

COMMENT

Cannabis, Justice, Race, and Politics

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TABLE OF CONTENTS

INTRODUCTION: CANNABIS AND CLEMENCY . . . . . 1071

I. CANNABIS AND JUSTICE . . . . . 1072

II. CANNABIS AND RACE. . . . . 1074

III. CANNABIS AND POLITICS . . . . . 1076

CONCLUSION. . . . . 1076

INTRODUCTION: CANNABIS AND CLEMENCY

Almost two years after Maryland voters approved a referendum legalizing the possession or use of cannabis for medical or recreational purposes, on June 17, 2024, Maryland Governor Wes Moore issued an executive order granting a mass pardon (often called an amnesty<sup>1</sup>) to between 100,000 and 175,000 offenders convicted in Maryland state courts of the misdemeanor crimes of cannabis possession or possession with the intent to use drug paraphernalia.<sup>2</sup> Governor Moore stated that he issued the pardons to achieve three results: (1) to eliminate

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1. See *Knote v. United States*, 95 U.S. 149, 152-53 (1877) (noting that the term “amnesty” is “generally employed where pardon is extended to whole classes or communities, instead of individuals”).

2. The State of Maryland, Executive Dep’t, Off. of Gov. Wes Moore, Executive Clemency Full Pardons of Certain Convictions for Cannabis Offenses (June 17, 2024) [hereafter Moore Cannabis Pardon], [https://governor.maryland.gov/Lists/ExecutiveOrders/Attachments/53/Executive%20Clemency%20-%20Full%20Pardons%20of%20Certain%20Convictions%20for%20Cannabis%20Possession\\_Accessible.pdf](https://governor.maryland.gov/Lists/ExecutiveOrders/Attachments/53/Executive%20Clemency%20-%20Full%20Pardons%20of%20Certain%20Convictions%20for%20Cannabis%20Possession_Accessible.pdf) [https://perma.cc/J8B4-X59N]; see, e.g., Erin Cox et al., *Maryland Governor to Pardon 175,000 Marijuana Convictions in Sweeping Order*, WASH. POST, June 17, 2024, <https://www.washingtonpost.com/dc-md-va/2024/06/16/maryland-mass-pardon-marijuana-conviction/> [https://perma.cc/7RPK-5UU4]; Rachel Nostrant, *Maryland Governor Pardons 175,000 Marijuana Convictions*, N.Y. TIMES, June 17, 2024, <https://www.nytimes.com/2024/06/17/us/maryland-marijuana-pardon-wes-moore.html?searchResultPosition=1> [https://perma.cc/3T6Y-GZMU]; Gareth Vipers, *Maryland Issues Mass Pardon for More than 175,000 Marijuana Convictions*, WALL ST. J., June 17, 2024, [https://www.wsj.com/us-news/maryland-to-issue-mass-pardon-for-more-than-175-000-cannabis-convictions-47985c13?mod=Searchresults\\_pos1&page=1](https://www.wsj.com/us-news/maryland-to-issue-mass-pardon-for-more-than-175-000-cannabis-convictions-47985c13?mod=Searchresults_pos1&page=1) [https://perma.cc/BC9E-AGQK].

any lingering adverse effect of a conviction for conduct that is now lawful,<sup>3</sup> (2) to remove barriers to employment and housing for people convicted of low-level cannabis offenses by eliminating convictions from their records,<sup>4</sup> and (3) to address the disproportionate investigation and prosecution of blacks for cannabis offenses.<sup>5</sup> To implement his order, the governor asked the Maryland judiciary, with the assistance of the state Department of Public Safety and Correctional Services, to identify and list the specific people who should receive the relief he granted.<sup>6</sup>

Governor Moore's action will be lauded by three groups: one supporting criminal justice reform, one claiming that the Maryland criminal justice system had discriminated against blacks, and one supporting politicians—whether Democratic or Republican, whether conservative or liberal—who see cannabis reform as a political boon for their preferred officials and candidates. The rationale that each of those groups would voice, however, is different from the others. Each justification should be examined separately.

### I. CANNABIS AND JUSTICE

The first group would support the governor's action because it reforms what many see as an overly punitive criminal justice system, particularly when it comes to the so-called "War on Drugs."<sup>7</sup> They would argue that legislatures have

3. "No one should continue to suffer the effects of a conviction for conduct that is no longer a crime in the State of Maryland[.]" Moore Cannabis Pardon, *supra* note 2, at 1.

4. Moore Cannabis Pardon, *supra* note 2, at 1 ("Despite the legalization of the personal use amount of cannabis, Marylanders have continued to face barriers to housing, employment, and educational opportunities as a result of possessing the personal use amount or lesser amounts of cannabis, sometimes decades ago[.]"); see Cox et al., *supra* note 2 ("If you want to be able to create inclusive economic growth, it means you have to start removing these barriers that continue to disproportionately sit on communities of color.").

5. Moore Cannabis Pardon, *supra* note 2, at 1 ("Black Marylanders have been arrested, prosecuted, and convicted for possession of cannabis at disproportionate rates, and the lasting disproportionate impact of arrest and prosecution for cannabis possession is antithetical to the Maryland voters' overwhelming approval of the legalization of cannabis use and possession and to the fair and equitable administration of justice[.]"); Cox et al., *supra* note 2 (quoting Governor Moore: "I'm ecstatic that we have a real opportunity with what I'm signing to right a lot of historical wrongs," Moore said in an interview.); cf. Nostrant, *supra* note 2, ("Today is about equity; it is about racial justice," Anthony Brown, Maryland's attorney general, said on Monday. "While the order applies to all who meet its criteria, the impact is a triumphant victory for African Americans and other Marylanders of color who were disproportionately arrested, convicted and sentenced for actions yesterday that are lawful today.").

6. Moore Cannabis Pardon, *supra* note 2, at 2-3.

7. "A trope heard throughout criminal justice circles today is that the system is a dystopia. The only difference is the stage of the criminal justice system being attacked. The allegations ordinarily go as follows: [¶] Legislatures and regulatory agencies have adopted too many criminal laws, so many that the average person cannot know what is and is not a crime. The police are motivated by racist attitudes and act like Rambo wannabes decked out in full military gear. Traditional forms of proof, such as eyewitness identification, fingerprints, and confessions, which the public assumes are foolproof are, in fact, anything but—to say nothing about the more exotic forms of proof such as 'bite-mark' or blood-spatter' analysis. Allegedly scientific test results and supporting expert testimony offered by law enforcement laboratory technicians are sometimes so riddled with errors as to be little more useful than

not done an adequate job of pruning unnecessary criminal laws from the penal code, of funding public defender offices (both lawyers and their investigators), and of paying attention to abuses of the investigative authority that they have given federal, state, and local law enforcement agencies. A necessary remedy, in their view, is a revitalized use of the President's and governors' clemency authority to remedy such systemic flaws.

Whether or not those critics are right about the alleged systemwide flaws in the operation of our 50-plus criminal justice systems,<sup>8</sup> Maryland presents a special case. In 2022, the state chose to legalize and regulate cannabis use, whether for "medical" or "recreational" purposes. The result is that the state now believes that conduct once made unlawful by the penal code should no longer be deemed a crime. The shift in public attitudes, policy, and law creates the anomaly that some individuals now stand convicted of conduct that the state now believes should be treated through the civil law or regulatory process, not the criminal law.

The laws on the books reflect the public policy judgments of the federal and state governments, and the governor can use the clemency power to reflect the contemporary judgment of his or her jurisdiction. In circumstances like those, a governor may—indeed, I would say *should*—exercise his or her clemency power to erase the stain on someone's record resulting from a conviction for now-lawful conduct.<sup>9</sup> That was a reason why Governor Moore issued the amnesty.<sup>10</sup> Accordingly, when viewed as a matter of criminal justice policy, Governor Moore's action should receive the plaudits that many criminal justice reformers will give it.

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guesswork. Prosecutors charge offenders with crimes that have maximum publicity value or can easily be proven in order to enhance their resumes, all while withholding exculpatory evidence from the defense to maximize the likelihood of conviction. Public defenders are so swamped with cases and starved for resources—investigators, assistants, and even office supplies—that they wind up being collaborators rather than effective independent advocates for their clients. Judges find themselves crushed by caseloads, forcing them to treat cases in the same way as tollbooth operators treat vehicles—make everyone pay the fee before moving on. They are also hog-tied by mandatory minimum sentencing laws, which force them to impose lengthy and unjust terms of imprisonment. All told, the system treats defendants like widgets wending their way down the assembly line, where no actor in the process believes in their innocence and where all must be processed quickly to keep the line from backing up. The result is not a pretty sight." Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 36 HARV. J.L. & PUB. POL'Y 833, 834-37 (2016); *id.* at nn.1-13 (collecting authorities so arguing).

8. Much of America's criminal justice apparatus is decentralized and subject to the control of local officials. The result is that the criticism of an "American criminal justice system" is often subject to the criticism that it mistakes the whole for errors made by individual parts and separate actors. *See* Paul J. Larkin & GianCarlo Canaparo, *The Fallacy of Systemic Racism in the American Criminal Justice System*, 18 LIBERTY U.L. REV. 1, 60-62 (2023).

9. Symmetry is not a relevant consideration in this setting. The *Ex Post Facto* Clauses of the U.S. Constitution prohibit the federal and state governments from retroactive making a crime conduct undertaken before a new criminal law goes into effect. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1.

10. *Supra* note 2.

## II. CANNABIS AND RACE

The second factor that appears to have motivated the governor is the desire to rectify racial imbalance in the criminal justice system that adversely affected blacks. As the *Wall Street Journal* noted, from 2010-2018 on average, a black person was “3.6 times more likely to be arrested for marijuana possession in the U.S. than a white person,” even though blacks and whites used cannabis at a similar rate.<sup>11</sup> Perhaps the governor relied on such a disparity. But if he did, he made a mistake. The reason why is that such a disparity, while warranting further inquiry, is not itself conclusive proof of racial discrimination.

The law here is straightforward. The Fourteenth Amendment’s Equal Protection Clause bars only intentional racial discrimination—that is, differential treatment for the purpose of causing an adverse result, not merely the disproportionate impact that a particular action might have or has had on a specific racial group.<sup>12</sup> The Supreme Court of the United States has made that point clear on numerous occasions.<sup>13</sup> The governor did not make a finding that any particular offender was the victim of discrimination, nor did the governor require any potential clemency recipient to make such a showing to receive a pardon. Moreover, the disparity cited by the *Wall Street Journal* involved different judgments made by different law enforcement agencies in *Maryland’s 23 counties and Baltimore City over an eight-year period*. A discriminatory judgment made by one police officer or one prosecutor cannot automatically be attributed to every other such official throughout the state in any one year, let alone eight of them.<sup>14</sup> In addition, some studies of the disparities between the number of blacks and whites arrested for cannabis offenses suffer from one or more methodological shortcomings.<sup>15</sup> In

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11. Vipers, *supra* note 2.

12. See, e.g., *Personnel Adm’r v. Feeney*, 442 U.S. 256, 273-79 (1979) (“[T]he Fourteenth Amendment guarantees equal laws, not equal results. . . . ‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”) (citation and footnote omitted).

13. See, e.g., *Alexander v. S.C. St. Conf. of the NAACP*, 144 S. Ct. 1221, 1233-36 (2024); Larkin & Canaparo, *supra* note 8, at 64 n.163 (collecting cases).

14. See *supra* note 8.

15. “For example, there is evidence that marijuana stores are disproportionately situated in some minority communities, see SMART APPROACHES TO MARIJUANA, LESSONS LEARNED FROM LEGALIZATION IN FOUR U.S. STATES AND DC 29 (Mar. 2018) [hereinafter *SAM, Lessons Learned from Legalization*], <https://learnaboutsam.org/wp-content/uploads/2018/04/SAM-Lessons-Learned-From-Marijuana-Legalization-Digital.pdf> [<https://perma.cc/UM5J-KMLA>] (‘An overlay of socioeconomic data with the geographic location of pot shops in Denver shows marijuana stores are located primarily in disadvantaged neighborhoods.’), and that juvenile offenders might be unaware of the distinction between private and public marijuana use, *id.* at 26 (referring to data from Colorado and Alaska: ‘Many young people hear the message that ‘pot is legal,’ but are unaware (or unconcerned) that public use is not.’). Moreover, the NYPD report cited above [REPORT OF THE NYPD WORKING GROUP, ENFORCEMENT OF THE LAW PROHIBITING PUBLIC BURNING OF MARIJUANA IN NEW YORK CITY (June 15, 2018) [hereinafter *NYPD Report*], <https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2018/marijuana-report-20180619.pdf> [<https://perma.cc/J5NA-B6X8>] states that pre-2017 data do not distinguish between arrests for simple possession and ‘public burning’—that is, smoking in public. ‘This distinction is important because it is

particular, it is not discrimination to enforce the law against the public consumption of cannabis if a predominantly black neighborhood complains about the public smoking of “joints” by a bunch of rowdy teenagers, even if that groups is also predominantly black.<sup>16</sup> Accordingly, it seem highly unlikely that the 100,000 to 175,000 Marylanders who might benefit from the governor’s order were all victims of racial discrimination. If so, the governor’s order is greatly overbroad.

Perhaps, Governor Moore believes that the Maryland criminal justice system has been infected with what has been called “systemic racism”<sup>17</sup> and therefore there was no reason to make case-by-case findings of racial discrimination.<sup>18</sup> Other people have made that argument, particularly in connection for drug offenses.<sup>19</sup> But he did not offer that justification. In fact, he did not cite racial discrimination as a justification for his order, only the “disproportionate effect” that the cannabis laws had on blacks was unjustifiable now that Maryland has legalized cannabis use.<sup>20</sup> Nor did he explain why Maryland suddenly became free of systemic discrimination on January 1, 2023, the terminal date of his clemency order.<sup>21</sup> In any event, the claim that any criminal justice system in this nation is irredeemably seeped in systemic discrimination, including the features of those systems that are devoted to the investigation and prosecution of drug crimes, is mistaken on its facts and on the law.<sup>22</sup>

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typically burning marijuana in public or sale, and not mere possession in public view, that generates calls from the public for the police to take action.’ *NYPD Report*, *supra*, at 4. In addition, studies noting the racial disparity may elide the difference between (1) the crime that precipitated the arrest and (2) the addition of an independent charge for marijuana possession discovered during a search incident to the arrest. See [Ed Gogek, *Marijuana Debunked: A Handbook for Parents, Pundits and Politicians Who Want to Know the Case Against Legalization* 107-09 (2015)] Finally, when minorities are predominantly both the perpetrators and victims of crime in a neighborhood, the police cannot legitimately be criticized for enforcing laws that protect law-abiding minority residents. See Paul J. Larkin, Jr. & David Rosenthal, *Flight, Race, and Terry Stops: Commonwealth v. Warren*, 16 GEO. J. L. & PUB. POL’Y 163, 194–225 (2018).” Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OH. ST. J. CRIM. L. 99, 132-33 n.134 (2020).

16. See Larkin & Canaparo, *supra* note 6, at 83-84 (“If the [Hot-Spots Policing] strategy of assigning more police where there are more crimes is successful, law-abiding black residents of predominantly black communities will be the principal beneficiaries. That might explain why African-Americans in poor communities want more aggressive enforcement of the criminal law in their neighborhoods.”) (footnotes omitted).

17. For a discussion of the argument that the American criminal justice system is infected with racial discrimination, see Larkin & Canaparo, *supra* note 8.

18. See Moore Cannabis Pardon, *supra* note 2, at 2-3.

19. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (Rev. ed. 2012).

20. See Moore Cannabis Pardon, *supra* note 2, at 2 (noting that “Black Marylanders have been arrested, prosecuted, and convicted for possession of cannabis at *disproportionate rates*, and the lasting disproportionate impact of arrest and prosecution for cannabis possession”) (emphasis added).

21. Moore Cannabis Pardon, *supra* note 2, at 2-3 (“Pursuant to my pardon power, I asked the Maryland Judiciary to identify and compile a list of electronically available case records for individuals who were convicted of misdemeanor cannabis possession *for conduct that occurred prior to January 1, 2023 . . .*”) (emphasis added).

22. For a detailed explanation why that is so, see Larkin & Canaparo, *supra* note 6, at 59-187.

### III. CANNABIS AND POLITICS

For a number of reasons, the governor's clemency order might just be an entirely political decision. Since the 1960s, there has been an ongoing debate over the proper treatment of cannabis under federal and state law,<sup>23</sup> and, like Maryland, numerous states have now legalized its use for medical or recreational purposes.<sup>24</sup> Any further liberalization of state cannabis laws will certainly be seen as a victory by advocates for reform, and pardoning past offenders will also be seen as a "win." The governor's decision follows not long after the Biden Administration announced that it would reclassify cannabis from Schedule I to Schedule III, a less rigorous regulatory category, a goal that cannabis reformers have long sought.<sup>25</sup> The sky did not fall in on President Joe Biden when Attorney General Merrick Garland made that announcement, so Governor Moore might have thought that he could profit from a similar action. The amnesty will apply only to misdemeanors, not felonies, and therefore might not require the release of anyone who is currently in prison. Indeed, the amnesty will apply to people who are dead.<sup>26</sup> That reduces the risk that a pardoned offender will commit a horrific or newsworthy crime. Accordingly, the pardons will not have an immediate and obviously harmful effect, but they will appeal to the "stoner vote," just like the Biden Administration's proposed decision to reclassify cannabis is designed to satisfy that group of voters.

### CONCLUSION

Governor Moore deserves credit for pardoning people who were convicted of conduct that Maryland no longer believes should be deemed illegal. Insofar as that rationale motivated his pardoning decision, he justly deserves credit for his June 17 executive order. Insofar as he was motivated by a felt need to remedy racial discrimination, however, his order was doubtless overbroad, because he did not make findings of racial discrimination in the 100,000-175,000 cases

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23. See generally Paul J. Larkin, Jr., *Introduction to a Debate: "Marijuana: Legalize, Decriminalize, or Leave the Status Quo in Place?"*, 23 BERKELEY J. CRIM. L. 73 (2018) (summarizing each side in that debate).

24. More than two dozen states permit the possession of small amounts of cannabis for medical or recreational use. See NAT'L CONF. OF ST. LEGISLATORS, *Cannabis Overview* (Apr. 9, 2024), <https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview> [<https://perma.cc/8HAG-C7VG>] (last visited June 17, 2024).

25. Ben Glickman, *U.S. Attorney General Begins Formal Process to Reschedule Marijuana*, WALL ST. J., May 16, 2024, [https://www.wsj.com/politics/policy/u-s-attorney-general-begins-formal-process-to-reschedule-marijuana-86506b41?mod=Searchresults\\_pos12&page=1](https://www.wsj.com/politics/policy/u-s-attorney-general-begins-formal-process-to-reschedule-marijuana-86506b41?mod=Searchresults_pos12&page=1) [<https://perma.cc/9T4U-S53S>].

26. Moore Cannabis Pardon, *supra* note 2, at 2-3 ("Pursuant to my pardon power, I asked the Maryland Judiciary to identify and compile a list of electronically available case records for individuals who were convicted of misdemeanor cannabis possession for conduct that occurred prior to January 1, 2023, including cases with a final disposition of probation before judgment, which the Judiciary has provided to me and from which I have identified the convictions eligible for pardon (the 'Cannabis Possession Pardon List.')[.] . . . This Executive Clemency Order applies only to the misdemeanor cannabis possession offenses identified in the Cannabis Possession Pardon List and shall not have the effect of pardoning any other charges or convictions.") (emphasis added).

affected by his amnesty. And insofar as he issued that order just to play politics, he sullied a valuable tool that the Framers and people gave to Presidents and governors to correct errors or grant mercy, not to serve their own political purposes. To that extent, he deserves criticism for misusing a noble power of his office for personal use.