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The Phantom Defense: The Unavailability of the Entrapment Defense in New York City "Plain View" Marijuana Arrests

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THE PHANTOM DEFENSE: THE UNAVAILABILITY OF THE ENTRAPMENT DEFENSE IN NEW YORK CITY "PLAIN VIEW" MARIJUANA ARRESTS

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INTRODUCTION

New York City Police Department ("NYPD") officers stopped a twenty-nine-year-old black truck driver leaving a Bronx housing project one evening. According to the man,

> [The officers] told me to show them if I had anything illegal. They said if I didn't have much, there'd be no problem. So I took out the nickel bag and they arrested me. I said 'Come on, I showed you everything I had,' but they just put cuffs on me.[1]

The man was arrested and charged with criminal possession of marijuana in the fifth degree under Section 221.10 of the New

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* J.D. Candidate, Brooklyn Law School, 2013; B.A., Columbia College, Columbia University, 2006. Thanks are due to the Marijuana Arrest Research Project, the New York Civil Liberties Union, The Bronx Defenders, and other scholars and advocates for their foundational work bringing the scope of unjust New York City marijuana arrests to light. Special thanks also to R.R. for his support and editing eye, and the editors and staff of the *Journal of Law and Policy* for their input and suggestions.

[1] HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007, at 40 (2008), *available at* http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf. The facts of this arrest, though not extensive, will serve as the basis for further discussion in this Note of how such arrests fit within New York entrapment law. *Id.*; *see also* E-mail from Harry Levine to author (Oct. 6, 2012, 14:07 EST) (on file with author).

York State Penal Law—possession in a public place burning or open to public view ("MPV"), a B misdemeanor.[2] Had the marijuana remained in his pocket, however, prosecutors could have only charged the man with unlawful possession of marijuana under Section 221.05 of the penal law—a nonfingerprintable violation.[3] Given the variance between the consequences of the two offenses, it is particularly troubling that criminal defense attorneys in New York City report that police make arrests such as this one with great frequency.[4]

While attorneys and academics had been concerned about the unprecedented number of low-level marijuana arrests in New York City throughout the 1990s and early 2000s,[5] the phenomenon was not comprehensively studied until 2008, when the New York Civil Liberties Union published a report, *Marijuana Arrest Crusade: Racial Bias and Police Policy in New York City 1997–2007* ("*Marijuana Arrest Crusade*"), written by Harry G. Levine and Deborah Peterson Small.[6] The report, which

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[2] N.Y. PENAL LAW § 221.10(1) (McKinney 2008).

[3] *Id.* § 221.05 ("Unlawful possession of marijuana is a violation punishable only by a fine . . . ."); N.Y. CRIM. PROC. LAW § 150.75 (McKinney 2004) ("Whenever the defendant is arrested without a warrant, an appearance ticket shall promptly be issued and served upon him, as provided in this article."). In limited cases, where the officer cannot determine the arrestee's identity or residence address or reasonably believes the arrestee has provided a false identification or address, the officer may condition the issuance of the ticket on the arrestee posting pre-arraignment bail. *Id.*

[4] LEVINE & SMALL, *supra* note 1, at 41.

[5] *See, e.g.*, Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000*, at 1 (John M. Olin Program in Law & Econ., Working Paper No. 317, 2006), *available at* http://www.law.uchicago.edu/files/files/317.pdf (describing pattern of increased marijuana arrests beginning in 1994); Kevin Flynn, *Arrests Soar in Crackdown on Marijuana*, N.Y. TIMES (Nov. 17, 1998), http://www.nytimes.com/1998/11/17/nyregion/arrests-soar-in-crackdown-on-marijuana.html (quoting Legal Aid Society attorney Tony Elichter lamenting the arrest-to-arraignment practices involving marijuana arrestees).

[6] LEVINE & SMALL, *supra* note 1. Harry G. Levine is a professor of sociology at Queens College and the City University of New York Graduate Center. Deborah Peterson Small was the executive director of Break the Chains when the report was published. *Id.* at 106.

remains the most extensive analysis of the NYPD's marijuana arrest practices, brought significant media and advocacy attention to the issue. Advocates used the occasion to designate New York City the "Marijuana Arrest Capital" of the world.[7]

New York State's current marijuana laws were enacted in 1977, when the state legislature decriminalized possession of less than 25 grams of marijuana under the Marijuana Reform Act and removed marijuana from the definition of controlled substances.[8] The Act sought to "reduce the penalties for possession and sale of marihuana and in particular to 'decriminalize' the possession of a small amount of marihuana for personal use."[9]

Yet arrests for marijuana possession in New York City have exploded in the past fifteen years. In 2011 alone, the NYPD arrested 50,684 people for section 221.10 offenses—more arrests than the total number of such arrests between 1978 and 1996 combined.[10] Criminal possession of marijuana was the most common arrestable offense in 2011.[11] This amounts to a

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[7] Associated Press, *NYCLU: City Is World's 'Marijuana Arrest Capital*,' N.Y. SUN (Apr. 30, 2008), http://www.nysun.com/new-york/nyclu-city-is-worlds-marijuana-arrest-capital/75535/.

[8] LEVINE & SMALL, *supra* note 1, at 60.

[9] People v. Allen, 92 N.Y.2d 378, 384 (1998) (quoting William C. Donnino, *Practice Commentary*, N.Y. PENAL LAW § 221.00 (McKinney 2008)).

[10] Andy Newman, *Marijuana Arrests Rose in 2011, Despite Police Directive*, NYTIMES.COM (Feb. 1, 2012, 4:03 PM), http://cityroom.blogs.nytimes.com/2012/02/01/low-level-marijuana-arrests-rise-for-seventh-straight-year/. The misdemeanor arrests referred to in this article are arrests under Penal Law section 221.10(1). In order for one to be convicted under section 221.10, one must either possess marijuana in a public place ("MPV"), PENAL LAW § 221.10(1), or possess between 25 grams and 56.7 grams, or two ounces, of marijuana, *id.* § 221.10(2). According to the New York State Division of Criminal Justice Services, there were 50,676 section 221.10 arrests in 2011, slightly fewer than the *New York Times* reports. *See* E-mail from N.Y. State Div. of Criminal Justice Servs., to author (July 27, 2012, 14:02 EST) (on file with author). Of the 50,676 section 221.10 arrests, 49,800 were for offenses under section 221.10(1), marijuana in view of the public. The remaining 876 arrests were for section 221.10(2) offenses, possession of marijuana between 25 and 56.7 grams. *Id.*

[11] Press Release, Drug Policy Alliance, New Data Released: NYPD

marijuana arrest approximately every ten minutes[12] or one out of seven criminal cases in New York City's courts.[13] The significance of such statistics should not be underestimated; despite a statutory decriminalization policy, the NYPD under the Bloomberg administration made over 400,000 fifth degree criminal possession of marijuana arrests between 2002 and 2011.[14] These arrests have significant consequences for arrestees, impacting employment, immigration status, child custody, educational opportunities, and driving privileges, among other ramifications.

Moreover, descriptions of police trickery in securing MPV arrests, such as the experience of the man in the Bronx recounted above, have become commonplace in major New York City mainstream media outlets.[15] The problem has grown so large that NYPD Commissioner Raymond Kelly felt

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Made More Marijuana Possession Arrests in 2011 than in 2010; Illegal Searches and Manufactured Misdemeanors Continue Despite Order by Commissioner Kelly to Halt Unlawful Arrests (Feb. 1, 2012), *available at* http://www.drugpolicy.org/news/2012/02/new-data-released-nypd-made-more-marijuana-possession-arrests-2011-2010-illegal-searche. In 2011, MPV arrests under section 221.10 were the top arraignment charge in New York City by at least 10,000 charges. OFFICE OF THE CRIMINAL COURT OF N.Y.C., ANNUAL REPORT 2011, at 30 (Justin Barry, ed. 2011) [hereinafter CRIMINAL COURT REPORT], *available at* http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2011.pdf. In 1995, the offense did not register in the top ten offenses citywide. *Id*.

[12] Jim Dwyer, *Push for Marijuana Arrests in N.Y. Has Side Effects*, N.Y. TIMES (June 17, 2011), http://www.nytimes.com/2011/06/17/nyregion/push-for-marijuana-arrests-in-ny-has-side-effects.html.

[13] Jennifer Peltz, *Pot Arrests Top 50K in 2011 Despite NYPD Order*, YAHOO! NEWS (Feb. 1, 2012), http://news.yahoo.com/pot-arrests-top-50k-2011-despite-nypd-order-182052393.html.

[14] *Documenting New York City's Marijuana Arrest Crusade*, MARIJUANA-ARRESTS.COM, http://marijuana-arrests.com/nyc-pot-arrest-docs.html (last visited July 15, 2012).

[15] *See, e.g.*, Alisa Chang, *Alleged Illegal Searches by NYPD Rarely Challenged in Marijuana Cases* (WNYC radio broadcast Apr. 27, 2011), *available at* http://www.wnyc.org/articles/wnyc-news/2011/apr/27/alleged-illegal-searches; Jim Dwyer, *A Call to Shift Policy on Marijuana*, N.Y. TIMES (June 15, 2011), http://www.nytimes.com/2011/06/15/nyregion/in-new-york-a-call-to-shift-policy-on-marijuana.html; Newman, *supra* note 10; Peltz, *supra* note 13.

compelled to issue a special order in September 2011 reminding NYPD officers that directing an individual to display any marijuana he or she is carrying cannot create a chargeable MPV offense.[16] The order reads in part:

> A crime will not be charged to an individual who is requested or compelled to engage in the behavior that results in the public display of marihuana. Such circumstances may constitute a violation of Penal Law section 221.05 – Unlawful Possession of Marihuana, a violation[,] *not* Penal Law section 221.10 (1) – Criminal Possession of Marihuana in the 5th Degree, a class B misdemeanor . . . . To support a charge of PL 221.10 (1) the public display must be an activity undertaken of the subject's own volition. Thus, uniformed members of the service lawfully exercising their police powers during a stop *may not* charge the individual with PL 221.10 (1) CPM 5th if the marihuana recovered was disclosed to public view at an officer's direction.[17]

While advocates of changes to NYPD marijuana policing cautiously praised the Commissioner's order,[18] and marijuana arrests slightly decreased in the months following its issuance,[19]

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[16] N.Y. POLICE DEP'T, OPERATIONS ORDER NO. 49, CHARGING STANDARDS FOR POSSESSION OF MARIHUANA IN A PUBLIC PLACE OPEN TO PUBLIC VIEW (2011) [hereinafter 2011 KELLY MEMO], *available at* http://s3.documentcloud.org/documents/252743/nypd-marijuana-order.pdf.

[17] *Id.*

[18] *See, e.g.*, Donna Lieberman, *Big Step Forward: NYPD Orders Officers to Stop Unlawful Marijuana Arrests*, ACLU BLOG OF RIGHTS (Sept. 26, 2011, 4:02 PM), http://www.aclu.org/blog/criminal-law-reform/big-step-forward-nypd-orders-officers-stop-unlawful-marijuana-arrests ("While the new directive is an important step forward, it will have little impact unless the NYPD vigilantly enforces it."); Press Release, Drug Policy Alliance, NYPD Commissioner Calls on NYPD to Stop Improper Marijuana Arrests (Sept. 23, 2011), *available at* http://www.drugpolicy.org/news/2011/09/nypd-commissioner-calls-nypd-stop-improper-marijuana-arrests ("This represents a tremendous victory. . . . But, the devil remains in the details."); Editorial, *Trouble with Marijuana Arrests*, N.Y. TIMES (Sept. 27, 2011), http://www.nytimes.com/2011/09/27/opinion/trouble-with-marijuana-arrests.html ("While the memo . . . is an important step, it does not by itself end the problem.").

[19] *See* Edith Honan, *Marijuana Arrests Fall in New York After Rule*

recent evidence suggests the order has ultimately had little impact on marijuana arrest practices.[20]

Even New York State Governor Andrew Cuomo acknowledged the impropriety of such arrests during the 2012 state legislative session by unsuccessfully proposing legislation to change the penal code to address the vast number of marijuana arrests.[21] Yet if knowledge of improper NYPD marijuana enforcement practices is so widespread, why do entrapment defenses fail to defeat MPV prosecutions in court?

This Note examines NYPD marijuana enforcement practices in light of New York State's entrapment law. It argues that although the NYPD appears to be in contravention of both the law and stated NYPD policy, entrapment defenses are still unavailable to many MPV defendants. Part I of this Note explores the causes of the substantial increase in MPV arrests since the mid-1990s. Part II details the significant consequences of misdemeanor marijuana arrests and convictions for New York City defendants. Part III examines New York State entrapment law as it applies to an emblematic MPV arrest, arguing that both traditional entrapment and entrapment by estoppel defenses should succeed in invalidating many MPV arrests. Part IV outlines the disincentives and obstacles to successfully arguing

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Change, REUTERS (Dec. 7, 2011), http://www.reuters.com/article/2011/12/07/us-newyork-arrests-marijuana-idUSTRE7B62GB20111207 (reporting a thirteen percent drop in New York City misdemeanor marijuana possession arrests in the nine weeks following the Commissioner's order compared to the same nine-week period in 2010).

[20] Alice Brennan & Ryan Devereaux, *New York Police Officers Defy Order to Cut Marijuana Arrests*, GUARDIAN (London) (Mar. 30, 2012, 5:00 PM), http://www.guardian.co.uk/world/2012/mar/30/nypd-stop-and-frisk-marijuana ("In September last year, [NYPD Commissioner Ray] Kelly issued an order to officers not to arrest people caught with small amounts of marijuana. But the number of those arrested increased after the order was made."); *see also infra* Part V.A.

[21] *See infra* Part V.D.; *see also* Alisa Chang, *Wading into Stop-and-Frisk Debate, Cuomo Pushes to Cut Pot Arrests*, WNYC (June 4, 2012), http://www.wnyc.org/blogs/wnyc-news-blog/2012/jun/04/cuomo-wading-stop-and-frisk-ask-reduced-pot-arrests/ ("'[A] young person has a small amount of marijuana in their pocket, during the stop-and-frisk the police officer says turn out your pockets, the marijuana is now in public view. It just went from a violation to a crime,' [Governor Cuomo] said.").

entrapment defenses in MPV arrests in New York City, particularly logistical hurdles, court overcrowding, police corruption, and considerable evidentiary burdens. Finally, Part V explores the strengths and weaknesses of policy proposals to protect the rights of MPV defendants and limit police misconduct in this area. Ultimately, this Note asserts that changes to New York State's marijuana laws are likely the most sustainable approach to reducing improper MPV arrests.

I. EXAMINING THE INCREASE IN SECTION 221.10 MARIJUANA ARRESTS

Given that there are now over 50,000 section 221.10 marijuana arrests per year in New York City, scholars and commentators have proposed various hypotheses to explain the explosion in MPV arrests. While several of the theories are explored below, this Note contends that it is a combination of these factors that have aligned to create a perfect policy storm leading to such unprecedented arrest numbers.

A. The Rise of "Broken Windows" Policing in New York City

The dramatic increase in misdemeanor marijuana arrests in New York City from 12,800 in 1991–1995 to 147,000 in 1996–2000 raises a fundamental inquiry into what changed in the mid-1990s.[22] The most common development scholars point to is the introduction of "order maintenance policing" in New York City in 1994.[23] The philosophical manifesto of this policing strategy is "Broken Windows," a 1982 *Atlantic Magazine* article by social scientists George Kelling and James Wilson.[24] Kelling and

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[22] LEVINE & SMALL, *supra* note 1, at 7.

[23] *See* Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 592 (2010); Bruce D. Johnson et al., *Policing and Social Control of Public Marijuana Use and Selling in New York City*, 6 L. ENFORCEMENT EXECUTIVE F. 59, 66 (2006).

[24] George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MAG., Mar. 1982, at 29, *available at* http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/.

Wilson argue that the aggressive policing of unruly, public behavior—"smoking, drinking, disorderly conduct, and the like"—will lead to a decrease in large-scale and violent crime.[25]

In his 1993 mayoral race, Rudolph Giuliani built his platform upon the "broken windows" theory. He promised to crack down on low-level street crime, pollution, and noise to effectively translate Kelling and Wilson's theory into practice.[26] Once in office, Giuliani tasked his newly appointed police commissioner, William J. Bratton, with the project of carrying out his campaign promises. Bratton responded with an array of policing reforms, including the introduction of the CompStat crime mapping system.[27] The focus of Bratton's strategy was proactive prosecution of "graffiti, aggressive panhandling, fare beating, public drunkenness, . . . public urination, and other low-level misdemeanor offenses."[28] While the NYPD did not explicitly identify marijuana possession in the context of its strategy to "reclaim the streets,"[29] the numbers of low-level marijuana misdemeanor arrests sharply increased following the introduction of the Bratton's new policing approach.[30]

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[25] *Id.*

[26] Giuliani has publicly identified Kelling and Wilson's article as the source of his administration's crime strategy. *See Rudolph Giuliani Interview*, ACAD. ACHIEVEMENT, http://www.achievement.org/autodoc/page/giu0int-4 (last updated Apr. 17, 2008) ("I very much subscribe to the 'Broken Windows' theory, a theory that was developed by Professors Wilson and Kelling, 25 years ago maybe. The idea of it is that you had to pay attention to small things, otherwise they would get out of control and become much worse. . . . [W]e started paying attention to the things that were being ignored . . . . [T]he street-level drug dealing; the prostitution; the graffiti, all the things that were deteriorating the city.").

[27] Geller & Fagan, *supra* note 23, at 594. CompStat is a large-scale computer system pioneered by the NYPD in 1994 that uses real-time statistical data to identify crime trends, allocate police resources geographically, and pursue accountability from precinct commanders by the NYPD leadership. *See* ARTHUR STORCH, WORLDWIDE LAW ENFORCEMENT CONSULTING GRP., INC., COMPSTAT—THE START OF A REVOLUTION IN POLICING (2006), *available at* http://www.wwlecg.com/docs/COMPSTAT%20article.pdf.

[28] Geller & Fagan, *supra* note 23, at 594.

[29] *Id.*

[30] *See* LEVINE & SMALL, *supra* note 1, at 8 (showing a significant increase in marijuana arrests beginning in the mid-1990s).

The focus on "Broken Windows" policing did not conclude at the end of the Giuliani administration in 2001. Shortly after the terror attacks of September 11th and days before his inauguration, Mayor-elect Michael Bloomberg emphasized his intention to continue the policing strategy of his predecessor and reemphasize a crackdown on "quality of life crimes."[31] The NYPD under Mayor Bloomberg has arrested more people for misdemeanor marijuana offenses than it did during Mayors Giuliani's, David Dinkins', and Ed Koch's administrations, combined.[32]

One of the central enforcement strategies of the Giuliani-Bloomberg quality-of-life policing philosophy has been the expansion of the NYPD's stop-and-frisk policy, which some commentators have identified as the source of increased MPV arrests.[33] Generally, a stop-and-frisk encounter takes place when a police officer detains and questions an individual, then conducts a pat-down or "frisk"[34] of the individual's outer clothing or bags to identify dangerous weapons.[35] While there is

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[31] Adam Nagourney, *Quality of Life Is High Priority for Bloomberg*, N.Y. TIMES (Dec. 27, 2001), http://www.nytimes.com/2001/12/27/nyregion/quality-of-life-is-high-priority-for-bloomberg.html.

[32] Press Release, Drug Policy Alliance, 2010 NYC Marijuana Arrest Numbers Released: 50,383 New Yorkers Arrested for Possessing Small Amounts of Marijuana (Feb. 10, 2011), *available at* http://www.drugpolicy.org/news/2011/02/2010-nyc-marijuana-arrest-numbers-released-50383-new-yorkers-arrested-possessing-small-.

[33] *See, e.g.*, Geller & Fagan, *supra* note 23. In 2011, approximately 30,000 of the over 50,000 section 221.10 marijuana arrests took place following NYPD street stops. *See* Brennan & Devereaux, *supra* note 20.

[34] During a frisk, "[t]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin area and about the testicles, and entire surface of the legs down to the feet." Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968) (quoting L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1954)).

[35] There does not appear to be an agreed-upon definition of a stop-and-frisk encounter. The Supreme Court set forth its Fourth Amendment analysis for such encounters in *Terry v. Ohio*, 392 U.S. at 20–22. In New York, the Court of Appeals described and established a distinct, and somewhat more stringent, analysis of such encounters in *People v. DeBour*, 40 N.Y.2d 210, 213, 215 (1976). This Note is not a constitutional analysis of NYPD stop-and-frisk practices; others, however, have questioned whether the day-to-day reality

no singular blueprint for stop-and-frisks, they continue to be a core component of the expansion of order-maintenance policing in New York City.[36] While in 1997 the NYPD reported conducting 85,768 stops,[37] in 2011 the NYPD reported 685,724 stops,[38] an increase of nearly 700%. Often, these stops do not arise from a police officer's reasonable suspicion that an individual possesses marijuana; rather, the police employ a range of permissible justifications for a search, such as observing "[f]urtive [m]ovements" or determining an individual "[f]its [the] [d]escription" of a suspect.[39]

Though a stop-and-frisk is not always targeted at uncovering marijuana possession, such stops are frequently a starting point for MPV arrests. In 2011, approximately 30,000 of the 50,000 arrests for possession of marijuana under section 221.10 took place following an NYPD street stop.[40] Evidence suggests that stop-and-frisks result in MPV arrests in two different scenarios:

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of NYPD stop-and-frisks fall within the permissible stop-and-frisk constitutional boundaries established in *Terry* and *DeBour*. *See, e.g.*, CIVIL RIGHTS BUREAU, OFFICE OF THE N.Y. ATT'Y GEN., STOP-AND-FRISK REPORT 160–62 (1999), *available at* http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf (explaining the varying reasons for stops and the applicable constitutional standards, such as reasonable suspicion); Geller & Fagan, *supra* note 23, at 614–18 (discussing the legality of stop-and-frisks dependent upon the circumstances and justifications involved in those stops).

[36] *See* CIVIL RIGHTS BUREAU, *supra* note 35, at 56–59 (noting the emphasis placed on stop-and-frisks in order-maintenance policing); Geller & Fagan, *supra* note 23, at 594–96 (describing the dramatic change in police strategy and tactics under the model of order maintenance).

[37] U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, at ch.5, n.63 (2000), *available at* http://www.usccr.gov/pubs/nypolice/ch5.htm.

[38] Julie Dressner & Edwin Martinez, Op-Ed., *The Scars of Stop-and-Frisk*, N.Y. TIMES (June 12, 2012), http://www.nytimes.com/2012/06/12/opinion/the-scars-of-stop-and-frisk.html.

[39] Geller & Fagan, *supra* note 23, app. at 632. NYPD officers are required to fill out a Stop, Question and Frisk Report Worksheet, or UF-250 form, indicating their reasons for detaining an individual, after each investigatory stop. For a copy of the UF-250, see Stipulation of Settlement at 8, Daniels v. New York, No. 99 Civ. 1695 (S.D.N.Y. Sept. 24, 2003), *available at* http://ccrjustice.org/files/Daniels_ StipulationOfSettlement_12_03_0.pdf.

[40] *See* Brennan & Devereaux, *supra* note 20.

a police officer encourages, instructs, or orders a detained individual to produce any marijuana he or she might have on his or her person,[41] or the officer reaches into an individual's pocket, bag, or clothing and retrieves the marijuana.[42] While the latter scenario has troubling Fourth Amendment implications,[43] it is the former that raises specific entrapment concerns.[44] Though

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[41] *See, e.g.*, *supra* text accompanying notes 1–21; *see also* Chang, *supra* note 21 (reporting Governor Cuomo's description of unlawful marijuana arrests where "the police officer says turn out your pockets" resulting in an MPV offense); Tom Hays, *A Little Pot Is Trouble in NYC: 50k Busts a Year*, WALL STREET J. (Nov. 5, 2011, 7:13 PM), http://online.wsj.com/article/AP4e600773864942f98e92afaa1c6e89e9.html (describing Bronx community organizer Alfredo Carrasquillo's MPV arrest before which an NYPD officer ordered him to "empty out his pockets" outside of his school).

[42] *See, e.g.*, *Marijuana Possession Arrests, Illegal Searches, and the Summons Court System: Hearing on Res. 986-2011 Before the Pub. Safety Comm.*, 2012 Leg., 2012 Sess. 25–37 (June 12, 2012) [hereinafter *Levine Testimony*] (statement of Harry G. Levine, Professor of Sociology, Queens Coll.), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=1965274&GUID=C07ECCDD-03B9-45D6-92C2-DC2E26CE2842 ("How do the police find a bit of marijuana, usually a few grams or less . . . or a thin marijuana cigarette, or even part of one? First of all, in the course of a pat down, or a frisk, an officer simply reaches into the person's pockets."); Verified Complaint at 17–22, Gomez-Garcia v. N.Y.C. Police Dep't, No. 451000-2012 (N.Y. Sup. Ct. June 22, 2012), *available at* http://www.legal-aid.org/media/157211/06222012_marijuana_complaint.pdf (describing the MPV arrests of five plaintiffs who allege NYPD officers found small amounts of marijuana by searching their pockets or clothing); Alisa Chang, *Marijuana Arrests Dip After NYPD Order, but Allegations of Improper Arrests Continue* (WNYC radio broadcast Dec. 8, 2011), *available at* http://www.wnyc.org/blogs/wnyc-news-blog/2011/dec/08/marijana-numbers/ (describing the MPV arrest of a nineteen-year-old in which an NYPD officer shook arrestee's sleeve until three bags of marijuana dropped out and the officer stuck his hand up the arrestee's sleeve to retrieve a fourth bag).

[43] *See* Sibron v. New York, 392 U.S. 40, 65 (1968) (holding that, absent a pat-down of the defendant's outer clothing for weapons and feeling objects that reasonably might be weapons, police officer's search of defendant's pockets for drugs violates the Fourth Amendment).

[44] Liz Benjamin, *Jeffries: Pot Arrests Are 'Classic Entrapment,'* YNN STATE OF POLITICS BLOG (June 5, 2012, 12:00 PM), http://capitaltonightny.ynn.com/2012/06/jeffries-pot-arrests-are-classic-entrapment/comment-page-1/ (quoting New York State Assemblyman Hakeem Jeffries's description of the scenario in which individuals who comply with a police demand to empty

the increase in stop-and-frisks is not likely the sole cause of increased MPV arrests, the dramatic uptick in stop-and-frisks closely correlates with the significant increase in such arrests and fits within the goals of the NYPD's policing priorities since the mid-1990s.[45]

B. Marijuana Enforcement Is a Means, Not an End: Building the NYPD's Databases

Another hypothesis for the dramatic increase in marijuana arrests is that such arrests are a means of database building: the more the NYPD make, the more names, photos, and fingerprints are collected in the Department's computer system for use in solving past or future crimes.[46] Information gathered from an arrest is retained and accessible to police via the NYPD's Real Time Crime Center database.[47] Although New York State law

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their pockets and are then charged with criminal marijuana possession as "classic entrapment" (internal quotation marks omitted)).

[45] *See* LEVINE & SMALL, *supra* note 1, at 21–22. In 2012, New York Governor Andrew Cuomo proposed a change in the marijuana possession laws as a means of reducing the number of stop-and-frisks in New York City. Thomas Kaplan, *Cuomo Seeks Cut in Frisk Arrests*, N.Y. TIMES (June 3, 2012), http://www.nytimes.com/2012/06/04/nyregion/cuomo-seeks-cut-in-stop-and-frisk-arrests.html.

[46] LEVINE & SMALL, *supra* note 1, at 21–22.

[47] Solana Pyne, *NYPD Unveils High-Tech Real Time Crime Center at Police Headquarters*, NY1 (July 14, 2005, 6:31 PM), http://www.ny1.com/content/top_stories/52142/nypd-unveils-high-tech-real-time-crime-center-at-police-headquarters. Since 2009, there have been reports that this database would also include an arrested individual's cell phone's International Mobile Equipment Identity (IMEI) number or serial number. *See* Rocco Parascandola, *NYPD Tracking Cell Phone Owners, but Foes Aren't Sure Practice Is Legal*, N.Y. DAILY NEWS (Oct. 8, 2009), http://www.nydailynews.com/news/ny_crime/2009/10/08/2009-10-08_number_please_nypd_tracking_cell_phone_owners_but_foes_arent_sure_practice_is_le.html. There have also been reports that arrested individuals' personal markings like tattoos, birthmarks, scars, missing and gold teeth, limps, skin conditions, or any other details an officer decides to write down are saved in the database. *See* Michael S. Schmidt, *Have a Tattoo or Walk With a Limp? The Police May Know*, N.Y. TIMES (Feb. 18, 2010), http://www.nytimes.com/2010/02/18/nyregion/18tattoo.html. Most recently, beginning August 1, 2012, any person convicted of any

requires the sealing and destruction of certain information collected from arrestees whose cases are dropped, dismissed, or are acquitted,[48] the NYPD admits it trains its officers to "take down as much [information] as they can."[49] As New York State law only specifically requires the destruction of photographs and fingerprints following a resolution in a defendant's favor,[50] some information the NYPD collects from arrestees is not required to be purged and may continue to be stored in NYPD databases.[51] The legality of such data collection and retention is unclear, but the NYPD argues the collection of identifying information is a legitimate part of its law enforcement strategy.[52]

The NYPD has used street stops, arrests, and technology to enhance its data-collection efforts aggressively in the past two decades.[53] This emphasis on data collection, while seemingly a

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misdemeanor or felony, except for first-time offenders convicted of MPV offenses and youthful offenders, is required to submit to DNA collection. *The NYS DNA Databank and CODIS*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., http://criminaljustice.state.ny.us/forensic/dnabrochure.htm (last visited Sept. 23, 2012).

[48] N.Y. CRIM. PROC. LAW §§ 160.50, 160.55 (McKinney 2004).

[49] Schmidt, *supra* note 47.

[50] CRIM. PROC. §§ 160.50, 160.55.

[51] For example, identifying information such as tattoos or other personal features are not listed as information to be destroyed or expunged in the event of a resolution of a criminal action or proceeding in favor of the defendant. *Id*. § 160.55.

[52] *See* Schmidt, *supra* note 47 ("Police officials said, however, that the database had helped identify people who were not carrying identification and that it had also had many successes catching criminals.").

[53] *See generally* N.Y. CIVIL LIBERTIES UNION, WHO'S WATCHING? VIDEO CAMERA SURVEILLANCE IN NEW YORK CITY AND THE NEED FOR PUBLIC OVERSIGHT (2006), *available at* http://www.nyclu.org/files/publications/nyclu_pub_whos_watching.pdf (reporting dramatic increase in surveillance cameras in NYC in 1990s and 2000s); *see also* Sean Gardiner, *NYPD Adopts Eye-Scan Technology*, WALL STREET J. (Nov. 15, 2010), http://online.wsj.com/article/SB10001424052748703326204575617031249438718.html (discussing the NYPD's collection of iris data as part of the booking process); Paul Harris, *NYPD and Microsoft Launch Advanced Citywide Surveillance System*, GUARDIAN (London) (Aug. 8, 2012, 4:20 PM), http://www.guardian.co.uk/world/2012/aug/08/nypd-microsoft-surveillance-system ("[The new system], which bears a passing resemblance to the futuristic hologram data screens used by Tom Cruise in the science

crime-solving strategy, may have also become itself an engine for arrests. Because the NYPD has the capacity to make MPV arrests so frequently and section 221.05, or "simple possession," offenses are nonfingerprintable violations that do not lead to arrests, officers may have an incentive to make MPV arrests—even arrests that may not be entirely proper—to contribute information to the department's growing databases.[54]

C. It's a Numbers Game: Bureaucracy, Quotas, and CompStat

One of the most significant developments that emerged from the changes to NYPD strategy in the mid-1990s was the creation of the CompStat system. CompStat allows top NYPD commanders to make resource-allocation decisions based on real-time crime conditions and to evaluate their subordinate commanders based largely on productivity indicators: statistics on crime numbers, arrests, stops, and seizures, for example, mapped geographically.[55] As CompStat was integrated into the NYPD structure, commanders faced constant pressure at weekly meetings with their superiors to show their crime numbers were low and arrest numbers were high.[56] Precincts and individual

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fiction film Minority Report, will allow police to quickly collate and visualise vast amounts of data from cameras, license plate readers, 911 calls, police databases and other sources"); Bob Hennelly, *A Look Inside the NYPD Surveillance System* (WNYC radio broadcast May 21, 2010), *available at* http://www.wnyc.org/articles/wnyc-news/2010/may/21/a-look-inside-the-nypd-surveillance-system/ (discussing the expansion of the NYPD's Domain Awareness System); Bob Herbert, *Big Brother in Blue*, N.Y. TIMES (Mar. 12, 2010), http://www.nytimes.com/2010/03/13/opinion/13herbert.html ("Commissioner Kelly [is] collecting more information than J. Edgar Hoover could ever have imagined compiling.").

[54] *See* Harry Levine et al., *Drug Arrests and DNA: Building Jim Crow's Database*, COUNCIL FOR RESPONSIBLE GENETICS GENETIC WATCHDOG BLOG, http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=58&archive=yes (last visited Nov. 5, 2011).

[55] *See* John A. Eterno & Eli B. Silverman, *The New York City Police Department's Compstat: Dream or Nightmare?*, 8 INT'L J. POLICE SCI. & MGMT. 218, 218–21 (2006).

[56] *Id.* at 223.

officers were praised or criticized by their supervisors partly based on their productivity numbers.[57] Over time, this pressure on commanding officers has led to the emergence of what is, in effect, an arrest quota system within the NYPD.[58] This is evidenced by tape recordings of precinct commanders' roll call announcements ordering street-level officers to meet arrest and summons goals.[59]

As MPV arrests are relatively straightforward,[60] making routine misdemeanor marijuana arrests allows officers to show

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[57] *See* Daniel Edward Rosen, *Is Ray Kelly's NYPD Spinning Out of Control?*, N.Y. OBSERVER (Nov. 1, 2011, 6:39 PM), http://observer.com/2011/11/is-ray-kellys-nypd-spinning-out-of-control ("[A high-ranking officer explains: f]rom the borough command to the precincts, they put the pressure on officers to produce the numbers . . . . And [officers] stop people who don't need to be stopped." (internal quotation marks omitted)).

[58] Despite the NYPD's denials of the existence of an arrest quota system, evidence continues to emerge that such practices may be commonplace throughout the department. *See, e.g.*, Al Baker & Liz Robbins, *A Quota by Any Other Name*, NYTIMES.COM (Jan. 13, 2011, 11:32 AM), http://cityroom.blogs.nytimes.com/2011/01/13/a-quota-by-any-other-name/; Al Baker, *Bronx Police Precinct Accused of Using Quota System*, N.Y. TIMES (Feb. 23, 2012), http://www.nytimes.com/2012/02/24/nyregion/lawsuit-says-bronx-police-precinct-uses-quota-system.html; Rocco Parascandola, *NYPD Lt. Janice Williams Captured on Tape Pushing for More Busts, but Brass Says There's No Quotas*, N.Y. DAILY NEWS (Mar. 3, 2011), http://articles.nydailynews.com/2011-03-03/local/28666735_1_officer-adrian-schoolcraft-illegal-quotas-nypd; Graham Rayman, *Brooklyn Police Officer: Stop and Frisk Is Not About Racism, It's About Quotas*, RUNNIN' SCARED (Jun. 15, 2012, 7:00 AM), http://blogs.villagevoice.com/runninscared/2012/06/brooklyn_police.php; Graham Rayman, *NYPD Quotas: Brooklyn Jury Says 'Yes, Virginia, They Do Exist,'* RUNNIN' SCARED (Feb. 19, 2011, 1:49 PM), http://blogs.villagevoice.com/runninscared/2011/02/nypd_quotas_bro.php [hereinafter Rayman, *NYPD Quotas*].

[59] *See* Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE (May 4, 2010), http://www.villagevoice.com/2010-05-04/news/the-nypd-tapes-inside-bed-stuy-s-81st-precinct/ [hereinafter Rayman, *NYPD Tapes*]; *see also* Al Baker & Ray Rivera, *Secret Tape Has Police Pressing Ticket Quotas*, N.Y. TIMES (Sept. 9, 2010), http://www.nytimes.com/2010/09/10/nyregion/10quotas.html; Graham Rayman, *Federal Judge: 'NYPD Tapes' Smoking Gun Evidence of Police Quotas*, RUNNIN' SCARED (Sept. 1, 2011, 8:00 AM), http://blogs.villagevoice.com/runninscared/2011/09/federal_judge_n.php.

[60] *See* LEVINE & SMALL, *supra* note 1, at 19 ("In our interviews,

high productivity with less of the risk associated with arrests for other offenses.[61] Thus, officers are incentivized to pursue MPV arrests to meet the quotas assigned, formally or informally, by their commanding officers.[62]

D. "Collars for Dollars": NYPD Overtime Policies Drive Arrest Numbers

A further explanation for the explosion in marijuana arrests focuses on the motivations of individual NYPD officers—easy MPV arrests can translate into significant overtime pay. Under NYPD overtime policies, officers that make arrests near the end of their shift are eligible for hours of overtime pay—at time and a half—for the booking process.[63] This unofficial policy is even known in NYPD parlance as "collars for dollars."[64] Offenses involving marijuana possession are particularly conducive to end-of-shift arrests because they are clean, reliable, and easy to group in multiples.[65]

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ordinary New York police officers report that making marijuana arrests is safer and eas[i]er than many other forms of police work.").

[61] Peter Moskos, *Collars for Dollars*, REASON (July 2011), http://reason.com/archives/2011/06/29/collars-for-dollars ("When the murder rate was falling fastest in the 1990s, police never arrested more than a few thousand people per year for public-view marijuana. Only after the crime drop *slowed* did police turn to small-scale drug arrests to meet their 'productivity goals.'").

[62] *See* Jim Hoffer, *Investigation: Police Officer Quotas Revealed*, (WABC television broadcast Mar. 3, 2010), *available at* http://abclocal.go.com/wabc/story?section=news/investigators&id=7305356 ("[NYPD Officer Adil Polanco:] 'At the end of the night you have to come back with something. You have to write somebody, you have to arrest somebody, even if the crime is not committed, the number's there. So our choice is to come up with the number.'").

[63] LEVINE & SMALL, *supra* note 1, at 20–21.

[64] *Id.* at 20.

[65] *Id.* at 19–20; Moskos, *supra* note 61 ("[Officers] are also influenced by what is known in New York as 'collars for dollars': Arrest numbers are influenced by incentive of overtime pay for finishing up paperwork and appearing in court.").

While overtime pay is a well-documented motivating factor in police work,[66] narcotics officers have received more opportunities for overtime than other officers when police leaders are focused on increasing arrest numbers.[67] Beginning in early 2000, which remains the year with the highest marijuana arrest total on record,[68] Police Commissioner Howard Safir and Mayor Giuliani ushered in Operation Condor, which focused on providing overtime to extra narcotics officers to make low-level drug arrests.[69] Operation Condor officers worked on their days off to pursue low-level drug offenses, particularly marijuana offenses, leading to record numbers of marijuana arrests in the early 2000s.[70] The initiative, which cost the NYPD $172 million in overtime costs and at its peak paid for an extra 1,000 officers on the street, was cut by Commissioner Kelly in 2002.[71] Operation Condor no longer exists but NYPD officers are still eligible for a certain number of overtime hours per month, although not as many as in earlier years.[72] Furthermore, NYPD supervisors earn overtime pay when their subordinate officers do.[73] This provides an incentive up and down the command structure to maximize opportunities for overtime and therefore to maximize arrests such as MPVs.[74]

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[66] *See, e.g.*, EDITH LINN, ARREST DECISIONS 125 (2009) ("Officers postpone arrest-making until the end of the tour, which maximizes overtime.").

[67] *See, e.g.*, Larry Ceona & Andy Geller, *Drug Cops Get More Overtime*, N.Y. POST (Jan. 7, 2008), http://www.nypost.com/p/news/regional/item_47zmaFKa2oJeIIO5MAE94J.

[68] LEVINE & SMALL, *supra* note 1, at 7.

[69] William K. Rashbaum, *Eyeing Crime Rate, Police to Work Overtime on Drug Arrests*, N.Y. TIMES (Jan. 21, 2000), http://www.nytimes.com/2000/01/21/nyregion/eyeing-crime-rate-police-to-work-overtime-on-drug-arrests.html.

[70] Geller & Fagan, *supra* note 23, at 595 n.2.

[71] William K. Rashbaum, *Kelly Plans to Cut Money for Overtime Police Patrols*, N.Y. TIMES (Jan. 10, 2002), http://www.nytimes.com/2002/01/10/nyregion/kelly-plans-to-cut-money-for-overtime-police-patrols.html.

[72] Johnson et al., *supra* note 23, at 70.

[73] LEVINE & SMALL, *supra* note 1, at 21 ("[S]upervisors also accumulate overtime pay when the officers working directly under them do.").

[74] *See id*.

II. HIGH STAKES CONSEQUENCES OF MARIJUANA ARRESTS

The stakes of the debate around the appropriateness of the NYPD's marijuana enforcement policies are high. The tens of thousands of New York City residents arrested for marijuana offenses each year often face serious, long-term consequences, including loss of employment, eviction, and deportation, as a result of their arrests. And for those improperly arrested for MPV offenses that might otherwise be chargeable only as violations, or not chargeable at all, the implications can be devastating.

These concerns motivated some members of the New York State legislature when they voted to pass the Marijuana Reform Act in 1977, decriminalizing possession of small amounts of marijuana.[75] Discussions then focused on issues still relevant to New York City marijuana arrest policies today. For example, New York State Senator Abe Bernstein explained his vote in support of the Marijuana Reform Act on the floor of the Senate: "It is inequitable, unfair and even catastrophic for a youngster or young adult, because of a small quantity of marijuana in his possession, to run the risk of being arrested and being convicted and having a criminal record remain with him for the rest of his life."[76] Senator Bernstein's words suggest that at least some in the legislature sought to divert arrestees with small amounts of marijuana away from the criminal justice system. However, current enforcement practices accomplish just the opposite: tens of thousands of individuals each year are shepherded through the arrest and arraignment process, leaving many with criminal records who might not otherwise have one.[77]

The most immediate and universal consequence of misdemeanor marijuana arrests is the experience of the arrest to arraignment process itself. This procedure, which exposes marijuana arrestees to up to twenty-four hours in custody, and

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[75] *Id.* at 59.

[76] *Id.* at 60 (quoting Richard J. Meislin, *Compromise Version of Marijuana Bill Approved in Albany; Governor Is Certain to Sign*, N.Y. TIMES, June 29, 1977, at A1).

[77] *See* LEVINE & SMALL, *supra* note 1, at 50–52.

sometimes longer,[78] often involves a full search or strip-search; photographing and fingerprinting; minimal access to toilets or hygiene facilities in dirty, crowded conditions; and overnight detention in the same cells as felony arrestees.[79] But the detrimental effects of the arrest experience go beyond its mere unpleasantness. Levine and Small argue that arrests for marijuana possession "provide young Black and Latino men[[80]] with a head start in becoming clients of the criminal justice system by acclimating them to the humiliation and degradation of jail."[81]

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[78] A 2006 study by the New York Civil Liberties Union found that thirty-six percent of arrestees over the study period in New York City were held longer than twenty-four hours before arraignment and a small number were held longer than thirty-six hours before arraignment. N.Y. CIVIL LIBERTIES UNION, JUSTICE DELAYED, JUSTICE DENIED 3, 6 (2006), *available at* http://www.nyclu.org/pdfs/cor_report_013106.pdf.

[79] K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 293–94 (2009).

[80] Much public attention on the NYPD's marijuana arrest policies has focused on the racial disparity in marijuana arrests. For example, under Mayor Bloomberg's administration, between 2002 and 2011, the New York State Division of Criminal Justice Services identified eighty-seven percent of arrestees under section 221.10 as Black or Latino and eleven percent as white. *Documenting 10 Years of Marijuana Possession Arrests Under Mayor Bloomberg*, MARIJUANA-ARRESTS.COM, http://marijuana-arrests.com/graph8.html (last visited Aug. 14, 2012). Yet recent national surveys have indicated higher rates of reported marijuana usage among whites than blacks or Hispanics. *See, e.g.*, *Quick Tables*, SUBSTANCE ABUSE & MENTAL HEALTH DATA ARCHIVE, http://www.icpsr.umich.edu/quicktables/quicksetoptions.do?reportKey=32722-0001_all%3A7 (select "Race and Ethnicity" from "Respondent Characteristics" drop-down menu; then click "Create the Table" button) (finding 45.9% of whites, 40.7% of blacks, and 30.6% of Hispanics have ever used marijuana). While the racial disparity in marijuana arrests is significant and should be subject to critical scrutiny, such analysis is not within the scope of this Note. For a deeper analysis of the role of race in New York City marijuana arrests, see Geller & Fagan, *supra* note 23, at 596; Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOL. & PUB. POL. 131 (2007).

[81] LEVINE & SMALL, *supra* note 1, at 51.

Arrestees also face negative consequences in the area of employment. For example, many arrestees lose their jobs for missing work as a result of the often-lengthy arraignment wait times or because their employers do not want to retain an employee associated with drug offenses.[82] In addition, a misdemeanor conviction can also automatically bar a defendant from access to employment in certain state-licensed professions, such as security guards. More informally, employers may discriminate against job applicants with an arrest record,[83] evidence of which may be accessible via commercial databases.[84] City agencies, such as the New York City Housing Authority (NYCHA), are also notified when an employee is arrested, putting those individuals' jobs in jeopardy.[85]

Arrests can also result in significant housing consequences. Under federal law, individuals in New York City arrested for marijuana possession and their families can be evicted from

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[82] Dwyer, *supra* note 12.

[83] *See* EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.002, ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 12 (2012), *available at* 2012 WL 1499883 (recognizing problem of employment discrimination against individuals with arrest records).

[84] *See* Howell, *supra* note 79, at 304–06. Some defendants may be eligible for certificates of relief from disabilities from New York State that can help to lift or mitigate some employment bars. *See* N.Y. CORRECT. LAW § 701 (McKinney 2003); *see also Summary of Collateral Consequences in Employment*, FOUR CS, http://blogs.law.columbia.edu/4cs/employment/summary/ (last updated Nov. 6, 2008) [hereinafter FOUR CS].

[85] *See* N.Y. COMP. CODES R. & REGS. tit. 9 § 6051.1(a)(5) (2012); MCGREGOR SMYTH, THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE 11 (2010), *available at* http://www.nlada.org/DMS/Documents/1100886992.2/Consequences%20of%20Criminal%20Proceedings_Oct04.pdf; Dwyer, *supra* note 12. In New York State, a misdemeanor conviction or guilty plea cannot be sealed and will remain public information indefinitely. FOUR CS, *supra* note 84. In contrast to a conviction or guilty plea for an MPV charge (section 221.10(1)), a conviction or guilty plea to unlawful possession of marijuana (section 221.05) is a violation and can be sealed after three years if the only substance involved is marijuana. N.Y. CRIM. PROC. LAW § 160.50(3)(k) (McKinney 2004).

NYCHA housing as a result of their arrests.[86] Significantly, eviction is not reserved for those convicted of an MPV offense; the law permits NYCHA to evict tenants based solely on a drug-related *arrest*.[87] An eviction for drug activity can result in a three-year ban on eligibility for federally assisted housing unless the person can demonstrate sufficient "rehabilitation,"[88] such as completion of a drug treatment program, to the housing agency. Arrestees who do not live in public housing may also face eviction as a result of a marijuana arrest.[89]

Misdemeanor marijuana convictions under section 221.10(1) can also result in dramatic immigration consequences. Under federal immigration laws passed in the mid-1990s, legal permanent residents who are convicted of two simple marijuana possession offenses are subject to deportation.[90] Furthermore, conviction of a marijuana offense can also be grounds for inadmissibility for noncitizens seeking lawful status in the United

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[86] Under federal law, "any drug-related criminal activity on or off [public housing premises] . . . by any member of [a] tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy." 42 U.S.C. § 1437d(*l*)(6) (2011); *see also* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002) (holding that, under federal law, local public housing authorities can "evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity").

[87] CORINNE CAREY, HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 1 (2004), *available at* http://www.hrw.org/sites/default/files/reports/usa1104.pdf.

[88] 42 U.S.C. § 13661(a).

[89] *See* Scott Duffield Levy, Note, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539 (discussing New York City drug-related evictions effected through the auspices of the Narcotics Eviction Program).

[90] 8 U.S.C. § 1227(a)(2)(B)(ii) (2011). Although the Supreme Court decided in 2010 that two minor drug offenses do not necessarily constitute an "aggravated felony" under the immigration law and cancellation of removal is not necessarily unavailable to a respondent convicted of such offenses, that respondent will still be subject to removal proceedings as a result of the conviction. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580 (2010).

States[91] and may subject those eligible for removal to mandatory detention pending deportation.[92]

An MPV arrest can also have destructive consequences for familial integrity. New York State child welfare law includes in its definition of "neglected" children a child whose parent "misus[es] a drug or drugs" or "repeatedly misuse[s] a drug or drugs."[93] In practice, New York City's Administration for Children's Services regularly removes children from parents arrested for marijuana possession.[94] The City brought hundreds of such cases against parents in recent years and defense lawyers report that more than ninety percent of neglect cases involving drugs include marijuana use.[95] Moreover, an individual need not be convicted of a marijuana offense to face neglect charges; an arrest or even suggestion to a child welfare worker about marijuana use suffices.[96]

Arrestees convicted of an MPV offense may also face the revocation of important privileges and benefits. For example, New York's Vehicle and Traffic law mandates a six-month suspension of a state driver's license when an individual is convicted of a misdemeanor marijuana offense.[97] Furthermore, under the federal Higher Education Act, students receiving federal grants, loans, or work-study aid are ineligible to continue receiving that assistance if convicted of any drug possession offense.[98]

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[91] 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[92] *Id.* § 1226(c).

[93] N.Y. SOC. SERV. LAW § 371(4-a)(i)(B) (McKinney 2010). If a parent is in a rehabilitation program, the law does not consider a child neglected unless there is evidence of a child's imminent physical, mental, or emotional impairment. *Id.*

[94] *See* Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), http://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html.

[95] *Id.*

[96] *Id.*

[97] N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 2011).

[98] 20 U.S.C. § 1091(r)(1) (2011). For a single offense, aid is suspended for one year; for a second offense, aid is suspended for two years; for a third offense, aid is suspended indefinitely. *Id.* Under the law, a student whose eligibility for federal aid has been suspended can regain the aid before the

The consequences of the tens of thousands of misdemeanor marijuana arrests each year[99] should not be underestimated. Although prosecutors offer most first-time misdemeanor MPV arrestees an adjournment in contemplation of dismissal ("ACD")[100] and New York State law provides for sealing the record of an ACD if the defendant does not offend for a period of up to a year,[101] an ACD can still result in grave ramifications, including some of the employment and child custody consequences discussed above.[102] As part of the ACD offer, prosecutors may also require that marijuana defendants complete a community service requirement or other sanctions that may result in an individual missing days at his or her place of employment.[103]

Even though an MPV offense is the lowest-level misdemeanor chargeable under New York State's marijuana laws, the consequences for MPV defendants upon conviction—or in some cases, even upon arrest—are profound. The ramifications of police misconduct in this context extend far beyond concerns over the integrity of the NYPD and the wisdom of broken windows policing; the harm to individual arrestees is tremendous.

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full suspension period if the student completes a drug rehabilitation program and passes two unannounced drug tests. *Id.* § 1091(r)(2). As most of the people arrested in New York City for marijuana offenses are males under age twenty-six from low-income neighborhoods, ineligibility for federal financial aid could place significant, if not insurmountable, barriers in the way of these men pursuing college-level education. LEVINE & SMALL, *supra* note 1, at 8.

[99] Newman, *supra* note 10.

[100] LEVINE & SMALL, *supra* note 1, at 35. An ACD allows a court, upon motion of the defendant prior to pleading guilty, to suspend the criminal action against the defendant for a period of time during which the court may set conditions for adjournment. If the defendant violates those conditions, the court may revoke the suspension and recommence the prosecution. If the defendant adheres to the conditions for the set period of time, the court dismisses the criminal action in furtherance of justice, and the records of the arrest and prosecution are sealed. *See* N.Y. CRIM. PROC. LAW § 170.56 (McKinney 2007).

[101] CRIM. PROC. § 170.56.

[102] Howell, *supra* note 79, at 304–06.

[103] *Id.* at 295 n.122.

III. ENTRAPMENT ANALYSIS

A. Emptying Pockets: How a Marijuana Possession Violation Turns Into a Misdemeanor Crime

Nearly all of the misdemeanor marijuana arrests in New York City take place under the MPV statute, yet, in reality, many of these arrests do not involve marijuana actually found in view of the public.[104] Levine and Small estimate that between two-thirds and three-quarters of MPV arrestees are not found smoking in public and do not possess marijuana in view of the public when they are arrested.[105] A 2012 study by The Bronx Defenders found a smaller percentage of improper MPV arrests than Levine and Small found; however, the study still reported that more than forty percent of all MPV arrests involve constitutional or evidentiary problems.[106] Media reports have also

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[104] LEVINE & SMALL, *supra* note 1, at 39.

[105] *Id*. Research on how people possess and consume marijuana indicates the unlikelihood of so many individuals possessing or smoking marijuana in public. According to one survey, following years of aggressive marijuana enforcement in the mid-1990s, most MPV arrestees knew the NYPD were targeting public consumption and virtually all marijuana users knew the NYPD were actively searching for and arresting people for misdemeanor marijuana offenses. Johnson et al., *supra* note 23, at 76. While other research does suggest that a sizeable portion of marijuana smokers admit to smoking in the presence of police, nearly two-thirds report avoiding smoking in the presence of police. Bruce D. Johnson et al., *Civic Norms and Etiquettes Regarding Marijuana Use in Public Settings in New York City*, 43 SUBSTANCE USE & MISUSE 895, 905 (2008). Because of the absence of nonanecdotal data on what proportion of MPV arrests came as a result of a stop-and-frisk or what proportion came from public smoking, there is no effective method of comparing public smoking habits with arrest data. However, the repeated testimony of criminal defense attorneys, defendants, police officers, and prosecutors should be sufficient to raise important doubts about the authenticity of the tens of thousands of MPV arrests each year.

[106] Press Release, The Bronx Defenders, The Bronx Defenders Marijuana Arrest Project Announces Preliminary Data Reflecting Ongoing and Systemic Constitutional and Evidentiary Problems in Marijuana Arrests by NYPD (Apr. 2, 2012) [hereinafter Bronx Defenders Press Release], *available at* http://www.bronxdefenders.org/press/bronx-defenders-marijuana-arrest-project-announces-preliminary-review-data-reflecting-ongoing- (finding in 212

revealed that many arrests under the MPV statute may not, in fact, be based on a police officer's observation of burning marijuana or marijuana in view of the public.[107]

Rather, anecdotal research suggests that at the time of arrest, "most people who did possess marijuana had it concealed, hidden in their clothing and belongings."[108] MPV defendants are typically young African-American or Latino men who are approached by a police officer on the street and searched[109] or who are prompted by a police officer to empty their pockets or bag."[110] Unfortunately, because so few misdemeanor marijuana arrests reach trial, there is no systemic record keeping of arrest facts beyond anecdotal evidence.[111]

In one publicly reported incident, a Latino man in Manhattan Criminal Court reported being pulled over in his vehicle by an unmarked police car.[112] The officer approached and told him, "'I saw you walking from that building, I know you bought weed, give me the weed. . . . Give me the weed now and I will give you a summons, or we can search your vehicle and take you

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of over 500 arrests studied, the police lacked legal cause for initial detention of the arrestee or police manufactured misdemeanor charges by causing marijuana to come into public view).

[107] *See* Chang, *supra* note 15 ("WNYC tracked down more than a dozen men arrested after a stop-and-frisk for allegedly displaying marijuana in public view. Each person said the marijuana was hidden—in a pocket, in a sock, a shoe, or in underwear.").

[108] LEVINE & SMALL, *supra* note 1, at 42.

[109] *See* Chang, *supra* note 15.

[110] *See* LEVINE & SMALL, *supra* note 1, at 38–44.

[111] *See infra* Part IV.A (discussing barriers to MPV defendants reaching trial). While the issue of improper marijuana arrests has become a mainstream media story, the details of arrests similar to the example of the Bronx man remain difficult to identify. Much of the reporting on New York City marijuana arrests featuring arrestees have tended to focus on the problem of police officers improperly searching individuals' pockets or bags. *See, e.g.*, Chang, *supra* note 15; Wendy Ruderman & Joseph Goldstein, *Lawsuit Accuses Police of Ignoring Directive on Marijuana Arrests*, NYTIMES.COM (June 22, 2012, 5:40 PM), http://cityroom.blogs.nytimes.com/2012/06/22/in-lawsuit-police-officers-are-accused-of-ignoring-directive-on-marijuana-arrests/.

[112] Jim Dwyer, *On Arrests, Demographics, and Marijuana*, N.Y. TIMES (Apr. 30, 2008), http://www.nytimes.com/2008/04/30/nyregion/30about.html.

in.'"[113] After taking out his marijuana and giving it to the officer, he was handcuffed and arrested for possession of marijuana "open to public view."[114] The man put it succinctly, "'I was duped.'"[115]

To get a better sense of the frequency of these arrests, public defender organizations have begun assessing circumstances surrounding their clients' arrests, with a particular focus on improper police tactics.[116] However, beyond the rare situations in which an arrestee shares his or her personal story with a researcher, arrestees have little incentive to publicize their arrests.[117] The lack of comprehensive data further compounds problems surrounding questionable MPV arrests.

B. Traditional Entrapment Law

The arrest of the man in the Bronx housing project raises a number of fairness concerns. But does it constitute entrapment in New York State? The facts of the Bronx defendant allow for an analysis of the applicability of New York State entrapment law to MPV arrests generally.

New York State's entrapment law reads:

> In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant . . . seeking to obtain evidence against him for purpose of criminal prosecution, and

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *See* Steven Banks, *Testimony [of] The Legal Aid Society in Support of Res. 986-A*, *in* N.Y.C. COUNCIL, HEARING TESTIMONY, Res. 986-2011, 2012 Leg., 2012 Sess., at 11–24 (June 12, 2012), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=1965274&GUID=C07ECCDD-03B9-45D6-92C2-DC2E26CE2842; Bronx Defenders Press Release, *supra* note 106.

[117] Publicity of a marijuana arrest, even without conviction, can have significant consequences for arrestees. For example, a marijuana arrest itself can be cause for New York City's Administration for Children's Services to make a finding of neglect and remove a child from a parent. *See* Secret, *supra* note 94.

> when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.[118]

The New York Court of Appeals has held that the defendant bears the "burden of establishing entrapment by a preponderance of the evidence."[119] The defendant must demonstrate that "(1) he was actively induced or encouraged to commit the offense by a public official; and (2) such inducement or encouragement created a 'substantial risk' that the offense would be committed by defendant who was not otherwise disposed to commit it."[120]

1. Inducement

Courts have not established a clear standard as to what conduct constitutes inducement.[121] Generally, entrapment defenses arise in the context of undercover or sting operations, so the facts of the Bronx arrest, which involved a uniformed officer, are not a traditional fit.[122] Although the details of the Bronx arrest provided here are admittedly limited, they are sufficient to reveal that the Bronx defendant did not appear to have any prior intention of removing the bag of marijuana from his person or bag until told to do so by the officers.[123]

In *People v. Brown*, the New York Court of Appeals laid out additional parameters for inducement, noting that "merely asking

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[118] N.Y. PENAL LAW § 40.05 (McKinney 2009).

[119] People v. Brown, 82 N.Y.2d 869, 871 (1993).

[120] *Id.*

[121] *See* Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53, 58 (1987) ("The principal problem in this area arises with defining what is sufficient government conduct to constitute inducement . . . .").

[122] Dru Stevenson, *Entrapment by Numbers*, 16 U. FLA. J.L. & PUB. POL'Y 1, 7 (2005) ("[Entrapment] is entirely a function of undercover operations.").

[123] *See* LEVINE & SMALL, *supra* note 1, at 40.

a defendant to commit a crime is not such inducement or encouragement as to constitute entrapment."[124] In *Brown*, an undercover agent posing as a prostitute on a street corner asked Brown whether he wanted oral sex for twenty-five dollars. Brown had pulled his car up to the officer and answered affirmatively when the officer asked him if he was looking for a date.[125] After Brown accepted the undercover officer's offer, the police arrested him for patronizing a prostitute.[126] The Court held that the officer's proposition to Brown was "insufficient to warrant an entrapment charge" because the officer was "merely asking [Brown] to commit a crime."[127]

While the undercover officer's conduct in *Brown* did not rise to the level of inducement necessary for an entrapment defense, the defendant in the Bronx hypothetical has a stronger case for arguing inducement. Here, the officer gave the defendant a *direct instruction* to reveal the marijuana,[128] which constitutes significantly greater pressure than *asking* an individual to do something. Furthermore, such an instruction did not merely "afford . . . an opportunity" for the Bronx man to remove the marijuana on his own volition; rather, the officer's command interrupted the man's otherwise ordinary course of conduct, creating more than a "substantial risk" the man would commit the crime. The police officer's instruction created a significant likelihood that the man would commit the crime unless he was willing to explicitly disobey police instructions. Absent additional evidence indicating the defendant planned to expose the marijuana of his own volition, the drugs would have remained concealed but for the officer's instruction.[129] A direct

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[124] *Brown*, 82 N.Y.2d at 872. Interestingly, NYPD Police Commissioner Ray Kelly's Operations Order No. 49 states, "[a] crime will not be charged to an individual who is *requested* or compelled to engage in the behavior that results in the public display of marihuana." 2011 KELLY MEMO, *supra* note 16 (emphasis added).

[125] *Brown*, 82 N.Y.2d at 871.

[126] *Id.*

[127] *Id.* at 872.

[128] LEVINE & SMALL, *supra* note 1, at 40 ("They told me to show them if I had anything illegal.").

[129] Anecdotally, a variant of the Bronx hypothetical exists in which

order from a uniformed police officer to a detained individual to take specific action is likely sufficient encouragement to meet the first prong of the entrapment burden.[130]

2. Predisposition

Once a defendant has established inducement by a preponderance of the evidence, the evidentiary burden shifts to the prosecution to rebut by proving beyond a reasonable doubt that the defendant was predisposed to commit the crime.[131] In *Sorrells v. United States*, the Supreme Court held that an individual is not predisposed to commit a crime when government officials "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."[132] The New York State Supreme Court, Appellate Division has indicated that predisposition "refers to the state of mind of a defendant before government officials make any suggestion that he should commit

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individuals stopped by police officers voluntarily hand over a small amount of marijuana they are carrying without being instructed or asked to do so by an officer hoping that cooperation will earn them some leniency. LEVINE & SMALL, *supra* note 1, at 94 n.79. In such a case, it is unlikely that, absent additional evidence, being stopped by a uniformed police officer without a direction to turn over contraband or to empty one's pockets is sufficient pressure to satisfy the inducement element of entrapment. *See* People v. Minckler, 695 N.Y.S.2d 843, 843 (App. Div. 1999) (quoting *Brown*, 82 N.Y.2d at 871) ("[M]erely afford[ing] defendant an opportunity to commit the offense . . . is [not]sufficient to warrant an entrapment charge.").

[130] *See Brown*, 82 N.Y.2d at 871; People v. Butts, 72 N.Y.2d 746, 750 (1988) ("When determining whether to give a charge on a claimed defense, the trial court must view the evidence in the light most favorable to the defendant.").

[131] People v. Chambers, 56 Misc. 2d 683, 686 (N.Y. Sup. Ct. 1968).

[132] Sorrells v. United States, 287 U.S. 435, 442 (1932). The drafters of New York's entrapment statute wrote the law to comport with the Supreme Court's entrapment formulation in *Sorrells*. William C. Donnino, *Entrapment Practice Commentary*, *in* MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK (2009) (quoting STAFF NOTES OF THE COMMISSION ON REVISION OF THE PENAL LAW, PROPOSED NEW YORK PENAL LAW, MCKINNEY'S SPECIAL PAMPHLET 321 (1964)).

a crime."[133] In addition to introducing details surrounding the circumstances of the arrest, the prosecution is entitled to introduce evidence of a defendant's criminal history to prove predisposition.[134]

While the criminal history of the Bronx defendant is unknown, past convictions are not dispositive in determining predisposition.[135] Absent additional compelling facts, presence in or near a Bronx public housing complex does not indicate a predisposition to possess or smoke marijuana in view of the public.[136] While the defendant did possess marijuana in violation of section 221.05, he did not exhibit behavior suggesting he intended to publicly display it.[137] There is no indication that the defendant was of a state of mind to commit the crime before the officer told him to show the officer if he had "anything illegal."[138] The evidence suggests the officer's direction itself created the defendant's *mens rea*[139] and encouraged him to bring the marijuana into public view.[140]

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[133] People v. Torres, 185 A.D.2d 257, 259 (N.Y. App. Div. 1992).

[134] People v. Calvano, 30 N.Y.2d 199, 204 (1972) ("[P]roof of the criminal disposition of a defendant claiming entrapment is relevant generally . . . ."); *Chambers*, 56 Misc. at 685 ("The subject of the defendants' past criminal record . . . is relevant on this point of predisposition.").

[135] *Calvano*, 30 N.Y.2d at 204 (summarizing Sherman v. United States, 356 U.S. 369, 375 (1958) ("[A] nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time [the government informant] approached him.")).

[136] Because there is no indication the man went to the housing project with the intent to publicly display his marijuana, a reasonable fact-finder could conclude that he had no predisposition to commit the MPV offense. *See* Pinter v. City of New York, 710 F. Supp. 2d 408, 435 (S.D.N.Y. 2010) ("[S]imilar to [the district attorney's] conclusion that [the defendant] likely did not go to [the video store] with the intent to solicit money for sex, a reasonable jury could conclude that [the defendant] had no predisposition to commit prostitution.").

[137] *See* LEVINE & SMALL, *supra* note 1, at 40.

[138] *Id.*

[139] *Mens rea* is the "state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . ." BLACK'S LAW DICTIONARY 455 (3d pocket ed. 1996).

[140] Psychological research has demonstrated that when someone wearing

C. Entrapment by Estoppel

Although the defendant in the Bronx arrest likely has a strong traditional entrapment law argument, alternatively, he may be able to avail himself of the entrapment by estoppel defense.[141]

Entrapment by estoppel is a defense distinct from traditional entrapment that focuses on a defendant's reasonable reliance on official representations in committing an offense.[142] In *United States v. George*, the Second Circuit held that the affirmative defense of entrapment by estoppel "bars conviction of a defendant whose commission of a crime results from government solicitation, so long as the defendant reasonably believes that government agents authorized him to commit the criminal act."[143] The Sixth Circuit has identified four elements in a successful entrapment by estoppel defense: "(1) a government

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what appears to be a police uniform instructs an individual to do something, the individual follows that instruction with a high rate of cooperation. Richard R. Johnson, *The Psychological Influence of the Police Uniform*, FBI L. ENFORCEMENT BULL., Mar. 2001, at 27, 28–29 (describing psychology experiment where researcher dressed in police uniform and ordered passers by to pick something up or give something to another person, resulting in high rate of cooperation from citizens in comparison to other types of uniforms).

[141] *See* 21 AM. JUR. 2D *Criminal Law* § 204 (2012).

[142] *Id.*

[143] United States v. George, 386 F.3d 383, 399 (2d Cir. 2004) (Sotomayor, J.) (quoting United States v. Abcasis, 45 F.3d 39, 42 (2d Cir. 1995)); *see also* United States v. Nichols, 21 F.3d 1016 (10th Cir. 1994); United States v. Weitzenhoff, 35 F.3d 1275, 1290 (9th Cir. 1993); United States v. Smith, 940 F.2d 710 (1st Cir. 1991). Without naming it so, the Supreme Court has recognized the defense of entrapment by estoppel in three prominent cases. United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 675 (1973) (finding that the district court erred in not allowing defendant to present evidence that it had been "affirmatively misled" into believing that its actions adhered to statutory law); Cox v. Louisiana, 379 U.S. 559, 571 (1965) (finding that protestors justifiably relied on assurances by police that they were not violating the law); Raley v. Ohio, 360 U.S. 423, 425–26 (1959) (finding unconstitutional "an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him").

must have announced that the charged criminal act was legal; (2) the defendant relied on the government announcement; (3) the defendant's reliance was reasonable; and (4) given the defendant's reliance, the prosecution would be unfair."[144]

Even in its most common application in the context of regulatory crimes like firearms licensing violations, the entrapment by estoppel defense is not frequently argued successfully.[145] However, the scenario created by MPV arrests like the Bronx hypothetical creates an opportunity for New York defense attorneys—and courts—to expand recognition of this defense.

In examining the elements, the first is arguably the most difficult in a successful entrapment by estoppel defense. According to the Bronx defendant, the police officer told him that if he showed what he had and it was not much, "there'd be no problem."[146] While the officer did not specifically tell the defendant that taking it out would be lawful, the officer did affirmatively tell him there would be "no problem," which a reasonable person could arguably interpret to mean there would be no problem in violation of the law.[147]

Second, the Bronx defendant's reaction to being placed in handcuffs following his display of marijuana—"I said 'Come on, I showed you everything I had,' but they just put cuffs on me"[148]—suggests that he relied on the officer's word that there would not be a problem and was surprised that he was arrested for following the officer's instructions.

Third, one's reliance on an officer's direct word that there will be no problem if marijuana is shown is reasonable.[149]

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[144] United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992).

[145] Stevenson, *supra* note 122, at 55–56.

[146] LEVINE & SMALL, *supra* note 1, at 40.

[147] *Id.*

[148] *Id.*

[149] *See* Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1491 (2007) ("Most people do not, in fact, feel free to walk away when a police officer has asked them a question or otherwise indicated a desire for their cooperation, whether those views are motivated by fear of the consequences, by simple good manners, or by an internal

Choosing not to follow the officer's instruction would have required the defendant to disobey a police direction, which is not reasonable to expect of the public.[150]

The fourth element addresses the fairness of prosecution given a defendant's reliance. The legislature's decision to separate MPV offenses from simple possession offenses indicates the intent to exclude simple possession offenses from the criminal offense category.[151] Accordingly, criminal prosecution of those defendants for activity that, absent police instructions, would fall squarely within the lower violation offense—section 221.05—is counterintuitive and offends basic notions of justice.[152]

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psychological compulsion to obey the direction of authority figures."). In the constitutional seizure context, courts have found police orders to remove one's hands from one's pockets, to exit a vehicle, or go to somewhere one does not otherwise intend to go, as seizures. *See id*. at 1493. While entrapment analysis is separate from a Fourth Amendment seizure analysis, courts' assessment of the reasonableness of following a police instruction in the seizure context is instructive. In the seizure context, a police request of an individual is not a seizure. *See id*. at 1494 n.13 (citing People v. Lawes, 790 N.Y.S.2d 481, 482 (App. Div. 2005) (finding plainclothes officers' request of defendant to accompany them to precinct for investigatory questioning was not a seizure)).

[150] *See* Raymond, *supra* note 149 at 1491.

[151] LEVINE & SMALL, *supra* note 1, at 60 (quoting Meislin, *supra* note 76).

[152] It is important to note that questions concerning whether evidence meets the evidentiary burdens for inducement and predisposition under traditional entrapment are traditionally questions for the jury. People v. Chambers, 56 Misc. 2d 683, 686 (N.Y. Sup. Ct. 1968). In addition, questions about whether official conduct amounted to entrapment by estoppel are also traditionally questions for the jury. *See* Mark S. Cohen, *Entrapment by Estoppel*, 31 COLO. LAW. 45, 48 (2002) ("Where a defendant alleges facts sufficient to make out a *prima facie* case for entrapment by estoppel, the majority of courts hold that the defendant is entitled to a jury trial."). However, New York State law mandates that trials for B misdemeanors in New York City criminal courts, which provide for a sentence of less than six months, such as those under section 221.10(1), take place before a single judge. N.Y. CRIM. PROC. LAW § 340.40(2) (McKinney 2005). The impact of New York's bench trial requirement for 221.10(1) offenses on traditional jury-based entrapment fact finding is beyond the scope of this Note but is an important area to be examined.

Although typically entrapment by estoppel cases involve challenges to unintentional official actions,[153] NYPD practices that have led to tens of thousands of MPV arrests each year indicate that the arrest strategy is deliberate.[154] Despite this, the entrapment by estoppel defense —while presently marginal at the state and federal levels[155]—is a close fit for improper MPV arrests.[156] When compliance with police instructions is the driving factor behind an individual's arrest, this goes to the core of what the entrapment defense is designed to protect against.[157]

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[153] Stevenson, *supra* note 122, at 55.

[154] Even following a directive from NYPD Police Commissioner Ray Kelly in September 2011 to officers to halt practices that direct individuals to remove marijuana from their person in order to bring the marijuana into view of the public, the practice persists. *See* Peltz, *supra* note 13 (stating officers are still conducting stop-and-frisks and making arrests after searching people's pockets or bags, or "inducing them to bring the pot into the open" though according to state law the drugs have to be in open view for an officer to make an arrest).

[155] *See* Stevenson, *supra* note 122, at 61–62 (suggesting a small number of such cases each year nationwide).

[156] Notwithstanding the obstacles to bringing challenges to MPV arrests to court, *see infra* Part IV, advancing entrapment by estoppel arguments in New York State in MPV cases when the opportunity presents itself would be an innovative tactic for defense lawyers seeking to set helpful precedent for future MPV cases.

[157] Another applicable entrapment theory may come from the sentencing entrapment defense. The Eighth Circuit has defined sentencing entrapment as when "a defendant although predisposed to commit a minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment." United States v. Stuart, 923 F.2d 607, 614 (8th Cir. 1991). Cases arguing sentencing entrapment have tended to involve the Federal Sentencing Guidelines and undercover agents' strategic efforts to secure more severe sentences under the guidelines. *See generally* Kristin Kerr O'Connor, Note, *Sentencing Entrapment and the Undue Influence Enhancement*, 86 N.Y.U. L. REV. 609 (2011) (discussing the debate over internet stings to catch sexual predators and efforts to induce sentence-enhancing behavior in potential defendants). As most MPV arrestees are violating the law by virtue of simple possession, *see* N.Y. PENAL LAW § 221.05 (McKinney 2008), NYPD officers' attempts to encourage individuals to bring the marijuana into public view could be a deliberate effort to cajole unknowing defendants into activity that meets the requirements for the arrestable B misdemeanor. Absent specific facts, there is a strong argument to be made for extending sentencing

IV. THE PHANTOM DEFENSE: ENTRAPMENT AS AN ILLUSION

While it appears that under New York State law NYPD officers may in fact be "entrapping" many MPV arrestees, the operational reality of the New York City criminal justice system undermines the availability of an entrapment defense in most MPV cases. Considering the hundreds of thousands of MPV arrests in New York City over the past decade,[158] one might expect the Court of Appeals to have ruled on the applicability of the entrapment defense in this context. However, because very few section 221.10(1) defendants ever reach trial, there are no such landmark New York State court decisions. The combination of procedural roadblocks associated with litigating a low-level misdemeanor charge, the pressure on defendants to plead, and the credibility challenges posed when defendants and police officers offer incompatible arrest accounts, may explain the absence of entrapment challenges to MPV arrest cases.

A. Mission Impossible: Obstacles to Having One's Day in Court

Observers of the New York City criminal court system report that very few misdemeanor cases ever make it to trial.[159] In 2000, there were 51,500 MPV arrests in New York City[160] and six reached trial (with three acquittals).[161] In 2011, at least twenty-one out of 49,800 arrests for section 221.10(1) reached trial (with

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entrapment law to the MPV context. The bulk of litigation on sentencing manipulation has taken place in the federal courts, and the Supreme Court has yet to address the issue. O'Connor, *supra*, at 622. Depending on how and when the Supreme Court rules on the issue, this may be an area for exploration in New York courts in the future.

[158] *Documenting New York City's Marijuana Arrest Crusade*, MARIJUANA-ARRESTS.COM, http://marijuana-arrests.com/nyc-pot-arrest-docs.html (last visited Sept. 23, 2012) (reporting over 400,000 misdemeanor marijuana arrests between 2002 and 2011).

[159] In 2003, the misdemeanor trial rate in New York City was less than one-third of one percent. Steven Zeidman, *Policing the Police: The Role of Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 321 n.35 (2005).

[160] LEVINE & SMALL, *supra* note 1, at 7.

[161] Howell, *supra* note 79, at 299 n.142.

nine acquittals).[162] An analysis of these figures raises the question: what prevents MPV defendants from having their day in court?

Explanations for why so few MPV or other misdemeanor arrests reach trial implicate many institutional components of the modern criminal justice system, including police officers, prosecutors, defense attorneys, judges, and existing New York State criminal procedure law. In practice, nearly all first-time MPV defendants accept a prosecutor's offer of an ACD.[163] Why might a defendant who believes he or she is not guilty agree to an ACD for an MPV arrest? To start, the structure of the New York's criminal justice system encourages such defendants to move through and out of the system with as little delay as possible.[164] Levine and Small describe the combination of "police searches, court procedures, plea deals, delay tactics, and strategic dismissals" as a "hermetically sealed system" that effectively denies such defendants their day in court.[165]

The misdemeanor arraignment process in New York City rarely allows for a hearing on the merits.[166] According to K. Babe Howell, a former New York City criminal defense attorney and a criminal justice legal scholar,[167] defense attorneys, overburdened by juggling hundreds of cases at a time,[168]

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[162] *See* E-mail from N.Y. State Div. of Criminal Justice Servs., *supra* note 10.

[163] LEVINE & SMALL, *supra* note 1, at 35.

[164] *See id.* at 35–36.

[165] *Id.*

[166] *See* Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1173 (2004) ("The transaction costs associated with reaching the merits of the case are so high compared to the marginal value of exercising one's rights, that it hardly ever makes sense to try a case in Manhattan Criminal Court.").

[167] *K. Babe Howell*, CUNY SCH. OF LAW, http://www.law.cuny.edu/faculty-staff/howell.html (last visited Sept. 23, 2012).

[168] *See* Howell, *supra* note 79, at 294. Under a state law passed in 2009 and new rule issued by New York's Chief Administrative Judge in 2010, public defenders' caseloads will be limited to 400 misdemeanors or 150 felonies beginning in 2014. Press Release, Legal Aid Society, The Legal Aid Society Receives Bi-Partisan Support at City Council Budget Hearing; Criminal Case Caps Announced by State Court Administrators (Mar. 11, 2010), *available at* http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/criminalcasecapsannouncedbystatecourtadministrators.aspx.

regularly meet clients in a holding pen and interview five to ten clients per hour. The attorneys "often spend[] no more than three minutes telling a defendant who is there on a first arrest that he or she will be out shortly, will have to stay out of trouble, and may have to do community service."[169] Howell argues that competent representation in light of the collateral consequences of noncriminal dispositions (such as an ACD) is not possible in so short a time period.[170] Presumably, most defense attorneys represent their clients to the best of their abilities. However, the pressure to expeditiously process minor arrestees has become routine and the adversarial model often morphs into one of administrative efficiency.[171]

Likewise, prosecutors often offer plea deals or alternative dispositions without knowledge of the facts, available evidence, or any mitigating circumstances of a case.[172] Prosecutors may also put pressure on defendants to take a plea bargain by holding out the prospect of immediate release in exchange for accepting a deal.[173] Like defense attorneys, prosecutors have few incentives to challenge a scheme in which they can process defendants through the system relatively cleanly and efficiently.[174]

Judges also bear much of the responsibility for the present state of misdemeanor adjudication.[175] Lower court judges have

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[169] Howell, *supra* note 79, at 294 n.118; *see also* NAT'L ASS'N OF CRIMINAL DEF. ATT'YS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 31 (2009), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (describing situation in many jurisdictions where defense attorneys "ha[ve] mere minutes to handle each case").

[170] Howell, *supra* note 79, at 295.

[171] Zeidman, *supra* note 159, at 338.

[172] Weinstein, *supra* note 166, at 1181.

[173] NAT'L ASS'N OF CRIMINAL DEF. ATT'YS, *supra* note 169, at 33.

[174] Weinstein, *supra* note 166, at 1181.

[175] *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2028 (1999) ("The judge bears the heavy responsibility for presiding over a fair proceeding, which includes not only what occurs at trial itself, but outcomes produced by the more common result of settlement." (citations omitted) (quoting Oko v. Rogers, 466 N.E.2d 661 (Ill. App. Ct. 1984)) (internal quotation marks omitted)).

presided over the mechanization of the misdemeanor processing system and have a responsibility to be the agents of change when justice is not being served in their courtrooms.[176] In some cases, judges simply accept the status quo of rushed defense counsel–client meetings and perfunctory prosecutors' plea offers.[177] In other cases, judges play a much more active role by effectively coercing defendants into pleading guilty, withdrawing plea offers if a defendant insists on a suppression hearing, or by issuing a harsher sentence if a defendant insists on trial and is convicted.[178] While judges are not immune to the bureaucratic incentives that lead prosecutors and defense attorneys to abandon a robust adversarial process, the role of judges as overseers of the justice system demands a greater resistance to the "plea bargain mill" system.[179]

Ultimately, the pressures on defendants of a criminal justice system that often emphasizes efficiency over justice and in some cases penalizes those who seek to exercise their rights[180] works to prevent many defendants accused of low-level misdemeanors, like MPV arrestees, from pursuing their day in court.

B. Not Even the Strong Survive: The Long and Winding Road to Trial

Even for those defendants who manage to withstand the significant pressure to accept a plea bargain after a day or night

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[176] *See* Zeidman, *supra* note 159, at 333 ("Judges should refrain from sacrificing the truth-seeking function of the hearing at the altar of judicial expediency and economy.").

[177] Howell, *supra* note 79, at 314.

[178] Zeidman, *supra* note 159, at 332; *see generally* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349 (2004) (detailing judges' roles in pressuring defendants to accept plea deals in jurisdictions across the United States, including New York).

[179] Zeidman, *supra* note 159, at 339.

[180] *See* NAT'L ASS'N OF CRIMINAL DEF. ATT'YS, *supra* note 169 at 33 (explaining that prosecutors offer defendants more favorable plea bargains at the first court appearance only if they plead guilty that day).

in jail, defending against the state's charges in court remains an elusive goal and may not be a worthwhile pursuit.[181]

Perhaps the most practical—and most onerous—obstacle to a hearing on the merits is the time commitment required of a defendant to contest the charge.[182] Typically, after arraignment, a defendant must return to court three to six times before any factual record is developed in the case.[183] Then, an additional two to six appearances may be required before actually reaching trial.[184] The reasons for each of these appearances are varied and can be the result of genuine process or scheduling challenges, unavailable witnesses, or unprepared prosecutors or defense attorneys.[185] Each appearance usually requires the defendant to be present in court for a few hours, if not a full day.[186] In practice, simply trying to defend oneself in court from a section 221.10(1) misdemeanor marijuana possession offense could cost a defendant between five and twelve days of missed work[187] over the course of a year or longer.[188] Even for a determined defendant assured of her innocence with the evidence to support her, the costs demanded of such a defendant to reach a trial may simply be too great.

Even for those MPV defendants who are determined to meet all of their required court appearances, with defense attorneys prepared to pursue an aggressive defense, the law may still prevent many defendants from reaching a hearing on the merits of their case. New York State's speedy trial law formally

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[181] Weinstein, *supra* note 166, at 1173.

[182] LEVINE & SMALL, *supra* note 1, at 35–36.

[183] Weinstein, *supra* note 166, at 1172. This record is usually created at a suppression hearing. *Id*.

[184] *Id*.

[185] Howell, *supra* note 79, at 298–299. For descriptions of this Sisyphean process, see *id.*; Weinstein, *supra* note 166, at 1172.

[186] Howell, *supra* note 79, at 298; *see also* Weinstein, *supra* note 166, at 1172.

[187] *See* Weinstein, *supra* note 166, at 1172.

[188] In 2010, the mean time between arraignment and a disposition at a bench trial was approximately 338 days. CRIMINAL COURT REPORT, *supra* note 11, at 53 ("Each court appearance requires a trip to the courthouse and between one and five hours waiting time in the courtroom.").

requires that charges against defendants accused of MPV offenses be dismissed upon motion from defense counsel if the prosecution is unprepared for trial within sixty days.[189] While there may be valid reasons or legitimate court congestion preventing trial from commencing within the statutorily required period,[190] it is not uncommon for misdemeanor arrestees who decide not to accept a plea bargain to see their cases dismissed for failing to meet the speedy trial requirement.[191] Though the speedy trial requirement ensures the efficient administration of justice, it can also disincentivize a defendant from arguing the merits of his or her defense at trial because filing a successful motion to dismiss based on a speedy trial violation terminates the defendant's interaction with the criminal justice system.[192] Because prosecutors may not have strong evidence in MPV arrests, particularly in cases involving questionable police conduct, the speedy trial requirement can work to filter out some *bad* arrests.[193] While the speedy trial requirement may be important for promoting efficiency—often to the benefit of all parties to a criminal matter—the ability of defendants to challenge improper policing tactics may suffer.

Furthermore, some MPV cases may not reach trial because prosecutors may dismiss MPV charges against defendants who

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[189] The sixty-day rule applies to misdemeanor offenses for which the potential sentence is not more than three months. N.Y. CRIM. PROC. LAW § 30.30(1)(c) (McKinney 2003). The maximum sentence for criminal possession of marijuana in the fifth degree (MPV) is ninety days. N.Y. PENAL LAW § 70.15(2) (McKinney 2009).

[190] *See* CRIM. PROC. §§ 30.30(3)(b), 30.30(4).

[191] *See* Howell, *supra* note 79, at 313 n.219; Weinstein, *supra* note 166, at 1169.

[192] *See* Howell, *supra* note 79, at 313 ("After multiple appearances, most defendants who initially wanted a trial will either accept a disposition or their cases will be dismissed based on speedy trial grounds . . . . As the system works now, the innocent do not have a chance to obtain public vindication . . . .").

[193] Weinstein, *supra* note 166, at 1169 ("In a minor case, a police officer who mishandled a street encounter may simply not cooperate with a junior Assistant District Attorney, knowing that the case will likely be pled out or be dismissed for [a speedy trial violation]. It is a common and unremarkable occurrence.").

have strong defenses or suppression arguments.[194] Defendants who insist on going to trial in spite of the practical hurdles to doing so may have stronger arguments on the merits than the typical case.[195] If a defendant has a strong case, prosecutors may be less likely to expend energy and resources on an MPV prosecution, and arresting police officers may be less likely to participate if a trial would raise questions as to the quality and integrity of the NYPD's marijuana arrest policy tactics.[196]

Ultimately both structural obstacles and the disincentives of all parties to an MPV prosecution to proceed to trial contribute to preventing many MPV arrestees from challenging their arrests in court.

C. Challenges to Proving Entrapment: Preponderance of the Evidence and Police 'Testilying'

Even if a defendant charged with an MPV misdemeanor manages to reach a trial—an exceedingly difficult thing to do—the obstacles to successfully arguing an entrapment defense remain great.

The burden of proving entrapment by a "preponderance of the evidence" falls on the defendant.[197] In most cases, such a burden is onerous to meet without sufficient witness testimony or material evidence to present.[198] This burden is particularly

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[194] *See,* e.g., LEVINE & SMALL, *supra* note 1, at 35–36 ("If the person continues to shows [sic] up and is always in court when his name is called, and especially if he has witnesses, eventually the prosecutor will probably drop the charges . . . . As one veteran attorney explained to us, 'nobody, not the DA's office, not the judges, and certainly not the police, wants to deal with a possible illegal search in a misdemeanor.'"); Howell, *supra* note 79, at 313 ("Defendants may . . . demand a trial and expect a dismissal if they can make multiple court appearances for months or years."); Weinstein, *supra* note 166, at 1168 ("The cases involving the clearest problems may end up being declined or dismissed.").

[195] LEVINE & SMALL, *supra* note 1, at 35–36.

[196] *See id.*

[197] N.Y. PENAL LAW § 25.00(2) (McKinney 2009).

[198] People v. Pilgrim, 545 N.Y.S.2d 794, 796 (App. Div. 1989) ("There must be more than 'some evidence' of inducement or encouragement and of overzealous or pressure methods by the police . . . .").

difficult in MPV arrest cases where there are generally not many witnesses to the stop or search and arrest besides the defendant and the officer.[199] Police officers will often write on their arrest reports and subsequently testify that the defendant revealed the marijuana unsolicited or dropped the marijuana onto the ground as the officer approached.[200] In some instances, police officers may deliberately conduct stop-and-frisks or searches without independent witnesses nearby to isolate themselves from evidence of potential wrongdoing.[201]

This phenomenon creates particular difficulty for an MPV defendant. Anecdotal reports suggest that in a credibility contest between an MPV defendant—an individual who may or may not have an existing criminal record—and a police officer, the officer is usually judged to be the more credible witness.[202] This stems from two inherent biases. First, legal scholars have demonstrated that race plays a significant role in fact-finders' credibility determinations.[203] As most MPV defendants are black or Latino,[204] a jury may be less likely to find their testimony credible, particularly when the juror is of a different race than the defendant.[205] This phenomenon is also found in the decisions made by trial judges.[206] Therefore, some fact-finders may

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[199] LEVINE & SMALL, *supra* note 1, at 31.

[200] *Id.* at 43–44. The phenomenon of "dropsy" arrests has been part of NYPD narcotics policing since the aggressive crack cocaine enforcement of the 1980s. *Id.*

[201] *Id.* at 31.

[202] *Id.* at 27.

[203] *See* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 312–317 (1996) (describing the psychology of how race and racism impacts credibility determinations). *See generally* Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1 (2000) (analyzing how race affects juries' abilities to perform cross-racial credibility determinations).

[204] *See Documenting 10 Years of Marijuana Possession Arrests Under Mayor Bloomberg*, *supra* note 80.

[205] *See generally* Rand, *supra* note 203.

[206] *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (concluding that judges carry implicit racial biases which can affect their judgment, but that judges can suppress their biases when aware of a need to do so).

prejudge an MPV defendant independent of the strength of his or her testimony. Second, there exists a perception among fact-finders that a testifying police officer "will testify with an official imprimatur of sorts, since he testifies subject to two oaths—the oath sworn as a witness to tell the whole truth, and the oath he takes as a police officer to serve, protect, and defend the public and the law."[207]

However, the presumption of credibility may not always be a sound one. Although not exclusive to the MPV arrest context, the problem of "testilying"—police officers fabricating testimony of the arrests they make to cover up misconduct—plagues the NYPD and police departments across the country.[208] In 1994, the Mollen Commission released its report on police corruption in New York City following a twenty-two-month investigation and found police corruption to be a "serious problem" in New York City.[209] In particular, it found police perjury and falsification to be "probably the most common form of corruption facing the criminal justice system, particularly in connection with arrests for narcotics and guns."[210] Despite nearly two decades' passage since the Mollen Commission issued its report, the NYPD continues to struggle with misconduct,[211] particularly in the context of arrest quotas[212] and narcotics arrests.[213]

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[207] David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 500 (1999).

[208] *See, e.g.*, I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 868 (2008) ("[B]lue lies have existed as long as there have been restraints on police activity."); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1331 (1994) (detailing the phenomenon of police perjury in the search and seizure context and advocating an interpretive theory of the Fourth Amendment to encourage judges to more rigorously evaluate police officers' testimony); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996) (describing the nature and causes of testilying and advancing various proposals to decrease it).

[209] COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF N.Y., COMMISSION REPORT 1 (1994) [hereinafter MOLLEN COMMISSION REPORT].

[210] *Id.* at 36. For a fuller discussion of "testilying" within the NYPD, see *id.* at 36–43.

[211] While by its nature "testilying" is difficult to detect on a mass scale,

The ability of courts to consider an individual's predisposition to commit a crime further exacerbates the issue of wrongful arrests. New York State's entrapment law follows the Supreme Court's subjective test established in *Sorrells v. United States*,[214] which allows the court to consider whether that particular defendant was "otherwise disposed to commit [the crime],"[215] and the defendant's criminal history.[216] Between 1996 and 2010, the NYPD made nearly 540,000 marijuana possession

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there are indications that it remains a not infrequent occurrence. *See, e.g.*, Press Release, N.Y. Cnty. Dist. Att'y's Office, District Attorney Vance Announces Guilty Verdict in Police Perjury Trial (Mar. 8, 2012), *available at* http://manhattanda.org/press-release/district-attorney-vance-announces-guilty-verdict-police-perjury-trial; Murray Weiss, *Dozens of NYPD Officers Investigated for Perjury*, DNAINFO.COM (last updated Aug. 17, 2011, 6:47 AM), http://www.dnainfo.com/new-york/20110817/manhattan/dozens-of-nypd-officers-investigated-for-perjury (reporting "at least three dozen cops" under investigation by NYPD Internal Affairs Bureau and district attorneys related to alleged perjury relating to circumstances of arrests and how evidence was seized in criminal cases including drug busts and a murder).

[212] Rayman, *NYPD Quotas*, *supra* note 58 ("Key testimony in the case came from Capt. Alex Perez, who told jurors that indeed arrest quotas were key in judging cops' productivity."); Rayman, *NYPD Tapes*, *supra* note 59 ("From the tapes, it's not hard to imagine an officer desperately driving to the precinct, looking for someone smoking pot on a stoop or double-parking to fill some gap in their productivity.").

[213] John Marzulli, *Bad Busts Cost City $1.2M in Settlements for NYPD's False Drug-Arrest Lawsuits*, N.Y. DAILY NEWS (Oct. 16, 2011), http://www.nydailynews.com/news/crime/bad-busts-cost-city-1-2m-settlements-nypd-false-drug-arrest-lawsuits-article-1.965581 ("Nearly 300 drug arrests had to be tossed in Brooklyn and Queens, most of them made by Brooklyn South narcs tainted by their false testimony and shredded credibility."); *Stephen Anderson Admits to Issuing Fake Drug Charges to Meet Quotas*, HUFFINGTON POST (Oct. 13, 2011, 12:44 PM), http://www.huffingtonpost.com/2011/10/13/stephen-anderson-admits-t_n_1008831.html ("[NYPD Officer] Stephen Anderson testified under a cooperation deal with prosecutors that it was common for officers to frame innocent people on drug busts, a practice known as 'flaking.'").

[214] Sorrells v. United States, 287 U.S. 435, 451–52 (1932).

[215] N.Y. CRIM. PROC. LAW § 40.05 (McKinney 2009).

[216] People v. Calvano, 30 N.Y.2d 199, 204 (1972) ("[P]roof of the criminal disposition of a defendant claiming entrapment is relevant generally . . . .").

arrests, some of which are likely to have been improper according to the evidence and analysis here. This leaves a long trail of wrongful MPV convictions on criminal records for those who did not receive an ACD or failed to complete the probationary period successfully.[217] Thus the hurdles compound onto themselves; NYPD marijuana enforcement practices themselves make it more difficult to make a successful entrapment argument for some MPV defendants.[218]

Acknowledging that many MPV arrests are conducted properly and stem from situations involving actual possession or smoking in view of the public,[219] many arrestees still face wrongful arrests with scant opportunity to demonstrate their innocence or to seek justice in court for police misconduct. This reality erodes the credibility of the criminal justice system, builds distrust between communities and police officers,[220] and ultimately upends the democratic promises of the judiciary.

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[217] *Levine Testimony*, *supra* note 42, at 33–34.

[218] One criminal defense attorney at a legal services organization in Brooklyn informally estimates that approximately two-thirds of MPV defendants represented by his office have faced arrest under section 221.10(1) in the past. E-mail from Josh Saunders, Trial Att'y, Brooklyn Defender Servs., to author (Dec. 1, 2011, 13:24 EST) (on file with author).

[219] Estimates vary as to how many MPV arrestees were actually possessing or smoking marijuana in view of the public. *See, e.g.*, Johnson et al., *supra* note 105, at 903 ("[N]early half [of those surveyed] reported smoking in public locations."); LEVINE & SMALL, *supra* note 1, at 39 ("Approximately two-thirds to three-quarters of those arrested for marijuana possession were not smoking and most were not displaying the marijuana."); Interview with Scott Levy, Attorney, Marijuana Arrest Project, The Bronx Defenders (Nov. 11, 2011) (on file with author) (reporting his estimate that approximately fifty percent of marijuana arrests are people actually smoking in public).

[220] Bill Perkins, *Political and Community Leaders Speak Out*, N.Y. CIVIL LIBERTIES UNION, http://www.nyclu.org/node/1738 (last visited Nov. 3, 2011) ("By funneling the NYPD's limited resources into those unfair and unwise tactics, serious crime in the city goes unchecked and residents become increasingly distrustful of those who have been sworn to protect them.").

V. POLICY ALTERNATIVES

As evidenced by the foregoing analysis, arrestees charged under section 221.10(1) face multiple challenges. Although many lack the predisposition for the MPV offense and would not have exposed marijuana but for the inducement of a police officer, they face daunting odds in reaching trial and making entrapment arguments in court. Altering the culture and processes of a criminal justice system with embedded roles for the police, courts, prosecutors, and defense attorneys is hardly a simple task, but policymakers and institutional players can look to alternatives to the current system to guard against improper arrests and convictions in MPV cases. There are a number of potential policy responses and strategies for reducing and defending against improper MPV arrests. While each has its merits, the most sustainable solution is a change in state marijuana law to eliminate the MPV offense entirely.

A. The Kelly Memorandum: Insufficiency of NYPD Policy Memoranda

On September 19, 2011, NYPD Commissioner Ray Kelly issued a memorandum to all NYPD commands providing the first acknowledgment by the NYPD that the Department's marijuana enforcement practices may have been improper for years.[221] Yet the evidence gathered thus far suggests that the Commissioner's order has not had a measurable effect on the number of improper marijuana arrests.[222]

While the binding language in the order specifically instructs officers that directing an individual to bring marijuana into public view does not create an MPV offense,[223] it does not appear to have translated into on-the-ground changes in enforcement practices.[224]

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[221] 2011 KELLY MEMO, *supra* note 16.

[222] *See, e.g.*, Brennan & Devereaux, *supra* note 20 ("[T]he number of those arrested increased after the order was made.").

[223] 2011 KELLY MEMO, *supra* note 16.

[224] *See* Peltz, *supra* note 13 (reporting higher annual low-level marijuana arrests in 2011 than in 2010). Estimates as to the number of MPV arrests that

Despite the hopeful tone of many advocates when Commissioner Kelly issued the order, there are two central reasons to be skeptical about the Kelly memorandum's capacity to effect a lasting policy shift. First, NYPD policy has not always historically been reflected in the day-to-day operations of the Department. One need not look much further than the Mollen Commission's description of the internal collapse of the NYPD's anti-corruption structures to see that there is little incentive to aggressively follow a policy to which strict adherence would reveal officers' wrongdoing or misconduct.[225] With criticism of the NYPD's self-policing mechanisms still prominent, it remains unclear what capacity or will exists within the Department to ensure that the Kelly memorandum is aggressively enforced.[226] Policing culture remains centered on productivity statistics, database-building, and, in many cases, securing overtime pay; thus, shifting officers away from tens of

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are not the result of actual public smoking or possession range from one-half to three-quarters. *See* Johnson et al., *supra* note 105, at 903; LEVINE & SMALL, *supra* note 1, at 39; Interview with Scott Levy, *supra* note 219.

[225] *See* MOLLEN COMMISSION REPORT, *supra* note 209, at 71 ("The reason for this collapse can be summarized in a few words: a deep-seated institutional reluctance to uncover serious corruption with no independent external pressure to counter it. . . . From the top brass down, there was a widespread belief that uncovering serious corruption would harm careers and the Department's reputation . . . . [A]voiding bad headlines, and tolerating corruption, became more important than eradicating it.").

[226] *See, e.g.*, Brennan & Devereaux, *supra* note 20 ("[Bronx Defenders attorney Scott Levy, after The Bronx Defenders released study showing improper arrests continued to be high following Commissioner Kelly's order:] 'This is clearly an illegal practice. And the fact that it hasn't stopped since Commissioner Kelly issued his memo, suggests there is a deep disconnect between what happens on the street and what the top brass in the NYPD are saying happens.'"); William K. Rashbaum et al., *Experts Say N.Y. Police Dept. Isn't Policing Itself*, N.Y. TIMES (Nov. 2, 2011), http://www.nytimes.
com/2011/11/03/nyregion/experts-say-ny-police-dept-isnt-policing-itself.html ("This spate of unrelated corruption prosecutions, and what some see as the Internal Affairs Bureau's spotty record uncovering major cases involving crooked officers, raise questions about the department's ability to police itself, said nearly a dozen current and former prosecutors who have handled corruption cases, as well as some current and former Internal Affairs supervisors and investigators.").

thousands of easy arrests each year may prove a difficult task for the NYPD.[227]

Second, continued enforcement of a commissioner's operations order is subject to the will of whomever the current commissioner is.[228] As mayoral administrations and NYPD leadership change, operations orders can change as well. Leaving marijuana arrest tactics to the discretion of future NYPD commissioners and mayors is an unstable solution, as future administrations may not adhere to Commissioner Kelly's operations order in the long term.

B. Damn the Torpedoes: Go For Entrapment

While defense attorneys are undeniably overburdened with cases and many lack the requisite resources to develop a sufficient evidentiary record to make a successful entrapment defense in a low-level misdemeanor case,[229] the criminal defense bar should encourage more attorneys to do so, even if on a limited or test-case basis. A defense attorney is ethically obligated to represent the interests of her client[230] and,

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[227] *See* Monique Marks, *Transforming Police Organizations from Within*, 40 BRIT. J. CRIMINOLOGY 557, 558 (2000) ("[T]ransforming police organizations has proven extremely difficult given their conservative nature and general resilience to change . . . .").

[228] N.Y.C. CHARTER & ADMIN. CODE ANN. ch. 18, § 434(a)–(b) (N.Y. Legal Publ'g Corp. 2001 & Supp. 2011).

[229] COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 17 (2006), *available at* http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefense Commission_report06.pdf ("Testimony at the Commission's hearings was replete with descriptions by defenders of their inability to provide effective representation due to a lack of resources. This lack of resources (a) results in excessive caseloads; (b) impedes the ability of many institutional providers to hire full-time defenders; (c) deprives defense providers of adequate access to investigators, social workers, interpreters and other support services; (d) is largely responsible for inadequate or non-existent training programs; and (e) contributes to defense providers having only minimal contact with clients and their families.").

[230] MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be

admittedly, for many clients this may mean a quick resolution. But among the tens of thousands of MPV arrestees each year, there are likely to be a number who would be interested in proving their innocence in court.[231] Even attempting to push a handful of such cases through the court system in each New York City borough could: (1) vindicate the rights of defendants; (2) educate prosecutors, judges, other defense attorneys, and the police about the legal and ethical murkiness surrounding MPV arrests; and (3) compel the justice system to function more fairly.[232]

Increased litigation would also draw media attention. Because there are so few reported entrapment cases in New York State each year,[233] with appropriate media outreach, even an unsuccessful entrapment argument might raise the profile of questionable police practices. Such media attention would, in turn, put pressure on the accountable political branches to reevaluate the wisdom and appropriateness of the NYPD's marijuana enforcement practices.[234]

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pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . . .").

[231] *See Cleary Gottlieb Partners with the Bronx Defenders on Stop and Frisk Project*, CLEARY GOTTLIEB STEEN & HAMILTON LLP (Feb. 1, 2012), http://www.cgsh.com/cleary_gottlieb_partners_with_the_bronx_defenders_on_stop_and_frisk_project/ (describing Cleary Gottlieb's partnership with The Bronx Defenders to "represent persons arrested for low-level marijuana possession in an effort to challenge the policing conduct that generates these needless, costly and often harmful contacts with the criminal justice system").

[232] *See* Michelle Alexander, Op-Ed., *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html (arguing that if a sufficient number of people charged with crimes suddenly exercised their constitutional rights, the "ensuing chaos would force mass incarceration to the top of the agenda for politicians and policymakers, leaving them only two viable options: sharply scale back the number of criminal cases filed (for drug possession, for example) or amend the Constitution").

[233] *See* Stevenson, *supra* note 122, at 24–25 (describing the number of entrapment cases in New York State each year as "paltry," with no more than a handful of reported cases in the early 2000s).

[234] Research has demonstrated that media attention and presentation of a social problem can compel government decision makers to change their minds

C. Change Within the Courts

As a general matter, all institutional participants in New York's criminal justice system must take proactive responsibility to protect the integrity of the courts. A number of commentators have suggested steps prosecutors, defense attorneys, and judges could take to make the adjudication of low-level misdemeanors like MPV more just.[235] For example, to deemphasize the primacy put on efficiency at the expense of justice, some have suggested the criminal courts expand their hours, including building in additional parts on nights and weekends, and increase calendar flexibility.[236] Others have recommended that judges require prosecutors to call arresting officers as witnesses in suppression hearings and reject more plea agreements that don't serve the ends of justice.[237] The apparent inability of MPV arrestees to

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about an "issue's importance, their belief that policy action was necessary, and their perception of the public's view of issue importance." Fay Lomax Cook et al., *Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policy Makers, and Policy*, 47 PUB. OPINION Q. 16, 28 (1983).

[235] *See, e.g.*, Howell, *supra* note 79, at 322–23 (arguing prosecutors should be educated about collateral consequences of misdemeanor convictions and exercise more discretion not to prosecute in appropriate cases, and defense attorneys should reject certain "standard offer[]" pleas that are not in the interest of their clients); Zeidman, *supra* note 159, at 332–38, 351 (arguing prosecutors should scrutinize police testimony and practices more closely). There do appear to be some signs of hope on the landscape. Some prosecutors have reported an increasing skepticism of MPV arrests. *See* Ari Paul, *Prosecutors Grapple with Marijuana Arrests*, GOTHAM GAZETTE (Mar. 2011), http://www.gothamgazette.com/article/health/20110329/9/3500 ("[Staten Island District Attorney Dan Donovan] said many people caught on misdemeanor drug offenses are brought in under questionable circumstances—like through a stop-and-frisk, which forces individuals to empty their pockets . . . . Donovan said that in those instances, prosecutors can move not to press the case. 'We've got real smart with that,' he said.").

[236] *See, e.g.*, Howell, *supra* note 79, at 323 (recommending the establishment of nights and weekend parts for working defendants); Martha Rayner, *Conference Report: New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1034–36 (2004) (making recommendations to increase efficiency of the Criminal Court, improve court facilities, increase information to defendants, and expand court hours and calendar flexibility, among other improvements).

[237] *See* Howell, *supra* note 79, at 323 (recommending that in rejecting

reach a hearing on the merits and argue entrapment in the face of significant police misconduct is not simply a crisis in the marijuana arrest context—the adjudication of misdemeanors as a whole in New York City is in crisis. Without any particularly effective, independent oversight of the NYPD,[238] much of the burden falls on the courts and its constituent participants to work to achieve justice for the thousands who move through the system each year. The causes are complex and there is plenty of blame to spread, but the courts do not shed their duty to ensure justice in the face of systemic collapse. Judges, prosecutors, and defense attorneys must work creatively and deliberately to take intermediate steps to retain the public's faith in the integrity of the courts.

D. The Decriminalization Approach: Eliminating the MPV Misdemeanor

Rather than attempt to alter the incentives of various players in the criminal justice system, a more sustainable approach would be to change state laws regulating marijuana. The bulk of New York State's marijuana laws have been intact since the decriminalization regime passed in 1977 established an independent section in the Penal Code for marijuana offenses.[239]

In response to the dramatic increase of arrests under section 221.10(1), Republican State Senator Mark Grisanti and Democratic State Assemblyman Hakeem Jeffries introduced legislation in 2011 to standardize the penalties for marijuana possession—effectively eliminating the "in view of the public" offense and making all marijuana possession below 25 grams,

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plea agreements judges broaden the scope of what does not serve justice to include collateral consequence calculations); Zeidman, *supra* note 159, at 334 (calling for judges to require prosecutors to call as witnesses officers most directly involved in an arrest).

[238] *See* ROBERT A. PERRY, N.Y. CIVIL LIBERTIES UNION, MISSION FAILURE: CIVILIAN REVIEW OF POLICING IN NEW YORK CITY 1994–2006, at 1–8 (2007), *available at* http://www.nyclu.org/files/publications/nyclu_pub_mission_failure.pdf (concluding that New York City's civilian review of policing is a failure).

[239] LEVINE & SMALL, *supra* note 1, at 38.

whether in public or in private, a violation.[240] The bill would extend the decriminalization approach of the 1977 statutory framework to possession or smoking in public by making such offenses violations rather than misdemeanors and therefore removing some of the incentives for police misconduct.[241] Furthermore, amending the marijuana statutory framework is more likely to ensure that changes in mayoral or police leadership will not result in a reversion to a high number of aggressive and improper MPV arrests.[242] New York City mayors do have considerable influence on the state legislative process but do not always succeed in passing their favored bills through the state legislature.[243] While such legislation would not prohibit officers from looking elsewhere in the penal code for ways to replace their lost MPV arrest numbers,[244] it would be effective in cutting down on the number of improper marijuana arrests each year.[245]

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[240] S. 5187, 2011 Leg., Reg. Sess. (N.Y. 2011), *available at* http://open.nysenate.gov/legislation/bill/S5187-2011.

[241] *Id.*

[242] N.Y. PENAL LAW § 221.10 (McKinney 2008). There have not been substantial changes to the marijuana laws in thirty-five years. According to Levine & Small, the structure of the original Marijuana Reform Act of 1977 was the same as the law is today: possession of up to twenty-five grams of marijuana is a violation under New York State law. LEVINE & SMALL, *supra* note 1, at 60.

[243] David King, *Rural Legislator, City Issue: How Upstaters Decide*, GOTHAM GAZETTE (Mar. 2, 2009 12:00 AM), http://www.gothamgazette.com/index.php/archives/148-rural-legislator-city-issue-how-upstaters-decide ("[Gene Russianoff of the Straphangers Campaign:] 'The Tom and Jerry relationship between the state legislature and the mayor dates back centuries. There has always been this tension. One level of government always has it in for another level.'").

[244] Steven Thrasher, *Harry Levine of Marijuana-Arrests.com: "We Are Always Encouraged When the Police Decide to Obey the Law,"* RUNNIN' SCARED (Sept. 26, 2011, 8:30 AM), http://blogs.villagevoice.com/runninscared/2011/09/harry_levine_nypd_marijuana.php ("The NYPD will likely try to make up the loss of these marijuana arrests by charging even more people with disorderly conduct, trespassing, resisting arrest and other crimes that do not require evidence.").

[245] Broader changes to state law could also go far in changing police behavior as it pertains to improper MPV arrests. These could include: (1)

In June 2012, the Grisanti-Jeffries legislation was superseded by New York Governor Andrew Cuomo's proposal to reduce the possession of twenty-five grams or less of marijuana in view of the public from a misdemeanor to a violation but to continue enforcement of public marijuana smoking as a misdemeanor.[246] The Governor's support for the legislation surprised advocates who had been pushing for such reforms,[247] and appeared destined for passage with the announced support of New York City Mayor Michael Bloomberg, New York City Police Commissioner Ray Kelly, and all five of the New York City district attorneys.[248] Ultimately, however, the proposal was sidelined when the Republican-controlled New York State Senate declined to bring it to a vote.[249]

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restrictions on stop-and-frisk procedures that would decrease the number of individuals searched and questioned by the NYPD for all offenses and (2) greater appropriations for the court system as a whole, and most particularly, indigent defense services, to reduce the assembly-line-like process for adjudicating misdemeanors and give defense attorneys an opportunity to more fully interview their clients, identify appropriate defenses, and develop evidentiary records to use at trial, among other procedural changes.

[246] Kaplan, *supra* note 45. Based on 2011 arrest data provided by the New York State Division of Criminal Justice Services ("DCJS") to the author, there is no way to definitively determine what effect the Governor's proposal to maintain a misdemeanor offense for public smoking would have on arrest numbers because such arrests are not identified in DCJS data. *See* E-mail from N.Y. State Div. of Criminal Justice Servs., *supra* note 10. However, see *supra* note 105 for further discussion on public marijuana smoking.

[247] Alisa Chang, *The Evolution of Cuomo's Push to Lower Pot Arrests* (WNYC radio broadcast June 5, 2012), *available at* http://www.wnyc.org/articles/wnyc-news/2012/jun/05/evolution-cuomos-push-lower-pot-arrests/.

[248] Alisa Chang, *Political Pressure Caused Cuomo's Pot Plan to Go Up in Smoke*, WNYC EMPIRE BLOG (June 19, 2012, 3:54 PM), http://www.wnyc.org/blogs/empire/2012/jun/19/cuomo-says-action-plan-cut-pot-arrests-highly-unlikely/.

[249] Thomas Kaplan & John Elgion, *Divide in Albany Kills Proposal on Marijuana*, N.Y. TIMES (June 20, 2012), http://www.nytimes.com/2012/06/20/nyregion/cuomo-bill-on-marijuana-doomed-by-republican-opposition.html. In his stated opposition to the proposal, New York State Senate majority leader Dean Skelos alluded to the image of someone walking around with "ten joints in each ear" facing only a violation. Thomas Kaplan, *G.O.P. Senators Oppose Cuomo's Marijuana Plan*, N.Y. TIMES (June 7, 2012),

Although the legislation did not pass the legislature in 2012, the non-traditional political support for the proposal from law enforcement entities such as the police commissioner and district attorneys is encouraging and indicates that the legislative change cannot be ruled out.[250] While it remains to be seen whether New York State's statute will change, such a development would make the most significant and sustainable impact on decreasing improper marijuana arrests in New York City.

CONCLUSION

While recent directives by NYPD leadership to avoid improper MPV arrests may prove fruitful, the unavailability of possibly meritorious entrapment defenses to thousands of defendants in New York City will remain an outstanding problem. The State Legislature can and should act to expand the decriminalization framework of the existing New York State marijuana laws and eliminate the incentives behind improper arrests. However, until policymakers and the gatekeepers of New York City's criminal justice system take responsibility for a broken system, defendants will be left with limited options to challenge illegitimate MPV arrests.

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http://www.nytimes.com/2012/06/07/nyregion/senate-republicans-oppose-marijuana-plan-by-cuomo.html.

[250] *See* Chang, *supra* note 21 (discussing support of Cuomo, Kelly, and New York County District Attorney Cyrus Vance).