

## Collateral Consequences in Marijuana Reform and the Rational Choice Theory

The “rational choice” theory of punishment argues that, prior to committing a crime, an individual will weigh the perceived benefits of successfully completing the crime against the risk of getting caught and the possible punishments for such capture. If an individual decides to commit a crime, therefore, that person has acted rationally under the theory and punishing them is justified as recognition of their rational choice as a human being. The rational choice theory, however, falls apart to the extent that the individual contemplating committing a crime does not have ready access to the information necessary to determine the risks and possible punishments associated with being caught. Further, to argue that an individual, prior to committing a crime, should invest significant time into thoroughly researching all of the possible risks of committing that crime undermines the rational choice theory in many circumstances because committing oneself to such thorough research is itself *irrational*.

The difficulties with the rational choice theory of punishment are particularly brought to light when considering what should happen to the collateral consequences for those who have been convicted of marijuana-related offenses prior to marijuana reform. Under the rational choice theory of punishment, those who have been convicted of marijuana-related offenses should continue to be punished despite society’s recognition (through marijuana reform) that the underlying offense is no longer punishable. Such punishment is still justified as recognition of the individual’s rational decision to break the law. When it comes to the collateral consequences of marijuana-related offenses, however, it is arguable that at least some of the relevant information regarding punishment was not available, at least definitely not readily so, to the individual when making their “rational choice” to commit the crime.

Collateral consequences for marijuana-related convictions are far reaching and dispersed throughout both the federal and state codes. Such consequences range from losing the ability to serve on a jury (which most people likely would not complain about) to having a driver’s license revoked or being banned from receiving public benefits such as food stamps or subsidized housing.<sup>1</sup> While many people know that any conviction may have collateral consequences, the collateral consequences associated with minor marijuana offenses often seem disproportionate and rationally disconnected from the underlying offense. For example, a misdemeanor marijuana conviction (such as one for personal possession), can result in a lifetime ban from adopting a child in seven states.<sup>2</sup> It is doubtful that a young individual who is caught by the police with a minimal amount of marijuana would have considered, or even known, about such a harsh collateral consequence. More importantly, it is difficult to understand how that young individual’s resulting conviction for a minor marijuana offense makes them incapable of being a good candidate for adoption for the rest of their lives.

The severity and rationally disconnected nature of the collateral consequences for marijuana convictions, coupled with their dispersion throughout both the federal and state codes, makes it incredibly difficult for the “rational choice” theory to justify certain punishments once marijuana reform has been implemented. It would be *irrational* for an individual to attempt to determine all of the collateral consequences associated with a minor marijuana conviction because of the sheer amount of reading that would entail. Further, the rationally disconnected nature of the convictions from the collateral consequences makes it difficult to argue that the convicted individual should have inferred the possibility of such a consequence from their crime. As a result, continuing to enforce certain collateral consequences once the underlying offense is no longer punishable would be unjust, even under a “rational choice” theory of punishment.

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<sup>1</sup> See Richard Glen Boire, Life Sentences: The Collateral Consequences Associated with Marijuana Offenses, CENTER FOR COGNITIVE LIBERTY & ETHICS, available at <http://www.mpp.org/assets/pdfs/library/The-Collateral-Sanctions-Associated-with-Marijuana-Offenses.pdf>.

<sup>2</sup> *Id.*

The issue then arises as to which collateral consequences for marijuana-related offenses should be removed when marijuana reform occurs. At a minimum, a standard should be set which eliminates collateral consequences which are dispersed throughout the jurisdiction's code, making them difficult to find, and are rationally disconnected from the underlying offense, making them difficult to infer. As a general matter, this would likely result in the elimination of collateral consequences that directly refer to convictions for minor marijuana offenses. It would not, however, result in the elimination of collateral consequences that result from a more general classification based on the conviction, such as limitations placed on "felons" for those who have been convicted of a felony marijuana-related offense.

The most interesting, and most difficult, collateral consequences to consider using a "rational choice" theory of punishment in this area are collateral consequences associated with general drug-related offenses. Such collateral consequences typically are not based upon the individual's decision to break the law but rather society's view of people who possess "drugs." Since marijuana would no longer be a "drug", the rational connection between the conviction and the collateral consequence would fall apart. On the other hand, the individual that committed the crime would have known that marijuana was a "drug" at the time of the incident and should also be held accountable to those collateral consequences which are known under the "rational choice" theory.

As a result, a deeper inquiry must be made into the motives behind collateral consequences resulting from general drug-related offenses to determine whether they would be appropriate to continue to enforce against those convicted of marijuana-related offenses after marijuana reform has been implemented. To the extent that the collateral consequence is motivated by society's view of people who possess "drugs", it would be unjust to impose such consequences on an individual for a conviction related to something that is not a "drug." To the extent that the collateral consequence is motivated by a desire to punish an individual which has chosen to break a law which society deems to be severe, however, punishment would still be just under a "rational choice" theory even after marijuana reform has been implemented.

I wanted to use this mini paper to express my thoughts and opinions about what would/should happen when the drug war ends and marijuana is made legal. First off, I don't believe that reparations should take place, as a general matter. This definitely applies for marijuana-related offenses that are more serious, such as large-scale trafficking. Trafficking offenses distinguish themselves from simple possession offense because they introduce the additional element of a criminal business and enterprise. Those trafficking drugs do so in a way specifically to avoid detection, because they know that their actions are illegal. What the offender is trafficking is not as important as the trafficking as a concept and action. Compare this to simple possession, where the offender is charged simply for having a drug, but not necessarily concealing it or acting in a manner to prevent detection. That being said, I still do not believe that even those people with simple possession charges should be absolved. Even if marijuana is made legal in the future, the fact still remains that it was illegal at the time the offender was charged, and the offender knew it was illegal. In this way, the offender is essentially being charged with committing an act that was against the law, but it doesn't necessarily matter what exactly that act was. I liken this to underage alcohol consumption violations. Alcohol itself isn't a bad thing, and any person aged 21 or older is legally permitted to purchase and consume alcohol. However, the act of drinking alcohol under the age of 21 has been made illegal, so those prosecuted under the law are prosecuted for performing an action that is against the law more than they are prosecuted for actually drinking the alcohol. Thus, giving out reparations for those charged with marijuana-related offenses is ignoring the fact that these people knowingly broke the law. Repeat marijuana offenders should not be rewarded for ignoring the law multiple times, even after being repeatedly told not to. This belief tends to look at the marijuana laws as a construct for social order, rather than preventing a specific substance from being used.

Colorado allows those convicted of possessing small amounts of marijuana to ask the court to throw out the conviction. A spring 2015 ruling in Connecticut allows those convicted of marijuana possession to have the right to get their convictions erased as well through an erasure statute. With 23 states and the District of Columbia allowing the use of marijuana for limited/medical purposes, and a growing decriminalization movement here in Ohio, the looming question remains: is an erasure statute the answer in Ohio if decriminalization of marijuana possession becomes a reality?

In 2012, Ohio police officers arrested or cited almost 15,000 people for marijuana-related offenses. 94% of those offenses were for possession only. A major argument of the decriminalization movement centers on the massive amount of funds the police force is “wasting” on pursuing and arresting those in possession of minor amounts of marijuana (even those that are not punishable with jail time). If the funds and time of the police force could be allotted for some of the crimes in Ohio that have the lowest solve rates (home invasions and car thefts – both have staggering solve rates in the 90 percentile), the argument is that society would be better for it. And with starting salaries of police officers in the state sometimes reaching as high as \$50,000, the amount of time and taxpayer resources going into convictions of miniscule amounts of marijuana makes the decriminalization statute/ruling all the more appealing.

But for those convicted of marijuana-related crimes that are serving time, what happens to them? A look at Connecticut’s erasure statute sheds some light on the possibilities for Ohio’s future. In Connecticut, past marijuana convictions are to be handled as “minor civil infractions” like parking violations. But the steep increase in overturning thousands of marijuana convictions will also cost taxpayers. With this steep increase subsiding as convictions are overturned and lawyers file the appropriate paperwork, it will continue to cost the state substantial funds in just providing public defenders to offenders who are in the prison system.

Even with these financial considerations, a legislative erasure statute seems to be the most effective for managing the thousands of convictions of marijuana possession, especially in a state like Ohio that (surprisingly) is not as tough on marijuana possession as other states. With many convictions of marijuana possession not requiring jail time, an erasure statute in Ohio would probably not be as costly as in many other states that require more prison time for marijuana-related charges. The statute would still require tens of thousands of cases (even those not requiring jail time) to be adjusted within the system, which will cost thousands of hours in paperwork for state and city employees.

So... should fairness prevail? Should an erasure statute eliminate the charges for marijuana possession convictions through Ohio's entire criminal history? It sounds simple to say that it is "fair" for all marijuana convictions to be thrown out. But in reality, more complicated situations occur everyday in the criminal justice system. If a prosecutor knocked a greater charge down to marijuana possession, should the greater charge be looked at in context to determine what happens to that specific conviction? Maybe the prosecutor wouldn't have made such a deal had decriminalization already occurred. Then there is the issue of a repeat offender: does one conviction of marijuana possession amount to much? What about 30 convictions? An individual using marijuana for self-medicating purposes and a regional drug kingpin could both have charges knocked down to what amounts to nothing more than a parking violation? Erasure statutes may be viewed as unfair and therefore not a viable solution.

As the decriminalization movement in Ohio continues to grow, more citizens will start to think about what should happen to those convicted of marijuana possession in the past. An erasure statute may be the most efficient way to solve the problem of past convictions, and maybe the state assembly will feel pressure from voters in the state to pass such legislation. With a 2013 poll showing that 77% of Americans think that marijuana has legitimate medical uses, the possibility that at least 50% of Ohioans would vote for the decriminalization of marijuana makes the issues of erasure on the minds of not just voters, but legislators who will have to tackle this issue and answer to Ohioans.

Re: Marijuana Reform

While watching a frontline special on segregation, the warden of a correctional facility said something about prison reform that I really agreed with: We need to decide whom we are just mad at and whom we are actually afraid of. I think this is especially relevant when talking about sentencing for drug crimes—generally, we are not scared of the people who are convicted of drug possession charges and yet, we punish them harshly with lengthy prison time. This time contributes to the problem of mass incarceration that the United States is experiencing today. While President Obama has made clear steps to reduce mass incarceration based on drug offenses by commuting sentences for over 20 drug offenders and signing the Fair Sentencing Act, there must be more done.<sup>1</sup>

For example, with the wave of marijuana legalization occurring throughout the country, a new question arises: What to do with incarcerated men and women who have committed offenses that no longer exist? There are several options that have been explored including reductions applying retroactively and allowing incarcerated persons to petition for release, expunging the now non-existent offenses, and providing full reparations for persons incarcerated under these laws.

First, if the legalization occurs, then the law should absolutely apply retroactively and allow for the petition by incarcerated persons. It would not be fair or economical to continue to house men and women who have acted in a way that is no longer a crime in the eyes of the law. Similar to California after the reform of their Three-Strikes law, petitions for resentencing, which would lead to release, should be assigned to a certain

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<sup>1</sup> Beth Eiter, *Obama Commutes Sentences for 22 Drug Offenders, Including Eight Serving Life*, SLATE (March, 31, 2015)  
[http://www.slate.com/blogs/the\\_slatest/2015/03/31/drug\\_sentence\\_commutations\\_president\\_obama\\_orders\\_22\\_non\\_violent\\_drug\\_offenders.html](http://www.slate.com/blogs/the_slatest/2015/03/31/drug_sentence_commutations_president_obama_orders_22_non_violent_drug_offenders.html)

judge or several judges depending on the number of persons who apply.<sup>2</sup> While the doors to prison would not swing open automatically, it is important for the justice system to allow this people their release.

Similarly, I think it is very important for the government to take action to expunge the offenses from all people's records. For a felony conviction of marijuana possession in Ohio, there is a required driver's license suspension as well as 524 other possible sanctions.<sup>3</sup> These sanctions severely limit a person's ability to find housing, employment, and live a normal life. If we decide that marijuana possession is no longer a crime, then we should expunge a person's records and remove these barriers to their life.

Finally, although some argue that persons convicted of these drug crimes should receive full reparations, this is just not feasible. While some released from prison are paid reparations, this is not the same situation. For example, those who have been released from death row based on their innocence have been awarded financial sums based on their time in prison. However, in death row cases, we are saying that those released were factually innocent but with retroactively applied releases for drug offenses, we are saying that you may have factually committed the crime but that circumstances have changed and we no longer feel this is a crime. Therefore, it is not necessary to provide reparations.

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<sup>2</sup> Lorelei Laird, *California Begins to Release Prisoners After Reforming Its Three-Strike Law*, ABA JOURNAL (December 1, 2013)  
[http://www.abajournal.com/magazine/article/california\\_begins\\_to\\_release\\_prisoners\\_after\\_reforming\\_its\\_three-strikes\\_la](http://www.abajournal.com/magazine/article/california_begins_to_release_prisoners_after_reforming_its_three-strikes_la)

<sup>3</sup> Civil Impacts of Criminal Convictions under Ohio Law, ORC 2925.11(A)(C)(3),  
<http://civicohio.org/Home.aspx/OffenseDetail/85>