

What Should Marijuana Legalization Mean for the Incarcerated and the Convicted?

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I. Introduction

Luke Scarmazzo is California's last federal marijuana¹ prisoner, and he has been in prison since 2008 and is set to be released in 2027, unless he is granted clemency.² Opponents to marijuana legalization³ and those who do not see legalization as a pressing issue point to decreasing conviction rates at the federal level and the decreasing population of marijuana related offenders in prison as evidence of the lack of urgency of the legalization effort. However, it remains a pressing issue as long as people like Scarmazzo remain incarcerated in federal prison for victimless, nonviolent crimes that involved operating a business that was legal at the state level.⁴ At the time of his arrest and conviction, medical marijuana had been legal in California pursuant to Proposition 215, but it remained illegal at the federal level as a schedule one substance.⁵

Scarmazzo's best friend from high school was recommended medical cannabis⁶ by his doctor after suffering from chronic sever pain following an emergency hand surgery, and Scarmazzo sought to service the Modesto area where he lived, as the closest medical dispensaries were located over 100 miles away in San Francisco.⁷ Being a cannabis patient himself, Scarmazzo and his business partner incorporated the California Healthcare Collective

¹ Marijuana is a cannabis plant containing a certain amount of THC (tetrahydrocannabinol), which is the psychoactive component that gets a user "high."

² Luke Scarmazzo, California's Last Federal Medical Marijuana Prisoner, <https://www.canorml.org/luke-scarmazzo-californias-last-federal-medical-marijuana-prisoner/>

³ Legalization of cannabis involves removing all legal prohibitions that exist against the substance. If cannabis were legalized, it would be as ubiquitous and available to the public as alcohol or tobacco are currently.

⁴ Amy Povah, *Luke Scarmazzo – 21.8 years for Medical Marijuana* (Sept. 4, 2015), <https://www.candoclemency.com/clemency-luke-scarmazzo/>

⁵ Proposition 215 Implementation Act of 1997., 1997 Bill Text CA S.B. 535.

⁶ Cannabis refers to the plant itself, which includes both marijuana and hemp under its umbrella.

⁷ Amy Povah, *Luke Scarmazzo – 21.8 years for Medical Marijuana* (Sept. 4, 2015).

after thoroughly researching California state laws pertaining to medical marijuana to ensure they would be in compliance with them.⁸ Around the same time, the federally funded, Fresno-based Central Valley High Intensity Drug Trafficking Area and its chief Bill Ruzzamenti had shifted focus from methamphetamine to marijuana.⁹ On September 27, 2006, the DEA raided the medical marijuana dispensary that had been operating and paying taxes for more than a year.¹⁰ The CHS had been paying both state and federal taxes, and while federal authorities never alleged that Scarmazzo nor his business partner Ricardo Montes were in violation of state law, federal prosecutors cited to the relevant Nixon-era controlled substances statutes in their charges. Scarmazzo was charged with conducting a continuing criminal enterprise and 2 counts of manufacture/possession of marijuana with intent to distribute and aiding and abetting, and because of the twenty-year mandatory minimum sentence “for conducting a criminal enterprise,” he was sentenced to twenty-two years in federal prison. Scarmazzo has been unable to play an active role in his daughter’s life for the last thirteen years because he operated a business that was legal in the state at the time and has grown exponentially since his incarceration.¹¹

Many previous offenders have been successful in receiving clemency or having their sentences commuted, but Scarmazzo has not been so lucky. His petition for commutation was denied in 2017 by President Obama, even though his business partner Ricardo Montes, who had received the same charges, did receive a commutation from President Obama.¹² He and his advocates made a push for clemency during President Trump’s last six months in office, and he felt confident about his release because, in his eyes, it was “basically a no-brainer” because “it

⁸ Id.

⁹ <https://www.canorml.org/luke-scarmazzo-californias-last-federal-medical-marijuana-prisoner/>

¹⁰ Id.

¹¹ Id.

¹² Jackie Bryant, *The Inside Story Of A Trump Pardon Gone Wrong* (Feb 1, 2021, 8:00 AM), <https://www.forbes.com/sites/jacquelinebryant/2021/02/01/the-inside-story-of-a-trump-pardon-gone-wrong/?sh=5581cb7d5f05>

was a state-legal cannabis dispensary.” After advocating heavily for clemency, Scarmazzo was all but guaranteed by White House officials that he would be pardoned and released. The hope that was so high fell on January 19, 2021 when Joe Biden was inaugurated, and Trump’s pardons had been exhausted. Although the reason is not entirely clear, Scamazzo believe his denial was prompted by his public criticism of the Bush’s administration’s handling of state marijuana laws, and his denied pardon could have been due to an assault charge he received when he was twenty-two years old and got into a fight with his friend.¹³ Ironically, he took a plea deal on the charge to avoid jail time, but that conviction could be what has kept him in federal prison for all these years. Although many of the people incarcerated for marijuana-related crimes have truly violent histories and were convicted of crimes relating to marijuana and violence, Scarmazzo is not the type of person who should be incapacitated by our criminal justice system when he does not have a violent history and his only crime was running a business that is now legal in a majority of our States. In an ideal world, marijuana would be legalized, Scarmazzo would be released from prison, and his record would be wiped clean of his felony charges so that he could contribute to both his state and the federal government through the running of his successful business.

Marijuana legalization on the federal level is a topic that has been debated since the herb has been outlawed. For some, the topic is an uncontroversial one with a simple answer, while the topic still remains taboo for others. The substance itself remains blacklisted at the federal level because some legislators are either diametrically opposed to the idea of legalization, or they feel that it is simply a matter best left to the states to decide for themselves. This issue has come up as recently as July of this year when Democratic Senators released a draft of proposed legislation

¹³ Id.

that would remove cannabis from the federal list of controlled substances, allowing states to implement their own cannabis laws and ending harm to communities of color.¹⁴

This paper will explore the question of what federal marijuana legalization should mean for the tens of thousands of people that are currently incarcerated for marijuana related offenses. Specifically, Part II of this paper will require a look at the history of marijuana regulation, which includes the infamous “War on Drugs,” the states that have legalized cannabis in some form themselves, and any proposed federal legislation on the subject that has failed thus far. It will also require defining many of the common terms when discussing the subject of marijuana legalization. Part III of this paper examines how those convicted of marijuana related felonies struggle to integrate into society in general, and they are mostly unable to find any haven in the now legal industry that ended them up in prison to begin with. Part IV argues that in many cases, these people who have felonies related to marijuana convictions on their record would be best integrated into society by giving them jobs in this growing industry. In many instances, these people are business savvy, these people understand the product and the culture surrounding it, and these people understand the market that this product is sold to. Lastly in Part IV?, this paper will explain the concept of “retroactive legality” and argue that we must adopt such a mindset towards marijuana legalization in order to truly and meaningfully reintegrate those convicted of marijuana distribution crimes.

II. The History of Marijuana Regulation in the United States

A. The War on Drugs

¹⁴ <https://www.democrats.senate.gov/newsroom/press-releases/majority-leader-schumer-senate-finance-committee-chair-wyden-and-senator-booker-release-discussion-draft-of-cannabis-administration-and-opportunity-act-legislation-to-end-the-federal-cannabis-prohibition-and-unfair-targeting-of-communities-of-color>

The “War on Drugs” represents a mindset towards narcotic substances and those who use them, rather than an event that took place at any point in history. To many, it represents an era shaped by policies, beginning with the Harrison Act of 1914, that mostly failed to achieve their purpose of stopping drug use in the United States.¹⁵ That being said, America’s war on drugs began about 100 years ago when Protestant missionaries and other religious groups managed to convince Congress that drugs were evil, and the people who use them were dangerous and immoral.¹⁶ Marijuana was not initially targeted in 1914 with other narcotics, but it was outlawed by the Marijuana Tax Act of 1937.¹⁷ The targeting of marijuana specifically elevated drug prohibition to another level, as it had not demonstrated harm to anyone at this point in time. These anti-drug policies and anti-marijuana regulations, which failed to address or deal with the rehabilitation of those addicted to drugs, persisted throughout the 20th century and through multiple administrations.

Many would argue that the United States’ War on Drugs movement actually began in 1971, when President Richard Nixon declared drug abuse as “public enemy number one.”¹⁸ It was Nixon who signed the law that has become known as the “Controlled Substances” act and he also announced the creation of the Drug Enforcement Agency (DEA) during his time in office.¹⁹ The trend of this “hardball approach” towards the war on drugs continued into the presidency of Ronald Reagan, who was assisted by Nancy Reagan and her “Just Say No” program.²⁰ When president Clinton took office in 1993, he voiced preference for rehabilitation over law

¹⁵ ARTICLE: AGAIN AND AGAIN WE SUFFER: THE POOR AND THE ENDURANCE OF THE "WAR ON DRUGS", 15 UDC-DCSL L. Rev. 59, 63.

¹⁶ Id.

¹⁷ Id.

¹⁸ NOTE: THE WAR ON DRUGS: HOW AMERICA AND PHILIPPINES ARE FIGHTING THE WAR IN DIFFERENT WAYS YET BOTH ARE LOSING, 42 SUFFOLK TRANSNAT'L L. REV. 327, 330.

¹⁹ Id.

²⁰ Id.

enforcement; however, he contradictorily signed a bill into law containing a federal “three strikes” provision in 1994, which has greatly contributed to the existing mass incarceration problem in the United States.²¹

Although the war on drugs was an effort aimed at many other drugs besides the marijuana plant, this had the unfortunate effect of lumping marijuana in with drugs that are proven to be chemically addictive and toxic. The federal marijuana policy we see today, which classifies marijuana as a schedule 1 drug along with heroin and morphine, has been shaped by the war on drugs.²² That same section of the U.S. code outlining drug schedules explains that schedule 1 drugs are those considered to have a high potential for abuse, no accepted medical use, and a lack of accepted use for the substance under medical condition.²³ This obviously conflicts with the logic of states that have legalized marijuana for medicinal purposes.

B. States that have legalized cannabis in some form

A growing number of states have decriminalized²⁴ marijuana in some form, though a smaller portion of these states have fully decriminalized the substance. Among these states that have legalized at the state level are California, Colorado, Oregon, and Washington, though much of the northeastern region of the country has legalized medical marijuana. The founding fathers of the United States intended for the individual states and their governments to be laboratories for the federal government, and we can look to states like Colorado to see what they have accomplished through cannabis tax and legalization to give a better idea of the direction the federal government should take. While many state services have benefited from the revenue of

²¹ Id.

²² 21 U.S.C.S. § 812 (LexisNexis, Lexis Advance through Public Law 117-44, approved October 2, 2021).

²³ Id.

²⁴ Decriminalization does not go as far as legalization, as it merely removes criminal sanctions against an act, article or behavior. Under this framework, the substance remains illegal, but the legal system essentially turns a blind eye to possession of cannabis under a certain amount.

the industry, Colorado still struggles with regulation of the substance and the people who have been convicted or incarcerated for crimes that no longer exist.

Colorado was at the forefront of states choosing to legalize marijuana recreationally in spite of the remaining status of the substance at the federal level. Notably, Colorado's legal cannabis industry has been successful in terms of tax revenue, which goes towards the state's programs for public safety, education, public health, and school construction.²⁵ In addition to tax revenue, the Colorado's cannabis industry has created tens of thousands of jobs, and many of the jobs once only existed in the black market or the medical industry.²⁶ Colorado does allow for persons convicted of low-level possession misdemeanors to apply for expungement²⁷, but the state bars anyone convicted of a felony from obtaining a license to grow and sell cannabis in any form.²⁸ Colorado certainly did not immediately release everyone convicted of a marijuana-related offense when the substance was legalized, and they have fallen short on retroactive justice compared to states like California or Oregon, which allow some people to apply to reduce felony convictions to misdemeanors or petition to seal certain marijuana-related felonies.²⁹

Illinois sets a nearly ideal example of what the federal government could do in terms of retroactive legality if it were to legalize marijuana. In 2019, Illinois became the first state include an expungement provision in its marijuana legalization bill.³⁰ The Cannabis Control Act (CCA), enacted through the Cannabis Regulation and Tax Act (CRTA), puts an onus on the Department

²⁵ ARTICLE: SPRUNG FROM NIGHT INTO THE SUN: AN EXAMINATION OF COLORADO'S MARIJUANA REGULATORY FRAMEWORK SINCE LEGALIZATION, 8 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 225, 247.

²⁶ Id.

²⁷ CRIMINAL LAW: RETROACTIVE LEGALITY: MARIJUANA CONVICTIONS AND RESTORATIVE JUSTICE IN AN ERA OF CRIMINAL JUSTICE REFORM, 110 J. CRIM. L. & CRIMINOLOGY 379, 408.

²⁸ AN EXAMINATION OF COLORADO'S MARIJUANA REGULATORY FRAMEWORK SINCE LEGALIZATION.

²⁹ CRIMINAL LAW: RETROACTIVE LEGALITY at 408.

³⁰ 60 JUDGES' JOURNAL 33 (2015).

of State Police to review all records and automatically expunge any legal order pertaining to lower-level marijuana offenses, and it also requires the Prisoner Review Board in the state to make pardon recommendations to the governor. What is particularly remarkable about Illinois approach to legalization is the promotion of business ownerships in areas that were adversely impacted by cannabis prohibition, including those with prior cannabis convictions. Although it is unclear if this is the case for those convicted of felonies, the CRTA offers support with license applications, as well as financial assistance, to those that have been directly harmed by the War on Drugs.³¹ This is something that we will see in Part IV of the paper which has been suggested by democratic candidates in the 2020 presidential election.

C. States with little to no accepted use of marijuana

The number of states where marijuana remains fully illegal is diminishing, though a few states hold strong and will likely continue to do so until the federal government acts on the subject. Tennessee, for example, has availed itself of the legal hemp³² industry pursuant to federal regulation, but it continues to criminalize cannabis testing above 0.3% THC, which is the psychoactive component of the cannabis plant.³³ Hemp is not the focus of this paper, as it has already been federally legalized through the Hemp Farming Act of 2018.³⁴ That being said, Tennessee bars those previously convicted of state or federal felony drug offenses in the past ten years from obtaining a hemp license, which is obviously required in Tennessee to grow and maintain hemp cannabis plants.³⁵

³¹ 60 JUDGES' JOURNAL 33 (2015).

³² Hemp is cannabis which contains CBD (cannabidiol), which has reported therapeutic effects, rather than psychoactive ones. Hemp is also useful as a building material.

³³ TENN. CODE ANN. § 43-27-103 (Lexis Advance through the 2021 First Extraordinary and the 2021 Regular Sessions).

³⁴ 115 H.R. 5485.

³⁵ TENN. CODE ANN. § 43-27-102 (Lexis Advance through the 2021 First Extraordinary and the 2021 Regular Sessions).

Although Tennessee is rather traditional in its approach to cannabis legislation, the State has recently passed legislation creating a “Medical Cannabis Commission” in anticipation of federal reclassifying of marijuana from Schedule I of the federal Controlled Substances Act.³⁶ This indicates that even states that do not favor legalization at the very least expect the federal government to change its stance on the substance within the next year. That being said, a number of other states, including Georgia, Texas, and Kentucky, have not legalized any form of marijuana outside of the CBD hemp that has been federally legalized. It is likely that states like these will continue take this approach until the federal government steps in and makes the decision for all of the states.

D. Proposed federal legislation on the subject that has failed thus far

As stated previously, marijuana remains illegal at the federal level, and it remains classified at the highest danger level along some of the most notorious narcotic substances. There is currently marijuana decriminalization legislation coming through the pipeline right now, coming in the form of the Marijuana Opportunity, Reinvestment and Expungement (MORE) Act³⁷, although previous efforts have failed before. The MORE Act seeks to decriminalize marijuana at the federal level, expunge criminal records for nonviolent offenders of federal cannabis laws, and establish funding for restorative justice programs.³⁸ The decriminalization of the substance would allow states to formally legalize marijuana without the looming fear of federal prosecution. This bill was based on a recently failed effort to accomplish similar goals.³⁹

³⁶ TENN. CODE ANN. § 68-7-102 (Lexis Advance through the 2021 First Extraordinary and the 2021 Regular Sessions).

³⁷ Marijuana Opportunity Reinvestment and Expungement Act of 2021, 117 H.R. 3617.

³⁸ *Id.*

³⁹ Sasha Hupka, *Senate moves to legalize pot at federal level. What are the chances?* (July 29, 2021), <https://www.latimes.com/politics/story/2021-07-29/what-are-the-chances-senate-will-legalize-pot-marijuana>

Marijuana legalization is even beginning to receive support from republican counterparts within congress. Freshman Rep. Nancy Mace, South Carolina Republican, recently introduced the States Reform Act, which would federally decriminalize cannabis and regulate the substance similarly to how alcohol is regulated while instituting a 3% excise tax on cannabis products.⁴⁰ On one end, it is incredibly encouraging to see that republicans see this as a bipartisan issue, but it is discouraging that this bill is being referred to as a “compromise bill.” Although the States Reform Act does seek to end discrimination of marijuana use along with decriminalization of the substance, it is not clear how much the bill will do to heal communities of color that have been damaged by the war on drugs and retroactively apply decriminalization. The reason legalization efforts have failed is due to lack of bipartisan support, but legalization should not pass until there is bipartisan support for retroactive application of legalization and restorative justice for communities that have been disproportionately impacted by the war on drugs and prohibition of marijuana.

III. A Snapshot of Those Currently Serving Sentences for Violating Federal Marijuana Crimes

When examining the trends federal convictions and incarceration pertaining to cannabis crimes, it is encouraging to see that prosecution and conviction rates for these types of crimes are declining.⁴¹ Moreover, non-violent offenders of federal marijuana laws have also been among a favored group of people who receive presidential pardons in the last couple of presidential administrations. That being said, the issue is that only so many pardons and commutations can be

⁴⁰ Kaia Hubbard, *GOP Congresswoman Offers Bill to Decriminalize Marijuana* (Nov. 15 2021), <https://www.usnews.com/news/national-news/articles/2021-11-15/gop-congresswoman-offers-bill-to-decriminalize-marijuana>.

⁴¹ ACLU Research Report: *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, page 14.

granted, and many people who were put behind bars for marijuana-related offenses before prosecution and incarceration rates began declining will remain there either until their sentence is up or until marijuana is federally legalized and justice is retroactively provided. Additionally, there are individuals who might have what some people would consider to be a “violent history” but would not be in prison if not for a marijuana-related charge. Moreover, many of those who have been released from prison since their conviction still must deal with the consequences of having a felony criminal record, which can affect one’s goals in education and employment. It would be a pressing matter if only one person was in federal prison for a non-violent marijuana trafficking offense, because this would be one person losing their liberty for dealing in a substance that has strengthened the economies of multiple states and allowed those states to put money from the industry into things like public education and health.

The Last Prisoner Project was founded in 2019 and is comprised of a team of cannabis industry leaders, criminal and social justice advocates, policy and education experts.⁴² The organization is committed “to freeing every last prisoner of the unjust War on Drugs, starting with the estimated 40,000 individuals imprisoned for cannabis.”⁴³ The organization highlights individuals who were the victims of mandatory minimums, tenuous statutory enhancements, and judges with the discretion to inflate sentences. Looking at the stories of the people who still remain in federal prison for marijuana-related crimes, their sentences ranges anywhere from twenty years to life without possibility of parole.⁴⁴

Many people who have received federal marijuana-related offenses have been charged with conspiracy to distribute marijuana, like Parker Coleman, who received sixty years without

⁴² <https://www.lastprisonerproject.org/who-we-are>

⁴³ Id.

⁴⁴ Last Prisoner Project: “Prisoners of Prohibition,” <https://www.lastprisonerproject.org/prisoners-of-prohibition>

there being any evidence of violence or even his direct involvement in the crime. Conspiracy to possess and/or to distribute seems to be a common crime that has seen people land in federal prison for decades, such as Craig Cesal, who is serving a federal life sentence for conspiracy to possess with intent to distribute as a first-time offender.⁴⁵ Diana Marquez is another first-time offender who is serving a thirty-year sentence for conspiracy to import and distribute marijuana and for money laundering.⁴⁶

These marijuana-related conspiracy, distribution, and criminal enterprise crimes are much different from other drug-related distribution crimes because marijuana, although the effects of marijuana continue to be debated, is categorically less harmful than other schedule I drugs, such as heroin or methamphetamine. The federal classification is poised to change, as evinced by the movement of the MORE Act, and even states like Tennessee, which has not legalized marijuana, does not have THC marijuana as a schedule I substance in its own statutory framework.⁴⁷ Schedule I supposedly indicates that a drug has “no accepted medical use in treatment in the United States,” but this runs contrary to a growing number of states that have legal medical marijuana industries that are supported by doctors within those states who write prescriptions for the federally illegal substance. There is at least “some” accepted medical use in treatment in the United States. There is not doctor in the country who would prescribe meth to a child with an attention deficit or heroin to a patient recovering from back surgery. Furthermore, one who distributes heroin throughout the country does more damage to the population than one who distributes marijuana because, even if it is technically non-violent distribution, people are

⁴⁵ Amy Povah, *Craig Cesal – 1st offender – Serving Life for Pot was released by BOP to home confinement due to COVID-19!* (Oct. 11, 2014), <https://www.candoclemency.com/clemency-craig-cesal-2/>

⁴⁶ Amy Povah, *Diana Marquez – 1st Offender – 30 years for pot! Now on Home Confinement* (May 24, 2016), <https://www.candoclemency.com/diana-marquez/>

⁴⁷ Tenn. Code Ann. § 39-17-415 (Lexis Advance through the 2021 First Extraordinary and the 2021 Regular Sessions).

actually harmed by virtue of the fact that heroin is so much more addictive and destroys the human body in a way that marijuana simply does not.

IV. Proposals to Support Those Previously Convicted of Violating Federal Marijuana Laws

A. Beto's suggestion – pay them reparations directly through cannabis tax revenue

Former United States Representative and Democratic Presidential Candidate Beto O'Rourke was vocal not only about the federal legalization of marijuana, but also the reparations that should come after such an action. When he was campaigning for the presidency in 2019, O'Rourke proposed a plan to legalize marijuana and to use cannabis tax revenue to directly repay those formerly incarcerated for cannabis-related charges.⁴⁸ His proposed plan went further than the ones suggested by his opponents.

O'Rourke explained that the reparations were necessary to try and mend the damage done to communities of color, who have been disproportionately arrested and incarcerated for marijuana-related crimes. A research report published by the ACLU in 2020 indicates that while rates of marijuana usage are similar for black and white people, black people are 3.64 times more likely than white people to be arrested for marijuana possession.⁴⁹ What makes this statistic more shocking is that data does not show any meaningful difference of usage rate between black and white people.⁵⁰ Data indicates that marijuana prohibition is an equality issue, which is why it is a pressing issue and why marijuana legalization should be applied retroactively.

Amazon has recently made progressive strides in the war against the War on Drugs by dropping marijuana drug tests for some recruitments and by announcing its public support for the

⁴⁸ Tom Angell, *Beto O'Rourke Proposes Drug War Reparations Funded by Marijuana Taxes* (Sept. 19, 2019), <https://www.forbes.com/sites/tomangell/2019/09/19/beto-orourke-proposes-drug-war-reparations-funded-by-marijuana-taxes/?sh=7f37eee14206>

⁴⁹ ACLU Research Report: *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, page 5.

⁵⁰ *Id.*

legalization of marijuana at the federal level. However, some fear the direction this super company may be heading as other “big” businesses have already begun to buy up legal “mom and pop” dispensaries that have operated in legal states.⁵¹ Although Amazon could become a major threat to smaller, family-owned dispensaries throughout the country, they do not allow the sale of marijuana on their site; however, looking at a state like Oregon that has a maturing cannabis market, we can see that the market is attracting big business.⁵² Small businesses or being forced to consolidate into chains to compete with “big business” and to address the growing demand that big businesses have the means to cater to.⁵³

Many fear that federal legalization would cause the issue of loss of small businesses, like we have seen in Oregon, on a grand scale.⁵⁴ This would run counter to O’Rourke’s plan to give small loans to people to get started in the industry, just the same as it would fly in the face of Illinois’s restorative justice program that helps people into the legal industry. The loans would be useless to start a business, and no amount of financial assistance would allow a prisoner trying to reintegrate into society to be able to compete with a company like Amazon in any industry. One solution would be to do what Maine and Washington have done by setting up guardrails around their marijuana markets, intentionally limited the industry to help small businesses.⁵⁵ The United States could maintain a system to reintegrate marijuana offenders into society by giving them small business loans, so long as federal legislation including protections for small businesses and extra-assistance for those seeking to reintegrate.

⁵¹ Akriti Sharma, *Amazon backs marijuana legalization, drops weed testing for some jobs* (June 2, 2021), <https://www.reuters.com/technology/amazon-backs-marijuana-legalization-drops-weed-testing-some-jobs-2021-06-02/>

⁵² Kristian Foden-Vencil, *Oregon’s maturing cannabis market attracts big business and unusual deals* (Jan. 8, 2021), <https://www.opb.org/article/2021/01/08/oregon-cannabis-growth-consolidation-clout/>

⁵³ *Id.*

⁵⁴ Natalie Fertig, *Some cannabis firms see ‘disaster’ in federal legalization* (Sept. 26, 2021), <https://www.politico.com/news/2021/09/26/weed-businesses-federal-legalization-514252>

⁵⁵ *Id.*

B. “Retroactive Legality”

If marijuana is federally legalized today, the question then becomes what to do with people in prison for marijuana, on parole for marijuana, or people who have simply continue to carry marijuana-related felonies and/or misdemeanors on their records. *Black’s Law Dictionary* defines a retroactive law as a law “that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect.”⁵⁶ This paper proposes that any marijuana legalization is a legislative act that should look backward and contemplate the past. This is because, as previously stated, marijuana laws both in their creation and their enforcement have inordinately affected communities of color, leading to higher rates of arrest and incarceration for marijuana-related crimes within these communities. Marijuana-related convictions should be expunged and sealed, and marijuana legislation should be applied retroactively in order to mend the damage brought unto minority populations, as people like Beto O’Rourke have suggested and as the MORE Act intends to do. It is not enough to expunge only the misdemeanor level offenses following legalization. “True retroactive legalization requires jurisdictions that have fully legalized the marijuana industry to treat felony marijuana convictions—convictions that may be for distribution, possession with intent to distribute, or trafficking—in the same manner.”⁵⁷

C. Proposal for how retroactive legality can be accomplished.

The federal government should pass the MORE Act because the steps taken through that legislation will lay a foundation upon which we can begin to correct the wrongs of marijuana prohibition in the United States. The federal government should also take steps further those

⁵⁶ Black’s Law Dictionary (11th ed. 2019).

⁵⁷ CRIMINAL LAW: RETROACTIVE LEGALITY: MARIJUANA CONVICTIONS AND RESTORATIVE JUSTICE IN AN ERA OF CRIMINAL JUSTICE REFORM, 110 J. CRIM. L. & CRIMINOLOGY 379, 386.

taken by the MORE Act. On its face, the act is expansive. The bill will decriminalize the substance by de-scheduling it, and it gets at retroactive and restorative justice by establishing a trust fund meant to support programs, individuals, and communities affected by the war on drugs. Additionally, the bill would provide small business loans to cannabis-related legitimate businesses, and it would provide a better process for expungement of previous conviction by conduction sentence review hearings related to federal cannabis offenses.⁵⁸

The MORE Act does more than some might would expect the federal government to do, but it is a characteristically idealistic bill that will likely be subject to compromise as it works through congress, as we have seen with the States Reform Act.⁵⁹ The heart of that bill that we should hold onto with marijuana legalization is the removal of cannabis and marijuana from the list of controlled substances, restorative justice for the communities adversely affected by the war on drugs, and retroactive application of the law. If marijuana is federally legalized, the substance should be de-scheduled, the money reaped from the taxes on cannabis should be reinvested into communities of color, and a commission should be created to adjust sentences and pardon citizens convicted of marijuana-related crimes.

Legally, the federal government should end the de facto prohibition on marijuana much the same way they ended the prohibition on alcohol in the United States. The states that have done this have seen their prisons free up space, their drug-related arrests go down,⁶⁰ but they continue to struggle with regulating cannabis in terms of how it can be safely grown and safely used, much the same way that states have always struggled with the regulation of alcohol since prohibition was abolished. If the government removed marijuana from the list of controlled

⁵⁸ MORE Act of 2021, 117 Bill Tracking H. R. 3617.

⁵⁹ Kaia Hubbard, *GOP Congresswoman Offers Bill to Decriminalize Marijuana* (Nov. 15, 2021).

⁶⁰ Sawyer D'Argonne, *Colorado releases report on impacts of marijuana legalization* (July 21, 2021), <https://www.aspentimes.com/news/colorado-releases-report-on-impacts-of-marijuana-legalization/>

substances altogether and we did treat it as we did the end of prohibition, we could then leave it to the states to regulate the possession, sale, and distribution of marijuana within their borders. This would put pressure on states to legalize if they have not done so already, and it would allow states more freedom to implement even more lenient cannabis policies and more freedom to offer expansive pardons and expungement to incarcerated individuals.

Although the MORE Act intends to get at retroactive and restorative justice, we have seen other states attempt to do the same and fall short. For example, we have seen where in Colorado that expungement has only been available to misdemeanor offenses even after the state decriminalized the substance.⁶¹ In California, people can apply to have their felonies retroactively bumped down to misdemeanors, but this only if they check certain boxes to do so.⁶² Although the substance is decriminalized in these places, the states have taken a step back from full legalization, likely for fear of interference from the federal government. The inequities of having people in prison for marijuana-related crimes that do not exist in other states will continue so long as we continue to drag our feet in terms of ending the prohibition on marijuana in America.

As the MORE Act suggests and intends to do, a fund should be created with the tax revenue of the legal cannabis industry. We have seen that a black person is 3.64 more likely to be arrested than a white person in generally, but this number increases in certain states.⁶³ This illustrates that the effects of the war on drugs have not been distributed proportionally throughout the country and throughout its history. This is why the tax revenue reaped from legalization

⁶¹ CRIMINAL LAW: RETROACTIVE LEGALITY: MARIJUANA CONVICTIONS AND RESTORATIVE JUSTICE IN AN ERA OF CRIMINAL JUSTICE REFORM, 110 J. CRIM. L. & CRIMINOLOGY 379, 408.

⁶² CRIMINAL LAW: RETROACTIVE LEGALITY at 408.

⁶³ ACLU Research Report: *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, page 14.

should pour into a fund that can be distributed proportionally into underprivileged communities that have suffered during the war on drugs. The revenue can and should be invested into the schools of those areas and into general social programs that will provide public safety and peace to these communities.

As for retroactive legality, the United States government should tackle this issue of in one fell swoop as it works to legalize cannabis wholly. Removing cannabis and marijuana entirely from the list of controlled substances would help accomplish this by creating a national recognition of the substance as something that can be safely regulated and studied medicinally. The MORE Act goes far enough as to remove marijuana from the list of controlled substances, but there should be an even larger emphasis in the bill on the expungement of sentences, as well as a larger emphasis on pardoning and releasing those currently incarcerated for marijuana-related crimes. The MORE Act does establish a process for expungement, but we also need to adopt a more expansive method of pardoning people who are incarcerated for marijuana-related crimes. If the United States is to legalize marijuana and eliminate criminal penalties for manufacturing, distributing, or possessing marijuana, then its government should create a commission tasked with freeing people incarcerated for these marijuana-related offenses from prison.

The pardon process is failing to adequately address the wrongly incarcerated if people like Luke Scarmazzo are unable to receive a pardon or a commuted sentence. The United States government has taken a restrictive approach to granting commutation to marijuana-related offenders in federal prison, denying commutation because of supposedly “violent” histories. Even if someone was convicted of a violent offense at some point in their life, that should not keep them in prison if they were only given such a lengthy sentence because they were dealing in

marijuana. The longer people sit in prison for crimes that have evaporated into thin air, the longer people are being unjustly denied their liberty. This commission could more efficiently review individual cases offer pardons to people who would not be in prison but for marijuana being a controlled substance at the time of their conviction. As for non-violent offenders, the commission should work quickly to offer blanket pardons to these citizens, because their liberty would be wrongly deprived if there only crime was possession a substance that you can now buy at the store. As for the supposed and alleged “violent” offenders, the commission should look at them on a case-by-case basis and determine whether they should be released or whether their sentence should at least be adjusted in recognition of marijuana’s legalization. If someone’s sentence was enhanced because they were distributing a controlled substance or because they had a gun during a sale for marijuana, the commission should look at these cases and see how someone would have been sentenced if marijuana was not a controlled substance at the time of arrest and conviction and adjust their sentence and/or record accordingly.

V. Conclusion

In conclusion, our federal government should end its prohibition on marijuana as it ended the prohibition on alcohol in the United States, and the government must work to efficiently and equitably restore justice retroactively by releasing the people who are incarcerated because of offenses relating to marijuana, by expunging the records of those convicted of marijuana-related offenses, and by adjusting convictions and incarcerations based on the recognition of cannabis as a legal substance. Only this can help to correct the damage done to communities of color throughout the war on drugs. We need to free the remaining marijuana prisoners, and work to heal the damage that has occurred in the past, rather than simply promising to do better going forward.