

The Bronx Defenders
Fundamental Fairness Project
December 9, 2013
Policy Brief

THE CONTINUING PROBLEM OF MANUFACTURED MARIJUANA MISDEMEANOR CHARGES

This summer, The Bronx Defenders Fundamental Fairness Project (“FFP”), with pro bono assistance from some of the city’s most prestigious law firms, systematically interviewed over 200 clients arrested for low-level marijuana possession in the Bronx from late-March through late-May 2013.¹ The interviews paint a clear, if disturbing, picture: even as marijuana arrests decrease citywide, the NYPD’s practice of manufacturing misdemeanors in marijuana cases persists. The data drawn from the 229 cases—coming from every NYPD precinct and command in the Bronx—suggest that at least 30% of marijuana arrests present clear constitutional and evidentiary problems stemming primarily from unlawful searches and seizures and fabricated criminal charges by the NYPD.

FFP’s findings are particularly disquieting in light of the flood of marijuana arrests that has consumed the NYPD in recent years, topping out at almost 40,000 in 2012. The NYPD’s marijuana arrest practices reveal a policing strategy that overwhelmingly and disproportionately targets young people of color and relies on rampant disregard for civil rights.² The New York State legislature decriminalized carrying concealed small amounts of marijuana more than 30 years ago, making it a non-criminal violation, not a crime. NYPD officers, however, manufacture thousands of misdemeanor arrests every year by charging clients—overwhelmingly young men of color—with possessing marijuana that is “open to public view,” even when it only comes into public view as a result of a police request or unlawful search.

¹ Pro bono assistance in conducting the interviews was provided by interns from New York Lawyers for the Public Interest supported by Cleary Gottlieb Steen & Hamilton LLP, Davis Polk & Wardwell LLP, Kasowitz Benson Torres & Friedman LLP, Latham & Watkins LLP, Sullivan & Cromwell LLP, and Weil Gotshal & Manges LLP.

² See *Floyd v. City of New York*, --- F. Supp. 2d ----, 2013 WL 4042609, at *33 (S.D.N.Y. Aug. 12, 2013) (“officers are routinely subjected to significant pressure to increase their stop numbers, without corresponding pressure to ensure that stops are constitutionally justified”).

In September 2011, the NYPD Commissioner Kelly issued a department-wide directive addressing the issue of mischarged marijuana cases—Operations Order #49—acknowledging that “[q]uestions have been raised about the processing of certain marihuana arrests.”³ The Order had little effect at the time. A report put out by The Bronx Defenders’ in March 2012 shows that the percentage of illegal detentions and manufactured misdemeanors actually *increased* in the month immediately following the issuance of the Commissioner’s Order.

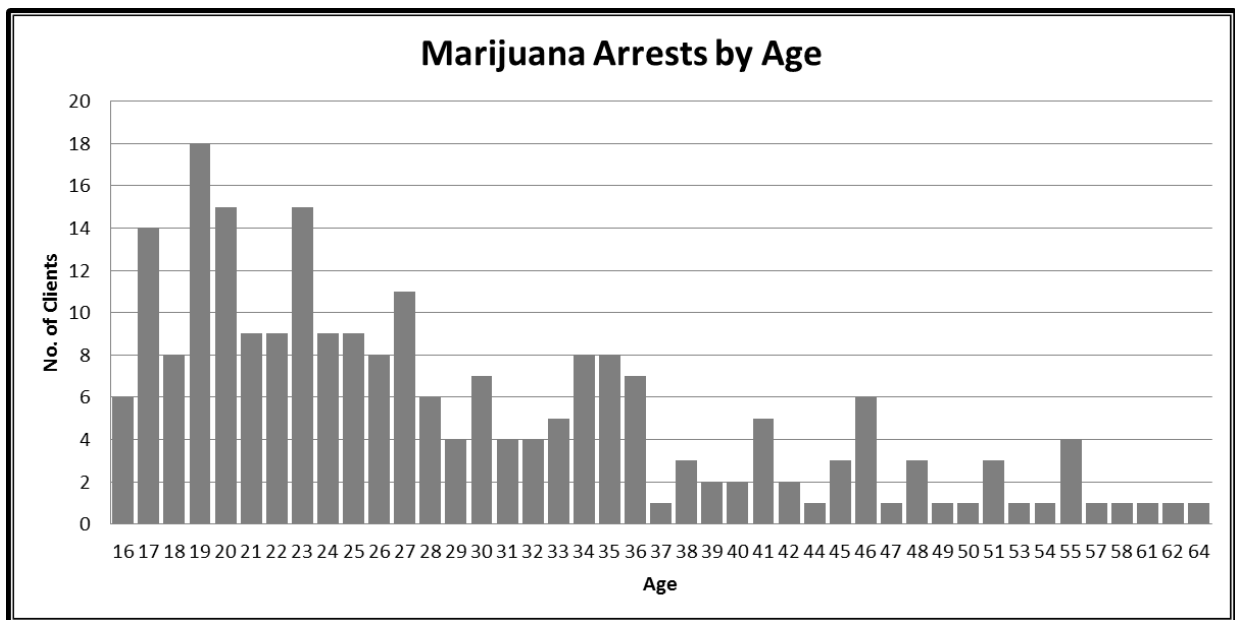
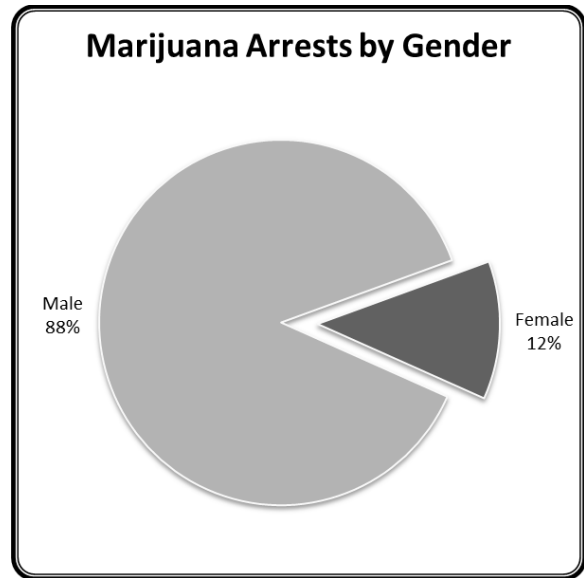
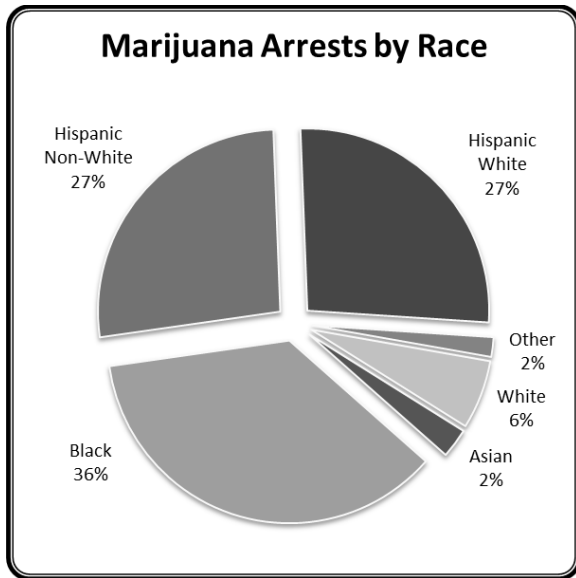
Marijuana Arrests by the Numbers

Little has changed in the intervening two years. As FFP’s analysis shows, Commissioner Kelly’s September 2011 Order has yet to make a significant difference in the way the NYPD conducts marijuana arrests. The data suggest that the NYPD continues to illegally arrest and charge thousands of people for misdemeanor marijuana possession citywide. Specifically, FFP found that

- The **police lacked sufficient legal basis** to justify the initial detention of the client in **28%** of all the cases reviewed;
- In **29%** of the cases, police officers **manufactured misdemeanor charges** by arresting clients for misdemeanors despite the fact that the marijuana only came into public view as a result of police action. In **81%** of these cases, the marijuana was brought into public view after an **intrusive physical search by the police** rather than by the client; and
- Taken together, cases in which the **police had no legal cause for the detention and/or manufactured misdemeanor charges** account for **30%** of all the cases evaluated by FFP.

³ NYPD Operations Order # 49, September 19, 2011.

Young men of color make up a hugely disproportionate number of those targeted by the NYPD's marijuana arrest policies. Indeed, 90% of the clients interviewed by FFP were either black or Latino; 88% were male; and 49% of clients in the sample were 25 years old or younger at the time of their arrests (many were only 16 or 17 years old).



This demographic skew is even more troubling in light of FFP's core findings, namely that marijuana arrests in the Bronx are plagued by rampant illegal searches and seizures and fabricated criminal charges.

Collateral Damage

The consequences of being unconstitutionally arrested and charged with a marijuana misdemeanor are potentially devastating. People falsely accused of “public view” marijuana possession are illegally fingerprinted and entered into statewide criminal record databases,⁴ threatened with increased fines and potential jail sentences,⁵ required to return to court for months on end,⁶ and often forced to spend a night in police custody following their arrests.⁷ Marijuana arrests can also lead to a cascade of negative collateral consequences: the possibility of a criminal record, eviction, deportation, loss of parental rights, denial of financial aid, absences from school, and lost employment. The disastrous and often unexpected consequences of these arrests are powerfully captured in *A Marijuana Arrest*, a new short film produced by Julie Dressner and Jesse Hicks, which tells the story of Alberto Willmore, a New York City school teacher falsely arrested for marijuana possession.

The negative consequences of these manufactured arrests are compounded by a fundamental failure of the city’s criminal courts. As The Bronx Defenders found in its report *No Day in Court*, the courts provide little or no recourse for people unconstitutionally arrested and charged with marijuana possession. Those clients wishing to fight the charges against them and challenge the constitutionality of the underlying police conduct are required to return to court time after time, only to be told that their cases are not ready. Rather than endure the continued disruption to their lives, many clients simply (and understandably) lose their resolve after two or three seemingly futile court appearances and opt to accept a plea bargain. Indeed, of the 54 “fighters” followed in *No Day in Court*, not a single one ever received a full hearing on the constitutionality of his arrest, despite having returned to court an average of five times over eight months. Due process gives way to empty promises; process becomes the punishment.

⁴ NYPD officers are prohibited from fingerprinting arrestees charged with non-criminal violations unless they are unable to ascertain the arrestee’s identity. See N.Y. Crim. Proc. Law § 160.10.

⁵ Whereas first-time offenders convicted of the non-criminal violation of Unlawful Possession of Marijuana (N.Y. Penal Law § 221.05) may not be sentenced to any term of jail, but merely face a fine of up to \$100, those convicted of Criminal Possession of Marijuana (N.Y. Penal Law § 221.10) risk a potential jail sentence of up to three months and a criminal record.

⁶ The statutory speedy trial time for a non-criminal violation is thirty days, while the statutory speedy trial time for a B misdemeanor is sixty days. Compare N.Y. Crim. Proc. Law § 30.30(d) (violations), with N.Y. Crim. Proc. Law § 30.30(c) (B misdemeanors).

⁷ Pursuant to N.Y. Criminal Procedure Law § 150.75, where an arrestee is charged with violating § 221.05, and no other offense is alleged, the arrestee must “promptly” be issued a desk appearance ticket and released from custody.

Conclusion

During his final State of the City address in February, Mayor Bloomberg announced that people arrested for low-level misdemeanor marijuana possession would no longer be formally booked and held overnight before seeing a judge, but would, instead, be issued desk appearance tickets and required to return to court at a later date.⁸ The policy went into effect in late March 2013.⁹ The clients interviewed for this study represent the first wave of people diverted out of the standard booking process under the policy.

While the Mayor's policy change is a step in the right direction, much work remains to be done. As FFP's findings make clear, the change in NYPD procedure did little to correct the deeply ingrained disregard for basic civil rights in marijuana arrests. Moreover, even though clients were spared spending a night in Central Booking, they nonetheless spent an average of 3.5 hours in police custody before being released with a desk appearance ticket. Almost 25% of clients were held for 5 hours or more. Clients also waited an average of 73 days for their first appearance before a judge. These delays are especially damaging for clients who work for the government or whose employment depends on licensing through a state agency, and for whom a mere misdemeanor marijuana *arrest* can mean immediate suspension or even termination, as it did for Alberto Willmore. For these clients, the delay between arrest and arraignment can be devastating, and more so when the underlying charges are completely baseless. Many clients lose their jobs before even seeing a judge, only to have the charges dismissed. The diversion of marijuana cases to the desk appearance part did nothing to alleviate these harms.

The Bronx Defenders Fundamental Fairness Project was created in September 2012 to address the ways in which the process has become the punishment for many people caught in the web of the criminal justice system in the Bronx. The Bronx Defenders has consistently taken a leading role in challenging police practices through litigation and policy reform, with a particular focus on "stop and frisk" and "quality of life" policing.

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⁸ Edith Honan, "In Last State of the City, Bloomberg Says No to Marijuana Jailings," Reuters, Feb. 14, 2013, *available at* <http://www.reuters.com/article/2013/02/14/usa-newyork-bloomberg-idUSL1N0BECHK20130214>.

⁹ NYPD Operations Order # 13, Mar. 26, 2013.