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Police Practices and Accountability in New York City
Panel Two: Low-Level Enforcement/Broken Windows

Thank you for holding this hearing and for providing me the opportunity to speak. My name is Steven Zeidman. I am a Professor here at CUNY School of Law.

I am very familiar with policing in New York City. I was a supervising attorney with the Legal Aid Society Criminal Defense Division in Manhattan. Thereafter, I taught a Criminal Defense Clinic at NYU Law School and I presently direct a similar Clinic at CUNY Law School where students under my supervision represent indigent people facing criminal charges. I train, lecture, research and write about policing and the Criminal Court, and recently submitted several articles to the Committee, including, “Policing the Police” from 2005; “The Racial Impact of Quality of Life Policing” from 2009, and “Equal Protection Examined in the Context of Policing” from 2014.

You have already heard this morning, and will no doubt hear more tomorrow, about the undeniable disproportionate, brutal, and multifaceted impact of low-level arrests and summonses on people of color, so I will focus on two other issues related to Broken Windows policing: first, the evidence that hyper aggressive policing is wholly unnecessary to reduce crime, and second, the failure of the Criminal Court to police the police.

In May 2015, then-NYPD Commissioner William Bratton issued a 41-page report extolling the virtues of Broken Windows policing and promoted what he termed a “peace dividend” of “nearly a million fewer enforcement contacts like arrests, summonses, and reasonable-suspicion stops.”¹ He explained further in a letter to New York City Council Speaker Melissa Mark-Viverito: “there has been a drastic reduction in enforcement contacts between police and citizens, a benefit of lower crime that I call the Peace Dividend.”² He clarified that the “dividend” is the “diminished need to use enforcement tools for every problem.”³

The use of the phrase “peace dividend” is revealing. The term was frequently used at the end of the Cold War when many nations cut their military spending and money originally intended for the military became available for other purposes. It is likely true that while the Commissioner was fighting his war on crime the police did feel like an occupying army in communities of color that bore the brunt of a policy of massive arrests for trivial things. And while the Commissioner’s notion of a dividend did not correspond to additional government funds allotted to badly needed social programs in the affected communities, it at least suggested that more people in those same communities might be left in peace.

¹ “Broken Windows and Quality-of-Life Policing in New York City” (NYPD 2015).

² Available at <https://assets.documentcloud.org/documents/2073238/bratton-letter-to-mark-viverito.pdf>.

³ Parascandola, Rocco et al, *NYPD Chief Bratton Releases Report on Why “Broken Windows” Policing Works*, NY Daily News, May 1, 2015.

Several months later, in the course of another round-up of crime statistics, then-Commissioner Bratton noted that arrests were down by about 10% and explained that the police were making fewer arrests for minor offenses and that “[w]e are trying to reduce the number of contacts we have with the public that is not necessary.”⁴

The candid acknowledgment of necessary versus unnecessary contacts even runs through the NYPD’s rank and file. Back in December 2014, police officers engaged in a slowdown to express unhappiness with Mayor de Blasio’s handling of Eric Garner’s death at the hands of Police Officer Daniel Pantaleo. An email, widely believed to be from the Patrolmen’s Benevolent Association, was circulated instructing officers to make arrests only when it was “absolutely necessary.”⁵ Arrest numbers dropped precipitously over the next few weeks leading to the recognition that the NYPD’s standard operating procedure included a lot of unnecessary arrests. Significantly, the crime rate continued to drop even in the face of drastically reduced arrests, tickets and stops.

The acknowledgement that many police/citizen contacts are unnecessary begs the questions of just how many unwarranted interactions there were, and still are, and upon whom are they inflicted? And while decreasing unnecessary interactions is obviously a worthy goal, the NYPD must eliminate, rather than reduce, police/citizen contacts that are not necessary.

Former Mayor Michael Bloomberg and his Police Commissioner Ray Kelly repeatedly and defiantly argued that the ever-rising number of stops-and-frisks – that peaked at almost 700,000 in one year – were necessary for public safety. When a federal judge ruled that the stops were unconstitutional, Bloomberg excoriated the judge saying, “[T]his is a very dangerous decision made by a judge who I believe does not understand what good policing is.”⁶ However, crime continues to decline even as the annual number of recorded stops-and-frisks has plummeted to about 23,000, providing powerful evidence that hundreds of thousands of stops were unnecessary, as well as illegal.

Similarly, crime continues to decline even as misdemeanor arrests are decreasing, a fact that calls into question the very premise of Broken Windows policing and provides powerful evidence that hundreds of thousands of arrests were also unnecessary. It bears noting that this vaunted “theory” of policing is actually a five-page article in a news magazine, *The Atlantic*, from thirty-five years ago; it is not a strategy that evolved from rigorous data analysis and research.

Why not more robustly apply the so-called peace dividend? As but one minor example, the NYPD issues about 1,000 summonses each year for riding a bike on the sidewalk in East New York.⁷ What if the officers in that precinct were instructed not to issue any summonses for unlawful bike riding for some period of time? If serious crime did not correspondingly increase, the same approach could be taken with similar low-level offenses in that and other precincts, and the number of unnecessary police contacts with the public could be further reduced until eradicated.

Hyper-aggressive policing drove the number of unnecessary police contacts in communities of color into the millions. Ultimately, a peace dividend, meaning some designated number of reduced arrests, cannot rectify that reality. The only solution is to fully abandon Broken Windows policing.

It is critical to keep in mind that Broken Windows arrests end up as Broken Windows prosecutions, with all the associated taxpayer costs of prosecutors, defense lawyers, judges, court reporters, court officers, and more, not to mention the toll going through the court system takes on someone’s ability to get to work, school or handle any other daily responsibilities.

While the tactics of the NYPD have been exposed and subject to vigorous debate, the Criminal Court, the entity that reviews arrests, determines bail, and metes out sentences, has been free from any serious scrutiny. With low-level arrests flooding the court, the question naturally arises whether the court is fulfilling its essential functions of evaluating the constitutionality of every arrest and the sufficiency of evidence of guilt.

⁴ Tracy, Thomas & Rayman, Graham, *DeBlasio Incorrectly Hails April as Having “Fewest Shootings” in Modern NYC History, as Arrests for Serious Crimes Rise*, NY Daily News, May 4, 2016.

⁵ Celona, Larry et al, *Arrests Plummet 66% with NYPD in Virtual Work Stoppage*, New York Post, December 29, 2014.

⁶ Carbado, Devon W. et al, *Racial Profiling Lives On*, NY Times, August 14, 2013.

⁷ <http://marijuana-arrests.com/docs/Criminal-Court-Summonses-in-NYC--CUNY-Law-School-April-24-2014.pdf>.

In 2015, about 315,000 people were arraigned in the city's Criminal Courts.⁸ More than 90% of the defendants were Black or Latino. Owing to the devotion to Broken Windows policing, misdemeanors and violations accounted for 80% of the cases (roughly 250,000). Almost 60% of those cases ended at arraignment, the accused's first appearance before a judge, a moment in time when the prosecutor, defense attorney, and judge know little about the charges, the accused, the arresting officer, or any actual victim.

It is hard to imagine the word "justice" occurring to anyone observing the court in action. Instead, it is as it has always been – an assembly line concerned primarily, if not exclusively, with rushing through cases. It is no secret that court administrators regularly evaluate judges on the speed with which they move their calendars and the number of guilty pleas they obtain in the process.

The original Broken Windows article itself flagged concerns with civil rights, equal protection and due process. While describing the actions of one officer maintaining order on the streets, the authors note that "[S]ome of the things he did probably would not withstand a legal challenge." In another example they observe that "[N]one of this is easily reconciled with any conception of due process or fair treatment." Perhaps even more troublesome is the authors' recognition of the ways that Broken Windows or order maintenance policing can disproportionately impact communities of color: "The concern about equity is more serious. We might agree that certain behavior makes one person more undesirable than another but how do we ensure that age or skin color or national origin or harmless mannerisms will not also become the basis for distinguishing the undesirable from the desirable? How do we ensure, in short, that the police do not become the agents of neighborhood bigotry?" In response to this "serious" concern the authors conclude: "We can offer no wholly satisfactory answer to this important question."

Most people assume that the Criminal Court actually does ensure due process and adjudicate the constitutionality of the arrest, as even non-lawyers are familiar with the prohibition against illegal search and seizure. However, pretrial suppression hearings, where officers testify under oath and judges determine whether they acted legally, are few and far between. If the Criminal Court focused on its role as protector of constitutional rights and less on its self-imposed mandate to speed through cases, the stop-and-frisk debacle might have been stopped in its tracks years earlier.

Most people also assume that the Criminal Court adjudicates guilt or innocence with witnesses testifying under oath, an attentive jury, and a judge at the helm. In fact, there are virtually no jury trials in the Criminal Court as defendants are pressured in myriad ways to plead guilty or resolve their cases in any way other than a trial. There were a grand total of ten misdemeanor jury trials in Queens in all of 2015. The average time citywide from arraignment until the start of jury trial is 564 days.⁹ In the Bronx it is 896 days.¹⁰ Who can languish in jail or repeatedly come back to court for that long a period of time without experiencing emotional strain, missed work, missed school, etc.? More deliberately pernicious is the time-honored "trial tax" – defendants are aware that they will be severely sentenced if convicted for having the temerity to contest the charges and exercise their constitutional right to a trial by jury.¹¹ As a result, in 2015 there were only 161 jury trials in the entire New York City Criminal Court,¹² about 1/5th of 1% of the cases that entered the court the same year. On the other hand, there were about 146,000 guilty pleas.

The lack of adversarial testing of the charges is not just an academic concern. Every study of the consumer perspective – the accused's point of view – has found that the defendants' greatest objection to the process is the lack of their day in court; that they had no opportunity to be heard or to question their accusers.¹³ The cynicism and mistrust that begins with arrest is exacerbated in the courts. In fact, scholars argue that defendants afforded their full measure of due process are less likely to reoffend, even if ultimately convicted, because they believe they were treated seriously rather than just rushed through a guilty plea.

⁸ https://www.nycourts.gov/COURTS/nyc/criminal/2015_crim_crt_ann_rpt_%20062316_fnl2.pdf.

⁹ Id.

¹⁰ Id.

¹¹ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006).

¹² See *supra* note 8.

¹³ Steven Zeidman, *Gideon: Looking Backward, Looking Forward, Looking in the Mirror*, 11 Sea. J. Soc. Justice 933 (2013).

Almost fifty years ago the Supreme Court in Terry v. Ohio¹⁴ recognized the importance of judicial oversight and emphasized the need for trial courts to “retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires.” Much-admired federal Judge Jack Weinstein of the Eastern District of New York has written about the “vital function” trial courts must play to police the police.¹⁵ Indeed, it was the Criminal Courts’ abdication of its critical oversight role that led to the Floyd v. New York stop-and-frisk lawsuit in federal court.¹⁶

In addition to ordering reform of policies, training, and supervision, the judge in Floyd also recognized the need for ongoing monitoring of police behavior. She emphasized that those people and communities most affected by stops-and-frisks should play a central role in the remedial process. What better way to involve the public, and to thereby make the police accountable, than by holding public hearings with officers testifying under oath, subject to cross-examination, about what they did and why they did it?¹⁷

Instead, the Criminal Court daily processes a multitude of young men of color charged with minor crimes and violations, saddles them with arrest or criminal records, and renders them less employable, less likely to get into college, less able to get loans, less able to get licenses, etc. That reality breeds frustration, pain, anger, and alienation. Ferguson, Missouri is not the only city that grows its coffers through its criminal justice system. In 2015, fines, surcharges, bail and related fees netted almost \$30,000,000.¹⁸

The homicide of Eric Garner led to immediate calls for local and federal prosecutors to swiftly issue indictments, make arrests, and bring civil rights charges. Elected officials, however, cautioned against a rush to judgment and, citing time-honored principles of due process, asked for patience. New York City Mayor Bill de Blasio, speaking at a church the morning of a march held in August to demand justice for Mr. Garner, declared “We all believe in due process, fairness, a full investigation, a full legal process. We believe everyone should be treated equally in that process.”¹⁹ That message was certainly heeded as the investigation dragged on for months and innumerable witnesses were interviewed and testified in the Grand Jury.

Appeals to due process also surfaced in the related debate about how people should respond when police officers attempt to place them under arrest, even for minor transgressions. After all, the Garner tragedy started with his arrest for selling individual cigarettes. In response to growing complaints over the use of force by police officers when effectuating arrests, de Blasio urged that “When a police officer comes to the decision that it’s time to arrest someone, that individual is obligated to submit to arrest . . . They will then have every opportunity for due process in our court system.”²⁰ To underscore his point, he referred subsequently to a “thorough” due process system.²¹

The Mayor would be well-served to widen the lens and look at what happens after someone is arrested. It is misleading for public officials to proclaim that those targeted for arrest by urban police forces should passively submit to such authority and take comfort in the knowledge that they will, in Mayor de Blasio’s words, have their “opportunity for due process in our court system.” Such statements ring hollow for those who have experienced a post-arrest system that quickly, and often carelessly, processes their cases in a matter of minutes.

Officers Daniel Pantaleo was entitled to due process and received it in abundance. Yet until such due process is also assured to the hundreds of thousands of people of color who are siphoned through our courts on a yearly basis, many people will continue to question the legitimacy and fundamental fairness of the criminal justice system. The Criminal Court hasn’t been fundamentally changed since its inception in 1962 and has repeatedly been referred to as

¹⁴ 392 U.S. 1 (1968).

¹⁵ Jack B. Weinstein & Mae C. Quinn, *Terry, Race and Judicial Integrity*, 72 St. John’s L. Rev. 1328 (1998).

¹⁶ 959 F. Supp.2d 540 (SDNY 2013).

¹⁷ On a related note, for there to be meaningful and transparent examination of an officer’s conduct it is imperative that New York Civil Rights Law §50-a that shields police personnel records be repealed or dramatically overhauled.

¹⁸ See *supra* note 8.

¹⁹ Mayor Bill de Blasio, Remarks at Kingsboro Temple of Seventh-Day Adventists (Aug. 23, 2014) (transcript available at <http://www1.nyc.gov/office-of-the-mayor/news/847-14/transcript-mayor-de-blasio-delivers-remarks-kingsboro-temple-seventh-day-adventists-holds#0>).

²⁰ Gonene, Yoav and Jamieson, Amber, *De Blasio Tells NYers: “Don’t Resist Arrest”*, N.Y. Post, Aug. 13, 2014.

²¹ *Id.*

a system in crisis.²² It is well past time for a new approach that polices the police, ensures due process, and focuses on assessing the nature and quality of justice delivered instead of the quantity and alacrity of cases disposed.

The Broken Windows article is thirty-five years old. No one would seriously suggest using an article from 1982 to dictate education, housing, energy or any kind of significant policy in 2017. If one broken window left unattended is truly a precursor to more broken windows, then there is an appropriate solution – fix the window and end the policy of massive arrests for minor crimes.

²² See, e.g., *Saving the Criminal Court*, Criminal Courts Committee of the Association of the Bar of the City of New York (June 1983).