

**WAR CRIMES AND MISDEMEANORS:
UNDERSTANDING “ZERO-TOLERANCE” POLICING AS
A FORM OF COLLECTIVE PUNISHMENT AND
HUMAN RIGHTS VIOLATION**

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ABSTRACT

A fundamental principle of criminal law is that individuals may only be punished for offenses which they have personally committed; any punishment must be personal and individual. To that end, international law proscribes as collective punishment any sanction imposed on a population without regard to individual culpability for the offense that provokes the penalty. Compstat-based zero-tolerance or order-maintenance policing, the prevailing thesis in contemporary law enforcement, punishes entire communities for the crimes of a few. More specifically, zero-tolerance policing seeks to deter violent crime not by apprehending those relatively few perpetrators of crime, but by indiscriminate search-and-seizure operations and wholesale misdemeanor arrests for minor quality-of-life offenses in the neighborhoods where violent crimes occur, typically poor communities of color. As a form of collective punishment, such policing is contrary to international human rights law.

In one eight-block section of Brooklyn, the New York City Police Department (NYPD) stopped, questioned, and searched 52,000 people in four years, 94% of whom had committed no offense. Residents of communities targeted for this type of intensive policing by Compstat are not only stopped and searched without individualized suspicion, but they are also

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routinely arrested and jailed on criminal trespassing charges for failing to provide police with identification. The indiscriminate policing in these neighborhoods closely resembles a counterinsurgency strategy known as cordon and search, in which troops seal off geographic areas and subject entire communities to violent search-and-seizure operations to suppress terrorist activity and seize weapons. Scholars and human rights activists have condemned the indiscriminate use of this tactic against civilian populations in Afghanistan, Uganda, and Sri Lanka as contrary to the Geneva Conventions and as collective punishment, since it penalizes entire communities for the crimes of a few of its members.

Drawing on some of the language and principles of international humanitarian and human rights law, this Article offers a new theoretical framework to address the harm caused by zero-tolerance policing on targeted communities. It highlights the collective nature of the sanctions imposed by the strategy and the resulting erosion of the core due process norm of individual culpability. The policing strategy at issue is not characterized by the sensational atrocities typically associated with collective punishment regimes but by a mass of seemingly small harms that have, over time, perpetuated racial and socioeconomic segregation of inner-city communities and deepened resentment towards law enforcement among significant numbers of law-abiding citizens.

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INTRODUCTION

Broken windows policing became central to the public discourse on urban blight and its relationship to crime control due largely to an immensely influential article in the *Atlantic Monthly* nearly three decades ago.¹ The thesis was compelling in its simplicity. Visible signs of disorder, such as broken windows or homeless people sleeping on sidewalks, signify a breakdown of the social fabric of a community and foster an environment that attracts more serious crime. Therefore, maintaining clean and safe public spaces and enforcing social behavioral norms against conduct that negatively affects the quality of life, such as aggressive panhandling, will bring order to the streets and reduce fear.² The secondary effect of orderly streets and reduced fear, the theory holds, is reduced crime rates, particularly violent crime or “index crimes.”³ Although the original broken windows theory did not advocate widespread arrests for quality-of-life offenses, policymakers have pursued that strategy as a means to reduce violent crime.⁴

Compstat, the now familiar statistical program developed to identify and map high-crime areas, facilitated targeted enforcement of quality-of-life offenses by concentrating resources in areas identified by the program.⁵ In these communities, zero-tolerance or order-maintenance policing (OMP) is aggressively prosecuted in an effort

1. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29; see Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 2 n.5 (2004) (“The influence of the *Broken Windows* piece can hardly be overstated.”); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 583–84 (1997) (discussing the influence of broken windows policing).

2. See, e.g., Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 378–79 (2001) (summarizing the broken windows theory).

3. Index crimes are violent felonies and felony thefts, specifically murder and non-negligent homicide, rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 276 n.19 (2009).

4. *Id.* at 278 (discussing the relationship between zero-tolerance policing and the broken windows thesis).

5. See, e.g., Adam Benforado, *The Geography of Criminal Law*, 31 CARDOZO L. REV. 823, 860 n.144 (2010).

to prevent future criminal activity.⁶ In cities such as New York, the vanguard of this policing regime, low-level offenses, such as trespassing and marijuana possession, have ascended from amongst the least prosecuted crimes to the most common criminal charges, and processing the arrests has become a core function of the City's criminal justice apparatus.⁷ Proponents of OMP contend that the strategy has ushered in a sustained period of declining rates of violent crime. Although the correlation between reduction in crime rates and mass misdemeanor arrests is the subject of scholarly debate with trends toward discrediting the causal relationship,⁸ policymakers have come to view the original thesis as the "holy grail" of policing;⁹ indeed it has been implemented across the country and around the world.

Contemporary tactics, however, have drifted far from the theoretical underpinnings associated with mending broken windows and addressing other relatively minor manifestations of disorder.¹⁰ Zero-tolerance policing is now used as a blunt instrument to control inner-city populations with intractable crime problems. Police respond to accelerated crime rates with overwhelming force, flooding

6. *But see* Howell, *supra* note 3, at 276–78. Literature on the broken windows theory tends to conflate the term broken windows with zero-tolerance or order-maintenance policing. Because the terms have become synonymous, they are used interchangeably in this Article.

7. Neither trespassing nor marijuana possession was among the top ten offenses arraigned in New York City Criminal Court prior to 1993, the year OMP debuted in New York. From 2007 through 2009, marijuana possession was the most common criminal charge and trespassing was the seventh most common. JUSTIN BARRY ET AL., CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2009 30–31 (2010) [hereinafter CRIMINAL COURT ANNUAL REPORT 2009], available at <http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2009.pdf>; JUSTIN BARRY ET AL., CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2008 36–37 (2009) [hereinafter CRIMINAL COURT ANNUAL REPORT 2008], available at <http://nycourts.gov/courts/nyc/criminal/AnnualReport2008.pdf>; JUSTIN BARRY ET AL., CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2007 32–33 (2008) [hereinafter CRIMINAL COURT ANNUAL REPORT 2007], available at <http://nycourts.gov/courts/nyc/criminal/NYCCC%20Annual%20Report%20Final%20072508.pdf>. See Martha Rayner, *Conference Report: New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1026 (2004) (noting that zero-tolerance policing was implemented in 1993).

8. See *infra* Part III.E.

9. 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, 292–93 (1998).

10. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000) (“[Broken windows] policing is not about disorderly places, nor about improving the quality of life, but about policing poor people in poor places.”).

officers into areas identified by Compstat.¹¹ Policing in these areas is indiscriminate and directed largely at law-abiding young black and Latino men.¹² The NYPD, for example, stopped and searched 580,000 people in 2009; blacks and Latinos were over nine times more likely to be stopped than whites, but less likely to have committed an offense.¹³ In public housing projects, the practice has resulted in widespread and systemic arrests of factually innocent people on charges of criminal trespassing.¹⁴ A zero-tolerance policy modeled after the NYPD's¹⁵ and adopted in high-crime neighborhoods of Baltimore, Maryland, resulted in a "broad pattern of abuse in which thousands of people were routinely arrested without probable cause."¹⁶

This Article contributes to the growing body of literature that is critical of aggressive, zero-tolerance policing and challenges its claimed efficacy in reducing violent crime.¹⁷ However, the principal focus is on the high individual and societal costs of abandoning the core due process norm of individualized justice in favor of police conduct that constitutes collective punishment and a violation of human rights law.

The conceptual evolution of collective punishment as a doctrine within human rights law, developed in international legal arenas since the Second World War, offers an appropriate framework within which to consider the harms OMP imposes on law-abiding community members—harms that include racial profiling, arbitrary deprivation of liberty, restrictions on freedom of movement, as well as racial and socioeconomic segregation. The framework further provides an analytical outline for determining whether these harms

11. See generally Thomas J. Lueck, *Study Lauds Police Effort; Commissioner Criticizes Low Starting Pay*, N.Y. TIMES, June 28, 2007, at B3 (noting that while the implementation of Compstat reduced crime rates in New York City, it required considerable manpower).

12. Al Baker, *City Minorities More Likely To Be Frisked*, N.Y. TIMES, May 13, 2010, at A1.

13. See Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1 (documenting one area targeted for intensive policing between January 2006 and March 2010).

14. See *infra* note 115 and accompanying text.

15. Justin Fenton, *NAACP, ACLU Hail Settlement of Arrests Suit, Police Reforms*, BALT. SUN, June 24, 2010, at 1A (reporting on the settlement of a class action lawsuit alleging widespread wrongful arrests; the Baltimore Police Department agreed as part of the settlement to abandon zero-tolerance policing and establish new methods to address quality-of-life offenses).

16. Justin Fenton, *City Poised to Approve "Mass Arrest" Settlement with NAACP, ACLU*, BALT. SUN, June 23, 2010, at 1A.

17. See *infra* note 168; see also *infra* note 71 (discussing the hostility collective punishment regimes engender within the targeted community).

are imposed as a form of collective punishment on entire communities and are thus contrary to human rights law.

This Article begins by briefly chronicling the development of collective punishment doctrine, from the narrow construct of a war crime governing the conduct of open, armed conflict between nation states to a customary international humanitarian law, applicable to all States in all conflicts. Part I argues that, as prosecuted, OMP constitutes a form of collective punishment against targeted inner-city communities. Using New York City as a case study, Part II analyzes separate harms attributable to OMP and corresponding harms associated with collective punishment regimes in international conflicts. Part III considers whether the aggregate harms attributable to OMP are of sufficient gravity to amount to violations of international law, and whether those harms can be justified in light of the dearth of empirical evidence supporting the claimed efficacy of OMP in reducing violent crime.

I. COLLECTIVE PUNISHMENT UNDER THE RUBRIC OF ZERO TOLERANCE

War metaphors are routinely invoked to describe the deployment of broad-scale law enforcement initiatives aimed at eradicating complex social problems (such as violent crime) with monolithic “law and order” solutions. The war on crime spawned additional campaigns, including the war on drugs and the war on terror. Police forces have become increasingly militarized,¹⁸ and, particularly in the aftermath of September 11, our culture has embraced zero-tolerance policies and has become correspondingly tolerant of law enforcement tactics antithetical to fundamental due process norms, including mass incarceration of non-violent drug offenders and torture of terrorist suspects.¹⁹ A consequence of both the use of war rhetoric and the warlike approach to addressing societal problems is the dehumanization of citizens as “enemies.” This, in turn, breeds

18. See Peter B. Kraska & Louis J. Cubelis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUST. Q. 607, 607-27 (1997) (exploring the implications of militarized police practices); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 404 (2002) (discussing the deployment of military-style policing in African American communities).

19. Jonathan Simon, *Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1418 (2002) (“The dominant theory of how to respond to crime has returned to nineteenth-century notions of simple deterrence and elimination through exclusion or execution. Likewise, the related concept of individualized justice . . . has been rejected in favor of mandatory sentences and zero-tolerance policies.”).

abuse and justifies harsh and often indiscriminate military-style tactics to “combat” the wrongdoers, typically poor people of color.²⁰ Indeed, “many in the [b]lack community view the police as an alien occupying army rather than protectors of citizens’ rights.”²¹ Thus, where the rhetoric of war is routinely used to define and rationalize aggressive police practices, placing the issue of collective punishment in a human rights context broader than armed war and civil conflict should surprise few observers.

A. *The Evolution of Collective Punishment from a War Crime to Customary International Law*

Broadly defined as “a punitive sanction inflicted on a group of persons without regard to individual responsibility for the deed or event which provokes the penalty,”²² collective punishment has been outlawed since the Hague Convention at the turn of the twentieth century.²³ Due to the widespread use of collective punishment against civilians during the First and Second World Wars, the Geneva Conventions, in 1949, set forth comprehensive protections proscribing the use of group sanctions against prisoners of war and civilians in occupied territory.²⁴ The Geneva Conventions did not, however, make explicit that the ban on collective punishment extended to purely civil conflicts.²⁵ The 1977 Additional Protocols to the Geneva Convention bridged this gap in the law by banning collective sanctions “at any time at any place whatsoever,” thereby

20. For a compelling article on how, even before September 11, war rhetoric has been employed to justify harsh domestic law enforcement initiatives and paved the way for similar abuses in the name of the war on terror, see James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009).

21. WILLIAM J. CHAMBLISS, *Drug War Politics: Racism, Corruption, and Alienation*, in CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 295, 302 (Darnell F. Hawkins et al. eds., 2003).

22. Shane Darcy, *Prosecuting the War Crime of Collective Punishment: Is It Time To Amend the Rome Statute?*, 8 J. INT'L CRIM. JUST. 29, 41 (2010).

23. The Hague Convention defined collective punishment as a penalty “inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.” Hague Regulations Respecting the Laws and Customs of War on Land, art. 50, Oct. 18, 1907, 36 Stat. 2295.

24. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 33, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention] (“No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.”).

25. See generally Darcy, *supra* note 22 (discussing the development of collective punishment as both an international humanitarian law and as a war crime).

bringing the “rules on collective punishment into line with modern criminal law standards.”²⁶ Today, the international legal community considers the prohibition on collective sanctions to be customary international law²⁷ and therefore binding on all states.²⁸

Although international humanitarian law governs only the conduct of states engaged in armed conflict or acting as an occupying power, the prohibition against group sanctions is not limited to humanitarian law. International human rights law, relating to the basic rights of all humans everywhere and at all times, also forbids imposition of collective punishment.²⁹ In light of the increased use of mili-

26. *Id.* at 33.

27. Customary international law has been defined as “rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act in that way.” SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984). From this definition two elements are considered to determine whether a law is “customary” and therefore binding on the state: state practice and *opinio juris*. *Opinio juris* is a somewhat vague subjective obligation, essentially, a belief on behalf of a state that it is bound to the law in question, often demonstrated by the existence of a rule of law indicating that the state views the practice as obligatory. The state practice element, typically evidenced by treaties or other international instruments, is established by the traditional actions of countries in their relations with each other. See James D. Fry, *Gas Smells Awful: U.N. Forces, Riot-Control Agents, and the Chemical Weapons Convention*, 31 MICH. J. INT’L L. 475, 531 (2010) (discussing definitions of *opinio juris* and state practice); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 236 (1988) (“Collective resolutions by States in international organizations are not sufficient by themselves to generate customary norms. There has to be evidence of additional State practice which is consistent with those collective resolutions.”).

28. Although the United States Supreme Court has not explicitly recognized the binding effect of customary international law, Justice Kennedy’s opinion in *Roper v. Simmons*, which freely cited international norms as persuasive authority, may signal a new willingness to accept international law as a framework by which to measure domestic jurisprudence. 543 U.S. 551, 575–80 (2005). *But see* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 743–51 (2004) (Scalia, J., concurring) (denouncing the use of international law in constitutional interpretation). Additionally, the United States is a signatory state to the Geneva Conventions, which, as noted above, proscribes collective punishment. Geneva Convention, *supra* note 24; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (finding Common Article 3 of the Geneva Conventions applicable to petitioner’s argument concerning the use of military commissions to try “enemy combatants”). For a thorough review of the multitude of institutions charged with developing and interpreting international humanitarian law, see David Weissbrodt, *The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law*, 31 U. PA. J. INT’L L. 1185 (2010).

29. See Shane Darcy, *Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel*, 21 PENN ST. INT’L L. REV. 477, 486 (2003) (noting that the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights both contain provisions banning the use of collective punishment); see also Usama R. Halabi, *Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis*, 5 TEMP. INT’L & COMP. L.J. 251, 258 (1991) (discussing the interplay between international humanitarian law and human rights law); Andrew L. Strauss, *Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a Peoples Assembly*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 489, 502 n.39 (1999) (“Numerous of the humanitarian international law and human rights conventions prohibit collective punishment.”).

tarized police tactics on inner-city populations and the aggregate harms imposed on entire communities as a result, application of the precepts of humanitarian law to contemporary zero-tolerance policing is, in any event, appropriate. Moreover, the norm against group sanctions is “drawn not only from progressive humanitarian limitations on the conduct of warfare but also from basic concepts of individual responsibility to be found in human rights and criminal law.”³⁰

B. Defining “Punishment”

It is worth emphasizing that the “punishment” imposed upon individuals through illegal collective punishment regimes is not narrowly defined as sentences of punishment handed down from criminal courts under penal law. Rather, it encompasses “penalties of any kind inflicted on persons or entire groups of persons.”³¹ Typically, open warfare has been the genesis of illegal collective punishment, but the tactic is also employed in asymmetrical conflicts that defy conventional definitions of antagonists.

Israeli policy in the Israeli-Palestinian conflict has, for instance, been frequently condemned as collective punishment. Scholars and human rights activists have criticized conduct such as razing homes of suspected terrorists, restricting Palestinian employment opportunities and freedom of movement, reducing supplies of electricity, and indiscriminate bombing in occupied territory as illegal group sanctions, which punish entire communities for the crimes of relatively few terrorists.³² The United States’ policy of destroying the

30. Darcy, *supra* note 22, at 31, 38–41 (citation omitted).

31. Darcy, *supra* note 29, at 488 (discussing elements of collective punishment as an international humanitarian law).

32. *Id.* (citing examples of Israel’s imposition of collective punishment, including demolition of homes); Jeanne Mirer, *White Paper on the Legal Issues Implicated in the Most Recent Israeli Attacks on Gaza*, 65 GUILD PRAC. 172, 172 (2008) (arguing that Israel’s bombardment of Gaza in December 2008 and January 2009 constituted collective punishment); David Weissbrodt, *The Approach of the Committee on the Elimination of Racial Discrimination to Interpreting and Applying International Humanitarian Law*, 19 MINN. J. INT’L L. 327, 357 n.139 (2010) (arguing that Israel’s restrictions on the free movement of Palestinians deprives them of access to legal employment, amounting to collective punishment). *But see* ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 172–81 (2002); Justus Reid Weiner & Avi Bell, *The Gaza War of 2009: Applying International Humanitarian Law to Israel and Hamas*, 11 SAN DIEGO INT’L L.J. 5, 24–27 (2009) (arguing that Israel has not engaged in illegal collective punishment).

homes of suspected insurgents in Iraq has likewise been criticized.³³ India's arbitrary search-and-seizure practices in Dalit communities, those of the so-called untouchables, have drawn similar condemnation as collective punishment.³⁴ And the Sri Lankan government's indiscriminate policing of Tamil neighborhoods during its conflict with the Liberation Tigers of Tamil Eelam (Tamil Tigers), which resulted in arbitrary detention of civilians, destruction of property, and instances of brutality, was denounced by human rights activists as collective punishment.³⁵

Each of the dominant powers in these diverse conflicts resorted to group sanctions, often imposed under the guise of law enforcement, that in many respects mirror the sanctions imposed upon domestic urban communities targeted for OMP. Moreover, as discussed in more detail below, the justification for the policies typically mirrors the justification for aggressive zero-tolerance policies in these communities: disarmament of civilians and suppression of criminal behavior viewed as endemic within the targeted community.

C. *The Community Nature of Zero-Tolerance Policing*

Irrespective of its expression in terms of specific sanctions, collective punishment is fundamentally a means of segregating and controlling a targeted population through various forms of intensive, pervasive, and indiscriminate policing. So too is Compstat-based OMP. Law enforcement identifies discrete geographical areas experiencing high crime rates, invariably poor communities of color,³⁶ and imposes collective punishment in those areas to control and disarm the entire targeted population. The punishment takes the form of indiscriminate *Terry stops*³⁷ to search for weapons and con-

33. Ronald C. Kramer & Raymond J. Michalowski, *War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq*, 45 BRIT. J. CRIMINOLOGY 446, 452 (2005) (criticizing as collective punishment the destruction of suspected insurgent homes in Iraq).

34. Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255, 295-300 (2008) (describing discriminatory policing measures directed at Dalits, including collective punishment in the form of "subject[ing] entire Dalit communities to violent search and seizure operations in search of one individual").

35. Matthew Solis et al., *International Legal Updates*, 15 No. 2 HUM. RTS. BRIEF 28, 35 (2008).

36. See Fagan & Davies, *supra* note 10, at 462, 495 (noting that zero-tolerance policing is disproportionately concentrated on poor, minority communities and that the concentration of street stops in New York's poor neighborhoods exceeded those neighborhoods' share of city-wide crime and disorder).

37. *Terry v. Ohio*, 392 U.S. 1 (1968) (requiring that police have an articulable, reasonable suspicion that "criminal activity may be afoot" to stop or "seize" a suspect and that police

traband, increased instances of police brutality,³⁸ restrictions on freedom of movement, arbitrary arrest and detention, denial of due process, loss of housing, employment restrictions, and deportation.³⁹ The individual culpability for the violent crime that provokes the intensive policing of the area is irrelevant. Similarly insignificant is the individual culpability as to the actual quality-of-life offense charged. The arrests are significant only as to their perceived impact on rates of violent crime.⁴⁰

From a purely functional perspective, group sanctions are often associated with the inability to identify individual wrongdoers within a targeted community. Sanctions are imposed on the entire community to suppress crime, to force identification of wrongdoers, or to coerce the group to self-govern. Where identification of individual wrongdoers is impossible or impractical, collective penalties have historically functioned to deter such wrongful conduct.⁴¹ This rationale has been advanced by at least one commentator in support of group sanctions against Palestinians in occupied territory.⁴² And with fewer critics, prison and military officials frequently suppress criminal conduct and force identification of wrongdoers through forms of collective punishment.⁴³

Though not acknowledged by its proponents, zero-tolerance policing, as currently executed, is based on this same deterrence rationale. Policymakers have come to believe that deterring violent crime through traditional law enforcement techniques is both inefficient and ineffective. They have therefore resorted to what amounts to collective punishment, as the following case study demonstrates.

have an articulable suspicion that the suspect is armed before conducting a "frisk" of the outside of the suspect's clothing).

38. See *infra* note 113 and accompanying text.

39. See *infra* Part III.A-D.

40. See *infra* Part II.B.

41. Modern group liability regimes that do not implicate international humanitarian law include shareholder liability for corporate harms, vicarious liability of employers for employee conduct, dram shop laws, and conspiracy law. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 361-73, 398 (2003); see also Saul Levmore, *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 CHI.-KENT L. REV. 85, 88-89 (1995) (contrasting perceptions and reality of ancient versus modern laws on punishment).

42. DERSHOWITZ, *supra* note 32, at 174-81 (2002) (proposing collective punishment against Palestinians for nurturing a culture in which terrorism is celebrated).

43. See Levinson, *supra* note 41, at 352-62.

II. CASE STUDY: NEW YORK CITY'S "OPERATION IMPACT"

New York City employs a variation of Compstat-based zero-tolerance policing known as Operation Impact, popularly referred to by policymakers as "Compstat on steroids."⁴⁴ Operation Impact identifies discrete "hot spots," some as small as a single housing project, and "floods" these "impact zones" with rookie police officers.⁴⁵ In response to incidents of violent crime, police in these neighborhoods impose collective punishment through an indiscriminate barrage of degrading detentions, interrogations, searches, summonses, and misdemeanor arrests. Police activity in Brownsville, Brooklyn, one of the poorest sections of New York City,⁴⁶ illustrates this practice.

In one eight-block section of the neighborhood, police performed 52,000 "stop, question, and frisks" over a four-year period, nearly one stop per year for each of the area's 14,000 residents; 94% of those stopped were not arrested.⁴⁷ During one month, police averaged sixty-one stop-and-frisks a day.⁴⁸ The highly concentrated, indiscriminate policing of these eight residential blocks is analogous to the counterinsurgency strategy known as a cordon and search. During these operations, troops seal off certain areas to conduct search-and-seizure operations not based on individualized suspicion, but on geography. Because cordon-and-search tactics are indiscriminate and have resulted in abuse of civilians living within the targeted areas—including beatings and arbitrary detentions—scholars and human rights activists have condemned the practice as a violation of the Geneva Conventions, and as collective punishment since it "penalizes communities for the crimes of a few members."⁴⁹

44. Lueck, *supra* note 11. The paramilitary branding of Operation Impact relates to the use of war metaphors. See *supra* note 18 and accompanying text. Announcing the launch of the program, New York City Mayor Michael Bloomberg resorted to war rhetoric, describing it as further evidence of a "relentless assault against crime." Press Release, Office of the Mayor, Mayor Michael R. Bloomberg and Police Commissioner Raymond W. Kelly Announce Operation Impact (Jan. 9, 2003) (on file with author). Commissioner Raymond Kelly labeled the initiative an "all out blitz on crime." *Id.*

45. Lueck, *supra* note 11.

46. See NEW YORK CITY, DEP'T OF CITY PLANNING, BROOKLYN COMMUNITY DISTRICT 16 REPORT (2010), available at <http://www.nyc.gov/html/dcp/pdf/lucds/bk16profile.pdf>.

47. See Rivera et al., *supra* note 13.

48. *Id.*

49. Solis et al., *supra* note 35. The United States military's use of cordon-and-search tactics in search of Taliban suspects in Afghanistan has been condemned by commentators. Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 859-60 (2010) (criticizing the U.S. military for its failure to conduct a single "Article 5"

During its conflict with the Tamil Tigers, the Sri Lankan government used this tactic against civilian populations to locate suspected insurgents and seize weapons.⁵⁰ Sri Lankan police and military officials frequently sealed off residential Tamil neighborhoods to conduct house-to-house search-and-seizure operations.⁵¹ Police made mass arrests of Tamil civilians during these operations for failing to carry identification within the sealed-off areas, a practice also finding parallels in the policing of areas with high concentrations of low-income housing in New York City, where failure to carry identification routinely results in arbitrary arrests for criminal trespassing.⁵²

The Ugandan government has also used cordon-and-search tactics during forced disarmament campaigns in the remote Karamoja region of northeastern Uganda, provoking criticism by human rights groups.⁵³ Soldiers from the Ugandan People's Defense Forces targeted civilian populations near the Kenya-Uganda border during these campaigns.⁵⁴ This resulted in extreme human rights violations, including torture.⁵⁵ The Ugandan government's rationale for the use of the tactic—the disarmament of civilians—parallels the NYPD's justification for the intensive policing in high-crime areas such as Brownsville: to get guns off the street.⁵⁶

It should be emphasized that the harm caused by the military in the cordon-and-search operations discussed here—and also by police

hearing to determine whether Afghans detained in cordon-and-search operations are “enemy combatants” or civilians).

50. See Solis et al., *supra* note 35.

51. During one such operation in six separate Tamil neighborhoods police arrested anyone without “valid identification” and ultimately arrested more than 900 people. See *920 Tamils Arrested in Major Cordon, Search Operation in Colombo*, TAMILNET (Dec. 31, 2005), <http://www.tamilnet.com/art.html?catid=13&artid=16702>.

52. See *infra* Part II.C.2.

53. HUMAN RIGHTS WATCH, “GET THE GUN!”: HUMAN RIGHTS VIOLATIONS BY UGANDA'S NATIONAL ARMY IN LAW ENFORCEMENT OPERATIONS IN KARAMOJA REGION 9 (Sept. 11, 2007), available at <http://www.hrw.org/en/node/10693/section/1>; David B. Kopel, Paul Gallant & Joanne D. Eisen, *Human Rights and Gun Confiscation*, 26 QUINNIPIAC L. REV. 385, 395–401 (2008) (describing Uganda's cordon-and-search disarmament campaigns).

54. Kopel, Gallant & Eisen, *supra* note 53, at 389.

55. HUMAN RIGHTS WATCH, *supra* note 53, at 29–30.

56. See Rivera et al., *supra* note 13 (discussing firearm confiscation campaigns by police and military officials which have frequently resulted in human rights abuses). Common to all these campaigns are arbitrary search-and-seizure policies not dissimilar to the NYPD's. See Kopel, Gallant & Eisen, *supra* note 53, at 388–419 (describing human rights abuses associated with gun policies in Kenya, Uganda, and South Africa, where the “firearm-free zones” result in “massive rights violations throughout the nation, including warrantless searches of any persons present in such a zone”); *infra* note 79 (discussing efficacy of disarmament efforts in Brownsville).

conduct in neighborhoods such as Brownsville—extend beyond the searches and seizures themselves.⁵⁷ Nevertheless, the arbitrary exercise of state power to search and seize individuals can itself amount to a human rights violation. A recent decision by the European Court of Human Rights (ECHR) is illustrative. In *Gillan and Quinton v. United Kingdom*, the ECHR determined that the practice of stopping and searching individuals within defined geographic areas in London without individualized suspicion of criminal activity violates the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention).⁵⁸ The ECHR's condemnation of London's search-and-seizure policy was based in part on statistical evidence that the police power was disproportionately used against blacks and Asians,⁵⁹ a characteristic London's policy shares with that of New York City.

57. As discussed in Parts II.B-D & III.A-B, these harms included arbitrary arrest, denial of due process, de facto segregation, deportation, loss of housing, and restrictions on employment and educational opportunities.

58. *Gillan and Quinton v. United Kingdom*, App. No. 4158/05, 50 Eur. H.R. Rep. 1105, 1148-50 (2010), available at <http://www.echr.coe.int/ECHR/EN/hudoc> (follow "HUDOC database" hyperlink; then type "Gillan" into "Case Title" and click search; then follow "Case of Gillan and Quinton v. The United Kingdom" hyperlink). The Convention was approved by the Council of Europe in the aftermath of World War II to establish and protect an array of human rights norms. Article 34 of the Convention allows the ECHR to accept applications from "any person . . . or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and 14 art. 34, Nov. 4, 1950, E.T.S. No. 005, 213 U.N.T.S. 221 (Council of Europe). The petitioners in *Gillan* were two individuals stopped and searched near a demonstration taking place at an arms fair in East London in 2003. *Gillan and Quinton*, 50 Eur. H.R. Rep. at 1105. Constables searched the petitioners pursuant to Sections 44-47 of the United Kingdom's 2000 Terrorism Act (Act). *Id.* at 1110-13. The Act allows for suspicionless searches of individuals in defined geographic areas with certain additional limitations, including a provision limiting the searches to "articles of a kind which could be used in connection with terrorism." Terrorism Act, 2000, c. 11, § 45(1)(a). The petitioners argued that their rights under Articles 5 (right to liberty), 8 (right to privacy), 10 (freedom of expression), and 11 (freedom of assembly) of the Convention had been violated. *Gillan and Quinton*, 50 Eur. H.R. Rep. at 1138. The ECHR found that the authority granting stop and search powers and the powers themselves—applicable throughout Greater London during a 28-day renewable period—were "neither sufficiently circumscribed nor subject to sufficient legal safeguards against abuse" to withstand scrutiny. *Id.* at 1150. Thus, the Court held that the stop-and-search police power of Sections 44 and 45 of the Act violates Article 8. *Id.* The Court did not consider the petitioners' remaining claims pursuant to Articles 5, 10, and 11. *Id.*

59. See *Gillan*, 50 Eur. H.R. Rep. at 1133-35, 1150.

A. Arbitrary Search and Seizure

Discrimination based on the perception of the shared characteristics of a minority group, such as young blacks and Latinos living in and around public housing, is a form of collective punishment. Negative judgments are formed about the populations as a whole, based on characteristics that are perceived to be common among all group members. Such stereotypes result in discriminatory policies directed at an individual “irrespective of whether she personally possesses those characteristics.”⁶⁰ In a law enforcement context, the perception of the inherent criminality of a minority group serves as justification for collective punishment policies to deter criminal behavior viewed as endemic within the community.

Police in India, for example, view Dalits as inherently criminal, which justifies “violent” search-and-seizure programs under a “collective punishment theory” against entire Dalit communities.⁶¹ Muslim men in the United States face similar discrimination as suspected terrorists, resulting in arbitrary detentions.⁶² This phenomenon is also evident in New York City’s racially discriminatory stop-and-frisk policy. The overwhelming focus on young blacks and Latinos in areas identified by Compstat feeds the stereotype of the inherent criminality of poor men of color and serves to justify indiscriminate policing of this targeted population.

Of the approximately 580,000 people stopped and searched in New York City in 2009, nearly 90% were black or Latino, yet they were less likely to have committed an offense than white people.⁶³ Between 2004 and 2009, New York City police stopped and frisked 2.5 million people, the overwhelming majority of whom were black or Latino.⁶⁴ Police concentrated these campaigns in poor communi-

60. Levinson, *supra* note 41, at 414; see also Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 1005 n.392 (2004) (discussing guilt by association as a form of collective punishment).

61. Narula, *supra* note 34, at 296 (noting some Indian police justify collective punishment of Dalit communities because Dalits are viewed as inherently criminal).

62. Amos N. Guiora, *Transactional Comparative Analysis of Balancing Competing Interests in Counter-Terrorism*, 20 TEMP. INT'L & COMP. L.J. 363, 364-71 (2006) (discussing detention of Muslims based on guilt by association in the aftermath of September 11).

63. Baker, *supra* note 12. The Terry stop data only became public as the result of litigation. See Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 141-44 (discussing Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001), the landmark racial profiling suit brought by the Center for Constitutional Rights, which forced the NYPD to provide stop-and-frisk data).

64. See Ray Rivera & Al Baker, *Police Cite Help from Stop-and-Frisk Data in 170 Cases*, N.Y. TIMES, July 17, 2010, at A15.

ties of color.⁶⁵ This practice causes not only an individual harm, which involves a humiliating encounter with a police officer, but also a communal harm to both the targeted segment and the entire community. As one social critic opined, “whole communities have been effectively ‘profiled’ for the suspicious combination of being dark-skinned and poor, thanks to the ‘broken windows’ or ‘zero-tolerance’ theory of policing”⁶⁶

The ever-increasing focus on people of color as criminal suspects fuels and reinforces police belief in their inherent criminality which, in turn, leads to ever-increasing numbers of wrongful arrests.⁶⁷ Even if there is no arrest, however, the NYPD retains the personal data of every individual stopped and searched. The personal data is maintained by police and used to investigate future crimes.⁶⁸ Thus, the unremarkable fact that a person of color was once confronted by a police officer is used as evidence of that individual’s future criminality, further perpetuating and legitimizing the perception of the inherent criminality of young black and Latino men,⁶⁹ a form of guilt by association that has drawn comparison to Jim Crow-era laws.⁷⁰

65. See Fagan & Davies, *supra* note 10, at 462, 495.

66. Barbara Ehrenreich, *Is It Now a Crime To Be Poor?*, N.Y. TIMES, Aug. 9, 2009, at WK9.

67. Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes To Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1093 (2008) (“The . . . ever-increasing focus on blacks as suspects causes ever-increasing arrests and convictions of blacks, thus further feeding police belief in black criminality as central to black character.”). Professor Taslitz’s argument centers on wrongful convictions for serious crimes. The argument is perhaps more relevant with regard to quality-of-life offenses because wrongful arrests are common and the guilt or innocence of the individual is virtually never contested in court. See *infra* Part III.C-D.

68. The NYPD defended the policy of retaining personal data on everyone searched by citing stop-and-frisk data that purportedly helped solve 170 violent crimes. A review of the data by the *New York Times*, however, concluded that the evidence was equivocal and often helped “speed[] the investigation along,” rather than actually solve the crime. See Rivera & Baker, *supra* note 64. In the wake of the release of the stop-and-frisk data, a law was passed banning the retention of personal data of people stopped but not arrested. However, the NYPD continues to retain the data in paper form, arguing that the law applies only to electronically stored data. Rocco Parascandola, *NYPD Brass Says Stop-and-Frisk Records Aren’t Dead: Just Use Paper, Not Computers*, N.Y. DAILY NEWS, July 22, 2010, at 2.

69. See Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 815-16 (1999) (arguing that OMP reinforces the social norm of black criminality); see also Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005) (discussing police perception of the inherent criminality of Latinos, among other “brown” people).

70. See Bob Herbert, Op-Ed., *Jim Crow Policing*, N.Y. TIMES, Feb. 2, 2010, at A27 (calling the use of Terry stops in New York City “Jim Crow policing,” which has led to widespread degradation and harassment of black and Latino New Yorkers); see also Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1282-86 (2000) (considering that OMP is a pretext to stop and frisk poor people of color). Moreover, the practice of retaining the personal

Proponents of OMP essentially condone this form of collective punishment as an acceptable harm.⁷¹ Scholars have gone so far as to propose differing levels of constitutional protections, arguing that police should be granted extra-constitutional latitude in communities with intractable crime problems and that law-abiding members of the community desire such behavior.⁷² The evidence for these assertions is lacking.⁷³ Moreover, whether the majority desires such illegal behavior is beside the point: constitutional constraints are in large part grounded in the rights of individuals, whatever a majority may desire.

Advocates of Compstat-based, zero-tolerance policing also contend that stopping and searching largely innocent people in targeted areas is valid because young blacks and Latinos are the ones committing violent crime and “that is where the vast majority of violent crime occurs.”⁷⁴ In addition to unduly minimizing the impact of the

data of individuals arrested but not convicted of a crime has also been condemned as a Human Rights violation by the ECHR. *Anna Peterson, S. v. United Kingdom: The European Court of Human Rights Overturns the United Kingdom's Procedure for the Indefinite Retention of Unconvicted Persons' Personal Data*, 18 TUL. J. INT'L & COMP. L. 557 (2010) (discussing the ECHR's decision in *S. v. United Kingdom*, App. Nos. 30562/04 & 30566/04, 48 Eur. Ct. H.R. 50 (2009), which held that the retention of personal data of individuals arrested but not convicted of a crime violates Article 8 of the Convention).

71. Forman, *supra* note 20, at 374 (noting that James Q. Wilson, one of the principal architects of OMP, concedes that innocent people, disproportionately black and Latino men, will be stopped and searched); Schragger, *supra* note 2, at 383 (“Proponents of community standards do not defend these [order maintenance] policies using the traditional language of rights. Instead, they mount a territory-based offensive grounded in a robust conception of community self-determination: territorially defined communities should be permitted to depart from background constitutional norms under certain circumstances.”); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2251 (1998) (“The ‘broken windows’ argument claims that broad police discretion is necessary for effective crime prevention, even if such discretion leads to some infringements on civil rights.”).

72. See, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1278 (1994) (noting that the disparate impact law enforcement practices have in black communities may be due to the “state apparatus responding sensibly to the desires . . . of black communities . . . for protection against criminals preying upon them”).

73. Cf. Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 215–22 (1998) (challenging assertion that there was support for aggressive enforcement of Chicago’s anti-loitering statute within the black community, and arguing that the anti-gang legislation had been originated by white politicians and not by the African American residents of the communities where the law was most aggressively enforced, as proponents of the law claimed).

74. Heather MacDonald, *Fighting Crime Where the Criminals Are*, N.Y. TIMES, June 26, 2010, at A17 (“[Terry] stops happen more frequently in minority neighborhoods because that is where the vast majority of violent crime occurs . . . Blacks and Hispanics together accounted

policy on entire communities, this argument can be viewed as a form of “aversive racism,” a theory holding that subtle, even unconscious prejudice has replaced overt racism in contemporary society.⁷⁵ This form of discrimination presents barriers to successful disparate impact arguments—in courts⁷⁶ as well as in the public consciousness—because even social policies with radically disparate impacts such as the NYPD’s stop-and-frisk program are rationalized in non-racial terminology by commentators who do not view themselves as racially biased.⁷⁷

Professor Gary Stewart has pointed out how this tendency specifically relates to the “deracialization” of the broken windows thesis, arguing that its proponents have constructed a false “symbolic battle between a ‘raceless’ vagrant and an entire community,” which provides race-neutral “arguments that are in fact deeply racial in ‘subtle, rationalizable ways.’”⁷⁸ Compstat has served to further insulate critical examination of the stop-and-frisk policy. Incidents previously understood as simple expressions of racial and socioeconomic bias by police have been effectively outsourced to a statistical program, freeing proponents of OMP to contend that racial profiling is not discriminatory but merely a strategic expenditure of law enforcement resources within communities identified by Compstat.

The NYPD and other advocates of large-scale stop-and-frisk operations carried out against targeted populations argue that all the adverse consequences described above are relatively trivial harms measured against the seizure of significant amounts of contraband, including guns, in high-crime areas.⁷⁹ However, this would be true

for 98 percent of reported gun assaults. And the vast majority of the victims of violent crime were also members of minority groups.”); see also HEATHER MAC DONALD, *ARE COPS RACIST?* 28-34 (2003) (arguing that race is a valid indicator of proclivity to commit certain crimes).

75. Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1904–05, 1916 (2009).

76. Plaintiffs challenging a government policy that negatively impacts minority groups must prove intentional discrimination; solely demonstrating a policy’s disparate impact based on race is insufficient. See *Washington v. Davis*, 426 U.S. 229, 238–41 (1976).

77. Professor Girardeau Spann’s essay on “post-racial discrimination” provides insight into the role that subtle forms of unconscious discrimination play in eroding disparate impact arguments in the post-Obama era. See Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133 (2010).

78. Stewart, *supra* note 71, at 2268–72. See also Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 263 (2007) (“Unlike state violence inflicted in the Jim Crow era explicitly to reinstate blacks’ slave status, today’s criminal codes and procedures operate under the cloak of colorblind due process.”).

79. In the over 52,000 stops and searches performed in one eight-block section of Brownsville, Brooklyn, twenty-five guns were recovered over four years, slightly more than six guns

to a certain degree in any area targeted for such intensive policing.⁸⁰ Collective punishment, after all, is not viewed as a violation of international law because it is ineffective at achieving the desired objectives of those who carry it out; indeed, it has been imposed as a deterrent to criminal behavior with varying degrees of success throughout human history.⁸¹ It is the corruption of the post-liberal norm of individual culpability that results in human rights violations.⁸²

annually. Rivera et al., *supra* note 13. Considering that over 90% of the tens of thousands searched by police had committed no offense, the collective punishment imposed on the community in the form of arbitrary “stop, search, and question” operations also raises serious proportionality concerns. See Weiner & Bell, *supra* note 32, at 24 (“The bar on collective punishment forbids the imposition of criminal-type penalties on individuals or groups on the basis of another’s guilt, or the commission of acts that would otherwise violate the rules of distinction and proportionality, or both.”).

80. The extent to which the results of large-scale stop-and-frisk operations would be similar in non-targeted areas is of course unknowable. But, some evidence suggests the causal connections lie in the illegal policing strategy rather than in the excessive criminality of the targeted population. The racial disparity in marijuana arrests in New York City is illustrative of this point. Although national surveys consistently demonstrate that white people are more likely to use marijuana than blacks and Latinos, 83% of those arrested for marijuana possession from 1998 to 2007 were black or Latino. See HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997-2007, 17 (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf.

81. See Levinson, *supra* note 41, at 352-62 (reviewing the history of group sanctions).

82. Contemporary examples of implementing collective punishment to deter criminal behavior have met with less success, largely as a result of the hostility they engender in the targeted communities. Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT’L SECURITY L. & POL’Y 1, 26 (2009) (“The British government learned painfully that internment of suspected Northern Ireland terrorists was viewed among Northern Irish communities as a form of collective punishment that fueled violent nationalism, and detention helped dry up community informants.”). This too can be said of OMP. The near constant harassment of blacks and Latinos going about their lives in perfectly legal ways breeds mistrust of police, which leads to an unwillingness to cooperate with law enforcement, as evidenced by the “stop snitching” movement. See Howell, *supra* note 3, at 307-08 (arguing that the disparate impact of OMP on people of color undermines police legitimacy and may ultimately be criminogenic); Taslitz, *supra* note 67, at 1139-40 (arguing that repeated racial stereotyping undermines trust in the police and the legitimacy of law enforcement and penalizes even those members of the affected racial group who are never arrested). Moreover, it is not unreasonable to attribute the incredible acquittal rates in some areas targeted for OMP to the use of collective punishment against targeted minorities. See, e.g., Chris Herring, *Bronx Acquittals Set Record – Borough Is Marred by High Arrest Rate, Tense Relations; ‘Let the Guy Walk,’* WALL ST. J., May 4, 2010, at A24 (suggesting that the 43% conviction rate in the Bronx in 2009 was attributable to the fact that the borough has the highest arrest rate in New York City).

B. Arrests Lacking Probable Cause

Much of the scholarship critical of aggressive enforcement of quality-of-life ordinances concentrates on the broad discretion these statutes provide.⁸³ However, police officers engaged in zero-tolerance policing have little or no discretion; they are constrained by the very nature of the strategy not to tolerate disorder.⁸⁴ The vagueness of the laws simply facilitates execution of the policing regime. “What makes the system work,” as Professor Bernard Harcourt explains, “is the availability of broad criminal laws that allow the police to take someone off the streets because they look suspicious [T]he desire for order excuses the questionable legality of the arrests.”⁸⁵

Because arrests for quality-of-life offenses could, to a certain extent, be executed in any neighborhood,⁸⁶ excessive discretion is exercised by the policymakers, not by the lower-level police officers who implement the strategy against targeted populations. These decision-makers deploy officers in discrete geographic locations and measure the officers’ efficiency in terms of numbers of arrests made and summonses issued.⁸⁷ The arrests are significant only in terms of their volume and what policymakers claim are the corresponding reductions in violent crimes. The culpability of the individual is not part of the calculus. The arrests themselves are touted as evidence of

83. See Garnett, *supra* note 1, at 3 (“[C]riminal procedure scholars concentrate primarily on the constitutional questions raised by the discretion afforded police officers by order-promoting criminal laws.”); see also Livingston, *supra* note 1, at 591-95 (critiquing police discretion in community policing). See generally David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999) (reviewing scholarship supporting police discretion); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (discussing the constitutional scrutiny used to evaluate community policing).

84. Anecdotal evidence suggests that police officers view OMP as a waste of valuable resources and that aggressive execution of the strategy has undermined their respect within the community. LEVINE & SMALL, *supra* note 80, at 49 (noting that police officers interviewed reported marijuana possession arrests were a “waste of time” that needlessly occupy narcotics squads).

85. Harcourt, *supra* note 9, at 344.

86. See Howell, *supra* note 3, at 307 (“The person arrested for having an open beer on a neighborhood stoop is fully aware that such rules are flouted in Central Park during classical music performances with no repercussions.”); see also *supra* note 80 and *infra* note 102 and accompanying text (discussing racial disparity in enforcement of marijuana laws).

87. Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 239 (2005) (reporting the results of an empirical study on broken windows policing, which used a methodology focused on the volume of misdemeanor arrests and corresponding violent crime rates because that “is consistent . . . with the way the NYC police administered [broken windows policing]”).

the efficacy of the program, creating incentive for ever-increasing numbers of misdemeanor arrests in areas experiencing upticks in violent crime rates.⁸⁸

Over 33,000 arrests and 360,000 summonses were issued in discrete impact zones in 2004.⁸⁹ In the twenty-eight-month period following the launch of the operation, police made 72,000 arrests in the targeted areas.⁹⁰ These arrests were largely made by rookie police officers assigned to impact zones as “field training.”⁹¹ Many of these arrests are made without probable cause, and many, if not most, are otherwise tainted by widespread violations of *Terry*’s reasonable suspicion standard. In nearly half of the encounters, police cited “other” or “furtive movements” as the basis for the search, notoriously vague bases for which to initiate a street stop.⁹² In areas “with large clusters of public housing,” as many as 30% of all stops from 2003 through March 2010 were conducted on suspicion of trespassing,⁹³ which can essentially be established by an individual’s mere presence in or on the grounds of low-income housing.⁹⁴

Arrests for criminal possession of marijuana—yet another example—suggest systemic false reporting of the manner in which police recover marijuana. New York State decriminalized the possession of less than one ounce of marijuana in 1977.⁹⁵ The State Legislature

88. See Press Release, Office of the Mayor, *supra* note 44 (trumpeting arrest numbers as evidence of efficacy of Operation Impact). *But see infra* Part III.E (discussing the lack of empirical data supporting assertion that violent crime is reduced by aggressive OMP). For a discussion on the malleability of violent crime rates, see *infra* note 108 and accompanying text.

89. Press Release, Office of the Mayor, Mayor Michael R. Bloomberg and Police Commissioner Raymond W. Kelly Re-Launch Operation Impact (Jan. 13, 2005).

90. Press Release, Office of the Mayor, Mayor Bloomberg Discusses Crime Reduction Strategies at Citizen’s Crime Commission Breakfast (May 2, 2005).

91. Press Release, Office of the Mayor, *supra* note 44; see also Lueck, *supra* note 11 (reporting that Operation Impact contained 1038 rookie officers supervised by approximately 200 experienced officers). The supervising officers, known as field training officers, “are often the primary people who teach rookies that it is appropriate to use command presence and physical force when they are merely disrespected.” Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 739 (2009).

92. Rivera et al., *supra* note 13; see Craig S. Lerner, *Judges Policing Hunches*, 4 J.L. ECON. & POL’Y 25, 49–54 (2007) (discussing the ease and incentive for police officers to justify *Terry* stops by citing “furtive movement” and “high-crime neighborhood” as the alleged basis of reasonable suspicion); see also Fagan & Davies, *supra* note 10, at 476 (noting that the “sharp decline” in the “evidentiary quality” of arrests and a 60% increase in the number of dismissals roughly coincided with the introduction of OMP in New York City).

93. Al Baker & Janet Roberts, *Judge Criticizes Stop-and-Frisk Police Tactics in New York City Housing Projects*, N.Y. TIMES, Dec. 23, 2010, at A29.

94. See *infra* Part II.C.2.

95. See Jim Dwyer, *Whites Smoke Pot, but Blacks Are Arrested*, N.Y. TIMES, Dec. 22, 2009, at A24.

determined that possession of less than twenty-five grams of marijuana constitutes a "violation" or, in other words, a non-criminal offense.⁹⁶ To be charged with marijuana possession as a misdemeanor, the marijuana must be "burning or open to public view."⁹⁷ That police routinely recover marijuana from pockets or handbags or in areas otherwise concealed from public view during the stop-and-frisk campaigns discussed above is axiomatic. Yet marijuana possession is nearly always charged as a misdemeanor because police officers contend that the defendant possessed the drug in a manner that was "open to public view" at the time of the arrest. In 2007, 2008, and 2009, misdemeanor marijuana possession was charged more than any other offense in New York City.⁹⁸ Marijuana possession as a violation, however, was not among the top eighteen offenses charged.⁹⁹ It strains credibility that marijuana was actually in plain view during all of these arrests. Tens of thousands of young black and Latino males are not walking their neighborhood streets smoking marijuana or holding it in plain view. The only fair inference is that police systemically swear to false criminal complaints for misdemeanor marijuana possession, and prosecutors tacitly condone or encourage the practice.

Moreover, 87% of those arrested for marijuana possession in 2009 were black or Latino, even though surveys have shown that white people are more likely to use marijuana.¹⁰⁰ The racial disparity of the marijuana arrests mirrors the racial disparity reflected in the stop-and-frisk data.¹⁰¹ Consider again Brownville, Brooklyn. A Brownville resident is over 150 times more likely to be arrested for marijuana than a resident of the predominately white Upper East Side in

96. N.Y. PENAL LAW § 221.05 (McKinney 2008).

97. *Id.* § 221.10.

98. See CRIMINAL COURT ANNUAL REPORT 2007, *supra* note 7; CRIMINAL COURT ANNUAL REPORT 2008, *supra* note 7; CRIMINAL COURT ANNUAL REPORT 2009, *supra* note 7. Because the Criminal Court Reports listed only the top eighteen most common offenses, it is not clear how often, if ever, marijuana possession is charged as a violation. In my experience, I have never encountered marijuana possession charged as a violation unless it was discovered as the result of a search incident to an arrest for a different offense.

99. See sources cited *supra* note 98.

100. Dwyer, *supra* note 95.

101. See Guiora, *supra* note 62, at 366–67.

Manhattan.¹⁰² In 2007–09, nearly 90% of those charged with marijuana possession in New York were black or Latino.¹⁰³

C. Wrongful Arrests of Factually Innocent People

1. Root causes

Compstat is an outgrowth of decentralized or “community policing.” The theoretical basis of community policing is grounded in the notion that local precinct commanders are best positioned to respond to issues of local community concern.¹⁰⁴ Precinct commanders are accountable both to the community and to superiors for highly localized areas of criminal activity, or “hot spots,” within their precincts. The more stubborn the high-crime area, the more pressure the precinct commanders experience during twice-weekly Compstat meetings, where “careers and promotions can be made or lost.”¹⁰⁵ During these meetings, commanding officers are “grilled, and sometimes humiliated, before their peers and subordinates” for failures to reduce crime in their precincts.¹⁰⁶

The received wisdom on how best to reduce crime in these areas is zero-tolerance policing.¹⁰⁷ This creates incentives for precinct commanders to crack down on Compstat-identified areas, such as Brownsville, Brooklyn, by ordering frenzied stop-and-frisk operations, and mass misdemeanor arrests, which are already encouraged by arrest quotas for patrol officers.¹⁰⁸ Beyond merely undermining

102. Jim Dwyer, *A Smell of Pot and Privilege in the City*, N.Y. TIMES, July 21, 2010, at A18. In 2007–09, police arrested 3109 people out of every 100,000 Brownsville residents for marijuana possession. *Id.* In the predominately white Upper East Side of Manhattan, during that same period, police arrested approximately twenty people out of every 100,000 residents. *Id.*

103. *Id.*

104. See Schragger, *supra* note 2, at 431–33 (discussing increased localism of contemporary police practices).

105. See William K. Rashbaum, *Retired Officers Raise Questions on Crime Data*, N.Y. TIMES, Feb. 7, 2010, at A1.

106. *Id.*

107. See, e.g., Press Release, Office of the Mayor, *supra* note 90. (“We know that if seemingly petty offenses like jumping turnstiles and aggressive panhandling are left unchecked, they create the environment in which more dangerous crime flourishes.”).

108. A five-part series of articles published by the *Village Voice*, based on audio recordings made by two NYPD officers in Brooklyn and the Bronx, revealed a quota system in which officers were threatened with discipline and, in at least one case, fired for failing to make sufficient numbers of arrests, summonses, and stop-and-frisks. Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE (N.Y.C.), May 4, 2010; Graham Rayman, *The NYPD Tapes, Part 2: Bed-Stuy Street Cops Ordered: Turn This Place Into a Ghost Town*, VILLAGE VOICE (N.Y.C.), May 11, 2010; Graham Rayman, *The NYPD Tapes, Part 3: A Detective Comes*

the “evidentiary quality” of tens of thousands of misdemeanor arrests, the confluence of Compstat pressure, arrest quotas, and the steadfast faith in the correlation between mass misdemeanor arrests and reduced violent crime rates has resulted in widespread summary arrests of factually innocent people.¹⁰⁹

Many are arrested and jailed overnight for non-criminal offenses, such as disorderly conduct or carrying an open container of alcohol;¹¹⁰ others are simply swept up in aggressive order maintenance campaigns that bring such an incredible volume of questionable cases into the system that prosecutors decline to prosecute them.¹¹¹ Wrongful arrests are also attributable to the explosion in aggressive, hands-on encounters between citizens of color – entirely innocent of any wrongdoing – and inexperienced police officers.¹¹² Indeed, with

Forward About Downgraded Sexual Assaults, VILLAGE VOICE (N.Y.C.), June 8, 2010 [hereinafter Rayman, *NYPD Tapes 3*]; Graham Rayman, *The NYPD Tapes, Part 4: The Whistle Blower*, Adrian Schoolcraft, VILLAGE VOICE (N.Y.C.), June 15, 2010; Graham Rayman, *The NYPD Tapes, Part 5: The Corroboration*, VILLAGE VOICE, Aug. 25, 2010; see also Al Baker & Ray Rivera, *On Secret Tape, Police Press a Ticket Quota*, N.Y. TIMES, Sept. 10, 2010, at A1 (“[T]here is persuasive evidence of the existence of quotas.”); Jim Hoffer, *NYPD Officer Claims Pressure To Make Arrests*, WABC-TV, Mar. 3, 2010, <http://abclocal.go.com/wabc/story?section=news/investigators&id=7305356> (summarizing television interview with an NYPD officer discussing strictly enforced arrest and summons quotas); Rivera et al., *supra* note 13 (NYPD patrol officers reported a “floor” number of ten stops a month and felt “pressure” to make arrests).

Other precinct commanders have responded to Compstat pressure by simply manipulating crime statistics to reflect fewer violent crimes. See Al Baker & Janet Roberts, *New York City Crime Dips but Violent Crime Is Up*, N.Y. TIMES, Nov. 25, 2010, at A28 (discussing manipulation of Compstat data to indicate fewer annual index crimes); Rashbaum, *supra* note 105 (reporting that precinct commanders responding to Compstat pressure made “‘unethical’ and ‘highly unethical’ alterations to crime reports” to reflect fewer violent crimes); Rayman, *NYPD Tapes 3*, *supra*.

109. Rayner, *supra* note 7, at 1027 (commenting on the near impossibility of separating the innocent from the guilty in Criminal Court due to excessive case loads and noting that many innocent people are compelled to plead guilty to avoid the costs associated with litigating wrongful arrests); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 318 (2005) (noting that DNA exonerations demonstrate that many “actually innocent” people are wrongly convicted, and arguing that, in light of the spike in “low-level” misdemeanor arrests, many more innocent people have been convicted of less serious crimes); see also Fenton, *City Poised*, *supra* note 15, at 1A. Wrongful arrests for criminal trespassing are discussed separately in Part II.C.2.

110. See Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1170 (2004) (“[P]ublic order policing . . . allows the police to impose the sanction of twenty-four hours in jail on whomever they may choose.”). Indeed, consumption of alcohol on the street was the ninth most common offense charged in New York City in 2009. CRIMINAL COURT ANNUAL REPORT 2009, *supra* note 7, at 31.

111. In 2008, over 39% of cases resulted in outright dismissals or a form of dismissal known as an adjournment in contemplation of dismissal (ACD). CRIMINAL COURT ANNUAL REPORT 2008, *supra* note 7, at 18.

112. In 2002 there were 97,000 documented stop-and-frisks; in 2009 there were 580,000. Baker, *supra* note 12; Rivera et al., *supra* note 13.

the introduction of OMP, police brutality and abuse claims increased nearly 50%, drawing condemnation from the international human rights community.¹¹³ These incidents routinely lead to wrongful arrests as “cover charges,” sometimes referred to as being “taken down the R.O.A.D.” This acronym refers to the practice of charging the victim of police brutality with a combination of resisting arrest, obstruction of governmental administration, assault, and disorderly conduct in order to obfuscate police misconduct.¹¹⁴

2. *Wrongful arrests for criminal trespassing*

In an interview with a *New York Times* reporter on the issue of stop-and-frisk quotas, one patrol officer reported questioning a superior officer as to how he should go about conducting a sufficient quantity of *Terry* stops. The officer was reportedly told it was “easy: ‘Just go to the well.’”¹¹⁵ The well was any lobby of a public housing project.¹¹⁶ Public and low-income housing areas provide police with fodder for stop-and-frisks; however, these areas also provide a well for low-level misdemeanor arrests, principally for criminal trespassing.

While there are a multitude of factors leading to wrongful arrests associated with aggressive zero-tolerance policing, arrests of factually innocent people for criminal trespassing in low-income and public housing is unique in its systemic and widespread nature. This problem is well known to criminal justice professionals in New York City.¹¹⁷ A Bronx Criminal Court judge, in an unpublished opinion, labeled unlawful trespassing arrests a “dreadful practice,” writing:

113. Zeidman, *supra* note 109, at 318; AMNESTY INT’L, U.S.A., POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 15 (1996). Moreover, the volume of cases shields police misconduct from judicial scrutiny because it will never be addressed in a hearing or at trial. See Weinstein, *supra* note 110, at 1168 (noting that because half of all arrests are dismissed by prosecutors or, “more commonly, the case is resolved with a plea at arraignment, any police misconduct is rendered irrelevant and goes unreviewed”). For a discussion of the due process implications of high-volume misdemeanor arraignments, see *infra* Part II.D.

114. For a discussion on the use of “cover charges” such as these to conceal police misconduct, see Sarah Hughes Newman, Comment, *Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims Under § 1983*, 73 U. CHI. L. REV. 347, 371 (2006). See also sources cited *supra* note 91 (discussing rookie police officers and *Terry* stops).

115. Rivera et al., *supra* note 13.

116. *Id.*

117. See generally N.Y. PENAL LAW § 140.15 (McKinney 2010) (codifying offense of second-degree criminal trespass). Wrongful trespassing arrests are the subject of a class action lawsuit brought by the Legal Aid Society and the NAACP Legal Defense and Educational Fund against the New York City Housing Authority and the NYPD. Cara Buckley, *Lawsuit Takes*

Some people get arrested simply for being in the lobby of a residential building in which they do not reside. They are charged with trespassing. Many of these arrests are justified, as the people arrested are actually trespassing[.] they do not live in the building[,] they are not visiting a resident[,] they are not there for any lawful purpose[,] and their unwanted presence severely decreases the quality of life for the residents. Some trespassing arrests, however, are not justified and are, in fact, unlawful arrests of people who seem to be caught in a trap while going about their everyday lives in a perfectly legal way. Courts, of course, are obligated to dismiss such cases, but not before the person arrested has been inconvenienced and perhaps humiliated by the arrest and has spent sometimes up to several days imprisoned, waiting to see a judge. Despite the unacceptable harm, unlawful trespassing arrests evidently continue.¹¹⁸

The arrests stem from Operation Clean Halls, a program established in 1991 by the NYPD, in conjunction with private landlords, the New York City Housing Authority (NYCHA), and New York City District Attorney's offices.¹¹⁹ Operation Clean Halls purports to legalize the practice of stopping, questioning, and demanding identification from individuals in, or anywhere on the grounds, of a building whose owner has signed a Clean Halls affidavit.¹²⁰ The

Aim at Trespassing Arrests in New York Public Housing, N.Y. TIMES, Jan. 29, 2010, http://www.nytimes.com/2010/01/26/nyregion/30housing.html?_r=2. Press accounts of wrongful trespassing arrests in public and private housing have also appeared in the *Daily News*, *Newsday*, and my own account in *The Village Voice*. See M. Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD's Apartheid-Like Trespassing Crackdown*, VILLAGE VOICE (N.Y.C.), Oct. 30, 2007, at 11 (discussing both the trial of a client charged with trespassing and the enforcement of New York City's trespassing law, which has led to widespread wrongful arrests); Alison Gendar & John Marzulli, *Cops Harass Folks Who Live in Projects, Survey Sez*, N.Y. DAILY NEWS, Sept. 19, 2008, at 23; Rocco Parascandola, *Phantom Trespassers?*, NEWSDAY (N.Y.C.), Apr. 12, 2007, at A18 (detailing a trespassing arrest that occurred at a non-existent building); Rocco Parascandola, *Trespass Arrests Under Attack*, NEWSDAY, Apr. 13, 2007, at A17 (Legal Aid lawyers told Newsday that "police increasingly make [trespassing] arrests without checking to see whether the suspects are telling the truth when they claim to be visiting a friend or a relative in the building."); Cara Tabachnick, *Trespass Laws Questioned*, NEWSDAY (N.Y.C.), Apr. 10, 2007, at A4 (discussing a college student arrested while trying to visit a friend at the Alfred E. Smith Houses in Manhattan).

118. *People v. Ruiz*, No. 056832C-2006, 2007 WL 1428689, at *1 (N.Y. Sup. Ct. May 15, 2007).

119. *C.f.* Denáe Brewer, *Tenants Unite Against Crime*, HIGHBRIDGE HORIZON, Feb. 19, 2003; Robin Pogrebin, *Neighborhood Report: Harlem; When Landlords Take a Stand Against Drug Dealers*, N.Y. TIMES, June 18, 1995, § 13, at 6 (describing a similar program).

120. Fabricant, *supra* note 117.

Trespass Affidavit Program grants police similar authority in all buildings under the auspices of NYCHA, the nation's largest public housing authority.¹²¹ In New York County (Manhattan) alone, 3200 privately owned buildings are enrolled in the program (up from 600 in 1995), and virtually all NYCHA buildings—home to over 400,000 people, or 5% of New York City's population—are enrolled in the affidavit program.¹²²

The affidavits grant police unfettered access to a building's common areas and grounds, creating large areas—inside and outside of low-income housing—where normal search-and-seizure law is suspended. In these targeted neighborhoods, police claim the power to stop, question, and demand identification of anyone. The affidavit program is enforced through police conduct known as verticals, a description of which is found on the Bronx District Attorney's website:

In carrying out Operation Clean Halls, the police go up and down the stairways in a building and around the grounds, stop all who are found, question them as to why they are in the building or on the grounds, and ask for identification showing that they live on the premises or for an apartment number to verify a legitimate visit.¹²³

Over 40% of people arrested on criminal trespassing charges in 2007 had no prior criminal record.¹²⁴ Many of those falsely arrested are arrested in their own buildings because they lack government-issued identification,¹²⁵ virtually assuring arrest;¹²⁶ others are “simply

121. *Id.*

122. N.Y. CNTY. DIST. ATTORNEY'S OFFICE, TRESPASS AFFIDAVIT AND NARCOTICS EVICTION PROGRAMS 2 (2010); Manny Fernandez, *Barred from Public Housing, Even To See Family*, N.Y. TIMES, Oct. 1, 2007, at A1; Pogrebin, *supra* note 119.

123. Adam Carlis, Note, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2017-18 (2009) (arguing that, due to their systemic nature, vertical patrols violate state search-and-seizure jurisprudence because officers necessarily lack the requisite suspicion to stop and question a suspect); *Death of Malcolm Ferguson*, BRONX DIST. ATTORNEY'S OFFICE, <http://www.bronxda.net/misc/malcolm.htm> (last visited Apr. 16, 2011).

124. N.Y. STATE DEP'T. OF CRIMINAL JUSTICE SERVS., COMPUTERIZED CRIMINAL HISTORY SYSTEM (May 2008) (data spreadsheet on file with the author).

125. See BRENNAN CTR. FOR JUSTICE, *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 2* (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf. Twenty-five percent of voting-age African Americans lack government-issued identification, and those making less than \$25,000 a year are twice as likely to lack identification as individuals making more than \$25,000. *Id.*

126. See *supra* Part II.C.2. A survey of two public housing projects, one in Harlem and one in Brooklyn, found that 30% of Harlem households had at least one member who had been

paying an unannounced visit to a friend” and are “caught in a trap.”¹²⁷ This pure form of geographic collective punishment can be likened to a prison “mass lockdown,” a sanction imposed on all inmates in response to crimes committed by individual perpetrators.¹²⁸ Law-abiding residents of low-income housing are stopped, searched, and wrongfully jailed by police who are ordered by precinct commanders to perform verticals in Compstat-identified areas. Thus, police are responding to criminal activity in and around buildings which, presumably, and in the overwhelming majority of cases, residents had nothing to do with. Indeed, the rationale that the majority of law-abiding citizens desire such policing was convincingly refuted when NYCHA tenant leaders delivered a report to the NYPD commissioner criticizing enforcement of trespassing laws, noting that the “dehumanizing” policy made law-abiding residents feel as though they were living in “penal colonies.”¹²⁹

Furthermore, as I have suggested elsewhere,¹³⁰ the Clean Halls and Trespass Affidavit Programs create such arbitrary and extreme restrictions on the fundamental human right of freedom of movement¹³¹ in and around low-income housing that the policy can be fairly analogized to the so-called “Pass Laws” instituted during South Africa’s apartheid regime.¹³² During the apartheid era, black

charged with trespassing; 72% of household members in the Harlem housing project also reported that they, and their regular visitors, had been stopped by police five to twenty times in 2008. N.Y. LAWYERS FOR THE PUB. INTEREST CMTY. OVERSIGHT OF POLICE PROJECT, NO PLACE LIKE HOME: A PRELIMINARY REPORT ON POLICE INTERACTIONS WITH PUBLIC HOUSING RESIDENTS IN NEW YORK CITY (Sept. 2008), available at <http://stage.nyipi.org/policing.html> (follow “report” hyperlink).

127. *People v. Boone*, No. 11527C/06, at 3 (N.Y. Sup. Ct. May 9, 2008) (“There appears to be no consideration [in trespassing cases] of an individual simply paying an unannounced visit to a friend. Or, of an individual having a standing invitation to visit a friend or relative [T]here appear[] to be far too many occasions where the trespass arrests[] are not justified.”) (granting defendant’s motion to dismiss).

128. Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 924 (2009) (describing “mass lockdowns” in response to one inmate’s crime as a “severe form of collective punishment . . . delivered to the entire group of prisoners designed not only to ‘contain’ but to deter and punish them as well”).

129. CITYWIDE COUNCIL OF PRESIDENTS OF NYCHA, THE PUBLIC HOUSING POLICE AND PUBLIC HOUSING RESIDENT PERCEPTIONS (2009) (on file with author).

130. Fabricant, *supra* note 117.

131. For a commentary describing discriminatory restrictions on freedom of movement and arbitrary arrests for violating laws designed to enforce those restrictions as violative of international humanitarian law, see generally Weissbrodt, *supra* note 32 (condemning, among other things, civil disabilities Israel imposes on Palestinians as collective punishment).

132. Raymond A. Atuguba, *Human Rights and the Limits of Public Interest Law: Ghana’s Reaction to a Messy World Phenomenon*, 13 UCLA J. INT’L L. & FOREIGN AFF. 97, 102 n.4 (2008) (describing apartheid-era “Pass Laws”).

South Africans were controlled and monitored by requirements that blacks carry identification with them at all times or risk arrest.¹³³ The same is now true for residents of neighborhoods with high concentrations of low-income housing in New York City, where over 90% of residents are black or Latino.¹³⁴ The failure to produce identification on demand in these neighborhoods routinely results in arbitrary arrests.

D. Denial of Due Process and Individual Justice

Punishment imposed without due process is a basic construct of collective punishment regimes.¹³⁵ A corollary principle to the prohibition against punishment imposed without regard to individual culpability is the core due process principle of individual justice. It follows that to impose collective punishment is to deny individual justice.

The New York City Criminal Court has demonstrated contempt for the due process rights of defendants charged with low-level misdemeanors for decades. Commentators have justifiably, and in the strongest possible terms, indicted virtually every aspect of the adjudication of minor offenses, including the quality of public defenders and prosecutors, the lack of judicial oversight, the judicial coercion of guilty pleas,¹³⁶ the fetid holding cells, the unconscionable lengths of pre-arraignment detention, the interminable pendency of cases, a dearth of suppression hearings and trials, and the routine police perjury committed during the few hearings conducted.¹³⁷

Long before the debut of broken windows policing, the New York City Criminal Court was ill equipped to manage its caseload consistent with procedural due process norms. In 1989, the Office of Court Administration commented that the “effect of the incredible

133. *Id.*

134. N.Y.C. HOUS. AUTH., RESIDENT DATA SUMMARY, *City Program Year End 2008* (Jan. 1, 2009), available at http://www.nyc.gov/html/nycha/downloads/pdf/res_data.pdf.

135. Halabi, *supra* note 29, at 267 (“‘Collective punishment’ is punishment which has been rendered without regard to due process of law and is imposed on persons who themselves have not committed the acts for which they are being punished.”).

136. See generally Richard Klein, *Judicial Misconduct in Criminal Cases: It's Not Just the Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L. 195 (2007) (discussing trial courts' failure to ensure constitutional guarantees to a fair trial).

137. Howell, *supra* note 3, at 294 (commenting that the process afforded defendants in Criminal Court is “nearly as inadequate as the facilities”); see Rayner, *supra* note 7, at 1036; Weinstein, *supra* note 110, at 1170, 1172; Zeidman, *supra* note 109, at 321; see also M. CHRIS FABRICANT, *BUSTED!*, 271-74 (2005) (discussing routine police perjury at suppression hearings).

caseload pressure in the New York City Criminal Court is profoundly troubling.”¹³⁸ Four years later, those same courts arraigned 60% more misdemeanors as a result of the introduction of zero-tolerance policing.¹³⁹

As noted above, and as evidenced by the failure to institute any meaningful reform to address these systemic problems,¹⁴⁰ OMP cases¹⁴¹ add yet another substantial caseload burden to a system that already makes the guilt or innocence of individual defendants subservient to the institutional imperative to “get rid” of the cases. These cases are insignificant to the police who make the arrests,¹⁴² the prosecutors who prosecute them, the judges presiding over their adjudication, and the defense attorneys standing by the defendants’ sides for the pat recitations of the vocabulary of guilty pleas. Nearly half of all misdemeanors and the majority of OMP cases are resolved at arraignments in a system so estranged from due process norms that at least one commentator called for the elimination of the New York City Criminal Court altogether due to its inability “to administer justice.”¹⁴³

138. Harry I. Subin, *The New York City Criminal Court: The Case for Abolition*, 12 OCCASIONAL PAPERS FROM CTR. FOR RES. CRIME & JUST. N.Y.U. SCH. L. 1, 9 (1992) (quoting N.Y. OFFICE OF COURT ADMIN., ANNUAL REPORT (1989)). Indeed, Criminal Court caseloads had already reached a crisis level as far back as 1983. See Klein, *supra* note 136, at 197.

139. See Rayner, *supra* note 7, at 1026.

140. *But see* N.Y.C. COUNCIL, HEARING ON THE MAYOR’S FISCAL YEAR 2011 PRELIMINARY BUDGET, LEGAL AID/INDIGENT DEFENSE SERVICES 3-4 (Mar. 10, 2010) (noting that, “[t]he Adopted State Budget for State Fiscal Year 2009-10 included a provision mandating a cap on public defender caseloads in New York City beginning in 2010.”). The plan currently calls for a four-year implementation period. Public defenders for the Legal Aid Society, the state’s primary defender service, currently handle 592 cases per year—around 103 at any given time. That number stands in contrast to the seventy-case annual limit set forth in non-binding standards established by the Appellate Division-First Department in 1995. *Id.* Because the plan mandates hiring additional attorneys, it is not clear in light of New York State’s current fiscal crisis that the capped caseloads will become a reality.

141. OMP cases are distinguished for purposes of the foregoing discussion by complaints in which the People of the State of New York are the captioned complainant, rather than a civilian. These include all drug possession, disorderly conduct, theft of services (i.e., turnstile jumping), trespassing, loitering, panhandling, public drinking, and prostitution cases. See Howell, *supra* note 3, at 275 n.5.

142. See LEVINE & SMALL, *supra* note 80, at 46 (marijuana arrests are viewed as a “waste of time” by patrol officers); see also Weinstein, *supra* note 110, at 1168 (“Police officers in New York City typically have little or no ongoing contact with the cases that result from the arrests they make.”).

143. Subin, *supra* note 138, at 8.

Though often described as “assembly-line justice”¹⁴⁴ or “fast food justice,”¹⁴⁵ an auction is perhaps a more accurate, if jarring, metaphor for understanding the arraignment process and its degradation of the core due process value of individualized justice. The desired outcome of the auction, shared by all institutional constituents, is to resolve the greatest number of cases as quickly as possible.¹⁴⁶ During what may be considered a time-constrained, pre-auction period, public defenders interview dozens of clients who have typically been in jail for twenty-four hours, often much longer, and often for offenses for which they are factually innocent or which, by law, mandate no jail time.¹⁴⁷ Because the substance of the interview is often limited to simply informing the client of the standard plea bargain for the offense charged, the typical interview will last approximately five minutes, or less for OMP offenses.

Following the interviews, the defense attorney will place a value on each case in terms of possible jail time (in addition to that which has already been served waiting for arraignment), an alternative sanction, such as community service, or a “straight” conditional discharge, meaning a period of unsupervised probation during which the defendant must avoid being rearrested for any offense. Prosecutors review the police report and place their own values on the cases, which is commonly referred to as the worth of a case. The worth of OMP cases is not based on the particular circumstances of the incident or the character of the individual defendant, aside from the defendant’s criminal record (or lack thereof). Instead, prosecutors make plea offers or sentencing recommendations based on uniform policy for the class of misdemeanor charged—a policy dictated by supervising district attorneys. However, neither the supervising attorney nor the prosecutor who actually arraigns the case will ever interview anyone associated with the incident; the entirety of the prosecutor’s knowledge is derived from one officer’s report.¹⁴⁸

144. Rayner, *supra* note 7, at 1030 (citations omitted).

145. See *Frontline: The Plea* (PBS television broadcast June 17, 2004) (interviewing Stephen Bright, President and Senior Counsel, S. Ctr. for Human Rights), available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/bright.html>.

146. This excludes cases that will not “plead out” at arraignments, which are typically “complainant cases,” including domestic violence and simple assault cases. The interviews of clients in these cases trend toward adequate. The quality-of-life offenses at issue here represent the bulk of criminal offenses “disposed of” at arraignments, typically with little or no additional jail time.

147. See CRIMINAL COURT ANNUAL REPORT 2008, *supra* note 7, at 25 (stating that the average pre-arraignment detention lasts approximately twenty-four hours).

148. Author’s personal experience as a public defender.

Once the case is called for the actual arraignment, the auction begins. The prosecutor starts the “bidding” by requesting a specific sanction; the defense counters with a proposed lesser sanction; and the judge, who has had even less time to review the file, functions as an auctioneer and decides what the case is worth by either endorsing the plea bargain or countering with an alternative proposal. Defendants who have been jailed in excess of twenty-four hours may receive reduced sentences; visible injuries that a defendant claims are the result of police brutality may warrant lesser sanctions for a recidivist drug offender;¹⁴⁹ an obvious Fourth Amendment violation can serve as a mitigating factor in sentencing. Protestations of innocence are of course proscribed, but the “innocence problem” in the plea bargaining context is well known, and questionable charges are often simply leveraged by defense attorneys for reduced penalties.¹⁵⁰ Next, the defendant must be “sold” on the bargain. Reluctance on the part of the defendant to accept proffered plea arrangements is often overcome through coercive measures, including threats of additional jail time for refusing to plead guilty. Finally, minutes after it began, the auction concludes with the defendant waiving the remainder of his rights and pleading guilty.¹⁵¹

This dehumanizing process in which a defendant’s due process rights are worth whatever a public defender can get for them at arraignment achieves the principal goal of rapidly resolving cases. However, the community targeted for OMP pays the high and largely unnoticed cost of undermining the legitimacy of the criminal justice system. The spectacle of poor people of color in shackles being processed en masse through a system with little regard for guilt or innocence is understandably viewed as racist and therefore illegitimate by those subjected to the process.

149. Recidivist drug users are a good example because they are viewed as poor candidates for release on their own recognizance because their lifestyle makes them less likely to return for subsequent court dates; thus, if they refuse to plead guilty at the arraignment, they are likely to have bail set, resulting in additional jail time while contesting the charges. The pressure to plead guilty under these circumstances is naturally extreme and will often overwhelm the desire to pursue vindication of individual rights.

150. Cf. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1118, 1144–45 (2008) (acknowledging the “innocence problem” of plea bargaining at arraignments, but arguing that defense attorneys should assist innocent clients to falsely allocute to offenses because most innocent clients are poor recidivists who are “punished by [the] process and released by [the] pleas,” which typically mandate no jail time or additional court dates).

151. The remaining constitutional rights waived by a guilty plea are the right to challenge the admissibility of the evidence, the right against self-incrimination, the right to a jury trial, and the right to confront and cross-examine the government’s witnesses. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

These cases are routine only for those who work in the criminal justice system; for most defendants, they are anything but routine. Moreover, considering that less than one-half of 1% of misdemeanor cases are resolved by trial, the auction-like atmosphere represents the entirety of the criminal justice system to the vast majority of individuals charged with minor offenses.¹⁵²

Those who resist the pressure to plead guilty in order to pursue individualized justice in the form of a hearing or trial are typically worn down by the prohibitive costs associated with contesting charges and “often plead guilty because they are tired of missing days of work, and not because they have, in fact, committed a crime.”¹⁵³ It is not uncommon for misdemeanor cases to drag on for well over a year, forcing defendants to attend “multiple, often unnecessary” court appearances.¹⁵⁴ This turns the system into “a game of endurance—which side can endure the numerous and mostly pointless court appearances.”¹⁵⁵ As a result, it is nearly impossible for an indigent defendant to challenge the legality of her arrest by hearing or trial.¹⁵⁶

Malcolm Feeley’s seminal book, *The Process Is the Punishment*, is, if anything, more relevant today than it was when first published more than thirty years ago.¹⁵⁷ This is because zero-tolerance policing and the corresponding mushrooming of misdemeanor cases has inundated criminal courts, further eroding their ability to administer

152. CRIMINAL COURT ANNUAL REPORT 2009, *supra* note 7, at 16.

153. Rayner, *supra* note 7, at 1036.

154. *Id.* at 1060; *see id.* at 1055.

155. *Id.* at 1057.

156. New York’s speedy trial statute requires the prosecution to bring a felony case to trial within six months from arraignment, ninety days from the commencement of an A misdemeanor, sixty days from the commencement of a B misdemeanor, and thirty days from the commencement of a violation. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2003); N.Y. PENAL LAW §§ 55.05–10 (McKinney 2009). However, section 30.30(4) of the statute tolls the time period for a myriad of reasons, such as delays “occasioned by exceptional circumstances, including but not limited to, the period of delay resulting from a continuance granted at the request of a district attorney.” N.Y. CRIM. PROC. LAW § 30.30(4)(g) (McKinney 2003). Because only the exact amount of time requested for a continuance counts against the speedy trial clock, prosecutors often request very short adjournments, typically a week, knowing the case will likely be adjourned for four to six weeks. *See, e.g.,* People v. Dushain, 669 N.Y.S.2d 30, 32–33 (N.Y. App. Div. 1998). As a result of this practice, low priority cases, particularly OMP offenses, are allowed to languish in Criminal Court, wearing down defendants’ resolve and resources to contest the charges. Because plea offers on OMP cases are typically non-incarceratory, defendants accept the pleas simply to end the litigation process.

157. *See generally* MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (discussing politics and the community environment in courts).

individualized justice.¹⁵⁸ Professor Feeley's work, however, was completed in an era before the proliferation of collateral consequences that flow not only from a criminal conviction,¹⁵⁹ but also from merely having been arrested. As the following section details, these collateral consequences are borne not only by the individual, but also by the entire community.

III. GRAVE HARM

It can be argued that the stopping, searching, and interrogating of one law-abiding resident of Brownsville, Brooklyn "30 to 40 times" by police does not amount to a human rights violation.¹⁶⁰ Likewise, the jailing of one man for two days in Baltimore, Maryland for "impeding the flow of traffic" on a sidewalk may not implicate international humanitarian law.¹⁶¹ However, the discriminatory policies examined in this Article negatively impact millions of people, most of whom bear no culpability for the violent crime that provokes the intensive and indiscriminate policing. It is the aggregation of the communal harms detailed below that implicates human rights law.

To simply label certain conduct as collective punishment and therefore violative of human rights law is insufficient. The communal harms associated with the conduct must be of sufficient gravity to implicate international law. Because a wide variety of conduct can be defined as collective punishment,¹⁶² much of the jurisprudential and scholarly debate surrounding collective punishment—as a prosecutable war crime and within the broader realm of international humanitarian law—centers on the question of the gravity of the harm at issue;¹⁶³ specifically, whether the punishment imposed

158. See *supra* text accompanying notes 138–39.

159. The proliferation of collateral consequences began in the mid-1980s and continued through the late 1990s, with passage of laws that impacted, among other things, a defendant's immigration status, eligibility for public housing, and eligibility for federal student loans for anyone with a criminal background. See Rayner, *supra* note 7, at 1032–33 (detailing the explosion of federal laws during the 1980s and 1990s that attached civil sanctions to criminal convictions).

160. See Rivera et al., *supra* note 13.

161. See Fenton, *supra* note 15.

162. See Darcy, *supra* note 22, at 41–42; sources cited *supra* note 32; Kramer & Michalowski, *supra* note 33; Narula, *supra* note 34; Solis et al., *supra* note 35 (citing various types of conduct condemned by commentators as collective punishment).

163. The International Criminal Tribunal for the former Yugoslavia, for example, concluded that any war crime must be a "serious" violation of international humanitarian law, constituting a "breach of a rule protecting important values, and the breach must involve grave consequences for the victim." Darcy, *supra* note 22, at 36–37 (citations omitted). The Ap-

on the victims must have caused grave harm, or some lesser gradation of harm. Although this Article argues that communities targeted for OMP have indeed suffered grave harm, there is ample support for consideration of lesser gradations of harm. Moreover, there is no corollary debate concerning international human rights law as it relates to harm caused by collective punishment regimes.¹⁶⁴

Regarding zero-tolerance policing, the harm that causes the most significant impact on the entire community flows from the collateral consequences of the tens of thousands of misdemeanor convictions that result from this policing strategy. The growing body of literature examining the nonpenal sanctions attached to criminal convictions has thoroughly documented this array of harsh penalties and the grossly disproportionate impact these penalties have on communities of color.¹⁶⁵ Indeed, paralleling the commentary provoked by the NYPD's discriminatory stop-and-frisk policy,¹⁶⁶ at least one legal commentator has argued that the impact of collateral consequences, including bars to employment and housing, is an extension of Jim Crow-era laws.¹⁶⁷ The collateral consequences of convictions for OMP offenses, in particular, often far outweigh any direct sanction imposed at sentencing.¹⁶⁸

A. Deportation

Of the many serious consequences of convictions for minor offenses, deportation of lawful permanent residents is the most severe. Deportation does not impact only the individual. As the Supreme Court recently recognized, deportation has a serious "concomitant

peals Chamber charged with reviewing the collective punishment convictions of individuals charged with crimes committed during the civil war in Sierra Leone did not, however, specifically consider a grave harm element in considering the elements of collective punishment. *Id.*

164. *Id.*

165. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 457-71 (2010) (noting the "burgeoning literature" detailing various collateral consequences and concluding that "race is significantly intertwined with current U.S. collateral consequence policies and practices").

166. Herbert, *supra* note 70.

167. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 139-60 (2010) (comparing collateral consequences of criminal convictions to Jim Crow-era policies targeting African Americans).

168. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 701 (2008) (noting that the collateral consequences of convictions for offenses associated with zero-tolerance policing can lead to severe "nonpenal consequences, including deportation").

impact . . . on families living lawfully in this country.”¹⁶⁹ Although deportation is a sanction¹⁷⁰ attached only to crimes involving “moral turpitude,” these include offenses most closely associated with zero-tolerance policing, such as marijuana possession and turnstile jumping.¹⁷¹ Since these offenses are most aggressively prosecuted in neighborhoods selected for zero-tolerance policing, this strategy steadily tears away at the fabric of these neighborhoods and the individuals and families living in them.

B. Civil Disabilities

In his concurring opinion in *Padilla v. Kentucky*, Justice Alito summarized the harsh “collateral” penalties, aside from deportation, that often attach to criminal convictions, “including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses.”¹⁷² Typically, a misdemeanor conviction will not result in disenfranchisement.¹⁷³ Other nonpenal sanctions, however, apply with equal force to felony and misdemeanor convictions. Indeed, entire families can be evicted from public housing for one member’s drug-related misdemeanor, a form of group sanction imposed to create an incentive for households to self-govern.¹⁷⁴ Drug-related convictions bar eligibility for federal student loans, and convictions or arrests¹⁷⁵ of any sort often create insurmountable barriers to employment in the public and private sectors.¹⁷⁶

169. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

170. I use the term “sanction” here acknowledging the difficulty of defining deportation purely within the framework of either civil or criminal law. The *Padilla* decision retained the distinction between “collateral” and “direct consequences” of criminal convictions insofar as it relates to counsel’s duty to correctly advise a client regarding the immigration consequences of a plea. *Id.* at 1480–82. The Court, however, recognized that deportation is “uniquely difficult to classify” and is often “the most important part” of the penalty imposed on noncitizen defendants. *Id.*

171. Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach To Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 338 (2008).

172. *Padilla*, 130 S. Ct. at 1488 (Alito, J., concurring).

173. *Cf.* N.Y. ELEC. LAW § 5-106 (McKinney 2007) (excluding most convicted felons from registering to vote).

174. See Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York’s Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 551–55 (2008) (characterizing New York City’s Narcotics Eviction Program as a form of collective punishment).

175. For example, the United States Census Bureau automatically rejected job applications from anyone arrested but not convicted of an offense. Applicants were directed to provide

Thirty-eight states allow employers to inquire about, and rely upon, records of arrests that did not result in a conviction of any kind.¹⁷⁷ This is particularly troubling in New York, where over 40% of misdemeanors were ultimately dismissed in 2009.¹⁷⁸ It is precisely this type of collateral consequence that punishes entire communities subjected to Compstat-based OMP. The precinct commander's decision to deploy patrol officers to crack down in areas experiencing problems with violent crime with mass misdemeanor arrests can render swaths of law-abiding community residents unemployable simply because they were once arrested during these campaigns. Moreover, as discussed above, challenging the legality of the arrests through a hearing or trial is nearly impossible for the poor.

C. *De Facto Segregation*

Beyond these traditional nonpenal penalties, communities targeted for zero-tolerance policing are in effect undergoing de facto segregation. Criminal law is enforced differently in these communities than in predominately white, middle-class communities. Arbitrary searches and seizures of law-abiding people are routine,¹⁷⁹ minor offenses otherwise ignored by police are aggressively enforced, public and private low-income housing developments are policed as though they are penal institutions, and areas with the highest concentrations of low-income housing are policed in a manner reminiscent of South Africa's apartheid regime.¹⁸⁰

Borders between these neighborhoods are further racialized by police, who are directed to enforce these strategies within defined borders and thus "function as de facto border patrol."¹⁸¹ This practice maintains historically racialized spaces, perpetuating segregation

additional documentation, but the Census Bureau did not specify the required documentation. Thousands of African American, Latino, and Native American people were denied well-paid, temporary census jobs as a result of the policy. Jane M. Von Bergen, *Philadelphia Woman at Center of Census Lawsuit*, PHILA. INQUIRER, Apr. 14, 2010, at C5.

176. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1503-05 (2003) (discussing occupational licensing and other employment barriers that result from criminal records).

177. *Id.* at 1503-04.

178. CRIMINAL COURT ANNUAL REPORT 2009, *supra* note 7, at 16.

179. *See supra* Part II.A.

180. *See supra* Part II.C.2 (discussing enforcement of criminal trespassing laws in low-income housing).

181. I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 68 (2009) (examining the perpetuation of historically segregated areas through contemporary police practices).

“[a]t a time when residential segregation plays a key role in perpetuating inequality through unequal education, employment opportunities, resources, social capital and norm building”¹⁸² Indeed, one study specifically focused on zero-tolerance policing confirmed its segregatory impact, concluding that it increased the race-based and economic disparity of historically disadvantaged residents of Baltimore’s poorest neighborhoods.¹⁸³ When considered concomitantly with the civil disabilities and communal harm of racial profiling detailed above, aggressive zero-tolerance policing results in both the spatial and economic segregation of the urban poor.

D. A Critical Mass of Harms

Collective punishment evolved as a concept to address communal harms. Its purpose is to provide a positive legal framework with which to address policies directed at entire communities. Whatever form the punishment takes, the international community of states has responded to the derogation of the core due process value of individual culpability by employing the doctrine of collective punishment to assess the harm of the policy and to consider any proffered justification for the group sanctions. As touched on above, Israeli policy in the occupied territory has drawn protest from the international community for collective punishment tactics,¹⁸⁴ including razing family homes of terrorists, summary deportation of Palestinians who have not committed crimes, systemic arbitrary arrests, restrictions on freedom of movement and employment, and denial of due process with respect to alleged security violations.¹⁸⁵ This Article has discussed the many parallel sanctions that result from ag-

182. *Id.*

183. Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL’Y 419 (2007).

184. Palestinian suicide bombers of course impose collective punishment as well, since they target Israeli civilians for punishment without regard to individual culpability for the state policy they protest.

185. See Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT’L L.J. 129, 134 (1991) (documenting violations of international humanitarian law, including “the summary deportation of prominent Palestinian citizens from many walks of life . . . ; systematic arbitrary arrests, detentions and the denial of procedural rights with respect to alleged security violations . . . [and] the imposition of collective punishments, especially in the form of the destruction of family residences”); see also Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 314–16 (2006) (discussing “arbitrary deprivations of liberty,” collective punishment, and “deviat[ions] from fundamental principles of fair trial” as non-derogable rights under international law).

gressive zero-tolerance policing: entire families are evicted from public housing for one family member's drug possession; public housing residents are subject to systemic arbitrary arrest and detention; employment opportunities are unjustly restricted; fathers and sons are deported and families are broken up for minor offenses; police impose severe restrictions on freedom of movement in areas with high concentrations of public housing; and criminal courts are incapable of providing due process to individuals charged with OMP offenses.

Although scholars debate the severity of the harms required to rise to the level of a human rights violation, at the least, most agree the victims must suffer serious consequences as a result of the collective punishment regime.¹⁸⁶ The gravity of the harm at issue in this Article can only be understood by taking into account the sanctions in the aggregate. Considered from this perspective, appropriate comparisons between elements of OMP and Jim Crow-era laws have been made by other commentators.¹⁸⁷ These group penalties, moreover, have exacerbated what many legal scholars and criminologists have argued is the deliberate racial and economic segregation imposed through the mass incarceration of African Americans in the post-Jim Crow-era.¹⁸⁸ By extending the reach of the criminal justice system to encompass non-criminal behavior, zero-tolerance policing has become an overwhelming and deleterious presence in the most disadvantaged inner-city communities. Simply put, aggressive zero-tolerance policing inflicts grave harm upon the urban poor.

E. The Putative Efficacy of Compstat-Based OMP

Even if collective punishment in the form of questionable mass misdemeanor arrests and the attendant communal harms could be endorsed as a regrettable trade-off in exchange for reduced rates of

186. See HANNIKAINEN, *supra* note 27, at 489-98 (noting grave harm is required); Yuval Shany, *The Prohibition Against Torture and Cruel, Inhumane, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?*, 56 CATH. U. L. REV. 837, 842 (2007) (discussing the "relative nature of human rights" in "special circumstances").

187. ALEXANDER, *supra* note 167 (discussing collateral consequences); Herbert, *supra* note 70 (citing 2009 "stop-and-frisk" statistics in New York City); *supra* Part II.C.2 (comparing enforcement of trespassing laws to the "Pass Laws" of South Africa's apartheid regime); see also William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 20 (2004) (linking racial profiling to the institution of slavery).

188. See Roberts, *supra* note 78, at 262-63 (arguing that the criminal justice system has a "direct lineage to slavery and Jim Crow" and that mass incarceration is deliberately used as a tool to control black people).

violent crime, this argument relies fundamentally on the asserted correlation between OMP and the reduction in violent crime rates. There is little empirical data to support that assertion, however, and the little that does exist is fiercely contested.¹⁸⁹ Indeed, since Professor Harcourt first shifted the paradigm of the debate in 1998 by critically examining the purported effect of misdemeanor arrests on violent crime rates, scholars have become increasingly skeptical of the efficacy of zero-tolerance policing on its own terms.¹⁹⁰

189. Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 499-501 (2010) (book review) (summarizing the debate between criminologists and noting that “researchers are skeptical about the degree of relationship between” zero-tolerance policing and reduced crime rates).

190. See Harcourt, *supra* note 9, at 293 (noting that in 1998 it was “practically impossible to find a single scholarly article that takes issue with the quality-of-life initiative”). More recently, the majority of empirical studies have concluded that broken windows policing is not nearly as effective as it purports to be. See Fagan & Davies, *supra* note 10, at 466 (finding that studies supportive of the broken windows theory “rely on cross-sectional research that is unable to determine whether the observed relationships are temporally-ordered and therefore causally related, or if they are simply correlations whose causal order is unknown”); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 315 (2006) [hereinafter Harcourt & Ludwig, *New Evidence*] (arguing that, although targeting police resources in high-crime areas does reduce crime, there is “no empirical evidence to support the view that shifting police towards minor disorder offenses . . . reduce[s] violent crime”); 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, 165-66 (2007) (concluding that there is “no good evidence that the [marijuana] arrests [in New York City] are associated with reductions in serious violent or property crimes in the city”); Kees Keizer et al., *The Spreading of Disorder*, SCI., Dec. 12, 2008, at 1681 (concluding that “there has not been strong empirical support” in favor of broken windows policing and that attempts to test the theory have “provided mixed results at best”); D.W. Miller, *Poking Holes in the Theory of “Broken Windows,”* CHRON. HIGHER EDUC., Feb. 9, 2001, at A14 (asserting that there is “little empirical evidence” supporting the broken windows hypothesis); Robert J. Sampson & Steven W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 638 (1999) (finding that disorder does not cause crime, but rather both stem from characteristics unique to certain neighborhoods); see also BERNARD E. HARCOURT, ILLUSION OF ORDER, THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001).

Additionally, serious doubts have been raised about the reliability of many supportive studies. See WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 75 (1990) (examining data from forty urban neighborhoods and finding a positive correlation between disorder and rates of robbery); Harcourt, *supra* note 9, at 309 (replicating Skogan’s study and finding that “his data do not support the claim that crime is related to disorder,” and that “the statistical relationship [between crime and disorder] vanishes when neighborhood poverty, stability, and race are taken into account”); GEORGE L. KELLING & WILLIAM H. SOUSA, JR., MANHATTAN INST. CTR. FOR CIVIC INNOVATION, DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY’S POLICE REFORMS 1 (2001) (concluding that “[b]roken windows’ policing is significantly and consistently linked to declines in violent crime” and that “[o]ver 60,000 violent crimes were prevented from 1989 to 1998 because of ‘broken windows’ policing”); Harcourt & Ludwig, *New Evidence*, *supra* at

Baltimore's experience with "New York style" zero-tolerance policing provides potential additional evidence of the fallibility of the policing strategy. After the Baltimore Police Department was compelled by litigation to abandon zero-tolerance policing due to the thousands of wrongful arrests that resulted from the practice, violent crime in Baltimore significantly declined.¹⁹¹ The city is making "tens of thousands fewer arrests" and has instead focused limited resources on targeting "the worst of the worst" perpetrators, which the police commissioner termed, "fishing with a spear instead of a net."¹⁹²

CONCLUSION

The norms derived from international humanitarian and human rights law seek to strike a balance between the rights of the individual, the rights of other individuals, and broader military or public interests. To do so, international law recognizes the need to limit or even suspend certain rights "during times of conflict or public emergency, or through other situations of pressing social necessity."¹⁹³ Although violent crime is obviously a pressing social problem, zero-tolerance policing strikes the wrong balance between addressing the problem and the transcendent need for individualized justice. Segregating and subjecting entire communities to arbitrary detentions, arrests, and the astonishing array of collateral consequences associated with the arrests cannot be justified. And because these penalties cause grave harm to the community and are imposed without regard to individual culpability, the policing regime violates international human rights law. I do not contend that poor

275-76 (examining data similar to that used by Kelling and Sousa and finding that "jurisdictions with the greatest increases in crime during the 1980s tend to experience the largest subsequent declines as well," a phenomenon that the authors call "Newton's Law of Crime: what goes up must come down (and what goes up the most tends to come down the most)"). A study commissioned by the New York City Police Foundation made contrary findings, concluding that "Operation Impact . . . has been consistently successful throughout its implementation in all precincts for all categories of violent crime." DENNIS C. SMITH & ROBERT PURTELL, AN EMPIRICAL ASSESSMENT OF NYPD'S "OPERATION IMPACT": A TARGETED ZONE CRIME REDUCTION STRATEGY 9 (2007), available at http://wagner.nyu.edu/faculty/publications/publications.php?pub_id=1133.

191. Fenton, *City Poised*, *supra* note 16; Justin Fenton, *Fewer Crimes, Fewer Arrests in City*, BALT. SUN, Dec. 31, 2010, at 1A, 13A [hereinafter, Fenton *Fewer Crimes*] (reporting a 4% drop in violent crime rates in 2010, as compared to 2009, including a 7% drop in homicides).

192. Fenton, *Fewer Crimes*, *supra* note 191.

193. Shany, *supra* note 186, at 837.

communities of color are not often in dire need of a robust police presence. Policing the residents of these communities must, however, be consistent with their fundamental human rights.