

THE PROCESS IS STILL THE PUNISHMENT: LOW-LEVEL ARRESTS IN THE BROKEN WINDOWS ERA

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*Purpose: This Article examines the experience of contemporary arrestees in New York City to identify impositions they face in the processing of charges against them. In his seminal 1979 study *The Process Is the Punishment*, Malcolm Feeley documented severe administrative burdens faced by arrestees before judgment of guilt or innocence.¹ I investigate the persistence of this dynamic in light of modern “proactive policing” tactics that bring millions of people into contact with the criminal justice system.*

Methods: I match records of police encounters with court data on arrest processing to construct a unique dataset tracing more than 100,000 arrests from initial police contact through the disposition of charges. I use descriptive statistical analyses to estimate time, confinement, and other burdens faced by arrestees.

Results: While most low-level arrestees avoid severe formal sanctions, they face considerable burdens before disposition of their cases. These burdens vary significantly by the courts in which cases are heard. Most arrests are disposed of with low-level plea bargains.

Conclusions: The burdens faced by arrestees before guilt or innocence is determined, coupled with a heavy use of plea bargains, raise concerns that

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¹ MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) [hereinafter *THE PROCESS IS THE PUNISHMENT*].

contemporary criminal procedure may undermine the adjudicative ideal of the courts. These findings also suggest arrestees face significant presentencing challenges requiring more detailed examination.

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INTRODUCTION

The twentieth century expansion of the United States criminal justice system extends far beyond the well-documented “prison boom.”² Despite the 700% increase in the United States prison population since the 1970s,³ people in prison represent only 21% of the overall correctional population, with the majority population consisting of individuals based in the community (58% probationers and 11% parolees).⁴ The experience that these individuals share, however, is the predicate of correctional supervision: arrests. The FBI’s Uniform Crime Reporting Program reported more than twelve million arrests in 2012,⁵ nearly one for every twenty-five inhabitants of the United States. The vast majority of these are for misdemeanors—relatively low-level arrests characterized by short or noncustodial sentences. Although felony arrests—with longer sentences for conviction—generate the majority of the prison population, approximately 80% of state court caseloads are misdemeanors; an estimated ten million misdemeanor cases are filed per year.⁶

Decades ago, Malcolm Feeley observed that although they lead to few prison sentences, misdemeanors and other low-level arrests can impose significant burdens on arrestees while their cases are being processed in the criminal courts.⁷ In his 1970s observation of a “lower criminal court,” defendants were frequently detained awaiting trial, and many faced financial burdens during the processing of their cases. The extent to which these burdens were borne before a determination of guilt raised serious due process concerns.⁸ Moreover, to the extent that these burdens were imposed before—or in lieu of—sentencing, the procedural punishment that they represented could not be regulated

² DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM (Steven Raphael & Michael A. Stoll eds., 2009); SARA WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY (2014); Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, 46 DEMOGRAPHY 265, 265–72 (2009) (discussing the prison boom).

³ *Mass Incarceration Problems*, AM. C.L. UNION, https://www.aclu.org/files/assets/massincarceration_problems.pdf (last visited Oct. 10, 2013).

⁴ See Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948–2010*, POPULATION ASS’N OF AM., Apr. 1, 2011, <http://paa2011.princeton.edu/abstracts/111687>.

⁵ *Crime in the United States 2012: Persons Arrested*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (last visited Sept. 25, 2015).

⁶ Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 (2012).

⁷ THE PROCESS IS THE PUNISHMENT, *supra* note 1.

⁸ *Id.* at 29–32.

through the formal mechanisms available to govern sentencing practices.⁹

The criminal justice system has seen significant changes since Feeley's seminal study. In addition to the wide expansion of the prison population, police practices have evolved to increase the likelihood of contact with the system. Contemporary policing has increasingly prioritized the aggressive enforcement of low-level regulations,¹⁰ commonly referred to as "Broken Windows" policing.¹¹ When these practices have been carefully examined, the discourse has largely focused on racial disparities¹² or Fourth Amendment violations¹³ in police stops.

One of the statistics frequently cited in the discussion of Broken Windows policing is the relative fruitlessness of pedestrian stops in identifying criminal activity.¹⁴ However, the sheer volume of police-citizen encounters in contemporary policing, even at low "hit rates," generates many resulting arrests. Much remains to be learned about the experiences of people who enter the criminal justice system in this way.¹⁵ What we do know about low-level arrests suggests that they are processed in a largely administrative or "managerial" fashion,¹⁶ which has the potential to impose a considerable unregulated burden, as it did in Feeley's time.¹⁷

⁹ *Id.* at 276–77.

¹⁰ See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); see also Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014).

¹¹ George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>.

¹² See Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 309 (Stephen K. Rice & Michael D. White eds., 2010); see also *Bailey v. City of Phila.*, No. 2:10-cv-05952-SD (E.D. Pa. June 21, 2011) (order certifying class and approving consent decree).

¹³ See Report of Jeffrey Fagan, Ph.D. at 4, 65, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034 (SAS)), http://ccrjustice.org/sites/default/files/assets/files/Expert_Report_JeffreyFagan.pdf; Jeffrey Fagan & Amanda Geller, Essay, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015).

¹⁴ See John Knowles, Nicola Persico & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203 (2001); Report of Jeffrey Fagan, *supra* note 13, at 3–4, 39; Jeffrey Fagan et al., *No Runs, Few Hits and Many Errors: Street Stops, Bias and Proactive Policing* (June 15, 2015) (unpublished conference draft) (on file with author).

¹⁵ See generally CIVIL RIGHTS BUREAU, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES (2013) [hereinafter OAG REPORT], https://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf.

¹⁶ Kohler-Hausmann, *supra* note 10.

¹⁷ See Robert J. Sampson, *Criminal Justice Processing and the Social Matrix of Adversity*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2014, at 296, 298 (drawing "an extension of the argument made by Feeley (1979) in his classic study of lower courts").

This Article uses a unique dataset¹⁸ to examine the burdens imposed in the processing of contemporary low-level arrests, focusing specifically on consequences of criminal justice involvement that precede the determination of guilt or innocence. In so doing, the Article connects Feeley's concerns about unregulated punishment to contemporary policing practices.¹⁹ The Article focuses specifically on criminal justice involvement that begins at relatively low levels—using data from more than 100,000 arrests resulting from the New York City Police Department's (NYPD) Stop, Question, and Frisk (SQF) practices between 2009 and 2012. Although low-level criminal justice involvement is often dismissed as a mild inconvenience for individuals not formally sanctioned as a result,²⁰ street stops and the arrests that result carry the potential for substantial impositions on individuals' liberty and well-being, whether or not they are subsequently sentenced to prison or jail. The analysis that follows advances our understanding of these impositions and their consequences.

I. BACKGROUND

A. Misdemeanor Arrests and Order Maintenance Policing

Misdemeanor arrests are a central component of contemporary policing practices. The Broken Windows theory, first applied to policing in the 1980s,²¹ suggested that, "society wants . . . an officer to have the legal tools to remove undesirable persons from a neighborhood when informal efforts to preserve order in the streets have failed."²² With the stated objective of "order maintenance," misdemeanor arrests have

¹⁸ The underlying data used in this Article was provided to the author by the Office of Court Administration and the New York Police Department, with the cooperation of the New York State Office of the Attorney General. Additional data is also drawn from the New York State Division of Criminal Justice Services, as well as from the expert reports in *Floyd v. City of New York*. See generally *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); OAG REPORT, *supra* note 15; *Criminal Justice Statistics*, N.Y. ST. DIV. OF CRIM. JUST. SERVICES, <http://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm> (last updated Jan. 8, 2016). This collective data set (Data Set) was then combined and analyzed by the author. When an individual source, rather than a combination of data, is utilized, the particular source is noted. All data is on file with the author.

¹⁹ See THE PROCESS IS THE PUNISHMENT, *supra* note 1.

²⁰ See Temitayo Fagbenle et al., *The Effect of Stop-and-Frisk in the Bronx*, WNYC: RADIO ROOKIES (Aug. 31, 2012), <http://www.wnyc.org/story/232447-radio-rookies-kelly>.

²¹ Kelling & Wilson, *supra* note 11.

²² *Id.*

served as the cornerstone of this toolkit, particularly in large urban areas.²³

More recently, Broken Windows policing has evolved, most notably in New York City, from broadly targeting disorderly behavior to targeting individuals or groups that the police deem to be suspicious. As explained by Jack Maple:

Rapists and killers don't head for another town when they see that graffiti is disappearing from the subway. The average squeegee man doesn't start accepting contract murders whenever he detects a growing tolerance for squeegeeing. . . . Quality-of-life enforcement works to reduce crime because it allows the cops to catch crooks when the crooks are off-duty. . . .²⁴

Although Broken Windows principles have now informed policing practices for over two decades,²⁵ recent years have seen a dramatic increase in the use of arrests to enforce low-level regulations.²⁶ Moreover, the increase in misdemeanor arrests has been most notable in neighborhoods and among individuals also targeted by other policing tactics, such as *Terry* stops,²⁷ commonly referred to as SQF activity. Most targeted for this enforcement are young people and ethnic minorities in high-crime, socioeconomically disadvantaged neighborhoods.²⁸

B. *Stop, Question, and Frisk*

Along with misdemeanor arrests, SQF activity has been a key component of contemporary policing tactics. Constitutionally sanctioned by the Supreme Court's 1968 decision in *Terry v. Ohio*, police officers have the authority to stop, question, and frisk individuals that they "reasonably" suspect are actively engaged in, recently engaged in, or are about to engage in criminal activity.²⁹ In New York City over the past decade, officers have recorded over four million stops, most of

²³ BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 128 (2001); see also Kohler-Hausmann, *supra* note 10, at 630–33.

²⁴ JACK MAPLE WITH CHRIS MITCHELL, *THE CRIME FIGHTER: HOW YOU CAN MAKE YOUR COMMUNITY CRIME-FREE*, 154–55 (Broadway Books 2000) (1999).

²⁵ See N.Y.C. POLICE DEP'T, *POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK* (1994), <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=167807>.

²⁶ See Kohler-Hausmann, *supra* note 10, at 630; see also Natapoff, *supra* note 6, at 1314–15, 1320.

²⁷ See *Terry v. Ohio*, 392 U.S. 1 (1968).

²⁸ See Report of Jeffrey Fagan, *supra* note 13, at 3–4; see also PREETI CHAUHAN ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, *TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK* (2014).

²⁹ See, e.g., William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213 (1998).

which were prompted by very low levels of suspicion. Similar tactics are used in other large cities.³⁰

Like misdemeanor arrests, SQF activity has been characterized by stark racial disparities and significant officer discretion as to which individuals and what locations are targeted.³¹ Documented stop justifications suggest that officer suspicion may lack individuation and instead follow “scripts” in which stops are explained with vague but institutionally accepted narratives, such as “furtive movements” or activity in an area with “high crime incidence.”³² Only a small fraction of SQF activity leads to arrest or reveals illegal activity; however, street stops have also been largely targeted toward the Maple objective of catching “crooks when the crooks are off-duty.”³³ For example, although far less than half of documented SQF activity was based on the suspicion of violent crime,³⁴ SQF in New York City—and the racial disparities in its implementation—were justified politically in large part based on “those who witnesses and victims describe as committing the murders.”³⁵ Individuals stopped by the police frequently face physically invasive frisks and searches,³⁶ harsh language, racial invective, or homophobic taunts.³⁷ Street stops lead to relatively few formal sanctions,³⁸ and until recently, have faced little oversight of officer behavior.

³⁰ See, e.g., *Bailey v. City of Phila.*, No. 2:10-cv-05952-SD (E.D. Pa. June 21, 2011) (order certifying class and approving consent decree); Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 *CRIMINOLOGY* 407 (2005).

³¹ See Report of Jeffrey Fagan, *supra* note 13, at 3–4; Fagan et al., *supra* note 12, at 310.

³² Fagan & Geller, *supra* note 13, at 69–78.

³³ MAPLE, *supra* note 24, at 155.

³⁴ See Report of Jeffrey Fagan, *supra* note 13, at 38–56; see also Declaration of Jeffrey Fagan at 13–14, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 01034 (SAS)), 2012 WL 911322.

³⁵ Jennifer Fermino, *Mayor Bloomberg on Stop-and-Frisk: It Can Be Argued ‘We Disproportionately Stop Whites Too Much. And Minorities Too Little’*, N.Y. DAILY NEWS (June 28, 2013, 6:37 PM) (quoting N.Y.C. Mayor Michael Bloomberg), <http://www.nydailynews.com/new-york/mayor-bloomberg-stop-and-frisk-disproportionately-stop-whites-minorities-article-1.1385410>.

³⁶ See Report of Jeffrey Fagan, *supra* note 13.

³⁷ See Rod K. Brunson, “Police Don’t Like Black People”: African-American Young Men’s Accumulated Police Experiences, 6 *CRIMINOLOGY & PUB. POL’Y* 71 (2007); Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 *URB. AFF. REV.* 858, 869–71 (2009).

³⁸ See Report of Jeffrey Fagan, *supra* note 13, at 4 (“Arrests take place in less than six percent of all stops, a ‘hit rate’ that is lower than the rates of arrests and seizures in random checkpoints observed in other court tests . . .”).

C. *Proactive Policing as an Entryway into the Criminal Justice System*

Although relatively few street stops lead to arrest, SQF activities couple with misdemeanor arrests as components of a “proactive policing” model in which officers actively, and often aggressively, engage citizens to disrupt circumstances interpreted as indicia that crime is afoot.³⁹ Figure 1 demonstrates the concurrent rise of SQF activity and misdemeanor arrests in New York City over the past ten years, a period which has seen a nearly steady increase in New Yorkers’ exposure to the criminal justice system.⁴⁰ While SQF activity has declined sharply following a federal lawsuit,⁴¹ both tactics remain central to policing in contemporary New York City.⁴²

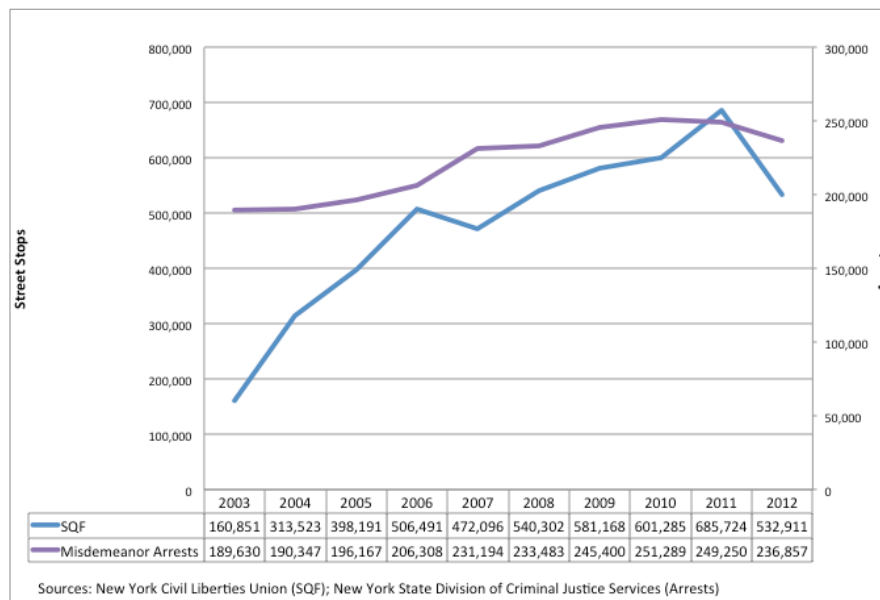


Figure 1: SQF and Misdemeanor Arrest Activity, NYC, 2003–2012⁴³

Shifts toward proactive practices in street policing have dramatically increased the risk of arrest for urban residents, particularly

³⁹ Charis E. Kubrin et al., *Proactive Policing and Robbery Rates Across U.S. Cities*, 48 CRIMINOLOGY 57, 62 (2010).

⁴⁰ An exception to this is the decline in both stops and arrests in 2012, following court decisions suggesting constitutional violations in NYPD practices. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 622 (S.D.N.Y. 2013).

⁴¹ *Id.*; see also *infra* Figure 1.

⁴² See Joseph Goldstein, *Street Stops Still a ‘Basic Tool,’ Bratton Says*, N.Y. TIMES (Mar. 4, 2014), <http://www.nytimes.com/2014/03/05/nyregion/bratton-says-street-stops-and-fighting-low-level-crime-will-remain-crucial.html>.

⁴³ Source of data: See *supra* note 18 (Data Set).

for low-level offenses.⁴⁴ This raises several concerns. First, arrests have the potential for serious consequences for the individuals they bring into the criminal justice system. Arrests impose significant financial and nonmonetary burdens⁴⁵ which, given their concentration among young, disadvantaged minority men,⁴⁶ are likely to compound the structural challenges that these men already face.⁴⁷ Further, even low-level arrests establish criminal history records, which may persist regardless of whether the arrests lead to criminal convictions.⁴⁸ Arrests also frequently lead to correctional supervision. The average jail population increased from approximately 500,000 to 2.3 million between 1980 and 2009, and the populations on probation and parole increased approximately fourfold and more than threefold, respectively, during this time.⁴⁹

In addition to the consequences for arrestees, the sharp increase in arrests has the potential to “overwhelm[]” the justice system itself, clogging judges’ calendars, increasing the caseload handled by the indigent defense system, and undermining the ideal of a speedy trial.⁵⁰ Defendants may face several court appearances and spend time in jail leading up to their trial, depending on their ability to post bail, contributing to overcrowding.⁵¹ The volume of criminal cases and resulting delays lead many cases to be processed in what several scholars refer to as an administrative or “assembly-line” fashion,⁵² for the sake of speeding up a resolution. As such, defendants may be treated in a de-individualized manner that undermines due process ideals.

⁴⁴ See Kohler-Hausmann, *supra* note 10, at 690.

⁴⁵ See THE PROCESS IS THE PUNISHMENT, *supra* note 1; Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339 (2009); Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1753–60 (2010); William M. Landes, *The Bail System: An Economic Approach*, in ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 135, 138 (Gary S. Becker & William M. Landes eds., 1974).

⁴⁶ See CHAUHAN, *supra* note 28, at 13.

⁴⁷ See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006).

⁴⁸ See Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay For?*, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 174, 185–86 (Shawn Bushway et al. eds., 2007).

⁴⁹ See Shannon et al., *supra* note 4.

⁵⁰ William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013) [hereinafter Glaberson, *Faltering Courts*], <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html>; see also William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013) [hereinafter Glaberson, *Long Waits*], <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html>.

⁵¹ See Glaberson, *Faltering Courts*, *supra* note 50; Glaberson, *Long Waits*, *supra* note 50.

⁵² See Kohler-Hausmann, *supra* note 10 (explaining and critiquing the “assembly-line justice” depiction of lower criminal courts).

II. ARREST PROCESSING

A. *Pretrial Activity*

When a person is arrested, he is brought to criminal court for arraignment, usually within twenty-four hours.⁵³ While awaiting arraignment, an arrestee is either released with a Desk Appearance Ticket (DAT), or held in custody until seen by a judge.⁵⁴ DAT defendants are typically detained at a local police precinct or central booking while fingerprints are taken and a criminal history report is returned, then released with a notice to appear in court on a future date.⁵⁵ In New York City, the decision to issue a DAT or hold a defendant in custody is made by law enforcement; citywide statistics from the New York State Office of Court Administration (OCA) suggest that defendants were released in nineteen percent of arraignments, and detained in eighty-one percent.⁵⁶ It bears noting that within New York City, while police operations are most immediately implemented at the precinct level with oversight at the city level, courts are operated at the county level, with separate criminal courts in each of the city's five boroughs.⁵⁷ It is therefore possible that arrests for similar charges may be treated dramatically differently across boroughs.

At arraignment, a case is either closed—due to dismissal of charges, adjournment in contemplation of dismissal, or guilty plea—or the judge makes a bail decision—setting a payment amount, remanding the defendant to custody, or releasing the defendant on recognizance, based on their promise to return to court.⁵⁸ Money bail is set when arrestees are perceived as unlikely to appear in court on their own recognizance. Defendants provide a quantity of money—cash, a bond, or some other form of money, which they will lose if they do not return to court, providing them with an incentive to appear.⁵⁹ Defendants charged with serious felonies or with two or more felony convictions may be remanded and ordered detained without bail.⁶⁰ Bail and remand determinations are made at the discretion of the court.⁶¹

⁵³ See HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY* 11 (2010).

⁵⁴ See LISA LINDSAY, *CRIMINAL COURT OF THE CITY OF N.Y., ANNUAL REPORT 2012*, at 10.

⁵⁵ See *id.*

⁵⁶ See *infra* Table 6; see also LINDSAY, *supra* note 54, at 24.

⁵⁷ See, e.g., LINDSAY, *supra* note 54, at 13.

⁵⁸ See *id.* at 21–25.

⁵⁹ See Landes, *supra* note 45, at 136.

⁶⁰ See N.Y. CRIM. PROC. LAW § 530.20 (McKinney 2009).

⁶¹ See HUMAN RIGHTS WATCH, *supra* note 53, at 35.

B. *Procedural Challenges and Due Process Concerns*

Despite the presumption of innocence afforded to criminal defendants, arrestees may face numerous burdens before a determination of guilt or innocence is made. Many police encounters are physically invasive and psychologically taxing.⁶² More than half of street stops involve the physical contact of a frisk, and officers describe approximately twenty percent as involving the “use of force.”⁶³ These physical intrusions are frequently coupled with harsh language and racial invective,⁶⁴ and have the potential to be psychologically distressing,⁶⁵ particularly if the accusations of criminality are unwarranted.⁶⁶ Repeated encounters of this nature with the criminal justice system also threaten to undermine the mental health of those involved if they perceive a racially discriminatory component to this activity, or fear that they may be targeted in the future.⁶⁷

Once arrested, many defendants are detained for an extended period of time.⁶⁸ While arrestees may be detained due to an outstanding warrant or conviction for another offense, many are detained, either because they lack the resources to post bail or for other reasons.⁶⁹ Data from the United States Bureau of Justice Statistics suggest that sixty-two percent of the United States jail population consists of detainees awaiting trial,⁷⁰ with procedural delays dramatically extending the length of time they spend incarcerated.⁷¹ Extended pretrial confinement

⁶² See Geller et al., *supra* note 10.

⁶³ CHRISTOPHER DUNN, N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2012, at 2 (2013), http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf (noting that “55.8 percent of those stopped were frisked”); Report of Jeffrey Fagan, *supra* note 13, at 64.

⁶⁴ See Brunson & Weitzer, *supra* note 37, at 869–71.

⁶⁵ See Brunson, *supra* note 37, at 95; see also Brunson & Weitzer, *supra* note 37, at 867–69; Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363 (2001).

⁶⁶ See Bob Herbert, Opinion, *Watching Certain People*, N.Y. TIMES (Mar. 1, 2010), <http://www.nytimes.com/2010/03/02/opinion/02herbert.html>.

⁶⁷ See Kathryn Freeman Anderson, *Diagnosing Discrimination: Stress from Perceived Racism and the Mental and Physical Health Effects*, 83 SOC. INQUIRY 55 (2013); Pamela J. Sawyer et al., *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions*, 102 AM. J. PUB. HEALTH 1020 (2012).

⁶⁸ See Glaberson, *Faltering Courts*, *supra* note 50; Glaberson, *Long Waits*, *supra* note 50.

⁶⁹ See HUMAN RIGHTS WATCH, *supra* note 53, at 20; Robert Lewis, *No Bail Money Keeps Poor People Behind Bars*, WNYC (Sept. 19, 2013), <http://www.wnyc.org/story/bail-keeps-poor-people-behind-bars>.

⁷⁰ See HUMAN RIGHTS WATCH, *supra* note 53, at 5.

⁷¹ See Michael P. Jacobson & Martha W. King, *A Mayoral Agenda for Justice and Safety in New York City*, in TOWARD A 21ST CENTURY CITY FOR ALL: PROGRESSIVE POLICIES FOR NEW YORK CITY IN 2013 AND BEYOND 7–8 (John Mollenkopf ed., 2013), http://www.21cforall.org/sites/default/files/pdf/21cforall_public_safety.pdf; see also Glaberson, *Faltering Courts*, *supra* note 50; Glaberson, *Long Waits*, *supra* note 50; Robert Lewis, *Guilty Until Proven Innocent*, WNYC (Sept. 17, 2013), <http://www.wnyc.org/story/guilty-until-proven-innocent>.

raises several due process concerns. Not only do jailed arrestees face a denial of liberty prior to trial and frequently face poor conditions of confinement, they are often precluded from consulting with lawyers and searching for witnesses, complicating their trial preparation.⁷² These challenges create incentives for detained defendants to plead guilty.⁷³

Arrestees released following arraignment also face costs, both monetary and nonmonetary. Those released on bail may struggle to afford the payment,⁷⁴ and in addition to the cost of bail itself, they may need to pay commission to a bail bondsman.⁷⁵ Those released are also likely to face legal fees. Although these fees may be reduced for defendants represented by a public defender or other subsidized attorney, judges in many cities and states have been given increasing authorization to impose monetary sanctions on defendants throughout the processing of their cases.⁷⁶ Many fees are imposed on individuals sentenced to probation, and some, such as filing or deferred prosecution fees, may even be imposed on defendants not ultimately convicted. Beyond monetary costs, arrestees face multiple “small indignities,”⁷⁷ such as the disclosure of their personal financial circumstances, to obtain public defender services. Arrestees who miss a court date or fail to pay their fees may have warrants issued for their arrest, creating incentives for them to go “on the run” and withdraw from social institutions more generally.⁷⁸ Police have raided homeless shelters⁷⁹ and conducted widespread searches in housing projects⁸⁰ to find individuals with outstanding warrants.

In *The Process Is the Punishment*, Feeley’s seminal study of lower courts, he noted that the burdens faced by low-level defendants create incentives for them to accept plea agreements to speed the disposition of their case since such pleas may carry a substantially reduced sentence.⁸¹ To the extent that pleas represent the end of sanctioning rather than the beginning, however, the most tangible sanctions associated with an

⁷² See Landes, *supra* note 45, at 138.

⁷³ See *id.*; see also THE PROCESS IS THE PUNISHMENT, *supra* note 1, at 134; Kohler-Hausmann, *supra* note 10, at 670; Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1530–32 (2013).

⁷⁴ See HUMAN RIGHTS WATCH, *supra* note 53, at 20.

⁷⁵ See THE PROCESS IS THE PUNISHMENT, *supra* note 1, at 238.

⁷⁶ See Harris et al., *supra* note 45, at 1770.

⁷⁷ THE PROCESS IS THE PUNISHMENT, *supra* note 1, at 221.

⁷⁸ See Goffman, *supra* note 45, at 340.

⁷⁹ See Tina Moore & Simone Weichselbaum, *NYPD Commissioner William Bratton Ordered Cops on the Upper West Side to Stop Raiding Homeless Shelters*, N.Y. DAILY NEWS (June 18, 2014, 5:12 PM), <http://www.nydailynews.com/new-york/nyc-crime/cops-told-stop-raiding-shelters-bratton-article-1.1835064>.

⁸⁰ See Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), <http://www.nytimes.com/2010/07/12/nyregion/12frisk.html>.

⁸¹ THE PROCESS IS THE PUNISHMENT, *supra* note 1, at 221–22.

arrest do not differ between the guilty and the innocent, and frequently lack formal regulation.⁸² These unregulated sanctions distort the “adjudicative ideal” and suggest a need for greater due process protections.⁸³

C. Current Contribution

This Article situates order maintenance policing, and low-level arrests in particular, within the wider context of the criminal justice system. Tracy Meares notes that the widespread nature of SQF and its top-down imposition comprise a program strongly supported by NYPD leadership, with broad lessons for the constitutionality of proactive policing.⁸⁴ To fully understand these lessons, it is important to understand how police contact and its consequences interface with other criminal justice institutions. This Article traces SQF arrestees from their initial contact with the police through the courts, to the disposition of charges against them, using a unique dataset linking data on SQF activity from the NYPD to data from the New York State OCA. This analysis advances our understanding of the experience of individuals whose initial contact with the criminal justice system begins with a low level of intrusion, referred to by police leadership as a “fact of urban life.”⁸⁵

Finally, this Article measures several of the burdens facing arrestees between their first police contact and their final case disposition (and, when relevant, sentencing). Presentencing burdens of criminal justice involvement are also more difficult to measure and regulate, and given the salience of sentencing in policy discourse⁸⁶ and research,⁸⁷ less is known about how the procedural punishments identified by Feeley are

⁸² See *id.* at 238.

⁸³ *Id.* at 291. Although defendants pleading guilty may not face additional sanctions associated with their arrest, they are at risk of significant collateral costs due to the criminal history they acquire as a result. *Id.* I return to this point in my conclusion. Arrest numbers were deemed invalid if they lacked the standard format or included strings of repeating digits (e.g., M99999999). See OAG REPORT, *supra* note 15, at A-1 to -2 (discussing the process by which arrest numbers were deemed invalid).

⁸⁴ Tracey L. Meares, Essay, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015).

⁸⁵ Fagbenle et al., *supra* note 20 (quoting Ray Kelly, Commissioner, N.Y.C. Police Dep’t).

⁸⁶ See *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 202–13 (2013) [hereinafter *S. Judiciary Comm. Hearing*] (statement of the Am. Civil Liberties Union).

⁸⁷ See Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL’Y 13 (2011); Jeffrey R. Kling, *Incarceration Length, Employment, and Earnings*, 96 AM. ECON. REV. 863 (2006); Charles E. Loeffler, *Does Imprisonment Alter the Life Course? Evidence on Crime and Employment from a Natural Experiment*, 51 CRIMINOLOGY 137 (2013).

experienced in the contemporary criminal justice system. By tracing SQF arrests through the courts over a four year period, during the peak of SQF activity in New York City, I measure aspects of front-end punishment which may have implications for the subsequent trajectories of arrested individuals.

III. DATA AND METHODS

A. *Analysis Sample*

Analyses were based on the 150,330 street stops reported as leading to arrest from 2009 through 2012—6.26% of all stops in this time period—as reported by the NYPD to the New York State Office of the Attorney General (OAG).⁸⁸ These were merged with data used in recent litigation⁸⁹ to provide more information on the encounters—whether arrestees were frisked, searched, and subject to physical force. The stops were subsequently matched to data from the OCA. Of these stops, 7,734 (5.1%) were eliminated from the analysis because their arrest numbers were duplicates or invalid.⁹⁰ The remaining 142,596 arrests represent 10.6% of all New York City arrests reported to the state Division of Criminal Justice Services (DCJS) from 2009 through 2012.⁹¹

In the merged dataset, arrests were identified either as “disposed” cases (i.e., in which arrestees were arraigned and disposition of charges were determined), “pending” cases (not yet disposed of), and “not arraigned” (not in the OCA system). Because the OCA data do not contain information from cases in family court, the primary analysis sample consists of the 116,896 arrests of individuals aged sixteen (the age of majority in the New York State criminal justice system) or over, whose cases reached disposition.⁹²

Table 1 compares the entering sample and final analysis sample to the universe of arrests reported to the state DCJS. The 116,896 arrests in the analysis sample are significantly less likely to be felonies than arrests more broadly ($P < .001$), consistent with the SQF prioritization of low-

⁸⁸ See *supra* note 18 (Data Set).

⁸⁹ *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2008 WL 4179210 (S.D.N.Y. Sept. 10, 2008).

⁹⁰ See *supra* note 18 (Data Set). Arrest numbers were deemed invalid if they lacked the standard format or included strings of repeating digits (e.g., M99999999). See OAG REPORT, *supra* note 15, at A-1 to -2 (discussing the process by which arrest numbers were deemed invalid).

⁹¹ See *supra* note 18 (Data Set).

⁹² *Id.*

level offenses.⁹³ Notably, the analysis sample contains over 7,000 arrests arraigned as violations and infractions (which are not reported to DCJS), rather than as either a felony or a misdemeanor.⁹⁴

	Full Sample	Arraigned and Disposed Cases	DCJS
Total Arrests, 2009-2012	142,596	117,427	1,395,792
Adult Arrests (16 or over)	137,240	116,896	1,348,113
Juvenile Arrests (under 16)	5,356	531	47,679
Percent Juvenile	4%	<1%	3%

Adult Arrests, 2009-2012	116,896	1,348,113
Felony	17,919	365,317
Percent	15%	27%
Misdemeanor	91,173	982,796
Percent	78%	73%
Violations and Infractions	7804	Not
Percent	7%	Reported

Table 1: Analysis Sample, Compared to Citywide Arrests⁹⁵

B. Analytical Approach

1. Sample Description

I begin the analysis with a detailed description of the analysis sample, including arrestee demographics, details of the offense generating each arrest, the charges on which arrestees were arraigned, and the charges and outcomes of disposition. Arrests can be disposed of as: guilty, either through a plea or a trial; not guilty, either through a case dismissal or an acquittal at trial; or as an Adjournment in Contemplation of Dismissal (ACD), in which the defendant is released, and after either six months or one year, if the defendant does not come into further contact with the criminal justice system, the case is

⁹³ *Id.*

⁹⁴ The distribution of arrests in the analysis sample is also skewed toward low-level offenses when violations and infractions (not recorded by DCJS) are discounted. Of the total felony and misdemeanor arraignments in the analysis sample, 16% were felonies, significantly less than the distribution of DCJS arrests. See *infra* Table 1.

⁹⁵ Source of data: OAG REPORT, *supra* note 15. Data on crime type for “Arraigned and Disposed Cases” based on arraignment charge reported by OCA to OAG. Arrestee age data in “Arraigned and Disposed Cases” based on data provided by NYPD to OAG. DCJS data based on aggregates of adult and juvenile arrests in New York City.

dismissed.⁹⁶ The incentives defendants face to plead guilty,⁹⁷ coupled with concerns about the NYPD's street policing tactics and the potential for arrests that lack probable cause,⁹⁸ suggest that on average, disposition charges will be less serious than arraignment charges.

The second stage of the analysis estimates the extent to which the processing of SQF arrests imposes burdens on arrestees that precede a determination of guilt or innocence, and their potential to compromise the adjudicative ideal described by Feeley. I measure the burdens that SQF arrests impose in several ways.

2. Early-Stage Intrusion

My first measure of processing burden examines the police encounters that bring the arrestee into contact with the system. I measure the intrusion applied by the police in the street stop that generated each arrest in terms of frisks, searches, and physical force. Although the SQF arrests that comprise the analysis sample may not be representative of the broader population of arrests in New York City, they are of unique interest due to the policy relevance of SQF activity, and the relatively substantial proportion of arrests (approximately 10%) that they represent.⁹⁹

3. Burdens on Time and Liberty

I next compute the average number of days arrestees spend awaiting arraignment, the total time arrestees spend between arrest and disposition, and the number of "adjournments" associated with each arrest. Due to the probability of differences in case processing across courts, I estimate these burdens separately by borough, as well as for the city as a whole.

I also estimate the extent to which arrestees are held in custody. Although the data do not specify which arrestees are released with a DAT and which arrestees are held in custody, I use the citywide rate at

⁹⁶ See N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2007); see also OAG REPORT, *supra* note 15, at 8–9. A small number of arrests (3.84% of the analysis sample) are given a final disposition of "post-disposition re-sentencing" (PDR), which may result from the violation of probation or conditional discharge, or from convictions that are vacated. For the purposes of this analysis, these cases are treated among the guilty dispositions in order to be conservative. See *supra* note 18 (Data Set).

⁹⁷ See THE PROCESS IS THE PUNISHMENT, *supra* note 1, at 220–22.

⁹⁸ See Graham Rayman, *The NYPD Tapes, Part 2*, VILLAGE VOICE (May 11, 2010), <http://www.villagevoice.com/2010-05-11/news/nypd-tapes-part-2-bed-stuy>.

⁹⁹ See *supra* Table 1.

which arrestees are detained (81%) to estimate the average time in confinement, assuming DATs were given to the longest 19% of wait times.¹⁰⁰ I also estimate the prevalence of detention during case processing for arrestees whose cases were not disposed of on the day of arraignment.¹⁰¹ Specifically, I use indicators of arrestees' bail and release status at arraignment, and consider arrestees to be detained if their bail status is "remand," or "bail not posted."¹⁰² Arrestees may be detained for the entire time their case is in progress, a portion of this time, or not at all. I therefore also assess the extent to which arrestees held at arraignment are subsequently released on recognizance or bail (i.e., if their case is "bail continued"). Finally, I note arrestees as having been detained predisposition if their case is disposed of as guilty (by plea or trial), and they are subsequently sentenced to time served.

4. Identifying Front-End Punishment

Finally, I examine arrests and the burdens they impose in the context of their final dispositions. I examine five groups of arrestees: (1) those whose cases were disposed of as not guilty; (2) those with cases disposed of with an ACD; (3) those pleading guilty to, or found guilty of, an offense, but not sentenced to incarceration; (4) those sentenced to time served; (5) those sentenced to prison or jail. For each group I compare the front-end burden incurred by individuals subsequently incarcerated to their custodial sentences or other dispositions.

It is inevitable, given that the constitutional standard for arrest is less stringent than the standard required for conviction,¹⁰³ that some people will be arrested who are not found guilty of a crime. However, case processing burdens may create incentives for guilty pleas, putting defense attorneys in the challenging position of helping their clients pursue either their short-term or long-term interests (i.e., quickly resolving their arrests versus avoiding a criminal conviction). The extent to which defendants incur burdens prior to, rather than as a result of, sentencing, undermines the adjudicative ideal underpinning criminal case processing.

¹⁰⁰ See LINDSAY, *supra* note 54, at 24.

¹⁰¹ Four arrests in the analysis sample have disposition dates that precede their arraignment dates (three ACDs and one plea). I assume that these represent transcription errors, and include them among the arrests disposed at arraignment. See *supra* note 18 (Data Set).

¹⁰² The extent to which bail is noted as "not posted" suggests that arrestees face a financial burden as well as a time burden as the result of their arrest, which I return to below. See *infra* Part IV.B.

¹⁰³ See *People v. De Bour*, 352 N.E.2d 562 (N.Y. 1976).

IV. RESULTS

A. *Sample Description*

1. Demographics and Arrest Offenses

Table 2 provides demographic characteristics of the arrestees in the analysis sample. It bears noting that the analysis sample is comprised of arrest incidents rather than individuals. The sample therefore need not represent the population of criminal defendants, or even SQF arrestees, since individuals may experience multiple arrests and be represented multiple times in the analysis sample. Nonetheless, the statistics in Table 2 suggest that SQF arrests follow a similar demographic pattern to SQF activity more broadly—concentrated among young, minority males. Nearly 90% of arrests in the sample are of nonwhites, and nearly 90% are of males, like the SQF distribution.¹⁰⁴ The analysis sample is older than the SQF distribution, due in part to the focus on arrestees sixteen and older.

Table 2 also presents the offenses for which individuals in the analysis sample were arrested, as noted by the arresting officer. The largest category of arrest type was for drug offenses, at just over 25%.¹⁰⁵ Another 19% of arrests were for “other or unknown offenses” (including 8% of arrests that could not be coded), and between 10 and 15% of arrests were for each category of trespass (14%), property (14%), weapons (12%), and violent offenses (12%).¹⁰⁶

¹⁰⁴ DUNN, *supra* note 63, at 19.

¹⁰⁵ *See infra* Table 2.

¹⁰⁶ *See infra* Table 2. While the classification of arrest offenses in this analysis does not correspond precisely to that used by the examination of misdemeanor arrests in CHAUHAN ET AL., *supra* note 28, it bears noting that violent offenses are less prevalent in the SQF sample than “offenses against persons” are in misdemeanor arrests in New York City for a similar time period, *see infra* Table 2. Weapons offenses are significantly more prevalent, and property and drug offenses appear in roughly similar proportions. *See infra* Table 2. Trespass arrests are significantly more prevalent in SQF arrests than in misdemeanor arrests more generally, while Quality of Life (QOL) offenses (including, but not limited to, turnstile jumping and disorderly conduct) are less prevalent in the SQF sample. *See infra* Table 2. It is notable, however, that nearly 20% of my analysis sample (19.39%) was classified as “other offenses” or could not be coded from the SQF data. *See infra* Table 2; *see also* OAG REPORT, *supra* note 15, at D-1 to -2, G-1.

**Table 2: Analysis Sample Demographic Characteristics
(N=116,896 Arrest Incidents)**

Arrestee Demographics and Arrest Characteristics		
<u>Race/Ethnicity</u>	<u>N</u>	<u>%</u>
White	11995	10.3
Black	60340	51.6
Hispanic – White	8171	7.0
Hispanic – Black	29553	25.3
Asian/Pacific Islander/American Indian	4685	4.0
Unknown and Other	2152	1.8
<u>Sex</u>		
Male	104561	89.5
Female	11132	9.5
Unknown	1203	1.0
<u>Age (mean = 30.2, SD=12.1)</u>		
16-19	24548	21.0
20-24	26125	22.4
25-35	30961	26.5
36-50	26537	22.7
50-65	8257	7.1
Over 65	430	0.4
Unknown	38	0.0
<u>Arrest Offense Category</u>		
Violence	13556	11.6
Weapons	14312	12.2
Property	16116	13.8
Drug	29286	25.1
Trespass	16379	14.0
QOL	4579	3.9
Other or Unknown	22668	19.4

Table 2: Arrestee Demographics and Arrest Characteristics¹⁰⁷

2. Charge Decay

The offenses for which individuals are arrested were distributed far differently than the offenses of their final dispositions. Table 3 presents the class of charges for which arrestees were arraigned, and for which their cases were disposed. The vast majority of SQF arrestees (78%) were arraigned on misdemeanor charges, and a substantial number (15.3%) were arraigned on felony charges.¹⁰⁸ However, it bears noting that fewer than two-thirds of SQF arrests result in guilty pleas, with more than a

¹⁰⁷ Source of data: See *supra* note 18 (Data Set). Percentages may not add up to 100 due to rounding.

¹⁰⁸ See *infra* Table 3.

quarter ending in ACDs, and approximately 12% ending with the dismissal of charges.¹⁰⁹ Of arrests resulting in guilty dispositions (usually through guilty pleas), the majority of convictions are for less severe offenses than the distribution of arraignments.¹¹⁰ More than half of arrestees found guilty are found guilty of violations and infractions—minor offenses that do not carry jail sentences.¹¹¹ A substantial minority of arrestees are found guilty of misdemeanors (38.6%), and fewer than 10% are found guilty of felonies.¹¹² This suggests significant charge decay as cases proceed through the courts.

Table 3: Distribution of Arraignment and Disposition Charges by Offense Class

Class	Arraignment Charges		Disposition Charges					
	N=116,896 100.0%		Guilty N=71,661 61.3%		ACD N=30,272 25.9%		Not Guilty N=14,963 12.8%	
	N	%	N	%	N	%	N	%
Felony	17,919	15.3	5,178	7.2	591	2.0	4,901	32.8
Misdemeanor	91,173	78.0	27,625	38.6	25,402	83.9	9,657	64.5
Violation	6,137	5.3	35,520	49.6	3,240	10.7	378	2.5
Infraction	1,667	1.4	3,338	4.7	1,039	3.4	27	0.2

Table 3: Distribution of Arraignment and Disposition Charges by Offense Class¹¹³

Charge decay can also be seen in the contrast between arraignment and conviction offense types. As shown in the first two columns of Table 4, the distribution of arraignment offenses closely resembles the distribution of arrest offenses in Table 2.¹¹⁴ Examining the disposition of arrests in the analysis sample, however, suggests significant degradation of charges as arrests made their way through the courts. Of the 61% of arrests leading to guilty dispositions, more than 40% were disposed of as

¹⁰⁹ See *infra* Table 3.

¹¹⁰ See *infra* Table 3.

¹¹¹ See *infra* Table 3.

¹¹² See *infra* Table 3.

¹¹³ Source of data: See *supra* note 18 (Data Set). Column percentages may not add up to 100 due to rounding.

¹¹⁴ The most notable difference in the distributions of arrest and arraignment charges was that QOL offenses were more prevalent in arraignments than arrests (6% versus 4%), and “other and unknown offenses” were more prevalent among arrests than arraignments (19% versus 16%). OAG REPORT, *supra* note 15, at 16. This difference was likely due to differences in recordkeeping practices by the NYPD and OCA—arrest offenses were recorded from the utterances by the arresting officer in his or her UF-250, while arraignment and disposition charges were recorded by penal law chapters and offense class (A felony, B felony, etc.), which provide greater detail. *Id.* at 7 (“[T]he NYPD compiled arrest numbers from all UF-250 forms—the worksheets that officers are required to fill out after each stop—and provided these numbers to the OAG. The OAG then submitted those arrest numbers to the OCA. For each matching arrest number, the OCA provided the OAG with information concerning arraignment, disposition, sentencing, and other details.”).

Quality of Life (QOL) offenses, although arraignment on QOL charges was relatively rare.¹¹⁵ The bottom panel of Table 4 presents the procedural path to disposition for the arrests in the analysis sample. Notably, nearly all guilty dispositions came from plea bargains, and nearly all not-guilty dispositions came from charge dismissals. In very few cases did arrestees complete a trial.

Charges	Arraignment Charges		Disposition Charges					
	N=116,896		Guilty N=71,661		ACD N=30,272		Not Guilty N=14,963	
	N	%	N	%	N	%	N	%
Violence	13,205	11.3	2,852	4.0	1,335	4.4	5,259	35.2
Weapons	13,646	11.7	2,742	3.8	2,314	7.6	1,582	10.6
Property	15,953	13.7	7,064	9.9	2,505	8.3	2,137	14.3
Drug	32,127	27.5	10,822	15.1	11,788	38.9	1,905	12.7
Trespass	16,132	13.8	9,448	13.2	4,223	14.0	1,438	9.6
QOL	7,550	6.5	29,370	41.0	3,907	12.9	375	2.5
Other	18,283	15.6	9,363	13.1	4,200	13.9	2,267	15.2
Path to Disposition			Plea: N=66,889 Trial: N=289 PDR: N=4,483		ACD: N=30,272		Dismissal: N=14,811 Trial: N=152	

Table 4: Distribution of Arraignment and Disposition Charges by Offense Type¹¹⁶

Charge decay can also be observed in the low rates at which arrestees are found guilty of their arraignment charges. As noted in Table 3, only 61% of arraignments resulting from SQF arrests resulted in guilty pleas or convictions. Of those, just under one-third were convictions for the arraignment charges.¹¹⁷ Figure 2 presents, for each category of arraignment offense, the percentage of cases disposed with the defendants guilty of the charges on which they were arraigned. Few defendants were convicted of their original charges. Of defendants arraigned on violent crime charges, only 8% were found guilty of their original charges—over half had charges dismissed or adjourned in contemplation of dismissal, and 40% plead to or were found guilty of other charges—nearly all lesser in degree, and approximately half of which were violations and infractions.¹¹⁸ Findings are even more striking for weapons and drug arraignments.¹¹⁹ More than half (61%) of weapons arraignments led to guilty pleas or convictions for charges other than the arraignment charge.¹²⁰ More than one-third of drug

¹¹⁵ See *infra* Table 4.

¹¹⁶ Source of data: OAG REPORT, *supra* note 15, at 15, G-1.

¹¹⁷ See *infra* Figure 2.

¹¹⁸ See *infra* Figure 2.

¹¹⁹ See *infra* Figure 2.

¹²⁰ See *infra* Figure 2.

arraignments (37%) were adjourned in contemplation of dismissal.¹²¹ For no offense category were more than 30% of arrestees convicted of the offense that they were charged with at arraignment.¹²²

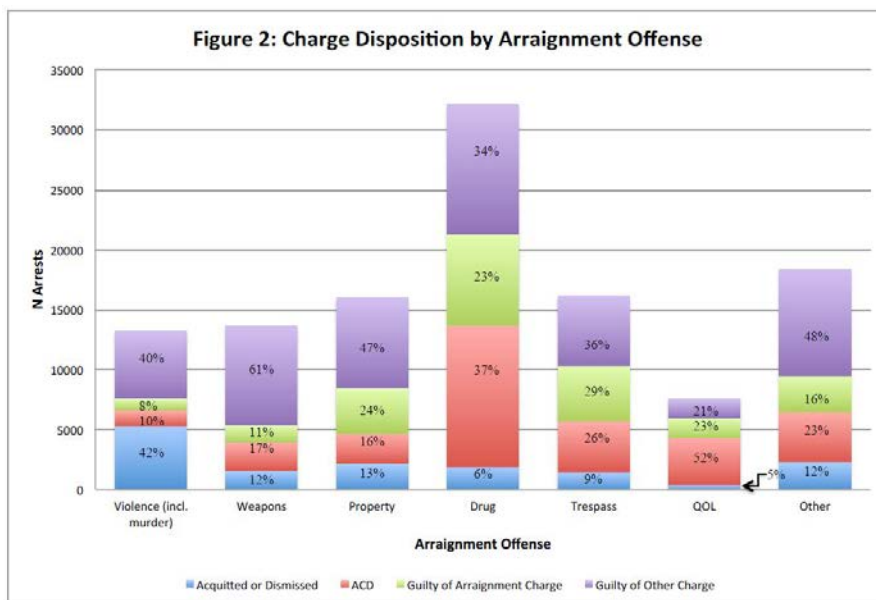


Figure 2: Charge Disposition by Arraignment Offense¹²³

It is also notable that more than half of guilty dispositions were convictions for violations and infractions—low-level offenses rarely punished with jail time. As demonstrated in Table 3, fewer than one-third of felony arraignments are resolved as felony convictions—the majority of felony arraignments result either in dropped charges, ACDs, or in pleas to misdemeanors and violations. It also bears noting that while the vast majority of SQF arrests (77.99%) were arraigned on misdemeanor charges, most of these arrests resulted either in ACDs or pleas to violations and infractions, and about 10% of misdemeanor arraignment charges were dismissed altogether.¹²⁴

B. Burdens of Arrest

Although most arrests in the analysis sample resulted in dismissals, ACDs, or low-level guilty pleas, the predisposition data suggest that

¹²¹ See *infra* Figure 2.

¹²² See *infra* Figure 2.

¹²³ Source of data: See *supra* Table 4.

¹²⁴ See *supra* Table 3.

arrestees faced considerable procedural burdens in their encounters with the justice system.

1. Early-Stage Burdens

Table 5 identifies burdens that arrestees experienced in the police encounters that generated their arrests, and in the proceedings that followed. The top panel identifies high rates of physical intrusion reported in the SQF activity leading to arrest. A significant majority of arrests involved physical contact from the police: 84% involved a frisk, and 64% involved a search.¹²⁵ Nearly half of the arrests in the analysis sample involved contact specifically reported by the officer as “physical force.”¹²⁶ While most of this force was classified as “use of handcuffs” and “use of hands,”¹²⁷ and may have been incident to the arrest, rates of more severe force (for example, the suspect being placed against a wall or on the ground, or the officer drawing or pointing a weapon) were significantly higher than in SQF encounters more broadly.¹²⁸

The bottom panel of Table 5 presents the average number of days that arrestees spent awaiting arraignment and disposition. As these distributions are highly skewed, the table presents not only the mean and standard deviation, but also the range, interquartile range (IQR), and median values of time elapsed, along with the skewness of the distribution. As shown in the first row, most defendants were arraigned within two days. However, 17% were arraigned more than a month after their contact with the police, and a very small number (less than 1%) of arrests were arraigned more than one year later.¹²⁹

The distribution of time to arraignment is largely skewed by well-documented delays in Bronx court case processing.¹³⁰ The average time to arraignment is more than twice what it is in any other borough, and more than 25% of arrestees wait more than two months for arraignment, a process that the city seeks to complete within a day.¹³¹

As noted, not all defendants wait for arraignment behind bars. Citywide, 19% of defendants were given DATs.¹³² Based on this citywide rate, the third panel of Table 5 estimates prearraignment detention,

¹²⁵ See *infra* Table 5.

¹²⁶ See *infra* Table 5.

¹²⁷ See *infra* Table 5.

¹²⁸ See Second Supplemental Report of Jeffrey Fagan, Ph.D. at 34–35, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 01034 (SAS)), <https://ccrjustice.org/sites/default/files/assets/files/FaganSecondSupplementalReport.pdf>.

¹²⁹ See *infra* Table 5.

¹³⁰ See Glaberson, *Faltering Courts*, *supra* note 50; Glaberson, *Long Waits*, *supra* note 50.

¹³¹ See Glaberson, *Faltering Courts*, *supra* note 50; Glaberson, *Long Waits*, *supra* note 50.

¹³² See LINDSAY, *supra* note 54, at 24.

assuming that detention was limited to the shortest 81% of prearrest times. The bounded distribution of prearrest detention is far less skewed than that of prearrest times overall. More than 75% of arrestees, who were assumed to be confined, were arraigned within a day, with a small portion held for over a week.¹³³ However, given the well-documented concentration of processing delays in the Bronx courthouse,¹³⁴ there is a risk that many defendants are detained for extended periods of time.

Examining the total time between arrest and disposition, and the total number of adjournments, further underscores the variation in arrestees' experiences. At least 25% of arrestees in the analysis sample had their charges disposed of within one day, while another 25% waited over four months for disposition.¹³⁵ At the upper end of the distribution, approximately 5% of sample arrests were disposed of more than one year later.¹³⁶ Again, delays in the Bronx courthouse led to significant differences in wait time by borough. Examining adjournments, arrests require an average of approximately three adjournments before disposition; 25% of defendants have four or more adjournments, and the distribution extends as high as more than 100 adjournments.¹³⁷

Whether defendants were in custody during all or some of this time, or released on recognizance or bail, the open arrests and associated proceedings have the potential to substantially disrupt arrestees' lives.

¹³³ See Data Set, *supra* note 18.

¹³⁴ See Glaberson, *Faltering Courts*, *supra* note 50; Glaberson, *Long Waits*, *supra* note 50.

¹³⁵ See *infra* Table 5.

¹³⁶ See *infra* Table 5.

¹³⁷ See *infra* Table 5.

**Table 5: Burdens of Police Intrusion and Time to Arraignment and Disposition
(N=116,896 arrest incidents)**

<u>Stop Intrusion</u>						
Frisked						84.3
Searched						64.8
Any Physical Force Used						48.0
Type of Force – Use of Handcuffs						35.6
Type of Force – Use of Hands						31.2
Type of Force – Suspect against Wall						6.7
Type of Force – Suspect on Ground						2.7
Type of Force – Officer Drew or Pointed Weapon						1.5
<u>Time to Arraignment and Disposition</u>						
	Mean	SD	Median	IQR	Range	Skewness
Days from Arrest to Arraignment	16.6	53.4	1	1-2	0-1515	9.1
Bronx	36.1	78.4	1	1-67	0-1508	4.9
Brooklyn (Kings County)	13.9	46.0	1	1-2	0-1515	10.0
Manhattan (New York County)	14.5	51.0	1	1-3	0-1267	11.6
Queens	10.4	42.0	1	1-1	0-1477	13.1
Staten Island (Richmond County)	7.7	23.5	1	1-2	0-678	13.9
<i>Assuming longest 19% released on DATs (n=94,175)</i>						
Estimated days pre-arraignment confinement (among confined)	1.5	3.3	1	1-1	0-26	5.8
Days from Arrest to Disposition	101.0	156.2	41	1-130	0-1629	3.0
Bronx	131.1	187.7	71	1-164	0-1629	2.6
Brooklyn (Kings County)	98.7	153.1	40	1-126	0-1616	3.1
Manhattan (New York County)	100.8	151.0	39	1-140	0-1579	2.9
Queens	83.8	140.5	30	1-106	0-1516	3.4
Staten Island (Richmond County)	101.6	145.6	41	1-141	0-1413	2.6
Adjournments	3.3	4.3	2	1-4	1-116	4.0

Table 5: Burdens of Police Intrusion and Time to Arraignment and Disposition¹³⁸

2. Burdens While in Process

Although all time spent awaiting arraignment and disposition of an arrest imposes a cost on arrestees, the time spent in jail before sentencing represents a particular disruption and threat to due process. The data presented in Table 6 show that nearly half of arrests in the analysis sample were disposed of on the same day that they were arraigned, and nearly two-thirds of defendants whose cases proceeded beyond the day of arraignment were released on recognizance.¹³⁹ A very small number (fewer than 1%) were remanded, and approximately one-

¹³⁸ Source of data: See *supra* note 18 (Data Set). Note: 1,746 arrests provided to the OAG (1.5%) could not be matched to data on stop intrusions, leaving a “stop intrusion” analysis sample of n=115,150. Fewer than 1% of stops reported the use of pepper spray, an officer’s baton, or “other force.”

¹³⁹ See *infra* Table 6.

third were offered bail release.¹⁴⁰ Another 1% or fewer were either parole continued or had their status unknown.¹⁴¹

However, most defendants who were offered bail release were unable to post bail at arraignment, suggesting that they were detained. Although defendants' bail and release status could change multiple times throughout the processing of their cases—indeed, the “last bail and release” status provided in the data suggests that at least 10% of these defendants were released before disposition—any detention that defendants experience between arraignment and disposition places them at a disadvantage in preparing their cases, creates incentives to plead guilty, and represents a denial of liberty prior to a determination of guilt.¹⁴² Moreover, the data suggest that bail and release status at arraignment may estimate only a portion of the presentence detention experienced by arrestees. Approximately 14% of defendants not held awaiting bail at arraignment were subsequently sentenced to “time served,”¹⁴³ suggesting that they, too, were confined at times throughout their case. Among the subsample sentenced to time served, the median time from arrest to disposition was only two days.¹⁴⁴ However, the distribution is highly skewed, with an IQR ranging from one day to eighty-six days, and the top 5% of the subsample waiting over one year for disposition (95th percentile = 369 days).¹⁴⁵

Table 6: Bail and Release Status at Arraignment (N=116,896)

	N	Percent (all arrests)	Percent (cases not disposed on arraignment)
Disposed on arraignment	56,468	48%	
Released on Recognizance	38,106	33%	63%
Remanded without bail	398	<1%	1%
Bail not met	18,734	16%	31%
Released on bail	1,959	2%	3%
Parole Continued	79	<1%	<1%
Status Missing/Unknown	1,152	1%	2%

Table 6: Bail and Release Status at Arraignment¹⁴⁶

¹⁴⁰ See *infra* Table 6.

¹⁴¹ See *infra* Table 6.

¹⁴² See *supra* note 18 (Data Set).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Source of data: see *id.*

C. *Front-End Punishment*

Table 7 presents the relationship between predisposition burden, disposition, and final sentencing. The first two columns suggest that arrestees may face substantial burdens, even if not ultimately convicted of a crime. Arrests ending in not-guilty dispositions (usually the dismissal of charges) take an average of more than five months (166.9 days) to reach disposition, and an average of nearly five adjournments.¹⁴⁷ Many defendants (in 24% of arrests) spent time unable to post bail. Nearly all (99%) of these arrests ended with the dismissal of charges.¹⁴⁸ However, these charges had the potential for considerable disruption in pursuit of their dismissal.

Arrestees whose cases ended in ACDs faced significantly less case processing burden; defendants with long wait times until arraignment were likely released with a DAT rather than held in custody. Very few ACD defendants were held in lieu of bail, and nearly three-fourths of ACD dispositions came at arraignment.¹⁴⁹ Defendants receiving an ACD faced fewer adjournments and spent less time awaiting disposition on average, than defendants with other dispositions.¹⁵⁰ It is noteworthy, however, that approximately one-third of cases ending in ACD involved defendants charged with marijuana possession.¹⁵¹ Defendants facing marijuana possession charges are only permitted a single ACD;¹⁵² if these individuals are rearrested on the same charge, they may experience a considerably greater burden.

Examining arrestees with guilty dispositions (more than 90% of the time as the result of a plea) suggests that arrestees faced substantial processing burdens before sentencing.¹⁵³ Nearly 10% of arrestees not subsequently incarcerated had been held for some time following arraignment.¹⁵⁴ Those pleading to charges with nonincarceration sentences had an average of more than three adjournments, and spent an average of more than 100 days with an open case.¹⁵⁵ Arrestees sentenced to time served faced fewer adjournments, and significantly less time until disposition. Finally, arrestees sentenced to additional jail or prison time experienced significant predisposition burdens. While they were arraigned more quickly than other arrestees, they were far

¹⁴⁷ See *infra* Table 7.

¹⁴⁸ See *infra* Table 7.

¹⁴⁹ See *infra* Table 7.

¹⁵⁰ See *infra* Table 7.

¹⁵¹ See *infra* Table 7.

¹⁵² See N.Y. CRIM. PROC. LAW §§ 170.55–170.56 (McKinney 2004).

¹⁵³ See *supra* note 18 (Data Set).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

more likely to be held due to bail nonpayment, their cases involved more adjournments, and on average, took more time until disposition than other defendants with cases disposed as guilty. Arrestees sentenced to jail or prison spent an average of 134.5 days with unresolved charges (median = 39 days).¹⁵⁶ Notably, the average incarceration sentence issued (excluding 27 arrests in which the arrestee was sentenced to life in prison) was 226.4 days, with a median of 30 days.¹⁵⁷

Table 7: Estimated Processing Burdens by Disposition and Sentence Status

	Not Guilty	ACD	Guilty, no incarceration	Guilty, time served	Guilty, jail/prison
Percent with Bail Not Posted at Arraignment	24.1	1.7	9.6	10.5	48.2
<i>Average Number of Adjournments</i>	4.9	1.7	3.2	2.4	5.6
[SD]	[5.0]	[1.7]	[3.9]	[2.8]	[6.4]
<i>Median Number of Adjournments</i>	3	1	2	1	3
<i>Average Days, Arrest - Disposition</i>	166.9	55	103.4	79	134.2
[SD]	[158.8]	[98.1]	[153.5]	[147.6]	[205.0]
<i>Median Days, Arrest - Disposition</i>	119	28	48	6	38
<i>Average Incarceration Sentence (days)</i>					226.7
[SD]					[539.1]
<i>Median Incarceration Sentence (days)</i>					30
<i>N</i>	14,963	30,272	36,666	15,300	19,695

Table 7: Estimated Processing Burdens by Disposition and Sentence Status¹⁵⁸

V. DISCUSSION

A. Summary of Findings

My findings suggest that involvement with criminal justice institutions imposes burdens on individuals even at very low levels of contact with the system. Many stop encounters that generated the arrests in the analysis sample were physically invasive, with physical force significantly more prevalent than in SQF activity more broadly.¹⁵⁹ In addition, the concerted efforts made by New York State's criminal courts to arraign defendants within one day¹⁶⁰ fall short in many cases—most notably in the Bronx—which is cause for concern. It is also notable that the time arrestees spent awaiting both arraignment and disposition, like the count of adjournments, were characterized by extremely skewed

¹⁵⁶ See *infra* Table 7.

¹⁵⁷ See *infra* Table 7.

¹⁵⁸ Source of data: See *supra* note 18 (Data Set). Note: Sentence length statistics exclude 27 life sentences.

¹⁵⁹ *Id.*; see also *supra* Table 5.

¹⁶⁰ See LINDSAY, *supra* note 54, at 19.

distributions. The vast majority of arrest-processing burden was disproportionately borne by a small number of people, including some whose charges were ultimately dismissed or who were acquitted at trial.

The trial burdens placed on arrestees raise serious concerns for the incentives that they create for arrestees to plead guilty and forgo formal processing. Nearly all cases resulting in not-guilty dispositions were due to dismissal of charges, and more than 80% of arrest charges were disposed of with guilty pleas and ACDs.¹⁶¹ Less than 1% of arrests ended with a trial.¹⁶² On average, cases resulting in not-guilty dispositions took far longer than cases resulting either in ACDs or guilty dispositions.¹⁶³ These burdens raise particular concern given the relatively limited resources available to most SQF arrestees, more than 90% of whom relied on legal services dedicated to low-income defendants.¹⁶⁴ The plea and ACD rates raise concerns that arrestees may have unintentionally foregone their rights to due process, establishing a potentially stigmatizing criminal record, all in the interest of resolving their cases more quickly or at a lower cost.

B. *Limitations*

Although these analyses suggest significant hardships imposed on low-level arrestees, the results must be interpreted with caution. The data provided by the OCA give only a partial picture of arrestees' experiences, and were not interpreted as a complete event history of their case processing. Most notably, the NYPD did not provide information about whether arrestees were held awaiting arraignment, or released with a DAT. Likewise, the OCA provided basic information on arrestees' bail and release status at arraignment, but no information or other details that might have indicated arrestees' ability to pay, such as the amount of bail set. Further, although the OCA provides bail and release status at arraignment, and (if disposed after arraignment) their last status prior to disposition, the data contain no information on the intervening period, other than the total number of adjournments. The "last bail and release" status suggests movement across categories,¹⁶⁵ but a complete event history cannot be ascertained from the data.

It also bears repeating that the analysis sample consists only of arrests resulting from SQF activity that were arraigned in criminal court. These arrests are highly unlikely to be representative of the broader

¹⁶¹ See *supra* Tables 3–4.

¹⁶² See *supra* Tables 3–4.

¹⁶³ See *supra* Tables 3–4.

¹⁶⁴ See *supra* note 18 (Data Set).

¹⁶⁵ See *supra* note 18 (Data Set).

universe of arrests in New York City¹⁶⁶ or elsewhere. Moreover, more than 20,000 arrests based on the initial sample of SQF data were unable to be matched to arrests in the court data, suggesting that these arrests may never have been arraigned.¹⁶⁷ In some cases, district attorneys declined to prosecute, while in others, the arrests were voided by the NYPD, or were not traced to any observable conclusion.¹⁶⁸ I was unable to trace these arrestees, but anticipate that they experienced burdens that systematically differed from those faced by arrestees who were arraigned. The challenges they faced (either in their stop and arrest, or subsequently) cannot be readily quantified but should be explored in future research.

C. Conclusions

1. Consequences of Low-Level Criminal Justice Contact

Despite these limitations, my findings suggest a troubling state of criminal case processing, in which arrestees incur non-negligible burdens on their time, liberty, and financial well-being before their guilt or innocence is determined. These burdens raise serious concerns not only for the processing of the case itself, but also for the potentially long-lasting consequences of personal contact with the criminal justice system.

Individuals involved with the criminal justice system, even at low levels, also face significant challenges in their social and economic lives. Those with outstanding warrants or unresolved arrests may go “on the run” to avoid police detection, disconnecting themselves from family and friends and avoiding institutions such as banks, hospitals, or the formal labor market.¹⁶⁹ This withdrawal, coupled with the stigma and strains of criminal case processing,¹⁷⁰ may present barriers to long-term partnership¹⁷¹ and parenting.¹⁷² Low levels of criminal justice contact

¹⁶⁶ See *supra* Table 1.

¹⁶⁷ See *supra* note 18 (Data Set).

¹⁶⁸ *Id.*

¹⁶⁹ See Goffman, *supra* note 45.

¹⁷⁰ See ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999); Kathryn Edin, *Few Good Men: Why Poor Mothers Don't Marry or Remarry*, AM. PROSPECT, Jan. 3, 2000, at 26.

¹⁷¹ See BRUCE WESTERN WITH LEONARD LOPOO, *Incarceration, Marriage, and Family Life*, in PUNISHMENT AND INEQUALITY IN AMERICA 131 (2006).

¹⁷² See Kathleen J. Ferraro & Angela M. Moe, *Mothering, Crime, and Incarceration*, 32 J. CONTEMP. ETHNOGRAPHY 9 (2003).

also carry economic risks.¹⁷³ Employers are reluctant to hire job applicants with criminal records,¹⁷⁴ and many conduct formal background checks.¹⁷⁵ Arrests may be included in records even if charges are subsequently dismissed¹⁷⁶ or are still pending. Some employers formally sanction employees who are arrested, even before case disposition: for example, taxi drivers working for the New York City Taxi and Limousine Commission who are arrested are suspended, and their licenses are not reinstated unless charges are dismissed or resolved as a lower-level offense.¹⁷⁷ Finally, arrestees may also be labeled, either formally or informally, for greater attention from the criminal justice system in the future.¹⁷⁸

2. Low-Level Arrests and the Adjudicative Ideal

The burdens faced by SQF arrestees also raise concerns that the adjudicative ideal described by Feeley¹⁷⁹ continues to be undermined by contemporary criminal procedure. It is inevitable, given that the constitutional “probable cause” standard for arrest is less stringent than the burden of proof required for conviction,¹⁸⁰ that some people will come into contact with the criminal justice system who are not found guilty of a crime. Very few arrests in my analysis sample reached disposition at trial (fewer than 1%);¹⁸¹ instead, arrestees were deemed not guilty when charges against them were dismissed, deemed guilty upon accepting a plea agreement, or disposition came upon acceptance of an ACD. Most guilty dispositions involved pleas to violations and infractions, which might have been resolved without an arrest.

¹⁷³ See David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. ED. 36 (2013) (discussing the effects of arrest on high school dropout and college enrollment rates).

¹⁷⁴ See Harry J. Holzer et al., *How Willing Are Employers to Hire Ex-Offenders?*, FOCUS, Summer 2004, at 40; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

¹⁷⁵ See Holzer et al., *supra* note 174.

¹⁷⁶ See Bushway et al., *supra* note 48, at 191.

¹⁷⁷ See, e.g., *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011) (holding that N.Y.C. Taxi and Limousine Commission’s pre-suspension hearing policy does not inherently violate drivers’ right to due process).

¹⁷⁸ See Sampson, *supra* note 17, at 297–98.

¹⁷⁹ See THE PROCESS IS THE PUNISHMENT, *supra* note 1.

¹⁸⁰ See *People v. De Bour*, 352 N.E.2d 562 (N.Y. 1976) (discussing levels of intrusion based on varying levels of suspicion); see also N.Y. CRIM. PROC. LAW § 70.20 (McKinney 2004) (“No conviction of an offense by verdict is valid unless based upon trial evidence which is legally sufficient and which establishes beyond a reasonable doubt every element of such offense and the defendant’s commission thereof.”); *Id.* § 140.10(1) (McKinney 2004) (requiring “reasonable cause” to arrest someone for a crime).

¹⁸¹ See *supra* Table 4.

Not-guilty dispositions generally involved significantly more time than either guilty or ACD dispositions, and the precarious financial position of many arrestees may have created incentives for defendants to accept guilty pleas. But such agreements often come at a cost. Kohler-Hausmann compared misdemeanor arrestees in New York City who accepted plea agreements to those whose cases were dismissed, and found that although the two groups subsequently faced similar arrest trajectories, those initially accepting pleas faced more future convictions.¹⁸² Kohler-Hausmann concluded that the court followed a *managerial justice* model, in which low-level arrests and convictions were used to identify and monitor individuals deemed to be high-risk.¹⁸³ Although my data could not identify trajectories of individual arrestees, the fact that more than half accepted plea deals raises particular concern in this light. Although most plea agreements in my sample did not involve an incarceration sentence (or involved a sentence of “time served”), these arrestees may be at increased risk of further criminal sanction in the future.

3. Policy Implications

Accordingly, this Article’s findings suggest two broad policy recommendations: closer oversight of police practices, and more efficient arrest processing. That more than 15% of SQF arrests were not arraigned¹⁸⁴ suggests that a portion of these arrests lacked probable cause. Police activity must be more closely monitored to ensure that arrests are carried out constitutionally. Moreover, the charge decay seen in the processing of SQF arrests suggests that many of the offenses engaged in by SQF arrestees might have been resolved by less burdensome measures, such as a warning or a summons.

In addition, the skewed distributions of arrestees’ time burdens suggest that greater care must be taken to ensure adjudication with fewer delays. More attention (and court resources) devoted to speedy trials will reduce both the threats to due process as well as the *de facto* incentives that defendants face to plead guilty in order to speed the disposition of their case.

¹⁸² Kohler-Hausmann, *supra* note 10, at 670–83.

¹⁸³ *Id.* at 619–29.

¹⁸⁴ *See supra* Table 1.

4. Implications for Research

The growth of the criminal justice system over the past thirty-five years has motivated a wide ranging research literature that assesses its potential causes and consequences. The expansion of the system has been alternately attributed to the rise in mandatory minimum sentencing,¹⁸⁵ a shift of discretionary powers from judges to prosecutors,¹⁸⁶ and a rise in felony prosecutions,¹⁸⁷ among other explanations including the War on Drugs¹⁸⁸ and deficits in mental health care.¹⁸⁹ A complementary literature has documented adverse prison conditions that threaten the health and well-being of inmates.¹⁹⁰ Although the challenges facing incarcerated and formerly incarcerated populations may be attributable in part to adverse selection,¹⁹¹ sentencing reform has been identified by many as a mechanism to

¹⁸⁵ See *S. Judiciary Comm. Hearing, supra* note 86; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ch. 4 (2011), <http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>; U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 38 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; Letter from Theshia Naidoo, Senior Staff Att'y, Drug Policy All., to U.S. Sentencing Comm'n (July 12, 2013), http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DPA_Proposed_Priorities.pdf.

¹⁸⁶ See *United States v. Dossie*, 851 F. Supp. 2d 478 (E.D.N.Y. 2012); BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUSTICE, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240334.pdf>; ASHLEY NELLIS ET AL., SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2d ed. 2008), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf; Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471 (2000).

¹⁸⁷ See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239 (2012).

¹⁸⁸ See TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 434 (2002); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004).

¹⁸⁹ See Thomas J. Conklin et al., *Self-Reported Health and Prior Health Behaviors of Newly Admitted Correctional Inmates*, 90 AM. J. PUB. HEALTH 1939 (2000); Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 PSYCHIATRIC SERVICES 170 (2008); Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666 (2009).

¹⁹⁰ See, e.g., HUMAN RIGHTS WATCH & AM. CIVIL LIBERTIES UNION, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES (2012), <https://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf> (focusing on youth in solitary confinement).

¹⁹¹ See Loeffler, *supra* note 87.

reduce the harms associated with incarceration on individuals, families, and communities.¹⁹² Likewise, the point of sentencing, or prospect of sentencing disparities, has frequently been used as a tool for assessment of incarceration's causal effects.¹⁹³ However, the burdens observed between arrest and case disposition, coupled with the high rate of plea bargains and ACDs, suggest challenges for researchers attempting to identify causal effects of incarceration. Given how few charges proceed through trial, survey researchers must understand the implications of plea bargains for respondents' perceptions of their experiences with the criminal justice system, and the validity of self-report data. Likewise, researchers relying on administrative data or treating changes in sentencing policy as "natural experiments" must be cognizant of the role of plea bargaining, which leaves sentencing as an endogenous process.

More broadly, researchers attempting to ascertain the effects of incarceration on health, economic, or behavioral outcomes must carefully identify the counterfactual against which they evaluate incarcerated populations. Systematic research, both quantitative and qualitative, is still needed to better understand the system's operation and consequences.

¹⁹² NICOLE D. PORTER, SENTENCING PROJECT, THE STATE OF SENTENCING 2013: DEVELOPMENTS IN POLICY AND PRACTICE 9–11 (2014), http://sentencingproject.org/doc/publications/sen_State%20of%20Sentencing%202013.pdf; Press Release, U.S. Dep't of Justice, Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harsh Penalties for Most Serious Drug Traffickers (Mar. 13, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-urges-changes-federal-sentencing-guidelines-reserve-harsh>.

¹⁹³ See Durlauf & Nagin, *supra* note 87; Kling, *supra* note 87; Loeffler, *supra* note 87.