

Lex Mitior: A Constitutional Right to Pot Amnesty

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Hot Topics: Assessing the Impact of President Biden's Marijuana Actions
AALS Annual Meeting, San Diego, Friday, January 6, 2023, 10:00-11:40 am

I. Crusto's Argument for Pot Amnesty, see Crusto, *Weeding Out Injustice: Amnesty for Pot Offenders*, 47 HASTINGS CONST. L.Q. 367-424 (2020), https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol47/iss3/3

1. Thesis:

There is arguably a constitutional right to ameliorate past marijuana offenders who were arrested or convicted for activities under laws that have since been decriminalized or legalized.

2. General Rule: When a law is enacted that decriminalizes or legalizes certain activities that were previous deemed criminal, that new law is not automatically retroactively applied to ameliorate past offenders. Retroactive amelioration.

3. Lex Mitior: However, when the new criminal law makes a substantive change and is silent as to its retroactivity, it can be plausible argued that a constitutional law principle of lex mitior (the milder law) applies. Lex mitior is arguable a corollary to the constitutional principle of ex post facto. <https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1265;jsessionid=6BEF7D2567D2D20E76AC2B64AE3993FA>

4. Applied to Marijuana Reform: The decriminalization of some marijuana-related activities should apply retroactively to ameliorate past offenses.

5. Amnesty is Required

"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.... 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." The term "amnesty"... 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.

6. Without Amnesty:

- a. Many Non-Violent Marijuana Offenders are Serving Life in Prison without the Possibility of Parole: A Living Death, Life without Parole for Nonviolent Offenses, 2013 ACLU Foundation,

https://www.aclu.org/sites/default/files/field_document/111813-lwop-complete-report.pdf.

- b. Millions of Americans Live as Second Class Citizens, Impaired by a Criminal Record of a Non-Violent Marijuana Arrest. Federal Collateral Consequences for Marijuana Convictions, including "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," <https://www.mpp.org/issues/criminal-justice/federal-collateral-consequences-for-marijuana-convictions/>.
- c. Over Policing. Of the 8.2 million marijuana arrests between 2001 and 2010, 88% were for simply possessing marijuana, <https://www.aclu.org/gallery/marijuana-arrests-numbers>. 21 Dreadful Marijuana Criminal Statistics [2021 Update], <https://cannabisoffers.net/marijuana-criminal-statistics/>.

II. President Biden's Leadership on the Issue of Amnesty/Pardons

1. On October 6, 2022, President Biden issued A Proclamation on Granting Pardon for the Offense of Simply Possession of Marijuana, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/>
2. The Justice Department Explains the Limitations of the Presidential Proclamation on Marijuana Possession, <https://www.justice.gov/pardon/presidential-proclamation-marijuana-possession>
3. Congressional Researchers Lay Out Six Key Limitations of Biden's Marijuana Pardons, <https://www.marijuanamoment.net/congressional-researchers-lay-out-six-key-limitations-of-bidens-marijuana-pardons/>
4. DOJ Official Details Plans to Provide Presidential Marijuana Pardon Certificates Through 10-Minute Application Process, <https://www.marijuanamoment.net/doj-official-details-plans-to-provide-presidential-marijuana-pardon-certificates-through-10-minute-application-process/>
5. Marijuana Pardons Affect Just a Sliver of Those Swept Up in the War, <https://www.nytimes.com/2022/11/27/us/politics/biden-marijuana-pardons.html>,
6. Biden's Cannabis Pardons: a Long Overdue Reassessment of the War on Drugs, <https://www.brookings.edu/blog/how-we-rise/2022/10/07/bidens-cannabis-pardons-a-long-overdue-reassessment-of-the-war-on-drugs/>
7. Governors Split on Biden's Call to Pardon Low-Level Pot Offenders, <https://www.pewtrusts.org/en/research-and->

[analysis/blogs/stateline/2022/10/28/governors-split-on-bidens-call-to-pardon-low-level-pot-offenders](https://www.marijuanamoment.net/analysis/blogs/stateline/2022/10/28/governors-split-on-bidens-call-to-pardon-low-level-pot-offenders)

8. Federal Report Details Who's Impacted By Biden's Marijuana Pardon Action, State By State, <https://www.marijuanamoment.net/federal-report-details-whos-impacted-by-bidens-marijuana-pardon-action-state-by-state/>
9. Racial Equity in Marijuana Pardons Requires States' Action, <https://www.usnews.com/news/politics/articles/2022-10-08/racial-equity-in-marijuana-pardons-requires-states-action>
10. Nearly 2 Million Marijuana Convictions Have Been Pardoned or Expunged in the U.S. in the Past Five Years, New Report Shows, <https://www.marijuanamoment.net/nearly-2-million-marijuana-convictions-have-been-pardoned-or-expunged-in-the-u-s-in-the-past-five-years-new-report-shows/>
11. Oregon's Governor Pardons Thousands for Cannabis Convictions, <https://www.opb.org/article/2022/11/21/oregon-governor-kate-brown-pardons-thousands-for-cannabis-convictions/>
12. State Expungement Laws, <https://norml.org/laws/expungement/>

III. Questions:

1. Statutory retroactivity, amelioration, expungement, and reparations
2. Self-effectuating vs. the need to and cost of making application
3. Minors in possession
4. Marijuana as a negotiated plea of a more serious crime
5. More aggressive federal laws to erase or mitigate the collateral consequences of a non-violent marijuana arrest or conviction
6. Pardon vs. clemency vs. amnesty

Mitch Crusto is the Henry F. Bonura Jr. Endowed Professor of Law at Loyola University New Orleans College of Law. See also *Assessing the Status of Minors in Possession: Marijuana versus Alcohol*, unpublished research grant report, 1-57, The Ohio State University (2022), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203910