

REPORT BRIEF
MARIJUANA IN MILWAUKEE

May 2015



*An overview of municipal marijuana policy
in Milwaukee and other U.S. cities*

Few public policy issues have attracted more attention in recent months – and in many cases, more controversy – than the treatment of marijuana. With full legalization now approved by voters in four states, the issue not only is drawing attention in Congress and state capitols, but also is taking center stage in city halls across the country.

Here in Milwaukee, the Common Council is considering a change to City ordinances that would dramatically reduce the fine for first-time possession of small amounts of marijuana. But will this be an effective solution for those who believe the existing legal framework is putting too many people behind bars and draining law enforcement resources? What might we learn from other cities that have grappled with similar concerns?

In this, the first of two reports on marijuana policy in Milwaukee, the Public Policy Forum seeks to provide factual context for those questions. Without taking a position on whether a change in the law is merited, we consider the reasoning cited by proponents and consider the options that may exist to address the concerns they are raising. ***Our focus is the City of Milwaukee, as opposed to the State of Wisconsin as a whole***, in light of the immediate nature of the deliberations at Milwaukee City Hall.

FEDERAL, STATE, AND MUNICIPAL MARIJUANA LAW

The report begins by broadly discussing the interplay between federal, state, and municipal law when it comes to marijuana policy, including how the legal authority of the federal and state governments impacts the ability of municipalities to establish independent legal frameworks for marijuana possession and usage.

The federal Controlled Substances Act (CSA), adopted by the U.S. Congress in 1970, classifies marijuana as a Schedule I drug, which means that its cultivation, use, possession, distribution, and sale are prohibited. Yet, despite this classification, there are a myriad of state laws that treat marijuana far less harshly and that essentially contradict federal law.

It has been the federal government's policy for many years to reserve the enforcement of petty marijuana possession offenses to the state and local level. As a result, different states have taken different approaches with regard to governing the possession, sale, and cultivation of the drug. Those states can be broken down into four categories:

- **Legalization** – this is the far end of the spectrum in which marijuana is legal for adults and is taxed and regulated similarly to cigarettes and alcohol.
- **Medical** – legislation allowing the use of marijuana for medicinal purposes has been adopted in 23 states. These states allow doctors to use marijuana to treat patients for certain conditions.
- **Decriminalization** – states with decriminalization laws typically do not impose jail time or criminal sanctions for first-time offenders caught possessing small amounts of marijuana (typically one ounce or less). Violators typically receive a monetary fine in this scenario.



- **Prohibition** – this is the most restrictive category in that the possession, sale, and cultivation of marijuana of any amount, regardless of the offense, are considered criminal. This means that the penalty may consist of jail time and a criminal record.

In several states, municipalities have the ability to pass local marijuana ordinances that can classify certain forms of possession or use of marijuana as municipal violations that are subject to civil fines or penalties. Because state law preempts municipal law (just like federal law preempts state law), municipal ordinances typically are consistent with state statutes. However, just as some states have passed laws that appear to contradict federal law, there has been a recent influx of municipalities that have attempted to reduce or eliminate state penalties for small-scale marijuana violations.

MARIJUANA LAWS IN MILWAUKEE

Prior to 1997, all marijuana possession charges in the City of Milwaukee were treated as violations of state law, meaning that violators were subject to criminal prosecution by the Milwaukee County District Attorney (D.A.) and to criminal penalties determined in state court. But in that year, an ordinance was adopted that allowed first-time offenders possessing 25 grams of marijuana or less to be charged with violating a city ordinance rather than a state law. Hence, violators receive the equivalent of a municipal ticket, and their cases are brought before municipal court.

For second and subsequent offenses involving 25 grams or less, individuals are to be charged by the D.A. with a criminal offense under state law. Whether that offense is a misdemeanor or a felony depends on whether the individual has experienced a previous marijuana conviction.

The Milwaukee Common Council currently is debating a proposed ordinance change that would reduce the maximum forfeiture for violating the City’s marijuana possession ordinance from \$500 to \$50. As shown in the table below, the forfeiture amount is accompanied by various fees and surcharges that add up to the total fine. Consequently, a forfeiture of \$266 (this is the average forfeiture amount according to officials from the Milwaukee Municipal Court) would produce a total fine of \$396 when fees and surcharges are added. If the typical forfeiture were reduced to \$50, then the addition of fees and surcharges would produce a total fine of \$124.

Court Fees and Surcharges

Item	Amount	Agency Retaining
Court Clerk Fee	\$33	City
Jail Assessment Fee	1% (\$10 minimum)	County
State Clerk Fee	\$5	State
State Crime Lab Fee	\$13	State
State Surcharge	26% of forfeiture	State

Until recently, Wisconsin law only allowed municipalities to regulate marijuana possession for the first time in which an individual is cited, and only for cases involving less than 25 grams. In April 2014, the State passed a new law allowing cities, towns, and villages to regulate second and subsequent offenses, “*provided the district attorney’s office declines to prosecute.*”



This change in state law affords municipalities the opportunity to pursue civil forfeitures from individuals whose marijuana possession cases otherwise would not have been prosecuted by the district attorney's office. It is possible this will result in the D.A. taking fewer second and subsequent marijuana possession cases, thus potentially establishing lower risk of incarceration but greater risk of municipal fines for some offenders. Some municipalities, such as the City of West Allis, have modified their ordinances to reflect the change in state policy. Most have not, however, including the City of Milwaukee.

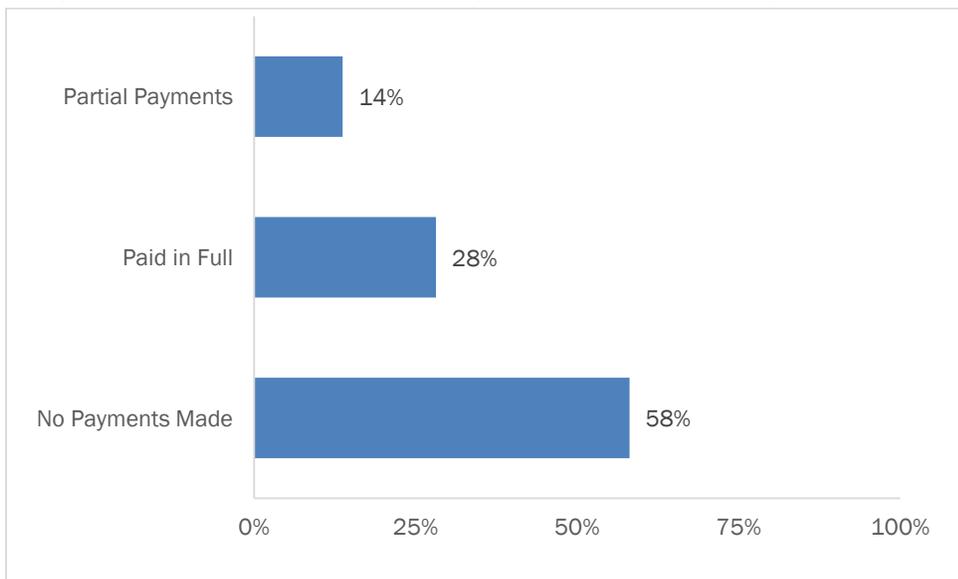
Policy in Practice: First Offenses

When individuals are ticketed for first-time marijuana possession offenses in Milwaukee, they are given an arraignment date when they must appear in municipal court. In most cases, if they do not appear at the arraignment, they are found guilty by default, a fine is determined, and they are given 60 days to pay. The municipal court undertakes a variety of efforts outside of police arrest to convince the violator to appear in court, and it offers payment plans and extensions to those who are found guilty but have difficulty paying the fine.

According to municipal court data, among 4,554 total marijuana possession cases in which the defendant was found guilty between January 2012 and March 2015, only 12 cases (involving 11 individuals) resulted in jail sentences. Among those, only eight individuals actually served time in jail. Notably, per State statute, the City of Milwaukee does *not* suspend driver's licenses for adults who fail to pay a marijuana possession fine, though juvenile offenders can have their licenses suspended.

While few people in Milwaukee are committed to jail time for first-time marijuana possession charges, most also do not pay the fines they are given. As shown below, payments of any amount were made in only 42% of cases in which individuals were found guilty of marijuana possession during a recent period of more than three years; only 28% of the fines were paid in full.

Marijuana Possession Cases in the City of Milwaukee's Municipal Court

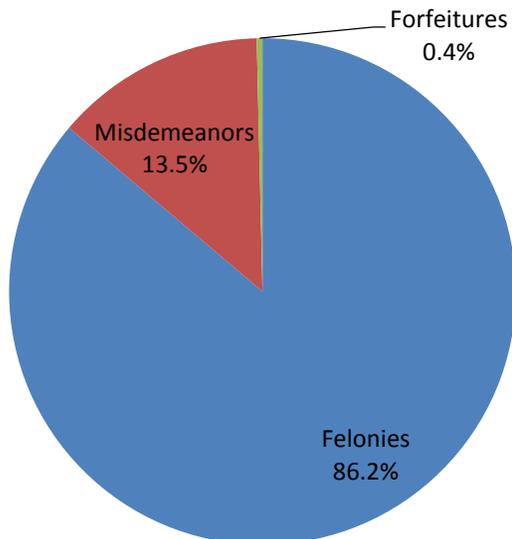


Policy in Practice: Second and Subsequent Offenses

Since the City of Milwaukee's marijuana possession ordinance only addresses first offenses, second and subsequent offense cases typically are sent to the D.A.'s office. That office exercises its discretion in deciding whether or not to criminally charge an individual for marijuana possession and what type of charge to issue. The general policy of the D.A.'s office is not to charge people with felonies for marijuana possession if they do not already have at least one other felony on their record.

Milwaukee County circuit court data from 2013 and 2014 on cases prosecuted by the D.A. that *only* involved a second or subsequent marijuana possession offense suggest that a majority of those cases resulted in felony convictions (as shown in the chart below) and sentences to time in jail. A total of 275 defendants have been convicted for cases that occurred during that two-year period, with 265 sentenced to time in jail and nine additional defendants sentenced to time in state prison.

Category of offense for second and subsequent marijuana possession convictions in Milwaukee County, 2013 and 2014



Policy Issues

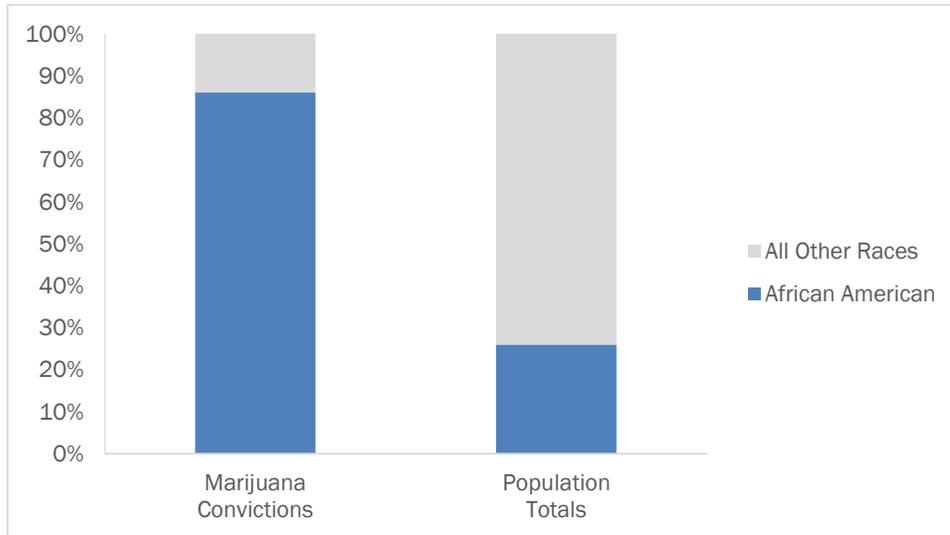
Our review of current policies pertaining to marijuana possession in the City of Milwaukee raises several important issues that warrant consideration.

- 1) Racial disparity of arrests:** One major concern often raised about Milwaukee's (and Wisconsin's) marijuana laws is that African Americans are arrested at disproportionate rates. In addition to being an issue of fundamental fairness, concerns have been raised regarding the impact of arrests for marijuana possession on police-community relations in predominantly African American neighborhoods. Our review of Milwaukee County circuit court data found that while African Americans make up approximately 26% of Milwaukee County's



population, they accounted for 86% of those found guilty of a second or subsequent marijuana possession offense in 2013 and 2014.¹

Marijuana possession convictions in Milwaukee County and population totals



- 2) **City vs. suburbs:** As Milwaukee aldermen debate the latest proposal for modifying the City’s marijuana ordinance, concerns have been raised regarding the lack of consistent policies throughout Milwaukee County. To shed light on this issue, we looked at several Milwaukee County suburbs to see how they regulate marijuana possession. We found that fines vary by municipality, deferred prosecution options exist in many suburbs but not in Milwaukee, and some suburbs handle second and subsequent offenses as municipal violations, while others send all second and subsequent offenses to the D.A.
- 3) **Lack of diversion opportunities:** Because marijuana is not considered an addictive drug and few clinical treatment programs exist for marijuana users, individuals arrested for possessing marijuana do not have the same diversion opportunities as those caught possessing other illegal drugs. This issue is particularly relevant to those being prosecuted for a second or subsequent small-scale offense, whose cases are in the hands of the D.A.’s office.
- 4) **Unpaid Fines, Incarceration, and Driver’s License Suspensions:** A common claim is that people who do not pay fines for municipal marijuana possession violations end up in jail and/or with suspended driver’s licenses. The City has incarcerated only eight individuals for failure to pay marijuana possession fines over the last three years, however, and does not suspend adults’ driver’s licenses for marijuana possession violations. While the City may wish to consider lowering its marijuana-related fines or changing its policy to *never* incarcerate offenders for failure to pay those fines, the perceived beneficial impact of doing so would appear to be less significant than some may believe.

¹ These data *do not* include cases involving additional charges other than second and subsequent marijuana possession offenses.



- 5) **Public resources used for enforcement:** The financial cost to local governments of policing and prosecuting marijuana possession also has been raised as an issue. Since most fines for marijuana possession never are paid, a key question is whether the amount of public resources being spent to enforce these laws is appropriate. The Public Policy Forum plans to devote detailed attention to this issue in a follow-up report to be released later this year.
- 6) **Consistency of enforcement:** Based on our conversations with justice system officials, there appears to be a great deal of discretion involved in enforcement of marijuana possession laws. Police officers decide whether to give individuals citations or make arrests – and the D.A. decides whether to prosecute for second and subsequent offenses – with a broad set of considerations in mind. For example, an individual’s previous record may be considered, and/or whether the case involves other offenses beyond marijuana possession. Police and D.A. discretion, therefore, has significant impacts on case outcomes.

MARIJUANA LAWS IN OTHER U.S. CITIES

The report provides an overview of cities across the U.S. that have reduced the penalties associated with marijuana use and possession despite federal and state prohibition. This national scan indicates that the strategies taken by such cities generally fall into three categories: adjusting law enforcement priorities; treating possession as a civil offense; and eliminating penalties altogether.

- **Adjusting Law Enforcement Priorities** – This approach aims to reduce the stringency of marijuana laws by placing limitations on the use of municipal resources to enforce those laws. Prominent examples include **Seattle**, where voters passed an initiative (before marijuana was fully legalized in the state) that made marijuana-related activities the lowest law enforcement priority for both the police department and the city attorney; and **Nashville**, which will vote on an initiative this August that would “prevent any metro tax dollars from being used for the criminal prosecution of an adult for the possession of less than two ounces of marijuana.”
- **Possession as a Civil Offense** – The second approach involves altering municipal codes to reclassify possession from a criminal to a civil infraction. This is the approach already taken in Milwaukee with regard to first-time offenses. Examples of cities that have taken this approach even further include **Ann Arbor**, which has established a \$25 fine for the first offense possession of any amount of marijuana, \$50 for the second infraction, and \$100 for the third and subsequent offenses; and **Philadelphia**, where private possession of 30 grams or less is subject to a non-criminal citation and a \$25 fine for each offense.
- **Eliminating Penalties for Possession** – The third approach involves eliminating penalties for small amounts of marijuana possession altogether. Again, as with the cities described above that have reduced marijuana possession violations to civil offenses, most of the cities that have eliminated small-scale marijuana possession penalties still have not fully *legalized* the drug, in that its purchase and sale still is prohibited. Examples of cities that fall into this category include **Madison**, where possession of up to 112 grams of marijuana in a private place is allowed without any penalties or consequences; and **Detroit**, where adults can possess less than one ounce of marijuana on private property without the threat of fine or criminal prosecution.



POLICY OPTIONS

Ultimately, the types of potential reforms to be considered will be driven by the broader policy goals of those seeking change. Our research and stakeholder interviews in Milwaukee – as well as our review of other cities that have reduced or eliminated penalties for marijuana possession – indicate that three broad (and sometimes overlapping) policy goals typically drive municipal governments to seek changes to their marijuana laws and enforcement practices.

Limited Effects When Compared to Other Drugs

There are many who believe that the health effects associated with marijuana are no more adverse than those associated with alcohol and that marijuana, therefore, should be regulated in a similar fashion. While it is beyond the scope of this research to opine on that belief, it would appear that the options to effectuate it on the municipal level may be somewhat limited.

To truly regulate marijuana in a similar fashion to alcohol, a municipality would need to legalize its commercial sale (or at the very least, home production). While several states have taken or will soon attempt to take that route, few municipalities have attempted to do so, in large part because their efforts would conflict with both federal *and* state law. That would be the case for the City of Milwaukee, as well.

Portland, Maine, and Washington, DC, are two cities we have identified that have sought to provide legal means for adults to obtain marijuana for personal use. There is a wider array of options for those who simply wish to establish marijuana penalties that are similar to penalties for alcohol without legalizing its commercial sale or home production. The **Detroit** model – which allows adults who are 21 or older to possess less than one ounce of marijuana on private property without the threat of fine or criminal prosecution – would be one potential approach.

Free Up Resources for More Pressing Law Enforcement Needs

Another common rationale for the pursuit of modifications to municipal marijuana policies is the desire to divert police and justice system resources to areas deemed more "serious" and important. Of course, the simplest way to achieve that objective is to legalize marijuana possession, but those who support action for resource-related reasons may be uncomfortable with the notion of full legalization.

There is a range of options for those wishing to pursue changes to Milwaukee's treatment of marijuana under this rationale. One model is the approach used by several cities to direct police departments to consider marijuana law enforcement their "lowest law enforcement priority." A potential advantage of pursuing that approach in Milwaukee is that by emphasizing a reduction in *arrests* (as opposed to a reduction in penalties), this strategy could produce resource savings across the justice system, from the Milwaukee Police Department (MPD) to the Milwaukee County Jail to the courts and D.A.'s office. A potential disadvantage, however, is the difficulty associated with defining "lowest priority" and ensuring that the policy is implemented.

Another option would be to treat all or greater numbers of small-scale marijuana possession offenses as civil violations. In Milwaukee, this approach could free up MPD resources by allowing



officers to issue greater numbers of municipal tickets while making fewer arrests, and it also could produce substantial savings in D.A., court, and incarceration costs. Potential examples for Milwaukee could include **Ann Arbor**, which treats all offenses for small-scale possession as municipal violations with varying small fine amounts depending on the number of offenses; and **Santa Fe** and **Philadelphia**, where all offenses for possession of small amounts of marijuana are treated as civil infractions with a maximum fine of \$25.

Eliminate Racial Disparities and Barriers to Employment

A third goal that often drives pursuit of relaxed penalties for small-scale marijuana possession is the desire to reform a legal framework that is perceived to treat African Americans more harshly than others, and/or that is perceived to add unnecessarily to the barriers to employment often faced by disadvantaged populations.

For those driven by this rationale, we have found that the treatment of second and subsequent violations for small-scale marijuana possession should perhaps be a bigger concern than the treatment of first offenses. As discussed previously, while the size of the fine for a first offense is a relevant concern for numerous reasons, an inability to pay such fines is not resulting in incarceration for the vast majority of those who are cited. Furthermore, because first offenses result in municipal citations, the only record of such offenses is in the municipal court database, as opposed to databases that are more commonly used to determine one's criminal record.

Conversely, under current law, even if the second or subsequent offense is treated as a misdemeanor, a conviction still appears on the offender's criminal record and still may result in time spent in jail while he or she awaits disposition by the D.A. or court. In addition, even if the Milwaukee ordinance was modified to allow second and subsequent offenses to be treated as municipal violations when the D.A. declines to prosecute, an arrest still would need to be made. Consequently, a change in the law that would definitively change the treatment of second and subsequent offenses to municipal violations could make a particular difference in addressing small-scale marijuana convictions as a barrier to employment.

CONCLUSION

This report is intended to frame policy options through the lens of the primary arguments used by those who are advocating for relaxed marijuana laws. There are other important perspectives that are not covered here, such as the perspectives of those concerned foremost with public safety and public health.

For example, police can use marijuana possession laws to arrest and detain individuals who are considered dangerous and suspected of more serious crimes that cannot initially be verified, but that are later determined through questioning or the post-arrest discovery of additional evidence. This and several other public safety-related reasons could be cited to support maintaining or even strengthening existing marijuana laws and enforcement policies.

With regard to public health, there has been impassioned debate in this country for the past 50 years regarding the health consequences associated with marijuana consumption. Furthermore, any



modifications to its legal treatment must be judged with consideration of the potential to pose harm to minors or to encourage persistent heavy usage by those who are currently only casual users.

Nevertheless, our initial research indicates that there are several policy considerations surrounding current marijuana laws and enforcement policies in the City of Milwaukee that justify a review of the current framework, and several examples from around the country that could serve as models for potential change. In our next report – to be released by the end of 2015 – we will dig deeper into justice system data in an attempt to provide even greater insight into the societal and fiscal impacts of Milwaukee's existing marijuana legal paradigm and where (if at all) potential change might be most appropriate.

