

# The Costs of Marijuana Prohibition Enforcement: The Criminal Justice System



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## New York's Existing Marijuana Laws

Marijuana sale, possession, and use has been prohibited in New York State since 1927,<sup>1</sup> preceding the passage and implementation of the federal Marihuana Tax Act that made marijuana a prohibited substance nationally in 1937.<sup>2</sup> Across the country, marijuana began to be criminalized in the early 20th century. This process was initiated largely as a result of racial prejudice against an influx of immigrants arriving from Mexico rather than any evidence of risk to public health or safety.<sup>3</sup>

Since Colorado and Washington became the first states to legally regulate marijuana in 2012, support for legalization has continued to increase, now reaching 60% nationally.<sup>4</sup> However, under current New York penal law, the use, sale, and public possession of marijuana remain prohibited, with the exception of authorized participants in the state's medical marijuana program.

Today, there are more arrests for marijuana possession every year in the U.S. than for all violent crimes combined.<sup>5</sup> Marijuana prohibition is unique among U.S. criminal laws – no other law is both enforced so widely and harshly yet deemed unnecessary by such a substantial portion of the population.<sup>6</sup>

## Current Marijuana Prohibition Enforcement

Historically, marijuana prohibition enforcement was not a high priority for New York law enforcement, and had not been perceived as a serious problem for the criminal justice system until the last couple of decades.<sup>7</sup> It was not until the mid-1990s, when policing tactics like broken windows policing became a central focus, that marijuana prohibition became a much higher priority for police departments across the state.

Because broken windows policing focuses on the lowest level offenses to theoretically prevent more serious offenses—an assumption that has been repeatedly disproven<sup>8</sup>—low-level marijuana possession and sale were among the most common offenses charged under broken windows policing.<sup>9</sup>

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.<sup>10</sup> Nearly 70 percent of those arrested are under 30 years old; more than a third are under 21 years old.<sup>11</sup> And more than 85 percent of all those arrested were Black and Latino, even though young white people use marijuana at higher rates than young Black and Latino people.<sup>12</sup> On average, 60 people are arrested every day for marijuana possession in New York State, making marijuana possession one of the top arrests in the state.<sup>13</sup>

## Marijuana Prohibition Has Given Hundreds of Thousands of New Yorkers a Criminal Record

This massive increase of New Yorkers involved with the criminal justice system has had significant reverberations. A marijuana arrest creates a permanent criminal record that can easily be found by employers, landlords, schools, credit agencies and banks.

Most people arrested for marijuana offenses do not spend long amounts of time in jail. In New York, they are generally held for less than 24 hours for booking and arraignment and then released. However, in that process before seeing the judge, they are photographed and fingerprinted – simple actions that can have lifelong consequences, including difficulty obtaining educational loans, getting a job, maintaining a professional license, securing housing, or even adopting a child.<sup>14</sup> A simple marijuana arrest also places both documented and undocumented immigrants on the radar of immigration officials, leading to deportations and separation of families.<sup>15, 16</sup>

## Marijuana and Bail

Because low-level marijuana possession has been one of the most common arrests in New York over the past twenty years, many individuals who are later accused of committing other offenses have a prior low-level marijuana-related offense on their record. While racially biased policing tactics may have resulted in that prior marijuana offense,<sup>17</sup> when a judge is considering bail in a later case, it can still be used as a justification to set bail in amounts that are all too often far beyond the financial reach of the individual and his or her family.<sup>18</sup> When prosecutors decide to ask for bail and judges

decide to order it, they rely heavily on an individual's record of arrests, prosecutions, and convictions.<sup>19</sup> Marijuana arrests and convictions can weigh down criminal records and paint an inaccurate picture of significant criminal justice involvement.

Moreover, judges base bail decisions on an individual's failure to appear at any time in the past for any court date or obligation.<sup>20</sup> If an individual missed a single court date, or failed to complete a single day of community service, or failed to pay a fine or surcharge based upon an underlying marijuana charge at any time in their past, they would not be recommended for release, and a judge would be more inclined to set bail in the present case, excuse notwithstanding.<sup>21</sup> As more and more marijuana arrests result in the issuance of Desk Appearance Tickets (DAT), with court dates set months in the future, people are inadvertently missing more court dates and courts are issuing greater numbers of bench warrants, which then later lead judges to set more bail.<sup>22</sup>

### **Marijuana and the Problem of Plea Bargaining**

The New York Court System is notoriously backlogged and unable to allot adequate time to each person brought into court. Because there are so many people arrested for low-level offenses, the court has developed practices to ensure that a large portion of cases – especially low-level misdemeanors, such as marijuana possession – never make it to trial.

The volume of plea deals for drug cases means trials are virtually nonexistent: 99.8 percent of the 143,986 adults convicted of drug possession between 2010 and 2015 in New York State accepted plea deals.<sup>23</sup>

In marijuana cases, defendants are often offered ways to resolve their cases immediately, on their first court date after arrest, whether processed and arraigned before a judge within two days of arrest, or after appearing in court after receiving a DAT. The prosecution will often offer the person accused an "opportunity" to "take" an Adjournment in Contemplation of Dismissal (ACD) or plead guilty to a violation or the charge with time already served in exchange for foregoing their right to trial.<sup>24</sup>

While these dispositions enable individuals to terminate their cases that day without any risk of additional incarceration, the decision still comes at a high cost.

ACDs are not dismissed outright – they remain as open criminal charges for 6 months to a year, which can prevent people from securing jobs, housing, and loans during that time.<sup>25</sup> Additionally, when people plea to a misdemeanor or violation, they are charged fines and/or

surcharges and the charges remain as open court records, which can restrict other critical rights and opportunities.<sup>26</sup> If an individual cannot pay the fines or surcharges, either a bench warrant is issued for their arrest or the courts order "civil judgment," which effectively waives the payment but operates as a lien against a person's credit for seven years.<sup>27</sup>

Perhaps more significantly, the swift disposition of marijuana cases forecloses any opportunity an individual may have to challenge unconstitutional searches and seizures. Once a case is resolved, defendants and their defense attorneys will never be able to cross-examine the police officer who may have violated the person's rights.<sup>28</sup> Therefore, the police officer will have no incentive to curb the same kind of illegal practice. Indeed, police officers who know that cases for marijuana (and other street arrests) will resolve early have little incentive to play by the rules.

Moreover, any plea, and even ACDs under certain circumstances, blocks one's ability to file federal civil rights claims, such as false arrest and malicious prosecution.<sup>29</sup>

The intersection of marijuana arrests and plea-bargaining perpetuates the cycle of racially targeted and illegal arrests and prosecutions, while undermining the faith of communities in a criminal justice system that is supposed to protect them.

### **Marijuana and Parole, Probation, and Other Forms of Supervised Release**

Marijuana is a contributor to recidivism because use can constitute a violation of parole, probation, and other forms of supervised release. This prevents otherwise lawful New Yorkers from moving beyond the clutches of the criminal justice system.

Data gathered by the Legal Aid Society's Parole Revocation Defense Unit show that marijuana was involved in more than 20 percent of parole violation charges in New York City in the first half of 2017.<sup>30</sup> In these cases, alleged use of marijuana was charged and played a major factor in the parole violation case and the client's continued detention in the parole violation. In some cases, use of marijuana is the sole charge for violation of parole, which can result in a significant time in custody.

However, simply using marijuana is not a true reflection of someone's rehabilitation. Marijuana is widely used by New Yorkers, with 12 percent of the statewide adult population reporting that they have used marijuana in the past year.<sup>31</sup>

**The Long-term Costs and Consequences of the Hyper-Criminalization of Communities and the Denial of Access to True Justice**

Marijuana prohibition and enforcement of this misguided policy have effectively eroded key principles of the criminal justice system, including the Constitutional protection against illegal searches and seizures, the Constitutional right to due process, and the general principle of a presumption of innocence.

The criminalization of marijuana drives broken windows policing, even when individuals aren't ultimately arrested for marijuana. The NYPD uses the claimed odor of marijuana or observation of smoking to justify illegal stop and frisks and turn already-pretextual car stops into full blown car searches based upon false probable cause.<sup>32</sup> Thus, even if the NYPD stopped making marijuana arrests and prosecutors stopped charging people for the offense, criminalization alone would continue to serve as a tool for illegal approaches, stops, and searches.

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

For more information, to get involved, or to share an arrest story, contact Chris Alexander at [calexander@drugpolicy.org](mailto:calexander@drugpolicy.org) or 212-613-8076.

*\* We are grateful to Scott Hechinger, Senior Staff Attorney, Criminal Defense Practice at Brooklyn Defender Services, and Anthony Posada and the Legal Aid Society's Parole Revocation Defense Unit for the knowledge and insight they shared in the development of this fact sheet.*

<sup>1</sup> Ch. 672, [1927] N.Y. Laws 1695-1703.

<sup>2</sup> Leary v. United States, 395 US 6 (1969). Retrieved from <http://supreme-court-cases.insidegov.com/l/2945/Leary-v-United-States>

<sup>3</sup> Drug Policy Alliance (2016), "Marijuana Facts." Retrieved from [http://www.drugpolicy.org/sites/default/files/DPA\\_Marijuana\\_Facts\\_Booklet.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Marijuana_Facts_Booklet.pdf)

<sup>4</sup> Swift, A. (2016). Support for Legal Marijuana Use Up to 60% in U.S. Retrieved from

<http://www.gallup.com/poll/196550/support-legal-marijuana.aspx>

<sup>5</sup> Federal Bureau of Investigation, "Crime in the United States, 2014," (Washington, DC: U.S. Department of Justice, 2015).

<sup>6</sup> Drug Policy Alliance, "Ten Facts about Marijuana." Retrieved from <http://www.drugpolicy.org/sites/default/files/TenFactsAboutMarijuana.pdf>

<sup>7</sup> Levine, Harry G. "NYC's 1.5 Million Arrest Warrants for Non-Criminal Offences." Testimony to the U.S. Commission on Civil Rights, New York State Board Public Briefing, March 21, 2017.

Truth, Race, Hidden Data, and Routine Policing in New York City

<sup>8</sup> Bernard E. Harcourt and Jens Ludwig, "Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989-2000," *Criminology and Public Policy* 6:1 (2007), pp. 165-182.

<sup>9</sup> Levine, Harry G. "NYC's 1.5 Million Arrest Warrants for Non-Criminal Offences." Testimony to the U.S. Commission on Civil Rights, New York State Board Public Briefing, March 21, 2017.

<sup>10</sup> New York State Division of Criminal Justice Services (2016, October). New York State Arrests for Marijuana Charges by year, Computerized Criminal History System.

<sup>11</sup> Ibid.

<sup>12</sup> 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/Sect1peTab1.80B.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/Sect1peTab1to46.htm#Tab1.26B>.

<sup>13</sup> New York State Division of Criminal Justice Services, New York State Arrests in 2016, Computerized Criminal History System, January 2017.

<sup>14</sup> Babe Howell, "Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing," *New York University Review of Law & Social Change* 33(2009); Richard Glen Boire, *Life Sentences: Collateral Sanctions Associated with Marijuana Offenses* (Center for Cognitive Liberty & Ethics, 2007).

<sup>15</sup> Human Rights Watch. *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*. October, 2016. Accessed from:

<https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

<sup>16</sup> Rivlin-Nadler, Max. "Don't Believe Broken Windows Policing Deports New Yorkers? Read Their Stories." *Village Voice*. March 7, 2017. Accessed from: <https://www.villagevoice.com/2017/03/07/dont-believe-broken-windows-policing-deports-new-yorkers-read-their-stories>.

<sup>17</sup> Levine, Harry G., and Loren Siegel. *Race, Class & Marijuana Arrests in Mayor de Blasio's Two New Yorks: The NYPD's Marijuana Arrest Crusade Continues in 2014*. Marijuana Arrest Research Project and the Drug Policy Alliance, October 2014. Accessed January 2017, <http://www.drugpolicy.org/sites/default/files/Race-Class-NYPD-Marijuana-Arrests-Oct-2014.pdf>

<sup>18</sup> *A More Just New York City: Independent Commission on New York City Criminal Justice and Incarceration Reform*. Independent Commission on New York City Criminal Justice and Incarceration Reform. April 2017. Accessed from:

<http://www.morejustnyc.com/the-report-1>.

<sup>19</sup> Pinto, Nick. "The Bail Trap," *New York Times*, August 13, 2015. Accessed from:

<https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.

<sup>20</sup> N.Y. C.P.L. § 510.30(2)(a)(vi) ("To the extent that the issuance of an order of recognizance or bail and the terms thereof are matters of discretion rather than of law, an application is determined on the basis of the following factors and criteria: . . . His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution.")

<sup>21</sup> Ibid.

<sup>22</sup> Phillips, Mary T., "Marijuana Possession Arrests In New York City — How Times Have Changed," New York City Criminal Justice Agency, Research Brief No. 30, May 2016. Accessed from: <https://issuu.com/csdesignworks/docs/researchbrief40>.

<sup>23</sup> Human Rights Watch. *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*. October, 2016. Accessed from: <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

<sup>24</sup> Correspondence with Scott Hechinger, Brooklyn Defender Services, May 2017.

<sup>25</sup> N.Y. C.P.L. §§ 170.55; 170.56.

<sup>26</sup> N.Y. C.P.L. §§ 60.35 (mandatory surcharges); 80.05 (fines).

<sup>27</sup> N.Y. C.P.L. § 420.40.

<sup>28</sup> See *United States v. Leon*, 468 U.S. 897, 918 (1984) ("If exclusion of evidence obtained pursuant [to a constitutional violation] is to have any deterrent effect . . . it must alter the behavior of individual law enforcement officers or the policies of their departments.")

<sup>29</sup> *Timmins v. Toto*, 91 F. App'x 165, 166-67 (2d Cir. 2004) ("[Plaintiff] cannot establish a constitutional violation for claims of false arrest or malicious prosecution because he pleaded guilty to disorderly conduct in exchange for the dismissal of the other charges brought against him in New York. An officer who arrests with probable cause cannot be liable for false arrest, and, by pleading guilty to the stipulated but lesser offense, [plaintiff] conceded that [the officer] had probable cause for all charges covered by the plea agreement."); *Johnson v. Bax*, 63 F.3d 154, 157 (2d Cir. 1995) (reaffirming that "under Second Circuit precedents," a section 1983 action for false arrest or malicious prosecution "cannot be maintained after the acceptance of an ACD, which is not considered a termination 'favorable to the defendant.'").

<sup>30</sup> Correspondence with Legal Aid Society Parole Revocation Defense Unit (PRDU), June 2017, covering cases involving Rule 11 (Use of Marijuana) from January 1, 2017 to June 5, 2017. PRDU is the primary provider of indigent defense services for all detained accused parole violators within the NYC area and handles over 95% of all parole violations in NYC. According to DOCCS, 45% to 50% of all first-time releases onto parole were paroled to the NYC area.

<sup>31</sup> John Liu, *Regulating and Taxing Marijuana: The Fiscal Impact for NYC*. New York City Comptroller, August 2013. Accessed from: [https://comptroller.nyc.gov/wp-content/uploads/documents/NYC\\_RegulateMarijReport.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/NYC_RegulateMarijReport.pdf).

<sup>32</sup> Correspondence with Scott Hechinger, Brooklyn Defender Services, May 2017.