
**TOWARD MISDEMEANOR JUSTICE:
LESSONS FROM NEW YORK CITY**

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INTRODUCTION

Fifty years ago, Malcolm Feeley sat in a lower-level court in New Haven, Connecticut, and observed defendants “suffer injustices in silence” amid “a ritualistic drama devoid of meaningful content.”¹ Feeley documented a number of problems with misdemeanor justice, including the reality that most of the defendants were effectively presumed to be guilty.² His ultimate judgment was neatly summarized by the title of his book, *The Process Is the Punishment*.

Fast forward to 2018. If we could embed Feeley again in a high-volume, urban criminal court, what would he see? The truth is that, in many places, not much has changed. Indeed, recent scholarship on misdemeanor crime has documented over-enforcement in poor communities of color, a watered-down version of due process, and an assembly-line approach to justice.³

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¹ MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 33 (1992).

² *Id.*

³ *See, e.g.*, ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASS’N CRIM. DEF. LAW., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 27 (2009), <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808> [<https://perma.cc/P98J-7M5M>] (noting that budget cuts adversely affect criminal defendants’ ability to receive fair trials in misdemeanor cases); PREETI CHAUHAN ET AL., JOHN JAY C. CRIM. JUST., *TRACKING ENFORCEMENT RATES IN NEW YORK CITY 2003-2014*, at 10 (2015), <http://www.jjay.cuny.edu/sites/default/files/News/Enfo>

In recent years, New York City has been a crucible for many of these issues, with a particular focus on the effects of “broken windows” policing.⁴ Researchers at the John Jay College of Criminal Justice have documented a sharp increase in the number and rate of misdemeanor arrests from 1980 to 2013.⁵ About eighty percent of the criminal cases in New York City are misdemeanors—some two hundred thousand each year.⁶ The vast majority (eighty-six percent) of these cases involve people of color.⁷

The wrongs and harms associated with low-level law enforcement in New York City were brought into stark relief with the death of Eric Garner in July 2014. Garner, a forty-three-year-old African-American man, was stopped by police on Staten Island for the alleged sale of loose cigarettes. During the arrest, an officer placed him in a chokehold, resulting in his death.⁸ “This was not a chance meeting on the street,” *The New York Times* reported. “It was a product of a police strategy to crack down on the sort of disorder that, to the police, Mr. Garner represented.”⁹ In the wake of Garner’s passing, activists generated significant political pressure to dial back the city’s commitment to low-level law enforcement.

But there is a flip side to this story. Anyone who has spent time going to community board and precinct council meetings in New York City can attest

rcement_Rate_Report.pdf [https://perma.cc/N7XQ-KV9D] (“While crime was declining, New York City was also experiencing drastic changes in the numbers of enforcement actions between police and citizens.”); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313-14 (2012) (“[M]isdemeanor processing is the mechanism by which poor defendants of color are swept up into the criminal system (in other words, criminalized) with little or no regard for their actual guilt.”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011) (“Misdemeanor adjudications have exploded in recent years At the same time, violent crime and the number of felony cases across the country have decreased markedly.”).

⁴ George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [https://perma.cc/NLJ9-YBMJ] (explaining that order-maintenance policing was about preventing large scale damage by stopping small scale misbehavior). Studies have shown, however, that this theory was either misapplied or wholly incorrect.

⁵ PREETI CHAUHAN ET AL., JOHN JAY C. CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 10-11 (2014), http://johnjay.jjay.cuny.edu/files/web_images/10_28_14_TOCFINAL.pdf [https://perma.cc/VE73-88JK] (showing increase in level of misdemeanor arrests in New York City).

⁶ *Id.*

⁷ INDEP. COMM’N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, A MORE JUST NEW YORK CITY 37 (2017), <https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/58e0d7c08419c29a7b1f2da8/1491130312339/Independent+Commission+Final+Report.pdf> [https://perma.cc/MJN6-47ZZ].

⁸ Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES, June 14, 2015, at A1.

⁹ *Id.*

that local residents often demand more aggressive misdemeanor enforcement from police. Alice Tapia, a resident of public housing in Red Hook, Brooklyn, is an example of this:

I think a lot people have a certain way that they look at people who live in public housing. But not everybody is urinating in the elevators and drinking in public and stuff like that. That has to be addressed because the other half of the people that live there do not want to live like that. They want to live clean, and they want their places to be beautiful.¹⁰

According to a 2015 Quinnipiac University poll, sixty-two percent of New Yorkers want police “to actively issue summonses or make arrests for so-called quality of life offenses in their neighborhood.”¹¹ The poll found no significant difference between white and black respondents on this point.

According to Professor Issa Kohler-Hausmann:

[I]t may well be that we have good reason for deploying a high number of police officers to poor and minority neighborhoods because they suffer disproportionately from high crime. And these policing techniques may indeed be effective in creating order and repressing serious crime, although that question is hotly debated among social scientists who have studied the issue. Insofar as the techniques are effective, the crime reduction benefits from these policing strategies accrue to the residents of these neighborhoods. But the costs of these strategies fall on the same people.¹²

So how do we reconcile these two competing impulses—the call for more low-level enforcement with a desire to reduce the impact of the criminal justice system, particularly on communities of color?

This question was part of the backdrop in 2016 when New York City Council Speaker Melissa Mark-Viverito created an independent commission to examine the criminal justice system. Named for former New York Court of Appeals Chief Judge Jonathan Lippman, the Lippman Commission blue-ribbon taskforce

¹⁰ GREG BERMAN & JULIAN ADLER, *START HERE: A ROAD MAP TO REDUCING MASS INCARCERATION* 62 (2018).

¹¹ Press Release, Quinnipiac University Poll, New Yorkers Back ‘Broken Windows’ Policing, Quinnipiac University Poll Finds; Bratton, Cops Outscore Mayor de Blasio (May 13, 2015), <https://poll.qu.edu/new-york-city/release-detail?ReleaseID=2226> [<https://perma.cc/MV3H-J3CU>].

¹² Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611, 691 (2014) (discussing impact of low-level law enforcement on residents of poor and minority neighborhoods).

issued its final report in April 2017.¹³ The Commission was staffed by a multi-agency team, led by our agency, the Center for Court Innovation.¹⁴

Much of the public response to the Commission focused on its signature recommendation that Rikers Island, New York City's notorious jail complex, be forever shuttered—an idea that is now the official policy of New York City, thanks to Mayor Bill de Blasio. There are miles to go before this happens, but it is safe to say that if it does, it will be one of this century's biggest stories in American criminal justice.

The Lippman Report also contained dozens of recommendations for reforming the misdemeanor justice system in New York City. Those recommendations aim to reduce the use of custodial arrest, pretrial detention, and short-term jail sentences, while promoting the fair and respectful treatment of defendants.

Based on the Lippman Report and other recent New York City reforms, this Article seeks to articulate a new approach to misdemeanor justice that reconciles the maintenance of public safety with the urgent need to reduce unnecessary incarceration.¹⁵ Specifically, we explore five critical dimensions: (1) moving some low-level charges from the criminal to the civil system, (2) increasing the use of arrest diversion programs, (3) promoting supervised release in lieu of bail and pretrial detention, (4) promoting alternatives to incarceration with an eye toward eliminating short-term jail sentences, and (5) advancing the principles of procedural justice. Taken together, these reforms add up to a significant rethinking of the standard approach to misdemeanor crime. If they are broadly implemented in good faith, they will be an important step toward the creation of a more fair and humane justice system.

I. MOVING SOME LOW-LEVEL CHARGES FROM THE CRIMINAL TO THE CIVIL SYSTEM

In recent years, numerous advocacy groups have focused policymakers' attention on the potential collateral consequences of misdemeanor enforcement.

¹³ See generally INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, *supra* note 7. As the coordinating agency, the Center for Court Innovation provided strategic and research support for the Independent Commission on New York City Criminal Justice and Incarceration Reform, including assisting with the composition and structure of the Commission and overseeing the work of Commission staffers. The Center's research included identifying the scope of the problems on Rikers Island and a range of empirically-based solutions, and the Center led efforts to develop final jail savings projections that were responsive to specific strategies identified by Commission members.

¹⁴ In addition to the Center for Court Innovation, the Independent Commission on New York City Criminal Justice and Incarceration Reform was staffed by the CUNY Institute for State and Local Governance, Forest City Ratner Companies, the Global Strategy Group, Latham & Watkins LLP, and the Vera Institute of Justice.

¹⁵ The Center for Court Innovation is involved in many of the initiatives described in this Article.

A misdemeanor conviction can have long-term consequences for defendants, hampering their ability to find employment, housing, and other essentials. Given this reality, some reform advocates have called for various forms of misdemeanor decriminalization. For example, the National Association of Criminal Defense Lawyers has argued that “[m]any misdemeanor crimes do not involve significant risks to public safety, yet they result in high numbers of arrests, prosecutions, and people in jail. . . . The criminal justice system would operate far more efficiently if these crimes were downgraded to civil offenses.”¹⁶

The argument against decriminalization is that cases involving public urination, disorderly conduct, and similar offenses have a harmful effect on neighborhoods. But we should not fall into the trap of thinking the choice is between criminal convictions (and potential jail) and looking the other way when people undermine the quality of life. It is, in fact, possible to continue to punish minor misbehavior without exposing people to the worst consequences of the criminal justice system. Part of the answer is to move cases to the civil system. That is precisely what currently happens in New York City.

In June 2016, the New York City Council passed the Criminal Justice Reform Act, which redirects a number of low-level violations (such as open container of alcohol, public urination, unreasonable noise) from criminal to civil court.¹⁷ The potential implications of this move are significant. In 2015, these violations added up to close to three hundred thousand cases in criminal court.¹⁸ Under the criminal system, an arrest warrant would be issued if a defendant failed to appear in court. At the time of the new law’s enactment, there were 1.5 million open summons warrants in New York City.¹⁹ The consequences of an open warrant are enormous—put simply, it can be the difference between freedom and incarceration (those with open warrants are far more likely to be detained if they get rearrested).

Professor Alexandra Natapoff warns that the move from criminal to civil court does not, by itself, immunize individuals from collateral consequences.²⁰ Civil schemes that incorporate fines or incarceration as a potential consequence for noncompliance may import some of the same harms associated with the criminal system. New York City is seeking to avoid these potential problems. Regardless of their ability to pay, the new law allows defendants to complete community service as an alternative to a civil fine—and there is no threat of

¹⁶ BORUCHOWITZ, BRINK & DIMINO, *supra* note 3, at 27.

¹⁷ N.Y.C. COUNCIL, CRIMINAL JUSTICE REFORM ACT (2016), <https://council.nyc.gov/legislation/criminal-justice-reform/> [<https://perma.cc/RE8H-YST5>].

¹⁸ *Id.* (“In 2015, New Yorkers received 297,413 criminal summonses for everything from having an open container of alcohol to breaking park rules.”).

¹⁹ *Id.*

²⁰ Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1055 (2015) (“Unlike full legalization, decriminalization preserves many of the punitive features and collateral consequences of the criminal misdemeanor experience, even as it strips defendants of counsel and other procedural protections.”).

incarceration for noncompliance. Participants are assigned to community service projects based on their schedules, interests, and physical abilities. Assignments range from cleaning up parks to stuffing envelopes.²¹ Once a fine is paid or service is completed, participants resolve their cases without entries on their criminal records.

II. INCREASING THE USE OF ARREST DIVERSION PROGRAMS

In addition to decriminalizing selected offenses, New York City is also discovering that many defendants are appropriate for diversion at the point of arrest.

Pre-court diversion offers a measure of accountability while simultaneously avoiding confinement and, in many instances, any further system involvement. A recent collaboration between the New York City Police Department and the Manhattan and Brooklyn District Attorneys' Offices is a case in point. Project Reset seeks to divert young people in target neighborhoods prior to criminal court arraignment—the most common offenses are trespassing and shoplifting.²² Participants engage in brief social service interventions and avoid formal processing in the court system. At the point of arrest, police alert young people that they may be eligible for participation in Project Reset. Prosecutors review each case in consultation with the defense bar and refer eligible cases to the Center for Court Innovation, which provides short-term social services for participants. Participants who successfully complete the brief interventions (which include, for example, counseling sessions and group workshops) will subsequently have their cases dismissed. They do not have to go to court, and no record of their engagement with the justice system is retained. If a participant does not complete the program's requirements, the case is then added to the court calendar. Significantly, no notation is made in the case file that the defendant failed to complete a diversion program—the case simply proceeds as usual.

In a similar vein, Manhattan District Attorney Cyrus Vance Jr. recently announced a new slate of justice reforms aimed at avoiding criminal prosecution for approximately twenty thousand nonviolent misdemeanor cases per year.²³ Going forward, individuals arrested for jumping subway turnstiles and minor drug possession in Manhattan will be held accountable through engagement in social services, rather than conventional prosecution. This includes adults as well as teens. In announcing the initiative, Vance made explicit the goal of

²¹ The Center for Court Innovation is coordinating community service for this initiative.

²² CTR. FOR COURT INNOVATION, *Project Reset*, <https://www.courtinnovation.org/programs/project-reset> [<https://perma.cc/A9L7-5XVH>] (last visited Apr. 28, 2018).

²³ Press Release, N.Y. Cty. Dist. Attorney's Office, District Attorney Vance to End Criminal Prosecution of Approximately 20,000 Low-Level, Non-Violent Misdemeanors per Year (June 30, 2017), <http://manhattanda.org/press-release/district-attorney-vance-end-criminal-prosecution-approximately-20000-low-level-non-vio> [<https://perma.cc/8CC6-P375>].

avoiding criminal records and collateral consequences of criminal prosecution.²⁴ Bronx District Attorney Darcel Clark is attempting something similar.²⁵

Some cities have begun to pilot diversion for more serious misdemeanor cases. For example, in Seattle, Law Enforcement Assisted Diversion (“LEAD”) gives police officers the option to connect individuals in need directly with service providers rather than booking them into the local jail.²⁶ Alongside drug addiction, the typical LEAD participant faces numerous other challenges, including high rates of homelessness and serious mental illness. While the research on LEAD is minimal at this point, the one study that does exist shows that LEAD participants are significantly less likely to be rearrested than those in a control group.²⁷ The Lippman Report urged replications of LEAD across New York City.²⁸

III. PROMOTING SUPERVISED RELEASE IN LIEU OF BAIL AND PRETRIAL DETENTION

Seventy percent of New York City defendants whose cases continue beyond the initial arraignment are currently released on their own recognizance—meaning no bail is set and no conditions are imposed (other than to return to

²⁴ *Id.* (“Today, by committing to divert these misdemeanor cases out of Criminal Court in Manhattan, we will further eliminate unnecessary incarceration, and reduce the risks of deportation, loss of housing, and loss of employment that often accompany a criminal prosecution.”).

²⁵ Press Release, Bronx County Dist. Attorney’s Office, Bronx DA, NYS Courts Announce New York City’s First Court Offering Pre-Plea Treatment to Offenders at Risk of Opioid Overdose (Jan. 29, 2018), <http://bronxda.nyc.gov/downloads/pdf/PR/2018/08-2018%20Overdose%20Avoidance%20and%20Recovery.pdf> [<https://perma.cc/5AUN-QRLC>].

²⁶ KATHERINE BECKETT, FORD FOUND., SEATTLE’S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS 1 (2014), <https://www.fordfoundation.org/media/2543/2014-lead-process-evaluation.pdf> [<https://perma.cc/E58K-JWWZ>] (“Seattle’s Law Enforcement Assisted Diversion (LEAD) program is the first known pre-booking diversion program for people arrested on narcotics and prostitution charges in the United States.”).

²⁷ Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL’Y REV. 77, 93 (2016); *see also id.* at 77 (“[P]rograms like LEAD that use harm reduction principles to guide the exercise of police discretion enable municipalities to respond to low-level crimes in a way that alleviates rather than exacerbates individual and community suffering associated with those behaviors.”); Caroline Preston, Opinion, *Don’t Lock ‘Em Up. Give ‘Em a Chance to Quit Drugs*, N.Y. TIMES (Oct. 25, 2016), http://www.nytimes.com/2016/10/25/opinion/dont-lock-em-up-give-em-a-chance-to-quit-drugs.html?_r=0 (“A University of Washington analysis found that LEAD participants—some 450 so far—were 58 percent less likely to be rearrested than those in a control group.”).

²⁸ INDEP. COMM’N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, *supra* note 7, at 40 (“A LEAD-like program should be developed across all five boroughs.”).

court).²⁹ It is worth pausing on this statistic. New York City's practice departs significantly from other cities. Very few places release so many defendants without any conditions whatsoever.³⁰ In this regard, New York City is a model for other jurisdictions.

Building on this, the Lippman Commission recommended creating a statutory presumption of pretrial release for misdemeanors and nonviolent felonies—either on recognizance or under community supervision.³¹ At first blush, this recommendation may appear bold, even controversial, especially because it could result in releasing an additional 3300 people who are currently detained in New York City. But facts on the ground suggest that it is actually a measured proposal.

Seventy-five percent of the New York City jail population consists of individuals who have yet to be convicted of a crime.³² The vast majority are held because they are unable to post money bail.³³ Nearly nine out of ten are black or Latino.³⁴

The average length of pretrial detention in New York City is only seventeen days for people held on misdemeanor charges, with fifty-five percent staying less than five days.³⁵ It is difficult to argue that this serves any public purpose.

Many believe that the current use of pretrial detention abrogates due process of law. According to the Lippman Commission: "When defendants are detained pretrial, the prosecutor inevitably gains leverage. Getting out of jail is an

²⁹ *Id.* at 41 ("Seven out of ten defendants are released on their own recognizance at this stage of the process. No bail is set in these cases and the accused leaves the courtroom subject to no formal monitoring or court-mandated conditions.").

³⁰ By way of comparison, in 2015, eleven percent of the pretrial population in New Orleans Parish was released on recognizance. *See* COURT WATCH NOLA, 2015 DATA & STATISTICS REPORT 6 (2015), <http://www.courtwatchnola.org/wp-content/uploads/2015/10/2015-Data-and-Statistics-Report.pdf> [<https://perma.cc/NZ2K-KRFL>]. In the first quarter of 2017, 10.7% of the pretrial population in New Jersey was released on recognizance. *See* N.J. COURTS, INITIAL RELEASE DECISIONS FOR CRIMINAL JUSTICE REFORM ELIGIBLE DEFENDANTS, JANUARY 1-MARCH 31, 2017, PRELIMINARY STATISTICAL REPORT 1 (2017), http://www.judiciary.state.nj.us/pressrel/2017/CJR_Summary_Reports_033117.pdf [<https://perma.cc/9GEK-N83R>]. Similarly, from 2011 to 2015, 15.9% of the pretrial population in California was released on recognizance. SONYA TAFOYA ET AL., PUB. POL'Y INST. OF CAL., PRETRIAL RELEASE IN CALIFORNIA 3 (2017), http://www.ppic.org/content/pubs/report/R_0517STR.pdf [<https://perma.cc/489C-SBFP>].

³¹ INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, *supra* note 7, at 52 (recommending release for misdemeanors and nonviolent felonies).

³² *Id.* at 25.

³³ *Id.* ("In nearly all . . . cases [where an individual is held without being convicted of a crime], the individuals are held due to their inability to make bail.").

³⁴ *Id.* at 34 ("Blacks and Latinos comprise slightly more than half of our City's overall population but are nearly 90 percent of our jail population.").

³⁵ *Id.* at 43.

enormous incentive to agree to a plea deal, whether favorable or not.”³⁶ Comparing similarly situated misdemeanor-level defendants held in pretrial detention with those released, the Lippman Report found both higher conviction rates (by ten percentage points) and increased jail sentences (by forty percentage points).³⁷ A recent study of misdemeanor-level defendants detained in Harris County, Texas, reached a similar conclusion: “Detained defendants are 25% more likely than similarly situated releases to plead guilty, 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average.”³⁸

As an alternative to pretrial detention, the New York City Mayor’s Office of Criminal Justice launched a citywide supervised release program in 2016.³⁹ In lieu of money bail, defendants are released on the condition that they meet regularly with a case manager and avoid rearrest. Additionally, defendants are offered a full range of voluntary social and clinical services; in the program’s “first ten months of operations, approximately 2,400 participants enrolled.”⁴⁰ This is consistent with a growing body of evidence that suggests that pretrial supervision can potentially lead to reductions in both failures to appear for court and rearrest rates.⁴¹

³⁶ *Id.* at 45.

³⁷ *Id.*; see also MICHAEL REMPEL ET AL., CTR. FOR CT. INNOVATION, VERA INST. JUST., JAIL IN NEW YORK CITY: EVIDENCE-BASED OPPORTUNITIES FOR REFORM 59 (2017), https://www.courtinnovation.org/sites/default/files/documents/NYC_Path_Analysis_Final%20Report.pdf [<https://perma.cc/L46Z-NBSY>].

³⁸ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017).

³⁹ INDEP. COMM’N ON N.Y.C. CRIMINAL JUSTICE AND INCARCERATION REFORM, *supra* note 7, at 45.

⁴⁰ CINDY REDCROSS ET AL., VERA INST. JUST., NEW YORK CITY’S PRETRIAL SUPERVISED RELEASE PROGRAM: AN ALTERNATIVE TO BAIL 9 (2017), <https://www.mdrc.org/sites/default/files/SupervisedRelease%20Brief%202017.pdf> [<https://perma.cc/386F-MECG>].

⁴¹ See MONA J.E. DANNER, MARIE VANNOSTRAND & LISA M. SPRUANCE, LUMINOSITY, RISK-BASED PRETRIAL RELEASE RECOMMENDATION AND SUPERVISION GUIDELINES: EXPLORING THE EFFECT ON OFFICER RECOMMENDATIONS, JUDICIAL DECISION-MAKING, AND PRETRIAL OUTCOME 4 (2015), <http://luminosity-solutions.com/site/wp-content/uploads/2014/02/Risk-Based-Pretrial-Guidelines-August-2015.pdf> [<https://perma.cc/E7UB-MY4B>]; MARIE VANNOSTRAND, KENNETH J. ROSE & KIMBERLY WEIBRECHT, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST., STATE OF THE SCIENCE OF PRETRIAL RELEASE RECOMMENDATIONS AND SUPERVISION 32 (2011), <http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20282011%29.pdf> [<https://perma.cc/V3DJ-AL2C>]; Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in ARIZ. STATE UNIV., SANDRA DAY O’CONNOR COLL. OF LAW, 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf [<https://perma.cc/ACA3-M26X>] (recommending pretrial supervision).

The city is now looking at expanding the eligibility criteria of New York City's supervised release program to allow for more participants, including defendants who are classified as higher risk of rearrest and those who are facing domestic violence charges.⁴² In effect, the city is moving toward the Lippman Commission's vision that there should be a presumption of release in misdemeanor cases.

IV. PROMOTING ALTERNATIVES TO INCARCERATION WITH AN EYE TOWARD ELIMINATING SHORT-TERM JAIL SENTENCES

While most people in New York City's jails are awaiting trial, there are also many inmates who have been convicted of minor offenses. "On any given day, more than 1200 individuals are serving jail sentences in New York City, with sixty-nine percent involving thirty days or less in jail."⁴³ Reflecting on his experience in criminal court, Judge Alex Calabrese describes these defendants as "doing a life sentence, 30 days at a time."⁴⁴

Misdemeanors are not complicated legal cases, but they are often committed by people with complicated lives. Misdemeanor-level defendants tend to bring a host of issues with them into the justice system. Trauma, substance abuse, unemployment, and homelessness are just a few of the problems commonly presented by misdemeanor defendants. Sending these people to jail is likely to have the opposite of its intended effect—individuals who go into Rikers Island with these kinds of problems tend to come out in worse shape.

Thankfully, New York City has a long history of utilizing alternatives to incarceration, drawing on a robust network of non-profit service providers.⁴⁵ In recent years, several programs, including the pioneering Midtown Community Court in Manhattan, have specifically targeted misdemeanor cases. For example, Bronx Community Solutions provides social and community service alternatives to jail to nearly ten thousand misdemeanor-level defendants each year.⁴⁶ The program also provides more specialized clinical services for underserved populations, such as high-risk young people and defendants who may be victims

⁴² INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, *supra* note 7, at 48 ("[T]he Commission recommends expanding supervised release to include some defendants charged with domestic violence offenses, some who score as high risk on the risk assessment tool, and some charged with serious offenses.").

⁴³ *Id.* at 16.

⁴⁴ *Id.* at 37.

⁴⁵ These include: Center for Alternative Sentencing and Employment Services; Center for Community Alternatives; Center for Employment Opportunities; Education & Assistance Corporation; NYC TASC & Mental Health Programs; Fortune Society; Greenburger Center for Social and Criminal Justice; Legal Action Center; Osborne Association; Urban Youth Alliance; Bronx Connect; and Women's Prison Association.

⁴⁶ Center for Court Innovation, Bronx Community Solutions, 2014 Annual Report (on file with author).

of human trafficking.⁴⁷ Bronx Community Solutions has been credited with playing a significant role in the marked decline in the number of misdemeanants sentenced to jail in the Bronx, which fell from twenty-three percent in 2004 to thirteen-and-a-half percent in 2014.⁴⁸

New York City has shown a consistent willingness to reduce the use of jail as a punishment for misdemeanor crime. The bigger question is whether it is possible to change the behavior of chronic misdemeanants. According to the New York City Department of Health and Mental Hygiene, from 2009 to 2014, four hundred defendants accounted for over ten thousand jail admissions.⁴⁹ The overwhelming majority of these individuals struggled with mental health issues and substance use.⁵⁰

Chronic misdemeanants typically have complex needs, but their cases involve low-level charges. The principle of legal proportionality imposes significant limits on the interventions that can be offered in these cases; no New York City judge would sentence a shoplifter to one year of inpatient treatment no matter how much she needs it.

This raises an important question: How much intervention is needed to make an appreciable difference in a defendant's life? Previous meta-analyses suggest that a hundred hours of treatment are needed to reduce recidivism in moderate-risk offenders, and two hundred hours are required for high-risk offenders.⁵¹ It probably goes without saying that anything approaching a hundred hours far exceeds a legally proportionate or justifiable outcome on most misdemeanor matters.

⁴⁷ INDEP. COMM'N ON N.Y.C. CRIMINAL JUSTICE & INCARCERATION REFORM, *supra* note 7, at 62 (recommending expanding treatment to underserved populations).

⁴⁸ CTR. FOR COURT INNOVATION, BRONX COMMUNITY SOLUTIONS, http://www.courtinnovation.org/sites/default/files/documents/BCSfactsheetApril2015_0.pdf [<https://perma.cc/9PW5-K9CG>] (last visited Apr. 28, 2018) (“By providing judges with additional sentencing options for non-violent offenders, Bronx Community Solutions reduces the reliance on short-term jail sentences and offers defendants the assistance they need to avoid further criminal conduct.”).

⁴⁹ CITY OF N.Y., MAYOR'S TASK FORCE ON BEHAVIORAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM: ACTION PLAN 6 (2014), <http://www1.nyc.gov/assets/criminaljustice/downloads/pdfs/annual-report-complete.pdf> [<https://perma.cc/RGG3-FSY3>] (noting that single group of four hundred people makes up population that has “been admitted to jail more than 18 times in the last five years” and “comprises the population that most frequently returns to the City's jails”).

⁵⁰ *Id.* (noting that population that most frequents the City's jails shows “even higher prevalence of mental illness and substance use disorder than the general jail population—67% have a mental health need; 21% have a serious mental illness; and 99.4% report substance use disorder”).

⁵¹ Guy Bourgon & Barbara Armstrong, *Transferring the Principles of Effective Treatment into a “Real World” Prison Setting*, 32 CRIM. JUST. & BEHAV. 3, 22 (2005) (discussing study on optimizing treatment length to reduce recidivism and examining “dosage” effects on offenders who had different levels of risk and needs).

This has led the developers of Thinking for a Change, a roughly thirty-session cognitive-behavioral intervention for criminal justice populations, to develop a short-term and flexible alternative called Decision Points.⁵² Similarly, the Center for Court Innovation is working to test a new intervention for the misdemeanor population, which integrates trauma-informed care and procedural justice principles with cognitive-behavioral approaches.⁵³ Although neither intervention has yet to be subject to rigorous evaluation, they signify the critical need for innovation in clinical practices to better serve the majority of the criminal justice population in the United States.

V. ADVANCING THE PRINCIPLES OF PROCEDURAL JUSTICE

A trip to a criminal court in New York City can be bewildering, whether you are a defendant, a victim, a witness, or a juror. The Lippman Report is vivid in its description: “Long lines at security. Overcrowded elevators. A dearth of directional markers. Officiously worded signs about court rules. Long waits. Court appearances lasting just a few minutes and including incomprehensible jargon.”⁵⁴

The Commission is right to raise concerns. A growing body of research suggests that a user’s experience in court bears directly on short- and long-term criminal justice outcomes.⁵⁵ Advocates of procedural justice, including

⁵² See *About*, DECISION POINTS, <http://www.decisionpointsprogram.org/about.html> [<https://perma.cc/PU57-6LWX>] (last visited Apr. 28, 2018) (noting that authors of Decision Points—including Juliana Taymans and Jack Bush—developed program “for flexible delivery across settings” and structured program with “five comprehensive learner-centered lessons fostering continuous delivery”).

⁵³ Maureen Richey, *Q&A with Julian Adler of the Red Hook Community Justice Center*, COUNCIL OF ST. GOV’TS JUST. CTR. (Apr. 29, 2015), <https://csgjusticecenter.org/courts/posts/how-procedural-justice-practices-can-help-reduce-crime-qa-with-julian-adler-of-the-red-hook-community-justice-center/> [<https://perma.cc/J7EM-UBX2>].

⁵⁴ INDEP. COMM’N ON N.Y. CITY CRIMINAL JUSTICE & INCARCERATION REFORM, *supra* note 7, at 60.

⁵⁵ See, e.g., M. SOMJEN FRAZER, CTR. FOR CT. INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK COMMUNITY JUSTICE CENTER 24-26 (2006), https://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf [<https://perma.cc/B8VH-NACG>] (discussing impact of community court model, judge, communication, court mandates, case outcomes, and defendant backgrounds on defendants’ perceptions of fairness in justice system); CYNTHIA G. LEE ET AL., NAT’L CTR. FOR ST. CTS., A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER: FINAL REPORT 122-45 (2013), <https://www.courtinnovation.org/sites/default/files/documents/RH%20Evaluation%20Final%20Report.pdf> [<https://perma.cc/V472-J2CU>] (discussing impact of Red Hook Community Justice Center (the “Justice Center”) on recidivism in criminal court and family court); SHELLI B. ROSSMAN ET AL., URB. INST. JUST. POL’Y CTR., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY 5 (2011), <https://www.urban.org/sites/default/files/publication/27361/412353-The-Multi-site-Adult-D>

Professor Tom Tyler, argue that the manner in which a defendant is treated matters just as much, if not more, than the final outcome of the case.⁵⁶

The experience of procedural justice is typically described as having several key elements, which include *voice* (were you given a chance to tell your side of the story?); *respect* (were you treated with dignity?); *neutrality* (did you perceive decision-makers as unbiased and trustworthy?); and *understanding* (did you understand your rights, obligations, and the decisions that were made about you?).⁵⁷ In his seminal book, *Why People Obey the Law*, Tyler makes the case that defendants who experience a justice process that they perceive to be fair and transparent are more likely to be law-abiding in the future.⁵⁸ This is true regardless of whether or not they receive a favorable case outcome.⁵⁹

The absence of procedural justice can lead to legal cynicism—a fatalistic outlook on the fairness and integrity of the system. Sociologists David S. Kirk and Andrew V. Papachristos have argued that legal cynicism becomes a “frame

rug-Court-Evaluation-Executive-Summary.PDF [https://perma.cc/LJG9-EHQP] (discussing impact of drug courts on criminal behavior, substance abuse, and other outcomes); Denise C. Gottfredson et al., *How Drug Treatment Courts Work: An Analysis of Mediators*, 44 J. RES. CRIME & DELINQ. 3, 25-27 (2007) (noting that results of authors’ study on drug treatment courts suggest that “judicial hearings provide effective restraints against both crime (via increased procedural justice) and drug use”).

⁵⁶ See ERIN J. FARLEY, ELISE JENSEN & MICHAEL REMPEL, CTR. FOR CT. INNOVATION, IMPROVING COURTROOM COMMUNICATION: A PROCEDURAL JUSTICE EXPERIMENT IN MILWAUKEE 22, 32 (2014), <https://www.courtinnovation.org/sites/default/files/documents/Improving%20Courtroom%20Communication.pdf> [https://perma.cc/F8R3-CEYP] (noting judges’ reactions to suggestion that they receive “one or two research articles published by Tom Tyler on procedural justice theory” during training on judicial communication, defendant perceptions of judicial system, and defendant recidivism); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 166 (2002) (discussing relationship between psychological connections to social groups and sentiments regarding legal authority and noting that “people are more likely to accept an authority’s decision when they feel that they are being treated fairly, independent of the nature of the outcome” according to relational model of authority); Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 6 (2008) (discussing Tom Tyler’s argument that voice, neutrality, respectful treatment, and trustworthy authorities comprise concept of procedural fairness).

⁵⁷ EMILY GOLD LAGRATTA & ELISE JENSEN, CTR. FOR CT. INNOVATION, *Introduction to MEASURING PERCEPTIONS OF FAIRNESS: AN EVALUATION TOOLKIT* (2015), https://www.courtinnovation.org/sites/default/files/documents/P_J_Evaluation.pdf [https://perma.cc/YGA5-XRAT].

⁵⁸ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 60, 143 (1990) (noting that perceived legitimacy of justice process influences compliance and that “those who believed before the experience that the authorities were competent were more likely to believe that their own views were considered”).

⁵⁹ *Id.* at 143 (noting that “judgments of favorability of outcome are only weakly linked to prior views about the legitimacy of legal authorities and prior evaluations of the quality of their performance”).

through which individuals interpret the functioning and usefulness of the law and its agents.”⁶⁰ Notably, they found that it was linked to violent crime in specific Chicago neighborhoods that have been historically resistant to general crime declines.⁶¹

A recent national study by the Urban Institute offers the following explanation:

A police department’s effectiveness in controlling and preventing crime is closely related to residents’ *perceptions of the law* and, more specifically, their belief in the rule of law. Negative views of the justice system contribute to “legal cynicism,” whereby people neither report crime nor cooperate with the police. Neighborhoods with high levels of legal cynicism often have high crime rates and low collective efficacy. A self-reinforcing cycle of resident noncooperation leads law enforcement to view community residents as apathetic about crime problems and hostile to the department, while residents perceive police as biased, indifferent, and ineffective.⁶²

To borrow a phrase from Professor Jenny Roberts, “[p]rocedural justice matters.”⁶³ This has certainly been true in Red Hook, Brooklyn, where an experimental courthouse is attempting to re-think misdemeanor justice.⁶⁴ The Red Hook Community Justice Center (the “Justice Center”) was created to reduce the use of jail and fines.⁶⁵ Instead, the Justice Center promotes the use of social and community services as a response to low-level offending.⁶⁶ According to researchers from the National Center for State Courts, “sentencing [at the Justice Center is] dramatically different from what prevails in the downtown

⁶⁰ David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190, 1207 (2011).

⁶¹ *Id.* at 1226 (“[L]egal cynicism explains why rates of homicide remained stable in some Chicago neighborhoods (e.g., Bronzeville) during the 1990s when homicide declined dramatically citywide.”).

⁶² NANCY LA VIGNE, JOCELYN FONTAINE & ANAMIKA DWIVEDI, URB. INST., HOW DO PEOPLE IN HIGH-CRIME, LOW-INCOME COMMUNITIES VIEW THE POLICE? 10-11 (2017), http://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf [<https://perma.cc/5MUA-G34H>].

⁶³ Roberts, *supra* note 3, at 286.

⁶⁴ *See generally* LEE ET AL., *supra* note 55 (discussing Justice Center’s impact on community and outcomes).

⁶⁵ *See id.* at 4 (discussing theory of community courts and noting that common feature of community courts is “[e]xpanded [s]entencing [o]ptions” that have “corresponding reduction in the use of jail time and fines as options”).

⁶⁶ *See id.* at 5 (“In accordance with deterrence theory, the Red Hook Community Justice Center intends to replace ‘walks’ . . . with meaningful sanctions for even the most minor of offenses and to have defendants begin serving social and community service sentences as quickly as possible.”).

courts,” with fewer defendants receiving jail sentences.⁶⁷ Compared to the downtown criminal court, the Justice Center increased the use of alternative sanctions (seventy-eight percent at the Justice Center versus twenty-two percent downtown) and decreased the use of jail as a sentence at arraignment (one percent versus fifteen percent).⁶⁸

Further, the researchers found “a robust and sustained decrease” in recidivism—adult defendants were ten percent less likely to be rearrested and juvenile defendants were thirty percent less likely.⁶⁹ Strikingly, the researchers concluded that the Justice Center managed to improve the behavior of participants because it changed the way they felt about the justice system.⁷⁰ From its well-lit entrance with welcoming court officers to its holding cells with specially-treated glass instead of bars, the Justice Center is designed to be a user-friendly building that communicates respect for all who pass through its doors.⁷¹ This extends to the courtroom, where judges speak to defendants using plain language and go out of their way to give defendants a chance to tell their side of the story.⁷² In the words of one defendant, “[t]o me, he’s fair, I’ll put it that way.”⁷³ In Red Hook, all of these small improvements in the court experience add up to something major: improved compliance with the law.

New York City has taken notice—through collaboration with the Mayor’s Office of Criminal Justice, the New York State Office of Court Administration,

⁶⁷ CYNTHIA G. LEE ET AL., NAT’L CTR. FOR ST. CTS., A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER: FINAL REPORT: EXECUTIVE SUMMARY 5 (2013), https://www.courtinnovation.org/sites/default/files/media/document/2017/RH_Report_ES.pdf [<https://perma.cc/YDW8-K9DU>].

⁶⁸ *Id.* at 7 (discussing changes to sentencing and sanctions as result of Justice Center and noting that “[t]he difference in the distribution of sanctions is pronounced”).

⁶⁹ LEE ET AL., *supra* note 55, at 176-77 (noting that “rate of re-arrest within a two-year period following arraignment is 10 percent lower for misdemeanor defendants whose cases are processed at the Justice Center” and that juvenile defendants face “30 percent lower risk of re-arrest at any given point in time than a similarly situated youth whose case was processed in a traditional family court,” though finding for juvenile defendants was not statistically significant at .05 level).

⁷⁰ *See id.* at 189 (concluding that “[p]rocedural justice as practiced in the courtroom and in the court’s relationship to the community emerges as the component of the program theory that can most plausibly explain why the Justice Center enjoys an advantage over the downtown courts in recidivism rates and other desired criminal justice impacts”).

⁷¹ *See id.* at 33 (discussing specific renovations of building that houses Justice Center, and noting that “new layout was designed to humanize the experience of a court appearance and to enable the building to function as a community center as well as a courthouse”).

⁷² *See id.* at 66 (discussing offender interview responses that “recount[ed] how the judge listened to their side of the story and offered practical advice on how to avoid trouble in the future, such as always carrying identification when walking through the hallways of the Red Hook Houses”).

⁷³ *Id.* app. E at 39 (discussing survey responses regarding participants’ perceived differences between Downtown Court and Justice Center).

and the Justice Collaboratory at Yale Law School, efforts are underway to incorporate elements of procedural justice at the centralized criminal courthouse in Manhattan.⁷⁴ The project includes improved signage and way-finding in the lobby, corridors, and courtrooms.⁷⁵ This will be paired with procedural justice training for judges and court staff.⁷⁶

The Lippman Report summed up the ultimate goal of procedural justice: “Every defendant and victim who comes into contact with the New York City criminal justice system should be treated with dignity and respect.”⁷⁷ What the Lippman Report is ultimately talking about here is a cultural shift. The justice system must move from a factory model that assumes the worst of defendants to one that seeks to serve clients and provide individualized attention. This extends to frontline staff (judges, attorneys, clerks, court officers), who must also be treated well and feel that they have a voice in reform to generate care and concern for those in their charge.

MOVING FORWARD

A new vision for misdemeanor justice is emerging in New York City. This vision embraces rerouting some low-level charges from the criminal to the civil system, while simultaneously increasing the use of arrest diversion programs and supervised release in lieu of bail and pretrial detention. Further downstream, it promotes meaningful and proportionate alternatives to incarceration with an eye toward eliminating short-term jail sentences. At every decision point, it is anchored in the principles of procedural justice.

It is important to have a vision, but ideas only get you so far. The perennial challenge of implementation looms large in New York City, as it does across every American city that is seeking fundamental justice reform. Will

⁷⁴ Erin Durkin, *Judges Told to Watch Their Language and Build a Kinder Courtroom in City's New Program*, N.Y. DAILY NEWS (Nov. 22, 2017, 5:40 PM), <http://www.nydailynews.com/new-york/judges-told-build-kinder-courtrooms-city-new-program-article-1.3651689> [<https://perma.cc/BX2X-F5T6>] (discussing effort between Center for Court Innovation, Mayor's Office of Criminal Justice, and Office of Court Administration “to build kinder, gentler courtrooms” by way of judges’ language choices and improved signage at Manhattan Criminal Court).

⁷⁵ See *id.* (noting that “[n]ew signs have . . . been installed at the lower Manhattan courthouse with directions, an overview of the judicial process, and inspirational quotes about the justice system”).

⁷⁶ Dean Meminger, *New Initiative Aims to Make Courts More Respectful and Customer-Friendly*, SPECTRUM NEWS 1 (Dec. 7, 2017, 2:52 PM), <http://www.ny1.com/nyc/all-boroughs/criminal-justice/2017/12/07/new-initiative-aims-to-make-courts-more-respectful-and-customer-friendly> [<https://perma.cc/37TG-J27N>] (“Starting in January, judges and court officers will be participating in workshops to learn how to make the court system a better place for everyone.”).

⁷⁷ INDEP. COMM’N ON N.Y. CITY CRIMINAL JUSTICE & INCARCERATION REFORM, *supra* note 7, at 16.

policymakers have patience to see this through? Is it possible to win the hearts and minds of the frontline judges and attorneys and other practitioners who actually run the justice system? Will editorial writers and advocacy groups move on to other topics?

The next couple of years will be crucial ones for those who care about criminal justice reform. If New York City can forge a new, systemic response to misdemeanor crime—and if it can make real progress on the path toward closing Rikers Island—the effort will have far-reaching implications for the rest of the country. This endeavor is vitally important because misdemeanors comprise the bulk of the cases in the American criminal justice system.⁷⁸ We have known what was wrong with the standard approach since Feeley first stepped foot in New Haven—overcrowded halls of justice that bear little relationship to the courts we were taught about in school.⁷⁹ People of color bear the worst burden.⁸⁰ What would a better approach look like? We can begin by acknowledging that there are many cases that do not need to be in criminal court. We can also begin by admitting that most misdemeanor defendants are not criminal masterminds. The system should be designed to both respond to the misbehavior that undermines community quality of life and judiciously use the power of the state to provide defendants with access to the resources needed to improve their lives.

⁷⁸ See Carla J. Barrett, *Adjudicating Broken Windows: A Qualitative Inquiry of Misdemeanor Case Processing in the New York City's Lower Criminal Courts*, 18 CRIMINOLOGY CRIM. JUST. L. & SOC. 62, 63 (2017) (noting that “[e]stimates put annual felony cases in the United States at between two and three million, while misdemeanor cases are estimated at closer to 10 or 11 million”).

⁷⁹ See *supra* notes 1-2 and accompanying text (discussing Malcolm Feeley’s observations in court fifty years ago).

⁸⁰ See *supra* note 3 and accompanying text.