

# The Life-Changing Consequences of a Marijuana Arrest in New York: Child Welfare

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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 now more arrests for marijuana possession every year than for all violent crimes combined.<sup>1</sup>

In 2014, law enforcement in NYC shifted its public policy so that people would be ticketed rather than arrested for possession of marijuana found during the course of a search.<sup>2</sup> This was done in an effort to align department practices with state law (as described below). Three years later, Professor Harry Levine, in conjunction with the Drug Policy Alliance, released a blistering report outlining the continued practice of racially biased marijuana arrests in New York City under Mayor Bill de Blasio, who had campaigned on ending such arrests.<sup>3</sup> Despite reductions in arrests following new NYPD operations orders in 2018, people in NYC and across the state are still being arrested for low-level marijuana possession and forced to deal with the subsequent damaging collateral consequences.<sup>4,5</sup>

**A marijuana arrest is no small matter. It involves being handcuffed, placed in a police car, taken to a police station, fingerprinted, photographed, possibly being held in jail for up to 24 hours while awaiting arraignment before a judge, appearing in court several times over the course of months, and can conclude with the imposition of a permanent criminal record that can easily be found on the internet by employers, landlords, schools, credit agencies, and banks.<sup>6</sup>**

## Mass Arrests for Marijuana Possession in New York

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>7</sup> 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.<sup>8</sup>

In 1977, New York decriminalized the possession of small amounts of marijuana in private, re-classifying it as a violation instead of a criminal offense. Possession of small amounts of marijuana that takes place in public is considered a misdemeanor crime.<sup>9</sup>

Despite New York's 1977 decriminalization law, for the past two decades individuals possessing small amounts of marijuana have often been charged with a misdemeanor offense because law enforcement exploits the loophole that treats possession in public differently from possession in private.

New Yorkers who are arrested face immediate and long-term consequences that make it difficult to get and keep a job, maintain a professional license, obtain educational loans, secure housing, or even keep custody of a child or adopt.<sup>10</sup>

## The Costs and Consequences of Marijuana Arrests for Parents

The collateral consequences of a marijuana arrest extend beyond the individual facing the arrest. When an individual also happens to be a parent, their children are also directly impacted. New York State law does not allow for a parent's use of marijuana to be the sole basis for denying a parent custody privileges, nor does it dictate the automatic severance of a parent-child relationship. However, the distinction between the language of the law and the realities many families face becomes significant when considering the disproportionate impact marijuana arrests have on families, especially families of color.

Despite similar rates of marijuana consumption across racial and ethnic groups,<sup>11,12</sup> 80 percent of the nearly 23,000 people arrested for marijuana possession in New York State in 2016 were Black or Latino.<sup>13</sup> The stark disparity has been consistent for the past two decades.<sup>14</sup>

These extreme racial disparities in marijuana arrests have forced a disproportionate number of individuals and families of color to deal with subsequent collateral consequences that affect their ability to maintain stable family units.

Although a parent's marijuana arrest alone is unlikely to be the cause for the separation of a family unit, it could lead to mandated drug testing, which—if indicative of continued use that is determined to pose additional risk for the children involved—might prompt intervention from child welfare authorities.

Research shows that mandated reporters, including education personnel, law enforcement personnel, social services personnel, and medical personnel (namely public hospitals) are more likely to report a Black parent's drug use to child protective authorities than other parents.<sup>15</sup> Once reported, child protective authorities are more likely to investigate, find neglectful, and remove children from Black parents suspected of drug use than other populations.<sup>16</sup>

As one example, around the same time that a white father wrote an op-ed in the *New York Times* about how smoking marijuana makes him a better parent, a Black mother was litigating a case in which she was adjudicated as neglectful for smoking marijuana.<sup>17, 18</sup>

Other studies have shown that negative perceptions of families of color can lead mandated reporters to conflate the effects of poverty as child maltreatment, or assume that families living in conditions of poverty are more likely to abuse their child.<sup>19</sup> Additionally, when given identical hypothetical cases with the only difference being race, caseworkers have been shown to consistently evaluate children as being at greater risk when the family is black.<sup>20</sup>

Within this context, a marijuana arrest could become a catalyst for a process that is already splintering Black families at alarmingly disproportionate rates.

In addition to influencing the rate at which families of color come into contact with the child welfare system, racial bias has also affected the quality of services they receive once the intervention is underway.<sup>21</sup>

The extreme racial disparities in marijuana arrests in New York and the documented bias of medical professionals in reporting drug use make the presence of both law enforcement and medical personnel on this list particularly troubling.<sup>22</sup>

#### Custody and Visitation

In practice, parents in New York experience surveillance by child welfare authorities and removal of their children based on positive toxicology tests alone. This occurs despite rules under the New York Family Court Act that require proof that the misuse of a drug

impairs the ability of a parent to meet a child's basic needs and provide them with adequate supervision to establish neglect and/or abuse.<sup>23</sup>

Additionally, parental drug use may be considered when awarding custody, and visitation is often made restricted and provisional.<sup>24</sup>

In family court, judges have significant influence on a child's likelihood of remaining or reuniting with a parent. This makes parents especially vulnerable to any individual prejudice and/or preconceptions against drug use that might influence a judge's decision-making. Research has identified judges as one of the many parties involved in family drug court that generally lack expertise on matters pertaining to substance use. Further, they have been shown to commonly view women who misuse substances as irresponsible and weak.<sup>25</sup>

This poses significant questions regarding the ability of judges to consistently act in the best interest of children rather than potentially succumbing to their own biases. A judge's personal views on marijuana could negatively impact the ability of a parent with a marijuana conviction—or a parent who, due to an arrest, has been discovered to be someone who uses marijuana, to get a fair hearing in family court.

#### Impact on Parental Rights

When a caregiver fails to meet the mandates provided by the court, the state can terminate their parental rights. When considering this, judges are asked to reflect on clear and convincing evidence as well as the best interest of the child.<sup>26</sup> However, families can still be vulnerable to exhibitions of judicial discretion that may be influenced by personal biases against drug use and drug users or pervasive misinformation regarding the relationship between marijuana and parenting.

The collateral consequences of a marijuana conviction can hinder a parent's ability to provide an environment that might be viewed favorably by a caseworker or a judge who wields the power to eliminate parental physical custody, rights to visitation, communication, and ability to regain custody.<sup>27</sup> Further, a significant amount of evidence exists that suggests keeping children with their families—even when the families are considered abusive—is better for the child than foster care.<sup>28</sup>

#### **SMART Choice for Family Law**

Across the United States and in New York, the tide is turning against marijuana prohibition—however, resolutions to deal with collateral consequences have

stalled. As marijuana laws have evolved, the family law system has not kept pace. We can use marijuana reform as a platform to improve the family law system and keep families together.

The Marijuana Regulation and Taxation Act (MRTA) will:

- Remove penalties for personal marijuana possession, preventing parents from being unnecessarily swept into the criminal justice system and left to deal with collateral consequences that jeopardize the stability of their children's home environment.
- Create a process to seal records of offenses no longer criminalized for those who have been previously convicted, and vacate marijuana violations (summonses) and public view possession misdemeanors.
- Prevent unnecessary denial of custody, visitation, or parenting time by requiring clear and convincing evidence of unreasonable danger to the safety of a child that is not solely based on the presence – or non-pertinent details – of a parent's marijuana use.
- Direct revenue to public health education, prevention efforts, family involvement, and substance use disorder treatment programs that will provide better help to parents looking to maintain or regain custody of their children.
- Provide civil protections related to housing, employment, family law, and access to social services for parents who are medical marijuana patients.
- Prohibit the Department of Criminal Justice Services from including a person's marijuana conviction in any report issued, preventing information from being routed to any authorities that may interfere with a parent's ability to provide suitable living conditions for their children.

If the purpose of child welfare legislation is to allow the state to operate in the best interest of a child, marijuana prohibition operates in direct opposition of this goal. The consequences associated with a marijuana conviction frequently undermine the ability of thousands of parents across the state to provide stable environments in which their children have access to everything they need to develop properly and discover the unique contributions they each can make to society.

**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 by voting for the Marijuana Regulation and Taxation Act (S.1527/A.1617).**

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*\* We are grateful to Lisa Sangoi, Soros Justice Advocacy Fellow at NYU Law Family Defense Clinic, and the Child*

<sup>1</sup> 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>

<sup>2</sup> Bill Bratton and Bill de Blasio, "Transcript: Mayor de Blasio, Police Commissioner Bratton Announce Change in Marijuana Policy." November 2014. Accessed from: <http://www1.nyc.gov/office-of-the-mayor/news/511-14/transcript-mayor-de-blasio-police-commissioner-bratton-change-marijuana-policy>.

<sup>3</sup> 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](http://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf).

<sup>4</sup> 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](http://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf).

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

<sup>6</sup> 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).

<sup>7</sup> New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.

<sup>8</sup> Ibid.

Also see: New York State Division of Criminal Justice Services, *New York State Arrests in 2010*, Computerized Criminal History System, January 2011.

<sup>9</sup> *Marijuana Reform Act of 1977*, Public Law 360, 1977-1978 Legislature, Regular Session (29 June 1977); N.Y. Crim. Law §§ 221.05 and 221.10.

<sup>10</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>11</sup> American Civil Liberties Union. "The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests." June 2013. Retrieved from <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.

<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/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>.

<sup>13</sup> New York State Division of Criminal Justice Services (2017, April). *New York State Arrests for Marijuana Charges by year*, Computerized Criminal History System.

<sup>14</sup> Ibid.

<sup>15</sup> Children's Bureau. *Child Maltreatment 2015*. January 19, 2017. Accessed from: <https://www.acf.hhs.gov/cb/resource/child-maltreatment-2015>.

<sup>16</sup> See: Chasnoff, I., Landress, H. and Barrett, M. (1990). The prevalence of illicit-drug or alcohol use during pregnancy and discrepancies in mandatory reporting in Pinellas County, Florida. *The New England Journal of Medicine*, 332 (17): 1202-1206. Goerge, R., & Harden, A. (1993). The impact of substance-affected infants in child protection and foster care caseloads. Chicago, IL: Chapin Hall Center for Children.

<sup>17</sup> Mark Wolfe, "Pot for Parents," *New York Times*, September 2, 2012. Accessed from: <http://www.nytimes.com/2012/09/08/opinion/how-pot-helps-parenting.html>.

<sup>18</sup> Docket No.: NN-33551/10, Brooklyn Family Court (Jan. 2012).

<sup>19</sup> Drug Policy Alliance (2017), "New York State's Child Welfare System and the War on Drugs."

<sup>20</sup> Daniel R. Neuspiel and Terry Martin Zingman, "Custody of Cocaine-Exposed Newborns: Determinants of Discharge Decisions," *American Journal of Public Health* 83 (1993), p.1726, supra. //12. U.S. Department of Health and Human Services, Children's Bureau, National Study of Protective Preventive and Reunification Services Delivered to Children and Their Families (Washington, DC: 1997).

<sup>21</sup> Osterling, Kathy Lemon. The Influence of Family Reunification Services on Racial/Ethnic Disparities in Permanency Outcomes for Children in the Child Welfare System. *Journal of Public Child Welfare* 6.3, 29 Jun 2012: 330-354. Haworth Social Work Practice Press. Data snapshot: In NYC, relative to white children, Black children are 5.2 times as likely to be reported to SCR, 6.6 times as likely to be indicated for abuse/neglect, 13.6 times as likely to be admitted to foster care, and 13.4 times as likely to be in care. Statewide, relative to white children, Black children in New York are 2.1 times as likely to be reported to SCR, 2.0 times as likely to be indicated for abuse/neglect, 3.6 times as likely to be admitted to foster care and 4.0 times as likely to be in care

<sup>22</sup> Raz, Mical. "Unintended Consequences of Expanded Mandatory Reporting Laws," *American Journal of Pediatrics*. March 14, 2017. Accessed from: <http://pediatrics.aappublications.org/content/early/2017/03/10/peds.2016-3511..info>.

It is important to know that mandatory reporters face no penalties for false reports (unless they are malicious) but

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serious penalties for missing suspected cases so there is incentive to overreport.

<sup>23</sup> New York Family Court Act § 1012.

<sup>24</sup> New York Family Court Act.

New York Domestic Relations Law Sections 70 & 240.

<sup>25</sup> Center on Addiction and Substance Abuse. (1999). No safe heaven: Children of substance-abusing parents. Columbia University.

<sup>26</sup> L.M. McWey, T.L. Henderson, J. Burroughs, Parental rights and the foster care system: A glimpse of decision-making in Virginia Journal of Family Issues, 29 (2008), pp. 1031–105

<sup>27</sup> Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 104 (2002).

<sup>28</sup> “The Evidence Is In: Foster Care vs. Keeping Families Together: The Definitive Studies,” National Coalition for Child Protection Reform. Accessed from: <https://nccpr.info/the-evidence-is-in-foster-care-vs-keeping-families-together-the-definitive-studies>.