JUDICIAL DRIFT†

Elizabeth Nevins-Saunders*

Abstract

Although there is broad consensus on what constitutes procedural due process in criminal cases, in courtrooms around the country, those ideals are often disregarded. In the wake of rising public attention to misdemeanors, be it through marijuana decriminalization or concern over unduly punitive fees and surcharges, a few scholars have pointed to theories explaining the gulf between rights and reality for low-level defendants. Yet none have expressly considered the impact of administrative rules made (or not made) at the courthouse level. This Article analogizes the courthouse to an administrative agency and borrows the doctrine of "bureaucratic drift" to explain how Supreme Court, legislative, and ethical norms of due process get filtered through a courthouse bureaucracy that ultimately leaves poor defendants without access to basic rights. The argument draws on findings of a five-week court observation project, which documented the daily injustices—in violation of established law—that individuals charged with low-level crimes experienced as defendants in a New York court. To remedy the drift, the Article proposes the appointment of an independent due process ombuds to oversee procedural justice court-wide.

Introduction

"Why don't any of these people have lawyers?" a student in my criminal defense clinic asked me. We were appearing for the first time on behalf of a client in Part 155, a courtroom hidden in plain sight in the Nassau County District Court

† This Article draws extensively from the observations of members of the Hofstra Law School Criminal Justice Clinic in Nassau County District Court. Where possible, the various incidents recounted in this Article were documented and are on file with the Clinic. However, do note that a number of occasions discussed in this Article involve observations that were not were not specifically documented, particularly where those observations refer to practices recurring over time. The bulk of the observed Nassau County District Court proceedings documented in this Article occurred during a planned five-week observation period from March to April of 2016, and a subsequent one-week observation period in 2018.

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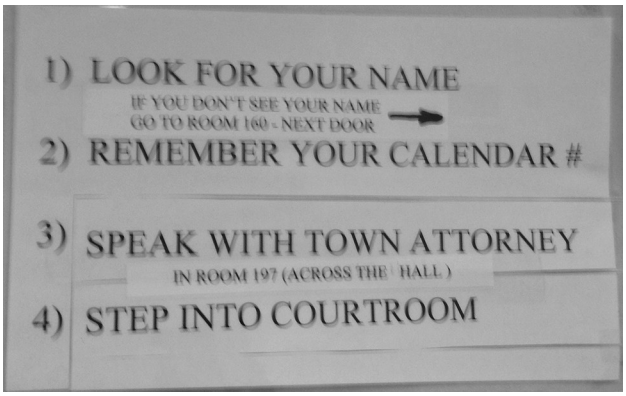
building.[1] I didn't have an answer for her. I was just trying to get my bearings since it was my first day with students in the court. But things got more curious as we began to look around. The sign that was hanging outside the door to the courtroom, for instance, was remarkable. Posted next to a listing of the day's docket of cases was a typewritten sheet with four instructions:

Figure 1



As it turned out, the meeting with the "TOWN ATTORNEY" was really a meeting with the prosecutor in an office across the hall. The people who were sent to the meeting were defendants charged with petty offenses, primarily misdemeanors and violations.[2] The sign did not indicate that state law entitles them to a lawyer and, if they could not afford one themselves, to a court-appointed lawyer.[3] The town attorneys certainly would not be advising the defendants that their role as prosecutors was to secure a conviction that could have numerous adverse

1. Nassau County as a whole constitutes the First District, where county district attorneys prosecute state law offenses. Part 155 is where the other "districts" of District Court hold proceedings, that is, where town attorneys prosecute local offenses. N.Y. UNIFORM DIST. CT. ACT § 2405 (McKinney 2019).

2. N.Y. PENAL LAW § 70.15 (McKinney 2019).

3. The Federal and State Constitutions both guarantee the right to counsel. U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6. The right to counsel in New York "antedates the federal right, and is much broader than the federal equivalent." People v. Richardson, 603 N.Y.S.2d 700, 700 (Sup. Ct. Kings Cty. 1993) (citations omitted). New York law requires counties to establish a system of representation for those who are charged with "crimes" and are "unable to afford counsel." N.Y. COUNTY LAW § 722 (McKinney 2019). A "crime" for this purpose includes not only state law violations, but also a "breach of any law, local law, or ordinance of a political subdivision" of the state, other than a traffic infraction, "for which a sentence to a term of imprisonment is authorized upon conviction thereof." *Id.* at § 722-a. *See also* N.Y. CRIM. PROC. LAW. § 170.10 (McKinney 2019) (providing that defendant charged in local criminal court "has the right to the aid of counsel at the arraignment and at every subsequent stage of the action" and that if he appears without counsel, he has right, "[t]o have counsel assigned by the court if he is financially unable to obtain the same" unless charged with exclusively traffic infraction(s)).

consequences, both direct and collateral, for the defendants.[4] In fact, following the instructions on the sign invariably led defendants to join a line of people in the hall waiting to meet with the prosecutors, where they missed the only mention of a right to defense counsel during the entire court session: one clerk's perfunctory announcement in English only before the judge took the bench. There was no mention—ever—that they might qualify to have counsel appointed. During the course of our clinic's subsequent representation of not only this first client, but also two others in Part 155, we observed still more surprising courthouse practices that deprived defendants of procedural rights.

A long history of judicial precedent seeks to define the limits and obligations of constitutional due process. These are the ideals at the heart of procedural justice in the criminal justice system. Even non-lawyers have a basic sense for what they think courtrooms look like and what it means for them to operate fairly. Defendants, even poor ones, should have zealous representation. The judge should be unbiased and not swayed by financial or other interests. Prosecutors should stay in their lane and seek justice. Courtrooms and their operations should be open to the public. Everyone should be treated with respect and should generally understand the proceedings.[5]

These ideals were flagrantly violated in Part 155, yet this whole corner of the courthouse seemed to fly under the radar. None of the members of the local defense bar were familiar with the proceedings in that courtroom. Attorneys from Legal Aid, the default public defender in the jurisdiction, did not appear there. Nor did representatives from the panel of conflict attorneys. Though there might be periodic news coverage of procedural outrages in courts around the country, most people, like those in District Court in Nassau County ("District Court"), have no idea about the distance between due process norms and what occurs in practice.

This Article addresses the distance between the ideal and the reality of the criminal justice system, focusing on people charged with low-level offenses. The work is grounded in data from a five-week court-observation case study and analyzed through the lens of administrative law. The observations, like those of classic studies of minor criminal courts, provides the data to identify and define the problem.[6]

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4. *See infra* Part IV.A for a full discussion on the legal and ethical issues regarding lawyers, especially prosecutors, speaking with unrepresented defendants.

5. This list of basic procedural rights is not terribly dissimilar from due process expectations articulated in the civil context in Goldberg v. Kelly, 397 US 254, 267–70 (1970). *See infra* Part II, at 11–12, 15–16 for more on the relationship between civil and criminal due process rights.

6. *See e.g.*, MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 31, 241–42 (1992) (documenting lower criminal court processes in New Haven); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956) (examining the enforcement of vagrancy laws in Philadelphia). *See also infra* Part I for other classic criminal court studies.

Here, the issue is the disregard of low-level defendants' rights despite clear law as to what those rights should be. The theoretical analysis examines the problem by looking not just at rulings that judges make in individual cases, but rather at the rules and policies that administrators make (or fail to make) courthouse-wide.[7] This Article is the first to identify this important lever of procedural power in the criminal justice system. It argues that these administrative decisions subvert defendants' procedural rights, particularly as their implementation filters down through the courthouse bureaucracy. The process is similar to what administrative law scholars call "bureaucratic drift," which refers to how congressional mandates can be lost as legislation passes through rulemaking administrators.[8] By analogizing what happens in the courthouse to what occurs in government agencies, this Article breaks new ground in understanding how injustice is meted out to this class of defendants.

This Article proceeds in five parts. Part I provides a brief background on the clinic's project to address the injustice in Part 155, including the project's genesis, execution, and limitations. It explains the tentative success the clinic had in changing the court's policies based on our courtroom observations and research about procedural due process. Part II addresses a normative standard for the prosecution of criminal cases that comports with due process. In so doing, it examines constitutional rules and other commonly agreed upon markers of courtroom fairness. Part III is an in-depth analysis of the findings of our preliminary study of Part 155. This Part contrasts the observations on the ground with the ideals of procedural fairness outlined in Part II. It also sets these concerns in a national context, given that many, if not all, of the issues we saw have been reported in other jurisdictions across the country. Part IV introduces and explains the concept of "judicial drift"—the notion that administrative rules and polices set at the courthouse level may interfere with individuals' constitutional and other rights. This theory explains how and why the court's bureaucratic structure allowed for such unjust practices to arise and turned our initial victory in reforming Part 155 into a Pyrrhic one. Part V tackles the question of why judicial drift has persisted and not been remedied in the way that bureaucratic drift has. It addresses the apparent failure of the courts, prosecutors, and defense bar to address the consequences of judicial

7. This Article focuses on procedural due process, which is just one of the most overt injustices in Part 155. It does not address other fundamental issues, such as the racial disparities in such prosecutions and whether such minor matters should be criminalized. In focusing on procedural issues, this Article does not diminish the importance of these and other questions. It does, however, suggest that procedural justice has value, even as a step towards achieving substantive justice in many cases. For further discussion of this issue, see *infra* Conclusion.

8. Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 671–72 (1992) (defining bureaucratic drift as a disjuncture between outcomes that parties to a legislative compromise intended and those that emerge from agency policies administering the legislation). For a fuller discussion of "bureaucratic drift" in the context of courthouses, see *infra* Part IV.

drift adequately. Part VI proposes the appointment of a due process ombuds[9] to oversee procedural justice in the courthouse. Such an independent official can protect rights in two different ways. First, the official can be a watchdog, who can address the problems that, because of competing interests, others in the courthouse do not or will not see. Second, she can be a bulldog, who can make sure that any fixes actually do the job, and that the court's bureaucracy does not erode any gains.

After considering how courthouse administration can structurally deprive defendants of constitutional and community norms of justice, it becomes clear that these cases are not petty at all. This argument expands upon the small but growing theoretical framework addressing low-level offenses from scholars such as Issa Kohler-Hausmann[10] and Alexandra Natapoff,[11] who have tracked low-level courtroom transactions and outcomes. In an age where the prosecution of misdemeanors vastly exceeds the number of felony cases,[12] they and a few other academics have recognized the significance of what were previously disregarded as insignificant contributors to the criminal justice system: non-felony cases. And they have stood as witnesses to practices, policies, and perversions that are not often documented. Indeed, while Part 155 litigants and their problems are routinely overlooked, they exist in many courts across the country. Scattered journalists and nonprofits may highlight a particular instance occasionally, but low-level criminal courts are rarely observed in any depth and even more rarely analyzed academically. Thus, the observational research and our experience in policy change was valuable not just for improving our own courthouse, but also as a case study for understanding how courts' administrative rulemaking can impact indigent defendants' due process rights.

I. THE PROJECT[13]

As a matter of course, the Hofstra Criminal Justice Clinic does not typically appear in Part 155. But upon my arrival as its new director, I inherited a client

9. "Ombuds" is one of many names for such a position, and the one that this Article uses for its lack of gendered specificity. Other terms are ombudsman, ombudsperson, or ombud. Part VI, *infra*, provides a discussion on the meaning and role of an ombuds.

10. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (theorizing that recent prosecutorial trends focus on a "managerial model" of regulating populations via the criminal process over time).

11. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (criticizing decriminalization as a potential fix for excesses of over-incarceration).

12. *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 281 (2011) (detailing an analysis of eleven state courts that showed that misdemeanors comprised seventy-nine percent of total cases in said courts).

13. *See supra* †. All further observations made by the members of the Hofstra Law School Criminal Justice Clinic in Nassau County District Court to which this Article refers are *supra*-cited to this footnote, with "CJC PROJECT" as the author, and the "at" field bearing the date, if available, on which the observation was made. These citations are meant to assist the reader in noting which portions of this Article are based on personal observations. Individual litigants' names are not provided.

whom the Town of Hempstead periodically charged with a number of offenses based on his thoroughly unkempt property. Our first venture into Part 155 began with the judge yelling at our eighty-four-year-old client for wearing shorts, and then at our team of three for being too many people. As we watched other cases being called on that day and on subsequent appearances, we routinely observed litigants who were publicly excoriated when they attempted to be heard or when they failed to respond fast enough or loud enough after the clerk called their name. Almost no individual appeared with a lawyer. A long line of litigants waited to meet with two town attorneys in a small room. The town attorneys seemed to view it all as a paper-pushing numbers game: they presumed each client's guilt, sometimes asked about updates, and ultimately set a price tag for the penalty.[14]

In most Nassau County District Court courtrooms, criminal cases are based on state penal law violations and prosecuted by assistant district attorneys.[15] In Part 155, on the other hand, town attorneys prosecute local ordinance violations or misdemeanors.[16] On any given day, defendants may be charged with offenses as diverse as an open container violation in Hempstead (carrying a fine of $50–$250 and/or jail time of up to ten days for the first offense),[17] a failure to get proper permits for demolition or construction in Oyster Bay (carrying a fine of up to $350 and/or six months in jail for the first offense),[18] or a failure to properly maintain doors and windows (carrying a fine of up to $1,000 per day and/or a year in jail).[19] Many of these are ongoing offenses. For instance, each day that a person fails to maintain his doors under the Property Maintenance Code, he incurs a new offense, subject to the same fine or jail sentence.[20] These might be classified as "quality of life offenses," and many of them involve individuals' use or alleged misuse of their own property, ??

14. In cases involving home or property repair, the prosecutors required that the property owner fix the alleged violation before offering a financial plea deal. *See, e.g.*, CJC PROJECT, *supra* note 13, at Mar. 29, 2016 (noting that vast majority of defendants got adjournments to correct the violations on their property).

15. "The Legislature has given to the Nassau County District Court jurisdiction over all misdemeanors committed within the county as well as all offenses below the grade of misdemeanors." People v. Kramer, 10 Misc. 2d 473, 475 (Nassau Cty. Ct. 1958) (citing Section 230, Nassau County District Court Act, Laws 1939, c. 274). *See also* N.Y. UNIFORM DIST. CT. ACT § 2001 (providing that District court has jurisdiction over criminal matters as prescribed by state criminal procedure law).

16. *See* N.Y. UNIFORM DIST. CT. ACT § 2021 (transferring all criminal dockets of town justices to district courts in the same county).

17. TOWN OF HEMPSTEAD, N.Y., CODE § 77-2, 77-5 (2019).

18. CODE OF THE TOWN OF OYSTER BAY § 93-15A-00.

19. NYS IPMC 304.13 (2006) ("Every window, skylight, door and frame shall be kept in sound condition, good repair, and weather tight"). New York Executive Law establishes that such violations of the Property Maintenance Code are misdemeanor offenses. N.Y. EXEC. L. § 382(2).

20. *See* N.Y. EXEC. L. § 382(2) (stating that violations are punishable by a fine of not more than $1,000 "per day of violation."); *see also* VILLAGE OF HEMPSTEAD § 1-16 (A) (outlining penalties for Hempstead Code violations, including imprisonment up to 15 days and noting, repeatedly, that "each day that any such violation shall continue or exist shall constitute a separate offense").

including small businesses.[21] Accordingly, at least some litigants were not the poorest of the poor. But even among those who owned their home, and therefore were subject to town codes about property use and upkeep, many also were barely holding on, with homes subject to foreclosure. In Nassau County, many residents "own" their home in that they are not renters, but nonetheless are underwater, steps away from foreclosure or otherwise losing their homes.[22]

Every few years, a journalist,[23] commission,[24] or policymaker[25] decries the injustice rampant in the New York State town and village, or "justice," courts, where local and state offenses are heard. In Nassau and Suffolk Counties, these town courts do not exist independently, but rather have been incorporated into county-wide district courts.[26] Because they have eliminated these town courts, Nassau and Suffolk Counties may have seemed to be above the fray.[27] For instance, unlike in the State's town courts, all of the sitting judges in the district courts are required to be attorneys.[28] But as the clinic was beginning to learn, the ills plaguing the State's town courts are also present in Nassau County, even within the Nassau County District Court building itself.

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21. Interview with Charles Kovit, Chief Deputy Town Attorney, Town of Hempstead (Sept. 20, 2019) (noting that cases in town court include smaller offenses such as open container violations, but cases are "usually building, zoning, sanitation" violations).

22. In Nassau and neighboring Suffolk County in the second quarter of 2017, 5.5 percent of homeowners with mortgages (just over 31,000 households) owed more than their home was worth. Maura McDermott, *Fewer LI Homes 'Underwater' than a Year Ago*, NEWSDAY (Sept. 21, 2017), https://www.newsday.com/business/fewer-long-island-homes-under-water-on-loans-report-shows-1.14239547. The number has been declining in recent years, but was as high as 9.25 percent among homeowners in the third quarter of 2012. Maura McDermott, "*Underwater" Loans Fall 15% on Long Island, CoreLogic Shows*, NEWSDAY (Dec. 17, 2013), https://www.newsday.com/classifieds/real-estate/underwater-loans-fall-15-on-long-island-corelogic-shows-1.6622562.

23. *See* William Glaberson, *In Tiny Courts of N.Y. Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1 (first in series of three front-page articles on town and village courts that week).

24. In 2007, a state commission to review the state's judicial system known as the "Kaye Commission," after then-Chief Justice Judith Kaye who appointed it, extended its tenure to focus on the justice courts. William Glaberson, '*Deeply Concerned,' Special Panel Will Extend Study to Small-Town Courts*, N.Y. TIMES, Feb. 24, 2007, at B1. Glaberson notes that, as of 2006, "at least nine commissions, conferences or other state bodies—including representatives of both major political parties and all three branches of government—have denounced the local courts over the last century, joined by at least two governors and several senior judges." William Glaberson, *How a Reviled Court System Has Outlasted Critics*, N.Y. TIMES, Sept. 27, 2006 at A1.

25. H.B. 14-1061, 69th Gen. Assemb., 2d Reg. Sess. (Colo. 2014).

26. The Uniform District Court Act (UDCA) created the District Courts. The Nassau County Charter supplements the UDCA and abolished the town courts within the county and transferred their jurisdiction and powers to the Nassau County District Court. *See* Nassau County District Court Act, Laws 1936, c. 879, as amended, §§ 2401–22; UDCA § 2300(c). Notably, separate village courts in Nassau and Suffolk Counties persist.

27. New York Uniform District Court Act § 2021 transferred all criminal dockets of town justices in the county to the district court in the same county.

28. *Compare* N.Y. CONST. art. VI, § 20(a) (judges in district courts must have been admitted to practice law in New York for at least five years) *with* N.Y. CONST. art. VI, § 20(c) (requiring a course of training/education for "justices of town and village courts . . . who have not been admitted to practice law in this state."). *See also* People v. Martinez, 13 Misc. 3d 1223(A) (Westbury Just. Ct. 2006) (distinguishing village courts in Nassau County from other town and village courts upstate on similar grounds).

The District Court provided little information regarding how the cases were handled, except on an anecdotal basis. There was scant collection of data about what goes on inside its walls, apart from the numbers of dockets opened and closed each year.[29] Information on each individual docket, such as the charges, plea, sentence, payments made, and presence of counsel, is noted on each file, and the proceedings themselves are recorded. However, there is no metadata pulled or analyzed to determine the effect of different policies and practices in Part 155, or even to see what's going on there at the most basic level. This is true not only for Part 155, but also for much of the District Court, where records appear to be kept for the purpose of assessing how long cases have been in the system and for little else.[30] The assistant district attorneys, who have the unique vantage of appearing on one side of every state criminal case in District Court, also keep their own data, but the data is not public.[31] Of course, as there is no assistant district attorney representing the state in Part 155, these proceedings elude even that focused statistical mining. Where no data was collected, no policy was made or enforced.

To better understand how the system processes the class of defendants who appear in Part 155 required primary research. Accordingly, the students and faculty of the Hofstra Criminal Justice Clinic conducted a preliminary study of Part 155.[32] Based on anecdotal experiences with the court, clinic members created a rubric to guide and record observations of the proceedings there for five straight weeks.[33]

It was not a perfect system. The haste of the proceedings and acoustics in the courtroom (where all but the judge had their backs to the gallery) made it difficult

29. Interview with Bruce Kahn, Management Analyst (Aug. 27, 2014).

30. The Chief Judge of the State of New York has made reducing the time that cases languish in the district court a real priority, and the supervising judge has, in turn, focused attention on eliminating cases that have been outstanding for more than 18 months (and now aiming for 12), regularly reviewing these timing statistics with court stakeholders. Among other things, the focus on this issue could demonstrate the tie between data collection and policy change.

31. Evidence of the district attorney's data collection appears at the Supervising Judge's biannual stakeholders' meetings, described in Part IV, *infra*, to support or oppose policy objectives. For instance, the District Attorney's Office uses its data to determine which party is responsible for the age of the cases, as they have documented the basis for adjournments in older cases.

32. CJC PROJECT, *supra* note 13.

33. The rubric itself was a collaborative project that sought to document lapses we had observed in Part 155 before we began the five-week study period. Over time, as students and post-graduate fellows noticed patterns, we modified the rubric to record such routine matters, as well as extraordinary moments. For the five-week observation period, the final rubric asked students to record specifically any statements by court officials or defendants that addressed (1) whether a defendant could have counsel; (2) whether the defendant could have counsel appointed by the court; and (3) whether the defendant should meet with the county attorney. Students were also asked to record (4) any litigants' statements about appointment of counsel or their inability to pay for it and (5) the plea colloquy used by the judge. Students were meant to summarize, in chart form, the proceedings for each case called, including, to the extent possible, the defendant's name, representation (or lack thereof) by counsel, charge, and disposition. Finally, students were encouraged to document any other "significant" thing that they observed, particularly with regard to due process rights.

to collect all of the details.[34] The findings were no doubt influenced by which judges happened to be sitting on the days we observed. We saw several different judges over the five-week period, each of whom ran the courtroom somewhat differently.[35] None of these judges was the one we first encountered, who excoriated our client's dress and later, in another case, refused to let us file motions.[36] The data collection was not conducted under standards that would have satisfied a rigorous statistical study. The individuals in the courtroom were not aware of the nature of the study, but they were at least sometimes aware that there was a law student observer. It is impossible to say if or how this awareness might have colored the proceedings on some or all of the days we observed them.

There are also limits as to what was collected. The study did not, as a matter of course, track demographic information about the litigants. The data does not capture any racial, ethnic, or gender disparity in the treatment of defendants, for instance.[37] The data provides not even anecdotal evidence on this issue. The study also did not track the same defendants over time, so it is unclear how most cases were resolved or whether any of the defendants might actually wind up litigating their cases through the courts.

Nonetheless, the more systematic observations confirmed that the clinic's initial experiences were not isolated incidents. At first, the project aimed to collect observations about practices in Part 155 in a white paper with a primary goal of making change in the courthouse. The clinic planned to share the finished product, including proposed remedies, with the court administration, advocacy organizations, and the media. But the clinic never fully drafted that white paper, much less executed an implementation strategy.

Instead, before publishing the document, we met with the supervising judge of the District Court—the administrator who oversees the court—to discuss the issue.[38] He readily agreed that litigants were entitled to counsel, including appointed counsel, and entitled to be notified of that right without having to meet with the prosecutor first. A few months later, the sign outside Part 155 had changed into two signs:

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34. CJC PROJECT, *supra* note 13, at June 4–8, 2018 (noting difficulty of hearing in part due to positioning of litigants and counsel).

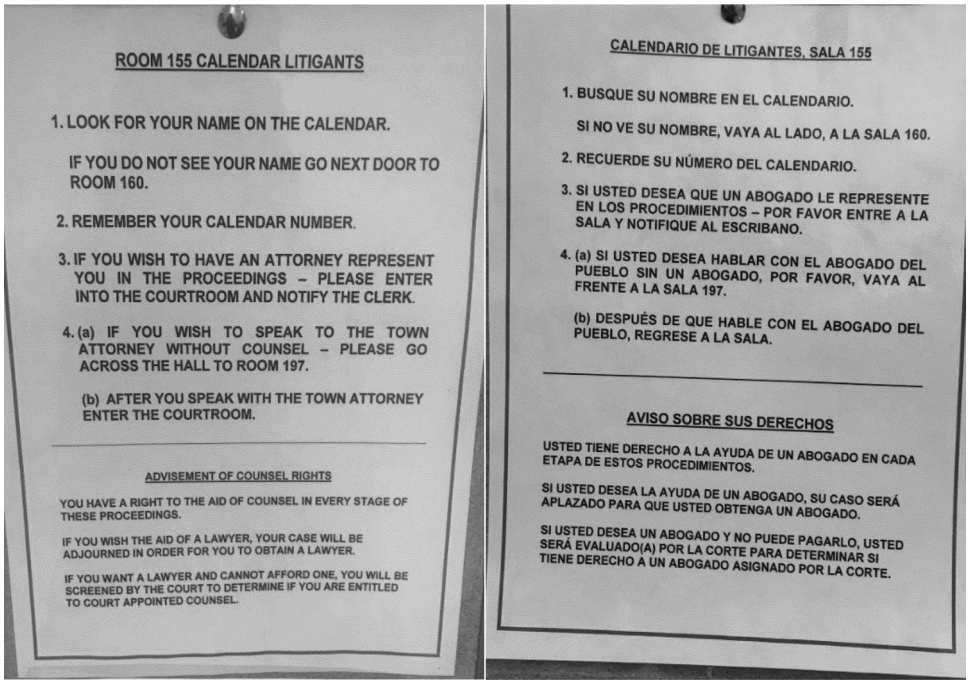
35. *See e.g., id*. at Mar. 25, 2016; *Id*. at Apr. 8, 2016; *Id*. at Apr. 21, 2016; *Id*. at Apr. 29, 2016.

36. *See* Adam DelVecchio, Contact Memo (Feb. 27, 2014) (on file with author) (documenting judge's decision to deny counsel's request for motions schedule).

37. A colleague from a state criminal defense organization sat in on the proceedings one morning and observed that the African American defendants had not been treated as fairly as other defendants. Because the study failed to record such demographic information, however, there is no way to evaluate this assessment further. CJC PROJECT, *supra* note 13.

38. *See infra* Part IV for more on the role and responsibilities of a New York State supervising judge.

Figure 2



Litigants were thus told—in two languages, no less—of their right to counsel and even to appointed counsel. The mandate to speak with the prosecutor was changed into an option, one that could be exercised with or without an attorney. As detailed further in Part IV, this modification would certainly not cure all of the ills of Part 155, but it was at least a move toward compliance with legal and ethical requirements. It was a win for due process for those whose charges are considered so petty that they were routinely denied basic rights, even if counsel was not to be automatically appointed for qualifying individuals.

Beyond Part 155, the study provided some preliminary data, however imperfect, to manifest what is usually hidden in courthouse walls. The law and society gap studies of the 1960s and 1970s (and their progeny) identified the distance between "law on the books" and "law in action."[39] The next two Parts elaborate on that contrast, detailing the ethical, statutory, and constitutional due process standards that we expect courts to uphold and the ways that those norms were violated in Part 155 on a daily basis.

39. Jon B. Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, 8 ANN. REV. L. SOC. SCI. 323, 324 (2012).

II. THE DUE PROCESS IDEAL

Certain principles are intrinsic to how most Americans think of courtroom justice. As this Part makes clear, there is broad agreement in scholarship and case law about certain indicia of procedural fairness in criminal matters. There should be a right to counsel, including appointed counsel for those who cannot afford to hire their own lawyer. Prosecutors should not try to manipulate unrepresented defendants. Everyone should be treated with dignity, and should understand, at least roughly, what is happening to them. Litigants deserve an independent, impartial tribunal. Courtrooms should be open to the public and subject to review. Some of these tenets are so fundamental that they cut across not only criminal cases, but also civil ones.[40] These first principles resonate because of the interests they were designed to protect. As important as the constitutional and statutory rules and ethical precepts are their underlying justifications. By defining, at least in part, what a courtroom should look like if it is to provide process that is due in a criminal matter, we can set a framework for understanding what actually happens on the ground in low-level criminal courts.

A. *Right to Counsel*

The right to counsel is a cornerstone of due process in criminal cases. It is a "right without peer,"[41] based in the Sixth Amendment, which specifically provides for the assistance of counsel in criminal prosecutions.[42] The right applies to state court defendants through the Due Process Clause of the Fourteenth Amendment because it is of such a "fundamental character" that it must be protected from state infraction.[43] Cases exploring the reach of the right have made clear that it has such prominence because of its protection of litigants' voices, and because it ensures both fairness and accuracy in court proceedings. In *Powell*, the first decision finding a clear right to counsel in federal capital cases, Justice Sutherland makes plain these justifications in a passage that virtually all significant right to counsel cases cite:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated

40. For instance, *Goldberg v. Kelly*, a seminal procedural due process case, discusses not only a right to counsel, but also rights to an impartial decision maker, to a clear record of the decision maker's reasoning, and to notice of the hearing and the basis for the government's action. 397 U.S. 254 (1970). The opinion even acknowledges the important governmental interest in fostering an individual's dignity and well-being. *Id.* at 264–65.

41. Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2484 (2013).

42. The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Notably, however, before constitutional jurisprudence evolved to consider the right to counsel as based in the Sixth Amendment, in capital cases, it was originally drawn directly from the Fourteenth Amendment right to due process. Powell v. Alabama, 287 U.S. 45, 68 (1932).

43. *Powell*, 287 U.S. at 68; *See also* Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (noting that "fundamental nature" of rights under Bill of Rights may be safeguarded from state incursion pursuant to Fourteenth Amendment, and including right to counsel in protected rights).

> layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[44]

As this passage indicates, the *Powell* Court seemed particularly concerned about leveling the playing field, emphasizing defendants' vulnerability.[45] Since *Powell*, the Court has continued to extend the right to counsel to include the right to government-funded counsel where a defendant cannot afford his own attorney in federal cases,[46] as well as non-federal felony cases,[47] juvenile cases,[48] minor criminal offenses with a carceral sentence,[49] and even cases where a sentence of incarceration would be suspended for a period of probation.[50]

The right is not absolute, even in criminal cases, although those cases that have declined to extend the Sixth Amendment right to counsel have done so without substantially challenging the principles of fairness and equality underlying this line of cases. For example, the Court in *Scott v. Illinois* refused to extend the right to counsel when the defendant was fined $50 for shoplifting, but could have been sentenced to up to a year in jail for the offense.[51] The Court justified its decision to limit the right to cases where a carceral sentence was actually imposed, not just authorized, by noting that imprisonment is a "penalty different in kind" than other sentences and by highlighting the administrative and financial burden it would place on the states to implement such a right.[52] Relatedly, in holding that individuals subject to probation revocation are only entitled to appointed counsel on a case-

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44. *Powell*, 287 U.S. at 68–69. *See also* Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (quoting same); *Gideon*, 372 U.S. at 344–45 (quoting same); Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) (quoting same); In re Gault, 387 U.S. 1, 36 (1967) (citing same, along with "guiding hand of counsel" language.).

45. In addition to the cited passage, the Court refers to the youth, ignorance, and illiteracy of the defendants in four other places in its relatively brief opinion. *See Powell*, 287 U.S. at 51, 69, 71.

46. Johnson v. Zerbst, 304 U.S. 458, 462–63, (1938).

47. *Gideon*, 372 U.S. at 344–45.

48. In re Gault, 387 U.S. 1 (1967).

49. *Argersinger*, 407 U.S. at 25.

50. Alabama v. Shelton, 535 U.S. 654 (2002). Until *Shelton*, the Court held that the right to counsel extended only to instances where the defendant was to be sentenced to incarceration (that is, not because a judge would be *authorized* to impose a carceral sentence based on the penal law or because a suspended sentence was imposed following a probation revocation). *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373-74 (1979) ("The Sixth and Fourteenth Amendments require that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.").

51. Scott v. Illinois, 440 U.S. 367, 374 (1979).

52. *Id*. at 373.

by-case basis, the Court in *Gagnon v. Scarpelli* pointed to the "financial cost to the state" of requiring counsel, as well as the fact that it would elongate and complicate an often simple, quasi-judicial proceeding.[53]

The right thus springs in part from a need to protect poor defendants from the parries of the prosecutor, ensuring fairness in what would otherwise be an unbalanced proceeding. In *Gideon v. Wainwright*, the seminal case finding a due process right to appointed counsel in criminal cases for those too poor to hire their own, the Court pointed to the "vast sums of money" that states spend on criminal prosecutions and noted that defendants of means would hire the best lawyers they could to oppose them.[54] The Court further noted that the need to appoint counsel at the expense of the state was "an obvious truth," essential if the country were to "assure fair trials" where every defendant would stand "equal before the law."[55] Ultimately, the adversarial system rests on a belief that when both parties are adequately represented, the process is not only more fair, but also more likely to reveal the truth.[56]

Some states have gone beyond federal constitutional requirements to protect the right to counsel. In New York, for instance, the right to counsel is a "cherished principle."[57] An individual is entitled to counsel at arraignment and at every subsequent stage of his or her case.[58] Further, New York requires counties to *fund* counsel for defendants who otherwise cannot afford it, whether or not a carceral sentence is ultimately imposed, unless the defendant is charged only with a traffic infraction.[59]

The right to counsel is so vital to due process that its waiver is also shrouded in procedural protections. The Supreme Court has stated that a defendant entitled to counsel may be allowed to proceed pro se, but only if her waiver of the right to counsel is knowing, voluntary, and intelligent.[60] The Court has noted that when waiving the right to counsel at trial, a defendant should be made aware of the

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53. Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973).

54. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

55. *Id.*

56. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994) (arguing that failure to support adequate defense representation in capital cases leads to "arbitrary results" in a process that lacks "fairness and integrity."); Rinat Kitai, *What Remains Necessary Following* Alabama v. Shelton *to Fulfill the Right of A Criminal Defendant to Counsel at the Expense of the State?*, 30 OHIO N.U. L. REV. 35, 38 (2004).

57. People v. West, 81 N.Y.2d 370, 373 (1993); *see also* People v. Ross, 67 N.Y.2d 321, 324 (1986) ("The common law and the statutory law of this State impose upon Trial Judges the duty to scrupulously safeguard the right of all defendants to the effective assistance of counsel at every stage of a criminal proceeding.").

58. N.Y. CRIM. PROC. LAW § 170.10(3) (McKinney 2017).

59. The County Law under New York State's Consolidated Code requires that counsel be assigned at the government's expense to represent any indigent criminal defendant charged with a "crime." N.Y. COUNTY LAW § 722 (McKinney 2019). It further defines a "crime" to include any offense, including a felony, misdemeanor, or "breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state" for which "a term of imprisonment *is authorized* upon conviction." *Id.* § 722-a (emphasis added). Because a term of imprisonment is authorized for a violation (up to 15 days) or misdemeanor (up to 1 year, for an A misdemeanor), N.Y. CRIM. PROC. LAW § 70.15 (LexisNexis 2020), assignment of counsel is required even if the court neither intends to nor actually does impose a sentence of incarceration on a defendant so charged.

60. Iowa v. Tovar, 541 U.S. 77, 88 (2004).

"dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing."[61] It is incumbent upon the judge to both advise and effectuate these rights.[62] Indeed, when a New York defendant charged with any offense, *including a traffic infraction*, proceeds at arraignment without counsel, the court must inform him that he continues to have a right to counsel.[63] Judicial ethics rules also compel judges to ensure high standards of conduct in their courtrooms generally, including the mandate of special care to ensure that even unrepresented defendants have their voices heard in court.[64]

Many have even argued to create a "civil *Gideon*," extending the right to counsel to civil cases.[65] In some contexts, when the state intervenes in an individual's life in a significant way, such as by civilly committing a person with mental illness[66] or taking custody of a person's child,[67] the state may be compelled to appoint a lawyer for that person. But although the right is not applicable in all civil cases, it is still regularly considered the gold standard of due process because of the protection it provides to an individual facing state action.[68]

B. *Right to Independence from Prosecutors*

A corollary to the right to counsel is the right to keep the prosecutor from interfering with the relationship between a defendant and her attorney or taking advantage of an unrepresented defendant. Ethical rules generally forbid attorneys from speaking to represented parties without permission from their counsel to protect these vulnerable individuals.[69] In a courthouse that respects due process,

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61. *Id.* at 88–89 (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

62. *See* N.Y. CRIM. PROC. LAW § 170.10(4)(a) (McKinney 2019).

63. *Id.* § 170.10(6).

64. Rules of the Chief Administrator of the Courts Governing Judicial Conduct, 22 NYCRR Part 1, 100.1, 100.3(6), (12) (requiring judges to "Accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law" and noting that judges may make "reasonable efforts to facilitate the ability of unrepresented litigants to have their matters fairly heard").

65. The term "civil *Gideon*" appears to come from an article by Federal Judge Robert Sweet. *See* Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL. REV. 503 (1998). Advocates now often refer to the "civil right to counsel," instead, in part to avoid the problems of appointed counsel in criminal cases. *See* NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, *The Right to Counsel in Criminal and Civil Cases*, http://civilrighttocounsel.org/about/criminal_and_civil_rights_to_counsel (last visited Jan. 3, 2020).

66. *See* Phyllis Coleman & Ronald A. Shellow, *Ineffective Assistance of Counsel: A Call for A Stricter Test in Civil Commitments*, 27 J. LEGAL PROF. 37, 39 (2003) (noting that although not constitutionally required, all states provide a right to counsel for compulsory hospitalization).

67. In Lassiter v. Department of Social Services, the Supreme Court refused to announce an across-the-board right to counsel in termination of parental rights cases, but did provide for a case-by-case approach to determine whether particular circumstances would require such measures. 452 U.S. 18 (1981). Moreover, many states have gone beyond constitutional due process requirements and required appointment of counsel in termination of parental rights or other family law cases. *See* Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL & CIV. RTS. L. REV. 733, 734 (2006).

68. *See* Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 YALE L.J. 2106, 2113–14 (2013) (citing, but critiquing, application of "gold standard" criminal due process norms to civil context).

69. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR. ASS'N 2019); *see also* Montejo v. Louisiana, 556 U.S. 778, 790 (2009) (citing same); William H. Edmonson, *A "New" No-Contact Rule: Proposing an Addition to*

prosecutors should not be contacting criminal defendants, particularly when they have reason to know that an unrepresented party may be confused about their role. Such conduct poses potential problems under ethical rules and the Fifth and Sixth Amendments.

While having a prosecutor speak directly to an unrepresented party is not a per se ethical or legal violation, it certainly can raise a range of troubling issues. As a general matter, ethical rules require all attorneys to take care not to appear disinterested when speaking to unrepresented parties and to avoid giving those with even possibly opposing interests any legal advice.[70] These rules recognize the particular susceptibility of an inexperienced, unsophisticated individual without counsel in the face of an attorney with potentially adverse interests.[71] But when it comes to prosecutors speaking to unrepresented parties, there are "special responsibilities," that go beyond these baseline principles. The American Bar Association's Model Rules of Professional Conduct, which nearly all states have adopted into law in whole or in part, mandates that prosecutors, when speaking to unrepresented defendants, "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel" and ensure that such defendants have "been given reasonable opportunity to obtain counsel."[72]

The ABA rules further state that a prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing."[73] Just as the generic rule regarding attorneys speaking with unrepresented parties acknowledges the power and information gap between the two sides, this rule focuses on protection of defendants from potential manipulation. An uncounseled defendant may feel she has no option but to accept a prosecutor's "let's make a deal" plea offer to regain freedom or end a case quickly, regardless of the strength or weakness of the government's case against her.[74] Prosecutors meeting with defendants alone may, and perhaps must, use statements or admissions that defendants make to them in conversation or other non-custodial settings.[75] As Judge Friendly once wrote for the Second Circuit, prosecutors'

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the No-Contact Rule to Address Questioning of Suspects After Unreasonable Charging Delays, 80 N.Y.U. L. REV. 1773, 1773–74 (2005) (arguing that unrepresented defendants are vulnerable to questioning by prosecutors who may even delay bringing criminal charges so they may interrogate unrepresented defendants before right to counsel attaches).

70. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR. ASS'N 2019).

71. *Id*. at r. 4.3 cmt.

72. *Id*. at r. 3.8(b).

73. *Id*. at r. 3.8(c).

74. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 342 (2011).

75. Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1153 (2006). Of course, not all statements to prosecutors by unrepresented defendants would be admissible, as some may be covered by *Miranda* and the Fifth Amendment. But if the defendant's remarks were made out of custody or not on the basis of interrogation or its functional equivalent, it would seem to be fair game. *See* William H. Edmonson, *A "New" No-Contact Rule: Proposing an Addition to the No-Contact Rule to Address Questioning of Suspects After Unreasonable Charging Delays*, 80 N.Y.U. L. REV. 1773, 1773–74 (2005) ("no contact" rule precluding prosecutors from speaking with represented defendants creates incentive

interviews of uncounseled defendants before their Sixth Amendment right to counsel attaches are "peculiarly likely to run afoul of *Miranda*" given that "such sessions are held for the very purpose of eliciting damaging statements."[76]

Even where there is no exploitative intent on the part of a prosecutor, putting a defendant who has no attorney against a prosecutor can mean that the outcome of the case may be based on a difference in skill, experience, and education, rather than on the merits.[77] Ideally, courts would not allow defendants who lack counsel to waive rights unknowingly to conference or negotiate directly with a prosecutor, or to depend on the prosecutor to look after their interests.[78] At a minimum, courts should not compel defendants to put themselves in such circumstances.

C. *Right to Understand and Be Respected*

Whatever the solution to the injustice in these petty court matters, it is essential that defendants understand the proceedings against them and that the professionals in the courtroom ensure that the parties are treated with dignity, respect, and decorum. Law on interpreters[79] and competence,[80] for instance, makes clear that part and parcel of a defendant's right to due process is the right to at least some understanding of the proceedings she is subject to.[81]

Relatedly, a plea may be found to be involuntary, and therefore invalid, where the person charged does not understand the constitutional rights she is waiving or the nature of the charges against her.[82] This is what happened in the 1941 Supreme Court case of *Smith v. O'Grady*.[83] There, the Supreme Court reversed the conviction of a Nebraska man who pleaded guilty to a serious offense but did so without counsel, without written notice of the charges against

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for prosecutors to delay charging indigent people in order to prolong the period that they can be questioned without the benefit of counsel); *see also* State v. Fenner, 846 A.2d 1020, 1034–35 (Md. 2004) (finding admissible defendant's statement in response to judge's question at bail hearing despite lack of counsel at hearing).

76. United States v. Duvall, 537 F.2d 15, 24 (2d Cir. 1976), cert. denied sub nom. Jones v. United States, 426 U.S. 950 (1976); *see also* People v. Dunbar, 24 N.Y.3d 304 (N.Y. 2014), *cert. denied sub nom.* New York v. Lloyd-Douglas, 135 S. Ct. 2051 (2015), *cert. denied sub nom.* New York v. Dunbar, 135 S. Ct. 2052 (2015) (finding that program of prosecutors questioning defendants after arrest but before arraignment without proper *Miranda* warnings violated Fifth Amendment protections against self-incrimination).

77. Kempinen, *supra* note 75, at 1149.

78. *Id.* at 1150–51, 1153.

79. *See* Julia Sherman, *The Right to an Interpreter Under Customary International Law*, 48 COLUM. HUM. RTS. L. REV. 257, 284 (2017) (citing federal and state statutory, constitutional, and common law finding interpreters as due process right).

80. To be competent to engage in a trial, plead guilty, or waive counsel, requires that a defendant have "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and a 'rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, 509 U.S. 389, 389 (1993) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960) (*per curiam*)).

81. There is also case law that combines the two issues. In *Ling v. Georgia*, the Supreme Court of Georgia held that a defendant with limited English skills might be considered effectively incompetent or even absent from her trial if the court failed to provide her an interpreter. 702 S.E.2d 881, 882 (Ga. 2010).

82. Henderson v. Morgan, 426 U.S. 637, 645 (1976) (citations omitted).

83. Smith v. O'Grady, 312 U.S. 329 (1941).

him, and without being advised of the nature of the charges he was facing.[84] In so holding, Justice Black emphasized that the defendant was an "ignorant"[85] or "uneducated"[86] layman who was "bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty."[87] Such rhetoric, like the requirements of competency and interpreter services, makes clear the Court's concern for non-lawyers and their need to comprehend criminal proceedings against them.

There is also law addressing the tenor of the courtroom and the treatment of defendants. New York's Judicial Code of Conduct, for example, instructs that "[a] judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."[88] Even non-judicial employees of the New York court system are bound to be "patient and courteous to all persons who come in contact with them."[89] Specifically with regard to people charged with crimes, the Supreme Court has noted that criminal defendants have a right to be treated with dignity.[90]

Social science research supports this doctrinal concept. Tom Tyler, a leading procedural justice scholar, found that one key determinant of procedural fairness is whether individuals feel that a decision maker has treated them with respect and courtesy.[91] Tyler and others have further argued that courts derive their legitimacy, and subsequent public deference, from individuals' perceptions of fair treatment before them.[92] Plainly, yelling at defendants, shuffling them through significant processes they cannot understand, and otherwise

84. *Id*. at 334.

85. *Id*. at 332.

86. *Id*. at 333. In the three paragraphs of the three-page opinion that address the defendant's constitutional deprivation, Justice Black also refers to the defendant as an "uneducated person" and cites to the defendant's own claim of "ignorance." *Id*. at 333–34.

87. *Id*. at 334.

88. N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(B)(3) (2019).

89. *Id*. at § 50.1(II)(B) (enumerating ethics rules governing conduct of non-judicial employees).

90. *See* Deck v. Missouri, 544 U.S. 622, 631 (2005) (holding that shackling of defendant during penalty phase of death penalty case violated due process in part because respectful treatment of defendants is part of judicial obligation to maintain "dignified process").

91. Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice in* APPLIED SOCIAL PSYCHOLOGY & ORGANIZATIONAL SETTINGS, 77, 78 (John S. Carroll ed., 1990).

92. *See, e.g*., JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 220 (2012). *See also* M. Somjen Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center* (Sept. 2006) (finding that defendants' perception of fairness was based largely on their sense that judges (especially) and other court actors (to a lesser extent) had treated them with respect), https://www.courtinnovation.org/sites/default/files/Procedural_Fairness.pdf.

disregarding litigants' humanity runs counter to public and legal expectations of a just courtroom.

D. *Right to Impartial Judge*

Another fundamental due process principle is that litigants should receive a fair and impartial tribunal, one that does not stand to benefit from the outcome of the proceeding. Where a judge can benefit financially from costs and surcharges associated with a particular outcome, for instance, she cannot be impartial. Rules of judicial ethics typically specify that as part of their obligation to perform their duties impartially, judges must be free from financial influence.[93] Court doctrine has also set limits on judicial discretion under the Due Process Clause of the Fourteenth Amendment in such circumstances. In considering whether a judge might be unduly swayed by a financial benefit, the Supreme Court held in *Tumey v. Ohio* that:

> [e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.[94]

Courts have argued over the nature of the pecuniary interest involved and whether it might be too insignificant or remote to compromise the integrity of the proceeding or the conflict, or whether the adjudicator had what *Tumey* characterizes as "a direct, personal, substantial pecuniary interest" in reaching a particular outcome.[95] In *Tumey*, a village mayor serving as a local trial judge personally received a portion of fees and costs to be paid by a defendant, but only if that defendant were convicted.[96] This financial incentive to convict, the Court held, disqualified the judge and called for reversal of the defendant's conviction for unlawful possession of alcohol under the Prohibition Act.[97] In *Tumey*'s wake, one would be hard pressed to find a case where a direct payment to the judge as a fine, fee, or forfeiture, however small, passed constitutional muster.[98]

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93. The ABA's Model Code of Judicial Conduct in Canon 2 states that Judges shall perform the duties of judicial office "impartially, competently, and diligently." MODEL RULES OF JUD. CONDUCT CANON 2 (AM. BAR ASS'N 2019). Further, Rule 2.4, titled External Influences on Judicial Conduct, specifies that a judge "shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." MODEL RULES OF JUD. CONDUCT r. 2.4(B) (AM. BAR ASS'N 2019).

94. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

95. *Id.* at 523.

96. *Id.* at 520.

97. *Id.* at 535.

98. *See* Herbert B. Chermside, Jr., Annotation, *Disqualification of Judge, Justice of the Peace, or Similar Judicial Officer for Pecuniary Interest in Fines, Forfeitures, or Fees Payable to Litigants*, 72 A.L.R.3d 375 (1976) (stating that, in cases surveyed for ALR where this argument was advanced, it was uniformly rejected). *See also* DePiero v. City of Macedonia, 180 F.3d 770, 777 (6th Cir. 1999) (quoting *Tumey* at 523) ("The Supreme Court has held that the Fourteenth Amendment right to due process is certainly compromised where the decision maker has a 'direct, personal, substantial pecuniary interest' in the proceedings.").

This potential for impermissible self-dealing need not be limited to cases where the judge lines her own pockets with fees and surcharges her court collects. The benefit to the judge may also come in the form of payments to a municipal fund, when the judge is also a local official whose jurisdiction would profit from the influx of cash.[99] The question is, what kind of connection between the official and the court payment is sufficiently great that it renders any judgment by the decision maker unconstitutional? Two of *Tumey's* progeny, both from Ohio municipalities, illustrate this point.[100]

On the one hand, there's the case where a Monroeville, Ohio mayor sat as both the executive responsible for the village's finances and a local judge who imposed criminal fines on defendants.[101] The Court found this dual role violated due process.[102] Focusing on the mayor's executive responsibilities for the village finances, the Court specified that because monies contributed a substantial portion of the village's revenues, there was an impermissible incentive for the mayor to convict, rather than sit as the "neutral and detached judge" that defendants deserve when they seek to challenge the charges against them.[103]

On the other hand, where the mayor of Xenia, Ohio served as the local court justice and ordered fines that accrued to the village's general fund, the Court found no due process violation because the mayor performed no significant executive functions in the village.[104] Although the mayor was one of five commissioners responsible for city appropriation and spending, the Court found that the benefit to him from the addition to village coffers was "remote" enough that that the mayor's role as a judicial officer did not implicate the Fourteenth Amendment.[105]

There are some ministerial functions, such as acceptance of a *nolo contendere* plea, which a judicial decision maker—even one with a pecuniary interest—may carry out without violating due process.[106] However, other court actions, such as the issuance of a bench warrant requiring a determination of probable cause, could

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99. *See Tumey*, 273 U.S. at 532–33.

100. *See also* DelVecchio v. Ill. Dept. of Corr., 8 F.3d 509, 523 (7th Cir. 1993), *reh'g. en banc granted, op. vacated* 8 F.3d 509, *on reh'g. sub nom.* Del Vecchio v. Ill. Dept. of Corr., 31 F.3d 1363, 1374 (7th Cir. 1994) ("The line between interests that require disqualification and those that do not is not always clear.").

101. Ward v. Vill. of Monroeville, Ohio, 409 U.S. 57 (1972).

102. *Id.* at 60; *see also* Williams v. Pennsylvania, 136 S. Ct. 1899, 1919 (2016) (Thomas, J., dissenting) (citing same for proposition that "a mayor could not adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality's revenue").

103. *Ward*, 409 U.S. at 61–62.

104. *Id.*

105. Dugan v. Ohio, 277 U.S. 61 (1928).

106. Bailey v. City of Broadview Hgts., Ohio, 721 F. Supp. 2d 653, 659 (N.D. Ohio 2010), *affd.* Bailey v. City of Broadview Hgts., 674 F.3d 499 (6th Cir. 2012). *Bailey* and other courts that have made such holdings have relied in part on dicta in *Ward*, which said that the Court's decision "intimate[d] no view that it would be unconstitutional to permit a mayor or similar official to serve in essentially a ministerial capacity in a traffic or ordinance violation case to accept a free and voluntary plea of guilty or nolo contendere, a forfeiture of collateral, or the like." *Ward*, 409 U.S. at 62; *see also* Gore v. Emerson, 557 S.W.2d 880, 883 (Ark. 1977) (citing same).

raise due process issues where the judge had substantial executive and administrative responsibilities.[107]

The problem of courts charging money, particularly from poor litigants, goes beyond the strict constructions that require having an unbiased decision-maker. Conflicts of interest—if not unconstitutional, then at least unseemly—can arise when parties in the criminal justice system feel pressure to raise revenue, even where they do not expressly benefit financially.[108] The devastating repercussions of defendants' outstanding debts from even low-level offenses have been documented in jurisdictions including Ferguson, Missouri[109] and New Orleans, Louisiana,[110] and in states including Alabama[111] and Colorado.[112] Lawsuits have been filed against municipalities like Doraville, Georgia, Charlestown, Indiana, and Pagedale, Missouri (among others), all challenging the abuse of municipal code enforcement to generate municipal income.[113] A 2016 report of the Conference of State Court Administrators critiqued the use of court fines and fees as revenue generation to fund government operations.[114] Additionally, clear precedent precludes debtors' prisons under the Fourteenth Amendment because of both due process and equal protection concerns.[115] But to the extent that poor people are essentially offered a choice between paying fines and serving time, or individuals

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107. DePiero v. City of Macedonia, 180 F.3d 770, 782–83 (6th Cir. 1999).

108. U.S. COMM'N. ON C. R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 17 (2017); *see also* Kasey Henricks & Daina Cheyenne Harvey, *Not One but Many: Monetary Punishment and the Fergusons of America* 32 SOC. F. 930, 946–47 (2017) ("Monetary punishment. . .incentivizes the use of these sanctions to help with resources that pay for operating costs to cycle people in and out of jails, courts, prisons, and parole . . . .").

109. One of the key findings of the U.S. Department of Justice report about Ferguson, Missouri, conducted in the wake of the Michael Brown shooting, addressed individuals charged with traffic and other minor offenses. The report noted that the municipal court depended on collecting endless fines and fees from poor, primarily African American citizens—some who were not even charged with crimes—but who nonetheless could not pay and were repeatedly punished for this failure. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/E9QY-SEKC].

110. MATHILDE LAISNE ET AL., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS, VERA INSTITUTE OF JUSTICE (2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf.

111. ALABAMA APPLESEED CENTER FOR LAW & JUSTICE ET AL., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE (2018), http://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf.

112. ACLU COLORADO, JUSTICE DERAILED: A CASE STUDY OF ABUSIVE AND UNCONSTITUTIONAL PRACTICES IN COLORADO CITY COURTS (2017), https://aclu-co.org/wp-content/uploads/2017/10/JUSTICE-DERAILED-web.pdf.

113. Patrick Sisson, *How the Municipal Court Money Machine Burdens City Residents*, CURBED BLOG (May 24, 2018), https://www.curbed.com/2018/5/24/17382120/tickets-fees-fines-criminal-justice-ferguson.

114. Arthur W. Pepin et. al, *The End of Debtors' Prisons: Effective Policies for Successful Compliance with Legal Financial Obligations*, CONFERENCE OF STATE COURT ADM'RS (2015–16), https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/End-of-Debtors-Prisons-2016.ashx.

115. *See* Bearden v. Georgia, 461 U.S. 660, 665–66 (1983) (reviewing precedents on treatment of indigent defendants and noting that "[d]ue process and equal protection principles converge in the Court's analysis in these cases").

who cannot pay avoid court and then get picked up on arrest warrants, courts wind up incarcerating people largely because they are poor.

Finally, as local jurisdictions rely more and more on their courts to raise funds, judges and court administrators become backdoor tax collectors.[116] These taxes are regressive and disproportionately affect communities of color.[117] An analysis of census data showed that communities that impose some of the greatest fines and fees on their residents are marked not by particularly high rates of poverty, but by particularly large African American populations.[118] As the scholar who made the findings summarized, "[t]he best indicator that a government will levy an excessive amount of fines is if its citizens are Black."[119] While this statistical analysis does not confirm causation or a deliberately racist fee structure, the correlation is a troubling one that may give rise to other constitutional challenges, such as an equal protection violation. Ultimately, the fairness of a proceeding depends on the independence of the decision maker and the justness of his or her judgments. To the extent that money unduly impacts or influences either, we cannot have confidence in the process or the outcomes it produces.

E. *Right to an Open and Public Case*

An open courtroom is key to protecting fairness in criminal proceedings. The Supreme Court has noted that in criminal cases, the open courtroom has long been an "indispensable attribute of an Anglo-American trial."[120] Of course, the Sixth Amendment guarantees criminal defendants a right to a public trial.[121] This right even extends to lower level cases.[122] Barring special privacy considerations for, say, juveniles, we expect our criminal courtrooms in particular to be open to the public not only because of the *defendant's* right to have observers under the Sixth Amendment, but also because of the *public's*

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116. Neil Sobol, *Charging the Poor: Criminal Justice Debt & Modern Debtors' Prisons*, 75 MD. L. REV. 486, 523 (2016).

117. U.S. COMM'N ON C.R., *supra* note 108, at 7.

118. *Id.* at 22–23 (2017). The researcher analyzing census demographic data to better understand communities where court fines and fees contributed most substantially to the municipalities' total revenue concluded:

> [O]ne demographic that was most characteristic of cities that levy large amounts of fines on their citizens: a large African American population. Among the fifty cities with the highest proportion of revenues from fines, the median size of African American population—on a percentage basis—is more than five times greater than the national median.

Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america/.

119. Kopf, *supra* note 118.

120. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

121. U.S. CONST. amend. VI.

122. *See* Argersinger v. Hamlin, 407 U.S. 25, 28 (1972) ("'It is simply not arguable, nor has any court ever held, that the trial of a petty offense may be held in secret . . . .") (quoting John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1968).

rights under the First Amendment.[123] Thus, beyond physically open doors to courtrooms, open courts means public access to records of court proceedings and court documents, including transcripts.[124] Although the Supreme Court has not yet enunciated an unfettered right to access court documents, some courts have found support for such access.[125]

There are a host of justifications for preserving the openness of courts. In its landmark decision *Richmond Newspapers, Inc. v. Virginia*, the Supreme Court held that the First and Fourteenth Amendments require criminal cases to generally remain open to the public and the press.[126] The Court cited to an "unbroken, uncontradicted history," on this point, and referenced an array of historical antecedents on the importance and purpose of maintaining an open court.[127] Hale and Blackstone, for instance, recognized that an open court helps assure that proceedings are conducted fairly and minimize perjury, misconduct of participants, and biased decision-making.[128] The Court also pointed to Jeremy Bentham's idea of "publicity" and its therapeutic value to the community.[129]

Modern scholars have echoed the historical record that the Court relied upon in *Richmond Newspapers*. In discussing the purpose and utility of court openness recently, Yale professor Judith Resnik expanded upon Bentham's argument:

> Public access to courts enables observers to see what democratic precepts of equal access *to* the law and equal treatment *by* the law mean in practice . . . [A]ll of us have entitlements in democracies to watch power operate and to receive explanations for the exercise of power that dispute resolution entails. The [court] observers are, in this account, a necessary *part* of the practice of

123. *Richmond Newspapers*, 448 U.S. at 569 (citing M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343–345 (6th ed. 1820); 3 WILLIAM BLACKSTONE, COMMENTARIES *372–73; 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

124. Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and A Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 85 (2006) ("Supreme Court cited cases dating back to the 1800s for the proposition that the federal and state courts of this country recognize a general common law right to 'inspect and copy public records and documents, including judicial records and documents.'").

125. *See* Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and A Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 121 (2006) (citing Nat'l Broad. Co. Inc. v. Presser, 828 F.2d 340, 343 (6th Cir. 1987) (addressing press right of access to judicial records); and In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1308–09 (7th Cir. 1984) (explaining public's right of access to court documents)). Note, however, that the United States Supreme Court has never found there to be a constitutional right of access to all court records. *See* United States v. McVeigh, 119 F. 3d 806, 812 (10th Cir. 1997).

126. *Richmond Newspapers*, 448 U.S. at 575 (1980).

127. *Id*. at 573.

128. *Id*. at 569.

129. *Id*. Justice Burger explained that, in the wake of a "shocking crime," public criminal proceedings could provide for "an outlet for community concern, hostility, and emotion" that might satisfy a need for justice and forestall vigilantism. *Id*. at 571.

> adjudication, anchored in democratic political norms that the state cannot impose its authority through unseen and unaccountable acts.[130]

Both Resnik and the Supreme Court, relying in part on historical precedent, thus find a connection between the open nature of the court, the court's accountability, and the public's confidence in the system.

In addition to federal constitutional protections, there are a host of state constitutional and statutory provisions that promote court openness, including freedom of information and "sunshine" laws, which apply to governments more generally and exist in every state.[131] The federal government also requires courts to report statistics and information about their courts' functioning,[132] as do many states.[133] And many municipalities or individual courthouses collect and disseminate more granular data on their own practices.[134] The National Center for State Courts not only collects data on cases opened and closed each year for nationwide publication and comparison,[135] but also provides a tool for trial courts to track a series of performance measures in part to promote "accountability in the administration of justice."[136]

The other way that courts can be held accountable for their procedures and decisions in criminal cases is through review by a higher court. The notion of an appellate procedure following a lower court judgment is so commonplace that most people assume it is a due process right.[137] Indeed, nearly all states provide for

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130. Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 617 (2018).

131. Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 456–57 (2011) (infra citations omitted) (stating that all states and federal government have some freedom of information laws and citing statutes from nine southern states providing for open records and/or open governmental meetings).

132. Resnik, *supra* note 130, at 628–29.

133. *See, e.g.*, N.Y. EXEC. L. § 837-a (2019) (requiring state Division of Criminal Justice Services to collect and analyze statistical information on felony cases and other criminal justice issues in New York); OHIO ADMIN. CODE SUP. R. 37 (2019) (requiring judges to submit monthly written reports and making those reports available for public access).

134. The criminal courts of New York City, for instance, issue an annual report of court information ranging from time between arrest and arraignment to numbers of pretrial hearings by city borough to revenue from summonses. *See* JUSTIN A. BARRY & LISA LINDSAY, CRIMINAL COURT OF THE CITY OF NEW YORK: 2016 ANNUAL REPORT (2017), https://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf.

135. *See* CONFERENCE OF STATE COURT ADM'RS & NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING v.2.2 (2019).

136. National Center for State Courts, *The Purposes of Performance Measurement*, COURTOOLS, http://www.courtools.org.

137. *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 504 (1992) ("It is difficult for any lawyer—or lay person, for that matter — to believe that the Supreme Court would uphold the withdrawal of all right to review of state law errors in criminal cases. In fact, most people—if not most law school graduates—simply assume that the constitutional guarantee of due process of law includes some right to appeal a criminal conviction."); David Rossman, *"Were There No Appeal": The History of Review in American Courts*, 81 J. OF CRIM. L. & CRIMINOLOGY 518, 519 (1990) ("The role of review in the contemporary criminal justice system is so pervasive that it is easy to assume this feature is a constitutional requirement. Review seems as fundamental an aspect of the system as trial by jury or the right to defense counsel.").

appellate review, at least in felony cases.[138] Yet, there is no constitutional right to an appeal at either the federal or state level.[139] Despite this, the Supreme Court has held that if states provide for appellate review, then they must do so in a manner that is consistent with the Due Process Clause.[140] Appellate rights, while not absolute, thus have some due process trappings in the public imagination, state law and, more conservatively, the Constitution.

Sunlight can come to courts in many forms: an audience observing the proceedings, press to expand that audience, statistics or other data reporting on court activities, and appellate review.[141] Each of these features can constrain disregard for the rule of law and promote accountability for courts. For courts to function properly, this sort of legitimacy is nonnegotiable.

It could be argued that there are other fundamental features of a court that respected due process norms. But the list this Part enumerates is comprised of many essential and well-established due process components, including the right to counsel (and appointed counsel), independence from prosecutors, understanding and respect in the courtroom, a judge without a financial interest in the outcome, and open proceedings. Collectively, these ideals provide a framework for analyzing procedural fairness in a criminal courtroom generally, and Part 155 in particular.

III. THE FINDINGS

For five weeks, students observed proceedings every day that Part 155 was in session. What emerged from those observations provides a case study of how far courts can fall short of their obligation to provide due process, in terms of both the letter and the spirit of those norms.[142] The observations made in Part 155 can be catalogued into primary themes that emerged, ones which are diametrically opposed to the due process norms outlined in Part II:

- The right to counsel was barely a footnote in the proceedings
- No one mentioned the right to *appointed* counsel for poor defendants
- Unrepresented defendants were required to meet with prosecutors
- Defendants were confused and upset
- The system runs on money
- There is no data trail and limited meaningful review

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138. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.1(a) (4th ed. 2018).

139. McKane v. Durston, 153 U.S. 684, 687 (1894) (providing no right to appeal in federal cases); *see also* Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.").

140. Evitts v. Lucey, 469 U.S. 387, 401, 105 S. Ct. 830, 839 (1985) ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.").

141. *See, e.g.*, Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2174 (2014).

142. Since the time of these observations, some attempt has been made to resolve the issues. Where that is the case, the attempts are noted. CJC PROJECT, *supra* note 13.

Notably, these issues are not isolated to Nassau County, for people charged with low-level offenses around the country suffer many of the same rights deprivations.[143] So the observations of this one courtroom provide useful insight into how courts prosecute people charged with petty offenses, even in a jurisdiction in a "progressive" state, a town just thirty miles outside of New York City. Understanding what actually happens in such a courtroom keeps us from engaging in assumptions about how due process works in action and enables us to see the distance between theory and reality.

A. *The Right to Counsel was Barely a Footnote*

Businesses that were defendants in Part 155 could not even get their cases heard unless they had counsel, but the situation was completely different for non-commercial entities appearing there.[144] For individual defendants, any indication that they had the right to counsel typically occurred, if at all,[145] during a clerk's routine series of announcements conducted once, at the outset of the proceedings, in English only.[146] The announcement was made without regard to whether all or even most of defendants were in the gallery or whether anyone could hear or

143. *See, e.g.*, Radley Balko, *How Municipalities in St. Louis County, Missouri Profit from Poverty*, WASH. POST (Sept. 3, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty; Heath Hamacher, *Municipal Courts Did Not Provide Required Counsel for Indigents*, S.C. LAWYERS WEEKLY (May 29, 2018), https://sclawyersweekly.com/news/2018/05/29/municipal-courts-did-not-provide-required-counsel-for-indigents; Joseph Shapiro, *Lawsuits Target "Debtors' Prisons" Across the Country*, NPR, (Oct. 21, 2015), https://www.npr.org/2015/10/21/450546542/lawsuits-target-debtors-prisons-across-the-country; Carrie Teegarden, *Lives Upended as Judges Push Legal Limits*, ATLANTA JOURNAL-CONSTITUTION (May 2, 2015), https://www.ajc.com/news/crime–law/lives-upended-judges-push-legal-limits/k4zxhraOvTI8TGfQ4LcunO.

144. On March 29, 2016, for instance, the clerk instructed "El Cappo Corporation," whose representative appeared without counsel, that he would need an attorney, whereas individual defendants appeared pro se and addressed the judge themselves. *See* CJC PROJECT, *supra* note 13, at Mar. 29, 2016.

145. Depending on the clerk, sometimes the announcement did not even refer to counsel at all. On April 7, for example, the announcement was only, "You must conference your case before your case is called." *Id*. at Apr. 7, 2016.

146. The clerk's warnings varied, but often included some mention of counsel. A typical speech to defendants began with the rights notification and then included other instructions. *See id*. at Apr. 8, 2016 ("You have the right to counsel at all stages of your trial. It is your privilege to have a trial. Pleading guilty, you are giving up your right to that trial. All fines and surcharges are payable today by 4 PM. They are to be paid at the cashier located next door to this room. If you have not done so you must conference your case with the Town Attorney. If your case is called and you have not counseled your case yet, you will have to wait longer. When your case is called please say 'here' in a loud, clear voice, as my back will be turned to you. If you don't do so, you might have to wait longer to be heard again."); *see also id*, at Apr. 4, 2016 (issuing similar warnings, starting with "on the criminal calendar, you have the right to counsel at every stage of the proceedings"); *id*, at Apr. 12, 2016 (issuing similar warnings, starting with "right to attorney at each stage of your case"). This example is consistent with observations of then Chief Judge Judith S. Kaye's Commission on the Future of Indigent Defense Services. The Kaye Commission's 2006 Report critiqued Nassau County village courts, noting that explanations on the right to counsel were given en masse to the litigants at the beginning of proceedings, at times misstating the law. COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REP. TO THE CHIEF JUDGE OF THE STATE OF N.Y. 112 (June 18, 2006).

understand the warnings.[147] These defendants were charged with violating a range of local ordinances or codes, which were typically classified as violations (non-criminal, but carrying a potential jail sentence)[148] or misdemeanors (criminal offenses carrying a maximum of 1 year in jail).[149] The defendants were not told about this right individually. It was not written on the sheet that orders defendants to speak with the prosecutor. It was not handed out in writing. It was not mentioned during the arraignment.[150] And it was almost never included as a right they were "knowingly waiving" as part of their plea colloquy.[151]

Although some might say that the charges in these cases are so minor that counsel would not make a difference, our students observed numerous ways in which counsel could have or did make a difference in individual cases. One small but important distinction between those who had counsel in Part 155 and those who had none is that clients with lawyers routinely had their cases called first. Those who did not have counsel, including those who arrived before proceedings even commenced, were forced to wait until every attorney's matter was called, no matter when the attorney arrived. There are valid reasons to maintain such a policy,

147. Student observers were trained to listen for and record the initial announcements, including specifically whether they referred to the right to counsel, and even they could not always hear the clerk. On one date, a student observer sitting in the second row could not hear the announcement at all. CJC PROJECT, *supra* note 13, at Mar. 31, 2016. On another occasion, warnings were made while the clerk's back was turned to the audience and the observer could not hear. *Id.* at Mar. 28, 2016. Further, just twelve people were in the courtroom at the time of the warnings; others were either late, or, possibly, in line outside the prosecutor's office. *Id.*

148. *See, e.g.*, TOWN OF HEMPSTEAD, N.Y., CODE § 144-7 (2019) (establishing that "unreasonable noise" provisions of town code establish a violation (not a "crime"), which is punishable by up to 15 days in jail and/or up to $250 for each offense).

149. *See, e.g.*, TOWN OF HEMPSTEAD, N.Y., CODE §§ 128-43, 128-45 (2019) (establishing that improper dumping of garbage is a misdemeanor punishable by up to 1 year in jail and/or a fine not exceeding $1500); TOWN OF HEMPSTEAD, N.Y., CODE § 91-6 (2019) (establishing that entering a home which has been secured as a public nuisance shall be a misdemeanor, punishable by up to six months in jail and/or a fine of up to $500). Notably, the District Court and the Office of Court Administration do not seem to collect any information to distinguish how many defendants are charged and/or convicted of misdemeanors, violations, or infractions in Part 155. Interview with Bruce Kahn, Management Analyst (Aug. 27, 2014).

150. Arraignments in Part 155 are even briefer than they are in other District Court parts, and sometimes do not even occur completely. The opacity of the arraignment procedure to a non-attorney litigant is compounded in Part 155, however, as there is no counsel to explain it to the defendant off the record. Defendants who had been told in conference by the prosecutor that they needed to plead guilty, for instance, sometimes improperly responded "guilty," when the clerk fed them the "waiver further reading and plead not guilty" language of the arraignment, rather than replying "yes." CJC PROJECT, *supra* note 13, at Apr. 8, 2016.

151. Most colloquies were very curt, focusing on payment of fines. Typical examples include: "do you plead guilty to the charge and can you pay the fines today?" or "can you pay the fines?" or even just "do you have the money?" *Id.* at Apr. 5–8, 2016. In one instance, the clerk, not the judge, appeared to conduct the colloquy, asking, "You are changing your plea of not guilty to guilty? Are you able to pay today?" *Id.* at Apr. 8, 2016. The judge's colloquy on April 4 was more extensive than most: "Did you hear what the prosecutor has said just now in this case? Do you think you make out the elements of the charge? Can you pay the fine? Plea accepted." *Id.* at April 4, 2016. On April 28, the judge said nearly the same colloquy for all six pleas: "Heard the offer? Guilty plea is equivalent to being found guilty at trial. By pleading guilty you are giving up right to trial." *Id.* at Apr. 28, 2016. Only one judge actually raised some of the rights that individuals would be waiving if they pleaded guilty and asked defendants if they had been coerced and if they had discussed the matter with their counsel. *Id.* at April 15, 2016.

including the notion that clients should not be forced to pay for the hours of an attorney compelled to wait in courtroom after courtroom. But for defendants whose cases go on for months or even years, this delay can mean many additional hours of required childcare or missed work or school.

Perhaps more significantly, during the more than month-long observations, only defendants with counsel appeared to have motions filed on their behalf or requests for discovery that the court would consider.[152] Pro se defendants who sought to file motions were told that they would need attorneys to help them, but they were not appointed counsel.[153] Similarly, one defendant tried to object to the scope of the town's demand to search the interior of his home (his alleged violation involved an illegal fence).[154] The judge, however, recommended that the defendant give his consent to the search because the town could get a warrant and "that would be worse for the defendant."[155] Other defendants were "arraigned" without ever agreeing to waive their right to hear the charges or enter a plea, ultimately saying only their name and address.[156] Still another was arraigned although he was not even present because he was incarcerated.[157]

Admittedly, even when counsel is present, arraignments are hasty proceedings that are a far cry from the formal reading of charges that the law anticipates. Nonetheless, it is hard to imagine that these matters, particularly those that were not arraignments, would have been handled identically if the defendants had counsel. Even if specific case outcomes would not have differed just because a defendant had counsel present, at least there may have been the possibility of litigation on the client's behalf. In the past couple of years, our clinic has represented three individuals in Part 155, including our original elderly gentleman client. All three ultimately had their charges dismissed once the court permitted us to file motions.[158]

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152. *See, e.g.*, *id.* at Mar. 25, 2016 (case dismissed in interest of justice); *id.* at Apr. 18, 2016 (attorney seeks discovery).

153. *Id.* at Apr. 19, 2016; *id.* at Apr. 7, 2016. Notably, on both occasions, the Town Attorney told the judge that the defendant needed an attorney because he had written his own motions. *Id.* at Apr. 19, 2016; *id.* at Apr. 7, 2016.

154. *Id.* at Apr. 25, 2016.

155. *Id.*

156. *See, e.g.*, *id.* at Apr. 18, 2016 (defendant arraigned and responds only with name and address); *id.* at Apr. 29, 2016 (same); *see also id.* at Apr. 19, 2016 (defendant not properly arraigned; judge enters "not guilty" plea on defendant's behalf).

157. *Id.* at Apr. 21, 2016.

158. *See* Ashley Guarino & David Sardarizedeh, Closing Memo (May 5, 2014) (describing case dismissal for facial insufficiency on 3/17/14) (on file with author). Initially, the sitting judge in our second case in Part 155, which charged a wheelchair-bound woman with multiple serious health problems for living in a placarded dwelling unfit for human occupancy, refused to let the clinic file motions. Adam DelVecchio, Contact Memo (Feb. 27, 2014) (on file with author). On a subsequent appearance in the same case, however, a different sitting judge agreed to accept the motions. *See* Adam DelVecchio, Contact Memo (Mar. 25, 2014) (on file with author). This second judge then granted a motion to dismiss the case on facial sufficiency grounds. People v. Rafalowitz, No. 2013NA001156S, 2014 WL 2592598 (N.Y. Dist. Ct. 1st June 9, 2014). In his opinion, the judge noted further that, "Although defendant's attorneys have also made out a persuasive case for dismissal in the interest of justice the Court need not reach that issue at this time." *Id.* In the final case, the town attorneys eventually

B. *There was No Mention of the Right to Appointed Counsel for Poor Defendants*

While there was little more than a cursory mention of the right to counsel in Part 155, at least it was uttered at times. However, based on our observations, there was zero discussion there regarding the *appointment* of counsel for defendants who could not afford a lawyer. Defendants did not know to raise it (even the ones who said they could not afford to hire a lawyer), and the court never advised them that counsel might be appointed if they could not afford it. Not once did students observe counsel actually being appointed to a case. In South Carolina, a similar issue arose when municipal court defendants were neither informed of their rights to counsel nor provided counsel, despite their indigence.[159] There, three defendants were forced to serve jail sentences because they couldn't pay court fines and fees ranging from $2,200 to $3,212.[160]

In Part 155, however, the right is only honored in the breach. Even in specific cases, where it was clear that the defendant sought counsel or could not afford it, no one indicated that counsel might be appointed.[161] Thus, the defendant who said he could not pay a $1,000 fine because he had no job (and contended he did not own the subject property anyway) was nonetheless told that he should get an attorney but not advised that he might be eligible for appointed counsel.[162] The same was true for the woman who said she was waiting for a child support check to come in so that she could hire a lawyer.[163] The judge acknowledged that the check might not arrive, and that not having a check would pose a significant challenge to her ability to remedy the problems with the subject property, but did not mention it as a barrier to her ability to hire counsel.[164] Indeed, the judge never mentioned that the court might be able to appoint her an attorney.[165]

C. *Unrepresented Defendants were Required to Meet with Prosecutors*

Despite ethical rules surrounding prosecutors' discussions with criminal defendants or unrepresented parties, defendants in District Court were required to meet with the town attorney for a plea conference if they wanted the court to address their case. Moreover, defendants were not advised that they might consult with

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conceded to our motion to dismiss the case in the interests of justice. Nassau Dist. Ct., Certificate of Disposition (Jun. 23, 2017) (on file with author).

159. Hamacher, *supra* note 143.

160. *Id.*

161. CJC PROJECT, *supra* note 13, at Mar. 25, 2016; *id.* at Apr. 4, 2016; *id.* at Apr. 7, 2016.

162. *Id.* at Apr. 7, 2016. This defendant told the court he could not afford to pay his $1,000 fine because he had no job. *Id.* The court offered to lower the fine to $750 and give him time to pay. *Id.* But, when the defendant raised the issue that he might not even be liable for the subject property (although he had fixed the underlying issue anyway, a fact which was undisputed), the court indicated that he needed to get an attorney to challenge his liability at trial. *Id.* The judge then lowered the fine to $400 and adjourned the case, again advising the defendant to get a lawyer but never offering to provide counsel or even assess him for financial eligibility. *Id.*

163. *Id.* at Apr. 4, 2016.

164. *Id.*

165. *Id.*

their own counsel before doing so. Indeed, the original sign hanging just outside the door of Part 155 instructed defendants that, after finding their name on the posted docket sheet, they would be *required* to speak with the prosecutor before getting their case called.[166]

Defendants thus waited in line for their opportunity to meet in a cramped room with at least two prosecuting attorneys and often an administrative enforcement officer or two, who may have ticketed them in the first place.[167] Once they entered, they were typically told, without a presumption of innocence, that they had a range of charges, each worth a certain dollar figure in fines. If the charge was based on allegedly improper conditions on the person's property, there would be likely some specific discussion about the facts of the case and the need for remedial work. Even if the defendant had already complied and fixed the alleged violation, they were virtually always fined on at least one of their charges. With very few exceptions, every defendant was expected to talk to the prosecutors about their case, plead to something, and pay something. In the courtroom, the parties doubled down on the sign outside the room: at the outset of the proceedings and throughout the day, the parties were told that their case would not even be heard by the court unless they met with the prosecutor first.[168]

The defendant's inability to get a case heard without having such a meeting, and the fact that the discussion at the meeting focuses on the facts of the allegations—including presumed admissions from the defendant—could heighten the scrutiny of such discussions under the Fifth and Sixth Amendment. Even if the practice in Part 155 does not quite rise to the level of a constitutional violation, it casts doubt on the town attorneys' compliance with ethical standards.

D. *Defendants Were Confused and Upset*

On almost every day that we observed proceedings, we saw defendants who were baffled by what was happening in their cases, some to the point where they were visibly distraught. At times, the court stopped to explain the proceedings. At

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166. *See supra* Fig. 1, for an image of the sign posted next to list of calendared cases for the day. The sign gave defendants the following instructions:

> LOOK FOR YOUR NAME [on the calendar]; (2) REMEMBER YOUR CALENDAR #; (3) SPEAK WITH TOWN ATTORNEY (IN ROOM 197 ACROSS THE HALL); and (4) STEP INTO COURTROOM.

167. The enforcement officers may come from the Department of Buildings, the Department of Sanitation, or some other County agency that functions like the police in these cases. These are the parties that inspect properties and often issue tickets for code violations. *See generally* CJC PROJECT, *supra* note 13.

168. *See, e.g.*, *id.* at Mar. 28, 2016 (court refuses to call final cases until these meetings occur); *id.* at Mar. 31, 2016 (litigants warned to meet with Town Attorney or go to trial); *id.* at Apr. 7, 2016 (clerk announces to entire courtroom, "You must conference your case before your case is called); *id.* at Apr. 15, 2016 (clerk announces to entire courtroom, "You must conference your case across the hall with the Town Attorney. If have not done so and your case is called and you have not counseled your case yet, you will have to recalled and will have to sit here longer.").

other times, the proceedings rolled right through the defendant's confusion. Arraignments occurred whether or not the defendants understood what was happening and were considered legitimate regardless of what form they took. For instance, when one attorney had not yet arrived, his client was arraigned without him.[169] When a defendant did not know how to respond to the clerk's rapid-fire questioning, the town attorney instructed her to "say 'yes.'"[170] When a defendant failed to respond to a clerk's request that she waive a formal reading of the charges, he settled for the defendant's articulation of her name and address alone.[171] Even more problematic were the pleas and sentencings that occurred despite a defendant's apparent bewilderment or discomfort.[172] On three occasions, defendants who were pleading guilty were in tears: two saying that they could not afford to pay the fines and one indicating that the defendant did not want to plead guilty but felt compelled to do so by the town attorneys and her need to resolve the case before a pending surgery.[173]

Some defendants appeared to believe that the town attorneys were their advocates. Five times over the five weeks we observed, there were defendants who appeared to think the prosecuting attorney represented them as well as town attorneys who just jumped into that role.[174] When the only lawyer that a client gets to

169. *Id*. at Apr. 8, 2016.

170. *Id*. at Apr. 12, 2016.

171. *Id*. at Apr. 18, 2016.

172. At least four times, defendants did not seem to understand the terms and conditions to which they were submitting; sometimes defendants still did not understand the terms and conditions even after a full plea colloquy. The first time was where the judge asked defendant if she was pleading guilty based on her own free will, the defendant answered through a translator that she was not, and the judge continued to ask until she said "yes" to the question. *Id*. at Mar. 31, 2016. The second time, the defendant initially tried to speak to the Town Attorney because he had questions; the judge told the defendant that "this is not how [we] do things here" and instructed the defendant to speak only to the judge. *Id*. at Apr. 8, 2016. The clerk then started doing the plea colloquy even though defendant had never said he wanted to take the plea; the defendant's plea was ultimately entered. *Id*. The third time, after an extensive plea colloquy, the judge told the defendant to pay $100 or serve a day in jail. *Id*. at Apr. 11, 2016. The defendant tried to stop and ask the judge about the offer, but the clerk and judge skipped over the question and told the defendant to plead guilty as they were moving on to the next case. *Id*. The last time, the defendant asked what she was charged with after the plea colloquy and seemed not to want to plead guilty, but the Town Attorney told her to say "yes." The defendant did so and the plea was accepted. *Id*. at Apr. 19, 2016.

173. On April 26, one defendant was crying through her plea colloquy, so the judge twice asked her if anyone was forcing her to plead guilty, and the defendant answered that she could not afford to pay the fines. The judge accepted the plea and gave her time to pay. *Id*. at Apr. 26, 2016. On April 28, the judge began a plea colloquy but the defendant interrupted, saying she did not want to plead guilty but that the town attorney was forcing her to do so. *Id*. at Apr. 28, 2016. After a break, the case was called again and the defendant started to cry, saying she was having surgery that week and needed to have the case resolved quickly. *Id*. The defendant insisted that she wanted to plead guilty, but the judge refused because he did not think it was voluntary. *Id*.

174. On April 4, 2016, when a woman was attempting to speak to the judge about her attempts to hire an attorney, the prosecutor talked over her to explain her circumstances to the court; later, the same prosecutor said he could notify a defendant about an adjournment because he was friendly with her. *Id*. at Apr. 4, 2016. On April 8, one defendant addressed questions to the town attorney and seemed to think that he was her counsel; a second got instructions from the town attorney as to what to tell her own counsel (who was not present); and a third was so confused that the town attorney not only tried to explain the defendant's position to the court but also gave her

speak to about his case is the town attorney, it is perhaps unsurprising that defendants think of the prosecutors this way. And, at times, to their credit, the town attorneys sometimes did seem to be trying to assist the unrepresented individuals. But because the town attorneys have an ethical and professional duty that may be adverse to the defendant's interests, such efforts were inappropriate.[175]

Court personnel also generally tried to accommodate defendants who may have been confused because of their limited comprehension of English. Generally, clerks, prosecutors, and judges recognized the need for interpreters and provided them regularly for Spanish-speaking and other defendants.[176] They even obtained a Turkish interpreter on one occasion,[177] although individuals who needed language assistance were sometimes required to come back to court at another time or even on another date in order to have an interpreter present.[178]

As further outlined in Part IV, assigned counsel may not be the silver bullet for achieving due process. Indeed, anyone who has been in a criminal courtroom knows that sometimes defense counsel can aid and abet the injustice against their client in the name of avoiding ruffled feathers. But without counsel, defendants had no ally to explain the basics of the proceedings against them. The clinic's experience demonstrates that counsel can substantially alter the outcome in a Part 155 case. At a minimum, decent counsel could have addressed any client confusion and likely prevented clients from becoming so dejected and overwhelmed by the process that they were reduced to tears.

E. *The System Runs on Money*

It is impossible to be in Part 155 and not notice how much the proceedings are focused on money. The nature of the offenses is rarely discussed. Even when defendants plead guilty, the factual allegations or charges are generally not mentioned by name.[179] Rather, in some circumstances, the plea colloquy amounted to

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his card with instructions to call later if she still had questions. *Id*. at Apr. 8, 2016. On April 12, when a defendant did not know how to respond after the court arraigned her, the town attorney instructed the defendant to say "yes." *Id*. at Apr. 12, 2016.

175. In some cases, for instance, it is not clear what would have been in the defendant's interests. On April 1, in a two year-old case, the judge stated "we need to start taking these cases to trial," and the Town Attorney responded by saying that there were many cases he would be happy to take to trial, but not Mr. Lee's. *Id*. at Apr. 1, 2016. It was the observer's impression that the prosecutor was sympathetic to the defendant – but it is impossible to know if the position was truly in line with the defendant's interests. *Id*.

176. *See, e.g*., *id*. at Mar. 28, 2016 (interpreter ordered); *id*. at Apr. 8, 2016 (Spanish interpreter present); *id*. at Apr. 15, 2016 (Spanish interpreter present); *see also* N.Y. CT. R. § 217.1(a) (McKinney 2019) (obliging courts to provide a translator where a party needs one in order to "meaningfully participate in the court proceedings").

177. CJC PROJECT, *supra* note 13, at Mar. 28, 2016.

178. *See, e.g*., *id*. at Apr. 8, 2016 (case adjourned for Mandarin interpreter).

179. On April 8, for instance, of ten dispositions, only a few mentioned the allegations at all, and none mentioned them by name or with any specificity. *Id*. at Apr. 8, 2016. A private attorney where the client was not present was asked, "Do you have a check? Defendant know he violated these charges?" *Id*. A defendant without counsel was asked, "Name and address? Do you think you satisfied the charges? Do you think you are able to pay the $500 fine? Can you pay today?" *Id*. And a husband and wife were asked, respectively, if they were pleading

little more than the judge asking, "Can you pay the fine? Can you pay today?"[180] And nearly every case heard in Part 155 ends up with the court ordering the defendant to pay a fine based on what the town attorney standing in the courtroom advises the judge that his colleagues across the hall and the defendant agreed upon. We observed private, unrepresented individuals in Part 155 ordered to pay fines ranging from $50[181] to $2,500[182] and corporate defendants (who are required to have counsel) ordered to pay as much as $7,650,[183] or $11,500 for a judgment when neither a representative nor counsel appeared for the defendant business.[184]

New York's District Court Act provides that money collected from Part 155 goes to different public coffers, depending on the legislative source of the violation.[185] Generally, the jurisdiction that crafted the law or regulation underlying the charge thus reaps the benefit of its violation. Penalties or fines based on violations of the North Hempstead Town Code, for instance, would be remitted in a lump sum on at least a monthly basis to the town of North Hempstead.[186] Similarly, penalties imposed due to violation of state navigation law generally remit to the State of New York.[187] Reviewing the docket sheets for one week, though, makes clear that the vast majority of charged offenses are from the town codes of each of the primary towns that Part 155 covers: Hempstead, Oyster Bay, and North Hempstead. The U.S. Commission on Civil Rights reviewed data on of the 100 cities in the United States that garner the greatest percentage of total revenue from court fines and fees.[188] According to the Commission's report, six of the top 100 are on Long Island, including North Hills, a village in Nassau County, which ranks second, with a whopping twenty-five percent of its budget derived from court

guilty to "the charges"; only the wife was asked if she "heard the charges" and if she understood everything. *Id*. Both were asked if they could "pay today." *Id*. Other plea colloquies addressed, briefly, the rights that the defendant was giving up, but again, nothing about what they were pleading to. *See generally* CJC PROJECT, *supra* note 13.

180. *Id*. at Apr. 8, 2016; *see also id*. at Apr. 7, 2016 (colloquy limited to "Can you pay the fines?").

181. $50 appears to be the standard rate for offenses such as being in the park after dark or having a dog without a leash. VILLAGE OF HEMPSTEAD § 1-16 (A) sets the penalty range from $50 to $200 and/or up to 15 days' incarceration for the first offense of any local law of Hempstead where the penalty is not otherwise specified. The statute further notes that each date that the act or failure to act occurs constitutes a separate offense.

182. CJC PROJECT, *supra* note 13, at Apr. 7, 2016 ($1500 fine); *Id* at Apr. 14, 2016 ($2500 fine).

183. A single defendant, who was charged under eight dockets, pleaded guilty to fifteen violations and was ordered to pay a total of $7,650 in fines. *Id*. at Apr. 18, 2016.

184. *Id*. at Apr. 14, 2016.

185. N.Y. UNIFORM DIST. CT. ACT § 2408-a (McKinney 2019).

186. *Id*. at § 2408-a (1).

187. *Id*. at § 2408-a (2). The exception to this is violations of Long Island State Park Commission Regulations, which although violations of state law, incur fines that are passed to the county's general fund. *Id*. at § 2408-a (3).

188. US COMM'N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 21 (2017).

fines.[189] Three Nassau County towns rely on fines for a greater percentage of their budget than did Ferguson, Missouri, the city whose abusive fines practices garnered national media attention, which ranks eighteenth on the list.[190]

Of course, the flip side of this calculus is what this money means to the defendants from whom it is collected. Although there is no data available regarding the financial circumstances of the defendants before the court, our preliminary study makes plain that many find meeting the fines for their charges onerous, if not impossible. On twelve occasions throughout the observation period, defendants publicly expressed concerns about their ability to pay what was being asked of them in a timely way.[191] These defendants included a man who was suffering from throat cancer but still owed $100[192] and a woman who wrote to and called the town attorney to say that she was too poor to fix her home, as they were asking her to do, or even to take off work to come to court.[193]

As noted explicitly by this woman who could not afford to meet the court's demands, for the defendants, the fines levied are only part of the expense they must incur as a result of their charges. They also may have to bear the cost of remedying the situation if the charge is related to a condition on their property, or of coming to court and missing work and/or finding childcare to do so, or both. Of course, hiring an attorney would cost money as well. These costs inevitably multiply over time, since so many of the cases are routinely and repeatedly adjourned to give the defendant more time to make the requested repairs or pay the demanded fines. For a low-income defendant, then, entanglement in a Part 155 matter can become a self-perpetuating cycle of expenses.

Although the town attorneys, acting on behalf of the town fire, sanitation, and building departments, told us in our cases that they were most concerned about "compliance," even speedy compliance after a case is brought does not obviate a person's financial sanction; it only reduces it.[194] Two defendants we observed raised this question explicitly: why would they need to pay fines if they remedied the situation?[195] But although the judge lowered his promised sentence to a fine of

189. Lisa Foster and Joanna Weiss, *American Courts Should not be Turned Into Revenue Machines*, THE HILL (June 8, 2018), http://thehill.com/opinion/judiciary/391449-american-courts-should-not-be-turned-into-revenue-machines.

190. US COMM'N ON C.R., *supra* note 188, at 21.

191. CJC PROJECT, *supra* note 13, at Mar. 25, 2016; *id*. at Mar. 31, 2016; *id*. at Apr. 4, 2016; *id*. at Apr. 7, 2016; *id*. at Apr. 8, 2016.

192. *Id*. at Apr. 7, 2016.

193. *Id*. at Apr. 8, 2016.

194. *See, e.g*., Jana McNulty, Contact Memo (Feb. 15, 2013) (on file with author) (town attorney noted he is focused on compliance more than criminal charges); Adam DelVecchio, Contact Memo (Feb. 27, 2014) (on file with author) (town attorney stated that he is looking for "compliance" but that regardless of compliance, there will be no "dismissal" of charges); *see also* Interview with Chief Deputy Town Attorney Charles Kovit (Sept. 19, 2019) (notes on file with author) (stating that compliance is first priority but that the office of the town attorney typically does not dismiss cases, although they do sometimes dismiss cases "in the interest of justice.").

195. A defendant said she could not pay now or on the day of plea, so she asked the judge if the fine would still apply if she fixed the problem on her property. CJC PROJECT, *supra* note 13, at Mar. 31, 2016. Another

$750 and then $400 instead of $1,000 if the defendant pleaded guilty in one case, in neither case was the fine eliminated.[196] In another instance, following some discussion regarding the defendant's inability to pay, the judge wound up deferring to the town attorney, telling the defendants they would have to take their cases to trial if they could not pay on the next court date.[197] In this regard, and at other times when defendants needed more time to pay, judges seemed to posit trial as a threatened penalty. But these defendants were not seeking to challenge the case against them or vindicate their right to trial; they simply averred that they did not have the funds to pay the levied fines. And, of course, if they did go to trial and lost, they would owe at least as much as they would after a plea, likely more since potentially none of the charges would be dismissed.

Community service is, for some defendants, a viable alternative to a cash payment. But this option was generally limited to younger defendants, and only those charged with the most minor offenses, such as being in the park after dark.[198] Certainly, judges showed some concern about defendants who indicated that they could not pay. And it was apparently the judges' initiative that encouraged the town attorneys to offer community service as an alternative at all. As noted, we also sometimes saw courts lowering fines based on a defendant's expressed concerns. A defendant who was required to pay $50 on the date he was in court dug through his pockets, found $42, and had his fine lowered accordingly.[199] Only once did we see the prosecutor offer a defendant who said he could not pay his fine the alternative of doing community service.[200] But this was not an alternative open to all defendants, as others who said they could not pay were simply given more time to pay or told they would need to go to trial.[201]

Finally, although money seems to be the order of the day in Part 155, the specter of incarceration not only hangs over the proceedings but also is actually part of the process, since virtually all offenses are violations that carry a jail term of at least 15 days.[202] While we observed no jail sentences imposed, in several cases the judge set bench warrants, which could easily result in arrest and incarceration for individuals pulled over for a simple traffic stop.[203] On one day, the court ordered four

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defendant told the court that he could not pay the $1,000 fine because he had no job but had corrected the issue. *Id*. at Apr. 7, 2016.

196. *Id*. at Apr. 7, 2016.

197. *Id*. at Apr. 7, 2016 (defendant told the court that he could not pay the $1,000 fine because he had no job but had corrected the issue).

198. *See, e.g*., *id*. at Apr. 7, 2016 (17 year-old defendants).

199. *Id*. at Apr. 15, 2016.

200. *Id*. at Apr. 21, 2016 (defendant told court that he could not pay the $100 fine and offered to perform community service instead).

201. *See id*. at Mar. 25, 2016; *id*. at Mar. 31, 2016; *id*. at Apr. 4, 2016; *id*. at Apr. 7, 2016; *id*. at Apr. 8, 2016.

202. *See supra* notes 16–20; *see also*, *e.g*., VILLAGE OF HEMPSTEAD § 1-16 (A)(1) (stating that any act committed in violation of the Village Code or any local law is guilty of a violation and may be subject (for a first offense) to 15 days' imprisonment).

203. CJC PROJECT, *supra* note 13, at Apr. 4, 2016 (two cases had come off the warrant vacate calendar and several warrants ordered at the end of the morning's proceedings).

warrants and marked the file of one of them for bail to be set.[204] Further, short jail terms were sometimes ordered as a penalty to be imposed for failure to pay a fine by a certain deadline.[205] Just as the fines seemed to vary significantly from case to case, these penalties varied a great deal among defendants, with no clear pattern as to how the sentences were meted out.[206]

In two ways, however, the system of fines and fees was an improvement over the system in the rest of District Court. First, because the offenses are typically not New York Penal Law offenses, convictions for violations typically do not involve mandatory fees and surcharges in addition to the levied fines.[207] In the rest of District Court, where state law violations are prosecuted, any conviction, even on a non-criminal violation that will include sealing the person's record, comes with at least $120 in mandatory costs that cannot be modified or waived, regardless of the defendant's financial status.[208] Second, unlike community service sentences in the rest of District Court, defendants in Part 155 who are permitted to perform community service as a sanction need not pay an administrative fee to a contract agency to set up the community service.[209] In Part 155, a defendant can perform community service at the location of her choice, and, upon proof of completion, the court will dismiss the case in the interests of justice.[210]

F. *There is No Data Trail and Limited Meaningful Review*

Part of the difficulty in examining the proceedings in Part 155 is that so little of what happens there sees the light of day. The court collects virtually no data to feed statistics related to Part 155, so understanding the scope of the problem means relying on the sort of preliminary observations that our clinic undertook. The primary data points that the court clerks collect and report are the number of cases docketed and the number of cases closed each year, by town.[211] Because they are

204. *Id*. at Apr. 11, 2016 (warrants issued at end of proceedings).

205. *Id*. at Apr. 1, 2016 (defendant warned he will face jail time if there was no inspection by a certain date or if fines were not paid by 4:00 PM).

206. *See generally* CJC PROJECT, *supra* note 13.

207. *See* N.Y. PENAL LAW § 60.35 (1)(a)(ii) (McKinney 2019) (excluding violations outside the penal law from mandatory fees and surcharges). Some statutory violations heard in Part 155, such as environmental conservation charges, do include their own mandatory fees. *See, e.g*., Environmental Conservation Law § 71-0213(1). *See also* NEW YORK STATE OFFICE OF THE STATE COMPTROLLER, HANDBOOK FOR TOWN AND VILLAGE JUSTICES AND COURT CLERKS 42 (2019), https://www.osc.state.ny.us/localgov/pubs/jch.pdf.

208. N.Y. PENAL LAW § 60.35 (McKinney 2019). Note, that even though the mandatory surcharge may not be waived, it may be deferred due to financial hardship. N.Y. CRIM. PROC. LAW § 420.40 (McKinney 2019).

209. In the First District, defendants sentenced to community service— or even required to do community service as a precondition to getting an adjournment in contemplation of dismissal, typically must perform the service through EAC Network, an agency with contracts with Nassau County to coordinate the work with local organizations. Defendants are required to pay an administrative fee to EAC ranging from $75 to $200 depending upon the number of hours of community service ordered and whether they are represented by appointed counsel. Nassau County Dist. Atty. Referral Form for Community Serv. Prog. (Sept. 2008) (on file with author); CJC PROJECT, *supra* note 13.

210. N.Y. CRIM. PROC. LAW § 170.35 (McKinney 2019).

211. Interview with Bruce Kahn, Management Analyst, New York Unified Court System (Aug. 27, 2014).

required to provide monthly payments to each of the towns for violations of their local law, the amount of money that the court generates for each local jurisdiction is also ascertainable, if not publicly available.[212] But the number of trials? The number of people who appear pro se? The requests for counsel, granted or denied? The offenses for which people are charged and convicted? None of this basic information is collected except insofar as some of it may be recorded on an individual case file.

There is also limited oversight of Part 155. The courtroom is open to the public, of course, and the proceedings are typically recorded.[213] But with no assigned counsel for individuals in the courtroom, there is little awareness in the district about what happens there.[214] As we considered how we might address the issues in Part 155, I consulted with leadership at the assigned counsel defender plan, Legal Aid, and many local private attorneys. In almost every instance, I had to explain not only the problem, but also the nature of the cases in the part. Further, although defendants are entitled to appeal their convictions, there is no way of tracking whether these cases are ever appealed to County Court because the data is not collected.[215] As a practical and often legal matter, there is virtually no oversight in Part 155.

In response to these concerns, we drafted recommendations for how to ameliorate some of the injustices we observed in Part 155:

- Appoint counsel
- Advise defendants of their right to counsel
- End the pro se meetings
- Ensure that defendants understand
- Consider alternative remedies
- Collect data

These are predictable rejoinders to the concerns we raised. Notably, subject to financial constraints, most of the recommendations are within the control of the court administration and would not require a legislative fix. Indeed, several of them merely ask the court to follow existing legislative rules. The decree of the supervising judge and the new signs were essentially the court administration

212. *Id.*

213. State law requires that proceedings be recorded, *see* People v. Wanass, 54 N.Y.S.3d 488, 489 (App. Term 2017) (citing Jud. L. § 295), and that is certainly the norm in Nassau. Interestingly, however, when a defendant called our clinic complaining that the sitting judge had outright denied her specific request for counsel, the proceedings that day were not recorded. CJC PROJECT, *supra* note 13.

214. Legal Aid and the assigned counsel defender program administrator both indicated that their contracts with the county did not include cases in Part 155, and consecutive leaders of the Nassau County Criminal Courts Bar Association had no idea what was occurring there. *Id.*

215. For some details on appeals of local court cases, *see generally*, N.Y. STATE ASS'N OF MAGISTRATES COURT CLERKS INC. AND N.Y STATE MAGISTRATES ASS'N, OCA'S OFFICE OF JUSTICE COURT SUPPORT TOWN AND VILL. COURT CLERK OPERATIONS MANUAL, (2015), http://www.nycourts.gov/courts/townandvillage/FinalJusticeCourtManualforUSCsite.pdf.

addressing the first three of these recommendations. These changes occurred even though we never gave them the full list of recommendations, since our meeting with the supervising judge seemed to moot most of the white paper.[216] It felt like a solid start when the court announced the new rules and distributed them to all the contract counsel. As noted below, however, the extent to which this brought about actual change, or just the potential for change, is not clear. Only further study or data collection by the court itself would reveal how, or if, the process in the courtroom really improved for the clients there. In the meantime, there is much to be gained from reflecting on the experience and what it tells us about how courts that prosecute low-level cases operate.

IV. DISJUNCTURE AND DRIFT

We are used to evaluating the fairness of a case or a trial by analyzing what precedent is created or what happens during the proceedings in the courtroom. To know whether a person's Fourth, Fifth, or Sixth Amendment rights have been violated or upheld in a particular case, we look to the rulings that a sitting judge has issued on written motions, after a hearing or during a trial, all during a specific case before her. Because of this, challenges to the proceedings in Part 155 could occur in a courtroom-specific manner. For instance, a defendant who felt coerced to plead guilty because she had not received the advice of counsel and the judge and prosecutor were pressuring her could have appealed her conviction on due process grounds.[217]

But another way to understand and ultimately challenge the unjust distance between due process ideals described in Part II and the practices that our case study revealed in Part III is to think of the court*house*, not just the court*room*. This Part looks to administrative law theories to build the case that the courthouse is analogous to a bureaucracy and suffers from some of the same dysfunctions that plague other administrative agencies, specifically, "bureaucratic drift."[218] This

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216. The meeting with the supervising judge before publication of any white paper was suggested and then arranged by Judge A. Gail Prudenti, who was then a special advisor to the Dean of Hofstra Law School. *See generally* CJC PROJECT, *supra* note 13. In 2017, she became the Dean. *Id*. Judge Prudenti had previously served as the Chief Administrative Judge of the State of New York and, in that capacity, appointed the supervising judge of the District Court. *Id*. It is not clear if that relationship had any bearing on the outcome of the meeting. *Id*.

217. Indeed, the clinic has been approached by defendants in exactly these circumstances. One defendant in particular told us that she understood that the charges against her were being dismissed, yet she actually pleaded guilty to over a dozen violation-level offenses. *Id*. As is often the case, however, the risk involved in reopening her case (winding up with a multitude of fines and fees, all of which she had been spared), outweighed the benefit of seeking to undo the outcome. *Id*.

218. *See* Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 427 (2013) ("'bureaucratic drift,'. . .occurs when an agent uses its discretionary authority to pursue policy goals that diverge from the principal's"); Macey, *supra* note 8, at 671–72 (defining bureaucratic drift as "changes in administrative agency policies that lead to outcomes inconsistent with the original expectations of the legislation's intended beneficiaries"); Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 257–58 (2015) ("Bureaucratic drift is the difference between the policy preferences of Congress and the policy preferences of the agency").

phenomenon occurs when an agent charged with administering, implementing, and executing ideas and rules of a principal does so in a way that is inconsistent with the principal's original intent.[219] Just like in an agency, there are a host of policies and rules that get made, or not, at the administrative level in the courthouse. To the extent that people at the top and bottom of the bureaucracy disregard due process norms, their rules (or lack thereof) may jeopardize the rights of defendants in a sort of "judicial drift" from constitutional, statutory, and ethical obligations.

The notion that there may be administrative law overlays in the criminal law is not new. Typically, however, legal academics writing in this area have argued that legislatures or courts have delegated their power to entities outside the court and the adversarial process, such as executive branch agencies,[220] prosecutors,[221] or law enforcement.[222] There is, however, a gap when it comes to scholarship about how courts act as administrative bureaucracies themselves. Judges may function as administrators not just as they issue opinions in individual cases, but also as they set (or fail to set) internal, court-wide policies and rules, which in turn affect due process norms in individual cases.[223]

A. *Administrative Law in the Courthouse*

Courts are administrative bureaucracies because they are complex organizations with many moving parts and hierarchical structures.[224] The problem, as Owen Fiss argued decades ago, is not the status of courts as bureaucracies per se, but rather

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219. *Id.*

220. Nikhil Bhagat, *Filling the Gap? Non-Abrogation Provisions and the Assimilative Crimes Act*, 111 COLUM. L. REV. 77, 100 (2011) ("Since [the Court's opinion in *Loving v. United States*, 517 U.S. 748, 768 (1996)], it has generally been regarded as settled law that as long as Congress fixes the maximum penalty by statute, a delegated agency is free to criminalize virtually any behavior through administrative regulation.").

221. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV 869, 895 (2009) (Analogizing federal prosecutors' offices to administrative agencies that have accumulated executive and adjudicative, power, and arguing that prosecutors' offices should, like agencies, have controls to ensure those powers are not abused.); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) ("[T]he American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize.").

222. John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205, 205–06 (2015) (arguing that courts regulate the activities of law enforcement both directly (by ordering police to engage in or refrain from specific behaviors) or indirectly (by "enunciat[ing] constitutional values and creat[ing] incentives for political policy makers to write the conduct rules."); *see also* O'Rourke, *supra* note 218, at 409 (contending that courts, in announcing decisions on constitutional criminal procedure, act as regulators of police, who in turn have a "policy space" to comply or deviate with the doctrinal rules).

223. Very little legal academic work makes the direct analogy between courts and administrative agencies or as rule makers inside their own courthouses. Owen Fiss writes about the federal judiciary as a bureaucracy, critiquing judges who seek to manage caseloads by delegating their responsibilities as adjudicators in specific cases to non-judges, but not with regard to court-wide rulemaking as it affects criminal defendants. *See* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1458 (1983).

224. *Id.* at 1444. Fiss worried about courthouse bureaucratic dysfunction, but did so regarding federal judges' delegation of decision-making (particularly opinion-drafting) to special masters, magistrates, law clerks, and staff attorneys. To Fiss, this signaled a delegitimization of judicial authority. *See id.* at 1456–57.

the dysfunction that so often seems to attend that status.[225] In administrative agencies, bureaucrats charged with announcing and implementing rules may deviate, sometimes intentionally, from the mandate originally delegated to them. Political scientists call the distance between intended policy outcomes of legislators and actual outcomes based on the actions of agency employees "bureaucratic drift."[226] Drift may be the result of "the opportunistic behavior"[227] of "recalcitrant bureaucrats."[228] Alternatively, it may describe any scenario in which agency bureaucrats "stray from the principal's wishes when implementing policy,"[229] or otherwise run afoul of the desires of the political coalition that established the original legislation.[230]

Such drift occurs not only at the higher administrative levels of a bureaucracy, but also, perhaps even more so, as the rules are administered down the line by lower-level judges and other courthouse staff. Political administration scholars have long recognized this interplay between administrators at the top who can announce or shape policy and the so-called "street level bureaucracy" that helps implement it.[231] These individuals at the lower rungs of a bureaucracy wield an unexpected power as they interact directly with the public and exercise discretion in their execution of policies handed down to them by upper level administrators.[232] Like teachers and police officers, court clerks and possibly even judges in low-level criminal courts may be considered street level bureaucrats because they interact closely with litigants.[233]

In the court context, we might label these multi-tiered, administrative law dynamics as "judicial drift." These administrative law principles provide a helpful lens for analyzing the District Court, insofar as it has a policymaker at the top of a bureaucracy that has allowed for drift from constitutional, statutory, and ethical

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225. *Id.*

226. O'Rourke, *supra* note 218, at 422–23. Of course, in an actual agency setting, the drift is from what Congressional legislation intended. *See* Macey, *supra* note 8, at 671–72 ("The goal of Congress is to ensure that administrative agencies generate outcomes that are consistent with the original understanding that existed between Congress and the various interest groups that were parties to the initial political compromise. The problem facing Congress can be described as bureaucratic drift, which refers to changes in administrative agency policies that lead to outcomes inconsistent with the original expectations of the legislation's intended beneficiaries.").

227. Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 502–03 (1989).

228. Jonathan R. Macey, *Winstar, Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173, 180 (1998).

229. Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1651–52 (2018).

230. Matthew D. McCubbins, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–34 (1989).

231. *See* Michael Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual Engaged in Public Services* 13 (1980).

232. Shannon Portillo & Danielle S. Rudes, *Construction of Justice at the Street Level*, 10 ANN. REV. OF L. & SOC. SCI. 321, 324 (2014).

233. *See* Emilie Biland & Helen Steinmetz, *Are Judges Street-Level Bureaucrats? Evidence from French and Canadian Family Courts*, 42 L. & SOC. INQUIRY 298, 299–300 (2016).

norms. The rest of this Part teases out the application of theory to the reality on the ground in District Court.

B. *Judicial Drift in District Court*

First, although the law does not articulate the duties of a supervising judge with specificity, these judges have rulemaking and administrative powers.[234] Like an agency head, a supervising judge is charged with ensuring that her courthouse is implementing procedural law and justice as set forth in opinions by New York appellate courts and the Supreme Court and statutes of the New York legislature. Specifically, the supervising judge's "agency"—the District Court—must realize the rule of law and ensure the due process norms outlined in Part I are not undermined.[235]

With regard to Part 155, the very fact that so many of the problems were ostensibly fixed following a single meeting with the supervising judge suggests the extent of the administrator's power in the courthouse and their effect on defendants' procedural rights. In our case, the main switch occurred virtually overnight, on paper, with the posting of a new advisory to litigants that they need not meet with the prosecutor before having their case called and that they had a right to counsel,

234. Local courts (including district courts) are explicitly empowered to make their own court procedural rules. N.Y. COMP. CODES R. & REGS. tit. 22, § 200.21 (2019). There are few rules expressly addressed to the powers of supervising judges, however. The court system states that supervising judges work under the administrative judge of each judicial district to facilitate the smooth operation of the trial courts: "Supervising Judges are responsible for assisting Administrative Judges in the on-site management of the trial courts, including court caseloads and personnel and budget administration. Supervising Judges manage a particular type of court within a county or judicial district." *Court Administration: Executive Officers, Administrative & Supervising Judges*, N.Y. CTS., http://ww2.nycourts.gov/Admin/directory.shtml (last visited 2/1/2020). The specific duties of the supervising judge are not extensively articulated in the law, however. The Rules of the Chief Administrative Judge barely mention them. In pertinent part, these rules indicate only that the Chief Administrative Judge may appoint supervising judges, and that supervising judges may recommend non-judicial personnel for appointment or removal. *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1.1(b), 80.1(b)(3), 80.2(a)(3). Case law does not do much to further elucidate the role of the supervising judge. What is available, however, seems to substantiate the notion that supervising judges have discretion with regard to administrative matters. *See, e.g.*, People v. Granitelli, 438 N.Y.S.2d 707, 714 (Sup. Ct. NY, Crim. Term Suffolk Cty. 1981) (designating judges to particular calendars, or transferring cases, or signing off on certificates of relief from disabilities). Supervising judges cannot, however, override substantive decisions of other judges, such as a trial judge's sealing orders. Mendez ex rel. Bennett v Sharpe, 93 Misc.2d 776, 779 (Sup. Ct. 1978).

235. In some senses, the New York State courts are explicitly *not* considered an administrative agency under the Administrative Procedures Act, but they do have an arm that is: the Office of Court Administration ["OCA"]. OCA is an actual state agency that serves as "the administrative arm of the court system." *Court Administration: Office of Court Administration*, N.Y. CTS., https://ww2.nycourts.gov/Admin/oca.shtml (last visited Feb. 1, 2020). OCA is run by the state's Chief Administrative Judge who is charged with overseeing the day-to-day operations of the courts statewide. *Rules of the Chief Administrative Judge*, N.Y. CTS., http://ww2.nycourts.gov/rules/chiefadmin/index.shtml (last visited Feb. 1, 2020). A series of Deputy Chief Administrative Judges (and a host of bureaucrats) work under the Chief, including one who is specifically responsible for operations in trial courts outside of New York City and the Town and Village Courts statewide. *Court Administration: Deputy Chief Administrative Judge (Outside NYC)*, N.Y. CTS., http://ww2.nycourts.gov/Admin/directory/caruso_vito.shtml (last visited Feb. 1, 2020).

even appointed counsel.[236] The new signs replaced the old signs, and the new policy replaced the old policy, just like that.

Beyond the confines of Part 155, there are a number of other areas in the District Court that have or lack policies in ways that manifest judicial drift, infringing on defendants' rights across the board. While an individual courtroom judge might assign counsel in a particular case, for instance, there are a number of courthouse practices related to that Sixth Amendment issue. Such policy areas include the timing and process for assessing defendants' financial eligibility for court-appointed counsel and the timing and process for assigning trial counsel. Determining when a defendant's appearance may be waived, which raises Fifth and Sixth Amendment rights as well as ethical and fundamental fairness issues regarding coercive plea policies, is also subject to court-wide policy. Indeed, on quite a few occasions, judges have actually invoked the supervising judge's pronounced (but unpublicized, and apparently also unpublished) rules as they refused to waive a client's appearance. Many additional issues call for a courthouse policy. For example, instead of telling clients that they must return on yet another new date when there is to be a change in venue to a different judge because a public defender was just assigned, cases and clients could be sent "forthwith" to a courtroom down the hall.[237]

In District Court, like many other governmental bureaucracies, there is a second layer of drift below the supervising judge: the street level bureaucracy that works in the courtrooms and offices in the courthouse. As the literature suggests, those street-level bureaucrats have authority and discretion in deciding whether or how to implement rules in practice, making them the "ultimate policy-makers."[238] As in any bureaucracy, the success or failure of the agency's mission depends not only on the rules set at the executive level, but also on how those lower down in the hierarchy interpret, implement, and administer those rules. In District Court, the judges, clerks, prosecutors, and others below the supervising judge act as agency bureaucrats in making sure that court policies, and the constitutional and legal ideals that they seek to embody, get implemented on the ground. Therefore, those policies, and the degree to which those at all levels of the bureaucracy comply with them, may have as much to do with whether individual litigants actually obtain justice as do the actions of individual judges in individual cases.

The realization that the locus of power would be the supervising judge and his rulemaking ability led to initial success for our work on Part 155. But the failure to appreciate the extent of the courthouse bureaucracy led to a subsequent failure. Months after the single sign mandating meetings with the prosecutor had been

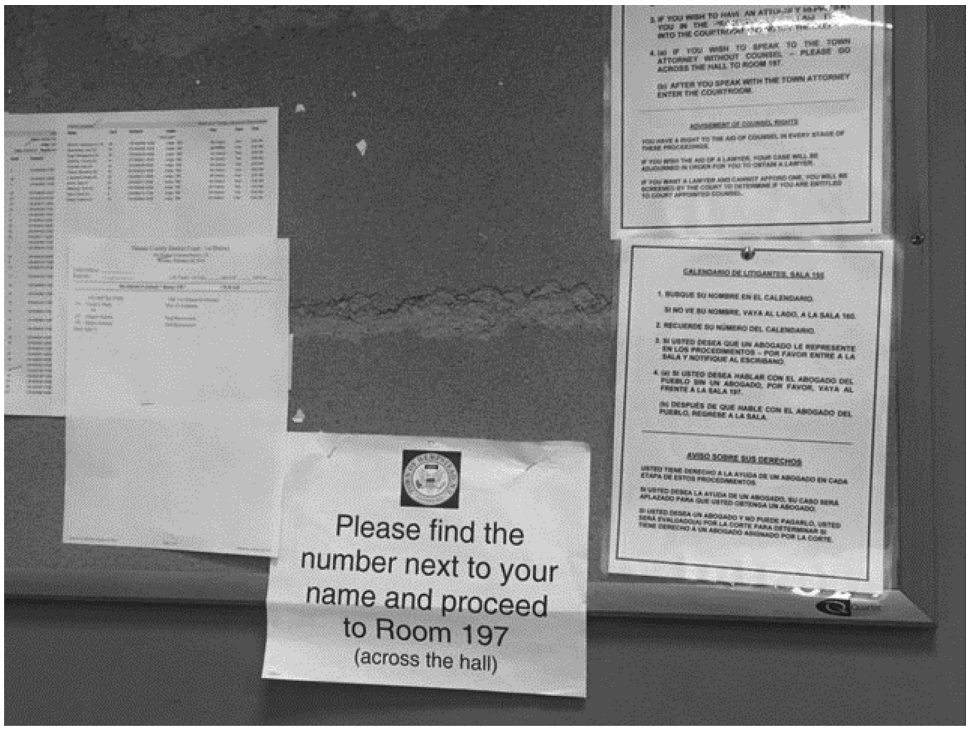
236. *See supra* Fig. 2.

237. For a short time in 2018, at least in some instances, court files were being sent "forthwith" to Legal Aid courtrooms when a judge found a person eligible for assigned counsel. By the end of 2018, this policy appeared to be followed only periodically.

238. Shannon Portillo & Danielle S. Rudes, *Construction of Justice at the Street Level*, 10 ANN. REV. OF L. & SOC. SCI. 321, 322, 330 (2014).

replaced by the two signs indicating that counsel might be obtained or even assigned, a new sign appeared:

Figure 3



The sign essentially reestablished the status quo before the supervising judge changed the rules. It instructed readers to find their docket number and proceed to a room across the hall: the tiny conference room used exclusively for the town attorney to negotiate pleas with defendants from Part 155.

The symbolism was rich. While not literally covering the signs that announced the allowance for counsel (above right), it dwarfed their message in clarity and font size—and added an official-looking logo for good measure. The Town Attorney's seal at the top suggested that the change had not actually come from court employees, but no court employees endeavored to remove or modify it, and as institutional players present in the court on a daily basis, the town attorneys certainly play a role in the court's bureaucracy. Indeed, as if the tangible manifestation of judicial drift were not enough, more than a year after the signs announcing the right to counsel had first been hung, another student went to Part 155 to observe

the proceedings for a week. Any litigant who arrived before the judge was told by a court officer to go meet with the town attorney across the hall, just as they were when we initiated our observations.[239] The clerk's perfunctory words at the outset of the proceedings remained the same, warning those who had not yet conferenced their cases with the town attorney to do so, and neglecting any mention of the right to counsel. The rules should have been clear to the judges and attorneys in the room, if not to everyone in the bureaucracy. Yet the court had drifted far from the ideal, even after the rules had nominally changed.

V. WHY THE DRIFT PERSISTS: THE ABSENCE OF POLICE AND FIRE OVERSIGHT

Just as administrative law provides a diagnosis for what was ailing Part 155, it provides a touchstone for why judicial drift has persisted and how it might be remedied. McCubbins, Noll, and Weingast (collectively known as "Mcnollgast"),[240] the political scientists who identified drift as an example of bureaucratic dysfunction, also identified how legislators can try to fix the problem, further illuminating our understanding of the issues in District Court.

Mcnollgast highlighted the need for the political coalitions behind legislation to anticipate and try to guard against it with *ex ante* structures and process.[241] In this solution to a classic principal-agent problem, the agent must create mechanisms that will seek to "nip[] bureaucratic drift in the bud" by limiting bureaucratic flexibility.[242] In the federal agency delegation scheme, where Congress delegates rulemaking authority to an administrative agency, such tools to constrain agency divergence from the interests underlying the enabling legislation might include *ex ante* protections like building in an internal or external review process (including statutory standards for review), an extensive public hearing process open to a wide array of interests,[243] and procedural delay.[244] Other guards against bureaucratic drift are *ex post* enforcement features, such as designation of a particular agency[245] or member of the public or affected constituency[246] to prosecute perceived

239. Even more recently, checking into the courtroom on August 29, 2019, for another purpose, we observed a court clerk instructing all of the litigants gathered in Part 155 to go meet with the Town Attorney before their cases were called. *See* CJC PROJECT, *supra* note 13, at Aug. 29, 2019.

240. Macey, *supra* note 8, at 703.

241. McCubbins, *supra* note 230, at 433–34.

242. Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 502–03 (1989).

243. Macey, *supra* note 8, at 675.

244. *Id*. at 671–72.

245. McCubbins, *supra* note 230, at 470 (arguing that the amendment to the Clean Air Act which appoints Attorney General to represent the EPA in all federal court cases effectively grants executive veto power over EPA's challenged policy decisions).

246. David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 742 (1983) (explaining Clean Air Act provision for private citizens to enforce the Act in federal district court).

violations of delegated authority,[247] strategic resource allocation or deprivation,[248] principal or third party investigations into the performance of an agency,[249] supervision by watchdog agencies, such as the Office of Management and Budget or the General Accounting Office,[250] or the legislative veto.[251] Even creating temporary legislation or sunset provisions, which preordain a law's expiration date, can guard against bureaucratic drift.[252]

Mcnollgast have classified the bulk of these measures into two types of curbs against drift: "police-patrol oversight" and "fire alarm oversight."[253] Police patrol involves surveillance initiated and controlled directly by the principal, typically a legislator, to ensure compliance.[254] This oversight could include reading agency reports, conducting field investigations, commissioning studies from third party evaluators, and holding hearings, among other options.[255] Fire-alarm oversight is more decentralized and indirect. Instead of the principal steering the review of agency actions and seeking to determine itself whether there has been deviation from original policy goals, the principal puts rules, practices, and procedures in place so that other affected constituencies can "sound the alarm" when they observe bureaucratic drift occurring.[256] To assist in this effort, the legislator or principal might provide information to citizens or interest groups, formal or informal reporting procedures, and designated remedies, then step back and wait for advocates to flag any issues of drift.[257] The principal may even step in to investigate, organize parties into some collective action, or otherwise respond to the alarm itself. But someone outside the legislature pulls the fire alarm.

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247. *See also* Macey, *supra* note 228, at 179–80 (*"*the cure for bureaucratic drift is ex post control over bureaucratic behavior by congressional subcommittees, oversight by specialized agencies such as the Congressional Budget Office and the General Accounting Office, and reliance on interest group notification. This oversight is supplemented by legal requirements that agencies provide information about themselves to their political watchdogs. Similarly, micro rules (like the prohibition on ex parte communication that enables politicians, but not interest groups, to gain direct one-way access to administrators) and macro rules (like congressional control over agency funding) permit politicians to control bureaucratic drift.").

248. *See, e.g.*, Light, *supra* note 229, at 1651–52 ("there are numerous informal ways to reduce program resources, including by slashing agency budgets, reassigning staff, declining to enforce a regulatory program, or seeking delays in the courts.").

249. *See* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1456 (2003); *see also* McCubbins, *supra* note 230, at 472–74.

250. McCubbins, *supra* note 230, at 434 (congressional oversight into the agency actions may take place through annual budgetary process, reauthorization of an agency's programs, and watchdog agencies such as the Office of Management and Budget and the General Accounting Office).

251. Macey, *supra* note 8, at 671–72.

252. Jacob E. Gersen, *Temporary Legislation*, 74 U CHI. L. REV. 247, 279 (2007).

253. Matthew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI.165, 166 (1984).

254. *Id*.

255. *Id*.

256. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1752 (2007).

257. *Id*. at 1769.

Professors Richman and Vorenberg have lamented that these tools are not available to provide oversight of law enforcement agencies when legislators effectively delegate to them the job of policing or prosecuting the public.[258] The same failure is true in the courthouse, where there is drift with insufficient, if any, tools designed to recognize or control it. The policing powers of surveillance are not really built into due process jurisprudence, which relies primarily on judges' respect for precedent as well as subsequent appeals and appellate decisions to curb any drift among wayward lower court judges. But if trials are rare in Part 155, appeals are almost unheard of—in seven years, we never observed either one.[259] And as explained above, virtually no data is collected about what occurs in the District Court, much less disaggregated data specifically about Part 155.[260] What is clear is that the supervising judge, who should have primary responsibility for administering procedural justice in the courthouse, appeared to have no knowledge of the problems in Part 155 until our clinic raised them, possibly because the courtroom, focused on local violations, sits near the bottom of the courthouse hierarchy.

The one tool that does serve as a sort of hybrid police and fire alarm in District Court is the stakeholders' meetings that the supervising judge convenes twice a year.[261] At his discretion, the supervising judge invites a range of interested parties to discuss court business, including representatives from the offices of the public defender (Legal Aid), the district attorney, the court clerk, the conflict counsel provider, and the defense bar association. This group allows for some formalized input and feedback from different stakeholders on implementation of assorted norms, policies, and programs from the highest levels of the court system. In fact, it is where the Judge announced the changes he planned to make in Part 155 after our initial discussion with him, which was the first time the clinic was invited to attend.[262]

While these meetings provide a forum for raising and debating proposed policies, the supervising judge both literally and figuratively sets the agenda and determines the court's policies. Unlike the process for issuing agency rules, the stakeholder meetings have no openings for public input or participation. There is no formalized notice-and-comment procedure or voting upon court-issued rules, even among the meeting's invitees. And there is no built-in judicial review to

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258. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 768–69 (1999); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

259. *See* CJC PROJECT, *supra* note 13.

260. Interestingly, town and village courts in New York have explicit record-keeping requirements, although the state rule does not provide for the collection of those records as data. *See* 22 NYCRR 200.23 (requiring maintenance of records on 16 different issues, including, *inter alia*, constitutional and statutory rights of which defendant was advised at arraignment).

261. Our clinic was unaware of these meetings and began to be invited only when the changes to the Room 155 signs/policy were announced. Even then, students were not permitted to attend. But the clinic director (this Article's author) is now a routine member of the group. *See* CJC PROJECT, *supra* note 13.

262. *See* CJC PROJECT, *supra* note 13.

assess whether a policy, such as a new court part dedicated to opioid or license suspension cases, is consistent with due process norms.[263] In our case, as discussed below, where even the provision of some procedural justice may not have resulted in substantive justice, we had no recourse other than to return to the supervising judge or start from scratch with another strategy. Yet, it is significant that the supervising judge has left space during these meetings to hear from interested parties about their concerns.

But even at its best, the stakeholder meeting is only effective as a check on judicial drift if the supervising judge recognizes the drift and brings it before the stakeholders, or, more significantly, if stakeholders are willing and able to sound an alarm. The drift we reported in Part 155 went unnoticed, or at least unremarked upon, not only by the supervising judge, but also by the rest of the stakeholders and anyone else involved in the bureaucracy. Everyone seemed to be oblivious to the fact that there were due process violations or any sort of problems in Part 155. The judges who preside in Part 155 tend to be newly appointed and are posted for a short period until they get assigned a permanent courtroom.[264] Almost no lawyer we spoke with in the process of our investigation into Part 155, including those who have spent their careers in Nassau County, had either appeared in Part 155 or knew about its problems. Because the cases are prosecuted by town attorneys rather than district attorneys, there is no one from the state prosecutor's office who would be practicing in Part 155. Further, the town attorneys who do appear there have no reference point for comparison since they do not prosecute state-level offenses in the other criminal parts in the District Court.

Even if people in the courthouse noticed the issues in Part 155, the incentives of all the parties—with the notable exception of compliance with professional responsibility standards—cut against focusing a critical eye on these proceedings.[265] Before we got involved in Part 155, the judges and prosecutors still got to move dockets. They got convictions. They got elected. They got money for the county and other government agencies. They avoided cumbersome litigation. They even generally got proof that the "problem" with a property giving rise to so many cases

263. Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 861 (2011).

264. At the time of our court observations, the only judge we observed with a permanent courtroom assignment sat on a civil calendar and was merely filling in for that one date. Since that time, at least some of them have been promoted to have their own regular courtroom calendars.

265. Several of these parties regularly stationed in Part 155 would have had an ethical obligation to notice and actually do something about the sort of unjust activities that were occurring in Part 155, so their ignorance is not an excuse. In New York, ethical rules require that prosecutors to do justice. N.Y. R. OF PROF'L. CONDUCT r. 3.8 cmt. 1. Judges are required to be faithful to the law and to ensure that staff under them "observe the standards of fidelity and diligence that apply to the judge." N.Y. COMP. CODES R. & REGS. Tit. 22 § 100.3 (2019). But plainly, just as their county contractual obligation failed to move the defender agencies to act, these rules of ethical conduct were not sufficient to incentivize compliance with the rights of the defendants.

in Part 155 had been solved, since doing so is often a mandatory condition for obtaining a plea or non-criminal disposition.[266]

In the District Court, there are also essentially no other fire alarm mechanisms to oversee the drift in the event that the limited police oversight fails. The outside parties that might have scrutinized the agency actors were just as ignorant of the problem and, even apprised of it, manifested no apparent incentive to solve it. The assigned counsel provider and the public defender would seem to be in the position of those who might sound the fire alarm even had a seat at the table in the stakeholders' meeting. But although both of these organizations' contracts to provide defender services to the county technically required them to cover cases in part 155, neither appeared there. Since no one in the courthouse was asking them to pay attention to the proceedings, they had no inclination or incentive to do so. If they sought to check the drift, they could reasonably fear being compelled to do more with less, finding themselves obliged to cover a whole new set of cases under already strained budgets and manpower. Moreover, these institutional providers were and are beholden to the County for their contracts and may have conflicting interests in justifying their budgets.

Finally, the defendants themselves, who frequently had little idea what was happening in their own cases, did not have the political power to bring to light their concerns beyond in front of the judge in the courtroom on a given day. As described above, the litigants were directed by signage and court clerks to abdicate some of their rights before their cases even got called. Then, they often lacked any meaningful opportunity to address the court themselves, much less to actually litigate their cases. Instead, they tended to resolve their cases through a sort of "hallway justice," where cases were worked out between parties, regardless of rights.[267] Here, these unrepresented defendants and town attorneys—with unequal knowledge of the legal landscape—often devised a solution with virtually no input from the court. Part 155 defendants were thus hardly in a position to reach out to the supervising judge, whose office sits in a suite behind locked, mirrored doors. There was not even a suggestion box posted.

What we were observing in Part 155 was dysfunction that persisted because of limited worldviews and limited incentives. As in the original telling of the Kitty Genovese case, the due process drift in the courthouse was a problem that should have provoked everyone to sound the alarm, but was a problem that was no one's

266. *See supra* Parts III.C, III.E (discussing litigants required to fix conditions on their property); *see also* interview with Charles Kovit, Chief Deputy Town Attorney (Sept. 20, 2019) (explaining that compliance is first goal of office, and fines still typically accompany cases even after compliance).

267. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981) ("The fate of most of those accused of crime is determined by prosecutors, but typically this determination takes place out of public view – in the hallways of the courthouse, in the prosecutors' offices, or on the telephone."); *cf.* N.R. Kleinfield, *Where Brooklyn Tenants Plead the Case for Keeping their Homes*, N.Y. TIMES, May 20, 2018, at A1 (describing common practice of settlement discussions in hallways of Brooklyn Housing Court).

to claim.[268] Given this inaction, some agent or institution must be tasked with keeping an eye on what happens in Part 155 and in the District Court generally. To begin to address the gap between due process ideals and reality requires imposing more policing and fire alarm powers than those that currently exist in the administration of the District Court.

VI. REMEDYING DRIFT: OMBUDS AS WATCHDOG AND BULLDOG

Acknowledging bureaucratic drift has given rise to a host of ways to try to prevent or to ameliorate it when it occurs in the administrative law context. Because the analogous phenomenon has not been theorized in the judicial system and because of all the countervailing incentives described in Part V, however, there are no such controls for its effects in the courthouse, either in theory or in practice. For that reason, low-level courts should create the position of due process ombuds, charged with both identifying and seeking to constrain instances of drift.

The ombuds resolves two issues that allowed the due process problems at District Court to persist: a failure to identify the problem in the first place and a failure to ensure ongoing compliance once the problem was "solved." These two essential roles of the ombuds might be thought of as those of "the watchdog" and "the bulldog," respectively. A number of different parties might take on this mantle, including public defenders, law clinics, advocacy organizations, and the press. But none of these options is an ideal remedy. Instead, administrative agencies again provide a model—the court system should have its own ombuds. Only an independent ombuds has the capacity and obligation to ensure the courthouse's proper functioning. It must be as much a part of the fabric of the court as the assignment of judges to calendars and other administrative responsibilities.

A. *Searching for an Ombuds*

As argued above, the problems in Part 155 went unaddressed, even as there were many who could have—and, based on ethical or contractual obligations, should have—noticed and addressed them. A spotlight matters, as calling attention to injustice alone is sometimes sufficient to initiate policy change (as it initially was in this case). The question remains, however, who the watchdog will be to shine that light, particularly where incentives may favor darkness? And perhaps more importantly, who can push for solutions, and ensure that there is no

268. Martin Gansberg, *37 Who Saw Murder Didn't Call Police; Apathy at Stabbing of Queens Woman Shocks Inspector*, N.Y. TIMES, Mar. 27, 1964, at A1. *But see* Nicholas Lemann, *A Call for Help: What the Kitty Genovese Story Really Means*, NEW YORKER, Mar. 10, 2014 (reviewing books on Genovese case and noting that, despite iconic status of the incident as a tale of urban disaffection and collective inaction, several people did in fact act to try to respond to Genovese). Professor William Buzbee's "regulatory commons" theory might also be applied here as a way of understanding how an area of public concern might nonetheless be underregulated because of dysfunction, fragmentation, and overlap among existing regulatory regimes. *See* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 10–11, 18 (2003).

backsliding? In a courthouse with a longstanding culture and institutional or quasi-institutional players, the system will resist change. Our follow-up observation found not just that litigants were declining to exercise new rights, but also that bureaucratic players undermined procedural changes and turned them into Pyrrhic victories. Who will be the bulldog, ensuring that progress is maintained?

The parties who have the greatest interest in changing municipal courts are the individuals charged with offenses there. They certainly suffer the most from its dysfunction (although the taxpayers, a group that also comprises many litigants, come in second). Public defenders represent the interests of the accused in the courthouse generally, and they have at least some power based on their numbers and their institutional status. Accordingly, they are best situated not only to identify the problem, but also to effect change and ensure follow-through. Indeed, public defenders from many jurisdictions have marshaled their advocacy expertise to improve conditions for their clients beyond individual case work. Colorado and Florida public defenders have led efforts to unshackle juvenile defendants during court appearances.[269] Missouri's public defenders have, like at least six other defender offices around the country, sought to refuse case assignments in a bid to draw attention to the state's lack of resources for thorough defense representation.[270] Washington, D.C.'s Public Defender Service has a unit for policy issues and has challenged issues such as civil forfeiture[271] and the use of hair and fiber evidence in criminal cases.[272] As these examples suggest, some defender offices already see shaping public policy as part of their missions.[273]

But one need only consider the activism around excessive caseloads to understand that expecting public defenders to be guardians of due process in the courthouse at large as well as guardians of due process in individual cases may be untenable. When defender offices are stretched so thin that attorneys cannot adequately perform their core function of representing clients, it seems unduly

269. Jordan Steffen, *Colorado public defenders want children out of restraints in court*, THE DENVER POST (Aug. 31, 2014, 3:09PM), https://www.denverpost.com/2014/08/31/colorado-public-defenders-want-children-out-of-restraints-in-court/.

270. Dan Margolies, Kansas City's Public Defenders Stage Courtroom Protest Over Caseloads, KCUR.ORG (Oct. 17, 2017), https://www.kcur.org/post/kansas-citys-public-defenders-stage-courtroom-protest-over-caseloads#stream/0. In Missouri, the public defender tried to assign the state's governor to an assault case to highlight the need for more counsel resources. *Id*. Many other states, including Louisiana, Tennessee, Maryland, Arizona, Minnesota, and Florida have protested excessive caseloads through demonstrations and lawsuits. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1; *see also Inside NOLA Public Defenders' Decision to Refuse Felony Cases*, 60 MINUTES (Apr. 16, 2017), https://www.cbsnews.com/news/inside-new-orleans-public-defenders-decision-to-refuse-felony-cases/.

271. 271. *See* Simms v. D.C., 872 F. Supp. 2d 90, 104 (D.D.C. 2012) (enjoining police from holding seized vehicle pending conclusion of forfeiture proceedings).

272. Letter from Sandra Levick, PDS, to Chief Judge Lee Satterfield and Senior Judge Frederick Ugast (Dec. 16, 2010).

273. Gideon's Promise, an Atlanta-based nonprofit, has seized on this vision of public defenders and works with public defender offices around the country to train attorneys and their leadership to become movement lawyers. *See* Jonathan Rapping, *Retuning Gideon's Trumpet: Telling the Story in the Context of Today's Criminal-Justice Crisis*, 92 TX. L. REV. 1225, 1227 (2014).

burdensome to hold them accountable not just for identifying problems, but for strategizing, spearheading, and maintaining reform efforts.

Moreover, not every defender office or chief defender views itself as a change agent. A Brevard County, Florida public defender claimed he was fired in part for wearing a Black Lives Matter tie and opposing a conservative political environment in his office.[274] In Nassau County, the public defender was completely disengaged from the proceedings in Part 155, even when alerted to the due process violations occurring there. Whether or not such inaction stems from the financial conflicts outlined above, not every defender office has an interest in rocking the boat. Furthermore, in some jurisdictions there is no public defender, but rather just a panel of private attorneys, or even just ad hoc attorneys who get assigned to cases.[275] In these jurisdictions, where panel attorneys lack the volume of cases and institutional heft that agencies have, collective action problems pose an even greater challenge. The ability to observe and organize practices on both the local and state level is one reason why a statewide public defender system, with its bird's-eye view of court practices, is so vital. The economy of scale offered at the statewide level can also free up resources for fighting more than just individual cases. In the end, although public defenders are the ideal parties to be fighting these justice issues, where they lack the will or the way, others may need to step in to serve as bulldog or as watchdog.

Law school clinics might also play a role. Law clinics were borne out of the social justice movement. They have a long history of providing not only assistance to underserved defendants, but also significant systemic change in the criminal justice system. Clinics in Baltimore have challenged the unavailability of counsel at arraignments and pretrial bail and detention proceedings.[276] In Colorado, law clinics obtained recreational facilities and outdoor time for prisoners at the Colorado State Penitentiary.[277] In Nassau County, the clinic was particularly well positioned given its liminal status as an outside and an insider. Hofstra is the only law school in Nassau County, and many of its graduates populate the bench and local bar. The University is clearly an important community institution, and the clinic, if not individual students, has been a fixture in the courthouse since 1983.[278] So if there is a clinic, and resources and institutional support for it, the law clinic may be well-suited to the role of ombuds.

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274. J.D. Gallop, *Brevard Public Defender Fired, Says Tie Raised Eyebrows*, FLORIDA TODAY (Feb. 3, 2017, 10:23AM), https://www.floridatoday.com/story/news/2017/02/03/brevard-assistant-public-defender-fired-says-black-lives-matter-tie-raised-eyebrows/97409412/.

275. Robert L. Spangenberg & Marea L. Breeman, *Indigent Defense in the United States*, 58 L. & CONTEMP. PROB. 32–34 (1995).

276. Douglas L. Colbert, *The Maryland Access to Justice Story: Indigent Defendants' Right to Counsel at First Appearance*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1 (2015).

277. Decoteau v. Raemisch, 13-CV-3399-WJM-KMT, 2016 WL 8416756 (D. Colo. July 6, 2016) (citing Lindsey De Soto Webb of the University of Denver-Sturm College of Law as co-counsel).

278. Email from Professor Doug Colbert, Founder of Criminal Justice Clinic, to author (May 8, 2019) (on file with author).

Not every jurisdiction has a law clinic, however. Outside of New York City, there are only seven law schools in the state.[279] Given the county-based court system outside of the City, fifty counties have trial courts without a local school. Furthermore, law clinics have multiple aims, including teaching students how to work with individual clients and handle cases. Those goals may limit the capacity for broader law reform efforts, much less ones that would entail a permanent position. This, as well as the fact that students are only around seasonally, accounts for why clinics are not likely to take on the full mantle of monitoring the courthouse.

Depending upon their capacity, advocacy organizations may be critical watchdogs and, in some cases, bulldogs as well. Having documented a host of ills in the New York State criminal justice system, including the lack of counsel and other injustices in five New York counties, the New York Civil Liberties Union sued and then reached a landmark settlement with the state for reform of indigent criminal defense.[280] The ACLU has been an active partner bringing lawsuits for due process violations where jurisdictions are routinely abridging litigants' constitutional rights by denying them adequate counsel or any counsel at all.[281] A particular benefit to these lawsuits is that they provide some ongoing bulldog capacity, as court decisions and court-approved settlements often provide enforcement provisions for violators.

Finally, news reporters, particularly where local publications still exist to cover local issues, have also provided a clarion call in many jurisdictions—drawing the public's and policymakers' attention to justice and injustice in the courts.[282] Citizen journalists serve a similar role. For instance, CourtWatch NYC, an organization that trains individuals to observe and report on what happens in New York City courtrooms, publicizes its findings on a daily basis through its Twitter feed, providing an informal way to hold the courts and prosecutors accountable.[283] But as important as these watchdogs are, they are not institutionalized or obligated to carry the mantle. What news outlet could write consistently on only one issue? And they have even more limited ability to serve as a bulldog, ensuring that policy changes are actually made. The long-ranging problem of judicial drift needs a catalyst that is equally long-ranging.

Of all of these options, appointing an independent ombuds to be a due process watchdog and bulldog within the court system is the best. Although there is not

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279. *See N.Y. State Law Schools*, N.Y. CTS., http://ww2.nycourts.gov/attorneys/nylawschools.shtml (last visited Feb. 1, 2020). In addition to Hofstra (in Nassau County), there is Albany (Albany), Buffalo (Erie), Cornell (Tompkins), Pace (Westchester), Syracuse (Onandaga), and Touro (Suffolk). *Id.*

280. William Glaberson, *The Right to Counsel: Woman Becomes a Test Case*, N.Y. TIMES March 19, 2010, at MB1.

281. Davis et al. v. State et al., No. 170c002271B, complaint filed (Nev. Dist. Ct., 1st Jud. Dist. Nov. 2, 2017); see also Rudi Keller, Court of Appeals: Governor Can't be Sued over Public Defender Caseloads, Col. Daily Trib. (Jan. 10, 2019), https://www.columbiatribune.com/news/20190110/court-of-appeals-governor-cant-be-sued-over-public-defender-caseloads.

282. *See, e.g.*, Glaberson, *supra* note 280, at MB1.

283. CourtWatchNYC (@CourtWatchNYC), TWITTER, https://twitter.com/courtwatchnyc?lang=en.

one common definition of an ombuds, the typical ombuds serves to investigate and possibly respond to or resolve perceived governmental wrongdoing on behalf of the public.[284] In the United States, the ombuds was seen early on as a response to bureaucratic failures, a bridge between the public and the government agencies meant to serve them.[285] An ombuds would provide an administrative law fix to an administrative law problem.

B. *Shaping the Ombuds*

To be successful, an ombuds typically needs independence, impartiality, confidentiality, and authority or access to authority.[286] An ombuds who could be easily fired by a supervising judge, or whose budget might be controlled by local court colleagues, might lose the impartiality that is critical to her position.[287] At the same time, to be able to effect change or otherwise influence courthouse policy, an ombuds would need access to and credibility with administrators at a high level. An ombuds who carries weight in a local legal community and has at least some structural independence from the court, such as one who might be nominated and/or approved by stakeholders, would have the gravitas necessary to identify judicial drift as a watchdog and to ensure that effective changes are made. Retired judges have served as ombuds in both the Eastern District of Michigan and the Northern District of California.[288] The risk is balancing the importance of gravitas with the critical eye that will see and correct policies and procedures that subvert due process.

Some ombuds are focused on responding to specific user complaints,[289] but others are more proactive and engage not only in outreach and issue resolution, but

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284. CHARLES L. HOWARD, THE ORGANIZATIONAL OMBUDSMAN 1–2, 38, 171–72 (2010). In the prefatory note to their model legislation for states to create an ombuds, the United States Ombudsman Association explained that "the term 'Ombudsman' should be used only when the legislation provides for an independent official who receives complaints against government agencies and who, after investigation, may, if the complaints are justified, make recommendations to remedy the complaints." US OMBUDSMAN ASS'N, MODEL OMBUDSMAN ACT FOR STATE GOV'TS § 2 cmt. (1997) (reformatted in 2004).

285. Kenneth Kulp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PENN. L. REV. 1057-58 (1961). Davis was an early promoter of the idea that the Scandinavian ombuds could be imported as a solution to American problems with the administrative process.

286. *See* Michele Bertran, *Judiciary Ombudsman: Solving Problems in the Courts*, 29 FORDHAM URB. L.J. 2099, 2109 (2002).

287. *See, e.g.*, WENDY R. GINSBERG & FREDERICK M. KAISER, CONG. RESEARCH SERV., RL34606, FEDERAL COMPLAINT-HANDLING, OMBUDSMAN, AND ADVOCACY OFFICES 38–39 (2009) (describing concerns of EPA ombuds's lack of impartiality and independence when it was located in the same unit it was responsible for investigating).

288. *See* U.S. DIST. CT., EASTERN DIST. OF MICH., ANNUAL REPORT 15 (Sept. 21, 2018); *Ombudsperson Program*, US DIST. CT., NO. DIST. OF CAL., https://www.cand.uscourts.gov/ombudsperson (last visited Jan. 3, 2020). Notably, these ombuds serve as intermediaries only between members of the bar and the bench.

289. *See, e.g.*, Michele Bertran, *Judiciary Ombudsman: Solving Problems in the Courts*, 29 FORDHAM URB. L. J. 2099, 2108–09, 2112 (2002) (describing role of New Jersey court ombuds as responsive to litigant complaints).

also "identification of areas for systemic change and issue prevention."[290] This dual role would be appropriate here. A courthouse ombuds could both assist a concerned defendant and monitor Part 155 and other court parts to ensure that the court is effectively supporting defendants' rights more generally.

Such an institutional player would not be subject to the vagaries of competing professional or pedagogical demands, a focus that may vary with the academic calendar, the interest of a reading public, or a funder's whims. At least in New York, creating such a position is within the bounds of the chief judge or the chief administrator's jurisdiction. State law provides that the chief judge has wide latitude to establish policies relating to "the rules and orders regulating practice and procedure in the courts."[291] This includes the appointment of a supervising judge (such as the one administering the District Court in Nassau) in courts across the state,[292] as well as delegating administrative responsibilities to other court personnel.[293] In addition, the chief administrator may staff an administrative office as she chooses and may even approach the legislature and governor to push for "laws and programs to improve the administration of justice and the operation of the unified court system."[294]

Another risk to having an ombuds in the court would be the fear of interfering with either judicial decisions, particularly appellate review, or existing systems for complaints about counsel and judges. The U.S. Ombudsman Association, for instance, excludes judges from the purview of ombuds in its model legislation.[295] Nearly thirty years ago, however, the ombuds of Victoria, Australia spoke to this controversy and rejected the notion that seeking "accountability" from courts through an ombuds would impinge on court independence, a position which maintains validity.[296] Indeed, even the model legislation comments note that the exclusion of judges is a narrow one and provides room for an ombuds to address administrative or ministerial acts by judicial employees that are not directly tied to

290. CHARLES L. HOWARD, THE ORGANIZATIONAL OMBUDSMAN 75 (2010). The EPA's Public Liaison, for instance, not only receives and responds to complaints, but also writes reports about the agency efficacy and efficiency and independently "prevents and detects fraud, waste, and abuse." GINSBERG, *supra* note 287, at 39; *see also* WILLIAM F. FUNK, & STEVEN O. WIESE, ET. AL., ABA, REP. TO HOUSE OF DELEGATES, RECOMMENDATIONS: STANDARDS FOR THE OPERATION OF OMBUDSMAN OFFICES 11 (2004) (explaining ombuds can choose to respond to particular complaints or have "the discretion to initiate action without receiving a complaint or question.").

291. N.Y. JUD. L. § 211(1)(b) (McKinney 2019).

292. *See* N.Y. JUD. L. § 212(d) (McKinney 2019) (authorizing the chief administrator of the courts to designate deputy chief administrators and administrative judges for each court in the state, apart from appellate divisions and the court of appeals).

293. N.Y. JUD. L. §§ 211(1)(a), 212(1)(s) (2019).

294. N.Y. JUD. L. § 212(1)(f) (2019).

295. U.S. OMBUDSMAN ASS'N, MODEL OMBUDSMAN ACT FOR STATE GOVERNMENTS § 3(a)(1) (1997) (reformatted in 2004).

296. NORMAN GESCHKE, 18TH ANNUAL REPORT OF THE OMBUDSMAN (1991).

the adjudication itself.[297] Certainly, given that the issues addressed above are based on failures to implement settled law as a matter of policy, or lack thereof, an ombuds could, for instance, remind sitting judges that counsel are meant to be appointed in cases in Part 155 without running afoul of specific rulings.

The appointment of an ombuds in a court setting is not unprecedented. In several federal courts, ombuds respond to confidential concerns of either the public or attorneys who appear there, investigating and sometimes seeking a remedy for concerns about judges or judicial administration.[298] Although the issues that ombuds have addressed are not specifically tied to the judicial drift described in this Article, there is no reason that this could not be made clear in the ombuds' mandate. Indeed, making sure that the contours of the mandate are clear and include clear confidentiality rules regarding reports of misconduct is vital to an effective program.[299]

There is some reason for hope that even a change as revolutionary as the appointment of an ombuds to oversee misdemeanor and other low-level cases may be possible. Attention to the prosecution of petty offenses has gained more traction in academic and policy circles in recent years, and, as in the District Court, attention can bring change. Although noting that individuals charged with misdemeanors have been "largely ignored by the criminal literature and policy makers,"[300] Alexandra Natapoff joins other scholars who have critiqued the "misdemeanor crisis" in recent years.[301]

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297. US OMBUDSMAN ASS'N, MODEL OMBUDSMAN ACT FOR STATE GOVERNMENTS § 3 (a)(1) cmt. (1997) (reformatted in 2004).

298. Some ombuds in federal courts address concerns of members of the bar about the court or individual judges. *See Ombudsperson Program*, US DIST. CT., NO. DIST. OF CAL., https://www.cand.uscourts.gov/ombudsperson (last visited Jan. 3, 2020); *Ombudsman for the Eastern District of Michigan*, 85 MICH. B.J. 40, 41 (2006). As of 2006, the Eastern District of Michigan and Delaware were the only two federal courts to have ombuds. *Id.* Others have since created the position, including the Northern District of California. *See Ombudsperson Program*, US DIST. CT., NO. DIST. OF CAL., https://www.cand.uscourts.gov/ombudsperson (last visited Jan. 3, 2020). New Jersey's state court ombudsman has a number of "customer service" roles, including collecting data and suggestions to improve court services. NEW JERSEY ADMIN. OFFICE OF THE COURTS, JUDICIARY OMBUDSMAN PROGRAM (2019), https://www.njcourts.gov/forms/11266_statewide_ombuds_brochure.pdf?c=puT. While not court specific, Alaska's state ombuds also addresses complaints about state court administrative operations (but explicitly not judicial decisions or cases). *Alaska Ombudsman F.A.Q*, ALASKA OMBUDSMAN, https://ombud.alaska.gov/faqs/ (last visited Jan. 3, 2020).

299. WILLIAM F. FUNK, & STEVEN O. WIESE, ET. AL., ABA, REP. TO HOUSE OF DELEGATES, RECOMMENDATIONS: STANDARDS FOR THE OPERATION OF OMBUDSMAN OFFICES 11 (2004).

300. Alexandra Natapoff, *Misdemeanors*, 102 SO. CAL. L. REV. 101, 103 (2012).

301. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1095 (2013)*; see also* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal* Courts, 45 U.C. DAVIS. L. REV. 277, 279–82 (2011); 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 (2009); AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (METRO. BOOKS/HENRY HOLT & CO., 2010); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (Basic Books, 2018).

Politically, as some unprecedented consensus begins to arise in the margins regarding excesses of the criminal justice system,[302] greater attention is also finally being paid to these low-level offenses and individuals charged with them. One of the key findings of the Department of Justice report after the police shooting of Michael Brown, an unarmed young black man in Missouri, addressed this too. The report noted that the municipal court depends on collecting endless fines and fees from poor, primarily African American litigants charged with traffic and other minor offenses who could not pay.[303] A growing list of states has either legalized or decriminalized the use of marijuana[304] or the arrest of those found with the drug.[305] In New York City, the district attorneys in four of five boroughs have outright dismissed warrants for lower-level offenses more than ten years old.[306] And in Georgia, the Southern Center for Human Rights and the Civil Rights Corps are waging a multi-front campaign of litigation, public petitions, and pressure on Atlanta's mayor to reform bail practices, particularly for low level offenses.[307]

The political and financial pressure to take misdemeanors seriously can provide the will. Court administrators' latitude to create policy and appoint staff can provide the way. There is a solution to the judicial drift that allows so much procedural injustice to foment in District Court and in local courts nationwide.

CONCLUSION: PROCEDURE ONLY GETS YOU SO FAR

Are the new signs and policy changes that they represent really a magic cure for all that ails Part 155?[308] Even apart from the most recent sign encouraging litigants to return to speak with the town attorneys before entering the courtroom, the inquiry alone answers the absurdity of the postulate.[309] Indeed, it is unclear how many litigants even avail themselves of the new opportunities in Part 155. A different student went in to observe proceedings for a week in late spring of 2018, and the findings were virtually identical to those from prior to the announcement of changes more than a year earlier. Staff in the courtroom seem unaware that the

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302. Carl Hulse & Jennifer Steinbrenner, *Sentencing Overhaul Proposed in Senate with Bipartisan Backing*, N.Y. TIMES, Oct. 1, 2015 at A19; Carl Hulse, *Unlikely Cause Unites the Left and Right: Criminal Justice Reform*, N.Y. TIMES, Feb. 19, 2015 at A1.

303. US DEPT. OF JUSTICE CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (Mar. 4, 2015).

304. NAT'L. CONFERENCE OF STATE LEGISLATURES, *Marijuana Overview*, http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx, (last visited 5/29/19).

305. Tina Moore, et al., *NYPD to Stop Arresting for Minor Pot Possession, Will Issue Tickets Instead*, N.Y. DAILY NEWS (Nov. 11, 2014), http://m.nydailynews.com/new-york/nyc-crime/nypd-stop-arrests-low-level-marijuana-charges-source-article-1.2005222.

306. James C. McKinley, Jr., *644,000 Old Warrants Scrapped for Crimes Like Public Drinking*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/2017/08/09/nyregion/644000-old-warrants-scrapped-for-crimes-like-public-drinking.html.

307. Richard Fausset, *Bail Was $500, Money He Didn't Have. Atlanta Faces Calls for Change*, N.Y. TIMES, Jan. 16, 2018, at A10.

308. *See supra* Fig. 2.

309. *See supra* Fig. 3.

panel attorney assigned to accept conflict cases each day is supposed to check in the morning if he or she is on duty, in case anyone needs assigned counsel. And there is still a line of people who appear to be unrepresented waiting to meet with the town attorneys every morning.

In this regard, the defendants in Part 155 are little different than those Malcolm Feeley studied years ago when he sought to understand why so few litigants availed themselves of procedural rights and the adversarial process.[310] As Feeley has again recently noted, such violations seem endemic to misdemeanor courthouses throughout the country.[311] It may well be that the individuals in Part 155, like those Feeley studied, found that their short term interests, such as returning to work or avoiding detention, compelled them to choose a quick plea or other disposition, however unjust, instead of a full airing of their rights.[312] Understanding the motivations of these individuals is beyond the scope of this Article. But at least those who did seek to obtain counsel could potentially have counsel appointed on their behalf. Moreover, the outcome is at least as public as it would have been if the appellate court had mandated counsel through a long and drawn out appellate process.

To be fair, even when counsel is present it can sometimes, like the perfunctory plea waiver, suffice as window dressing to make us feel like procedural justice has been served. In Part 155, as in other courtrooms, the efficacy of counsel depends on the efficacy of the particular lawyer in the particular case. In one plea colloquy, for instance, a rare case where a defendant had a lawyer, the defendant was unable to answer any of the judge's questions and kept looking to his attorney for instruction as to how to answer. The town attorney was shaking his head disapprovingly through the proceeding, but there was no objection to the disposition from any of the parties or the judge. On another occasion, after a judge told a defendant to "stop talking and leave the legal work to the attorney," the attorney scolded the defendant on the way out of the room.[313] The outcome of the proceedings in Part 155 or other courtrooms where low-level offenses are heard may wind up little changed, even if counsel is present.

This divide may reflect what the late William Stuntz described as a focus on procedural justice that has eclipsed our focus on actual justice.[314] Stuntz laments the Warren Court's reliance on the Fourth, Fifth, and Sixth Amendments as remedies to an unjust system in part because rather than equaling the playing field between rich and poor defendants, they have created a complex system navigable only by

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310. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992).

311. Malcolm Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 192–93 (2018).

312. MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 31, 241–42 (1992); *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 620.

313. CJC PROJECT, *supra* note 13 at Apr. 15, 2016.

314. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 39, 209-217, 227-30 (2011).

the most sophisticated attorneys affordable only to the wealthy.[315] Certainly, the difference between counsel and zealous counsel with resources to vindicate a client's rights is dramatic. The clinic's experience representing individuals in Part 155 has made clear that a dedicated advocate can have marked success there, and that actual justice may be possible.[316] The former is a necessary precursor to the latter, but the latter is hardly an inevitable result. Greater resources and a cultural change would need to follow if the procedural shift providing for counsel and some distance from the prosecutor is to be more than window dressing.

However court policies are set, they have a dramatic effect on the experience, and often outcomes, of clients. A client who has to come to court three times over a period of eighteen weeks before she gets her permanent counsel assigned, as can happen regularly in District Court, will surely have a frustrating experience of missing work and not making progress in her case.[317] This structural delay can affect outcomes—given the frustrations (including the fact that her case may be called last each time simply because she does not have counsel yet) involved in missing work and arranging childcare for these unproductive court dates, she may wind up pleading guilty to an offense "just to get things over with."[318] And, of course, if she never gets counsel, she may never know there was a defense or an opportunity to negotiate with the prosecutor she was compelled to meet with before her case was called. As one commission historically referred to the New York town and village court system, it is "a feeble office respected by no one."[319] So the appointment of counsel matters. It matters, at least, to the individuals who have found their way to the law school clinic when they have been frustrated by experiences in Part 155.

Beyond an individual's own case outcome, there may be systemic damage. Proceedings and policies in Part 155 patently violate a host of state and federal laws, ethical guidelines, and county contracts to provide services for indigent criminal defendants. Underlying the specific legal and ethical concerns are questions of fundamental fairness and due process. The harm to the subversion of these norms is not limited to the individual defendants' experience in their individual cases. In a democratic society, the rule of law depends on public confidence in its

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315. *Id*. at 218; *see also* Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1073–74 (2013).

316. *See supra* Part III.B. Other counsel also made arguments for their client, about the need to dismiss a case and to eliminate a fine, given the expense of repairs made. *See generally* CJC PROJECT, *supra* note 13.

317. There is some indication that this policy may be changing in the District Court. *Id*. In at least some instances, individuals are being assessed for eligibility for counsel at the first court appearance and may be assigned counsel from Legal Aid by their second court appearance. *Id*. There has been no official announcement of a rule change, however, and there are still instances where defendants do not obtain counsel until their third court appearance. *Id*.

318. *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA L. REV 407, 469 (2008) (citing MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 30–31 (1979)).

319. William Glaberson, *How a Reviled Court System Has Outlasted Critics*, N.Y. TIMES, Sept. 27, 2006 at A1.

administration.[320] Jurors, defendants subject to the court's jurisdiction, taxpayers, and voters who elect judges and prosecutors all buttress the court system and provide it legitimacy. It is perhaps a relatively small pool of individuals that encounter Part 155, but their experience could color their understanding of the county's, or country's, criminal justice system writ large. An individual may be forever tainted as a potential crime witness, victim, or juror, disillusioned by a criminal justice system that depends on public trust for its legitimacy.[321]

If their confidence fails based on their experiences in Part 155, and their participation ceases, the system collapses.[322] Having an ombudsman who can monitor and regulate not only appointment of counsel, but also other indicia of procedural fairness, can help ensure that such lapses are neither hidden from view nor relegated to superficial fixes. Ideally, an ombudsman can ensure that such lapses do not occur at all, at least not on a systemic basis. Ultimately, though, this is a Ferguson-type problem: why is so much behavior criminalized, and why must communities rely so heavily on fines and surcharges for revenue, which often become a regressive tax on those least able to afford it, particularly people of color?[323]

The social control that Natapoff has proposed as a basis (but not a justification) for prosecuting these extremely low-level offenders cannot be worth the expense and trauma involved in their processing. This is particularly true since the offenses prosecuted in Part 155 are thankfully at least somewhat removed from the rest of the criminal justice system in that they are not fingerprinted when charged. That is, a person may have a conviction, but because he was never fingerprinted as a part of his case processing, that conviction will not be reported to the state criminal justice agency that records law enforcement and court contacts. Perhaps the real solution is legalizing the minor misconduct that Part 155 and its counterparts around the country seek to regulate.[324] Or to regulate them only via civil penalties.[325] Or to

320. Tracey L. Meares, *Justice Falls Down*, HARVARD MAG., Mar.-Apr. 2012, at 21.

321. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012) (stating that community perceptions of fairness in criminal justice procedures affect the "cooperation, or at least acquiescence" required of all parties in the system, including "witnesses, jurors, police, prosecutors, judges, offenders, and others").

322. Sherman Lawrence W., University of Pennsylvania, *Trust and Confidence in Criminal Justice* (July 2001), NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, https://www.ncjrs.gov/pdffiles1/nij/189106-1.pdf?q=ideas-in; Catie Edmonson, *At Columbia, Attorney General Lynch Addresses 'Loss of Faith' in Criminal Justice System*, COLUMBIA SPECTATOR, (May 26, 2016), https://www.columbiaspectator.com/news/2016/04/08/columbia-attorney-general-lynch-addresses-loss-faith-criminal-justice-system.

323. *See supra* Part II.D.

324. *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1078 (2015).

325. If these offenses were fully decriminalized, "reclassified as civil with no possibility of arrest, incarceration, or criminal stigma," it would go a long way towards remedying the injustice documented in the Part 155 study, without sacrificing due process norms. Turning the system into one of civil enforcement also has drawbacks, however, insofar as it replaces one system of fines and fees for another. Thus, local communities

disentangle revenue generation from this whole schema.[326]

Such substantive changes to the criminal justice system would be worthy goals, requiring even more political power than the increasingly popular move of decriminalizing marijuana possession. Once there is an awareness of the mechanism and power of court-level rulemaking, solving the procedural concerns raised in this Article is a comparatively simple task. Because the legal basis for so many procedural rights already exists, resolution requires only more scrutiny of current practices, as well as persistent monitoring of the results. Short of a move to dismantle the machinery of criminal prosecution of petty offenses altogether, having a court ombuds will keep courts from drifting too far from our procedural ideals.

might also consider disentangling revenue generation from this form of social control. It would not be sufficient to "decriminalize" these offenses – i.e., call all of them "violations" or "infractions," rather than "misdemeanors" or "crimes." Such a move would likely impose the same costs on defendants (who must still show up for court, miss work, pay fines, be subject to court supervision while the fines are outstanding and then punished again for failing to pay them, etc.), without providing any of the procedural protections outlined above. Indeed, many of the offenses charged in Part 155 are already sub-misdemeanor type offenses.

326. The US Commission on Civil Rights made a similar recommendation in its bipartisan report. US COMM'N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 4 (2017); *see also* Kasey Henricks & Daina Cheyenne Harvey, *Not One but Many: Monetary Punishment and the Fergusons of America* 32 SOCIOLOGICAL FORUM 930, 944 (2017) (recommending end of "monetary punishment"); FINES & FEES JUSTICE CENTER, https://finesandfeesjusticecenter.org/ (providing resources and clearinghouse materials to eliminate impact of fines and fees in the justice system).