the reason they are imprisoned (Caulkins et al., 2012, p. 50).

Discretion can often be exercised at many points of the justice system: at initial contact, arrest, charges, prosecution, sentencing, parole, and time added or subtracted while incarcerated. However, with the advent of mandatory minimum sentences at both the federal and state level, beginning in 1973 with the Rockefeller drug laws, such discretion with drug sentences is not optional. Many states have enacted mandatory minimum sentences, often targeted toward such crimes relating to drugs, sexual abuse, and weapons. Twenty-nine states are now considering legislation to ease their harsh sentencing guidelines (Subramanian & Delaney, 2014). Twenty states have decriminalized marijuana possession, reducing it to a fine (NORML, 2016).

When leniency is exercised, it is often whites that benefit (American Civil Liberties Union, 2013). However, leniency is rare: for felony marijuana arrests in 2009, prosecutors only dropped 4% of cases, and for misdemeanors, it was only 2% (Caulkins & Kilmer, 2014, p. 19). When prosecutors pursue their charges, defense lawyers and public defenders rely almost exclusively on plea-bargaining, which denies individuals their right to a trial. In 2006, only
5.7% of cases went to trial, and the rest relied on plea bargains. Such pressure forces defendants to compromise their case (Caulkins & Kilmer, 2014, p. 19). Trials are very resource intensive. Caulkins and Kilmer (2014) estimate that in just California alone in 2010, approximately $150 million was spent on prohibiting marijuana, mostly for incarceration (p. 25). The American Civil Liberties Union (2013) estimates that between $1.2 and $6 billion is spent annually in the United States to enforce marijuana prohibitions (2013, p. 75). Cost-saving measures are motivating many states to reduce marijuana prosecutions, but others continue with this expensive venture.

**Prisoner reentry**

Parolees are often required to seek employment as a condition of their parole. And as we know, felons face tremendous discrimination in the job market. The Department of Justice (2016) sets forth an overview of some restriction upon federal felons in the document *Federal Statutes Imposing Collateral Consequences upon Conviction*. These restrictions include restrictions on voting, jury service, licensing, employment, federal benefits, armed forces service, employment in finance, bearing arms, and immigration. Additionally, each states has their own list of restrictions for felons. In the state of Connecticut, there are restrictions on licenses for many fields, such as: architects, private detectives, guards, attorneys, judges, radiographers, midwives, electrical workers, plumbers, elevator installation, sheet metal worker, major contractors, public accountants, psychologists, insurance sales, and gas technicians (Reinhart, 2003). In the state of Texas, there are twenty-six codes that restrict the employment, licensing or participation of felons, creating a web of exclusion (Texas State Law Library, 2015). States differ on whether they ban public employment for felons, but this is certainly one area in which states can be proactive in reducing barriers to employment.

The U.S. Equal Employment Opportunity Commission (EEOC) (2012) has put forth guidelines for the ‘Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,’ which highlights racial disparities in conviction rates and promotes measures to reduce restrictions on felon employment. In response, Texas sued the EEOC, resisting ‘the agency’s guidance forbidding employers from having categorical bans on hiring criminals … The state of Texas … has the sovereign right to impose categorical bans on hiring of criminals’ (Smith, 2013). The industries least inclined to hire felons include those that have contact with children and customers, or those that handle property or valuables (Petersilia, 2003, p. 118; Weiman, 2007, p. 585). Industries more inclined towards hiring ex-offenders are ‘skewed toward manufacturing, construction, and transportation’ (Holzer, Raphael, & Stoll, 2007, p. 125).

Besides such outright barriers to hundreds of professions, felons will face discrimination from employers individually. Nearly all employment application forms ask for criminal records. Most employers admit that they would not hire felons because they fear lawsuits for negligence (Petersilia, 2003, p. 117; Zeidner, 2014, p. 52). Such discrimination especially impacts black and Latino applicants, as employers may use race as a shorthand assumption of felon status (Pettit & Loyns, 2007, p. 206). Pager conducted a study in which pairs of college-aged white and black men applied for jobs at 350 different sites, with the only difference in resume being their criminal record (Pager, 2007a). Her starling finding was that a white applicant with a criminal record was more likely to receive a call back than a black or Latino
applicant with no criminal record (Decker, Ortiz, Spohn, & Hedberg, 2015, p. 115; Pager, 2007a, 2007b).

Felons could benefit from protective legislation that reduced such employment penalties. Models can be based on Title VII of the Civil Rights Act of 1964, which protects individuals on the basis of race, color, gender, national origin, or religion. The move towards sealing marijuana convictions in some states provides another example for shielding convictions from negative employment impact. Another effort is the measure to ‘ban the box,’ which would prohibit asking about criminal backgrounds on application forms. Pager suggests comparable legislation to the Fair Credit Reporting Act of 2002, which erases an individuals credit blemishes after seven years, a similar measure could put time limits on felony records (2007a, p. 156). Already, there is legislation in seventeen states that ‘forbid access to criminal records or require employers to meet certain qualifications in order to obtain them’ (Bushway, Briggs, Taxman, Thanner, & Van Brakle, 2007, p. 177). Such efforts could go a long way towards protecting employment options for drug felons.

‘Good moral characters’ clause

In legal marijuana states, their laws often include a ‘good moral character’ clause, requiring prospective owners and employees, to submit to criminal background checks. The original argument to legalize the marijuana industry was to move it away from the criminal underground. Therefore, convicted criminals are usually not allowed to work in the industry. This specifically is the clause Michelle Alexander’s opening quote in this article most directly relates. While one may have had experience working with marijuana in the black market, and subsequently received a felony, they are now banned from the industry that prefers workers with experience only as long as legalization has been in place. For those who worked in the black marijuana market and received a conviction, they will be hard pressed to gain entry into the white market. With black and brown individuals targeted at disproportionate rates, this may impact them disproportionately.

Most of the state laws ban workers who have felonies or misdemeanor convictions from working in the industry; however, some make finer distinctions. Washington, DC bans individuals with felony convictions and drug misdemeanors specifically, but not other misdemeanors (Initiative Measure No. 71, 2014). Therefore, individuals with drug misdemeanors are barred from the industry over those with misdemeanors potentially involving violent crimes or theft.

A few states have attempted to rectify this law by making exceptions for those who have committed marijuana-specific crimes, within a certain time period. For example, Oregon makes exception for those with a prior conviction of the manufacture or possession of marijuana, on convictions older than five years, if they have no more than one conviction (Measure 91, 2014, Section 29). Washington State also makes an exception for a prior conviction for a marijuana offense if the sentence was not enhanced. However, any current convictions for owners or employees will result in a license suspension.

Besides felony or misdemeanor convictions, owners or workers can be denied a license when they are ‘not of good repute and moral character,’ as Oregon and other states require (Measure 91, 2014, Section 29). Oregon’s law specifies, ‘Is in the habit of using alcoholic liquor, habit-forming drugs, marijuana, or controlled substances to excess,’ having a felony conviction, or violating any current marijuana state laws (Measure 91, 2014, Section 30). Colorado
State goes even farther by requiring license holders to not have any delinquency with their student loans, or be in arrears for taxes or child support (Wyatt, 2015). However, in Colorado, a drug felon is allowed to work in the industry five years post-conviction if their conviction would not be a crime under current law.

It is not uncommon for felons to be restricted from specific industry, indeed, some estimate that there are up to 350 industries that bar felons from employment. However, some individuals convicted of marijuana violations may have the skills of working with the marijuana plant before legalization. Because of the racially disproportionate arrest rates, this can significantly impact people of color. States that are allowing past marijuana convictions that would not be illegal under current law are showing the most progressive way in addressing this conflict. Allowing for those with some marijuana violations to work in the legal market would be a move in the direction of relief for those who have faced the harsh penalizations of the drug war.

**Legally allowed amounts, restrictions, and continued enforcement**

While the public may have the impression that marijuana in legalized states is a free-for-all, serious restrictions on amounts and consumption exist, and can still result in a hefty fine or imprisonment. Adult and medical users have different limits on the amount of usable cannabis, or number of plants, allowed in the home. According to Initiative Measure No. 502 (2011) in Washington State, adult users are allowed one dry ounce of marijuana in their possession. Ballot Measure 2 allows the same one-ounce possession limit in Alaska. Washington, DC. voters approved Initiative 71, which allows for the possession of up to two ounces of marijuana, and six plants in the home (only three of which can be mature at a time). According to Chapter 475B – Cannabis Regulation in Oregon state, adults can have up to one ounce in public, and eight ounces in their residence, with four plants at home. Washington is the only adult-use state that does not allow for residential plants; the punishment for which is a felony charge, five years in prison and a $10,000 fine. Washington State allows medical patients to grow up to six plants, and possess up to eight ounces of usable marijuana, from their own plants (or three ounces of purchased marijuana). In states that allow for both adult use and medical marijuana, registered medical patients are usually allowed larger amounts, more plants, and pay a lower price for retail and no taxes.

Adult users who exceed these amounts will face penalties. In Oregon, adults face a violation and maximum fine of $650 for having 1–2 oz in public, and a misdemeanor for having 2–4 oz, or more than 4 oz in public. In addition, Oregonians can face 6 months to one year of incarceration and fines from $2,500 to $6,250. For home consumption, Oregonians are not penalized until they possess 1–2 lbs, a misdemeanor, with a maximum penalty of six months imprisonment and a $2,500 fine. Over two pounds in the home is the threshold for a felony charge in Oregon. Other states do not make such a public/residential distinction. In Washington State, more than one ounce is a misdemeanor, and more than 40 g is a felony, with a maximum sentence of five years in prison and a $10,000 fine. This is quite stark, considering having one ounce is not a criminal penalty, but 40 grams can land one in prison for five years, especially considering the sentencing discrepancy with neighboring Oregon. In Alaska, it takes more than four ounces in possession to reach a felony charge. Washington, DC simply states that more than two ounces will be a misdemeanor charge, without further distinction. In Colorado, it would take more than twelve ounces to reach a felony charge.
While marijuana may be legal for adult-use, it is important to recognize the amount limitations that can still land one in prison for a five-year felony sentence.

The aim of legalization was to reduce the number of people arrested and convicted for petty drug possession charges, and the initial reduction of such charges after the laws have changed is promising. In Washington State, before legalization in 2011, there were 6,879 low-level marijuana court filings, compared to 120 in 2013 (Drug Policy Alliance, 2015, May 23, p. 2). In Colorado, marijuana possession and cultivation charges are down 80% since 2010 and distribution charges are down a dramatic 97% (Drug Policy Alliance, 2015, May 1).

Before legalization in Alaska, marijuana accounted for 64% of drug arrests, with narcotics comprising between 12 and 28% of the annual arrests, a total of 23,000 per year (Markowitz, 2015). Juvenile arrests rates in Alaska were already dropping between 2000 and 2011, from 6000 to 3600. For juvenile drug arrests, marijuana accounted for 90%, a peak in 2010, and by 2011, it was down to 73% of all drug arrests (Myrstol, 2013). California passed a marijuana decriminalization bill that went into effect in January 2011, and this law included reduced penalties for juveniles in possession as well, creating a reduction in marijuana arrests from 14,991 in 2010 to 5831 in 2011 (Ferriss, 2012). Most states that have legalized or decriminalized marijuana maintain high penalties for minors, whereas California demonstrates that including juveniles in penalty reductions can reduce negative criminal outcomes for youth, who are facing declines in offending, especially in California with the lowest rates of juvenile crimes in decades (Ferriss, 2012). Marijuana reform has shown reductions in case filing for those under 21, from a 90% reduction in Massachusetts, to a 30% reduction in Colorado (Males, 2014, p. 3). However, the Center on Juvenile and Criminal Justice finds in their five-state analysis that ‘African Americans are still more likely to be arrested for marijuana offenses after reform than all other races and ethnicities were before reform’ (Males, 2014, p. 1). While legalization and decriminalization have tremendously reduced the numbers of individuals brought into the criminal justice system, racial disparities persist with those that continue to be arrested.

**Legal marijuana consumption restrictions**

Just as there are restrictions on legal amounts of marijuana to possess in legal states, there are also strict rules on where people can and cannot consume cannabis. These restrictions will have a disparate impact on communities of color, just as we have seen under prohibition laws that had racially disparate outcomes. Because of the targeting of low-income neighborhoods for policing, such communities will face continuing penalties for marijuana consumption, as we will see in more detail in this section.

In all of the states that have legalized cannabis for medical or adult-use, it is illegal to consume cannabis in public. In addition, it cannot be consumed in a dispensary, while driving, and in locations that ban (cigarette) smoking, such as bars and hotels (which also face restrictions for cannabis use in venues with liquor licenses). Indeed, the only location one can lawfully consume cannabis is in one’s residence. In Alaska, the fine is $100 for breaking this rule (AS 17.38 [Ballot Measure 2], 2015). In Washington, DC, the medical marijuana law states that for those consuming for medicinal purposes, they can only consume in their residence or in a treatment facility (Initiative Measure No. 71, 2014).

The U.S. Department of Housing and Urban Development released a memorandum stating that ‘new admissions of medical marijuana users are prohibited into the PH and HCV
programs’ and that local authorities can create their own standards for evicting or accepting existing residents (U.S. Department of Housing & Urban Development, 2011). If one is renting a residential property, it is legal for landlords to prohibit smoking on the property and to evict tenants for such an offense if it is specified in the lease. Therefore, only those who own their home can legally smoke cannabis in their residence, without fear of eviction. This may push lower income communities to consume marijuana in public and expose them to police patrols.

The practice of ‘broken windows’ style policing, as it became known after the Atlantic article, written by Kelling and Wilson (1982), which emphasized the importance of focusing on quality-of-life petty crimes, such as the removal of undesirables, and targeting vagrants from public areas, especially contributed to increased marijuana arrests. In 1994, mayor Rudolph Giuliani and police commissioner William J. Bratton responded with ‘Police Strategy No. 5: Reclaiming the Public Spaces of New York,’ which stated New York’s ‘society of civility’ was being curtailed by ‘aggressive panhandling, squeegee cleaners, street prostitution, “boombox cars,” public drunkenness, reckless bicyclists, and graffiti.’ These elements would become targets under this new policing strategy (1994, p. 4). It would:

…Emerge as the linchpin of efforts now being undertaken by the New York Police Department to reduce crime and fear in the city. By working systematically and assertively to reduce the level of disorder in the city, the NYPD will act to undercut the ground on which more serious crimes seem possible and even permissible (1994, p. 5).

After two decades in practice, such policy is threatening to erase public space as we know it, argues Belina Bernd (2011). Tracing the shifting conception of public space in philosophy, from Ulysses, Jurgen Habermas’ bourgeois public sphere, to broken windows, Bernd presents the way undesirables have always been stigmatized within a consumer-oriented public space. For the targeted groups, their mere physical presence is conflated with social harm and a tarnishing of the ‘society of civility’ (p. 21). Such broken windows style of policing has spread worldwide. This policy was foundational for stop-and-frisk tactics that fueled marijuana arrests. Such maneuvers may continue after legalization in a way that still targets young men of color and fines them for petty marijuana violations. Indeed, as Kristen Day (2006) finds in her interviews with 82 University of California, Irving male students, all of the Black and Hispanic men report 100% experience of being feared in public, whereas for White and Asian American men, the reporting was around 50% (p. 574). Thus, not only are police stereotyping and responding to men of color on the streets with suspicion and fear, but also the general public consistently reinforces such sentiment. Within such a social context, marijuana legalization can ease, but not erase, racially targeted police enforcement.

Parental rights can continue to be threatened under legalization. States with legal marijuana may ban consumption with a child present, or define impairment of one’s ability to care for children present, to be terms for child removal from the home. According to the U.S. Department of Housing and Urban Development (2010), eight states have a ban on a caregiver’s impairment (California, Delaware, Kentucky, Minnesota, New York, Oklahoma, Rhode Island, and Texas). These restrictions can continue to place children of cannabis users at risk for state intervention in their parental rights. Cannabis use could be used against the individual in a custody battle.

Driving under the influence for medical patients and adult-users is banned. Washington State has the lowest threshold for DUI laws for cannabis consumption, which is 5.00 nanograms or more, ‘or the THC concentration of the driver’s blood is above 0.00’ (Initiative
Measure No. 502, 2011). If a driver refuses a breathalyzer or blood test, their driving privileges will be revoked or denied for one year. Yet, a test for current cannabis impairment does not exist. A urine, blood, or hair test can only prove that cannabis or THC is present, but because of the long retention period for marijuana ingestion, this can only prove that it has been consumed recently. According to a study by Ellis, Mann, Judson, Schramm, and Tashchian (1985), for chronic cannabis users, cannabinoids in urine can be detected upwards of 46 to even 77 consecutive days after last use. The Center for Disease Control (1983) posted its own advisory that stated in part: ‘smoking a single marijuana cigarette produces THC metabolites that are detectable for several days… and the urine cannabinoid test result alone cannot indicate performance impairment or assess the degree of risk associated with the person's continuing to perform tasks’ (p. 3).

While there are no (cigarette, e-cig) smoking bans at the federal level, such laws exist in most states at the state, city, county, and municipal levels. States ban smoking in a variety of venues, such as: restaurants, bars, non-hospitality workplaces, or in government buildings. All of the adult-use legal marijuana states have bans on all such locations. The states that do not have bans on smoking are largely in southern states. These bans, in addition to further restrictions in the marijuana laws, make it impossible to have private marijuana smoking lounges, because smoking is banned, and/or marijuana laws specify that it cannot be consumed in a venue that has a liquor license. Such bans will especially impact tourism, as visitors will hard-pressed to find a location in which they can legally partake. The website Bud & Breakfast attempts to target this niche audience by collecting together lodgings that call themselves ‘bud friendly,’ even if that does not including smoking marijuana inside the guest rooms. Organizations such as NORML are introducing city level legislation to establish licensing for private marijuana clubs, but none have yet passed. In the meantime, such venues continue to flourish underground (Paulson, 2015).

**Retroactive ameliorative relief**

‘Oregon Will Pay Reparations to Individuals Formerly Convicted of Marijuana Related Crimes,’ announced the title of a news article from United Media Publishing. Quoting Carol Shapiro, the newly appointed coordinator for the Oregon Department of Marijuana Reparations, she states that these marijuana charges should have never been crimes to begin with, and that:

…Individuals who served prison time for drug offenses involving marijuana within the last 10 years will automatically be eligible for a refund of any fines and fees incurred as a result of those conviction, as well as compensation for pain and suffering endured from being incarcerated. These parties will also have their records automatically expunged. We are hoping that these actions will correct injustices previously inflicted upon innocent citizens, and help them to go on with their lives (Mason, 2015).

Is Oregon setting a high bar for retroactive ameliorative relief? What does happen to individuals with marijuana convictions, even those who may be imprisoned, after the law changes? Unfortunately, United Media Publishing is a hoax news website, which takes stories that are true and tweaks them into the realm of questionable believability. The story almost makes sense. But the idea of a state providing financial reparations for ‘pain and suffering’ of incarceration, is unfortunately, far from reality, as is the establishment of a Department of Marijuana Reparations. The truth is that Oregon has gone further than any other state to allow for a potential reduction of marijuana sentences, which applies to 78,319 cases, where
eligible individuals can apply ‘to have their convictions set aside, sentences reduced, and records sealed’ (Drug Policy Alliance, 2015, March 25). As already established in the state law ORS 137.225, individuals can apply to have their charges set aside by going through a lengthy legal process (wait the allotted amount of time for the conviction to be applicable, often one to three years, be fingerprinted, fill out court forms, file forms, serve the prosecuting attorney’s office, wait to hear from the court, argue one’s case in front of a judge or hire a lawyer to do so, and failure to appear will result in denial). Under the newly established ‘ORS 137.226 Eligibility for order setting aside certain marijuana convictions,’ eligible participants can file a motion to have their charge considered as if it had happened after adult-use legalization, which would reclassify the charge into a Class C misdemeanor. Oregon even plans to implement a new law that will allow ‘more serious felony marijuana convictions of the past, like manufacturing, [to] be eligible for record sealing as well’ (Johnson, 2015).


… that Colorado Constitution article XVIII, section 16 (popularly known as Amendment 64), which decriminalized possession of one ounce or less of marijuana for personal use, applies retroactively to defendants whose convictions under those provisions were subject to appeal or post-conviction motion on the effective date of the amendment.

While this only addresses cases that were in process during the transition of the law, this does not apply retroactively to cases concluded before the law change, nor imply it will ease convictions before legalization (Peralta, 2014; RT Staff, 2014). In the state of Alaska, the new legalization measure did not include a new statute regarding previous convictions. The only possibility to have one’s sentence reduced in Alaska is to receive a pardon from the governor (Woodham, 2015). In Washington, DC, before adult-use was legalized, the DC, Council first decriminalized possession to a $25 fine, and then eased laws so that marijuana convictions are easier to have sealed (Nucklos, 2014). Washington State did not include a measure for record sealing or downgrading. In California, during the 2014 midterm election, Measure 47 automatically and retroactively downgraded many nonviolent drug related felonies to misdemeanors, which also resulted in ten thousand prisoners being eligible for immediate release (Sledge, 2014). Across the country, activists are pushing for decriminalization of marijuana in addition to medical and adult-use. Such measures are significant, and the retroactive aspect of legislation is important for laws to include.

Before marijuana legalization, the most significant drug related retroactive ameliorative relief case was the Fair Sentencing Act of 2010, which reduced the disparities between crack and cocaine sentencing from the 100 to 1 disparity, to 18 to 1. This act did not include a provision to apply retroactively (Brungard, 2012, p. 745). In 2015, President Obama commuted the sentences of 95 federal drug offenders who had already served decade-long sentences on average, most for cocaine related crimes (Washington Post Staff, 2015). However, 95 cases are a tiny fraction of the 95,678 federal prisoners whose most serious offense was a drug crime, with 54% of federal drug crimes for cocaine (Urban Institute, 2015).

Legal scholars argue that by not providing retroactive relief, it increasing the financial costs of continuing to imprison these inmates, the social costs of continued disruption to the family, and lost income (Mitchell, 2009, p. 15). Morrison (2015) states that a guiding principle is the rule of lenity, where courts are supposedly oriented to ‘construe ambiguous criminal statutes in the defendant’s favor’ (p. 335). Ameliorative relief acts to correct overtly harsh and punitive laws from which society has moved away and to ‘restore the balance
between the punishment and the offense’ (Mitchell, 2013, p. 19). Such a doctrine is especially applicable in the case of legalized marijuana, where there is significant public support and recognition of the failures of the drug war.

**Conclusion: structural racism and legalization**

Michelle Alexander (2010) points out that the justice system only recognizes discriminatory intent, not discriminatory outcomes (p. 139). Because drug laws did not specifically state that they were targeting blacks and Latinos, courts do not recognize the inherent racial bias. Yet, this racial bias continues to impact communities of color swept into the drug war net. Specifically, those who continue to serve their drug sentences, face barriers to employment, and are barred from working in the legal marijuana industry continue to suffer. Drug felons, even for simple marijuana possession, continue to be barred from receiving financial aid for school or receiving welfare benefits, such as housing and food aid (Mears & Cochran, 2015; Provine, 2007; Pryor, 2013; Weiman, Stoll, & Bushway, 2007). Even with legalization, the marijuana consumption and amount limitations will continue to impact the most vulnerable community members. Including retroactive ameliorative relief language in marijuana legalization laws is an important progressive step towards righting these injustices. Overall, legalization is a significant victory in the fight against the drug war and should continue to spread across the nation (Norris, 2011–12, p. 511; Tiger, 2013, p. 144).

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**Notes on contributor**

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**References**


NORML. (2016). States that have decriminalized. Retrieved February 13, 2016, from http://norml.org/aboutmarijuana/item/states-that-have-decriminalized


