

2016

Broken Windows: Restoring Social Order or Damaging and Depleting New York's Poor Communities of Color?

Jonathan Oberman

Benjamin N. Cardozo School of Law, joberman3@gmail.com

Kendra Johnson

Follow this and additional works at: <https://larc.cardozo.yu.edu/faculty-articles>



Part of the [Law Commons](#)

Recommended Citation

Jonathan Oberman & Kendra Johnson, *Broken Windows: Restoring Social Order or Damaging and Depleting New York's Poor Communities of Color?*, 37 *Cardozo Law Review* 931 (2016).

Available at: <https://larc.cardozo.yu.edu/faculty-articles/112>

This Article is brought to you for free and open access by the Faculty at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact christine.george@yu.edu, carissa.vogel@yu.edu.

INTRODUCTION

BROKEN WINDOWS: RESTORING SOCIAL ORDER OR DAMAGING AND DEPLETING NEW YORK'S POOR COMMUNITIES OF COLOR?

Jonathan Oberman[†] & Kendea Johnson[†]

On February 8, 2014, with the temperature below freezing, two New York City Police Department (NYPD) officers performing a routine “vertical patrol”¹ found Jerome Murdough, a homeless 56-year-old Marine veteran with a diagnosed history of mental illness, sleeping in a stairwell near the roof of an East Harlem housing project.² Instead

[†] Jonathan Oberman is a Clinical Professor of Law at the Benjamin N. Cardozo School of Law and Director of Cardozo’s Criminal Defense Clinic. After working as a public defender—appeals and trials—both with the Legal Aid Society and Neighborhood Defender Service of Harlem, Oberman joined the Cardozo faculty in 1994. In addition to teaching and directing the Criminal Defense Clinic, he also teaches Criminal Law and Criminal Procedure.

[†] Kendea Johnson is a Clinical Fellow in the Criminal Defense Clinic. Prior to her fellowship in the clinic, Ms. Johnson was a staff attorney at the Criminal Defense Division of the Legal Aid Society in Manhattan.

¹ The NYPD website describes a vertical patrol as the “process by which a Police Officer systematically and methodically checks each building one at a time, covering roof landings, stairwells and lobbies.” *Frequently Asked Questions: Police Administration*, N.Y.C. POLICE DEP’T (NYPD), http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml (last visited Oct. 22, 2015). The tactic, first applied during the 1960s to address crime in high-rise public apartment buildings, has been subjected to sustained criticism. See, e.g., Adam Carlis, Note, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2002, 2004 (2009). There is also great constitutional scrutiny in the federal class action lawsuit, *Davis v. City of New York*, which was filed in 2010 and settled in early 2015. See *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) (granting in part and denying in part defendants’ motions for summary judgment regarding individual plaintiffs’ arrests and tenancies). New York City agreed to revise its police department patrol guide instructions on how to conduct vertical patrols, to limit them to circumstances more respectful of the rights of residents of the buildings being patrolled and consistent with constitutional standards. See Benjamin Mueller & J. David Goodman, *New York to Settle Suit on Policing in Public Housing*, N.Y. TIMES (Jan. 8, 2015), <http://www.nytimes.com/2015/01/09/nyregion/new-york-to-settle-suit-on-policing-in-public-housing.html>; Mark Hamblett, *Judge Signs New York City Stop-and-Frisk Settlement*, N.Y.L.J. (Apr. 29, 2015), <http://www.newyorklawjournal.com/id=1202724864015/Judge-Signs-New-York-City-StopandFrisk-Settlement>.

² For a summary of the story of Jerome Murdough, see Jake Pearson, *A New York Jail Let a Homeless Man ‘Bake to Death’*, HUFFINGTON POST (Mar. 19, 2014, 11:51 AM), http://www.huffingtonpost.com/2014/03/19/jerome-murdough_n_4993423.html, and Caroline Bankoff, *City Settles Lawsuit Over Rikers Inmate Who ‘Baked to Death’ for \$2.25 Million*, N.Y.

of taking him to a shelter,³ the officers arrested him for trespassing, brought him to their precinct, and determined that he should neither be released nor issued a Desk Appearance Ticket (DAT).⁴ Instead, they put the case “on line”—holding Mr. Murdough in custody from arrest through court arraignment—and a few hours after arresting him, transported him to Manhattan Criminal Court’s Central Booking for processing. There, the arresting officer met with an assistant district attorney (ADA) assigned to a regular shift in the Early Case Assessment Bureau,⁵ who evaluated the case and decided to charge Mr. Murdough with a crime.⁶ Based on Mr. Murdough’s past criminal record and

MAG.: DAILY INTELLIGENCER (Nov. 1, 2014, 5:33 PM), <http://nymag.com/daily/intelligencer/2014/11/nyc-settles-rikers-lawsuit-for-225-million.html>.

³ New York City’s shelter system is far from benign. With New York City’s rate of homelessness at its largest since the Great Depression, scores of homeless people choose to “sleep rough” in the streets, parks, and subways on a nightly basis instead of entering the City’s shelter system. See Patrick Markee, *Municipal Shelter System in New York City Fails to Meet the Needs of Homeless Individuals*, N.Y. DAILY NEWS (Feb. 17, 2015, 11:08 AM), <http://www.nydailynews.com/new-york/municipal-shelter-system-nyc-fails-homeless-individuals-article-1.2117926>; see also Tana Ganeva, “Conditions Were ‘Bluntly Dickensian’”: *The Disgrace of New York’s Homeless Shelters*, SALON (July 9, 2015, 6:57 PM), http://www.salon.com/2015/07/09/homeless_in_nyc_partner; Winnie Hu, *Review of New York Shelter System Finds Hundreds of Violations*, N.Y. TIMES (Mar. 12, 2015), <http://www.nytimes.com/2015/03/13/nyregion/new-york-homeless-shelter-system-violations-report.html>; Vivian Yee, *Homeless Families Endure Roaches, Mice and Failed Promises*, N.Y. TIMES (Aug. 28, 2015), <http://www.nytimes.com/2015/08/29/nyregion/new-york-relies-on-housing-program-it-deplores-as-homeless-ranks-swell.html>.

⁴ The NYPD Patrol Guide provides that a DAT may be issued at the discretion of a precinct desk officer, in lieu of holding a person in detention until court arraignment, “for misdemeanors, violations, and certain class ‘E’ felonies for hospitalized prisoners.” NYPD, PATROL GUIDE PROCEDURE 208-27: DESK APPEARANCE TICKET—GENERAL PROCEDURE 1 (2013). A DAT is made returnable on a future date set by the desk officer to the arraignment part of the criminal court in the borough in which the prisoner was arrested. After being issued the DAT, the prisoner is released from the precinct. *Id.*

⁵ The Early Case Assessment Bureau (ECAB) is the office in the New York County District Attorney’s Office (DANY) in which ADAs meet with arresting officers to: assess whether probable cause exists to support an arrest, evaluate the arrest for legal sufficiency, determine whether to advance the case through the system or decline to prosecute, and assess what bail, if any, to seek in the event that the defendant does not resolve the case at the time of his initial arraignment. The ECAB has been called “the epicenter of the criminal justice system.” John Eligon, *In a Complaint Room, a Prosecutor’s-Eye View of Crime*, N.Y. TIMES (Aug. 22, 2010), <http://www.nytimes.com/2010/08/23/nyregion/23ecab.html>. As such, “[a]ssistants must determine the proper charges to file based on the facts of a case—which are usually provided by a police officer—or whether to drop charges altogether.” *Id.* But as was the case in 2010 when the New York Times article was written, and was equally true at the time of Mr. Murdough’s arrest, and is no less true now, prosecutors stress that, at least in theory, the “ECAB is a place for investigation, not simply writing complaints.” *Id.*

⁶ Between 2012 and 2014, researchers at the Vera Institute of Justice “worked in close partnership with DANY . . . collecting and analyzing a wide range of data to examine case outcomes occurring along a continuum of discretionary points for different racial and ethnic groups.” BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, RESEARCH SUMMARY: RACE AND PROSECUTION IN MANHATTAN 2 (2014), <http://www.vera.org/sites/default/files/resources/>

history, which included six instances of Failures to Appear (FTA),⁷ the ADA evaluating the case recommended that the prosecutor assigned to the arraignment court ask that bail be set at \$3,500 in order to assure Mr. Murdough's return to court,⁸ and recommend a sixty-day sentence

downloads/race-and-prosecution-manhattan-summary.pdf. The report, issued in July 2014, concluded that DANY provided next to no screening in misdemeanor cases, with a rate for declination to prosecute of only four percent. *Id.* at 4 ("Vera found that DANY prosecutes nearly all cases brought by the police, including 94 percent of felonies, 96 percent of misdemeanors, and 89 percent of violations."). While Vera concluded that no noticeable racial or ethnic differences attached at this discretionary point, *id.* at 3, a different conclusion arose when Vera examined data relating to pretrial detention. Vera found that while several factors—including "the seriousness of the charges, whether the defendant had an outstanding bench warrant, whether the defendant had a prison record, the type of offense with which the defendant was charged, whether the defendant had a private attorney or one who was court-appointed, and the defendant's gender"—proved to be strong indicators of pretrial detention or release decisions at arraignment, race and ethnicity were measureable factors. *Id.* at 5. Specifically, the data demonstrated that black defendants, like Mr. Murdough, were forty-eight percent more likely to be detained when compared to similarly situated white defendants. See BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, VERA INST. OF JUSTICE, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY: TECHNICAL REPORT 85 (2014), <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-technical.pdf>.

⁷ New York Criminal Procedure Law section 510.30(2) delineates the factors a court must consider when determining what conditions, if any, to impose on an individual's release following initial court arraignment. See N.Y. CRIM. PROC. LAW § 510.30 (McKinney 2009). Subsection 2(a)(vi) directs the court to consider the person's "previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution." *Id.* § 510.30(2)(a)(vi) (emphasis added). For a concrete demonstration of the impact that past failures to appear can have on a defendant's qualification for nonbail, supervised release programs, see Mari Curbelo et al., *Research Brief No. 32: Queens Supervised Release*, N.Y.C. CRIMINAL JUSTICE AGENCY, INC. (2013). A warrant history—the failure to appear for one's designated court case—may by itself cause one to be disqualified from a supervised release program, unless the defendant can provide a mitigating narrative that reduces the presumption of unreliability which otherwise attaches to one's past failure to return to court.

⁸ The damage that cash bail imposes on those too poor to pay it has recently received increased focus, causing New York City to adopt a modest pilot program that will divert up to 3,000 people who would otherwise have been held on bail into pretrial supervision of some kind. See, e.g., Shaila Dewan, *When Bail Is out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>; Jamie Fellner, Opinion, *Power Failure: NYC Judges Penalize the Poor*, OBSERVER (July 13, 2015, 7:10 AM), <http://observer.com/2015/07/power-failure-nyc-judges-penalize-the-poor/>; Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>; Margaret Talbot, *The Case Against Cash Bail*, NEW YORKER (Aug. 25, 2015), <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail>. But even as New York City has introduced new programs in an attempt to ameliorate the disproportionate impact cash bail has on indigent defendants, it will continue to rely on existing risk-assessment tools that give weighted significance to whether the person charged has failed to appear for scheduled court appearances in prior cases. For a discussion of the new programs in place or soon to be part of New York City's bail experiment, see Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html>, and Alysia Santo, *Stung by Abuses at Rikers, New York City Acts on Bail Reform*, MARSHALL PROJECT (July 8, 2015, 6:05 PM), <https://>

if Mr. Murdough instead chose to resolve the case by pleading guilty to the charge.⁹

With the arrest charge written into a complaint and docketed, Mr. Murdough appeared in Manhattan Criminal Court for his arraignment. During the course of a seemingly pro forma court appearance, Mr. Murdough rejected the judge's offer—a thirty-day sentence if he pled guilty to the trespass charge for which he had been arrested.¹⁰ With the

www.themarshallproject.org/2015/07/08/stung-by-abuses-at-rikers-new-york-city-acts-on-bail-reform. Thus, supervised release, as an alternative to bail, will not be open to everyone. “[The New York City Criminal Justice Agency’s] current risk assessment program to determine who is eligible for the program,” or, release pending trial absent any bail conditions, “consists of a weighted point system with five questions. The most weighted question is whether the defendant’s bench warrant count is at zero.” Raven Rakia, *How Will de Blasio’s Bail Reform Actually Work?*, *GOTHAMIST* (Aug. 26, 2015, 3:30 PM), http://gothamist.com/2015/08/26/de-blosios_bail_reform.php. In this regard, New York City will apply the existing practice of many states that have implemented bail reform by incorporating risk-assessment tools developed by the John and Laura Arnold Foundation. This tool relies, among other factors, on “the person’s age and criminal history, including any prior incarcerations and failures to appear in court.” Chris Peak, *Each Day, 731,000 People Are in Jail. How Many Are There Simply Because They Can’t Afford to Make Bail?*, *NATIONSWELL* (July 29, 2015), <http://nationswell.com/new-york-city-reform-bail-no-jail>.

⁹ Cf. CRIMINAL JUSTICE SECTION, N.Y. CTY. LAWYERS’ ASS’N, REPORT AND RECOMMENDATIONS ON BAIL REFORM IN NEW YORK STATE 1–2 (2014), http://www.nycla.org/siteFiles/Publications/Publications1668_0.pdf (“In New York City, bail is set in approximately one-third of cases that continue past arraignment, about 50,000 cases per year. At any given moment, approximately 39% of the City’s jail population are pre-trial detainees who have been charged with, but not convicted of, a crime, and the average length of stay for pre-trial detainees is 53 days. Eighty percent of defendants in state criminal cases are determined to be indigent, and thus provided with mandated representation. Yet the average amount of bail set is \$2000; bail is set at less than \$500 in only 17% of cases. While bail set at even \$500 may not appear onerous, a full 44% of defendants are never able to pay the bail amount and therefore cannot obtain release while their case is pending. In New York City alone in 2011, bail was set on 25,296 defendants who were charged with crimes that were only misdemeanors or violations.” (footnotes omitted)). As early as 2013, Chief Judge of the New York Court of Appeals, Jonathan Lippman, “called for a ‘top to bottom’ overhaul of making bail determinations that not only protects public safety but is fair to low-income defendants waiting for their cases to be adjudicated.” Joel Stashenko, *Lippman Proposes Bail System Fix, Expansion of Supervised Release*, *N.Y.L.J.* (Feb. 6, 2013), <http://www.newyorklawjournal.com/id=1202587085501/Lippman-Proposes-Bail-System-Fix-Expansion-of-Supervised-Release>. Then, in early October 2015, impatient with the legislature’s failure to adopt bail reform and concerned that “[f]ar too many people are trapped in pretrial detention simply because they are poor,” Chief Judge Lippman “announced a series of administrative changes . . . intended to reduce the number of people who are incarcerated for long periods before trial because they cannot make bail.” James C. McKinley Jr., *State’s Chief Judge, Citing ‘Injustice,’ Lays Out Plans to Alter Bail System*, *N.Y. TIMES* (Oct. 1, 2015) (first quoting Chief Judge Lippman), <http://www.nytimes.com/2015/10/02/nyregion/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html>; see also Press Release, N.Y. State Unified Court Sys., Chief Judge Jonathan Lippman Announces Series of Reforms to Address Injustices of NY’s Current Bail System (Oct. 1, 2015), https://www.nycourts.gov/press/PDFs/PR15_13.pdf.

¹⁰ Transcript of Arraignment at 3, *People v. Murdough*, No. 2014NY010756 (N.Y. Crim. Ct. Feb. 8, 2014) (on file with author). In New York City, there is a presumptive 24-hour period between arrest and arraignment. The minutes of Mr. Murdough’s arraignment made clear that

offer rejected, the judge heard the prosecutor's arguments on the appropriate bail conditions to secure Mr. Murdough's return to court to contest the pending misdemeanor trespass charge. In response to the prosecutor's request for \$3,500, cash or bond,¹¹ the public defender assigned to Mr. Murdough's case neither argued for lower bail nor suggested some nonfinancial conditions that, if agreed to by the judge, would—at least during the pendency of this case—have kept Mr. Murdough out of jail.¹² In fact, the assigned public defender made no bail application whatsoever.¹³ When asked by the judge whether he wished to be heard on the question of bail, the defender simply said, “No, Your Honor.”¹⁴

The judge set bail at \$2,500, cash or bond, and adjourned the case for nineteen days to allow defense counsel to file pretrial motions. That nineteen-day period constituted the full amount of time that Mr. Murdough would have served had he pled guilty and accepted the thirty-day sentence offered by the judge.¹⁵ Critically, for the undomiciled Mr. Murdough, the bail terms imposed by the judge were the functional equivalent of remand.¹⁶

it took place in “AR4,” the designation assigned to Sunday day arraignments. *Id.* at 1. Thus, Mr. Murdough was arrested on the evening of February 7, 2014, and then arraigned the following day, on February 8, 2014.

¹¹ *Cf.* *People ex rel. McManus v. Horn*, 18 N.Y.3d 660, 665–66 (2012) (holding that courts must set bail in two forms, as opposed to setting cash bail only).

¹² While judges routinely and perhaps reflexively set bail almost exclusively in terms of cash or bond, New York's bail statute permits judges to consider and set bail in a multitude of forms—many of which do not require the posting of cash or bond secured by private property. Judge Lippman recognized as much, underscoring that New York's bail statute provides for seven types of bail bonds, as well as cash bail and credit card bail, but that as a matter of practice, “judges exclusively use two types—cash bail or insurance company bail bonds.” Press Release, N.Y. State Unified Court Sys., *supra* note 9. In order “[t]o facilitate wider use of alternate forms of bail that defendants may be able to post more readily, the court system will enhance training for judges and clerks on the availability of alternate types of bail and the procedures required.” *Id.*; *see also* N.Y. CRIM. PROC. LAW § 520.10.

¹³ *See* Transcript of Arraignment, *supra* note 10.

¹⁴ *Id.* at 4.

¹⁵ Misdemeanor sentences are calculated by reference to N.Y. PENAL LAW §§ 70.00(4), 30(1)(b), 85.00 (McKinney 2009), and N.Y. CORRECT. LAW § 804 (McKinney 2014). In New York, a person serving a definite sentence on a misdemeanor will automatically earn “good behavior time” credit of one-third of the term of the sentence. *See* PENAL LAW § 70.30(4)(b); *see also* CORRECT. LAW § 804(2). Thus, had Mr. Murdough accepted the arraignment judge's offer to plead guilty to the charge with a promise of a thirty-day sentence, he would have earned ten days of “good behavior time” credit, reducing the time he actually needed to serve to twenty days. Crediting him for the day he had been in custody between his arrest and arraignment, the thirty-day sentence offered by the judge would have satisfied nineteen days after the arraignment—the day the judge fixed for his next court appearance.

¹⁶ *See* MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY: FINAL REPORT (2012), <http://static1.squarespace.com/static/546cc3c3e4b0e3dbf861c974/t/54906416e4b02102b7c91376/1418748950483/CJA+-+DecadeBailResearch12.pdf>. Thus, for example, in the 22,642 nonfelony cases where bail was

One week later, Mr. Murdough died of excessive heat in his jail cell at Rikers Island (Rikers).¹⁷ In the words of one city official who spoke on the condition of anonymity, “[Mr. Murdough] basically baked to death.”¹⁸ New York City Councilman Rory Lancman described the case as “almost the perfect storm of the city’s failed policies on homelessness, mental health, veteran services and corrections.”¹⁹ The case was indeed a perfect storm of failed policies, institutions, and practices, but Mr. Lancman’s description was under-inclusive. At its core, Mr. Murdough’s arrest highlighted the limitations and challenges posed by the NYPD’s “Broken Windows” policing policy²⁰ which, as

set in 2013, 15,733 (69.5%) had bail set at \$1,000 or less. See N.Y.C. CRIMINAL JUSTICE AGENCY, INC., ANNUAL REPORT 2013, at 30 (2014) [hereinafter CJA ANNUAL REPORT 2013]. Approximately 87% of these defendants were unable to pay this modest sum at arraignment, and more than 46% never made bail at all. *Id.* According to a 2007 study, those who were unable to make bail spent a median of five days at Rikers Island. See MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES: FINAL REPORT 73 (2007). Forty-four percent of all cases are disposed of at arraignment—that is, the case is dismissed or adjourned in contemplation of dismissal, where the defendant receives a sentence without any jail time (not even time served). See CJA ANNUAL REPORT 2013, *supra*, at 17. Black and Hispanic defendants were more likely to be detained at arraignment (i.e., remanded without bail, or be unable to make bail) than white defendants. See KUTATELADZE ET AL., *supra* note 6, at 3. Furthermore, black and Hispanic residents comprised 89% of all pretrial detainees held on bail of \$1,000 or less. See HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 48 (2010), http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

¹⁷ Sadly, Mr. Murdough was not the only person to die recently while in the custody of the New York City Department of Corrections. See, e.g., Stephen Rex Brown, *Diabetic Inmate Needing Insulin Dies After Suffering for 14 Hours as Rikers Island Guards Do Nothing*, N.Y. DAILY NEWS (Aug. 26, 2015, 2:30 AM), <http://www.nydailynews.com/new-york/exclusive-rikers-guards-diabetic-inmate-die-article-1.2337244>; *Rikers Inmate Found Dead in Cell After Suspected Overdose*, CBS N.Y. (Oct. 14, 2015, 4:33 PM), <http://newyork.cbslocal.com/2015/10/14/rikers-inmate-death-richard-gonzalez>; Rich Schapiro, *Mentally Ill Rikers Island Inmate Dies After Languishing in Jail Cell for 7 Days*, N.Y. DAILY NEWS (May 22, 2014, 1:11 PM), <http://www.nydailynews.com/new-york/nyc-crime/rikers-island-inmate-dies-7-days-cell-report-article-1.1801606>; see also Press Release, U.S. Attorney’s Office, S. Dist. of N.Y., Manhattan U.S. Attorney Finds Pattern and Practice of Excessive Force and Violence at NYC Jails on Rikers Island that Violates the Constitutional Rights of Adolescent Male Inmates (Aug. 4, 2014), <http://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-finds-pattern-and-practice-excessive-force-and-violence-nyc-jails>.

¹⁸ Jake Pearson, *APNewsBreak: NYC Inmate ‘Baked to Death’ in Cell*, ASSOCIATED PRESS (Mar. 19, 2014, 9:46 PM) (quoting an anonymous city official), <http://bigstory.ap.org/article/apnewsbreak-nyc-inmate-baked-death-cell>.

¹⁹ Michael Schwirtz, *New York Council Sees Flawed Mental Health System*, N.Y. TIMES (Mar. 27, 2014), <http://www.nytimes.com/2014/03/28/nyregion/new-york-council-sees-flawed-mental-health-system.html> (quoting N.Y.C. Councilman Rory Lancman).

²⁰ The term “Broken Windows” derives from a 1982 Atlantic Monthly article, which advanced a non-data-based and significantly anecdotally derived hypothesis that correcting visible signs of social disorder will reduce serious crime. The theory has spawned aggressive order-maintenance policing strategies in New York City and numerous other jurisdictions and depends on producing a high volume of nonfelony, “quality-of-life” arrests. See George L.

implemented, has produced a high volume of nonfelony arrests. In addition, Mr. Murdough's death highlighted the degree to which the New York County District Attorney's Office and the judiciary failed to provide appropriate, independent oversight of the NYPD. That inadequacy was compounded by the assigned public defender's failure to vigorously challenge the theory and practice of hyperaggressive Broken Windows policing as they were applied to Mr. Murdough's case.²¹

What happened to Mr. Murdough is an appropriate and somber lens through which to consider the current state of New York City's criminal justice system. The case compels a number of interrelated questions: Why did police officers determine that it was appropriate to arrest Mr. Murdough? Is low tolerance for minor offenses the most intelligent or efficacious approach to policing?²² To the extent that

Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>; George L. Kelling & William H. Sousa, Jr., *Do Police Matter? An Analysis of the Impact of New York City's Police Reforms*, MANHATTAN INST. 8 (2001), http://www.manhattan-institute.org/pdf/cr_22.pdf (“[A] measure of ‘broken windows’ policing [is] represented by a precinct’s arrests for misdemeanor offenses . . .”); see also Bernard E. Harcourt, *Broken Windows Policing Is a High-Arrest Program*, HUFFINGTON POST: THE BLOG (Aug. 17, 2015, 4:59 PM), http://www.huffingtonpost.com/bernard-e-harcourt-/broken-windows-policing-i_b_8000250.html.

²¹ Broken Windows policing has had a dramatic impact on the number of people arrested and charged with nonfelony crimes. Researcher Freda Solomon of the New York City Criminal Justice Agency has charted nonfelony arrests in New York City from 1989—before Broken Windows was adopted—to 1998—by which time the policy was well entrenched. She noted that the number of nonfelony arrests prosecuted increased by nearly 90,000: before Broken Windows was adopted in 1989, there were 86,822 nonfelony arrests; in 1998, there were 176,432. See FRED A. SOLOMON, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., RESEARCH BRIEF: THE IMPACT OF QUALITY-OF-LIFE POLICING 2 (2003). Between 1998 and 2007, for example, the number of misdemeanor arrests was never less than 189,000, and it rose to as high as 231,120 in 2007. See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 283 (2009). The high volume of nonfelony arrests has continued over the last decade. A 2014 report authored by Preeti Chauhan and others of the John Jay College of Criminal Justice collected state and local arrest data since 1980, and presented the clearest picture to date of New York City's three-decade long shift in crime policy. The report made clear that in 1980, felony arrests outpaced those for misdemeanors and hit a peak in 1989 with 149,204 felony arrests. See PREETI CHAUHAN ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 9, 17 (2014), http://johnjay.jjay.cuny.edu/files/web_images/10_28_14_TOC_FINAL.pdf. By 2013, the two categories had flipped: the arrest rate for nonfelonies skyrocketed past that for felonies. *Id.* at 10. Specifically, in 2013, the police made 225,684 nonfelony arrests, *id.* at 18, but only 90,532 felony arrests, *id.* at 17. The study provided vivid evidence of the consequences of the Broken Windows policy predicated on preventing major crime by aggressively pursuing minor offenses.

²² For example, a competing view measures the utility of police conduct, not exclusively by reference to the volume of low-level offenses, but instead, by a more complicated rubric that seeks to incorporate the policed community's sense of its own safety and the concomitant legitimacy of police conduct. See Susan Shah & Jim Burch, Opinion, *How to Build Trust in*

Broken Windows policing purports to be motivated by concern for enhancing safety and the community's social contract, is the way in which it is being implemented by the NYPD producing the desired beneficial effect on the communities of color that are absorbing the brunt of its impact?

More specifically, as the Broken Windows theory was applied to Mr. Murdough, when the ADA assigned to the Early Case Assessment Bureau interviewed the arresting officer, why did that ADA choose to continue the case as opposed to diverting it out of the criminal justice system? Then, having determined that the facts merited a prosecution, why did the prosecutor, aware of Mr. Murdough's past arrest history and mental health condition, deem it appropriate to recommend that he be held on bail when nothing suggested that he could possibly post cash or secure a bond by way of property? When the case was arraigned, the prosecutor recommended a sixty-day jail sentence on a plea to the charge and then requested \$3,500 in bail—were those appropriate exercises of prosecutorial discretion?

Posed another way, what normative notions of safety and security directed the New York County District Attorney's Office to request a sixty-day jail sentence for the conduct at issue—sleeping in a stairwell—and \$3,500 bail if the plea were rejected? How did those standards, whatever they may be, comport with the prosecutor's sense of justice and represent a sound exercise of prosecutorial discretion, when Mr. Murdough's crime, in the most basic sense, was that he was homeless, needed a place to sleep, and suffered from a diagnosed history of mental illness?²³

Why, in turn, did the judge offer Mr. Murdough thirty days in jail, in essence, for being undomiciled? When Mr. Murdough rejected the plea, why did the judge set bail at what anyone would reasonably recognize as an unattainable amount, especially when the New York bail statute unequivocally provides that bail's primary purpose is to assure that the person returns to court?²⁴ This last question assumes greater significance, as any judge presiding in New York City's arraignment

Policing: Measure What Really Matters, MARSHALL PROJECT (Oct. 23, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/10/23/how-to-build-trust-in-policing>.

²³ Rule 3.8 of the New York Rules of Professional Conduct unequivocally states that “[a] prosecutor . . . shall not . . . maintain a criminal charge when the prosecutor . . . knows or it is obvious that the charge is not supported by probable cause.” RULES OF PROF'L CONDUCT r. 3.8(a) (N.Y. STATE UNIFIED COURT SYS. 2013). Similarly, the American Bar Association (ABA) notes its expectation that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 2013).

²⁴ New York's bail statute unequivocally states that, “[w]ith respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his court attendance when required.” N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney 2009).

courtrooms would know that cash and bond bail often have the disparate effect of imprisoning poor people of color.²⁵

Finally, why did the assigned public defender, at least as reflected by the record of the proceedings, do nothing to secure a more favorable outcome for his client?²⁶ One may wonder whether Mr. Murdough asked his lawyer to forego a bail application because he preferred to go to Rikers for the proverbial “three hots and a cot?” And if that were the case—if a jail cell at Rikers seemed to Mr. Murdough a more attractive option than a bed in a city-run men’s shelter—what a terrible indictment that would be of the system that failed him.

These questions, and others, derive from the officer’s initial decision to arrest Mr. Murdough—a decision that gave effect to a theory of policing that, as applied in New York City, appears to damage more lives than it repairs, while leaving unaddressed the underlying root causes that often contribute to nonfelony criminal behavior.²⁷

And then there is the case of Eric Garner: on July 17, 2014—less than six months after Mr. Murdough’s death—on a street in the heavily policed neighborhood of Tompkinsville, Staten Island, a police officer killed Mr. Garner by administering a chokehold, while attempting to arrest him for selling a single cigarette, called a “loosie.”²⁸ The grand jury hearing the evidence in that case voted not to indict the officer on

²⁵ For more than two years, Jonathan Lippman, the recently retired Chief Judge of New York’s highest court, has advocated for bail reform. He urged the passage of legislation that would establish a presumption of release, for nonviolent, nonfelony charges—such as those on which Mr. Murdough was arraigned. See JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., *THE STATE OF THE JUDICIARY 2013: “LET JUSTICE BE DONE”* 3–6 (2013), <https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf>; Russ Buettner, *Top Judge Says Bail in New York Isn’t Safe or Fair*, N.Y. TIMES (Feb. 5, 2013), <http://www.nytimes.com/2013/02/06/nyregion/judge-jonathan-lippman-seeks-to-overhaul-bail-process.html>.

²⁶ See *supra* note 10 and accompanying text.

²⁷ See Howell, *supra* note 21; E.B., *What “Broken Windows” Policing Is*, ECONOMIST (Jan. 27, 2015, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2015/01/economist-explains-18>; Editorial, *Broken Windows, Broken Lives*, N.Y. TIMES (July 25, 2014), <http://www.nytimes.com/2014/07/26/opinion/broken-windows-broken-lives.html>; Michael Greenberg, *‘Broken Windows’ and the New York Police*, N.Y. REV. BOOKS (Nov. 6, 2014), <http://www.nybooks.com/articles/2014/11/06/broken-windows-and-new-york-police>; Eugene Robinson, Opinion, *It’s Time to Seriously Rethink ‘Zero Tolerance’ Policing*, WASH. POST (May 4, 2015), http://www.washingtonpost.com/opinions/a-broken-pproach/2015/05/04/5119f10c-f28c-11e4-b2f3-af5479e6bbdd_story.html.

²⁸ Joseph Goldstein, *A Cigarette for 75 Cents, 2 for \$1: The Brisk, Shady Sale of ‘Loosies’*, N.Y. TIMES (Apr. 4, 2011) [hereinafter Goldstein, *A Cigarette for 75 Cents, 2 for \$1*], <http://www.nytimes.com/2011/04/05/nyregion/05loosie.html>; Joseph Goldstein & Marc Santora, *Staten Island Man Died from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html>. “Loosie” is the street term given to single cigarettes, sold most often for seventy-five cents or two for one dollar. See Goldstein, *A Cigarette for 75 Cents, 2 for \$1*, *supra*.

any charge.²⁹ Too many people were unsurprised by that result—disappointed and saddened perhaps, but not surprised. Mr. Garner’s death was yet another unintended consequence of the Broken Windows theory. Mr. Garner’s alleged crime the day he died—selling loose cigarettes—was something he had been arrested for and convicted of a number of times before. And his death—after telling the officers that being arrested over loosies had to end that day—as well as the subsequent failure to indict the officer for his death, only fed the lack of trust in the criminal justice system felt by his overpoliced neighborhood in Staten Island, as the NYPD continued to roll onto its blocks to enforce what had to feel like one-sided zero-tolerance policing.

Poor communities of color in New York City experience a police presence that feels too much like an occupying army³⁰ and too little like a police force committed to preserving peace, reducing fear, and maintaining order by protecting the lives of all citizens, regardless of the neighborhood in which they live, by treating them “with courtesy, professionalism, and respect.”³¹ Indeed, if the mayor’s faith in Broken Windows³² were matched by a concomitant effort to repair the decaying

²⁹ See J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

³⁰ See Joseph Goldstein, *‘Stop-and-Frisk’ Ebbs, but Still Hangs Over Brooklyn Lives*, N.Y. TIMES (Sept. 19, 2014) [hereinafter Goldstein, *‘Stop-and-Frisk’ Ebbs*], <http://www.nytimes.com/2014/09/20/nyregion/friskings-ebb-but-still-hang-over-brooklyn-lives.html>; see also Dan Balz & Scott Clement, *On Racial Issues, America Is Divided Both Black and White and Red and Blue*, WASH. POST (Dec. 27, 2014), https://www.washingtonpost.com/politics/on-racial-issues-america-is-divided-both-black-and-white-and-red-and-blue/2014/12/26/3d2964c8-8d12-11e4-a085-34e9b9f09a58_story.html; Doug Mataconis, *Poll Find[s] Wide Racial Divisions Over Confidence in Law Enforcement and the Justice System*, OUTSIDE BELTWAY (Dec. 7, 2014), <http://www.outsidethebeltway.com/poll-find-wide-racial-divisions-over-confidence-in-law-enforcement-and-the-justice-system>; Michael Wines, *Reaction to Ferguson Decision Shows Racial Divide Remains Over Views of Justice*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/2014/11/26/us/after-ferguson-announcement-a-racial-divide-remains-over-views-of-justice.html>.

³¹ *NYPD Mission*, N.Y. POLICE DEP’T, <http://www.nyc.gov/html/nypd/html/administration/mission.shtml> (last visited Dec. 21, 2015); see also Ginia Bellafante, *In New York Public Housing, Policing Broken Lights*, N.Y. TIMES (Nov. 26, 2014) [hereinafter Bellafante, *Policing Broken Lights*], <http://www.nytimes.com/2014/11/30/nyregion/in-new-york-public-housing-policing-broken-lights.html>.

³² Erin Durkin, Sarah Ryley & Jennifer Fermino, *De Blasio Administration Defends ‘Broken Windows’ Policing After Daily News Analysis, but Says it Should Be Respectful*, N.Y. DAILY NEWS (Aug. 5, 2014, 1:53 PM), <http://www.nydailynews.com/news/politics/de-blasio-defends-broken-windows-policing-daily-news-analysis-article-1.1891943>; Jennifer Fermino & Larry McShane, *De Blasio on City Council Decriminalization Proposal: I Agree with NYPD’s Bratton on ‘Broken Windows’*, N.Y. DAILY NEWS (Apr. 22, 2015, 8:48 PM), <http://www.nydailynews.com/news/politics/de-blasio-agrees-bratton-broken-windows-article-1.2194751>; Ken Auletta, *Fixing Broken Windows*, NEW YORKER (Sept. 7, 2015), <http://www.newyorker.com/magazine/2015/09/07/fixing-broken-windows> (“In April [2015], de Blasio

infrastructure in the city's most policed communities, then the light bulbs might have been replaced in the stairwell of the Louis Pink Public Housing complex, and officers doing yet another vertical patrol down a darkened stairwell in that complex might not have shot at Akai Gurley and he might still be alive.³³

These incidents and too many others like them were the backdrop to the Symposium that was held at the Benjamin N. Cardozo School of Law³⁴ on December 3–4, 2014. Its purpose was to initiate a set of conversations to help assess where we are, how we got here, and to consider alternatives to New York City's current hyperaggressive, racialized Broken Windows policing.

The Broken Windows theory emerged from a five-page essay by George Kelling and James Wilson, published in 1982 in the *Atlantic Monthly*. The essay argued that a single broken window left unaddressed will quickly result in a building full of broken windows; and that a car with a cracked windshield, allowed to remain on the street, will, if not repaired, be quickly vandalized. The authors wrote, "The unchecked panhandler is, in effect, the first broken window."³⁵ As Ginia Bellafante of the *New York Times* observed more than thirty years later, "We have come to think of 'broken windows' in terms of the need to make arrests for minor offenses, the imperative to get rid of squeegee men and other avatars of nuisance."³⁶

Yet in spite of its current practice by the NYPD, Kelling and Wilson recently maintained that their theory was not, at its inception, committed to hyperaggressive, high volume, low-level, "quality-of-life" arrests.³⁷ Rather, they insisted the core of their theory was that "ruined

again expressed support for the broken-windows approach. 'I want to emphasize, my vision of quality-of-life policing and my vision related to the broken-windows strategy is the same as Commissioner Bratton's')

³³ Bellafante, *Policing Broken Lights*, *supra* note 31; Ginia Bellafante, *The Dark Side of 'Broken Windows' Policing*, N.Y. TIMES (Jan. 16, 2015), <http://www.nytimes.com/2015/01/18/nyregion/the-dark-side-of-broken-windows-policing.html>. For a fuller account of the human cost of this incident and of the institutional conditions that contributed to it, see Alex Ronan, "His Life Matters": *The Story of Akai Gurley*, BUZZFEED (Jan. 20, 2016, 12:07 AM), <http://www.buzzfeed.com/alexronan/the-life-and-death-of-akai-gurley#.fslOeYQvLB>.

³⁴ See generally Cardozo Law Review Symposium: The Underbelly of the Beast: Misdemeanor Practice in the Era of Broken Windows and Saturation Policing (Dec. 3–4, 2014).

³⁵ Kelling & Wilson, *supra* note 20.

³⁶ Bellafante, *Policing Broken Lights*, *supra* note 31.

³⁷ New York City Police Commissioner William Bratton uses the term "quality-of-life" policing synonymously with "Broken Windows," to mean focusing on "the little things" like fare evasion and graffiti. WILLIAM J. BRATTON, NYPD, BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY 1 (2015), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf. No crime would be considered too petty to address. As Commissioner Bratton explains,

More misdemeanor arrests ultimately led to fewer felony arrests because the NYPD

things—broken windows, cracked sidewalks, littered pathways—must get fixed” for the health of the community.³⁸ They maintained that if the shattered glass of a broken window were allowed to litter the street rather than be quickly removed, and the window repaired, the community as a whole would suffer.³⁹

Broadly speaking, as Ginia Bellefante recently observed, Kelling and Wilson—in the notable absence of supporting data or field studies⁴⁰—claimed that “physical decay begets the moral kind;

was preventing crime more effectively. By applying summonses to violations and arrests to misdemeanor crimes, rather than looking the other way because these offenses are “too insignificant,” officers were correcting conditions early. Arresting someone for a misdemeanor frequently prevents him from graduating to committing felonies, for which severe sanctions like prison may result.

Id. at 3. Accounts filed contemporaneously with the program’s implementation give concrete meaning to Commissioner Bratton’s theory. Writing for the *New York Times* in 1994, Norimitsu Onishi reported:

Mr. Favia, a father of two, was one of 33 people arrested yesterday as part of the New York City Police Department’s crackdown on so-called quality-of-life offenses. Like Mr. Favia, they had failed to pay summonses issued for such transgressions as drinking and urinating in public, playing their radios too loud and riding bicycles on sidewalks.

Norimitsu Onishi, *A Quality-of-Life Offense? It Could End Up in Arrest*, N.Y. TIMES (June 30, 1994), <http://www.nytimes.com/1994/06/30/nyregion/a-quality-of-life-offense-it-could-end-up-in-arrest.html>. For a critical view that places “quality-of-life” policing—and the advertising campaign that accompanied it—in a broader political context, see ALEX S. VITALE, *CITY OF DISORDER* (2008), and the sources cited in note 39, *infra*.

³⁸ See Bellefante, *Policing Broken Lights*, *supra* note 31.

³⁹ See George Kelling, *Don’t Blame My ‘Broken Windows’ Theory for Poor Policing*, POLITICO MAG. (Aug. 11, 2015), <http://www.politico.com/magazine/story/2015/08/broken-windows-theory-poor-policing-ferguson-kelling-121268>. Kelling protested that his Broken Windows theory was never predicated on a high volume of nonfelony, low-level arrests. *But see* Harcourt, *supra* note 20. Bernard Harcourt’s rebuttal conclusively demonstrated that, by design and in its current New York iteration, Broken Windows depended on a high volume of nonfelony arrests, in spite of the absence of data demonstrating a causal link between hyperaggressive nonfelony arrests and a reduction in serious or violent crime. *Id.*; *see also* BRATTON, *supra* note 37; 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).

⁴⁰ Prominent criminologist and Columbia University law professor Jeffrey Fagan has argued that “[t]here’s no good scientific evidence that broken-windows works or has much to do with crime And the few claims for it that people try to make have been contested. None of them stand up to really close examination.” Auletta, *supra* note 32. Fagan noted that while the crime rate in New York fell in the nineteen-nineties when Broken Windows was applied on a city-wide basis, it also declined in San Diego, Houston, Dallas, and other cities that were not applying “Broken Windows” policing. *Id.* Fagan concluded that “Bratton can say all he wants that broken-windows works, and he can look at large correlations between misdemeanor arrests and declines in crime, but there’s no plausible connection between the two.” *Id.* Bratton, in essence, concedes the point, telling Ken Auletta during a recent interview: “You’re not going to find the scientific study that can support broken-windows one way or the other The evidence I rely on is what my eyes show me.” *Id.* Bratton pointed not to data but instead to “the reduction of fear” that he sees in rejuvenated neighborhoods like Times Square. *Id.*

appearances must be maintained for civility to cohere.”⁴¹ Even more important than making arrests, however, the theory if taken to its logical and reasonable conclusion would require that we actually replace the broken windows, scrub graffiti off the walls, and repair that which is broken in order to avert further accretive and corrosive deterioration of the community. Only that kind of concerted and purposeful action, in conjunction with nuanced “community oriented, problem-oriented policing,” seems likely to reduce crime and improve the relationship between New York City’s minority citizens and the police.⁴²

The authors were speaking both literally and metaphorically: their concern was to fix, repair, and restore not only the windows, but also, on a more profound level, the institutions and infrastructure that shape and define the quality of life in communities. And yet, disturbingly, but perhaps unsurprisingly, as City University of New York law professor Steve Zeidman observed, “If the problem is a broken window[,] they should fix the window But somehow we don’t fix the window, we just arrest people who start hanging out by the broken window.”⁴³

⁴¹ See Bellafante, *Policing Broken Lights*, *supra* note 31.

⁴² For a description of that approach to policing and its impact on a community, see Mark Obbie, *One Street in Minnesota Separates Radically Different Policing Strategies*, TAKEAPART (Dec. 14, 2015), <http://www.takepart.com/feature/2015/12/14/community-policing>. It might be that in the coming year the NYPD may seek, at least in part, to move closer to this model. In a recent essay advancing the claim that the NYPD was “winning the war on crime,” Commissioner Bratton noted that in the last two calendar years, New York City had experienced a “decline in overall index crime of 5.9%; two of the three lowest years since 1958 for murder,” and highlighted new strategies being implemented. He described how “precision policing”—“launching a variety of intensive investigations into local pockets of violence,” would be implemented in conjunction with the establishment of a “new set of expectations for patrol officers” requiring them to “meet with community members and work as active problem solvers in their assigned sectors.” Bill Bratton, *The NYPD: Winning the War on Crime*, N.Y. DAILY NEWS (Jan. 20, 2016, 4:00 AM), <http://www.nydailynews.com/new-york/nypd-winning-war-crime-article-1.2502562>. Bratton’s essay prompted an immediate response by Robert Gangi, the Director of the Police Reform Organizing Project. Robert Gangi, Letter to the Editor, *Don’t Buy Bratton’s Bogus Boasts*, N.Y. DAILY NEWS (Jan. 23, 2016, 3:52 AM), <http://www.nydailynews.com/opinion/january-23-tricks-ant-attacks-eagle-hate-article-1.2506133>. Writing in the New York Daily News, Gangi characterized Bratton’s description as a self-serving, “false narrative.” *Id.* Gangi argued that Bratton’s claim that “today’s NYPD practices a kinder, gentler kind of policing,” ignored the facts that “by any applicable criteria,” the NYPD “continues to harass and sanction low-income people of color for engaging in low-level infractions or innocuous activities that have been virtually decriminalized in well-off white communities.” *Id.* Only time will tell how the most scrutinized communities experience the new directives and policies.

⁴³ Emily Stephenson & Aruna Viswanatha, *New York Chokehold Death Brings Attack on ‘Broken Windows’ Doctrine*, REUTERS (Dec. 6, 2014, 4:29 AM) (quoting professor Zeidman), <http://www.reuters.com/article/2014/12/06/us-usa-new-york-chokehold-politics-idUSKCN0JJ2CN20141206#Vyb67lMe1ofQco4F.97>. New York City Councilman Ritchie Torres made a similar point when commenting on the death of Akai Gurley: “The story of Akai Gurley evinces the contradictions between two competing theories of broken windows Should broken windows be about policing the behavior of the window breakers or should it be about repairing

More than twenty years after the advent of citywide Broken Windows policing, New York remains two cities, divided on race and class lines; its fissure no more clearly revealed than through the prism of its criminal justice system.⁴⁴ Indeed, while private funding has restored Central Park from the dustbowl it was in the early 1990s into an emerald gem and “national treasure,”⁴⁵ the physical condition of New York City’s public housing continues to deteriorate—windows remain broken, stairwells remain unlit, mold festers.⁴⁶ As income and economic inequality in New York City increased,⁴⁷ its homeless population, absent adequate social services, swelled to an all-time high.⁴⁸ Schools in the most economically strapped communities—the have-nots in our mayor’s tale of two cities—remain underfunded and underperforming.⁴⁹ Students in those schools are too often subjected to zero-tolerance disciplinary policies and suffer the consequences of exclusionary discipline: their lives shattered, not restored, by out-of-school suspension and relocation to secondary placements that, with disturbing frequency, end *not* with graduation out of high school, but into the juvenile and then adult criminal justice systems.⁵⁰

the broken windows and improving the quality of the built environment of public housing?” Ronan, *supra* note 33.

⁴⁴ See Steven Zeidman, *Equal Protection Examined in the Context of Policing*, N.Y.L.J. (Feb. 7, 2014), <http://www.newyorklawjournal.com/id=1202641893657/Equal-Protection-Examined-in-the-Context-of-Policing#ixzz2sfew7WrK>.

⁴⁵ See Douglas Martin, *City Offers Private Group Contract to Maintain Central Park*, N.Y. TIMES (Sept. 6, 1997), <http://www.nytimes.com/1997/09/06/nyregion/city-offers-private-group-contract-to-maintain-central-park.html>; Press Release, Central Park Conservancy, Central Park Conservancy Announces the Campaign for Central Park, <http://support.centralparknyc.org/site/DocServer?docID=143>.

⁴⁶ See Jennifer Gonnerman, *A Daughter’s Death*, NEW YORKER (Oct. 5, 2015), <http://www.newyorker.com/magazine/2015/10/05/a-daughters-death>.

⁴⁷ See ESTELLE SOMMEILLER & MARK PRICE, ECON. POLICY INST., *THE INCREASINGLY UNEQUAL STATES OF AMERICA: INCOME INEQUALITY BY STATE, 1917 TO 2012* (2015), <http://www.epi.org/publication/income-inequality-by-state-1917-to-2012>; Hana R. Alberts, *Wealth Gap Champ Manhattan Is U.S.’s ‘Most Unequal’ County*, CURBED (Apr. 21, 2015), http://ny.curbed.com/archives/2015/04/21/wealth_gap_champ_manhattan_is_uss_most_unequal_county.php.

⁴⁸ See *supra* note 3; see also Bellafante, *Policing Broken Lights*, *supra* note 31; Schwirtz, *supra* note 19.

⁴⁹ See, e.g., Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE & SOC. PROBS. 21 (2015), <http://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult>.

⁵⁰ See ELORA MUKHERJEE, N.Y. CIVIL LIBERTIES UNION, *CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS* (2007), http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf; SAMANTHA POWNALL, N.Y. CIVIL LIBERTIES UNION, *A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE* (2013), http://www.nyclu.org/files/publications/nyclu_STPP_1021_FINAL.pdf; Molly Knefel, *The School-to-Prison Pipeline: A Nationwide Problem for Equal Rights*, ROLLING STONE (Nov. 7, 2013), <http://www.rollingstone.com/music/news/the-school-to-prison-pipeline-a-nationwide->

As social institutions in New York City's poorest neighborhoods remain largely unrepaired, Police Commissioner William Bratton and Mayor Bill de Blasio hold fast to Broken Windows. They in turn are chastised by former police commissioners and mayors, who lament any efforts to reshape police practice, and issue doomsday warnings of approaching urban Armageddon.⁵¹ More worrisome, however, is that two decades of zero tolerance for Broken Windows policing has failed to translate into zero tolerance for that which is literally broken in poor communities of color.⁵² It is not a giant leap to wonder whether what

problem-for-equal-rights-20131107; Editorial, *The School-to-Prison Pipeline*, N.Y. TIMES (May 29, 2013), <http://www.nytimes.com/2013/05/30/opinion/new-york-city-school-to-prison-pipeline.html>; N.Y. Civil Liberties Union, *Project Liberty: School to Prison Pipeline*, YOUTUBE (Mar. 4, 2015), <https://www.youtube.com/watch?v=DXR51vZCfVY>.

⁵¹ See Al Baker & J. David Goodman, *Gunplay Rises in New York, Reviving Issue for de Blasio*, N.Y. TIMES (June 1, 2015), <http://www.nytimes.com/2015/06/02/nyregion/gunplay-rises-in-new-york-reviving-issue-for-de-blasio.html>; John Del Signore, *Shootings & Gun Deaths on the Rise in NYC*, GOTHAMIST (June 2, 2015, 10:01 AM), http://gothamist.com/2015/06/02/shootings_homicide_nypd.php; Rocco Parascandola et al., *Murders Up 20% in 2015 in Year-to-Year Comparison, NYPD Says*, N.Y. DAILY NEWS (Mar. 3, 2015, 12:04 AM), <http://www.nydailynews.com/new-york/nyc-crime/murders-20-2015-year-to-year-comparison-nypd-article-1.2134509>; Jamie Schram et al., *Shootings Spike in NYC Over the Last Year*, N.Y. POST (June 10, 2014, 2:42 AM), <http://nypost.com/2014/06/10/shootings-spike-in-nyc-over-the-last-year>. While crime rates may vary by week, month, and season, what remains constant is that those living in New York City's poorest neighborhoods are both most actively policed and bear the heaviest immediate burden of whatever crime is committed. As Jennifer Gonnerman recently observed,

Last year, there were three hundred and thirty-three homicides in New York City, the lowest number of any year on record. But almost twenty per cent of the shootings in the city occur in public-housing developments, which hold less than five per cent of the population. Violent crime is so concentrated in some projects—places like the Ingersoll Houses, in Brooklyn, and the Castle Hill Houses, in the Bronx—that to residents it can feel as if shootings and sidewalk memorials were part of everyday life.

Gonnerman, *supra* note 46.

⁵² For example,

[f]orty-five hundred people live in the nine brick towers that make up the Grant Houses. The Manhattanville Houses, with six buildings, are home to three thousand people. According to the New York City Housing Authority, the average household income for both projects is twenty-four thousand dollars a year, and nearly forty per cent of the residents between the ages of eighteen and sixty-one are unemployed. The projects are more than fifty years old and in severe disrepair.

Gonnerman, *supra* note 46. In addition,

[m]ost of the city's three hundred and twenty-eight housing projects are in poor condition, but, in 2013, Bill de Blasio, then the city's public advocate, issued a report showing that the Grant Houses had more "outstanding work-order requests" than any other project in the city. Conditions such as lobby doors with broken locks and stairwells without lights exacerbate an already serious crime problem. In 2014, the *News* reported that "some of the city's most crime-ridden housing projects are the same developments most in need of immediate repairs."

may in fact be broken is the underlying theory of policing that seems predicated on occupy and degrade, rather than protect and serve.⁵³ Even as the NYPD replaces the unconstitutional-as-practiced “Stop-Question-and-Frisk” with programs like Operation Omnipresence,⁵⁴ New York City’s violent crime rate continues to decline. Despite some upticks, the rate and number of felony arrests continue to decline significantly, maintaining a trend that had begun years before the current mayor assumed office. This trend is mirrored nationally, regardless of the policing strategy employed in the communities involved.⁵⁵

Id. (quoting Greg B. Smith, *Most Crime-Ridden Housing Projects Are Also Buildings in Greatest Need of Repairs*, N.Y. DAILY NEWS (Oct. 6, 2014, 2:30 AM), <http://www.nydailynews.com/new-york/nyc-crime/exclusive-crime-ridden-projects-greatest-repairs-article-1.1964379>). Most recently, Ginia Bellafante underscored this point in connection with an incident that took place in the Osborne Playground in the Brownsville section of Brooklyn on the night of January 7, 2016, that resulted in five teenagers being arrested and charged with rape. *See* Ginia Bellafante, *Brownsville’s Broken Windows*, N.Y. TIMES (Jan. 15, 2016), http://www.nytimes.com/2016/01/17/nyregion/brownsvilles-broken-windows.html?action=click&pgtype=Homepage&version=Moth-Visible&moduleDetail=inside-nyt-region-1&module=inside-nyt-region®ion=inside-nyt-region&WT.nav=inside-nyt-region&_r=0. The playground, Bellafante noted, had been left unlocked, and three of the four lights intended to illuminate the section of the playground in which the incident occurred were broken. *Id.* “Although the events that unfolded at the Osborn Playground on Jan. 7 are still unclear,” Bellafante observed,

what seems obvious, as it did in the case of Akai Gurley, mistakenly shot to death in a dark stairway in the Louis Pink Houses in East New York when a light bulb was out, is the inconsistency with which ‘broken windows’ policing is practiced. The philosophy behind it is that safety and civility arise as a function of well-maintained public spaces, and yet, not surprisingly, it is the challenged neighborhoods that are the most poorly tended. Playgrounds in Brooklyn Heights, for example, are locked at night, precisely, one assumes, to protect the well-established from whatever might erupt if the ill-behaved were to congregate there.

Id.

⁵³ *See NYPD Mission*, *supra* note 31 (“The mission of the New York City Police Department is to enhance the quality of life in New York City by working in partnership with the community to enforce the law, preserve peace, reduce fear, and maintain order. The Department is committed to accomplishing its mission to protect the lives and property of all citizens of New York City by treating every citizen with courtesy, professionalism, and respect, and to enforce the laws impartially, fighting crime both through deterrence and the relentless pursuit of criminals.”).

⁵⁴ *See* Goldstein, ‘Stop-and-Frisk’ *Ebbs*, *supra* note 30; *see also* Stephen Farrell, *Omnipresence: New Stop-and-Frisk?*, N.Y. TIMES (Sept. 22, 2014, 7:17 AM), <http://www.nytimes.com/video/nyregion/10000003045311/omnipresence-ill-be-watching-you.html>; John Surico, *Omnipresence Is the Newest NYPD Tactic You’ve Never Heard of*, VICE (Oct. 20, 2014), <http://www.vice.com/read/omnipresence-is-the-newest-nypd-tactic-youve-never-heard-of-1020>.

⁵⁵ *See* Matt Flegenheimer, *De Blasio Calls New York ‘the Safest Big City’ Despite Some Crime Statistics*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/2015/06/03/nyregion/de-blasio-calls-new-york-the-safest-big-city-despite-some-crime-statistics.html>. In spite of the dire warning issued almost gleefully by defenders of Broken Windows—ostensibly out of concern for preserving the values of black lives in the midst of aggressive policing—hard data failed to support the doomsday prophets. *See* Heather Mac Donald, Opinion, *The New Nationwide*

And yet, we—or at least significant numbers of poor black and Hispanic New Yorkers—continue to live in an era of mass criminalization.⁵⁶ Violent crime in New York City continues to decrease. And, as a recent study conducted by the Misdemeanor Justice Project at the John Jay College of Criminal Justice reported, the number of encounters between the police and civilians—stops, arrests, moving violations, and criminal summonses—has declined from a peak of 2.63 million in 2011, to 1.82 million in 2014. But the decline was driven overwhelmingly by a steep reduction in the number of stop-and-frisks from a high of 685,724 in 2011, to a low of 45,787 in 2014.⁵⁷ Over the same period, by sharp contrast, misdemeanor arrests, which had peaked at 249,639 in 2010, decreased only to 219,917 in 2014.⁵⁸

Thus, Broken Windows continues to direct arrest practices, charging decisions, and bail determinations, and makes New York City's criminal justice system appear less equitable and distinctly not color-blind—thereby mirroring the ongoing divide in American society.⁵⁹

Crime Wave, WALL ST. J. (May 29, 2015, 6:27 PM), <http://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425>. A recent study completed by the Brennan Center for Justice demonstrated that while there has been a slight and disturbing uptick in homicides, especially in five cities (i.e., Baltimore, Detroit, Milwaukee, New Orleans, and St. Louis), “analysis shows, overall violent crime—which includes not just murder, but robbery, larceny, assault and burglary—is projected to be 1.5 percent lower in 2015 than 2014.” Editorial, *False Alarms About a National Crime Wave*, N.Y. TIMES (Nov. 27, 2015), <http://www.nytimes.com/2015/11/27/opinion/false-alarms-about-a-national-crime-wave.html>; see also MATTHEW FRIEDMAN ET AL., BRENNAN CTR. FOR JUSTICE, CRIME IN 2015: A PRELIMINARY ANALYSIS (2015), https://www.brennancenter.org/sites/default/files/publications/Crime_in_2015.pdf; Radley Balko, *There's No Evidence of a 'New Nationwide Crime Wave'*, WASH. POST (June 8, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/06/08/theres-no-evidence-of-a-new-nationwide-crime-wave>. But see Mark Berman, *FBI: Murders and Other Violent Crimes Increased Last Year*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/19/fbi-murders-and-other-violent-crimes-increased-last-year/?postshare=2381453305236380&tid=ss_mail.

⁵⁶ See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–12 (2005) (recounting that, in recent decades, America has criminalized behavior that had previously been considered legal). Assertions that the era of mass incarceration may have passed are significantly premature. See Andrew Cohen & Oliver Roeder, *Way Too Early to Declare Victory in War Against Mass Incarceration*, BRENNAN CTR. FOR JUST. (May 21, 2014), <http://www.brennancenter.org/analysis/way-too-early-declare-victory-war-against-mass-incarceration> (“[T]he incarceration rate is decreasing, but . . . not by much. It's down 5.5 percent since its 2007 peak. Since 2001, it's up 1.6 percent. An unscientific word for this trend would be ‘flat.’”).

⁵⁷ See PREETI CHAUHAN ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, TRACKING ENFORCEMENT RATES IN NEW YORK CITY: 2003–2014, at 21–22 (2015), http://www.jjay.cuny.edu/sites/default/files/News/Enforcement_Rate_Report.pdf.

⁵⁸ *Id.* at 10.

⁵⁹ See, e.g., KUTATELADZE ET AL., *supra* note 6; K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286 (2014) (“[S]ubstantial racial disparities arise because zero-tolerance policing is primarily pursued in poor urban neighborhoods of color. The result is that black and Latino people are routinely and aggressively prosecuted under statutes and local ordinances that go

Zero-tolerance policing, as applied to the school system, pushes black and Hispanic kids out of mainstream schools and into secondary placements, the juvenile justice system, and finally, into adult jails.⁶⁰ Nonfelony arrests and convictions often keep people in jail, or require them to return to court for multiple appearances to resolve their cases.⁶¹

Those case resolutions too often impose not only the stain of a criminal conviction, but also derivative consequences that may include: removal from this country, denial of citizenship, limitation on one's ability to travel out of and re-enter this country, removal from public housing, termination or suspension of employment, rejection of licensure, limited access to or removal from educational opportunities, and denied access to the financial support that may be necessary to make educational opportunities more than a theoretical possibility.⁶²

largely unenforced in white and wealthy areas... [thereby undermining] procedural justice... because over-policing increases the number of cases in lower criminal courts, overwhelming prosecutors, defenders, and judges.”)

⁶⁰ See *supra* note 50 and accompanying text. A recent Bureau of Justice Statistics report noted that the indigence rate for state felony cases was 43% in 1963, while “[t]oday approximately 80% of people charged with crime are poor.” Paul D. Butler, Essay, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2179–81 (2013).

⁶¹ Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351 (2013). Here, in brief, Kohler-Hausmann argues that misdemeanor arrests, even absent a resulting criminal conviction, serve as a form of social control by imposing three costs: The arrest itself creates a criminal record that is logged into a statewide data base, and “marks” the arrestee, allowing the system to measure the individual against a rubric based on a number of variables, including history of arrests, convictions, court attendance, and successful completion of obligations imposed to secure a disposition. The second form of control imposed by misdemeanor arrests is the time-cost imposed on the arrestee: defendants often must make multiple mandatory court appearances to obtain final resolution of their cases, with attendant consequences that could include lost work, lost time in school, and child care costs. Finally, to secure a final disposition, individuals often are required to perform some task in a court ordered or approved program that subjects them to ongoing oversight and control. *Id.*; see also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 633–35 (2014). This multiyear ethnography of judgments issued by New York City’s misdemeanor courts persuasively argued that the plea driven system sorts defendants charged with misdemeanors and assigns outcomes based not on the strength or weakness of evidence, but instead on the basis of the defendants’ prior contacts with the system. Kohler-Hausmann’s quantitative analysis demonstrated that prior misdemeanor convictions are the single greatest predictor of future misdemeanor convictions; and that New York City’s criminal justice system, at least as it applies to those charged with nonfelonies—overwhelmingly economically disadvantaged black and Hispanic men—functions to mark, sort, and categorize them as minor, moderate, or frequent rule-breakers for ease of future oversight and management by the state. *Id.*; see also Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013).

⁶² For a general and comprehensive introduction to the scope of the consequences that may attach with a conviction or arrest, see MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013), and SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, N.Y. STATE BAR ASS’N, *RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY* (2006), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=26857>. The ABA has recently completed an encyclopedic catalogue of 45,000 regulations that prohibit individuals with criminal histories from engaging

In addition, current nonfelony arrest practices in New York City are overwhelmingly racialized and geographically specific, imposing their burden and cost on a small number of neighborhoods and communities—all poor, all marginalized, and all overwhelmingly black and Hispanic.⁶³ Without intending to conflate causation and correlation, that data supports an argument that current policing and prosecution policies effectively criminalize race, poverty, drug addiction, and mental illness, while “tagging” a growing class of young black and Hispanic people in order to oversee and manage them by repeatedly pulling them into the criminal justice system with low-level, nonfelony arrests.⁶⁴ The system’s unfairness is further exacerbated by the degree to which it functionally denies due process that is only exhausted when the accused proceeds to trial where she enjoys the full panoply of her Sixth Amendment, Article One, Section 6 rights.⁶⁵

in various civic activities—from voting to getting a barber’s license. In introducing its data, the ABA emphasized how all but impossible it is for anyone to be cognizant of, and therefore protect against, all the consequences that may attach to a criminal conviction:

Persons convicted of crime are subject to a wide variety of legal and regulatory sanctions and restrictions in addition to the sentence imposed by the court. These so-called “collateral consequences” of conviction have been promulgated with little coordination in disparate sections of state and federal codes, which makes it difficult for anyone to identify all of the penalties and disabilities that are triggered by conviction of a particular offense. While collateral consequences have been a familiar feature of the American justice system since colonial times, they have become more important and more problematic in the past 20 years for three reasons: they are more numerous and more severe, they affect more people, and they are harder to avoid or mitigate. As a result, millions of Americans are consigned to a kind of legal limbo because at one point in their past they committed a crime.

Project Description, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION (2013), <http://www.abacollateralconsequences.org/description> (last visited Dec. 22, 2015). To examine a current New York database, see *New York*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org/search/?jurisdiction=35> (last visited Dec. 22, 2015). For a concrete example of the human dimension of collateral consequences, see Shaila Dewan, *The Collateral Victims of Criminal Justice*, N.Y. TIMES (Sept. 5, 2015), <http://www.nytimes.com/2015/09/06/sunday-review/the-collateral-victims-of-criminal-justice.html>. As Dewan noted, “[c]ollateral damage is not limited to the guilty party. When money for fines or bail is needed, often a relative pays. When prisoners are released, often with no job prospects, no driver’s license, and crippling court debt, their families bear the burden.” *Id.*

⁶³ Significant data on which this assertion is based may be located in a number of publications. See e.g., CHAUHAN ET AL., *supra* note 21; CJA ANNUAL REPORT 2013, *supra* note 16; Dewan, *supra* note 62; see also Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003). For information about direct health consequences that derive from mass arrests and resulting incarcerations, see DAVID CLOUD, VERA INST. OF JUSTICE, ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION (2014), <http://www.vera.org/sites/default/files/resources/downloads/on-life-support-public-health-mass-incarceration-report.pdf>.

⁶⁴ See sources cited *supra* notes 6, 21, 63; see also Kohler-Hausmann, *supra* note 61.

⁶⁵ See U.S. CONST. amend. VI; N.Y. CONST. art. 1, § 6; see also Kohler-Hausmann, *supra* note 61; Natapoff, *supra* note 61.

To state that which is apparent to even the most casual observer of New York City's criminal court practice, that practice provides the overwhelming majority of those prosecuted with what might be described, at best, as "Due Process-light." The current criminal justice system depends overwhelmingly on pleas. For example, 172,490 out of the 359,475 cases arraigned in New York City in 2014—nearly half—were resolved with guilty pleas at arraignment. Arraignment is the initial court appearance where the great majority of defendants have met their assigned lawyer only a matter of minutes prior to appearing before the judge; it is a time when neither the prosecutor nor the defense attorney has had the opportunity to probe the factual or legal strengths and weaknesses of the charges being brought.⁶⁶ These cases are resolved quickly, often within minutes of the assigned attorney first meeting her client, in what has repeatedly been described as cookie-cutter, "meet 'em, greet 'em, and plead 'em" assembly line justice.⁶⁷

Of the cases that survive arraignment, few are resolved by actual litigation—the taking of sworn testimony, and the testing of the government's proof with a final assessment on legal sufficiency by a finder-of-fact. Indeed, in 2014, the city's 359,475 arraigned cases produced only 580 trials—of which only 175 were in front of a jury; the remaining 405 were decided by a judge.⁶⁸ That year was hardly an anomaly: in calendar year 2013, 364,583 nonfelony cases were vacuumed into the system, yet those cases produced only 209 jury trials—a meager 0.0006%—in which the accused thoroughly exercised all the due process rights accorded by the Constitution.⁶⁹

Broken Windows policing has flooded the criminal justice system with a volume of low-level offenses that dramatically exceeds the system's capacity for nuanced, due process based, adversarially-tested resolution. NYPD arrest policies, thus, in significant part, have helped shape a managerial, nonadjudicative, order-maintenance system of criminal justice that reflects the growing racial and socioeconomic divide between New York City's haves and have-nots, and exacerbates the racial tension that undermines public trust in the police.⁷⁰ In many

⁶⁶ See OFFICE OF THE CHIEF CLERK, CRIMINAL COURT OF THE CITY OF N.Y., 2014 ANNUAL REPORT 19 (2015) [hereinafter 2014 CRIMINAL COURT REPORT], https://www.nycourts.gov/COURTS/nyc/criminal/cc_annl_rpt_2014.pdf.

⁶⁷ See ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 33 (2009) (quoting Joseph Bellacosa, Opinion, *In Defense of a Proper Defense*, NEWSDAY (July 27, 2008, 8:00 PM), <http://www.newsday.com/opinion/in-defense-of-a-proper-defense-1.563775>), <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>; see also AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009).

⁶⁸ See 2014 CRIMINAL COURT REPORT, *supra* note 66, at 19, 51.

⁶⁹ *Id.*

⁷⁰ See, e.g., Joseph Goldstein, *Safer Era Tests Wisdom of 'Broken Windows' Focus on Minor*

ways, nonfelony arrests and prosecutions are at the root of the flawed justice system that, as it currently exists, too often degrades individuals, depletes families, weakens communities, and in these ways poses a threat to our democracy.⁷¹

Crime, N.Y. TIMES (July 25, 2014), <http://www.nytimes.com/2014/07/25/nyregion/safer-era-tests-wisdom-of-broken-windows-focus-on-minor-crime-in-new-york-city.html>; Sarah Ryley et al., *Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in 'Broken Windows' Policing*, N.Y. DAILY NEWS (Aug. 4, 2014, 2:00 AM), <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>. As Charles Blow argued in a recent Op-Ed, how one views Broken Windows policing “completely depends on your vantage point, which is heavily influenced by racial realities and socio-economics. For poor black people, it means that they have to be afraid of the cops as well as the criminals.” Charles M. Blow, Opinion, *Romanticizing 'Broken Windows' Policing*, N.Y. TIMES (June 4, 2015), <http://www.nytimes.com/2015/06/04/opinion/charles-m-blow-romanticizing-broken-windows-policing.html>. “People in these black communities . . . are being asked to make an impossible choice: accept the sprawling, ruinous collateral damage—including killings of unarmed black people—in police departments’ wars on crime, or complain about excessive force and attempt to curtail it only to have criminals roam free” as officers curtail their legitimate efforts to protect and serve. *Id.* But the degree to which Broken Windows policing has had a radically disparate racial impact is not specific to New York. To the contrary,

the broken windows theory is still used in police departments across the country, resulting in racial profiling and unleashing other indiscriminate policies on black people, such as stop-and-frisk, that are never similarly applied in white neighborhoods. The failure of broken windows to do anything except discriminate is a constant theme running through investigations of police departments by the Justice Department under President Obama.

It found major patterns of excessive force in Cleveland, Albuquerque, Seattle, and Miami and harsh treatment of Latinos in traffic stops in Maricopa County, Ariz. and East Haven, Conn.

It found discriminatory stops of pedestrians and drivers of color in Newark, N.J., and Antelope Valley, Calif., and discriminatory policing of people of color, gay citizens, and women trying to report domestic violence in New Orleans.

Derrick Z. Jackson, *'Broken Windows,' Broken Policy*, BOS. GLOBE (Dec. 29, 2014), <https://www.bostonglobe.com/opinion/2014/12/29/broken-windows-broken-policy/WM8hUySUL0YerJq2S2Ay1N/story.html>. In short, Broken Windows policing has split the cities in which it has been applied into the world of the haves—who are not aggressively policed—and the have-nots—who are poor black and brown people. *See id.* For helpful context, see Butler, *supra* note 60 (noting that, according to a Bureau of Justice Statistics report, the indigence rate for state felony cases was 43% in 1963, while “[t]oday approximately 80% of people charged with crime are poor”).

⁷¹ *See* BORUCHOWITZ ET AL., *supra* note 67, at 12–13; Editorial, *End Mass Incarceration Now*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/opinion/sunday/end-mass-incarceration-now.html> (“The severity [of current criminalization and incarceration policies] is evident in the devastation wrought on America’s poorest and least educated, destroying neighborhoods and families. From 1980 to 2000, the number of children with fathers in prison rose from 350,000 to 2.1 million. Since race and poverty overlap so significantly, the weight of our criminal justice experiment continues to fall overwhelmingly on communities of color, and particularly on young black men.”); *see also* Editorial, *Forcing Black Men Out of Society*, N.Y. TIMES (Apr. 25, 2015), <http://www.nytimes.com/2015/04/26/opinion/sunday/forcing-black-men-out-of-society.html>; Justin Wolfers et al., *1.5 Million Missing Black Men*, N.Y. TIMES: THE UPSHOT (Apr. 20, 2015), <http://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html>.

In the last eighteen months, we have been unfortunate witnesses to the literally fatal consequences of Broken Windows policing. James Murdough died in a cell on Rikers Island after being arrested for misdemeanor trespass.⁷² Eric Garner was killed on a street in Tompkinsville, Staten Island, when officers attempted to arrest him for selling a “loosie”—a single cigarette.⁷³ Akai Gurley died while innocently walking down the stairs in an unlit stairwell in the Louis H. Pink Houses in East New York, Brooklyn. Mr. Gurley was the victim of a vertical patrol, one of the instruments of zero-tolerance policing, and of New York City’s failure to fix the broken light bulbs in his building’s stairwell.⁷⁴

These events should give us pause and encourage us to reconsider the wisdom of zero-tolerance policies.

Reforming hyperaggressive, quality-of-life, Broken Windows policing, as well as the culture of the criminal courts, is the most concrete, immediate, long-term, and necessary way to alter the criminal justice system in New York City and throughout the United States. In a recent essay, Jelani Cobb, reflecting on the events in Ferguson, Missouri, during the summer of 2014 (and we may add Staten Island and the Bronx, New York; Cleveland, Ohio; Baltimore, Maryland; and North Charleston, South Carolina),⁷⁵ found equally relevant today the most

⁷² See *Homeless Veteran ‘Baked to Death’ in New York Prison Cell*, GUARDIAN (Mar. 19, 2014, 12:03 AM), <http://www.theguardian.com/world/2014/mar/19/homeless-veteran-new-york-prison>; Jake Pearson, *Autopsy Says Ex-Marine Jerome Murdough Died in Rikers Island Cell from Heat and Meds*, HUFFINGTON POST (Sept. 12, 2014, 5:54 PM), http://www.huffingtonpost.com/2014/09/12/jerome-murdough-autopsy-_n_5813452.html (last updated Nov. 12, 2014, 5:59 AM).

⁷³ See Ford Fessenden, *New Perspective on Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/interactive/2014/12/03/us/2014-12-03-garner-video.html>; N.Y. Daily News, *Eric Garner Video—Unedited Version*, YOUTUBE (July 12, 2015), <https://www.youtube.com/watch?v=JpGxagKOkv8>.

⁷⁴ See Bellafante, *Policing Broken Lights*, *supra* note 31; J. David Goodman & Vivian Yee, *Officer Charged in Akai Gurley Case Debated Reporting Gunshot, Officials Say*, N.Y. TIMES (Feb. 11, 2015), <http://www.nytimes.com/2015/02/12/nyregion/akai-gurley-shooting-death-arraignment.html>. There remains the still unresolved case of eighteen-year-old unarmed Ramarley Graham, shot and killed by an NYPD officer in the bathroom of his mother’s apartment as he flushed a small amount of marijuana down the toilet, when the police officers had entered with guns drawn—but without a warrant, consent, or probable cause. See Zena Barakat & Randy Leonard, *Officer Had ‘No Choice’ in Bronx Man’s Shooting, His Lawyer Says in Court*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/2012/06/14/nyregion/officer-pleads-not-guilty-in-ramarley-graham-shooting.html>; Matt Flegenheimer & Al Baker, *Officer Fatally Shoots Teenager in Bronx*, N.Y. TIMES (Feb. 2, 2012), <http://www.nytimes.com/2012/02/03/nyregion/unarmed-teenager-fatally-shot-by-officer-chasing-him.html>; Christopher Mathias, *Ramarley Graham’s Mother Tells DOJ To Stop Dragging Its Feet*, HUFFINGTON POST (July 24, 2015, 2:35 PM), http://www.huffingtonpost.com/entry/ramarley-grahams-mother-tells-doj-to-stop-dragging-its-feet_us_55b251b3e4b0224d8831eb6b.

⁷⁵ See David A. Graham, *The Shockingly Familiar Killing of Walter Scott*, ATLANTIC (Apr. 8, 2015), <http://www.theatlantic.com/national/archive/2015/04/the-shockingly-familiar-killing-of>

salient conclusion of the Kerner Commission Report, issued in 1967 in response to the race riots that had exploded in urban centers across the United States in the early to mid-1960s,⁷⁶ “that the United States was ‘moving toward two societies, one black, one white—separate and unequal.’”⁷⁷

It is hard to ignore how many people living in the most policed communities throughout New York City feel about the criminal justice system—overpoliced and improperly protected⁷⁸—which made the Symposium held at the Benjamin N. Cardozo School of Law so important. Jelani Cobb writes, “Forty-seven years ago, the Kerner Commission looked at the smoldering landscape of American cities and asked three questions: ‘What happened? Why did it happen? What can be done to prevent it from happening again?’”⁷⁹ The authors in this collection of essays ask similar questions. The “what”: where we are with the problem of mass criminalization, and the hyperarrest and prosecution of low-level offenses that are being pursued in an overtly racialized manner. The “so what”: why this matters; the immediate and long-term social costs of these policies and the institutions that actualize and process them—the trauma caused by street stops; the immediate and long-term costs when trust is supplanted by fear, when

walter-scott/390006; Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>; Sheryl Gay Stolberg & Ron Nixon, *Freddie Gray in Baltimore: Another City, Another Death in the Public Eye*, N.Y. TIMES (Apr. 21, 2015), <http://www.nytimes.com/2015/04/22/us/another-mans-death-another-round-of-questions-for-the-police-in-baltimore.html>; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), <http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html>.

⁷⁶ Following the race riots of the 1960s, President Lyndon Baines Johnson appointed a commission, chaired by Illinois Governor Otto Kerner, to determine the causes of the riots. The Commission Report concluded that the principle trigger derived from confrontations between the local police and members of local black communities. It also found that residents held an often justified perception of the largely white police as an occupying force which was in the community to serve and protect the interests of the privileged white communities rather than to serve and protect the legitimate interests of the local minority residents, and that the police inherently harbored racist attitudes toward residents of minority communities that they were also charged to serve. See NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, THE KERNER REPORT (1967), http://faculty.washington.edu/qtaylor/documents_us/Kerner%20Report.htm; James Meyerson, *What Is the Kerner Commission and Why it Should Be Revisited in Light of Ferguson*, HUFFINGTON POST: THE BLOG (Oct. 18, 2014), http://www.huffingtonpost.com/james-meyerson/what-is-the-kerner-commis_b_5686572.html.

⁷⁷ Jelani Cobb, *Crimes and Commissions*, NEW YORKER (Dec. 8, 2014) [hereinafter KERNER COMM'N REPORT] (quoting NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS I (1968), <https://www.ncjrs.gov/pdffiles1/Digitization/8073NCJRS.pdf>), <http://www.newyorker.com/magazine/2014/12/08/crimes-commissions>.

⁷⁸ See sources cited *supra* notes 30, 70.

⁷⁹ *Id.* (quoting KERNER COMM'N REPORT, *supra* note 77, at 1).

communities feel that cops are not there to protect and serve, but to occupy and degrade; the staggering consequences not only of convictions but also of arrests, as measured in lost school days, lost wages, and lost jobs. Lastly, the “now what”: approaches to reform, and changes that each of the institutional actors—police, prosecutors, courts, and defenders—must make to produce ameliorative changes motivated by a concern for greater fairness, equality, and justice.

Windows left too long unfixed may well breed social disorder. A broken theory of policing that encourages a false dichotomy between occupation and disorder has produced its own form of social disorder. It is well past time that it be repaired.⁸⁰

⁸⁰ As this Introduction goes to press, the New York City Council has begun debate on a set of eight bills labeled the Criminal Justice Reform Act, which would provide police officers the discretion to process certain low-level Broken Windows offenses like drinking in public, littering, riding bikes on sidewalks, and violations of park rules, in civil, rather than in criminal court. Some advocates, including the New York Civil Liberties Union, have praised the proposals for seeking to prevent poor, New Yorkers of color from accumulating arrests, arrest records, and criminal warrants in connection with low level, quality of life offenses. Others have raised concerns that the bills do too little by: failing to decriminalize all or some of the low-level conduct at issue, leaving unchallenged the underlying assumption of Broken Windows policing, vesting too much power in the NYPD, stripping those processed civilly of their right to counsel, and allowing for the imposition of fines, the entry of civil judgments for a failure to pay, thereby saddling those affected with the attendant consequence of garnishment of wages or bank accounts, and an adverse credit rating that could have long term impact on the person's eligibility for bank loans, student loans, or mortgages. As one critic has written, “this package of reforms is at best a baby step, and at worst, may open the door to more racially discriminatory police actions. . . . If the City Council is serious about reducing the negative impacts of the criminal justice system, it should start by revisiting its decision to expand the NYPD. More police with more discretion is not the answer.” Alex S. Vitale, Opinion, *Criminal Justice Reform Act Is No Alternative to Broken Windows Policing*, GOTHAM GAZETTE (Jan. 25, 2016), <http://www.gothamgazette.com/index.php/opinion/6112-criminal-justice-reform-act-is-no-alternative-to-broken-windows-policing>; see also Madison Margolin, *Will NYC's New Approach to Policing Minor Offenses Be Any Different From 'Broken Windows'?*, VILLAGE VOICE (Jan. 25, 2016), <http://www.villagevoice.com/news/will-nycs-new-approach-to-policing-minor-offenses-be-any-different-from-broken-windows-8193059>; Emma Whitford, *NYC'S Broken Windows Reform Is Too Weak, Critics Say*, GOTHAMIST (Jan. 26, 2016, 11:33 AM), http://gothamist.com/2016/01/26/broken_windows_reform.php.