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THE COSTS OF “BROKEN WINDOWS” POLICING: TWENTY YEARS AND COUNTING

K. Babe Howell[†]

Over twenty years ago, in 1994, I started my career as a public defender, as Mayor Rudolph Giuliani and Police Commissioner William Bratton transformed New York City policing based on the “Broken Windows” theory (Broken Windows).¹ I watched Broken Windows transform the criminal justice system, but it was not really Broken Windows.² It was zero-tolerance policing.³ Moreover, it was zero-tolerance policing that was confined almost entirely to communities of color and vulnerable populations. Twenty years later, the same zero-tolerance policing persists in New York City.

If we took the theory underlying Broken Windows policing seriously, we would be fixing broken windows. We would be replacing broken light bulbs. We would be repairing broken doors and broken elevators in public housing.⁴ We would be improving parks and schools and after school programs in underserved communities. We would be making our public spaces safe by addressing unsafe conditions.

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¹ See George L. 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>.

² 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> (“Arrest of an offender is supposed to be a last resort—not the first.”).

³ By zero-tolerance policing, I refer to a policing policy that requires arrests and summons, rather than informal responses to minor violations. As the next sentence makes clear, “zero-tolerance” is a bit of a misnomer because only certain populations are arrested and policed for these minor violations.

⁴ See Ginia Bellafante, *In New York Public Housing, Policing Broken Lights*, N.Y. TIMES (Nov. 26, 2014), <http://www.nytimes.com/2014/11/30/nyregion/in-new-york-public-housing-policing-broken-lights.html> (noting that leaders purportedly committed to Broken Windows policing have failed to address deterioration of public housing).

The theory behind Broken Windows is to make public spaces safe so that law-abiding people feel comfortable spending time in such public spaces.⁵ But what zero-tolerance policing does is make public spaces *very, very dangerous* for black⁶ people,⁷ Latino people, poor people, LGBTQ⁸ people, people with substance abuse problems, people with mental health problems, and homeless people. The risk of being subjected to a stop, summons, or arrest for de minimis offenses means that many individuals, and particularly young men of color, in aggressively policed neighborhoods experience a certain amount of fear each time they leave their homes.⁹

Zero-tolerance policing re-creates and reinforces that “tale of two cities” that New York City Mayor Bill de Blasio promised to end in his campaign.¹⁰ While I do not doubt that Mayor de Blasio is concerned about the increasing disparities between the rich and the poor in New York City, the decision to bring back Police Commissioner Bratton demonstrates that Mayor de Blasio, like so many others, fails to

⁵ *Id.*

⁶ This Article has been edited to conform to *The Chicago Manual of Style*, which prefers not to capitalize “black.” THE CHICAGO MANUAL OF STYLE ¶ 8.39 (16th ed. 2010). However, the Author’s preference is to capitalize it. See Merrill Perlman, *Black and White: Why Capitalization Matters*, COLUM. JOURNALISM REV. (June 23, 2015), http://www.cjr.org/analysis/language_corner_1.php; Lori L. Tharps, Opinion, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), <http://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html>.

⁷ See Roxane Gay, *On the Death of Sandra Bland and Our Vulnerable Bodies*, N.Y. TIMES (July 24, 2015), <http://www.nytimes.com/2015/07/25/opinion/on-the-death-of-sandra-bland-and-our-vulnerable-bodies.html>.

⁸ LGBTQ is an acronym for Lesbian, Gay, Bisexual, Transgender, and Queer.

⁹ Many moving accounts are available regarding the impact of these policies. See, e.g., Julie Dressner & Edwin Martinez, Opinion, *The Scars of Stop and Frisk*, N.Y. TIMES (June 12, 2012), <http://www.nytimes.com/2012/06/12/opinion/the-scars-of-stop-and-frisk.html> (recounting Tyquan Brehon and his mentor’s experiences with the New York Police Department (NYPD), leading Tyquan to stay home to avoid the police, and his mentor, a thirty-something-year-old educator, to experience fear when a police car was behind him); Nicholas K. Peart, Opinion, *Why Is the N.Y.P.D. After Me?*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html> (explaining that, after several unjustified stops, “I was afraid I would be stopped and searched or that something worse would happen. . . . I incorporated into my daily life the sense that I might find myself up against a wall or on the ground with an officer’s gun at my head. For a black man in his 20s like me, it’s just a fact of life in New York”). For an excellent discussion of the impact of aggressive policing policy on youth, see Brett G. Stoudt, Michelle Fine & Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331 (2011/12) (analyzing NYPD stop, frisk, use of force, and arrest data for youths aged fourteen through twenty-one and youth-generated survey results regarding policing), and also see Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 64–65 (2014) (recounting the experiences of black men who modify behavior because of aggressive policing tactics).

¹⁰ See Ray Sanchez, *Sworn-in de Blasio Pledges to Take on ‘Tale of Two Cities’ in NYC*, CNN (Jan. 2, 2014), <http://www.cnn.com/2014/01/01/politics/bill-de-blasio-inauguration>.

recognize the enormous cost imposed on vulnerable communities by zero-tolerance policing.¹¹ Broken Windows policing as a practice in New York City is one of the policies that favors the rich and disfavors the poor, reinforcing and magnifying income and social inequality.¹²

First, every police encounter that arises out of a minor offense has the potential to end in tragedy, making unnecessary policing under zero-tolerance policies dangerous. In New York City today, Eric Garner would not be dead and his children would have a father if not for zero-tolerance policing.¹³ Mr. Garner was arrested for selling loose cigarettes by a unit that was designated to address quality-of-life conditions as part of the Broken Windows strategy.¹⁴ Akai Gurley would not have been shot and killed during a “vertical patrol.”¹⁵ These, of course, are just two of a list of unfortunate victims of zero-tolerance policing stretching back two full decades to the 1994 chokehold death of Anthony Baez, who was

¹¹ Alternatively, he may understand the harms imposed by zero-tolerance policing, but be making a politically strategic choice of police commissioner to avoid allegations of being soft on crime and to shore up support for other initiatives.

¹² For data on the concentration of stop and frisk, use of force, and arrest activities by precinct with income and race data, see Stoudt, Fine & Fox, *supra* note 9, at 1340, 1364 app. III, 1365 app. IV (comparing stop, frisk, and arrest rates and income in the ten police precincts in NYC most likely to stop youths and in the ten police precincts least likely to stop youths), and also see Sarah Ryley, *Minorities Face Disproportionate ‘Broken Windows’ Enforcement Everywhere—Especially in Predominately White Neighborhoods*, N.Y. DAILY NEWS (Sept. 8, 2014, 10:03 PM), <http://www.nydailynews.com/new-york/nyc-crime/broken-windows-disproportionately-enforced-white-neighborhoods-article-1.1931171> (analyzing summons data in New York City and finding “this tale of two cities seems to follow blacks and Hispanics wherever they go”). For an interactive map of summonses in New York City, see Maura R. O’Connor, *The NYPD’s Improbable Cause*, N.Y. WORLD (Sept. 5, 2012), <http://www.thenewyorkworld.com/2012/09/05/nypd-improbable-cause>. For racial disparities in marijuana arrests and the increase in these prosecutions since Broken Windows policing was adopted, see K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 321–24 (2014) [hereinafter Howell, *Prosecutorial Discretion*] (comparing use, arrest, and prosecution data by race for marijuana misdemeanors in New York City), and also see AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 94 (2013) (depending on the county, New York City arrests for marijuana under zero-tolerance policies were nearly five to ten times higher for blacks than for whites).

¹³ See Curtis Skinner, *Man, Allegedly Selling Untaxed Cigarettes, Dies After Chokehold by NYC Police*, REUTERS (July 18, 2014, 3:11 PM), <http://www.reuters.com/article/2014/07/18/us-usa-new-york-chokehold-idUSKBN0FN2D020140718>.

¹⁴ Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> (linking Mr. Garner’s death to the Broken Windows policing strategy of addressing minor disorder, stating that “[t]his was not a chance meeting on the street,” but rather, “[i]t was a product of a police strategy to crack down on the sort of disorder that, to the police, Mr. Garner represented”).

¹⁵ See Bellafante, *supra* note 4, for an account of Akai Gurley’s death during a vertical patrol. For a discussion of the relation of vertical patrols of public housing buildings to Broken Windows policing, see Adam Carlis, Note, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2006–08 (2009).

tossing a football in the street.¹⁶ Elsewhere in the country, similar tragedies unfold as police proactively engage in policing based on the Broken Windows model that New York City made so popular.¹⁷ Michael Brown would not be dead if a Ferguson, Missouri, police officer had not attempted to confront him for walking in the street rather than on the sidewalk.¹⁸ Walter Scott¹⁹ and Sandra Bland²⁰ would also be with us if they were not subjected to protracted stops for traffic infractions. While the use of force to effectuate arrests has always created the risk of injury or death, Broken Windows policing has multiplied the number of police–civilian encounters that may result in such tragedies by encouraging stops, summonses, and arrests for even the most minor of offenses.²¹

Second, often overshadowed by these tragedies is the fact that for every death that makes the front pages of the newspaper, there are millions of discretionary police encounters.²² These encounters take

¹⁶ See Clifford Krauss, *Clash Over a Football Ends with a Death in Police Custody*, N.Y. TIMES (Dec. 30, 1994), <http://www.nytimes.com/1994/12/30/nyregion/clash-over-a-football-ends-with-a-death-in-police-custody.html> (describing the chokehold death of Anthony Ramon Baez, a security guard and night student).

¹⁷ See WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 228–29 (1998) (describing the NYPD's Police Strategy #5, a zero-tolerance policy of arresting individuals rather than ticketing or warning people for offenses such as public consumption of alcohol, panhandling, trespass, and fare evasion); Tim Newburn, *Atlantic Crossings: 'Policy Transfer' and Crime Control in the USA and Britain*, 4 PUNISHMENT & SOC'Y 165, 167 (2002) (discussing the influence of New York "zero tolerance" policing); Tierney Sneed, *From Ferguson to Staten Island, Questions About Broken Window Policing*, U.S. NEWS (Aug. 14, 2014, 6:30 PM), <http://www.usnews.com/news/articles/2014/08/14/michael-brown-eric-garner-deaths-add-scrutiny-to-broken-windows-policing> (indicating that the vast majority of police departments incorporate Broken Windows policing).

¹⁸ Michael Brown was shot shortly after police stopped Brown and a friend for the offense of "walking in roadway," a charge that Ferguson Police brought almost exclusively against African-Americans. See Max Ehrenfreund, *The Risks of Walking While Black in Ferguson*, WASH. POST: WONKBLOG (Mar. 4, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/03/04/95-percent-of-people-arrested-for-jaywalking-in-ferguson-were-black>; see also CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–63 (Mar. 4, 2015) [hereinafter DOJ INVESTIGATION OF FERGUSON POLICE DEP'T], http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

¹⁹ Walter Scott was shot by Officer Michael T. Slager after Scott ran away from a traffic stop. See 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>.

²⁰ Sandra Bland was pulled out of her car during a routine traffic stop after she refused to put out a cigarette. See Gay, *supra* note 7. She was arrested, held on \$5,000 bail, and committed suicide three days later while in police custody. See *id.*

²¹ For information on the increase in policing of minor offenses, see *infra* notes 23–27 and accompanying text.

²² In 2012, more than 12.1 million arrests were reported to the Federal Bureau of Investigation. See *Estimated Number of Arrests: United States, 2012*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the->

place because of police policies that require or encourage “proactive” policing activity in the form of arrests, stops, and summonses.²³ In New York City, for example, the criminal courts handled approximately 675,000 misdemeanor arrests, violation arrests, and summonses in 2014 alone.²⁴ There were almost 200,000 more nonfelony arrests in 2014 than in 1989.²⁵ At least two million arrests over the past two decades are attributable to increased misdemeanor enforcement.²⁶ In 2014 alone, the revenues from fees, fines, and surcharges generated in New York City

u.s.-2012/tables/29tabledataadecpdf (last visited Jan. 19, 2016). There were over a half million arrests for “[d]isorderly conduct” and another half million for “[d]runkenness.” *See id.* A catch-all category of “[a]ll other offenses” accounted for nearly 3.5 million arrests. *See id.* In addition to arrests, there are, of course, millions of stops and police encounters that do not result in arrest.

²³ *See* Memorandum from the Police Commissioner, N.Y. Police Dep’t, to All Commands, N.Y. Police Dep’t 1 (Oct. 17, 2011), http://www.nyclu.org/files/releases/NYPD_Operations_Order_52_10.27.11.pdf (requiring police officers to perform and report on “proactive enforcement activities” including stop and frisks, summonses, and arrests); *see also* Floyd v. City of New York, 813 F. Supp. 2d 417, 426–27 (S.D.N.Y. 2011) (marshaling evidence of NYPD pressure to engage in proactive enforcement activity including: (1) officer testimony, (2) audio recordings of precinct commanders ordering certain numbers of arrests, stop and frisks, and summonses during roll call, (3) Patrolmen’s Benevolent Association labor grievance alleging transfer of six officers and one sergeant for failure to meet quotas, and (4) the labor arbitrator’s decision finding that the 75th precinct had imposed quotas). Similarly, in Ferguson, Missouri, police “[o]fficer evaluations and promotions depend to an inordinate degree on ‘productivity,’ meaning the number of citations issued.” DOJ INVESTIGATION OF FERGUSON POLICE DEP’T, *supra* note 18, at 2; *see also* WILLIAM J. BRATTON, N.Y. POLICE DEP’T, BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY 2–3 (2015) (showing an increase in the rate of misdemeanor arrests from 1990–2012, and confirming that Broken Windows policing was pursued “[b]y applying summonses to violations and arrests to misdemeanor[s],” but rejecting the characterization that this increase in summonses and arrests can be characterized as “zero tolerance”).

²⁴ *See* LISA LINDSAY, N.Y.C. CRIMINAL COURT, CRIMINAL COURT OF THE CITY OF N.Y. ANNUAL REPORT 2014, at 27, 33 (Justin Barry ed., 2015) [hereinafter CRIMINAL COURT REPORT 2014], http://www.courts.state.ny.us/COURTS/nyc/criminal/cc_annl_rpt_2014.pdf (demonstrating that there were roughly 285,000 nonfelony arraignments and 390,000 summons filings). Of course, some of these arrests are for non-Broken Windows (or quality-of-life) type offenses, but as the top ten misdemeanor arraignment charges and desk appearance ticket (DAT) arraignment charges demonstrate, the vast majority of additional arrests in the last two decades are the result of proactive policing of offenses such as possession, trespass, theft of services (turnstile jumping), unlicensed general vending, and unlicensed operation of a motor vehicle. *See id.* at 32.

²⁵ *See* FREDA F. SOLOMON, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., RESEARCH BRIEF NO. 3: THE IMPACT OF QUALITY-OF-LIFE POLICING 2 (2003), <http://www.nycja.org/library.php> (showing that there were about 87,000 prosecuted nonfelony arrests in 1989). There were 285,000 nonfelony arrests prosecuted in 2014. *See* CRIMINAL COURT REPORT 2014, *supra* note 24.

²⁶ This is based on a conservative estimate of an average of at least 100,000 additional arrests per year for each of the past twenty years of the pre-Broken Windows era. *See* PREETI CHAUHAN ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 19 fig.5 (2014), http://johnjay.jjay.cuny.edu/files/web_images/10_28_14_TOCFINAL.pdf (noting that misdemeanor arrest rates tripled from fewer than 80,000 to over 200,000 between 1980 and 2013).

criminal courts by these misdemeanors, violations, and summonses were nearly \$32 million.²⁷ A back-of-the-envelope estimate arrived at by multiplying the 2014 revenues by twenty (for the twenty years that Broken Windows policing has been practiced in New York City) suggests that criminal court fees and revenues may well exceed a half billion dollars.²⁸ For the most part, these revenues are extracted from relatively poor segments of the population, who live in heavily policed neighborhoods.²⁹

A person need not be strangled, shot, subjected to excessive force, arrested, given a summons, stopped, or even be directly involved to be harmed by zero-tolerance policing if the costs associated with such policing are borne by the families³⁰ and their communities.³¹

²⁷ See CRIMINAL COURT REPORT 2014, *supra* note 24, at 58.

²⁸ Thirty-two million dollars multiplied by twenty would be \$640 million; however, the number of cases and size of court fees have also increased in the last two decades, so actual costs are probably somewhat less.

²⁹ For a discussion of the costs and impacts of fees associated with the criminal justice system, see Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1602 (2015) (“Across the United States, even minor criminal charges, such as loitering, littering, and unpaid traffic tickets, trigger an array of fees, court costs, and assessments in both juvenile and criminal courts. These fees can create insurmountable debt burdens for already struggling families.” (footnote omitted)).

³⁰ See *id.* (manuscript at 6–7) (“[L]egal financial obligations come first: first before food and shelter. It doesn’t matter what the family suffers, so long as the court gets paid.” (alteration omitted) (quoting AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., MODERN DAY DEBTORS’ PRISONS: THE WAYS COURT-IMPOSED DEBTS PUNISH PEOPLE FOR BEING POOR 14 (2014))); see also MITALI NAGRECHA ET AL., CTR. FOR CMTY. ALTS., FIRST PERSON ACCOUNTS OF CRIMINAL JUSTICE DEBT: WHEN ALL ELSE FAILS, FINING THE FAMILY 19–20 (2015), <http://www.communityalternatives.org/pdf/Criminal-Justice-Debt.pdf> (“[I]ndividuals with criminal justice debt survive—and pay—by depending on a network of supports from family. . . . Put another way, it is not just the individual who is being punished. It is also the incarcerated individual’s friends and family who become, in effect, a parallel welfare state. This reality runs counter to the stated purpose behind many fees and fines: They are put in place to ‘make the criminal pay for his time in the system’ and not to tax already poor urban communities by forcing them to band together to support loved ones.”). Based on my experience, New York City does not engage in the levels of aggressive imposition and collection of court-related fees and fines as do other counties in New York or other states; nonetheless, indigent defendants do struggle to pay mandatory costs out of very limited incomes.

³¹ For a discussion of the impact on the broader community, see M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 407 (2011); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1009–10 (2001); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 467 (1998) (explaining that misdemeanor arrests and records “contribute to such social problems as inequality, family life deterioration, economic and political alienation, and social disorganization”).

Over-enforcement of minor offenses affects employment,³² schooling, housing, and has the potential to break up families.³³ As the Department of Justice concluded in its investigation of Ferguson, Missouri, even citations for minor municipal offenses can lead to imprisonment, loss of employment, and loss of housing.³⁴ We cannot effectively address expanding income gaps, poverty, and inequality when the policing of vulnerable populations imposes barriers to success that are not faced by the population at large.³⁵ Broken Windows policing criminalizes conduct of those who can least afford it—the same conduct that is largely ignored in more affluent communities.³⁶

For example, New York’s commitment to zero-tolerance policing has led to enormous increases in marijuana arrests (despite state decriminalization of simple possession).³⁷ These increases have been marked by clear racial disparities.³⁸ Because any offense involving a

³² See DOJ INVESTIGATION OF FERGUSON POLICE DEP’T, *supra* note 18, at 3 (recounting the arrest of a man for sitting in a parked car, which led to eight charges and the loss of employment); MADELINE NEIGHLY & MAURICE EMSSELLEM, NAT’L EMP’T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 3 (2013), <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf> (finding that people of color are especially disadvantaged by inaccurate criminal history in employment).

³³ See DOJ INVESTIGATION OF FERGUSON POLICE DEP’T, *supra* note 18, at 4 (“Minor offenses can generate crippling debts, result in jail time because of an inability to pay, and result in the loss of a driver’s license, employment, or housing.”); see also 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 (2009) [hereinafter Howell, *Broken Lives*].

³⁴ See DOJ INVESTIGATION OF FERGUSON POLICE DEP’T, *supra* note 18, at 4.

³⁵ These barriers include ineligibility for student loans, public housing, professional licenses, suspension of drivers’ licenses, missed work days due to court appearances and arrest delays, and the impact of a criminal record on employment opportunities. See Howell, *Broken Lives*, *supra* note 33, at 300–05.

³⁶ See, e.g., *People v. Figueroa*, 948 N.Y.S.2d 539, 542 (Crim. Ct. 2012) (A review of all adjudicated open alcoholic container summonses for April 2012 involving Brooklyn residents revealed that “the summonses were concentrated in a few precincts located mostly in Black and Latino neighborhoods. More than 85% of the ‘open container’ summonses were given to Blacks and Latinos. Only 4% were issued to Whites”); Jim Dwyer, *A Smell of Pot and Privilege in the City*, N.Y. TIMES (July 20, 2010), <http://www.nytimes.com/2010/07/21/nyregion/21about.html> (“[T]he chances of getting arrested on pot charges in Brownsville [Brooklyn]—and nothing else—were 150 times greater than on the Upper East Side of Manhattan.”); see also 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> (documenting park after hours summonses by neighborhood).

³⁷ See Solomon, *supra* note 25, at 2 (noting an increase of class B misdemeanor arrests of about 34,000 between 1989 and 1998, largely attributable to marijuana arrests). For a discussion of the demographics of these arrests, see Howell, *Prosecutorial Discretion*, *supra* note 12, at 321–26.

³⁸ See Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. OF EMPIRICAL LEGAL STUD. 591, 606 (2010) (stating that black New Yorkers are arrested for marijuana at eight times the rate of white New

controlled substance carries harsh immigration consequences, even a lawful permanent resident (including one whose spouse or children are citizens) can face removal based on marijuana offenses.³⁹ For citizens, marijuana convictions can lead to eviction from public housing,⁴⁰ suspension of drivers' licenses,⁴¹ and ineligibility for student loans.⁴² The list of legal collateral consequences is seemingly endless.⁴³

Even in cases where a person is not deported, convicted, or legally sanctioned, minor arrests often bear major costs in the form of loss of salary or loss of employment. Although people are not usually at work when they are arrested, zero-tolerance policing is most heavily enforced midweek, and with twenty-four hour arrest to arraignment times, arrestees will typically miss at least a day of work or school.⁴⁴

Moreover, an arrest even without a conviction can create a bar to obtaining gainful employment.⁴⁵ All of these direct and collateral

Yorkers, and Latino New Yorkers are arrested at four times the rate of white New Yorkers, despite similar levels of marijuana use across racial groups). For statistics on marijuana use by race, see SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA), U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2011 NATIONAL SURVEY ON DRUG USE AND HEALTH: ILLICIT DRUG USE TABLES (2011), <http://www.samhsa.gov/data/NSDUH/2011SummNatFindDetTables/NSDUH-DetTabsPDFWHTML2011/2k11DetailedTabs/Web/PDFW/NSDUH-DetTabsSect1peTabs24to28-2011.pdf> (showing that a higher percentage of white people use marijuana during their lifetime than blacks or Latinos).

³⁹ See NEIGHLY & EMSELLEM, *supra* note 32 (finding people of color are especially disadvantaged by inaccurate criminal history in employment).

⁴⁰ N.Y.C. HOUS. AUTH., TENANT SELECTION AND ASSIGNMENT PLAN 23 (2015), <http://www1.nyc.gov/assets/nycha/downloads/pdf/TSAPlan.pdf> (stating that persons convicted of felonies and their families are ineligible for New York City public housing for between five to six years after the sentence is completed, and persons convicted of misdemeanors are ineligible for New York City public housing for between three to four years after the sentence is completed).

⁴¹ See N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 2011) (imposing a six-month suspension for possession of a controlled substance). Federal law makes a portion of highway funding dependent on adopting such a policy unless the governor and legislature both state their opposition. See 23 U.S.C. § 159 (2012).

⁴² Federal law makes "[a] student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance" ineligible for federal financial aid for a period of one year upon the student's first conviction, if the offense occurred while the student was enrolled and receiving federal financial aid. 20 U.S.C. § 1091(r)(1) (2012). Possession of even a small amount of marijuana is a violation under New York Law. N.Y. PENAL LAW § 221.05 (2008).

⁴³ Indeed, the American Bar Association has launched an online database cataloging collateral consequences for each state. See *National Inventory of Collateral Consequences of Conviction*, AM. BAR ASS'N, <http://www.abacollateralconsequences.org> (last visited Oct. 11, 2015). For example, Missouri's collateral consequences have 905 entries, while New York's has 1,274. See *id.* (follow directions to enter site; then find Missouri and New York entries by clicking on the corresponding states on the map).

⁴⁴ See Howell, *Broken Lives*, *supra* note 33, at 284–85.

⁴⁵ MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 14 (2011), http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf ("[A]

consequences of arrest create an inability to get ahead in our system—a tax on those who can least afford it. And this tax results in children going to bed hungry, electricity being cut off, nonpayment of rent, eviction, burdens on soup kitchens—the list of harms is endless and varied.⁴⁶ As the “tale of two cities” campaign recognized, some New Yorkers are poor⁴⁷—a zero-tolerance policing strategy based on Broken Windows makes the disparity between rich and poor that much worse.⁴⁸

Note that since Broken Windows policing is not about policing serious offenses, the disparities in enforcement cannot be attributed to vulnerable New Yorkers engaging in higher rates of serious misconduct. White and economically privileged New Yorkers often engage in precisely the same conduct as vulnerable New Yorkers, without the same threat of enforcement. For example, if you are white, enjoy a bottle of wine in Central Park on a summer evening.⁴⁹ If you are white, ride your bike on the sidewalk, if that is the fastest or safest way for you to get home.⁵⁰ These are offenses for which black and Latino New Yorkers can be and often are arrested or given a summons.⁵¹ Everyone commits the same “offenses,” but certain groups are far more likely to be arrested or summonsed based on appearance and neighborhood demographics.

On December 3, 2014, I attended a symposium at the Benjamin N. Cardozo School of Law⁵² at which there was a film series about over-

2010 survey of employers indicated that over 30 percent consider an arrest that did not lead to conviction to be at least ‘somewhat influential’ in a decision to withhold a job offer.”).

⁴⁶ See AM. CIVIL LIBERTIES UNION OF WASH. & COLUMBIA LEGAL SERVS., *supra* note 30, at 13–14 (describing the choice between paying court costs and “the electricity bill” or “buying my kid a winter coat”).

⁴⁷ See *supra* note 10 and accompanying text.

⁴⁸ For an interactive map of the disparities in the racial and geographic enforcement of low-level offenses, see Ryley et al., *supra* note 36.

⁴⁹ See *id.* (noting that in 2013, there were 396 summonses for open alcoholic containers in Central Park versus nearly 4,076 in Bedford-Stuyvesant).

⁵⁰ Irene Chidinma Nwoye, *Cycling on the Sidewalk: the New Stop-and-Frisk?*, VILLAGE VOICE (Oct. 30, 2014), <http://www.villagevoice.com/news/cycling-on-the-sidewalk-the-new-stop-and-frisk-6703521>.

⁵¹ Another example of this appears to be occupying two seats on a subway. Although race statistics are not maintained for transit authority infractions, articles discussing arrests for this offense point towards racial disparities in enforcement. See Joseph Goldstein & Christine Haughney, *Relax if You Want, but Don’t Put Your Feet Up*, N.Y. TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html> (depicting images, names, and narratives that all suggest that those arrested are people of color, although the article does not include specific race information); see also Nathan Tempey, *Cops Arrest Subway Riders for “Manspreading”*, GOTHAMIST (May 28, 2105, 10:19 AM), http://gothamist.com/2015/05/28/manspreading_crackdown.php (describing the ticketing and arrests of several men of color and one white woman for occupying two seats on a subway).

⁵² Cardozo Law Review Symposium: The Underbelly of the Beast: Misdemeanor Practice in the Era of Broken Windows and Saturation Policing (Dec. 3–4, 2014). The Symposium included panels examining the misdemeanor court practice, the impact of Broken Windows on

criminalization and constructive responses to problems of social disorder.⁵³ It focused on people with substance abuse problems, with mental illness, and who are homeless.⁵⁴ That is a part of our problem, but it should not be society's only focus. Zero-tolerance policing is about policing specific areas and communities.⁵⁵ Douglas Husak has referred to policing choices as "justice by geography."⁵⁶ That is, since it is not possible to police every infraction of minor municipal codes everywhere, select neighborhoods and populations are targeted. When a young person of color enters his teens, he can no longer move through the city assuming that if he engages in no serious misconduct, he will not encounter the police if he lives in certain neighborhoods.⁵⁷ He cannot have his bike on the sidewalk even for a moment.⁵⁸

The impetus behind selection of targets is not necessarily discriminatory. Target areas are those that are considered "high crime" areas.⁵⁹ The impetus may be to protect the "innocent" people in these high crime neighborhoods, but by policing and criminalizing large segments of the community for engaging in behavior that most people would be surprised to learn are crimes, the ability to succeed and thrive in these neighborhoods is thwarted. While the intentions driving Broken Windows policing may not be discriminatory, the effects are visited largely on people of color⁶⁰ and may be experienced as

misdeemeanor court practice and indigent communities, and a panel on potential solutions. Attorneys and researchers came together to provide a rich and consistent sense of the impacts of aggressive order-maintenance policing in lower criminal courts in New York City.

⁵³ See *OVERCRIMINALIZED* (Brave New Films 2014).

⁵⁴ See *id.*

⁵⁵ See Fabricant, *supra* note 31, at 407.

⁵⁶ DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 30 (2008).

⁵⁷ This reality is reflected in the need for black parents to have "the conversation" with their children about what to do "when," not "if," they are stopped by the police. See Geeta Gandbhir & Blair Foster, Opinion, 'A Conversation with my Black Son', N.Y. TIMES (Mar. 17, 2015), <http://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html>.

⁵⁸ See, e.g., CHAUHAN ET AL., *supra* note 26, at 66 fig.41 (documenting rates for misdemeanor arrests that have nearly tripled since 1990 for Hispanic and black sixteen and seventeen-year-old males from approximately 4 and 6% respectively to nearly 12 and 18%); Ryley et al., *supra* note 36 ("You'll see a disproportionately large percentage of young male blacks and young male Hispanics. . . . It seems that only a certain kind of people are being targeted with [summons].") (quoting a court employee)).

⁵⁹ But note that the NYPD has tended to consider neighborhoods of color "high crime" even when empirical evidence does not support that conclusion. See *Floyd v. City of New York*, 813 F. Supp. 2d 417, 436 (S.D.N.Y. 2011).

⁶⁰ See Bernard E. Harcourt, *Broken-Windows Policing Is a High-Arrest Program*, HUFFINGTON POST (Aug. 17, 2015, 4:59 PM), http://www.huffingtonpost.com/bernard-e-harcourt/broken-windows-policing-i_b_8000250.html (noting that "misdemeanor arrests have historically skewed toward African-American and Hispanic persons" and showing the increase in this trend over the past two decades (citing CHAUHAN ET AL., *supra* note 26)).

discriminatory.⁶¹ The cost of policing minor violations aggressively and differently based upon location is a loss of legitimacy and trust in law enforcement and the criminal justice system.⁶²

Front line police officers have long recognized that over-policing of minor offenses strains relations with communities.⁶³ Indeed, the Patrolmen's Benevolence Association has challenged quotas as counterproductive and wrong.⁶⁴ While not the loudest critics of Broken Windows policing, some officers have criticized and resisted the shift. According to one police officer:

Cops say that CompStat sometimes gets warped into numbers for numbers' sake, and it grinds at community relationships. "I grew up in the South Bronx, and in the summer we'd throw a football in the street at night," an eighteen-year veteran lieutenant says. "The cops would roll by and say, 'Fellas, just keep it quiet.' Now we need to make the number, so we write all those kids summonses for dis con—disorderly conduct. And they grow up hating cops."⁶⁵

Now, with video cameras everywhere, widely disseminated recordings of rude and abusive officers using excessive force make these encounters even more fraught. Even if such encounters are the exception, rather than the rule, increased public awareness of the potential dangers of these encounters will increase tensions on both sides. Officers and community alike are now more aware of the animosity, distrust, and fear that has the potential to affect every encounter with police.⁶⁶ Given these dynamics, pursuing Broken

⁶¹ See Michael Greenberg, *'Broken Windows' and the New York Police*, N.Y. REV. OF BOOKS, Nov. 6, 2014, at 22 ("The debate about the broken windows method of policing unavoidably turns around the question of racial injustice. By an overwhelming majority, New Yorkers who are arrested for low-level infractions—'rule-breaking' may be a better term—are young black and Hispanic men in poor neighborhoods.").

⁶² See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 10–11 (2002).

⁶³ See Kevin Flynn, *Police Feel Scorn on Beat and Pressure from Above*, N.Y. TIMES, Dec. 26, 2000, at A1.

⁶⁴ Joseph Alejandro, *Arbitrator Calls a Quota a Quota*, N.Y.C. PATROLMEN'S BENEVOLENCE ASS'N MAG. (Winter 2005–2006), <http://www.nycpba.org/publications/mag-05-06-winter/alejandro.html> (reporting on successful officer grievance challenging arrest and summons quotas); see also David Murray, *Why Arrest Quotas Are Wrong*, N.Y.C. PATROLMEN'S BENEVOLENCE ASS'N MAG. (Spring 2005), <http://www.nycpba.org/publications/mag-05-spring/murray.html>.

⁶⁵ Chris Smith, *What's Eating the NYPD?: Ray Kelly Has Built the Best Police Force in the Country. Now It Is Turning on Him.*, N.Y. MAG., Apr. 16, 2012, at 24.

⁶⁶ The NYPD's renewed emphasis on community policing is a response to this distrust. See *NYPD Pledges to 'Reinvigorate Community Policing' in Effort to Ease Tensions*, GUARDIAN (Mar. 3, 2015, 4:53 PM), <http://www.theguardian.com/us-news/2015/mar/03/nypd-outlines-community-programs-tension>.

Windows arrests and summonses for minor offenses creates numerous unnecessary encounters each day that can erupt in violence.⁶⁷

The cost to the legitimacy of the criminal justice system cannot be overstated either. Broken Windows policing affects courts, prosecutors, and defense attorneys. From the perspective of a defendant or observer, these three players in the criminal justice system collaborate to process the hundreds of thousands of additional arrests with little to no regard for substantive justice, procedural justice, or constitutional constraints on police conduct.

Trust has never been high between public defenders and those they struggle to defend, and zero-tolerance policing makes the problem that much worse. Believing that the process is the punishment,⁶⁸ defenders frame the attractiveness of a plea in terms of minimizing process.⁶⁹ Defenders believe that, generally, defendants just want to get it over with and want to get out of the system.⁷⁰ But in over-burdened arraignment parts, many defenders resolve cases in minutes, if not seconds, without asking clients if they want to fight zero-tolerance policing as an issue of civil rights, equal treatment under the law, and the liberty to walk the streets unmolested by officers pushed to make arrests and issue summonses.⁷¹

⁶⁷ Jamelle Bouie, *Broken Windows Policing Kills People*, SLATE (Aug. 5, 2014, 4:33 PM), http://www.slate.com/articles/news_and_politics/politics/2014/08/broken_windows_policing_deaths_racism_in_chokeholds_arrests_and_convictions.html (“[Broken Windows] citations are minor—‘consumption of alcohol on streets’ and ‘bicycle on sidewalk’—but they produce frequent (and potentially dangerous) police encounters.”).

⁶⁸ MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 241 (1st paperback ed. 1992) (concluding after extensive study of a lower criminal court that, as the title states, the process of arrest and appearances in misdemeanor court is more punishing than the sanctions typically associated with misdemeanor offenses). However, the process need not be as punishing as it is. Defense attorneys talk about clients arriving to court only to wait for hours for court appearances and appearing over and over before a case is eventually adjudicated or dismissed for speedy trial purposes, but defense lawyers can exercise power here. We can ask that our clients be excused so they can go to school, take care of their children, go to work, or look for employment. We can ask that clients be excused unless prosecutors provide forty-eight hours’ notice that they will actually be ready and the court confirms that there is likely to be an available courtroom. Defense attorneys are complicit in accepting that the process is the punishment and accepting our very imperfect brutal system rather than demanding concessions that are consistent with the notion that each defendant is presumed innocent.

⁶⁹ See Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 318 (2012). In an underfunded system of assembly-line justice, however, defense counsel might not only fail to serve as a counterweight, but also might herself end up promoting the status quo—a position harmful to her client. See *id.*

⁷⁰ See, e.g., AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 13 (2009).

⁷¹ For descriptions of the limited availability of defense counsel and constraints in lower criminal courts, see, for example, *id.*, and NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS* (2011), <https://www.nacdl.org/reports/threeminutejustice>.

Nor are prosecutors exercising the discretion that is required by their function. Prosecutors have a duty to seek and serve justice.⁷² They have a duty to screen cases and exercise discretion about who and what is charged. Prosecuting ninety-six percent of these cases is not exercising that duty, but delegating that discretion to the police.⁷³ The standards for prosecutorial conduct do not permit such delegation of screening discretion.⁷⁴ Examining whether prosecution outcomes are racially biased once a prosecutor accepts nearly all minor cases brought in by police overlooks the issue of the racial disparity in how laws are enforced. The Brooklyn District Attorney Kenneth Thompson has stepped up and, noting that marijuana arrests affect youth of color in particular and can have consequences for jobs, housing, and school, has adopted a policy of declining to prosecute most of these cases.⁷⁵ Like Kenneth Thompson, other district attorneys should conclude that prosecuting hundreds of thousands of Broken Windows arrests is inconsistent with the duty to serve justice, because justice cannot be served without equal applications of law.

Half measures, such as deferred dismissals, do not satisfy the prosecutors' duty to serve justice or the defense counsels' duty to provide competent representation. A deferred dismissal that may minimize process in a single case is not costless either. It is an open arrest that creates a record.⁷⁶ A defendant who is looking for work may have trouble getting a job in the next six months or year until the case against him is officially dismissed.⁷⁷ A defendant may lose a job he

⁷² For a discussion of this duty, see Howell, *Prosecutorial Discretion*, *supra* note 12, at 305–21.

⁷³ See BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN: RESEARCH SUMMARY 4 (2014) (finding that the New York County District Attorney's Office "prosecutes nearly all cases brought by the police, including 94 percent of felonies, 96 percent of misdemeanors, and 89 percent of violations").

⁷⁴ Both the American Bar Association (ABA) and National District Attorneys Association standards require the prosecutor to exercise discretion in determining what charges to bring. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.2(a) (AM. BAR ASS'N 2015); NATIONAL PROSECUTION STANDARDS § 4-1.2 (NAT'L DIST. ATT'YS ASS'N 2009).

⁷⁵ See Stephanie Clifford & Joseph Goldstein, *Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES, July 9, 2014, at A17 (announcing a plan to stop prosecuting most low-level marijuana cases to keep nonviolent people "and especially young people of color" out of the criminal justice system (quoting Thompson)).

⁷⁶ See N.Y. CRIM. PROC. LAW §§ 170.55–170.56 (McKinney 2007).

⁷⁷ See *Smith v. Bank of Am. Corp.*, 865 F. Supp. 2d 298 (E.D.N.Y. 2012) (approving employer's adverse employment action following employee's adjournment in contemplation of dismissal in shoplifting case, notwithstanding state laws barring unreasonable discrimination based on criminal record). Research going back to the 1960s demonstrates that contact with the criminal justice system, even in the absence of a conviction, negatively impacts employment opportunity. See Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962); see also R.H. Finn & Patricia A. Fontaine, *The Association Between*

already has. And, if the client is likely to be stopped for anything else, the open case is used against him.⁷⁸ Where are defenders in this? One consequence of the continued commitment to Broken Windows policing is the failure of our criminal justice system to live up to the requirements of the Sixth Amendment⁷⁹ and the American Bar Association standards for the defense function.⁸⁰ Another consequence is that the prosecutor has not assured that justice is served, but allowed a person to be temporarily branded and treated as a criminal without determining whether or not there is any basis for culpability or whether the conduct merits punishment.

It is naive to believe that an adjournment in contemplation of dismissal (ACD), a type of deferred dismissal, is in the client's best interest or serves justice when we know, as Professor Kohler-Hausmann's research shows, that the system is one of escalating penalties.⁸¹ The ACD will show up if a defendant is rearrested and will be taken into account, resulting in escalated punishment on a subsequent arrest.⁸² The electronic record of the ACD will still exist and the electronic record of a violation will still exist.⁸³ There is also a belief subscribed to by courts, prosecutors, and defenders, which I have noticed based on personal experience, that a violation is better than a misdemeanor.⁸⁴ But for potential employers, this may make little difference. These costs destabilize families, communities, and undermine employment prospects.⁸⁵ Any mark on a criminal record may have an effect. Indeed, the work of Devah Pager suggests that the general criminalization of people of color affects the employment opportunities of even black and Latino job applicants who have *no*

Selected Characteristics and Perceived Employability of Offenders, 12 CRIM. JUST. & BEHAV. 353 (1985).

⁷⁸ See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (noting the marking and sorting function of the lower criminal court).

⁷⁹ See U.S. CONST. amend. VI; see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending the right to counsel to most misdemeanors); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that counsel must be provided to indigent felony defendants).

⁸⁰ See CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (AM. BAR ASS'N 2015), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html.

⁸¹ See Kohler-Hausmann, *supra* note 78, at 646 (noting the sorting and regulating function of the lower criminal court).

⁸² *Id.* at 648, 656–57.

⁸³ An ACD typically results in a case remaining as an open arrest on the record for either six months or a year depending on the original charge. See N.Y. CRIM. PROC. LAW §§ 170.55–170.56 (McKinney 2007). Violations are sealed pursuant to CRIM. PROC. § 160.55 (McKinney 2004). For a discussion of the continued availability of electronic records of both convictions and arrests, see JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015).

⁸⁴ This observation is based on eight years as a public defender and two years as a supervising attorney for a defender clinic.

⁸⁵ See *supra* notes 32–36 and accompanying text.

criminal records.⁸⁶ Aggressive Broken Windows policing taxes vulnerable communities and reinforces the entrenched poverty and racism that affects everyone in these communities, even those who are not brought into court.

A word about two responses that do not address the problem of Broken Windows policing. Recently, Mayor de Blasio announced that he would like police to issue summonses for marijuana instead of making arrests.⁸⁷ This is absolutely not a solution.⁸⁸ Summonses do not track race. Summons parts are even more under-resourced than lower criminal courts. Putting these arrests into a system where the courts are more crowded, where cases are handled faster, where defense counsel is often waived—and if provided is even more overwhelmed—and where review for constitutional violations is even less likely to occur, insulates policing from review without ameliorating any of the problems. Nor do “diversion” programs address the problems created by Broken Windows policing. Broken Windows policing is about policing conduct that is so minor that it is ignored in privileged areas of the city. Neither of these responses target the issue of over-policing directly.

The first step in dismantling Broken Windows policing as it has been practiced for twenty years in New York is to recognize the full extent of the costs of this policing. The next step is to further recognize that this policing favors the rich and disfavors the poor, and particularly poor people of color. Policing is a critical contributor to New York’s ongoing “tale of two cities.” Until this regressive policy is addressed, there is little hope of addressing racial or income disparities in our city or our country.

⁸⁶ See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937, 957–58 (2003).

⁸⁷ Andrew Keshner, *Marijuana Arrest Policy Draws Support, Raises Questions*, N.Y.L.J. (Nov. 17, 2014), <http://www.newyorklawjournal.com/id=1202676548528/Marijuana-Arrest-Policy-Draws-Support-Raises-Questions>.

⁸⁸ See Joseph Goldstein, *In City, Marijuana May Mean Ticket, Not Arrest*, N.Y. TIMES, Nov. 10, 2014, at A1.