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Fine-Tuning: The Emergent Order-Maintenance Architecture of Local Civil Enforcement

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FINE-TUNING: THE EMERGENT ORDER- MAINTENANCE ARCHITECTURE OF LOCAL CIVIL ENFORCEMENT

Brendan M. Conner*

“When we can, we will put you in jail. When we can’t, we will
put you out of business.”¹

-NYPD Commissioner Lee P. Brown (1990–1992)

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1. Jerry Gray, *Police ‘Nuisance’ Crackdown Starts with Bronx Vice Raid*, N.Y. TIMES, June 23, 1991, at A23.

I. INTRODUCTION

This past decade, local governments have drawn increasing criticism for fine, fee, and forfeiture abuses. Detractors accuse state and local police, prosecutors, and judges of propping up a runaway system of profit-driven enforcement, in which decisions are guided less by legal principle than prospective municipal revenue.² Although few states and localities release the necessary data for an exact accounting of total municipal revenue, a conservative estimate of funds generated by these quasi-criminal sanctions runs into the tens—if not hundreds—of billions per year.³ Even the Supreme Court recently signaled its disquiet, issuing an ominous warning in *Timbs v. Indiana* that punishing-for-profit undermines a slew of constitutional liberties, alongside the Court’s unanimous holding that the Excessive Fines Clause is applicable to the States.⁴

While the growing attention to reform of profit-driven policing is encouraging, in “Fine-Tuning” I argue that legal scholars and other advocates for reform have uncritically neglected an equally dangerous, and inextricably interrelated, enforcement trend. Specifically, proponents of reform have

2. See *Review of Federal Asset Forfeiture Program: Hearing Before the Legis. and Nat’l Sec. Subcomm. of the Comm. on Gov. Operations*, 103rd Cong. 177 (1994) (quoting former director of the DOJ Asset Forfeiture Office admitting “[w]e had a situation in which the desire to deposit money in the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measures the desire to effect fair enforcement of the laws as a matter of pure law enforcement objectives.”).

3. See, e.g., Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/> (reporting that “298 [state and local] departments and 210 task forces have seized the equivalent of 20 percent or more of their annual budgets since 2008.”); Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUST. CTR., 4 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf (estimating \$27.6 billion in outstanding criminal justice court debt based on data from the fourteen U.S. states publishing total court debts and eleven states providing partial data).

4. See 139 S.Ct. 682, 689 (2019) (“For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts’ critics learned several centuries ago. Even absent a political motive, fines may be employed ‘in a measure out of accord with the penal goals of retribution and deterrence,’ for ‘fines are a source of revenue,’ while other forms of punishment ‘cost a State money.’”) (citations omitted).

ignored police- and prosecutor-led civil enforcement actions that impose putatively *non-pecuniary* sanctions with far-reaching economic costs, all in the plain service of achieving penal goals traditionally associated with arrest-based prosecutions. Indeed, in major cities and counties across America today, police and prosecutors now wield a variety of centuries-old civil and administrative actions—such as abatement, eviction, and license revocation—historically reserved to private litigants and non-uniformed municipal agencies. And despite the *Timbs* Court’s warning, constitutional challenges to civil enforcement abuses hold little immediate promise given existing Supreme Court caselaw exempting non-monetary sanctions from Eighth Amendment protection and a procedural due process and Bill of Rights jurisprudence hopelessly mired in anachronistic “criminal” and “civil” enforcement distinctions by which defendants in publicly filed civil actions enjoy minimal if any protection from governmental overreach.

This Article seeks to recover the shared history and purposes of profit-driven enforcement, order-maintenance policing, and police- and prosecutor-led civil enforcement in America. I document a pattern of constitutional avoidance in the pursuit of purely penal objectives, with uniquely devastating consequences for the predominantly Black and Hispanic low- and middle-income renters, small businesses owners, and employees targeted for police- and prosecutor-led civil enforcement.

Exposing the commonalities between civil enforcement tactics involving non-pecuniary sanctions and fine, fee, and forfeiture abuses represents an important corrective to the existing scholarly literature. Many commentators have posited, for instance, that revenue-generating state and local policing efforts were byproducts of federal forfeiture reforms and municipal economic crises in the 1980s.⁵ As the explanation goes, the windfall revenues promised by federal-state cooperative enforcement initiatives led cash-strapped cities to duplicate federal forfeiture initiatives in the substance and procedure of state and local law.⁶ However, as “Fine-Tuning”

5. See, e.g., DICK M. CARPENTER II ET AL., INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 25 (2d ed. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>.

6. See John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise*,

documents, this narrative ignores the various state and local civil enforcement remedies that emerged as early as the 1970s, many of which are based in abatement or eviction with no analogue in federal legislation.

If political and budgetary incentives do not alone explain the continued rise of punishing-for-profit enforcement tactics among states and localities, what drives its unstoppable growth? I propose that—far from a policy choice made solely by the political branches—the primary driver of these enforcement trends is the federal judiciary’s asymmetrical approach to publicly filed criminal versus civil and administrative proceedings. This suggests the judiciary is not only the leading cause of, but a potential solution to, state and local civil enforcement abuses.

Part I presents a series of case studies detailing three signature New York City civil enforcement innovations developed from the 1970s through the 1990s: The Nuisance Abatement Law Initiative, Narcotics and Bawdy House Eviction Program, and NYPD Civil Enforcement Initiative. The policymakers and agency officials in the driver’s seat of each of these initiatives made no secret of their overarching strategy—to circumvent the greater judicial scrutiny afforded to traditional, arrest-based approaches while generating municipal revenue in the service of criminal-law-enforcement objectives. Together, these case studies track a decades-long legislative reform campaign undertaken by New York officials, which models similar trends by police and prosecutors across the country to expand criminal-law-enforcement agency authority over civil and administrative actions and push the envelope of procedural, evidentiary, and remedial advantages in civil and administrative—as opposed to nominally “criminal”—actions.⁷

Netting Innocent with Guilty, WALL ST. J. (Aug. 22, 2011), <https://www.wsj.com/articles/SB10001424053111903480904576512253265073870> (illustrating that federal-level forfeiture authority exploded in 1990, with the number of federal statutes permitting forfeiture doubled from 200 to 400 from 1990 to 2010, and federal payouts to participating states surged from roughly \$200 to \$500 million between 2002 and 2010).

7. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1329 (1991) (“Police and prosecutors have embraced civil strategies not only because they expand the arsenal of weapons available to reach antisocial behavior, but also because officials believe that civil remedies offer speedy solutions that are

New York City is especially suited to this inquiry as the progenitor of contemporary municipal public safety policies followed by most major American counties and cities today. New York's initiatives are also well-matched to the Article's topic because, though cities including Chicago and Los Angeles tinkered with siloed civil enforcement innovations in the same period,⁸ none pursued the kind of integrated criminal-civil enforcement infrastructure pioneered by the NYPD and Manhattan District Attorney's Office.⁹ Thus, to facilitate comparisons and contrasts with other jurisdictions, I select New York City initiatives as distinct but representative models of common law and statutory reappropriation (as well as unique organizational, budgetary, representational, and technological innovations) by which police and prosecutors in America have increasingly commandeered authority in civil enforcement proceedings while sidestepping the heightened protections afforded to criminal defendants.

With this background, Part III turns to the rich social scientific and legal scholarly literature surrounding OMP-style *arrest-based* tactics to draw comparisons and contrasts with its present-day civil enforcement analogues. Much of the recent sociological and criminological literature on the subject questions the efficacy of zero-tolerance arrests for low-level "quality-of-life" offenses, disputing the methodologies and assumptions supporting claims as to a positive correlation between summary arrest practices for low-level criminal offenses and the overall reduction of serious crime. Introducing civil enforcement tactics to this efficacy debate opens new and important lines of inquiry; for instance, cross-referencing arrest and court statistics with civil enforcement data to assess the interrelationship of custodial arrests, abatement of "problem

unencumbered by the rigorous constitutional protections associated with criminal trials . . .").

8. See, e.g., L.A., CAL. MUN. CODE § 12.27.1 (permitting administrative nuisance abatement proceedings); L.A., Cal. Mun. Code § 11.00; CAL. HEALTH & SAF. CODE §§ 11570 *et seq.*; CHICAGO, ILL., MUN. CODE § 8-4-090 (broadly expanding the definition of an abatable "public nuisance").

9. See, e.g., MARTHA J. SMITH & LORRAINE MAZEROLLE, U.S. DEP'T OF JUSTICE, COMMUNITY ORIENTED POLICING SERVS., USING CIVIL ACTIONS AGAINST PROPERTY TO CONTROL CRIME PROBLEMS 14 (2013), https://popcenter.asu.edu/sites/default/files/civil_actions_against_properties.pdf ("By 1992, 24 U.S. states had passed statutes specifically designed to control drug activities on private properties." (citation omitted)).

properties,” publicly filed tenant evictions, and reductions if any in the incidence of serious crime. Additionally, I explore the existing literature on arrest-based OMP tactics to illuminate the collateral consequences and social and economic effects of police- and prosecutor-led civil enforcement that are deserving of further study.

In “Fine-Tuning” I attempt to lay the groundwork for a larger reappraisal of the constitutional implications of contemporary misuse of civil enforcement authority by state and local police and prosecutors. Antiquated doctrine has obscured the many extra-legal factors—e.g., managerial, organizational, technological—accelerating civil enforcement abuses. Meanwhile, citizen-led efforts to reform civil enforcement practices have met with little success due to the unholy union of pecuniary, among other, interests shared by state and local legislators and executive officials in revenue generation. Community organizing efforts have, in a few isolated cases, admittedly resulted in incremental reforms, such as by strengthening procedural protections, mandating data-reporting, and increasing attorney representation. However, the enduring constitutional asymmetry between publicly filed criminal and civil proceedings will steamroll these incremental reforms absent the intervention of the federal judiciary. Litigators have thus far gained only limited purchase in procedural due process, equal protection, exceeding local home rule authority, and state law preemption challenges.¹⁰ And while *Timbs* opened up the prospect of *Monell* challenges to municipal abuses of monetary sanctions and forfeitures, reigning doctrine dangerously excludes “equitable” sanctions such as abatement and eviction from the definition of “fines” for Excessive Fines Clause purposes among myriad other constitutional protections originally intended to protect individual rights against encroachment by governmental authorities. In the end, it is only by extending the Court’s contemporary substantive and criminal-procedural protections to defendants in publicly filed civil enforcement actions that the Eighth Amendment will fulfill what the *Timbs* Court has

10. See Sarah Swan, Note, *Home Rules*, 64 DUKE L.J. 823, 881–90 (2015) (collecting cases successfully challenging crime-free lease and nuisance abatement ordinances on grounds such as exceeding the locality’s home rule authority, preemption by state law, and procedural due process).

declared is the Framers' intended purpose—"guard[ing] against abuses of government's punitive or criminal-law-enforcement authority."¹¹

II. EXPERIMENTS IN THE "LABORATORY OF ORDER":
NEW YORK CITY'S SIGNATURE CIVIL ENFORCEMENT
INNOVATIONS

Starting in the 1970s, New York City law enforcement embarked on a two-decade-long quest to develop novel legal strategies for circumventing criminal-procedural barriers to arrest-based enforcement. Beginning with the Midtown Enforcement Project's ("MEP") refinement of the Nuisance Abatement Law to combat sexually oriented businesses in Times Square in 1976, the Manhattan District Attorney's Office followed suit with its 1988 Narcotics Eviction Program ("NEP"). Both initiatives contributed to the integrative operations pioneered by the NYPD Civil Enforcement Initiative (the "Initiative"), which first launched as a pilot project in the Bronx in 1991. These three signature programs not only shaped civil enforcement operations at the time but spawned numerous departmental descendants, including the Mayor's Office of Special Enforcement and the Civil Enforcement Unit, and affirmatively altered statutory and decisional law in the process.

The collective strength of these initiatives was such that, by 1995, then-Police Commissioner Bratton praised civil enforcement as among the "most effective enforcement techniques" in the NYPD's arsenal.¹² The historical record of legal innovations and attained enforcement outcomes also support Bratton's claim. In the present, NYPD "civil" attorneys are fully integrated into planning, preparation, and execution of civil enforcement actions at the precinct level. Attorneys in the Mayor's Office coordinate citywide, multi-agency civil enforcement initiatives; and attorneys in the borough District Attorneys' offices bring Bawdy House eviction proceedings in New York State Supreme Court. In the aggregate, these agencies leverage civil enforcement on a massive scale that

11. *Timbs v. Indiana*, 139 S.Ct. 682, 686 (2019).

12. William J. Bratton, *POLICY REVIEW: The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J. L. & POL'Y 447, 452 (1995).

would be impossible in isolation. Meanwhile, through interagency data-sharing agreements, the dragnet of arrest, search, and code enforcement data accumulated as “evidence” is repurposed in subsequent civil and administrative actions, easily overcoming the comparatively low evidentiary and constitutional protections afforded to defendants in publicly filed civil or administrative proceedings.

As this Part demonstrates, critical to the success of these programs is their ability to leave the substance of these historically “remedial” actions intact while expanding the grounds for violation and radically reshaping the procedural protections and presentment authority associated with them. Together with managerial and technological innovations, proponents of civil enforcement pushed through far-reaching legislative reforms—e.g., local prosecutors’ appropriation of presentment authority, bounty-based redistribution of civil enforcement proceeds—that distort equitable, common law, and Progressive Era statutory remedies beyond recognition.¹³ Further eroding the already limited civil-procedural protections guaranteed by constitutional doctrine and New York statutes, state and local legislation in the 1980s and 90s gutted service and pleading requirements, lowered evidentiary burdens, and expanded the means for securing civil judgments. These newly secured procedural advantages dovetailed with managerial and technological advances to make civil enforcement increasingly practicable for police and prosecutors. The record of decisional law during this period documents the exponential success of these practices as time advanced, including the wildly disproportionate civil enforcement agency success rates attained against defendants, who faced ever-more fatal financial and representational barriers in litigation as civil enforcement reform advanced.¹⁴

13. Pre-dating the Court’s criminal-civil distinction, many nuisance-related statutory reforms resurrected by contemporary civil enforcement efforts owe their origins to morality policing in the Progressive Era. See Peter C. Hennigan, *Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era*, 16 YALE J.L. & THE HUMANS, 123, 127 (2004) (describing a proliferation of nuisance abatement laws in the Progressive Era that eliminated the common law “special injury” requirement for private individual standing to bring a public nuisance action as “the most successful use of public nuisance law in American history.”).

14. Relying solely upon the judicial record to measure civil enforcement’s

Taken together, the case studies demonstrate that doctrinal asymmetries between criminal and civil constitutional protections incentivize state and local officials to pursue constitutional avoidance. As Nicole Stelle Garnett observes in her groundbreaking study of order-maintenance-style municipal property and land-use policy, the criminal-procedural protections recognized by the Warren Court led municipalities to shift emphasis from policing to land management approaches.¹⁵ The heightened operational barriers and liabilities attached to traditional, arrest-based methods increasingly led states and localities to pursue civil and administrative alternatives.¹⁶ And in Garnett's reading, by "transferring the power to regulate disorder *away from the police*" to land management agencies, city planners learned they could mitigate constitutional tort liability and multiply municipal revenue streams while also sidestepping the straightjacket of criminal-procedural protections.¹⁷ Further, local leaders discovered that civil and administrative actions frequently outperformed arrest-based approaches in achieving penal objectives given the comparatively mild protections for defendants to publicly filed, non-criminal proceedings.

However, as this Part bears out, this is only half the story. Far from acceding to the *transfer* of power, police and prosecutors engaged in a decades-long campaign of legislative,

impact, however, underestimates its secondary effects due to the extraordinarily high rate of property owners who, after an initial warning from presentment agencies, comply with the agency demands to head off costly litigation. *See e.g.*, SMITH & MAZEROLLE, *supra* note 9, at 15 ("The first warning is typically enough to leverage owners to take action. In fact, early research on the use of abatements in the 1990s found that civil suits were filed in fewer than 5 percent of abatement actions in cities that initiate warning letters to property owners." (citation omitted)). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (holding that in administrative actions due process is satisfied simply by "notice and an opportunity" to respond).

15. *See id.*; *see* NICOLE STELLE GARNETT, ORDER CONSTRUCTION AS DISORDER SUPPRESSION, IN ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 100 (Yale Univ. Press, 2010).

16. *See id.*; *see generally* Nicole Stelle Garnett, *The Order-Maintenance Agenda As Land Use Policy*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 131 (2010).

17. GARNETT, *supra* note 15, at 117 (emphasis added). Garnett also argues that local governments operationalized zoning ordinances and other property regulations to achieve law-enforcement goals through the concentration or dispersal of "disorder." *Id.* at 102–03.

organizational, and technological transformation to reappropriate the authority of civilian land management agencies. Indeed, just as state and local officials began to increase investment in municipal code enforcement to exploit the constitutional “criminal-civil” divide, local police and prosecutors sprang into action: propping up special unit pilot projects, reappropriating presentment authority from civilian agencies, and inserting criminal-law-enforcement personnel into complex, administrative code enforcement staffing regimes through legislative authorization and interagency operational and data-sharing agreements.

A. The Midtown Enforcement Project’s Nuisance Abatement Law Initiative

To call Times Square the rotten core of the Big Apple was already cliché in 1970s New York. Despite Mayor Fiorello La Guardia’s temporary success denying license renewals to what he termed the “incorporation of filth” of burlesque theaters in the late 1930s, Times Square was essentially abandoned to porn shops and peep shows.¹⁸ While some New Yorkers entertained the district as part of the city’s character, public officials regarded the area as a sinkhole in which the cost of sanitation and enforcement dwarfed property tax revenues.

Nonetheless, during the fiscal crisis of the 1970s, Mayor Abraham Beame advanced an economic development program that called for the restructuring of police work schedules and the aggressive redevelopment of Times Square.¹⁹ The Mayor’s Office promptly sought to justify its efforts in the court of public opinion—in 1976, the chairman of Mayor Beame’s Midtown Citizens Committee related findings that sexually oriented businesses in Times Square repelled non-sex related businesses, undermined the Midtown economy, and attracted “more felony type crime than non-sex related businesses and that the concept of victimless crime is a myth.”²⁰ The same month as the

18. *La Guardia Backs Ban on Burlesque*, N.Y. TIMES, May 3, 1937, at 3.

19. See Robert D. McFadden, *Abraham Beame Is Dead at 94; Mayor During 70’s Fiscal Crisis*, N.Y. TIMES, Feb. 11, 2001 at 1.

20. Peter J. O’Connor, *The Nuisance Abatement Law As a Solution to New York City’s Problem of Illegal Sex Related Businesses in the Mid-Town Area*, 46 FORDHAM L. REV. 57, 57 (1977).

Committee's report, the multi-agency Midtown Enforcement Project ("MEP") launched.²¹ The MEP was tasked with three key functions: planning, inspection, and legal innovation to "identify, investigate and prosecute illegal activities in the Midtown area," particularly illegal sex-related businesses.²²

Despite its fanfare, the MEP's early efforts met a similar fate as the city's previous crusades to shutter sex-related establishments. Early in the MEP's operation, then-Director Sidney Baumgarten assigned the project's legal counsel Peter O'Connor to develop a legal strategy for shuttering sexually oriented businesses. In a 1977 article, O'Connor argued that the problem lay not in substantive criminal law, which presented a variety of criminal offenses, such as prostitution, promoting prostitution, and permitting prostitution, let alone the consequences of a criminal conviction, which encompassed everything from fines to imprisonment.²³ Instead, O'Connor argued that *criminal-procedural protections* stood in the way of effective enforcement of these offenses, writing that "while the substantive provisions of New York's Penal Law prohibit [such operations], the State's criminal procedure provisions are ill suited to terminating [them]."²⁴

To illustrate the point, O'Connor offered a laundry list of criminal-procedural barriers the MEP faced using an extended hypothetical:

Let us suppose that a police officer visits the "Happy House Massage Parlor" (a house of prostitution), and is greeted by a receptionist who offers him the massage services of any one of ten females. The officer selects on "Xaviera" ("X"), goes with her to a cubicle, and is there solicited to engage in sexual conduct for a fee. At this point, the officer has reasonable cause to arrest X for prostitution. But the officer lacks sufficient grounds to arrest the receptionist or any other

21. See *id.* at 58 n.3 (citing MIDTOWN ENFORCEMENT PROJECT, OFFICE OF THE MAYOR, REPORT OF OPERATIONS FOR JAN. 19, 1976, THROUGH DEC. 8, 1976 1 (1976)).

22. *Id.*

23. See *id.* at 61–62.

24. *Id.* at 65.

employee of Happy House for any offense If she elects to stand trial, she could defend either by completely denying the charge—posing an issue of credibility for resolution by the fact finder—or by claiming entrapment. If successful on either defense, X would be entitled to an acquittal. If unsuccessful, X could face incarceration for a term of up to three months In any event imprisonment of X would simply mean that, for the term of her incarceration, she would be prevented from plying her trade. Her colleagues in Happy House and its owners, managers, and agents would still have a viable prostitution business.²⁵

Having noted these barriers to effective enforcement—e.g., lack of probable cause for third-party arrests, the entrapment defense, the perceived leniency of three-months' incarceration for a suspected prostitution offense—O'Connor added to X's potential defenses by introducing a wrinkle. That is, O'Connor imagined the situation in which a prosecutor investigates Happy House by means of issuing grand jury subpoenas.²⁶ In this alternative fact pattern, O'Connor notes that witnesses could exercise their constitutional right not to incriminate themselves, which would trigger the necessity of an eavesdropping warrant to meet the strict corroboration requirements of the Penal Law, and the so-called Happy House employees could continue their illicit operations when released on bail pending an appeal.²⁷

Interestingly, O'Connor failed to account for the common law offense of criminal nuisance, an action the Penal Law codifies in Section 240.45 as criminal nuisance in the second degree. Criminal nuisance is a fitting remedy for O'Connor's hypothetical problem, which he described in terms of prosecuting a certain proscribed use or occupation rather than individuals, specifically the operation of illegal sex-related businesses. The statute classifies the conduct of a defendant as a Class B misdemeanor where a defendant:

25. *Id.* at 63–64 (citations omitted).

26. *See id.* at 64–65.

27. *See id.*

By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or . . . knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.²⁸

However fitting this provision, O'Connor clearly rejected it as unworkable. Criminal nuisance is an even less attractive than the prostitution-related crimes detailed by O'Connor. The criminal offense is necessarily accompanied by the high evidentiary burden characteristic of criminal proceedings, i.e., proof beyond reasonable doubt. In 1964, before the MEP's establishment, legislators even added a mental culpability requirement over concern about the strict liability nature of the criminal nuisance provision.²⁹ Further, the MEP was no doubt nonplussed by the offense requiring that the subject condition endangers the safety or health, and not merely the *morality*, of a "considerable number of persons."³⁰ And New York courts had also established, by the time the MEP had begun operations, that "crimes associated with the unlawful use of premises require a showing of something more than an 'isolated misuse.'"³¹ Indeed, the New York Court of Appeals explained that to prove a defendant maintains a nuisance requires not merely knowledge of its existence, but also "[p]reserving and [c]ontinuing its existence."³²

Whether a product of studied analysis or salutary neglect, O'Connor concluded that the barriers to enforcing prostitution-

28. N.Y. PENAL LAW § 240.45 (McKinney 2021).

29. Notably, the offense of criminal nuisance embodied in former Penal Law § 1530(1) did not contain a mental culpability requirement but was instead a strict liability crime. See COMMISSION ON REVISION OF THE PENAL LAW, STAFF NOTES OF PROPOSED NEW YORK PENAL LAW, MCKINNEY'S SPEC. PAMPH. at 391 (1964).

30. PENAL § 240.45.

31. *People v. Galluci*, 404 N.Y.S.2d 768, 772 (4th Dep't 1978) (citing *People v. Fiedler*, 286 N.E.2d 878 (N.Y. 1972)).

32. *Fiedler*, 286 N.E.2d at 880 (citing *People v. Campbell*, 256 N.Y.S.2d 467, 468 (N.Y. Crim. Ct. 1965)) (emphasis added).

related criminal law against sexually oriented businesses were insurmountable—an entirely different approach was needed. To resolve the issue, O'Connor devised an elegant solution; instead of criminal law, why not turn to civil law? In the project's first year of operations, this insight led the MEP to experiment with several civil actions as candidates.³³

Definitions of public nuisance abound in New York law, including noxious weeds or plant or soil exposed to or host to injurious insect or plant diseases;³⁴ flight hazards within designated flight hazard areas;³⁵ outdoor advertising signs in violation of Section 88 of the New York Highway Law;³⁶ “[a]ny junkyard or scrap metal processing facilit[ies]”;³⁷ multiple dwellings whose “plumbing, sewerage, drainage, lighting or ventilation” is dangerous to life or health;³⁸ “[c]ertain cultivars of black currant”;³⁹ forest insects and forest tree diseases and the plants or trees infested by them;⁴⁰ and unauthorized signs, signals, or markings in view of any highway that might be mistaken as official.⁴¹

Amidst this junkyard of inanities, O'Connor and the MEP found precisely the mechanism that would become a key tactic of police- and prosecutor-led civil enforcement for decades to come. Specifically, the authorization of summary proceedings for the abatement of public nuisances was codified in the New York Public Health Law. The provision was adopted along with a package of related “public nuisance” provisions in the Public Health Law in 1953 and 1972 covering everything from fat rendering to bone boiling and the accumulation of water in which mosquitos breed, or are likely to breed, and even the bodily excretions of a person with tuberculosis.⁴²

For its part, Section 2320 defines any “place used for the purpose of lewdness, assignation, or prostitution” as a

33. See O'Connor, *supra* note 20, at 58 n.3.

34. See N.Y. AGRIC. & MKTS. LAW § 164(2) (McKinney 2021).

35. See N.Y. GEN. MUN. LAW § 356(1) (McKinney 2021).

36. See N.Y. HIGH. LAW § 88(8) (McKinney 2021).

37. *Id.* § 89(7).

38. N.Y. MULT. DWELL. LAW § 309(1)(b) (McKinney 2021).

39. N.Y. ENV'T. CONSERV. LAW § 9-1301(1) (McKinney 2021).

40. See *id.* § 9-1303(9).

41. See N.Y. VEH. & TRAF. LAW § 1114(a) (McKinney 2021).

42. See N.Y. PUB. HEALTH LAW §§ 1300, 1335, 1500, 2223, 3387 (McKinney 2021).

nuisance.⁴³ As a consequence for violation, Section 2321 provides that any citizen or association of the county *or* the District Attorney of that county may bring an action in equity in the jurisdiction within which the property is located to permanently enjoin the maintenance of the illegal use.⁴⁴ On its face, the Public Health Law's newfound definition of a nuisance as any "place used for the purpose of lewdness, assignation, or prostitution" seems unremarkable.⁴⁵ After all, the term "public nuisance" encompasses a class of offenses long recognized by the common law providing for abatement or criminal prosecution of a substantial and unreasonable interference—vague enough as the standard is—with rights common to the public at large.⁴⁶ But in determining whether conduct is a public nuisance at common law, the petitioner must surmount the higher threshold that the challenged activity represents, among other things, a *substantial* interference with the public health or welfare, whether the conduct is approved by other law, and whether the conduct is of a continuing nature or produces a long-lasting effect.⁴⁷ Section 2320 does not require any such legwork. Where a statute defines a certain use or occupation to constitute a nuisance, then the court need only inquire as to the existence of the use or occupation at issue—here merely an alleged reputation for "lewdness, assignation, or prostitution."⁴⁸ Statutory authorization thus summarily replaced the careful judicial inquiry that had constrained this far-reaching remedy.

Even more attractive to the MEP, Section 2321 permits granting a preliminary injunction without a hearing or prior notice, restraining the maintenance of the nuisance and prohibiting the removal of personal property connected to the nuisance.⁴⁹ Courts are also empowered to issue the extraordinary remedy of an *ex parte* restraining order—in a publicly filed proceeding—pending the decision of the court upon the preliminary injunction.⁵⁰ Once granted, the court may

43. *Id.* § 2320(1).

44. *See id.* §§ 2321(1)–(2).

45. *Id.* § 2320(1).

46. 17A FRANCIS X. CARMODY & WILLIAM WAIT 2D, N.Y. PRACTICE WITH FORMS § 107:38 (Westlaw 2021).

47. *See id.* § 107:39.

48. *See* N.Y. PUB. HEALTH LAW § 2320 (McKinney 2021).

49. *See id.* § 2321(4).

50. *See id.* § 2323(1).

moreover enforce the terms of the injunction or temporary restraining order through contempt proceedings.⁵¹ If found guilty on a first violation, the party could be fined between \$300 to \$1,000 or receive three to six months of imprisonment, while a second offense portends imprisonment for as much as a year.⁵² Finally, upon a finding of the existence of a nuisance under the law, an order of abatement is entered, which directs the removal and sale of all chattels used in conducting the nuisance, and for the closure of the building for a period of one year with costs to the defendant.⁵³ A court could only cancel the order of abatement where the owner of the premises pays all costs of the proceeding, files a bond with sureties to be approved by the court in the full value of the property, and on the condition that the owner would immediately abate the nuisance and prevent it from being reestablished for a period of one year.⁵⁴

Proving the existence of a nuisance is also made extraordinarily easy for local agencies invoking the Public Health Law. For instance, Section 2324(3) provides that evidence of the “common fame and general reputation of the place” or its occupants or patrons is competent evidence in and of itself of the existence of an actionable nuisance.⁵⁵ Moreover, an admission or finding of guilt for the criminal offense of permitting prostitution at the premises acts as presumptive evidence of the existence of a public nuisance.⁵⁶ The evidentiary advantage enjoyed by governmental agencies extends not only to occupants but also to *owners*, as reputation evidence of the place or its occupants or patrons is sufficient to establish both the existence of the nuisance and prima facie evidence of the *owner’s* own “knowledge thereof and acquiescence and participation therein and responsibility for the nuisance.”⁵⁷

Moreover, to obtain a permanent injunction, the presentment agency need not prove lack of an adequate remedy at law, despite the centuries-old prohibition on issuing equitable relief in criminal cases, because public nuisance is said to be

51. *See id.* § 2327.

52. *See id.* § 2328.

53. *See id.* § 2329(1).

54. *See id.* § 2332.

55. *Id.* § 2324(3)(a).

56. *See id.* § 2324(3)(b).

57. *Id.* § 2324(3)(c).

“inherently a condition for which the law provides a remedy.”⁵⁸ And where a municipality is specifically authorized to enjoin a public nuisances, the commission of a singular act (as opposed to continuous or prolonged interference) is sufficient to sustain an injunction.⁵⁹ Therefore, there is little need to balance the larger negative economic and other effects of an injunction’s issuance against the invasion of private rights represented by the nuisance itself, as is the case in private nuisance litigation. Indeed, “the rule in New York is that the nuisance will be enjoined despite a marked disparity between the effect of the injunction and the effect of the nuisance.”⁶⁰

The Public Health Law also effectively overruled the traditional requirements for issuance of a TRO or preliminary injunction. Generally, a party seeking the drastic remedy of a preliminary injunction must show a likelihood of ultimate success on the merits, irreparable injury absent the granting of the injunction, and that a balancing of the equities lies in favor of the movant’s position.⁶¹ And historically public nuisance actions placed the burden of proof on the plaintiff for establishing the “public nuisance . . . by clear evidence before the preventive remedy will be granted.”⁶² But under the Public Health Law and similar legislation enacted across the country in the past few decades, where a municipality is authorized to enjoin a specified activity as a public nuisance, the commission of a single prohibited act in the *past* is sufficient for a *prospective* injunction.

The opportunity represented by this antiquated law was immediately apparent to O’Connor, but only health officials and not the MEP were authorized with presentment authority to initiate Public Health Law injunctions. Instead of merely appropriating such authority, O’Connor painstakingly catalogued the Public Health Law’s perceived limitations, limitations he planned to eliminate if given the chance to draft

58. Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 781 N.Y.S.2d 324, 327 (N.Y. App. Div. 1st Dep’t 2004).

59. City of New York v. Castro, 542 N.Y.S.2d 101 (N.Y. Sup. Ct. 1989), *order aff’d*, 559 N.Y.S.2d 508 (N.Y. App. Div. 1st Dep’t 1990).

60. State v. Monoco Oil Co., 713 N.Y.S.2d 440, 446–47 (N.Y. Sup. Ct. 2000) (citation omitted).

61. See CARMODY & WAIT, *supra* note 46, § 107:85.

62. Sullivan County v. Filippo, 315 N.Y.S.2d 519, 539 (N.Y. Sup. Ct. 1970) (citing Bd. of Health of Yonkers v. Copecutt, 35 N.E. 443 (N.Y. 1893)).

a new law from scratch. He complained, for instance, that the Public Health Law did not allow the police to *immediately* close the premises pending further order of the court. In addition, the New York Court of Appeals refused to apply Section 2320 to close an establishment in which topless and bottomless dancers performed, noting that the law provides only for the institution of an action against a place used as a *house of prostitution* rather than premises known for lewdness or obscenity in which prostitution did not occur.⁶³ Indeed, the Court of Appeals later ruled that *even if* a given property—such as a pornographic theater or bookstore—is reputed to be used for prostitution, courts must exercise the least restrictive alternative to cure the alleged nuisance in accordance with First Amendment protections.⁶⁴

The MEP had some success amending the law to the benefit of the Department, including the addition in 1977 of Section 2324-a, which established as presumptive evidence of the existence of a nuisance for two or more arrests for prostitution, or certain degrees of patronizing or promoting prostitution at a home or residence.⁶⁵ Flagging the law's other perceived deficiencies for resolution at a later date, the MEP resorted to still other civil actions to rid Times Square of perceived vice. In so doing, it stumbled upon another underutilized action, this time for summary eviction of tenants engaged in conduct qualifying as a nuisance—in other words, a holdover eviction predicated on a theory of nuisance. This package of statutory provisions—also known as the Bawdy House laws—was enacted in 1868 as a part of the New York Real Property Law and New York Real Property Actions and Proceedings Law (“RPAPL”). The enforcement provision provided by Section 715 of the RPAPL was intended to diminish “bawdy house”—houses of prostitution—activity, “and Section 715 was amended in 1947 to broaden its applicability to ‘any illegal trade, business or manufacture.’”⁶⁶ However, the Bawdy House laws were

63. *See* Comm’r of Dep’t of Bldgs. of City of N.Y. v. Sidne Enters., Inc., 394 N.Y.S.2d 777 (N.Y. Sup. Ct. 1977).

64. *See* People ex rel. Arcara v. Cloud Books, Inc., 503 N.E.2d 492, 494–95 (N.Y. 1986).

65. *See* N.Y. PUBLIC HEALTH LAW § 2324-a (McKinney 2018).

66. PETER FINN, NAT’L INST. OF JUSTICE, THE MANHATTAN DISTRICT ATTORNEY’S NARCOTICS EVICTION PROGRAM 4 (1995), <https://www.ncjrs.gov/pdffiles/mann.pdf>.

apparently never used by the MEP with much efficiency. The action would reemerge in 1988 when—under the circumstances discussed *infra* Part I.B—under pressure from neighborhood anti-crime groups, Manhattan District Attorney Robert Morgenthau launched the NEP initiative, which deployed Section 715 systematically and to great effect to expel alleged drug dealers and users from multi-family residences.⁶⁷

Despite its initial interest in the Bawdy House Laws and other nuisance-related actions,⁶⁸ the MEP set aside such proceedings in favor of the Public Health Law, and the promise of the Bawdy House Laws were not fully realized until their resurrection by the Manhattan District Attorney's Office in the 1980s. Instead of experimenting with these other grounds for civil enforcement proceedings, under O'Connor the MEP became preoccupied with reimagining the law itself to fulfill the project's tripartite mission—"planning, inspectional, and *legal*"—included not only the development of "new enforcement approaches" but also "analyzing current laws and procedures in order to recommend needed changes."⁶⁹ Thus, in the summer of 1976, Director Baumgarten tasked O'Connor with drafting what became the Nuisance Abatement Law.⁷⁰ O'Connor designed the law as a remedy with unprecedented reach, one that would allow police to secure near-instant closure of premises in *ex parte* proceedings without the inconvenience of criminal-procedural roadblocks. On July 28, 1977, Mayor Abraham Beame signed the Nuisance Abatement Law ("NAL")⁷¹ with the instantiation of the New York City Administrative Code. Subchap. 1. §§ 7-701 to 7-704.

The NAL incorporated lessons learned by the MEP during its trial-and-error period of operations in several respects. Important for the later innovations of the Civil Enforcement Initiative discussed *infra* Part I.C, unlike the narrowly defined category of reputed "houses of prostitution" targeted by Section 2320 of the Public Health Law, the NAL radically reconstituted the definition of a public nuisance to include a smorgasbord of potential "violations" cutting across many categories—building,

67. *See id.* at 6–7.

68. *See* O'Connor, *supra* note 20, at 58 n.3.

69. *Id.* (emphasis added).

70. *See id.* at 58.

71. *See id.* at 59.

zoning, health, multiple dwelling, environmental, alcohol-related, prostitution-related, gambling, drugs, and stolen property offenses.⁷² In addition, where Section 2320 permitted a court to grant an ex parte TRO, until City Council reforms in 2017, the NAL empowered courts with expansive authority not only to grant a TRO but also a temporary *closing* order, or both, pending the hearing and determination of a motion for a preliminary injunction.⁷³ The NAL also allowed actions imposing a civil penalty for certain nuisances, and, if sufficient proof was presented, the court was to grant an ex parte application for an order restraining defendants from making a bulk transfer of inventory and assets pending the hearing and determination of a motion for a preliminary injunction.⁷⁴ The application did not even require written notice of the closure order. If granted a permanent injunction, moreover, the City was statutorily mandated to keep the location closed for a full calendar year and to impose daily fines which virtually guaranteed the permanent closure of the business and summary termination of its employees—whatever the social and economic costs.

Later cases endorsed local officials' unchecked authority under NAL. In *City of New York v. Castro* (1989), for instance, the Supreme Court of New York County granted an NAL preliminary injunction against use and occupancy of the first-floor area of a building where arrests—rather than convictions—were made on six occasions for alleged gambling activities.⁷⁵ Just a year later, in 1990, the First Department affirmed the lower court's preliminary injunction in *Castro*, finding no violation of constitutional due process where immediate closure is obtained by ex parte order, and ruling that once entered a closure order may only be vacated by documentary, rather than testimonial, evidence showing that the alleged nuisance was abated.⁷⁶ The First Department also denied the defendants' Fifth Amendment void-for-vagueness challenge, reasoning that the term "violation" used in Section 7-703(g) of the NAL, as

72. *See id.* at 69 n.13.

73. *See* N.Y.C. ADMIN. CODE. § 7-704(a).

74. *See id.* § 7-704(b).

75. *See City of New York v. Castro*, 542 N.Y.S.2d 101 (N.Y. Sup. Ct. 1989).

76. *See City of New York v. Castro*, 559 N.Y.S.2d 508 (N.Y. App. Div. 1st Dep't 1990).

opposed to “conviction” as used in subdivisions (a), (b), and (c) of same, “*clearly* means the existence of the prohibited conduct set out” in the cited statutes are sufficient, without requiring a prosecution or conviction, let alone an arrest, in order for a court to grant the government’s application for immediate closure.⁷⁷ In its ruling, the First Department stressed that the proceeding was “civil in nature, as are the penalties which can ultimately be imposed,” and that “the court’s jurisdiction on the application for preliminary injunctive relief . . . is *in rem*, and its orders are enforced against the premises” rather than the owner—ignoring the centrality of NYPD officers in planning and executing the summary arrests that served as the basis for the proceeding and completely unconnected to the outcome of these predicate and putatively criminal offenses.⁷⁸

Further, where a locality seeks a preliminary injunction for *threatened* harm, as opposed to an injury that has already become manifest, a court may still issue an immediate closing order so long as the government makes the showing of a “degree of probability of occurrence as to amount to a reasonable certainty that they will result.”⁷⁹ A standard of review confounded by boondoggles like “degree of probability” virtually guarantees an outcome favorable to the government.⁸⁰ The orderly parade of state court decisions that followed only served to shore up this absurdity, allowing city officials to obtain an immediate ex parte closure order more or less by shuffling some paper.

In a representative case, the First Department unanimously reversed a lower court’s order permitting the Wall Street Sauna to operate all but the upper floor of the sauna where investigators allegedly observed a single incident of “high-risk sexual activity” in violation of the State Sanitary Code, even where the alleged “observation” did not result in an arrest, prosecution, or conviction, *and* the observation occurred *after* the granting of a preliminary injunction as well as the business owner’s agreement to prevent such activity from occurring in the future.⁸¹ The First Department ruled in the City’s favor,

77. *Id.* at 510 (emphasis added).

78. *Id.* (citing N.Y.C. ADMIN. CODE §§ 7-704, 7-709[c]).

79. CARMODY & WAIT, *supra* note 46, § 107:85.

80. *Id.*

81. *See City of New York v. Wall St. Sauna, Inc.*, 778 N.Y.S.2d 883 (N.Y.

reasoning that the “high-risk conduct was so pervasive at this establishment that the new management’s promises cannot be deemed a sufficient safeguard against its continuation.”⁸² In yet another representative example just two years later, in *City of New York v. Ring*, the First Department upheld a preliminary injunction against sellers of counterfeit goods, despite their removal from the premises in the interim, holding that localities have an ongoing right to ensure sellers do not subsequently recommence their illegal activities in the same location.⁸³

In short, with passage of a made-to-order statute like the NAL, the MEP had accomplished something extraordinary; it invented a policing tool giving police and prosecutors unprecedented authority unchecked by Warren Court Era strictures. Nonetheless, the program did not lead to citywide enforcement of the NAL, and in many ways, the MEP’s principal goal of ridding Times Square of illegal sexually oriented businesses remained unfulfilled. As discussed *infra* Part I.C, the fact that the NAL’s enforcement was limited to the New York City Corporation Counsel resulted in the NAL and Bawdy House Laws collecting dust until the latter was revived by the Manhattan District Attorney’s Office in 1988 and the former by the Civil Enforcement Initiative in 1991, as addressed *infra* Parts I.B and I.C respectively.

While a failure, MEP did have some success in “cleaning up Times Square” for several years. For instance, real estate developer and owner of the Times Tower Alex M. Parker—who, in 1973, envisioned Times Square as a place for “nice people”⁸⁴—had by 1977 cut the power to the state-of-the-art electronic news bulletin, saying he was “not going to spend another penny to entertain pimps, prostitutes and criminals.”⁸⁵ Parker relit the sign five months later, crediting the MEP’s civil enforcement efforts, though he went on to sell the building in 1981.⁸⁶

In the immediate aftermath of the MEP, New York turned

App. Div. 1st Dep’t 2004).

82. *Id.* at 883–84.

83. *See City of New York v. Ring*, 823 N.Y.S.2d 145, 146 (N.Y. App. Div. 1st Dep’t 2006).

84. David W. Dunlap, *Alex Parker, Times Square Visionary, Dies at 87*, N.Y. TIMES (APR. 23, 2008), <http://www.nytimes.com/2008/04/23/nyregion/23parker.html>.

85. *Id.*

86. *See id.*

from the NAL to other land management tools to address Times Square's "vice problem." In the early 1980s, the Urban Development Corporation ("UDC") entered into an agreement with the city in the form of the 42nd Street Development Project, with the goal of condemning virtually all buildings on 42nd Street between Seventh and Eighth Avenues.⁸⁷ After an extensive land-use approval process—in which the project navigated the approval process required by the State Environmental Quality Review Act and Eminent Domain Procedure Law—and more than thirty-five lawsuits, not a single condemnation occurred.⁸⁸ Indeed, the UDC's chief executive during the project approval process William Stern now claims the scheme actually *slowed* Times Square's "revival," and instead credits local law enforcement efforts that took place under the Dinkins and Giuliani administrations.⁸⁹

The 1977 NAL remained dormant until, in 1992, NYPD attorneys in the Bronx obtained authorization to bring the actions as part of the Civil Enforcement Initiative pilot project. By the mid-1990s, the NAL had become what Commissioner Bratton called "probably the most powerful civil tool available to the police."⁹⁰ The NAL's alteration of the landscape of nuisance litigation cannot be overstated, transforming from a focus on criminal nuisance prosecutions in the early-to-mid 1800s to a limited, civil variety of public nuisance designed to obtain an injunction and finally to the NAL's expansive enforcement. From 1890 through 1929, a mere 750 written opinions were issued in public nuisance-related criminal prosecutions—and only 125 cases in which public officials sought injunctive relief against a public nuisance.⁹¹ In 1994, there were 214 nuisance abatement lawsuits filed in New York City.⁹² By 1996, this

87. See Eric J. Lobenfeld, *The 42nd Street Development Project: How Litigation Obstructs Public Goals*, 7 PACE ENV'T L. REV. 347, 347 n.1 (1990).

88. See *id.* at 349–50.

89. See generally WILLIAM J. STERN, PERSPECTIVES ON EMINENT DOMAIN ABUSE: THE TRUTH ABOUT TIMES SQUARE, (INST. FOR JUST., 2009); cf. Charles V. Bagli, *After 30 Years, Times Square Rebirth Is Complete*, N.Y. TIMES (Dec. 3, 2010), http://www.nytimes.com/2010/12/04/nyregion/04square.html?pagewanted=all&_r=0.

90. Bratton, *supra* note 12, at 452.

91. See Donald G. Gifford, *Public Nuisance As a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 805 (2003).

92. See ELI B. SILVERMAN, NYPD BATTLES CRIME: INNOVATIVE STRATEGIES

number had more than tripled, amounting to 709 cases.⁹³ In 2008 alone, the city obtained 900 nuisance abatement closings or stipulations.⁹⁴ The civil enforcement strategy which Bratton originally claimed would “*supplement* criminal law enforcement” began to take on a purpose all its own.⁹⁵

In closing, Part I.A’s history of the Nuisance Abatement Initiative is a representative example of the escalating sequence of legislative and executive collusion typical to cities and counties adopting civil enforcement methods. Pilot projects inaugurated by the mayor or other executive officials lead to proposed statutory reforms, which in turn grant still greater presentment authority and grounds for violation to police and prosecutors while lowering procedural protections for civil defendants.⁹⁶

IN POLICING 137 (1ST ED. 1999).

93. *See id.*

94. *See* Christine Hauser, *Among Gay Men, Arrests Spark Concern About Being Singled Out*, N.Y. TIMES, Feb. 15, 2009, at 33. For recent statistics on NAL enforcement in New York City, consult Sarah Ryley’s Pulitzer Prize-winning series in the *New York Daily News*. *See, e.g.*, Sarah Ryley, *The NYPD Is Kicking People out of Their Homes, Even if They Haven’t Committed a Crime*, PROPUBLICA & N.Y. DAILY NEWS (Feb. 4, 2016), <https://www.propublica.org/article/nypd-nuisance-abatement-evictions> [hereinafter Ryley, *The NYPD Is Kicking People Out of Their Homes*]; Sarah Ryley, *Officials Outraged After ‘Shocking’ Report on NYPD Kicking People Out of Homes*, PROPUBLICA & N.Y. DAILY NEWS (Feb. 8, 2016, 8:59AM), <https://www.propublica.org/article/officials-outraged-after-shocking-report-nypd-kicking-people-out-of-homes>; Ginger Adams Otis & Sarah Ryley, *NYPD to Change how Police Use Nuisance Abatement Law*, PROPUBLICA & N.Y. DAILY NEWS (Feb. 11, 2016, 12:01 PM), <https://www.propublica.org/article/nypd-to-change-how-police-use-nuisance-abatement-law>; Sarah Ryley & Rocco Parascandola, *NYPD Chief: Police Will Continue to Aggressively Enforce Nuisance Abatement*, PROPUBLICA (Apr. 28, 2016, 3:16 PM), <https://www.propublica.org/article/nypd-chief-police-will-continue-to-aggressively-enforce-nuisance-abatement>.

95. Bratton, *supra* note 12, at 451 (emphasis added).

96. For instance, Illinois’ legislative expansion of police- and prosecutor-led nuisance abatement powers directly followed Chicago’s 1989 pilot nuisance abatement program, with the Cook County State’s Attorney Office securing amendments to the Illinois Narcotics Forfeiture Act and Drug Paraphernalia Act in 1990 and 1992. *See generally* ILLINOIS CRIM. JUSTICE INFO. AUTH., AN EVALUATION OF THE COOK COUNTY STATE’S ATTORNEY’S OFFICE NARCOTICS NUISANCE ABATEMENT UNIT 26–28 (Nov. 1993), <http://www.icjia.state.il.us/assets/pdf/ResearchReports/Cook%20County%20States%20Attorneys%20Office%20Narcotics%20Nuisance%20Abatement.pdf>.

B. The Manhattan District Attorney Office's Narcotics
Eviction Program

The story of the NEP began in a crime-ridden three-story brownstone on the Upper West Side that, ironically enough, was operated by the New York County Public Administrator.⁹⁷ In 1986, the neighborhood group Westside Crime Prevention Program lodged suit *Kellner v. Cappellini* pursuant to Section 715 of the New York Real Property Actions and Proceedings Law ("RPAPL")—which the MEP unearthed during its earlier civil enforcement experimentation *infra* Part I.A.⁹⁸

In *Kellner*, twenty-six homeowners and tenants neighboring the premises at issue invoked Section 715's statutory authorization of a private right of action to remove tenants from properties used for illegal purposes after the owner of such premises has failed to initiate removal after being given notice of the underlying, unlawful activity.⁹⁹ The petitioners sought to evict occupants of 124 Manhattan Avenue after it fell into disrepair and allegedly became the site for drug dealing and other illegal activity when the owner died intestate, and the property reverted to the Public Administrator of the County of New York.¹⁰⁰ Among other things, the aggrieved residents presented testimonial evidence of themselves being solicited by street-based sex workers in front of the property, heavy foot traffic to and from the premises at all hours of the night, and the testimony of police officers as to arrests made and illegal substances and drug paraphernalia seized when executing search warrants at the brownstone.¹⁰¹ Unsurprisingly based on the facts presented, and despite the presumption against forfeiture of tenancy where an alternative resolution exists, the judge ruled for petitioners. But in doing so the judge offered up some unusually colorful language:

[T]he only effective solution to save this
neighborhood is to vacate the entire building and

97. See *Kellner v. Cappellini*, 516 N.Y.S.2d 827, 828, (N.Y. Civ. Ct. 1986).

98. *Id.*; see also Jan Roehl, *Civil Remedies for Controlling Crime: The Role of Community Organizations*, 9 CRIME PREVENTION STUD. 241, 246 (1998).

99. See *Kellner*, 516 N.Y.S.2d at 827–28 (citing REAL PROP. ACTS. § 715).

100. See *id.* at 828.

101. See *id.* at 828–29.

get rid of all its drug dealers and users. To effectively remove a cancer, it must be completely cut out. The actions by the Police Department in raiding the premises and making numerous arrests have not stopped or even reduced the illegal activities in the premises. The Court must now permanently close this “crack house.”¹⁰²

Within two years of the boarding-up and mass eviction of 124 Manhattan Avenue, community criticism of the Manhattan District Attorney’s failure to address the sale of drugs out of rented premises reached a tipping point.¹⁰³ Then-District Attorney Robert Morgenthau’s solution was based on lessons learned from the MEP’s efforts discussed in Part I.A and the private right of action brought in *Kellner*. The “illegal use” proceeding countenanced by Section 715 allowed action on not just drug- or prostitution-related grounds but also “for any illegal trade, business or manufacture.”¹⁰⁴ Moreover, the law established a presumption of illegal use justifying eviction where in the preceding year two or more prostitution or gambling-related convictions were secured against persons on or associated with the premises of the subject property.¹⁰⁵

Morgenthau’s staff conceived of the idea of bringing Section 715 and similar actions systematically using their superior access to precinct-level arrest and search warrant data as well as neighborhood contacts cultivated by their Community Affairs Unit, but this would only be possible if they could be granted presentment authority that was then-exclusive to the Corporation Counsel.¹⁰⁶ Prior to 1988, the New York City Corporation Counsel represented the city in all nuisance abatement actions.¹⁰⁷ But Morgenthau secured the authority, which proved to have an explosive effect on enforcement activity, similar to the drastic increase in civil enforcement activity

102. *Id.* at 831.

103. See PETER FINN & MARIA O’BRIEN HYLTON, NAT’L INST. OF JUSTICE, USING CIVIL REMEDIES FOR CRIMINAL BEHAVIOR: RATIONALE, CASE STUDIES, AND CONSTITUTIONAL ISSUES 42 (1994).

104. N.Y. REAL PROP. ACTS. § 715(1) (McKinney 2016).

105. See *id.* §§ 715(2)–(3).

106. See FINN & HYLTON, *supra* note 103, at 43.

107. See, e.g., *City of New York v. Goldman*, 356 N.Y.S.754 (N.Y. Civ. Ct. 1974).

witnessed in the 1990s once the NYPD secured authorization for precinct-level use of the Nuisance Abatement Law. Indeed, Scott Levy convincingly argues that the leading innovation of the NEP was less the resurrection of a nineteenth-century statute than its administrative gambit; that is, moving presentment authority to bring illegal use eviction proceedings from the Mayor's Office to the District Attorney.¹⁰⁸

While the NEP was initially under-resourced, with only one assistant prosecutor and one paralegal assigned in the entire District Attorney's Office,¹⁰⁹ it obtained federal grant money and began to prove itself with a high eviction success rate, owing to refined case-screening and pre-trial notification processes.¹¹⁰ From an early stage, prosecutors recognized the novel benefits of using civil remedies to avoid procedural due process protections. Peter Finn and Maria O'Brien Hylton document how prosecutors swiftly came to understand Section 715's tactical advantages, including its supply of a lawful means for otherwise unlawful sharing of police reports with landlords for the purposes of facilitating evictions.¹¹¹ Additionally, prosecutors also correctly anticipated that Section 715 would allow them to sidestep a 1971 consent judgment entered into by the New York City Housing Authority, which required administrative hearings for a Housing Authority tenant threatened with eviction.¹¹²

However, prosecutors knew that Section 715's true strengths lay elsewhere, allowing them to escape the same criminal-procedural straitjacket complained of by MEP attorneys. On the one hand, criminal prosecutions "take months to go to trial, during which time the defendants typically remain on the premises; and even when the defendants are convicted, brief jail sentences or simply probation (because of jail overcrowding) enables offenders to return quickly to their former base of operations."¹¹³ By contrast, the total time from

108. 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, 544 (2008).

109. See FINN & HYLTON, *supra* note 103, at 42.

110. See generally FINN, *supra* note 66, at 11.

111. See *id.*

112. See FINN & HYLTON, *supra* note 103, at 42 (citing N.Y. Cnty. Dist. Atty's Off. v. Oquendo, 553 N.Y.S.2d 973 (N.Y.C. Civ. Ct. 1990)).

113. *Id.* at 44-45.

NEP case acceptance to removal was three to five months.¹¹⁴ Finally, and again echoing the MEP, the standard of proof of “a fair preponderance of the evidence,” allows for eviction based on a single police witness, and that the landlord or District Attorney need not establish the tenant themselves was involved in the activity, solely that “an illegal business is being conducted on the premises which the leaseholder is—or ought to be—aware of.”¹¹⁵ Section 715 procedure sidestepped what the District Attorney’s Office bemoaned as the “rigid requirements” applicable to searches, seizures, and arrests.¹¹⁶

The MEP and Manhattan District Attorney Offices’s shared dream of being liberated from constitutional constraints aside, the District Attorney-led NEP was in no way a mere bureaucratic duplication—the NEP’s contributions of interagency operational and data-sharing methods are responsible for much of police and prosecutors’ unprecedented success in civil and administrative proceedings today. NEP’s three-step case screening, notification, and court proceeding procedure illustrates the point.

In the case screening stage, the NEP reviews “every search warrant that the police . . . execute for suspected narcotics offenses” and obtains referrals from the police department, residents, tenant organizations, and landlords and their attorneys.¹¹⁷ Incredibly, the NEP has secured information-sharing agreements with local precincts related to drug cases generally, even where no search warrant has been executed.¹¹⁸ And in 2000, the NYPD issued a department-wide Patrol Guide procedure to facilitate the filing of complaint reports to trigger the screening process of District Attorneys’ Offices.¹¹⁹

Equally as important, befitting prosecutors’ legal training and complicating attempts by litigators to hold them to account, the NEP developed “third-party policing” methods such as issuing written demands to landlords threatening prosecution for failure to institute eviction proceedings against “problem

114. See FINN, *supra* note 66, at 6.

115. FINN & HYLTON, *supra* note 103, at 45.

116. *Narcotics Eviction Program*, N.Y. CNTY. DIST. ATTORNEY’S OFFICE, <http://manhattanda.org/narcotics-eviction-program>.

117. FINN, *supra* note 66, at 3.

118. See FINN & HYLTON, *supra* note 103, at 43.

119. See NYPD PATROL GUIDE, PROC. NO. 214-02 (2000).

tenants” targeted by the office.¹²⁰ Pressuring landlords into pursuing eviction at their own cost, prosecutors not only conserve enforcement resources but help insulate themselves from constitutional challenge due to difficulties satisfying the state action requirement in suits against government agencies acting as third parties.

In a further attempt to insulate itself from constitutional challenge and public criticism, the NEP made much of its allegedly “strict evidentiary requirements” for entertaining an eviction in the first place, asserting that eviction is not initiated by the NEP for illegal personal drug use alone but instead drugs seized must “typically” weigh at least 3.5 grams and that police records suggest the operation of a drug business.¹²¹ Despite the claimed safeguards of prosecutorial discretion, the NEP reported astonishingly high enforcement rates; for instance, between 1988 and 1994, the program initiated eviction proceedings in 2,150 out of 5,305 cases screened.¹²²

In the notification phase, the District Attorneys’ Offices used Section 715 not just to announce its intentions, but also to maximize its leverage against landlords to maintain independently filed eviction proceedings. The NEP first notifies the landlord by telephone, and mails the landlord and the landlord’s attorney a letter informing them of the suspected illegal activities and requesting that the landlord commence eviction proceedings.¹²³ Included with the letter to the landlord’s attorney are a printout of Section 715, a copy of the executed search warrant, an inventory of property recovered during any and all police searches, and a laboratory report of suspicious substances seized.¹²⁴ If within two weeks the landlord fails to take action, the NEP issues a second letter warning that if

120. See FINN & HYLTON, *supra* note 103, at 40; see also LORRAINE MAZEROLLE & JANET RANSLEY, *THIRD PARTY POLICING* 51 (2005) (“Third party policing . . . involves the police knowing (or being informed of) some general legal levers, identifying a problem that could be alleviated with a legal lever and co-opting non-offending persons or organizations to take on a crime control role. In order to insure [*sic*] compliance, the police motivate third parties to cooperate by drawing on some type of ‘lever’ that . . . includes a range of criminal, civil and regulatory laws and provisions.”).

121. *Id.*; *Narcotics Eviction Program*, *supra* note 116.

122. See FINN, *supra* note 66, at 4–5 fig.2.

123. See *id.* at 5; see also FINN & HYLTON, *supra* note 103, at 40.

124. See FINN, *supra* note 66, at 5. See also FINN & HYLTON, *supra* note 103, at 40.

confirmation of an eviction proceeding is not received by the enclosed date, the NEP will initiate proceedings against the tenant *and the landlord* as respondents, and that if the court grants relief, the landlord may be required to pay the civil penalty of \$5,000 and reimburse the NEP's fees and costs.¹²⁵

In most cases, the landlord agrees to initiate an eviction proceeding, despite the attendant costs for attorney's fees, the marshal, and replacement locks.¹²⁶ Peter Finn explains the economic calculus that conspires to coerce landlords into filing third-party proceedings:

[T]he civil approach offers both a tempting carrot and a powerful stick for the landlord. The carrot: Eviction enables landlords to raise the rent of a new tenant The stick: The civil court can fine landlords \$5,000 for refusing to act, and landlords can be referred to the U.S. Attorney for a forfeiture proceeding if they do not make a good faith effort to force out drug dealers¹²⁷

The NEP further thumbs the scales of justice using as many "carrots" and "sticks" as possible. For instance, though the NEP has referred an extraordinarily small number of cases to U.S. Attorneys, this referral is threatened at an early stage, with the explanation that such a proceeding may result in the seizure of the entire building if the landlord fails to institute eviction proceedings.¹²⁸ The NEP offers "carrots" as well, such as arranging for a police officer to appear in court to act as a witness, and providing necessary paperwork and a staff attorney or paralegal as liaison to monitor the proceedings and assist the landlord's attorney in prosecuting the eviction.¹²⁹

The combined efficacy of Section 715 actions themselves and the technological systemization of data-sharing embraced by Robert Morgenthau's office create a perfect storm, one which renders a tenant attorney powerless to litigate a case rendered

125. See FINN & HYLTON, *supra* note 103, at 40–41.

126. See FINN, *supra* note 66, at 4.

127. *Id.* at 11 (citation omitted).

128. See FINN & HYLTON, *supra* note 103, at 44.

129. See FINN, *supra* note 66, at 4.

a foregone conclusion. Of the few cases that advance to the litigation phase, 55% result in the tenant vacating the apartment before court action is taken.¹³⁰ Respondents who do not vacate prior to court action, and manage to contest the proceedings, are evicted in nearly 85% of cases.¹³¹ And a court dismissal in the tenant's favor is secured in a vanishingly small 1% of cases litigated, with most dismissed "due to technicalities in which the landlord failed to follow proper procedure," rather than a determination that the landlord or District Attorney presented insufficient evidence.¹³²

The exceedingly high eviction success rate is only matched by the shocking number of potential residents who have been displaced since the NEP's inception. While the precise number of individuals expelled is unreported to this day, in the first six years of the Manhattan NEP's operation the program expelled an untold number of residential tenants from 2,005 locations.¹³³ This tally does not even include the NEPs established in the remaining four New York City boroughs after the Manhattan District Attorney's implementation, boroughs which regularly post higher eviction rates.

While at first the NEP was operated solely by the Manhattan District Attorney's Office, all boroughs but Staten Island followed suit. Although little data has been gathered as to the NEP's non-drug-related evictions, the NEP has used Section 715 not just against drug dealing, but also against gambling, prostitution, counterfeit goods manufacturers, weapons trafficking, and other activities.¹³⁴

In closing, Manhattan District Attorney Robert Morgenthau's resurrection of the long-forgotten Bawdy House law in the 1980s demonstrates how state and local officials subtly manipulate historical common-law and statutory actions to circumvent constitutional protections. With a stroke of his pen, Morgenthau secured New York City prosecutors unprecedented powers to self-initiate residential eviction proceedings against tenants in private housing based on one

130. *See id.* at 5 fig.2.

131. *See id.*

132. FINN & HYLTON, *supra* note 103, at 44.

133. *See* FINN *supra* note 66, at 8; *Narcotics Eviction Program*, *supra* note 116.

134. *See* FINN, *supra* note 66, at 4.

untested prior arrest, regardless of whether the arrest resulted in a conviction. The “third party policing” tactics Morgenthau developed¹³⁵ targeting landlords without requiring prosecutors to even initiate court action in the first place radically advanced prosecutors’ civil enforcement authority.

Morgenthau’s prosecutors—and New York City prosecutors still today—routinely threaten private landlords with the “stick” of prosecuting landlords themselves if they do not initiate eviction proceedings in their own name along with the “carrot” of police testimony and documentary evidence to corroborate the tenant’s arrest, allowing the private landlord to easily withstand the low evidentiary burden in nuisance-based holdover evictions. More recent developments in the NEP demonstrate the ever-increasing role that interagency operational and data-sharing agreements play in fueling the state and local civil enforcement explosion, harnessing civil and administrative investigatory powers to easily defeat civil defendants’ already meager procedural and evidentiary protections, not to mention their lack of constitutionally guaranteed counsel.

C. The NYPD’s Civil Enforcement Initiative

On June 21, 1991, Mayor David Dinkins and Police Commissioner Lee Brown cut the proverbial ribbon on the Civil Enforcement Initiative (the “Initiative”), personally padlocking an alleged “house of prostitution” in the Bronx in the presence of news crews.¹³⁶ Police snipers on surrounding rooftops looked on as Dinkins and Brown installed a “six-inch chrome-plated padlock and chain” on the basement apartment claimed to be the center of the operation.¹³⁷ Brown summed up the goal of the program as follows: “When we can, we will put you in jail. When we can’t, we will put you out of business.”¹³⁸ The closure was accomplished using yet another New York City innovation in civil enforcement, the Padlock Law signed by Mayor Edward Koch in 1984, authorizing administrative proceedings overseen

135. MAZEROLLE & RANSLEY, *supra* note 120, at 51.

136. N.Y.C. POLICE DEP’T, CIVIL ENFORCEMENT INITIATIVE 4 (1992), <https://www.ncjrs.gov/pdffiles1/Digitization/145550NCJRS.pdf> [hereinafter INITIATIVE REPORT 1992]; see Gray, *supra* note 1.

137. Gray, *supra* note 1.

138. *Id.*

by the NYPD Commissioner and NYPD administrative law judges by which the NYPD Commissioner may order the closure of any building, erection, or place the Commissioner declared a nuisance.¹³⁹

Together with the Padlock Law, the Initiative invoked a panoply of civil actions, including most prominently the Nuisance Abatement Law authored by the MEP and illegal use eviction program pioneered by the NEP discussed *infra* Parts I.A-B above—not to mention the city, state, and federal forfeiture provisions, Alcoholic Beverage Control Law injunctions, seizures for noise violations conducted pursuant to the Vehicle and Traffic Law, and proceedings for the revocation of licenses issued by the State Liquor Authority.¹⁴⁰ In short, the Initiative was the culmination of decades of legal tinkering in the area of order-maintenance civil enforcement. While the scope of this Article does not allow for a full survey of these actions, this subpart outlines the Initiative’s weaponization of the Padlock Law.

The City Council passed the Padlock Law unanimously, and Mayor Edward Koch quickly signed the bill into law on September 10, 1984.¹⁴¹ The bill amended the Administrative Code to authorize the Police Commissioner to order the discontinuance of a public nuisance and to order the closing of a building, erection, or place where the nuisance exists.¹⁴² A “public nuisance” was initially defined to include only premises where two or more convictions for prostitution, controlled substance, unlawful manufacturing, sale or consumption of alcohol in violation of the Alcoholic Beverage Control Law, possession of stolen property, or maintenance of a vehicle “chop shop” occurred.¹⁴³ In 1989, New York City Administrative Code was amended to reduce the requirement to two or more violations which result in one or more criminal convictions and one or more arrests occurring within a twelve month period and added to the category of a “public nuisance” any activity which separately constitutes a criminal nuisance in the second

139. *See generally* N.Y.C., N.Y., ADMIN. CODE §§ 10-155, 10-156 (2021).

140. *See* INITIATIVE REPORT 1992, *supra* note 136, at 14–16.

141. Remarks by Mayor Edward I. Koch at Padlock Law Press Conference, Police Headquarters, Police Plaza Manhattan, Jan. 4, 1985, at 1.

142. *See* N.Y.C., N.Y., ADMIN. CODE § 10-156a(1)–(2).

143. *See id.* § 10-155a–d.

degree.¹⁴⁴

Prior to the issuance of a discontinuance or closure order by the Commissioner, the respondent must be provided notice and opportunity for a hearing. The hearing is overseen by a Hearing Officer employed by the Police Department, whose role is to create a full record and recommend a disposition to the Commissioner, although the Commissioner has the authority for final decision.¹⁴⁵ The trial attorney prosecuting the alleged nuisance bears a burden of proof by a preponderance of the credible evidence.¹⁴⁶ The rules of evidence are not to be strictly enforced by the Hearing Officer.¹⁴⁷

Innocent owners have no defense; it is immaterial whether the respondent lacked knowledge of, acquiescence to, or participation in the underlying activity or thing constituting the alleged public nuisance on the premises.¹⁴⁸ Each order of closure becomes effective on the fifth business day after the posting of the order and may be for a period of up to one year from the posting of the order.¹⁴⁹ A respondent may post a bond or cash security with a hearing officer, and petition for the order to be vacated provided satisfactory proof that the nuisance has been abated and will not be renewed.¹⁵⁰

A range of collateral consequences are attached to such an order as well. In reviewing one challenge by the new owner of a property subjected to a closure order due to gambling violations occurring prior to the new owner taking possession of the premises, the First Department ruled that failure to first exhaust administrative remedies—namely, filing a petition with the Police Commissioner to vacate the closure order—barred recourse to the courts and dismissed the claim.¹⁵¹ When a closure order is in force, it is a misdemeanor for any person to use, occupy, or permit any other person to use or occupy the premises, destruction of a posted order is punishable by a fine

144. *See* N.Y.C., N.Y., LOCAL LAW 6, 64 (1989).

145. *See* N.Y.C., N.Y., RULES OF CITY OF N.Y., tit. 38, ch. 10, § 10-03 (1991).

146. *See id.* § 10-05(b)(1).

147. *See id.* § 10-05(b)(4)(i).

148. *See* N.Y.C., N.Y., ADMIN. CODE, § 156b(2) (repealed 2017).

149. *See id.* § 156e.

150. *See id.* § 156e(i)-(ii).

151. *See* *Abreu v. N.Y.C. Police Dep't*, 582 N.Y.S.2d 148, 148–49 (N.Y. App. Div. 1992).

up to \$250 or up to fifteen days in jail, and intentional disobedience or resistance to a closure order is punishable by a fine of up to \$1,000 and up to six months in jail.¹⁵²

Utilization of the Padlock Law climbed quickly. In the five months after the Padlock Law's passage, the Department had conducted only eleven hearings regarding the padlocking of premises alleged to involve narcotics, gambling, and "after-hours clubs," out of which closing orders were issued to six establishments, orders of discontinuance to four, and one hearing decision left pending.¹⁵³ Within one year of the start of operations, however, officials claimed they had used the Padlock Law to halt 417 marijuana operations and 286 gambling, narcotics, and prostitution operations, with roughly 3,600 arrests made at the targeted sites.¹⁵⁴

The Padlock Law both borrows from the strengths of the MEP and NEP initiatives and benefits from the additional innovation of internalizing civil enforcement proceedings within the administrative authority of the NYPD itself. The success of the Padlock Law is due in large part to the—seemingly conflicted-out—decisional authority vested in the Police Commissioner rather than an independent judge. But its success is also owing to the padlock proceeding's procedure itself, which borrows from the illegal use of eviction tactics developed by the Manhattan District Attorney Office's NEP outlined *infra* Part I.B above. For instance, in instituting Padlock Law proceedings, a letter is sent to landlords after each arrest on the premises, pressuring them to initiate eviction proceedings or face personal liability.¹⁵⁵

Still, the Padlock Law did not spring forth fully formed, and its true impact would not begin to be felt until the Initiative's formal establishment in 1991. In addition to the 1989 amendments strengthening the Padlock Law discussed above, variations in enforcement architecture began in earnest in 1991. In the first year of the Padlock Law's enforcement, 100 of the

152. See N.Y.C., N.Y., ADMIN. CODE § 156g-h (repealed 2017).

153. Remarks by Mayor Edward I. Koch at Padlock Law Press Conference, Police Headquarters, Police Plaza Manhattan, Jan. 4, 1985, at 1–2.

154. See *700 Crime Sites Shut Down by Police Under New York City Padlock Law*, N.Y. TIMES, Sept. 29, 1985, at 51.

155. See *id.*

more than 700 sites closed in the law's first year reached the hearing stage, with the vast majority of the others accomplished by threats to landlords.¹⁵⁶ Between the Padlock Law's 1984 enactment and the Initiative's 1991 launch, 447 Padlock Law actions ultimately reached the hearing stage.¹⁵⁷ Unfortunately, however, New York City has not released statistics allowing for better accounting of post-1991 Padlock Law enforcement actions.

It is easy to infer that the number of actions increased exponentially after the Civil Enforcement Unit's ("CEU") launch. From the time of its ribbon-cutting in 1991, the departmental footprint of the Initiative was extraordinary. Within two months, what started as a pilot project in the 52nd Precinct expanded to three additional precincts in the Bronx.¹⁵⁸ Within a year, a partnership with the Office of Midtown Enforcement—the successor of the MEP—brought the CEU to a Manhattan precinct and secured the Corporation Counsel's authorization for a one-year pilot program permitting the NYPD to independently commence nuisance abatement actions.¹⁵⁹ By the time of Ray Kelly's first tenure as Acting Police Commissioner in 1993, the Initiative had expanded to a Queens divisional level that included five precincts.¹⁶⁰ And by 1994, when the document *Police Strategy No. 5* discussed *infra* Part II was published, fifty-five precincts were enrolled in the Initiative.¹⁶¹ With police reformists distracted by other trends, in 1995, the Ford Foundation and Ash Center at the Harvard-Kennedy School of Government awarded the Innovations in American Government Award to the CEU.¹⁶²

The Initiative was not a success merely because NYPD attorneys took advantage of prior innovations, or even because they added to civil enforcement tools through padlock, forfeiture,

156. *See id.*

157. *See* Gray, *supra* note 1.

158. *See* SILVERMAN, *supra* note 92, at 64.

159. *See id.*; *see also* INITIATIVE REPORT 1992, *supra* note 136, at 11–12.

160. *See* SILVERMAN, *supra* note 92, at 64.

161. *See* N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK 47 (1994) [hereinafter POLICE STRATEGY NO. 5].

162. *See* Harvard Ash Center, *The Civil Enforcement Initiative: Finalist Presentation*, YOUTUBE (Mar. 29, 2011), <http://www.youtube.com/watch?v=ZOMKwFRS-14> [hereinafter *CEU Finalist Presentation*].

or other novel actions. Indeed, programs such as those discussed *supra* Part I.A-B remained geographically limited and selective. The Initiative's impact was instead owing to its incorporation of emergent managerial and technological advances through its decentralization of NYPD attorneys to bring civil actions at the precinct and specialized-unit level. The Initiative itself was designed first and foremost to be relevant to precinct commanders as "a program that complements the Police Department's criminal enforcement activities by instituting parallel civil actions to support the Police Department's overall public safety mission."¹⁶³

The NYPD's official line was that "the Police Department cannot rely on arrests alone to address" neighborhood complaints.¹⁶⁴ Robert Messner, Managing Attorney of the Civil Enforcement Unit, described the partnership as a consultancy:

adding lawyers into a police department's response to community problems . . . not as critics of the police conduct but rather as partners with the police, as consultants to individual police officers and police commanders . . . our lawyers, working with police commanders, have come up with innovative strategies to address community crime problems; strategies that were never used anywhere else, they created them, they put them into place, and they replicated them in various precincts, they modified them where necessary . . .¹⁶⁵

But the ultimate audience for the Initiative was seen as the electorate. Part of the "community policing philosophy" that served as the centerpiece of Mayor Dinkins's Safe Streets/Safe City campaign, the Initiative was intended to "combine[] criminal and civil remedies into a comprehensive strategy for solving the problems facing the community of a particular

163. INITIATIVE REPORT 1992, *supra* note 136, at 13; *see also* Bratton, *supra* note 12, at 451 (describing the civil enforcement strategy as intended primarily to supplement criminal law enforcement).

164. INITIATIVE REPORT 1992, *supra* note 136, at 2.

165. *CEU Finalist Presentation*, *supra* note 162.

precinct.”¹⁶⁶ From an early stage, the NYPD quashed internal and external objections concerning the potential for abuse and waged an aggressive public relations campaign. As CEU attorney Robert Messner claimed before accepting on CEU’s behalf the 1995 Innovations in American Government award from the Ford Foundation and Harvard University’s Kennedy School of Government, the goal “has never been to use things like forfeiture or seizure or nuisance abatement as a money-making tool. We are using it to address a crime problem . . . [W]e are not there to punish people, we are trying to address community problems.”¹⁶⁷

In short, Part I.C’s case study highlights the central role of managerial and technological innovations in the rise of police- and prosecutor-led civil enforcement, which allow law enforcement officials to leverage the full weight of other agencies and direct civil enforcement actions and arrest-based tactics based on statistical modeling.

III. PATCHING UP “BROKEN WINDOWS”: CIVIL ENFORCEMENT’S CRITICAL ROLE IN ORDER- MAINTENANCE POLICING

For years, elected officials exhorted the city’s numerous law enforcement agencies to “crack down” on crime without much success. While isolated special enforcement and pilot projects like those detailed *infra* Part I laid the legal groundwork, civil enforcement activities remained plagued by budget shortfalls and restricted catchment areas until 1990. Police, prosecutors, and civilian code enforcement agencies also suffered from a lack of operational coordination, and civilian agencies jealously guarded their presentment authority. But as this section demonstrates, police- and prosecutor-led civil enforcement operations exploded in the 1990s, particularly under the tenure of NYPD Commissioners Lee P. Brown and William Bratton, ushering in the so-called Blue Revolution.¹⁶⁸

166. INITIATIVE REPORT 1992, *supra* note 136, at 1.

167. *CEU Finalist Presentation*, *supra* note 162; see also Ryley, *The NYPD Is Kicking People out of Their Homes*, *supra* note 94 (quoting then-director of the NYPD’s Civil Enforcement Unit Robert Messner as saying, “You have to remember, it’s an action about a place. It’s not about people.”).

168. See generally Michael Massing, *The Blue Revolution*, N.Y. REV., Nov. 19, 1998, at 32.

This history reveals how present-day civil enforcement tactics emerged contemporaneously with order-maintenance policing (“OMP”).¹⁶⁹ While Lee Brown formalized the legal architecture for integrated enforcement in the form of the Civil Enforcement Initiative described *supra* Part I.C, William Bratton pioneered managerial and organizational innovations that, together with his vision for order-maintenance policing, caused the drastic scale-up of civil enforcement actions.¹⁷⁰ For both Brown and Bratton, civil enforcement was just as if not more tactically critical to the “new policing” as the far more visible zero-tolerance approach to quality-of-life arrests.¹⁷¹ In

169. Neither the definition of “order-maintenance policing”—variously referred to as “broken windows,” zero-tolerance, or quality-of-life policing—nor its identification with particular tactics is well settled. *See, e.g.*, George Kelling & William Bratton, *Why We Need Broken Windows Policing*, CITY J. (Winter 2015), <https://www.city-journal.org/html/why-we-need-broken-windows-policing-13696.html> (“Critics use the term ‘zero tolerance’ in a pejorative sense to suggest that Broken Windows policing is a form of zealotry—the imposition of rigid, moralistic standards of behavior on diverse populations. It is not. Broken Windows is a highly discretionary police activity that requires careful training, guidelines, and supervision, as well as an ongoing dialogue with neighborhoods and communities to ensure that it is properly conducted.”).

For purposes of this Article, I use “order-maintenance policing” to denote policing strategy characterized by summary civil and criminal enforcement targeting low-level disorder in personal conduct or property conditions. By contrast, I use “zero-tolerance” and “quality-of-life” policing to refer strictly to the aggressive use of arrest-based tactics targeting low-level disorder. What the approaches share in common is the “broken windows theory” propounded by criminologists James Q. Wilson and George L. Kelling, discussed in detail *infra* Part II, which posits that intervening in low-level disorder interrupts a developmental sequence leading to serious crime.

For a more nuanced discussion of these interrelated concepts, *see generally* BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001) [hereinafter HARCOURT, *ILLUSION OF ORDER*]; Bernard E. Harcourt, *Policing Disorder: Can We Reduce Serious Crime by Punishing Petty Offenses?*, BOSTON REV. (Apr. 1, 2002), <https://bostonreview.net/us/bernard-e-harcourt-policing-disorder>.

170. *See generally* Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L. J. 407 (2000) (identifying the three essential reforms Bratton implemented, including: use of crime metrics and statistical mapping to allocate police resources and deploy officers, management reforms tied to these metrics holding supervisors accountable for performance, and proactive enforcement activity).

171. *See, e.g.*, William J. Bratton, *Great Expectations: How Higher Expectations for Police Departments Can Lead to a Decrease in Crime*, in NAT'L INST. OF JUST., *MEASURING WHAT MATTERS: PROCEEDINGS FROM THE POLICING RESEARCH INSTITUTE MEETINGS 15-16* (1999) (describing the Civil Enforcement Initiative as “a powerful tool to combat petty crime and disorder” by “[s]end[ing] NYPD attorneys into the field to assist precinct commanders in

short, Commissioners Brown and Bratton were the first to implement a systematic—and citywide—program of interdepartmental coordination to leverage civil remedies for disorder suppression.

While arrest-based OMP tactics have suffered recent defeats in the courts and the press, municipal police have attempted to restyle civil enforcement tactics as “community” or “neighborhood” policing tools.¹⁷² In this way, Part II’s description of civil enforcement’s pivotal role in OMP undermines efforts to smuggle civil enforcement tactics under the umbrella of “problem-solving policing” interventions, which with the notable exception of *Floyd* and its companion challenges to the NYPD’s systematic stop-and-frisk program, have survived criminal-procedural and Equal Protection Clause challenges with a high rate of success.¹⁷³

devising their enforcement strategies. Together, they use civil law—especially nuisance abatement law, police padlock law, and various forfeiture proceedings—to augment the traditional police sanctions of summons and arrest.”).

172. William Bratton himself criticized the “idealized notion of community policing, in which beat cops organize a community to solve its problems . . . as unrealistic.” Bratton, *supra* note 12, at 463–64. Instead, Bratton contends that at an operational level “community policing” resembles order-maintenance strategies involving “the reorganization of police resources and police strategies, including civil enforcement tactics, to help communities counter the problems that afflict them.” *Id.* at 464.

173. Though the *Floyd* plaintiffs lodged substantive due process challenges, the lion’s share of briefing and oral argument centered on the criminal-procedural and equal protection dimensions of the case. *See, e.g., Floyd v. City of New York*, No. 08-CV-1034(SAS) (S.D.N.Y. Aug. 12, 2013) (J. Scheindlin) (enjoining the stop-and-frisk program based on the City’s deliberate indifference to, and widespread policy or practice of, unconstitutional stop-and-frisks by the NYPD, targeting black and Latino residents without reasonable suspicion as required by the Fourth Amendment and adopting a policy of indirect racial profiling resulting in the disproportionate and discriminatory stopping of black and Latino persons in violation of the Equal Protection Clause); *Ligon v. City of New York*, No. 12-CV-2274(SAS), 2013 WL 71800, at *3 (S.D.N.Y. Jan. 8, 2013) (J. Scheindlin) (enjoining the NYPD’s practice of conducting “trespass stops” outside of privately-owned Bronx apartment buildings participating in the Trespass Affidavit Program); *Davis v. City of New York*, No. 10-CV-0699(SAS), 2012 WL 4813837, at *2 (S.D.N.Y. Oct. 9, 2012) (J. Scheindlin) (granting in part and denying in part defendants’ motion for summary judgment in lawsuit challenging NYPD vertical patrols conducting trespass stops in public housing).

By contrast to arrest-based criminal enforcement tactics like those challenged in *Floyd*, OMP-style civil enforcement operations are vulnerable to

NYPD planning and operational documents in this period make clear civil enforcement's central place in the OMP agenda. It was in the 1994 report *Police Strategy No. 5: Reclaiming the Public Spaces of New York*, then-Police Commissioner William J. Bratton first announced the rationale for the Department's emergent policing strategy, proclaiming that "[b]y working systematically and assertively to reduce the level of disorder in the city, the NYPD will act to undercut the ground on which more serious crimes seem possible and even permissible."¹⁷⁴ The report famously rooted its justification a decade earlier in the "broken windows" theory set forth by James Q. Wilson and George L. Kelling in the pages of *The Atlantic*.¹⁷⁵ Wilson and Kelling maintained that "at the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence," while conceding that the Newark Foot Patrol study on which the article was based showed merely that increased foot patrols reduce residents' fear of crime and not the actual crime rate.¹⁷⁶ To interrupt this sequence, the authors argued that police must sustain visibility in neighborhoods to reduce fear and restore the confidence of residents themselves to regulate low-level disorder.¹⁷⁷

Many scholars have since characterized Bratton's approach as misappropriating Wilson and Kelling's proposal.¹⁷⁸ As Jeffrey

other lines of constitutional attack. See, e.g., GARNETT, *supra* note 15, at 27 (cataloging successful free speech, Eighth Amendment, and vagueness challenges to certain order-maintenance policies and practices).

174. POLICE STRATEGY NO. 5, *supra* note 161, at 7.

175. See *id.* at 6 (referencing George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>); see generally George L. Kelling, *The Newark Foot Patrol Experiment*, POLICE FOUND., (1981), <https://www.policefoundation.org/publication/the-newark-foot-patrol-experiment/>.

176. Kelling & Wilson, *supra* note 175.

177. See *id.*

178. See, e.g., 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, 279 (2009); ANDREA MCARDLE, ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 4–5 (Andrea McArdle & Tanya Erzen eds., 2001) (referring to "New York's idiosyncratic version of James Wilson and George Kelling's influential 'broken windows' theory."). But see Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1160 n.6 (2004) (claiming Bratton "[a]dopted Wilson and Kelling's Broken Windows thesis as the basis for the city's new policing

Fagan and Garth Davies argue, Bratton's idiosyncratic program of *Terry* stops and summary arrests for minor offenses reflected "theoretical and strategic innovations," including substituting a focus on police suppression of *social* disorder for Wilson and Kelling's focus on *physical* disorder.¹⁷⁹ Relatedly, in his in-depth study of the NYPD's organizational development during this period, Eli Silverman credits Bratton with consequential managerial and statistical innovations.¹⁸⁰ Wilson and Kelling's writings partially support this reading. In their original publication in *The Atlantic*, Wilson and Kelling stressed that "many aspects of order maintenance in neighborhoods can probably best be handled in ways that involve the police minimally if at all."¹⁸¹ And within two years of the publication of *Police Strategy No. 5*, Kelling reaffirmed that, in his view, order-maintenance policing of social norms should be limited to primarily "non-arrest" approaches—education, persuasion, counseling, and ordering—so that arrest would only be resorted to when other approaches failed."¹⁸²

While these managerial, organizational, and technological reforms do in fact represent innovations on Wilson and Kelling's theory, the tort- and property-based civil enforcement methods introduced in "Fine-Tuning" suggest a strong linkage with Wilson and Kelling's focus on *physical* disorder. The pervasiveness of civil enforcement approaches to the NYPD's implementation of "broken windows theory" contradicts Kelling's later attempt to divorce order-maintenance designs from Bratton's innovations. Put another way, Bratton simply tailored Kelling's theory of physical-disorder suppression to the organizational architecture and technological capabilities of urban policing, turning law into an instrumentality for

initiative in 1994.").

179. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L. J., 457, 464, 471 (2000).

180. See SILVERMAN, *supra* note 92, at 124 (describing Bratton's participation in CompStat's development, a program that became "[t]he NYPD's most permanent, far-reaching, and widely imitated innovation.").

181. Kelling & Wilson, *supra* note 175.

182. GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 23 (1996) (emphasis added).

achieving police objectives.¹⁸³

Civil enforcement proved central to this effort. Indeed, *Police Strategy No. 5* places equal if not greater emphasis on civil actions as compared to the summary arrest and misdemeanor enforcement that has dominated public attention.¹⁸⁴ And its discussion of civil enforcement is not merely aspirational; for instance, *Police Strategy No. 5* announces the doubling of civil enforcement attorneys assigned to precinct commanders across the fifty-five precincts participating in the Civil Enforcement Initiative.¹⁸⁵ It also details the NYPD's efforts to build out the civil enforcement infrastructure through staffing and training initiatives designed to accomplish a variety of civil enforcement actions: vehicle forfeiture of those suspected to patronize the street-based sex trade; Nuisance Abatement Law proceedings targeting smoke shops, crack houses, and illegal massage parlors; and administrative proceedings seeking the revocation of alcohol and street vendor licenses.¹⁸⁶ Further, *Police Strategy No. 5* lays the groundwork for interagency and intergovernmental cooperation agreements to expand civil enforcement's reach, including a partnership between New York City's Civil Enforcement Initiative and the State Liquor Authority to overcome laws inhibiting NYPD undercover operations in connection with liquor license inspections and

183. Bratton's experimentation with OMP tactics pre-dates his tenure as NYPD Commissioner. For instance, as chief of the New York City Transit Police from 1990 to 1992, Bratton retooled the division to aggressively pursue summary arrests for misdemeanors and violations directly associated with physical disorder in the New York transit system. SILVERMAN, *supra* note 92, at 81. One 1991 report dating from Bratton's leadership of the Transit Police Department reports a 35% uptick in summonses (totaling 205,452) and 473% increase in ejections for rules violations—fare beating, panhandling, unauthorized sales, overstretch, and sleeping in the subway—that encompass not only disorderly persons but non-conforming usages of the *physical* environment. See N.Y. TRANSIT POLICE DEP'T, THE NEW YORK CITY TRANSIT POLICE VISION FOR THE 1990S: TAKING BACK THE SUBWAY FOR THE PEOPLE OF NEW YORK 17 (1991).

184. See POLICE STRATEGY NO. 5, *supra* note 161.

185. See *id.* at 9. See also Andrew Ingram, *Breaking Laws to Fix Broken Windows: A Revisionist Take on Order Maintenance Policing*, 19 BERKELEY J. CRIM. L. 112 (2014) (arguing that better community outcomes are obtained when police discretion is guided by legal principles rather than treated as an instrumentality for obtaining criminal law enforcement objectives). But see SILVERMAN, *supra* note 92, at 138 (noting that contemporaneous NYPD documents report an even more dramatic civil-enforcement staffing increase).

186. See POLICE STRATEGY NO. 5, *supra* note 161, at 38–40.

revocation proceedings.¹⁸⁷

The correlation between Wilson and Kelling's focus on physical disorder and Bratton's civil enforcement innovations is similarly borne out by related departmental planning documents issued in this same period. For example, *Police Strategy No. 2: Curbing Youth Violence in the Schools and on the Streets* explicitly targets premises catering to youth for civil enforcement proceedings: "Action will be taken against alcohol and cigarette sales to minors, and against video arcades, pool halls, bowling alleys, and movie theaters found to be in violation of the law."¹⁸⁸ *Police Strategy No. 2* supplements this place-based approach with a social-order policing model involving the strict enforcement of graffiti, noise, drinking, and disorderly conduct in areas surrounding school property, while confirming departmental efforts to expand interagency partnerships like its renegotiation of reporting protocols with the Chancellor of the Board of Education.¹⁸⁹

Police Strategy No. 3: Driving Drug Dealers Out of New York also places great emphasis on civil enforcement, reflecting the NYPD's early focus on civil and administrative remedies for narcotics and gambling-related activities.¹⁹⁰ The report boasts of twenty-six new attorney hires under the newly created Civil Enforcement Unit and assigned to Borough, Division, and Precinct Commanders to supplement their efforts in order to rapidly "close locations and seize assets used or gained in illegal activity."¹⁹¹ *Police Strategy No. 3* goes on to describe the growing number of powerful civil and administrative remedies at the NYPD's disposal—including the nuisance abatement, narcotics eviction, license revocation, and forfeiture proceedings outlined in Part I—by virtue of the NYPD's collaborative interagency agreements:

Under the Nuisance Abatement Law, the New York Supreme Court can close locations where

187. *See id.* at 32–33.

188. N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 2: CURBING YOUTH VIOLENCE IN THE SCHOOLS AND ON THE STREETS 28 (1994).

189. *See id.* at 28.

190. N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 3: DRIVING DRUG DEALERS OUT OF NEW YORK 17 (1994).

191. *Id.*

there were three violations for narcotics or gambling activity. Under the Padlock Law, the Police Commissioner is authorized to close a location where two or more narcotics or gambling violations resulted in at least one arrest and conviction within the last year. Working with the Corporation Counsel and the District Attorneys, the Civil Enforcement Unit will secure evictions of individuals who are dealing drugs. They will facilitate seizure of drug paraphernalia and closure of stores selling them. And they will facilitate sustained efforts to confiscate cars which are being used to transport narcotics. The Civil Enforcement Unit will expand efforts to assist the District Attorneys' Offices and the U.S. Attorneys' Offices to notify landlords of widespread illegal activity in their buildings and then, if no action is taken, to seize these buildings.¹⁹²

In sum, scholars of OMP are wrong to neglect civil enforcement. While critics of arrest-based OMP-style policing have made progress in reform, present-day civil enforcement operations remain faithful to the same approaches outlined by the NYPD in its early OMP planning documents. This operational continuity is a testament to the decades-long development of New York City's civil enforcement system, which demands a parallel in the scholarly literature critical of the efficacy and consequences of OMP. In the following section, the value of this effort is shown by comparing OMP-style civil and criminal enforcement methods.

IV. THE TROUBLE WITH "ORDER": QUESTIONING THE EFFICACY, RACIAL AND ECONOMIC DISPARITIES, AND COLLATERAL CONSEQUENCES OF AGGRESSIVE CIVIL ENFORCEMENT

After over thirty years of contentious academic discourse surrounding OMP, much of the legal and social scientific literature on policing has moved on to other features of present-

192. *Id.* at 17.

day policing that urgently deserve attention—implicit bias, disciplinary practices, departmental diversity, police-community relations, police-involved killings, and so on. In this Part, I make a case for reviving OMP-related research in the context of police- and prosecutor-led civil enforcement, surveying the rich academic literature on OMP *criminal* enforcement methods to compare the causal, constitutional, socio-economic, and other implications of OMP-style civil enforcement.

First, I review empirical studies concerning the utility of arrest-based OMP interventions in reducing serious crime to identify metrics for evaluating the efficacy of civil enforcement in future research. In addressing the research into OMP's efficacy, I also demonstrate how social scientific studies of OMP as traditionally understood will benefit from more robust understanding of place-based enforcement practices, as the geographically diffuse but institutionally specific (e.g., public schools, transit, and housing) actions common to contemporary civil enforcement introduce new variables. I also review the related procedural justice literature on the “trust deficit” fostered by discriminatory and arbitrary police practices, connecting these insights to the civil enforcement context.

Next, I describe the community-wide social and economic impacts of police- and prosecutor-led civil enforcement. In the abstract, “property owners” might seem a less disadvantaged class than those without property in issue—public housing residents subjected to trespass stops in hallways or homeless persons cycled in and out of custody for their mere proximity to Times Square—but to assume a lack of identity between affected communities is a serious mistake. Police- and prosecutor-led civil enforcement disproportionately targets low-income, Black, and Latino defendants: renters in rent-regulated or subsidized housing, for instance, evicted by landlords pressured in third-party Bawdy House law actions or directly by NAL actions;¹⁹³ sole proprietor bodegas, delicatessens, taxi-dance bar owners

193. See, e.g., Sarah Ryley, *How We Did Our Analysis of New York City Nuisance Abatement Cases*, PROPUBLICA & N.Y. DAILY NEWS (Feb. 5, 2016, 9:00 AM), <https://www.propublica.org/article/how-we-did-our-analysis-of-new-york-city-nuisance-abatement-cases> (noting that many residents charged with nuisance abatement actions in 2013 and 2014 “agreed” to warrantless searches of their homes as a condition of being to return, while others agreed to automatically forfeit their lease upon merely being accused of wrongdoing in the future).

shattered, and their employees sacked when coerced into costly stipulations or face lost profits and mounting legal fees upon being served with ex parte NAL closure orders;¹⁹⁴ low-income vehicle owners and lessors whose vehicles are seized, forfeited, and auctioned off by the NYPD after summary decisions by NYPD-appointed agency judges.

A. Questioning Causation: Does Order-Maintenance-Style Criminal or Civil Enforcement Reduce Serious Crime?

Although recent systematic reviews of the social scientific literature concerning the efficacy of OMP arrest-based practices conclude there is *no* evidence these tactics reduce serious crime,¹⁹⁵ for more than a decade, the efficacy debate raged among sociologists, criminologists, and legal scholars. Definitional confusion characterized early debate but was resolved by distinguishing between “broken windows theory”—as a criminological hypothesis of the dynamic interrelationship between physical disorder, social deviance, and governmental interventions—and its as-applied iterations in municipal law enforcement practices such as “zero-tolerance” or “quality-of-life” policing.

While I have no intention of relitigating the efficacy debate specific to *arrest-based* tactics, the literature is instructive for identifying metrics for evaluating the relative efficacy, if any, of OMP-style *civil enforcement* practices in reducing serious crime. Among other themes, critics of OMP arrest practices argued that existing social scientific studies attempting to measure

194. See also Bryan M. Seiler, Note, *Moving from “Broken Windows” to Healthy Neighborhood Policy: Reforming Urban Nuisance Law in Public and Private Sectors*, 92 MINN. L. REV. 883, 893–94, 904–05 (2008) (suggesting that public nuisance actions in civil court may be the most common form of publicly-filed civil action due to the lower standard of proof in civil courts and that public nuisance actions are often fueled by race-based agendas at the community level).

195. See, e.g., Anthony A. Braga, et. al., *Disorder Policing to Reduce Crime: A Systematic Review*, CAMPBELL SYSTEMATIC REVIEWS. 1, 1 (Sept. 8, 2019) (concluding that “aggressive, order maintenance approaches” do not generate crime reductions comparable to those achieved by community and problem-solving approaches based on systematic review of evidence presented by 28 social scientific studies including nine randomized controlled trials); Anthony A. Braga, et. al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RES. CRIME & DELINQ. 567–68 (2015).

“disorder” (and so also assessing the effectiveness of OMP-style efforts to reduce it) are inherently skewed by normative judgments unsuited to scientific methods. Additionally, many researchers argued that even if objective measurement were possible, the existing data simply does not support claims that OMP tactics were responsible for decreasing crime rates in the 1990s; indeed, falling crime rates were experienced not only in cities that adopted OMP-style methods but those *without*.¹⁹⁶ In OMP’s place, scholars have advanced a wide variety of competing explanations for 1990s crime reduction, ranging from declining use of crack cocaine, decreases in the relative population of sixteen to twenty-four-year-old men, and a rise in college enrollment.¹⁹⁷

Empirical studies attempting to objectively measure civil enforcement’s effects on crime reduction would do well to avoid being paralyzed by the fuzzy metrics and intervening variables that plagued research into OMP-style arrest practices. For instance, in his influential *Disorder and Decline*, OMP proponent Wesley Skogan claimed to link perceptions of area-level disorder with neighborhood crime problems based on the combined results of five different studies of neighborhood crime problems between 1977 and 1983 consisting of qualitative surveys of 13,000 adult residents across forty residential urban neighborhoods.¹⁹⁸ Additionally, Skogan attempted to supplement his anecdotal findings with targeted evaluations of special enforcement initiatives adopted in several major cities (e.g., foot patrols, team policing, administrative decentralization to local storefront offices).

Skogan’s research drew widespread criticism. For instance, Bernard Harcourt replicated Skogan’s survey-based study and found that the statistics did not support his conclusion.¹⁹⁹

196. See Howell, *supra* note 178, at 276 n.20; see also Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163 (2004).

197. See generally ANDREW KARMEN, *NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S* (2000); HARCOURT, *ILLUSION OF ORDER*, *supra* note 169; STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005).

198. See WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 18–19, 187–90* (1990).

199. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the*

Harcourt found that: Skogan's data omitted key variables; his inadequate sample size of at most forty neighborhoods undermined the strength of his conclusions; and that even if accepting these variations, certain types of crime like rape, purse-snatching, and pick-pocketing are not significantly related enough to disorder perception to draw larger conclusions as to OMP's efficacy; that even physical assault and burglary rates are not sufficiently indicative of objectively perceivable disorder when neighborhood poverty, stability, and race are held constant; and that Skogan only correlated robbery with objectively perceived disorder because the five Newark neighborhoods exert outlier influence on the statistical findings and were non-representative of the larger sample.²⁰⁰ Separately, Bernard Harcourt and Jens Ludwig tested the theories of Skogan, Kelling, and William Sousa in a study comparing New York City crime and arrest data, census tract-level measures of socio-demographic characteristics, and a measure of the number of police officers assigned to each precinct by year.²⁰¹ The evaluation concluded there was "no empirical evidence to support the view that shifting police towards minor disorder offenses would improve the efficiency of police spending and reduce violent crime."²⁰²

The concept of "disorder" itself has been subject to a wealth of scholarly criticism, including the argument that "order" and "disorder" are incapable of formal definition and vulnerable to racial and other biases.²⁰³ For instance, Robert Sampson and Stephen Raudenbush showed that residents of all races report heightened disorder where there is a higher concentration of Black or Latino neighbors, even where objective manifestations of disorder in neighborhood conditions, such as boarded-up buildings and trash-littered streets, are equal.²⁰⁴ Their findings

Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 MICH. L. REV. 291, 295 (1998).

200. *See id.* at 295–96.

201. *See* 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).

202. *Id.* at 315.

203. *See, e.g.*, Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows"*, 67 SOC. PSYCH. Q. 319, 337 (2004).

204. *See id.* at 337.

suggest that qualitative studies of disorder perception are distorted by “social psychological processes of implicit bias and statistical discrimination” in the racialized context of U.S. urban centers.²⁰⁵ Similarly, given that poor and minority neighborhoods labeled as disorderly are targeted for heightened arrest-based interventions, OMP tactics *themselves* are arguably “criminogenic” in that increased officer presence results in a net-widening effect.²⁰⁶

On the other hand, subjective community perceptions were marshaled by Tom Tyler and Jeffrey Fagan to support a procedural justice critique of OMP’s efficacy, arguing that, far from reducing serious crime, the economic and legitimacy costs imposed by OMP-style tactics are *themselves* criminogenic.²⁰⁷ In a panel design study of 830 New York City residents, Tyler and Fagan document how public perception of institutional *legitimacy* affects citizens’ willingness to cooperate with or assist police crime reduction efforts.²⁰⁸ Moreover, Tyler and Fagan’s study found that community perception of police legitimacy is linked directly to perceptions of the relative justice or injustice of the procedures used by the police to exercise their authority.²⁰⁹

These findings echo other research showing that community perceptions of legitimacy more significantly accounts for neighborhood crime trends than heightened police presence in the neighborhood.²¹⁰ Trends in civilian complaints of police misconduct tend to corroborate that decreased community perceptions of police legitimacy result from the implementation of OMP-style tactics. To return to the example of New York City, during Bratton’s first term as NYPD Commissioner, there was a 25% uptick in arrests and a concomitant 50% jump in complaints of police misconduct in neighborhoods in which the NYPD

205. *Id.*

206. See Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOCIO. 603, 604–05, 638 (1999).

207. See generally Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

208. See *id.* at 244–62.

209. See *id.* at 244–45.

210. See Lawrence W. Sherman, *Policing for Crime Prevention*, in PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING: A REPORT TO THE UNITED STATES CONGRESS 227 (1997).

claimed the sharpest reductions in crime rates.²¹¹ Researchers studying civil enforcement efficacy would do well to account for perceptions of the legitimacy of civil enforcement actions.

As predictive policing has gained purchase in many municipal police departments, the social-psychological insights of Sampson and Raudenbush have proven prescient, and researchers into civil enforcement should beware of the pitfalls of econometric models. Bernard Harcourt has thoroughly documented how leading econometric models contain inherent biases, skewing any claims to OMP's *actual* contributions to crime reduction. For instance, Harcourt observed that many predictive models were geared toward maximizing search success rates (i.e., detection) but based on metrics derived solely from preexisting crime data—with racial profiling effectively baked in.²¹² More fundamentally, Harcourt argues that reliable measures of actual crime reduction only exist if the “members of the higher-offending targeted group have the same or greater elasticity of offending to policing.”²¹³ Put another way, if “the targeted population is less responsive to the change in policing, then the profiling will *increase* overall crime in society.”²¹⁴ Against the “actuarial” turn in criminal law enforcement,²¹⁵ Harcourt argues for a “presumption *against* prediction.”²¹⁶

The obstacles to objective assessment found in studies based on crime statistics, social-psychological observations, and econometric models have prompted some of OMP's earliest proponents to reconsider their position. David Thacher,

211. See Clifford Kraus, *THE BRATTON RESIGNATION: THE LEGACY; Bratton Hailed As Pioneer of New Style of Policing*, N.Y. TIMES, Mar. 27, 1996; see generally Michael Duffy & Massimo Calabresi, *The NYPD Chief Who Did His Job Too Well*, TIME, Nov. 15, 2007, www.time.com/time/magazine/article/0,9171,1684512,00.html.

212. See BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 122–25 (2009).

213. *Id.* at 123.

214. *Id.*

215. *Id.* at 1 (defining criminal-actuarial methods as “[t]he use of statistical rather than clinical methods on large datasets to determine different levels of criminal offending associated with one or more group traits, in order (1) to predict past, present or future criminal behavior and (2) to administer a criminal justice outcome.”).

216. Bernard E. Harcourt, *Moving Beyond Profiling: The Virtues of Randomization*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READING 505, 509 (Stephen K. Rice & Michael D. White eds., 2010); see also HARCOURT, *supra* note 212, at 238.

previously a leading OMP proponent, announced that he now viewed OMP's primary benefits as intangible and incapable of objective measurement—lessening “fear” and improving community wellbeing rather than measurably reducing serious offenses.²¹⁷ Later, in 2014, Thacher retreated still further, writing that “[o]rder’ and ‘order maintenance’ are essentially moral concepts, and when we view them through the lens of social scientific study we risk distorting them.”²¹⁸

To split the difference, some scholars have proposed ways to mediate police subjectivity in defining “disorder” and increase neighborhood-level involvement. Richard Sennett, for instance, decries the stultifying effects of zero-tolerance enforcement on urban communities, instead proposing community-contingent metrics and third-party interventions to facilitate “creative disorder”—substituting many police-oriented encounters through community watch associations and informal street “mayors” such as shopkeepers, food vendors, and licensed youth and social service professionals.²¹⁹ In a variation on this theme, Robert C. Ellickson suggests a kind of superstructure to constrain police discretion according to a system of red, yellow, and green zoning associated with different degrees of governmental intervention in response to “disorderly” behaviors.²²⁰ However, neither approach has gained purchase with police officials.

B. Race and Class Disparities in Civil Enforcement

Racial disparities in stops, frisks, searches, and arrests obtained through OMP-style criminal enforcement are well-documented.²²¹ The consequences to society cannot be

217. See generally David Thacher, *Community Policing Without the Police? The Limits of Order Maintenance by the Community*, in COMMUNITY POLICING AND PEACEKEEPING 55, 55–70 (Peter Grabosky ed., 2009).

218. David E. Thacher, *Order Maintenance Policing*, in THE OXFORD HANDBOOK OF POLICE AND POLICING 122, 141 (Michael D. Reisig & Robert J. Kane eds., 2014).

219. See generally RICHARD SENNET, THE USES OF DISORDER: PERSONAL IDENTITY AND CITY LIFE (1970).

220. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1220–22 (1996).

221. See, e.g., Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 633 (2014) (noting that between 1990 and

overstated; while each custodial arrest is effected against an individual, its systematic application to high-crime areas undermines the principle of individual culpability and transforms policing into a method of collective punishment.²²² These practices effectively aggregate punishment for low-income communities where the majority of residents are Black or Latino.²²³

Moreover, increases in racial enforcement disparities are directly correlated with periods of fiscal crises and policies permitting enforcement agencies to retain seized revenue. For instance, in a recent study, researchers found that arrest rates of African American and Hispanic persons for drug, DUI, and prostitution offenses increased during periods of fiscal distress, particularly where the jurisdiction permits police departments to retain revenue from seized property.²²⁴

These dynamics are paralleled in local civil enforcement. While county and city civil enforcement programs suffer from a woeful lack of transparency, researchers have put existing data to good use, establishing stark racial, socio-economic, and geographic disparities. For instance, out of 1,162 nuisance abatement cases filed in New York City's five Supreme Courts in 2013 and the first half of 2014, more than 44% involved residential premises—among these residential premises, 90% of residents lived in minority neighborhoods, and among defendants whose race could be identified only five were non-Hispanic white.²²⁵ Further illustrating the disparate impacts common to arrest-based and civil OMP-style enforcement alike, of these residential actions, more than half of defendants who surrendered their leases or were banned from their homes were

2010 in New York City the number of misdemeanor arrest events of white individuals increased roughly 35% compared to increases of over 105% for Black individuals and more than 158% for Hispanic individuals); Andrew Golub et. al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131, 131 (2007).

222. See M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing As a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 384 (2011).

223. See *id.*; see generally Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013).

224. See Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189, 211 (2019).

225. See Ryley, *supra* note 193.

never convicted of a crime.²²⁶

Racial disparities in civil enforcement have also been documented in other jurisdictions in the enforcement of various civil actions, including civil forfeitures and nuisance abatement. For instance, in Alabama, while race is not routinely reported in civil cases, and researchers could not determine the racial breakdown of all defendants to civil asset forfeiture, a review of court documents attached to civil forfeiture cases accompanied by criminal charges identified 64% of defendants as African-American.²²⁷ Similarly, an informal review of Seattle court records from the 1990s found that 96% of defendants in drug abatement cases in Seattle were racial minorities and centered on low-income neighborhoods with majority Black residents.²²⁸

C. Collateral Consequences of Civil Enforcement

Civil enforcement actions present both similar and distinct collateral consequences to those resulting from arrest. For one thing, civil enforcement *itself* is a collateral consequence of arrests. In addition to triggering police- or prosecutor-led actions, arrests increasingly trigger separate civil or administrative action outside the criminal justice system as “immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, . . . education officials,” civil agencies, and private actors “routinely receive and review arrest information” to guide enforcement.²²⁹

Similarly, civil enforcement’s “primary” consequences (e.g., eviction, license revocation, employment termination) are often “collateral” consequences of OMP arrest-oriented tactics; as a result, civil enforcement consequences include familiar legal, social, and economic costs to individuals, families, and

226. See *id.*; see also Ryley, *The NYPD Is Kicking People Out of Their Homes*, *supra* note 94.

227. See ALA. APPLESEED & SOUTH. POVERTY L. CTR., *FORFEITING YOUR RIGHTS: HOW ALABAMA’S PROFIT-DRIVEN CIVIL ASSET FORFEITURE SCHEME UNDERCUTS DUE PROCESS AND PROPERTY RIGHTS* 13 (2015).

228. See Michelle Malkin, *Seizure Disorder: Seattle’s “Drug Nuisance Abatement” Program Is a Menace to Law-Abiding Property Owners*, *REASON MAG.*, Mar. 1999, at 55.

229. Eisha Jain, *Arrests As Regulation*, 67 *STAN. L. REV.* 809, 810 (2015).

communities.²³⁰ On the other hand, unlike civil enforcement actions, arrest-related collateral consequences include distinct *legal* secondary effects such as deportation proceedings, ineligibility for public benefits, and future sentencing, parole or probation revocation and reincarceration.²³¹

Temporal and resource costs also attend to these criminal and civil actions. Babe K. Howell has described the underappreciated temporal, situational, and resource costs of OMP-style custodial arrests, including: (i) overcrowding, infestation, and inadequate sanitation and nutrition in pre-arraignment detention; (ii) 19.5 minutes per case for legal aid attorneys defending the case, encompassing file review, client interviewing, and court argument; (iii) greatly increased temporal costs of disposition such as the application for, completion of, and demonstration to the court of compliance with community service requirements; (iv) fixed mandatory surcharges and court fees resulting in civil judgments for failure to pay (which in turn negatively impacts credit ratings); and (v) significantly extended court appearances before final resolution of the case for defendants who do not accept a disposition at arraignment.²³²

Temporal costs imposed upon *civil* enforcement defendants are again both similar and distinct. For instance, by contrast to criminal prosecutions, civil enforcement defendants must research and secure legal representation or appear pro se, which in turn requires additional time and resources for fact development, court attendance, and legal drafting.

Depending on the type of civil enforcement action initiated, defendants experience various other temporal and resource costs. In nuisance abatement or Padlock-Law-style suits securing immediate closure orders, property owners may have to terminate or suspend employees, seek new loan terms, suspend lease payments, cancel vendor contracts and deliveries, and more. Even if a property owner manages to negotiate a stipulation allowing him or her to continue occupying the premises, stipulations typically impose onerous compliance and reporting provisions as well as opening the premises to

230. *See id.* at 810–11.

231. *See id.* at 811.

232. *See* Howell, *supra* note 178, at 293–99.

warrantless police searches.

While deserving of further research, given the information-sharing and computerization tactics discussed *infra* Part I.B, it is likely that the owners of “problem properties” prosecuted by civil enforcement agencies are substantially more likely to face subsequent civil and criminal enforcement prosecutions. As Issa Kohler-Hausmann observed in the context of criminal prosecutions, while the rate of criminal conviction falls sharply where OMP-style arrest tactics generate mass misdemeanor arrests, the drop in conviction rate, counterintuitively, also produces worse outcomes for defendants collectively.²³³ To cope with surging dockets, criminal courts abandon the “adjudicative model” of court administration for the “managerial model” in which guilt and blameworthiness are largely immaterial, and the criminal process instead used to “sort and assess” large populations over time, based almost exclusively on their previous contacts with the justice system.²³⁴

Finally, civil enforcement consequences parallel the economic and social costs for neighborhoods and larger communities produced by arrest-based tactics, such as collective loss of income, rising unemployment, indebtedness due to monetary penalties and fees, and increased rates of homelessness and unstable housing.²³⁵ The geographic exactness of civil enforcement patterns described *infra* Part III.B makes clear that police- and prosecutor-led civil enforcement involves intentional targeting of specific neighborhoods, likely those otherwise designated by police as high-crime areas. As Aya Gruber argues, “blue-lining” neighborhoods is a function by which police seek to control “race, space, and place,” carving out parcels of land predominantly inhabited by low-income and Black or Hispanic residents for heightened enforcement operations.²³⁶ Empirical research into the social and economic costs and consequences of arrest-based enforcement tactics therefore represents an incomplete picture of contemporary state and local enforcement absent the sustained study of civil enforcement operations.

233. See generally Kohler-Hausmann, *supra* note 221.

234. *Id.* at 623.

235. See Howell, *supra* note 178, at 306–07.

236. Aya Gruber, Commentary, *Policing and “Bluelining,”* 58 HOUS. L. REV. 867, 891–901 (2021).

V. CONCLUSION

Since the decline of the Warren Court, state and local law enforcement has aggressively pursued the use of historically “civil” actions to achieve otherwise penal goals and circumvent long-standing constitutional and evidentiary protections. Once adopted by a given state or locality, the desire for constitutional avoidance is only further reinforced by the operational success of publicly filed civil enforcement proceedings. Any rational governmental actor, in the absence of coordinated electoral opposition, would embrace civil enforcement—regardless of whether there is potential financial gain for the department itself or the state or municipality at large. By combining the legal advantages of civil and administrative actions with the tremendous investigatory and operational power of criminal law enforcement, police and prosecutors increase their power at the expense of both civilian authorities and the broader public. The appetite of executive officials and legislators only increases with each pilot program and tactical renovation. Thus, despite the seeming consensus developing among policing-for-profit reformers, in the final analysis it is certain that police- and prosecutor-led civil enforcement will remain ascendant even should department-level profit incentives be eliminated.

“Fine-Tuning” is not intended as merely a legal-historical footnote describing this latest progression in the American legal system. Instead, its conclusions have larger implications for judicial review of state and local enforcement actions post-*Timbs*. Given that the interests of state and local executives and legislators are so closely aligned in police- and prosecutor-led civil enforcement objectives, added to the inevitable growth in the technological and operational capabilities of state and local law enforcement in the near future, in our constitutional order only the state and federal judiciaries stand a chance of reigning in civil enforcement abuses. Without such an intervention, the civil enforcement defendants facing down this Leviathan will invariably fail in the courts. Overwhelmingly, the persons targeted for such actions—small businesses proprietors, working-class renters, and vehicle owners—are pro se given the Supreme Court’s failure to recognize a Sixth Amendment guarantee for state-appointed counsel in publicly filed civil actions. And even the small fraction of defendants wealthy

enough to afford a lawyer face near-certain defeat as a result of the minimal constitutional, evidentiary, and other limitations on publicly filed civil actions. All the while, the Court's outdated distinction between criminal and constitutional civil procedural protections allows the status quo to continue unabated, leaving low-income renters and small businesses no recourse.

Together, the forces conspiring for police- and prosecutor-led civil enforcement's expansion ought to raise a red flag for the judiciary. The innovations developed over the past five decades have driven the frequency and severity of civil enforcement operations to unprecedented levels in America: data-driven policing techniques implemented by big-city law enforcement in the 1990s—statistical modeling, crime mapping, etc.—permitted more efficient allocation of departmental personnel and resources. And the advent of digitization and computer networking in the 2000s produced yet another technological growth bubble in the growing virtual dragnet of interagency agreements allowing police and prosecutors access to municipal code enforcement agency data (e.g., land management, health, land use, etc.). The impact of data-driven policing and digitization will surely pale in comparison to that of near-future developments in predictive policing, mapping algorithms, remote-sensing, and other emerging technologies. Judicial delay in revisiting outdated “civil” and “criminal” distinctions will only serve to enshrine this dangerous enforcement trend as a permanent feature of the American legal system.