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# GRASSROOTS PLEA BARGAINING

JOSH BOWERS\*

## INTRODUCTION

There is nothing new to the claim that plea bargaining typically occurs outside the shadow of law.<sup>1</sup> This failure of bargaining to reflect statutory law is most apparent in petty cases.<sup>2</sup> For me, no story captures that reality better than the experiences of my former client, Eddie Wise. Eddie had a long record. In addition to several convictions for legitimate crimes, Eddie had also repeatedly pled guilty to loitering for the purposes of begging, an offense that the Second Circuit had held unconstitutional in 1993.<sup>3</sup> No valid law remained in place to cast a shadow. Nevertheless, Eddie kept getting arrested and charged. And he kept pleading out.

Lawyers ultimately launched a class-action suit to enjoin enforcement of the long-defunct loitering statute.<sup>4</sup> Their suit revealed that Eddie was far from alone. In fact, the New York City Police Department (NYPD) had arrested 1,876 people on the unconstitutional

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1. See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (discussing the structural and psychological influences that skew the bargaining process); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (discussing the manner in which substantive law governs settlements in criminal cases).

2. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. at Pts. III–IV (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=983819](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983819).

3. N.Y. PENAL LAW § 240.35(1) (Consol. 2000) (“A person is guilty of loitering when he . . . [l]oiterers, remains or wanders about in a public place for the purpose of begging.”); *Loper v. New York City Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993) (holding peaceful begging to constitute protected speech); see also Elva Rodriguez et al., *Beggar Gets Change, Wins Suit Forcing City to Lay Off Panhandlers*, N.Y. DAILY NEWS, June 11, 2005, at 3 (noting that Eddie was convicted under statute seven times after it was held unconstitutional); Jess Wisloski & Thomas Zambito, *It Beggars Belief, City Hands Panhandler 100G for 27 Bad Arrests*, N.Y. DAILY NEWS, Dec. 12, 2006, at 3.

4. Rodriguez et al., *supra* note 3.

charge between 1992 and 2004.<sup>5</sup> Remarkably, even after the 2005 suit was filed, police made an additional fifty-eight arrests under the statute and issued 641 summonses.<sup>6</sup>

This example of bargaining and punishment outside the shadow of valid law is admittedly extreme. But it is not necessarily surprising. Police, prosecutors, defense attorneys, and defendants pay little attention to what the law is;<sup>7</sup> they pay attention, instead, to past practices that serve as precedents for parties' future expectations and performances.<sup>8</sup> Plea bargaining provides notice to the public (and even sometimes the institutional actors) of what the system proscribes. Especially in low-stakes cases, plea bargaining is shaped principally by institutional pressures and cognitive errors, and hardly at all by penal codes.<sup>9</sup>

To identify a few of these plea bargaining pressures: prosecutors and defense attorneys are influenced by caseload, political climate, workgroup principles of cooperation, career and reputation concerns, personal perspectives of just punishment, and sundry other idiosyncratic preferences.<sup>10</sup> Defendants, of course, hope for minimal sentence length, but in petty cases they bargain first and foremost in the shadow of their own process costs—most notably, potential pretrial detention.<sup>11</sup> Even in the rare instances where parties try to reach shadow-of-law bargains that approximate post-trial sentence length (discounted by the probability of acquittal), cognitive biases cloud their abilities to agree on such accurate figures.<sup>12</sup> Overall, then, it is more appropriate to say that criminal law

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5. Wisloski & Zambito, *supra* note 3; see also Jim Dwyer, *Police Charged Panhandlers Under Unconstitutional Law*, N.Y. TIMES, June 10, 2005, at B1.

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

7. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1898–99 (2000) (“We need to think of criminal law as having less to do with codes and court opinions than with policing strategies and . . . prosecutors’ charging patterns.”).

8. See MILTON HEUMANN, PLEA BARGAINING 120–21 (1978) (“After obtaining a specific plea bargain . . . [defense attorneys] treat this disposition as a ‘precedent’ . . . . Prosecutors, in turn, admit that they are subject to these ‘habits of disposition’ . . . . Thus, a good defense deal in one case can have a trickle-down effect.”); see also Bowers, *supra* note 2.

9. See, e.g., *supra* note 1.

10. See HEUMANN, *supra* note 8, at 104–05; Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52–54 (1968); Bibas, *supra* note 1, at 2470–86; see also Bowers, *supra* note 2, at Pts. III–IV.

11. See Bibas, *supra* note 1, at 2491–93 (“[T]he shadow of pretrial detention looms much larger over these small cases than does the shadow of trial.”); see also Bowers, *supra* note 2, at Part II.

12. See Bibas, *supra* note 1, at 2496–2519.

exists in the shadow of plea bargaining—not the other way around.<sup>13</sup>

What then do I hope to add to this well-tread topic? The answer is something quite small, yet meaningful. We can think of the heretofore recognized influences on plea bargaining as either existing at the institutional level or arising out of the actors themselves (for instance, out of their own punishment preferences or cognitive limitations).<sup>14</sup> But there is another very real unrecognized pressure that leads prosecutors to set low prices outside the shadow of trial. It is a bottom-up—or vertical—pressure that I call grassroots plea bargaining.

Grassroots plea bargaining is a prosecutorial response to certain communities' views on crime and enforcement. It should not, however, be mistaken for previously observed prosecutorial efforts to temper punishment for particular sympathetic defendants or to reconstruct draconian or ill-considered legislation to reflect personal and local views of proportionality.<sup>15</sup> By grassroots plea bargaining, I mean a systematic prosecutorial reduction of plea prices—even in circumstances where prosecutors find such reductions otherwise unwarranted—in order to purchase communal acquiescence to enforcement policies that otherwise lack public support.

Grassroots plea bargaining goes hand-in-hand with quality-of-life (or order-maintenance) policing. The citizens of many poor minority communities harbor both deep crime fears and animosity to aggressive enforcement. They want restoration of public order, but not at the high

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13. By way of further example from my own practice, when it came to bargaining over sentence length, it mattered not at all (nor would I even necessarily notice) whether a client was charged with Trespass in the Second Degree (an A-misdemeanor, punishable by up to one year jail) or Trespass in the Third Degree (a B-misdemeanor, punishable by up to ninety days jail) or unlawful Trespass (a non-criminal violation, punishable by up to fifteen days jail). N.Y. PENAL LAW §§ 140.05–15 (Consol. 2000). The “going rate” for the plea was almost always tantamount to time served. In short, the bargained-for sentence length remained wholly independent of the charge level. To the extent the codes mattered, it was only in the coarsest of ways: Was the charge a misdemeanor or a non-criminal violation? If it was a misdemeanor, was a plea bargain to a violation available?

14. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 108 n.83 (2005) (categorizing plea bargaining's recognized shadow-of-law failures as either “built into the institutional arrangements of the criminal courtroom [or] growing out of common human failures to process information rationally”).

15. See HEUMANN, *supra* note 8, at 109 (describing how prosecutor “redefines his professional goals” in face of statutes that “sweep too broadly”); H. RICHARD UVILLER, *VIRTUAL JUSTICE* 180 (1996) (“What I thought I was doing, mainly, in the run-of-the-docket case, was . . . rewriting the law, modifying the judgment of the legislature to fit the circumstances of the crime, in accord with what I perceived to be the prevailing ethic in the courts of my time and place.”); Alschuler, *supra* note 10, at 52–54 (describing prosecutors who try to “do the right thing”); Bibas, *supra* note 1, at 2470–71; Stuntz, *supra* note 1, at 2549.

costs of living under constant police suspicion or losing children, friends, and neighbors to jail cells. As police turn up enforcement pressure, prosecutors may feel the need to pull back on the punishment throttle to ensure that these communities accept—or at least tolerate—hard-nosed police tactics.

At first blush, this might seem a strange and inefficient way of doing business. Either public-order policing is a good idea or it is not. On the first score, if it is a good idea, it would seem that citizens arrested under public-order policing should face the same sanction that citizens faced pre-implementation of the new policing strategy. But efficient deterrence is not so clean a concept. Enforcement can engender its own resistance. Zero-tolerance policing of borderline offenses (or, in Eddie Wise's case, non-offenses) may undermine deterrence and anti-crime norms by increasing disaffection with the police while concurrently creating sympathy for a growing cadre of petty-offense defendants—individuals who might have faced tickets or warnings in other times but now face summary arrests.

On the second score, if public-order policing is not a good idea (for social-norms or any other reasons), then police should just soften enforcement, instead of leaving that task to prosecutors at the back-end. One might wonder why police would engage in the expensive practice of mass arrest and processing only to permit defendants to subsequently plead out and go home. But this objection ignores the fact that the principal benefits of public-order policing are realized not in the sentencing but in the *processing of arrests* themselves. For police, order-maintenance enforcement is more than just a way to fix “broken windows,” it is a highly useful—albeit potentially normatively problematic—tool to search and catalogue data about large segments of the population of poor minority neighborhoods.

Ultimately, then, prosecutors lose little by reducing conviction charges to non-criminal violations<sup>16</sup> and by lowering sentence length on quality-of-life offenses to time-served or its near equivalent. Conversely, they believe they achieve something substantial: the preservation of communal perceptions of legitimacy while enabling heavy-handed (but tactically useful) policing. Prosecutors know that even though minority communities may never wholly embrace summary arrests for marginal crimes—especially when white members of affluent communities face no similar enforcement policies—these communities

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16. Violations—for example, public consumption of alcohol or disorderly conduct—are not crimes but may carry small penalties like fines, community service, or a few days jail.

will be more willing to at least abide mass arrests if plea prices stay low.

My project here is almost entirely descriptive. I make no well-theorized normative claim about grassroots plea bargaining. I do not even claim that prosecutors who are influenced by it in fact manage to achieve their ends. I simply assert that prosecutors *are* influenced by it—that grassroots plea bargaining is a *genuine* plea bargaining pressure. To test my thesis, I use New York City as a backdrop. I do this for three reasons: First, New York City whole-heartedly adopted a particularly vigorous brand of order-maintenance policing in the 1990s.<sup>17</sup> Second, unlike police forces in other cities, the NYPD did very little to solicit the collaboration of affected communities.<sup>18</sup> Third, generally speaking, there is a startling dearth of data on misdemeanor case processing.<sup>19</sup> New York City, however, is something of an exception. Specifically, the city's Criminal Justice Agency conducted a fairly thorough study comparing misdemeanor enforcement for the years 1989 and 1998.<sup>20</sup> The first period precedes the city's implementation of order-maintenance policing; the second period coincides with it.

Even with this information, however, my analysis remains somewhat

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17. See generally Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

18. See Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 422–40 (2000) (comparing New York City's model of order-maintenance policing with the Boston and Chicago models); see also *infra* Part I.B.

19. See Michael J. Lieber & Anita N. Blowers, *Race and Misdemeanor Sentencing*, 14 CRIM. JUST. POL'Y REV. 464, 469 (2003) ("Only a few comprehensive studies of misdemeanor sentence outcomes exist."); Ed A. Muñoz & Stephen G. Sapp, *Racial/Ethnic Misdemeanor Sentencing Disparities: Additional Evidence for Contextual Discrimination*, 1 J. ETHNICITY CRIM. JUST., Mar. 2003, at 27, 29 (2003) ("The deficiency in knowledge surrounding the adjudication of misdemeanor crimes is somewhat surprising considering they are the most common types of offenses for which people are detained, interrogated, arrested and convicted."); cf. James F. Nelson, *A Dollar or a Day: Sentencing Misdemeanants in New York State*, 31 J. RES. CRIME & DELINQ. 183, 183 (1994) ("Most studies of racial disparities in case processing decisions have focused on sentencing decisions for persons convicted of serious crimes.").

20. The study's findings are collected in three separate documents, all available at [www.cjareports.org/index3.htm](http://www.cjareports.org/index3.htm). NEW YORK CITY CRIMINAL JUSTICE AGENCY, RESEARCH BRIEF: THE IMPACT OF QUALITY-OF-LIFE POLICING (2003) [hereinafter, CJA, RESEARCH BRIEF]; NEW YORK CITY CRIMINAL JUSTICE AGENCY, SUMMARY AND ANALYSIS: TRENDS IN CASE AND DEFENDANT CHARACTERISTICS, AND CRIMINAL COURT PROCESSING AND OUTCOMES, IN NON-FELONY ARRESTS PROSECUTED IN NEW YORK CITY'S CRIMINAL COURTS (2002), [hereinafter CJA, NON-FELONY TRENDS]; NEW YORK CITY CRIMINAL JUSTICE AGENCY, TRENDS IN CASE AND DEFENDANT CHARACTERISTICS, AND CRIMINAL COURT PROCESSING AND OUTCOMES, OF PROSECUTED ARRESTS FOR MISDEMEANOR AND LESSER-SEVERITY OFFENSES IN NEW YORK CITY (2001) [hereinafter CJA, MISDEMEANOR TRENDS].

incomplete. Indeed, the data I offer as consistent with grassroots plea bargaining may be consistent also (at least partially) with other oft-recognized plea bargaining influences, most significantly heavy caseloads. Consequently, the aim of my project is to show only that grassroots plea bargaining is a plausible influence that further obscures law's shadow. In short, I open the discussion, but I leave to the econometricians the significant task of definitively measuring the impact of grassroots plea bargaining—if that is even possible. After all, it may be that the wide range of distinct influences on real-world bargaining is unknowable and the strength of any isolated identified influence “unquantifiable.”<sup>21</sup> But even if grassroots plea bargaining is ultimately immeasurable with precision, it remains worthwhile to recognize it as another pressure point—an additional ingredient in the mix.

The project has three parts. In Part I, I draw on social-norms theories that explore the importance of communal perceptions of law's legitimacy. I then illustrate how New York City's initial adoption of “broken-windows” discretion soon became a policy that more closely approximated zero tolerance. In Part II, I describe prosecutorial biases that favor the charging of defendants in public-order cases. However, I also provide data that shows that in New York City in the 1990s these same defendants—once charged—typically received increasingly lenient plea bargains. I then provide reasons to believe that conventional explanations fail to account wholly for this leniency trend. Finally, in Part III, I attempt to demonstrate that grassroots plea bargaining is a genuine force that exerts downward pressure on plea prices, at least in the order-maintenance-policing context.

#### I. ORDER-MAINTENANCE POLICING & PERCEPTIONS OF LEGITIMACY

To properly comprehend the reasons for grassroots plea bargaining and the influence it had on plea prices in New York City, two first-order aspects of order-maintenance policing must be understood: first, the degree to which normative crime control turns on public perceptions of the legitimacy of law; and second, the way in which order-maintenance policing in New York City transformed from a policy of discretionary enforcement into one of zero tolerance.

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21. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 171 (2005).

### A. Legitimacy

Normative crime control ultimately depends on “bring[ing] the potential offender to see prohibited conduct as unattractive because it is inconsistent with the norms of family or friends and, even better, with the person’s own internalized sense of what is acceptable.”<sup>22</sup> The law’s “normative punch” is weakened when communities identify with criminals over the police and view enforcement as “oppressive and discriminatory,” rather than “stigmatizing.”<sup>23</sup> When the public begins to side with criminals over police, deterrence and voluntary compliance with law are undermined: “Crimes become self-defeating. . . . [The] criminal law generates its own opposition and resistance.”<sup>24</sup>

This legitimacy problem is especially acute in the petty-crime context because these offenses proscribe conduct that is not intuitively criminal. All right-minded people *know* that robbery, rape, and murder

22. Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1840, 1861 (2000) (“The criminal law cares about layperson’s intuitions of justice because their incorporation is essential to normative crime control. . . . [P]eople obey the law because they fear the disapproval of their social group if they violate the law.”); see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 31–37, 64–68, 161–62 (1990) (“[S]tudies suggest that those who view authority as legitimate are more likely to comply with legal authority, whether the legitimacy is expressed as obligation or as support.”).

23. Stuntz, *supra* note 7, at 1872, 1877 (“If the law strays too far from the norms, the public will not respect the law, and hence will not stigmatize those who violate it. Loss of stigma means loss of the most important deterrent the criminal justice system has.”); see also Jeffrey Fagan et al., *Neighborhood, Crime, and Incarceration in New York City*, 36 COLUM. HUM. RTS. L. REV. 71, 73 (2004); Robinson, *supra* note 22, at 1841 (“Effective normative crime control requires a criminal law that has moral credibility within the community it governs.”).

24. Stuntz, *supra* note 7, at 1880; see also, George Akerlof & Janet L. Yellen, *Gang Behavior, Law Enforcement, and Community Values*, in *VALUES AND PUBLIC POLICY* 173, 191 (Henry J. Aaron et al. eds., 1994) (noting that using “bricks and sticks” to enforce crime in ways that communities find unfair “may be self-defeating”); Jeffrey A. Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in *GUNS, CRIME, AND PUNISHMENT IN AMERICA* 191, 210 (Bernard E. Harcourt ed., 2003) (arguing that many minority communities suffer “stigma saturation” and consequently, “[w]hen legal control engenders resistance, . . . the opportunity to leverage formal social control into informal social control is lost”). See generally Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171 (2004).

This observation that enforcement practices may prove self-defeating is as true of foreign affairs as it is of criminal law. See, e.g., JULIA E. SWEIG, *FRIENDLY FIRE: LOSING FRIENDS AND MAKING ENEMIES IN THE ANTI-AMERICAN CENTURY* (2006); Dana Priest & Josh White, *War Helps Recruit Terrorists*, *Hill Told: Intelligence Officials Talk of Growing Insurgency*, WASH. POST, Feb. 17, 2005, at A1.



are wrong,<sup>25</sup> but reasonable minds may disagree about “borderline” crimes, like aggressive panhandling, public urination, or even simple drug possession.<sup>26</sup> This is not to say that law-abiding members of minority communities crave public disorder—just the opposite.<sup>27</sup> But, for them, “quality of life” is a more nuanced concept: it may be affected negatively not only by disorder, but also by the police charged with rooting it out.<sup>28</sup> Police and prosecutors who respond too stridently to “borderline” behavior (that is more annoying than anything else) run the risk of producing sympathy for the rule breakers.<sup>29</sup> Under certain enforcement conditions, suspects of petty crime can become the perceived victims of police aggression. And police become agents of oppression—the “occupying force.”<sup>30</sup>

This tenuous balance underscores seemingly conflicting findings that show great fear of crime in minority communities<sup>31</sup> but concurrent

25. See Robinson, *supra* note 22, at 1865 n.84 (“[A]s a matter of common sense, the law’s moral credibility is not needed to tell a person that murder, rape, or robbery is wrong.”); Stuntz, *supra* note 7, at 1871 (“The mass of the population avoids seriously bad behavior not because they know it can be found in the codes, but because they know the behavior is thought to be seriously bad.”).

26. See Stuntz, *supra* note 7, at 1894 (“The more ‘crime’ includes things that only a slight majority of the population thinks is bad, the harder it is to sell the idea that ‘criminal’ is a label that only attaches to very bad people.”); see also Robinson, *supra* note 22, at 1865 n.84.

27. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1167–68, 1182 (1996) (noting that black politicians in Washington, D.C. and Atlanta embraced anti-panhandling measures); *infra* note 34 and accompanying text.

28. See Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137, 138–46 (1997) (discussing “dual frustration” in minority communities that “uniquely experience problems” associated with both crime and criminal enforcement). For me, the reggae classic *Police and Thieves* captures this conflicted thinking perfectly. JUNIOR MURVIN & LEE “SCRATCH” PERRY, *Police and Thieves, on POLICE AND THIEVES* (Mango 1977) (“Police and thieves in the street . . . . Fighting the nation with their guns and ammunition . . . . All the crimes committed day by day. . . . All the peacemakers turn war officers.”).

29. See *supra* notes 22–24 and accompanying text; cf. Robinson, *supra* note 22, at 1866 (noting that criminal law generally does not and ought not punish behaviors that are simply “annoying to some people”).

30. Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. Summer 2003, at 183, 185. Thus, African-Americans are several times more likely to have a low or very low opinion of the honesty and ethical standards of police. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.2.21 (2003), [http://www.albany.edu/sourcebook/tost\\_2.html](http://www.albany.edu/sourcebook/tost_2.html). And they are almost three times more likely to have very little confidence in the police and to see police brutality as an issue in their communities. *Id.* at tbls.2.21 & 2.0002.2005.

31. African-Americans are more afraid than whites to walk alone in their own neighborhoods. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF

aversion to tough-on-crime measures.<sup>32</sup> On the one hand, members of minority communities are the most likely crime victims and therefore have a greater stake in effective enforcement.<sup>33</sup> Indeed, they are frequently among the vanguard pushing for increased attention to unaddressed crime problems.<sup>34</sup> On the other hand, these same community members recognize that although the criminal element may be a scourge on the community, it is still a *part of* the community—whereas the police typically are not. Accordingly, the crime victims and the perpetrators cannot help but keep strong ties: they share “linked fate[s].”<sup>35</sup> Ultimately, the community probably favors *some* sanctions for the disorderly, but within narrow bounds.<sup>36</sup> When the police

CRIMINAL JUSTICE STATISTICS, 130–31 tbl.2.38 (2003) [hereinafter SOURCEBOOK]. They worry more about every category of crime than whites. *Id.* at 132 tbl.2.39. They are more than twice as likely to fear being murdered. *Id.* They are far more likely to believe the crime rate is rising. *Id.* at 128 tbl.2.34. They are consistently more likely to report that society spends too little on crime. *Id.* at 134–35 tbl.2.42. And they are more likely to favor criminalization of drugs. *Id.* at 158–59 tbl.2.68; *see also* Meares, *supra* note 28, at 145–47.

32. SOURCEBOOK, *supra* note 31, at 140–41 tbl.2.47 (finding that African-Americans are two to three times more likely to conclude that courts treat criminals too harshly); *see also* Meares, *supra* note 28, at 145–47; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 208–10. *See generally* Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 156–57 (2004).

33. Meares & Kahan, *supra* note 32, at 208.

34. *Id.* at 210; Ellickson, *supra* note 27, at 1190; Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1255 (1994).

35. Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 588–89 (1997); *accord* Meares & Kahan, *supra* note 32, at 210 (“Inner-city teens and even gang members are linked to the majority by strong social and familial ties. . . . [T]he troublemakers are natives.”); Jody David Armour, *Bring the Noise*, 40 B.C. L. REV. 733, 735 (1999) (noting “deep sense of connectedness and sympathy that law-abiding blacks feel toward their wayward sons and daughters, brothers and sisters, fathers and mothers, friends and cousins, as well as toward blacks they don’t know personally but with whom they share a common plight”); Meares, *supra* note 28, at 160 (“The young black men wreaking havoc in the ghetto are still ‘our youngsters’ in the eyes of many of the decent poor and working-class black people who are sometimes their victims.” (quoting Glenn C. Loury, *Listen to the Black Community*, PUB. INTEREST, Sept. 22, 1994, at 33, 35.)). As critics of the incarceration boom make plain, whole communities suffer when large segments are warehoused in prisons. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 690–91 & nn.73–74, 695 (1996) (“These costs . . . include the perceived dearth of men ‘eligible’ for marriage, the large percentage of black children who live in female-headed households, the lack of male ‘role models’ for black children, . . . the absence of wealth in the black community, and the large unemployment rate among black men.”). *See generally* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

36. As Tracey Meares explained, “[W]hen there is mutual support between . . . law-

overstep these bounds, it is not the disorder but the police themselves that become principal foci of community ire.<sup>37</sup> Law-abiding citizens come to fear and loathe “borderline” crime far less than order-maintenance policing.<sup>38</sup>

### B. Zero Tolerance

In 1982, James Q. Wilson and George Kelling wrote a seminal essay introducing the “broken windows” theory of deterrence.<sup>39</sup> Wilson and Kelling argued that public disorder left unchecked breeds more serious crime.<sup>40</sup> In the early 1990s, New York City embraced the idea, implementing broad strategies that targeted low-level offenses like public urination, drinking, and pot smoking; graffiti; turnstile hopping; and aggressive panhandling.<sup>41</sup> In its initial incarnation, proponents of the broken-windows theory generally (and the New York City approach specifically) believed that the policy worked best by decentralizing police response to public disorder to increase enforcement flexibility and effectiveness.<sup>42</sup> Implementation turned on providing police ample discretion: they could make arrests for public-order offenses, they could give tickets or warnings, they could do something else all together, or

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abiders and lawbreakers, it may be difficult to draw lines between them by penalizing lawbreakers very harshly for nonviolent offenses.” Meares, *supra* note 35, at 589. This is a main reason that Meares and Kahan favor gang-loitering ordinances:

[M]inority residents of high crime communities do not desire to cut themselves off entirely from those against whom the gang loitering law was enforced.

In fact, it may be precisely because they care so deeply about these persons that residents of the inner-city prefer relatively mild gang loitering and curfew laws over draconian . . . measures. Inner-city residents may believe these harsher penalties visit an intolerably destructive toll on the whole community.

Meares & Kahan, *supra* note 32, at 210; see also William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1837 (1998).

37. See Meares, *supra* note 35, at 590.

38. See Butler, *supra* note 35, at 691 n.76 (noting that Henry Louis Gates and Wynton Marsalis both report the criminal justice system as their “worst fear”).

39. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

40. *Id.*

41. See Harcourt, *supra* note 17, at 292.

42. See Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 317 (2005); Jeffrey Rosen, *Excessive Force—Why Patrick Dorismond Didn’t Have to Die*, NEW REPUBLIC, Apr. 10, 2000, at 24.

they could do nothing at all.<sup>43</sup> But in New York City the approach “morphed” over time into a perhaps initially unintended policy of zero tolerance.<sup>44</sup>

What heralded this change was recognition at the NYPD’s highest levels that summary arrests conferred greater benefits than tickets and warnings.<sup>45</sup> First, the NYPD often found contraband and other evidence of more serious crime when it stopped and searched suspects for petty offenses.<sup>46</sup> Second, the arrestees sometimes had open warrants that were discovered only in processing the arrests.<sup>47</sup> Third, the NYPD used arrests to collect fingerprints and other pedigree information that proved beneficial in future criminal investigations.<sup>48</sup> Concurrently, the NYPD relied on new data-basing technology and other innovations that made feasible the efficient processing of mass arrests.<sup>49</sup> For example, then-police commissioner Bill Bratton employed a “Bust Bus,” a city bus retrofitted into an on-the-spot arrest-processing center.<sup>50</sup>

43. See Wilson & Kelling, *supra* note 39, at 29; Rosen, *supra* note 42, at 24–25.

44. See Rosen, *supra* note 42, at 24–26 (quoting George Kelling: “‘Zero tolerance’ is a phrase I never use, never have used.”); see also Tim Newburn & Trevor Jones, *Symbolizing Crime Control: Reflections on Zero Tolerance*, 11 THEORETICAL CRIMINOLOGY 221, 226 (2007) (“Although . . . the main players in the New York policing story distanced themselves from the term Zero Tolerance, it became inextricably associated with the policing approaches developed under [Police Commissioner] Bill Bratton.”). Conversely, Bernard Harcourt stresses that order-maintenance policing in New York City was zero tolerance all along. BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 50 & 252 n.3 (2001) (“[The] approach was, from its inception, a zero-tolerance approach. . . . [It was] not an exercise in police discretion. . . . It was about sweeps.”).

45. See HARCOURT, *supra* note 44, at 50 & 252 n.3 (“Bratton and Giuliani understood from the beginning the close relationship between order maintenance, sweeps, and catching criminals.”); Zeidman, *supra* note 42, at 317; Rosen, *supra* note 42, at 24–26.

46. See HARCOURT, *supra* note 44, at 48; Rosen, *supra* note 42, at 24 (“[P]olice stop, frisk, and arrest vast numbers of young black and Hispanic men for minor offenses, in the hopes that turnstile jumpers and pot smokers may also be guilty of more serious offenses.”).

47. See HARCOURT, *supra* note 44, at 48 (noting that one in seven of those arrested for hopping turnstiles had outstanding warrants); Rosen, *supra* note 42, at 26.

48. See HARCOURT, *supra* note 44, at 48; Rosen, *supra* note 42, at 26 (describing account of violent-crime defendant who was arrested based on fingerprints that were collected pursuant to earlier subway-hop arrest).

49. See CJA, *NON-FELONY TRENDS*, *supra* note 20, at 32 (noting that technological developments “made possible, among other things, faster pre-arraignment processing of defendants . . . [and the implementation of] more restrictive [arrest] policies”); see also HARCOURT, *supra* note 44, at 48; Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 472 (2000) (describing New York City’s “sophisticated data-driven . . . system—Compstat”); Newburn & Jones, *supra* note 44, at 226 (same).

50. HARCOURT, *supra* note 44, at 48.

Public-order policing, thus, became no mere end in itself but an investigatory means—less of a social problem and more of a policing “opportunity.”<sup>51</sup> As Jeffrey Rosen put it: “Instead of prosecuting lower-level offenses to encourage an atmosphere of social order that would *prevent* more serious crime, [authorities] began prosecuting lower-level offenses in order to *catch* more serious criminals.”<sup>52</sup> Commissioner Bratton, himself, gleefully recounted: “Every arrest was like opening a box of Cracker Jack. What kind of toy am I going to get? Got a gun? Got a knife? Got a warrant? . . . It was exhilarating for the cops.”<sup>53</sup> Unsurprisingly, the NYPD’s upper ranks turned up the pressure on beat officers to satisfy higher arrest quotas.<sup>54</sup>

The end result was a wide police net that captured an extraordinarily broad cross-section of citizens.<sup>55</sup> In the 1990s, the city witnessed a rise in the arrest and prosecution rates of both older defendants and younger

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51. Rosen, *supra* note 42, at 24, 26.

52. *Id.* at 26. “Zero tolerance focuses not on deterring crime but on *discovering* it.” *Id.* at 24; *see also* Zeidman, *supra* note 42, at 317 (“No longer were the police targeting low-level offenses to restore social order; instead their modus operandi was to catch more serious criminals. The motivation to arrest even more people grew accordingly.”).

Recent attention to the NYPD’s “Operation Lucky Bag,” illustrates this point. Under the sting operation, police leave unattended bags on subway platforms and arrest commuters who take them. Editorial, *Manufacturing Misdemeanors*, N.Y. TIMES, Mar. 6, 2007, at A20; Dan Mangan, *Crooks ‘Carted’ Off to Prison—NYPD’s Bait Snags Thieves*, N.Y. POST, Feb. 27, 2006, at 15; *Police Sting Operation Lucky Bag Has Some Calling Entrapment*, N.Y.1NEWS, Mar. 1, 2007, available at <http://ny1news.com/ny1/content/index.jsp?stid=6&aid=67233>. The operation has been called everything from entrapment to a colossal waste of resources. True, the operation may be shaky normatively and legally, but it is not wasteful. It gives the NYPD opportunities to make arrests, and these arrests alone have value. Indeed, the NYPD has offered precisely this defense of the operation, stressing the operation’s success in netting career criminals. Mangan, *supra*. In short, police create disorder to police disorder—not as a futile exercise or as a mere mechanism to bolster arrest numbers, but because policing disorder is itself advantageous.

53. HARCOURT, *supra* note 44, at 10; *see also id.* at 100–02 (noting that misdemeanor arrests led to arrests for more serious crimes).

54. *See id.* at 176 (noting that Bratton directed his force to stop issuing desk-appearance tickets in lieu of formal arrests); Newburn & Jones, *supra* note 44, at 226 (“Bill Bratton described the twice-weekly Compstat meetings as requiring precinct commanders ‘to be ready to review their up-to-date computer-generated crime statistics and relate what things are going to be done to achieve crime reduction.’”); *see also* CJA, NON-FELONY TRENDS, *supra* note 20, at 39 (finding that summary arrests for minor offenses shifted throughout the 1990s from “innovation” to “norm”). *See generally* Fagan et al., *supra* note 23, at 80 (describing NYPD programs designed to generate high rates of drug arrests).

55. CJA, RESEARCH BRIEF, *supra* note 20, at 7 (“[T]hese [police] tactics have swept into the criminal courts large numbers of older, chronic offenders, and young people . . . often from minority communities and without adult criminal records, arrested for low-level drug offenses.”).

defendants (many of whom had no criminal records). Specifically, from 1989 to 1998, the rates of non-felony cases against defendants aged sixteen to twenty and defendants aged over forty approximately doubled.<sup>56</sup> The total number of non-felony cases against all defendants without records rose by 233%.<sup>57</sup>

Table 1  
Non-Felony Prosecutions of Older, Younger, and Clean-Record Defendants<sup>58</sup>

	1989	1998
Rate of Non-Felony Cases Against Defendants Age 16-20 (total number)	9.2% (7,964)	19% (33,461)
Rate of Non-Felony Cases Against Defendants Age 41+ (total number)	10.3% (8,954)	20.4% (35,915)
Rate of Non-Felony Cases Against Defendants Without Records (total number)	49.4% (38,160)	54.1% (89,132)

Significantly, however, these enforcement policies were zero tolerance in certain communities only. Conversely, predominately white and affluent neighborhoods were left largely unaffected.<sup>59</sup> In fact, in 1998, the rate of non-felony prosecutions against whites was almost a third *lower* than in 1989.<sup>60</sup> In short, as police ramped up to zero

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56. CJA, NON-FELONY TRENDS, *supra* note 20, at fig.3a; *see also infra* tbl.1. Similarly, the rate of cases against defendants aged sixteen to twenty with no prior convictions more than doubled. CJA, NON-FELONY TRENDS, *supra* note 20, at tbl.11.

57. CJA, NON-FELONY TRENDS, *supra* note 20, at tbl.11.

58. *Id.* at fig.5.

59. *See* Jeffrey Fagan, *Race, Legitimacy, and Criminal Law*, 4 SOULS 69, 70 (2002) (“Under the recent policies of the New York City Police Department, aggressive stops and searches have been disproportionately aimed at nonwhite citizens, far outpacing their actual involvement in crime.”); Fagan & Davies, *supra* note 49, at 458–63; Zeidman, *supra* note 42, at 318, 320 (noting that minorities disproportionately bore the brunt of proliferation of stop-and-frisk practices); *see also* CIVILIAN COMPLAINT REVIEW BOARD, STREET STOP ENCOUNTER REPORT: AN ANALYSIS OF CCRB COMPLAINTS RESULTING FROM THE NEW YORK POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES, June 2001, at 1–2, <http://www.nyc.gov/html/ccrb/pdf/stop.pdf> [hereinafter CCRB]. *See generally* Fagan et al., *supra* note 23, at 74 (“[T]he overall excess of incarceration rates over crime rates seems to be concentrated among non-white males living in [New York] City’s poorest neighborhoods.”).

60. CJA, NON-FELONY TRENDS, *supra* note 20, at fig.3a.

tolerance, they paid *less* attention to white New Yorkers who were committing petty offenses. Accordingly, in a densely populated metropolis such as New York City, law-abiding community members in the affected communities could readily bear witness to what police were doing in the immediate neighborhoods—but not the more affluent and whiter ones nearby.

The fallout of such highly localized enforcement was the disintegration of norms against “borderline” conduct. Community members came to feel that certain behavior—for instance, wandering uninvited into building lobbies—was proscribed only for *them*.<sup>61</sup> Consequently, anti-crime norms shifted perceptibly against the police and in favor of the perceived-aggrieved petty criminals.<sup>62</sup> Law-abiding community members saw the police stop, search, and arrest great numbers of their acquaintances, friends, and relatives (most notably their children).<sup>63</sup> Many of the law abiding even experienced enforcement firsthand because less discriminate policing practices led invariably to higher error rates.<sup>64</sup> Unsurprisingly, complaints about

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61. Stuntz, *supra* note 7, at 1880; *see also* Fagan & Davies, *supra* note 49, at 462 (“[W]hat was constructed as ‘order-maintenance policing’ . . . was widely perceived among minority citizens as racial policing, or racial profiling.”); Stuntz, *supra* note 36, at 1800 (“[T]he message becomes: The behavior is bad when people in that class and neighborhood do it. That is not a message likely to have normative force for those who are its targets.”). On such matters, hip-hop lyrics can provide a salient and under-emphasized snapshot of inner-city perspective. *See, e.g.*, TALIB KWELI, *Protective Custody*, on HIP HOP FOR RESPECT EP (Rawkus 2000) (lyrics available at [http://www.lyricsmania.com/lyrics/talib\\_kweli\\_lyrics\\_4001/lyrics\\_11903/protective\\_custody\\_lyrics\\_138148.html](http://www.lyricsmania.com/lyrics/talib_kweli_lyrics_4001/lyrics_11903/protective_custody_lyrics_138148.html)) (“Justice? All I see is ‘Just Us’ gettin’ knocked, locked, and bust.”). *See generally* Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004).

62. *See* Rosen, *supra* note 42, at 24 (“Zero tolerance has undermined the popular support upon which effective crime-fighting ultimately relies.”); *see, e.g.*, BRAND NUBIAN, *Probable Cause*, on FOUNDATION (Arista Records 1998) (“They say protect and to serve and never give the people the respect they deserve, as if they wasn’t equal. These is man-made laws, selectively applied. . . . Now Giuliani wanna talk about the quality of life. Think he got the right to follow me at night. . . . You don’t have to break no laws. They just say probable cause.”).

63. As the criminal justice agency noted, early city-generated policy papers that trumpeted the virtues of broken-windows enforcement had failed to foresee the great increases in arrest and prosecution of the young, and accordingly under-estimated public dissatisfaction with the policy. CJA, NON-FELONY TRENDS, *supra* note 20, at 39.

64. *See* Stuntz, *supra* note 36, at 1821 (“But there are other costs to these tactics, costs borne not by police officers but by innocent citizens of the targeted neighborhoods. Large numbers of street stops based on fairly casual cues mean large numbers of bad stops as well as good ones.”); *see, e.g.*, Zeidman, *supra* note 42, at 343 (discussing an informal poll revealing that with few exceptions residents in these communities reported being subjected to street searches). *See generally* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 218 (1966) (“If an honest citizen resides in a

police brutality skyrocketed as vigorous enforcement continued to put strain on already fragile police-community relations.<sup>65</sup> Ultimately, people in the target neighborhoods came to see arrests as more of an affliction that unfortunate community members “caught” than as a deserved state response to justifiably unlawful conduct.<sup>66</sup>

## II. MORE CHARGES, LESS PUNISHMENT

Zero tolerance may describe criminal enforcement along any of three principal axes: the degrees to which (i) police make arrests, (ii) prosecutors levy charges, or (iii) prosecutors maximize conviction sentences. As indicated, the NYPD tried to maximize arrests under the guise of order-maintenance policing. Prosecutors, however, took a more nuanced approach. They levied charges with increasing frequency but concurrently offered progressively more lenient bargains.

### A. Charging Frequency and Dismissal Aversion

Generally speaking, prosecutors possess a strong predilection in favor of levying and keeping charges—essentially, a mindset of “non-defeat.”<sup>67</sup> To some degree this is a product of an engrained

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neighborhood heavily populated by criminals, just as the chances are high that he might be one, so too are the chances high that he might be mistaken for one.”); Akerlof & Yellen, *supra* note 24, at 194 (“There is thus the possibility that inner-city neighborhoods may be caught in a crime-ridden equilibrium in which the innocent are punished along with the guilty and, because this occurs, the community resents and frustrates the police.”); Bowers, *supra* note 2, at Part I.

65. CJA, NON-FELONY TRENDS, *supra* note 20, at 38 (“[C]ommunity relations, which supposedly should have been improved by police efforts to restore order and civility in neighborhoods, have lagged far behind the achievement of order maintenance goals.”); see also Bernard E. Harcourt & Jens Ludwig, *Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000*, 6 CRIMINOLOGY & PUB. POL’Y 165, 166; CCRB, *supra* note 59, at 1; Zeidman, *supra* note 42, at 318.

66. See Butler, *supra* note 61, at 998 n.91 (quoting common hip-hop refrain: to “catch a case”); cf. BIG-L, *Ebonics*, on THE BIG PICTURE (Rawkus 2000) (“If you caught a felony you caught a ‘F’.”).

67. Jerome H. Skolnick, *Social Control in the Adversary System*, 11 CONFLICT RESOL. 52, 57 (1967) (“In the county studied, the prosecutor’s office cared less about winning than about *not losing*. The norm is so intrinsic . . . [i]t cannot be attributed to such a simple and obvious fact as the periodic requirement of reelection. Indeed, reelection seemed to be taken for granted.”); accord Bibas, *supra* note 1, at 2472 (“[Prosecutors’] psychology of risk aversion and loss aversion reinforces the structural incentives to ensure good statistics and avoid risking losses.”); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent*, 49 RUTGERS L. REV. 1317, 1363 (1997); Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 337 (1990) (“Conviction rates constitute simplistic but easily advertised indicators of success since they appear to measure prosecutors’ ability to win cases.”).



prosecutorial “presumption of guilt.”<sup>68</sup> More significantly, in the context of order-maintenance enforcement particularly, prosecutors make and follow through with charges out of fealty to police.<sup>69</sup> In these public-order cases, police typically provide the *entire* impetus for arrests, because the arrests are made on the basis of police observations, not crime reports.<sup>70</sup> Therefore, prosecutors cannot decline to prosecute or dismiss public-order offenses without at least implicitly rejecting police decisions. And such rejection would reinforce the undesirable message that police are unjustifiably targeting poor and minority citizens.<sup>71</sup> Conversely, when prosecutors process arrests that arise out of citizen crime reports, they can elect not to charge or to dismiss for police-neutral reasons—for example, that witnesses seem incredible or uncooperative. Indeed, studies have found that witness non-cooperation is the leading cause of case dismissal and no-charge decisions.<sup>72</sup>

This makes sense of otherwise seemingly curious data on charging and dismissal rates in New York City in the 1990s. Specifically, the data shows, first, that non-felony charging rates *rose* and pre- and post-charge dismissal rates *fell*, even as prosecutors were called upon to process more than *twice* as many arrests—most of them for public-order “victimless” offenses.<sup>73</sup> Prosecutors charged more and dismissed less—

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68. HEUMANN, *supra* note 8, at 103; accord Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1188 (2004); Givelber, *supra* note 67, at 1363 (“Having made this decision [to charge], the prosecutor will not retreat easily from it without securing something in return, such as a plea.”); Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1328 (2000); Skolnick, *supra* note 67, at 62.

69. See George F. Cole, *The Decision to Prosecute*, in ROUGH JUSTICE 123, 127 (John A. Robertson ed., 1974) (“[T]he police . . . are dependent upon the prosecutor to accept the output of their system; rejection of too many cases can have serious repercussions affecting the morale, discipline, and workload of the force.”); see, e.g., Amy Waldman, *Diallo Case Tests Bronx Prosecutor*, N.Y. TIMES, Mar. 17, 1999, at B1 (“For [prosecutors] good relations with the police are crucial . . . District attorneys know that if they are perceived as being unfair to the police, securing cooperation for subsequent investigations . . . can be much harder.”); see also Givelber, *supra* note 68, at 1362; Leipold, *supra* note 68, at 1328.

70. See Stuntz, *supra* note 36, at 1819–21. See generally Heymann, *supra* note 18, at 422–23 (describing differences between reactive and preventative policing).

71. See *supra* Part I.B and notes 59–61 and accompanying text.

72. See, e.g., HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 26–28 (1982); see also Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 644–46 & nn.33 & 35 (1999).

73. CJA, *NON-FELONY TRENDS*, *supra* note 20, at 12 & tbls.1 & 14. Specifically, in 1989, there were 144,779 non-felony arrests and 86,822 non-felony arraigned cases, meaning prosecutors charged in 60% of the cases. *Id.* at 12 & tbl.1. In 1998, there were 246,957 non-felony arrests and 176,432 non-felony arraigned cases, meaning prosecutors charged in 71.4%

even as they wrestled with far higher caseloads—because they *could*; they did not need lay-witnesses in order to push these victimless public-order cases forward. In short, during the very period that police were arresting citizens *en masse*, prosecutors were electing to accept police output with higher frequency. The Giuliani administration instituted a policing policy of zero tolerance, and prosecutors did more than just keep up.<sup>74</sup>

Second, the data demonstrates that non-felony harm-to-persons cases in the second period were dismissed at a rate almost *ten times* higher than the rate for non-felony drug cases and over *twenty times* higher than the rate for fraud cases (a category principally comprised of turnstile hops).<sup>75</sup> At first blush, it seems odd that prosecutors would more readily dismiss arguably violent cases with concrete victims. But that is just the point: in those cases, prosecutors typically needed the victims (or other lay witnesses) to cooperate. When prosecutors did not have such cooperation, they had no choice but to dismiss; conversely, when prosecutors could proceed, they did so.

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of the cases. *Id.* Likewise, dismissals dropped during the same period, from 11.6% to 8.9% of non-felony cases. *Id.* at tbl.14.

74. *Cf.* CJA, MISDEMEANOR TRENDS, *supra* note 20, at 71 & tbls.44B & 44E (“[T]he actors and agencies operating within the Criminal Court function in a reactive manner, responding to criminal justice policy decisions made outside of the court system but which determine to a very great extent both the volume and nature of the caseloads of the criminal courts.”).

75. CJA, NON-FELONY TRENDS, *supra* note 20, at 16 & tbl.15.

Table 2  
Non-Felony Arrest and Prosecution Rates<sup>76</sup>

	1989	1998
Total Non-Felony Arrests (percentage increase in arrests)	144,779	246,957 (+71%)
Total Non-Felony Prosecutions (percentage increase in prosecutions)	86,822	176,432 (+103%)
Rate of Prosecuted Non-Felony Arrests	60%	71.4%
Rate of Dismissed Non-Felony Cases	11.6%	8.9%
Rate of Dismissed Non-Felony Harm-to-Persons Cases	34%	37%
Rate of Dismissed Non-Felony Drug Cases	8.3%	3.9%
Rate of Dismissed Non-Felony Fraud Cases	4.4%	1.5%

### *B. Leniency*

When it came to plea bargaining, however, prosecutors did something wholly different. Far from instituting a policy of zero tolerance, prosecutors provided more and more lenient and summary offers of adjournments in contemplation of dismissal (ACDs)<sup>77</sup> or no-

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76. *Id.* at fig.1.

77. Under the terms of an ACD, the case is pulled from the court calendar, but it remains open for six or twelve months during which time the defendant must stay out of trouble (and possibly meet other conditions). N.Y. CRIM. PROC. LAW §§ 170.55–56 (Consol. 2000). If the defendant complies with the terms of the ACD, her case is ultimately dismissed; if not, the case may be restored to the calendar. *Id.* Some debate exists over whether ACDs are more akin to dismissals or to adjudications of culpability. See JAMES F. NELSON, RACIAL AND ETHNIC DISPARITIES IN PROCESSING PERSONS ARRESTED FOR MISDEMEANOR CRIMES: NEW YORK STATE, 1985–1986 19–20 (1991). Like Nelson, I believe that ACDs should be “labeled culpable dispositions because they resemble conditional discharges and probation sentences.” *Id.* at 20 (“It is hard to imagine when the court would prefer to dispose an innocent defendant with an ACD rather than with a case dismissal.”).

time pleas to non-criminal violations—particularly to defendants without criminal records.

First, with respect to charge reductions, far fewer criminal charges remained misdemeanors for the purposes of disposition. Specifically, the rate of ACDs rose from 11% to 30% of all non-felony cases.<sup>78</sup> And, even for cases that resulted in some kind of conviction, the rate of reduction to non-criminal violations rose from 44% to 52% of non-felony conviction cases.<sup>79</sup> Admittedly, for recidivist defendants, rates of ACDs and plea reductions to violations rose only slightly: ACDs rose from 4% to 9% of all non-felony cases and plea reductions to violations rose from 28% to 32% of non-felony conviction cases.<sup>80</sup> But for defendants with no criminal record, the rate of ACDs rose precipitously from 19% to 47% of all non-felony cases, and the rate of plea reductions to violations rose from 71% to 86% of non-felony conviction cases.<sup>81</sup>

Second, with respect to sentence type and length, fewer defendants received any jail sentence in the second period. Jail sentences dropped from a rate of 58% to 50% of non-felony conviction cases.<sup>82</sup> Again, recidivist defendants experienced only a slight decline (from 66% to 62%), while defendants with no criminal record enjoyed the greatest drop (from 41% to 29%).<sup>83</sup> More significantly, there was a decline in sentence length from a mean of 39.1 to 19.9 days, and from a median of 20 to 7 days.<sup>84</sup> Put simply, most jail sentences were more than halved (for the minority of defendants who even received jail sentences). And the sentences fell for all types of non-felony public-order offenses.<sup>85</sup> Notably, the only two non-felony offense categories that saw jail-sentence increases were sex and harm-to-persons cases—respectively, a mean rise from 6.5 to 9.5 days and from 54.1 to 76.4 days.<sup>86</sup> And these are the two categories of charges that fall almost wholly outside the

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78. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbl.19.

79. CJA, NON-FELONY TRENDS, *supra* note 20, at tbl.17A.

80. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbls.19 & 20. CJA, NON-FELONY TRENDS, *supra* note 20, at 17A, 18 (combining all recidivist categories and A- and B-level misdemeanors and calculating rate).

81. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbl.21; CJA, NON-FELONY TRENDS, *supra* note 20, at tbl.18 (combining A- and B-level misdemeanors and calculating rate).

82. CJA, MISDEMEANOR TRENDS, *supra* note 20, at 37.

83. *Id.* at tbl.23 (combining all recidivist categories and calculating rate).

84. *Id.* at tbl.25. Unfortunately, the data do not delineate differences in jail-sentence length between recidivist and clean-record defendants. *Id.*

85. *Id.*

86. *Id.*

public-order umbrella.

Third, defendants had to wait less time to end their cases. New York City has a well-established history of terminating the majority of its non-felony cases at arraignments (a defendant's first court appearance that usually occurs less than twenty-four hours post-arrest).<sup>87</sup> The 1990s witnessed a rise even in this historically high arraignment-disposition rate—from 62% to 73%.<sup>88</sup> As several commentators have noted, the process is often the principal punishment in many petty cases; accordingly, quick dispositions may be tantamount to lenient dispositions for the reason of speed alone.<sup>89</sup>

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87. See Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1170 (2004).

88. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbl.43.

89. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 277 (1979); HEUMANN, *supra* note 8, at 69–70 (“Contrary to what the newcomer expects, defendants are often eager to plead guilty. . . . [T]hey contrast the relative ease with which they can plead guilty with the costs in time and effort required to fight a case.”); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 952–55 (1983) (“For it is primarily the process costs of misdemeanor justice that currently cause all but a small minority of defendants to yield to conviction; these process costs are, in practice, more influential than plea bargaining.”); Bowers, *supra* note 2, at Part II.

Table 3  
Snapshot of New York City Leniency Trend<sup>90</sup>

	1989	1998
Overall ACD Rate (all prosecuted non-felony cases)	11.4%	30.0%
ACD Rate, Recidivist Defendants	4.1%	6.3%
ACD Rate, Clean-Record Defendants	19.1%	47.2%
Overall Rate of Plea Reductions to Violations (all non-felony conviction cases)	44.0%	52.5%
Rate of Plea Reductions to Violations, Recidivist Defendants	28%	32%
Rate of Plea Reductions to Violations, Clean-Record Defendants	71%	86%
Rate of Jail Sentences (all non-felony conviction cases)	55.2%	49.9%
Rate of Jail Sentences, Recidivist Defendants	70.7%	66.5%
Rate of Jail Sentences, Clean-Record Defendants	41.1%	28.7%
Jail Sentence Length (Mean)	39.1 days	19.9 days
Jail Sentence Length (Median)	20.0 days	7.0 days
Rate of Disposition at Arraignments	61.9%	72.7%

Overall, then, New York City witnessed a fairly clear leniency trend. But the trend did not extend citywide. Instead, leniency was most apparent in those boroughs that were directly affected by public-order policing.<sup>91</sup> By contrast, Staten Island, which has the highest concentration of white residents and white defendants, experienced the only overall jail sentence increases: the mean jail sentence rose from 20.4 to seventy-one days and the median rose from ten to forty-five

90. See CJA, MISDEMEANOR TRENDS, *supra* note 20, at 35, 36, & tbls.19, 21, 23 & 25.

91. See *infra* notes 153–54 and accompanying text.

days.<sup>92</sup> Additionally, Staten Island had the smallest percentage rise in ACDs.<sup>93</sup> And it was the only borough to experience a decrease—albeit slight—in the frequency of cases disposed of at arraignments.<sup>94</sup> Ultimately, Staten Island’s small defendant population and distinctive sentencing practices<sup>95</sup> caution against reading too much into these data. But Staten Island does appear to have been something of an outlier from the general leniency trend.

### C. Conventional Explanations

There are three chief conventional explanations that might underlie this leniency trend in the second period: (1) resources were tighter, which compelled over-burdened prosecutors to offer lower prices to ensure quicker pleas;<sup>96</sup> (2) the cases were less serious;<sup>97</sup> and/or (3) the cases were weaker.<sup>98</sup> I cannot wholly refute any of these explanations. Each, no doubt, played some part. Admittedly, there is a colorable argument that these three explanations—taken together—account principally for the leniency trend. But there are reasons—beyond my mere intuition—to believe that these explanations fail to tell the whole story—that another force was also at play.

#### 1. Resource Pressure

Overstretched resources are the weightiest conventional explanation

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92. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbl.47.

93. *Id.* at tbl.43.

94. *Id.*

95. In 1998, Staten Island sentenced defendants to jail less frequently than it had in 1989 and less frequently than other boroughs in the latter period. *Id.* at tbls.45 & 48. Accordingly, it could just be that Staten Island provided lengthier jail sentences for the few defendants it sentenced to jail. In other words, it reserved incarceratory sentences for only those defendants who qualified for no other type of sanction and who merited particularly harsh punishment.

96. See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”); UVILLER, *supra* note 15, at 180–81 (discussing influence of caseload on plea bargaining). But see Worden, *supra* note 67, at 339 (“[C]ase pressure appears to have almost no effect on plea bargaining policies.”). See generally Peter F. Nardulli, *The Caseload Controversy and the Study of Criminal Courts*, 70 J. CRIM. L. & CRIMINOLOGY 89 (1979).

97. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2000 (1992); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1336 (2003).

98. HEUMANN, *supra* note 8, at 106 (discussing influence of case weakness on plea bargaining); Bibas, *supra* note 1, at 2472–73 (noting potential for “irresistible offers in weak cases”); Alschuler, *supra* note 10, at 59; Bowers, *supra* note 2, at Part IV.C.

for the leniency trend. There are two broad categories of criminal justice resources: jailhouse resources and courthouse resources. As to the first, jailhouse resources were under no greater stress in the 1990s. Indeed, New York City's total jail inmate population *fell* by almost ten percent from 1990 to 1999—notwithstanding substantial increases in arrests and prosecutions.<sup>99</sup>

As to the second, courthouse resources admittedly were taxed far more heavily in the latter period; accordingly, this pressure cannot be so readily dismissed.<sup>100</sup> Nevertheless, for two reasons, higher caseloads may not have proven terrifically determinative. First, prosecutors charged defendants more frequently and dismissed cases less frequently in the second period.<sup>101</sup> As noted, prosecutors did so because (from an evidentiary standpoint) they typically needed only the word of police witnesses.<sup>102</sup> But, from a resource standpoint, it is significant that prosecutors *remained able* to charge at higher rates—notwithstanding their markedly heavier dockets. This increased charge rate would seem unexpected in a system under debilitating resource strain.

Second, the data reveal marked variability in leniency growth across categories of crime and record. Specifically, defendants without criminal records and those facing public-order charges did far and away the best. Conversely, recidivists enjoyed only marginal reductions in sentence length and conviction charges.<sup>103</sup> And jail sentences actually *rose* dramatically for all categories of defendants in sex and harm-to-persons cases.<sup>104</sup> Of course, an argument could be made that prosecutors operating under significant resource constraints would elect to direct the greatest discounts precisely where they went: to those defendants for whom prosecutors felt the most sympathy—those defendants without criminal records facing non-violent charges. But this does not explain why sentences increased in sex and harm-to-persons cases. (A system under heavy strain would have kept these sentences

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99. See Fagan et al., *supra* note 23, at 75.

100. See *supra* note 73 and accompanying text; see also Mark Hamblett, *Johnson Stays Focused on Job as Prosecutor*, N.Y. L.J. Feb. 1, 1999, at 1 (quoting Bronx District Attorney: "The system just hasn't expanded as it should . . . . We still don't have anywhere near the judges we need to handle the volume.").

101. *Supra* notes 73–75, tbl.2 and accompanying text.

102. *Supra* note 75 and accompanying text.

103. See *supra* notes 81–82 and accompanying text.

104. See *supra* note 86 and accompanying text. Moreover, harm-to-persons cases saw a *decline* in ACDs and a *rise* in convictions (whereas every other crime category, except weapons cases, witnessed a *rise* in ACDs and a *decline* in convictions). CJA MISDEMEANOR TRENDS, *supra* note 20, at tbl.15.



level, at least.) In any event, there is a countervailing argument that prosecutors under resource pressure should rationally offer lenient (and therefore quickly consummated) pleas in the other direction: to recidivist defendants in more serious cases because these cases present the greatest systemic burdens. Defendants in these cases are more likely to be detained pretrial.<sup>105</sup> Courts must provide caged buses and staffed cells to produce them for court appearances. Therefore, courts least want to accommodate repeat appearances for this most-costly defendant population.<sup>106</sup>

## 2. Case Seriousness

If case seriousness were a significant factor, again, the study should have made this plain when it controlled for crime category and record. Presumably, defendants with like records who were charged with like crimes should have done equally well in both periods. Yet, the data show that the second-period defendants—with the same criminal records and facing the same types of charges—were convicted and received jail sentences less often, and received plea reductions more often.<sup>107</sup> And, as noted, the differences were greatest for defendants with no criminal record.<sup>108</sup>

Admittedly, crime categories are just rough proxies for the actual seriousness of discrete cases, but such coarse measures seem to be sufficient in the context of public-order offenses. After all, while first-degree robbery may encompass widely varying degrees of conduct, turnstile hopping generally does not. It would be strange indeed to posit that first-period defendants without criminal records somehow hopped turnstiles or smoked marijuana far more seriously than similarly situated defendants a decade later.<sup>109</sup>

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105. See Bowers, *supra* note 2, at Parts II–III.

106. See *id.* Nor were these expensive defendant populations small. Recidivists made up roughly half of criminal court dockets in both periods. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbl.28. Harm-to-persons cases comprised approximately a tenth of all cases in both periods. CJA, NON-FELONY TRENDS, *supra* note 20, at tbl.3.

107. CJA, NON-FELONY TRENDS, *supra* note 20, at tbls.21–23.

108. *Supra* notes 81–83 and accompanying text; *infra* Part III.B (arguing that clean-record defendants are the expected principal beneficiaries of grassroots plea bargaining).

109. Of course, there are exceptions. For example, I represented a client in a misdemeanor case of newsworthy silliness: selling flavored ices without a vendor's license on one of the hottest days of the year. See Sabrina Tavernise, *Bronx Icy Vendor Is Put on Ice with a Wagonload of Legalese*, N.Y. TIMES, Aug. 6, 2005, at A1. But such notably silly cases are exceptions; roughly speaking, minor crimes seem to be of fairly unitary degrees of seriousness. (Comparatively, a Columbia psychiatry professor recently segregated different

### 3. Case Weakness

My argument against case weakness is more logical than analytical or empirical. Case weakness is undoubtedly a significant factor in plea pricing generally.<sup>110</sup> However, it would not seem to play any great role in public-order offenses. As noted, these cases typically arise wholly out of police observation of concrete non-violent conduct.<sup>111</sup> There is little in such circumstances to signal case weakness to prosecutors at the time prosecutors offer pleas. First, the police paperwork is skeletal. It usually indicates only that, for example, the officer observed the defendant hop a turnstile or tag a wall with graffiti or enter without permission into a public-housing unit. And this police paperwork is generally *all* prosecutors have to work off of when making plea offers at arraignments. Second, even if the police paperwork were detailed, the paperwork would not likely accurately record indicia of case weakness. As the Mollen Commission on Police Corruption concluded, the NYPD in the 1990s suffered an epidemic of police “falsifications,” which included the widespread “falsification of police records, as when an officer falsifies the facts and circumstances of an arrest in police reports.”<sup>112</sup>

Indeed, the fact that prosecutors charged a larger percentage of defendants in the second period (when more arrests occurred solely on the basis of police observations) indicates that prosecutors were prone to accept police paperwork at face value.<sup>113</sup> So, even where cases were weak, prosecutors could not and would not comprehend such weakness.

## III. GRASSROOTS PLEA BARGAINING

If the conventional explanations do not account completely for the leniency trend, then what does? Return for a moment to the question of law’s legitimacy.

Wilson and Kelling might well have been right that petty crime

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brands of killing into twenty-two categories that he ranked on a “depravity scale” in order of evil. Adam Liptak, *Adding Method to Judging Mayhem*, N.Y. TIMES, Apr. 2, 2007, at A1.)

110. See *supra* note 98 and accompanying text.

111. *Supra* notes 75 and 102 and accompanying text.

112. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF NEW YORK, COMMISSION REPORT, 36 (1994), [http://www.parc.info/client\\_files/special reports/4 - Mollen Commission - NYPD.pdf](http://www.parc.info/client_files/special%20reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf) [hereinafter MOLLEN REPORT]; see also Zeidman, *supra* note 42, at 323–33. The Mollen Commission called falsifications “the most common form of police corruption facing the criminal justice system.” *Id.* at 323.

113. See *supra* notes 73–75 and accompanying text.

breeds violence and disorder. However, localized zero-tolerance policing engendered oppression of other sorts: lives interrupted and social ties splintered.<sup>114</sup> Just as order-maintenance policing rose to prominence on a wave of “compassion fatigue” for the disorderly and the down and out,<sup>115</sup> the potent police response risked its own backlash.<sup>116</sup>

Critically, police and prosecutors did not need to be social-norms theorists to comprehend potential legitimacy problems. In New York City in the 1990s, salient instances of police overreach—most notably the highly publicized police shootings of unarmed civilians of African descent—made audible to everyone the pitched uproar of certain communities against zero-tolerance policing.<sup>117</sup> More importantly, institutional players found themselves in unique positions to intuit even less-apparent communal disaffection. Police observed, understood, and were affected by this growing estrangement most directly.<sup>118</sup> But prosecutors could discern it too. Generally speaking, prosecutors devote substantial energy to securing community cooperation—cooperation with investigations, evidence collection, testimony, or just the willingness of citizens to sit on grand and trial juries and indict or convict indictable or convictable defendants.<sup>119</sup> When cooperation is not

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114. See *supra* notes 35–38 and accompanying text.

115. Ellickson, *supra* note 27, at 1167–68, 1218–19.

116. See Fagan & Davies, *supra* note 49, at 462; Stuntz, *supra* note 7, at 1875, 1891 (“Far from strengthening embattled norms, criminalization is at least as likely to speed their unraveling.”); see also *supra* Part I.B.

117. See Fagan & Davies, *supra* note 49, at 462; see, e.g., Waldman, *supra* note 69 (“[I]t would be difficult for Mr. Johnson, the only black district attorney in the state, to miss the emotions swirling around the Diallo case. Protestors . . . rally outside the Bronx County Courthouse almost daily.”).

118. See CJA, NON-FELONY TRENDS, *supra* note 20, at 38–39 (“The strained nature of police-community relations has been recognized by the NYPD leadership, which has been developing since 1996 new initiatives to improve these relationships.”); see also Akerlof & Yellen, *supra* note 24, at 174–75; Jason Sunshine & Tom. R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513 (2003). Indeed, in an effort to avoid further alienation of affected communities, then-NYPD commissioner Bill Bratton took pains to distance himself from the term “zero tolerance”—a term most tough-on-crime advocates readily embrace. Newburn & Jones, *supra* note 44, at 233, 235. Remarkably, Bratton insisted that zero tolerance adequately described only the NYPD’s approach to police corruption. *Id.*

119. For example, Paul Butler, a former federal prosecutor, noted the widespread understanding among urban prosecutors that they would lose many amply provable cases “because some black jurors would refuse to convict black men who they knew were guilty.” Butler, *supra* note 35, at 678. Indeed, the expression “Bronx Jury” has become something of a term of art to capture the high rates of jury nullification in these communities that harbor such profound and problematic systemic distrust. See Waldman, *supra* note 69 (explaining

forthcoming, prosecutors see it. They experience rising levels of disengagement firsthand, and they quite obviously wish to minimize it, because growing public disengagement makes criminal enforcement of the law increasingly difficult.<sup>120</sup>

### A. Hedging Against Anger

Dan Kahan has accurately described order-maintenance policing as “a drug whose primary effect is that it will reduce crime, and its side effect is that it may exacerbate political tensions.”<sup>121</sup> Political tension undermines political will. However, in this context, the requisite political will is not of the garden-variety electoral breed. District attorneys are elected, of course, but their fates do not usually rise and fall with their handling of misdemeanor cases.<sup>122</sup> In any event, the target communities of public-order enforcement are not those that typically wield terrific electoral clout.<sup>123</sup> The requisite political will is more of a functional means to an end: it is the baseline level of public trust

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that Bronx jurors “do not trust the police” and consequently convict five to fifteen percent less frequently than jurors in other parts of the city); *see also* Butler, *supra* note 35, at 678–79; Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 900–01 (1999). *See generally* Stuntz, *supra* note 36, at 1827 & n.77 (noting phenomenon of juror holdouts to avoid convicting African-American men, and noting anecdotally that most of these holdouts seem to be African-American women); Kennedy, *supra* note 34, at 1260 n.21 (noting juror letter indicating that jury “didn’t want to send anymore Young Black Men to Jail”).

120. *See* Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 LAW & SOC’Y REV. 51, 52 (1984) (“Because of their interest in maintaining public support, legal authorities have been centrally concerned with minimizing the hostility that . . . unsatisfactory government decisions might engender.”); *see also* Akerlof & Yellen, *supra* note 24, at 196 (“[T]he traditional tools for crime control—more police cars cruising the neighborhood and longer jail sentences—wrongly applied, will be counterproductive because they undermine community norms for cooperation with the police.”); Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445, 447 (2006) (“[D]isillusionment is contributing to a crises of legitimacy, a crisis that will . . . undermine a readiness for positive engagement with the police and with the court system.”); Fagan, *supra* note 59, at 70 (“If you take away that legitimacy, you take away the incentives for people to interact with the law.”); Fagan et al., *supra* note 23, at 73; Luna, *supra* note 30, at 187 (noting “citizen reluctance to participate in the criminal process as the legitimacy of law and its enforcers are undermined to the point of irrelevance”); Meares, *supra* note 35, at 590 (“The mutual distrust between African Americans and law enforcement officers makes it less likely that African Americans will report crimes to the police, assist the police in criminal investigations, and participate in community policing programs that lead to greater social control of neighborhoods.”).

121. Rosen, *supra* note 42, at 27.

122. *See* Bowers, *supra* note 2, at Parts I.C., IV.A.

123. *See generally* Butler, *supra* note 35, at 710 (“[B]lack are unable to achieve substantial progress through regular electoral politics.”).

essential for effective enforcement.<sup>124</sup> This, then, is what grassroots plea bargaining is all about. It is a prosecutorial tool to maximize political will for order-maintenance policing (or, rather, to minimize the communal will to resist it).

In the 1990s, New York City prosecutors came to the fairly obvious conclusion that zero-tolerance enforcement posed a legitimacy threat. As Bronx District Attorney Robert T. Johnson explained: "Feelings of fear and frustration abound. Troubling questions have been raised, particularly in communities of color . . . regarding police/community relations, civil liberties and the issue of respect. . . . These questions must be addressed."<sup>125</sup> But addressing these daunting questions directly and thoroughly would have required substantial and fundamental reform, well beyond the will or capacity of individual prosecution offices. Prosecutors, however, had a readily available alternative identical to one exercised frequently in the business sector to mollify dissatisfied customers—slash prices. As anyone who has ever complained of shoddy service at a restaurant knows, the standard managerial response is complimentary drinks or some other reduction of the bill. Free booze, of course, does not address the underlying grievance. It might not even wholly assuage the customer's anger, but, then again, it might (as management is well aware). At bottom, slashing prices is a comparatively easy and rational quick-fix because in the restaurant industry—as in most industries—the loss of customer satisfaction is of far greater consequence than the loss of a bit of merchandise.

Similarly, prosecutors do not highly value the commodity of sentence length in petty cases.<sup>126</sup> In the context of order-maintenance policing, police and prosecutors have almost fully extracted the sought-after crime-fighting value via the already-consummated arrest.<sup>127</sup> Thereafter, it makes eminent sense for prosecutors to give up sentence length to foster an environment of cheap and quick pleas that allow for

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124. See Rosen, *supra* note 42, at 27 ("[E]ffective law enforcement officials must seek the political support of the communities they serve."). As Tom Tyler, a leading social-norms thinker, observed, "[G]overnment authorities can only function effectively when citizens support them enough to comply willingly with their directives." Tyler, *supra* note 120, at 51.

125. *Excerpts from Remarks by the District Attorney*, N.Y. TIMES, April 1, 1999; see also Hamblett, *supra* note 100 (quoting Bronx District Attorney on importance that community have "a sense that they are being heard").

126. Bowers, *supra* note 2, at Part III (discussing prosecutorial unwillingness to maximize plea prices, particularly in low-stakes cases).

127. See *supra* Part I.B.

a maximal number of police arrests with minimal opening for public backlash. In any event, line prosecutors have no other systemic means to buy satisfaction. As indicated, they cannot readily decline to prosecute or dismiss cases.<sup>128</sup> Thus, plea bargaining is the only mechanism generally available to prosecutors to reshape criminal enforcement—and perhaps public perceptions of it as well.<sup>129</sup>

This last point raises a first-order question that I have not fully answered: Do defendant-favorable outcomes, in fact, positively impact public perceptions of legitimacy? The brief answer is that the question is beside the point.

Let me explain a bit further. Psychologist Tom Tyler has argued forcefully against the conception that perceptions of legitimacy are influenced by outcomes. Instead, Tyler has linked communal and individual satisfaction wholly to procedural fairness.<sup>130</sup> On that reading, grassroots plea bargaining would seem to do nothing at all to promote positive perceptions of legitimacy. After all, one can forcefully argue that cursory plea bargaining is perhaps the least fair or deliberative process, even if the resulting *outcomes* are defendant-favorable.<sup>131</sup> One counterargument, however, is that quick procedures may, in fact, correlate well with fair procedures in these petty cases because these are the cases where defendants most want to just “get it over with.”<sup>132</sup> In other words, when the “process is the punishment,” the quickest process is also the fairest.<sup>133</sup>

For present purposes, however, the better counterpoint is that the

128. See *supra* Part II.A.

129. The only other readily apparent option is community outreach to soften some of the hard feelings at the margins. See, e.g., Bronx County District Attorney’s Office, <http://www.bronxda.net/frames.html> (last visited Oct. 3, 2007) (providing details about Office’s community outreach programs; Community Affairs Unit; and weekly television program, “Ask the Bronx D.A.”); New York County District Attorney’s Office, <http://www.manhattanda.org/community/index.htm> (last visited Oct. 3, 2007) (providing details about community outreach programs and Community Affairs Unit); cf. Waldman, *supra* note 69, (describing Bronx District Attorney as engaging with community members and attending “countless community events”).

130. TYLER, *supra* note 22, at 31–37, 64–68, 161–63; see also Tyler, *supra* note 120, at 53 (discussing the debate); Sunshine & Tyler, *supra* note 118. But see JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANT’S PERSPECTIVE 48–51 (1978) (correlating defendants’ perceptions of fairness principally with outcomes and finding greater levels of satisfaction with pleas than trials).

131. Indeed, New York City defendants reported frustration with what they saw as “an unending cycle of revolving-door justice.” CJA, RESEARCH BRIEF, *supra* note 20, at 7.

132. HEUMANN, *supra* note 8, at 69–70.

133. See *supra* notes 87–89 and accompanying text.

debate does not matter. To demonstrate that grassroots plea bargaining is a genuine influence, it is of no moment whether plea bargaining equates with fair process or even whether Tyler is right that fair procedures are the most accurate measure of defendant satisfaction. Instead, the entirely descriptive question of whether grassroots plea bargaining is a real force turns solely on prosecutors' *beliefs*. If they believe that case outcome (not process) is the best predictor of defendant satisfaction, then that is proof enough of the existence of grassroots plea bargaining, because that belief alone will motivate prosecutors to provide discounts. And even Tyler would concede that prosecutors operate on such a belief: "[S]tudies of courts have related case outcomes to satisfaction . . . , [and] actors in the legal arena have tended to adopt this view as well."<sup>134</sup>

Of course, even if prosecutors are right to think that defendant-favorable outcomes positively impact satisfaction, grassroots plea bargaining would still seem to be an incomplete panacea for individual and communal resentment that is aimed principally at a separate (albeit related) entity—the police. After all, *ex post* cheap pleas cannot wholly wipe away the negative externalities of questionable police tactics and arrests.<sup>135</sup> In target communities, police end up arresting more people on less evidence.<sup>136</sup> And even though prosecutors are unaware which defendants face weak, silly, or even baseless charges,<sup>137</sup> the defendants themselves *do* know, and their families and friends may know too. Those who commit "borderline" conduct (or no unlawful conduct at all) are bound to harbor some level of animosity even if they had to spend only a night in jail. But, at bottom, a night is less than a week, and a week is less than a month. The point is not that grassroots plea bargaining definitively purchases satisfaction or wholly (or even partially) scrubs away discontent—just that prosecutors rationally believe it might, and they act upon that rational belief. They employ grassroots plea bargaining because it is the most obvious and ready prosecutorial hedge against public anger.

This premise—that prosecutors game plea offers (at least implicitly) to maintain an adequate baseline level of systemic support—provides an interesting corollary to a similar dynamic identified by George Akerlof

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134. Tyler, *supra* note 120, at 53, 56 (describing this as traditional view).

135. See generally, Sunshine & Tyler, *supra* note 118.

136. See *supra* notes 56–66 and accompanying text.

137. See *supra* notes 112–113 and accompanying text.

and Janet Yellen.<sup>138</sup> Akerlof and Yellen focused on a gang's optimal level of criminality. They hypothesized that a "cooperation/noncooperation" boundary exists in all communities, below which law-abiding members withhold necessary assistance from authorities.<sup>139</sup> Accordingly, in communities with high levels of systemic disaffection, gangs maximize wealth by victimizing community members *just up to* this "cooperation/noncooperation" boundary.<sup>140</sup> "Any higher level of crime would trigger the community's cooperation, resulting in expected penalties so great that crime would have a negative return. Any lower level of crime is suboptimal."<sup>141</sup> Likewise, prosecutors use grassroots plea bargaining to win the same leverage along the same axis—albeit in the opposite direction.<sup>142</sup> Prosecutors lower prices to manipulate public goodwill—to make sure that sentiment stays *just above* the critical cooperation boundary.<sup>143</sup>

Returning, then, to my client, Eddie Wise: operationally, it was of little importance to police and prosecutors whether loitering for the purposes of begging was a valid offense. (Indeed, if not for a few

138. Akerlof & Yellen, *supra* note 24, at 175–88.

139. *Id.* at 186–87.

140. *Id.* at 184–86 ("The gang has an incentive to commit crime right up to the point where people will cooperate with the police; but beyond that point, the community will cooperate and crime will not pay.").

141. *Id.* at 186.

142. *Cf. id.* at 177 ("The most important constraint on the criminal activities of gangs comes from the police power of the larger society outside its territory and the attitudes of local residents toward cooperation with the police.").

143. Indeed, Akerlof and Yellen seemed to implicitly recognize my premise. They identified two systemic factors impacting community cooperation: "fairness of penalties" and "attitudes toward the police." *Id.* at 184. The implication is that prosecutors may be able to make up for police overreach by offering penalties that are seen as fairer. *Id.* at 189–90 ("[T]he optimal crime-fighting strategy does not call for punishments at infinitely high levels. . . . In many situations, the optimal punishment . . . is whatever penalty the community considers fair.").

A parallel also might be drawn between my theory of grassroots plea bargaining and a separate theory recently proposed by Keith N. Hylton & Vikramaditya Khanna in their article, *A Public Choice Theory of Criminal Procedure*, 15 SUP. CT. ECON. REV. 61 (2007). Hylton and Khanna argued that defendant-friendly procedural protections serve to constrain abusive prosecutorial rent-seeking. *Id.* Grassroots plea bargaining provides a similar exogenous constraint—perhaps one that is all the more necessary in petty cases where guilty pleas are the almost-exclusive mode of disposition and procedural protections are consequently exercised infrequently and to no great effect. *Cf.* Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207, 210 (1995) (arguing that procedural protections are wholly ineffective, and, instead, that "constitutional protections intended to make prosecution more difficult instead serve [to] make the prosecutor's job easier").



intrepid lawyers, enforcement of the adjudicated-unconstitutional statute might have continued unabated for years more.) All that mattered was keeping communal approbation of police conduct and irritation with beggars sufficiently strong. As long as that balance was achieved, police and prosecutors could effectively enforce the ostensible law. Indeed, when the unlawful loitering arrests and prosecutions came to light, the NYPD used just this line of reasoning to defend its unlawful arrests: “The arrests were made for conduct that certainly rose to the kind of aggressive, obnoxious behavior that the NYPD is curbing.”<sup>144</sup> In other words, the NYPD felt that what mattered was not adverse judicial rulings of constitutional scope, but that the public wanted the behavior punished.

### *B. Predicting Grassroots Plea Bargaining*

Prosecutors need not give grassroots plea bargaining discounts to all defendants in all jurisdictions. Rather, it seems safe to assume that the need is greatest when prosecutors in urban jurisdictions charge young, clean-record minority defendants with petty nonviolent offenses because localized heavy enforcement of “borderline” offenses against such sympathetic defendants poses the greatest threat to perceptions of legitimacy.<sup>145</sup> Street disorder may “annoy” members of urban communities,<sup>146</sup> but criminalizing their quasi-wayward children for debatably unlawful conduct produces more significant angst still.<sup>147</sup> By contrast, stiffer sentences would seem less likely to provoke public backlash (i) when conduct is patently wrong (for example, in the case of assaults or forcible sexual contact),<sup>148</sup> (ii) when defendants are recidivists, or (iii) when the police arrest defendants in affluent white communities that are not the principal targets of police crackdowns and that may, in fact, favor rigid and punitive police response.<sup>149</sup>

Indeed, the New York City data track these assumptions. First, the

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144. Jego Armstrong et al., *Beggar Sues Cops & Law Is on His Side*, N.Y. DAILY NEWS, June. 10, 2005, at 8 (quoting NYPD deputy commissioner).

145. See *supra* notes 26–30, 38, 61 and accompanying notes.

146. Ellickson, *supra* note 27, at 1170.

147. See Stuntz, *supra* note 7, at 1897 (“[A] system that aims to criminalize not only that which almost all of us condemn but also that which only most (or some) of us condemn, is a system bound to produce not justice, but its opposite.”).

148. See *supra* note 25 and accompanying text.

149. From my own experience as a public defender in Bronx County, prosecutors would sometimes grouse to me in sum and substance, “You know you would never get this deal in Westchester”—an affluent, predominately white suburb immediately to the Bronx’s north.

leniency trend was localized to the same communities that were the principal targets of order-maintenance enforcement. Specifically, the data show that Staten Island exhibited no clear leniency.<sup>150</sup> Staten Island is predominantly white, and it has the highest concentration of white defendants of any borough (a plurality in the second period).<sup>151</sup> Notably, Staten Island did not embrace leniency even though it saw the largest percentage growth of defendants without criminal records and of defendants aged sixteen through twenty years old—the very defendants who would otherwise seem most likely to benefit from grassroots plea bargaining.<sup>152</sup> By contrast, the Bronx—a predominantly minority borough that was a policing focal point<sup>153</sup>—experienced one of the largest decreases in average jail sentences and the lowest overall median sentences in the second period.<sup>154</sup>

Second, the leniency trend was most pronounced for clean-record nonviolent defendants, a growing percentage of whom were adolescents.<sup>155</sup> By contrast, the data show (i) far more marginal leniency growth for recidivist defendants and (ii) markedly heightened punitive response for all defendants in harm-to-person or sex cases.<sup>156</sup> In short, prosecutors directed grassroots plea bargaining to its most obvious targets, providing the greatest discounts to the very clean-record nonviolent defendants who were most likely to rouse communal sympathy and spark potential backlash.<sup>157</sup>

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150. *Supra* notes 92–94 and accompanying text.

151. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbl.42.

152. *Id.* at tbls.40 & 41.

153. Hamblett, *supra* note 100 (noting a two-thirds rise in number of arrests in Bronx from 1993 to 1998).

154. CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbls. 40–41 & 47 (noting that Bronx sentences fell from a mean of 24.5 to 18.8 days and from a median of 15 to 5 days). Separately, a statewide New York study has shown that defendants in urban and predominantly minority jurisdictions received lower sentences than defendants in more affluent and rural jurisdictions. NELSON, *supra* note 77, at 70–73 & tbl.24; *see also infra* Part III.C.

155. *See* CJA, NON-FELONY TRENDS, *supra* note 20, at tbl.17A; CJA, MISDEMEANOR TRENDS, *supra* note 20, at tbl.21; CJA, NON-FELONY TRENDS, *supra* note 20, at tbl.18 (combining A- and B-level misdemeanors and calculating rate).

156. *See supra* notes 81, 83, tbl.3 and accompanying text.

157. Of course, it could also be that these defendants received better bargains because they were the subject of direct prosecutorial empathy. But there are reasons to believe this was not the case. *See supra* notes 103–06 and accompanying text; *infra* notes 163–64 and accompanying text. In any event, as I have indicated from the start, my aim is not to prove that grassroots plea bargaining was the *definitive* reason for leniency in New York City in the 1990s (I do not believe that it was), only that grassroots plea bargaining is a plausible and heretofore unrecognized plea bargaining influence. And the numbers are wholly consistent

### C. A Normative Implication

If grassroots plea bargaining is a real force pushing down plea prices in minority communities, then this raises a final highly charged question: Is grassroots plea bargaining a kind of redistributive correction to recognized racial “tilts” in criminal justice enforcement?<sup>158</sup> The answer is yes and no. From a broad view, defendants in urban and minority-heavy jurisdictions are bound to do better on balance.<sup>159</sup> Assessed more narrowly, however, *within* discrete jurisdictions of every type—urban, suburban, rural, poor, or rich—individual white defendants seem to do better than minority defendants.<sup>160</sup> Specifically, a statewide New York study found that when all counties were analyzed collectively

whites were sentenced to longer jail terms than minorities for almost all categories of arrest charge, prior criminal record score, concurrent felony arrests, and age at arrest . . . [because] [m]ost minorities were processed in counties that sentenced defendants to relatively short terms, whereas most whites were processed in counties that sentenced defendants to relatively long terms.<sup>161</sup>

Conversely, when the study compared white defendants to minority defendants in individual counties a “different pattern” emerged: minorities were convicted and sent to jail more frequently, they received longer jail sentences than whites, and they were offered fewer ACDs.<sup>162</sup>

Such racial disparities in favor of white defendants cut against conventional perceptions that lenient treatment in urban communities might just be the result of prosecutors’ own individualized conceptions of appropriate punishment for poor minority defendants—some kind of “white paternalism”<sup>163</sup> or what Heather Gerken might call “dissenting by

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with that proposition.

158. Stuntz, *supra* note 7, at 1893 (“[W]e keep experiencing anti-vice crusades that target racial or ethnic minorities who live in urban poverty. Police and prosecutorial discretion have produced these tilts . . . .”); cf. Stuntz, *supra* note 36, at 1838–39 (raising possibility of enhanced punishment for affluent white defendants, but conceding that such a proposal would be politically impossible).

159. NELSON, *supra* note 77, at 70–73 & tbl.24.

160. *Id.* See generally Muñoz & Sapp, *supra* note 19, at 38, 42–43.

161. NELSON, *supra* note 77, at 70–73 & tbl.24.

162. *Id.* at 31–40, 62–63, 70–73, 95 & tbls.11, 12, 13, 20 & 24.

163. Muñoz & Sapp, *supra* note 19, at 42–43 (“‘White paternalism’ . . . can work to the detriment of Whites, particularly in counties with large non-White populations. . . . Judges may be more attuned to the costs of overtly discriminating against non-Whites . . . [or] judges

deciding.”<sup>164</sup> Rather, it seems that when prosecutors offer lenient prices of their own volition, they typically exercise that kind of discretion to the benefit of white defendants.<sup>165</sup> Conversely, when prosecutors establish low “going rates” in urban jurisdictions, it is not because they *want to*, but because they *have to* in order to avoid debilitating non-cooperation.<sup>166</sup>

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may expect and have higher tolerance for non-White crime, and . . . hold Whites to higher moral standards.”).

164. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (“*Dissenting by deciding* occurs when would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decisionmaking body and can thus dictate the outcome.”). Examples of this kind of prosecutorial decision making are San Francisco District Attorney Terrence Hallinan’s announcement that he would no longer pursue three-strike convictions for many types of felonies or Bronx District Attorney Robert Johnson’s refusal to seek the death penalty in any case. See Jonathan DeMay, *A District Attorney’s Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 768–70 & 768 n.6 (1999); Tony Perry & Maura Dolan, *Two Counties at Opposite Poles of ‘3 Strikes’ Debate*, L.A. TIMES, June 24, 1996, at A1. Dissenting by deciding, then, depends on the prosecutor’s *own* views of proportionally appropriate punishment. For example, District Attorney Robert Johnson declared that he had no “present intention” to pursue the death penalty because of his personal “‘intense respect for the value and sanctity of human life.’” DeMay, *supra*, at 768 & n.6 and accompanying text. And Terrence Hallinan remarked: “I myself feel I am able to tell the difference between a bad person and someone who has just done the wrong thing.” Perry & Dolan, *supra*.

165. In the charging context, the now infamous “Jena 6” case provides a telling analogy. In that case, Reed Walters, the District Attorney of Jena, Louisiana, took a narrow view of the criminal code in declining to prosecute white students who had strung nooses to a tree, but took an expansive view in charging black students with attempted murder after a subsequent attack on a white classmate. Howard Witt, *Jena 6 Defendant Out of Jail*, CHI. TRIB., Sept. 28, 2007, at C4. A firestorm of grassroots protest erupted over Reed’s charging decisions. Notably, after an appeals court reversed the felony conviction of one of the black students, Reed elected not to recharge the student as an adult. *Id.* As one lawyer indicated, the grassroots response had forced Reed’s hand; he could only proceed as he saw fit at the risk of undermining necessary community cooperation: “I think [Reed] is under tremendous pressure. There’s not a single district attorney in the state that doesn’t want to see this whole thing go away. They are concerned about jury nullification in their own cases—they don’t want the system to be seen as so unfair.” *Id.*

166. The notion of plea prices as fixed “going rates” helps answer a further potential objection. Specifically, one might posit that even if there is a pro-white bias, that bias is of less force than grassroots plea bargaining. Accordingly, because white defendants pose no obvious legitimacy threat (and do not, therefore, need to be given grassroots-plea-bargaining discounts), they should still do worse in predominantly minority jurisdictions than minority defendants (who are the subjects of grassroots plea bargaining). But white defendants in minority jurisdictions may end up receiving the race-based discount *and* the grassroots-plea-bargaining discount. The reason for this potential double discount is that plea prices for particular offenses in particular jurisdictions start at fixed points—“going rates”—that are intuitively known to defense attorneys and that prosecutors may not abandon without push back from defense attorneys (and possibly judges). See Bowers, *supra* note 2, at Part III.C. So, in a predominantly minority jurisdiction, the fixed opening price for *all* defendants—white or minority—is the grassroots-plea-bargaining price. From there, a white defendant may

The cynical view, then, is that grassroots plea bargaining may be no more than a tool that enables unpopular and otherwise unsustainable enforcement policies. In other words, beware of prosecutors bearing gifts; they are mere agents of a normatively problematic and otherwise unsustainable discriminatory status quo.<sup>167</sup> The optimistic view is that grassroots plea bargaining provides (in a pragmatic and politically feasible way) a much-needed “bottom up” fix to a historically draconian, unjust, and racially disparate “top down” punishment regime.<sup>168</sup> Such a fix might not be all bad—whatever the prosecutorial motivation.

### CONCLUSION

Prosecutors want to enable vigorous police enforcement, but they concurrently wish to deflate communal perceptions of illegitimacy and objections about unfair treatment. So, prosecutors set low prices for public-order offenses in an effort to have their cake and eat it too. This is grassroots plea bargaining, and it becomes a genuine influence any time the system attempts to strictly enforce “borderline” offenses against members of communities that feature traditionally discordant police-citizen relations. As police and prosecutors shift to zero tolerance in their arrest and charging decisions, prosecutors concurrently move toward greater tolerance in their plea-bargaining decisions. In this way, grassroots plea bargaining is just another instance of the oft-noted pattern that when the system attempts to eliminate the exercise of discretion it merely pushes that exercise to other points in

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benefit yet further from implicit pro-white bias.

167. Under this reading, lenient plea deals pose the same problem that critical legal theorists ascribe to the rhetoric of rights. See Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 26 (1984) (“[T]hey start talking as if ‘we’ were rights-bearing citizens who are ‘allowed’ to do this or that by something called ‘the state,’ which is a passivizing illusion—actually a hallucination which establishes the presumptive political legitimacy of the status quo.”); cf. Seidman, *supra* note 143, at 207, 210–11 (arguing that procedural protections “entrench the status quo” by “mak[ing] the punishment we inflict on criminal defendants seem more acceptable” and by therefore “contribut[ing] to an atmosphere that promotes acceptance of a situation that ought to shock us”); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992).

168. Butler, *supra* note 61, at 1000. Grassroots plea bargaining thereby helps to ensure the “tolerably moderate” punishments that Meares and Kahan advocated upon defending gang-loitering ordinances. Meares & Kahan, *supra* note 32, at 213; see also *supra* note 36. Along this line, some critics of order-maintenance policing have proposed reducing petty misdemeanors to statutory violations. See, e.g., Harcourt & Ludwig, *supra* note 65, at 3. To some extent, by offering such frequent plea reductions and ACDs, prosecutors have *de facto* adopted this proposal.

the process.<sup>169</sup>

Ultimately, more work must be done to determine (i) the scope of grassroots plea bargaining, (ii) whether it is normatively positive, and (iii) whether it even succeeds in fostering communal perceptions of legitimacy in the face of unpopular enforcement policies. It could be that these questions prove unanswerable. Some theorists have argued, after all, that diverse influences on real-world bargaining are “unquantifiable”—either collectively or in isolation.<sup>170</sup> If this is so, all we can hope to do is put fingers down on as many of these manifold influences as possible. Grassroots plea bargaining is such an influence. It is one more force pulling crime and punishment outside the shadow of law.

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169. See MICHAEL TONRY, SENTENCING MATTERS 147 (1996) (“Sentencing policy can only be as mandatory as police, prosecutors, and judges choose to make it.”).

170. See, e.g., Barnhizer, *supra* note 21, at 171 (arguing that the only quasi-effective measurement of bargaining power is a loose “multifactor balancing test”).

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