The Life-Changing Consequences of a Marijuana Arrest in New York: Noncitizen Immigrants

June 2017

Marijuana arrests are the engine driving the U.S. war on drugs. In 2015, there were 643,122 marijuana arrests in the U.S. – roughly 43 percent of all drug arrests. The vast majority (over 89 percent) of these arrests were for simple possession, not sale or manufacture. There are more arrests for marijuana possession every year than for all violent crimes combined.[1] U.S. Sentencing Commission data for 2015 shows that 46.6 percent of people sentenced at the federal level for marijuana offenses were noncitizens.[2]

New York's Mass Arrests for Marijuana Possession

Since 1996, there have been more than 800,000 arrests for possession of small amounts of marijuana in New York State, with over 700,000 arrests by the NYPD alone.[3] On average, more than 60 people are arrested every day for marijuana possession in New York State, making marijuana possession one of the top arrests in the state.[4] Nearly 23,000 people were arrested statewide in 2016, a nearly 2,300 percent increase from 1990.[5]

In 1977, New York decriminalized private marijuana possession, making it a violation instead of a criminal offense, and made the public possession of marijuana a misdemeanor.[6] Under New York law, possession of 25 grams of marijuana or less is supposed to be a violation. However, individuals possessing a small amount of marijuana are often charged with a misdemeanor offense, a distinction made due to a subsection of the law that treats general (or private) possession differently from public view possession. This difference in public/private penalties established a loophole in the law that has been exploited for the last twenty years.

Racial Disparities in Enforcement

Misdemeanor marijuana possession arrests overwhelmingly affect young people of color – more than 85% of all those arrested in New York are Black and Latino.[7] Additionally, the vast majority of those arrested are young people between 16 and 29 years old[8] and most arrests occur in the state's poorest neighborhoods.[9]

Precise data on the number of immigrants caught in this dragnet is lacking because the NYPD, which was responsible for more than 80 percent of the marijuana arrests in New York state in 2016, is barred from asking people about their immigration status. However, given that many of the neighborhoods with the toughest enforcement are also heavily populated by immigrants, it is highly likely that immigrants of color are disproportionately impacted by prohibition.

Source: Brendan Cheney, POLITICO.[10]

The Costs and Consequences of Marijuana Arrests for Noncitizen Immigrants

On the national level, minor drug convictions are the most common criminal offenses among people who are deported.[11] Roughly 40,000 people have been deported from the United States with drug law violations every year since 2008.[12]

Simple marijuana possession was the fourth most common offense among people who were deported in 2013, and the most common offense among people deported with drug law violations.[13]

Of those deported in 2013, marijuana possession was the most serious offense that 6,770 people had on their record.[14] From 2007 through 2012, more than 260,000 people were deported whose most serious conviction was a minor drug offense.[15] Statistics are incomplete, but in at least 38 percent of cases the offense involved possession of drugs for personal use.[16] In 2012, nearly 20,000 people were deported for drug possession.[17]

Deportation and Inadmissibility for Low-Level Marijuana Offenses

A marijuana conviction can cause a variety of immigration penalties for a noncitizen. For instance, a green card holder (or a legal permanent resident) could lose their green card and be placed into deportation proceedings. Immigration proceedings differ from criminal proceedings in that they often times do not provide the same due process protections including a right to government appointed counsel and can result in mandatory detention for an undetermined amount of time.

Residents with Lawful Status

Any immigrant who has lawful status (green card, refugees, asylees, and persons with non-immigrant temporary visas such as students, employees, and investors) can lose that status if they become "deportable." They can be placed in deportation proceedings (officially called removal proceedings), and ordered deported (removed). A legal permanent resident, refugee, or other person with lawful status becomes deportable if convicted of almost any drug offense.[18]

Currently, a legal permanent resident is not deportable based solely on a first conviction related to simple possession of 30 grams of marijuana or less.[19] But if the amount of marijuana was over 30 grams, or involves conduct such as giving away or transporting a small amount of marijuana, or possessing marijuana in a school zone, or if the person ever receives a second marijuana or other drug conviction in their lifetime, they will be deportable.[20] And if they ever takes a trip outside the U.S., they can be refused admission back into the country.[21]

Under existing law, a noncitizen who pleads guilty to a criminal offense is deportable. Since most diversion programs like drug courts require a guilty plea, even if that person is eligible for diversion they would still be subject to deportation.[22]

Other Noncitizens and Eligibility to Legalize

Many individuals who do not have lawful permanent immigration status currently, including undocumented individuals, are eligible to apply for status or will become eligible in the future. This might include a person who is married to a U.S. citizen or permanent resident or has an adult U.S. citizen child, or a person who has lived in the U.S. for many years and who supports a U.S. citizen or permanent resident relative who would face severe hardship if the person were deported.

A noncitizen must be "admissible" to gain lawful entry at the U.S. border, or to qualify for lawful immigration status. A noncitizen becomes "inadmissible" if they fall within certain categories, one of which includes a conviction of any drug offense.

A conviction of any drug offense, including one minor marijuana offense, will make a noncitizen permanently inadmissible and block them from attaining legal status.[23]

In rare circumstances, a waiver[24] may be available for a single offense of less than 30 grams of marijuana, but in practice this waiver is very difficult to get, has many requirements, and is often denied.[25] If the judge decides not to grant the waiver, the person will remain inadmissible.

There are other immigration applications where no waiver is possible, including for simple possession of 30 grams or less marijuana. In that case, the single marijuana misdemeanor (or noncriminal marijuana infraction) will mean that the person never can obtain lawful status through close family.

SMART Choice for Protecting Noncitizen Immigrants

Across the United States and in New York, the tide is turning against marijuana prohibition, but resolutions to deal with collateral consequences for noncitizen immigrants remain stalled. As marijuana reform has progressed, reforms to the immigration system have not. We can use marijuana reform as a platform to increase safety and security for noncitizen immigrants.

The Marijuana Regulation and Taxation Act (MRTA) will:

- Remove penalties for personal possession, preventing noncitizen immigrants from being swept into the criminal justice system and subsequently flagged to immigration authorities.

- Create a process to seal records of offenses no longer criminalized for those who have been previously convicted, and will vacate marijuana violations (summonses) and public view possession misdemeanors.

- Prohibit the Department of Criminal Justice Services from including a person's marijuana conviction in any report issued, preventing information from being routed to federal immigration authorities.

- Allow convictions of certain past marijuana offenses to be vacated, thereby protecting against deportation or inadmissibility for offenses no longer criminalized.

- Allow for resentencing for convictions of certain past marijuana offenses to protect DACA and naturalization eligibility, and guard against other incarceration-based admissibility issues.

The *NY State Legislature* should make the SMART choice: End prohibition, create a system to tax and regulate marijuana, and repair/reinvest in communities most harmed by the war on marijuana and communities by voting for the Marijuana Regulation and Taxation Act.

For more information, contact Chris Alexander at calexander@drugpolicy.org or 212-613-8076.

** Portions of this text are excerpted and adapted from "Immigration Impact: The Adult Use of Marijuana Act," Immigrant Legal Resource Center (2016) and "Protecting Immigrant New Yorkers through a Gubernatorial Presumptive Pardon FAQ," Immigrant Defense Project (2017).*

** We are grateful to Mizue Aizeki, Deputy Director at Immigrant Defense Project for the knowledge and insight she shared in the development of this fact sheet.*

---

[1] Federal Bureau of Investigation, "Crime in the United States, 2015," (Washington, DC: U.S. Department of Justice, 2016). https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested.

[2] U.S. Sentencing Commission Interactive Sourcebook, fiscal year 2015 Datafile, USSCFY2015, table 36. Accessed from: http://isb.ussc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table36.

[3] New York State Division of Criminal Justice Services, *New York City Arrests for PL 221.10 in 2012,* Computerized Criminal History System, February 2013. See also: U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, *2005 National Survey on Drug Use and Health,* (Washington D.C.: United States Government Office of Applied Studies, 2006) See: Table 1.80B *Marijuana Use in Lifetime, Past Year, and Past Month among Persons Aged 18 to 25, by Racial/Ethnic Subgroups: Percentages, Annual Averages Based on 2002-2003 and 2004-2005,* Accessed on January 26, 2011, http://www.oas.samhsa.gov/NSDUH/2k5NSDUH/tabs/Sect1peTabs67to132.htm#Tab1.80B.
Also see: U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, *2007 National Survey on Drug Use and Health,* (Washington D.C.: United States Government Office of Applied Studies, 2008) See: Table 1.26B *Marijuana Use in Lifetime, Past Year, and Past Month among Persons Aged 18 to 25, 2006 and 2007,* Accessed on January 26, 2011, http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1peTabs1to46.htm#Tab1.26B.

[4] New York State Division of Criminal Justice Services, *Adult Arrests in 2016*, Computerized Criminal History System, February 2017.
Also see: New York State Division of Criminal Justice Services, *New York State Arrests in 2010*, Computerized Criminal History System, January 2011.

[5] New York State Division of Criminal Justice Services, *Adult Arrests in 2014*, Computerized Criminal History System, 2014.
Also see: New York State Division of Criminal Justice Services, *New York State Arrests in 2014*, Computerized Criminal History System, January 2015.
Sayegh, Gabriel. "New York Legislators and Community Groups Hold Urgent Rally to Reform State's Broken Marijuana Possession Law" *Huffington Post*, March 12, 2013. Accessed at: http://www.huffingtonpost.com/gabriel-sayegh/new-york-legislators-and-marijuana_b_2856013.html.

[6] *Marihuana Reform Act of 1977*, Public Law 360, 1977-1978 Legislature, Regular Session (29 June 1977).

[7] New York State Division of Criminal Justice Services, *New York City Arrests for PL 221.10 in 2012,* Computerized Criminal History System, February 2013. See also: U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, *2005 National Survey on Drug Use and Health,*

(Washington D.C.: United States Government Office of Applied Studies, 2006) See: Table 1.80B *Marijuana Use in Lifetime, Past Year, and Past Month among Persons Aged 18 to 25, by Racial/Ethnic Subgroups: Percentages, Annual Averages Based on 2002-2003 and 2004-2005,* Accessed on January 26, 2011, http://www.oas.samhsa.gov/NSDUH/2k5NSDUH/tabs/Sect1peTabs67to132.htm#Tab1.80B.
Also see: U.S. Dept. of Health and Human Services, Substance Abuse and Mental Health Services Administration, *2007 National Survey on Drug Use and Health,* (Washington D.C.: United States Government Office of Applied Studies, 2008) See: Table 1.26B *Marijuana Use in Lifetime, Past Year, and Past Month among Persons Aged 18 to 25, 2006 and 2007,* Accessed on January 26, 2011, http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/tabs/Sect1peTabs1to46.htm#Tab1.26B.

[8] New York State Division of Criminal Justice Services, *Adult Arrests in 2010*, Computerized Criminal History System, January 2011.

[9] Wegman, Jesse. "The Injustice of Marijuana Arrests." *New York Times*, 28 July 2014. Accessed January 2017, https://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html.

[10] Brendan Cheney, "Marijuana arrests in city increased in 2016, with large racial disparities," POLITICO, February 6, 2017. Available at: http://www.politico.com/states/new-york/city-hall/story/2017/02/marijuana-arrests-in-nyc-increase-in-2016-still-large-racial-disparities-109306.

[11] Grace Meng, *A Price Too High, US Families Torn Apart by Deportations for Drug Offenses*, Human Rights Watch (Jun. 16, 2015), https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses; *Secure Communities and ICE Deportations: A Failed Program?,* TRAC Immigration (Apr. 8, 2014), http://trac.syr.edu/immigration/reports/349/#f3.

[12] Ibid.

[13] *Secure Communities and ICE Deportations: A Failed Program?,* TRAC Immigration (Apr. 8, 2014), http://trac.syr.edu/immigration/reports/349/#f3.

[14] Alissa Scheller, *How Marijuana Gets People Deported, in 5 Simple Charts*, THE HUFFINGTON POST (Apr. 18, 2014), http://www.huffingtonpost.com/2014/04/17/marijuana-possession-deportations_n_5168742.html; *Secure Communities and ICE Deportations: A Failed Program?,* TRAC Immigration (Apr. 8, 2014), http://trac.syr.edu/immigration/reports/349/#f3.

[15] Grace Meng, *A Price Too High, US Families Torn Apart by Deportations for Drug Offenses*, Human Rights Watch (Jun. 16, 2015), https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses.

[16] Thirty-eight percent of cases involved possession for personal use, thirty-one percent of cases contained no information about the nature of the drug offense and the remainder of the cases involved trafficking, including trafficking of very small amounts of drugs. See Grace Meng, *A Price Too High, US Families Torn Apart by Deportations for Drug Offenses,* Human Rights Watch (Jun. 16, 2015), Figure 2, at https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses.

[17] See Meng, Figure 3a.

[18] 8 U.S.C. § 1227(a)(2)(B).

[19] 8 U.S.C. § 1227(a)(2)(B)(i). This exception reaches possession, possession of paraphernalia, or being under the influence, if the offense is related to 30 grams or less of marijuana.

[20] See, e.g., Matter of Martinez-Esponoza, supra at 125 (possessing marijuana in a school zone does not come within the exception).

[21] See Part IV.C, discussing inadmissibility. A permanent resident who travels outside the U.S. will be held inadmissible upon her return. They may or may not qualify to submit an application for a highly discretionary waiver of inadmissibility.

[22] Immigrant Defense Project, presentation to Drug Policy Alliance, June 17, 2014 (on file with author); Jordan Cunnings, "Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences," *UCLA L. Rev.* 62(2015); Cade, "The Plea Bargain Crisis for Noncitizens in Misdemeanor Court; Sara Elizabeth Dill, "Unbalanced Scales of Justice: How Ice is Preventing Noncitizens from Having Equal Access to Diversion Programs and Therapeutic Courts," *Family Court Review* 50, no. 4 (2012).

[23] 8 U.S.C. § 1187(a)(2)(i)(II).

[24] 8 U.S.C. § 1182(h)(B). If the person is permitted to submit the waiver application, they will have to show that a qualifying relative (a U.S. citizen or legal permanent resident spouse, parent, or child) will suffer "extreme" hardship if the waiver is denied. Extreme hardship requires hardship greater than the common consequences of deportation and separation, meaning that it must be greater than "normal" consequences such as financial loss, loss of educational opportunities, and the emotional pain that a family will feel as a result of being permanently separated. If the waiver is granted, the person will be admissible and can proceed despite the conviction.

[25] See, e.g., Shooshtary v. INS, 39 F.3d 1049, 1051 (9th Cir. Cal. 1994) (extreme hardship requires a showing of great or prospective injury beyond the family separation and economic dislocation normally suffered in deportation).