

Why is Marijuana Decriminalization Not Enough for New York?



February 2019

New York's Senseless Marijuana Policy

Under New York law, a first offense of *personal possession* of 25 grams or less of marijuana is technically a violation punishable only by a \$100 fine. The categorization of the offense as a violation means that it carries no jail time as a result of conviction, which is a key component of decriminalization.

Twenty-one states (including New York) and Washington D.C. have enacted various forms of marijuana decriminalization,¹ which means that these states have replaced criminal sanctions with the imposition of civil penalties.

Many New Yorkers don't know that the state decriminalized marijuana possession forty years ago – and that the law is still on the books. When New York State passed the *Marihuana Reform Act of 1977* the bipartisan legislation, sponsored by a Republican State Senator and a Democratic State Assemblyperson, removed criminal penalties for possession of marijuana for personal use.²

They are unaware, primarily, because in the last twenty years the police in New York State have still made about 800,000 arrests for possession of small amounts of marijuana.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

Racial Bias in Enforcement

These arrests have been largely justified by a loophole left in the law allowing police officers to distinguish between public and private personal possession. Because possession in “public view” remains a crime, this loophole – coupled with pervasive and racially biased over-policing of certain communities – has resulted in continued mass arrests for personal possession of marijuana despite decriminalization.^{5,6}

Significant racial bias in enforcement exacerbates the effects of the “public view” loophole. While marijuana consumption and sales occur at similar rates across racial and ethnic groups,^{7,8} Black and Latino individuals are arrested for possessing marijuana at vastly disproportionate rates.^{9,10} Nationally, Black people were nearly four times more likely to be arrested for possession than white people in 2010.¹¹ The discrepancy is even more extreme in New York, where in 2016 more than 80% of all those arrested statewide were Black and Latino; more than 72% of those arrested were under 30 years old; and nearly a third were under 21 years old.¹²

Decriminalization of marijuana possession is a necessary first step towards reducing the harms caused by marijuana prohibition. But it falls short in that it operates within the framework of prohibition, which is still enforced disproportionately in communities of color.

Marijuana Decriminalization Does Not End the Harms of Prohibition

At its core, marijuana decriminalization is an attempt to make sense of the senseless policy of marijuana prohibition. Marijuana prohibition has not curbed use and it has not increased public safety.^{13, 14} Despite 80 years of prohibition, marijuana remains the most widely used illegal drug in the U.S. and the world.¹⁵ More than 128 million adults in the U.S. – 50 percent of those surveyed – admit to having tried marijuana at least once in their lives, and more than 34 million to using it once or twice a month.¹⁶

Decriminalization, then, is an attempt to limit the ways that an arrest stemming from this senseless policy may hinder an individual's ability to succeed and participate in society by preventing him or her from obtaining employment, housing, and student loans.¹⁷

However, in New York, imposing a civil fine for an offense merely adds a step before criminalization. Those lacking the means to pay the fine have a warrant issued for their arrest; those who have been previously targeted by law enforcement can still face criminal penalties, as penalties are removed only for a first offense but a second offense is punishable by an increased fine and up to 15 days in jail.¹⁸

In New York, marijuana decriminalization has fallen short and will continue to do so. It has not succeeded in curbing the costs or the harms of prohibition and has instead made the need for reform clearer.

New York City's Attempt at Decriminalization has Been Ineffective

In 2014, then-Police Commissioner Bill Bratton issued a statement in coordination with Mayor de Blasio that instructed NYPD police officers to no longer make an arrest when they have discovered marijuana on a person in the course of a search.¹⁹ The accompanied police instruction, Order 43, represented a clarification of the existing law to law enforcement. This policy change represented a visible shift from the NYPD's previous practices and signaled the potential for the increased efficacy of New York's 1977 Decriminalization statute.

However, the result has been much of the same. In 2015 arrests dropped significantly, but 2016 saw those numbers increase once again.²⁰ More importantly, although arrests have been generally reduced from their 2014 level, the racial disparities in *who* is being arrested have remained consistent.²¹

In early 2018, the NYC Council Committees on Public Safety and on the Justice System held a joint hearing to examine the NYPD's marijuana enforcement policies; Council members specifically examined the efficacy of the NYPD's 2014 policy shift on marijuana policing and sought an explanation for the continued racial disparities in marijuana arrests. Subsequently, the Council passed legislation to further compel the NYPD to produce data relating to summonses being issued for low-level marijuana possession, which must now be released publicly for the first time and include demographic information.

In May 2018, Mayor de Blasio and the NYPD announced they would be reviewing the guidelines around marijuana enforcement and implementing changes to address disparities, specifically saying that NYPD will no longer arrest certain individuals for public

smoking—although the exceptions to the policy were greatly concerning to advocates. The exceptions generally apply to people who have been previously targeted by the criminal legal system and people without an ID, with the latter largely including people experiencing homelessness and young people. In practice, this means Black, Latino, and otherwise marginalized New Yorkers will continue to be subject to far higher rates of enforcement, despite roughly equal use of marijuana across demographics.

In September, the new NYPD guidelines took effect and arrests dropped significantly. However, Black and Latino people accounted for 89 percent of NYPD low-level marijuana arrests in 2018 – an *increase* in racial disparities despite the new policy.

Further, there were more than 1,000 summonses issued in September 2018, and racial disparities continue in this enforcement as well. It is important to note that if a person does not show up to their summons court date, an open warrant is issued that can lead to arrest.

Enforcement across New York State

Racial disparities in marijuana enforcement continue to be extreme outside of New York City as well. In 2017, in Upstate cities Black people were 12.1 times more likely to be arrested for marijuana possession than white people; Latino people were 6.4 times more likely. In the rest of the state in 2017, Black people were 11.2 times more likely to be arrested while Latino people were 5.2 times more likely.²²

The rate of enforcement remains harsh across the state also: upstate the arrest rate was 126 per 100,000 in 2017, versus 63 per 100,000 in 1990.²³ In the rest of the state the arrest rate was at its highest in 2017 at 82 per 100,000 versus 25 per 100,000 in 1990.²⁴

Additionally, in upstate the number of marijuana arrests resulting in a jail sentence *increased* from 9.8 percent to 17.8 percent in 2016.²⁵

What Decriminalization Misses

While most of the conversation around marijuana arrests has focused on simple possession, arrests for low-level marijuana sale have also been disproportionately enforced in communities of color, despite research showing that people buy drugs from people that look like them.²⁶

New York Penal Law defines low-level sale as sale of a marijuana compound or substance that is less than 2 grams, the equivalent of a single marijuana cigarette.²⁷ These offenses amount to 90 percent of all arrests for sale (in any quantity).²⁸ The low threshold for this offense and the discretion afforded to police in making an arrest for this offense – and the disparate rates of arrest – is alarming.

While the illicit market in New York is substantial,²⁹ enforcement has almost entirely been concentrated on the lowest level of sale.³⁰ Arrests for marijuana possession accounted for 87 percent of all marijuana arrests statewide in 2017.³¹

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

Beyond arrests, marijuana criminalization 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 2017.³² 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.³³

New York Deserves Statewide Reform

Ten states and the District of Columbia have now legalized marijuana for recreational use and allowed for the growth of a multibillion dollar industry. Tax revenue is being used to build schools and re-build communities.

New York must also move beyond prohibition to address the damage being done to communities across the state that have suffered from marijuana prohibition and its collateral consequences. New Yorkers deserve a statewide solution to this statewide problem.

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 marijuana criminalization.

For more information, to get involved, contact Melissa Moore at mmoore@drugpolicy.org or 212-613-8071.

- ¹ "State Laws." NORML. <http://norml.org/laws>.
- ² *Marihuana Reform Act of 1977*, Public Law 360, 1977-1978 Legislature, Regular Session (29 June 1977).
- ³ New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.
- ⁴ New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.
- ⁵ American Civil Liberties Union. "*The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests.*" June 2013. <https://www.aclu.org/report/report-war-marijuana-black-and-white>.
- ⁶ Harry Levine, *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio's New York*, (New York: Marijuana Arrest Research Project and Drug Policy Alliance, 2017). Retrieved from http://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf.
- ⁷ American Civil Liberties Union. "The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests." June 2013. <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.
- ⁸ 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/Sect1p eTabs67to132.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/Sect1p eTabs1to46.htm#Tab1.26B>.
- ⁹ Jamie Fellner, *Decades of disparity: drug arrests and race in the United States* (Human Rights Watch, 2009). Accessed January 2017, https://www.hrw.org/sites/default/files/reports/us0309web_1.pdf.
- ¹⁰ New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.
- ¹¹ American Civil Liberties Union. "*The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests.*" <https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white>.
- ¹² New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.
- ¹³ Christopher Ingraham, "Teen marijuana use falls as more states legalize," *Washington Post*, December 16, 2014.
- ¹⁴ Alejandro Crawford, "What Have We Been Smoking?" *U.S. News & World Report*, July 13, 2015.
- ¹⁵ Substance Abuse and Mental Health Services Administration, "Results from the 2014 National Survey on Drug Use and Health: Detailed Tables," (Rockville, MD: Substance Abuse and Mental Health Services Administration, 2015), Table 1.1A & B.
- ¹⁶ Yahoo/Marist Poll: Weed and the American Family, April 17, 2017. http://maristpoll.marist.edu/wp-content/misc/Yahoo%20News/20170417_Summary%20Yahoo%20News-Marist%20Poll_Weed%20and%20The%20American%20Family.pdf
- ¹⁷ American Civil Liberties Union. "*The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests.*" <https://www.aclu.org/report/report-war-marijuana-black-and-white>.
- ¹⁸ *Marihuana Reform Act of 1977*, Public Law 360, 1977-1978 Legislature, Regular Session (29 June 1977).
- ¹⁹ Operations Order No. 43, Enforcement of Criminal Possession of Marijuana, Fifth Degree, Subdivision One. November 11, 2014, <https://www.scribd.com/document/246263485/NYPD-Marijuana-Operations-Order>.
- ²⁰ Harry Levine, *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio's New York*, (New York: Marijuana Arrest Research Project and Drug Policy Alliance, 2017). http://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf.
- ²¹ *Ibid.*
- ²² Bond et. al. "Marijuana Enforcement in New York State, 1990-2017," Data Collaborative for Justice, John Jay College of Criminal Justice. February 2019.
- ²³ *Ibid.* "Upstate Cities," include Albany, Buffalo, Rochester, Syracuse, and Yonkers.
- ²⁴ *Ibid.*
- ²⁵ *Ibid.*
- ²⁶ Jamie Fellner, *Decades of disparity: drug arrests and race in the United States*. Human Rights Watch, 2009. https://www.hrw.org/sites/default/files/reports/us0309web_1.pdf
- ²⁷ N.Y. Penal Law § 221.35 (McKinney 2009 & Supp. 2015).
- ²⁸ New York State Division of Criminal Justice Services, *Adult Arrests 2013-2016*, Computerized Criminal History System, December 2016
- ²⁹ Liu, John C. "Regulating and Taxing Marijuana; the Fiscal Impact on NYC." Office of New York City Comptroller, August 2013.
- ³⁰ New York State Division of Criminal Justice Services, *Adult Arrests 2013-2016*, Computerized Criminal History System, December 2016.
- ³¹ Bond et. al. "Marijuana Enforcement in New York State, 1990-2017," Data Collaborative for Justice, John Jay College of Criminal Justice. February 2019.
- ³² 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.
- ³³ 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.