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Cover Page Footnote

Professor of Law, Fordham University School of Law and Supervising Attorney of Fordham's Criminal Defense Clinic. Thanks to Cheryl Bader, Deborah Denno, Martha Rayner, Monica Rickenberg, the students in Fordham's Advanced Criminal Law Seminar, and my research assistant, Annabelle Chan. Fordham University provided financial support for this project.

THE ADJUDICATION OF MINOR OFFENSES IN NEW YORK CITY

*Ian Weinstein**

So I came to the City to shop with my friend. First we were downtown and I bought the knife. You know, they sell them right on the sidewalk in front of the stores for like \$7.00. Then we went uptown, cause the best hip hop clothes are there and first I stopped to see my cousin. He was not home and we were walking downtown from his building and two cops come around the corner and come right over to us.

“What happened next?” asked Joe, a third year law student in our Criminal Defense Clinic.

Well, the cop says something like—“What are you doing in this neighborhood, are you here to buy drugs, don’t you know this is a dangerous place” and stuff like that. And I said, “It is a free country,” or something, I know I talked back. So I guess he did not like that. So the two cops shove us up against this chain link fence and start frisking us, but he does not find anything on me. So he says, “Do you have a knife on you?” and I say “Yes, but it is under four inches and I can have that.” So he says “Give it to me slowly,” and I did. And he says, “You are under arrest.”¹

INTRODUCTION

Mr. Henrique Ramos sat in a little metal booth, on the opposite side of a metal grill from Joe Raines, Tara Hudson, and me. The three of us were crammed into a space of about twelve square feet in an interview booth behind Arraignment Part I at New York County Criminal Court. It was mid-September. This morning the air conditioning was working and the air was cold. Even with the

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1. Statement made by Henrique Ramos, a twenty-two year old college sophomore. Henrique Ramos and the Ramos case are composites based upon dozens of clients with whom I have worked in the Criminal Defense Clinic at Fordham University School of Law. Our clinic represents people charged with minor offenses in the New York County Criminal Court, the lower criminal court that serves the borough of Manhattan in New York City.

dim lights, peeling paint, claustrophobic space, and noise from the twenty or thirty people in the two big cells that took up most of the area behind the courtroom, it was not a particularly noxious morning back in the pens.

Mr. Ramos had been arrested for possession of a gravity knife at about 2:30 p.m. on a Tuesday afternoon. Joe, Tara, and I met him at about 8:30 a.m. on Wednesday morning. Joe and Tara were students in our Criminal Defense Clinic and I was their Supervising Attorney. Joe had already reviewed the complaint with Mr. Ramos, taken his personal history, and advised him that he would very likely be released on his own recognizance once he appeared before the judge.

“And then what happened?”, asked Joe, continuing the interview.

Well, after they check out my friend and don't find anything on him, they tell him to get out of that area and stay out. They already had me cuffed. So they take me to the police station and the cop is telling me, I know you are a drug dealer. And he is sitting there holding my phone, and it rings and he answers it. He tells me he is going to get one of my drug calls and then he'll have me on a distribution charge, and I tell him he isn't going to get anything. So after an hour or so, he tells me I'm just lucky he can't make a drug case today, but he'll be watching me and I'm going to have a record. He says I shouldn't carry a gravity knife and I should stay out of that neighborhood—it's dangerous. And he took my \$375.00 shopping money and I want it back.

“Yes, I can understand that. You have already given me quite a lot to think about,” commented Joe.

Indeed, Mr. Ramos had given us quite a lot to think about that morning. As the case worked out, however, most of the questions I had were never answered. Mr. Ramos ended his case on his third appearance in court, pleading guilty to disorderly conduct,² a non criminal resolution under New York State law. Although the case posed interesting legal and factual issues well worthy of litigation, American lower criminal courts have long been structurally incapable of adjudicating legal and factual disputes in the vast majority of the cases that come before them.³ The story I tell in this essay

2. N.Y. PENAL Law § 240.20 (Consol. 2003).

3. In 2002, 0.2% of all dispositions (650 out of 325,193) in the New York City Criminal Courts were by verdict after trial. STATE OF NEW YORK, TWENTY-FIFTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS FOR THE CALENDAR YEAR 2002, 17 & tbl. 11 (2002); see also, Chester L. Mirsky, *The Political Econ-*

illustrates how America's reliance on overcriminalization, prosecutorial discretion, and procedural guarantees makes it very difficult for our lower criminal courts to reliably sort minor cases according to their merits.

These are not new problems for the courts that adjudicate minor offenses. Although Mr. Ramos was arrested and prosecuted in New York City in the very first years of the twenty-first century, there is a timelessness about the lower criminal court in America, the institution that accounts for ninety percent of all criminal cases in the United States.⁴ For more than 120 years it has been characterized by, and consistently criticized for, its rapid pace, relative indifference to law, inability to influence police practices, lenient sanctions, and ripe atmosphere.⁵ All of those themes played out in Mr. Ramos's case, in which questionable conduct by both Mr. Ramos and the state was, in the end, essentially glossed over by all involved. This essay argues that if we aspire to improve how we adjudicate minor cases, we must get clear on why it is so difficult to reach the merits of minor cases. Given the endless supply of cases and the low stakes involved in each case, it will always be more attractive to appear very busy rather than to invest the resources adjudication on the merits requires.

But we can do better and we should. These are the courts where the vast bulk of American criminal adjudication takes place. Known by a variety of names, these courts handle all aspects of non-felony offenses and typically process the earliest phases of felony cases. They account for most of Americans' direct exposure to

omy and Indigent Defense: New York City, 1917-1998, 1997 ANN. SURV. AM. L. 893, 1016 (1997). In 1997, New York City Criminal Courts (throughout all five boroughs) disposed of 388,887 misdemeanor and petty offense cases, but only 0.1% (581) were from trial verdicts; 51.3% (199,490) were from guilty pleas; and 33.8% (133,601) were from dismissals. *Id.* The trial rate for felonies is much higher, but still quite low in absolute terms. In Supreme Court (throughout all five boroughs), there were 41,770 dispositions only 6.6% (2,749) were from trial verdicts, 82.3% (34,251) from guilty pleas, and 9.7% (4,046) were from dismissals. *Id.*

4. MALCOM M. FEELEY, PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURT 5 (1992) (In systems operating with a two-tiered criminal court system, roughly divided by misdemeanor and felony jurisdiction, about ninety to ninety-five percent of all cases are handled by lower courts).

5. *See id.* at 5-34 (describing factors contributing to the crisis in the courts). *See generally* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA (1930) (exploring the problem of criminal justice and tracing the historical development of the criminal justice system from the nineteenth century to the present); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 652-53 (1987).

the judicial aspects of the criminal justice system. These courts have been the focus of renewed attention in recent years, as public order policing⁶ has dramatically increased the number of low level arrests in many jurisdictions,⁷ and the problem solving movement has led to the establishment of specialized lower courts in many jurisdictions.⁸ Yet the high volume, rapid-fire, misdemeanor court persists.

The timelessness of the lower criminal court, the intractability of its essentially lawless, rapid processing of cases is deeply rooted in American criminal justice. It flows all too readily from the central

6. Public order policing, usually associated with the "Broken Windows Theory" first put forward by James Q. Wilson, is one name for a policing strategy that encourages vigorous enforcement of minor offenses. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. New York City Police Commissioner William Bratton adopted Wilson and Kelling's Broken Windows thesis as the basis for the city's new policing initiative in 1994. See generally CITY OF NEW YORK, POLICE DEP'T, POLICE STRATEGY No. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK (1994) (setting forth the New York City Police Department's strategy for improving disorderly conditions); see also William J. Bratton, *Policy Review: The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J. L. & POL'Y 447, 447-51 (1995). As practiced by Bratton, head of New York's Transit Police, Mayor Giuliani's Police Commissioner, and now the head of the Los Angeles Police Department, this style of policing includes: 1) statistical emphasis (i.e. extensive use of information technology to identify crimes patterns and develop statistically driven assessments of police techniques); 2) a high contact strategy (wherein the police seek to interact with as many minor offenders as possible to maximize the number of searches and warrant checks they do); and 3) flooding the zone (saturation policing which involves using the statistics generated by the information technology to target particular neighborhoods for intensive police activity). See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 293, 377-81 (1998); Ana Joanes, *Does the New York City Police Department Deserve Credit for the Decline in New York City's Homicide Rates? A Cross-City Comparison of Policing Strategies and Homicide Rates*, 33 COLUM. J.L. & SOC. PROBS. 265, 274-81 (2000).

7. Shortly after the city implemented this scheme, misdemeanor arrests jumped more than fifty percent in the first three years. BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 10 (2001). By 1998, the total number of adult misdemeanor arrests had increased by 66.3%, from 129,404 in 1993, to 215,158. NEW YORK STATE, DIVISION OF CRIMINAL JUSTICE SERVICES 2000, CRIMINAL JUSTICE INDICATORS (2000), available at <http://criminaljustice.state.ny.us/cgi/internet/areastat.cgi>.

8. See generally Chief Judge Judith S. Kaye, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence: Eleventh Annual Symposium on Contemporary Urban Challenges, Keynote Address The Changing Face of Justice*, 29 FORDHAM URB. L.J. 1925 (2002).

organizing principles of our system, overcriminalization,⁹ and executive discretion.¹⁰

There is an endless supply of defendants to keep the lower courts busy. The executive can, and often will, bring many cases in, but choose to fully litigate very few of them.¹¹ For the prosecutors and the police, most of the benefits of the enforcement of minor crimes seemingly come from initiating the contact with the criminal justice system. For differing reasons, defendants, prosecutors and judges have little incentive to reach the merits of these cases and sort them according to their real deserts. Not enough is at stake to make it worthwhile. This essay argues that there is no effective judicial check on executive authority in the misdemeanor cases which account for ninety percent of the citizen police encounters

9. Overcriminalization occurs when the legislature passes broad criminal laws, which criminalize more conduct than we can or would choose to prosecute and sanction. It would be inefficient and draconian to enforce every tax law to the letter, upon every taxpayer. We rely upon official discretion to sort out the cases worthy of enforcement. Another kind of overcriminalization occurs when the legislature passes multiple statutes that may apply to the same conduct, giving the executive the discretion to bring appropriate charges in a given case.

10. Executive discretion refers to both the discretion of the police on the street, KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4-5 (1969), and the almost unreviewable discretion prosecutors exercise in their power to decide whether and what charges to bring against any particular defendant. See Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, n.99 (1999). Prosecutorial discretion is an important mechanism for allocating criminal justice resources. For the debate on the use of prosecutorial discretion to allocate resources, see generally Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) (discussing incentives favoring plea bargaining and arguing that prosecutorial discretion is an efficient and fair regulator). See also Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988) (arguing 1) that prosecutorial discretion in charging, bargaining, and sentencing does not lead to most efficient results because of problems of public management, and 2) even if it were most efficient, fairness concerns would still justify some controls on discretion).

There are supposed to be political limits on this authority. Prosecutors who abuse their power, or use it ineffectively, will lose office when either they, or their executive bosses, are voted out of office. These political controls are also supposed to give defendants some leverage against prosecutorial power. They, or their counsel, can make a public issue of abuse of power to invoke these political controls. The power of these controls has received critical attention. See Sara Sun Beale, *What's Law Got To Do With It? The Political, Social, Psychological And Other Non-Legal Factors Influencing The Development Of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 42-53 (1997) (cataloguing public opinion influences on criminal sentencing); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999) (arguing that Congress exercises more control over federal prosecutorial discretion than is usually recognized through hearings, informal contacts, control of high level appointments and other mechanisms).

11. See *supra* note 10 and accompanying text.

that result in a constitutionally cognizable seizure of the person and deprivation of liberty.

The structural features which make lower courts process, rather than adjudicate, cases have received significant policy and doctrinal encouragement in recent years. As legislators have passed even more criminal statutes, legal doctrine has stepped away from more aggressive limiting of police conduct in criminal cases, and the vigorous enforcement of minor crimes has become the received wisdom of crime control. Overcriminalization and discretion, however, are the broad boundaries within which many different criminal justice vogues have flourished.¹² Indeed, the real genius behind very important shift in law enforcement that has come to be known as public order policing.¹³ It recognizes that a major shift to much more active law enforcement could be accomplished with almost no change in the law and would work with and be re-enforced by the real world unintended consequences of the adjudicative mechanisms intended, by another era, to reduce police activism.¹⁴

Public order policing is a wonderful fit with overcriminalization, executive discretion and rapid fire adjudication in our lower courts. I argue that it is too good a fit. In a system built on checks and balances, reliant on inefficiencies to limit the reach of official power,¹⁵ and police discretion to enforce and sanction minor transgressions, has become too great.

The judicial authority of the lower criminal court is a very weak constraint on how police interact with citizens accused of minor crimes for two interrelated reasons. First, the law gives police officers very broad scope to arrest citizens for minor offenses. On any given day, if you drive a car, walk, or stand on a sidewalk or public road, you likely subject yourself to the legal possibility of

12. For a trenchant, insightful discussion of the rapid shift from the rehabilitative to the punitive model in American criminal justice policy, see generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001) (discussing how the rehabilitative ideal suddenly collapsed in the late 1970s and early 1980s).

13. See *supra* note 6 and accompanying text.

14. *Id.*

15. See Richman, *supra* note 10, at 765. Richman argues that:

[W]ith maximal jurisdiction but limited resources [federal enforcers] have the best of both worlds. Their resource limitations generally allow them to avoid taking responsibility for crime on any particular beat, but, at the same time, they can be confident that they will have a criminal statute to fit any anti-social conduct they choose to pursue.

arrest and twenty-four hours of detention without much likelihood of substantial legal remedy. Our regime of overcriminalization and executive discretion vests a degree of authority in our police and prosecutors that many will find surprising. Second, the system imposes such significant costs on citizens who seek to vindicate their rights in minor cases that many violations are never pursued. Most who are arrested for a minor traffic offense or loitering, jaywalking or other minor charges are angry at first, but end up happy to just end the whole thing and move on. If the defendants and their lawyers feel that way, the prosecutors will not insist that they pursue the matter. The court, however, might take a different stance, but as is discussed later, they do not.

American criminal justice is founded on overcriminalization and discretion.¹⁶ Our legislatures have long criminalized much more conduct than can be effectively sanctioned.¹⁷ American police and prosecutors have been granted virtually unreviewable authority (discretion¹⁸) to allocate¹⁹ investigative and prosecutorial resources.²⁰ Minor crimes absorb the bulk of our ordinary, local enforcement efforts and there is an endless supply of minor crime which may be pursued. There has been recent and insightful commentary on the explosion of criminal statutes over the past fifteen years, but even before this trend the great discretion our criminal law confers upon the police and prosecutors has long been evident in our minor statutes.

Anywhere in America today, if a practical and experienced police officer decides to impose some constraint, and even a minor sanction on the average person, she can often do so with almost certain impunity, regardless of the circumstances. This state of affairs runs counter to the notion that official power is constrained in our legal culture—that law enforcement must have a reason under

16. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (discussing the vicious cycle whereby politically motivated legislative overcriminalization leads to increased prosecutorial discretion, which in turn facilitates further legislative overcriminalization).

17. See *id.* at 519.

18. For discussion of the various meanings of discretion in American law, see Weinstein, *supra* note 10, at 497-506.

19. For the debate on the use of prosecutorial discretion to allocate resources, see Easterbrook, *supra* note 10, at 289 (discussing the incentives favoring plea bargaining and arguing that prosecutorial discretion is an efficient and fair regulator), and Schulhofer, *supra* note 10, at 43 (arguing that prosecutorial discretion in charging, bargaining and sentencing does not lead to the most efficient results because of problems of public management and even if it were “most efficient, fairness concerns would still justify some controls on discretion.”).

20. See *supra* note 9 and accompanying text.

the Fourth Amendment²¹ to intrude—but this example captures the reality of our law. Police resources, not minor offenders, limit the number of arrests for minor offenses.

We look first at the breadth of our minor substantive criminal²² statutes. Many, if not most Americans repeatedly violate our substantive laws everyday, exposing themselves to police intrusion into their lives. Our cultural fixation on the automobile provides one of the broadest entry points for official interaction with ordinary citizens.²³ In short, it is almost impossible to drive a car in America without giving the police a legally valid reason to stop and arrest you.

Walking down the street, or sitting on a stoop, is little better. The New York Penal Code²⁴ proscriptions against disorderly conduct,²⁵ harassment,²⁶ menacing,²⁷ and simple assault,²⁸ considered with provisions scattered through other section of New York Law that govern public consumption of alcohol,²⁹ littering,³⁰ and noise pollution,³¹ begin to illustrate how many opportunities each of us has to break the law. For those of us who spend most of our days in our private offices and then walk, within the crosswalks, to a commuter train on which we are not inclined to eat, drink, or sit on two seats and then walk home, again within the crosswalks, and stay in our homes until the next workday; the opportunities for police contact are reasonably limited. For those of us who drive, frequently ride public transit, are inclined to eat or drink out of doors, or whose dispositions may result in our raising our voices in a public setting; the opportunities are somewhat greater. The point is

21. U.S. CONST. amend. IV.

22. Although criminal here is a misnomer many of these are explicitly denominated non-criminal. See N.Y. PENAL LAW § 10.00 (Consol. 2003) (distinguishing definitions of violation, offense, and misdemeanor). They do, however, carry the burden of an arrest and court process to resolve. Most also result in a record which may effect how future interactions with law enforcement are handled and even non-criminal violations can have significant collateral consequences in housing, employment and immigration.

23. DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 30-32 (2002).

24. A reasonably modern code, completely redrafted in the 1970s under the influence of the Model Penal Code.

25. N.Y. PENAL LAW § 240.20 (Consol. 2003).

26. *Id.* § 240.25-.26.

27. *Id.* § 120.15.

28. *Id.* § 120.00.

29. N.Y. ALCO. BEV. CONT. LAW § 100(4) (Consol. 2004).

30. N.Y. VEH. & TRAF. LAW § 1220(a) (Consol. 2004).

31. N.Y. ENVTL. CONSERV. LAW § 19-0107(2) (Consol. 2004).

that our substantive laws, drafted in the spirit of overcriminalization and discretion, create an inexhaustible supply of potential defendants in minor cases.

Mr. Ramos's case illustrates a less common subcategory of broad minor proscriptions, conduct most people would just not think is illegal. Mr. Ramos was charged with possession of a gravity knife.³² Commonly called a *per se* deadly weapon under New York State law, it is one of a group of nasty sounding weapons, including switchblade knives, gravity knives, ballistic knives, and brass knuckles, the simple possession of which is a crime.³³ There is no requirement that one possess the weapon with the intent to use it unlawfully.³⁴ The legislature reasonably determined that some weapons are so dangerous that they should simply be banned. The devil, of course, is in the details.

The New York Penal Law defines a gravity knife as any knife that is released from its handle by gravity or centrifugal force and is locked into place by a button or other device.³⁵ It turns out that knives fitting this definition are commonly sold by hardware and camping stores across New York and the rest of the country, and many men routinely carry such knives in their pockets. One common version is called the Clip-It, but any camping store carries small knives, with blades that extend from their handles and lock into place to prevent injury, should the knife fold while being used. Although I did not think these knives could be operated by centrifugal force, my students quickly showed me that any folding knife can be "flipped" or "flicked" open by the right fast motion of the wrist. I was quite surprised to learn that a common kind of knife, sold at several stores within blocks of my office and routinely carried by many New Yorkers, is in fact illegal, and the mere possession of this knife, anywhere in New York State, could bring a one year jail sentence.³⁶

Although I was unaware when I first met Mr. Ramos of this particular wrinkle in the law, or how easy it is to flick open most knives, I came to learn that some police officers know this statute and its application to these common knives quite well. Of course not everyone carries one of these little knives in New York, but they are common enough to be worth looking out for. When you

32. N.Y. PENAL LAW § 265.01(1) (Consol. 2003).

33. N.Y. PENAL LAW § 10.00(12) (Consol. 2003); § 265(5).

34. N.Y. PENAL LAW §§ 10.00(12), 265(5).

35. *Id.* § 265(5).

36. N.Y. PENAL LAW § 55.05(2) (Consol. 2003).

add all the men who wear these knives clipped in their belts or visible at the top of their pockets, to all those who do not know or remember that the brown paper bag has to completely cover the beer can, or who take one last puff on their cigarette as they walk down the steps to the subway, you begin to get some picture of why the street can sometimes appear to be a pond full of sitting ducks to a police officer interested in an encounter with a citizen.

Some may reasonably respond that most of us enjoy the important protection that comes from doing absolutely nothing wrong.³⁷ After all, the police cannot just arrest anyone, if we consider the real situation on the street once again. A police officer might conceive an unmotivated, spontaneous desire to hassle a person upon whom his eyes fall. That would be a bad thing, but our major concern should not be the officer who acts for no reason or out of pure evil. Supervisors who oversee police conduct, as well as the infrequency of such occurrences, reasonably protects us from that problem. Much more typically, the police officer has some reason for a stop. If he or she is patrolling in a neighborhood in which a high enforcement strategy is in effect, or he or she has an articulable suspicion, or someone seems out of place or the officer needs to make an arrest to fill a quota—it is easy enough to find a person to arrest. How about the out of place person; such as Mr. Ramos, a young, light skinned Latino male in a predominantly African-American neighborhood. In these cases, overcriminalization and discretion, coupled with the structural realities of minor criminal court, come into play to make this an easy, but dangerous, response.

Overcriminalization has a different impact in the area of minor transgressions because it reaches almost everyone. This is an important contrast with more serious offenses. From 1989 to 1996, Congress added ten new statutes and increased the ways a cocaine trafficker could be charged under federal law.³⁸ These statutes gave prosecutors additional power, but that enforcement power only encompasses the narrow group of malefactors who traffic in

37. This might be true, if we claim that we are currently engaged in no conduct which would give a police officer reasonable cause to believe we are committing an offense in his presence. So long as I am not driving my car or jaywalking, I could often meet that standard in New York City.

38. See generally Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses: The 100-to-1 Ratio is Not As 'Cracked' Up as Some Suggest*, 27 S. ILL. U. L.J. 413 (2003) (discussing the current approach to federal sentencing policy for cocaine offenses).

cocaine.³⁹ Although there may be more cocaine dealers than we can prosecute, making overcriminalization and discretion an important tool for allocating scarce resources, we would prosecute all the cocaine dealers, if we could. Full enforcement of serious crime is a reasonable aspiration. Of course scarce resources generally require us to limit our enforcement resources, but we reasonably expect that both police and prosecutors will only decline to prosecute narcotics trafficking cases for which they have good evidence for good reasons.

The situation is quite different with many minor offenses. The police simply must ignore most minor crimes. In New York City some police officers know that if they stand on the corner near a construction site they could arrest all the construction workers carrying Clip-It and similar knives, along with those who drink a can of beer with their al fresco lunch. Yet it would make no sense to do that everyday, or for however long it took to stop the workers from wearing the knives in plain view and drinking the beer outdoors. Full enforcement, understood as at least the aspiration to prosecute every offender, is simply not a useful idea when it comes to minor offenses in a regime of overcriminalization. Discretion is the inevitable partner of overcriminalization and its control rightly concerns us.

Perhaps police discretion in enforcing the law is best controlled by the enforcement of rights. This is the core idea underlying the suppression remedy in our Fourth and Fifth Amendment jurisprudence.⁴⁰ Although a police officer could charge many people with some minor crime justifying an arrest and its accompanying sanctions and abrogation of rights, his or her ability or incentive to do so could be significantly curtailed by constitutional protections or the threat of civil liability. But it is not, at least in the world of minor offenses.

Police officers have the authority in every state to arrest people when the officer has probable cause to believe the person has committed a minor offense in the officer's presence.⁴¹ The warrant clause offers no protection here. One might counter that it is not so easy for police officers to see many crimes and they still lack the authority to walk up to someone and search them. That depends, however.

39. *Id.*

40. U.S. CONST. amends. IV & V.

41. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

Let us just put aside how riddled the Fourth amendment law has become with exceptions and justifications for searches and seizures.⁴² What motivates or constrains police officers to stay within the law in minor cases? In my experience, it is not the system that facilitates the adjudication of minor offenses. Police officers in New York City typically have little or no ongoing contact with the cases that result from the arrests they make. For the half of all arrests that result in immediate disposition, either because prosecution is denied or more commonly, the case is resolved with a plea at arraignment, any police misconduct is rendered irrelevant and goes unreviewed.⁴³

Among the cases that go forward in Criminal Court, motions raising issues of police conduct, the guise of suppression motions, are filed in many of the cases in which the State has seized physical evidence, intends to use a custodial statement or will offer an out of court identification.⁴⁴ Although one might hope those are the cases that involve the worst behavior, there are several reasons to think the selection is quite imperfect. The cases involving the clearest problems may end up being declined or dismissed. If they are not dismissed, they are likely the cases in which the best offers are made. Thus, in the minor cases there is a selection bias against having a court hear the cases involving the worst police conduct. This is quite different from serious offenses, in which the state is much more likely to act on the full enforcement paradigm.

42. *Id.*

43. Though some commentators, such as Prof. Schuck, argue that fear of litigation leads officials to engage in self-protection and risk-minimizing behavior, there is no empirical evidence to support this. Stephanie E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purposes in Civil Rights Litigation*, 95 YALE L.J. 126, n.11 (1985) (citing P. SCHUCK, *SUING THE GOVERNMENT* 47-51 (1983)); cf. L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule; A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669 (1998) (examining several empirical studies of the exclusionary rule's application and concluding that it does not adequately deter police misconduct).

44. There is also the separate process of complaints filed directly against police officers, outside of any pending criminal litigation. During the first three years of Giuliani's quality-of-life initiative, The Civilian Complaint Review Board (the mayoral agency in New York that receives charges of police wrongdoing) registered a sixty-eight percent rise in the number of allegations of police misconduct. Harcourt, *supra* note 6, at 167-68. Furthermore, in 1997, the New York Times reported that the city received 8,316 court claims of police misconduct between 1994 and 1996, in comparison with the 5,983 complaints received in the previous three years. Matthew Purdy, *In New York, the Handcuffs Are One-Size Fits All*, N.Y. TIMES, August 24, 1997, at A1.

Even where the defendant files the motions and the prosecution goes forward with the case, the minor stakes encourage continued winnowing out of the meritorious claims. In a minor case, a police officer who mishandled a street encounter may simply not cooperate with a junior Assistant District Attorney, knowing that the case will likely be pled out or be dismissed for violation of 30.30,⁴⁵ as the speedy trial clock runs down. It is a common and unremarkable occurrence. More likely, the police officer will come to court and offer a version of the encounter that passes constitutional muster during a pre-trial hearing. For several reasons, these hearings are almost always discovery sessions, not real fact finding hearings intended by the defense to demonstrate police illegality. It is hard to know whether that is caused by the low likelihood of winning or vice versa. In minor cases almost all the arrests develop quite quickly and there are no witnesses besides the police officer and the defendant. Based on my experience, it seems that the police officer almost always wins that credibility contest. When there are other witnesses, the low stakes and uncertainty about whether and when the hearing will take place means that police officers are very rarely called.

Regarding the very small of number of cases in which the hearing is actually held, a record is developed that suggests some police illegality and the judge or hearing officer is inclined to limit the state's use of certain evidence. There is still no impact upon police conduct. The suppression of evidence in a minor case is a very rare event, but when it does happen, it is of no consequence to anyone. As I noted, this is in contrast to when this occurs in more serious cases, wherein suppression of evidence can gain public attention, cause police officers great consternation and impact their conduct in other ways.

No one in the system believes, or acts like, suppression hearings are really about discovering and providing disincentives to police violation of rights. Rather, the hearings are part of the shell of procedural justice the systems' players use to insulate themselves from forces outside the court, and to ensure that the cases are resolved according to the internal marketplace of the system, rather than according to any measure of worth that would place control outside the court.

45. N.Y. PENAL LAW § 30.30 (Consol. 2003) (setting forth speedy trial time limitations).

I. THE CONSEQUENCES OF BEING ARRESTED FOR A MINOR TRANSGRESSION

If there is little constraint upon the police power to arrest for minor offenses, perhaps we should not be so concerned because little harm is done. To test this proposition, consider the consequences of violating a minor proscription. One of the most significant aspects of public order policing, as practiced in New York City since 1992, is the policy of arresting, rather than issuing summonses to many of the people charged with minor transgressions.⁴⁶ In New York City, I have come across people who have been charged with non-criminal transgressions such as drinking alcohol in public,⁴⁷ who were handcuffed and incarcerated for up to twenty-four hours. Both the New York Criminal Procedure Law⁴⁸ and Supreme Court precedent⁴⁹ authorize these arrests. One stunning aspect of the public order policing is that it has resulted in many more people spending some time in jail without any change in the law or adjudicative practices. It essentially allows the police to impose the sanction of twenty-four hours in jail on whomever they may choose.

A remarkable fact is that this unofficial sanction has been reduced between one-half and two-thirds over the past ten years, with no change in the adjudicatory system. Up until 1991, it typically took between forty-eight and seventy-two hours for people to be arraigned after their arrest.⁵⁰ Under threat of civil suit, the police and the courts worked together administratively to reduce the pre-arraignment time in custody to less than twenty-four hours in almost all cases.⁵¹ The impact of this change in New York City can only be fully appreciated when one accounts for how these cases are typically litigated and sanctioned.

About half the arrests are fully resolved by the time the case is arraigned and the defendant makes his or her first appearance

46. See *supra* note 6 and accompanying text.

47. N.Y. ALCO. BEV. CONT. LAW § 100(4) (Consol. 2004).

48. N.Y. CRIM. PROC. LAW § 140.10 (Consol. 2003).

49. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-27, 354 (2001) (holding that the Fourth Amendment does not prohibit police officers from arresting persons for minor criminal offenses without a warrant).

50. See N.Y. CRIM. PROC. LAW § 140.20(1) (providing that upon a warrantless arrest, a police officer shall perform without unnecessary delay pre-arraignment tasks); see also *Williams v. Ward*, 845 F.2d 374, 387 (2d Cir. 1988) (finding pre-arraignment delays of up to seventy-two hours constitutional).

51. See *People ex rel. Marian v. Brown*, 570 N.E.2d 223, 223-24 (N.Y. 1991) (holding that arrestees held in custody for more than twenty-four hours without arraignment are entitled to release unless an acceptable explanation for the delay is given).

before a judge.⁵² Most of these cases are resolved at the arraignment by a plea or acceptance of an adjournment in contemplation of dismissal (“ACD”).⁵³ Virtually all of these defendants will never appear in court again on the case and most will walk out of the courtroom at the end of the arraignment. A small group will serve an additional period of time in jail and will then be released. Interestingly, the cases resolved at arraignment tend to fall into two groups: the most obviously trivial of the cases and those who are willing to accept the sanction of a conviction and perhaps minor additional punishment to complete the adjudication process that day. The most obviously trivial, such as those charged for the first time with smoking marijuana in public or eating on a subway car, receive an ACD and leave the courtroom. In six months their records will be sealed and under New York law, their arrest will be a legal nullity.⁵⁴ They will, however, have spent the night in jail and may be treated less leniently should they come through the system again.⁵⁵

The second group of cases resolved at arraignment are more varied. For some, the prospect of a non-criminal violation with no additional sanction is more attractive than returning to court. For some, the prospect of even a misdemeanor record, usually another on a record already sullied, is more attractive than returning to court for an uncertain result. For another group, bail is the deciding factor. If a defendant is denied bail, she will likely spend more time waiting for the case to be resolved than would have been imposed in a jail term.⁵⁶ For some, the quick resolution may be the result of bad advice but hard eyed consideration of the path of litigation in that courthouse suggests that immediate resolution makes a certain sense in many cases.

52. In 1998, 46.6% of all non-felony, non-Vehicle and Traffic Law arrests were resolved by conviction at arraignment. An additional 24.5% of the arrests were resolved by adjournment in contemplation of dismissal at arraignment and 1.6% were dismissed at arraignment. NEW YORK CITY CRIMINAL JUSTICE AGENCY, TRENDS IN CASES AND DEFENDANT CHARACTERISTICS, AND CRIMINAL COURT PROCESSING AND OUTCOMES, IN NON-FELONY ARRESTS PROSECUTED IN NEW YORK CITY'S CRIMINAL COURTS tbl. 14 (2002).

53. See N.Y. CRIM. PROC. Law § 170.55 (Consol. 2003).

54. *Id.*

55. *Id.*

56. This is the one thing lawyers can do improve bail chances. See Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1722-23 (2002) (using a study of Baltimore lawyers who represented low-income defendants to argue for the use of representation at bail proceedings).

Typically, about half the cases continue past the arraignment stage. Usually the defendant will be directed to return to court in between two and six weeks. The second appearance in the case will be for one of three purposes: filing of a corroborating affidavit, response and decision on motions or "disposition," a term of art for an adjournment during which nothing is likely to happen.

The important point for our purpose is that in most cases, the defendant must return to court three to six times before there is any real likelihood that a witness will be called and a factual record developed. That factual record is most likely to be the limited record of a suppression hearing. From my experience, moving from suppression hearing to trial will often require between two and six additional appearances. Each court appearance requires a trip to the courthouse and between one and five hours waiting time in the courtroom. The vast majority of the appearances involve no substantive action by the court or parties. A defendant may be directed to return because the state did not file a response, because the People were not ready on some randomly selected hearing date or because his lawyer took no action on the case. In my experience, without any delay by the defense, it is very rare for a case to get to trial before the fifth court date.

After spending a night in jail, five or more trips down to the courthouse can be a very burdensome price to pay to take a chance on lowering or eliminating a marginal sanction, which is what these repeated appearances are about. A defendant charged with a violation already faces a non-criminal charge, which will be sealed by operation of law, even upon conviction.⁵⁷ She may be offered a plea requiring a day or two of community service and must weigh that offer against the prospect of returning to court repeatedly in the hope that the people will misstep enough to use up their speedy trial time and the case will simply be dismissed. A defendant charged with a misdemeanor may face slightly higher stakes, as he faces a criminal conviction, but the comparison remains the same. She is weighing the cost of repeated additional appearances against the benefit of the chance that the state will not be able to pursue the case. But almost always, it is only the marginal sanction at issue—the day or two of community service and the impact of the misdemeanor on ones record. The most significant part of the price has already been paid through the arrest and pre-arraignment detention.

57. N.Y. PENAL LAW § 10.00(3) (Consol. 2003).

For those facing a violation, the real choice post arraignment is between an additional three to five trips to court and three to fifteen hours waiting time, along with the risk of a bench warrant to save the stigma of a sealable non-criminal violation and perhaps a day or two of community service. Defendants in this situation are rarely willing to invest their time and energy in what is almost always a fruitless effort to create a factual record of what happened in their case, and in the rare case when that record is developed, nothing comes of it. This process can have no impact on police behavior.

Those facing misdemeanors face a slightly harder choice, but few of them will receive a sanction harsher than the day they have already spent in jail. For them, the decision to return to court turns on how to weigh the cost of the record of a conviction, the additional time in court, and the risk of a bench warrant, against the reasonable, but fairly randomly distributed possibility that if they stick it out, the case will be disappear and the much lower chance that the offer will get worse.

The crowded calendar, which makes it seem impossible to do much more than set another date to appear in most of the cases, functions as the key management tool in the modern lower criminal court. Although defendants are told they can have a trial and insist upon their procedural rights, a high cost is imposed upon those who take that path. This is nothing new or distinctive in American criminal justice. Encouraging pleas by imposing costs upon those who seek a trial has been the American way of doing business for a long time. But in the minor cases, the stakes are so low, the difference in outcome between plea and trial often so minor and the results are so randomly distributed that it is almost impossible to compel defendants to make rational choices based on the seriousness of their conduct and the likelihood that the state can prove its case. The transaction costs associated with reaching the merits of the case are so high compared to the marginal value of exercising one's rights, that it hardly ever makes sense to try a case in Manhattan Criminal Court.

One solution would be to raise the stakes in these cases to encourage more of the defendants to take the charges seriously enough to demand a trial. Prosecutors could insist on guilty pleas to A misdemeanor charges and ask for jail time in more of the cases. That change would likely result in somewhat more trials,⁵⁸

58. Although the federal experience does not make that so clear. When the sentencing guidelines and mandatory minimums came into force in the early 1990s, many

improving the ability of these courts to better sort cases on their merits and play a greater role in monitoring police conduct. Increasing the stakes in minor offenses would also be consistent with the political and social pressures that have made zero tolerance such a popular slogan.⁵⁹ It would, however, be a mistake to continue to raise the penalties we impose on these minor cases.

Today, many more minor offenders are sanctioned by arrest and prosecution than was the case ten years ago. The offenses are minor because they involve minor normative transgressions, cause minor harms, and are quite common. We all understand what separates us from the bank robber or the murderer—most of us do not commit such offenses. But how many of us have a utility knife at home that meets the statutory definition of gravity knife, drink a beer outdoors, fall asleep on the subway, or have ever had an argument in public? Many of us are minor transgressors, at the mercy of a police officer having a particularly bad day. These are each sufficient reasons to impose very minor sanctions in these cases. On a retributivist theory of punishment, even a weak principle of proportionality recommends minor sanctions for minor transgressions.⁶⁰

predicted a surge in trials, but the surge never came. In fact, rates of pleas increased for many offenses. See Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 118 & n.146-47 (2003) (observing that the number of guilty pleas from fraud and robbery defendants increased between 1996 and 2000).

59. See David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1064-65 (1999). Despite its name, there is no such thing as zero tolerance, police will always have to make decisions often on an ad hoc basis, about which law violations to tolerate, and which to pursue. David Garland, *Overall Perspectives on Crime is Not the Problem: Criminology, Crime Control, and the American Difference*, 69 U. COLO. L. REV. 1137, 1148 (1998) (arguing that between 1960-1990, the criminal justice system gradually defined deviance down and filtered out minor illegalities); Harcourt, *supra* note 6, at 209 (arguing that John Stuart Mill's harm principle, i.e. that "the only purpose for which power can be rightfully exercised . . . is to prevent harm to others is no longer a limiting principle on legal intervention due to the proliferation of harm arguments." (quoting JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978, 1859))).

60. The development of a range of collateral consequences now associated with very minor offenses aggravates the problem of imposing just punishment in these cases. Misdemeanor convictions, and even some non-criminal dispositions, can have immigration consequences, require sex offender registration, impact on public housing and public benefits, affect future eligibility for certain kinds of plea offers and sentences and affect employment. See generally Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV 153 (1999).

The retributivist waters have been muddied in recent years as we consider how to think about these offenses in deterrence terms. A simple understanding of the broken windows theory,⁶¹ and some related arguments, suggests there is greater harm than we recognize in minor offenses. If minor public disorder leads to major public disorder, then littering or fighting in public should be harshly punished to curb robbery and murder. But the empirical case has not been made and the data does not support any link between the prosecution of minor offenses and the rate of major crime.⁶² Even were there is empirical link, deep and difficult normative questions remain.⁶³

There has been a nationwide drop in crime rates, but its causes are clearly quite complex, as rates have dropped in jurisdictions widely varying policing practices.⁶⁴ Here in New York City, the very impressive drop in crime rates seems related to more aggressive data based policing and demographic shifts.⁶⁵ It appears quite likely that the enforcement of minor offenses has played a role and has crime control value, but in considering the role of adjudication, it is very unlikely that the courts have played any significant role. The crime control comes from more police contacts with more peo-

These consequences are uncommon and unpredictable in two different senses. First, it is hard to predict who, among the many people who are arrested for minor offenses, will actually be convicted of an offense carrying collateral consequences. The system is too random and shot through with procedural defenses to make good predictions at the outset of a case. Thus, it seems hard to support the argument that the harshest consequences are really likely to fall reliably on those most deserving of those consequences. Secondly, even among those upon whom these consequences might fall, those convicted of offenses that can carry these consequences, it is hard to predict what will happen. As recent changes in immigration law make clear, defendants are at risk that future changes in the law will have retroactive effect. *Cf.* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1228 (2004) (making the expanded definition of aggravated assault an offense for which an alien may be deported retroactively applicable). It is often impossible to predict whether or not a public agency or employer will learn of, or take action on account of these offenses. The consequences of minor transgressions are shot through with arbitrary application and random outcomes.

61. See Wilson & Kelling, *supra* note 6.

62. See *id.*

63. See Harcourt, *supra* note 6, at 124. Harcourt argues that there is little evidence that Giuliani's quality of life initiative primarily caused the decline in crime; other more likely factors include: 1) an increase in the number of police officers; 2) shifting drug use patterns; and 3) computerized tracking systems. *Id.* Harcourt maintains that whatever effect Giuliani's initiative did have was due to aggressive policing, not the Broken Windows effect. *Id.*

64. See *id.*

65. See generally *id.* at 47-50 (discussing the implementation of Giuliani's "quality of life" initiative).

ple, based on data about where and when crime occurs.⁶⁶ From the point of view of reducing serious crime, it is high value to pick up a turnstile jumper and discover a gun or an outstanding felony warrant.⁶⁷ It is silly to fetishize the adjudication of a turnstile jumper who is just a turnstile jumper, in the mistaken expectation that we can control more serious disorder or have a positive impact on police behavior.

Although the police bring many more minor cases to the court system, the actual sanction in most cases has decreased over the past five years⁶⁸ and the adjudicatory system is unchanged. It does not sort the cases any better than it used to and it still relies almost entirely upon the dance of apparent procedure as the cover story for a system of internal bargaining. The drop in crime rates, in the absence of any adjudicatory reform, strongly suggests that the minor criminal courts have played no role in these changes, beyond processing the increased caseload in the time honored way. It appears that court imposed sanctions have played no role in the drop in crime rates, as those sanctions have held steady or decreased during the period in which crime rates have dropped.

What then do our minor criminal courts do and what might they do? In New York City, the criminal courts continue the long American practice of processing cases, according to an internally developed marketplace that is only loosely related the facts or merits of the individual case. Although this marketplace operates with the forms of procedural justice that pretend to monitor police conduct, in fact police discretion is exceedingly broad in this class of offenses and receives no meaningful check from the lower court bench.

Many others have critiqued the procedural⁶⁹ and substantive⁷⁰ doctrines we have inherited from the Warren Court. Whatever their efficacy or justice in more significant cases, I have tried to

66. *Id.* at 98-99.

67. For example, John Royster, who fatally beat a flower shop owner and assaulted several women (including a piano teacher in Central Park) was caught after being arrested and fingerprinted for turnstile jumping. Harcourt, *supra* note 6, at 101.

68. Because the most common sanction is the time spent in jail before arraignment and that time has been cut from three days to one. See *People ex rel. Marian v. Brown*, 570 N.E.2d 223, 223-24 (N.Y. 1991).

69. See generally Cole, *supra* note 59 (discussing the Court's emphasis on limiting police discretion since the Warren Court).

70. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 551-52 (arguing that invalidation of public order rules is not the appropriate way to curb police discretion, and instead advocating community-police enhancing reciprocity).

make a simpler point about suppression of evidence and vagueness and overbreadth review in lower criminal courts. The low stakes involved in these cases make it almost impossible to litigate the significant legal issues these cases can present. Malcolm Feeley's classic *The Process is the Punishment*,⁷¹ still captures what may be the most essential truth about the lower criminal court—so long as the cost of the proceeding is greater than the ultimate sanction, most cases will never be litigated. This is the central flaw in the application of the due process model⁷² to the lower criminal court.⁷³

II. IMAGINING AN ALTERNATIVE

I have tried to explain some of the structural features of our system for adjudicating minor offenses that have long made it difficult to resolve these cases on the merits or use them to check the authority of police and prosecutors. Because the lower courts have been processing, rather than really adjudicating cases for so long been, many find it difficult to imagine how else they could operate. Even if we can picture a different system in a moment of creativity, many are quick to offer reasons why the system will never change. Indeed, that cast of inevitability, the sense that things will never change in the lower courts, may be the greatest barrier.⁷⁴ But courts can change, and do change, as the rise of problem solving courts across the country well illustrates. Those closest to the situation often find it hardest to see the possibilities.

The case for change is very strong. The best that I can say about the adjudication of minor offenses is that it has not gotten too much in the way of whatever has caused crime rates to drop over that last ten years. It is hard to see much in the way of positive contributions, and easy to find fault with the way we have done

71. See FEELEY, *supra* note 4.

72. See generally Herbert Packer, *Two Models of the Criminal Process*, 114 U. PA. L. REV. 1 (1964) (describing a due process model designed to protect the rights of the accused by placing obstacles to carrying them past each step in the legal process).

73. Of course, when the stakes are high enough, it makes sense to pay the price for procedural justice because the benefits clearly outweigh the costs for most individuals and the system.

74. Almost all of the judges, lawyers and court personnel are people of good will whose daily work lives are an intense whorl of real activity and hard work. They do not see themselves as wasting a great deal of time and energy in a system that masks an internal marketplace with talk of procedural justice. I do not criticize the individuals at all, as it seems that many of us are caught in systems and habits that defy logic but appear sensible, inevitable and unchangeable from the inside. Cf. GARLAND, *supra* note 12 (observing that we quickly grow used to the way things are).

business for a long time. We should, however, have higher aspirations for the criminal courts in which more than ninety percent of the cases are heard.

We should focus the adjudication of minor cases on the developing a factual record about what happened, including the conduct at issue,⁷⁵ its impact on victims, and the community and the defendant's background and situation. We could use a less formal record that we would develop at a full trial, on the model of a preliminary hearing. We could use that record of the conduct of both the defendant and the police to seek a resolution that does justice, without imposing harsh sanctions. This would require a live witness in many more cases. There are procedural changes, however, that could shift much of the system's resources from setting adjourned dates to resolving most cases on the merits by the second court appearance. The goals would be justice and transparency.

Two modest changes in the New York Criminal Procedure Law could shift the day to day work of the Criminal Court from case processing to adjudication on the merits.⁷⁶ The first would substitute a live witness, at a preliminary hearing type of proceeding, for the written corroborating affidavits in New York state law.⁷⁷ The second would change the pleading burdens to get a pretrial suppression hearing⁷⁸ in a non-felony case so they require a first person affidavit from the defense to gain a hearing. These procedural changes would dramatically alter the litigation of misdemeanors by requiring a live prosecution witness at the charging stage of the

75. In these police initiated minor cases, developing a record of the defendant's conduct will often also develop a complete record of the police officer's actions in the incident.

76. Another modest change that could have a very significant impact is simply to schedule fewer cases in each misdemeanor courtroom for any given day, and devote more time to each case with the goal of making real progress in court, rather than just setting another date.

77. Under New York State law, the prosecution's accusatory instrument must be supported by a first person sworn statement with facts supporting each element of the offense. Unless and until this corroborating affidavit has been filed, the prosecution has not met its pleading burden and the case cannot go forward without the defendant's consent. N.Y. CRIM. PROC. LAW §§ 100.15, 100.30, 100.40 (Consol. 2003). In practice, many defendants will waive the right to be prosecuted by a legally sufficient accusatory instrument and enter a plea of guilty to a hearsay complaint, while others will make one, two, or three court appearances at which the case is on for corroboration, and then have their case dismissed if the affidavit is not filed.

78. N.Y. CRIM. PROC. LAW §§ 710.60 (Consol. 2003) (permitting affidavits on information and belief in support of a motion to suppress evidence). Federal law requires that the defendant submit a personal knowledge affidavit, making it more difficult to file suppression motions. *United States v. Gillette*, 383 F.2d 843, 848 (2d Cir. 1967).

case, and greatly reducing the number of suppression hearings that are granted.

There is also one additional institutional change required to make adjudication on the merits possible. The Assistant District Attorney responsible for the case must appear in court for the preliminary hearing. To put it another way, the court should insist that the lawyer representing the People in court that day exercise real prosecutorial authority and not just act as a clerk, reading from a note. We could then develop a culture in which most cases are resolved at the preliminary hearing stage, for reasons having to do with the facts developed at that appearance. For those who choose not to resolve cases at that early stage, formal motion practice and trial would always remain an option.

The first criticism will be that caseload pressures make these changes impossible. I side with Professor Feeley, and others, who have forcefully argued that caseload pressures are not the cause of the emphasis placed on rapid disposition and procedure in the criminal court. Professor Feeley observed that courts with fewer cases simply worked shorter hours and did not spend more time on each case.⁷⁹

There are real possibilities for change in this system. Some of that potential can be realized by addressing the staggering inefficiencies under which we currently labor. The typical case requires several appearances at which nothing substantive happens. Defendants and lawyers frequently appear in court, with all the attendant waiting time, just to set another date to return to court. Although everyone appears to be very busy and reasonably feels quite pressured by the large dockets, there is really very little being accomplished.

There are, of course, reasons why the lower courts operate this way. Acting within this shell of procedural justice is easy for the professionals because it permits them to escape virtually all responsibility for meeting professional standards, and ensures that the cases will be resolved according to their interests, rather than those of the public or the defendants. We can understand the behavior of the lawyers and judges through the lens of incentives and agency problems, institutional role definition, or a preference for personal relationships over formal connections defined by law. We understand, however, the forces that have brought us where we are to-

79. See FEELEY, *supra* note 4, at 260-61.

day, we must recognize that it ill serves the defendants and especially the public.

Defense lawyers can justify their failure to interview clients outside of court, conduct investigations or engage in any substantive legal research, with the claim that they are too burdened by their many required court appearances. Never mind that nothing happens at most of those court appearances and what little does happen is completely uninformed by the actual facts of the case, the defendant's background or the law. Something is getting done and the lawyers are busy—even if the work they are doing does not serve their clients. The system permits the defense lawyers, and indeed all of the professionals, to spend most of their time engaged in relatively simple, undemanding but still undeniably professional tasks.⁸⁰

Adjudication within the shell of procedural justice also gives tremendous power to the lawyers. From the defense lawyer's perspective, much of what happens in the case is within the lawyer's sphere of technical expertise. My clients rarely have a view on whether the corroborating affidavit is sufficient or the motions well pled. By marginalizing the significance of what happened and the client's situation, the two things about which the client has better information than the lawyer, the lower courts take these cases away from the defendants and turn them over to the lawyer. In most cases, the only thing I really need to know from my client are how many times they are really willing to come back to court and how big a cost they assign to a misdemeanor conviction and performing a little community service. I can do a better job than many of the other lawyers handling misdemeanor cases, if myself and my students know more about our clients; but I can also play the procedural game without much input from my client, and unfortunately most lawyers do exactly that. We keep setting new dates in the case until our client decides he has had enough and takes the offer.

These same forces play out in a different form for prosecutors. First, they make essentially the same claim about their own inabil-

80. I make this observation, again, with respect for the professionals, who are working in a frustrating system. My observation grows out of my own experience with defense practice in both high and low volume settings. I have always experienced being in court as relatively straightforward and undemanding, except for the few moments of terror when something really is happening before the judge. Compared to spending time on the streets investigating, counseling clients or writing motions, waiting in court and then setting an adjourned date is a pretty undemanding task, accomplished in a controlled setting.

ity to stay on top of their many cases. They have to spend a good deal of their time in court and have just a few hours at the start and end of the day to talk with witnesses, draft papers, and carry out their other responsibilities. In the lower-level court in which I practice, the prosecutors very rarely appear on their own cases. They read from a note in the file, have no personal knowledge about the case in front of them and precious little discretion. This classic agency problem relieves them of responsibility for what happens in court, which is precious little anyway.

In that system, the prosecutor in court has virtually no opportunity to use the facts of the case to make a decision about how to handle the case in court. The prosecutor knows nothing about the case, beyond the note at the top of the file from which he or she reads. Any discretion the prosecutor may exercise in court, such as agreeing to a judge's suggestion about a sentence or not opposing some particular defense request, must be largely informed by the prices set by the market, not the facts of the case. Although the prosecutor actually assigned to the case will base her plea offer and other actions upon some individualized understanding of the case at hand, the inefficient, procedurally focused system discourages prosecutors from learning much about each of their many cases—most of which will be resolved with reference to the commodity price of the case, not an individual pricing.

The shell of procedural justice also suits judges. Although it must have its frustrations, they spend their days moving cases along, making relatively few legal decisions. Although they are busy, the key to the work is moving through the docket of one to two hundred cases without major delay. The judges in these courts make legal decisions, but few of the appearances present a request for legal relief. Most of the appearances are resolved by agreement between the parties, or most commonly, scheduling another court date.

Other constituencies also benefit from this inefficient system. The large dockets and multiple appearances increase the importance and number of court officers and other personnel required to keep things moving. The system in which I litigate has raised the art of ensuring it is overburdened to a fine art, all the while making a range of choices that guarantee that cases will not be handled expeditiously or decided on their merits. Perhaps it is time we stopped blaming the criminal court and started thinking realistically about what it can, and cannot, do in America.

