

FROM PAGE TO PRACTICE AND BACK AGAIN: BROKEN WINDOWS POLICING AND THE REAL COSTS TO LAW-ABIDING NEW YORKERS OF COLOR

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I am glad to be here as a member of this panel celebrating the fortieth anniversary of the *N.Y.U. Review of Law & Social Change* and talking about how our work on *Social Change* has informed our practice. *Social Change* was my home during my time in law school—a place where students who actually cared about social justice and the deepening injustices in our society gathered. It is for this reason that I placed my article, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*,¹ in *Social Change*. Though this panel is titled “From Page to Practice,” my trajectory was the opposite. It was my experience in the real world of practice that inspired me to put pen to page after years of struggling against injustice in New York City’s criminal courts. The mass criminalization of people resulting from Zero Tolerance Policing and “quality of life” initiatives adopted in the mid-1990s has made it nearly impossible for a young man of color in our city to avoid arrest or harassment, while White men and suburban youth engage in the same low-level victimless conduct and grow up to be president.²

As a defense lawyer and a teacher, I struggle to make people understand and care about the real costs of these “minor arrests” and the injustices they impose on individuals, families, and communities. This is an uphill battle. People believe that misdemeanors are “minor” (at least until someone they care about is charged with one), and academics who write

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1. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 296 (2009).

2. Two of the last three presidents have admitted to marijuana use. See BARACK OBAMA, DREAMS FROM MY FATHER 93 (1995) (“I blew a few smoke rings, remembering those years. Pot had helped, and booze; maybe a little blow when you could afford it.”); Gwen Ifill, *Clinton Admits Experiment with Marijuana in 1960’s*, N.Y. TIMES, Mar. 30, 1992, at A15 (“Gov. Bill Clinton of Arkansas said yesterday that he experimented with marijuana while he was a Rhodes Scholar at Oxford University in the late 1960’s . . .”). President Bush said he “‘wouldn’t answer the marijuana question . . . ’cause I don’t want some little kid doing what I tried.” CNN.COM, Politics, *Author: I Should Give Tapes to Bush* (Feb. 21, 2005), <http://www.cnn.com/2005/ALLPOLITICS/02/21/bush.tapes> (alteration in original). He also refused to answer a question about cocaine use. *Id.*

critically about the criminal justice system typically focus on felonies, excessive imprisonment, and capital cases. While these subjects are important, aggressive policing of minor offenses exacts disproportionately high costs from individuals who are generally as law-abiding as those of us sitting in this room, as the prosecutors who prosecute them, as the police who arrest them, as the bankers on Wall Street, and as the kids in Westchester.

A little background about what brought me to criminal work and to my focus on minor offenses. When I came to N.Y.U. School of Law, I had already worked for a number of years doing anti-eviction work with families at The Legal Aid Society. Like many would-be public interest lawyers, I was interested in the “innocent poor,” the victims of unscrupulous landlords, lenders, and employers. I worked during law school at a small firm that did plaintiff-side employment discrimination cases and represented labor unions, and I spent my first summer at the Attorney General’s Office in West Virginia working in its Civil Rights Division. There, I worked on racially-motivated evictions and job terminations, discrimination against children based on their HIV status, and even a magistrate’s firing of a pregnant clerk. My goal upon graduation was to work in a small, rural legal services office representing poor people in the wide range of civil matters that destroy and disrupt lives. Why represent criminals, I thought, when so many people are victimized by discrimination and corporate malfeasance?

During law school, however, two things happened that changed my viewpoint and made me recognize that so many of the people in the criminal justice system are every bit as “innocent” as the people that I went to high school and college with. The only differences between my experience and theirs were where they lived and the color of their skin. I had the advantage of observing the impact of geography and race within my own family. My father is Black, my mother White, and my extended family runs the gamut from pale (including those of us who are of mixed race) to dark.

First, my second year criminal procedure class stoked my growing sense of outrage about how people are treated by the criminal justice system. The rules and sanctions that “protect” our Fourth, Fifth, and Sixth Amendment rights only make sense to those who are confident that they will never be the target of police stops or investigations. I learned that our constitutional rights are not violated when police lie to suspects, interrogate children without their parents, or stop and frisk men for looking in a jewelry store window in broad daylight. The question that is so central to constitutional analysis—when is a person “free to go”?—seemed to have very different answers depending on the class and race of the person asking it. I sat in class day after day, thinking, Really? Would

you feel “free to go” if your skin was a different color?

Second, days after the acquittal of the police who beat Rodney King, my cousins, two young Black men who had the misfortune of living in Los Angeles in 1992, were thrown in jail while going to buy pizza and held for twelve days before being released. They never committed any offense and were never charged with any crime.

After graduating from law school and accepting a position with The Legal Aid Society’s Criminal Defense Division in New York City, I got a front row seat to witness the parade of people dragged into the criminal justice system as a result of Rudolph Giuliani and William Bratton’s new Zero Tolerance Policing strategy, under which people were arrested for selling umbrellas and flowers on the streets, drinking beer on their stoops, possessing marijuana or other drugs for personal use, and “trespassing” in their own buildings. The number of misdemeanor and lesser arrests skyrocketed from around 80,000 in the late 1980s to around 200,000 in the late 1990s,³ and, following a slight decline after September 11, 2001, has continued to rise to over 245,000 in 2009 with no sign of abatement.⁴ Tens of thousands of those arrested had no prior criminal record,⁵ and the arrestees are consistently at least eighty-five percent people of color.⁶ Few if any people think about the costs of these policies or the injustices hidden in these numbers. The pressure on police officers⁷ to make arrests for minor offenses was sweeping largely law-abiding citizens into the criminal courts. No one seemed concerned about this because the arrestees were rarely sent to jail.

My article looks at the hidden costs of these policies.

Broken Lives from Broken Windows has a very pragmatic goal, a goal consistent with the theme of this celebration. That goal is to convince someone—any of the actors who could make a difference: the police, the prosecutor, the state or local government, or the court—to make the practice of arresting people for misdemeanor and non-criminal offenses

3. Freda F. Solomon, *The Impact of Quality-of-Life Policing*, N.Y. CITY CRIM. JUST. AGENCY RES. BRIEF, Aug. 2003, at 2, available at <http://www.pretrial.org/Docs/Documents/brief3.pdf>.

4. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS, NEW YORK CITY: 2000-2009 (2010), <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/nyc.htm>.

5. Solomon, *supra* note 3, at 3 (approximately 90,000 out of 164,865 people charged with misdemeanors in 1998 had no prior criminal record).

6. *Id.* at 4.

7. For more on the pressure on police to make minor arrests and issue summonses, see Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy’s 81st Precinct*, VILLAGE VOICE, May 4, 2010, at 12, and Graham Rayman, *The NYPD Tapes: Part 2*, VILLAGE VOICE, May 11, 2010, at 12 (two-part series featuring tape recordings made by whistle-blowing police officer Adrian Schoolcraft that expose pressure on NYPD officers to meet stop-and-frisk and arrest quotas).

less costly to already at-risk communities. The article examines the costs of Zero Tolerance Policing (ZTP) of quality of life offenses and suggests a number of ways to reduce these costs.⁸

Why the title? “Broken Windows” is the name of the theory used to justify ZTP of minor offenses in New York City.⁹ According to the Broken Windows theory, correcting minor social disorder will reduce serious crime. A broken window, left unrepaired, will lead to more broken windows, vandals, graffiti, and eventually serious crime. Thus, aggressively policing minor quality of life offenses to social order should, the theory predicts, reduce serious crime. In New York City, to be sure, serious crime dropped dramatically after ZTP of minor offenses was adopted. Skeptics of the Broken Windows theory point to the fact that New York City’s crime drop was mirrored in many jurisdictions without ZTP strategies and that the drop began *before* the ZTP approach to minor offenses was adopted.¹⁰ While I share this skepticism, my article does not focus on the link between order maintenance policing and serious crime. Instead, it focuses on the costs associated with bringing hundreds of thousands of people through the criminal justice system for minor offenses.

Broken Lives from Broken Windows explores the costs that are imposed on people of color, the poor, and those with the fewest resources by the policing of minor offenses. Wealthy people and suburban youth are not policed aggressively, and are rarely arrested for possession of controlled substances in small quantities or drinking alcohol while on picnics in the park. When police stop suburban kids and find marijuana, they throw away the drugs and speak to their parents. On the rare occasions when suburbanites or wealthy people are arrested for minor offenses, they hire attorneys, point to their clean records, and refuse to accept a disposition short of dismissal.

On the other hand, people who live in New York City’s communities of color are subjected to ZTP. ZTP requires the police to make arrests, rather than issuing summonses, talking to or warning offenders, or speaking to minors’ parents. On average, the decision to arrest will cost the arrestee twenty-four hours of their life. It will also take the arresting officer off the street for at least a few hours. Dispositions may include dismissals or non-criminal “disorderly conduct” pleas, but often require

8. Specific references for the factual material summarized here can be found in my article, *Broken Lives from Broken Windows*, *supra* note 1.

9. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 19.

10. Further, a recent survey of high-ranking retired police officers suggests that the crime reduction might have been exaggerated by the manipulation of crime statistics. William K. Rashbaum, *Retired Officers Raise Questions on Crime Data*, N.Y. TIMES, Feb. 6, 2010, at A1.

community service and fines. Fighting a case requires repeat court appearances. Because jail is rarely a result of these minor quality-of-life arrests, the real costs of ZTP are overlooked.

The costs of employing a ZTP response to minor offenses undermine social justice in two ways. First, the arrests have very real direct and collateral consequences that create substantial barriers to housing, education, and employment for the already poor and minority targets of ZTP. These costs are not confined to the arrestees alone but also affect their families and communities. Frequently, the arrest alone leads to unexplained absences from work and loss of employment. For an individual who agrees to do community service, additional days of work are lost signing up for community service and providing proof of completion, even if the community service itself can be done on weekends. For anyone who maintains her innocence and insists on a trial, multiple court appearances are typically required. Targets of ZTP lose hourly wages or miss days of school if they insist on their innocence.

These costs are largely borne by poor, working people and often lead to pleas, regardless of innocence. Pleas, even for no jail time, carry their own costs. First, even non-criminal pleas carry a “mandatory surcharge” and, ironically since quality of life offenses are victimless, a “victim’s assistance fee.” While a \$100 or \$200 fee may be an inconvenience for a middle-class person, for the poor and working poor, the fine usually comes from money that would otherwise go to necessities such as food or school supplies. Failure to pay the surcharge and fee results in a civil judgment that can prevent the person from qualifying for loans for education and cars to get to work. In this computerized age, employers routinely run record checks and refuse to hire employees with minor offenses or open cases. Convictions can also tear families apart by triggering immigration removal proceedings or exclusion from public housing. The effects of a minor victimless offense can have a profound impact on a person’s life and on her family.

These economic costs and collateral consequences need not be imposed in order to achieve the goal of ZTP, if that goal is simply to maintain order. Nor are these consequences proportional to the offenses to which they relate. We do not arrest people for marijuana possession or for having an open alcoholic beverage in public with the goal of causing them to lose their jobs and homes. Rather, the purpose of ZTP is to maintain social order on the theory that this will reduce serious crime.

A second societal cost that *Broken Lives from Broken Windows* explores is based on procedural justice research. This research suggests that unfair treatment at the hands of the criminal justice system may lead a person to resent the system and reoffend, thereby increasing, rather than decreasing, crime. Thus, the aggressive pursuit of minor offenses may, in

fact, make some targets more, rather than less, inclined to commit crimes. Procedural justice research has shown, somewhat counter-intuitively, that it is the fairness with which people are treated by the criminal justice system, rather than the outcome of their case, that has the most influence on their perception of law enforcement legitimacy. Even when outcomes are positive—such as when cases are dismissed—a perception that the procedure used to reach that outcome was unfair may lead to resistance and reoffense. Unfair procedures are those that do not provide the participant with a voice, and those that are discriminatory, disrespectful, or unconcerned with accurate fact finding. The criminal justice system's processing of minor offenses appears to be all of these things. A person arrested for a minor offense will be shocked by the filthy conditions in the "pens"¹¹ where arrestees are held before seeing a judge, will notice that over eighty-five percent of arrestees are people of color, will have little opportunity to talk to a lawyer and none to talk to the court, and will see a fact-finding hearing only if she is one of the fraction of one percent of cases that goes to hearing or trial.

My theory, and the theory behind *Broken Lives from Broken Windows*, is that the combined economic and legitimacy costs of aggressively policing minor offenses undermine the efficacy of policing social order to reduce crime. I propose two basic courses of actions. First, there is no doubt about the costs to arrestees of fines and fees, missed school and work, immigration removal, and public housing evictions. Actors in the criminal justice system can reduce these costs in a number of ways. Second, a longitudinal study should be conducted to determine whether being targeted by ZTP actually increases criminality. A pilot project can examine whether arrest or warning is more effective to prevent reoffense. It would be a simple matter to compare outcomes for those stopped with marijuana and arrested and those found in possession of marijuana and warned to determine whether rearrest rates differ between the two groups.¹²

Eliminating economic costs and police legitimacy costs through the use of warnings and civil summonses rather than criminal arrests would remove bars to employment and reduce evictions and immigration removals of legal residents. The police could reduce these costs by making a simple policy decision to warn instead of arrest. One benefit of a non-

11. "Pens" is the word used for the holding cells behind and below the courtrooms where arrestees are kept for about twenty-four hours after an arrest before they see the judge.

12. Such studies have been conducted to determine the effect of arrest versus warning in misdemeanor domestic violence cases. Raymond Paternoster, Ronet Bachman, Robert Brame & Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163 (1997).

arrest approach would be to increase the presence of officers on the street and reduce overtime expenses. The legislature could review victimless offenses and make certain victimless crimes civil offenses. Courts could schedule appearances in the evening and on weekends so arrestees would not have to choose between school or work and their right to a trial. They could also excuse arrestees from all appearances at which no fact finding is conducted so that repeat appearances would not cause missed work. District attorneys could adopt their own guidelines, reducing or dismissing charges where the offenses are minor or the evidence of disparate racial impact is stark, such as in cases of marijuana arrests.¹³

Although the costs of hundreds of thousands of minor arrests each year are largely borne by the working poor and people of color, these costs also affect the rest of society. They lead to unemployment and resentment, thereby creating a feedback mechanism that impedes policing's efficacy in reducing serious crime. Furthermore, these costs are disproportionate to the offenses that they arise from and burden individuals and urban communities in ways that wealthy or suburban people guilty of the same offenses are not burdened. To address both of these issues, we must examine the real costs of ZTP and ways to reduce these costs.

ZTP is a policing practice that was adapted from the pages of a magazine describing the Broken Windows theory. Although the original *Broken Windows* article never suggested a practice of arrests in response to minor disorder, New York City adopted a zero tolerance approach to disorder resulting in hundreds of thousands of minor arrests each year. In this article I bring the question of what this practice really means back to the page. What does the practice cost? Is it fair to place barriers before young people of color growing up in New York City that their White and suburban counterparts do not face? Are there ways to reduce these burdens? My hope is that these pages inspire new practices that recognize and mitigate the impact of arrest-based approaches to order maintenance on the poor and people of color.

13. Although Whites use marijuana more than Blacks or Hispanics, eighty-three percent of people arrested for misdemeanor marijuana possession in New York City in the period 1997-2007 were Black or Hispanic, and only fifteen percent were White. See HARRY G. LEVINE & DEBORAH PETERSON SMALL, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997-2007, at 8 (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf.