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The legalization of marijuana raises a quintessential jurisprudential question: Whether such laws apply retroactively to exonerate past pot offenders. The answer to this question affects millions of Americans who are suffering from the negative effects of past pot-related offenses. Some such offenders are serving life sentences without the possibility of parole, while all such offenders face negative impacts on their everyday lives. This Article advances the normative claim that past pot offenders have a constitutional right to the retroactive application of marijuana legalization laws. Further, it suggests that a tailored concept of amnesty is a practical means to exonerate such offenders, freeing some from imprisonment and allowing all of them to enjoy productive lives without the stigma of a criminal record.

Introduction

In the movie, *Back to the Future*,[1] Marty McFly traveled back in time to save his future existence.[2] While in the past, Marty met with some people

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1. BACK TO THE FUTURE (Universal Pictures 1985); *see also,* AFI Catalog of Feature Films, https://catalog.afi.com/Catalog/moviedetails/55763 (last visited June 26, 2019).

2. *Id.*

who were smoking[3] "weed."[4] Now imagine that Marty were arrested, convicted, and imprisoned for possession of marijuana with the intent to distribute. This presents the issue: if Marty returned to the future and merely possessed pot in a state that legalized marijuana, should he be entitled to erase his past criminal offense? If the answer is no, Marty might be serving a life sentence without the possibility of parole or at least suffer from the negative effects of a criminal record.[5] The Marty McFly hypothetical raises a quintessential legal issue for States[6] that have decriminalized or legalized[7]

3. *See* Hollyweeds, *The Weed Scene in Back to the Future*, YOUTUBE (Mar. 7, 2013), https://youtu.be/hZVdrp_zO40.

4. In this Article, the terms "weed," "pot," and "marijuana" will be used interchangeably to refer to what is legally known as "marijuana." *See* Katy Steinmetz, *420 Day: Why There Are So Many Different Names for Weed*, TIME (Apr. 20, 2017), http://time.com/4747501/420-day-weed-marijuana-pot-slang/ (noting over twelve hundred slang terms are related to marijuana). For purposes of this Article, the legal term "marijuana" or "marihuana" is defined as that provided for in The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 202, 84 Stat. 1236, 1247-49 (1970) (hereinafter "CSA"). Title II of the CSA, 21 U.S.C. Section 802, provides:

> The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

5. *See infra* note 14, discussing the direct and collateral effects of marijuana-related criminal offenses.

6. As of 2019, ten States, the District of Columbia (D.C.), and the Northern Mariana Islands have legalized the recreational use of cannabis, while thirty-three states, Guam, Puerto Rico, the U.S. Virgin Islands and D.C. have legalized the medical use of the drug. *See* DISA, *Map of Marijuana Legality by State*, https://disa.com/map-of-marijuana-legality-by-state (last visited June 26, 2019). *See also,* MARIJUANA MOMENT, "Marijuana Legislation Tracking," https://www.marijuana moment.net/bills/ (last visited June 9, 2019) (reporting that as of June 9, 2019, there were over eleven hundred marijuana bills in state legislatures and Congress for the 2019 sessions). This Article focuses on states that have "legalized" marijuana; however, its observations provide important lessons for the federal government, states, municipalities, and nations that have or are contemplating such legal reforms.

7. For purposes of this Article, the term "legalization" includes laws that license the sale of pot and have reduced or eliminated civil or criminal penalties for recreational use or possession. *See, e.g.*, MARIJUANA POLICY PROJECT, *Types of Marijuana Reform Laws*, https://www.mpp.org/issues/legislation/types-of-marijuana-policy-reform-laws/ (last visited June 26, 2019) (distinguishing "decriminalization," wherein a state enacted a law that imposes penalties other than jail time for possession of marijuana, from "legalization," wherein a state enacted a law making it legal for adults who are 21 and older to use marijuana and allows for the legal sales and purchase of marijuana.). For example, in California, the decriminalization of marijuana preceded legalization. *See* California's Moscone Act, California Code of Civil Procedure, Section 527.3, passed in July 1975, made possession of one ounce of marijuana a misdemeanor punishable by a hundred dollar fine, rather than a criminal offense, with some exceptions such as possession on school grounds. *See also,* DRUG POLICY ALLIANCE, *Drug War Statistics*, http://www.drugpolicy.

certain marijuana-related activities and use.[8] That issue is whether those laws[9] eliminating some marijuana-related criminal offenses,[10] apply retroactively,[11] to modify, negate, or erase the criminal records of past pot offenders[12] (hereinafter "amelioration"[13]). The answer to this question affects the lives of millions of Americans who are negatively impacted by the collateral consequences of a criminal arrest,[14] as well as the many people who are currently incarcerated due to marijuana-related convictions.[15]

org/issues/drug-war-statistics (last visited June 26, 2019) (noting that twenty-two states have legalized or removed the threat of jail time for the simple possession of small amounts of marijuana); *see also, infra* Part I.

8. Even where legalized, marijuana is still highly regulated, prohibiting the use by and sale to minors, driving and operating heavy equipment under the influence, and restrictions on most sales by only licensed dispensaries. *See, e.g.*, California Proposition 64, Sen. Res. 64, 2017-2018 Reg. Sess. (Cal. 1999), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB64 (the "Adult Use of Marijuana Act," enacted in 2016). *See also,* Christopher Ingraham, *California Arrested Nearly Half a Million People for Pot Over the Past Decade*, WASH. POST (Aug. 18, 2016, 10:53 AM), https://www.washingtonpost.com/news/wonk/wp/2016/08/18/ california-arrested-nearly-half-a-million-people-for-pot-over-the-past-decade/, citing a report from the Drug Policy Alliance.

9. *See infra* Part I.

10. *See, e.g*., Prop 64, *supra* note 8.

11. The terms "retroactivity" and "retroactively," for purposes for this Article, refer to a change in a substantive criminal law, not a procedural one, that reduces or eliminates the culpability of marijuana activities or use, after a conviction is final. The issue of the retroactivity of laws in general is not limited to the legalization of marijuana. *See generally,* Russell L. Weaver, *Retroactive Regulatory Interpretations: An Analysis of Judicial Responses*, 61 NOTRE DAME L. REV. 167, 187 (1986) (noting that "[c]urrent approaches are . . . inadequate because they fail to give judges meaningful standards by which to decide retroactivity issues."). *See also, infra* Part I, B and Part III.

12. The term "pot offender(s)," for purposes of this Article, includes persons affected by any aspect of marijuana laws, including investigatory stops, searches, arrests, pleas, convictions, incarcerations, paroles, and/or criminal records, as well as the "collateral consequences" of such laws. *See infra* note 14.

13. The term "amelioration," for purposes of this Article, means eliminating and/or reducing arrests or convictions for past marijuana criminal offenses for actions, which happened today would not be deemed criminal.

14. *See* MARIJUANA POLICY PROJECT, *Federal Collateral Consequences for Marijuana Convictions*, https://www.mpp.org/issues/criminal-justice/federal-collateral-consequences-for-marijuana-convictions/ (last visited July 22, 2019); JUSTICE CENTER, *The National Inventory of Collateral Consequences of Conviction*, https://niccc.csgjusticecenter.org/ (last visited June 26, 2019) (defining "collateral consequences" of a criminal arrest or conviction as "legal and regulatory sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other opportunities," and providing a searchable database of the collateral consequences in all U.S. jurisdictions and an extensive resources and bibliography).

15. About twenty percent, or about four hundred thousand of those incarcerated, are imprisoned for marijuana-related offenses. *See* Drug War Statistics, *supra* note 15 (noting that the U.S. spends over fifty billion dollars on the war on drugs, annually, with over six hundred thousand people arrested in 2016 for marijuana law violations, of which eighty-nine percent were only for possession); *see also,* American Civil Liberties Union, Report: The War on Marijuana in Black and White (June 2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-

In addition to distributive justice, recent developments compel us to critically analyze whether past pot offenders are entitled to retroactive amelioration. First, there are a growing number of States that have legalized marijuana,[16] challenging the view that marijuana is a dangerous drug.[17] Second, these States are taking positions relative to both the retroactivity of the new laws and to amelioration of past offenses,[18] which arguably contradict United States Supreme Court decisions on the retroactivity of changes in substantive criminal standards.[19] And third, many States recognize that past marijuana laws have greatly contributed to the problems related to a broken criminal justice system,[20] including mass incarceration[21]

rfs-rel1.pdf (reporting that "[b]etween 2001 and 2010, there were over 8 million pot arrests in the U.S. That's one bust every 37 seconds and hundreds of thousands ensnared in the criminal justice system . . . . Enforc[ement] . . . costs us about $3.6 billion a year, yet the War on Marijuana has failed to diminish the use or availability of marijuana.").

16. *See* DISA and MARIJUANA MOMENT, *supra* note 6; *see also,* Theresa Waldrop, *Californians Line up to Legally Buy Recreational Pot*, CNN (Jan. 2, 2018), http://www.cnn.com/2018/01/01/us/california-marijuana-sales/index.html (noting that many other states will follow) Further, many municipalities have also legalized or decriminalized marijuana. *See generally,* Barry Malone, *Regulating Legalized Marijuana at the Local Level*, AMERICAN BAR ASSOCIATION (Apr. 29, 2019), https://www.americanbar.org/groups/young_lawyers/publications/ tyl/topics/municipal-law/regulating_legalized_marijuana_the_local_level.

17. *See* CSA, *supra* note 4. *Cf.* Alex Pasquariello, *Federal Lawsuit against Sessions and DEA Says Marijuana's Schedule I Status Unconstitutional*, THE CANNABIST (July 25, 2017), http://www.thecannabist.co/2017/07/25/marijuana-schedule-i-lawsuit-unconstitutional/84473/ (last visited July 22, 2019) (citing to *Washington, et al., v. Sessions, et al.*, filed as Case 1:17-cv-005625 (filed July 24, 2017) in the Southern District Court of New York, wherein the Plaintiffs claim the classification of cannabis as a Schedule I substance is so "irrational" that it violates the U.S. Constitution). *See generally,* Lisa Rough, *Cannabis and the Constitution: A Brief History of Cannabis in the US,* LEAFLY (Sept. 16, 2016), https://www.leafly.com/news/cannabis-101/cannabis-and-the-constitution-a-brief-history-of-cannabis-in-the-u-s.

18. *See infra* Part I.

19. *See, e.g.,* Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (holding that its previous ruling in Miller v. Alabama, 567 25 U.S. 460 (2012), that a mandatory life sentence without parole should not apply to persons convicted of murder committed as juveniles, should be applied retroactively). *See infra* Part III.

20. *See supra* note 15.

21. The United States incarcerates two million people, which is more than any other country. *See generally,* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JOHN PRAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (critiquing descriptive accounts of mass incarceration that focus too heavily on nonviolent drug-related offenses and sentence lengths); Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html (cautioning that "being locked up is just one piece of the larger pie of correctional control. There are another 840,000 people on parole (a type of conditional release from prison) and a staggering 3.7 million people on probation (what is typically an alternative sentence). Given the often-onerous conditions of probation, policymakers should be cautious of 'alternatives to incarceration' that can easily widen the net of criminalization to people who are not a threat to public safety."); Drug War Statistics, *supra* note 15.

and racial disparities,[22] particularly to the devastation of communities of color.[23]

In response to these developments, this Article advances the normative claim that past pot offenders are entitled to retroactive amelioration,[24] in States that have legalized marijuana. I argue that such retroactive amelioration has deep support in constitutional provisions and U.S. Supreme Court decisions.[25] Moreover, I suggest that, due to large numbers of offenders, over a long period of time, retroactive amelioration is best achieved through the use of amnesty.[26]

As an overview, this Article is divided into three parts. Part I explains the sources and the nature of the quandary that past pot offenders face, as they navigate their way through retroactivity rules and amelioration

22. *See infra* notes 89-97, and 174. *See also,* Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 689 (2016) (noting "[d]espite that legalization, marijuana usage continues to disproportionately impose serious consequences on racial minorities, while white entrepreneurs and white users enjoy the early fruits of legalization").

23. *See infra* Part I. One noted anti-incarceration scholar, Michelle Alexander, argues that merely legalizing marijuana is inadequate relief for embattled racial minorities ravaged by the War on Drugs:

> After waging a brutal war on poor communities of color, a drug war that has decimated families, spread despair and hopelessness through entire communities, and a war that has fanned the flames of the very violence it was supposedly intended to address and control; after pouring billions of dollars into prisons and allowing schools to fail; we're gonna simply say, we're done now? I think we have to be willing, as we're talking about legalization, to also start talking about reparations for the war on drugs, how to repair the harm caused.

April M. Short, *Michelle Alexander: White Men Get Rich from Legal Pot, Black Men Stay in Prison*, ALTERNET (Mar. 16, 2014), http://www.alternet.org/drugs/michelle-alexander-white-men-get-rich-legal-pot-black-men-stay-prison. *See also,* Jonathan Blanks, *The War on Drugs Has Made Policing More Violent: What Can be Done to Curb the Excessive and, Sometimes, Predatory Policing that has Emerged from the Drug War?,* DEMOCRACY JOURNAL (July 19, 2016), https://democracyjournal.org/arguments/the-war-on-drugs-has-made-policing-more-violent (noting that "[p]olice are incentivized to initiate unnecessary contact with pedestrians and motorists, and they do so most often against ethnic and racial minorities. Such over-policing engenders resentment among minority communities and jeopardizes public safety.").

24. The phrase "retroactive amelioration," for purposes of this Article, means the right to be judged by newly enacted, marijuana legalization law, retroactively to past crimes of a similar nature, using all legal methods or means available to officially absolve someone from blame for a marijuana-related offense. *See infra* Part II; *see also, Expungement: Removing the Lifelong Stigma Caused by Marijuana Prohibition*, MARIJUANA POLICY PROJECT, https://www.mpp.org/issues/criminal-justice/expungement-removing-lifelong-stigma-caused-marijuana-prohibition/ (last visited July 22, 2019).

25. *See infra* Part III.

26. The term "amnesty," for purposes of this Article, means a complete exoneration for a large group of individuals (general or blanket amnesty), granted by the government that obliterates all legal remembrances of the offense *Cf.* BLACK'S LAW DICTIONARY, https://thelawdictionary.org/amnesty/ (last visited July 22, 2019) (defining amnesty as "[a] pardon extended by the government to a group or class of people, usually for a political offense"). *See infra* Parts II and III, and Appendix.

practices. Part II proposes a solution that recognizes a constitutional right to retroactive amelioration. Part III explains how a right to retroactivity relief for past pot offenders is founded on constitutional principles and Supreme Court decisions. Further, this Article proposes a code that government officials and policymakers should adopt to provide pot offenders swift and certain remedies for the damages done to them from the failed War on Drugs.[27]

This Article has greatly benefited from the works of others directly related to the issue.[28] It benefits greatly from other scholars on topics relevant to this one including retroactivity,[29] retroactive ameliorative relief,[30]

27. The term "War on Drugs," hereinafter "WOD," for purposes of this Article, means the initiative to discourage the production, distribution, and consumption of psychoactive drugs, particularly marijuana. *See infra* Part I, A.

28. *See, e.g.*, Douglas A. Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices* (Apr. 18, 2018), Ohio State Public Law Working Paper No. 444; Federal Sentencing Reporter, Vol. 30, 2018, SSRN: https://ssrn.com/abstract=3165001 (last visited July 22, 2019); Robert A. Mikos, *Do (Should) State Marijuana Reforms Apply Retroactively?*, VANDERBILT UNIVERSITY, MARIJUANA LAW, POLICY, AND AUTHORITY (Dec. 2, 2017), https://my.vanderbilt.edu/marijuanalaw/2017/12/do-should-state-marijuana-reforms-apply-retroactively; Sophie Quinton, *In These States, Past Marijuana Crimes Can Go Away*, STATELINE (Nov. 20, 2017, 10:09 AM), https://www.google.com/amp/s/m.huffpost.com/us/entry/us_5a12e8e8e4b 023121e0e94e3/amp; Katie Zezima, *Cities, States Work to Clear Marijuana Convictions, Calling It a States' Rights Issue*, WASH. POST (Feb. 1, 2018, 3:15 PM), https://www.washingtonpost.com/ national/2018/02/01/cities-states-work-to-clear-marijuana-convictions-calling-it-a-states-rights-issue; Associated Press, *New York Gov. Signs Bill to Cut Penalties for Marijuana Possession, Expunge Some Convictions*, KTLA5 (July 29, 2019, 12:21 PM), https://ktla.com/2019/07/29/new-york-gov-signs-bill-to-cut-penalties-for-marijuana-possession-expunge-some-convictions/.

29. *See infra* Part I, B.

30. *See infra* Part III.

habeas corpus,[31] post-conviction remedies,[32] sentencing guidelines,[33] procedural criminal law,[34] drug law,[35] capital punishment,[36] racial

31. This Article does not address post-conviction relief—appeals of criminal convictions, including release, new trial, modification of sentence, re-arraignment, retrial, custody, and release on security, or a federal habeas corpus proceeding, including for constitutional considerations such as ineffective assistance of counsel. *See generally,* F. A. STEPHENS, WINNING HABEAS CORPUS AND POST CONVICTION RELIEF (7th ed. 2017); KELLY PATRICK RIGGS, *ET AL*., POST-CONVICTION RELIEF: THE APPEAL (2017). *Cf.* Peter Westen, *Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert*, 18 NEW CRIMINAL LAW REV. 167, 167-213 (Mar. 20, 2015), University of Michigan Public Law Research Paper No. 455, SSRN: https://ssrn.com/ abstract=2588143 (last visited July 15, 2019) (questioning why a state's prospective repeal of the death penalty should not preclude prosecuting a defendant for a capital murder that was committed before repeal).

32. There is thoughtful scholarship on the retroactivity of criminal law changes as it relates to convictions, primarily prior to finality. *See, e.g.*, S. David Mitchell, *Blanket Retroactive Amelioration: A Remedy for Disproportionate Punishment*, 40 FORDHAM URB. L.J. CITY SQUARE 14 (2013); Howard J. Krent, *Determining the Retroactive Reach of Decriminalization and Diminished Punishment*, 40 FORDHAM URB. L.J. CITY SQUARE 7 (2013); S. David Mitchell, *In with the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 AM. J. CRIM. L. 1 (2009); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (assessing the efficacy of the Court's approach to retroactivity when the Court finds "new" law); Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. PA. L. REV. 120 (1972); *See generally,* Richard Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. SUPP. 37 (2014). Additionally, retroactivity relative to other drug offenses has received some attention. *See, e.g*., Harold J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 U. MICH. J.L. REFORM 53 (2013) (arguing that "the strong presumption against retroactive application of reduced punishments reflected in *Dorsey* is neither historically grounded nor constitutionally compelled").

33. *See* Nathaniel W. Reisinger, Note, *Redrawing the Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle between Justice and Finality*, 54 HARV. C.R.-C.L. L. REV. 299 (2019) (analyzing the Supreme Court's decision in *Dorsey v. United States*, 567 U.S. 260 (2012) and noting "When policymakers recognized the injustice of the disparity between sentences for crack and powder cocaine, they passed the Fair Sentencing Act to correct that injustice. But the ongoing failure to make that law retroactive created a new injustice with a 'new set of disparities.'" (footnotes omitted). *See also,* U.S. DEPT. OF JUSTICE, DEPARTMENT OF JUSTICE ANNOUNCES THE RELEASE OF 3,100 INMATES UNDER FIRST STEP ACT, PUBLISHES RISK AND NEEDS ASSESSMENT SYSTEM (July 19, 2019), https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and (reporting on the implementation of First Step Act of 2018, which provides the retroactive application of the Fair Sentencing Act of 2010 to reduce the disparity between crack cocaine and powder cocaine threshold amounts triggering mandatory minimum sentences).

34. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the admission of an elicited incriminating statement by a suspect, not informed of the right to remain silent violated several provisions of the U.S. Constitution); *see also,* Solem v. Stumes, 465 U.S. 638 (1984) (holding that the Miranda decision did not apply retroactively as that "would have a disruptive effect on the administration of justice" by requiring a review of a "significant" number of criminal convictions).

35. *See, e.g.*, ALEX KREIT, ILLEGAL DRUG AND MARIJUANA LAW (2019); ROBERT A. MIKOS, MARIJUANA LAW, POLICY, AND AUTHORITY (2017).

36. *See, e.g*., Daniel G. Bird, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329 (2003); Matthew R. Doherty, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty*

profiling,[37] institutional racism,[38] unconscious bias,[39] mass incarceration,[40] war on drugs,[41] reform of the criminal justice system,[42] misdemeanor decimalization,[43] and amnesty.[44] Building on the works of other scholars, this Article uniquely analyzes whether the Constitution grants past pot offenders a right to retroactive amelioration, in States that have legalized marijuana.[45]

Collateral Review Cases, 39 VAL. U. L. REV. 445 (2004), http://scholar.valpo.edu/vulr/vol39/iss2/6.

37. *See, e.g*., End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/1933; Devon Carbado & Patrick Rock, *What Exposes African Americans to Police Violence*, 51 HARV. C.R.-C.L. L. REV. 159 (identifying racial profiling as a factor in police shootings).

38. *See, e.g.*, Lewis R. Katz, Symposium, Whren *at Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923 (2016).

39. *See, e.g.*, L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2016); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

40. *See, e.g*., ALEXANDER, *supra* note 21, Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531 (2016) (positing that the imprisonment of African-American men is one means by which society removes minority populations from mainstream life).

41. *See, e.g.*, Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381 (2002).

42. *See, e.g*., Michele L. Jawando & Chelsea Parsons, *4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, Center for American Progress (Dec. 18, 2014), https://www.americanprogress.org/issues/civil-liberties/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/; Ivana Dukanovic, Note, *Reforming High Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911 (2016).

43. *See, e.g.*, Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

44. *See, e.g.*, Conor Friedersdorf, The Nationalist Case for Amnesty, ATLANTIC (Feb. 15, 2019), https://www.theatlantic.com/ideas/archive/2019/02/immigration-amnesty/582688/ (arguing that granting amnesty to undocumented immigrants would benefit millions of American citizens); Leila N. Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955 (2006), http://scholarship.law.nd.edu/ndlr/vol81/iss3/5 (last visited Aug. 13, 2019) (examining recent state and international practice regarding amnesties for jus cogens crimes, which has strengthened the prohibition against amnesties); Robert W. Burg, *Amnesty, Civil Rights, and the Meaning of Liberal Republicanism, 1862-1872*, 4 AMERICAN NINETEENTH CENTURY HISTORY, 29 (2003) (imaging how the amnesty program that Liberal Republicans envisioned for the post-Civil War era would have resulted in a less violent and corrupt Reconstruction polity).

45. This Article focuses on the retroactivity of laws, as it applies to a large group of similarly situated offenders, and does not discuss changes in culpability for past offenders due to changes in individual cases, for example, due to the admission of exonerating evidence. This Article will not discuss post-conviction remedies relative to habeas corpus. There is well-established jurisprudence that dictates an inmate's right to post-conviction remedies based on the constitutional doctrine of habeas corpus. *See, e.g.*, People v. Boyd, No. 12CA2607, 2015 WL 4760414 (Colo. Ct. App. Aug. 13, 2015) (holding that Colorado's legalization law retroactively overturns marijuana possession convictions that had not become final on appeal before the new law took effect).

The next section describes the problems that past pot offenders face when they seek retroactive amelioration in a State that has legalized marijuana. Overall, it shows that many such States did not address this issue when they adopted the new laws. Moreover, in States where retroactivity is granted, the relief provided is both superficial and inconsistent.

I. Retroactive Amelioration Quandary[46]

When a State legalizes marijuana, past offenders suffer from the uncertainty of how the law applies to them, if at all, and ultimately face a retroactive amelioration quandary.[47] In this Part I, I show how the law fails to provide reparative justice for past offenders by providing a brief history of the criminalization of marijuana, explaining the shortcomings of the rules on retroactivity, and noting that retroactivity does mean swift and meaningful amelioration.

A. Criminalization of Marijuana[48]

Any meaningful approach to the retroactive amelioration of past pot offenses must be assessed within the context of the criminalization of marijuana and its negative impacts on society. We begin with a brief history of the WOD[49] to show that it was fundamentally flawed from the outset and fell short of achieving its stated goal of reducing drug use. On the contrary, the WOD caused, and continues to cause, great harm to individuals and to communities.

1. Brief History of the WOD

The first national regulation of pot was the Marihuana (sic) Tax Act of 1937 (hereinafter "MTA") which created elaborate enforcement rules, and levied an expensive tax and penalty for marijuana handlers.[50] Shortly after MTA's passage, marijuana was taken off the list of permissible medicines approved by the federal government.[51] In the 1950s, marijuana regulation went from civil penalties to criminal punishment, with mandatory sentencing

46. The phrase "retroactive amelioration quandary," for purposes of this Article, refers to the condition that past pot offenders face as they seek exoneration for past offenses, in light of inconsistent retroactivity rules and unclear, restrictive marijuana legalization laws.

47. *See, supra* note 46.

48. *See generally,* Rough, *supra* note 17; Scott C. Martin, *A Brief History of Marijuana Law in the United States*, TIME (Apr. 20, 2016), http://time.com/4298038/marijuana-history-in-america.

49. *See supra* note 27. The federal prohibition of pot is absolute, very serious, and carries lengthy punishments and costly fines. The prohibition includes the study and use of marijuana as medicine.

50. The Marihuana Tax Act of 1937, Pub. L. 75-238, 50 Stat. 551 (1937).

51. Mark Eddy, Cong. Research Serv., RL33211, Medical Marijuana: Review and Analysis of Federal and State Policies 9 (2010), http://fas.org/sgp/crs/misc/RL33211.pdf.

and increased penalties, through the passage of the Boggs Act of 1952[52] and the Narcotics Control Act of 1956.[53]

During the 1960s, some States' regulation of marijuana reflected the reality that marijuana usage had become common among white middle-class college students.[54] By the end of the decade, several States had decriminalized the drug, while many others had weakened their laws against cannabis use.[55] Despite this movement towards decriminalization, in 1969, President Richard M. Nixon declared a "war on drugs," namely, to eradicate, interdict, and incarcerate drug offenders.[56] In 1970, he signed into law the Controlled Substances Act (hereinafter "CSA"),[57] which, *inter alia*, prohibited marijuana and classified it as a Schedule 1 dangerous drug.[58] President Nixon demonized drug use and addiction,[59] declaring drug abuse as "public enemy number one."[60] In retrospect, President Nixon used the WOD as a means to punish his political dissidents[61] and was not based on public health and safety concerns.[62] The result of the WOD was an addition

52. Boggs Act of 1952, Pub. L. No. 82-255, 65 Stat. 767 (1951). The Boggs Act of 1952 amended the penalty provisions applicable to persons convicted of violating certain narcotic laws, such that a first federal offense conviction for marijuana possession carried a minimum sentence of two to ten years and a fine of up to $20,000.

53. Narcotics Control Act of 1956, 70 Stat. 567 (1956). The Narcotics Control Act of 1956 sought to reducing narcotics trafficking and use in the United States, by, *inter alia*, increasing the penalties and mandatory minimum prison sentences outlined by the Boggs Act of 1951 and introduced the death penalty for certain drug offenses.

54. *See generally,* CHARLES A. REICH, THE GREENING OF AMERICA (1995), THEODORE ROSZAK, THE MAKING OF A COUNTER CULTURE (1968).

55. *Id.*

56. *See generally,* TONY PAYAN, A WAR THAT CAN'T BE WON (2013).

57. *See* CSA, *supra* note 4, which, *inter alia*, repealed the MTA.

58. *See* Reich, *supra* note 54.

59. *See also,* Emily, Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), https://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319.

60. *See* Reich *supra* note 54 (stating that the term "War on Drugs" was popularized after President Richard Nixon's press conference on June 18, 1971).

61. Top Nixon advisor John Ehrlichman later acknowledged the President's political motivation behind the WOD:

> 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.

Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/, archived at https://perma.cc/W4S3-ASXS.

62. President Nixon viewed drug users as law-breaking hedonists that deserved to be punished, not because pot was harmful to society. *See* Reich, *supra* note 54. At the federal level, marijuana remains classified as a dangerous drug, despite science and popular opinion.

of fuel and more victims to segments of society that were already over-policed.[63]

During the 1980s, President Ronald W. Reagan accelerated the WOD.[64] During his administration, federal penalties for the cultivation, possession, or transfer of marijuana were increased,[65] with harsher penalties and mandatory sentences with the enactments of the Comprehensive Crime Control Act (1984),[66] the Anti-Drug Abuse Act (1986),[67] and the Anti-Drug Abuse Amendment Act (1988).[68]

On the judicial front, the United States Supreme Court supported the WOD through its interpretation of the Supremacy Clause of the United States Constitution.[69] In two separate cases, *United States v. Oakland Cannabis Buyers' Cooperative*[70] and *Gonzales v. Raich*,[71] the Court ruled twice that the federal government has the right to regulate and criminalize marijuana, whether in medical or recreational use.[72] Accordingly, federal laws that prohibit marijuana use and sale preempt State legalization laws.[73]

63. Don Stemen, *Beyond the War: The Evolving Nature of the U.S. Approach to Drugs*, 11 HARV. L. & POL'Y REV. 375, 386 (2017) ("an increase in sentence lengths [including harsh mandatory minimums], reaffirmation of the death penalty, an expansion of criminal offenses and a change in the stated purposes of corrections").

64. *See* Michael McGrath, *Nancy Reagan and the Negative Impact of the "Just Say No" Anti-Drug Campaign*, GUARDIAN (Mar. 8, 2016), https://www.theguardian.com/society/2016/mar/08/nancy-reagan-drugs-just-say-no-dare-program-opioid-epidemic.

65. Stephen R. Kandall, *Substance and Shadow: Women and Addiction in the United States*, 235 (1996) (providing that "In 1992 more than 340,000 people were arrested . . . [b]y the middle of 1994 approximately four million arrests for marijuana violations had been recorded since the early 1980s").

66. Pub. L. 98-473, 98 Stat. 197 (1984) (establishing Sentencing Commission, which established mandatory sentencing guidelines).

67. Pub. L. 99-570, 100 Stat. 3207 (1986) (changing the system of federally supervised release from a rehabilitative system into a punitive system and enacting new mandatory minimum sentences for drugs, including marijuana).

68. Pub. L. 100-690, 102 Stat. 4181 (1988) (creating the policy goal of a drug-free America, establishing the Office of National Drug Control Policy, and requiring mandatory minimum penalties to drug trafficking conspiracies and attempted drug trafficking offenses).

69. Meaning that federal laws preempt conflicting State and local laws.

70. 532 U.S. 483 (2001) (rejecting the common-law medical necessity defense to crimes enacted under the federal Controlled Substances Act of 1970, regardless of their legal status under the laws of States such as California that recognize a medical use for marijuana).

71. 545 U.S. 1 (2005) (previously *Ashcroft v. Raich*) (upholding the constitutionality of the Controlled Substances Act, affirming that Congress has the power to regulate marijuana possession, sale, and cultivation was affirmed, and that, under Congress' Commerce Clause of the U.S. Constitution, Congress may criminalize the production and use of homegrown marijuana even if state law allows its use for medicinal purposes).

72. *See supra* note 69; *see also,* Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001).

73. *See Gonzales*, 545 U.S at 40 (explaining that it was impossible to distinguish between "controlled substances manufactured and distributed intrastate" and "controlled substances manufactured and distributed interstate," because drugs like marijuana are fungible commodities, and that marijuana was only an instant away from entering the interstate market, whether or not it was legally obtained in a state that has passed marijuana reform).

The battle over the enforcement of the federal prohibition of marijuana has flip-flopped in the most recent two presidential administrations.[74] Following the 2012 reelection of President Barack H. Obama, his administration took a careful, painfully slow approach to assessing its past policy goals relative to drug regulations.[75] Then, on August 29, 2013, the United States Department of Justice announced a bold, hands-off policy, known as the "Cole Memorandum," which specified that the commercial distribution of cannabis would generally be tolerated, unless violence or firearms were involved, the proceeds went to gangs and cartels, or it was distributed to states where it was illegal.[76] This policy continued throughout the balance of the second term of the Obama administration.

In 2016, Donald J. Trump was elected as the 45th President, along with a Republican Party control of the Congress, with the expectation that the new leadership would reassess the federal enforcement of marijuana regulations.[77] Some expected that the new administration would challenge the Obama administration's tolerance of State legalization of marijuana with minimal federal roadblocks.[78] As predicted, on January 4, 2018, the Donald J. Trump administration, under then United States Attorney General Jeff Sessions, rescinded the Cole Memorandum and issued an updated memorandum instructing U.S. Attorneys to enforce the federal law prohibiting marijuana.[79] As such, Attorney General Sessions granted more discretion to federal prosecutors, allowing them to "use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country."[80] The stated purpose of the guidance was to allow federal prosecutors to decide whether to crack down on marijuana businesses in States where the substance is legal, for recreational use.[81] Despite these stated federal policies, states and municipalities have

74. Namely, the Obama and Trump administrations.

75. The White House, *Obama Administration Releases 21st Century Drug Policy Strategy* (Apr. 17, 2012), https://obamawhitehouse.archives.gov/ondcp/news-releases-remarks/obama-administration-releases-21st-century-drug-policy-strategy (last visited Aug. 14, 2019).

76. *Memorandum for All United States Attorneys: Guidance Regarding Federal Marijuana Enforcement*, OFFICE OF THE DEPUTY ATTORNEY GENERAL (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

77. *See generally,* German Lopez, *The Trump Administration's New War on Marijuana, Explained,* VOX (Jan. 5, 2018), https://www.vox.com/policy-and-politics/2018/1/4/16849866/marijuana-legalization-trump-sessions-cole-memo.

78. *Id*.

79. *Id.*

80. *Id.*

81. *Id.* "This is going to create chaos . . . If enforcement of laws are (sic) subject to the whims of individual prosecutors, no one will have any idea what is legal or what isn't—because it could change from day to day." *Id.*

continued to legalize marijuana, both for recreational and medicinal use, and the Trump Administration has not stood in their way.[82]

2. The WOD Has Failed.[83]

Despite its federal support for many years, the WOD has failed to achieve its stated goal to reduce the use of drugs, for several reasons. First, the WOD has not mitigated the use of marijuana.[84] Second, the WOD created a major drain on law enforcement resources.[85] According to the Federal Bureau of Investigation's annual Uniform Crime Report, there have been over twelve million cannabis arrests in the United States since 1996, including 749,825 arrests for marijuana violations in 2012.[86] As a result, by requiring police officers to pursue pot users, the WOD has diverted police attention from serious violent crimes.[87] Third, the WOD has been expensive; it is estimated to cost the United States fifty-one billion dollars each year.[88]

82. Joseph Misulonas, *These Charts Show the Evolution of America's Marijuana Laws over Time*, CIVILIZED (Aug. 31, 2017), https://www.civilized.life/articles/evolution-america-marijuana-laws-charts (providing various charts that demonstrate the exponential growth of marijuana reform in the United States and the inevitability of a federal level change).

83. *See generally,* GLOBAL COMMISSION ON DRUG POLICY, WAR ON DRUGS (June 2011), https://www.scribd.com/fullscreen/56924096 (declaring: "The global war on drugs has failed, with devastating consequences for individuals and societies around the world . . . fundamental reforms in national and global drug control policies are urgently needed.").

84. Marijuana is the most widely used illicit drug in both the United States and the world. *See Drug Facts: Marijuana*, NATIONAL INSTITUTE OF DRUG ABUSE (Feb. 2018), https://www.drugabuse.gov/publications/drugfacts/marijuana. Furthermore, an estimated twenty-two million people have used marijuana in a past month. Substance Abuse and Mental Health Services Administration, *Results from the 2015 National Survey on Drug Use and Health: Detailed Tables*, https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015/NSDUH- DetTabs-2015.htm.

85. Brian Stauffer, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HUMAN RIGHTS WATCH (Oct. 12, 2016), https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states (noting that every twenty-five seconds within the United States, a person is arrested for simply possessing marijuana for their personal use). Marijuana arrests comprise of almost one-half (48.3 percent) of all drug arrests reported in the United States. According to the American Civil Liberties Union, there were 8.2 million marijuana arrests from 2001 to 2010, and 88 percent of those arrests were just for the possession of marijuana. *Id*.

86. JONATHAN P. CAULKINS, BEAU KILMER, MARK A. R. KLEIMAN, MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW? (2016).

87. Christopher Ingraham, *Police Arrest More People for Marijuana Use than for all Violent Crimes—Combined*, WASH. POST (Oct. 12, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/10/12/police-arrest-more-people-for-marijuana-use-than-for-all-violent-crimes-combined (stating "at least 137,000 people sit behind bars on simple drug-possession charges, according to a report released Wednesday by the American Civil Liberties Union and Human Rights Watch").

88. *See supra* note 15; *see also,* Common Sense for Drug Policy, Drug War Policy, https://www.drugwarfacts.org/ (last visited July 17, 2019).

Fourth, the WOD has produced a disparate impact on people of color. While marijuana use is roughly equal among Blacks[89] and whites, Blacks are nearly four times more likely to be arrested for marijuana possession.[90] Further, although whites, Blacks, and Latinos use and sell drugs at similar rates, fifty-seven percent of the people incarcerated in state prison for drug offenses are Black or Latino.[91] Unfortunately, the criminalization of marijuana use has facilitated the government's harassment of racial minorities[92] and has disproportionally damaged minority communities.[93] Despite the fact that marijuana use was not always associated with people of color,[94] the criminalization of marijuana has been founded on racism and

89. The author has chosen to use the capitalized adjective "Black" to refer to Americans of the African diaspora and "Latino" to refer to Americans of Hispanic descent, while using the lowercased adjective "white" to refer to Americans of European ancestry. *See* Lori L. Tharps, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html, archived at https://perma.cc/SA U7-63XJ (last visited July 22, 2019).

90. *See* Drug War Statistics, *supra* note 15 ("In the 39 states for which we have sufficient police data, Black adults were more than four times as likely to be arrested for marijuana possession as white adults." (Footnotes omitted.)). *See also, supra* note 20, THE WAR ON MARIJUANA IN BLACK AND WHITE; Alex Burnes, *Colorado Could Move to Clear Pre-Legalization Marijuana Convictions Statewide as soon as 2019, Black and Hispanic Coloradans Have been Disproportionately Burdened by Marijuana-Related Arrests*, COLORADO INDEPENDENT (Dec. 6, 2018), https://www.coloradoindependent.com/2018/12/06/colorado-marijuana-convictions-2019/ (last visited Aug. 4, 2019).

91. *See* Drug War Statistics, *supra* note 15. There is historical evidence showing that a significant reason for the marijuana ban by the U.S. government was political and racist in nature, aimed to suppress Black and Mexican minorities. *See also,* L. M. VAN HET LOO ET AL., CANNABIS POLICY, IMPLEMENTATION AND OUTCOMES (2003) (stating that statistics show that controlling cannabis use leads in many cases to selective law enforcement, which increases the chances of arresting people from certain ethnicities. For example, while Blacks and Hispanics constitute about twenty percent of cannabis users in the United States, they accounted for fifty-eight percent of cannabis offenders sentenced under federal law in 1994).

92. Similarly, the prohibition of alcohol facilitated the rise of the Federal Bureau of Investigation as a national police force. *See generally, infra* Part III.

93. *See* Bender, *supra* note 22; Short, *supra* note 23.

94. *See generally,* Caulkins, *supra* note 86; MARTIN BOOTH, CANNABIS: A HISTORY (2005); ERIC SCHLOSSER, REEFER MADNESS (2003) (detailing the history of marijuana laws in the United States); Dr. Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place?*, DRUG POLICY ALLIANCE (Oct. 8, 2014), http://www.drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place (last visited Aug. 4, 2019).

xenophobia.[95] As a result, one scholar has referred to the WOD as a "war on people of color,"[96] with particular harm suffered by the Black community.[97]

Fifth, the WOD has negatively impacted research of the medicinal benefits of marijuana. In fact, the United States Food and Drug Administration has prohibited the research and use of marijuana as medicine.[98] Despite this probation, in 2015 Congress, by approving the Rohrabacher-Farr Amendment,[99] sought to restrict federal raids, arrests, and criminal prosecutions of medical marijuana activities, by prohibiting the Justice Department from using funds to prevent state implementation of medical marijuana laws.[100]

Sixth, the WOD is eroding with the federal government's repeal of the prohibition of the industrial use of cannabis for Hemp.[101] Originally, Hemp

95. *See generally,* NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 16 (1972); WILLIAM O. WALKER, DRUGS IN THE WESTERN HEMISPHERE: AN ODYSSEY OF CULTURES IN CONFLICT, 45 (1996).

96. *See generally,* David McDonald, *The Racist Roots of Marijuana Prohibition*, FOUNDATION FOR ECONOMIC FREEDOM (Apr. 11, 2017), https://fee.org/articles/the-racist-roots-of-marijuana-prohibition/.

97. *See* Short, *supra* note 23. Even with the legalization of pot, Blacks are more susceptible to being arrested for marijuana sale or possession than are whites. *See, e.g.*, Drug Policy Alliance, *From Prohibition to Progress: A Status Report on Marijuana Legalization* (Jan. 2018), http:// www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf# page=7.

98. *See* NATIONAL INSTITUTE on DRUG ABUSE, MARIJUANA AS MEDICINE (July 2019), https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine.

99. *See* Amendment Text: H. Amdt.748 — 113th Congress (2013–2014), https://www.congress.gov/amendment/113th-congress/house-amendment/748/text (last visited Aug. 13, 2019) and has been reenacted every year to date. Initially, the DOJ narrowly interpreted the Amendment to only apply to limit enforcement against state officials. *See also,* United States v. McIntosh, 833 F.3d 1163 (2016) (the U.S. Ninth Circuit Court of Appeals rejecting the DOJ's restrictive reading of the Amendment, in a case consolidating the appeals of ten medical cannabis providers in the states of California and Washington, in a unanimous ruling of the three-judge panel).

100. *See* Harris, *supra* note 76.

101. Marijuana Moment, *Hemp is Officially Legalized with President Trump's Signature on Farm Bill*, BOSTON GLOBE (Dec. 20, 2018), https://www.bostonglobe.com/news/marijuana/2018/12/20/hemp-officially-legalized-with-president-trump-signature-farm-bill/aKmNr3iS2AVJuRUbLPnz6I/story.html. The distinction between Cannabis, Cannabinoids (hereinafter "CBD"), and Hemp can be confusing. *See* Spencer Jakab, *The Verdict on CBD Is . . . Confusing*, WALL ST. J. (June 4, 2019) (reporting that a leading cannabis exchange-traded fund fell by a little over five percent and then rebounded following a United States Food and Drug Administration hearing on hearing on CBD), *available at* https://www. wsj.com/articles/the-verdict-on-cbd-is-confusing-11559685073 (last visited Aug. 13, 2019). Throughout the United States, CBD, a non-psychoactive component of cannabis, is widely marketed for medicinal purposes. *See generally,* NCSL, State Medical Marijuana Laws, http:// www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited July 22, 2019). In December 2018, President Donald J. Trump signed into law the 2018 Farm Bill, which declassified hemp as no longer a Schedule 1 drug and legalized the growth of hemp by licensed growers. As a result, hemp-derived CBD is no longer federally prohibited, while CBD derived from marijuana is prohibited at the federal level. *See* John Hudak, *The Farm*

was illegal to grow without a permit under the CSA, due to its relation to cannabis, and because it was an imported product, there was a zero-tolerance policy.[102] However, on December 20, 2018, President Trump signed the 2018 United States Farm Bill, which de-scheduled Hemp, making cannabis plants that contain less than 0.3% THC legal.[103] This action on the part of the Trump Administration sends a strong signal that the WOD, at least relative to marijuana, may be coming to an end.[104]

In summary, the legalization of marijuana should be reviewed within the context of the WOD and its failures. Legalization also reflects the need to address the shortcomings of the criminal justice system, such as the need to make jails and prisons more humane and to reduce the high costs of incarceration.[105] Furthermore, States that have legalized marijuana receive a new tax revenue stream, resulting from licensed marijuana sales.[106] However, when a State legalizes marijuana, it creates two groups of pot users: those who are legally permitted to smoke or consume weed today, and those who now have criminal records and are in prison, because they smoked or consumed it in the past. This discrepancy in the classification of criminality, based solely upon when the activity occurred in time, raises an issue of equal justice and demands a review of the laws of retroactivity.[107]

B. Retroactivity is Not Guaranteed.

The foregoing history of the WOD leads to a new chapter in the regulation of marijuana, namely, the legalization at the state level. This section analyzes whether marijuana legalization laws apply retroactively to past pot offenders. It begins with a review of retroactivity rules, as currently applied in the United States when newly enacted laws reduce or eliminate (diminishes) criminal culpability standards. As will be examined in detail,

Bill, Hemp Legalization and the Status of CBD: An Explainer, BROOKINGS (Dec. 14, 2018), https://www.brookings.edu/blog/fixgov/ 2018/12/14/the-farm-bill-hemp-and-cbd-explainer/.

102. FRANK J. HOUSE, AGRICULTURAL PROGRAMS, TERMS AND LAWS 146 (2006).

103. *See* Marijuana Moment, *supra* note 97.

104. *See* Marianne Levine, *Gardner: Trump Said He Would Sign Pot Bill*, POLITICO (Apr. 4, 2019), https://www.politico.com/story/2019/04/04/cory-gardner-trump-marijuana-bill-1255762.

105. *See* JAMES AUSTIN ET AL., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION (Nov. 2007), http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf (stating that the U.S. spends an estimated $68 billion per year on incarceration, with a sixth of those numbers as marijuana drug related offenses. A reduction in the prison population due to decriminalizing marijuana could save an average of $11.3 billion per year on courts, police, prison guards and other related expenses.).

106. *See* Jon Gettman, Marijuana Production in the United States, BULLETIN OF CANNABIS REFORM (2006) (reporting that marijuana is the top cash crop in twelve states, is one of the top three cash crops in thirty states, and is one of the top five cash crops in thirty-nine states, and estimating the value of U.S. pot production at 35.8 billion dollars, which is more than the combined value of corn and wheat).

107. *See supra* note 46.

in the U.S., such laws apply retroactively only when the legislation expressly provides for such. However, they do not apply retroactively when the legislation is silent as to retroactivity.[108] This second rule of retroactivity, when the law is silent, conflicts with most jurisdictions around the world, which adopt the position that when a new criminal law diminishes criminal culpability, the new, diminished standard *automatically* applies retroactively.[109]

Even when retroactivity is explicitly provided for in newly enacted laws, such laws seldom spell out the specifics as to how and when retroactivity applies.[110] For example, while California's legalization laws expressly provided for retroactivity, it continues to struggle with the depth and scope of the relief.[111] Next, to better understand how retroactivity rules apply in the case of marijuana legalization, I will discuss two legal sources of criminal legalization: legislative laws and executive laws. These and other sources of laws show how retroactivity rules are often inconsistent.

1. Legislative Laws

State criminal laws are "legislative," that is, enacted at the state level by the legislature and signed into law by the governor.[112] For purposes of this Article, such legislative laws will be organized into two categories. The first is comprised of laws that define and punish new criminal behavior, called "new crimes." The second is composed of laws that eliminate or lessen past crimes, called "reform laws." The legalization of marijuana falls into the reform law category. However, regardless of the category, all criminal laws require an effective date of enforcement.

Both types of legislative laws, new crimes and reform laws, are meant to apply prospectively, and become effective sometime in the future, after

108. *See generally,* University of San Francisco School of Law, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 65-73 (May 2013), Section II, D. Retroactive Application of Ameliorative Law (analyzing retroactive amelioration on a global scale and concluding that the United States is one of few countries to not expressly grant this right to its citizens).

109. *See generally, id.* (concluding the global reality is that most countries consider positive retroactive application of a change in law to be a basic and fundamental right).

110. *See, e.g.,* California Proposition 64, *supra* note 4; (full text available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB64); *supra* note 8; *see also,* Lee Gaines, *How Do You Clear a Pot Conviction From Your Record?*, THE MARSHALL PROJECT (Nov. 27, 2017), https://www.themarshallproject.org/2017/11/27/how-do-you-clear-a-pot-conviction-from-your-record.

111. *See infra*, Part I, C.; California Proposition 64, *supra* note 4; (full text available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB64).

112. *See Criminal Law: 1.6 Sources of Law*, ER SERVICES, https://courses.lumenlearning.com/suny-criminallaw/chapter/1-6-sources-of-law/ (last visited Aug. 14, 2019).

being signed into law.[113] While most are meant to continue for an indefinite period; a few are deemed to "sunset," that is, terminate on a given, set timetable.[114]

Contrary to prospective application, not all new legislative criminal laws are meant to apply retroactively. For example, a criminal law, called a "new crime," that applies retroactively to criminally punish past behavior or activity is an ex post facto law,[115] and is expressly prohibited by the Ex Post Facto Clause of the U.S. Constitution (hereinafter the "Clause").[116] Nonetheless, the Supreme Court has found that this Clause does not constitute an absolute bar against criminal ex post facto laws.[117] For example, in *Smith v. Doe*, the Supreme Court upheld Alaska's "Megan's Law" that required sex offenders to register with local police, to thereafter provide for public notifications via the Internet.[118] The Court determined that the legislative intent was civil and non-punitive.[119] Hence, the law did not violate the ex post facto prohibition.[120] Therefore, not all laws with retroactive effects are held to be unconstitutional.[121]

Most importantly, as the legalization of marijuana is a type of reform law, the focus shifts to how the retroactivity rules relate to these types of laws as opposed to "new crime" laws. The issue of retroactivity becomes less clear when a new law lessens or eliminates criminal liability. For example, a new marijuana law might provide that an adult can possess and consume a limited amount of marijuana for their personal use, regardless of

113. CONGRESS.GOV, *Enactment of a Law - Learn About the Legislative Process*, https://www.congress.gov/resources/display/content/Enactment+of+a+Law+-+Learn+About+the+LegislAtive+Process (last visited Aug. 14, 2019).

114. *Sunset Provision Law and Legal Definition*, U.S. LEGAL, https://111definitions.uslegal.com/s/sunset-provision/ (last visited Aug. 14, 2019).

115. *See* Cornell Law School, *Ex Post Facto*, Legal Information Institute https://www.law.cornell.edu/wex/ex_post_facto (last visited Jan. 2, 2020). *See also, infra* Part III.

116. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post fact Law, or Law impairing the Obligation of Contracts . . . ."). These provisions, though actually comprised of two separate clauses, will be referred as the "Ex Post Facto Clause" or the "Clause." *See also, infra* Part III.

117. Smith v. Doe, 538 U.S. 84 (2003). Not all laws with retroactive, negative effects are unconstitutional. *See also,* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat 587 (2006) (imposing imposes new registration requirements on convicted sex offenders and applying to offenders whose crimes were committed before the law was enacted).

118. Smith v. Doe, 538 U.S. at 98-99.

119. *Id.* at 105-106 (holding the Act "establish[ed] a civil regulatory scheme. The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause.").

120. *Id.* at 106.

121. *See generally,* Smith v. Doe, 538 U.S. 84 (2003). *See also,* U.S. Federal Sentencing Guidelines, U.S.S.G. § 1B1.11 (2012) (stating the rules as they relate to the effects of ex post facto).

the purpose.[122] This modifies the old marijuana rule which expressly prohibited any such possession and use.[123] If said change results from a legislative law and that law is silent as to retroactivity, a past offender would not be exonerated for the same activity that is now no longer illegal.[124]

Unlike ex post facto laws that punish past behavior, there is no constitutional prohibition against a reform law applying retroactively to exonerate or lessen past criminal behavior or activity.[125] As a result, legislative laws are *permitted* to apply retroactively.[126]

As there is no constitutional prohibition, such laws apply retroactively, when the legislation in and of itself explicitly provides.[127] On the other hand, it appears that legislative laws do not apply retroactively, when the legislative law is either silent or when it expressly states that it does not apply retroactively.[128]

Another problem that exists with the retroactivity of legislative laws is the "separation of powers" features of the Constitution.[129] This means

122. *See* J. Richard Couzens & Tricia A. Bigelow, *Proposition 64: "Adult Use of Marijuana Act" Resentencing Procedures and Other Selected Provisions* (Nov. 2016), http://www.courts.ca.gov/documents/prop64-Memo-20161110.pdf (last visited Aug. 14, 2019).

123. *Id.*

124. *See* Mikos, Zezima, *supra* note 28. *See also,* Berman, *supra* note 28 (noting "[s]ome limits on the reach of ameliorative efforts are formalized in the laws providing for record sealing or expungement: many statutes that create or expand expungement or sealing mechanisms still often place significant waiting periods before any remedy is available to an ex-offender or limit relief to the lowest level of offenders and offenses.").

125. *See* Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America (3d ed. 1900); The New International Encyclopædia, *supra* note 111.

126. Cooley, *supra* note 125.

127. *See* S.B. 5605, 66 Leg., Reg. Sess. (Wa. 2019) http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5605.pdf (last visited Aug. 14, 2019). Sec. 1. RCW 9.96.060 and 2017 c 336 s 2, 2017 c 272 s 9, and 5 2017 c 128 s 1 are each reenacted and amended to read as follows:

> (1) Every person convicted of a misdemeanor marijuana offense under RCW 69.50.4014, who was twenty-one years of age or older at the time of the offense, may apply to the sentencing court for a vacation of the applicant's record of conviction for the offense. The court shall vacate the record of conviction by: (a)(i) Permitting the applicant to withdraw the applicant's plea of guilty and to enter a plea of not guilty; or (ii) if the applicant has been convicted after a plea of not guilty, the court setting aside the verdict of guilty; and (b) the court dismissing the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence.

H.B. 1438, Cannabis Regulation and Tax Act (2019), http://www.ilga.gov/legislation/publicacts/101/PDF/101-0027.pdf (last visited Aug. 14, 2019).

128. *See generally,* University of San Francisco School of Law, *supra* note 108.

129. *See* Harold J. Krent, *Retroactivity and Crack Sentencing Reform* (April 26, 2013) (Chicago-Kent College of Law Research Paper No. 2013-19) https://ssrn.com/abstract=2257086 (last visited July 22, 2019) (analyzing, inter alia, "two separation of powers concerns that might justify a rule against retroactive application of congressional leniency: first, whether Congress's reduction of sentences would interfere with the President's pardon authority under Article II, and second, whether Congress lacks the power to undo a final decision of the judiciary." And

legislative laws may be subject to judicial review, which could overturn the retroactive application of the newly enacted laws.[130] As will be discussed later, such legislative laws would be invalid if they wrongfully infringe on the constitutional rights of a past offender.[131]

2. Executive Laws

In addition to retroactivity relating to the legislative legalization of marijuana, there is another source of law that could support a case for retroactive amelioration. These are Executive Orders or actions of the President or the Governor at the State level, called "executive laws," such as clemency.

Clemency,[132] granted by the President or a State governor, is another way to obtain relief for a past offense.[133] Clemency includes the power to pardon[134] which works differently from legalization by way of legislative laws. Rather than redefining the relevant acts as noncriminal, a pardon may simply prohibit the prosecution of, or may release, a person that is already incarcerated.[135] However, this is an incomplete remedy, as it leaves the underlying conviction technically unaltered.[136] In fact, as a condition of

concluding "[t]here were no constitutional obstacles preventing Congress from benefiting those previously convicted of trafficking crack.").

130. Couzens & Bigelow, *supra* note 118.

131. *See infra* Part III.

132. *See* U.S. CONST, art. II, § 2, cl. 1 (The President "shall have power to grant reprises and pardons for offenses against the United States, except in cases of impeachment."). *See also,* P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900-1993)*, 27 PRESIDENTIAL STUDIES QUARTERLY 251 (1997) (concluding that the Supreme Court has held this includes the power to grant pardons, conditional pardons, commutations of sentences, remissions of fines and forfeiture, respites, and amnesties).

133. *Id.*

134. *See* Smith v. Doe, 538 U.S. at 98-99; *See also,* Janet Portman, *Presidential Clemency: Pardons, Commutations, and Reprieves*, NOLO, https://www.criminaldefenselawyer.com/resources/presidential-clemency-pardons-commutations-and-reprie (last visited Aug. 8, 2019).

135. U.S. DEP'T OF JUSTICE, PARDON INFORMATION AND INSTRUCTIONS, https://www.justice.gov/pardon/pardon-information-and-instructions (last visited Aug. 8, 2019):

> While a presidential pardon will restore various rights lost as a result of the pardoned offense and should lessen to some extent the stigma arising from a conviction, it will not erase or expunge the record of your conviction. Therefore, even if you are granted a pardon, you must still disclose your conviction on any form where such information is required, although you may also disclose the fact that you received a pardon. In addition, most civil disabilities attendant upon a federal felony conviction, such as loss of the right to vote and hold state public office, are imposed by state rather than federal law, and also may be removed by state action. Because the federal pardon process is exacting and may be more time-consuming than analogous state procedures, you may wish to consult with the appropriate authorities in the state of your residence regarding the procedures for restoring your state civil rights.

136. *Id.*

receiving a pardon, the recipient must admit that the crime did take place.[137] Additionally, pardons are rare and are usually granted on an individual, specific case-by-case basis.[138] While pardons are usually granted to individuals, a President or a Governor can issue a blanket, unconditional pardon or amnesty to apply to an entire group of people.[139] As will be discussed in the next section, the Governors of Washington and Illinois are aggressively using the power to pardon as a means to provide retroactive amelioration to past pot offenders.[140]

Hence, an analysis of the executive laws on retroactivity leads to the observation that while pardons support the concept of exoneration, they do not guarantee retroactive amelioration. Additionally, pardons are limited in both scope and application. That is, executive pardons usually apply to individuals, rather than groups, and provide only forgiveness, rather than the complete exoneration for a past offense. As a result, such executive laws are ill-suited to address the needs of past pot offenders.

In summary, relative to retroactive amelioration, neither legislative nor executive laws guarantee retroactivity, and, even when retroactive relief is expressly granted, such laws fail to define the scope of relief. Hence, the rules of retroactivity have a shortcoming: for legislative laws, the rules focus on the intention of the legislature, rather than the rights of the past offender. Furthermore, the legislative rules may not apply to most marijuana legalization laws, as they have resulted from statewide referendums.[141] For executive rules, retroactivity does not mean exoneration. Yet, this is only part of the problem, because, even when legalization laws expressly provide for retroactivity, the amelioration they grant is both superficial and inconsistent, as will be shown next.

137. *Supra* note 135. (Noting ". . . a presidential pardon is ordinarily a sign of forgiveness and is granted in recognition of the applicant's acceptance of responsibility for the crime and established good conduct for a significant period of time after conviction or release . . . .").

138. *Id. See also,* Tom Murse, *Number of Pardons by President*, THOUGHT CO. (Aug. 7, 2019), https://www.thoughtco.com/number-of-pardons-by-president-3367600 (last visited Aug. 8, 2019).

139. *See, e.g.,* Andrew Glass*, Carter Pardons Draft Dodgers January 21, 1977*, POLITICO (Jan. 21, 2008, 3:56 AM) (Then President Jimmy Carter granted amnesty to Vietnam War draft dodgers who had fled the United States to Canada.), https://www.politico.com/story/2008/01/car ter-pardons-draft-dodgers-jan-21-1977-007974 (last visited Aug. 13, 2019); *President Johnson's Amnesty Proclamation*, https://www.nytimes.com/1865/05/30/archives/president-johnsons-amn esty-proclamation-restoration-to-rights-of.html (last visited July 22, 2019); JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON, THE RESTORATION OF THE CONFEDERATES TO THEIR RIGHTS AND PRIVILEGES, 1861-1898 (1953).

140. *See infra* Part I.

141. *See* Marijuana Moment, *supra* note 7.

C. Retroactivity Does Not Mean Exoneration.

It is critical for past pot offenders to know if and how the legalization of marijuana exonerates their past offenses. Some of them face the most severe effect of a marijuana conviction, life in prison without the possibility of parole.[142] They need the most immediate, certain relief to address over-sentencing and the right to be released.[143] Nonetheless, all past pot offenders need comprehensive remedies to reflect the new standard of criminal culpability. To assess whether States are meeting the needs of past offenders, this Section analyzes the various approaches to retroactive amelioration for past pot offenders following legalization.[144] Specifically, it will review whether a State has expressly provided for retroactivity in its legalization laws, analyze the scope of the retroactivity when it is expressly provided for, and discuss illustrations of retroactive amelioration initiatives. Most notably, it will analyze the retroactivity issue from five criteria, seriatim: 1) certain, automatic, immediate, and inexpensive relief; 2) remediation of negative, collateral consequences of arrests or convictions; 3) post-conviction remedies; 4) reparations of communities devastated by the WOD; and 5) exoneration based upon past offenders' constitutional rights, rather than from the arbitrary grant of privilege by the government.

1. Certain, Automatic, Immediate, and Inexpensive Relief

Currently, California,[145] Illinois,[146] Oregon,[147] and Washington[148] have expressly provided for retroactive ameliorative relief in their marijuana

142. *See* Couzens & Bigelow, *supra* note 112; *See also,* Drug Policy Alliance, *It's Not Legal Yet: Nearly 500,000 Marijuana Arrests in California in the Last Decade* (Aug. 17, 2016), http://www.drugpolicy.org/news/2016/08/its-not-legal-yet-nearly-500000-marijuana-arrests-california-last-decade (last visited July 31, 2019) (noting that despite California's more permissive marijuana possession laws, the state had 465,873 marijuana arrests between 2006 and 2015 and on average 14,000 marijuana felony arrests each year (this number dropped by a third to 8,866 in 2015); Bryan Schatz, *Waiting to Die in Prison—for Selling a Couple Bags of Pot*, MOTHER JONES (2015), https://www.motherjones.com/politics/2015/07/life-sentence-marijuana-pot-prison-commuted/ (last visited Feb. 3, 2020) ("Federal judges have sentenced 54 people to life without parole for marijuana crimes since 1996.").

143. *See* Berman, *supra* note 28.

144. This is a select sampling of legalization laws and not meant to be representative of all such laws.

145. Section 11361.8 is added to the Health and Safety Code. Olson, Hagel and Fishburn LLP, *Control, Regulate and Tax Adult Use of Marijuana* Act, 52-55; 58-60 (2016), https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf (last visited July 24, 2019).

146. *See* H.B. 1438, *supra* note 124 (providing, inter alia, for expungement of marijuana offenses and defining "expunge" to mean to "physically destroy the records or return them to the petitioner and to obliterate the petitioner's name from any official index or public record, or both.").

147. *See* OR. REV. STAT. § 137.225 (2016) (uncodified provision § 129); H.B. 1438, *supra* note 124.

148. *See* S.B. 5605, *supra* note 126.

reform laws—by providing for the possibility of a revised sentence and/or expungement of a criminal record.[149]

However, even when a State has an aggressive approach to retroactive amelioration, the relief made available does not satisfy the needs of past offenders for several reasons. First, the relief does not provide certainty or consistency. For example, misdemeanor charges are treated differently from felony changes. In 2018, former San Francisco District Attorney, George Gascón, announced that without petitions, he will dismiss and seal more than three thousand *misdemeanor* marijuana convictions in San Francisco dating back to 1975; yet, relative to pot-related *felony* cases, less than two dozen people in San Francisco filed for expungement.[150] Additionally, there is no guaranteed consistency from one county to another. For example, in April 2019, prosecutors in Los Angeles and San Joaquin counties announced their plans to automatically clear approximately fifty-four thousand marijuana-related convictions.[151] Yet, it is unclear whether other jurisdictions in the State of California have or will respond to the new laws in a consistently acted, if at all.[152] Second, even with retroactivity, such as in California, the laws produce uncertainty, as they do not designate how far back in time the new laws shall apply.[153] Whether the new laws apply retroactivity for ten years, twenty years, or longer is not clear.

Third, even when legalization laws provide for retroactivity, such as in California, the process is cumbersome, as it often requires a past offender to actively apply for relief.[154] This can be both time consuming and

149. *See supra* notes 145-8; Kyle Jaeger, *States That Legalize Marijuana Need to Do This Too*, ATTN.COM (Nov. 23, 2016) https://www.attn.com/stories/13022/the-one-law-all-states-with-legal-marijuana-need (providing a useful link to *The Orange County Register*, showing the difference in marijuana-related penalties under California's new law, at https://www.ocregister.com/2016/11/07/if-prop-64-passes-what-happens-to-prisoners-convicted-of-marijuana-charges/).

150. *See also,* Evan Sernoffsky, *SF Will Wipe Thousands of Marijuana Convictions off the Books*, SFGATE.COM (Feb. 1, 2018), http://www.sfgate.com/news/article/SF-will-wipe-thousands-of-marijuana-convictions-12540550.php (last visited July 24, 2019); *see also,* Press Release, News from the Office of District Attorney George Gascón, District Attorney George Gascón Applies Proposition 64 Retroactively to Every Marijuana Case Since 1975 (Jan. 31, 2018), https://sfdistrictattorney.org/district-attorney-george-gasc%C3%B3n-applies-proposition-64-retroactively-every-marijuana-case-1975 (last visited July 24, 2019).

151. *See* Alene Tchekmedyian, *Prosecutors Move to Clear 54,000 Marijuana Convictions in California*, L.A. TIMES (Apr. 1, 2019), https://www.latimes.com/local/lanow/la-me-ln-la-county-marijuana-convictions-20190401-story.html (last visited July 24, 2019).

152. *See* Mikos, *supra* note 29.

153. *See* Sernoffsky*, supra* note 147.

154. *See* Zezima, *supra* note 28 (stating that "[i]n most places, people must specifically request to have their records expunged, a process that can be costly and time-consuming. Though the laws largely aimed to help low-income people, there is concern that the petitioning process makes it more difficult, and therefore less likely, that they will move to have their records changed.").

expensive.[155] California recognized the need to expedite its retroactive amelioration of past offenders and enacted additional laws to facilitate some relief.[156] However, even under the new laws, applying for retroactive relief does not ensure such relief will be granted.[157] Some of the uncertainty relates to the fact that not every case of a criminal offense is the same. In one case, the record of a marijuana conviction might have resulted from a plea bargain of a more severe charge.

Fourth, retroactivity only applies in the jurisdiction that has legalized marijuana, and it does not apply to a *federal* marijuana-related offense, since the drug is still criminally proscribed at the federal level. The result is that one major goal of marijuana reform, redressing the injustices of the WOD is failing.

Fifth, the same problems occur when a Governor uses the pardon power, as in Washington.[158] A past offender looking to the pardoning power for relief faces an additional problem, in that it merely excuses, but does not fully exonerate, a past offender.

Observation #1: The legalization laws fail to provide past offenders with certain, automatic, immediate, and inexpensive exoneration of past offenses.

155. *Id*.

156. California Assem. Bill 1793, 2017-2018 Reg. Sess. (Cal. 1999), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1793; *see* Lindsay Schnell, *Marijuana Reform: New California Law Gives People with Records a Do-Over*, USA TODAY (Oct. 1, 2018), https://www.usatoday.com/story/news/2018/09/30/california-passes-landmark-marijuana-law-residents-reclaim-lives/1340729002/ (reporting that Assembly Bill 1793 was signed into law by Gov. Jerry Brown and will streamline a previously tedious process that made it difficult for residents with a prior pot-related conviction to clear their names).

157. *See* Lee Gaines*, How Do You Clear a Pot Conviction from Your Record?*, MARSHALL PROJECT (Nov. 27, 2017), *https://www.themarshallproject.org/2017/11/27/how- do-you-clear-a-pot-conviction-from-your-record* (last visited July 31, 2019).

158. On May 13, 2019, Governor Jay Inslee signed SB 5605, Concerning Marijuana Offense Convictions, https://app.leg.wa.gov/billsummary?BillNumber=5605&Chamber=Senate&Year=2019 (last visited July 3, 2019). As of July 28, 2019, every person convicted of misdemeanor marijuana possession offenses in Washington, who was 21 years of age or older at the time of the offense, may apply to the sentencing court to vacate his or her conviction record for the marijuana offense. *Id*. In order to expedite the impact of the new law, Governor Inslee issued the Marijuana Justice Initiative, https://www.governor.wa.gov/marijuanajustice (last visited July 3, 2019):

> Under this Initiative, Inslee will exercise his constitutional clemency authority to pardon individuals who have a single conviction on their criminal record. That sole conviction must be for adult (21+) misdemeanor marijuana possession, prosecuted under state law in Washington. The conviction must have occurred between January 1, 1998 and December 5, 2012, when I-502 legalized marijuana possession. Records indicate that roughly 3,500 individuals are eligible under this Initiative.

2. Remediation of Negative, Collateral Impacts

The past marijuana laws have negative, collateral consequences[159] on a large number of offenders.[160] For example, over two hundred thousand students have lost federal financial aid eligibility because of drug convictions.[161] Other collateral consequences of marijuana offenses include negative impacts on employment,[162] professional licensing,[163] immigration,[164] travel,[165] and governmental benefits.[166] Unfortunately, past (and some current) marijuana laws have created a second-class tier of

159. *See supra* note 14.

160. *See infra* Part I, on how the legalization laws fail to remediate collateral consequences for past offenders.

161. *See* Drug War Statistics, *supra* note 15 (because of a "drug" conviction, including pot).

162. *See* Marijuana Policy Project*, supra* note 14.

163. *See, e.g.*, CAROLINE COHN, ET AL., STANFORD CENTER ON THE LEGAL PROFESSION AND STANFORD CRIMINAL JUSTICE CENTER, UNLOCKING THE BAR: EXPANDING ACCESS TO THE LEGAL PROFESSION (identifying a range of successive obstacles to becoming a lawyer in California and recommending ways for each of these barriers to be overcome to expand access to the legal profession for qualified people with criminal records).

164. Latinos and other immigrants experience detrimental immigration consequences for marijuana possession and other drug offenses. For example, simple possession offenses are grounds for deportation of noncitizens under the Immigration and Nationality Act, unless they fall under the exception for single offense possession of small amounts of marijuana. *See* Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 531-35 (2015) (discussing how this personal-use exception can be lost by more than one marijuana offense, or by a conviction for social sharing of marijuana; also noting that there is no personal-use exception when noncitizens who travel abroad attempt to return to the United States). *See generally,* Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967 (2015) (addressing how racial profiling of minority noncitizens adds to the treacherous immigration law impact of drug offenses); GRACE MENG, HUM. RTS. WATCH, A PRICE TOO HIGH: US FAMILIES TORN APART BY DEPORTATIONS FOR DRUG OFFENSES (June 16, 2015) (discussing the rise in drug deportations and the consequent impact on families). *See also,* Tom Angell, *New Cory Booker Bill Would Protect Immigrants from being Deported for Marijuana*, FORBES (June 27, 2019), https://www.forbes.com/sites /tomangell/2019 /06/27/new-cory-booker-bill-would-protect-immigrants-from-being-deported-for-marijuana/#46 4b663f5dbe (noting that "[u]nder current law, more than 34,000 immigrants were deported for cannabis possession between 2007 and 2012, according to a Human Rights Watch reportFalse" and reporting that "In April, U.S. Citizenship and Immigration Services issued a memo clarifying that using marijuana or engaging in cannabis-related activities—including working at a state-licensed dispensary or cultivation operation—makes immigrants ineligible for citizenship because it means that they do not have 'good moral character.'" *Id*.).

165. *See* Federal Collateral Consequences, *supra* note 11.

166. For example, over two hundred thousand students have lost federal financial aid eligibility, because of a drug conviction. *See* Drug War Statistics, *supra* note 12; *see also,* U.S. DEPT. OF JUSTICE, *Denial of Federal Benefits Program*, https://www.bja.gov/ProgramDetails. as px?Program_ID=57 (last visited July 22, 2019) (noting that state and federal courts—as part of the sentencing process—have the ability to deny all or selected federal benefits to individuals who are convicted of drug trafficking or drug possession, and supplying a list of the many federal benefits that may be denied to convicted individuals).

citizenry, who are often prohibited from enjoying constitutionally guaranteed rights and other societal benefits.[167]

For example, the retroactivity provision in the California legalization laws do not address the collateral consequences that result from rightful or wrongful marijuana arrests. Hence, the stigmatizing effects of marijuana arrests are not rectified by Proposition 64. Ultimately, most current retroactivity rules do not provide for making a past offender whole, such as compensating the offender for time spent in jail or for damage done to the offender's reputation.[168]

In comparison, Illinois recently enacted the most aggressive laws to address the issue of retroactive amelioration of past pot offenders.[169] While Illinois does not require the physical destruction of circuit court files,[170] it pardons individuals with nonviolent convictions for amounts of cannabis up to thirty grams.[171] Yet, even still, the Illinois law fails to redress the negative collateral consequences past pot laws have on people's livelihoods, many of which are controlled by federal regulations.

Observation #2: The legalization laws fail to remediate past offenders of the negative, collateral consequences of the past (and some current) marijuana laws.

3. Post-Conviction Remedies

The post-conviction remedies that might be available following legalization are unsatisfactory for several reasons. First, the legalization laws fail to free people from incarceration or qualify people for parole.[172] Notwithstanding, the amelioration of past pot offenders would have a tremendous impact on the lives of people currently serving time in prisons

167. *See* Bender, *supra* note 19, at 704-05 (discussing how most low-wage employers, including fast food restaurants, retail stores, hotels, and public transportation, require drug testing, and that racial minorities may bear the brunt of these requirements through such private contracts, and, further, that past drug offenses can haunt the applicant, as more than ninety percent of employers undertake background checks on prospective employees that have criminal records).

168. *See* Margaret Colgate Love*, Forgiving, Forgetting, and Forgoing Legislative Experiments in Restoring Rights and Status*, 30 FEDERAL SENTENCING REPORTER 231 (2018); *see also,* Alana Rosen, *High Time for Criminal Justice Reform: Marijuana Expungement Statutes in States with Legalized or Decriminalized Marijuana Laws* (Feb. 1, 2019), SSRN: https://ssrn.com/abstract=3327533.

169. *See* Illinois's Cannabis Regulation and Tax Act, http://www.ilga.gov/legislation/101/HB/10100HB1438enr.htm (last visited July 3, 2019) (providing, *inter alia*, for expungement of marijuana offenses and defining "expunge" to mean to "physically destroy the records or return them to the petitioner and to obliterate the petitioner's name from any official index or public record, or both.").

170. *Id.*

171. *Id.*

172. *See generally,* Part I.B.

and jails throughout the United States.[173] Perhaps, the most significant of these situations is people who are serving of life imprisonment without the possibility of parole (hereinafter "LWOP"), due in whole or in part to a marijuana conviction.[174] Parenthetically, despite the apparent "cruel and unusual punishment" aspect of these sentences, the U.S. Supreme Court has failed to rule these sentences as unconstitutional, despite having had the opportunity to do so.[175]

Resentencing or exoneration of inmates following legalization can mean freedom, a return to family and community, the right to habitation, a return of a sense of self-worth, and the enjoyment of governmental benefits for many convicted of marijuana-related crimes.[176] For examples, California Proposition 64 expressly provides for the resentencing of people convicted under California's previous marijuana laws who would serve a lighter sentence under the new legalization regime.[177] However, the new law requires that a convicted person apply to a court in order to have their sentence reduced.[178] If serving time, such relief may mean a release from jail for time already served.[179] Thus, the impact of retroactive amelioration can be real and life-changing.

173. *See* Drug War Statistics, *supra* note 12, (noting that twenty-two states have decriminalized or removed the threat of jail time for the simple possession of small amounts of marijuana); *see also, infra*, Part I, B.

174. AMERICAN CIVIL LIBERTIES UNION, *A Living Death: Life without Parole for Nonviolent Offenses*, https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf (last visited Aug. 13, 2019). "Dale Wayne Green is serving LWOP for his role as middleman in a sale of $20 worth of marijuana to an undercover deputy . . . Green was convicted of distribution of marijuana and sentenced to mandatory life without parole as a third-strike offender under Louisiana's multiple offender law." *Id.* Mr. Green is one of many people serving excessive sentences related to marijuana offenses. *See also,* Kristen Gwynne, *Ten Worst Sentences for Marijuana-Related Crimes: Punishments of this Sort Seldom Fit the Offense, but these Cases are Especially Egregious*, SALON (Oct. 29, 2012), https://www.salon.com/2012/10/29/ten_worst_sentences_for_marijuana_related_crimes/.

175. The Editorial Board*, Outrageous Sentences for Marijuana*, The New York Times (Apr. 14, 2016), https://www.nytimes.com/2016/04/14/opinion/outrageous-sentences-for-marijuana.html (discussing implications of Booker v. Alabama and analyzing that LWOP is not cruel and unusual punishment); *see also,* Mark Hansen, *Supreme Court Refuses to Hear Challenge to Life Sentence for Pot Possession*, ABA JOURNAL (Apr. 20, 2016), http://www.abajournal.com/news/article/supreme_court_refuses_to_hear_challenge_to_life_sentence_for_pot_possession.

176. *See* Sernoffsky, *supra* note 140. As a disproportionate number of people affected by marijuana offenses are Black, the San Francisco District Attorney's decision to dismiss and seal more than 3,000 misdemeanor marijuana convictions in San Francisco dating back to 1975 for a prosecutors' review and, if necessary, re-sentence 4,940 felony marijuana cases will greatly benefit the African-American community. Rev. Amos Brown, president of the San Francisco chapter of the NAACP, said, "it is a step toward setting black people free to live in the community, to have jobs, to have health care, to have a decent education, and we just need to keep this good thing a-rollin'." *Id.*

177. *See* Ingraham, *supra* note 8.

178. *Id*.

179. *Id*.

For example, imagine that Marty (from *Back to the Future*) was convicted of transporting marijuana for sale in 2014. Imagine further, that at that time, under California law, Marty was convicted for a felony offense and was sentenced to three years in jail, as he had no prior criminal record. However, in 2016, with the enactment of Proposition 64, Marty's offense would be a misdemeanor punishable by up to six months in jail. With an aggressive approach to retroactive amelioration, Marty could file a petition for resentencing which the prosecutor should not oppose, although the process would be both costly and time consuming. As a result, his sentence would be reduced, and he would be immediately released from jail.[180]

Observation #3: An aggressive approach to retroactive amelioration would reduce some marijuana-related sentences and may be life-changing for many current inmates.

Fourth, the legalization laws fail to provide reparations to communities devastated by the WOD, specifically the socially and economically vulnerable segments of our country.[181] While the legalization of marijuana is expected to and has, in fact, increased revenue for the states in the form of sales taxes, the new laws mainly ignore the damages done to various communities. However, recently, Illinois enacted a bold provision that will provide potentially large sums of investments in those communities negatively impacted by the WOD.[182] Hence, most legalization laws fail to provide for resources, including funding, to rebuild communities devastated by the WOD.

Observation #4: The legalization laws fail to redress the WOD's harm to communities, particularly those inhabited by socially and economically vulnerable segments of society.

And fifth, the legalization laws do not guarantee a right to amelioration, let along full exoneration. Even States that expressly provide for some form of retroactive amelioration take a "top-down" approach to retroactivity. That is, they provide relief as a matter of privilege or mercy, rather than as a matter of right. In order words, past offenders would be lucky if they receive some

180. *See* AMERICAN CIVIL LIBERTIES UNION, *supra* note 169. Relative to Mr. Green, Louisiana's marijuana legalization law does not apply retroactively to exonerate a habitual offender with a minor marijuana conviction. This is because his conviction was not based on the use of marijuana for medicinal purposes. *See also,* Matt Ferner, *This Man is Serving More Than 13 Years in Prison over Two Joints' Worth of Marijuana*, HUFF POST (Aug. 14, 2015), https://www.huffingtonpost.com/entry/bernard-noble-marijuana_us_55b6b838e4b0074ba5a5e160.

181. *See* Bender, *supra* note 23.

182. *See* McDonald, *supra* note 92.

relief, rather than being entitled to relief. If past pot offenders had a constitutionally based to retroactive amelioration exists, then State governments would be required to swiftly take action to redress past offenses. To date, no State marijuana legalization laws have identified or embraced such a principle that would ensure an offender's rights to exoneration.

I believe that, for several reasons, such a right exists, as will be explored in great detail in Parts II and III of this Article. One reason relates to the retroactivity rules. Unlike normally enacted legislation, the legalization of marijuana laws have *mainly* resulted from statewide ballot measures, direct initiatives, propositions, questions, or referenda ("direct democracy"),[183] with very few of them resulting from enacted legislation.[184] This means that the retroactivity rules that apply to legislation might not apply to marijuana legalization. Furthermore, the federal prohibition of marijuana complicates the retroactivity of State marijuana laws, as federal law preempts state law.[185]

Observation #5: The legalization laws fail to provide past offenders with a right to amelioration, forcing such offenders to rely on the government's acts of mercy.

In summary, the observations relative to retroactivity and amelioration lead to a profound conclusion: current marijuana legalization laws greatly fail to ameliorate or exonerate past pot offenders, because retroactivity is not guaranteed, and, even when retroactivity is expressly provided for, amelioration is both superficial and restricted. Consequently, Part I shows that the legalization of marijuana creates a problem relative to retroactive amelioration, one that demands a strong, individual rights' solution—a

183. *See infra* Part III. *See, e.g.,* California Proposition 215, http://vigarchive.sos.ca.gov/1996/general/pamphlet/215text.htm (last visited July 22, 2019) ("the Compassionate Use Act," enacted in 1996, established a medical cannabis program), and California Proposition 64, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB64 (last visited July 22, 2019) (the "Adult Use of Marijuana Act," enacted in 2016, legalized the sale and distribution of cannabis in both a dry and concentrated form, for recreational use). Relative to direct democracy as a means of enacting changes in the law, some question it, while others defend it. *See generally,* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999); and Carson Bruno, *Is It Time To Reconsider California's Initiative System?*, STANFORD UNIVERSITY HOOVER INSTITUTE (Aug. 30, 2016), https://www.hoover.org/research/it-time-reconsider-californias-initiative-system.

184. *See* H.B. 1438, Cannabis Regulation and Tax Act (2019), http://www.ilga.gov/legislation/publicacts/101/PDF/101-0027.pdf (last visited Aug. 14, 2019).

185. *See* CSA, *supra* note 4 (explaining that the federal government prohibits marijuana, as a Schedule 1 substance). *See also, infra* Part III; *Gonzales v. Raich*, 545 U.S. 1 (2005) (ruling, 6-3, that the Commerce Clause and Supremacy Clause of the U.S. Constitution allowed the federal government to criminalize the production and use of homegrown cannabis, even if a state approved its use for medicinal purposes).

constitutional rationale for amelioration and a radical plan for remedies for past pot offenders.[186] In Part II, this Article presents a seminal solution and a model code to address the retroactivity amelioration quandary.

II. Solution

The proposed solution to the retroactive amelioration quandary is the normative claim that past pot offenders have a constitutional right to the retroactive application of new, State-adopted legalization laws.[187] Further, as the right to retroactivity would apply to a large number of past offenders over an extended period of time, I propose a broad approach to amelioration, that is, that amnesty[188] should be adopted.[189] This recommendation is detailed in the Marijuana Amnesty Code, following the main text of this Article. I have drafted the Code with the hopes that government officials and policymakers will adopt it as a model for reform in this area of law. The constitutional basis for a right to retroactive amelioration for past pot offenders is presented next.

III. Support for Retroactive Amelioration

Part III supports the normative claim that past pot offenders are entitled to retroactive amelioration in states that have legalized marijuana. This claim is based on a two-step analysis. First, there is Supreme Court support

186. This rights-based approach to the retroactive amelioration of the legalization of marijuana laws is consistent with former U.S. Supreme Court Justice Sandra Day O'Connor's vision of federalism, as a means to protect individuals from undue governmental intrusion. *See, e.g.*, Gonzales, 545 U.S. 1 at 42 (dissenting in a medical marijuana decision, stating "This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens."); City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (holding that drug checkpoints violated the Fourth Amendment protection against unreasonable searches and seizure). *See generally,* Bradley W. Joondeph, *The Deregulatory Valence of Justice O'Connor's Federalism*, 44 HOUS. L. REV. 507 (2008).

187. *See infra* Part III, under the principle of *lex mitior*, past pot offenders have the right to be judged by the new, milder standards of culpability.

188. The goal of the proposed code is to make the past offender whole, embracing the spirit of amnesty, by aggressively and immediately removing any and all negative impacts from the prior, now-antiquated law. This proposal reflects recommendations from others, including: MARIJUANA POLICY PROJECT, *Model State Civil Fine Bill*, https://www.mpp.org/issues/ legalization/model-state-legalization-bill/ (last visited Aug. 13, 2019); NORML, *Real World Ramifications of Cannabis Legalization and Legalization*, http://norml.org/pdf_files/NORML_Real_World_ Ramifications_Legalization.pdf (last visited Aug. 13, 2019) (proposing a regulatory scheme for marijuana similar to that for alcohol); S. 1689, 115th Congress (2017); NATIONAL ALLIANCE FOR MODEL STATE DRUG LAWS, *Marijuana: Comparison of State Laws Legalizing Personal, Non-Medical Use* (2016), http://www.namsdl.org/library/33FD7B09-D862-91A9-48FFEFD87F 5D46 11/ (last visited Aug. 13, 2019); AMERICAN CIVIL LIBERTIES UNION, *supra* note 169, at 14-15.

189. The provisions of the Marijuana Amnesty Code (hereinafter "MAC") are provided as an Addendum to this Article.

for the rule that a "substantive" change in the Constitution applies retroactively.[190] Second, State marijuana legalization laws are "substantive" to this issue because they reflect constitutional principles and because they largely derive from direct democracy, which are or resemble constitutional amendments.

A. Right to Retroactivity

Retroactivity rules fall into two categories: those that do not guarantee the right to retroactivity (hereinafter "privilege"), and those that do (hereinafter "right"). As previously discussed, the rules relative to retroactivity of substantive criminal laws generally focus in on an overly narrow manner on legislative and executive laws.[191] This view of retroactivity (privilege) disfavors the automatic application of retroactivity, relying instead on the "will" of the legislature or the "mercy" of the executive.[192] Generally, privilege rules disfavor retroactivity in so far as they do not imply retroactivity; rather, they require that the law expressly provide for retroactivity.[193] Pursuant to privilege rules, a past pot offender must rely on the goodwill or mercy of the government for relief.[194] Further, when privilege rules expressly provide for retroactivity, the scope of the amelioration, relative to marijuana legalization, is uncertain, costly, and superficial.[195]

Over the last several years, legal scholars have sought various rationales to overcome the privilege rules of retroactivity, especially when a sentence is final.[196] For example, Professor S. David Mitchell claims that retroactive amelioration should be based on fairness and mercy,[197] arguing that Congress

190. *See infra* Part III, B.

191. *See supra* Part I, B, for a discussion of legislative and executive laws.

192. *Id*.

193. *Id*.

194. *See supra* Part I, C, for a discussion of legislative and executive laws relative to retroactivity.

195. *Id*.

196. *See supra* note 32. *See generally,* Douglas Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J. L. & POL'Y 151 (2014) (challenging the strength of those finality interests in cases where a collateral attack seeks only to alter a criminal sentence without affecting the underlying conviction); *see also,* Reisinger, *supra* note 33. *Cf.* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J. L. & POL'Y 179, 180 (2014) (defending the government's interest in finality as a basis for many barriers to collateral relief and noting that the nonretroactivity of "new constitutional rules" of criminal procedure, in particular, is grounded principally in respect for the finality of criminal judgments). Courts are also concerned with the threat to ''comity'' between the federal government and the states that arises when federal courts overturn state court convictions on federal habeas. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 308 (''[W]e have recognized that interests of comity . . . must also be considered in determining the proper scope of habeas review.'').

197. *See* Mitchell, *supra* note 32.

has no rational reason to distinguish between those whose sentences were finalized on the day that the congressional amelioration decision went into effect, from those whose sentences were not finalized.[198] Accordingly, Professor Mitchell asserts that neither consequentialist nor retributivist theories of punishment support continuing punishment for those whose actions are subsequently legalized or punished less severely.[199] Further, Professor Harold J. Krent claims that, relative to changes in crack-cocaine sentencing, the traditional justifications against the automatic application of amelioration do not apply when Congress is the actor,[200] especially for "instrumental" reasons.[201]

In summary, both the privilege rules and the finality doctrine restrict the retroactive application of legislative criminal laws, showing deference to the will of the legislature. However, this approach fails to view retroactivity from the perspective of the constitutional rights of past offenders, who are arguably victims of an overly aggressive criminal justice system. What is needed is a theory of retroactivity, which will effectively exonerate the millions of past pot offenders in states that have legalized pot. This circumstance is particularly unique and compelling because not only has marijuana use become legal with widespread public support, but licensed sellers are able to actively capitalize off of these marijuana reforms while others remain in prison for the same act.

Contrary to the privilege rules, there is another body of retroactivity rules, by which a person is entitled to retroactivity as a *matter of right*. Where it is applicable, retroactivity is guaranteed and applies "bottom-up," in such a manner that a person does not have to rely on the goodwill or mercy of the government. These rights-based rules of retroactivity derive from two different sources. The first comes from the courts, including judicial pronouncements relating to the Constitution (hereinafter "judicial laws").[202] The second set of rules results from amendments to the Constitution or state

198. Mitchell, *supra* note 32. For a similar view expressed by a jurisprudential legend, *see* Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 553 n.54 (1977).

199. *See* Mitchell, *supra* note 32.

200. *See* Krent, *supra* note 32 (arguing that "three related fundamental concerns-honoring reliance interests, imposing rule of law constraints on legislatures, and valuing certainty-largely are absent when Congress ameliorates the severity of prior penalties or decriminalizes conduct altogether."). *See also,* Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2144 (1996).

201. "[L]egislatures may reduce the penalties for particular crimes, not because of changed circumstances or views of the wrongfulness of the underlying conduct, but for instrumental reasons due to the rising cost of incarceration or the social costs of incarcerating too many young men." Krent, *supra* note 32, at 64.

202. The term "judicial laws," for purposes of this Article, means laws that change the standard of substantive criminal culpability that result from a court decision, often based upon an interpretation of the U.S. Constitution.

acts of direct democracy (hereinafter "constitutional amendments").[203] The following section discusses how judicial laws and, in particular, Supreme Court decisions have established constitutional criteria for when retroactivity applies as a matter of right.

Courts play a role in determining the retroactivity of criminal laws.[204] In addition to having the jurisdiction to review legislative laws, courts, especially the United States Supreme Court, have the power to decide on the constitutionality of criminal laws. However, the Court's rules may vary on whether its decision creates (or finds) new law, or whether it is an interpretation of the scope of an Act of Congress, a Presidential Executive Order, or an administrative action.[205] The Supreme Court has articulated a more general presumption against reading statutes and administrative rules retroactively.[206] Generally, the Court has stated the principle that retroactivity is disfavored in the law.[207]

However, outside of interpreting statutes, the Supreme Court has assessed whether the Constitution explicitly or implicitly guarantees certain fundamental or constitutional rights, such as the right of privacy.[208] On these occasions, the Court must determine whether the protection of a certain right is to be applied retroactively.[209] The most recent example is *Obergefell v. Hodges*,[210] where the Court held that the right to marry is constitutionally guaranteed, so as to apply to same-sex couples.[211] Even when the Court's decisions are clearly substantive, lower courts must determine whether that

203. The term "constitutional amendments," for purposes of this Article, means laws that change the standard of substantive criminal culpability that results from an amendment to the U.S. or state constitution.

204. *See, e.g.*, Bender, *supra* note 22 (discussing a Colorado case about marijuana retroactivity).

205. *See infra* Part III.

206. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (finding no clear congressional intent to apply a provision of the Civil Rights Act of 1991 to pending cases); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208-09 (1988) (noting that an administrative agency can't promulgate rules that apply retroactively, unless expressly granted that power by Congress).

207. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 532 (1998) (citing *Bowen*, 488 U.S. at 208).

208. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

209. *See, e.g.*, *id.*; *see generally,* Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 110 U PA. L. REV. 650 (June 2009).

210. *Obergefell*, 135 S. Ct. at 2604-05.

211. *Id*.

right applies retroactively.[212] Nevertheless, retroactivity is not always immediate.[213]

The right to retroactivity is particularly challenging when it comes to the Court's decisions relating to the area of criminal law.[214] Much of the recent scholarship in this area focuses on the retroactivity of the Supreme Court's decisions relating to the death penalty.[215] As to the retroactive application of its decisions, a brief history explains the Court's transition to its current position on the matter.[216] Until 1965, the Court treated all constitutional rights as fully retroactive to all persons entitled to such rights, regardless of whether their prosecutions were final or nonfinal.[217] As it expanded the constitutional rights of criminal procedure and habeas corpus, the Court adopted a nuanced approach to retroactivity.[218]

In 1965, in *Linkletter v. Walker*,[219] the Court deviated from the strong presumption that favored retroactivity, by stating that "the Constitution neither prohibits nor requires retrospective effect."[220] Next, the Court

212. *See, e.g.*, Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395 (Apr. 2017) (evaluating the constitutional basis for "backdating" same-sex marriages following the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*, to provide marital benefits such as social security); Lee-Ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of Obergefell*, 2016 WIS. L. REV. 873 (2016) (examining the retroactivity of *Obergefell* as it applies to trusts and estates and property issues and the jurisprudence of retroactivity); Julie B. Colton, *Determining a Wedding Date: Retroactive Recognition of Same Sex Common Law Marriages Post-Obergefell*, JURIST, Sept. 19, 2017, https://www.jurist.org/commentary/2017/09/julie-colton-obergefell-common-law/ (analyzing how the *Obergefell* decision applies to prior, common law marriages); Steven A. Young, *Retroactive Recognition of Same-Sex Marriage for the Purpose of the Confidential Marital Communications Privilege*, 58 WM. & MARY L. REV. 319 (2016) (arguing for a modification of the confidential marital communication privilege unfairly prejudiced by now unconstitutional laws). *Cf.* Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (holding that state criminal laws prohibiting interracial marriage were unconstitutional).

213. *See, e.g.*, Brown v. Bd. of Topeka, 347 U.S. 483, 495 (1954) (holding that state laws which established racial segregation in public schools were unconstitutional and that desegregation would take place "with all deliberate speed"). *See generally,* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

214. *See supra* notes 28-34.

215. *See* Westen *supra* note 31; Bird; Doherty, *supra* note 36.

216. *See* Westen, *supra* note 31, at 203-6.

217. *See* Westen, *supra* note 31, at 202 (citing Danforth v. Minnesota, 522 U.S. 264, 271 (2008). *See also,* Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1645 (2005); Harper v. Va. Dep't of Taxation, 509 U.S. 86, 94 (1993) (citing Robinson v. Neil, 409 U.S. 505, 507 (1973), stating that "[b]oth the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court.") (internal citations omitted)). *See generally,* Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 815-16 (2003).

218. *See* Westen, *supra* note 31, at 202.

219. 381 U.S. 618, 629 (1965).

220. *Id*. (deciding whether *Mapp v. Ohio* should be given retroactive effect). *See also, Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (holding that the ex post facto clause of the Constitution is violated in the following situations: if a law is applied retroactively that punishes an act previously

presented a balancing test that would weigh the merits and demerits of each case, to ultimately decide whether a law should be given retroactive effect.[221] According to the *Linkletter* decision, to determine retroactivity, a court would conduct a three-part test: first, to consider "the prior history of the rule in question;" second, to look at "the purpose and effect of the law;" and, third, to determine "whether the retroactive operation will further or retard its operation."[222] As applied to the exclusionary rule facing the Court in *Linkletter*, the Court held that the exclusionary rule announced in *Mapp* did not apply to state court convictions which had become final before its rendition.[223] Hence, the *Linkletter* Court stated that even when the error complained of might be fundamental, it must also be of "the nature requiring us to overturn all final convictions based upon it."[224] Despite its critics, the *Linkletter* rule on retroactivity was followed for over twenty years.[225]

However, in 1989, in *Teague v. Lane*,[226] the Supreme Court made a radical shift in direction relative to retroactivity and finality, by rejecting the *Linkletter*'s distinctions of rights.[227] In *Teague*, the Court treated all its interpretations of constitutional, statutory, and common law rights as retroactive.[228] The Court reasoned that its findings of rights are not novel, but merely reflect rights, that have been in existence *prior* to the Court's ruling.[229]

Consequently, the *Teague* Court divided its rules of retroactivity rights into two categories that differ from those established in *Linkletter*.[230] First, where a decision is so clearly dictated by *prior precedent* that rulings to the contrary would be unreasonable,[231] the decision is fully retroactive to all

committed, which was innocent when done; if a law makes more burdensome the punishment for crime after its commission; or if a law deprives an individual of any defense available under the law in effect when the crime was committed).

221. Linkletter v. Walker, 381 U.S. at 629.

222. *Id*. (stating that, in determining whether a decision applies retroactively, the Court had to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation"). Further, the *Linkletter* test applied to both direct and collateral attacks, regardless of finality. *Id*.

223. *Id*. at 639-640.

224. *Id*.

225. *See generally,* James B. Haddad, *Retroactivity Should be Rethought: A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 417 (1969).

226. *Teague*, 489 U.S. 288, 301-05 (1989); *Cf.* Miller v. Florida, 482 U.S. 423, 435 (1987) (striking down retroactive application of Florida's revised sentencing scheme); Weaver v. Graham, 450 U.S. 24, 36 (1981) (denying retroactive application of revised sentencing schemes in Florida).

227. *See Teague*, 489 U.S. 288 at 301-05.

228. *Id*.

229. *Id.*; *see also,* Danforth v. Minnesota, 552 U.S. 264, 271 (2008). This approach follows the jurisprudential belief that the Court does not create or legislate on the law, but that the Court merely rules on the law already in existence.

230. *Teague*, 489 U.S. at 301-07.

231. *Teague*, 489 U.S. at 301-07; *see also,* Graham v. Collins, 506 U.S. 461, 467 (1993).

defendants, regardless of whether their convictions are final.[232] However, where a decision is "new," the Court will apply two subcategories of rules, "substantive" versus "procedural."[233] When the Court finds a right to be substantive, it is available retroactively to all past defendants, regardless of finality.[234] On the other hand, when the Court finds a right to be procedural, it is retroactive to past defendants on direct review, but is not available to collateral attacks on a final conviction by federal habeas corpus.[235]

The Court added a caveat to the application of the procedural rule, that is, when the Court's rule represents a "'watershed' rule of procedure," that "implicate[s] fundamental fairness" and "accuracy" of the trial as to be "implicit in the concept of ordered liberty."[236] In that case, such a ruling would apply retroactively, regardless of finality. Therefore, the *Teague* Court made clear that the Supreme Court has the power to apply its decisions retroactively, especially when a decision reinforces past precedent, is substantive, or is a watershed rule of procedure.[237]

To understand the constitutional nature of retroactivity, a closer analysis of the *Teague* decision is required.[238] First, the Court in *Teague* took the opportunity to revamp the *Linkletter* rules on retroactivity.[239] Second, the *Teague* Court negated the *Linkletter* approach which viewed retroactivity as a balancing test.[240] Instead, writing for the plurality, Justice Sandra Day O'Connor moved the role of retroactivity from the conclusory end of a balancing act to a position of prominence:

Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated.[241]

Third, with adequate analysis of the quotation, it is evident the Court announced a rule of law, namely, that retroactivity would automatically

232. *Id.*; *see also,* Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

233. *Linkletter*, 381 U.S. 618, 639-40; *see also,* Schriro v. Summerlin, 542 U.S. 348, 352, n.4 (2004).

234. *See also,* Schriro v. Summerlin, 542 U.S. 348, 352, n.4 (2004).

235. *Linkletter*, 381 U.S. 618, 639-40.

236. *Id*.

237. *Id.*

238. *See generally,* Peter Westen, *Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert*, 18 NEW CRIMINAL LAW REV. 167-213 (Mar. 20, 2015), U of Michigan Public Law Research Paper No. 455, SSRN: https://ssrn.com/abstract=2588143 (last visited July 15, 2019) (citing Teague, 489 U.S. 310, 312-13).

239. *Teague*, 489 U.S. 288 at 300 (noting that "the question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an amicus brief," the Court decided sue sponte to revamp the *Linkletter* rules of retroactivity).

240. *Id*.

241. *Id*.

apply.[242] Fourth and foremost, the Court's rationale demonstrates that "even-handed justice"[243] is a fundamental principle of due process or fairness, which mandates that a past offender is entitled to be judged by the lesser of the standards of criminal culpability, the one from the past or the one in the present.[244] Therefore, the *Teague* Court heightened retroactivity to the status of a substantive due process right, albeit, not expressly.[245] That conclusion means that the *Teague* decision stands for the principle that automatic retroactive application follows "substantive" changes in the law as a constitutional right.

This new approach to the retroactivity of substantive changes in the criminal laws has recently come front and center in the Supreme Court's jurisprudence relating to the sentencing of juveniles. In 2016, in *Montgomery v. Louisiana*,[246] the Court elaborated on its retroactivity rules as they applied to decisions concerning criminal laws.[247] The Court held that prisoners previously given automatic LWOP for crimes committed as juveniles, must have their cases reviewed for re-sentencing or be considered

242. *Teague*, 489 U.S. 288 at 300.

243. Justice O'Conner's opinion does not define or explain the term "even handed justice." *See* William W. Berry III, Normative Retroactivity, 19 U. PA. J. CONST. L. 485, 489 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1617&context=jcl (providing the following rationale and research behind the nature of even handed justice). One might suppose that by even handed justice, Judge O'Conner might have been referring to the commonsense or morale reaction to the travesty that past offenders can remain in prison or even be executed in cases where, if decided today, the imposition of that sentence would violate their constitutional rights. *See generally,* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991) (addressing the potential unfairness of non-retroactivity approaches to new constitutional rules by reframing the inquiry in terms of constitutional remedies doctrine); David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991) (exploring the unfairness of *Teague* in the death penalty context). This seems offensive both as a matter of individual rights and as a matter of equal treatment under the law. *See generally, e.g.,* Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373 (1977) (exploring theories of retroactivity, including fairness and equality, before arguing that the concept of legal validity should determine the content of "retroactive law").

244. *See infra* Part III for a discussion of the embodiment of "even-handed justice," which is hereinafter referred to as *lex mitior*.

245. *See infra* Part III for a discussion of substantive due process ruling of the Court.

246. Montgomery v. Louisiana, 136 S. Ct. 718, 727-28 (2016) (holding that its previous ruling in Miller v. Alabama, 567 U.S. 460 (2012), that a mandatory life sentence without parole should not apply to persons convicted of murder committed as juveniles, should be applied retroactively). *Montgomery* and *Miller* are a series of U.S. Supreme Court decisions that, since 2005, have mitigated the harshness of sentencing of juveniles and persons who committed crimes as juveniles, based, in part, on scientific evidence showing that juvenile brains are not developmentally equivalent to those of adults. *See also,* Roper v. Simmons, 543 U.S. 551, 578-79 (2005) (holding that the death penalty for children under eighteen years old was unconstitutional); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that it was unconstitutional to impose mandatory life sentence without parole on prisoners who committed non-murder crimes as juveniles).

247. *See Montgomery*, 136 S. Ct. at 727-28.

for parole.[248] At first glance, both the holding and subject matter of the *Montgomery* case appear far removed from the issue of the retroactivity of state laws that legalize marijuana. However, arguably, the Court's dicta in *Montgomery* provides support for the retroactivity of pot laws.

First, the Court in *Montgomery* found that it had jurisdiction over Louisiana's prisoners because the rule governing retroactivity is constitutional, not statutory.[249] Second, Justice Kennedy, in writing for the majority, stated that retroactivity applied because it was founded on substantive grounds, in the application of precedent watershed principles of retroactivity.[250]

As a result of the Supreme Court decisions in *Teague* and *Montgomery*, one might conclude that a "new" criminal law that lessens or eliminates criminal culpability or mitigates sentencing applies retroactively and automatically to past offenders if that law is either substantive or is a watershed rule of procedure. Unfortunately, the right of retroactivity does not guarantee amelioration.[251] Relative to the legalization of pot, the watershed rule of procedure does not apply, but as will be argued next, the new marijuana laws are substantive and, therefore, apply retroactively as a matter of constitutional law. What makes the *Montgomery* decision especially persuasive is that it views the retroactivity of criminal laws that lessen culpability (albeit sentencing) to be a matter of constitutional law, in that it applies regardless of finality (most marijuana offenses are final), and it applies to State collateral matters. From this decision, the Court's approach to retroactivity is consistent with that of a majority of other countries.[252]

248. *Id.*; *see also, Leading Case: 1. Constitutional Law: Eighth Amendment—Retroactivity of New Constitutional Rules—Juvenile Sentencing*—Montgomery v. Louisiana, 130 HARV. L. REV. 377 (2016).

249. *See supra* note 19, *Montgomery*, 136 S. Ct. at 727-728.

250. *Id*. (Justice Kennedy, stating, the decision was based "on the diminished culpability of all juvenile offenders, who are, he said, immature, susceptible to peer pressure and capable of change. Very few, he said, are incorrigible. But he added that as a general matter the punishment was out of bounds."). As to the definition of "substantive," *see Leading Case: 1. Constitutional Law: Eighth Amendment—Retroactivity of New Constitutional Rules—Juvenile Sentencing*—Montgomery v. Louisiana, 130 HARV. L. REV. 377 (2016).

251. *See Montgomery*, 136 S. Ct. at 736-37 (writing for the majority, Justice Kennedy, stating that "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored"); *see also,* State v. Montgomery, 194 So. 3d 606, 609 (La. 2016) (vacating Montgomery's life sentence and remanding for resentencing); Grace Toohey, *Board Denies Parole to Man Who Served More than 50 years after Killing Deputy when He Was Juvenile*, ADVOCATE (Feb. 19, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_acca953e-1579-11e8-aa66-1b036f45b902.html (last visited Aug. 18, 2019) (reporting that in February 2018 and April 2019, Montgomery had parole hearings, and was denied parole both times).

252. *See supra* note 104.

Proposition #1: This discussion of the rules of judicial laws on retroactivity leads to the proposition that current retroactivity rules ensure retroactivity to past pot offenders, if the legalization laws are new and represent a substantive right. And that the concept of "even-handed justice" means past pot offenders have a constitutional right to retroactive amelioration.

B. Marijuana Legalization Laws Are Substantive.[253]

1. Lex Mitior *Is a Constitutional Principle.*

There are two arguments to support the proposition that past pot offenders are entitled to retroactive application of state legalization as a matter of substantive right. The first argument is that the principle of *lex mitior*[254] is a substantive rule of law, well-grounded in constitutional and

253. It is also likely that on the same basis, past pot offender are entitled to retroactive amelioration, because *lex mitior* is a fundamental, "past" constitutional principle, which, according to *Teague*, would result in automatic retroactivity. In addition to the substantive-right analysis above, there are other constitutional arguments in support of retroactive relief for past pot offenders. First, marijuana criminalization arguably violates the Fifth Amendment. *See* Leary v. United States, 395 U.S. 6, 37 (1969) (holding that the MTA was unconstitutional, since it violated the Fifth Amendment to the United States Constitution, privilege against self-incrimination); National Commission on Marijuana and Drug Abuse, Marijuana: A Signal of Misunderstanding (1972), http://www.druglibrary.org/schaffer/Library/studies/nc/ncmenu.htm (last visited Aug. 13, 2019) (reporting that the federal prohibition of marijuana was constitutionally suspect and stated that regardless of whether the courts would overturn the prohibition of pot possession, the executive and legislative branches have a duty to obey the Constitution). *See also,* Alex Pasquariello, *Federal Lawsuit Against Sessions and DEA says Marijuana's Schedule I Status Unconstitutional*, THE CANNABIST (July 25, 2017), http://www.thecannabist.co/2017/07/25/marijuana-schedule-i-lawsuit-unconstitutional/84473/ (last visited July 22, 2019) (citing to *Washington, et al., v. Sessions, et al.*, filed as Case 1:17-cv-005625 (filed July 24, 2017) in the Southern District Court of New York, wherein the Plaintiffs claim the classification of cannabis as a Schedule I substance is so "irrational" that it violates the U.S. Constitution). Further, in its inception, the prohibition of marijuana as a Schedule A drug arguably violated the Ex Post Facto Clause. Such a criminal designation was especially punitive against people who were addicted to certain drugs and were unable to change their drug "habit" to comply with the new criminal standards. It was inherently unfair to punish people for such past behavior, which was previously legal, overnight turning the users of these drugs from law-abiding citizens to criminals. That leads to the next point, which is how the law facilitate retroactivity of marijuana laws, when such application applies to a large group of people over a long period of time. *See generally,* Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KENTUCKY L.J. 323 (1992-93), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2437&context=facpub (last visited Aug. 18, 2019) (arguing . . . the values that underlie the Ex Post Facto Clause demand that there be some protection against civil laws that are punitive in nature).

254. The term, "*lex mitior*," which literally means "the milder law," for purposes of this Article, means the constitutional and fundamental right to be judged by the lesser standard of criminal culpability that is more advantageous to a past offender, when a new law is enacted or upon the declaration of a constitutional right or amendment of the federal or state constitution. Here, the concept is broadly applied retroactively, including all post, final judgements, and not only to defendants, when the law changes after the crime is committed, but before a final judgment is

fundamental principles of due process. Under the principle of *lex mitior*, a past pot offender has a constitutional right to retroactivity amelioration. The second argument is that such legalization laws are substantive, as they result from direct democracy, which are, or operate as, amendments to state constitutions.

a. Liberty as an Inalienable Right

As to the first argument, there is ample support for the proposition that *lex mitior* is a substantive rule of law, supported by constitutional principles, including the Ex Post Facto Clause of the Constitution (hereinafter "Clause").[255] The Clause expressly prohibits state and federal legislation that retroactively applies criminal laws that would punish past behavior.[256] Yet, there is evidence for the proposition that the Clause and the underlying concept of *lex mitior* represent one of the many ways by which the Founding Fathers sought to protect the inalienable right to liberty. A brief history of the Clause of the Constitution[257] shows that the Founding Fathers believed that liberty was an inalienable right, which should be protected from wrongful governmental infringement or tyranny, when criminal standards

handed down. *See* Peter Westen, *Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert*, 18 NEW CRIM. L. REV. 167-213 (Mar. 20, 2015), Univ. of Mich. Public Law Research Paper No. 455, SSRN: https://ssrn.com/abstract=2588143 (last visited July 15, 2019) (assessing whether a state's repeal of the death penalty would preclude all pending (not final) prosecutions for capital murder and questioning "whether punishing offenders under harsher laws that obtained at the time of their conduct can serve consequentialist and/or retributive purposes of punishment"). *See also,* Alessandro Rosanò, *et al*., *Principle of* Lex Mitior*, Is that You?*, NEW J. OF EUR. CRIM. LAW (May 22, 2017), https://journals.sagepub.com/doi/full/10.1177/2032284417699272 (last visited July 22, 2019) (noting that "[t]he principle of applying the more lenient sanction—also called principle of lex mitior—constitutes a general principle of national criminal laws as well as a general principle of Union law, as confirmed by the Court of Justice of the European Union over time").

255. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."). These provisions, though actually comprised of two separate clauses, will be referred to in this Article to as the "Ex Post Facto Clause" or "Clause." To argue that *lex mitior* is embodied in the Ex Post Facto Clause does not suggest that there is a prohibition against legislation or other changes in the law, which lessens criminal culpability or reducing penalties. There is no such constitutional limitation.

256. *See* U.S. CONST. art. I, § 9, cl. 3.

257. *See generally,* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA (Little, Brown, and Co., 1880; reprint 3d ed. 1900).

change.[258] This interpretation is consistent with scholarly writing on the history and meaning of the Clause.[259]

Liberty is a fundamental right that was prominent in the most sacred statement of rights in United States history and uncontrovertibly, in the cornerstone of our culture and values—the Declaration of Independence.[260] When drafting the Declaration of Independence and the Constitution, the Founders were undoubtedly aware that the English common law recognized and embraced the fundamental right to liberty, as noted in Blackstone's Commentaries, that liberty meant "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[261]

The Founders were also aware that the English common law embraced principles of due process, against wrongful infringement on the right to liberty, including that of *lex mitior*. This ensured a person's right to be judged by the lesser standard of criminal culpability. The historic rationale for the inclusion of the Clause was based on the practices of the English Parliament, which had passed legislation as "bills of attainder" or "bills of pains and penalties," which enhanced penalties for crimes after they were

258. *See, e.g.,* ALEXANDER HAMILTON, LETTER FROM PHOCION, in PAPERS 485, 542-543 (Jan. 1784), reprinted in CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 132 (1964) (stating: "[M]en . . . change their principles with their situations-to be zealous advocates for the rights of the citizens when they are invaded by others, and as soon as they have it in their power, to become the invaders themselves-to resist the encroachments of power . . ."). *Id. See also,* James Iredell noted that James Iredell, *Observations on George Mason's Objections to the Federal Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, 368, 369 (Paul L. Ford ed. 1888) (noting an Ex Post Facto Clause prevented the exercise of "tyranny that . . . would be intolerable . . . .").

259. *See generally,* Oliver P. Field, *Ex Post Facto in the Constitution*, 20 MICH. L. REV. 315 (1920-21), William W. Crosskey, *The Ex Post Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248, 252-54 (1968) (discussing the internal and external inconsistencies of Madison's notes with respect to the scope of the Ex Post Facto Clause); Breck P. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 CALIF. L. REV. 269 (1927).

260. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."), http://www.archives.gov/exhibits/charters/declaration_transcript.html. *See generally,* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION: PART ONE: SEPTEMBER 17, 1787– JANUARY 12, 1788 (Bernard Bailyn, ed. 1993).

261. Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes.* (Philadelphia: J.B. Lippincott Co., 1893). https://oll.libertyfund.org/titles/2142.

committed or defined acts as crimes after the fact.[262] The rationale for the prohibition against such infringements was broad-based and included the concept of *lex mitior*—as explained in Blackstone's Commentaries, and as cited in a leading Supreme Court decision on the scope of the Clause:[263]

There is still a more unreasonable method than this, which is called making of laws, ex post facto, when after an action, indifferent in itself, is committed, the Legislator, then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible, that the party could foresee such an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it; and all punishment for not abstaining, must, of consequence, be cruel and unjust.[264]

Furthermore, when drafting the Constitution, the Founders borrowed from various previously established state constitutions that expressly prohibited ex post facto laws.[265] For example, in 1813, Founder and later President, Thomas Jefferson reported:

The sentiment that ex post facto laws are against natural right is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. The federal constitution indeed interdicts them in criminal cases only; but they are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing what is wrong. Nor ought it to be presumed that the legislature meant to use a phrase in an unjustifiable sense, if by rules of construction it can be ever strained to what is just.[266]

The Founders considered the prohibition of ex post facto laws so important, that the existence of the Clause in the Constitution was advanced as one argument in favor of the States' ratification of the 1787 Constitution, even without a Bill of Rights attached.[267]

262. *See* Calder v. Bull, 3 U.S. 386, 391 (1798) (Justice Chase noting that these laws were used repeatedly under the claim that they were necessary to the kingdom's safety, but the advocates of the laws were motivated by ambition and malice, and the possibility of legislative abuse is ripe); *see* Bryan R. Diederich, *Risking Retroactive Punishment: Modifications of the Supervised Release Statute and the Ex Post Facto Prohibition*, 99 COLUM. L. REV. 1551, 1564 (1999).

263. Sir William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibold, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes* (Philadelphia: J.B. Lippincott Co., 1893), https://oll.libertyfund.org/titles/2142.

264. *See Calder*, 3 U.S. 386, 396-99 (1798), quoting 1 Bl. Com. 46.

265. Many states constitutions have such a provision today. *See, e.g.*, V.A. CONST. art. I, § 11 ("That no person shall be deprived of his life, liberty, or property without due process of law . . .").

266. Founders Online, *Thomas Jefferson, Letter to Isaac McPherson, August 13, 1813*, https://founders.archives.gov/documents/Jefferson/03-06-02-0322.

267. *See* Diederich, *supra* note 253 (arguing that the dual supports for ex post facto prohibition of protecting citizens from tyranny and providing for individual justice should act as guideposts to help courts determine whether a law is ex post facto or not).

In prohibiting ex post facto laws, the Framers guaranteed that citizens would not be criminally punished for behavior that was legal during the commission of the acts, of which is presently illegal. Essentially, it would be an inherently unfair policy, because a person is entitled to know what behavior or activities are legal in real time. To allow the law to change that standard after the fact would deny a person due process, and wrongfully provide the government with the power to punish a person retroactively. More broadly, the fundamental principle reflected in the Clause's prohibition was the Framers' belief and dedication to the fundamental right to due process against citizens being judged by two conflicting sets of criminal standards, one under today's new laws and one under yesterday's old laws. Hence, the mere existence of the Clause reflects the important constitutional principles of fundamental fairness to individuals, equal treatment under the law, and protection against wrongful government infringement.

b. Right to Due Process

Further, *lex mitior* should be viewed within the broader concept of due process protections found in other amendments to the Constitution and their penumbra, particularly in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.[268] For example, the Fifth Amendment[269] and the Fourteenth Amendment[270] provide two different types of due process protection: (1) procedural due process, which requires that before depriving a person of life, liberty, or property, the government must follow certain procedures; and (2) substantive due process, which requires that if depriving a person of life, liberty, or property, the government must have sufficient justification.

Perhaps, the clearest constitutional provision protecting liberty against governmental infringement, without the due process, is found in the Fourteenth Amendment. To understand the purpose of this Amendment, we need to examine the legal history of the United States enslavement of people of African descent.[271] Unfortunately, prior to the Civil War, the legal system protected the institution of slavery and Black people were not considered

268. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 458 (1895) (establishing the presumption of innocence of persons accused of crimes, noting "[t]he evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, make more apparent the correctness of these views, and indicate the necessity of enforcing the one in order that the other may continue to exist").

269. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .").

270. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

271. *See generally,* F. MICHAEL HIGGINBOTHAM, RACE LAW: CASES, COMMENTARIES, AND QUESTIONS (Carolina Academic Press, 4th ed. 2015).

United States citizens.[272] The Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth) sought to abolish slavery and protect the citizenship rights of newly freed Blacks.[273] As the Confederate leadership regained power in the South, southern legislatures enacted "black codes," state-sanctioned, racially based controls on the lives, liberty, and property rights of Black people.[274] In direct response to the black codes, the country passed the Fourteenth Amendment, which provides, in pertinent part, "[N]or shall any State deprive *any person* of life, liberty, or property, without due process of law . . . ."[275]

With the end of Reconstruction, the Supreme Court, in the *Slaughter-House Cases*,[276] effectively limited the application of the Fourteenth Amendment federal rights, such as the right to interstate travel, but not State rights, such as intra-state travel. At the time, federal rights of citizenship were few, and thus the cases effectively limited protection pertinent to a small minority of rights. Three years later, in *United States v. Cruikshank*,[277] the Supreme Court ruled that the First and Second Amendments did not apply to State governments, further restricting the reach of the Fourteenth

272. Article 1, Section 2, Clause 3, or the Enumeration Clause or "Three-Fifths Compromise," provided:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

The term "other Persons" referred to enslaved persons of predominately of African descent. *Id.* Article 1, Section 9, provided,

> The Migration and Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

This was a reference to the importation of enslaved persons of African descent. *Id*. Article IV, Section 2, Clause 3, or the "Fugitive Slave Clause," required

> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom Service or Labour may be due.

See also, Dred Scott v. Sandford, 60 U.S. 393, 396 (1857) (holding that "a negro, whose ancestors were imported into [the U.S.], and sold as slaves," whether enslaved or free, were not and could not be a U.S. citizen).

273. *See supra* note 262 (emphasis added).

274. *See generally,* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

275. *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

276. The Slaughter-House Cases, 83 U.S. 36, 81-83 (1873).

277. United States v. Cruikshank, 92 U.S. 542, 552 (1875).

Amendment. However, beginning in the 1920s, a series of Supreme Court decisions interpreted the Fourteenth Amendment to "incorporate" most portions of the Bill of Rights, making these portions, for the first time, enforceable against state governments.[278] Under Selective Incorporation, the Court used the Fourteenth Amendment Due Process and Equal Protection Clauses to "incorporate" individual elements of the Bill of Rights against the states.[279] In the 1940s and 1960s, the Supreme Court issued a series of decisions incorporating several of the specific rights from the Bill of Rights to apply to the States.[280] Civil liberties that are protected against both federal and state governments' infringements are now analyzed under the auspices of "fundamentality."[281]

More recently, in 2010, the Supreme Court incorporated the Second Amendment's right to bear arms into the protection against state actions.[282] Overall, when a right is deemed to be fundamental, any law, policy, practice or action that abridges such a right is assessed by the courts under the more exacting standard of strict scrutiny, instead of the less demanding rational basis test.[283] Further, when the victim of police misconduct is a racial minority or other protected class, such action is extremely suspect.[284] As the Fourteenth Amendment expressly grants Congress the authority to guarantee the effectiveness of the Amendment, Congress is authorized to enact the laws that protect liberty, even retroactively.[285] Hence, I contend that, relevant to marijuana legalization, any governmental action that wrongfully infringes on the *fundamental right to liberty*, without due process, is suspect and must be viewed from a strict scrutiny judicial perspective. Therefore, when a State legalizes marijuana and fails to apply the new laws retroactively to past offenders, then that State is acting in an unconstitutional manner.

278. *See, e.g.,* Gitlow v. New York, 268 U.S. 652 (1925) (holding that States were bound to protect freedom of speech).

279. *See generally,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3rd ed. 2000).

280. *Id.*

281. *See* Lutz v. City of York, Pa., 899 F.2d 255, 267 (3d Cir.1990) ("The test usually articulated for determining fundamentality under the Due Process Clause is that the putative right must be 'implicit in the concept of ordered liberty'", or 'deeply rooted in this Nation's history and tradition.") (internal references omitted).

282. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding the right to bear arms as a fundamental and individual right that will necessarily be subject to strict scrutiny by the courts).

283. *See generally,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000).

284. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964) and subsequent legislation/jurisprudence (U.S. federal antidiscrimination law protects groups of people with a common characteristic, from discrimination on the basis of that characteristic, including race, color, religion, national origin, and other such categories).

285. *See* U.S. Const. amend. XIV, § 5.

c. Substantive Due Process

Another argument supporting the proposition that the right to liberty is fundamental relative to State infringement is the Supreme Court's expansion of such rights. Since 1925, the Court has expanded its list of unenumerated or fundamental rights, and civil liberties that are protected against both federal and state infringement.[286] To establish when such constitutional designation exists, the Court has looked to "history, legal traditions, and practices [to] provide the crucial 'guide-posts for responsible decisionmaking (sic).'"[287] Recently, the Supreme Court outlined criteria for whether a right is fundamental, in the landmark case of *Obergefell v. Hodges*.[288] There, the Court applied "four principles and traditions [that] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[289] These same principles guide us in determining whether *lex mitior* is a fundamental right, specifically raising the questions: (1) is *lex mitior* inherent in the concept of individual autonomy; and (2) is *lex mitior* a keystone of our social order?[290] As presented next, the answer to both questions is yes.

Thus, the *Obergefell* Court reiterated a substantive due process right to marriage inherent in the Fourteenth Amendment, explaining that its prior cases have held the amendment to guarantee "more than fair process," to include a "substantive sphere" which bars "certain government actions regardless of the fairness of the procedures used to implement them."[291] As presented above, a past pot offender's right to retroactive amelioration meets the recent Supreme Court's criteria for what constitutes a fundamental right, as spelled out in *Obergefell* and other key fundamental rights decisions. Therefore, there is a constitutional basis for holding that *lex mitior* is a fundamental right. This position is a logical extension of the findings on the

286. *See generally,* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000).

287. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

288. 135 S. Ct. 2584, 2608 (2015) (holding the right to marry is fundamental as applied to same sex couples). "The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution . . . it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect . . . guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements." *Id*. at 2599-2601.

289. *Id*. at 2599. The Court listed four distinct reasons why the fundamental right to marry applies to same-sex couples: 1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy;" 2) "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals;" 3) it "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education;" and 4) "marriage is a keystone of our social order." *Id*. at 2599.

290. *Id.* at 2599, 2601.

291. *Id*. at 840 (quoting Washington v. Glucksberg, 521 U.S. 702, 719 (1997); Daniels v. Williams, 474 U.S. 327, 331 (1986)).

nature of *lex mitior*, following an extensive scholarly survey of the existing laws on the topic.

d. Scholarly Support for *Lex Mitior*

In a groundbreaking article, distinguished Professor Peter K. Westen explored whether *lex mitior* is a constitutional norm and claimed that *lex mitior* is the "converse" or "counterpart" to the Clause.[292] Professor Westen pondered whether *lex mitior* was a binding norm, a nonconstitutional norm, or a mere rule of leniency.[293] Following a lengthy survey of the existing laws, he adopted a limited vision of *lex mitior* and concluded that the doctrine was a nonconstitutional norm, which could be overwritten by the legislature.[294] He added that *lex mitior* is or should be the default rule, where legislative intent as to retroactivity is uncertain, following the rule of lenity.[295] He also stated that *lex mitior* should only apply, where a judgment is not final.[296]

Relative to the Supreme Court's position on retroactivity, Professor Westen observed that *Teague* does not constitute legal authority on whether *lex mitior* should be legislatively or constitutionally mandated to extend to full retroactivity.[297] Parenthetically, Professor Westen admitted that *lex mitior* could be a plausible constitutional norm under the Eighth Amendment or Equal Protection Clause if it were a constitutionalized subject to one or more of the aforementioned exceptions.[298]

Contrary to Professor Westen's limited view, I contend that *lex mitior* is a constitutional principle that cannot be modified by legislative mandate. First, as presented above, the Supreme Court in *Teague* has indirectly recognized the doctrine of *lex mitior,* when it expressly adopted the concept of "even-handed justice."[299] According to Justice O'Connor, "even-handed

292. *See* Westen, *supra* note 31, at 167 (stating "[t]he ex post facto doctrine prohibits retroactivity by prohibiting the state from prosecuting persons under criminal statutes that either retroactively criminalize conduct that was hitherto lawful or retroactively increase penalties for conduct that, while unlawful all along, was hitherto punishable less severely. In contrast, *lex mitior* mandates retroactivity by mandating that criminal defendants receive the retroactive benefits of repealing statutes that either decriminalize conduct altogether or reduce punishment for it.").

293. *Id.* at 168.

294. *Id.* at 206. ("In the United States, however, *lex mitior* is a common law or a statutory doctrine, rather than a constitutional command, and as such, it is subject to legislative override."); *see also, id*. at 208-13 (providing a comprehensive survey of state and federal adoption of *lex mitior*).

295. *Id*. at 207.

296. *Id.* at 196-98.

297. *Id.* at 205.

298. *Id*. at 207 ("Indeed, *lex mitior* could also be a plausible constitutional norm under the Eighth Amendment or Equal Protection Clause, if it were constitutionalized subject to one or more of the aforementioned exceptions.").

299. *See supra* note 237.

justice" requires the retroactive application of a substantive change in criminal laws.[300]

This brings the discussion to the second support for the right to retroactivity for past pot offenders; that is, that marijuana legalization laws are substantive because they are created by amendments to various state constitutions.

2. State Constitutional Amendments

With some exception, states have legalized pot by way of statewide ballot measures, direct initiative, propositions, questions, or referenda[301] or "direct democracy."[302] This leads to a discussion of the retroactivity of constitutional amendments.[303] Clearly, rights that are expressly provided for in the Constitution and state constitutions are substantive. Equally clear, an amendment to constitutions that creates or elaborates on rights is also

300. *See supra* note 237.

301. *See, e.g.,* A Colorado Marijuana Legalization Amendment, also known as "Amendment 64," was on the November 6, 2012 ballot in Colorado as an initiated constitutional amendment, where it was approved; California Proposition 215, http://vigarchive.sos.ca.gov/1996/general/pamphlet/ 215text.htm (last visited July 22, 2019) ("the Compassionate Use Act," enacted in 1996, established a medical cannabis program), and California Proposition 64, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB64 (last visited July 22, 2019) (the "Adult Use of Marijuana Act," enacted in 2016, legalized the sale and distribution of cannabis in both a dry and concentrated form, for recreational use). *See also,* History of Ballotpedia, Marijuana on the Ballot, https://ballotpedia.org/History_of_marijuana_on_the_ballot (last visited Sept. 2, 2019) (noting that as of 2019, seventeen of the states that legalized medical marijuana did so through citizen-initiated ballot measures, and the sixteen did so through legislative action; and that voters had approved ballot measures to legalize the recreational use of marijuana in nine states, with an additional state—Vermont—legalized recreational marijuana through legislative action). Katie Zezima, Vermont is the First State to Legalize Marijuana through Legislature, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/01/23/vermont-is-the-first-state-to-legalize-marijuana-through-legislature/. Cf. H.B. 1438, Cannabis Regulation and Tax Act (2019), http://www.ilga.gov/legislation/publicacts/101/PDF/101-0027.pdf (last visited Aug. 14, 2019).

302. Relative to direct democracy as a means of enacting changes in the law, some question it, while others defend it. *See generally,* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999); and, Carson Bruno, Is It Time To Reconsider California's Initiative System?, STANFORD UNIVERSITY HOOVER INSTITUTE (Aug. 30, 2016), https://www.hoover.org/research/it-time-reconsider-californias-initiative-system.

303. *See generally,* The NBER/State Constitutions Database, http://www.stateconstitutions.umd.edu/index.aspx (last visited Sept. 2, 2019); *See also,* Constitutions of the Several States, http://www.thegreenpapers.com/slg/constitution.phtml (last visited Sept. 2, 2019); *See also,* DAVID R. BERMAN, STATE AND LOCAL POLITICS (7th ed. 2000); GEORGE ALAN TARR, ED. CONSTITUTIONAL POLITICS IN THE STATES (1996); Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014), https://papers.ssrn.com/ sol3/papers.Cfm?abstract_id=2461507 (last visited Sept. 2, 2019). In this Article, we will focus the discussion on amendments to the U.S. Constitution.

substantive.[304] As a result, when a State provision, such as the legalization of marijuana, is enacted by an act of direct democracy, that law is substantive, and, therefore, applies retroactively.

Provisions for amending the Constitution, alone, show that the Founding Fathers expected amendments to have the same substantive effect as the original Constitution. The Founding Fathers did not expect the Constitution to remain static, as it expressly provides for amendments to itself.[305] Less than two years later, on December 15, 1791, the Constitution was amended with the Bill of Rights, Amendments One through Ten.[306] These amendments are undoubtedly substantive and guarantee specific personal freedoms, provide clear limitations on the Federal Judiciary power, and explicitly reserve the rights to the states or the people.[307]

Each amendment to the Constitution applies prospectively and thereby becomes the law of the land on its effective date.[308] Does that mean that every amendment was meant to apply retroactively or apply to the federal and state governments? Here, the Ex Post Facto Clause[309] is unique for two reasons. First, it is one of the few clauses in the Constitution that expressly restricts both federal and state authority.[310] Second, it is one of the few clauses in the Constitution that expressly provides for retroactivity, by prohibiting retroactive application of new criminal laws.[311]

Relative to marijuana legalization, two particular Amendments to the Constitution shed some light on the retroactivity of new criminal amendments, which dealt with "intoxicating liquors."[312] The repeal of Prohibition did not mean the total, unrestricted legalization of the use and

304. *See* Amending State Constitutions, https://ballotpedia.org/Amending_state_constitutions (last visited Sept. 3, 2019).

305. *See* Article V of the United States Constitution on due process, which was ratified on June 21, 1788 and effective on March 4, 1789. *See generally,* Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747 (2005), https://ssrn.com/abstract=803864 (last visited Sept. 2, 2019) (seeking to restore the early understanding of Article V and to reject the view expressed by modern commentators that the Constitution should be kept largely immune from amendment).

306. U.S. CONST. amend. I-X.

307. *Id*. While the Bill of Rights does not expressly provide for retroactivity, one might argue that the Bill of Rights was expected to apply retroactively to protect individual civil liberties.

308. *Id.*

309. *See* Ex Post Facto Clause, *supra* note 112.

310. *Id.*

311. *Id.*

312. *See generally,* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION (1979). In 1920, reflecting society's outcry against alcohol abuse, the U.S. Constitution was amended to prohibit the production, transport, and sale of alcohol. U.S. CONST. amend. XVIII ("After one year from the ratification of this article, the manufacture, sale, or transport of intoxicating liquors . . . or the exportation . . . for beverage purposes is hereby prohibited."). Then, in 1933, the Twenty-First Amendment repealed the federal prohibition, effectively allowing the states and local communities to decide how to regulate alcohol. U.S. CONST. amend. XXI.

sale of alcohol.[313] On the contrary, the constitutional repeal merely ended the federal, nationwide prohibition of alcohol, pursuant to federal law.[314] However, in 1933, after years of the federal prohibition of intoxicating liquors, the country decided to change course, the Twenty-First Amendment, Repeal of Prohibition, was ratified, expressly repealing the Eighteen Amendment.[315]

Neither amendment expressly provided for retroactivity; however, their effects implied retroactivity.[316] Following the repeal, States and local jurisdictions still had the authority to permit, restrict, or even prohibit the use or sale of alcohol within their respective jurisdiction.[317] Similarly, in the recent repeal of the federal prohibition of the use and sale of Hemp, States continue to have the power to prohibit, restrict, or allow such activities in their jurisdiction.[318]

By comparison, when the Thirteenth Amendment prohibited the enslavement of people,[319] it was meant to apply retroactively.[320] In accordance with this Amendment, every State and individual had to comply, meaning that any and all enslaved persons were automatically emancipated by way of retroactivity. It would have been ludicrous to hold that the Thirteenth Amendment only applied prospectively, that is, that people who were initially enslaved prior to the Amendment would still be enslaved after. Furthermore, in the instance where a State decriminalizes marijuana law by an amendment to the State constitution, there is no issue of comity as the state law controls state criminal law, but does not control federal law.

Proposition #2: This discussion of the rules of constitutional amendments on retroactivity leads to the proposition that the current retroactivity laws should provide relief to past pot offenders, when they are enacted by way of amendments to a State's constitution, albeit through direct democracy. Arguably, such relief should logically follow when the new laws derive from such a significant statement of public support.

In summary, it is inaccurate to view the rules of retroactivity of criminal laws strictly on legislative laws, as a "top-down" approach. This misapplication of retroactivity fails to provide retroactive amelioration to

313. *See generally,* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION (1979).

314. *Id.*

315. U.S. CONST. amend. XXI.

316. *See* Mitchell, *supra* note 32 (noting that when the National Prohibition Act was repealed, the Supreme Court decided to terminate several pending prosecutions).

317. *See* KYVIG, *supra* note 303.

318. *See* Hudak, *supra* note 4.

319. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitudes . . . shall exist within the United States, or any place subject to their jurisdiction.").

320. *Id.*

past offenders. Academic critics also seem to be captured by this "top-down" view of retroactivity, believing that past offenders must await legislative or executive authorization to obtain any relief. However, both United States Supreme Court's jurisprudence and as well as Amendments to the Constitution, take a "bottom-up" approach, one that identifies and develops a constitutional basis for past offenders' right to retroactive amelioration.[321] The substantive right of retroactivity supports the automatic, immediate application of retroactivity to provide relief to past offenders, after legalization. The next section proposes that amnesty is the solution to apply retroactive relief for the legalization of marijuana over an extended period of time.

C. Amnesty as the Best Remedy

While past pot offenders are entitled to retroactive application of marijuana legalization laws, retroactivity does not dictate the quality or level of amelioration. As a result, past pot offenders are at the mercy of the government to provide adequate, meaningful remedial relief to such offenders. This Article suggests that a broad approach in the form of amnesty is the answer. Amnesty proposes that the States that have legalized marijuana immediately remediate all negative effects of past, non violent marijuana laws, and effectively obliterate past, non-violent pot offenses, including investigatory stops and arrests. Additionally, it provides that past pot offenders are entitled to a broad list of remedies, inclusive of compensation, to aggressively erase the direct and collateral effects of past pot laws.[322] Despite the overwhelming bases for the right of retroactivity, there are critics of automatic or comprehensive retroactive amelioration whose perspectives deserve a response.

This section responds to two positions against the right to retroactive amelioration and amnesty as a proposed solution. The first critique is that the right to retroactive amelioration preempts legislative authority. The second criticism is that the right of retroactive amelioration, especially in the form of amnesty, is too expensive to implement. Each critique is accompanied by a response, which provides how the benefits of the solution outweigh its possible shortcomings.

321. *See* McDonald, *supra* note 92.

322. *See infra* Addendum, the Marijuana Amnesty Code (hereinafter "MAC") provides that all laws, which intentionally or unintentionally discriminate against past pot offenders are hereby deemed unconstitutional infringements on individual's inalienable, constitutional rights against discrimination, such laws include but are not limited to employment, licensing, voting, travel, and immigration; such laws are hereby mandatorily void and unenforceable, in such a manner to treat past pot offenders as a protected class, subject to strict scrutiny. These provisions are tangential and are beyond the purview of this Article.

1. Preempts Legislative Discretion

Some critics might argue that amnesty wrongfully preempts legislative authority, as it deprives the legislature of the power to restrict the scope of the legalization laws that it enacted. Critics might even explain that such preemption would serve as a disincentive to marijuana law reform. Similarly, prosecutors might view amnesty as being overly broad in that some "marijuana offenses" were, in fact, proxies for other drug-related offenses, such as trafficking and/possession of other illicit drugs. As a result, they would complain that amnesty would exonerate criminals who were not intended to be relieved.

In response, I believe that amnesty is the most practical solution to a right that the Constitution guarantees to past pot offenders, the right to retroactivity of marijuana legalization laws. Viewed from that perspective, once a State has chosen to legalize marijuana, it has no choice but to make it retroactive. While amnesty might mean that a few past offenders might get a slightly undeserved break, that is a minor by comparison to the injustice to those who have suffered from over-sentencing and unconscionable convictions.

2. Too Expensive

Some critics claim that amnesty would be too expensive to implement, as it provides a blanket remedy to a large class of people. As a result, some lawmakers might claim that implementing amnesty would pose a financial burden on states. Furthermore, some critics might argue that such a notable transformation in a criminal justice system based on mass incarceration, over-charging, and disparate sentences would be administratively untenable.

In response, I believe that amnesty would be a positive solution to address the WOD's negative, direct, and collateral consequence on people's lives, arresting people for drug possession is costly to society.[323] First and foremost, the criminalization of pot is a source of violence, pitting police officers against the communities they police.[324] Second, it places an incredibly high enforcement burden on an already strained criminal justice system, taking valuable resources from serious criminal infractions.[325] And third, it is extremely expensive to prosecute and incarcerate pot offenders, most of whom are nonviolent, misdemeanor, first-time offenders.[326]

323. *See supra* note 88, Common Sense for Drug Policy, Drug War Policy, https://www.drug warfacts.org/ (last visited July 17, 2019).

324. *See* Blanks, *supra* note 23 (noting that "[p]olice are incentivized to initiate unnecessary contact with pedestrians and motorists, and they do so most often against ethnic and racial minorities. Such over-policing engenders resentment among minority communities and jeopardizes public safety." *Id*.).

325. *See* CRIM. JUSTICE POL'Y FOUND., *supra* note 20.

326. *Id*.

Furthermore, to those critics, I say that the harm to society and to the victims of the continuing inequities of our unjust criminal justice system is untenable and makes the cost of change immaterial. Besides, legalization is creating a new marijuana industry, with a new source of tax revenue and economic development. Thus, I propose the answer is the MAC, which provides a "Pot Victim Relief and Compensation Fund." It could be funded from the increased tax revenues from legalization and the cost savings from freeing incarcerated, nonviolent pot offenders. Overall, I believe that the increased tax revenue from legalized marijuana should be used to provide the funding and other resources needed to facilitate the remediation of past offenders. Therefore, in creating a better world, we should free the innocent and exonerate the victims of the WOD.

Proposition #3: This discussion of the constitutional and fundamental principles leads to the next proposition, that past pot offenders have a right to be judged by a new, lessen, substantive criminal standard and, therefore, are entitled to retroactive amelioration, and that amnesty is the practical remedy to deliver on this right to a broad group of people.

In summary, Part III argues that past pot offenders are entitled to the retroactive application of marijuana legalization law. It shows that constitutional principles and recent Supreme Court decisions grant past criminal offenders the right to retroactive application of substantive changes in the law. Further, it is argued that legalization of marijuana is a substantive change resulting from amendments in State constitutions. By the right of retroactivity, embodied in the concept of *lex mitior*, past pot offenders must be judged by the new, lessened standards of marijuana criminal culpability. As a result, such offenders need not rely on a restricted view of retroactivity rules, from a top-down perspective, in which past offenders must pray for the mercy of the government. Instead, past pot offenders are entitled to view retroactivity from a bottom-up, substantive rights-based viewpoint. Moreover, recognizing that millions of past pot offenders are entitled to retroactive amelioration, this Article proposes amnesty as a comprehensive means to redress such relief. Lastly, it briefly explains how amnesty withstands critics, as it reflects the preemptive authority of constitutional principles over State legislative discretion, and it is ultimately cost effective.

Conclusion

In the movie *Back to the Future*, Doc Brown travels into the future to warn Marty McFly of impending events "back in time," that threaten Marty's present existence.[327] Today, States that have legalized marijuana, and those that contemplate doing so, face a similar problem: whether legalization applies retroactively to past offenses. In other words, should the Marty McFlys of prelegalization time be exonerated retroactively for past offenses, because they deserve to be judged by today's criminal standards?

Currently, the retroactivity practices fail to address the problems of our criminal justice system, produce inconsistent and unsatisfactory results, lack a guiding principle, and, most importantly, leave past offenders in prison or living with the stigma of being a pot offender. With the legalization of marijuana, past offenders are entitled to be freed from the penalties and stigma from antiquated laws. It is inherently unfair to continue punishing past offenders for activities in a state that now deems those activities to be legal.

This Article claims that past pot offenders have a constitutional right to retroactive amelioration, in States that have legalized marijuana. Recognizing that the implementation of such a broad-based right is burdensome, this Article suggests that amnesty is a practical, comprehensive means to provide remedial action in a swift and certain manner. In conclusion, society as a whole will greatly benefit from returning past pot offenders to normal lives, freed from onerous prison sentences and from the stigma of a criminal record.

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As noted in Part II of this Article, the following is my proposed code that government, courts, and policymakers should adopt to provide past pot offenders with retroactive amelioration.

Addendum, Marijuana Amnesty Code

A. Provisions

WHEREAS, there is a cultural and political shift relating to the safety and benefits of marijuana and in the minor, nonviolent use, possession, cultivation, sale, and distribution of small amounts of the same;

WHEREAS, the War on Drugs has failed to stop the use of marijuana and has resulted in, direct and indirect, negative impacts on the lives of millions of Americans; and the prohibition of marijuana has been utilized by the legal

327. *See* BACK TO THE FUTURE, *supra* note 1.

system to denigrate, investigate, and infiltrate the private, protected spheres of our society;

WHEREAS, there are ongoing efforts at every level of government to address how marijuana laws negatively impact our criminal justice system, including racial inequities, wasted resources in the policing, prosecution, and incarceration of such offenses in crowded prison conditions, and the collateral consequences of these offenses;

WHEREAS, the criminalization of marijuana has resulted in the incarceration of hundreds of thousands of non-violent offenders, some of whom are serving life imprisonment without the possibility of parole;

WHEREAS, the criminalization of marijuana has produced negative, collateral damage to the lives of millions of Americans, creating a second-class citizenry;

WHEREAS, society as a whole, especially past pot offenders and their families, have been and continue to be harmed by such past criminalization, imprisonment, or collateral consequences of having a criminal record and there is a recognized need to reconcile this past intrusion on privacy, to provide amnesty to victims of the War on Drugs, and to compensate the victims and remediate the communities negatively impacted from past marijuana laws;

WHEREAS, it is inherently unfair to permit current and future marijuana activities to be legal without applying the same legal standard of culpability to past pot offenders and that the rules of retroactivity are unsatisfactory, inconsistent, and do not provide for the automatic retroactive amelioration of past arrests, pleas, convictions, and sentences;

WHEREAS, the U.S. Supreme Court has established a right to retroactive application of substantive changes in the law, and that the legalization of marijuana is such a substantive change;

WHEREAS, the U.S. Constitution embraces the fundamental principle of *lex mitior* as a reflection of our commitment to due process as codified in the Ex Post Facto Clause, as well as in the penumbra of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution, including the right of habeas corpus;

WHEREAS, pursuant to the principle of *lex mitior*, all offenders are exonerated from a past offense when a change in the criminal law lessens,

reduces, or eliminates certain criminal behavior, whether the change in the law expressly provides for amelioration, is silent, or even denies such relief;

WHEREAS, this Code recognizes Amnesty for past pot offenders whose criminality is ameliorated due to a lessened standard of criminal culpability:

THEREFORE, IT IS HEREBY ENACTED that the Marijuana Amnesty Code (hereinafter "MAC") provides as follows: that all levels of government, to the highest extent of their powers and authorities, are hereby mandated to "exonerate" all such past marijuana-related offenses, both criminal and civil, when the substantive criminal law is lessened, in such a manner wherein those offenses are now deemed legal or may be interpreted as being legal. This mandate is self-evident and does not require supplemental action other than the immediate endeavors needed to facilitate these requisites. This means that the past offenses must be viewed as if the current laws were in force and in effect when the past offenses occurred. Additionally, this Code creates the "Pot Victim Relief and Compensation Fund," and directs that fifty percent of all revenues derived from by marijuana taxes be used to compensate each and every past offender and to reconcile/remediate the damages suffered by their families and their communities. Next, this Code requires that any and all laws that discriminate against past pot offenders, including but not limited to employment, licensing, voting, travel, and immigration, be void, as pot offenders are a protected class under the individual civil liberties guaranteed under the Constitution, including the anti-discrimination laws.

In this Code, the terms "exonerate," "amnesty," and "ameliorate" shall embrace the spirit of the ameliorative goal of the code, that is, to remove any and all negative impacts from the prior, now antiquated law. Such amelioration shall include any and all of the following remedies: a. release from imprisonment; b. reduction of sentencing; c. parole for life imprisonment without the possibility of parole, where appropriate; d. nunc pro tunc; e. expungement; f. seal of criminal record; g. remission/reimbursement of fines and penalties; h. pardons; i. letters of good standing for licensing and employment purposes; j. executive clemency; k. commutation of sentence; l. restitution; and m. reprieve.

B. Explanation

In summary, the provisions of the MAC reflect the following four tenets:

1. The MAC declares that *lex mitior* is a fundamental principle that is embodied in the Ex Post Facto Clause of the Constitution and requires that citizens in all substantive criminal matters be judged by the lessor of the legal standards of culpability, when a latter law lessens the present and future criminal behavior, as applied to marijuana legalization.

2. The MAC recognizes amnesty and orders retroactive exoneration, automatically and immediately, as the application of a fundamental constitutional, inalienable right that is guaranteed to each individual, of which cannot be infringed upon without due process, when a jurisdiction lessens its criminal substantive marijuana standard of culpability.

3. The MAC mandates that public officials in states that legalize marijuana remediate all negative effects of past marijuana laws, inclusive of effectively obliterating and all past pot offenses, including investigatory stops and arrests. Further, it provides that past pot offenders are entitled to a broad list of remedies, inclusive of compensation, to aggressively erase the direct and collateral effects of past pot laws.

4. The MAC determines that all laws, which intentionally or unintentionally discriminate against past pot offenders are hereby deemed unconstitutional infringements on an individual's inalienable, constitutional rights against discrimination, such laws include but are not limited to employment, licensing, voting, travel, and immigration; such laws are hereby mandatorily void and unenforceable, in such a manner to treat past pot offenders as a protected class, subject to strict scrutiny.

In conclusion, the MAC restores full citizenship rights to past offenders and constitutes a win-win, as it exonerates past pot offenders, through remediation and compensation, while raising tax revenue for the state and reducing the costs of incarceration.

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