THE Bronx Defenders

Redefining Public Defense

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Written Comments of The Bronx Defenders
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Committee on Public Safety
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Introduction

My name is Kate Rubin and I am the Director of Policy and Community Development at The Bronx Defenders. I also serve as a member of the Steering Committee of Communities United for Police Reform. I submit these comments on behalf of The Bronx Defenders, and thank the Public Safety Committee and the City Council for the opportunity to testify.

The Bronx Defenders is a holistic public defender that provides criminal defense, family defense, civil legal services, and social services to indigent people in the Bronx. We serve over 28,000 Bronx residents each year, all of whom are poor and nearly all of whom are Black and Latino. The Bronx Defenders views our clients not as "cases," but as whole people: caring parents, hard workers, recent immigrants, native New Yorkers, and students with hope for the future. Whether defending a client's liberty; connecting a young man to mental health services; preventing an elderly woman's eviction; working to keep a family together; or preparing a neighborhood teenager to join the next generation of leaders, The Bronx Defenders ultimately strives to improve the lives and futures of all Bronx residents.

The Need for Meaningful Reform

Every week, we meet hundreds of clients in criminal court arraignments, family court intake, and community intake in our office. Day in and day out, these clients relate to us their experiences of police misconduct: unlawful stops, non-consensual searches, and false arrests. And far too often, use of force. We joined the Steering Committee of Communities United for Police Reform and have

made advocating for the Community Safety Act a priority because this issue rises to the top of the list of concerns for many of our thousands of clients, their families, and the broader community that we serve.

The vast majority of stop and frisk encounters—88% in 2011—are of people who are completely innocent of any crime.[1] But from our position at The Bronx Defenders, we see a picture of the 12% for whom the stop doesn't end on the street. In every arraignment shift, we meet people who were arrested for extremely low-level offenses as a result of unlawful stops and searches. The sheer volume of misdemeanor arrests made each year in New York City is documented by the by the Office of Court Administration's Annual Report on the Criminal Court of the City of New York:

- In 2011, 289,816 misdemeanor cases were arraigned in the City's criminal courts, compared to 50,548 felonies.[2]
- Of the top ten arraignment charges in 2011, the top eight were misdemeanors and the ninth was a violation—consumption of alcohol in a public place.[3]
- The most common arraignment charge by far was possession of less than 25 grams of marijuana either "burning" or "open to public view."[4]

What the Annual Report of the Criminal Court doesn't document, but the stop-and-frisk numbers do, is the extreme disproportionality in enforcement of these misdemeanors and violations. Profiling based on race, age, gender, sexual orientation, disability, housing status, and immigration means that these targeted groups are not only stopped more frequently, they more frequently receive

[1] New York Civil Liberties Union Stop and Frisk Briefing 2011, p. 17, *available at* http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf (last accessed October 8, 2012).
[2] Criminal Court of the City of New York, Annual Report 2011, p. 26, *available at* http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2011.pdf (last accessed October 7, 2012).
[3] *Ibid.*, p. 30.
[4] *Ibid.*, p. 30.

summonses for minor offenses and are more frequently falsely arrested on misdemeanor charges like marijuana possession and trespassing.[5]

While the charges that stem from unlawful arrests are nearly always minor, the consequences are not. As the Council is well aware, now that Secure Communities has been activated in New York, some of our non-citizen clients have already been flagged by Immigration and Customs Enforcement (ICE) for detention and deportation before we meet them in arraignments. Many clients are suspended from work as soon as they disclose their arrest to employers. They remain suspended without pay while their cases are pending, which can mean months or even more than a year. We represent parents in Family Court whose children were removed by the Administration for Children's Services and placed in foster care on the basis of a single arrest for misdemeanor-level marijuana possession.

And these are just the consequences triggered by arrest; the consequences of guilty pleas are often even more certain and severe. A plea to disorderly conduct, defined by New York law as a non-criminal offense, makes a person presumptively ineligible for New York City public housing for three years.[6] Simple possession of a marijuana cigarette cuts off federal student loans for a year for a student who is receiving them.[7] Every single guilty plea to a violation carries a mandatory surcharge of $120 and every misdemeanor plea carries a surcharge of $200. These fees are leveled against people who are already struggling economically—young people, homeless people, and people who

[5] See generally, New York Civil Liberties Union Stop and Frisk Briefing 2011, *available at* http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf (last accessed October 8, 2012); *Marijuana Arrests in NYC: Fiscally Irresponsible, Racially Biased and Unconstitutional*, *available at* http://www.drugpolicy.org/sites/default/files/NYC_MJ_fact_sheet_GENERAL_2012.pdf (last accessed October 9, 2012); Amended complaint in *Davis v. City of New York*, May 27, 2011, *available at* *http://www.naacpldf.org/files/case_issue/Davis%20Amended%20Complaint.pdf* (last accessed October 9, 2012).

[6] The period of ineligibility runs two years from the expiration of any sentence; the standard sentence for a Disorderly Conduct plea is a one-year conditional discharge. *See:* N.Y. Penal Law § 240.20 (defining disorderly conduct); N.Y. Penal Law § 10.00(6) (defining crime as misdemeanor or felony); N.Y. Crim. Proc. Law § 1.20(39) (defining petty offense as violation); New York City Housing Authority Applications Manual, "Standards for Admission: Conviction Factors and End of Ineligibility Periods—Public Housing Program" Ex. F.

[7] NY PL § 221.05; 20 U.S.C. § 1091(r)(1). On February 8, 2006, this provision was amended to bar student loan eligibility only when the drug conviction occurred during receipt of student loans.

lost their jobs or can't find work because of their criminal justice involvement. And while most violation convictions will seal automatically, misdemeanor convictions remain on our clients' criminal records permanently; New York State currently has no general provision for sealing or expunging misdemeanors, even decades after the convictions.

The Community Safety Act

The four bills that comprise the Community Safety Act have the potential to radically alter street encounters between the NYPD and New Yorkers—encounters that have come to be accepted despite the fact that they are disrespectful, unlawful, and have driven an enormous wedge between the NYPD and communities it is supposed to serve and protect. If enacted, the Community Safety Act could also fundamentally change the current reality of an overloaded court system that can afford only a tiny fraction of people who encounter it a real "day in court".

Our testimony focuses on Intros 799, 800, and 801, because our expertise is on street encounters that lead to arrest and the consequences of those encounters on individuals, families, and communities. But passing one or any combination of the bills will not suffice; the bills function together to create a system of transparency and accountability for the New York City Police Department that every city should strive for.

Intro 800

All over the Bronx, every single day, people are stopped because they are young and black or Latino. Because they appear to be homeless. Because they appear to be drug-users. Because they appear to be sex-workers. Because they have a psychiatric disability. Because they are transgender. Most of these stops don't lead to arrest, but some of them do. We meet people in arraignments every week charged with trespass when they were visiting a friend, charged with prostitution because of

their gender appearance or how they dress, and falsely charged with possessing marijuana "open to public view".

Far too frequently, our clients plead guilty to these charges when they are not guilty of any crime, and they do so despite the fact that the consequences can be severe. They take pleas at arraignments because they can't afford a few hundred dollars bail and also can't afford to stay in jail for weeks or months to fight their cases. They take pleas because after months of returning to, missing days of work and school, having to find childcare or drag their children along with them, they decide that the consequences of having an open case are worse than the consequences of a guilty plea. At the bottom line, they take pleas because the court system is so overloaded with cases, largely because of the over-policing of quality-of-life offenses, that it simply cannot afford to offer a fair trial to more than a tiny fraction of people arrested each year. At The Bronx Defenders, we represent clients charged with marijuana possession who have been waiting for more than year to take their cases to trial, and who cannot get a trial date no matter how many times they return to court. One client returned to court 11 times over nearly 18 months before his case was finally dismissed this past August.

If enacted, Intro 800 would help to reduce unlawful arrests and the backlog of people in the city's court system. But in order to be effective, Intro 800 must be enforceable. The need for enforcement by private right of action is illustrated by a class action lawsuit that we settled in February of this year on behalf of 20,000 New Yorkers who were charged under three unconstitutional "loitering" statutes between 1983 and 2012. The New York City Police Department and the City of New York continued to charge these void statutes for decades after New York State and Federal courts had struck down the laws in the 1980s and 1990s, on First Amendment and other constitutional grounds. In April of 2010, a Federal court judge found the NYPD in contempt of court

for *continuing* to enforce void statutes, decades after the statutes were struck down and years after litigation was filed against them to stop the practice.[8] Only after the City was held in contempt and threatened with progressively increasing sanctions did the NYPD institute an effective program to cease the enforcement of unconstitutional laws.

Intro 800 won't solve all of the problems with the court system, but together with Intro 799—and with proper enforcement mechanisms in place—it will reduce the number of people who are put through the system unnecessarily for unlawful stops and searches that begin with profiling.

Intro 799

Between May and October of 2011, The Bronx Defenders Marijuana Arrest Project interviewed over 500 clients arrested for low-level marijuana possession from every precinct and command in the Bronx. While a full report is forthcoming, our initial analysis suggested that more than 40% of cases reviewed presented clear problems stemming primarily from unconstitutional searches and seizures and improper charging of clients by the NYPD. Our interviews document how NYPD officers manufacture thousands of misdemeanor arrests by charging people with possessing marijuana "open to public view", despite the fact that it came into public view only as a result of a police request or, more frequently, an unlawful search. If these numbers reflect NYPD practices across the city, more than 20,000 arrests could be called into question for 2011 alone.

The Marijuana Arrest Project interviewed and reviewed the cases of 518 clients charged with misdemeanor-level marijuana possession, Penal Law 221.10.

[8] *Casale v. Kelly*, 710 F. Supp. 2d 347 (S.D.N.Y. 2010).

- In 34% of cases reviewed, the NYPD lacked legal basis to justify the initial detention of our client. In other words, the stop itself was unconstitutional and, in nearly every case, the result of profiling.
- In 36% of cases, police officers manufactured the misdemeanor charges by making a misdemeanor arrest after a small amount of marijuana came into view *only* as a result of police action.
    - In the majority of these cases—79%—the marijuana was brought into public view as the result of an intrusive physical search by the police officer rather than voluntarily by the client.
- Taken together, cases in which the police had no legal cause for the detention and/or manufactured misdemeanor charges account for 41% of all of the cases evaluated by MAP (212 of 518).

The Council has already passed Resolution 986-A, calling for an end to racially biased, costly, and unlawful marijuana arrests. This year, the New York State legislature tried and failed to take action to address the problem. We don't know what will happen in Albany in the 2013 session, but we don't need to wait to find out. The City Council can significantly reduce the number of marijuana and other arrests that stem from unlawful stops and unconstitutional searches by passing the Community Safety Act now.

Moreover, this legislation is needed even if the legislature does act to fix the marijuana possession law. Marijuana arrests are the most common, but they are far from the only arrests that stem from unconstitutional stops and searches. Women are arrested for prostitution after police officers reach into their purses and find condoms; people in harm-reduction programs are arrested for carrying clean syringes as directed under the Public Health Law; and grocery-store workers are

arrested for criminal possession of a weapon when illegal searches turn up box-cutters and small pocketknives that they use on the job.

The fourth amendment contemplates a narrow exception to the probable cause requirement, where police officers may conduct searches with consent. Implicit in this exception is the assumption that individuals know that they have the right to refuse consent, because freedom from unreasonable search and seizure is one of the most important founding principles of our legal system. Yet many of our clients—like many New Yorkers in general—are not aware that they have a right to refuse to consent to searches. Even when they are aware, they do not feel empowered to exercise that right when an armed police officer commands them to empty their pockets or open up their bag. And in too many cases, our clients who attempt to exercise their rights are ignored or even retaliated against by NYPD officers.

Intro 799 would clarify the procedure for consent searches by requiring that police officers notify the subject of a stop of the right to refuse a search, and by ensuring that consent is properly obtained. By doing this, it would also make prosecutions more efficient by cutting down on hearings and litigation over the question of voluntariness of consent.

To be clear, Intro 799 would not change the underlying Constitutional standard for a search. If passed, police officers would still be able to search people with probable cause, or with full consent. An officer who observes a gun being shoved into a backpack will have probable cause to search that backpack, with or without consent. An officer who receives a tip saying that a person fitting a specific description is carrying a gun will have probable cause to search that person unburdened by a consent requirement. In the narrow band of cases where law enforcement has founded suspicion to question a person but lacks probable cause for a search, federal law already requires the officer to obtain voluntary consent before searching. Intro 799, if enacted, would simply

require that they also obtain proof of that consent. The proposed protection is similar to the *Miranda* warning and informed waiver that many people sign before making voluntary statements to the police. This waiver has not stopped the NYPD from obtaining statements and introducing them in countless criminal proceedings.

Likewise, Intro 799 would not interfere with an officer's ability, in the course of a lawful stop, to frisk a person for his or her own safety. Intro 799 would *only* apply to a search, not to a pat down where an officer has reasonable suspicious that the subject of a stop is armed and dangerous. Rather than putting officers in danger, Intro 799 would make officers and civilians safer by establishing the best practice for consensual searches that could serve as a model for cities around the country.

Intro 801

At the most fundamental level, New Yorkers want to be treated with respect by the NYPD. We hear this every day from our clients, their families, and Bronx residents of every age, race, and occupation. By passing Intro 801, the Council can take an important step towards ensuring that all police interactions are defined by fairness and respect.

Under Intro 801, NYPD officers would have to provide their name and rank to the subjects of law enforcement activity. When making stops, officers would have to provide the specific reason for the stop, and give the person being stopped information about how to file a complaint.

The proposal is simple, but the impact would be dramatic. Intro 801 would change the very nature of routine stops, which are often defined for the subjects of those stops by the utter powerlessness that they feel. Simply requiring officers to identify themselves would add an automatic layer of accountability to every police interaction.

And should an officer abuse his or her power during a stop, the subject of that stop would have all the information necessary to file a complaint. Currently, even when people want to file complaints they are frequently not able to because they have no way of identifying the officers who were involved. All too often, a request for an officer's name or badge number is perceived as disrespectful, and results in escalation of a police encounter and even retaliation.

Increasing accountability for individual officers is not only good for our clients and the public; it is also good for the NYPD. It would allow the Department to monitor and track the "bad apples"—the officers who abuse their power and give the Department a bad name. It is in the interest of every city agency—just as it is in the interest of every private business—to monitor its workforce for unlawful, inappropriate, and counter-productive behavior. Intro 801 would create a mechanism to do that.

Conclusion

The foundation of genuine public safety is trust between police and the communities they serve. If enacted, the Community Safety Act has the potential to repair some of the trust that has eroded between police and communities of color over the past decade. None of the bills, separately or together, attempt to tell the NYPD how to police the city. Instead, they create bottom-line standards of transparency and accountability. These are standards that every city agency should be held to, but none more so than the NYPD, which is tasked with the crucial job of keeping New Yorkers safe, and vested with significant powers to use in doing so. The Community Safety Act would improve the experiences of tens of thousands of New Yorkers—particularly the most vulnerable New Yorkers—in daily interactions with the police. We urge the Council to take action and pass this legislation immediately.