PROCESS COSTS AND POLICE DISCRETION

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Cities across the country are debating police discretion. Much of this debate centers on "public order" offenses. These minor offenses are unusual in that the actual sentence violators receive when convicted—usually time already served in detention—is beside the point. Rather, public order offenses are enforced prior to any conviction by subjecting accused individuals to arrest, detention, and other legal process. These "process costs" are significant; they distort plea bargaining to the point that the substantive law behind the bargained-for conviction is largely irrelevant. But the ongoing debate about police discretion has ignored the centrality of these process costs. Many scholars have argued that vague terms and broad standards in defining public order crimes results in broad discretion that leads to abuse. In this Essay, we argue instead that criminal law process costs essentially decouple statutory language from actual police behavior, rendering the debate about statutory language largely moot. Abuse is better addressed by first recognizing that, in the context of public order crimes, discretion has little to do with substantive criminal law. Instead, policymakers should focus on mitigating the harmful consequences discretion can generate and on limiting police discretion through other means. To this end, we propose providing the police with new civil enforcement tools that will be equally effective at preserving order but that will in all likelihood cause significantly less unnecessary harm.

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Cities across the country are debating police discretion. New York, for example, has recently endeavored to end its controversial practice of stopping and frisking citizens as a matter of course.[1] The debate over police discretion implicates fundamental questions about the role of police in American society, racial discrimination in the criminal system, and the disproportionate use of violence by the police against young black men. Much of the debate over the proper scope of police discretion centers on reforming the criminal code to decriminalize or eliminate minor crimes. This essay will argue that the debate over the proper scope of police discretion should instead focus on the real source of that discretion: the process costs of low-level adjudication.

Minor crimes are a big problem. In 2006 alone, Americans were charged with and detained on misdemeanor offenses approximately 10.5 million times.[2] These cases have serious long-term consequences for defendants, their families, and our criminal justice institutions.[3] They create criminal convictions and criminal records.[4] They crowd our jails.[5] And minor convictions are usually imposed with little process, no counsel, and often regardless of factual guilt or innocence.[6] Worse, these crimes and convictions arguably form the core of our criminal justice system: while most people incarcerated in the United States were convicted of a felony, a large majority of criminal sentences imposed come from misdemeanor and violation convictions.[7]

Many of these minor convictions result from what are often called "public order" offenses.[8] These offenses are relatively petty to be sure, but their more important defining feature is that the actual *sentence* violators receive for transgressing—usually time already served in detention via a guilty plea—is not the "punishment" that ought to matter to policymakers. In practice, our criminal justice system primarily enforces public order prohibitions prior to any conviction by subjecting the accused to arrest, detention, and other legal process.[9] These "process costs" are significant; they include not just pre-

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[1] *E.g.*, *NYC Police to Reform Public Housing Stop-And-Frisk in Settlement*, N.Y. TIMES, Jan. 8, 2015, at A1.

[2] *See* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE (2009).

[3] *Id.* at 11–12; *see also* Marc Santora, *City's Annual Cost Per Inmate is Nearly $168,000, Study Says*, N.Y. TIMES, August 23, 2013, at A16 (noting that on an average day in 2012, there were 12,287 inmates in New York City's jails, 76% of whom were there awaiting trial).

[4] *E.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

[5] *See* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *supra* note 2.

[6] Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) [hereinafter Bowers, *Punishing the Innocent*].

[7] Natapoff, *supra* note 4, at 1322.

[8] *See* Debra Livingston, *Police Discretion and Quality of Life in Public Places*, 97 COLUM. L. REV. 551, 556 n.14 (1997) (citing Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning,* 105 YALE L.J. 1165, 1168, 1217–19 (1996)).

[9] MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992). For rough estimates of how many defendants plead guilty to avoid prolonged detention, see generally Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Determination*, 111 MICH. L. REV. 1513, 1515 n.13–14 (2013) ("In 2010, in New York City alone, 16,649 defendants were unable to make bail set at one thousand dollars or less . . . [and d]efendants who are required to post bail that they cannot afford . . . end up pleading guilty to avoid waiting in

trial detention, but also the hassle of pre-trial and trial proceedings and the risk and uncertainty that those proceedings necessarily entail.[10] These costs distort plea bargaining so much that the substantive law behind the bargained-for conviction becomes irrelevant. Defendants are likely to spend more time in jail if they contest the charges than if they plead guilty. Not surprisingly, they almost always plead guilty, whether or not they committed the charged offense and despite the fact that the criminal conviction may result in serious consequences down the road.[11]

Maintaining public order is nevertheless an important civic function. Many of these offenses—disorderly conduct, minor trespassing, loitering—attempt to serve this function by giving police discretion that allows them to disrupt, to isolate, and to sober.[12] The use of vague terms and broad standards in drafting statutory language can deliver such discretion. In the minds of some, however, discretion leads to abuse, a conclusion that has caused a heated debate about how much statutory discretion the law should make available to police.[13]

We do not join this battle. Instead, we suggest that criminal law process costs essentially decouple statutory discretion from actual police behavior, rendering the debate about statutory language largely moot. Abuse is better addressed by first recognizing that, in the context of public order crimes, discretion has little to do with substantive criminal law and that, instead, focus is much better placed on mitigating the harmful consequences discretion can generate and on limiting police discretion through other means. To this end, we propose providing the police with new *civil* enforcement tools that will be equally effective at preserving order but that will in all likelihood cause significantly less unnecessary harm. We believe—counterintuitevly, perhaps—that giving the police an additional power (non-criminal arrest) might encourage them to use the power they have (criminal arrest) less frequently and, therefore, might reduce the harm that power causes.

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jail.") (citing Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 348–52 (2011)).

[10] *See* Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, 119 AM. J. SOCIOLOGY 351, 374 (discussing procedural hassle as a technique for control of vulnerable populations) [hereinafter "Kohler-Hausmann, *Control without Conviction*"]; Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007) [hereinafter Bowers, *Grassroots Plea Bargaining*"]; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (arguing that as the severity of the criminal offense decreases, the influence of the substantive law wanes) [hereinafter "Stuntz, *Disappearing Shadow*."].

[11] Bowers, *Punishing the Innocent*, *supra* note 6; Natapoff, *supra* note 4; Gerstein, *supra* note 9, at 1524 n.84 (2013) (citing Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 987 (1989)).

[12] *See* Livingston, *supra* note 8; *see also* Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359 (2005).

[13] *Compare, e.g.*, Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking*, 1998 U. CHI. LEGAL F. 197 (1998) [hereinafter Meares & Kahan, *Procedural Thinking*], *and* Livingston, *supra* note 8, *with*, *e.g.*, Albert W. Alschuler & Steven J. Schulhofer, *Antiquated Procedures or Bedrock Rights?*, 1998 U. CHI. LEGAL F. 215 (1998).

Our argument begins with the fact that when the police feel they need to arrest someone, the police will, in most cases, arrest that person—regardless of how specific or general a given city's criminal code may be.[14] Why? Because the specificity of the criminal code has little relationship to the costs (e.g., pre-trial detention) imposed by an arrest, and it is the ability to impose these costs that allow the police to achieve their ends. There are good reasons to believe that the police care primarily about what happens before (and only some of what happens before) any conviction, not the conviction itself or its consequences for the defendant. Consequently, code reforms are unlikely to control police discretion.

If discretionary arrests turn on considerations *other* than the substantive law that underlies public order offenses, cities should instead give the police tools that do not trigger criminal records, meaningless pleas, unnecessary risk and uncertainty, and useless (from a police officer's perspective) process costs. Cities should adopt civil ordinances that free the police to make discretionary arrests for low-level violations, but limit the tendency of those arrests to inflict socially useless process costs on defendants.

This essay proceeds in three parts. Part I quickly recounts the realities of low-level criminal punishment in big cities and shows that low-level arrests are untethered to substantive law, rendering solutions that work *within* the criminal law unlikely to be effective at controlling police discretion. Part II outlines the debate over discretion to police public order, and argues that it neglects the reality that substantive law is mostly irrelevant to the matter of police discretion in this domain. Part III proposes a solution that comes from a long line of police practice: civil laws with strictly limited periods of detention and other features designed to reduce or eliminate those process costs that have no connection to what police are supposed to be trying to do—maintain order.

Before moving on, we note that the purpose of this essay is not to discuss whether the police should arrest people as often as they do. Rather, operating on the assumption that the police *do* feel the need to arrest people, we seek to ameliorate the consequences of those arrests by reforming substantive law in a particular way. As we explain below, we believe that our proposal (or something like it) can reduce the negative effects of many public-order policing arrests without increasing the total number of such arrests.

I. ARRESTS FOR PUBLIC ORDER OFFENSES

In very low-level misdemeanor prosecutions, the substantive criminal law that generates the punishment is largely irrelevant. Instead, the conviction is the near-certain result of the arrest, and the punishment is the process of criminal adjudication.[15]

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[14] *See* Bowers, *Grassroots Plea Bargaining*, *supra* note 10; David Cole, *Forward: Discretion and Discrimination: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); *cf.* George Fisher, *Historian in the Cellar*, 59 STAN L. REV. 1, 2, (2006) (citing LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY CALIFORNIA, 1870–1910 (1981)).

[15] MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992); Natapoff, *supra* note 4, at 1328; Bowers, *Punishing the Innocent*, *supra* note 6; Bowers, *Grassroots Plea Bargaining*, *supra* note 10; Stuntz, *Disappearing Shadow*, *supra* note 10.

Consider New York City today. The police see (or learn of) someone doing something they don't like.[16] That person is arrested for a minor offense,[17] usually disorderly conduct,[18] trespassing,[19] loitering,[20] possession of marijuana,[21] or drinking on the street.[22] Within twenty-four hours, this arrestee is supposed to be arraigned by a judge,[23] but it often takes much longer.[24] In the interim, the arrestee spends roughly four to six hours in a precinct holding cell before being transferred to courthouse lockup.[25] When he finally sees a judge, if he has a record, he is likely to be held on bail that he cannot afford.[26] But even if he is released on his own recognizance, which, for defendants with a criminal record, is unlikely,[27] the hassle of a trial—with its many courthouse trips, where there might be long lines at secured entrances[28]—starts to look unmanageable. He is offered a plea deal in which the twenty-four hours he *just spent* in lockup will in effect serve as his sentence. If he doesn't take it, he will either remain in jail until his trial—which could be a rather long time[29]—or be forced to attend a series of time-consuming and meaningless court appearances.[30] If the defendant works full-time, these court appearances are nearly impossible for him to attend. And so at arraignment

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[16] Sometimes, that can be wearing your pants too low. People v. Martinez, 905 N.Y.S.2d 847, 847 (2010).

[17] New York law characterizes many of these minor offenses as non-criminal violations. Nonetheless, the evidence suggests that these offenses create serious long-term problem. *E.g.*, Kohler-Hausmann, *Control without Conviction*, *supra* note 10.

[18] N.Y. PENAL LAW § 240.20 (McKinney 2013).

[19] N.Y. PENAL LAW § 140.10 (McKinney 2013).

[20] N.Y. PENAL LAW § 240.35 (McKinney 2013).

[21] N.Y. PENAL LAW § 220.10 (McKinney 2013).

[22] N.Y.C. ADMIN. CODE § 10-125[b] (2012).

[23] People ex rel. Maxian on Behalf of Roundtree v. Brown, 570 N.E.2d 223 (N.Y. 1991).

[24] Joseph Goldstein, *After Budget Cuts, Defendants' Wait to See a Judge Often Exceeds 24 Hours*, N.Y. TIMES, July 19, 2011, at A22.

[25] THE LEGAL AID SOCIETY, WHAT CAN I EXPECT IF I'M ARRESTED?, *available at* http://www.legal-aid.org/en/ineedhelp/ineedhelp/criminalproblem/faq/whatcaniexpectifiamarrested.aspx (last accessed August 18, 2013, 10:17 AM).

[26] Natapoff, *supra* note 4, at 1322 n.22 (citing Mosi Secret, *N.Y.C. Misdemeanor Defendants Lack Bail Money*, N.Y. TIMES, Dec. 2, 2010, at A27.). *See also* HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 23 tbl.3 (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (noting that only 10.0% of those with a misdemeanor conviction were released on their own recognizance) [hereinafter: "HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM"].

[27] Natapoff, *supra* note 4, at 1322 n.22.

[28] *See* Kohler-Hausmann, *Control without Conviction*, *supra* note 10; William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES, April 13, 2013, at A1.

[29] *Id. See also* HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM *supra* note 26 (reporting that the average length of pretrial detention for someone who cannot make bail is 15.7 days).

[30] *See* Kohler-Hausmann, *Control without Conviction*, *supra* note 10, at 375 ("They must then sit patiently in a crowded courtroom, sometimes all day, watching the seemingly inscrutable logic of other cases being called and courtroom lulls, waiting for their 60–120 seconds in front of the judge . . . . When the lunch break is called at 1 p.m., the crowd of defendants who have been waiting since 9 a.m. for their case to be called invariably express what could be understated as discontent . . . . If defendants fail to return for their case call after lunch a warrant will [likely] be issued.")

he does not contest whatever low-level offense is available and goes home.[31] Statutory law has no role in this type of prosecution.

Many have noted the startling lack of process in misdemeanor and violation prosecutions generally, as well as the extent to which those prosecutions are driven by process costs.[32] The picture is bleak in New York, to be sure—but at least in New York defendants plead guilty one at a time. In some jurisdictions, defendants are read their rights and enter their guilty pleas en masse.[33] Guilty pleas are a near certainty.[34] Adjudication, in the sense of determining, say, the factual basis of guilt, is absent.[35] This world of low-level criminal processing does not remotely approach the criminal process taught in law school classrooms. At least one scholar suggests that the misdemeanor system in New York is no longer principally concerned with adjudicating at all—rather, she claims, its goal is to mark defendants with records so that they can be effectively sorted in future encounters with the system.[36]

As a matter of legal doctrine, New York's disorderly conduct offense is limited in scope and difficult to prove.[37] Same with open container violations.[38] In the tiny

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[31] *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 65 STAN. L. REV. 1203 (2014) [hereinafter: "Kohler-Hausmann, *Managerial Justice*"]. In New York City, 78.2% of all misdemeanor arrests result in either a conviction for a violation (28.7%), a conviction for a misdemeanor (19.6%), or an adjournment in contemplation of dismissal (ACD) (29.9%), where the charge stays on a defendant's record for a year and is reactivated if the defendant is rearrested. *Id.* at 1241 fig.11. In this essay, we occasionally refer to "guilty pleas" so as to include the ACD. This is because only a straight dismissal gets you out of court without any record that can come back to haunt you, so agreeing to an ACD is tantamount to pleading guilty for our purposes.

[32] *E.g.*, Kohler-Hausmann, *Managerial Justice*, *supra* note 31; Natapoff, *supra* note 4; Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y. L. SCH. L. REV. 1009, 1014 n.15 (2011) (discussing "innocent defendants who plead guilty to avoid the process costs of a criminal prosecution, in particular those who have been held long enough in pretrial detention that they will get to go home if they accept the prosecutor's offer to plead guilty in return for a sentence of imprisonment that they have already served."); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 180 (2008); Bowers, *Grassroots Plea Bargaining*, *supra* note 10.

[33] Natapoff, *supra* note 4 (citing FEELEY, *supra* note 9).

[34] *Id.*

[35] *Id.*

[36] *See* Kohler-Hausmann, *Managerial Justice*, *supra* note 31.

[37] *See, e.g.*, People v. Jones, 9 N.Y.3d. 259, 262 (1997) ("The conduct sought to be deterred under the statute is 'considerably more serious than the apparently innocent' conduct of defendant here.") (quoting People v. Carcel, 144 N.E.2d 81 (1957)); People v. Richardson, 913 N.Y.S.2d 549, 551–2 (N.Y. Crim. Ct., City of N.Y., N.Y. County 2010) (dismissing complaint for failure to allege mens rea of "intent to cause annoyance or alarm" where a police officer "observed the defendant shouting obscene language to wit: 'f**k off nigga, stop f**king with me' in a public area.") (alterations in original); People v. Stephen, 581 N.Y.S.2d. 981, 982–3 (N.Y. Crim. Ct., City of N.Y., N.Y. County, 1992) (dismissing complaint for failure to allege disorderly conduct where defendant screamed at a police officer "Fuck you . . . If you were in jail, I'd fuck you, you'd be my bitch . . . . If you didn't have that gun and badge, I'd kick your ass, I'd kill you," and "where a crowd of approximately 15–20 people gathered who joined the defendant yelling, 'Yeah, fuck the police.'").

[38] *See* People v. Figueroa, 948 N.Y.S.2d 539, 541 (N.Y. Crim. Ct., City of N.Y., County of Kings

minority of cases that receive actual judicial scrutiny, the New York Court of Appeals has espoused a common law of disorderly conduct violations that sharply circumscribes the extent to which these laws can intrude on individual liberties. But these laws routinely underlie convictions for defendants who did not, and could not have, violated them.[39]

There are particularly stark examples of this phenomenon: people often plead guilty to crimes that, by virtue of either repeal or unconstitutionality, the police can no longer legally enforce.[40] In 1993, the Second Circuit struck down New York's loitering statute because it violated the First Amendment on its face, and it enjoined the City from prosecuting charges under the statute.[41] Yet between 1993 and 2004, the New York City Police Department (NYPD) arrested, and local prosecutors charged, 1,876 people for violating the loitering statute. Eddie Wise, one of those defendants, was convicted of violating the unconstitutional statute seven times *after* it was declared unconstitutional.[42] In 2005, local lawyers sued again to enjoin the NYPD from enforcing the statute.[43] (They won.[44]) But the reminder didn't stop the NYPD from issuing 641 summonses and arresting 58 people after the suit was filed.[45]

Marijuana arrests present an equally stark example. In New York, possession of marijuana in public view is a misdemeanor.[46] But, since 1977, having marijuana in your pocket is non-criminal, non-arrestable violation.[47] Between 1996 and 2011, New York City alone made 586,320 arrests for possession of marijuana in public view.[48] In most of these arrests, the marijuana "becomes 'open to public view' only after the police stop individuals and either ask them to empty their pockets or conduct a frisk."[49] Local public defenders, because they were concerned that these arrests "present clear constitutional

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2012) (dismissing open container violation because "[w]hile the arresting officer's professional training and sense of smell may be sufficient to support his conclusion that defendant was drinking beer, such does not support the conclusion that the beer contained more than one-half of one percent (.005) of alcohol by volume because the beverage could have very well been non-alcoholic beer.").

[39] Kohler-Hausmann, *Managerial Justice*, *supra* note 31, at 1244; Bowers, *Grassroots Plea Bargaining*, *supra* note 10, at 85.

[40] *Id.*

[41] Loper v. New York City Police Dep't, 999 F.2d 699, 705 (2d Cir. 1993).

[42] Elva Rodriguez et al., *Beggar Gets Change, Wins Suit Forcing City to Lay Off Panhandlers*, N.Y. DAILY NEWS, June 11, 2005, at 3. Josh Bowers was Eddie Wise's attorney, and describes Mr. Wise's story in greater detail in Bowers, *Grassroots Plea Bargaining*, *supra* note 10, at 85.

[43] *Id.*

[44] *Id.*

[45] Kati Cornell, *Beggar Buster Blues—Judge Blasts NYPD*, N.Y. POST, Nov. 30, 2006, at 39.

[46] N.Y. PENAL LAW § 221.10.

[47] N.Y. PENAL LAW § 221.05.

[48] HUMAN RIGHTS WATCH, A RED HERRING: MARIJUANA ARRESTEES DO NOT BECOME VIOLENT FELONS (2012), *available at* http://www.hrw.org/sites/default/files/reports/us_mj1112webwcover.pdf [hereinafter: "HUMAN RIGHTS WATCH, RED HERRING"]. We thank Issa Kohler-Hausmann, a coauthor of this report, for her helpful comments on this point.

[49] *Id.* at 11 (quoting N.Y. PENAL LAW § 221.10.)

and evidentiary problems,"[50] began trying to take these cases to trial. They were unable to try a single case.[51]

How this happens is no mystery. The process costs so outweigh the defendant's perceived costs of pleading guilty that it seems to make very little sense to contest even patently invalid charges. Almost everyone pleads guilty,[52] even though many did not commit (or could not have committed) the charged offense. This is because successfully fighting the charge is worse for the defendant, at least in the short run, than pleading guilty. The Fourth Amendment, then, imposes no restrictions on police behavior in this realm of criminal punishment, beyond the distant possibility of a § 1983 suit. Because the police can be confident that a trial on these charges is at worst a remote possibility, the exclusion remedy for Fourth Amendment violations is meaningless.

These public order arrests create a cascade of problems for those defendants who are frequently stopped by the police. In well-studied New York, often a defendant's first misdemeanor arrest results in an adjournment in contemplation of dismissal (ACD), where the charge is dismissed after a year if the defendant stays out of trouble.[53] But if the defendant gets rearrested within the next year, the ACD usually results in a worse offer from the prosecution, and often a formal conviction for the offense on which he was rearrested.[54] And, during the year the ACD is pending, potential employers can see (and make decisions on the basis of) the arrestee's record.[55]

But while prosecutors may aim for criminal convictions, the police have much less reason to care about dispositions for loitering, disorderly conduct, or open-container arrests. At least in theory, in some circumstances, they ought to care only about the arrest and pre-arraignment detention.[56] With rare exceptions, once the very low-level defendant is arrested, the police have accomplished their immediate goal of maintaining order.[57] Of course, the defendant is *also* prosecuted, convicted, and permanently marked, but these fallen dominos are hard to pin on the police. The public expects the police to maintain order, but when an arrest is necessary, the law often arms them—at least officially—with only the powerful and blunt tools of criminal law. This is a mismatch: public-order or

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[50] THE BRONX DEFENDERS, MARIJUANA ARREST PROJECT, http://www.bronxdefenders.org/programs/the-marijuana-arrest-project/ (last accessed Feb 01, 2015, 10:35 AM).

[51] William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES, April 30, 2013, at A1.

[52] Or, in New York, accepts an ACD that stays on his record for a year. Kohler-Hausmann, *Mangerial Justice*, *supra* note 31.

[53] *See supra* note 31.

[54] Kohler-Hausmann, *Managerial Justice*, *supra* note 31, at 1262 ("If a defendant with [an ACD] from a prior arrest is brought back to criminal court on a new arrest, the offer on the new case will go up along one vector or another—the seriousness of the mark, the conditions he or she must satisfy to be granted the disposition, or the formal sentence.").

[55] *Id.* Indeed, the purpose of New York's misdemeanor system may be to mark defendants so that they can be treated differently when they are subsequently arrested. *See id.* at 1283.

[56] FEELEY, *supra* note 15.

[57] *See* notes 43–45, *infra*.

"quality of life" policing is conducted almost entirely outside the shadow of substantive criminal law and almost entirely within the discretion of the police.[58]

The problem stems from the misalignment of purposes between the police, who primarily (and optimistically) seek to prevent crime and keep streets safe, and district attorneys, who focus more immediately on pursuing chargeable offenses.[59] Prosecutorial involvement in a case typically begins when someone has already been arrested. At least according to some, prosecutors are interested in minimizing the risk that a defendant emerges from the system without being "marked" so that, in the event the person reoffends, the prosecutor isn't blamed.[60] Prosecutors are not well-positioned to weed out those public-order arrests that should never have led to a criminal conviction. The police, on the other hand, are expected to enforce public order. They likely care less about the escalating penalties of the criminal system than prosecutors do. But when the police make public-order arrests, they (perhaps inadvertently) start a process of escalating punishment ill-suited to the task of order maintenance.

"Criminal" public order enforcement is counterproductive in other ways. For one, it erodes the label "crime." When we ask the police to maintain public order we do not ask them to focus on *crime* or to arrest *criminals* as the typical person uses those terms. We ask them to regulate behavior that may inadvertently create some risk to the public;[61] to deter chronic low-level misconduct that doesn't rise to the level of criminality;[62] and even to be our primary—and maybe exclusive—agent for dealing with people with substance abuse problems, the mentally ill, and the homeless.[63] Calling this sort of policing "criminal" makes the term mean less,[64] and therefore makes it less powerful, eroding any deterrent or expressive value of a criminal sanction.[65] Worse still, this approach brands as "criminals" many who have merely offended other people's sensibilities or have engaged

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[58] Livingston, *supra* note 12.

[59] *See also generally* Kohler-Hausmann, *Managerial Justice*, *supra* note 31 (arguing that prosecutors' principal goal in misdemeanor and violation cases—in New York, at least—is to mark defendants for future encounters).

[60] *Id.*, at 1261 (citing an interview with a New York assistant district attorney).

[61] *See, e.g.*, Cole, *supra* note 14, at 1066 nn.28–31 (citing Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998)).

[62] Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996)

[63] *See* HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 9 (1977) ("The police have come to be viewed as capable of handling every emergency."); Peter C. Patch & Bruce A. Arrigo, *Police Officer Attitudes and Use of Discretion in Situations Involving the Mentally Ill*, 22 INT'L J. L. & PSYCH. 23, 23 (1999).

[64] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

[65] *See* Glanville Williams, *The Aims of the Law of Tort*, 4 J. CURRENT L. PROBS. 137, 155 (1951) ("To stigmatise the ordinary person by the epithets 'criminal,' 'offender,' and 'conviction,' is itself a punishment, and, from a deterrent point of view, it is important that the emotion invoked by these words should be kept at full strength and not weakened by their indiscriminate application."); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Law*, 107 YALE L.J. 1 (1997).

in what almost everyone agrees is very minor misconduct that in reality almost always poses very little risk to physical safety.[66]

Because defendants cannot (realistically) contest the charges against them, policing outside the substantive law also leaves no account of what happened—or why.[67] The sentence imposed is in effect subverted by the process, which ought to be an administrative incident to punishment, not the punishment itself. Cases are often resolved at arraignment,[68] and very rarely at trial,[69] so there is no record of *why* the system punished someone. All we'll ever know is that someone was convicted of "disorderly conduct."[70] Those who read the record might think the worst.[71] A criminal record is chief among the unintended and unnecessary costs generated by relying on criminal law to maintain public order. A person arrested for an essentially non-criminal public-order offense becomes part of the criminal system alongside those guilty of genuinely transgressive conduct and about whom society would agree on the label "criminal." Because of the wide variety of conduct covered by public-order prosecutions, employers are unlikely to bother drawing distinctions.

Is there a justification for uniformly marking arrestees with criminal convictions in the context of public-order offenses? Certain classes of low-level offenses are apparently poor predictors of serious criminality in the future.[72] In some jurisdictions the probability of being convicted of a more serious low-level offense as opposed to a less serious one is chiefly a function of how long it has been since the individual's last arrest.[73] Because people in highly policed areas are arrested at much higher rates, this fact likely produces a cascade of arrests and convictions that have little relationship to the goals of public-order policing (and much more to do with a person's neighborhood and race).

Public-order arrests often result in a lengthy period of pre-arraignment detention[74]—perhaps well in excess of the sentence any institutional actor would rationally want to

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[66] *Cf.* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1985) (distinguishing criminal from civil wrongdoing).

[67] Indeed, New York City did not even *keep track* of how many convictions were generated in non-felony cases until 2010. Ray Rivera & Al Baker, *Data Elusive on Low-Level Crime in New York City*, N.Y. TIMES, Nov. 1, 2010, at A1.

[68] Kohler-Hausmann, *Managerial Justice*, *supra* note 31, at 1248 ("In New York, *over* 57% of all misdemeanor and violation cases go to disposition at arraignment.") (emphasis in original).

[69] *Id.* at 1241 fig. 11 (fewer than 1% of cases go to trial).

[70] Consider Michigan law, which criminalizes being a "disorderly person." *E.g.*, People v. Gagnon, 341 N.W.2d 867, 870 (Mich. App. 1983).

[71] *See* Kohler-Hausmann, *Managerial Justice*, *supra* note 31, at 1244 ("In practice, 'dis con' serves as an all-purpose generic charge to mark the defendant for a specific period of time, not to indicate that the defendant is guilty of any specific illegal conduct."); *cf.* Old Chief v. United States, 519 U.S. 172 (1997).

[72] *See* Kohler-Hausmann, *Managerial Justice*, *supra* note 31, at 1273 (citing an empirical study of New York City arrest data).

[73] *Id.* at 1283.

[74] *See* Joseph Goldstein, *After Budget Cuts, Defendants' Wait to See a Judge Often Exceeds 24 Hours*, N.Y. TIMES, July 19, 2011, at A22 (describing pre-arraignment detentions that regularly exceed seventy-two hours).

impose for the "violation." The defendant is processed through the court system and provided a court-appointed lawyer. All of this jailing and process costs money and imposes needless suffering.

The debate about police discretion cannot move forward as long the police are compelled to use extra-legal means to impose criminal punishment. Using the process in this way constrains other institutional actors' ability to limit police discretion: as it stands today, most discretionary arrests result in a conviction with serious consequences. In these arrests, everything seems to have gone right, so the public—including much of the legal academy—continues to think that the text of the substantive law can meaningfully constrain police behavior.[75]

II. THE FALSE DICHOTOMY OF POLICE DISCRETION

There has long been a vigorous debate over how much discretion to give the police in initiating street encounters and making low-level arrests.[76] This debate is alive today in the fight over New York's controversial stop-and-frisk policy and its practice of arresting people for marijuana possession.[77] Some scholars claim that the density of urban spaces requires new forms of police discretion to maintain "social norms" and to smooth community tensions.[78] They argue that the increasing empowerment of black communities means that the Constitution should leave them alone to self-police.[79] Courts should no longer be suspicious that public order laws are designed to keep black people *out* of community life because, the argument goes, black communities increasingly write those laws themselves.[80]

The early incarnation of this debate centered on *City of Chicago v. Morales*,[81] which involved a broad anti-gang loitering ordinance that allegedly gave the police power to arrest (or harass) whomever they wanted to. The ordinance essentially criminalized "remaining in any one place with no apparent purpose."[82] Some maintained that this

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[75] *E.g.*, Livingston, *supra* note 12, at 561 ("Courts cannot 'solve' the problem of police discretion by invalidating reasonably specific public order laws—as some have attempted—without seriously impairing legitimate community efforts to enhance the quality of neighborhood life.").

[76] *Compare, e.g.*, Meares & Kahan, *Procedural Thinking*, *supra* note 13, *and* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998) [hereinafter "Kahan & Meares, *The Coming Crisis*"], *and* Livingston, *supra* note 12, *and* Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359 (2005), *with* Schulhofer & Alschuler, *supra* note 13, *and* Cole, *supra* note 14, *and* Natapoff, *supra* note 4.

[77] *E.g.*, Editorial, *The Truth Behind Stop-and-Frisk*, N.Y. TIMES, September 3, 2011, at A20; Joseph Goldstein, *Marijuana May Mean Ticket, not Arrest, in New York City*, N.Y. TIMES, November 9, 2014, at A1.

[78] *See, e.g.*, Kahan & Meares, *The Coming Crisis*, *supra* note 76.

[79] *See* Cole, *supra* note 14, at 1062 (discussing Meares & Kahan, *Procedural Thinking*, *supra* note 13).

[80] *Id.*

[81] 527 U.S. 41 (1999).

[82] *Morales*, 527 U.S. at 47. Morales is the most recent in a line of cases in which the Supreme Court invalidated local quality-of-life ordinances on vagueness grounds. Kolender v. Lawson, 461 U.S. 352 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971).

language was fatally overbroad and gave the police inordinate discretion to arrest people for innocent conduct[83]—the Court agreed—while others argued that this broad language was necessary for the police to do their jobs and maintain order for the benefit of minority communities.[84] This debate implicitly assumes, however, that you can have either specific criminal laws that constrain the police, or very general laws that allow the police broad discretion.[85] This is a false dichotomy. What the law *says*—the specific conduct it defines and criminalizes—does little to constrain police discretion in the enforcement of very low-level violations. The need to control police discretion could hardly be more important, but in the context of public order offenses, it has at best a very weak connection with substantive criminal law.[86]

Regardless of how offenses are defined, the police can still use them to generate convictions by using the process to force guilty pleas. Therefore, by focusing primarily on the content of substantive law, policymakers pay too little attention to the real agent of criminal punishment in this setting: the process costs of a criminal arrest.

To illustrate this disconnect, consider an example. Imagine that drinking on the street—a very *specific* activity—were no longer prohibited. Someone is arrested for drinking on the street even though drinking on the street violates no criminal or administrative rule. If he is offered a plea bargain at his arraignment, he will probably take it, as the previous Part shows. Thus, if the police encounter someone drinking on the street in a manner that they find disruptive or objectionable, they can still arrest that person despite the fact that drinking on the street is no longer against the rules.

The disconnect stems from a fact that has been true of lower courts since at least the 1950s: the process is the punishment.[87] Beginning with the "due process revolution,"[88] when the Bill of Rights was incorporated against the states, lower courts have used the process of adjudication for the purpose of enforcing substantive norms of behavior. Because they are no longer able—at least formally—to enforce order without fairly extensive process, the criminal system evolved to use the costs that the process generates to enforce order.[89]

But the political system and much of the legal academy continues to believe that code reforms can serve to control police discretion. Indeed, in response to the criticism that

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[83] Schulhofer & Alschuler, *supra* note 13.

[84] Meares & Kahan, *Procedural Thinking*, *supra* note 13.

[85] *See* Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 777–78 (1999) ("For the last several decades, conservative commentators have called for a relaxation of the vagueness doctrine as well as procedural restraints on police discretion to permit bolder law enforcement efforts to investigate, punish, and prevent crime.").

[86] *Contra*, *e.g.*, Livingston, *supra* note 12, at 561 ("Courts cannot 'solve' the problem of police discretion by invalidating reasonably specific public order laws—as some have attempted—without seriously impairing legitimate community efforts to enhance the quality of neighborhood life.").

[87] FEELEY, *supra* note 15.

[88] *E.g.*, FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (1977).

[89] *E.g.*, Kohler-Hausmann, *Control Without Conviction*, *supra* note 9.

marijuana arrests do almost nothing to protect public safety,[90] New York Governor Andrew Cuomo introduced legislation to make possession of marijuana in public view a non-arrestable, non-criminal violation, just like possession in your pocket is.[91] Despite support from all five New York City district attorneys,[92] the legislation failed because of opposition from upstate legislators.[93] Both sides of this debate neglected the reality that code reforms cannot alone control police discretion. Even if the legislation passed, if the NYPD wanted to continue arresting people for marijuana possession in public view—despite the fact that it would become a non-arrestable offense—they could.

Other norms and institutions are much better suited to constrain police discretion. Indeed, the political process that led to the passage of Chicago's gang-loitering ordinance may have strongly influenced police behavior in favor of aggressive enforcement and vigorous public-order policing.[94] Civilian oversight can constrain police discretion.[95] So can consent decrees with the Justice Department.[96] Perhaps most importantly, law enforcement departmental norms can restrain discretion.[97] But in the context of minor crimes—the lowest level of criminal punishment—police discretion appears to be largely unimpeded by substantive criminal law.

And there is reason to be hopeful about the possibility for reform in our cities. After the legislation in New York to decriminalize marijuana possession in open view failed, the political movement behind those substantive reforms continued to apply pressure to political actors. Turning their focus away from the criminal code, opponents of marijuana arrests were able to persuade New York City simply to stop making them.[98]

It is important to recognize the limits of our claim. In prosecutions for serious crimes, the substantive scope of criminal conduct really matters. As the ratio of the

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[90] HUMAN RIGHTS WATCH, RED HERRING, *supra* note 48, at 19.

[91] *Id.* at 4.

[92] Each borough of New York City has its own district attorney.

[93] HUMAN RIGHTS WATCH, RED HERRING, *supra* note 48, at 4.

[94] Professors Meares and Kahan argue rancorously with Professors Alschuler and Schulhofer about how the political process in Chicago ended up generating the anti-gang loitering ordinance. *Compare,* Meares & Kahan, *Procedural Thinking*, *supra* note 13 (claiming that black communities on the South- and West-sides of Chicago birthed the ordinance), *and* Tracey L. Meares & Dan M. Kahan, *Black, White, and Gray: a Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245 (1998) (same), *with* Schulhofer & Alschuler, *supra* note 13 (arguing that aldermen from predominantly white wards were the real movers behind the ordinance). Both sides *do* agree that the process was loud, open, and unusually prominent in the eyes of citizens and police.

[95] *E.g.*, Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151 (2003).

[96] *See, e.g.*, HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 103–05 (1998) (discussing consent decrees pursuant to 42 U.S.C. § 14141); Debra Ann Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999).

[97] *Cf., e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

[98] Joseph Goldstein, *Marijuana May Mean Ticket, not Arrest, in New York City*, N.Y. TIMES, November 9, 2014, at A1.

expected sentence to the expected process costs grows, plea bargaining outcomes increasingly mirror trial outcomes.[99] It thus matters whether drugs are illegal. It matters very little, however, whether Chicago criminalizes loitering with "no apparent purpose" or "causing a disturbance." Similarly, our claim is limited to relatively large jurisdictions, where the process costs are high. Smaller jurisdictions may function quite differently.

Finally, all this is not to say that the text of the criminal code does *nothing*, even in the context of low-level crimes. Criminal prohibitions send important signals to the public and to the police about the scope of proper conduct.[100] They can have a tremendously important expressive value, outlining for the citizenry conduct that is to be encouraged and conduct that ought to be forbidden. They can transmit important messages to the police about the proper scope of their ability to intrude on individual liberty. Our point here is only that, whatever they do, criminal codes do not meaningfully constrain police discretion in the context of public-order offenses.

III. LOWERING PROCESS COSTS

High process costs of low-level criminal adjudication are the problem. The police can—at their discretion and unconstrained by substantive criminal law in any meaningful way—impose draconian, but often unnecessary, even counterproductive, costs on defendants and their families. The police do not necessarily do this out of spite or incompetence. They simply need tools to police public order (often by making arrests), and criminal law is usually all that they have.

We offer one potential solution: reduce the consequences of discretionary, low-level arrests by limiting the process costs they can generate, leaving only the arrest itself and a brief period of non-criminal detention.[101] Counterintuitively, we believe that giving the police this new power will persuade them to use their power formally to arrest less often, not more. An important historical analog to this approach is the "drunk tank," in which officers would lock up dangerously inebriated people to sober up overnight.[102] No

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[99] *E.g.*, Stuntz, *Disappearing Shadow*, *supra* note 10.

[100] For a tiny sample of the vast literature on this subject, see Adil Ahmad Haque, Lawrence v. Texas *and the Limits of the Criminal Law*, 42 Harv. C.R.-C.L. L. Rev. 1, 33 & n.145 (2007) (citing Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1623 (1998)).

[101] We discuss briefly below why we believe this proposal is unlikely to significantly increase the volume of arrests.

[102] *See, e.g.*, Livingston, *supra* note 12; *see also* Joshua Partlow, *Holiday Rush at Mexico City's Hangover Prison*, WASH. POST, December 26, 2013, *available at* http://www.washingtonpost.com/world/the_americas/holiday-rush-at-mexico-citys-hangover-prison/2013/12/26/4edfcf10-6dcc-11e3-a5d0-6f31cd74f760_story.html. On the subject of history, it is also worth noting that the earliest Western police forces were permitted—indeed, required—to effect non-criminal, low-process arrests. Early common-law arrest doctrines recognized a distinction between the authority of the police in matters of crime and the authority of police in matters of order. For example, the Statute of Winchester, which established London's first police force in 1285, provided that watchmen were authorized and charged "'as . . . in Times past' to 'watch the Town continually all Night, from the Sun-setting unto the Sun-rising' and were directed that 'if any stranger do pass by them, he shall be arrested until Morning.'" *See* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law*

formal criminal process need be involved and no criminal record would result. While the debate about police discretion has centered on the substantive scope of low level regulation, we focus on the real-world *process* of arresting people for low-level offenses, and seek a way to avoid criminal records and disproportionate, socially wasteful costs. If the police are going to enforce public order through discretionary arrests, society would benefit from providing law enforcement with the legal instruments to do so safely, effectively, and legitimately.

Specifically, we propose replacing or complementing public-order crimes with a class of civil ordinances that allow only very brief detentions. First, these ordinances should strictly limit the total time of detention imposed—including the sentence and the period that anyone can be detained on suspicion of a violation—to twenty four hours at the very longest.[103] Ideally, the limit would be even shorter. The ordinances should provide for no fines or monetary payments of any kind. Second, the ordinances should allow the defendant to attack the legitimacy of his detention post-hoc via mail or telephone and to waive in-person arraignment. Lastly, these ordinances should be non-criminal and should not, under any circumstances, leave the defendant with a recorded violation of any kind. The police should be required to retain reliable records of whom they arrested and why, but those records should be accessible to the public only in totally anonymous form.[104]

These features serve to reduce wasteful process costs. No longer will there be any reason to plead guilty to time-served or to take an ACD—you will already have served the maximum penalty you can receive anyway. No longer will there be any reason to plead guilty to avoid trial. You can conduct a paper adjudication if you want to vindicate your innocence, or just let it go—you won't have a criminal record. Lastly, no matter what happens, you're back home in twenty-four hours.[105]

These laws will still allow the police to do all the things public-order policing enthusiasts expect them to do. Rarely, if ever, do the police need more than a twenty-four hour detention to accomplish the goals of public-order policing. If the police want more than twenty-four hours, they should typically arrest for a more serious crime for which the defendant should be charged and tried: in this situation, the criminal system becomes appropriate, and the plea bargaining process functions better because the

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Warrantless Arrest Standards and the Original Understanding of "Due Process of Law", 77 MISS. L.J. 1, 58, 60, 61 (2007) ("'A watchman may arrest a night walker by a warrant in law.' In effect, being out after dark in town was so suspicious that it was grounds for a temporary arrest."). We thank Josh Bowers for his helpful comment on this point.

[103] New York currently has serious problems complying with a twenty-four hour deadline for arraignments. Goldstein, *supra* note 24. That said, this deadline should be much easier to comply with—though, compliance is by no means a certainty.

[104] *Cf.* Jeffrey Skopek, *Anonymity, The Production of Goods, and Institutional Design*, 82 FORDHAM L. REV. ___ (forthcoming 2014) (discussing various aspects of anonymity in the modern legal structure), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310868.

[105] To again use New York City as an example, these detentions should be at the local station house, rather than in the currently overcrowded jails. Even short periods of time in overcrowded jails can be traumatizing and degrading. Station house lock-ups—where police are generally present nearby and periods of detention are very brief—should serve to minimize the cruelty of detention.

sentence the defendant would face upon conviction often exceeds the process costs of fighting the charge.[106] Our goal is simply to provide the police with tools that allow them to avoid high process costs while maintaining public order.

When police arrest people for low-level crimes, they seek a wide variety of ends, depending on the context. Sometimes police want to clear a corner where drug dealers are congregating.[107] Sometimes they want to send a signal to a neighborhood that they are in control.[108] Often, police are maintaining a sense of order in the community, even manifesting that order through the regulation of physical spaces.[109] They are almost always our front-line responders to mental illness and substance abuse and so they lock people up because there is no other way to keep them safe or ensure that they receive care.[110] Sometimes the police have illegitimate reasons.[111] But no matter why the police make public-order arrests, they should rarely be invested in whether the person they've arrested is ultimately convicted. The ordinances we suggest leave the police equally effective at maintaining order, but eliminate the criminal process as a near-certain result. And, similarly, by lowering process costs, the proposed ordinances can bring public order policing above-board, allowing the political debate about how much discretion the police *should* have to occur on more productive terrain.

We recognize that police departments may want to use low-level arrests to incapacitate or simply to keep track of people they worry may pose a threat. With respect to the former possibility, police may use low-level arrests to keep potentially violent criminals off the street for more than a few days,[112] although the evidence suggests that

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[106] Stuntz, *Disappearing Shadow*, *supra* note 10.

[107] Natapoff, *supra* note 4.

[108] *Id.*

[109] *See, e.g.*, Nicole Stelle Garnett, *Ordering (and Order in) The City*, 57 STAN. L. REV. 1 (2005); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513 (2002); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); William J. Bratton, *The New York Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J. L. & POL'Y 447 (1995) (NYPD Chief discussing City's efforts at policing quality-of-life).

[110] *See* GOLDSTEIN, *supra* note 63.

[111] *Cf.* MICHELLE ALEXANDER, THE NEW JIM CROW (2010); MICHAEL TONRY, MALIGN NEGLECT 49–80 (1995); Marcellus Andrews, *Punishment, Markets, and the American Model: An Essay on a New American Dilemma*, *in* THE USE OF PUNISHMENT 116, 116–48 (Seán McConville ed., 2003); *see generally* Nicola Lacey, *Humanizing the Criminal Justice Machine: Reanimated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299, 1299 (2013) (reviewing STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012)) (collecting books and articles on the subject of policing and punishment in the United States).

[112] *E.g.*, *id.* at 16 n.47 (quoting JACK MAPLE & CHRISTOPHER MITCHELL, THE CRIME FIGHTER: PUTTING THE BAD GUYS OUT OF BUSINESS 155–56 (1999)("[W]e need to be more selective about who [*sic*] we were arresting on quality-of-life infractions. When a team of cops fills up a van with arrestees, the booking process can take those cops out of service for a whole day in some cities. The public can't afford to lose that much police protection for a bunch of first-time offenders, so the units enforcing quality-of-life laws much be sent where the maps show concentrations of crime or criminals, and the rules governing the stops have to be designed to catch the sharks, not the dolphins.")

this approach is unlikely to be effective.[113] For better or worse, our proposal will not actually eliminate the police's ability make such arrests. By contrast, the police may instead be concerned about the long-term trajectory of chronic low-level violators. By arresting people for, say, drinking on the street, police can keep track of how many times that person has been caught drinking on the street and can escalate his punishment accordingly. By allowing an individual police officer to use an unrecorded, non-criminal arrest, our proposal may interfere with the ability of the police to achieve this goal.

In theory, a system of criminal misdemeanors may serve many purposes: it may seek to punish, to deter, and to mark. It may even serve to incapacitate. But the current system achieves these purposes at significant expense. From our perspective, the issue in the public order policing domain is the disparity between the purposes of the police (short-term incapacitation) and the costs of the formal criminal misdemeanor system. We can accomplish short-term incapacitation in a much more humane and less costly way. It is our view that public order policing issues are in large part non-criminal, and that diverting low-level violators from the criminal system will provide a fairer and lower-cost alternative to the current practice.

This paper does not take a position on the appropriate amount of discretion to give the police in maintaining public order. Nonetheless, assume for the moment that whatever the optimal level of discretion happens to be, police in many big cities currently have too much; and assume that, as a separate matter, police arrest people too often. You might think that our proposal will make both of these problems worse, not better. In response to the first concern (too much discretion), it is our view that the current system constrains police minimally in this area of criminal law—if it constrains them at all—so our proposal will not free the police much more than they already are. We have a similar response to those who are concerned that our proposal would weaken defendants' ability to fight the underlying merits of their claims: they have very little ability to do so at present, so, at worst, our proposal is neutral.

In response to the concern that our proposal will lead to more arrests, though, we are more cautious. Perhaps the hassle of a formal arrest under the current system provides some disincentive to the police. If our proposal makes it easier for the police to arrest people, the argument goes, they will do it more. But there is no good reason to believe that an arrest leading to civil detention under our proposal is (or has to be) any less difficult than a formal criminal arrest is today *for the police*. For prosecutors, defense lawyers, court personnel, and judges, our system eliminates a tremendous amount of work. The police, on the other hand, still have to arrest someone, lock him up, and fill out paperwork explaining why.

Our proposal might prompt someone to ask: why do police need to arrest people at all? If we are concerned about the current system of meaningless pleas and useless process, why not scrap it altogether? Police, indeed, use a wide array of non-arrest techniques to calm situations and ease tensions—why arrest?

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[113] *See generally* HUMAN RIGHTS WATCH, RED HERRING, *supra* note 48.

In reply, we simply point to the fact that police under the current system arrest people for very low level crimes all the time.[114] If we simply removed prohibitions on public order offenses from the statute books, there is actually no solid reason to believe people would not continue to be arrested for violating them anyway—or that police would not arrest people for a more serious crime, perhaps exacerbating the current situation.[115] The importance of the debate about how much discretion to afford the police—and about how much public conduct to prohibit—cannot be understated, but we do not believe significant progress can be made simply by reforming the criminal code. Police almost certainly arrest people too often, but this reality is not driven by the substantive content of criminal prohibitions. If our proposal is adopted and established, we can use other, more productive, means to advance the debate over police discretion to arrest.[116]

[114] *E.g.*, Kohler-Hausmann, *Misdemeanor Justice*, *supra* note 31, at 1241.

[115] *See supra* notes 40-45, and accompanying text.

[116] *See supra* notes 94-97, and accompanying text.