

Marijuana Prohibition and Policing

June 2017



Early History of Marijuana Prohibition

In the first three decades of the 20th century, local and state governments enacted the first U.S. marijuana prohibition laws. At that time, policing of marijuana use was almost non-existent. Instead, enforcement of marijuana prohibition focused on sale and cultivation, on stopping small farms from growing the plant, and pharmacies and other stores from selling the plant.¹

Despite the “reefer madness” hysteria, marijuana prohibition remained mostly a low priority for law enforcement. It was not until the drug war was launched in 1971 that marijuana use, possession, and sale became a large focus of law enforcement resources.

Decriminalization

Noting the wide use of the substance and the lasting harm an arrest may have on a young person’s future, New York State decriminalized *private* marijuana possession soon in 1977, making it a violation, not a criminal offense.²

But twenty years later, with the shift to broken windows policing, low-level marijuana possession would nonetheless become one of the leading misdemeanor arrests in New York.³

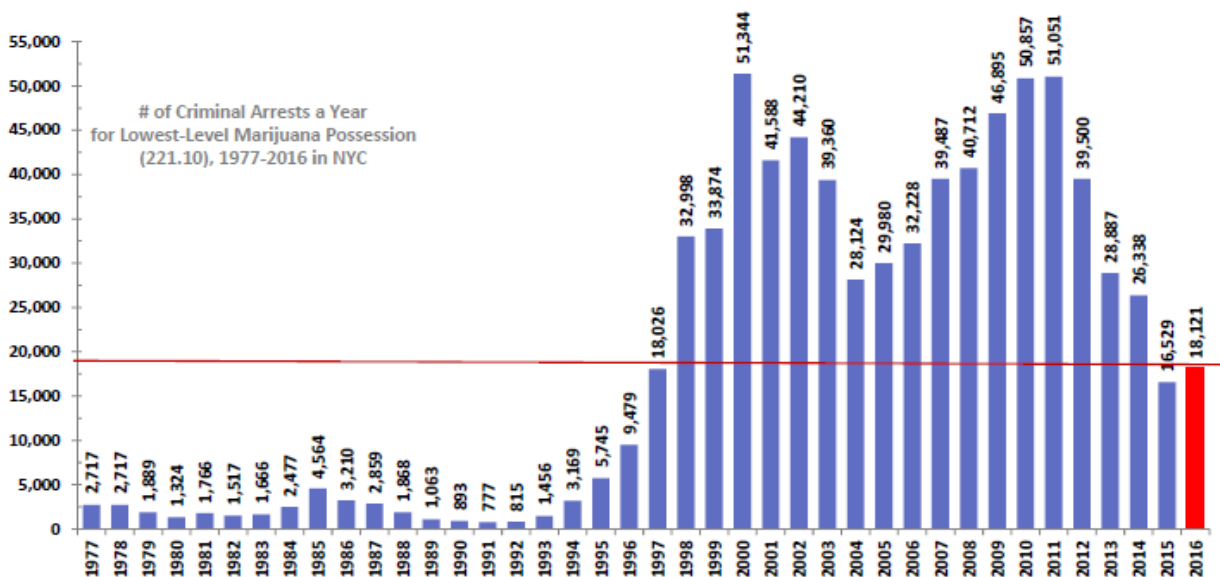
Broken Windows and Increased Enforcement

In the years before the development and implementation of broken windows policing in New York, the 1977 Marijuana Reform Act managed to ensure prohibition was not causing devastating collateral consequences for those in New York who possessed and used marijuana privately.

“The Legislature finds that arrests, criminal prosecutions and criminal penalties are inappropriate for people who possess small quantities of marijuana for personal use. Every year, this process needlessly scars thousands of lives and waste millions of dollars in law enforcement resources, while detracting from the prosecution of serious crime.”

— New York Marijuana Reform Act of 1977⁴

40 YEARS OF NYPD MARIJUANA POSSESSION ARRESTS, 1997-2016



Under Mayor Giuliani, a shift in the policies and tactics of the NYPD left a lasting impact on the city and state and highlighted the harm that prohibitionist policies could bring about.

From 1993 to 1997, the year before and year after Bill Bratton's first term as NYPD Police Commissioner, there was a 1,141% increase in arrests for low-level marijuana possession,⁵ a trend that would begin a period known as the "marijuana arrest crusade." Over the next twenty years the NYPD arrested nearly 700,000 people⁶ for an offense that the state legislature had already decriminalized only two decades earlier.

Those arrests were possible due to a loophole in the law that continued to criminalize possession of marijuana "in public view." This loophole, coupled with new policing tactics, made New York the marijuana arrest capital of the world.⁷

Broken windows policing demanded more police presence in communities and more police engagement with populations viewed to be disorderly, unfamiliar, or a threat to general community safety.⁸ At the height of the arrest crusade in 2011, the NYPD stopped, questioned, and searched 685,724 people.⁹ They also arrested 50,684¹⁰ people for low-level marijuana possession that year. During this time about two-thirds of people arrested for possession of small amounts of marijuana in New York City displayed it at an officer's request, or were searched by police, often illegally.¹¹



■ Person arrested displayed marijuana at officer's request
■ No request from officer

The rise in frequency of stops by law enforcement was almost identical to the rise of marijuana arrests. And what remained true of both was that it was largely people of color who were being targeted.¹² At that time, almost 86% of those arrested for possessing small amounts of marijuana were Blacks and Latinos – a disparity that persists still – despite government studies that consistently show that young white men use marijuana at higher rates than young black men.¹³ This ramp up in enforcement left communities devastated and people of color in those areas saddled with criminal records that inhibited access to education, housing, and employment opportunities.¹⁴

Not Just an NYC Problem

Broken windows policing was not solely practiced in New York City. Order-maintenance policing tactics have been implemented in most major cities across the country – and even in some small ones, sometimes performing doubly as a revenue generator for local governments.¹⁵ The Department of Justice has reported on how cities issued copious tickets and citations almost entirely for small violations, but those tickets, if unpaid, would result in arrests.

Cities and towns across the state have experienced similar practices implemented in their municipalities by local police forces and enforcing marijuana prohibition. Due to marijuana's wide use, simple possession has remained one of the central arrestable offenses that law enforcement can turn to when there is an unjust stop or an unauthorized search.

Operation Strike Force in Buffalo is one of those examples. Strike Force called for increased police patrols in specific communities, unconstitutional checkpoints, and regular stops and searches to be conducted by law enforcement of people traveling through pre-identified target areas.¹⁶ The practice resulted in a Justice Department investigation into the Buffalo Police Department's practices, similar to the Ferguson investigation.

In 2016, Black people represented 70 percent of arrests for marijuana possession in Erie County, which includes Buffalo, despite only representing 14 percent of the population.¹⁷

The statewide result is much of the same as what has been experienced in NYC and Buffalo: 80 percent of those arrested statewide for low-level marijuana possession in 2016 were Black or Latino.¹⁸

Marijuana arrests have also been the engine driving the U.S. domestic war on drugs. In 2015, there were 643,121 marijuana arrests in the U.S. – roughly 45 percent of all drug arrests. The vast majority (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.¹⁹

Police Time Spent and State Resources Wasted

New York's marijuana arrest crusade was both time consuming and expensive. A 2013 report by Professor Harry Levine of Queens College revealed that between 2002 and 2012, New York City's Police Department spent 1 million police hours enforcing marijuana prohibition.²⁰ That time included street patrols' patrol time; police stops, questions, and searches; and time spent making arrests and processing those arrested. That time spent in addition to court costs and fees resulted in taxpayers footing a bill in excess of \$675 million in 2010 alone for marijuana prohibition enforcement.²¹

Current Enforcement Practices

In 2014, under pressure from advocates and communities, New York City's Mayor Bill de Blasio held a press conference with Police Commissioner Bratton, who was serving a second term as NYPD Police Commissioner. During that press conference, Mayor de Blasio acknowledged that marijuana prohibition had been disproportionately enforced on people and communities of color and claimed that there was a need for this practice to end.²²

“Too many New Yorkers without any prior convictions have been arrested for low-level marijuana possession. Black and Latino communities have been disproportionately affected. There have been, in some cases, disastrous consequences for individuals and families. When an individual is arrested, even for the smallest possession of marijuana, it hurts their changes to get a good job, it hurts their chances to get housing, it hurts their chances to qualify for a student loan – it can literally follow them the rest of their lives, and saddle young people with challenges that for many are very, very difficult to overcome.”
— Mayor Bill de Blasio, November 2014²³

That shift was embodied in Order 43, which stated that no police officer who discovers marijuana on a person, while engaged in an authorized search of an individual, shall make an arrest for said marijuana's possession if the amount possessed is under the amount of 25 grams and is not burning.²⁴ This shift in policy was actually an alignment of police practice with the existing law.

Abuse of Discretion

Included in the 2014 Order 43 issued by Commissioner Bratton was language instructing NYPD officers to continue to exercise their discretion in determining whether or not an individual was in fact committing the offense of public burning or if personal possession should be construed to be criminal sale.²⁵

This type of discretion being exercised by the NYPD most closely resembles the legal determination of constructive possession, but includes no legal standard for use by the courts in affirming or challenging such a presumption of guilt. Instead, the initial decision made by an officer to assume whether an individual was burning in public or that a person's possession was not indeed possession is virtually unchallengeable by people charged with the offense.

“There is a certain degree of discretion in a lot of what police do. I'm not going to sit here and tell you in the 30,000 incidents that there they are all going to go exactly this way. There's a certain amount of discretion involved in the circumstance of each of these encounters that officers have.”

—Police Commissioner Bratton, November 2014²⁶

Destruction of Relationship between Police and Community

The enforcement of marijuana prohibition has shaped the relationship between police and communities. In addition to the racial disparities in enforcement, marijuana has also been cited as a pretext for police engagement in several high profile police-involved killings across the country and the state. Wardel Davis in Buffalo, NY and Ramarley Graham in Brooklyn, NY are two examples of people of color who died following an encounter with law enforcement and who law enforcement claimed was involved in the illicit trade of marijuana.

New York Deserves Statewide Reform

The enforcement of marijuana prohibition in New York State has significantly changed policing. It has been the catalyst for abuses of police power and the deterioration of community trust. It has also been a major drain on already-limited state resources.

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 and communities by voting for the Marijuana Regulation and Taxation Act.

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** We are grateful to Professor Harry Levine and Loren Siegel of the Marijuana Arrest Research Project for the knowledge and insight they shared in the development of this fact sheet.*

¹ "To Make it Harder to get Habit Drugs: Towns-Boylan Bill at Albany Would Stop the Loopholes in Present Prescription Law." New York Times. New York City. January 26, 1914. Web. April 2017

² Marihuana Reform Act of 1977, Public Law 360, 1977-1978 Legislature, Regular Session (29 June 1977).

³ 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.

⁴ Ibid.

⁵ New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.

⁶ Ibid.

⁷ American Civil Liberties Union. "The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests." June 2013.

⁸ James Q. Wilson and George L. Kelling. "Broken Windows." *The Atlantic*, March, 1982. Accessed from: <https://www.theatlantic.com/past/docs/politics/crime/windows.htm>.

⁹ New York City Police Department. *Reasonable Suspicion Stops: Precinct Based Comparison by Stop and Suspect Description*. 2011 (April 2017)

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 John Liu, *Regulating and Taxing Marijuana: The Fiscal Impact on NYC*. New York City Comptroller, April 2013.

¹² Harry Levine and Deborah Peterson Small. *Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City 1997-2007*. New York Civil Liberties Union, April 2008. Accessed from: http://www.drugpolicy.org/sites/default/files/nyclu_pub_marijuana_arrest_crusade.pdf.

¹³ 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/Sect1p1eTabs67to132.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/Sect1p1eTabs1to46.htm#Tab1.26B>.

¹⁴ See Jenny Roberts, "Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts," *UC Davis Law Review* 45(2011); Alexandra Natapoff, "Misdemeanors," *Southern California Law Review* 85 (2012).

¹⁵ United States Department of Justice Civil Rights Division. Investigation of the Ferguson Police Department. 2015. This report highlights the way the Ferguson Police Department had been issuing tickets and citations to Ferguson city residents at an alarming rate in pursuit of order maintenance. "African Americans account for 85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers."

¹⁶ City of Buffalo. Buffalo Police Department. Mayor Byron W. Brown. Commissioner H. McCarthy Gipson, *Operation Strike Force Press Release*.

¹⁷ New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.

¹⁸ Ibid.

¹⁹ Federal Bureau of Investigation, "Crime in the United States, 2014," (Washington, DC: U.S. Department of Justice, 2015).

²⁰ Harry Levine, Loren Siegel, and Gabriel Sayegh, "One Million Police Hours: Making 440,000 Marijuana Possession Arrests in New York City," 2002-2012, Drug Policy Alliance and Marijuana Arrest Research Project, NYC, March 2013.

²¹ American Civil Liberties Union. "The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests." June 2013.

²² Bill Bratton and Bill de Blasio, "Transcript: Mayor de Blasio, Police Commissioner Bratton Announce Change in Marijuana Policy" November 2014 <http://www1.nyc.gov/office-of-the-mayor/news/511-14/transcript-mayor-de-blasio-police-commissioner-bratton-change-marijuana-policy>.

²³ Ibid.

²⁴ 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>.

²⁵ Ibid.

²⁶ Bill Bratton and Bill de Blasio, "Transcript: Mayor de Blasio, Police Commissioner Bratton Announce Change in Marijuana Policy" November 2014 <http://www1.nyc.gov/office-of-the-mayor/news/511-14/transcript-mayor-de-blasio-police-commissioner-bratton-change-marijuana-policy>.