Criminal Justice Reform and the Social Determinants of Health

by: Elizabeth Hardesty

The following sections of the “Smart and Safe Arizona Act” (SSAA) directly relate to the criminal justice components of marijuana legalization:

§36-2853 Violations; classification; civil penalty; additional fine; enforcement
§36-2854 Rules; licensing; early applicants; fees; civil penalty; legal counsel
§36-2856 Smart and safe Arizona fund; disposition; exemption
§36-2862 Expungement; petition; appeal; dismissal of complaints; rules
§36-2863 Justice reinvestment fund; exemption; distribution; definition

If Arizonans vote to pass SSAA in November, it will make Arizona the 13th state in the US to legalize recreational marijuana use. Legalization can do a lot of good for the state if done in a financially and socially responsible way, and this evaluation of the SSAA in regard to its criminal justice implications is an important piece of the puzzle.

Before jumping into the evaluation, it is important for the reader to have some knowledge of our country’s past in regard to drug policy and policing practices. This history is both important and necessary to take into consideration as we navigate the path ahead.
Since the inception of the War on Drugs in the 1970’s, the US prison population has surged dramatically. As of January 2020, the US incarcerated more people than any other OECD country in the world, with a rate of 698 per 100,000 behind bars. Put another way, 1 out of every 5 prisoners in the world are incarcerated in the US.\(^1\) Arizona’s incarceration rate is even higher, at 877 per 100,000 people - around 62,000 individuals.\(^2\) Over the past decade, 32 states have successfully lowered their crime rates and prison population by implementing policies that focus on community-based treatment and supervision: two methods that have produced better outcomes than their harsher alternative.\(^3\) While Arizona has seen a modest reduction in crime in the past 10 years, our prison population has skyrocketed during the same period. This cannot be attributed to the state’s population growth, either - since the year 2000 the incarceration rate has grown twice as fast (60%) as the general population (33%).\(^4\) The reason for this is a statewide change in policy that makes it easier to imprison individuals for first-time felony offenses and non-violent crimes, many of which are simple drug possession.\(^5\) In fact, 7 out of 10 prison admissions in 2017 were for non-violent crimes, with drug possession topping the list at 3,418 admissions (an increase of 142% since 2000).\(^5\) Even more concerning than Arizona’s increase in prison admissions is the glaring racial and ethnic discrimination that goes along with it – Blacks make up only 5% of the state’s population but account for 13% of prison admissions, Native Americans make up 5% of the population but account for 7% of admissions, and Hispanics make up 31% of the population and account for 37% of admissions.\(^5\) Hispanics and Blacks are also severely overrepresented in prison for the simple act of marijuana possession, with Hispanics making up 60% of the incarcerated population and Blacks at 16%.\(^5\) Since we know that Whites use marijuana at similar rates as people of color\(^6\), these statistics are
particularly disturbing. Research by criminologists has shown that these differences between races are not so much the result of disparities in arrest rates, but rather occur throughout other parts of the prosecution and conviction process.\(^7\) Black and Hispanic people on average serve longer sentences than Whites even after controlling for factors like gender, type of offense, and number of prior felonies.\(^6\)

Incarceration does more than deplete a state’s budget – it also places significant financial and social burdens on individuals, their families, and the wider community in which they reside. Research has shown that in communities with high incarceration rates, simply living there without having any personal involvement in the criminal justice system can have negative effects: increased mental health problems, higher rates of disease, and lower income overall.\(^8\)
In Arizona, rural counties send a higher proportion of their population to prison than their more metropolitan counterparts\textsuperscript{9}, further depleting the economies and social structure of these underserved areas. Some researchers have argued that with higher incarceration rates comes more crime, so it is a perpetually destructive cycle.\textsuperscript{10}

The prospect of finding lucrative employment greatly decreases when you have a criminal record. Offenders may be barred from receiving assistance from the state and federal government, including but not limited to housing, food stamps, and loans for higher education. There are also significant social costs such as deportation, being disconnected from family or losing custody of minor children.\textsuperscript{11} Minimum sentencing and harsh policies for drug use and possession can have far-reaching negative effects that may not be immediately evident but are
nonetheless responsible for tearing apart the fabric of society little by little. For this reason, it is important that with the passing of SSAA we seek to address many of the injustices of the past and find a way to gain back the trust of individuals and communities that have been so negatively affected by harsh drug enforcement policies.

Armed with the knowledge of past wrongs that have been committed against people of color, one can see why the way in which we go about legalization is worthy of critical thought and consideration. While some states with recreationally legal marijuana have not done their part to address years of systemic racism in policy and practice, others have set a more positive example for a way forward.

California and Illinois lead the way in policy best practices. As of August 2018 the California Department of Justice is “required to review marijuana records for potential expungement” and has approximately 218,000 cases that qualify for the process (ranging from minor offenses to more serious convictions where individuals may currently be serving prison sentences). In Illinois, those who were arrested with “30 grams or less” qualify for automatic expungement as long as the crime was “not tied to a violent offense”. California and Illinois are the only states that have this provision for automatic expungement, although other states - Colorado, Oregon, Washington, Nevada, Michigan, Delaware, Massachusetts & Vermont - have laws in place that allow for some marijuana-related records to be either sealed (hidden from view) or expunged (altogether erased from criminal databases). In these states, this does not happen automatically but must be initiated by the individual – a process that for many is overly complicated and/or financially burdensome. Alaska and Maine have proposed legislation for sealing and/or expungement, but efforts are still a work in progress.
There are numerous reasons why expungement is important. It allows those with past convictions to have some hope of taking part in the legal marijuana industry. The marijuana business is booming – by 2021 it is expected to bring in around $20 billion in sales in the United States. Sadly, the minority groups that were most heavily targeted by drug laws prior to legalization will not be able to participate because past convictions often bar them from owning or operating a marijuana business. While some states now have legislation in place to try and diversify the industry, it is a far from perfect system with laws varying greatly from state to state.

Expungement allows individuals to receive certain benefits that may have previously been denied to them due to their criminal record such as federal financial assistance for higher education and housing support. Expungement also means better job opportunities since negative marks on background checks often prevent individuals from getting higher-paying jobs or bar them from working in certain fields altogether. We all benefit when more people can work and contribute more fully to our economy.

Arizona’s proposed legislation does seek to address racial inequities with the inclusion of a justice reinvestment fund outlined in §36-2863. According to the SSAA, funds from the sale of recreational marijuana will first be used to fund law enforcement and public safety, costs related to petitions for expungement, imposing and enforcing taxes, etc. Remaining funds will be transferred to other institutions such as community colleges for workforce development, and 10% of funds will be diverted to the justice reinvestment fund. This fund further divides the money among public health agencies, non-profit organizations, behavioral health and substance use intervention programs and restorative justice/diversion programs. It is difficult
to know exactly how much money will end up going to these worthy causes, so state officials and policy makers should keep a close eye on how the funds are distributed and utilized in the early years following passage of the act.

§36-2862 deals with the expungement of records and would take effect on July 12, 2021. According to SSAA, individuals will be eligible for petitioning the court to expunge their record if they were “arrested for, charged with, adjudicated or convicted by trial or plea, or sentenced” for the following:

1) Possessing, consuming or transporting two and one-half ounces or less of marijuana, of which not more than twelve and one-half grams are in the form of marijuana concentrate.
2) Possessing, transporting, cultivating, or processing not more than six marijuana plants at the individual’s primary residence for personal use.
3) Possessing, using, or transporting paraphernalia relating to the cultivation, manufacture, processing, or consumption of marijuana.\textsuperscript{16}

According to §36-2853, the maximum penalty (first offense) for anyone under the age of 21 who is in possession of marijuana is a $100 fine (directed to the fund) as well as up to 4 hours of required drug education and/or counseling. Second and/or subsequent offenses can be classified as a class 3 misdemeanor.\textsuperscript{17} This is another area legislators and policy makers should monitor closely, as some states have seen a surge in arrests and criminal charges for youths since legalizing recreational marijuana.\textsuperscript{18} We certainly do not want to introduce a large number of young users to the prison pipeline when there are more effective treatment options available.

In conclusion, we are at a turning point in Arizona’s history. We have a chance to enact smart, informed policy that will help decrease the number of individuals that are admitted to
jail or prison for simple possession offenses, while at the same time increasing opportunities for those whose past and present have been negatively affected by antiquated drug policies.

Knowing what we do about Arizona’s rate of incarceration compared to other states in the US, we should also take this time to reevaluate our priorities when it comes to putting drug users behind bars. Ultimately, we must come together and continue to fight for policies that will improve the social determinants of health for everyone in the state, not just a select few.

**Marijuana laws in the US**

Note: Vermont and Washington, DC, do not allow marijuana sales for recreational purposes.

![Map of marijuana laws in the US](image)

*Source: Marijuana Policy Project*

*Credit: German Lopez*
Breakdown of Marijuana Business Owners & Founders By Race

% Of Cannabis Industry Owners & Founders By Race

- White: 81.0%
- Other: 6.7%
- Hispanic/Latino: 5.7%
- African-American: 4.3%
- Asian: 2.4%

Note: Results reflect the percentage of respondents with any ownership stake in a marijuana business.
Source: Marijuana Business Daily August 2017 reader survey
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References


19. Lopez G. Marijuana has been legalized in 11 states and Washington, DC. Vox.  