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FORGIVENESS REMEDIES FOR MARIJUANA CRIMES

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As more states have begun legalizing marijuana, many are asking whether it's time to revisit charges and convictions for the possession, sale, and cultivation of cannabis. Several states that legalized marijuana for recreational use have followed up with measures to provide relief to those with convictions for marijuana crimes.¹

There is a lot of nuance to forgiveness, and a lot depends on the stage of judicial proceedings. For a person charged with a marijuana crime but not convicted, forgiveness would be dismissing their case. For those convicted and serving probation or prison time, forgiveness means curtailing their sentence. And for those whose sentences have already been carried out, forgiveness takes the form of removing the crime from their record.

The first two cases fall under the umbrella of *abatement*: cutting a sentence short before or during its term. The latter is referred to as *expungement* (also *expunction*): removing past crimes from a person's public record.

ABATEMENT

It's intuitive that a person charged with a crime that no longer exists should not be punished. Abatement prior to adjudication can be accomplished through legislation alone, and is sometimes even mandated by court precedent. Whether by intent of the legislature or prevailing case law, abatement before adjudication can reduce the need for attorneys, judges, clerks, prison guards and probation officers. With financial incentives aligning with a psychology of fairness, and few barriers to implementation, a powerful case presents itself in favor of abatement at this stage.

Abatement after adjudication is more complicated. Legislatures usually do not have the power to reverse court decisions, and cannot simply pass a law that would cut existing sentences short. Remedies for these circumstances do exist: most commonly, the legislature instructs the judiciary to hold "resentencing" hearings for convicts. Other potential remedies have been tried through the legislature alone. For example, the state legislature of Washington, after lowering mandatory minimum sentences for some marijuana crimes in 1971, empowered its prison board to commute prison terms accordingly.²

EXPUNGEMENT

After judgment has been entered and complied with, relief may come in the form of expungement (the sealing of previous convictions) or reclassification (redesignating a previous conviction as a lower charge). Different approaches have been taken by states in determining which crimes should qualify for expunction or reclassification.

Many states provide a remedy specifically for smaller possession charges that are no longer crimes. Because the conduct is now legal, petitions for expungement can generally be filed immediately.³ These measures are fairly uncontroversial, but because these low-level charges usually did not have dire consequences in the first place, the impact of such changes is limited.⁴ Other states focus on misdemeanors, on the theory that these charges are less likely to be associated with violence or other, more dangerous drugs. And a few efforts specifically center on reclassifying felony crimes, which are considerably more debilitating to ex-convicts and can preclude them from obtaining a job, a lease, or any kind of financing.

States determining expungement or reclassification remedies based on underlying charges must be mindful of plea deals. A state that forgives only misdemeanor possession charges might clear the record of someone who had pled down from felony weight, whereas someone carrying the same weight who went to trial and lost would be ineligible for forgiveness. In another scenario, someone who pled to possession in order to get another charge (such as resisting arrest) dismissed ends up scot-free.

Such complications have led states to require a hearing before records are changed. New Jersey went even further, requiring completion of a probationary term *and* a hearing.⁵ But such processes are costly, both for the petitioner and the state. They also compound existing barriers, like long wait periods between release and expunction eligibility, which dissuade would-be applicants from taking advantage of the process.⁶ This has led to interest in widening the net by implementing automatic expunction. States have been timid about embracing such an expansive measure, but trading the scrutiny of a hearing does provide two substantial benefits: it reduces the cost to the state, and it dramatically increases the forgiveness remedy’s reach.

STATE SOLUTIONS

	Abatement (pre-adjudication)	Abatement (post-adjudication)	Expungement and Reclassification
California	Always (mandated by existing case law) ⁷	For any crime that would either now be legal or a lesser offense (by petition). ⁸	Transfer or possession < 1 oz (automatically after 2 years) For any crime that would either be legal or a lesser offense (by petition). ⁹
Oregon	Class B felony possession can be treated as a Class A misdemeanor upon completion of a probationary program. ¹⁰	No remedy.	Treats crimes as if committed today for the purpose of qualifying for the expunction. ¹¹ Requires that: <ul style="list-style-type: none"> •The petitioner has complied with the court’s judgment; •The conviction is not a Class A or B felony; •Three years have passed since conviction; •The petitioner has no pending charges; and •The petitioner has no other convictions in past 10 years.¹² Wait time is reduced to one year if petitioner < 21 when the crime was committed. ¹³

	Abatement (pre-adjudication)	Abatement (post-adjudication)	Expungement and Reclassification
Colorado	Always (mandated by case law decided after legalization). ¹⁴	Existing legislation allows anyone convicted of a crime to petition for relief when there has been a “significant change” in the law. ¹⁵	Up to two felony possession crimes can be reclassified as misdemeanors (no wait time). ¹⁶ Any misdemeanor that is now legal can be expunged without limitation. ¹⁷

CALIFORNIA

California’s forgiveness regime encompasses pending and prior convictions at all stages. Its wide-scope policy is aimed at bringing charges in line with the current law. The Drug Policy Alliance estimated that over 100,000 Californians are eligible for abatement or expunction.¹⁸ However, the state has struggled to carry these out, as the necessity of a hearing has proven a significant barrier in terms of cost, effort, and information. A report at the end of 2017 by the California Judicial Council indicated it had received just 4,583 applications for resentencing or redesignation.¹⁹

A bill introduced this year would mandate courts track down convictions that qualify for expunction or reclassification, and automatically redesignate them without requiring any action from the offender. This would undoubtedly be less costly than a hearing, though determinations would still require more than a glance at someone’s criminal record. One risk of this approach is that it would unfairly advantage those who pled to marijuana crimes in exchange for dismissal of other charges. On the other hand, the harm of such a measure may be outweighed by its vastly increased efficacy at providing a remedy for those burdened with marijuana convictions on their records. Moreover, many counties aren’t waiting for the legislature: San Francisco and San Diego prosecutors have already begun throwing out past marijuana convictions en masse.²⁰

OREGON

The change in Oregon’s forgiveness regime is limited to expungement. Though broad in terms of the conduct it will consider, the requirement that the petitioner have no convictions within 10 years dramatically limits the number of people who would be eligible. A person with two possession charges, even minor ones, would have to wait 10 years before

expunction. The Oregon Judicial Department reported just 453 successful applicants the year after both measures had been passed.²¹

Oregon's updated expungement method also continues to endorse "school zone" laws. Oregon's school zone laws include any area within 1,000 feet of a school, regardless of whether the offender simply lived in that area or was pulled over near a school during a traffic stop.²² While sale to minors is rightly excluded from expungement, the exclusion of these school zone crimes may warrant more debate.

COLORADO

Colorado's expunction and reclassification regime is specific about what it will consider but fairly loose in what it demands. Its earliest law focused exclusively on felony possession crimes, with a bill that explicitly embraced the goal of reducing "the significant negative consequences of that felony conviction."²³ This law also applies to felony possession charges received under the *current* law—the main limitation is that it can only be used twice.²⁴

Colorado's biggest blind spot in its expunction regime is cultivation. Cultivation of up to six marijuana plants is now fully legal, but was previously a felony.²⁵ While those serving time for growing marijuana could be eligible for resentencing, no method exists for them to escape a felony record and its disastrous effects.

CONCLUSION

States are still exploring new forgiveness remedies for old marijuana charges, and they are far from reaching a consensus on how past cannabis crimes should be handled.

Nonetheless, interest is clearly growing in methods to mend those marred by the war on drugs. As the results of measures taken in various states begin to bear fruit, policymakers rethinking pot prohibition should be able to build a better road map for implementing forgiveness remedies for past marijuana crimes.

ABOUT THE AUTHOR

James Craven is a Senior Fellow who writes about criminal justice and drug policy issues on behalf of Reason Foundation. His work includes a policy brief and presentation on driver's license suspension reform in Michigan, research on occupational licenses in Tennessee, and task force participation assessing mandatory minimum sentences in North Carolina. Craven is committed to helping states achieve cost-efficient solutions that maximize opportunity for their citizens.

Prior to his time at Reason, Craven worked as a defense attorney representing private and indigent clients throughout North Carolina's Piedmont Triad area. He graduated from Georgetown University Law Center in 2013.



For more on cannabis policy, see reason.org/topics/drugpolicy



ENDNOTES

- ¹ National Conference of State Legislators. "Marijuana Overview." *nsl.org*, National Conference of State Legislators. 30 Aug. 2017. Web. <<http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>> Accessed 26 Apr. 2018.
- ² "Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation." *University of Pennsylvania Law Review* 121:120 (1972). Penn Law Legal Research and Scholarship Repository. Web.
- ³ This is true in both Colorado (CO HB 17-1266) and California (CA AB-64).
- ⁴ California, Colorado, Oregon, Maine and Massachusetts all decriminalized small amounts of marijuana years before legalizing sale. There are still notable discrepancies between past and present possession law in many of these states, but they are often smaller than the banner of "legalization" might lead one to assume.
- ⁵ N.J.S.2C:35-14

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- ⁶ New Hampshire, for instance, has a wait period of two years before marijuana offenses can be considered for expunction (NH SB 16-391). Maryland sets the wait period for marijuana crimes at four years (MD SB 17-949).
- ⁷ *In re Estrada* 63 Cal.2d 740, 748 (1965). “[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.”
- ⁸ CA AB-64
- ⁹ *Ibid.*
- ¹⁰ OR SB 15-364
- ¹¹ OR SB 16-1598
- ¹² OR SB 15-364
- ¹³ OR SB 15-844
- ¹⁴ *Colorado v. Russel* 396 P.3d 71 (2014)
- ¹⁵ C.R.S. 18-1-410(1)(f)(I) (2013)
- ¹⁶ CO SB 13-250
- ¹⁷ CO HB 17-1266
- ¹⁸ The Associated Press. “California Bill Would Ease Erasure of Cannabis Convictions.” leafly.com, Leafly. 9 Jan. 2018. Web. <<https://www.leafly.com/news/politics/california-bill-would-ease-erasure-of-cannabis-convictions>> 27 Apr. 2018.
- ¹⁹ “Proposition 64 Data Summary Report.” Judicial Council of California. courts.ca.gov. 14 Dec. 2017. Web. <<http://www.courts.ca.gov/documents/Prop64-Filings.pdf>> 14 Mar. 2018.
- ²⁰ Parvani, Sarah and Rong-Gong Lin II and Cindy Chang. “San Francisco will wipe out thousands of marijuana crimes dating to 1975.” Latimes.com, *The Los Angeles Times*. 31 Jan. 2018. Web. <<http://www.latimes.com/local/lanow/la-me-san-francisco-marijuana-20180131-story.html>> 05 Feb. 2018; Rice, Travis. “San Diego forgiving thousands of marijuana convictions.” <<https://www.10news.com/news/san-diego-forgiving-thousands-of-marijuana-convictions>> 06 Mar. 2018.
- ²¹ Quinton, Sophia and Stateline. “In these states, past marijuana crimes can go away.” pewtrusts.org, The Pew Charitable Trusts. Web. <<http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/20/in-these-states-past-marijuana-crimes-can-go-away>> Mar. 10 2018.
- ²² O.R.S. § 475.904
- ²³ CO SB 13-250
- ²⁴ *Ibid.*
- ²⁵ *Ibid.*; C.R.S.A. § 18-18-406 (2009).