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Enforcement and Enmeshed Consequences: The Limitations of Conventional Criminal Justice Reform

Shannon A. Cumberbatch*

INTRODUCTION

Criminal justice reform efforts have brought a critical lens to unjust policies and procedures that result in racially biased policing, excessive force, wrongful convictions, and unduly punitive sentencing, among other issues. Such efforts have prompted a reevaluation of substantive laws that have contributed to mass-incarceration,[1] as well as the racial and socioeconomic disparities in prison populations.[2] Some of the changes borne of these movements

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* Shannon Cumberbatch is a criminal defense attorney at The Bronx Defenders. Special thanks to Adam Shoop and Jessica Rofe for their substantive contributions to the content of this essay. Additional thanks to the many advocates who practice, and clients who inspire, a holistic approach to criminal defense and justice reform.

1. An estimated 700,992 arrests were made for marijuana offenses in 2014. *Crime in the U.S. 2014*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST. (Sept. 2015), https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014. Nationwide, Black people are 3.73 times more likely than White people to be arrested for marijuana possession, despite reporting use of marijuana at nearly equal rates. *The War on Marijuana in Black and White*, AM. C.L. UNION, 66–67 (June 2013), https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf. In New York City, between January and March of 2015, Black and Hispanic people accounted for over 88% of the City's 2,690 marijuana possession arrests.

2. According to a March 2016 report by the Prison Policy Initiative, there are over 2.3 million people being held in American federal and state prisons, local jails, juvenile detention centers, and other correctional facilities. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PUB. POL'Y INITIATIVE (Mar. 14, 2016), http://www.prisonpolicy.org/reports/pie2016.html. One in five persons incarcerated in prisons are serving sentences for drug convictions, including approximately 50% of all federal prisoners. *Id. See also* E. Ann Carson, *Prisoners in 2014*, U.S. DEP'T OF JUST. (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf. Based on an analysis of the 2010 Census, approximately 40% of the United States the incarcerated population is Black despite being only 13% of the population, 19% Hispanic despite being only 16% of the population, and 39% White despite being 64% of the population, 1% Native American despite being 0.09% of the population, and, overall, 91% are male. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PUB. POL'Y INITIATIVE (May 28, 2014). In December 2014, persons serving prison sentences for drug offenses were approximately 39% Black; 29%

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have been integral in lessening the loss of liberty and supporting the reentry of those charged with non-violent offenses.[3] However, reform strategies are most frequently focused on what happens in the process of stop and arrest, or post-conviction, and are often limited to injustices that occur within the confines of the criminal context.[4] Despite the noteworthy strides of reformist efforts in criminal justice,

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White; 25% Hispanic; 7% Native American, Asian, Pacific Islander, or persons of two or more races. E. Ann Carson, Ph.D., *Prisoners in 2014*, BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST. (Sept. 17, 2015). One in five persons incarcerated in prisons are serving sentences for drug convictions, including approximately 50% of all federal prisoners. *See id. Mass Incarceration: The Whole Pie 2016*; *see also* Ryan King, Bryce Peterson, Brian Elderbroom & Samuel A. Taxy, *How to Reduce the Federal Prison Population*, URBAN INST. (Oct. 2015), http://webapp.urban.org/reducing-federal-mass-incarceration/. Late twentieth century policies that created or contributed to mass incarceration have come under fire in recent years, as former President Bill Clinton says of the Violent Crime Control and Law Enforcement Act of 1994, which he signed into law: "We have too many people in prison. And we wound up spending—putting so many people in prison that there wasn't enough money left to educate them, train them for new jobs and increase the chances when they came out that they could live productive lives." David McCabe, *Bill Clinton Renounces His 1994 Crime Bill*, HILL (May 6, 2015, 4:16 PM), http://thehill.com/blogs/blog-briefing-room/news/241247-bill-clinton-renounces-his-1994-crime-bill.

3. For example, President Barack Obama had commuted the sentences of 348 people as of June 2016, the vast majority of whom were convicted of non-violent drug offenses. Neil Eggleston, *President Obama Has Now Commuted the Sentences of 348 Individuals*, THE WHITE HOUSE (June 3, 2016, 3:30 PM), https://www.whitehouse.gov/blog/2016/03/30/president-obama-has-now-commuted-sentences-348-individuals. *See also Commutations Granted by President Barack Obama (2009–2016)*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/pardon/obama-commutations (last updated June 8, 2016).

4. For instance, Class Action law suit *Floyd v. City of New York*, successfully challenged New York Police Department's racially discriminatory, unconstitutional practices of Stop and Frisk, resulting remedial policies and efforts to increase accountability. *Floyd et al. v. City of New York et al.*, CTR. FOR CONSTITUTIONAL RTS. (Aug. 9, 2016), https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al. This litigation did not result in the end of stop and frisk nor discriminatory policing, however, the mandates demanding greater accountability will hopefully trigger strides in the right direction, however slow and incremental. See also the Conviction Review Unit created by late District Attorney Ken Thompson, lauded as one of the largest and most comprehensive programs in the nation, resulting in over twenty-one exonerations in Brooklyn alone. *Conviction Review Unit*, BROOKLYN DISTRICT ATTY'S OFF. (2016), http://www.brooklynda.org/conviction-review-unit/. See also the national "Ban the Box" campaign, a reentry movement to end employment and housing discrimination against those with criminal records. *Ban the Box Campaign*, ALL OF US OR NONE, http://bantheboxcampaign.org/?p=20#.WAOvN-UrIY0. One legislative success of such movements is The Fair Chance Act, which makes it illegal for employers in New York City to inquire about criminal records before making a job offer. *Fair Chance Act*, NYC HUM. RTS. (2016), http://www1.nyc.gov/site/cchr/media/fair-chance-act-campaign.page. These efforts, though laudable, address issues at the entrance and exit of criminal proceedings, while there are fewer such movements to address the injustice in between.

there is still an entire, often overlooked universe of injustice that lies in limbo between the beginning and the end of a criminal case, and often unfolds in venues untouched by the reach of conventional criminal justice reform.

If the goals of systemic reform include promoting fairness, decreasing punitive effects, and allowing one to establish or maintain stability during and after a case, we must, when constructing the reformed law (1) anticipate how engrained police practices might undermine its successful execution and endeavor to mitigate that effect and (2) peer through a more holistic lens to factor all consequences arising out of a criminal arrest, even in non-criminal contexts. We must understand how the criminal system intersects with other areas of law to produce even more severe consequences than a criminal disposition, and allow this reality to inform our strategies for reform. Even in circumstances where reform efforts have lessened the harm in the criminal context, there are a multitude of serious repercussions one suffers in other venues shortly after arrest, and oftentimes before their case is substantively heard in court. To maximize the impact of meaningful reform, we must look at the web of systems in which people are ensnared after a single arrest and address the enmeshed consequences that can ensue from a seemingly minor offense.

To illustrate the limitations of conventional reform efforts, I will begin by discussing the evolution and enforcement of marijuana laws in New York City. While discussing enforcement, I will highlight the role of officer discretion in foiling reform goals and ensuring that certain races and classes of people are disproportionately disadvantaged under what were intended to be more just and less punitive policies. Ultimately, through real life scenarios, I will demonstrate how people arrested under reformed criminal laws continue to suffer the extreme punishment and marginalization the reform measures were designed to avoid.

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I. THE EVOLUTION OF MARIJUANA REFORM IN NEW YORK AND THE ISSUE OF ENFORCEMENT

Marijuana drug laws are a prime example of criminal justice reform efforts that have gained national momentum, but often fall short of the intended purpose in practice.[5] It has become popular conception that marijuana is among the more innocuous controlled substances that should not carry harsh penalties, if any at all. Marijuana charges and the sentences they carry have been under reconstruction for quite some time in several states; some states have even completely decriminalized small amounts of the substance.[6] Despite such progress, a mere arrest for marijuana, let alone a conviction, still presents among the heaviest cocktail of consequences outside of criminal proceedings.

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5. For example, in 2010, President Barack Obama signed the Fair Sentencing Act of 2010 into law, reducing the disparity in mandatory minimum sentencing between powder and crack cocaine, which disproportionately impacted African Americans. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. However, it was not until fall of 2015, the United States Sentencing Commission updated sentencing guidelines, which may shrink the sentences of up to forty-six thousand people serving sentences for drug offenses. U.S. SENTENCING GUIDELINES MANUAL, § 3E1.1 (Nov. 2015); *see also What You Need to Know About the New Federal Prisoner Release*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2015/10/06/what-you-need-to-know-about-the-new-federal-prisoner-release#.uYA3ZIXA3 (last updated Oct 29, 2015, 9:30 PM).

6.

> Twenty-one states and the District of Columbia have decriminalized small amounts of marijuana. This generally means certain small, personal-consumption amounts are a civil or local infraction, not a state crime (or are a lowest misdemeanor with no possibility of jail time). Decriminalization states are Alaska (also now with legal provisions), California, Colorado (also now with legal provisions), Connecticut, Delaware (enacted in 2015), Illinois (enacted in 2016), Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon (also now with legal provisions), Rhode Island, Vermont and Washington (also now with legal provisions), and the District of Columbia (also now with legal provisions).
>
> Of those, six—Minnesota, Missouri, Nevada, North Carolina, Ohio (and Oregon before legalization)—have it as a low-level misdemeanor, with no possibility of jail for qualifying offenses. The other states with decriminalization policy have specified small amounts of marijuana as a civil infraction, or the like.

Marijuana Overview, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 10, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/ marijuana-overview.aspx.

A. Marijuana Reform: The Push to "Decriminalize" Minor Marijuana Possession in New York

Almost forty years ago, the New York Legislature acknowledged that "arrests, criminal prosecutions and criminal penalties are inappropriate for people who possess small quantities of marijuana for personal use. Every year, this process needlessly scars thousands of lives and wastes millions of dollars in law enforcement resources, while detracting from the prosecution of serious crime."[7] This is the language of The Marijuana Reform Act of 1977. This Act added a new, "non-criminal" charge to Article 221.00 to cover possession of small amounts of marijuana. New York Penal Law (N.Y.P.L.) § 221.05, Unlawful Possession of Marijuana, states that if a person merely possesses less than twenty-five grams of marijuana—not burning or in public view—they are to be charged with a violation, not a crime,[8] and are to be sentenced only to a fine of no more than one hundred dollars.[9] In other words, if the police find less than

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7. The Marijuana Reform Act of 1977. 1977 N.Y. Laws 1, ch. 330.

8. Under New York law, a "crime" is a misdemeanor or felony. N.Y. PEN. LAW § 10.00 (McKinney 2016). A misdemeanor is an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment of up to one year may be imposed. *Id.* A felony is an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. *Id.* A "violation" is an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment for up to fifteen days may be imposed. *Id. See also* N.Y. PEN. LAW § 70.15 (McKinney 2016). Since violations are not crimes, they technically do not add to a person's criminal record. While New York does not afford the option of expungement, most violations appear temporarily on one's record, then automatically seal after one to three years, depending on the offense. N.Y. CRIM. PROC. LAW § 160.55 (McKinney's 2016). It is worth noting that while a violation for Disorderly Conduct under P.L. § 240.20 or non-domestic violence related Harassment under P.L. § 240.26 seals at the conclusion of a Conditional Discharge, usually the length of one year, a violation for Unlawful Possession of Marijuana under P.L. § 221.05 seals after three years. N.Y. CRIM. PROC. LAW § 160.50(2)(k) (McKinney 2016).

9. The law provides that:

> Unlawful possession of marijuana is a violation punishable only by a fine of not more than one hundred dollars. However, where the defendant has previously been convicted of an offense defined in this article or article 220 of this chapter, committed within the three years immediately preceding such violation, it shall be punishable (a) only by a fine of not more than two hundred dollars, if the defendant was previously convicted of one such offense committed during such period, and (b) by a fine of not more than two hundred fifty dollars or a term of imprisonment not in excess of fifteen days or both, if the defendant was previously convicted of two such offenses committed during such period.

N.Y. PEN. LAW § 221.05 (McKinney's 2016).

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twenty-five grams of marijuana in one's pockets while they are on the street or in their home, they should be charged with a violation, not a crime. However, if someone has a lit marijuana cigarette burning, or in public view, the act falls under N.Y.P.L. § 221.10, Criminal Possession of Marijuana, which at minimum, is a Class B misdemeanor, punishable for up to 90 days jail and/or a fine of up to $250.[10] The vision when enacting this change was that people charged with unlawful possession for small amounts of marijuana would not suffer the same penalties and have to navigate the system like those charged with the misdemeanor offense of Criminal Possession of Marijuana.[11] However, this reform measure fell short of its ultimate goal of lessening the punishment and marginalization of those found in possession of small amounts of marijuana. Despite creating an entirely separate clause and category to distinguish small amounts of marijuana possession from criminal drug charges, officers enforcing the law and jurists in city, state and federal civil proceedings continue to treat these people as criminals.

B. Manufacturing Misdemeanors: How Officers Re-Criminalized Minor Marijuana Possession

In practice, The New York City Police Department (NYPD) has been able to circumvent the Marijuana Reform Act of 1977 by abusing stop and frisk tactics and manufacturing misdemeanors.[12]

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10. N.Y. PEN. LAW § 221.10 (McKinney 2016). *See also* N.Y. PEN. LAW § 70.15(1) (McKinney 2016).

11. "The Legislature's intent in its passage of the Act was to 'reduce the penalties for possession and sale of marihuana and in particular to decriminalize' the possession of a small amount of marijuana for personal use[.]'" People v. Allen, 92 N.Y.2d 378, 384, 681 N.Y.S.2d 216, 220, 703 N.E.2d 1229, 1233 (1998) (quoting Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law art 221, at 84).

12. *See* Anita Abedian, *If Marijuana is Decriminalized in NYC, Then Why are Possession Arrests on the Rise*, VILLAGE VOICE (June 1, 2016, 5:15 PM), http://www.villagevoice.com/news/if-marijuana-is-decriminalized-in-nyc-then-why-are-possession-arrests-on-the-rise-8683515. The article reports that "Edwin Raymond, an eight-year-veteran of the NYPD involved in a class-action lawsuit against the department for quota-based policing, says the problem is that cops are being used to 'generate revenue'" Raymond continues noting that "'Marijuana becomes the easiest arrest because everybody smokes weed—across ethnicities and racial lines. It's a minor infraction, it's the low-hanging fruit.'" *Id. See* Press Release, Drug Policy Alliance, New Data Released: NYPD Made More Marijuana Possession Arrests in 2011 than in 2010; *Illegal Searches and Manufactured Misdemeanors Continue Despite Order by Commissioner*

Essentially, officers would routinely stop people without the basic level of reasonable suspicion, demand that they empty their pockets (or do it for them), force marijuana from their pockets into public view, and convert what would have been a violation into a misdemeanor offense.[13] Another tactic that is employed less, but far too frequently, is when an officer finds what they claim is a piece of a marijuana cigarette on the ground, accuses a person of smoking it, and arrests them for the misdemeanor of N.Y.P.L. § 221.10, Criminal Possession of Marijuana.[14] I have witnessed circumstances where clients have been exonerated after the marijuana cigarette that the officer testified to seeing in our client's mouth was DNA tested and did not show a single trace of our client's DNA. However, this type of vindication is extremely uncommon, as it only presents itself if the case reaches hearing and trial posture, which is extremely rare and is often up to three years following the date of arrest in the unlikely event it does occur.[15] Furthermore, such extensive investigation can

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Kelly to Halt Unlawful Arrests (Feb. 1, 2012), http://www.drugpolicy.org/news/2012/02/new-data-released-nypd-made-more-marijuana-possession-arrests-2011-2010-illegal-searche ("in response to mounting public pressure, NYPD Commissioner Ray Kelly issued an operations order reminding officers to follow existing New York State law . . . [and] . . . stop falsely charging people for possessing marijuana in public view if individuals removed marijuana from their pocket under the order of a police officer.").

13. *Id. See also* Criminal Possession of Marijuana, P.L. § 221.10.

14. 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), http://www.nyclu.org/files/ MARIJUANA-ARREST-CRUSADE_Final.pdf.

> Perhaps the most common legal method that New York City police have used for many years to find concealed marijuana and arrest people for having it "open to public view" is by stopping people and asking them to reveal anything they are "not supposed to have." Or by just directing them to hand it over. Generally, this is coupled with a threat of serious consequences if they do not immediately do so. An officer can say: "I'm going to have to frisk you. If you have anything illegal you should show it to me now. If we have to search you and then find something, it's a much bigger deal, and we'll have to take you to the police station and lock you up. But if you show us what you have now, maybe we can just give you a ticket or, if it's nothing much we can let you go. So if you've got anything you're not supposed to have, show it now."

Id. See also the official order from New York Police Department Commissioner Raymond Kelly discouraging officers from engaging in this illegal practice. N.Y. POLICE DEP'T, OPERATIONS ORDER NO. 49, CHARGING STANDARDS FOR POSSESSION OF MARIHUANA IN A PUBLIC PLACE OPEN TO PUBLIC VIEW (2011), http://s3.documentcloud.org/documents/252743/ nypd-marijuana-order.pdf [hereinafter 2011 Kelly Memo].

15. *See* Benjamin Weiser & James C. McKinley Jr., *Chronic Bronx Court Delays Deny Defendants Due Process, Suit Says*, N.Y. TIMES (May 11, 2016), http://www.nytimes.com/

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only be accommodated in limited circumstances due to the costs involved.

While one of the intended effects of marijuana reform was to decrease the amount of marijuana arrests and reallocate police resources to more serious offenses, the exact opposite occurred over the decades following the enactment of the law.[16] In 1992, there were 812 arrests in New York City for small amounts of marijuana, whereas in 2012, there were 39,230.[17] Between 2008 and 2013, the NYPD arrested over 255,000 people for misdemeanor possession of marijuana[18]; 86% of whom were Black or Latino, and in the Bronx specifically, 94% of those arrested for marijuana were Black and Latino.[19] It is worth noting that only 11% of those arrested for misdemeanor marijuana in New York City during that time were White, despite overwhelming evidence that White people use marijuana with the same, or greater level of frequency as Black and Latino people.[20]

2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html?_r=0.

16. For example:

> 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. Criminal possession of marijuana was the most common arrestable offense in 2011. This amounts to a marijuana arrest approximately every ten minutes or one out of seven criminal cases in New York City's courts.

Ari Rosmarin, Note, *The Phantom Defense: The Unavailability of the Entrapment Defense in New York City "Plain View" Marijuana Arrests*, 21 J.L. & POL'Y 189, 191 (2012).

17. *See* Harry G. Levine, *New York City's Marijuana Arrest Crusade . . . Continues*, QUEENS COLL. & GRADUATE CTR., CITY UNIV. OF N.Y. 6 (Sept. 2009), http://www.drugpolicy.org/sites/default/files/Levine_NYC_MJ_Arrest_Crusade_Continues_Sept_2009.pdf (reporting 812 arrests in 1992); *Marijuana Arrests in NY: Fiscally Irresponsible, Racially Biased and Unconstitutional*, DRUG POL'Y ALLIANCE, 1 (May 20, 2013), http://www.drugpolicy.org/sites/default/files/NY_State_MJ_fact_sheet_GENERAL_2013_0.pdf (reporting 39,230 arrests in 2012).

18. *The Hidden Tax: Economic Costs of Marijuana Enforcement in the Bronx and New York City*, BRONX DEFENDERS, at 5 (Dec. 17, 2014), http://www.bronxdefenders.org/wp-content/uploads/2014/12/The-Hidden-Tax-A-Bronx-Defenders-Report-Dec2014.pdf.

19. *Id.* at 8.

20. For example, in the 2014 National Survey on Drug Use and Health, 15.7% of Black survey participants self-reported using marijuana in the past year, as did 13.7% of White participants, and 11.3% of Hispanic or Latino participants. *Results from the 2014 National Survey on Drug Use and Health: Detailed Tables*, SUBSTANCE ABUSE & MENTAL HEALTH SERV'S ADMIN., 167 (Sept. 10, 2015), http://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs2014/NSDUH-DetTabs2014.pdf. For eighteen to twenty-five year olds, an age group

The reality is, most effective application of these reform efforts is usually contingent upon officers—gatekeepers of the criminal justice system—consistently acting in good faith and appropriately enforcing the law. However, the aforementioned police practices highlight the reality that officers are not infallible and with so many incentives and pressures to make arrests, might thwart efforts to decrease them.[21] To increase the likelihood of success in application, reform strategists must consider the realities of policing as well as the human bias to which officers are susceptible, which inevitably permeates their judgment when deciding who to arrest and in what circumstances. Granted, as mentioned at the outset, many reform strategies are in fact focused on reforming laws and policies that regulate what happens at arrest, but most remain reliant upon officer discretion in application and the affected person may only seek "remedy" if and when the case advances to trial, likely well after they have already suffered irreparable harm in other venues.[22]

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with higher arrest rates than other age brackets, 34.3% of Black participants used marijuana in the past year as well as 34.3% of White participants and 27.5% of Hispanic or Latino participants. *Id.* at 171. For lifetime use, 42.6% of Black participants reported using marijuana in their lifetime, as did 49.6% and 32.6% of their White and Hispanic peers. *Id.* at 167. This data is consistent with the NSDUH data that the ACLU compiled for the years 2001 to 2010. AM. C.L. UNION, *supra* note 1, at 23.

21. *See* Abedian, *supra* note 12.

22. The primary remedy available to those wrongfully arrested or subjected to illegal stop, search and/or seizure, is that the evidence the police claim to have attained during arrest may be not be used against them at trial, in the unlikely event the case progresses to trial and the fact-finder finds the officer's testimony incredible. Miranda v. Arizona, 384 U.S. 439 (1966); Mapp v. Ohio, 367 U.S. 643 (1961). This Exclusionary Rule is designed to deter officers from illegally obtaining evidence, lest the evidence be excluded at trial, however, this assumes that officers are invested in the outcome of the criminal case, as opposed to just securing the arrest; officers are incentivized to make arrest, whereas an actual conviction is within the purview of the District Attorney. Because it is merely a deterrent and not primarily operating as a protection for the accused person, there are many exceptions to the Exclusionary Rule and it only applies when the fact-finder believes that the officer acted in bad faith. *See* Herring v. United States, 555 U.S. 135 (2009) (holding that the good-faith exception applies when police employees are responsible for the warrant error); Arizona v. Evans, 314 U.S. 1 (1995) (holding that the Exclusionary Rule does not apply when officers rely upon an invalid warrant). Furthermore, recent precedent has eroded this already limited remedy as the Supreme Court recently held that discovery of an unpaid parking ticket can retroactively justify an illegal stop, search and seizure, raising great concern that officers will be even more likely to violate the rights of civilians without consequence. *See* Utah v. Strieff, 579 U.S. ___ (2016). *See also Supreme Court Rules Evidence Stands After Illegal Search*, BALTIMORE SUN (June 20, 2016, 8:52 PM), http://www.baltimoresun.com/news/maryland/bs-md-supreme-court-decision-reaction-20160620-story.html**.** It is also worth noting that this remedy does not apply in non-criminal

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C. The Shift to Summons Court: Further Imbedding Enmeshed Consequences

Acknowledging critics' concerns that police practices and arrest patterns undermined the marijuana reform goals, Mayor Bill de Blasio and NYPD Commissioner Bill Bratton announced a policy change (not a substantive change in law) in 2014, outlining how officers may handle marijuana arrests differently. This NYPD Order holds that officers can exercise their discretion to issue a summons to people in possession of a small amount (less than twenty-five grams) of marijuana, even in public view as long as it is not burning.[23] When applied appropriately, this would partly address the NYPD practice of pulling marijuana out of a person's pockets and bringing it into public view to charge the misdemeanor.

Immediately following the announcement of this new policy, there did appear to be a steep drop in marijuana arrests in New York City. In 2015, arrest numbers hit around 17,000, a low last seen in 1996.[24] However, the racial disparity in marijuana arrests persisted, with 88% of those arrests being of Black and Latino New Yorkers.[25] It also appears that such decline might have only been temporary, as only three months into 2016, the NYPD had already made 5,311 arrests for small amounts of marijuana, already up over 33.7% from the previous year.[26] One constant that does not shift with the number of

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contexts, including deportation proceedings. *See* Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984). In turn, while awaiting hearing and trial, or even after being successful in the criminal hearing and/or trial, the evidence recovered in the criminal case can still be used against you in housing, family, immigration, and other civil proceedings. Even if one were to file a civil suit in the rare instances that the case is dismissed on the merits or the accused person endures until trial and is acquitted, it is unlikely that any judgement can compensate for the harm already inflicted.

23. *See* Don Murray, *NYPD Marijuana Enforcement Policy Updated on November 11, 2014—The Emperor's New Policy*, QUEENS DEFENSE (Nov. 14, 2014), http://www.queensdefense.com/new-nypd-marijuana-policy/ (including a link to operations order).

22. *See* Jeremy Berke, *New York Police are Getting Even More Aggressive on Marijuana*, BUS. INSIDER (June 2, 2016, 6:54 PM), http://www.businessinsider.com/nypd-disproportionately-arrests-people-of-color-for-marijuana-offenses-2016-6.

25. *New Data Released: NYC Marijuana Possession Arrests Under 17K for First Time Since 1996, 67% Drop from 51,000 Arrests in 2011*, DRUG POLICY ALLIANCE (Feb. 4, 2016), http://www.drugpolicy.org/news/2016/02/new-data-released-nyc-marijuana-possession-arrests-under-17k-first-time-1996-67-drop-51.

26. *See* Abedian, *supra* note 12.

arrests or changes in policy, is the targeting of people of color; 86.5% of the misdemeanor arrests thus far in 2016 have been people of color, the vast majority being for marijuana, and theft of services for entering public transportation without paying or retaining a receipt of payment.[27] Because the success of these policies relies on officers exercising good and unbiased judgement, communities of color rarely reap the full benefit of reform policies whose enforcement is at the officer's discretion.

In essence, allowing officers discretion to shift these cases to another venue does not sufficiently address the problematic policing practices that unjustifiably thrust so many of these cases into criminal court, the losses and indignities experienced in each appearance—even in summons court,[28] or the extreme enmeshed consequences individuals will suffer in non-criminal proceedings.[29] In fact, given the professional and financial incentives for officers to issue a certain volume of summonses,[30] and the failure to collect procedural and demographic data when they are, summonses for marijuana charges may be even greater in number, with consequences even more difficult to assess.

Summons court is arguably more chaotic and congested than criminal court, with little to no due process, and without practitioners with an abundance of institutional knowledge and resources to properly advise clients about enmeshed consequences of the dispositions offered. In effect, people are still required to take time

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27. *Id.* Note that like marijuana, two convictions for the seemingly simply offense "jumping a turnstile" also makes a Legal Permanent Resident deportable. 8 U.S.C. § 1227(a)(2)(A)(ii) (2012). *See also* Gill v. Immigration & Naturalization Serv., 420 F.3d 82, 89 (2d Cir. 2005) (synthesizing the Board of Immigration Appeals' approach to "moral turpitude"), Mojica v. Reno, 970 F. Supp 130, 127 (E.D.N.Y. 1997) ("turnstile jumping in the New York City Subway Station leading to a 'theft of services' conviction is considered a crime of 'moral turpitude'").

28. *See* Abedian, *supra* note 12.

29. In a survey conducted by the Bronx Defenders, 21% of respondents issued desk appearance tickets for marijuana possession missed work as a result of their arrest and 69% missed work due to attend their court appearance. *See* BRONX DEFENDERS, *supra* note 18, at 10. The respondents lost an average of $128.13 per day. *Id.* at 10. "FPP also found that 30% of respondents were accompanied to court by a parent, friend, spouse/ partner, or child, 40% of whom missed work in order to come to court." *Id.* at 11. Twenty-one percent of respondents were at risk of losing their public housing. *Id.* at 17.

30. *See* Abedian, *supra* note 12.

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off of school, work, treatment programs, and child care to stand in line for hours and await their turn in the assembly line of cases quickly shuffled through summons court.[31] The appearance lasts seconds, and the conversation with the solo-practitioner appointed by the court lasts a couple of minutes at most.[32] Because you are just given a pink slip for a relatively minor offense and told to return on a later date instead of being placed in handcuffs, fingerprinted and held in a cell waiting to see a judge, people are more likely to treat summonses like traffic tickets, not imagining that a simple pink slip could lead to their deportation, homelessness or loss of federal financial aid.[33] For similar reasons, summons court dates are a bit easier to forget, but the consequences of missing that date is the same as in criminal court: you are arrested and involuntarily brought before a criminal court judge who may set bail or impose a sentence of incarceration.[34] So, while this policy change gives the perception of reduced policing and the decriminalization of marijuana possession, it in fact merely diverts the issue into a system subject to less

31. *See* BRONX DEFENDERS, *supra* note 18.

32. "[S]ummons court—which handles offenses like public drinking, riding bicycles on the sidewalk or talking back to the cops, otherwise known as disorderly conduct—is anything but petty. It is a place where low-level offenses can lead to permanent criminal histories and lifelong encumbrances." Brent Staples, *Inside the Warped World of Criminal Court*, N.Y. TIMES (June 16, 2012), http://www.nytimes.com/2012/06/17/opinion/sunday/inside-the-warped-world-of-summons-court.html.

33. A single marijuana violation under P.L. § 221.05 can make a person who is not a U.S. citizen *inadmissible*, if they were to leave the United States and try to return. Immigration and Nationality Act 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2016) ("any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of . . . any law . . . relating to a controlled substance is . . . inadmissible."). Two violations under that statute can make a person *deportable*. 8 U.S.C. § 1227(a)(2)(B)(i) (2016) ("Any alien who at any time after admission has been convicted of a violation of . . any law. . . relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

34. *See* Staples, *supra* note 32.

> . . . [W]oe to those who forget the date, even if the violation seems minor, like littering. The summons court will then issue a warrant, which means that the defendant stands a good chance of being handcuffed, fingerprinted and taken to jail, where he could spend days before going in front of a Criminal Court judge. In 2011, more than 170,000 warrants were ordered. Once a warrant is issued and recorded in a database, the defendant is at greater risk of having a citizenship application denied or being turned away by potential employers."

Id.

scrutiny, where the consequences are more difficult to track and assess. People are then caught in this ironic space that appears to be a less punitive proceeding, but leaves them even more vulnerable to extremely punitive consequences in related proceedings. Furthermore, we must remember that even when appropriately applied, the officer only has the discretion to issue a summons if the marijuana cigarette is not lit, and the aggregate weight of the marijuana is less than twenty-five grams. Thus, relatively speaking, anyone in possession of a greater, yet still minor amount of marijuana, or in possession of even the tiniest amount while lit, is still shuffled through criminal court in addition to the myriad of devastating consequences they may suffer in other venues.

II. CAUGHT IN A WEB OF PUNISHMENT: THE NON-CRIMINAL CONSEQUENCES OF CRIMINAL ARRESTS

The grave effect of a single marijuana arrest, even in the absence of a criminal conviction or sentence, is clearly depicted in the case of Alberto Wilmore.[35]

A. Narrative Number One: Loss of Legacy and Livelihood

Mr. Wilmore is an artist, and was an art teacher and founding member of a New York City Public School. Early one morning, Mr. Wilmore was standing outside of his Bronx home smoking a tobacco cigarette. As soon as he dropped that tobacco cigarette to the ground, the police arrived, grabbed him, and arrested him after claiming that what he was smoking and dropped was a marijuana cigarette.[36] Mr. Wilmore was processed and fingerprinted at the precinct.[37] Notification of his arrest was sent to a criminal justice repository in Albany and the Department of Education was promptly notified less

35. Julie Dressner & Jesse Hicks, *How a Small-Time Marijuana Arrest Has Devastated a Great Teacher's Life, Video: Meet Alberto Wilmore, a popular New York City Public School Teacher*, BUZZ FEED NEWS (Dec. 8, 2013, 10:23 PM), https://www.buzzfeed.com/jdressner/a-marijuana-arrest?utm_term=.trpgDbdgwN#.qlY4ygN4Oz.

36. *Id.*

37. *Id.*

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than twenty-four hours thereafter.[38] Despite the fact that marijuana possession is widely recognized as a relatively minor offense, to the Department of Education, it constitutes "Serious Misconduct" and is listed among serious felony charges such as sexual abuse of a student or felony possession of a firearm.[39] Note that Mr. Wilmore had not been convicted of anything at this point—in fact, he had not even had his "day in court" as of yet and adamantly maintained his innocence. Nevertheless, he suffered a loss of income and tarnished professional reputation within twenty-four hours of his arrest and throughout the pendency of the criminal case. Mr. Wilmore's criminal case was ultimately dismissed and sealed twenty-one months later. Despite this seemingly favorable result in the criminal court where Mr. Wilmore made no admission of guilt and the case was nullified, the Department of Education maintained their position and terminated Mr. Wilmore from his home school. After paying a $1,500 fine, he was permitted to be a substitute teacher at another school. Mr. Wilmore's career, reputation, and life were never the same.[40]

The new policy of issuing summonses for small amounts of marijuana was implemented a bit over a year after Mr. Wilmore's case was resolved. However, this change would not have made a difference in Mr. Wilmore's experience. Because the officers were claiming to have observed Mr. Wilmore smoking the marijuana cigarette, it would not fall within the purview of offenses for which the police may issue a summons. In turn, when officers manufacture misdemeanors, and even in circumstances when they don't, otherwise law abiding New Yorkers accused of possessing a small amount of marijuana are at risk of losing their livelihood over a seemingly minor offense.

It is important to note that there is not the same right to counsel and burden of proof beyond a reasonable doubt in civil and administrative proceedings as is aspired to in criminal court.[41] In

38. *Id. See also* 8 N.Y. COMP. CODES R. & REGS. tit. 8, § 876; N.Y. EDUC. LAW § 3004-b(1).

39. N.Y.C. DEP'T OF EDUC. COLLECTIVE BARGAINING AGREEMENT art. 21(G)(5) (2014) at 156.

40. Dressner & Hicks, *supra* note 35.

41. *See* McGregor Smith, *"Collateral" No More: The Practical Imperative for Holistic Defense In a Post-Padilla World . . . Or, How to Achieve Consistently Better Results for*

essence, people are thrust into these ancillary proceedings as a result of a criminal arrest, but are not afforded the same constitutional protections or counsel as in criminal court. As demonstrated in Mr. Wilmore's case, even a dismissal or acquittal at trial in criminal court does not ensure a favorable disposition in the "collateral" proceedings.

B. Narrative Number Two: Loss of Housing, Employment, and Interruption of Parental Rights

Mr. Wilmore's experience is a common one, but far too frequently, individuals in Bronx communities experience a greater multitude of concurrent consequences than conveyed in Mr. Wilmore's narrative. More than 38% of the population in the Bronx lives below the poverty line.[42] This means that this population, which is one of the most heavily targeted for low-level offenses like marijuana, is among the least equipped to cope with the enmeshed consequences that follow. Oftentimes, there are several lines of consequences holding clients in a cycle of injustice like spokes on a wheel, all arising out of a criminal arrest. Consider the following example:

> Austin Johnson[43] was, at the time, a thirty-two-year-old Bronx man with no criminal record. He worked for a city agency

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Clients, 31 ST. LOUIS U. PUB. L. REV. 139, 149 (2011) (noting that "many penalties are imposed in administrative proceedings with lower burdens of proof, no rules of evidence, and virtually unlimited discretion by the fact-finder" and that Public Housing Authority may terminate assistance "regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction" (citing 24 C.F.R. § 966.4(1)(5)(iii)(A) (2011)). *See, e.g.*, Nnebe v. Daus, 644 F.3d 147, 158–59 (2d Cir. 2011) (holding that city is not required to provide a hearing before suspending taxi licenses immediate after arrest).

42. Richard Sisk, *South Bronx is Poorest District in Nation, U.S. Census Bureau Finds: 38% Live Below Poverty Line*, N.Y. DAILY NEWS (Sept. 29, 2010, 8:30 PM), http://www.nydailynews.com/new-york/south-bronx-poorest-district-nation-u-s-census-bureau-finds-38-live-poverty-line-article-1.438344.

43. The details depicted are not in any way unique, but are instead of template of circumstances for many clients in the Bronx criminal justice system. The names, sex, and other identifying details have been changed to protect identities and confidentiality of former clients while still conveying the intersection of issues. The case upon which this example is based ultimately resolved with a plea of guilty to P.L. 240.20 Disorderly Conduct and is now sealed, pursuant to C.P.L. 160.50(3)(k).

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> during the day then returned home to support his ill, elderly mother at night. His mother relied upon him for meals, medication and mobility. Mr. Johnson and his two children resided with his mother in her New York City Housing Authority (NYCHA) apartment, where they lived for over seventeen years. Early one morning, the police kicked in the door and rummaged through the apartment, snatching cabinet doors off the hinges and bursting into various rooms where his mother, wife, and children were sleeping. After turning their humble home upside down, the police mentioned that they were effectuating a search warrant for drugs. The search pursuant to this defective warrant did not unveil a single illegal substance, but Mr. Johnson did volunteer that he had a small amount of marijuana for personal use, and had been smoking a marijuana cigarette alone—away from his family. The police then arrested Mr. Johnson and his wife, and even threatened to arrest his ill, elderly mother. The police also called the Administration of Children's Services (ACS) to place the children under supervision in Family Court.[44]

As a result of this arrest for the relatively minor charge of marijuana possession, Mr. Johnson was promptly suspended from his job, NYCHA commenced proceedings to permanently exclude him from all NYCHA premises, or terminate his mother's seventeen-year tenancy,[45] and ACS required that Mr. Johnson complete a series of parenting classes and drug tests in order to regain unsupervised custody of his children.[46] In addition to making appearances in

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44. *Id.*

45. NYCHA tenancy can be terminated for "Non-Desirability," which is broadly defined to encompass a criminal arrest. N.Y.C. HOUS. AUTH., Grounds for Termination of Tenancy Procedures Paragraph 1(a) (1997). Additionally, families with members who have illegally used a controlled substance within the last three years will be found ineligible. N.Y.C. HOUS. AUTH., TENANT SELECTION & ASSIGNMENT PLAN, at 25 (Jan. 22, 2016), https://www1.nyc.gov/assets/nycha/downloads/pdf/TSAPlan.pdf. "The family shall be ineligible for a period of three years after the ineligibility finding, or until the family provides written verification from a state-licensed drug treatment agency that the offending person has been drug-free for 12 consecutive months and submits a current clean toxicology report." *Id.*

46. Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES, Aug. 18, 2011, at A1.

criminal court, Mr. Johnson also had to accompany his mother to administrative hearings at NYCHA, attend his own employment proceedings, and make appearances and appointments for family court. In addition to the open case, these mounting obligations made it nearly impossible for Mr. Johnson to obtain alternative employment to support his family while suspended from his city job. For many, it is inconceivable that an entire family might face homelessness, loss of stable employment and interruption of parental rights all over possession of a small amount of marijuana for private, personal use. However, this is a routine experience for many members of over-policed, marginalized communities.[47]

Mr. Johnson's criminal case ultimately resolved with a plea to a non-specific violation of Disorderly Conduct under P.L. § 240.20.[48] This lesser, catch-all violation usually carries the least "collateral"

> Hundreds of New Yorkers who have been caught with small amounts of marijuana, or who have simply admitted to using it, have become ensnared in civil child neglect cases in recent years, though they did not face even the least of criminal charges, according to city records and defense lawyers. A small number of parents in these cases have even lost custody of their children.

Id. According to Lauren Shapiro, director of the Brooklyn Family Defense Project, more than 90% of the cases alleging drug use that her lawyers handle involve marijuana, as opposed to other drugs. *Id. See also* Caroline Preston, *Parents Face Child Abuse Investigations Over Pot Use*, ALJAZEERA AM. (Sept. 7, 2015, 5:30 AM), http://america.aljazeera.com/articles/2015/9/7/parents-face-child-abuse-investigations-over-marijuana-use.html.

> No nationwide data exist on how many parents have faced neglect and abuse investigations over their marijuana use . . . but the Family Law & Cannabis Alliance, a Massachusetts-based group formed in 2013 to help parents in marijuana-related child-welfare and custody disputes, says it assisted 200 families nationwide last year. According to the NYC Administration for Children's Services, between April 16 and June 16, 2016, 14% of the 42,309 allegations made to the New York State Central Register were for parental or child drug use, abandonment, or inappropriate custodial contact.

Id.

47. *Poverty and Opportunity Profile: Americans with Criminal Records*, THE SENTENCING PROJECT (Nov. 2015), http://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf; BRONX DEFENDERS, *supra* note 18, at 2.

48. N.Y. PEN. LAW § 240.20 (McKinney 2016). This violation has several subsections related to fighting, making unreasonable noise, etc., but in my experience in the Bronx, is often pled to, non-specifically, by people who may have initially faced unrelated criminal charges.

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baggage and is a relatively favorable disposition.[49] However, Mr. Johnson had already suffered a cluster of severe, non-criminal consequences immediately following his arrest and well before his criminal case resolved. This is one of the many instances where the punishment was in the process, and what appeared to be leniency in a criminal court sentence to a lesser, non-criminal charge, failed to lessen the severe punishment imposed in other venues in the interim.[50]

C. Narrative Number Three: Loss of Employment, Professional License, Housing Stability, Educational Opportunity, and Immigration Status

There are occasions where necessary negotiations make timely resolution of a criminal case incredibly difficult. In many marijuana cases, the prosecution will often offer a violation under P.L. § 221.05, Unlawful Possession of Marijuana[51] the non-criminal section created under the Marijuana Reform Act of 1977. In the criminal context, this may appear to be of little consequence, beyond a fine and a surcharge,[52] but may in fact have grave consequences in many other areas of that person's life.

Consider the following example:

> Ashleigh Majors was, at the time, a twenty-two-year-old legal permanent resident (LPR) from Jamaica.[53] She was in a

49. As previously indicated, a violation, particularly under P.L. § 240.20 Disorderly Conduct, does not give one a criminal record, and will seal after one year under C.P.L. § 160.55. A crime, such as a misdemeanor or felony on the other hand, remains on one's criminal record forever, as New York does not offer expungement. N.Y. PEN. LAW § 221.05 (McKinney's 2016).

50. BRONX DEFENDERS, *supra* note 18, at 7–13.

51. However, people usually receive an Adjournment in Contemplation of Dismissal (ACD) in which the case will be nullified and sealed after one year in cases where they have not previously been convicted of a drug offense as an adult or youthful offender, granted a one-year ACD, or have a prior conviction and the prosecutor does not consent. N.Y. CRIM. PROC. LAW § 170.56 (McKinney 2016).

52. Failure to pay a fine results in a warrant being issued for one's arrest, and can result in the person being held in a cell until a judge decides whether or not to hold the person in on bail.

53. The details depicted are not in any way unique, but are instead of template of circumstances for many clients in the Bronx criminal justice system. The names, sex, and other identifying details have been changed to protect identities and confidentiality of former clients

> nursing program part-time, and was a full-time single parent. To gain stability for herself and her daughter, Ms. Majors was in the process of applying for naturalization and public housing. She also had several pending applications for employment, including some that require licensing in the medical field. One day in the park, she was sitting with friends who were smoking, and someone dropped a marijuana cigarette to the ground upon seeing police. The officers recovered the marijuana cigarette and arrested everyone in that area, claiming to have seen all of them smoking and passing marijuana.[54] While Ms. Majors maintains that she was not smoking, she did admit to being in the space where someone else had been. Ms. Majors was taken to the precinct, fingerprinted and processed, then given a Desk Appearance Ticket (DAT), which allowed her to go home after several hours at the precinct and return on a later date for her court appearance. After securing child care and taking a day off school and work, Ms. Majors appeared for her Desk Appearance Ticket (DAT) court date, hoping to resolve the case so that she would not miss any additional days of work. She was offered the violation of N.Y.P.L § 221.05, Unlawful Possession of Marijuana, and was prepared to plead guilty.[55]

However, for a non-citizen, even one with legal status in the United States like Ms. Majors, a violation for possessing a small amount of marijuana under N.Y.P.L. § 221.05 has essentially the same consequence as a misdemeanor criminal conviction for marijuana.[56]

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while still conveying the intersection of issues. The case upon which this example is based ultimately resolved with an Adjournment in Contemplation of Dismissal pursuant to C.P.L. § 170.56 in which the case was nullified and sealed.

54. *Id.*

55. *Id.*

56. Immigration and Nationality Act, *supra* note 33. This Act, "any alien" inadmissible or deportable after conviction of "any law" relating to a "controlled substance[,]" defines "controlled substance" by federal government standards, which lists marijuana as a Schedule II Controlled Substance, and is not flexible to various state standards that no longer define marijuana as controlled substances or non-criminal convictions. 21 U.S.C. § 802(6). While in New York, a plea to a violation is not technically a "conviction," because it is not a crime, conviction in the immigration context is "a formal judgment of guilt . . . entered by a court," or admits facts that would be sufficient for a finding of guilt. *Id.* § 101(a)(48)(A);

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The first violation or misdemeanor for marijuana will make an LPR inadmissible to the United States if they attempt to reenter the country after leaving, and the second will make them deportable, regardless of whether they leave the country or not.[57] In essence, if Ms. Johnson were to visit her family in Jamaica after taking the offered plea, she would be detained and placed in deportation proceedings upon attempting to reenter the United States. Even if she received a more favorable disposition, like the Disorderly Conduct violation under N.Y.P.L. § 240.20 and a conditional discharge, she would have to wait until the conclusion of her conditional discharge sentence to apply for naturalization, at which point the disposition of Disorderly Conduct would be considered in the evaluation of her "good moral character" during the application process. Another area of concern was that she was relying upon federal grants and loans to cover her educational tuition, and if she were to accept this plea, her federal financial aid would be terminated and she would be ineligible for further funding for a year following the resolution of the case.[58] Because Ms. Majors only works part-time and is a single mother, she does not have funds to contribute to her education and would have to leave her nursing program. As for her pending job applications, a violation under N.Y.P.L. § 221.05, Unlawful Possession of Marijuana, would make her ineligible for certain licenses, and remains visible to employers for three years following the resolution of the case.[59] This disposition also makes her ineligible for public housing for three years following the finding of ineligibility.[60] To avoid as many of these devastating consequences as possible, Ms.

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8 U.S.C. § 1101(a)(48)(A) (2006). In essence, a plea of guilty to a non-criminal marijuana violation is tantamount to a plea of guilty to a criminal possession of a controlled substance in the federal context.

57. Immigration and Nationality Act, *supra* a note 33.

58. Under federal law, students receiving any federal grants, loans, or work study have their eligibility suspended if they are convicted of *any offense* involving possession or sale of a controlled substance, but only for conduct occurring while receiving student aid. 20 U.S.C. § 1091(r)(1) (2011). Students are ineligible for one year for their first possession offense, starting the date of the conviction. *Id.*

59. Marijuana violations under P.L. § 221.05 are typically sealed once three years have passed since the offense occurred, if the sole controlled substance involved is marijuana and the conviction was only for a violation or violations. N.Y. CRIM. PROC. LAW § 160.50(3)(k) (McKinney 2016).

60. N.Y.C. HOUS. AUTH., *supra* note 45, at 25.

Majors had to continue to take days off of school and work to appear in criminal court for years, hoping that negotiations with the prosecutor might yield a more favorable disposition carrying less punitive enmeshed consequences.

Unfortunately, the details of these narratives are not remotely unique, but instead reflect a representative sample of circumstances individuals in over-policed, marginalized communities experience when navigating the system, especially, but not exclusively in the Bronx.[61] One important thing to note about these specific stories is that no one featured here had a criminal record, and everyone was accused of possessing a small amount of marijuana, most of whom maintained their innocence. I chose these circumstances to highlight that even the most minor infractions carry some of the most severe consequences. I also chose what many might consider more palatable narratives, as such narratives are often more powerful in pushing reform. However, our strategies for reform should not be solely driven by the experience of the adamantly innocent, or the most sympathetic narratives. Whether someone has an extensive criminal record, or several of the same marijuana offenses for possession well over twenty-five grams or lit in public view—they should not be suffering consequences exponentially more severe than intended by the criminal statute governing the offense with which they are charged.

III. EXPANDING THE REACH OF CRIMINAL JUSTICE REFORM: AN INTERDISCIPLINARY APPROACH

Too frequently, councils convened to propose and implement strategies for reform fail to include adequate input from practitioners in the relevant fields who can offer insight into how the proposal may actually unfold—the reality of police practices upon which we rely to enforce reform and how the criminal system communicates with other venues to compound consequences for those arrested. This is not to say that these working groups should be composed exclusively of criminal practitioners, in fact, it is quite the contrary, as these

61. BRONX DEFENDERS, *supra* note 18, at 2–6.

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enmeshed consequences of non-criminal proceedings often evade criminal practitioners as well.

For at least a decade now, and particularly following the decision of the United States Supreme Court in the seminal case of *Padilla v. Kentucky*,[62] there has been a movement to raise the standard of defense, encouraging criminal defense attorneys to learn and advise their clients of enmeshed consequences that may arise out of their arrest.[63] The idea is to move away from the practice of simply seeing clients as cases, and instead, viewing and treating each client as a whole, multi-dimensional person facing a multitude of consequences beyond the criminal case. To represent each person most comprehensively, criminal defense attorneys must become sufficiently familiar with other areas of law that intersect with criminal, and collaborate with peers in these disciplines to properly advise clients of potential consequences beyond the criminal case.

The concept of centering the person and considering the circumstances they face in practicing criminal law is just as important for those creating and reforming the law. Presumably, the goal of policy reform is to change the way certain policies affect the lives of actual people; to achieve that goal, reformists must be fully aware of how the laws they design will affect the whole person, not simply how it affects that substantive area of law. Like criminal defense attorneys, this requires reform strategists to become sufficiently familiar with other areas of law that intersect with the area they are seeking to reform and engage the expertise of practitioners from relevant fields.

If an offense is deemed a violation precisely to avoid the stigma and marginalization that accompanies a criminal record, we need to ensure that this offense does not result in the same loss of

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62. Padilla v. Kentucky, 599 U.S. 356 (2010). In a case where a legal permanent resident was ordered deported after pleading guilty to possession of marijuana, the Court held that Padilla's counsel was ineffective in failing to advise that his criminal plea could result in deportation. In practice, this holding is applied to a broad range of circumstances and enmeshed consequences. *Id.*

63. *See* McGregor Smyth, *"Collateral" No More: The Practical Imperative for Holistic Defense in A Post-Padilla World . . . or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139 (2011); McGregor Smyth, *Holistic is Not a Bad Word*, 36 U. TOL. L. REV. 479 (2005).

employment, parental rights, public benefits, higher education, housing and other bare necessities for survival the law was re-designed to avoid. If jail is not a reasonable consequence conceived of by the statute, but that same charge results in someone being held in what is essentially immigration jail awaiting deportation, we need to reevaluate the applicable federal law, but in the meantime, substantively change the state law that evokes it.[64]

To carefully craft reform laws that most effectively achieve instead of undermine their goals, every constructive conversation about criminal justice reform must be interdisciplinary in nature, appreciating the full scope of consequences triggered in other areas of substantive law. For example, a committee for criminal justice reform should be composed of practitioners and policy-makers with experience and expertise in criminal, family, civil, immigration and other areas of law triggered by contact with the criminal justice system. Likewise, councils crafting policies that create these consequences arising out of criminal arrests should be substantively familiar with the criminal laws to which their policies respond, and the legislative intent behind them.

In my practice, I have observed judges in housing court, for example, impose extremely punitive consequences upon clients following a criminal arrest while relying upon an extreme misunderstanding of the criminal system and the relevant criminal law in their rationale. As holistic advocates, we attempt to educate judges as much as possible about the practical realities our clients face in other relevant areas of law, in hopes that a clearer

64. To mitigate the enmeshed consequences of deportation arising out of a criminal conviction for minor offenses, a few states have reduced the maximum misdemeanor sentence to 364 days, from the 365 days that triggers deportation under federal immigration law. *See* Patrick McGreevy, *Gov. Brown Signs Bill to Reduce Deportations for Minor Crimes*, LA TIMES (July 27, 2014, 7:29 PM) http://www.latimes.com/local/crime/la-me-pol-brown-364-days-20140722-story.html; Kristi Pihl, *Measure Reduces Misdemeanor Sentence by 1 Day*, SEATTLE TIMES (Apr. 24, 2011, 4:13 PM), http://www.seattletimes.com/seattle-news/measure-reduces-misdemeanor-sentence-by-1-day/; Daniel M. Kowlaski, *Nevada Gross Misdemeanor Statute Modified to 364 Days* (June 4, 2013, 2:05 AM), http://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/archive/2013/06/28/nevada-grossmisdemeanor-statute-modified-to-364-days.aspx. New York is also making a push in this direction. *See* New York City Bar, *Report on Legislation by the Criminal Courts Committee and the Criminal Justice Operations Committee*, (July 2016) http://www2.nycbar.org/pdf/report/uploads/20073134-One_Day_to_Protect_NYers_Crim_CourtsandCJO_Report_FINAL_7.21.16.pdf.

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understanding might result in a less punitive outcome. Similarly, having interdisciplinary committees for reform would not only promote more comprehensive criminal justice reform strategies, but also educate policy makers from other areas of law about the practical realities and rationales behind the criminal laws they evoke. For example, if the crafters of rules and regulations in the Housing Authority were more cognizant of the reality that an arrest might speak to the officer's bias and not the person's culpability, that officers are manufacturing misdemeanors in contravention to the law, and/or that the criminal law upon which they are basing a punitive policy was not intended to punish, it might prompt reform for more informed and more favorable housing policy.[65] Siloed committees composed almost exclusively of experts and actors in the field for reform makes for less effective, more myopic policy. Interdisciplinary committees allow for greater education and foresight, leaving fewer blind sides to undermine the goals of reform.

CONCLUSION

Ideally, efforts in criminal justice reform would work at the federal and state level concurrently, would be constructed to limit officer discretion and ensure oversight of police enforcement with immediate consequences for abuse of officer discretion, and would be supplemented by concurrent efforts in reforming the civil, housing, family and immigration policies triggered by contact with the criminal justice system. Of course, this is easier said than done, considering the complicated bureaucracy, politics, and power dynamics one must navigate in attempting comprehensive and substantive change at the city, state, or federal level. However, at minimum, we can begin by engaging the substantive expertise of

65. This is easier if the civil systems do intend for their consequences to be consistent with criminal law and not simply using criminal law as a channel to impose further regulation and punishment in their realm. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (arguing that arrests operate as a regulatory tool in the civil context, serving as a source of information and enforcement that may not have otherwise been available).

every other area of law intimately connected with criminal when creating criminal justice reform; otherwise, the movement toward a fairer and less punitive system will continue to be stagnant.

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