

BROKEN LIVES FROM BROKEN WINDOWS: THE HIDDEN COSTS OF AGGRESSIVE ORDER-MAINTENANCE POLICING

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ABSTRACT

In this article I demonstrate that the aggressive policing of misdemeanor and lesser offenses results in a number of consequences that may ultimately be criminogenic. These effects can roughly be broken down into two categories: economic burdens and legitimacy costs. I conclude that while the impact of aggressive policing of minor offenses on crime rates requires more study, the costs associated with policing order via the criminal justice system are so great that immediate steps must be taken to reduce them.

Recently, scholars in the field of criminal justice have grappled with three major developments that have significantly changed the landscape of the criminal justice system. These developments are (1) increased policing of minor social disorder based on the Broken Windows theory, (2) insights based on social psychology in the area of procedural justice, and (3) the expansion of civil collateral consequences of convictions. This paper explores the interplay between these three developments.

In the policing sphere, the Broken Windows theory—the theory that correcting visible signs of social disorder will reduce serious crime—has given rise to aggressive order-maintenance policing strategies in many jurisdictions. Such policing has drawn millions of individuals into the criminal justice system for minor offenses. Social psychologists have contemporaneously produced compelling evidence that perceptions and judgments about “procedural justice”—the fundamental fairness of a process—have a greater impact on willingness to comply with authority than favorable outcomes (e.g., light sentences or even dismissal in a criminal case). Finally, scholars, judges, prosecutors, and defense attorneys have written with concern about

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civil collateral consequences that often outweigh and outlast underlying criminal convictions.

This article examines these three developments. Using New York City as a case study, I assess the panoply of aggressive order-maintenance policing costs in light of both procedural justice costs and the collateral consequences. I reach two conclusions. First, aggressive order-maintenance policing likely exerts criminogenic pressure on the targets of aggressive policing and the neighborhoods from which they come. Second, many of the unintended and undesirable costs of aggressive order-maintenance policing can be mitigated or eliminated without abandoning a commitment to order maintenance.

INTRODUCTION

In recent years, a great deal of attention has been given to the costs of incarceration¹ fueled by, among other things, the “war on drugs,” inflexible state and federal sentencing guidelines, “three strikes” laws, and similar “tough on crime” legislation. The cost, effectiveness, necessity, and community impact of these felony sentencing policies have been examined at length by a number of scholars.² This trend, along with state budget

1. By incarceration, I refer to imprisonment of one year or more. There were over 1.5 million prisoners in state and federal prisons on December 31, 2007. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 224280, PRISONERS IN 2007, at 6 (2008), *available at* <http://ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>. In addition, approximately 800,000 people were in American jails either awaiting trial or serving sentences of less than a year on that date. *See id.* With 756 out of every 100,000 residents in prison or jail, the United States has the highest imprisonment rate in the world. Int'l Ctr. for Prison Studies, King's Coll. London, World Prison Brief, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php (select “Entire world” and “Prison population rates”) (last visited Feb. 13, 2009).

2. *See, e.g.*, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) (examining the many ramifications of felony convictions for convicts, families, and communities); PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON 17 (2003) (providing female felons' narratives on the impact of incarceration in order to “stimulat[e] reconsideration of the near-exclusive reliance on incarceration for crimes in our society”); MARC MAUER, SENTENCING PROJECT, RACE TO INCARCERATE 13 (2d ed. 2006) (examining the same with a focus on “the wide-ranging effects of the race to incarcerate on African American communities in particular”); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999) (discussing the negative and extensive effects of excluding ex-offenders from political and economic realms); Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552 (2003) (examining high incarceration rates within a community as a factor that increases crime and perpetuates “the accumulation of social and economic adversity for people living in these areas”); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1028 (2001) (discussing the same with a focus on current incarceration policies’ “disproportionate disruption of Black families”); Dorothy E. Roberts, *The Social and Moral Cost of Mass*

crises, has given rise to significant movements for sentencing reform and alternatives to incarceration for nonviolent felony offenders in many state systems.³ Yet overlooked in the deluge of commentary on the costs of tough-on-crime policies are the effects and costs of aggressive order-maintenance policing strategies that target misdemeanor and noncriminal offenses.⁴ These policies affect millions of people in the United States each year,⁵ resulting in more convictions than for more serious crimes⁶ and

Incarceration in African American Communities, 56 STAN. L. REV. 1271, 1277 (2004) (discussing how racial disparities in incarceration of adults disrupt black families, causing devastating collateral damages to entire communities).

3. See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1285–90 (2005) (noting that over half the states have reformed their sentencing and incarceration policies in some way, including Alabama, Louisiana, and New Mexico, which have amended three strikes laws due to cost); DANIEL F. WILHELM & NICHOLAS R. TURNER, VERA INST. OF JUSTICE, IS THE BUDGET CRISIS CHANGING THE WAY WE LOOK AT SENTENCING AND INCARCERATION? (2002), *available at* http://www.vera.org/publication_pdf/167_263.pdf (surveying various attempts by lawmakers to reduce corrections spending).

4. A misdemeanor is a minor offense, excluding traffic infractions, which is punishable by no more than one year in jail and more often than not is punished by little or no jail time. N.Y. PENAL LAW § 10.00(4) (McKinney Supp. 2008). Lesser offenses include traffic infractions and violations, the latter of which cannot be punished by more than fifteen days in jail. *Id.* § 10.00(2)–(3).

5. Of over fourteen million arrests nationwide reported to the FBI in 2005, only about 2.2 million arrests were for FBI Uniform Crime Reports Index Crimes. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *Table 29: Estimated Number of Arrests, in CRIME IN THE UNITED STATES, 2005* (2006), http://www.fbi.gov/ucr/05cius/data/table_29.html [hereinafter FBI, *Table 29*]. These Index Crimes include eight serious offenses: four violent crimes (murder and non-negligent homicide, rape, robbery, aggravated assault) and four property crimes (burglary, larceny-theft, motor vehicle theft, arson). FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *About the UCR Program, in CRIME IN THE UNITED STATES, 2005*, *supra*, http://www.fbi.gov/ucr/05cius/about/about_ucr.html [hereinafter FBI, *About the UCR*]. Roughly 600,000 of the arrests were for violent index crimes, and 1.6 million were for property index crimes. FBI, *Table 29, supra*. The remaining 11.9 million arrests included, among other minor offenses, 670,000 arrests for disorderly conduct; 550,000 for drunkenness; 270,000 for vandalism; 590,000 for violation of liquor laws; 140,000 for curfew and loitering violations; and 3.8 million arrests that fall into a category defined as “[a]ll other offenses.” *Id.* While some small portion of the 11.9 million non-index crimes may be relatively serious, millions of these arrests were for misdemeanor and lesser offenses. *Id.*

6. Nationwide statistics for the number of misdemeanor convictions are not maintained by the FBI, but there are many million. The U.S. Department of Justice’s Bureau of Justice Statistics (BJS) estimates that over sixty-four million individuals (about 30% of the adult population of the United States) have criminal records. OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (2006) (citing 2001 BJS estimates), *available at* www.usdoj.gov/olp/ag_bgchecks_report.pdf. The FBI fingerprint database has forty-eight million individuals. *Id.* at 13. In New York in 2004, only 12.7% of all convictions were for felonies. SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, N.Y. STATE BAR ASS’N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY 380–81 (2006) [hereinafter NYSBA RE-ENTRY REPORT], *available at* <http://www.nysba.org> (follow “Publications/Forms” hyperlink; then follow “Substantive Reports” hyperlink; then select title of report).

constituting the most common point of contact between the public and the criminal justice system. The most aggressive of these policies permit arrests for offenses not even punishable by jail time.⁷

This paper argues that policing minor offenses so aggressively creates significant hidden costs that undermine the legitimacy of the criminal justice system, create substantial burdens for poor people (the majority of those arrested for order offenses), and erect barriers to education and employment. In addition to the loss of legitimacy and diminished economic opportunities, another result of aggressive order-maintenance policing may be an increase in crime and disorder. Determining whether and to what extent the latter hypothesis is correct requires longitudinal study and is beyond the scope of this paper. Instead, this paper examines the process and results of arrest for minor offenses in terms of costs to arrestees and to the broader community. Procedural justice research by social psychologists informs the explanation of why aggressive policing of misdemeanor and lesser offenses is likely to undermine compliance with the criminal law.

Procedural justice research establishes that the perception of being treated fairly is more important than a favorable outcome in predicting whether a person views authority as legitimate.⁸ Legitimacy, in turn, is critical in predicting willingness to abide by the law.⁹ Individuals make judgments about procedural fairness and legitimacy based on a number of factors.¹⁰ Unfortunately for the criminal justice system and for the millions of people subjected to summary arrest each year for minor and noncriminal order-maintenance offenses, the processing of minor offenses bears few of the hallmarks associated with perceptions of procedural

See also id. at 381 (“[S]ome of the most draconian consequences follow from misdemeanors and non-criminal violations.”).

7. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 324–25, 354 (2001) (affirming police authority to make warrantless arrests for petty offenses punishable only by fine; here, failure to wear seatbelt and carry license and proof of insurance).

8. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006) (1990). *See also* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 *LAW & SOC’Y REV.* 513 (2003) (demonstrating through empirical studies that public reaction to police depends largely on police legitimacy, and that police legitimacy depends largely on fairness of police procedures).

9. *See* Lawrence W. Sherman, *Policing for Crime Prevention*, in LAWRENCE W. SHERMAN, DENISE GOTTFREDSON, DORIS MACKENZIE, JOHN ECK, PETER REUTER & SHAWN BUSHWAY, *UNIV. OF MD., PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING: A REPORT TO THE UNITED STATES CONGRESS 8-1* (1997), available at <http://www.ncjrs.gov/docfiles/wholedoc.doc> (arguing that perception of police legitimacy affects rates of serious crime more drastically than many tactics of increased police presence).

10. *See infra* Part III.A.

fairness.¹¹ Furthermore, collateral consequences associated with even minor arrests have become so pervasive, severe, and long-lasting that they violate notions of proportionality.¹² In addition to collateral consequences, the direct costs of arrest, processing, and either disposition by plea or an attempt to contest charges are high. These costs are high even when the official sanction is low or nonexistent. The decision to pursue aggressive arrest-based order-maintenance campaigns that sweep millions into the criminal justice system must include an assessment of how the procedural justice, collateral costs, and direct costs of these policies may affect society. This paper addresses those issues.

In order to examine the panoply of costs of aggressive order-maintenance policies, this article uses New York City as a case study. Though I focus on New York City, the inquiry is relevant throughout the state, across the nation, and around the world as many jurisdictions adopt increasingly rigid approaches to disorder.¹³ In this article, I identify a number of burdens that are not necessary for effective order-maintenance policing and that, if eliminated, would not compromise any quality-of-life benefits or increase crime, but would rather decrease the disproportionate and accordingly unjust consequences that flow from arrest for misdemeanors and lesser offenses.

In Part I of this article, I will examine some of the underpinnings of New York's quality-of-life policing policies. Part II will examine the daily arrest numbers in New York City in recent years and use the contrast between "slow arrest days" and "busy arrest days" to examine the impact of aggressive policing. How many people are being arrested? For what offenses? With nearly 85% nonwhite arrestees, what is the racial impact of such aggressive policing? The procedural justice implications and costs to the police, criminal justice system, individuals accused, and their communities are examined in Part III. Finally, in Part IV, I will suggest a number of ways to reduce these costs to enhance, rather than undermine, compliance with the law, respect for the criminal justice system, and the ability of courts to administer justice in misdemeanor cases.

11. The lack of process in lower criminal courts is not a new development, nor does it appear to be entirely the result of caseload. *See, e.g.*, MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 261 (paperback ed. 1992) (comparing case processing in high-volume Connecticut courts with low-volume courts).

12. *See infra* Part III.B.

13. For more on other jurisdictions adopting aggressive order-maintenance policing tactics, see Tim Newburn, *Atlantic Crossings: 'Policy Transfer' and Crime Control in the USA and Britain*, 4 PUNISHMENT & SOC'Y 165, 167 (2002) (discussing influence of New York policing and limited experiments with "zero tolerance policing" in the United Kingdom), and BILL DIXON, *THE GLOBALISATION OF DEMOCRATIC POLICING: SECTOR POLICING AND ZERO TOLERANCE IN THE NEW SOUTH AFRICA* (2000), <http://web.uct.ac.za/depts/sjrp/publicat/global1.htm>.

I.

ZERO TOLERANCE POLICING

In 1994 New York City adopted “Zero Tolerance Policing” (ZTP)¹⁴ for minor quality-of-life offenses, one of a range of policing strategies rooted in the “Broken Windows” theory set forth in the article of the same name by James Q. Wilson and George L. Kelling.¹⁵ According to the Broken Windows theory, physical and social disorder (broken windows in houses or factories, abandoned lots, begging, loitering, and public drinking or urination) gives rise to fear, which leads inhabitants to stay at home and sends a signal to more serious criminals that no one cares about a block or neighborhood.¹⁶ This increases the likelihood of serious crimes in such areas.¹⁷

Accordingly, the Broken Windows theory encourages police to focus on maintaining order both to counteract fear of crime and to combat crime itself. Prevention of petty offenses to order will, the theory predicts, reduce fear and win community confidence, while also reducing serious crime attracted by disorder.¹⁸ Whether aggressive order-maintenance policing is responsible for any part of the drop in index crimes¹⁹ in the last fifteen years is highly contested.²⁰ This is not surprising, given the evidence

14. “Zero Tolerance Policing” is the practice of intervening to prevent disorder by means of summary arrest. See WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 228–29 (1998) (describing “Police Strategy Number 5 ‘Reclaiming the Public Spaces of New York’” as explicitly adopting a policy of arresting people for minor offenses, including panhandling, fare evasion, trespassing, public consumption of alcohol, and public urination).

15. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

16. *Id.* at 31–32.

17. *Id.* at 32.

18. *Id.* at 34.

19. “Index crimes” refers to FBI Uniform Crime Reports Index Crimes, which include eight serious offenses: murder and non-negligent homicide, rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. FBI, *About the UCR*, *supra* note 5.

20. For a thorough review of the ambiguous evidence that ZTP was actually responsible for the crime drop in New York City, see John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA 207, 226–28 (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006) (concluding that the effectiveness of ZTP “remains untested” because “[m]any strategies designed to lower the crime rate were implemented simultaneously, including: the quality-of-life initiative, hiring more officers, Compstat . . . and a variety of crime-specific efforts”). Other, better-supported explanations for the drop in crime include changes in demographics, shifts in the economy, preexisting anti-narcotics policing activity, and incapacitation. *Id.* See also Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, J. ECON. PERSP., Winter 2004, at 163 (attributing drop in crime to increased number of police, decreased use of crack, increased incarceration, and legalized abortion; and discounting policing strategies such as order-maintenance because crime dropped in both cities that adopted these strategies and cities that did not).

available at the time the article appeared. In the 1982 *Broken Windows* article, Wilson and Kelling develop their theory based on a project which placed foot patrols in several Newark, New Jersey neighborhoods. These police served an important role in order-maintenance and, although crime did *not* go down, residents in the neighborhood became significantly less fearful.²¹ These results are consistent with research that confirms that fear of crime is not actually closely related to the likelihood of victimization.²² Rather, fear may reflect the accumulated burden of “urban unease,” as early researchers in this field defined fear.²³ Fear is the result of the perception that an area is unpoliced and out of control and that the community is not responsive to these problems. It is the result of the perceived “threats” presented by the beggar, the homeless person, the mentally ill person, the drunk or drug addict, or the group of kids blocking the sidewalk.²⁴ Because fear occurs on an individual basis, “[t]hose who are much more afraid than their neighbors are the ones who are contributing most to fear,”²⁵ as measured in the aggregate for the neighborhood. Thus, fear can theoretically be significantly reduced by reducing these perceived threats regardless of whether the actual likelihood of victimization is decreased.²⁶

Despite the fact that the very experiment in order-maintenance policing²⁷ that was the basis for the *Broken Windows* article showed no effect on serious crime, the authors hypothesized that reduction in disorder would cause an actual reduction in crime.²⁸ The debate about whether crime reduction is achieved by either order-maintenance generally or ZTP

21. Wilson & Kelling, *supra* note 15, at 29.

22. The notion that fear is reduced for a neighborhood and hence all of its members ignores two important aspects of fear reduction. First, susceptibility to fear is a highly individual trait and varies from neighbor to neighbor; therefore, to speak of a fear level for a given neighborhood overlooks the wide range of individual levels of fear within that neighborhood. See RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS* 368 (2001). See also BRATTON & KNOBLER, *supra* note 14, at 151 (discussing polls showing that while 2–3% of all crime took place in subways, women believed the figure was 40–50% and men estimated 30–40%). Second, the community is made up of any number of groups that may react differently to order-maintenance policing. Thus, while fear may be reduced for elderly residents, or young single women, fear may be *increased* for teenage boys and their parents because of the aggressive policing of the young male portion of the population.

23. See TAYLOR, *supra* note 22, at 368.

24. Wilson & Kelling, *supra* note 15, at 29–30.

25. *Id.*

26. *Id.*

27. “Order-maintenance policing” includes aggressive order-maintenance policing or ZTP but does not necessarily depend on criminalization and summary arrest to achieve order. For example, in *Broken Windows*, the authors describe the police talking to disorderly civilians, enforcing informal rules without making arrests, and making arrests when disorderly citizens harassed others. Wilson & Kelling, *supra* note 15, at 30–31.

28. *Id.* at 38.

specifically is one that will likely never be resolved.²⁹ While a significant drop in serious crime has occurred while ZTP has been in effect in New York City, a similar drop in crime has taken place in jurisdictions that have not adopted ZTP.³⁰ Furthermore, the drop in crime began *before* ZTP or other significant order-maintenance policing was adopted in New York City.³¹ Finally, and perhaps most importantly, a number of other significant crime prevention approaches were adopted roughly concurrently to ZTP in New York City, and it is impossible to definitively attribute serious crime reduction to any one of these programs. Even the architect of ZTP in New York City, former NYPD Commissioner William Bratton, has indicated that the interplay of various aggressive policing strategies, including targeting and gathering information on guns, following crime patterns with Compstat (NYPD's computerized statistics crime mapping technology),³² and youth anticrime efforts, caused crime to drop in New York City.³³ While there are those who would attribute much of the crime drop in New York City to order-maintenance policing,³⁴ others see no solid evidence to support such a conclusion.³⁵ Whether the

29. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (replicating Wesley Skogan's empirical study that claimed to prove that order-maintenance policing reduced serious crime and concluding that the statistics did not support this conclusion); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 607 (1999) (noting that empirical studies indicate that disorder may be a part of crime rather than a cause).

30. In some of these jurisdictions, other, less aggressive, forms of order-maintenance policing have been adopted, such as community policing and problem-oriented policing. See Eck & Maguire, *supra* note 20, at 226 (noting that Boston, San Diego, and Washington, D.C., all experienced significant drops in index crimes using policing strategies other than aggressive order-maintenance policing). See also CTR. ON JUVENILE & CRIMINAL JUSTICE, SHATTERING "BROKEN WINDOWS": AN ANALYSIS OF SAN FRANCISCO'S ALTERNATIVE CRIME POLICIES 3-4 (1999), <http://www.cjcj.org/files/shattering.pdf> (noting that San Francisco experienced a drop in violent crimes similar to New York City's with a simultaneous decrease in misdemeanor arrests).

31. Eck & Maguire, *supra* note 20, at 226 (citing examples such as getting guns off the street and increasing the number of police officers).

32. BRATTON & KNOBLER, *supra* note 14, at 219-22, 227-30.

33. *Id.* at 290.

34. See, e.g., George L. Kelling & William H. Sousa, Jr., *Do Police Matter?: An Analysis of the Impact of New York City's Police Reforms*, 22 MANHATTAN INST. FOR POL'Y RES. CIVIC REP. 1 (2001), http://www.manhattan-institute.org/pdf/cr_22.pdf (citing correlation between high misdemeanor arrest rates precinct-by-precinct and a drop in crime as proof of Broken Windows theory). See also *id.* at 18 (interpreting empirical survey to demonstrate "that *citizens* broadly support the 'broken windows' point of view" (emphasis added)).

35. Harcourt, *supra* note 29; Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (concluding that order-maintenance policing does not reduce crime or affect criminal behavior).

drop in serious crime is a result of ZTP (or, as is most likely the case, partially the result of ZTP),³⁶ there can be no doubt that one primary aim of ZTP, reduction in disorder and reduction of fear-as-urban-unease in New York City, has been achieved to some extent.³⁷ To judge order-maintenance policing by its effect on “serious crime” overlooks the benefits in the form of reduced disorder and fear.³⁸ A final wrinkle in evaluating order-maintenance policing is the recognition that order-maintenance policing and ZTP are not necessarily one and the same. *Broken Windows* focused on physical disorder (broken windows and abandoned lots) and non-arrest interventions in social disorder (police asking questions and enforcing informal social norms).³⁹ Order-maintenance policing as described in *Broken Windows* neither demands nor suggests that zero tolerance arrest policies are efficient, desirable, or effective methods to achieve order and reduce fear.

The focus on this secondary effect of serious crime reduction as a justification for ZTP and other order-maintenance policing may be a reflection of the unease that police, criminologists, lawyers (including prosecutors), and society at large experience regarding criminally prosecuting citizens for disorderliness. By endlessly debating the weight of evidence supporting the indirect effect of aggressive order-maintenance policing on serious crime, we avoid the question of whether the costs of order-maintenance policing (in any given incarnation) outweigh the benefits.⁴⁰ While articles questioning the benefits of aggressive order-

36. I do not attempt to resolve this debate, and I believe that there is no practicable means of controlling for all variables (multiple policing innovations, demographic changes, drug-use preferences, economic changes, community efforts, etc.) to determine what independent contribution ZTP makes to crime reduction. In order to create an appropriately controlled experiment to test this contribution, one would have to designate adjacent blocks within a neighborhood, some to be policed according to ZTP for order and some to be policed without the arrests and citations that ZTP entails. These contiguous blocks would presumably have the same economic conditions, the same school systems, the same demographics, and be similar in all other relevant respects. Moreover, to isolate the ZTP effect it would be necessary to make sure that police presence is similar in the control area.

37. Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2488 (1997) (describing ZTP as “[o]ne such policy . . . with startlingly successful results in New York City” in terms of battling perceptions of criminal activity); Editorial, *Crimefighting Has Changed Forever*, N.Y. DAILY NEWS, Dec. 20, 2001, at 42 (“Stepped-up enforcement, plus zoning reforms, purged sex shops and led to a family-friendly Times Square.”).

38. For an article critiquing the critique of order-maintenance policing on the basis of lack of evidence of reduction in serious crime and urging a focus on the primary benefits of order maintenance, see David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381 (2004).

39. See Wilson & Kelling, *supra* note 15, at 31.

40. Also avoided are the larger questions of the constitutionality of such policing, and the proper reach of the criminal law. For discussions of these topics, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

maintenance policing point out various discrete costs of this approach—particularly in terms of race relations⁴¹ and liberty interests⁴²—there has been no examination of the full range of actual costs of ZTP to society, the criminal justice system, the police, or the targets of this policing and their families and communities. These costs include direct and collateral costs of arrest processing as well as the costs associated with the lack of procedural justice for minor offenses. An examination of these costs suggests ways to minimize them without abandoning a comprehensive approach to disorder and fear reduction. Nor would modifications necessarily reduce any secondary benefit in terms of reduction of serious crime, if this benefit does exist. Indeed, if the current arrest policies lead to judgments that undermine the legitimacy of law enforcement and legal institutions, reforming the process associated with minor offense policing may reduce both minor offenses and serious crimes. While some of these costs have been noted or explored, and some solutions have been proposed to avoid constitutional problems of vagueness and overbreadth (particularly the use of civil sanctions where loitering statutes are at issue),⁴³ there has been no effort to examine the particular types of arrests and their costs and to suggest diversion of offenses or changes in handling these cases to reduce the deleterious effects of ZTP.

II.

THE STATISTICAL FACE OF AGGRESSIVE ORDER-MAINTENANCE POLICING IN NEW YORK CITY

To evaluate the costs of aggressive order-maintenance policing, it is necessary to determine the number of arrests⁴⁴ caused by the decision to police minor offenses aggressively. We may be willing to absorb costs of \$100 or \$1000 dollars for each additional minor arrest if there are only 100

41. See, e.g., MAUER, *supra* note 2; Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998).

42. See, e.g., Harcourt, *supra* note 29, at 381–84.

43. See Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1064 (2003) (proposing search programs not focusing on general crime control be evaluated under a “civil restraint” rubric rather than a traditional Fourth Amendment standard); Livingston, *supra* note 40, at 638–40 (also proposing civil sanctions to avoid constitutional vagueness challenges). For an example of the Supreme Court invalidating a municipal loitering statute as unconstitutional, see *City of Chicago v. Morales*, 527 U.S. 41 (1999) (holding that legislature had to establish minimum guidelines to govern law enforcement and prevent excessive discretion).

44. By “arrest” I refer to a full summary arrest, a process which typically takes about twenty-four hours and is described further in Part III below. Those who receive summonses or “Desk Appearance Tickets” are not included in the “arrest” statistics discussed in this article.

or 1000 additional arrests per year. If, however, there are 100,000 additional arrests per year due to ZTP, we may wish to explore ways to reduce costs. This may be particularly true if these costs fall disproportionately on disadvantaged groups. A review of the arrest numbers and patterns in New York City in this section of the article demonstrates that the arrests resulting from ZTP are in the hundreds of thousands, are for particularly minor offenses, disproportionately affect people of color, and do not result in more seizures of weapons.

In this section I begin by looking at existing research comparing arrests before and after ZTP was adopted, and then specific arrest patterns from the years 2000 through 2005. The first comparison provides a sense of the overall increase in arrests for minor offenses, and the second examination provides a more nuanced view of daily policing patterns.⁴⁵ The breakdown of ZTP arrests by offense is provided because this information is necessary to assess whether the costs and penalties associated with ZTP are acceptable and proportionate.

A. Comparison of Non-Felony Arrests Before and After the Adoption of Zero Tolerance Policing

The push towards ZTP has led to a change in how police exercise discretion. Rather than issuing warnings, or choosing not to arrest individuals for minor offenses, discretion is typically exercised in favor of arrest.⁴⁶ To examine the resulting shifts in the number of arrests, types of offenses, demographics of arrestees, and outcomes of arrests, one can look to the work of Freda Solomon comparing non-felony arrests in New York City in 1989, before ZTP was adopted, to 1998, when the policy was well-entrenched.⁴⁷ The most striking changes can be summarized as follows:

First, the number of non-felony⁴⁸ arrests increased by approximately 90,000.⁴⁹ Before ZTP was adopted in 1989, there were approximately 86,000 non-felony arrests.⁵⁰ In 1998, there were 176,000.⁵¹

45. The use of empirical evidence in this section is descriptive. While patterns are examined, they are examined to give a sense of how many are arrested—who, and for what offenses. Except for the proposition that these arrests are the result of a policing choice (aggressive order-maintenance policing by means of summary arrest), the statistics in this section are not intended to “prove” a causal relation.

46. See BRATTON & KNOBLER, *supra* note 14, at 229.

47. Freda F. Solomon, *The Impact of Quality-Of-Life Policing*, N.Y. CITY CRIM. JUST. AGENCY RES. BRIEF, Aug. 2003, at 1, *available at* <http://www.cjareports.org/reports/brief3.pdf>.

48. These numbers include three types of offenses: A misdemeanors (punishable by up to one year in jail), B misdemeanors (punishable by up to six months in jail), and penal law violations (noncriminal offenses punishable by up to fifteen days in jail). In addition to arrests under the provisions of the New York State Penal Law code, thousands of arrests for violations of New York City regulations are made each year but are not reported to the state.

49. Solomon, *supra* note 47, at 2.

50. *Id.*

Second, the demographics of people arrested changed from 1989 to 1998. These changes include:

1. More people with no prior criminal records (approximately 90,000)⁵²
2. More young people ages sixteen to twenty without prior convictions (over 22,000)⁵³
3. Proportionally fewer white⁵⁴ people (from 18.9% in 1989 to 12.9% in 1998)⁵⁵
4. Proportionally more Hispanic people (from 27% in 1989 to 32% in 1998)⁵⁶

While the percentage of people arrested who were black remained essentially unchanged at 50%, this nevertheless represents about 45,000 additional arrests of black people because of the increase in the overall number of arrests by 90,000; this also means that the increase in Hispanic arrests amounts to over 32,000 additional arrests.⁵⁷

Third, the severity of arrest charges declined. Consistent with the focus on offenses to order rather than harms to people or property, the number of arrests for B misdemeanors (mostly marijuana possession) more than quadrupled (from 9208 to 43,540) from 1989 to 1998.⁵⁸ Fourth, the outcome of these arrests also shifted in significant ways. The percentage of cases disposed of at arraignment (the first court appearance) increased from 62% to 73%.⁵⁹ The number of arrests that did not result in conviction increased from 23% to 39%.⁶⁰ Despite the higher dismissal rate in 1998, there were nonetheless 42,000 more convictions in 1998 than in 1989.⁶¹ For those who received jail time in 1998, the median jail sentence shrank from twenty days to seven days.⁶²

Thus, as of 1998, the shift to ZTP had resulted in huge numbers of people—largely minorities, youths, and many without criminal records—being arrested and put through the system on especially minor charges, only to have their cases disposed of at the first appearance, and often

51. *Id.*

52. *Id.* at 3.

53. *Id.* at 4.

54. I use the terms “black,” “Hispanic,” and “white” because these are the terms police and criminal statistics agencies in New York use.

55. Solomon, *supra* note 47, at 2.

56. *Id.* at 4.

57. *Id.*

58. *Id.* at 2.

59. *Id.* at 5.

60. *Id.*

61. *Id.*

62. *Id.* at 6.

without conviction or jail time. While proponents of ZTP might see such treatment as relatively cost-free—after all, arrestees are walking away without jail time or a record—Part III below explores the hidden costs of this treatment.

B. Arrest Patterns in the Twenty-First Century

Before turning to these costs, I examine recent misdemeanor arrest patterns to identify arrests which appear to be the result of the exercise of discretion in favor of summary arrests. Specifically, I looked at the statistics for daily misdemeanor arrests in New York City in the years between 2000 and 2005. According to the New York State Division of Criminal Justice Services (DCJS), about 1.2 million arrests were made for misdemeanors in these six years.⁶³ This figure is reflected in Table 1, which lists the number of arrests by year and broad category of offense.

TABLE 1. NEW YORK CITY ARRESTS: 1998–2007⁶⁴

Year	Total	Felony	Violent	Misdemeanor	Drug	DWI	Property	Other
1998	345,332	130,170	42,768	215,162	82,532	4,226	69,857	58,547
1999	314,286	116,955	37,420	197,331	78,353	3,465	58,873	56,640
2000	337,881	113,213	35,974	224,668	102,712	3,434	58,502	60,020
2001	298,620	104,126	33,782	194,494	79,903	3,452	50,571	60,568
2002	289,339	99,632	31,557	189,707	80,337	3,770	47,282	58,318
2003	278,938	89,327	29,144	189,611	72,710	4,432	53,619	58,850
2004	282,957	92,643	28,023	190,314	62,115	6,425	55,713	66,061
2005	291,159	95,039	27,672	196,120	64,085	7,105	55,830	69,100
2006	303,414	97,156	27,516	206,258	68,879	7,925	59,422	70,032
2007	334,082	102,962	28,100	231,120	81,024	9,059	66,528	74,509

In addition to these arrests, the New York City Criminal Court reports that about 17,000 people per year were arrested for non-printable offenses between 2000 and 2004.⁶⁵ The most common of these offenses were

63. See *infra* Table 1.

64. New York State Division of Criminal Justice Services, Adult Arrests in New York City (2008), <http://www.criminaljustice.state.ny.us/crimnet/ojsa/arrests/nyc.htm>.

65. CRIMINAL COURT OF THE CITY OF N.Y., STATISTICS REPORT (2004) (on file with author). A non-printable offense is an offense that is not defined by the Penal Law and for which fingerprints are not authorized. These offenses include misdemeanors and traffic infractions, and may or may not be criminal. The DCJS does not track these arrests, and those arrested will not have criminal records associated with their fingerprints. While some people are given summonses for these offenses, others are subjected to summary arrest.

unlicensed general vending,⁶⁶ open containers,⁶⁷ Transit Authority offenses (failure to pay fare, disorderly conduct, misuse of transit system),⁶⁸ and aggressive solicitation.⁶⁹ To get beyond and behind these large numbers, I looked at daily arrest patterns and then at specific arrest charges for particular days.

By examining how many misdemeanor arrests were made on each day during this period, a pattern emerged. In all six years, the fewest arrests were made on Sundays, followed closely by Saturdays and then Fridays; in each of these years, the most arrests were made on Wednesdays.⁷⁰ In 2003, for instance, the average number of people arrested on Wednesdays for misdemeanors (679.7) was 221% higher than the average number of people arrested for misdemeanors on Sundays (306.3).⁷¹ And arrests on Fridays and Saturdays—days on which one might logically expect to see more arrests because of the increase in alcohol consumption on weekends—were actually significantly *lower* than on peak weekdays.⁷² Chart 1 demonstrates this weekly arrest pattern.⁷³

The differences in the numbers of misdemeanor arrests can be attributed to decisions made regarding the deployment of police resources.⁷⁴ In order to arrest people for minor offenses, teams of officers are organized to observe people buying drugs, to do sweeps of particular buildings, or to watch for people jumping turnstiles. “Busy arrest days,” therefore, are the result of aggressive order-maintenance policing targeted

66. *Id.* (reporting approximately 5000 arrests per year for violations of NEW YORK CITY, N.Y., ADMIN. CODE § 20-453 (2007)). Those arrested for this offense commonly sell watches, scarves, umbrellas, socks, and t-shirts without a vending license. However, there has been a cap on general vending licenses since 1983 (only 853 exist), and there is a waiting list of thousands. See Local 169V & Urban Justice Ctr., Street Vendors Unite! Recommendations for Improving the Regulations on Street Vending in New York City 1 (April 2003), <http://www.urbanjustice.org/pdf/publications/VendorsUnite.pdf>.

67. *Id.* (reporting approximately 5000 arrests per year for violations of NEW YORK CITY, N.Y., ADMIN. CODE § 10-125 (2007)).

68. *Id.* (reporting approximately 2000 arrests per year for violations of 21 N.Y. COMP. CODES R. & REGS. § 1050.6 (2009)).

69. *Id.* (reporting 500–700 arrests per year for violations of NEW YORK CITY, N.Y., ADMIN. CODE § 10-136 (2007)).

70. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., STATISTICS ON NEW YORK CITY MISDEMEANOR ARRESTS, 2000–2003 (2004) (on file with author) [hereinafter DCJS Arrest Statistics for 2000–2003]; N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., STATISTICS ON NEW YORK CITY MISDEMEANOR ARRESTS, 2004–2005 (2006) (on file with author) [hereinafter DCJS Arrest Statistics for 2004–2005].

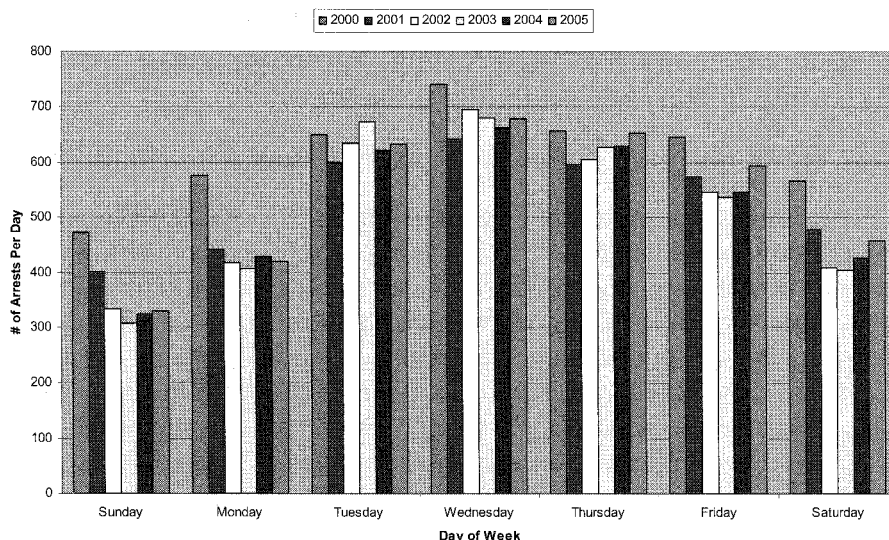
71. DCJS ARREST STATISTICS FOR 2000–2003, *supra* note 70.

72. In 2003, average misdemeanor arrests for Fridays and Saturdays were, respectively, 537.3 and 404.7. *Id.*

73. DCJS ARREST STATISTICS FOR 2000–2003, *supra* note 70; DCJS ARREST STATISTICS FOR 2004–2005, *supra* note 70.

74. A FOIL request to the NYPD for information about police staffing by day-of-week was denied because the statistics “could not be found.” Letter from NYPD Foil Unit, dated March 22, 2005 (on file with author).

Chart 1
Average Misdemeanor Arrests By Day of the Week



at particular locations. Other days are “slow arrest days” because of less aggressive policing of these offenses. By comparing slow arrest days to busy arrest days, we can generate an estimate of the number of arrests that are due to aggressive order-maintenance policing.

The arrest numbers for Sundays provide a possible baseline for misdemeanor policing. While the NYPD maintains a responsive capacity coupled with some policing of low-level victimless crimes on Sundays, they do not make large numbers of arrests for low-level offenses.⁷⁵ If, in the six years from 2000 through 2005, the NYPD had policed every day as they did on Sundays, there would have been approximately 340,000 fewer misdemeanor arrests.

These numbers and weekly patterns demonstrate that continuous and inflexible engagement in ZTP is not pursued in New York City. Instead, every week there are days when ZTP is practiced, and other days when it is not. Further, after September 11, 2001, there was a significant decline of about thirty-thousand misdemeanor arrests (15%) for about three years and no contemporaneous increase in serious crime.⁷⁶ Thus, looking at

75. I infer an adequacy of responsive capacity from the following: first, the NYPD planners would presumably aim for adequate responsive capacity; second, the city as viewed from inside the criminal courts or on the streets shows no noticeable rise in disorder or failure to police on Sundays; and third, since a number of nonviolent low-level arrests are made, we can assume that police response resources are not stretched beyond capacity to still conduct some order-maintenance policing.

76. When referring to the decline in crime, this article refers to the decline in FBI Uniform Crime Reports Index Crimes. See FBI, *About the UCR*, *supra* note 5.

these patterns helps to identify arrests that are the result of ZTP and suggests that inflexible arrest approaches are not absolutely necessary. Examining slower arrest days and comparing them to the high arrest days of midweek can provide clues about which arrests are potentially expendable. Who are the “extra” people being arrested on busy days? What offenses are they alleged to have committed?

C. Comparison of Slow Arrest Days to Busy Arrest Days

To answer these questions, I examine the specific misdemeanor arrests made on slow and busy arrest days. For purposes of comparison I also include days at the median. To avoid extreme cases, I eliminate the ten slowest days—typically caused by holidays and disasters—and, for the sake of balance, the ten busiest days—though I suspect that these are not the result of increased unlawfulness, but simply greater allocation of resources. The specific slow, median, and busy days that will be examined, together with the number of misdemeanor arrests made on each day, appear in Table 2 below.⁷⁷

TABLE 2. SLOW/MEDIAN/HIGH ARREST DAYS⁷⁸

	2000	Arr.	2001	Arr.	2002	Arr.	2003	Arr.	2004	Arr.	2005	Arr.
Slow 1	10/1	295	9/30	143	1/30	249	9/1	219	6/20	240	5/29	257
Slow 2	9/3	309	12/24	143	12/16	255	1/26	235	5/9	242	5/30	257
Slow 3	7/3	314	12/31	147	2/4	266	12/7	237	7/4	250	8/14	264
Median1	12/5	624	8/24	559	1/18	501	6/20	513	9/8	523	10/25	548
Median2	9/22	627	8/3	559	3/29	501	3/28	516	1/16	525	9/16	554
Median3	6/12	629	12/28	560	10/21	503	3/20	518	3/8	525	4/4	556
High 1	3/14	906	6/20	803	3/21	801	1/7	809	3/3	780	4/20	765
High 2	3/15	908	2/27	804	4/17	809	10/22	816	2/25	788	3/2	771
High 3	3/22	909	5/9	804	9/24	811	9/17	819	11/3	791	2/10	785

A cursory review of these figures shows that the number of misdemeanor arrests made on busy arrest days is typically about 500 to 600 more arrests per day than for slow days, and between 240 and 300 more arrests per day than the days that fall at the median. One step toward examining the wisdom of allocating substantial police resources to processing hundreds of additional arrests is to identify the nature of the

77. Data on particular arrest days were provided by the DCJS and are on file with the author. See *supra* note 70.

78. The median dates are the dates with the 182nd, 183rd, and 184th days respectively. The 183rd ranked day is the actual median day in the non-leap years. For 2000 and 2004—leap years—the same dates are used as, given the even number of days in the year, there is no actual median. In 2001 there were so few arrests in the days following 9/11 that Christmas Eve and New Year’s Eve were not among the slowest ten arrest days.

offenses that make up the additional daily arrests.⁷⁹ Are there more “serious” misdemeanors committed on these busy days? The answer to this question depends primarily, of course, on the reader’s definition of a “serious” misdemeanor. Is marijuana possession “serious”? Is gambling, prostitution, or possession of other drugs for personal use “serious”? Assuming these acts are serious, how serious?

For the purposes of the following analysis, I have divided the arrests into three categories that relate to the harm caused by the offense. In the first category, “Harm to Persons,” I include offenses that result in nonconsensual harm or potential harm to others, including assaults, menacing, stalking, sex offenses (sexual assaults, not prostitution), weapons possession, and the like. Also included in this category are driving while intoxicated and failure to register as a sex offender, as these offenses are designed to control for potential harm to persons. In the next category, “Harm to Property,” the offenses obviously cause some harm to owners but do not harm the owner physically. The essence of these offenses is that they represent either the theft or the destruction of property. A third category of offenses, “Offenses to Public Order,” include consensual or victimless crimes and other low-level offenses.⁸⁰

While some may argue that some of the crimes are miscategorized,⁸¹ I suspect that there will be little disagreement that the offenses to public order are somewhat less serious than the misdemeanor offenses to persons or property.⁸²

The reader need not agree with my categorization—perhaps she will consider prostitution as causing harm to persons,⁸³ or petit larceny

79. An arrest typically takes an officer off the street for hours. For a good description of the entire arrest process from the police perspective, see EDWARD CONLON, *BLUE BLOOD* 14–16 (2004).

80. See Appendix for tables indicating number of arrests by offense. Once again, the non-printable offenses are not included in this particular data set.

81. Indeed, the categorization reflects some ambiguous calls on the part of the author. Is graffiti more properly categorized as harm to property or harm to order? Because the offense most often results in only temporary alteration to often abandoned or unused properties and does not compromise the utility of, for example, a wall, a steel gate, or even a subway car, the offense seems more properly one of public order.

82. Of course there are bound to be baseless charges in any and all of these categories. With the exception of obstruction of administration of justice and resisting arrest, the division into categories of seriousness or lesser seriousness assumes that the arrests for any given offense are consistent with the elements as described in the New York Penal Law. For the offenses of obstruction and resisting arrest, the author’s experience (eight years in the Criminal Court) suggests that they be placed in the harms to order category, as the former most commonly involves a person questioning police conduct without interfering in any way, and the latter involves waving one’s arms (if injury results, the charge will invariably be raised to a felony assault).

83. See, e.g., Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 533 (2000) (discussing criminalization of exchanging sex for money as actually a significant cause of violent crime against prostitutes by police, pimps, johns, and others).

(shoplifting) to be less serious than some offenses to public order. The importance of the exercise lies in recognizing that, within the general category of misdemeanors, there are significant discrepancies in the gravity of the offenses. Despite these differences, those arrested for these offenses are treated in a way that is largely indistinguishable from felony arrestees.⁸⁴ As discussed below, the consequences of arrest and conviction for minor offenses have not been fully studied but have significant potential to adversely affect those arrested, their families, their communities, and the criminal justice system. Disaggregating and studying misdemeanor arrests is an exercise that should be undertaken if our policing strategy results in hundreds of thousands of minor arrests in a handful of years. Crucial questions to consider are whether particular offenses belong in the criminal justice system; and, if so, whether these offenses should be policed via summary arrest.

These statistics show that the least serious offenses make up the lion's share of the additional arrests on busy days.⁸⁵ This is true of the additional arrests made from slow to median days (approximately 300 per day), as well as the difference between slow and busy days (approximately 600 per day). Chart 2 shows the breakdown by offense of the "extra" arrests made on busy days as opposed to slow days.⁸⁶ Over 80% of these additional arrests were offenses to order. Thus of the approximately 600 additional arrests on a busy arrest day in any given year, on average nearly 200 are for marijuana possession, 120 for misdemeanor drug possession, 65 for turnstile jumping (theft of services), 40 for trespass, and 30 for prostitution-related offenses. Arrests for these offenses drop to the single figures on slow days and can rise by well over 1000% on busy days.

Of the Harm to Persons and Harm to Property offenses, only two offenses in the first category and one in the second rise consistently in all six years as policing intensifies. In the Harm to Persons category, there are two to five times more arrests for harassment offenses.⁸⁷ There are also typically two to three times more arrests for second degree criminal contempt⁸⁸ or bail jumping.⁸⁹ In the Harm to Property category, petit larceny⁹⁰ arrests nearly double from slow to busy arrests days each year.

84. See *infra* Part III.A. on arrest processing. Of course, sentencing differs substantially from category to category among misdemeanors and between misdemeanors and felonies. The arrest process, however, is the same.

85. See *infra* Chart 2 and Appendix (providing raw numbers).

86. The chart reflects the statistics for all six years (2000–2005). N=approximately 9000.

87. N.Y. PENAL LAW §§ 240.25–.26 (McKinney 2008).

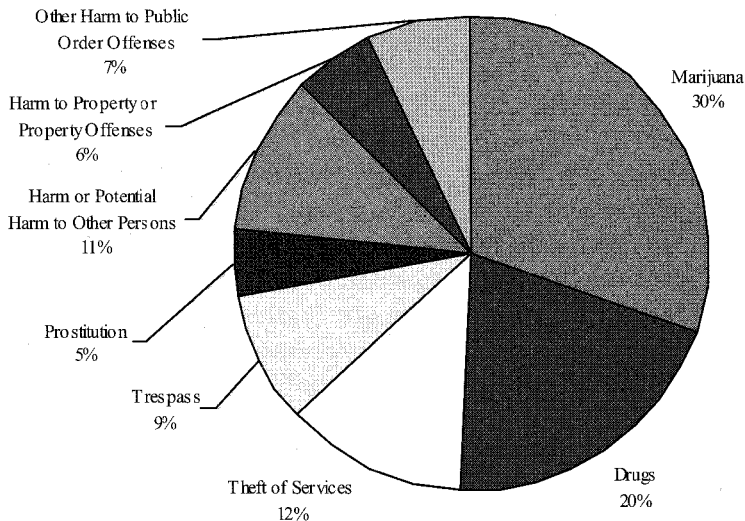
88. *Id.* § 215.50.

89. *Id.* § 215.55.

90. *Id.* § 155.25.

It seems likely that in all categories these rises are due to enforcement choices. It is unlikely that the number of shoplifters, amount of harassment, number of marijuana sales, or people who choose to ignore court orders (most often orders of protection), leading to contempt of court charges, rises coincidentally on these “busy” Wednesdays and Thursdays. There is not *more* crime; it is simply that it

Chart 2
Breakdown of Offenses for Extra Arrests on Busy Policing Days (2000-05)



is policed differently. Police go out looking for offenses, more specifically for arrests under the ZTP model of policing.⁹¹ On days when more police officers are on regular duty, discretion will more likely be exercised in favor of arresting shoplifters. Police may follow up on complaints for contempt of court or harassment.⁹² Warrant squads will look for those who missed court appearances and can be charged with bail jumping. Police teams will set out to make undercover buys or observations of marijuana sellers. Similarly, they will target spots where other controlled substances are purchased, resulting in the hundreds of non-marijuana drug arrests. Vehicle check points, and placing officers in “trespass buildings” to look for and search people who appear out of place, result in additional arrests for driving with a suspended license, trespassing, or possession of a controlled substance.

91. BRATTON & KNOBLER, *supra* note 14, at 229.

92. Harassment offenses often involve annoying phone calls and therefore require the police to seek out the accused based on a complaint.

With the exception of misdemeanor assault,⁹³ which involves no weapon and no serious injury, the more serious misdemeanors—sex offenses, unlawful imprisonment, unauthorized use of an automobile and autostrapping, endangering the welfare of a child, and driving while under the influence—show little or no correlation with increased misdemeanor policing. This is not an argument either for or against ZTP. In fact, this is what one would expect, because presumably these more serious offenses are policed even on slow days, though follow-ups on complaints and the exercise of discretion in favor of arrests may lead to a few more arrests on fully staffed days.

D. Weapons Justification for Zero Tolerance Policing

One significant justification for ZTP is that arresting people for minor offenses provides the opportunity to get weapons off the street.⁹⁴ However, the statistics do not establish a correlation between aggressive misdemeanor policing and the seizure of felony-grade weapons. Felony weapons arrests do not rise in tandem with misdemeanor arrests from slow days to busy days.⁹⁵ In the six years studied, felony weapons arrests were highest on busy arrest days in three years, highest on slow arrest days in two years, and highest on median days in one year. This distribution suggests that aggressive misdemeanor policing is not significantly contributing to gun seizures.⁹⁶ This is not to say that the perception that police are policing aggressively is not a deterrent to those who would carry weapons, but simply that the practice of making 200,000 misdemeanor arrests a year is not bringing in significant numbers of weapons.

On the other hand, in five of the six years, misdemeanor weapons arrests were higher on median days than on slow days, and higher on busy days than on median days (about ten more misdemeanor weapons arrests were made per day on busy days). Thus, in the course of arresting over 500 “extra” people on minor offenses, about ten misdemeanor weapons arrests were made.⁹⁷ However, it is important to assess the term “weapon” in this context and consider what it actually means. First, the weapons being seized are not loaded guns.⁹⁸ Under New York law, a “loaded” firearm would be charged as a misdemeanor *only* if seized at a home or

93. N.Y. PENAL LAW § 120.00 (McKinney 2008).

94. BRATTON & KNOBLER, *supra* note 14, at 154 (stating that one in twenty-one people arrested for fare evasion in the initial days of the Transit Authority crackdown on this offense had a weapon).

95. See Appendix, Felony Weapons Offenses table.

96. This is consistent with studies suggesting that focused problem-solving approaches are a more effective means of interdicting weapons.

97. See Appendix, Offenses: Harm or Potential Harm to Other Persons table.

98. N.Y. PENAL LAW §§ 265.01–.03 (McKinney 2008).

office.⁹⁹ Second, misdemeanor weapons charges are most often the result of possession of a knife or a box cutter.¹⁰⁰ Third, any prior criminal conviction can be used to increase the misdemeanor weapons charge to a felony.¹⁰¹ Thus, only a person with no prior criminal convictions will be charged with misdemeanor weapons possession. As often as not, these additional arrestees will be entirely law-abiding individuals who carry a knife or box cutter for work or protection.

Despite the weapons-based justification for ZTP, it appears that high arrest numbers do not lead to large numbers of gun arrests.

E. Racial Impact of Zero Tolerance Policing

A final issue that the statistics highlight is the demographics of misdemeanor policing. The communities from which defendants most often come are disproportionately affected by the aggressive misdemeanor policy. The data indicate that about 86% of people arrested for misdemeanors in New York City in the years 2000–2005 were nonwhite.¹⁰² About 48–50% were reported to be black and another 32–34% Hispanic. The 2001 census estimates that blacks and Latinos make up 27.09% and 27.80% of New Yorkers, respectively.¹⁰³ While race is only a rough proxy for community¹⁰⁴ and there is no assurance that those arrested are even from New York City, it seems reasonable to assume that the hundreds of thousands of arrests made during the past six years under an aggressive misdemeanor policing strategy have had a disproportionate impact on communities of color in New York City. Furthermore, many of the aggressive arrest approaches do have a geographic locus that affects those

99. *Id.* §§ 265.01–.03.

100. *Id.* §§ 265.01–.03. Also included are fake, nonfunctional, and unloaded guns; nunchaku; kung-fu stars; brass knuckles; etc. See Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 *FORDHAM URB. L.J.* 1157, 1167 (2004) (noting that the police could easily arrest all construction workers and charge them with weapons possession because of the utility knives on their belts).

101. N.Y. PENAL LAW § 265.02 (McKinney 2008).

102. *New York City Misdemeanor Arrests by Race-Ethnicity*, Div. of Criminal Justice Servs. (provided for 2000–05) (on file with author).

103. U.S. Census Bureau, American Community Survey, 2001 Supplementary Survey Profile for New York City, Table 1, <http://www.census.gov/acs/www/Products/Profiles/Single/2001/SS01/Tabular/160/16000US36510001.htm>. These percentages reflect people who reported that they were Hispanic, Latino, black, or of mixed heritage in the 2000 U.S. census.

104. It is my belief that the proxy is not as rough as it may seem. As mentioned above, the additional arrests on high arrest days are the result of concerted police action. Thus, teams will plan to put up vehicle check-points, do “vertical sweeps” in which they stop everyone in particular buildings, set up observation points to look for drugs, or stand beyond turnstiles to catch those who jump them. It is only natural that these efforts are focused on particular spots and in particular neighborhoods. Police officers waiting by a turnstile at Wall Street may achieve fewer turnstile jumper arrests than those waiting by a turnstile in a poorer area of the city.

residing in or passing through disadvantaged and largely minority communities.¹⁰⁵

As discussed in the next section, this impact resolves itself into very real economic losses in terms of lost earnings and surcharges. The long-term impact related to decreased employment opportunities, bars to public housing, and adverse credit ratings due to misdemeanor and violation arrests and convictions require long-term study but are likely to be substantial. Further, the impact is likely to be compounded by race. Finally, the perception of unfairness created by the racial discrepancy and the treatment received within the system may lead to procedural justice costs that decrease willingness to comply with the law.

III.

THE COSTS OF AGGRESSIVE ORDER-MAINTENANCE POLICING

Aggressive misdemeanor policing in New York City has a number of hidden costs. Many of these costs are externalized, born by individual arrestees, their families, their communities, and the larger community of taxpayers to the extent that arrests and criminal records lead to further arrests, incarceration, or un(der)employment. Other costs are borne directly by the system. The NYPD, District Attorney's offices, courts, and defenders' offices¹⁰⁶ all dedicate significant resources to moving papers and people for thousands of minor offenses. The costs are greater than the dollar amounts or loss of time for other matters. The very fabric of the criminal justice system suffers under the pressure to process the large number of people charged with misdemeanors and lesser offenses that flood the system. In this section, I will examine the costs, both direct and indirect, of ZTP policies. Although such costs will vary from system to system, identifying the many points at which costs could be minimized in the New York City system should prove instructive in reviewing any other system. I begin with costs to the defendant that arise directly from the arrest through disposition of a case. I will then explore common collateral consequences for the individual. Finally, I will outline costs to the community, the police, and the court system.

105. For a discussion of why police and prosecutorial resources focus on poor neighborhoods, thereby creating a disparate racial impact, see William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1821–24 (1998).

106. New York City does not have a single public defender office. Rather, the city relies on contracts with various private defender offices to provide defense services to the indigent.

A. The Process

1. The Arraignment Experience¹⁰⁷

In New York City, the process from arrest to the first appearance before a judge in court is the same for misdemeanor and felony charges. Regardless of the level of arrest offense, New York City permits twenty-four hours of detention prior to arraignment¹⁰⁸ and, for the most part, the process takes this amount of time.¹⁰⁹ Nor is it unusual for particular individuals to spend significantly more than twenty-four hours detained prior to arraignment.¹¹⁰ What is rare is for a person to be arraigned within less than fifteen hours of her arrest. Those charged with misdemeanors or lesser offenses are searched or strip-searched¹¹¹ and held in the same cells at precinct houses with alleged felons. They are then transported to central booking, where they are photographed, fingerprinted, and booked. At central booking and the arraignment courtrooms, those accused of felonies, misdemeanors, and even violations are held in large cells together.¹¹² These holding cells are lined with benches along the walls and have a single doorless toilet; there are

107. The description of the conditions of pre-arraignment detention and treatment are based on the author's own observations as a defense attorney for eight years in Manhattan Criminal Court.

108. See *People ex rel. Maxian v. Brown*, 570 N.E.2d 223, 223, 225 (N.Y. 1991) (interpreting the "unnecessary delay" requirement of N.Y. CRIM. PROC. LAW § 140.20(1) to entitle a person to release after twenty-four hours without arraignment unless an acceptable reason for the delay is given, and creating a presumption that a delay greater than twenty-four hours is unnecessary).

109. The average arrest to arraignment time in 2007 in New York City Courts was 24.07 hours. JUANITA BING NEWTON & WILLIAM H. ETHERIDGE III, CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2007, at 23 (Justin Barry ed., 2008) [hereinafter CRIMINAL COURT ANNUAL REPORT 2007], available at <http://www.courts.state.ny.us/courts/nyc/criminal/> (follow "2007" hyperlink under "NY City Criminal Court Annual Reports").

110. New York City Bill of Rights Defense Campaign, N.Y. Civil Liberties Union, Arrest to Arraignment in New York City: Oct.–Nov. 2004, http://www.nycborc.org/docs/nyc_arrest_to_arraignment.pdf. In the two-month period of October and November of 2004, 16,341 defendants (40% of those arrested) were held more than twenty-four hours. *Id.* at 5. Misdemeanants made up 9396 of these detainees. *Id.* at 4.

111. Benjamin Weiser, *New York Will Pay \$50 Million In 50,000 Illegal Strip-Searches*, N.Y. TIMES, Jan. 10, 2001, at A1. Although the NYPD Patrol Guide indicates that only those suspected of concealing a weapon or contraband should be strip-searched, the Civilian Complaint Review Board found that police were sometimes unaware of the proper procedures. N.Y. CITY CIVILIAN COMPLAINT REV. BOARD, STATUS REPORT, at i, 3 (Jan.–June 2004), available at <http://www.nyc.gov/html/ccrb/pdf/ccrbsemi2004.pdf>.

112. Women, juveniles, those with infectious diseases, and transvestites are generally separated from men. Facilities for these groups are usually less functional than the areas reserved for men, lacking even a bathroom, forcing the individuals to beg police officers to take them to the bathroom.

no beds and no washrooms.¹¹³ No one has the opportunity to brush their teeth or shower, and it is the rare individual who manages to sleep in the mayhem of these holding cells. During the hours in this cell, arrestees are given either cheese or bologna on white bread or Special K in a small box with milk, depending on the time of day or night. Roaches crawl over the remains of these meals,¹¹⁴ and the floors are either sticky or newly mopped with industrial strength cleaner which burns the eyes. The Appellate Division has characterized conditions of pre-arraignment detention as “notoriously harsh,” “chronically overcrowded and squalid.”¹¹⁵

The process is nearly as inadequate as the facilities.¹¹⁶ Attorneys meet with clients in booths attached to the main cells. The defendants are located by yelling an arrestee’s name into each cell until someone responds. Attorney and client sit (when the chairs are not broken) separated by heavy caging to review the charge or charges. The defense attorney is expected to be able to handle at least twenty misdemeanor or violation complaints in a shift.¹¹⁷ In an eight-hour shift with the court closing down for a ninety minute lunch break, the attorney has 19.5 minutes per case.¹¹⁸ These minutes are not all dedicated to explaining the clients’ rights, but include time to (1) review the case file; (2) meet and interview the client; (3) advise the client on likely outcomes and on what challenging the charges, pleading guilty, or accepting an adjournment in contemplation of dismissal (ACD)

113. While the description of the conditions is based on the author’s own observations, the arraignment experience is also described in Randy Schain, Op-Ed., *Doing Major Time for a Minor Crime*, N.Y. TIMES, Mar. 9, 1996, at A23.

114. Martha Rayner, *Conference Report: New York City’s Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1035, 1045 (2004) (describing the dehumanizing conditions, including vermin, in New York City Criminal Courts).

115. People *ex rel.* Maxian v. Brown, 561 N.Y.S.2d 418, 422 (N.Y. App. Div. 1990).

116. It has long been accepted that, for misdemeanors, “the process is the punishment.” In his aptly named description of the New Haven Criminal Court first published in 1979, Malcolm Feeley described a system in which an accused would gladly waive all rights (even after hours in jail) because the cost of asserting rights far outweighed the potential punishment. FEELEY, *supra* note 11, at 277.

117. Rayner, *supra* note 114, at 1054 (“[T]he sheer number of cases required professionals to value speed and efficiency over individualized justice.”).

118. In fact, defendants are usually brought to the arraignment pens in bunches, and there is considerable pressure on defense attorneys to interview the defendants as quickly as possible and then to make themselves available by sitting in court prepared to run through a number of dispositions in a row. Thus, rather than nineteen minutes, an attorney is likely to interview five to ten defendants in an hour, giving more time to the defendants with the charges that involve offenses against others or property, and often spending no more than three minutes telling a defendant who is there on a first arrest for a minor offense that he or she will be out shortly, will have to stay out of trouble, and may have to do community service. In many jurisdictions no counsel is provided to indigent defendants in misdemeanor cases at all. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 26 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

would involve; (4) make phone calls related to bail; (5) speak with family members in the court room; (6) discuss potential disposition with the Assistant District Attorney; and (7) actually stand up in front of the court on the case. Competent client-centered representation, particularly in light of the increasing consequences of noncriminal dispositions, cannot take place in such a short time.¹¹⁹ In reality, however, many attorneys give clients charged with minor offenses even shorter shrift. For everyone in the courthouse—with the exception of the defendant—an arraignment is so routine that there is little to talk about, and the sooner a defendant appears before the judge the sooner that defendant will be able to get out and go home. The typical offer for a first arrest of the type that rise exponentially on busy arrest days (marijuana possession, misdemeanor drug possession, turnstile jumping, or petit larceny) is some variation on a noncriminal disposition with or without a day of community service or a “treatment” program.¹²⁰ For a defendant with a nonviolent record who is not on parole or probation, the likely result is a plea to the charged offense for time already served in jail plus community service or a sentence of a few days.¹²¹ Over 60% of misdemeanor and lesser offense arrests are resolved by plea, dismissal, or ACD¹²² at the arraignment appearance in criminal court.¹²³ For those whose cases are not resolved, about 80% are released on their own recognizance, and the remainder are held on bail.¹²⁴

119. Steven Zeidman, *Perspective: Time to End Violation Pleas*, N.Y.L.J., Apr. 1, 2008, at 2.

120. These dispositions are based primarily on observations in Manhattan arraignments and may vary from borough to borough.

121. See Solomon, *supra* note 47, at 6 (noting that the median jail sentence for a person convicted of a misdemeanor in 1998 was seven days, including pretrial detention time).

122. An adjournment in contemplation of dismissal (“ACD”) results in the automatic dismissal of all charges six months (or one year for a family offense) after the arraignment unless the prosecutor makes a motion to restore the case to the calendar before the expiration of that time. N.Y. CRIM. PROC. LAW § 170.55(1)–(2) (McKinney 2008). An ACD pursuant to N.Y. CRIM. PROC. LAW § 170.55 requires the consent of all parties. *Id.* Section 170.56 permits a judge to give an ACD with a one-year dismissal date for the first marijuana arrest without the consent of the prosecutor. See N.Y. CRIM. PROC. LAW § 170.56(1)–(2) (governing ACDs for violations of the provisions of the penal code relating to marijuana). Often, the prosecutor will offer an ACD with community service, a short treatment program, or a “Stoplift” Program (a daylong educational program for first offender shoplifters that typically costs about \$100). A “straight” ACD is one that does not require any further action on the part of the defendant.

123. See N.Y. CITY CRIMINAL JUSTICE AGENCY, INC., ANNUAL REPORT 2006 (2007), available at <http://www.cjareports.org/reports/annual06.pdf> (noting that 45% of A misdemeanor cases in Manhattan, Queens, Brooklyn, and Staten Island and 49% in Bronx were disposed of at arraignment; 67% of other misdemeanor offenses citywide were disposed of at arraignment; and 92% of less severe offenses citywide, excluding the Bronx, and 75% in the Bronx were disposed of at arraignments). A total of 160,228 cases were disposed of at arraignments—3% of felony cases, 45% of A misdemeanors, 67% of B misdemeanors, and 92% of lesser offenses. *Id.* at 18.

124. See *id.* at 18 (reporting that defendants in 70% of continued A misdemeanor cases, 85% of other misdemeanors, and 88% of lesser offenses were released on their own recognizance).

2. Dispositions

For those who accept a disposition short of a “straight” ACD or dismissal, the costs of a single day of community service, or a sentence of time served on a disorderly conduct plea (the typical noncriminal alternative) is far higher than they might at first suspect. The completion of a single day of community service will generally demand significant portions of three different days (two of which will be weekdays).¹²⁵ First, the defendant must return to sign up for community service (if she is arraigned on a weekday morning, she may be able to accomplish this before leaving the courthouse if she is stalwart enough not to run directly for fresh air and a toothbrush). This must be done on a weekday morning. Second, the defendant must complete the community service. A request to perform the community service on a particular day of the week (including Saturday or Sunday) can be accommodated. Finally, the defendant needs to return to court to prove that she completed the community service (also on a weekday). Thus, between the twenty-four hours between arrest and release (usually resulting in at least one missed day of work), signing up for community service, completing it, and appearing at 9:30 a.m. in a court to prove that completion, an arrestee will typically miss between two and four days of work or school. For some employed individuals, particularly those in low-skill or service sector jobs, such absences can mean the loss of a job. In many more cases they mean the loss of income. For those with childcare responsibilities, these demands can lead to makeshift and suboptimal solutions affecting extended families. The subway fares required to keep these appointments alone can represent a significant expense to a person of limited means.

3. Mandatory Surcharge and Crime Victims’ Assistance Fee

When a person pleads guilty to a misdemeanor or violation under the Penal Law, a mandatory surcharge and Crime Victims’ Assistance Fee are imposed.¹²⁶ The surcharge for a misdemeanor is \$175, and it is \$95 for a violation.¹²⁷ The Crime Victims’ Assistance Fee is \$25 for all convictions.¹²⁸ For those with the means to pay this surcharge, an additional trip to the courthouse during business hours is required to pay these fees. But for many defendants, payment of \$200 for a misdemeanor or \$120 for a violation deprives them of money that might otherwise be spent on food, clothing, school supplies, housing expenses, and other necessities. Certainly, the hardships represented by these fixed mandatory fees are

125. Description of this process is based on the author’s observation in criminal court.

126. N.Y. PENAL LAW § 60.35(1) (McKinney 2008).

127. *Id.* § 60.35(1)(b)–(c).

128. *Id.* § 60.35(1)(a)–(c).

regressive: they are felt most by the needy, and are little more than an inconvenience to the rare wealthy or middle-class defendant. For those without the resources, some judges will enter civil judgment at the time of the plea and others will require the defendant to appear to pay the fee or plead poverty in court sixty days after the conviction. At this court appearance, a civil judgment will generally be entered against the impoverished defendant.¹²⁹ In addition to the multiple trips to the courthouse, the long-term effects of civil judgments are significant and seldom if ever explained to a defendant. Once a judgment is entered, a person may not be able to obtain loans to buy a car, to go to school, or to buy a house.¹³⁰ Without schooling or private transportation, job opportunities are limited in a way that is not intended by any of the individuals standing in criminal court or the police officer exercising discretion in favor of making a misdemeanor arrest. Job opportunities are further limited because many employers also look at credit reports that may reflect this civil judgment or arrest.¹³¹

4. Court Appearances

A decision not to accept a disposition at arraignment leads to a number of court appearances which impose a considerable burden on the accused and a lesser burden on the criminal justice system.¹³² These court appearances are generally between two and four weeks apart for non-incarcerated clients. Typical purposes of these appearances are for supporting depositions¹³³ and/or laboratory reports,¹³⁴ motion practice,¹³⁵

129. See N.Y. CRIM. PROC. LAW § 420.40(5) (McKinney 2008) (making applicable to mandatory surcharges and crime victim assistance fees the legal provisions governing collection of fines). It appears that civil judgments are entered in the vast majority of cases. The revenues from surcharges suggest that only a fraction of the 144,000 people convicted in Criminal Court in 2007 paid the mandatory surcharges. See CRIMINAL COURT ANNUAL REPORT 2007, *supra* note 109, at 16, 62 (reporting on number of citywide guilty pleas and convictions and revenues from surcharges).

130. Once the judgment is paid the credit record may be marred by the fact that a judgment was entered for years.

131. NYSBA RE-ENTRY REPORT, *supra* note 6, at 177.

132. The mean age at disposition (by dismissal or plea—trial cases take longer) of a case surviving arraignments in 2007 was 100 days. CRIMINAL COURT ANNUAL REPORT 2007, *supra* note 109, at 40, 41. Since court appearances are generally two to four weeks apart for non-incarcerated defendants, the mean age at disposition represents three to six appearances.

133. A supporting deposition is simply a sworn verified statement, typically made by a complainant in a misdemeanor case, that the allegations in the complaint filed at arraignment are true. N.Y. CRIM. PROC. LAW § 100.20 (McKinney 2008).

134. Laboratory reports or field tests may be required to satisfy pleading requirements that require facts of “evidentiary character” to support the charge. See *id.* § 100.15(3) (establishing pleading requirement for misdemeanor and felony complaints of factual allegations “of an evidentiary character” supporting or tending to support the charges).

135. Typically, defense motions may include motions to dismiss charges that are not supported by the allegations in the complaint and motions to suppress evidence that flows

suppression hearings, and trial dates.¹³⁶ Defendants are told to appear in misdemeanor parts¹³⁷ at 9:30 a.m. and wait there for defense counsel, prosecutor, and judge to be ready and for all the cases that are signed up ahead of their case to be called.¹³⁸ In addition, jailed defendants' cases will often be completed before non-incarcerated defendants to facilitate the functioning of corrections. Thus, a defendant who appears in court at or before 9:30 a.m. will frequently not have her case called for hours.¹³⁹ It is not uncommon for misdemeanor courts with heavy calendars to be running at 6:00 p.m.; defense attorneys from large offices can ask colleagues to "cover" their cases, and often an attorney who is there and has a case signed up by 9:20 a.m. will be able to get her clients out of the courtroom by 10:00 or 11:00 a.m. For attorneys with cases in different courtrooms, asking another attorney to cover is the only way to assure that a client who arrives early is not still in the courthouse in the afternoon or early evening. The trade-off, of course, is that a defendant may show up for court again and again and never see her attorney. For attorneys who do appear, hours are spent simply waiting for a case to be called. For appointed counsel (most often solo practitioners), this means hours of billable time that the city must pay.

When the court calls a case, it can appear from a defendant's perspective that nothing happens. Papers are exchanged (an affidavit or motions), adjournments are requested (for filing an affidavit or a motion), or a suppression hearing or trial is adjourned because defense counsel,

from violations of constitutional rights. They may be accompanied by a demand for a bill of particulars and discovery requests. Prosecutors respond to these motions and the judges decide the motions. At its most efficient, the defendant appears once: defense motions are filed on a non-court date, the prosecutor responds, and the judge issues a decision on the date the defendant appears. More often, the defense attorney, prosecutor, or judge requires more time to file or decide motions, and the defendant makes multiple appearances during this process.

136. In New York, as opposed to many jurisdictions, neither the defense nor the court will be told whether the prosecutor is ready for trial until the court appearance. The result is that the defendant and defense counsel often make multiple appearances for "trial" and are sent away with another court date.

137. The term "part" is synonymous with "courtroom" and will be used interchangeably throughout this discussion.

138. Generally a single judge and one or two prosecutors will be in a part for the entire day handling all cases. Defense counsel frequently have cases in multiple parts all scheduled for 9:30 a.m., and defendants often wait for their attorneys. Prosecutors, however, will frequently ask for a "second call" to determine whether they are ready for hearings or to get supporting depositions and lab reports, thus requiring the defendant to return and repeat the process another day.

139. In most New York misdemeanor courtrooms, the list of defendants on the calendar is not read in the morning, so the court does not know if a defendant is present at 9:30 a.m., and a defendant may be unsure whether she is in the right place. It is not uncommon for a defendant to sit for hours in the courtroom and nonetheless have a warrant issued based on her absence when she has gone out momentarily to use a phone or a bathroom.

prosecutor, or witnesses are otherwise engaged or for lack of available court parts.¹⁴⁰ In the rare instance when a hearing does take place,¹⁴¹ the parties are generally sent to a Judicial Hearing Officer, another wait begins, and at the end of a long day an advisory opinion based on the hearing is issued. Because this must be reviewed by a criminal court judge, another adjournment ensues whether or not the attorneys choose to put arguments in writing after the hearing. At the following appearance, a decision is issued and then the case is adjourned for trial. Misdemeanor trials almost never occur for offenses to public order; the tens of thousands of turnstile jumping and marijuana possession cases that go through the system every year do not result in any adjudicative process.¹⁴² Only a small fraction of 1% (0.2%) of misdemeanor and violation cases are ever tried in New York City.¹⁴³ The consequences of this for the legitimacy of the criminal justice system are discussed below.

140. Because there are so many misdemeanor cases and relatively few misdemeanor judges, there is a lack of trial and hearing courts for misdemeanor cases. To address this problem, the former Chief Judge of New York has created an experimental program in the Bronx to increase hearing and trial capacity for misdemeanors by combining felony and misdemeanor courts into a single Criminal Division. See James C. McKinley Jr., *Bronx Courts to Merge in Pilot Project to Trim Backlogs*, N.Y. TIMES, Feb. 10, 2004, at B4 (“[The] pilot project [is] meant to respond to a steep drop in felonies and a surge in misdemeanors over the past decade.”); JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2005, at 8 (2005), available at <http://www.courts.state.ny.us/admin/stateofjudiciary/soj2005.pdf> (confirming former Chief Judge Kaye’s motivation in establishing this merger).

141. Less than 1000 hearings have been conducted in misdemeanor or violation cases in any year since 2000. CRIMINAL COURT ANNUAL REPORT 2007, *supra* note 109, at 56.

142. Of 220,000 arrests in New York City in 2000, only 412 were tried. N.Y. State Div. of Criminal Justice Servs., New York City Misdemeanor Arrests and Trial Statistics for 2000–2003 (2004) (on file with author) [hereinafter DCJS Trial Statistics]. Of these, 299 were for harm to people, 31 for harm to property, and 77 for offenses which I included in the category of harm to order. *Id.* Six marijuana possession cases were tried (with three acquittals) despite tens of thousands of arrests for this offense. *Id.* Those who seek to challenge arrests for victimless crimes often get a speedy trial dismissal after months of appearing in court. See N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2008) (providing time limits on charges when the state is not ready to proceed with trial). In one turnstile jumping case, my client insisted from the start that he was not guilty and appeared time after time in court waiting to tell his story. When we arrived at the trial part, the prosecutor came in and moved to dismiss the case, stating that the police officer had no recollection of the arrest. The defendant never got to tell his story, the police officer’s credibility was never tested, and the defendant “won” his case without ever getting justice.

143. DCJS Trial Statistics, *supra* note 142.

B. Collateral Consequences¹⁴⁴ of Minor Offenses

The collateral consequences of a misdemeanor or even a violation conviction can be substantial and are often inadequately explained to a defendant.¹⁴⁵ They are also overlooked by most of the actors in the system and, if considered, may well violate our basic notions of proportionality.¹⁴⁶ Presumably when a defendant is asked to do a day of community service or is given a sentence of “time served” after a night in jail, there is no intention to ruin her life—to bar her from employment, loans, home, or family.¹⁴⁷ Further, the impact of an arrest alone (whether followed by conviction or not) has collateral consequences that have not been studied or quantified but that clearly should be considered in deciding whether the benefits of aggressive misdemeanor policing are worth the costs. A careful review of the costs also suggests a number of ways in which such costs can be reduced or even eliminated, which will be explored in the final section of this paper.

1. Individual Collateral Legal Consequences

The list of consequences associated with even a misdemeanor or violation conviction can include deportation, housing and employment penalties, ineligibility for public assistance and food stamps, future sentencing, parole or probation revocation and incarceration, driver's license suspension and, as mentioned above, civil judgments.¹⁴⁸

a) Immigration

For immigration purposes a single misdemeanor conviction can result in deportation, even for a legal permanent resident.¹⁴⁹ Drug convictions

144. I use this term broadly to include both legally mandated and legally permitted collateral consequences (such as deportation, exclusion from public housing, parole violations, and suspension from work for certain employers), as well as the consequences that flow from arrest or conviction that are not the result of legislative decisions (such as loss of income, reduction of employment opportunities, and impact on attitudes of different parties about the criminal justice system).

145. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 *FORDHAM URB. L.J.* 1067, 1077–81 (2004) (noting that judges and prosecutors are similarly unaware of collateral consequences and that judges and defense attorneys have no duty to ensure the defendant is aware of these consequences).

146. Robert M.A. Johnson, *Collateral Consequences*, *CRIM. JUST.*, Fall 2001, at 32, 33.

147. *Id.* (describing a prosecutor's struggle to do justice in a case where a conviction would result in the defendant's deportation despite the district attorney's belief that the defendant should not be separated from his family).

148. The lifetime ban for receipt of public assistance and food stamps applies only to felony drug convictions and therefore is not discussed. See 21 U.S.C. § 862a(a) (2006).

149. Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 *HARV. C.R.-C.L. L. REV.* 289, 340 (2008).

fall into this category.¹⁵⁰ Two convictions for offenses that demonstrate “moral turpitude” (such as jumping a turnstile or petit larceny) can have the same result.¹⁵¹ It is easy to imagine the victims of such fates as foreign, undocumented, non-English speaking, or marginal, but there is little to prevent a parent who has lived and worked here lawfully for decades from being deported.¹⁵² Such defendants are often entirely uninformed of deportation consequences because the defense attorneys fail to recognize their clients’ immigration status. For individuals who are more obviously immigrants, some defense attorneys do not consider it a part of their job to advise clients about immigration issues.¹⁵³ Even if an attorney does ask about immigration status in the few minutes allowed for a client interview, a client may choose not to reveal such information to a stranger. Many attorneys continue to believe that the likelihood of deportation for a misdemeanor is so remote that it is unnecessary to explain the possibility. Finally, there are defense attorneys who, regrettably, are still entirely unaware of the potential consequence of a guilty plea to a seemingly insignificant misdemeanor.¹⁵⁴ Suffice it to say, it is not uncommon for misdemeanors to result in deportation of defendants who remember no other home but the United States and have always maintained a legal immigration status. For those on the road to legal status, even noncriminal convictions (such as the ubiquitous “disorderly conduct”) can lead to adverse immigration consequences because the underlying records are available to immigration authorities. Because deportation is civil and collateral to the offense at hand, the defense counsel has no enforceable duty in many jurisdictions to advise defendants of immigration consequences,¹⁵⁵ and the non-citizen in immigration removal proceedings has no right to counsel.¹⁵⁶

150. 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

151. § 1227(a)(2)(A)(ii).

152. “In the year ending in June, as part of a new federal project, more than 1,800 foreign-born New Yorkers who had completed short terms at Rikers [Island] were turned over to immigration authorities for deportation, officials said. Many . . . were legal residents who had pleaded guilty to misdemeanors, unaware that they were making themselves deportable, or that the government could send them to wait in jail cells far from family, friends and legal help.” Nina Bernstein, *When a MetroCard Led Far Out of Town*, N.Y. TIMES, Oct. 11, 2004, at B1.

153. For a discussion of the narrow focus on criminal consequences of some defense attorneys, see Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 674–76 (2006).

154. Pinard, *supra* note 145, at 1080.

155. *United States v. Yearwood*, 863 F.2d 6, 7 (4th Cir. 1988); Flo Messier, *Alien Defendants in Criminal Proceedings: Justice Shrugs*, 36 AM. CRIM. L. REV. 1395, 1416–19 (1999) (discussing different approaches to defense attorney’s duty to advise defendant of immigration consequences).

156. Markowitz, *supra* note 149, at 341 (arguing that the expulsion of legal permanent aliens should be considered a criminal proceeding).

The costs of adverse immigration consequences are rarely confined to the individual deported. The ripples affect whole families and communities.¹⁵⁷ Even where a family member is not gainfully employed, often the presence of extended family permits others to work and support the family without paying for childcare. While a convicted criminal may properly be removed from a community to deter and protect the community, this rationale hardly applies to the vast majority of victimless misdemeanor convictions. The crimes are often unworthy of any jail time at all, yet detention and deportation can follow.

b) Public Housing

In the case of public housing, entire families may be evicted, become ineligible for public housing for a period of years, or be forced to bar members from the household.¹⁵⁸ The New York City Housing Authority deems a person ineligible for public housing for four years following the conviction (and end of sentence) for an A misdemeanor, three years after a B misdemeanor, and two years after a conviction for a violation under the penal law.¹⁵⁹ It is important to note that this period begins at the end of the sentence. Thus, when a defendant is given a conditional discharge on an A misdemeanor and told to stay out of trouble for a year, she will not be eligible for public housing for five years. Even sealed convictions for violations can serve as the basis for exclusion.¹⁶⁰ A person who is convicted of a misdemeanor while living in public housing can attempt to prove that they are rehabilitated, but the burden is on the applicant to prove such rehabilitation at a hearing.¹⁶¹

c) Incarceration

Though defendants rarely serve significant sentences for misdemeanors that do not harm others, misdemeanor arrests and convictions can lead to significant incarceration in jail and prison because

157. See Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1 (recounting story of daughter who suffers depression and is hospitalized and treated after her mother was deported after a routine visit to immigration). While the deportation described was not the result of an arrest, the circumstances are illustrative of the fact that one cannot pull out one thread without tugging at others within our society, and that the costs are not limited to the offender.

158. 42 U.S.C. § 13661 (2000).

159. LEGAL ACTION CTR., HOW TO GET SECTION 8 OR PUBLIC HOUSING EVEN WITH A CRIMINAL RECORD: A GUIDE FOR NEW YORK CITY HOUSING AUTHORITY APPLICANTS AND THEIR ADVOCATES 24–26 (2006), http://lac.org/doc_library/lac/publications/How_to_Get_Section_8_or_Public_Housing.pdf. If a defendant has three or more convictions in a five-year period, the bar is extended for an additional year from the last conviction. *Id.*

160. *Id.* at 1.

161. *Id.* at 3, 12–20.

the mere fact of arrest may lead to violations of parole or probation.¹⁶² Parolees and probationers are required to report any police contact, and even if they fight and prevail in a misdemeanor case, they are likely to spend the time fighting such a case in jail at the taxpayers' expense. Misdemeanors can also result in sentence enhancement under the Federal Sentencing Guidelines and similar sentencing models by giving a defendant points for criminal history.¹⁶³ In the city courts there is an informal sentence enhancement effect. Typically, for a first misdemeanor arrest for an offense to public order, a defendant will be offered a disorderly conduct violation. For the second arrest, she will be offered a misdemeanor conviction without jail time. For subsequent arrests, the prosecutor will recommend incrementally harsher sanctions, including longer jail sentences. Troubled teenagers who live in heavily policed areas are likely to develop a record of multiple arrests early in life, whereas their counterparts in less policed areas will rarely be arrested. Recently, Operation Spotlight—Mayor Bloomberg's effort to "build on the zero tolerance strategies of Mr. Giuliani"—has been singling out defendants with multiple misdemeanor convictions for particularly aggressive treatment.¹⁶⁴ Arrests or misdemeanor convictions may also be used in formulas that assess risk for recidivism and lead to denial of parole or supervised release.¹⁶⁵ The end result is that the costs of an arrest-based approach to order-maintenance policing will not simply include minimal jail sentences, but may *indirectly* result in longer imprisonment on unrelated charges.

d) Driving

In cases where a defendant is convicted of a crime such as possession of a controlled substance, her driver's license or eligibility to apply for a driver's license is automatically suspended for six months.¹⁶⁶ Defense

162. Statistics for parole violations are not available at either the state or federal level. Sara Steen & Tara Opsal, "*Punishment on the Installment Plan*": *Individual-Level Predictors of Parole Revocation in Four States*, 87 PRISON J. 344, 354 (2007).

163. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(c) (2008) (providing for up to four additional points for convictions resulting in sentences of less than sixty days, although not all misdemeanor offenses will be counted).

164. William K. Rashbaum, *In New Focus on Quality of Life, City Goes After Petty Criminals*, N.Y. TIMES, May 22, 2002, at A1. See also CRIMINAL COURT ANNUAL REPORT 2007, *supra* note 109, at 50 ("*Operation Spotlight* . . . focuses on chronic misdemeanor offenders who commit a disproportionate amount of crime throughout the city.").

165. John Monahan, *Prediction of Crime and Recidivism*, in 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1125, 1128 (Joshua Dressler ed., 2d ed. 2002) (citing early first arrest as predictive of likelihood of recidivism).

166. N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 2007). Federal law makes a portion of highway funding dependant on adopting such a policy unless the governor and legislature both state their opposition. 23 U.S.C. § 159 (1998). While at first blush this policy seems to be the height of rational law making—we certainly do not want people on

counsel can ask for a waiver, which is within the judge's discretion to grant (or to do so for limited purposes, such as to drive to and from work) based on "compelling circumstances."¹⁶⁷ As with many of the collateral consequences of conviction, this one is rarely mentioned, explained, or considered in the rapid-fire world of misdemeanor arraignments. In New York City, this consequence may not be as dire as it is in other parts of the state or country. Nevertheless, it significantly restricts access to jobs and schools and may increase the amount of time and money spent in commuting. For some defendants, such suspensions fuel a new round of misdemeanor arrests based on driving with a suspended license.

e) Employment

A staggering number of professions require licenses from state authorities.¹⁶⁸ These professions range from barbers to attorneys. Although in some licensing procedures arrests are only a hurdle to be surmounted, in many others convictions can be to a bar to employment. The Board of Education in New York City, for example, requires that employees immediately report any arrest (including for a violation) and often suspends or reassigns teachers from duty while a case is pending in criminal court.¹⁶⁹ The military will not accept applicants while a conditional discharge is still pending, even if there was no conviction or the

drugs driving—the policy is both over- and under-inclusive. The policy is under-inclusive in that it has no effect on legally prescribed drugs, and those portions of society who are not policed aggressively will continue to drive despite drug use. It is over-inclusive because any drug conviction leads to the license suspension; people who would never drive under the influence are nevertheless barred from driving. We may choose to accept such a policy anyway, but we ought to examine the impact on employment, education, and social capital before taking licenses from drivers who have not been convicted for any traffic-related infraction.

167. N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 2007).

168. For a list of over 100 professions that require licenses in New York, see N.Y. State Dep't of Labor, Occupations Licensed or Certified by New York State (last visited May 26, 2009), <http://www.labor.state.ny.us/workforceindustrydata/lstrain.shtml#olcnys>.

169. Procedures in Cases of the Arrest of Employees, N.Y. City Dep't of Educ. Chancellor's Reg. C-105, at 7-9 (2003), *available at* <http://docs.nycenet.edu/docushare/dsweb/Get/Document-55/C-105.pdf>. The result of this preemptive suspension policy can mean the loss of talented and dedicated school teachers and principals while questionable arrests for minor offenses drag through the school system. See CIVIL RIGHTS BUREAU, OFFICE OF THE ATT'Y GEN., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 80-82 (1999) (describing the case of a black high school science teacher who was arrested after questioning an officer who stopped his car about the basis for the stop, and was then prevented from teaching during several months, until the charges against him were dismissed). This is particularly the case where police are now stationed in schools and arrest school faculty for contradicting their mandates. See Elissa Gootman, *Arrest of a Bronx Principal Spurs Criticism of the City*, N.Y. TIMES, Feb. 9, 2005, at B3 (describing reassignment of a principle arrested by on-site police after attempting to moderate a dispute between an officer and a student).

conviction was for a noncriminal offense.¹⁷⁰ While New York State Human Rights Law has provisions intended to protect people with convictions from discrimination,¹⁷¹ the easy availability on commercial databases of criminal records (and even noncriminal records) undermines these provisions.¹⁷² Further, both state and federal criminal databases are incomplete and inaccurate.¹⁷³ These errors mean that even people with no criminal record may be denied employment because of inaccurate information in criminal databases.

Even where no bar to employment exists, employers favor applicants who have not had contact with the criminal justice system. A recent study of the impact of incarceration on the employment opportunities of college-educated job applicants demonstrated that, though applicants were otherwise equally qualified, the criminal record of a white job applicant reduced the likelihood of a positive response (an offer or a callback) by 50% (from 34% to 17%).¹⁷⁴ For a black candidate with no convictions whatsoever and the same qualifications, the likelihood of getting a callback was only 14% (less than a white person with a conviction).¹⁷⁵ A similarly qualified black applicant with a conviction received callbacks in only 5% of job applications.¹⁷⁶ While the study examined the impact of a felony

170. Gary Muldoon, *Collateral Effects of a Criminal Conviction*, N.Y. ST. B.J., July–Aug. 1998, at 26, 29. By contrast, the military has become increasingly willing to grant waivers for those with misdemeanor, or even felony, convictions. Lizette Alvarez, *Army and Marine Corps Grant More Felony Waivers*, N.Y. TIMES, Apr. 22, 2008, at A21.

171. N.Y. EXEC. LAW § 296(15) (McKinney 2008); N.Y. CORRECT. LAW §§ 750–753 (McKinney 2008). Employers with more than ten employees may not deny employment or licensure because of a criminal record “unless there is a *direct relationship* between the offense and the job or license sought, or unless hiring or licensure would create an unreasonable risk to property or to public or individual safety.” Legal Action Center, Overview of State Laws that Ban Discrimination By Employers 4, http://www.lac.org/toolkits/standards/Fourteen_State_Laws.pdf (last visited Feb. 15, 2009).

172. OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, *supra* note 6, at 53–55; NYSBA RE-ENTRY REPORT, *supra* note 6, at 384.

173. OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, *supra* note 6, at 16–17; NYSBA RE-ENTRY REPORT, *supra* note 6, at 386 (reporting that 87% of New York DCJS rap sheets contain errors).

174. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 957–58 (2003). To examine the effect of a criminal record, a pair of black and a pair of white applicants applied for the same entry-level jobs in a number of fields. *Id.* at 946–47. Their resumes were designed to reflect the same qualifications, and they were trained to fill out job applications and answer interview questions in the same ways. *Id.* at 957 n.33. The experiment participants were also chosen to be of similar attractiveness and pleasantness. *Id.* Each candidate applied to half of the jobs indicating no criminal record and another half indicating a criminal record. *Id.* at 947. The original experiment took place in Milwaukee, but the experiment has been repeated in New York with Latino, black, and white applicants. See DEVAH PAGER & BRUCE WESTERN, RACE AT WORK: REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET (2005), *available at* http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf.

175. PAGER, *supra* note 174, at 957–58.

176. *Id.* at 958.

conviction followed by incarceration on the ability to obtain employment, it is likely that a misdemeanor conviction would have significant adverse impact on black job applicants, particularly in light of the fact that black applicants with no felony record were already less likely to get a job than white applicants with a record.¹⁷⁷

This assertion is confirmed by several older studies which indicate that, all else being equal, contact with the criminal justice system (even contact resulting in acquittal) is likely to negatively affect employment opportunities.¹⁷⁸ Where records of convictions for misdemeanors are erroneous, employers are nonetheless unlikely to look beyond the conviction. A recent Bronx Defenders publication describes a client whose criminal record indicated erroneously that he had a 1993 misdemeanor conviction.¹⁷⁹ Although the defendant had no other arrests eleven years later, a number of employers refused him employment, citing this conviction.

While a study is needed to determine the impact of misdemeanor or violation convictions and arrests in terms of employment opportunity, it is quite clear that the impact exists and is negative. It is also clear that the family of a defendant who is unable to obtain gainful employment is likely to suffer.

2. Impact on the Community

The impact on the communities that are subjected to the greatest policing will, of course, be mixed. On the one hand, to the extent that policing efforts result in more order and/or less fear, the benefits may be very positive. On the other hand, the externalized costs of thousands of arrests are not limited to the arrestees.¹⁸⁰ Loss of income or employment due to an arrest for a minor offense affects not only the wage earner but also her entire family. Similarly, payment of surcharges or civil judgments that mar credit records also affect the economic well-being of entire families. Evictions or exclusions from public housing tear at the fabric of families. Barriers to work, education, and military service in the form of

177. *Id.*

178. *Id.* at 942–43 (citing, e.g., Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962); R.H. Finn & Patricia A. Fontaine, *The Association Between Selected Characteristics and Perceived Employability of Offenders*, 12 CRIM. JUST. & BEHAV. 353 (1985)).

179. *Back to Work! The Civil Action Project Helps Clear a Client's Record*, BRONX DEFENDERS UPDATE (Bronx Defenders, Bronx, N.Y.), Spring 2004.

180. See Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137, 163 (1997) (noting that tough-on-drug policies tend to “exacerbate the precursors to social organization disruption such as low economic status, family disruption, and unemployment”).

misdemeanor offenses limit the opportunities not only of the arrestee, but also of her entire family. As suggested by the work of Devah Pager, the perception of criminality may attach to young men of color who have no convictions and make their likelihood of even being interviewed for an entry-level job less than a white person with a conviction.¹⁸¹ Similarly, ZTP reinforces the stereotype of black criminality.¹⁸² It is easy to imagine that only “criminals” are affected by these policing decisions, but the repercussions of being arrested for an open container of alcohol or for selling umbrellas on the street in an attempt to earn a living for one’s family are borne by the larger community, and indeed by blacks and Latinos across the country.¹⁸³

3. Costs to the Police Department

The Police Department is burdened by the substantial overtime costs incurred processing misdemeanor arrests.¹⁸⁴ Of course, even when police are not drawing overtime pay, the choice to process an arrest for a misdemeanor or noncriminal offense removes the police officer from the street for several hours. In addition to these concrete costs, the police suffer from a loss of legitimacy in some communities.¹⁸⁵ For individuals subjected to arrest in a system where people of color are heavily overrepresented, the experience creates or strengthens perceptions of race and class biases on the part of the police.¹⁸⁶ The person arrested for having an open beer on a neighborhood stoop is fully aware that such rules are flouted in Central Park during classical music performances with no repercussions.¹⁸⁷ Police officers themselves have complained that

181. PAGER, *supra* note 174, at 960. See also Meares, *supra* note 41, at 678 (discussing stigmatizing effect of criminal justice system on law abiders).

182. Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 815 (1999) (“[T]he damage inflicted by the social norm of presumed Black criminality is immeasurable.”).

183. Meares, *supra* note 180, at 163.

184. In 2003, sixty-three million dollars was spent in arrest processing, with the average overtime cost per arrest in New York City at \$183. BERNARD O’BRIEN, N.Y. CITY INDEP. BUDGET OFFICE, FISCAL BRIEF, POLICE OVERTIME: TRACKING THE BIG GROWTH IN SPENDING 7 (2004), available at <http://www.ibo.nyc.ny.us/iboreports/NYPDOTfiscalBrief.pdf>. The budget for Operation Condor, which targets narcotics and quality-of-life offenses, peaked at over 100 million dollars per year for overtime costs in the fiscal year ending June 2001. Kevin Flynn, *City’s Deficit Forces Police to Study Cuts in Overtime*, N.Y. TIMES, Mar. 15, 2002, at B1.

185. Roberts, *supra* note 182, at 817.

186. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 10–11 (2002).

187. Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1267 (2000) (“[D]ata suggest that favorable perceptions of the police are negatively correlated with arrest rates for low-level offenses of vandalism and vagrancy, and positively correlated with arrest rates for violent crimes.”).

aggressive policing of quality-of-life offenses has made them feel “unpopular, even despised, in neighborhoods they helped make safer.”¹⁸⁸

4. *Procedural Justice and the Criminal Justice System*

Research conducted in the field of procedural justice reveals additional costs associated with the way minor criminal cases are currently processed.¹⁸⁹ This valuable work demonstrates that a person subjected to the justice system will evaluate that system based on the perceived “fairness” of the process, rather than the favorability of the outcome.¹⁹⁰ Fairness judgments lead to the following results: first, to the extent that procedures are seen as “fair,” the system will be seen as legitimate; and second, legitimacy leads to a willingness to comply with societal norms. On the other hand, the perception that a process is *not* “fair” may result in a sense of betrayal and defiance. Thus, being subjected to procedures that are perceived as “unfair” may lead individuals to reoffend.¹⁹¹ At the very least, being subjected to procedures that are seen as unfair is unlikely to deter future similar behavior.¹⁹²

Unfortunately, the process associated with minor offenses in the criminal justice system bears few of the hallmarks that social psychologists have identified as important to the perception of procedural justice. It is less important that the *outcomes* for minor offenses in the criminal justice system be “favorable” (dismissals, non-criminal convictions, community service, and little or no jail time are common dispositions).¹⁹³ Rather, the

188. Kevin Flynn, *Police Feel Scorn on Beat and Pressure from Above*, N.Y. TIMES, Dec. 26, 2000, at A1.

189. LIND & TYLER, *supra* note 8, at 94–95.

190. *Id.* at 1–2.

191. See Robert White, *Curtailing Youth: A Critique of Coercive Crime Prevention*, in CIVIL REMEDIES AND CRIME PREVENTION 117, 124 (Lorraine Green Mazerolle & Jan Roehl eds., 1998) (“[A] consequence of street policing as crime prevention . . . is the creation of ‘criminals.’”); Jeffrey Fagan, Valerie West & Jan Holland, *Neighborhood, Crime, and Incarceration in New York City*, 36 COLUM. HUM. RTS. L. REV. 71, 97 (2004) (explaining that drug enforcement appears to have an adverse effect on crime rates); Raymond Paternoster, Ronet Bachman, Robert Brame & Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 163, 182–84, 192 (1997) (in a randomized study of domestic violence arrests, defendants who were treated politely and given an opportunity to speak were less likely to reoffend than those who were treated less politely); Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445, 460–61 (1993) (proposing that defiance to unfair sanctions may explain reoffending for some individuals).

192. For example, in an article about his experience being arrested in Red Hook for disorderly conduct as a result of being drunk in public, the author indicated that he went straight out to purchase more beer, and a co-arrestee stated that he was going to buy more marijuana upon his release. Christopher Ketcham, *Roach Motel*, SALON, Oct. 17, 2002, http://archive.salon.com/mwt/feature/2002/10/17/jail_time/.

193. See discussion *supra* Part II.A.

elements associated with fair process have been identified by some scholars as representativeness, consistency, impartiality, accuracy, correctability, and ethicality.¹⁹⁴

The first of these elements, representativeness, refers to the opportunity to consider everyone's concerns, most importantly to give voice to all participants.¹⁹⁵ Procedural justice research demonstrates that even when a person is given the opportunity to express her views *after* an unfavorable decision has been made, the opportunity to be heard will result in a more favorable view of the fairness of the process.¹⁹⁶ Unfortunately, both the adversarial system and the system for adjudicating minor offenses deprive arrestees of the opportunity to make themselves heard. For a person who wishes to fight a case, defense counsel must guard the right to remain silent and will instruct the client to remain silent during the many appearances that precede the ultimate dismissal without a trial for the typical misdemeanor or noncriminal offense. Making statements to the court simply creates evidence that is fodder for later cross-examination. Even the attorney's statements can be used to impeach a defendant at trial.¹⁹⁷ Though the cases are unlikely to ever be tried, making a statement, naming defense witnesses, or revealing any part of the defense case before trial is a strategic mistake that few defense attorneys make.¹⁹⁸ While the typical arrestee on these minor cases is represented by counsel, that representation actually leads to a lack of "representativeness" by systematically silencing the arrestee and not giving voice to the defendant for the months that a case may be pending.

For a defendant who opts to take whatever deal is offered at arraignments, the only answer that the court wants to hear from her is a series of "yes" answers to leading questions about whether she is guilty and whether she is waiving her rights voluntarily. The defendant who attempts to explain, particularly one who attempts to offer a semi-exculpatory explanation, is abruptly and sometimes harshly hushed and told that if she does not want the deal, she does not have to take it. One danger of letting anyone speak, even to apologize, is that she may unwittingly articulate a defense and disrupt whatever disposition has been agreed to. The typical appearance, after twenty hours of waiting, is rarely longer than five minutes,

194. TOM R. TYLER, ROBERT J. BOECKMANN, HEATHER J. SMITH & YUEN J. HUO, *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 90–93 (1997). See LIND & TYLER, *supra* note 8, at 94–101, for a discussion of process control.

195. TYLER, BOECKMANN, SMITH & HUO, *supra* note 194, at 91.

196. *Id.* at 90.

197. See, e.g., *People v. Brown*, 98 N.Y.2d 226 (2002); *People v. Rivera*, 58 A.D.2d 147, 148 (N.Y. App. Div. 1977), *aff'd*, 45 N.Y.2d 989 (1978).

198. RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 8-208 (11th ed. 1995). Sometimes a defense attorney will disclose the defense if necessary to obtain favorable bail terms (so if one has spoken to witnesses or confirmed an alibi this may be disclosed), but this is rarely at issue in a minor case.

and during that time there is no opportunity for a person to explain, apologize, or admit or deny her conduct. In the failure to give arrestees a voice, the criminal justice system loses a critical opportunity to gain legitimacy and foster willingness to comply with the law.

Consistency refers to the consistency across groups and over time.¹⁹⁹ From the perspective of a person arrested and appearing in the criminal courts in New York City, the racial disparities in arrest numbers alone undermine sought-after consistency, regardless of whether there is any racial disparity with regard to outcome. Further, because there are many defendants with different records, and various judges treat minor offenses in very different ways, the outcomes will appear to vary significantly for similar arrests among defendants and over time.²⁰⁰ While I suspect that there is significant consistency based on offense record, arrest to arraignment time, and other factors, there would likely be no *appearance* of consistency to the casual observer or to a person going through the system.

Impartiality²⁰¹ refers not so much to the fair treatment of people across groups but to the demeanor of the decisionmaker. Does the decisionmaker appear to be neutral between the parties and not motivated by self interest? In this regard, it is difficult to venture an opinion as to the perceptions of arrestees, family members waiting for arrestees, and other visitors to courtrooms. Judges vary in their demeanor, but most arraignment judges have little to do with either side. Some will listen more politely to prosecutors and express impatience with defense counsel, but others will express concern for defendants or skepticism for prosecutors, or even impatience with prosecutors for inflexibility on minor offenses. It is likely that only a survey could begin to uncover these perceptions and that they might vary from judge to judge. My guess is that, in this regard, the criminal justice system in New York City might score fairly well because many of the judges display a relatively restrained and neutral demeanor.²⁰²

Accuracy is another fundamental component by which people evaluate the fairness of procedures.²⁰³ The perception of accuracy is based on the use of accurate information and thorough fact-finding to reach

199. TYLER, BOECKMANN, SMITH & HUO, *supra* note 194, at 90.

200. Repeat players and institutional actors are likely to discern patterns that suggest there is a great deal of consistency on many minor offenses. Prosecutors offer “standard deals” for particular offenses. Nevertheless, defense attorneys are able to persuade prosecutors to undercut standard offers in conversations prior to court appearances, and frequently the reason for such concessions is not stated on the record.

201. Impartiality includes bias suppression, honesty, and effort to be fair. LIND & TYLER, *supra* note 8, at 107–08; TYLER, BOECKMANN, SMITH & HUO, *supra* note 194, at 90.

202. The outcome in local courts across the state and across the country might be very different. See William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1 (describing the “second-class system of justice” perpetuated in New York’s local courts, which hear over 300,000 criminal cases a year).

203. TYLER, *supra* note 8, at 118–20.

informed opinions. Since there is no testing of accuracy of information, very little information,²⁰⁴ and a willingness to dispose of minor cases with no fact-finding, the system for adjudication of minor offenses provides no appearance that accuracy is important. In fact, in the cases where a person accepting a plea states that she did not commit an offense, she is more often than not told that she cannot have the plea if she does not admit the offense, and is then asked again whether she committed the offense. If she says yes on the second try (or even a third if the judge is patient) and goes on to agree that she is saying yes because it is true, this is clearly good enough for all concerned.

Correctability refers to the availability of a means for review and correction of erroneous results.²⁰⁵ It is provided in the criminal court context by the availability of appellate review. Whether the availability of appeal for such summary proceedings is sufficient to satisfy this element or not is not clear. Given the fact that over 99% of convictions are obtained by guilty pleas and that pleading guilty substantially limits the available grounds for appeal, the scope of appellate review is quite limited. Nevertheless, it is the perception of correctability that is important, and the fact that all defendants who plead guilty are advised that they have the right to appeal may create a perception of correctability.

A final and critical element contributing to perceptions of procedural justice is the ethicality of the process. Factors that procedural justice scholars relate to ethicality include whether the process comports with fundamental moral and ethical values, whether rights are respected, and whether people are treated politely and with respect.²⁰⁶ These judgments may relate to either court process or treatment at arrest or during pre-arraignment detention. Narratives about the arrest experience for minor offenses suggest that at every juncture arrestees may experience treatment that does not comport with ethicality judgments.²⁰⁷ For example, arrestees are certainly not housed or fed decently, and police may not treat them politely. Defense attorneys may be skeptical, particularly of claims of innocence, or give little time or attention to defendants; and defendants

204. At arraignments, where 60% of cases are disposed of, there are typically no police reports, no supporting documents, and only a short factual description of the offense in the accusatory instrument. While some boroughs have open file discovery, the police fill out very little paperwork on minor arrests and tend to use boiler-plate language. For a discussion of discovery in misdemeanor cases in New York, see Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1128–40 (2004).

205. TYLER, BOECKMANN, SMITH & HUO, *supra* note 194, at 91.

206. *Id.* at 94; LIND & TYLER, *supra* note 8, at 109.

207. See, e.g., Bryonn Bain, *Three Days in NYC Jails*, VILLAGE VOICE, Sept. 24–30, 2003, at 30; Ketcham, *supra* note 192; The Assimilated Negro, *The Time I Got Arrested for Holding a DVD*, <http://theassimilatednegro.blogspot.com/2005/11/time-i-got-arrested-for-holding-dvd.html> (Nov. 2, 2005, 1:20 EST).

may perceive judges or prosecutors as unwilling to listen to them. Even if no specific or intentional rudeness is experienced, the entire process is dehumanizing.²⁰⁸ Further, fundamental values of proportionality may be offended when arrestees spend days and nights in jail for minor offenses.

Evidence from empirical work that examines perceptions of procedural justice demonstrates that perceived fair treatment is more important than outcome in predicting reoffending rates.²⁰⁹ Put another way: treatment that is *not* considered fair, polite, and respectful; that does *not* give voice to the parties involved; that does *not* seek accurate results based on thorough information gathering; but is instead perceived as inconsistent among groups and disproportionate to offenses, may make future offenses by the same people more rather than less likely. Rather than serving as a deterrent to offenses to order, or even more serious offenses, aggressive arrest policies for minor offenses are associated with unfavorable perceptions of law enforcement.²¹⁰ The perception of legitimacy in our criminal justice system is key to compliance, and the experience of being treated in ways that are perceived as unfair undermines such a perception. Further, the deterrent effect of arrest is reduced by overuse for minor offenses. Fear of arrest is diminished once it is experienced, and the stigma associated with arrest is generally diluted when folks are arrested for selling flowers or drinking beer on their own stoops.²¹¹ Thus, voluntary compliance stemming from respect, fear-based compliance stemming from deterrence, and shame-based compliance stemming from stigma are all reduced by overuse of arrest for minor offenses.

5. Substantive Justice

Another casualty of ZTP is substantive justice. While misdemeanor trials have not been plentiful for many years (if they ever were), they continue to decrease in numbers.²¹² The majority of cases that are tried are

208. A conference working group, which included judges, prosecutors, defense attorneys, and court staff, agreed that criminal court is “dehumanizing” and inconsistent with concepts of individualized justice. Rayner, *supra* note 114, at 1039–40, 1054.

209. *See, e.g.*, Paternoster, Bachman, Brame & Sherman, *supra* note 191, at 182–83, 192–93. In this particular study, domestic violence arrestees were more likely to reoffend than individuals who were warned but not arrested. However, arrestees who reported being treated fairly had recidivism rates at approximately the level of the non-arrested individuals. Thus fair treatment improved recidivism rates, while arrest did not deter recidivism as some deterrence theorists would predict.

210. Brooks, *supra* note 187, at 1267 (noting also that favorable perceptions are associated with effective policing of violent crime).

211. *See* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 22–23 (1998) (discussing how frequent sanctions “may erode the foundation of the deterrent effect—fear of stigmatization”).

212. In 1990, when only 40% of cases were disposed of at arraignment, and 0.4% were tried, there was already a good case for the proposition that substantive justice was not an outcome of the criminal court. HARRY I. SUBIN, THE NEW YORK CITY CRIMINAL COURT:

harms to people or harms to property.²¹³ Order maintenance arrests rarely result in trials.²¹⁴ After multiple appearances, most defendants who initially wanted a trial will either accept a disposition²¹⁵ or their cases will be dismissed based on speedy trial grounds.²¹⁶ Police can, with impunity, arrest people on minor charges whether or not they have probable cause; they can stop and frisk whether or not they have reasonable suspicion.²¹⁷ The basis for arrests and frisks will almost never be tested.²¹⁸ Nor will unintentional police errors be discovered. Defendants may, with nearly equal impunity, demand a trial and expect a dismissal if they can make multiple court appearances for months or years.²¹⁹ As the system works now, the innocent do not have the chance to obtain public vindication, and the guilty can often evade trial and conviction.

THE CASE FOR ABOLITION 1, 4 (Ctr. for Research in Crime & Justice, N.Y. Univ. Sch. of Law 1992) (noting that if *all* misdemeanor judges spent all their time trying cases rather than at calendar control, only 2% of misdemeanor arrests could result in trial). Such a lack of resources has the effect of insulating misdemeanor arrests from review, resulting in “virtually unfettered, unchecked police activity and discretion.” Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 321 (2005). Today, less than 0.3% of misdemeanor cases are ever tried. *Id.* at 321 n.35; DCJS Trial Statistics, *supra* note 142. Moreover, 73% of cases were disposed of at arraignment in 1998. Solomon, *supra* note 47, at 5.

213. See *supra* note 142.

214. See *supra* note 142; Zeidman, *supra* note 212, at 321 n.35 (“[T]he New York City misdemeanor trial rate in 2003 was less than one third of one percent.”).

215. For a description of the plea bargain process, see DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER’S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* 157–69 (2006) (describing how a client who is innocent and wants a trial will eventually take a plea). See also Weinstein, *supra* note 100, at 1158.

216. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2008) (requiring the prosecution to answer ready for trial within 90 days on an A misdemeanor and 60 days on a B misdemeanor, but excluding various periods of delay attributed to defense consent, motion practice, defendant’s absence and other obstacles to trial).

217. *Terry v. Ohio*, 392 U.S. 1 (1968) (establishing the framework for stopping and frisking people based on less than probable cause). While this article does not address the impact of the over 500,000 “stops and frisks” that the police undertake annually in New York; many of the same procedural justice, race, and community impact issues discussed in this article are also raised by such processes. See, e.g., Trymaine Lee, *As Officers Stop and Frisk, Residents Raise Their Guard*, N.Y. TIMES, Feb. 4, 2007, at A31 (discussing the effects of this police practice on the community of Red Hook, Brooklyn).

218. See *Terry*, 392 U.S. at 26.

219. The *mean* age at the time of bench trial verdict in misdemeanor cases before the Criminal Court (exclusive of Bronx cases) was 340.6 days in 2007. CRIMINAL COURT ANNUAL REPORT 2007, *supra* note 109, at 55. Because this far exceeds the time permitted under N.Y. CRIM. PROC. LAW Sec. 30.30 cases will often be dismissed for speedy trial delays. Statistics for the number of speedy trial dismissals are not readily available, however, a speedy trial dismissal is a common outcome of litigating misdemeanors. See Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, n.82 (1996) (48.5% of dismissals obtained by clinic were due to Denial of Speedy Trial); Weinstein, *supra* note 100, at 1169, 1172 (discussing the interplay between speedy trial rules, repeat appearances, and the cost of litigating a misdemeanor).

6. Attorney Ethical Rules

A final problem with the mass processing of misdemeanors and lesser offenses through the criminal justice system without regard to collateral consequences is the systematic violation of basic requirements of professional responsibility for defense attorneys and prosecutors.²²⁰ Prosecutors are required to “exercise sound discretion”²²¹ and to pursue justice²²² but can hardly exercise discretion or pursue justice without investigating the facts. More specifically, the American Bar Association’s Defense Function standards require defense attorneys to investigate the facts regardless of a defendant’s admission of guilt,²²³ and “under no circumstances [should they] recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law.”²²⁴ Yet defense attorneys counsel clients to take hundreds and perhaps thousands of pleas in the course of a year with no independent factual investigation and little or no discovery.²²⁵ “Counseling” on whether to waive constitutional rights and become exposed to myriad collateral consequences takes place in two, three, or five minutes. Prosecutors similarly recommend dispositions without ever speaking to witnesses or evaluating credibility and weight of evidence and with no information about potential collateral consequences.²²⁶ Judges disregard these breaches of attorneys’ duties on both sides of each case and accept dispositions on the majority of misdemeanor cases in arraignments. The motivation for such practice is not to harm clients, but to save them from repeated court visits. However,

220. Professional standards for lawyers for both the defense and prosecution define the basic duty of competency owed. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE §§ 3-1.2(c), 4-6.1(b) (1999); NAT’L DIST. ATTORNEYS ASS’N NATIONAL PROSECUTION STANDARDS § 1.1 (2d ed. 1991). It is the duty of the prosecutor “to seek justice”; one component of that duty, often left undone, entails familiarity with the full range of collateral consequences because they are, as described by the former president of the National District Attorneys Association, “a new form of mandated sentences.” Johnson, *supra* note 146, at 33.

221. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, 3-1.2(b), *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html.

222. *Id.* at 3-1.2(c).

223. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, 4-4.1(a), *available at* http://www.abanet.org/crimjust/standards/dfunc_toc.html.

224. *Id.* at 4-6.1(b).

225. *See, e.g.*, COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 24–25 (2006), http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

226. *See* NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS, 35 (2009) [hereinafter NACDL, MINOR CRIMES, MASSIVE WASTE], *available at* [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) (discussing inability of defense counsel to investigate or counsel clients due to excessive caseloads).

the result is the routine breach of the standards of professional responsibility applicable to all attorneys. The public is deprived of the informed representation of the district attorney and the accuracy that adversarial criminal justice system is designed to ensure.

IV.

REDUCING THE COSTS OF ORDER-MAINTENANCE POLICING

Many of the costs identified in the previous section can be reduced or eliminated by any number of options available to thoughtful policymakers and criminal justice actors. Examples already exist of a slight trend in this direction. Some of these possibilities reduce various costs while not significantly changing others. For example, issuance of summonses may not necessarily alleviate perceptions of procedural injustice, but it does reduce commitment of police resources to processing and eliminate the ugliest facet of the criminal court: pre-arraignment detention. In this section, I will briefly propose a number of avenues for reducing the costs of aggressive order-maintenance policing. The proposals are not aimed at reducing policing, but at reducing the costs of aggressive policing of minor offenses.

Many of these suggestions would presumably affect only the cost side of the cost-benefit analysis of aggressive misdemeanor policing. Adopting these suggestions should not have adverse effects on either the causal link between aggressive order-maintenance policing and reduction of serious crime (to the extent that such a link exists), nor should they reduce the gains in the area of quality of life and reduction of fear. In fact, to the extent that these proposals improve perceptions regarding procedural justice and remove barriers to education, employment, housing, and benefits, they should increase the efficacy of order-maintenance policing and free police resources for community patrol and targeted policing initiatives. By contrast, the current approach, which creates tens of thousands of new criminal and quasi-criminal records and instills in hundreds of thousands of individuals negative perceptions about the procedural fairness of the criminal justice system, almost certainly has a positive correlation with both serious crime and disorder, thereby creating negative feedback that undercuts the positive gains of order-maintenance policing.

Other suggestions that follow are more expansive and thus may reduce costs but also potentially reduce benefits. It is my belief that the cost reduction would substantially outweigh the reduction in benefits, but such assumptions should certainly be put to the test, either by reform coupled with careful empirical review or by pilot projects to study such causal links.

I will organize the discussion of proposals according to the institution

that could intervene to reduce costs, hoping that one or more of these institutions may pursue these proposals. The reason for this organization is that the institutional structures and incentives are perhaps the greatest barriers to reform, and they differ among the institutions. I will begin with institutions that could most readily create the broadest reforms and conclude with those that can attempt to mitigate some of the costs on a case-by-case basis.

A. The Legislature

There are many routes that the legislature might take to reduce the costs of order-maintenance policing. I will address five possible reforms, organizing them from the most sweeping to the most minor. These are decriminalizing particular crimes and offenses, changing arrest-processing provisions for particular crimes, changing sealing provisions for minor crimes and offenses, and changing or eliminating surcharge provisions.

1. Decriminalizing Offenses

Although the first of these proposals may sound quite radical, from a historical perspective what is arguably more radical is the extent and pervasiveness of criminal punishment for behavior that causes only the most minor harm to others or property. Our criminal law has, like an invasive weed, permeated all areas of behavior such that, if it were to be uniformly and perfectly enforced, there would be few people *without* a criminal record.²²⁷ Further, the crimes and the classifications of offenses largely arose at a time when collateral consequences for misdemeanors were fewer and less pervasive. My purpose in categorizing misdemeanors according to the object of their harm and in focusing within the categories on particular offenses is to invite the review of each offense. Must trespass be a violation of the penal law subjecting a person to arrest and creating a permanent record? Prostitution? Possession of marijuana? Other controlled substances? Should jumping a turnstile be an A misdemeanor? The legislature should review each of these offenses carefully and reevaluate whether it is necessary to prosecute such offenses in the criminal justice system when so many significant harms might flow from such prosecution. If only one category were to be removed from the criminal justice system, thousands or tens of thousands could be spared some of the costs discussed in Part III. Similar review should be undertaken with regard to the non-printable offenses that account for over

227. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–15 (2001) (describing the growth of categories of criminal offenses, from less than 200 federal crimes in the 19th century to nearly 650 titles in the federal criminal code today, and noting also that state criminal law has undergone a similar expansion).

15,000 arrests per year.

A decision to decriminalize does not necessarily mean a decision to condone, permit, or not police such behavior. In fact, the decision to treat a matter as a noncriminal offense opens up possibilities for re-integrative and non-adversarial solutions that can strengthen rather than undermine social order. One example of such an alternative approach exists in cases of failure to pay subway or bus fare, which is currently handled in two parallel systems—one criminal, one civil.²²⁸

The unlucky are charged with the crime of theft of services,²²⁹ typically arrested, treated to a day in arrest processing, and sentenced to jail, community service, or time served, or given an adjournment in contemplation of dismissal, in the whirlwind of arraignments. If they choose to fight the charges, they can expect to make multiple appearances at the courthouse and will probably never get a trial.²³⁰ Whether the defendant pleads or fights, she will most probably never have the opportunity to have a voice in the proceeding or tell her side of the story to anyone. This is particularly worrisome where the defendant is falsely accused. The almost complete absence of trials means that the credibility of police officers will never be tested. As the literature on procedural justice demonstrates, the outcome is less important than the chance to be heard.²³¹ This, in turn, predicts willingness to comply with or defy the law in the future.

The more fortunate defendant accused of failing to pay the fare on a subway or bus is given a civil citation.²³² These citations can be paid by mail or answered in person at the Transit Adjudication Bureau (TAB).²³³ A person who challenges the citation at the TAB on the appearance date will be heard the same day by an Administrative Law Judge (ALJ). That hearing allows the person who received the citation to sit face to face with the ALJ and explain what happened.²³⁴ If there is a challenge to the facts alleged by the police officer, then a second date is arranged for the police to answer to the citizen. The TAB will obtain Metrocard records to determine whether the fare was indeed paid. During a day that I watched

228. The choice of whether to issue a summons for the civil offense or arrest an individual for the crime of theft of services is entirely at police discretion. Such discretion will be informed by any number of factors, including (1) whether an officer can afford to be off the streets for several hours, (2) whether the officer wants to spend several hours processing the arrest, (3) whether the person who failed to pay fare has identification, and (4) whether that person treats the officer respectfully.

229. N.Y. PENAL LAW § 165.15 (McKinney 2008).

230. *See supra* Part II.A.4.

231. *See supra* Part III.B.4.

232. 21 N.Y. COMP. CODES R. & REGS. § 1050.4 (2007).

233. N.Y. PUB. AUTH. LAW § 1209-a (McKinney 2008).

234. Several ALJs sit in small rooms and hear one respondent at a time. A respondent is free to bring witnesses or documentation.

TAB proceedings, adjournments were made for those who contested their guilt. Even more impressive were respondents who came to TAB to explain that they normally paid their fares but did not have the money on the day they were stopped. While the fines were not reversed in these cases, I observed none of the anger or frustration presented in the endless appearances in criminal court.²³⁵ The opportunity to be heard and to assert a general pattern of lawfulness appeared community-affirming in a way that no interaction I have ever observed in the criminal justice system has been.²³⁶

There are many options for decriminalization, including complete decriminalization of particular offenses, decriminalization of first offenses,²³⁷ or the creation of civil citation alternatives (as with the turnstile-jump example) that would leave discretion to police officers whether to charge individuals with a crime or issue a citation.

The city counsel could most certainly require citations rather than arrest for the numerous unclassified misdemeanors and violations of the city code that are not even included in most statistics about the criminal justice system.

2. Change Arrest Processing Provisions

The legislature could, without decriminalizing offenses (or in conjunction with decriminalization of some offenses), change arrest-processing provisions. This would reduce the cost of missed work days to defendants, decrease the amount of overtime paid to police officers for processing defendants after their shift has ended, and ameliorate perceptions of procedural justice. For example, legislation could easily require that those accused of misdemeanors or certain classes of misdemeanors (offenses to order, for example) be arrested, searched, printed, and released if the fingerprints showed no warrants.²³⁸ Following

235. No doubt anger erupts in this setting as well. I do not begin to suggest that this route will eliminate all conflict, but as the research in the area of procedural justice has shown, process is invariably more important to litigants than outcome.

236. The shortcoming of any non-arrest system is the likelihood of non-appearance. In the case of the TAB, about 25% of the 100,000 issued civil citations neither appeared nor paid on their first date. Response to FOIL Request, Transit Adjudication Bureau, Statistics, 2000–03 (Dec. 9, 2004) (on file with the author). In discussions with the Bureau, they indicated that over the longer term most individuals paid the fines either to clear up their records for employment, the military, or mortgage approval; or as a direct garnishment from tax returns. Interview with John Risi, Legal Director, Transit Adjudication Bureau, in N.Y., N.Y. (June 25, 2004).

237. There are a number of offenses that are more serious if committed by someone with a prior criminal record or someone who has previously committed the same offense, including loitering for the purpose of prostitution or criminal possession of a weapon. N.Y. PENAL LAW §§ 240.37(2), 265.02(1) (McKinney 2008).

238. Alternatively, and more conservatively, release might be required for those with no felony records or no offenses against persons, or for those with no record of arrests

such procedures, weapons would still be seized and deterrence maintained. Those who were serious criminals would be treated as such, and those who were not would be released to appear in court at a later date. Additional advantages to such procedures would be shorter arrest processing times and quicker return of officers to the street.²³⁹ While the procedural justice benefit of such a compromise would be unclear (it is not *outcome*—arrest or no arrest—that is critical, but *treatment*),²⁴⁰ the economic repercussions of missed work and lost jobs would be substantial.

3. Change Sealing Provisions

One of the most serious consequences of misdemeanor, and even violation, convictions is the effect such convictions have on employment opportunities. The legislature could require automatic sealing of court records for violation convictions. In addition, legislation could be passed to seal misdemeanor arrest records after some number of years. The legislature might also provide for automatic expungement of records of violations, certain misdemeanors, or all misdemeanors that did not involve harm to persons after a certain period of time.²⁴¹

4. Change Surcharge Provisions

Mandatory surcharges and Crime Victims' Assistance Fees could similarly be redesigned to serve restorative purposes rather than to further cripple those without resources to pay these fees. Until 1995 the "mandatory" surcharge was waivable and courts would not impose such a surcharge on indigent defendants.²⁴² Certainly there was some wisdom to that approach. Other potential improvements might be a progressive surcharge based on ability to pay or type of offense. Finally, in victimless offenses no Crime Victims' Assistance Fee should be imposed.

whatsoever.

239. It is unclear how police officer incentives would work out under such a system. On the one hand, some officers are motivated by the overtime that accompanies the hours required to transport a defendant and work with the District Attorney's Office to process a complaint. On the other hand, some officers may be dissuaded from making an arrest when doing so will result in a loss of hours of sleep or time that might be spent with their families.

240. See *supra* Part III.

241. See Demleitner, *supra* note 2, at 162 (supporting expungement as an "attempt to ameliorate the negative impact of collateral consequences after sentencing"). See also Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A Comparative Perspective*, 12 INT'L CRIM. JUST. REV. 22 (2002) (noting that for minor offenses France and Italy have automatic expungement of records).

242. N.Y. CRIM. PROC. LAW § 420.35 (McKinney 2008). For a discussion of the change in the mandatory surcharge law, see *People v. Brian L.*, 842 N.Y.S.2d 874 (City Ct. 2007).

5. Make All State Law Collateral Consequences Discretionary

Automatic mandatory collateral consequences are inconsistent with the pursuit of individualized justice and proportionality. The legislature could vest the courts with more discretion to waive collateral consequences where appropriate.

6. Challenges to Legislative Action

There are few groups with less legislative influence than criminal defendants, even those who are generally law-abiding and brought into the criminal justice system on noncriminal charges. For decades politicians have won elections by being “tough on crime” and passing more punitive laws.²⁴³ To object to punishment or decriminalize crime would certainly be a risky political position. Similarly, quality-of-life initiatives have garnered tremendous support from voters in rich and poor areas alike.²⁴⁴ Nevertheless, none of the proposals above are about policing less, or about sacrificing quality of life; they are merely about diminishing the costs associated with these policies. These costs are not limited to those who are arrested for minor offenses. Their families and communities are also affected. Further, all taxpayers incur costs in the form of police overtime, jail costs, and prison costs for those who receive longer sentences or parole violations due to arrests for disorder, as well as public benefits for families of those deprived of jobs because of a criminal record. Taxpayers also pay for the excesses in the system in the form of civil damages and class action suits for those wrongfully subjected to strip-searches²⁴⁵ and the thousands arrested under unconstitutional loitering charges.²⁴⁶ ZTP costs to the community are not merely economic. Law-abiding people of color incur costs because ZTP reinforces stereotypes of criminality in black and Latino individuals. Finally, there is an additional cost of ZTP, insofar as ZTP fosters defiance and even criminality among individuals subjected to processes that appear unfair, disproportionate, and arbitrary.

While the political incentives for change are few, the disincentives may not be great either. It is not clear to me that a legislator who supported sealing noncriminal records, expunging misdemeanor records after two, three, or five years, or creating marijuana civil citations for first arrests would be perceived as “soft on crime.” Such tactics could minimize stigma or divert thousands from the criminal justice system.

243. See Stuntz, *supra* note 227, at 529–33 (describing legislators’ incentives to please voters by increasing convictions and taking popular symbolic stands against crime).

244. Kahan, *supra* note 37, at 2477–88.

245. Weiser, *supra* note 111.

246. See Livingston, *supra* note 40, at 555.

B. The Police Department

In New York City, the police department is clearly in the best position to change these policies. In the same way that NYPD Commissioner Bratton and Mayor Giuliani adopted aggressive Zero Tolerance Policing in the mid-1990s, the police department could adopt non-arrest models for order-maintenance policing. They could otherwise modify arrest procedures as proposed in the discussion above and simply release people with no significant record instead of taking them to arraignments. They could also exercise discretion differently with regard to some offenses.²⁴⁷ Changing these policies would probably require no more consensus than that of the Chief of Police and the Mayor. Nevertheless, the commitment to such changes would have to be significant because the institutional rewards at the NYPD are still largely determined by arrest numbers, and salary for many officers is supplemented by overtime. Raises, rules about overtime, and incentives to maintain order would have to be rethought.

Other models for successful policing that have led to the reduction of crime and the improvement of quality of life certainly exist. In San Diego, for example, problem-oriented policing that focused on developing relations with communities and citizens to identify and address crime brought crime down and increased satisfaction with police.²⁴⁸ In Boston, a focus on a limited number of the most violent offenders resulted in a sharp decrease in violent crime.²⁴⁹ Los Angeles has recently adopted this model as well. This approach to policing may alleviate the sense among young men of color that police are targeting them as a class. It could also stretch police resources further. The number of uniformed officers has decreased from a peak in 2000 of about 41,000²⁵⁰ to a fifteen year low of about 33,300,²⁵¹ and starting salary²⁵² in the NYPD has also decreased in the last

247. In a major reversal of policy, the NYPD recently started issuing citations for open bottles of alcohol. Eddy Ramirez, *Drinking from a Brown Bag? Put Your Fine in an Envelope*, N.Y. TIMES, July 2, 2004, at B3. In 2007, over eleven thousand individuals pleaded guilty and paid the fine by mail for public consumption of alcohol. CRIMINAL COURT ANNUAL REPORT 2007, *supra* note 109, at 38.

248. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 92 (2001).

249. For an account of how introducing psychological counseling into Boston prisons brought about a decrease of violent crimes committed by former inmates and also reduced the amount of intra-prison violence to nearly none, see generally JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* (Vintage Books 1997) (1996).

250. The NYPD had over 40,000 police officers in 2000. *Maintaining Historically Large Police Force Presents Challenges*, INSIDE THE BUDGET (City of N.Y. Indep. Budget Office), Sept. 29, 2000, at 1, available at <http://www.ibo.nyc.ny.us/newsfax/insidethebudget69.pdf>.

251. *NYPD May Scrap Jan '09 Recruits*, TIMES NEWSWEEKLY, Dec. 4, 2008, http://www.timesnewsweekly.com/news/2008/1204/local_news/032.html.

252. See C.J. Chivers & William K. Rashbaum, *Army Lets a Felon Join Up, but the New York Police Will Not*, N.Y. TIMES, Jan. 6, 2008, at A21 (noting that with a starting salary of only \$25,100, the police force had only 35,400 officers, fewer than the authorized 37,838).

several years. Reducing arrest-related duties on hundreds of thousands of arrests each year could permit base pay raises and expand units focused on community relations and gang activities.

The empirical evidence suggests that consistent aggressive misdemeanor policing is not necessary. The drop in misdemeanor arrests in late 2001 and 2002 did not lead to an increase in crime. The fact that the police make twice as many arrests on Wednesdays as on Sundays also suggests that some of the thousands of arrests for minor offenses are not necessary to keeping crime low. A pilot project eliminating some or all of the discretionary arrests in a discrete area would yield evidence about whether summary arrests are necessary to effective order-maintenance policing.

C. Prosecutors

Within the adversarial system, prosecutors are in the best position to fashion responses that can reduce or eliminate costs to those arrested under aggressive order-maintenance policing policies. As a general rule, prosecutors have broad discretion about when and how to charge defendants.²⁵³ Nevertheless, many offices put pressure on assistant prosecutors to charge the highest available crime, to seek convictions as often as possible, and to seek minimum sentences on offenses no matter how minor. For all intents and purposes, New York City prosecutors have been partners with the mayor and the NYPD in prosecuting quality-of-life arrests.²⁵⁴ I have observed that the “standard offers” have gradually increased in minor cases over the years—in the early 1990s an adjournment in contemplation of dismissal (ACD) was the result of nearly any nonviolent first arrest—such that the Assistant District Attorneys now routinely seek community service, treatment programs, and violation pleas on first arrests.

What is missing from this calculus is systematic consideration of the collateral consequences of these convictions. Given the divergence between the punishment an Assistant District Attorney intends to impose—one day of community service and a noncriminal conviction that will be sealed within one year—and the consequences of the conviction—loss of home, income, employment, immigration status, or ability to pay for an education—it is time that the calculus be revised. It is clearly not enough to assert, as the courts have, that the collateral consequences are not part of the punishment. If District Attorneys represent the State of New York and have a duty to

253. *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

254. For a discussion of the active role of the New York County District Attorney's Office in an undertaking to eliminate social disorder, see Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 543–45, 562–63, 578–80 (2008).

protect the community, they cannot and should not close their eyes to the unintended harm that a plea may entail.²⁵⁵

The first undertaking in this regard is education. Several articles have addressed the need for defense counsel to learn of the many potential costs of criminal and even noncriminal convictions;²⁵⁶ the need is just as great for prosecutors. Once the external costs are considered, prosecutors may choose to consider declining prosecution, diversion, or the old expedient of offering more ACDs. Certainly “standard offers” must be revised to take into account collateral consequences. While defense counsel and judges surely need to learn of these consequences too, it is fully within the prosecutor’s power to make office-wide decisions to avoid the unintended consequences of convictions.

D. Courts

Courts have remarkably little power to eliminate many of the most serious collateral consequences associated with minor offenses. They can neither prevent arrests nor exercise discretion to dismiss or reduce charges.²⁵⁷ There are, however, relatively simple scheduling accommodations that would assist clients in challenging minor arrests. First, the courts could establish night and weekend parts for defendants who are employed so that they would not need to miss work to attend court or pay fines. Second, the courts could adopt a uniform policy of excusing defendants unless the prosecutor would be ready for a hearing or trial, or a plea had been offered and communicated and would be accepted. Third, courts already have discretion to reject pleas if they find that they do not serve justice. Like prosecutors, courts could include consideration of the collateral costs in these calculations and reject pleas that were likely to result in consequences that violate or strain the proportionality requirements of the criminal justice system.

It is important to emphasize that, in my opinion, community courts are not a solution. Community courts that handle almost exclusively minor

255. Johnson, *supra* note 146, at 33 (arguing that because prosecutors must “seek justice,” they must consider mandatory collateral consequences in charging and pleading recommendations).

256. See Gabriel J. Chin & Richard W. Holmes, Jr. *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 740 (2002) (noting that particularly in misdemeanor cases with “minimal direct consequences, the possibility of innocent defendants pleading guilty also warrants a requirement that lawyers take reasonable steps to ensure that their clients understand collateral consequences”); Pinard, *supra* note 145, at 1071, 1073–75, 1088–90; NACDL, MINOR CRIMES, MASSIVE WASTE, *supra* note 226, at 36, 40.

257. *But cf. id.* at 32–33 (noting that one judge averted collateral consequences by allowing a defendant to withdraw a guilty plea after serving his sentence, and explaining how other judges might convict of misdemeanors at bench trials rather than felonies based on the already harsh collateral consequences involved).

offenses treat each like a major offense, requiring multiple appearances for marijuana possession and other minor offenses.²⁵⁸ However, I do believe the use of entirely noncriminal proceedings could have potential—particularly if, like with the Transit Adjudication Bureau, a defendant could have the immediate opportunity to be heard and solutions were targeted towards the affected communities.²⁵⁹

The Criminal Division in the Bronx that consolidates the felony and misdemeanor court systems may be one promising reform. While this reform does not reduce the collateral costs of minor arrests, it does address procedural justice issues by allocating resources that permit more misdemeanor trials. Certainly, any effort to provide trials where demanded would increase the legitimacy of our criminal courts in the eyes of the public.

E. Defense Attorneys

How defense attorneys should handle collateral costs is the only question that has been squarely addressed in the scholarship on collateral consequences of misdemeanors, even though there is perhaps no actor less able to control such consequences. Nevertheless, the defense attorney's role is critical, as these earlier discussions demonstrate. The answers provided thus far are two. In one view, the defense attorney must learn what collateral consequences might flow from a conviction, advise her client of these consequences, and counsel the client accordingly.²⁶⁰ In a broader view, the defense attorney has a duty to represent the client "holistically," not only making sure that the client is properly advised of collateral consequences but also standing by the client and representing the client in immigration, housing court, licensing, and reentry, among others.²⁶¹ While both answers are certainly part of the role the defense attorney should undoubtedly play, they both also essentially accept the brave new world of collateral consequences and costs. Further, most defender offices are under-funded and lack the capacity to represent their clients in the full range of collateral consequences. Those that do handle civil consequences rely largely on grants that fund one or two overworked specialists who handle the more serious repercussions of criminal convictions. The typical institutional defense attorney, particularly those handling misdemeanors, has so many cases in so many courtrooms that it is

258. See Rayner, *supra* note 114, at 1048.

259. All penalties collected by the Transit Adjudication Bureau are used for a transit crime fund. N.Y. PUB. AUTH. LAW § 1209-a(10) (McKinney 2008).

260. The ABA Standards for Criminal Justice provide that, "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." STANDARDS FOR CRIMINAL JUSTICE § 4-3.2(f) (1999).

261. See Pinard, *supra* note 145, at 1071, 1073–75, 1088–90.

all that the defender can do to appear personally on the majority of cases. Finally, for appointed counsel who are often solo practitioners, even those who have managed to keep abreast of the myriad collateral consequences would not be paid for related noncriminal representation for indigent clients.

The holistic approach to collateral consequences should ideally harness the strength of the defense bar to seek some of the policy and practice reforms suggested above, rather than asking defense attorneys to spend resources accompanying clients to administrative hearings across the city. By rejecting “standard offers” with explicit reference to the unintended collateral consequences, defense attorneys can educate prosecutors and judges while also protecting clients. The system does not have the capacity to try minor offenses, and organized use of that leverage by rejecting pleas and demanding trials might result in improved dispositions for clients.

While defense counsel should certainly try to ameliorate the repercussions that follow an arrest, they are in the worst institutional position to do so. Moreover, the defense bar—at least the attorneys who represent the poor—have little political clout.

V.

CONCLUSION

The political incentives certainly are not well-aligned for any of the players in the criminal justice system to make substantial inroads to reduce the costs of aggressive order-maintenance policing. Yet the situation is not hopeless. At a recent conference on the state of the criminal courts, a working group of judges, prosecutors, defense counsel, and court staff came together and largely agreed that the glut of misdemeanors in New York City Criminal Courts were leading to many of the collateral consequences discussed above.²⁶² With very few exceptions, those who know the criminal justice system agree that there is a problem and a need for reform.

Recognizing that order-maintenance policing is not synonymous with Zero Tolerance Policing for minor crimes and noncriminal offenses is the first step in addressing these problems. The second step is understanding that such policies may in fact have a negative impact on order, economic stability, and respect for law enforcement and the criminal justice system. An important third step is assessing the scope of the impact of such policies. The statistics provided in this paper provide a rough proxy for beginning to undertake this inquiry. The hundreds of thousands of arrests

262. See Rayner, *supra* note 114, at 1047–51.

and the myriad negative consequences and costs associated with aggressive arrest policies provide a powerful argument in favor of taking steps to eliminate some of these costs sooner rather than later. Most importantly, longitudinal studies of the impact of minor arrests on defendants and their families should be conducted. Crime mapping techniques and community-wide studies should be pursued to see how aggressive misdemeanor policing affects different neighborhoods and economic groups. Finally, issues of procedural justice should not be ignored in this research. One wants to know not only the economic costs to individual, family, community and the state, but also what costs are created in terms of unwillingness to obey the law and cooperate with law enforcement by a process that violates any notion of proportionality, denies defendants their voices, and turns a blind eye to the question of guilt or innocence.

APPENDIX
VARIATION IN ARRESTS FOR SPECIFIC OFFENSE TYPES BETWEEN SLOW / MEDIAN / HIGH ARREST DAYS^a

	2000			2001			2002			2003			2004			2005		
	Slow days ^b	Med. Days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days
Offenses: Harm/Potential Harm to Other Persons																		
Assault	180	175	181	78 ^γ	159 ^γ	247 ^γ	124 ^λ	161 ^λ	225 ^λ	138	201	191	151 ^λ	177 ^λ	188 ^λ	186	215	212
Menacing/Reck Endngmnt/Stalking	56	41	68	39	52	48	30 ^λ	44 ^λ	46 ^λ	31	53	45	48	42	57	36	54	66
Sex Offenses	6 ^λ	10 ^λ	11 ^λ	3	9	7	8	8	11	3 ^γ	8 ^γ	11 ^γ	3 ^γ	7 ^γ	9 ^γ	8	8	12
Unlawful Imprison	3	0	4	0	1	0	0	0	4	0	0	1	1	1	2	0	0	2
Crim Cont/bailjump	13	34	30	10 ^λ	15 ^λ	22 ^λ	20 ^λ	21 ^λ	36 ^λ	15 ^λ	21 ^λ	30 ^λ	7 [†]	20 [†]	43 [†]	11 ^γ	24 ^γ	28 ^γ
Harassment	22 ^λ	48 ^λ	53 ^λ	17 ^γ	34 ^γ	52 ^γ	28 ^λ	41 ^λ	54 ^λ	18 ^γ	40 ^γ	66 ^γ	13 [†]	54 [†]	57 [†]	15 [†]	54 [†]	79 [†]
Public Lewdness	7 ^γ	12 ^γ	22 ^γ	0 [†]	4 [†]	5 [†]	3	5	4	0	8	6	1 [†]	2 [†]	4 [†]	2	3	1
End. Welf Child	2	6	6	5	10	9	8	5	8	9	7	21	5	8	5	2 [†]	10 [†]	14 [†]
Weapon	11 [†]	39 [†]	51 [†]	12 ^γ	36 ^γ	43 ^γ	17 ^γ	31 ^γ	41 ^γ	25	20	27	29 ^γ	48 ^γ	59 ^γ	28 ^γ	43 ^γ	74 ^γ
DWI	38	21	21	28	26	23	24	43	20	42	45	30	53	41	45	64	47	43
SORA	0	1	0	0	0	0	0	0	1	0	1	0	0	2	2	0	0	3
Total Harm to Others	338	387	447	192	346	456	262	359	450	281	404	428	311	402	471	352	458	534

^a Each row includes one or more related offenses within the same article or chapter of the New York Penal Law. Thus all arrests for misdemeanors under Article 130 of the Penal Law are included in the category of Sex Offenses. All forgery and false instrument related charges are also grouped. Occasionally offenses within the same article fall into different categories of offenses in the tables below. Thus autostrapping, N.Y. PENAL LAW § 165.09 (McKinney 2008), and unauthorized use of an automobile (joyriding), *id.* § 165.05, which both appear in Article 165, are categorized as “property” offenses because they relate to the theft or destruction of property, while theft of services (most often entry into the subway without paying the fare), *id.* § 165.15, is categorized as a “harm to public order” offense because “theft” does not involve directly taking the property of another.

^b The three columns of numbers under each year indicate the total number of arrests for a particular offense or offense group for the three slow days, three median days, and three busy days that were selected for each year. Thus, on the eleventh, twelfth, and thirteenth slowest arrest days in 2000 there were 180 arrests for misdemeanor assaults; on the three median days there were 175 assault arrests; and on the three busiest there were 181.

	2000			2001			2002			2003			2004			2005		
Offenses: Harm to Property or Property Offenses	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days
Burg Tools	1 [†]	3 [†]	8 [†]	2	6	1	2 [†]	3 [†]	7 [†]	1	6	5	0	1	0	2	1	7
Crim 145	21 ^λ	32 ^λ	38 ^λ	16 ^λ	18 ^λ	38 ^λ	16	28	23	25	26	27	22 ^λ	27 ^λ	36 ^λ	22 ^λ	35 ^λ	38 ^λ
Misch/tamp																		
Pet. Larceny	72 ^λ	100 ^λ	144 ^λ	88 ^λ	131 ^λ	145 ^λ	108 ^λ	123 ^λ	128 ^λ	76 ^λ	136 ^λ	151 ^λ	75 ^λ	122 ^λ	157 ^λ	86 ^λ	142 ^λ	129 ^λ
Unauth use/Autostrp	8	7	4	2	10	6	1 [†]	6 [†]	8 [†]	3	12	9	1	6	6	7	12	12
Cp stolenprop	2 [†]	9 [†]	19 [†]	6	4	10	10	6	10	7	13	15	7	7	18	7	7	15
Forge/false Instrument	6	3	4	2	4	3	2	2	7	1	5	5	2	2	5	1 [†]	6 [†]	8 [†]
Offic. misc.	0	1	5	0	0	0	0	0	0	0	1	0	0	0	0	1	0	2
Prison Contr.	1	5	5	1	0	3	0	0	1	1	1	0	3	1	4	0	2	5
Total Harm to Property	111	160	227	117	173	206	139	168	184	114	200	212	110	166	226	126	205	216

	2000			2001			2002			2003			2004			2005		
Felony Weapons Offenses	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days
	45	34	33	21 ^λ	30 ^λ	49 ^λ	53	34	44	30 ^λ	62 ^λ	63 ^λ	20	43	42	19 [†]	35 [†]	78 [†]

Offenses: Harm to Public Order	2000			2001			2002			2003			2004			2005		
	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days	Slow days	Med. days	Busy days
Trespass	41 [†]	137 [†]	201 [†]	25 [†]	72 [†]	124 [†]	79 ^λ	103 ^λ	145 ^λ	55 [†]	145 [†]	216 [†]	37 [†]	142 [†]	209 [†]	44 [†]	112 [†]	256 [†]
Graffiti/instr	6 ^γ	10 ^γ	18 ^γ	4	3	11	4	2	5	0	2	2	0	2	4	0	4	7
Theft of Serv. (turnstile jump)	72 [†]	222 [†]	331 [†]	4 [†]	140 [†]	251 [†]	42 [†]	84 [†]	160 [†]	41 [†]	115 [†]	234 [†]	28 [†]	169 [†]	247 [†]	35 [†]	129 [†]	224 [†]
Obstr/Resisting ^a	16 ^λ	29 ^λ	34 ^λ	13 ^λ	36 ^λ	41 ^λ	23 ^λ	25 ^λ	45 ^λ	20 ^λ	37 ^λ	54 ^λ	43	32	57	36 ^λ	43 ^λ	70 ^λ
Drugs	101 [†]	333 [†]	459 [†]	31 [†]	249 [†]	352 [†]	103 [†]	248 [†]	411 [†]	37 [†]	226 [†]	475 [†]	80 [†]	221 [†]	400 [†]	60 [†]	255 [†]	337 [†]
Marijuana	168 [†]	368 [†]	706 [†]	24 [†]	474 [†]	643 [†]	74 [†]	333 [†]	742 [†]	82 [†]	279 [†]	557 [†]	68 [†]	286 [†]	416 [†]	73 [†]	269 [†]	429 [†]
Marijuana 2 oz possession	2	5	5	0	4	2	0	3	3	0	1	2	0	0	5	0	1	0
Marijuana Sale	14 [†]	86 [†]	127 [†]	1 [†]	41 [†]	79 [†]	4 [†]	38 [†]	44 [†]	11 [†]	19 [†]	54 [†]	3 [†]	45 [†]	73 [†]	3 [†]	39 [†]	50 [†]
Gambling	2 [†]	6 [†]	17 [†]	0 [†]	11 [†]	28 [†]	2 [†]	3 [†]	18 [†]	0 [†]	9 [†]	21 [†]	7	7	27	7 ^λ	12 ^λ	15 ^λ
Prostitution	33 ^λ	61 ^λ	64 ^λ	15 [†]	82 [†]	125 [†]	8 [†]	95 [†]	136 [†]	7 [†]	31 [†]	90 [†]	2 [†]	26 [†]	83 [†]	12 [†]	49 [†]	71 [†]
Total Harm to Public Order	455	1277	1962	117	1112	1656	339	934	1709	253	864	1705	268	928	1517	235	908	1452
Total Arrests	904	1824	2636	426	1631	2318	740	1461	2343	648	1468	2345	689	1496	2214	713	1571	2202

^a Obstruction of administration of justice, N.Y. PENAL LAW § 195.05 (McKinney 2008), and resisting arrest, *id.* § 205.30 (Consol. 2008), are grouped together because most often these arrests arise from people questioning the police's decision to disperse, stop, detain, search, or arrest people on infractions of negligible importance. If the offense is more significant than resisting arrest, e.g., a sex offense or an assault, that offense would appear as the top charge.

†- > 10 times increase from slow to busy days

†- 4 > 10 times

γ- 2.5 > 4 times

λ- < 2.5 times