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Martha Rayner

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CONFERENCE REPORT: NEW YORK CITY'S CRIMINAL COURTS: ARE WE ACHIEVING JUSTICE?

*Martha Rayner**

INTRODUCTION

On October 18, 2003, at a conference hosted by the New York County Lawyers' Association and the Fordham University School of Law's Louis Stein Center on Law and Ethics,¹ more than one-hundred professionals, having diverse roles, and from the five boroughs of New York City, came together to identify, evaluate, and begin to solve some of the complex problems firmly embedded in the culture, operations, and practice in our City's Criminal Courts. They came together in an effort to enhance justice in New York City's Criminal Courts.

In her welcoming remarks, Judge Juanita Bing-Newton, Chief Administrative Judge of New York City's Criminal Courts,² emphasized the extraordinary volume of cases that move through the City's Criminal Courts³ and stressed the importance of justice in any discussion of the Criminal Court as the Criminal Court is where the "Constitution and the public intersect in a dramatic way."⁴

* Associate Clinical Professor, Fordham University School of Law. This report is based on the very hard work of the conference planning committee, facilitators, speakers, reporters, and participants. Thank you to Professor Bruce Green, Fordham University School of Law's Louis Stein Center on Law and Ethics, and the New York County Lawyers' Association's Justice Center and Criminal Justice Section. I am very grateful for the research assistance provided by Cassandra Abodeely, Diana Rubin, and Alison Shilling.

1. The event was co-sponsored by City University of New York School of Law, Columbia University School of Law, New York Law School, New York University School of Law, and Pace University School of Law.

2. Judge Juanita Bing-Newton addressed the participants via video due to a conflict. See Judge Juanita Bing-Newton, Welcome Address at New York City's Criminal Courts: Are We Achieving Justice Conference (Oct. 18, 2003) (on file with the author and the New York County Lawyers Association ("NYCLA")). Welcome remarks were also provided by John Feerick, Chair, NYCLA Justice Center and Professor, Fordham University School of Law, and Susan J. Walsh, Co-Chair, NYCLA Criminal Justice Section. Video recordings of the proceedings are available from the author and the NYCLA.

3. The Criminal Court oversees 325,000 docketed cases, 500,000 summons cases and has a backlog of approximately 100,000 cases. See *id.*

4. *Id.*

Like Judge Newton, Norman L. Reimer, the day's keynote speaker and president of the New York County Lawyers' Association,⁵ stressed the overwhelming number of case filings handled by Criminal Court.⁶ It is the Criminal Court that forms the impression of justice for tens of thousands of our fellow citizens—the accused, the victimized, and their families and friends. Reimer concluded that “all too often it is not a good impression.”⁷ Addressing prosecutors, public and private defense attorneys, judges, court clerks and administrators, probation officials, policy makers, members of advocacy organizations, academics, and others, he emphasized “our collective responsibility to do something about this” as the Criminal Courts have both the power to “destroy and to save lives.”⁸ Reimer urged the participants to aim for “a system with all components working at optimum level so that the process of deciding who deserves what result is as reliable as possible, and to see that the proper outcome is available and administered fairly and competently.”⁹

The conference planners¹⁰ designed the conference to emphasize the collective responsibility each organization has for enhancing justice in New York City's Criminal Courts. The courts do not

5. He was President-elect at the time.

6. See Norman L. Reimer, Keynote Address at the New York City's Criminal Courts: Are We Achieving Justice Conference (Oct. 18, 2003) (copy of speech on file with the author); see also *supra* notes 2-3 and accompanying text (Bing-Newton indicating that Criminal Court handled more than 325,000 docketed cases and 500,000 summonses in 2002).

7. See Reimer, *supra* note 6.

8. *Id.*

9. *Id.* The conference's afternoon speaker was Freda F. Solomon, Ph.D., author of *The Impact of Quality of Life Policing: How the NYPD's New Policing Strategy of the 1990s affected Arrests, Defendant and the Criminal Courts*, CJA RESEARCH BRIEF (N.Y. Crim. Just. Agency, Inc., New York, N.Y.), Aug. 2003 [hereinafter CJA RESEARCH BRIEF].

10. The Conference Planning Committee consisted of Adele Bernhard, Associate Professor, Pace University School of Law; Joel Copperman, Executive Director, CASES; Catherine Christian, Director, Legal Training, Special Narcotics Prosecutor, New York County; Mike Fahey, Esq., Chair, Minorities & the Law, NYCLA; Ronald Garnett, Esq., NYCLA, Criminal Justice Section; Florence Hutner, General Counsel, New York City Department of Corrections; Laura R. Johnson, Attorney-In-Charge, The Legal Aid Society, Criminal Appeals Bureau; Nathaniel Kiernan, Assistant District Attorney, Queens County; William Knisley, Esq., NYCLA, Criminal Justice Section; Michele Maxian, Director, Special Litigation, Criminal Defense Division, The Legal Aid Society; Shari Michels, Assistant District Attorney, New York County; Deidra R. Moore, Attorney, The Legal Aid Society, Criminal Defense Division, Bronx County; Tim Mulligan, Court Operations, CASES; Martha Rayner, Associate Clinical Professor, Fordham University School of Law; Susan J. Walsh, Co-Chair, Criminal Justice Section.

function in isolation; they are part of a complex system with components parts that are numerous, varied, and often independent of the court. Police, prosecution, defense, probation, and corrections, to name the most prominent, are all integral to the functioning of Criminal Court, yet traditionally, each component takes responsibility for only its own, circumscribed role within the court system. Thus, for example, the persistent, deplorable lack of attorney-client interview space in the courthouses is primarily relegated to defense organizations to solve, while in fact it is a problem that negatively impacts the entire system and is emblematic of the negative impressions formed by at least one sector of Criminal Court “users:” defendants. The conference challenged participants to move beyond their traditional workplace roles in Criminal Court and reflect thoughtfully on difficult, system-wide problems.

Though defined by law as “local” courts,¹¹ New York City’s Criminal Courts are commonly referred to as the lower courts or courts with “inferior jurisdiction.”¹² Under New York State’s “complex, somewhat unique, and in the opinion of many, antiquated”¹³ court structure, New York City’s Criminal Courts have preliminary jurisdiction over all offenses¹⁴ and trial jurisdiction over misdemeanors and violations.¹⁵ The Criminal Courts in each borough¹⁶ handle the arraignment for all arrests, from subway fare

11. N.Y. CRIM. PROC. LAW § 10.10(3) (McKinney 2003).

12. Quintin Johnstone, *New York State Courts: Their Structure, Administration and Reform Possibilities*, 43 N.Y.L. SCH. L. REV. 915, 916 (2001).

[t]here are eleven different types of trial courts in the New York State court system, some of general jurisdiction, some with jurisdiction of only a specialized field of law, some with broad but inferior jurisdiction. . . . Courts of inferior jurisdiction, those that may generally hear only what are considered less serious matters, are the . . . New York City Criminal Court. . . .

Id.

13. *Id.*

14. Pursuant to New York Criminal Procedure Law (“N.Y. CPL”) § 10.30(2), the New York City Criminal Court may arraign all felony matters and retain jurisdiction until the matter is indicted and transferred to Supreme Court. *See* N.Y. CRIM. PROC. LAW § 10.30 (2).

15. In New York State, “‘Violation’ means an offense, other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed. ‘Misdemeanor’ means an offense, other than a ‘traffic infraction,’ for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed.” N.Y. PENAL LAW 10.00(3)-(4) (McKinney 2004).

16. According to data provided by the Office of the Court Administration, on file with the author, there are nineteen Criminal Court Parts in Manhattan, seventeen in Bronx County, twenty-three in Kings County, thirteen in Queens, and one in Richmond County (Staten Island).

evasion, and the subsequent adjudication of all non-indicted felonies, misdemeanors, and violations.¹⁷

As a result of changes in policing policies, the number of misdemeanor arraignments increased more than sixty percent from 1992 to 2002.¹⁸ In 1993, New York City implemented a policing strategy that emphasized maintenance of public order, a policy now commonly referred to as quality-of-life policing.¹⁹ The policy mandated zero tolerance for minor misdemeanor crimes (so-called "quality-of-life crimes") and targeted offenses such as turnstile jumping, public drinking, and panhandling.²⁰ As a result, the number of misdemeanor cases flowing into Criminal Court increased dramatically.²¹ At the same time, the number of felony cases decreased significantly.²² Thus, the Criminal Court caseload has

17. This includes summons tickets issued by the police, the bulk of which are adjudicated in "Summons Appearance Parts." For 1998, New York City Criminal Courts had 309,261 summons cases filed with 273,009 dispositions; for 1999, 392,348 summons cases filed with 324,591 dispositions; and for 2002, 505,331 summons cases filed with 339,792 dispositions. See N.Y. State Unified Ct. Sys., *New York City Criminal Court Caseload Statistics 2002*, at <http://www.courts.state.ny.us/courts/nyc/criminal/caseload/statistics.shtml> (last visited May 17, 2004); OFF. OF CT. ADMIN., N.Y. STATE DIV. OF CRIM. JUST. SVCS., CASELOAD ACTIVITY REPORT FOR 1999, available at http://criminaljustice.state.ny.us/crimnet/ojsa/cja_99/oca.pdf (last visited May 17, 2004); OFF. OF CT. ADMIN., N.Y. STATE DIV. OF CRIM. JUST. SVCS., CASELOAD ACTIVITY REPORT FOR 1998, available at http://criminaljustice.state.ny.us/crimnet/ojsa/cja_98/oca.pdf (last visited May 17, 2004). Though commonly referred to as "summons cases," a summons may only be issued by a local criminal court, N.Y. CRIM. PROC. LAW § 130.10 (Mckinney 2003), not the police, and thus despite its name, such tickets are in fact appearance tickets, N.Y. CRIM. PROC. LAW § 150.50 (Mckinney 2003), and commonly referred to as Desk Appearance Tickets ("DATs"). An appearance ticket must be replaced by a local criminal court accusatory instrument, *Id.* § 150.50(1); simplified information is permitted only in cases charging traffic offenses, parks offenses or environmental conservation offenses. N.Y. CRIM. PROC. LAW §§ 100.10, 100.25 (Mckinney 2003).

18. According to data provided to the author by the New York State Office of Court Administration, a total of 144,124 misdemeanor cases were arraigned city-wide in 1992; the number increased sixty-four percent, to 236,916, in 2002.

19. See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 292 (1998); see also James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Feb. 1989 ("sometimes 'fixing broken windows' does more to reduce crime than conventional 'incident-oriented' policing.").

20. Harcourt, *supra* note 19 at 292; Wilson & Kelling, *supra* note 19.

21. Harcourt, *supra* note 19 at 298-99, 340 (describing that quality-of-life policing resulted in a fifty percent increase in misdemeanor arrests, from 133,446 in 1993 to 205,277 in 1996, while the number of misdemeanor complaints remained relatively stable: 421,116 in 1993 as compared to 424,169 in 1996).

22. As to whether quality-of-life policing was responsible for the decrease in the felony crime rate, see *id.* at 292 (scrutinizing and critiquing the widely accepted theory that the quality-of-life initiative was the cause of the precipitous drop in New York

greatly increased with misdemeanor cases accounting for a much higher percentage of the caseload.²³ In 2002, the Criminal Courts handled 327,592 felony and misdemeanor arraignments and the resulting misdemeanor caseload.²⁴ These massive Criminal Court caseloads present an immense challenge to the achievement of justice.

The charge of excessive caseloads has been long leveled at the Criminal Courts. In 1983, the Criminal Courts Committee of the Association of the Bar of the City of New York described the City's Criminal Court as "a system out of control—a crowded, heavily time-pressured, continually depressing market place in which the need simply to dispose of cases has overshadowed everything else, and in which it has almost never been possible to use real care in separating out the innocent and imposing sensible penalties on the guilty."²⁵ In 1989, the Office of Court Administration, in its Annual Report, wrote that the "effect of the incredible caseload pressure in New York City Criminal Court is profoundly troubling."²⁶ Just over ten years ago, referring to New York City's Criminal Court, a prominent legal ethicist, Harry I. Subin, concluded that the Court was "[h]opelessly awash in a sea of cases"

City's crime rate since 1993). Compare Dan Hurley, *Scientist At Work—Felton Earls; On Crime As Science (A Neighbor At a Time)*, N.Y. TIMES, Jan. 6, 2004, § F, at 1 (quoting James Q. Wilson, one of the two original architects of the Broken Windows theory as saying "I still to this day do not know if improving order will or will not reduce crime," . . . "People have not understood that this was a speculation."), and Gordon Witkin, *The Crime Bust*, U.S. NEWS & WORLD REP., May 25, 1998, at 33 (finding that new police tactics were probably not "not the key factor nationwide" and that the settlement of crack turf battles probably played a much larger role in reducing urban crime), with Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2488 (1997) (order maintenance policing "has been used with startling successful results in New York City"), and William J. Bratton, Editorial, *New York's Police Should Not Retreat*, N.Y. TIMES, Aug. 19, 1997, at A27 (Former N.Y. City police commissioner crediting quality of life initiatives for falling crime rates in New York City).

23. According to the Office of the Court Administration, misdemeanors accounted for fifty-four percent of all cases arraigned in 1992 and rose to seventy-one percent in 2002. The Office of the Court Administration is on file with author.

24. Adjudication of summons, as compared to online arrests, constituted approximately 61 percent of the criminal filings citywide (505,331 of a total 830,010 filings) and approximately 51.1 percent of the dispositions citywide (339,792 of a total 664,985 dispositions). See N.Y. State Unified Ct. Sys., *supra* note 17.

25. ASS'N. OF THE BAR OF THE CITY OF N.Y., *SAVING THE CRIMINAL COURTS: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK* 2 (1983) [hereinafter *SAVING THE CRIMINAL COURTS*]

26. Harry I. Subin, *The New York City Criminal Court: The Case for Abolition*, 12 N.Y.U. CTR. FOR RES. IN CRIME & JUST. 9 (1992) (citing the Office of Court Administration's Annual Report).

and “unable to administer justice.”²⁷ Presently, the State’s Chief Judge has expressed concern about the significant backlogs caused by quality-of-life policing.²⁸

At the core of this decades-long hue and cry over caseloads is a concern for justice—for individualized justice—and a fear that massive caseloads unacceptably compromise the opportunity for that individualized justice. Implicit in the criticism is the acknowledgement that as case loads rise, court resources fail to rise commensurately. Thus, the equation is simple. Time is limited and higher numbers result in each professional in the criminal justice system having less time to devote to the people involved in each case, whether it be defendant, victim, complainant, or family members. This, in turn, results in professionals having to place a premium on strategies that increase efficiency rather than justice. The end result: rote, routinized, and perfunctory treatment of people and processing of matters important to defendants, victims, their families, and the public.

27. *Id.* at 8. Subin saw the New York City Criminal Court as so overburdened with cases that the only solution was to abolish the Court: “Hopelessly awash in a sea of cases, the Court is unable to administer justice. Recognizing that, it has redefined its mission. The measurement of success is the disposition rate, how many cases can be moved in and out of the court, without regard to how they are moved.” *Id.* Subin reported that approximately 213,000 cases were processed in the New York City Criminal Court in 1990 at an average of five minutes for each case. Both prosecutors and defense counsel have almost no time to investigate the facts of cases and instead end up relying upon the facts as set forth in the police reports. *See id.* at 6-7. “The per-Assistant [District Attorney] investigative caseload is nearly 1,700 cases a year. . . . This comes to 7 cases a day, or little more than an hour or so that can be devoted to the investigation of any case.” *Id.* at 1. The defense side is confronted with similar time constraints:

The initial, and often only, interview of the defendant is conducted under great time pressure, and in conditions not conducive to learning the client’s name, let alone whether he or she might have a defense. And with so many pending cases to deal with, and so little ability to predict which will survive long enough to require investigation, a minimal amount of out-of-court work is undertaken.”

Id. at 1, 6-8.

28. Judith S. Kaye, *The State of the Judiciary* (Feb. 9, 2004), in JUDITH S. KAYE, *THE STATE OF THE JUDICIARY 7* (2004), available at <http://www.courts.state.ny.us/ctapps/SO J04.pdf> (last visited May 17, 2004). In her remarks, Judge Kaye had this to say:

Nowhere is the misdemeanor backlog more apparent than in New York City. In part because of the continuing emphasis on prosecuting quality-of-life offenses, thousands of defendants and crime victims face long delays in our criminal courts. Despite herculean efforts of our judges and staff, tens of thousands of misdemeanor cases remain pending for months, even years, while felony filings decline.

Id.

Yet, individualized justice is a core principle of due process and of our criminal justice system.²⁹ Judges are required to impose sentences based on individualized assessments of each case.³⁰ This is also central to the prosecutor's role: "[T]he capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law.'"³¹ The broad discretion given to prosecutors in deciding who to charge and what to charge allows for individualized justice.³² And criminal defense attorneys certainly must represent the individual interests of each client.³³

29. See *McClesky v. Kemp*, 481 U.S. 279, 311-12 (1987) (quoting 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.2(a) (1984)); *United States v. Williams*, 65 F.3d 301, 310 (2d Cir. 1995) (noting that "district courts should not hesitate to use their discretion in devising sentences that provide individualized justice"); *United States v. Willoughby*, 27 F. 3d 263, 268 (7th Cir. 1994) ("This is the essence of our system of individualized justice."); Rachel E. Barkow, *Recharging the Jury: the Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 127 (2003) (discussing the ramifications of mandatory sentencing as they relate to individualized justice); Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 530-31 (2001) ("Our government is built on a system of individualized justice"); see also PHILOSOPHY OF LAW 51 (Joel Feinberg & Jules Coleman eds., Wadsworth 7th ed. 2004) ("A principle of our liberal tradition justice, fairness and equality").

30. See *Republican Party of Minn. v. Kelly*, 63 F. Supp. 2d 967, 977 (D. Minn. 1999) ("The judicial system is based on the concept of individualized decisions on challenged conduct and interpretations of law enacted by the other branches of government." (citing *Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa.*, 944 F.2d 137, 142 (3d Cir. 1991))); see also *Lockett v. Ohio*, 438 U.S. 586, 602-03 (1978) ("individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country."); *William v. New York*, 337 U.S. 241, 247 (1949) ("Highly relevant—if not essential—to [a judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."); *United States v. Flores*, 336 F.3d 760, 765-68 (8th Cir. 2003) (Bright, J., concurring) (critiquing failure of Federal Sentencing Guidelines to provide sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors); Leslie Eaton, *Panel Urges Judge's Removal*, N.Y. TIMES, Apr. 6, 2004, § B, at 8 ("The State Commission on Judicial Conduct has recommended that an upstate judge be removed from office, saying that he meted out what it called assembly-line justice.").

31. *McClesky v. Kemp*, 481 U.S. 279, 311-12 (1987) (quoting 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.2 (a) (1984)).

32. Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. OF COMP. L. 643, 645-46 (2002) (describing the concept of individualized justice as justification for courts and legislatures not interfering with prosecutorial discretion)

33. See Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 489-500 (1982) (describing the various theories of jurisprudence regarding defendant representation and detailing the necessary individualized treatment); see also Symposium, *Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1920 (2002) [hereinafter Symposium, *Impact of Problem Solving*] (transcribing Susan Hendricks of The Legal Aid Society as saying: "Defense attorneys have an ethical duty to zealously advocate on behalf of individual clients, and this duty particularly requires them

As to public perception, the terms used to describe that which is antithetical to individual justice—assembly-line justice, wholesale justice—are inherently pejorative and inimical to our system of justice. There is deemed to be a baseline unfairness in a system that does not treat each case individually, thereby undermining public faith in the system's effectiveness.³⁴

It may be that rapid, efficient case processing is endemic to a system that hears "minor" criminal cases. However, "[t]here will always be too many cases for many of the participants in the system since most of them have a strong interest in being some place other than in court."³⁵ And this includes defendants who find that the cost, including numerous court appearances, of litigating a criminal case in New York City is simply too high.³⁶

to defend their client's liberty interest, that is, their desire to remain in the community in lieu of a jail sanction."). See generally Richard Klein, *Eleventh Commandment: Thou Shalt Not Be Compelled to Render The Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993) (examining potential remedies for counsel working within a system that fails to provide enough funding to ensure constitutionally mandated effective assistance of counsel); Richard Klein, *The Emperor Gideon has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

34. See Ronald Wright & Marc Miller, *The Screening/bargaining Tradeoff*, 55 STAN. L. REV. 29, 34 (2002); Charles Levin, *County OKs \$1.25 billion budget with cuts for most; Sheriff and district attorney get increases; 267 jobs slashed*, VENTURA COUNTY STAR, June 17, 2003 at A1 (country district attorney complaining that county budget cuts to his office would result in assembly-line justice that undermines public safety). But note that though typically pejorative, "assembly-line justice" is a system affirmatively endorsed in a crime control model of criminal case processing. In his landmark book, Packer describes two models of the criminal process: the "Crime Control Model" and the "Due Process Model." See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153 (1968). The "Crime Central Model" assumes large caseloads and limited resources, is administrative and managerial in nature, and values efficiency (which requires informality and uniformity) and finality (which requires minimizing the occasions for litigation or challenge). See *id.* at 158-59. Whereas, Packer explains, "[i]f the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course." *Id.* at 163. The Due Process Model consists of many underlying pressures to get at reliable truths and the appropriate formal proceedings used to do that. See *id.* at 163-65. Moreover, Packer notes that this model's "values can be expressed in "the concept of primacy of the individual and the complementary concept of limitation on official power." *Id.* at 165.

35. MALCOLM FEELEY, *PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 261 (1992). In his study of criminal courts, Feeley challenged the widely-held belief that the perfunctory processing of criminal cases is due to heavy caseloads. He compared a high volume urban court to a light caseload suburban court. Both courts processed their cases in a rapid and perfunctory manner, spending approximately the same amount of time per case. *Id.*

36. See Feeley, *supra* note 35, at 277 (noting that the "cost of invoking one's rights is frequently greater than the loss of the rights themselves").

The traditional attitude that misdemeanors are low-stakes cases³⁷ favors a system that values rapid, efficient case processing. After all, thirty percent of misdemeanor cases will result in an Adjournment in Contemplation of Dismissal.³⁸ In addition, most defendants will not serve additional jail time beyond the twenty-four hour arrest-to-arraignment time.³⁹ Moreover, it is arguable that the problem-solving courts that have proliferated in New York City in recent years siphon off the case types, such as domestic violence, most in need of individual attention.⁴⁰

In considering the calculus between stakes and the individualized attention required on the part of prosecutors, defense attorneys and judges, the growing number of collateral consequences for misdemeanor arrests and convictions must be considered. Col-

37. See Kirsten Howe, Note, *Criminal Nonsupport and a Proposal for an Effective Felony-Misdemeanor Distinction*, 37 HASTINGS L.J. 1075, 1091 (1986) (stating that “[m]isdemeanors are given low priority by overburdened law enforcement agencies. One investigator, commenting on the low priority given child support investigations by an understaffed district attorney’s office, said, ‘After all, it’s only a misdemeanor. It’s not in the same class with a burglary.’”).

38. See CJA RESEARCH BRIEF, *supra* note 9, at 5. (reporting that in 1998, thirty percent of misdemeanor cases were disposed of by ACDs, compared to eleven percent in 1989). An adjournment in contemplation of dismissal is “an adjournment of the action [for six or twelve months] . . . with a view to ultimate dismissal . . . in the furtherance of justice.” N.Y. CRIM. PROC. LAW § 170.55 (Mckinney 2004). Note that many ACDs have an accompanying order of protection requiring the defendant to refrain from certain conduct for the duration of the adjournment. In addition, many ACDs require the performance of community service or completion of a rehabilitation program as a condition of the ultimate dismissal.

39. *Id.* at 6 (reporting that fifty percent of convicted defendants received a jail sentence with a median length of seven days compared to fifty-eight percent in 1989 with median length of twenty days).

40. For a discussion of how these problem-solving courts deliver the special attention some defendants require, see generally Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 930 (describing Redhook Community Court in Brooklyn, N.Y. as “a more responsive Court built on individualized justice and provision of social services.); *The Effectiveness of the Broward Mental Health Court: an Evaluation*, POLICY BRIEF (Louis de la Parte Fla. Mental Health Inst., Tampa Fla.), Nov. 2002 (reporting that defendants appearing before Broward County, Florida’s Mental Health Court are more likely than regular defendants to describe the court as fair and non-coercive and are more likely afterwards to obtain social services), available at <http://www.fmhi.usf.edu/institute/pubs/newsletters/policybriefs/issue016.pdf> (last visited May 18, 2004). In addition, Judge Judy H. Klugers has noted that:

There are over 500 drug courts nationwide, as well as domestic violence courts, mental health courts, community courts, parole reentry courts, all focused on doing more than just adjudicating the facts of the individual case, but rather trying to address the underlying problems that brought the defendant, this particular individual, before the court.

Symposium, *Impact of Problem Solving*, *supra* note 33, at 1893.

lateral consequences have, beginning in the mid-1980s, grown in number and severity, and have continued to impact more and more people as the number of arrests and criminal convictions rose.⁴¹ The consequences of a criminal conviction that in the past were almost exclusively limited to the criminal court sanction now have the potential to lead to devastating civil consequences, wholly outside the control of criminal court. For example, in 1996 and 1998, Congress passed two laws that gave discretion to local public housing agencies to deny eligibility to anyone with a criminal background.⁴² In New York, a person convicted of a simple disorderly conduct violation is presumptively ineligible for public housing for two years.⁴³ In 1998, Congress passed the Higher Education Act that suspends eligibility for federal student loans, grants, or work assistance to students convicted of a drug-related offense.⁴⁴ This includes a conviction for a marijuana violation, a common plea bargain offered by the prosecution and accepted by defendants in the many misdemeanor marijuana cases that are adjudicated in Criminal Court.⁴⁵ In New York, pursuant to federal law,⁴⁶ a person's driver license is automatically suspended for six months upon a

41. See Jeremy Travis, *Invisible Punishment in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 18 (Marc Mauer & Meda Chesney-Lind eds., 2002). New laws enacted by congress since the 1980s, coupled with the fact that 47 million people—approximately twenty-five percent of the nation's adult population—have criminal records, means that collateral consequences, or “invisible punishments” as Jeremy Travis calls them, “reach deep into American life.” See also Debbie Mukamal & Paul Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1502 (2003).

42. See Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996); Veteran Affairs and HUD Appropriations Act, Pub. L. No. 105-276, tit. V, 112 Stat. 2461 (1998); see also Mukamal & Samuels, *supra* note 41, at 1506.

43. See N.Y. CITY HOUS. AUTH., DEPARTMENT OF HOUSING APPLICATIONS MANUAL (2003) (the Manual's “Standards for Admission: Conviction Factors and End of Ineligibility Periods—Public Housing Program” details this two-year bar); OFF. OF N.Y. CITY COMPTROLLER WILLIAM C. THOMPSON, JR., AUDIT REPORT ON THE NEW YORK CITY HOUSING AUTHORITY'S PROCESS FOR DETERMINING TENANT ELIGIBILITY 6, 20 (2003), available at http://comptroller.nyc.gov/bureaus/audit/PDF_FILES/MG03_080A.pdf (last visited May 18, 2004).

44. 20 U.S.C. § 1091(r)(1) (2004) (“A student who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance shall not be eligible to receive any grant, loan, or work assistance”); 21 U.S.C. § 812(c) (2004) (defining a controlled substance as including marihuana).

45. 20 U.S.C. § 1091(r)(1); 21 U.S.C. § 812(c).

46. See 23 U.S.C. § 159 (2004) (requiring the federal government to withhold a portion of a state's federal highway grant if the state does not suspend state-issued driver's licenses for controlled substances convictions); see also Mukamal & Samuels, *supra* note 41, at 1515 (describing the operation of this federal law and the states' response to it).

conviction of any drug offense, including misdemeanor marijuana possession.⁴⁷ In addition, the impact of misdemeanor convictions on traditional collateral consequences such as immigration has become more severe since passage of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.⁴⁸

There is great tension in a criminal court system premised on the ideal of individualized justice that so often simply does not deliver. Whether because of intense volume or the perceived low stakes of misdemeanor cases, Criminal Court and all its contributing players, including the District Attorney and Public Defender offices, have developed policies and practices that value case processing over justice. There is great value in working hard to describe accurately the policies and practices that have developed, some consciously and thoughtfully designed and others patched together haphazardly, and then to evaluate how these policies and practices hinder or further the ideal of individualized justice. The Criminal Courts Conference was a first step in such a process of analysis.

The conference planners focused on five problems that have undermined the pursuit of justice in New York City's Criminal Court system for decades. The first group, Arraignment Norms, Practices and Culture, targeted professionalism and justice at the first and often last court appearance for people arrested and charged with misdemeanor crimes in New York City. The second group focused on the collateral consequences of misdemeanor arrests and convictions, as well as the specialized and problem-solving courts becoming prevalent in the Criminal Courts. The third group, The Impact of Criminal Court on the Marginalized Person Who "Use" the System, took on the highly charged, but fundamentally important, issue of the intersection of race and New York City's Criminal Courts. The fourth group examined the post-arraignment processing of cases, and the fifth group explored standards, evaluation and

47. See N.Y. VEH. & TRAF. LAW § 510(2)(b)(v) (McKinney 2004) (suspending a driver license for any violation of the Controlled Substances Act, 21 U.S.C. § 801 (2004), including marijuana possession).

48. See Nora Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL'Y REV.* 153, 154 (1999). ("The number and scope of such adverse consequences tend to be unknown even to participants in the criminal justice system, often because they are scattered throughout different bodies of law."); Lea McDermid, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 *CAL. L. REV.* 741 (2001); see also Margaret Colgate Love, *Deconstructing the New Infamy*, 16 *CRIM. JUST.* 30, 30-35 (2001) (explaining why collateral consequences should be a concern to prosecutors and the criminal justice system).

monitoring of the many professionals who participate in the functioning of Criminal Court.⁴⁹

The conference was to be a first step in a longer term endeavor to improve New York City's Criminal Courts. The New York County Lawyers Association is currently in the process of forming a Criminal Courts Task Force to follow up on the discussions and creative ideas that came out of the conference, to work more closely with Court Administration to explore what can be accomplished, and most importantly, to serve as a facilitator for greater communication between the Courts and those who "use" and practice in them. An executive summary and list of conference participants follows. Detailed reports from each of the five working group are attached as addenda.

I. EXECUTIVE SUMMARY

A. Volume and Speed

All of the working groups discussed the workload of the criminal court. So many cases are processed and at such rapid speed that there is a lack of individualized attention to cases and a risk of premature and inaccurate disposition. Several recommendations resulted, although not all the participants agreed on the best way to implement the recommendations.

1. Reduce the number of cases processed in the Criminal Court, possibly by issuing more Desk Appearance Tickets⁵⁰; declining prosecution; or diverting cases into alternative fora.
2. Add resources to the Criminal Court, to allow professionals to pay more attention to each case. This could be achieved by opening more courts or by reallocating resources between Criminal and Supreme Court on the basis of caseloads rather than status, as has been recently proposed by Chief Judge Kaye.⁵¹

49. Before the conference, participants were assigned to a working group and provided with the group's "charge" and background reading, which included *SAVING THE CRIMINAL COURTS*, *supra* note 25; Subin, *supra* note 26; statistics from the Office of Court Administration, *supra* note 17; and *CJA RESEARCH BRIEF*, *supra* note 9. Participants, led by a facilitator, met in a morning and afternoon session. Everyone reconvened at the end of the day for oral reports from a member of each working group.

50. *See supra* note 17.

51. Since the conference, Chief Judge Kaye has announced a pilot project in Bronx County that will combine the Criminal Court with the Criminal Term of Supreme Court into a single consolidated criminal trial court. *See Kaye, supra* note 28, at 8.

3. Do not assign Civil Court judges, who are unfamiliar with criminal law and procedure, to arraignments

B. Lack of Information Communicated to the Accused, Witnesses, and Victims

The potential collateral consequences of a criminal court conviction are significant. Convicted persons may be deported, evicted, or prevented from obtaining licenses and loans. Sentencing in criminal court is more complex than it appears. Convictions may require the payment of fines and fees. Individuals who do not pay may be re-arrested and jailed. When payment is deferred by the entry of judgment, individuals may unknowingly damage their credit rating.

1. Devise ways to ensure that individuals convicted of offenses and crimes understand fully the ramifications of a plea of guilty. Defense attorneys should learn more about the collateral consequences of convictions and counsel their clients accordingly. Courts could shoulder responsibility for informing the individuals who appear before them. Courts could also experiment with informational leaflets, film clips, and kiosks that could inform arrestees, even before they are arraigned, about what happens in criminal court, potential sentences and alternatives to incarceration.
2. Devise mechanism to keep all professionals who work in the system informed about relevant developments.

C. Facilities

Every group discussed the deplorable physical condition of the criminal courts, which were described as filthy and infested with vermin. These conditions are unpleasant for the people who work in the court, foster unprofessional attitudes towards work, and, perhaps even more importantly, negatively impact the public. There is little or no case conferencing space for defense attorneys to conference with their clients, for prosecutors to prepare witnesses, or for lawyers to have privacy and quiet to thoughtfully discuss case resolution. Judges complained that in some courthouses, they lack personal chambers.

1. Clean the courts.
2. Include the perspective of the people who work in the courts when planning new facilities.

3. Create private interview space for lawyers to meet with defendants, witnesses and each other.
4. Encourage professional and courteous behavior by court professionals who interact with the public. Disrespect and unprofessional treatment by court personnel and lawyers toward defendants and their families was identified as a dehumanizing aspect of Criminal Court. Group Three in particular recommended training for lawyers and court personnel, as well as a well-publicized complaint process.

D. Calendar Control

Cases move through the courts at a maddeningly slow pace. The accused often plead guilty because they are tired of missing days of work, and not because they have, in fact, committed a crime. The discovery process is ponderous.

1. Experiment with excusing defendants from some court appearances. A reporting part could permit defendants to check in with the court, maintaining court control over the accused, yet granting those individuals some flexibility in their work, childcare and education obligations.
2. Experiment with a night court session.
3. Experiment with a split calendar. Designating morning and afternoon appearance times may alleviate the delays that result from all cases being calendared first thing in the morning but not heard until much later in the day.
4. Re-think discovery practice. Lack of investigation and refusal to disclose the results of investigation slow the process and result in miscarriages of justice.
5. Experiment with alternatives to the current, almost exclusive, use of cash bail.

E. Information Sharing

All conference participants expressed frustration with the lack of ability to control their workload. Public safety strategies are implemented without discussing the impact any given strategy might have on the courts. When the police implement a new strategy and decide to target a specific criminal element for arrest, that decision immediately impacts the Criminal Court, without warning to its contributing organizations.

1. Re-establish a regular schedule of meetings to share information and ideas. Members of Group One in particular recalled a series of meetings among representatives of the component organizations working in Criminal Court that succeeded in reducing the time between arrests and arraignment. The group endorsed the idea of resuming a regular meeting schedule to meet ongoing challenges and to foster cooperation and coordination among the many stakeholders in the criminal justice system.
2. Create a mechanism for influencing, or at least hearing about policing decisions.
3. Create a mechanism for influencing legislative decisions.

F. Status

Group Four, in particular, recognized that Criminal Court is not just “lower” to Supreme Court jurisdictionally, but in many other aspects as well. The group was concerned that the lower pay and status awarded to Criminal Court professionals creates the impression that the work of the criminal courts is unimportant and inferior. Thus many Criminal Court judges seek promotion to Supreme Court as quickly as possible to achieve improved working conditions, status and perquisites. This attitude is reflected in District Attorney and public defender offices, where new lawyers “cut their teeth” on misdemeanor cases in preparation for the glory of prosecuting and defending felonies. Even the police departments relegate criminal court matters to the back burner. Prosecutors have trouble obtaining police officers as witnesses in misdemeanors. The overall effect is to “de-professionalize” the criminal court.

G. Standards, Evaluation and Monitoring

Members of Group Five believe that standards could: 1) measure and improve the satisfaction of community members who use the court; 2) ensure efficient use of resources; 3) facilitate better communication among the various groups that interact in the criminal court; and 4) more efficiently use the Criminal Court buildings.

Participants:

Working Group #1: Arraignment Norms, Practices and Culture

Facilitator: Michael Pinard, Assistant Professor of Law, University of Maryland Law School

Participants:

Michael Bachrach, Esq., Richard, Ware & Levitt;
Llinet Beltre, Staff Attorney, Legal Aid Society, Criminal Defense
Division, Bronx
Hon. John Carter, Judge, Criminal Court, Kings County;
Catherine Christian, Director of Legal Training, Office of the Special
Narcotics Prosecutor, New York County
Michael Coleman, Co-Director, New York County Defender
Services
Rick Costello, Deputy Chief, Trial Division, The Office of the District
Attorney, New York County;
Rachel Ferrari, Assistant District Attorney, The Office of the District
Attorney, New York County;
Peter Kiers, Director, Criminal Justice Agency;
Hon. Patricia Henry, Judge, Criminal Court, Kings County;
Thomas Litsky, Assistant Solicitor General, Office of the New
York State Attorney General;
Brian Meagher, Assistant District Attorney, Kings County;
Vincent Modica, First Deputy Chief Clerk, Criminal Court, New
York County;
Diedre Moore, Staff Attorney, Legal Aid Society, Criminal Defense
Division, Bronx;
Martha Rayner, Associate Clinical Professor of Law, Fordham
Law School;
Wayne Saitta, Judge, Criminal Court, Kings County;
Susan Tipograph, Law Office of Susan Tipograph;
Andrea Umlas, Assistant District Attorney, Office of the District
Attorney, Kings County.

Reporter: Pat Almonrode, Student, Fordham University School of
Law

**Working Group #2: Resolution of Misdemeanor Cases: Non-Jail
Sanctions, Collateral Consequences and Specialized Courts**

Facilitator: Steve Zeidman, Associate Professor, City University
School of Law

Participants:

Elizabeth Bliss, Bronx Borough Manager, Domestic Violence Police
Program, Safe Horizon
Toni Bullock
Tim Casey, Associate in Law, Columbia University School of Law;

Joseph DiFlumeri, Staff Attorney, Legal Aid Society, Criminal Defense Division, Queens;
Rhonda Ferdinand, Deputy Chief Assistant District Attorney, Office of the Special Narcotics Prosecutor, New York County;
Andrew Hassel, Assistant Deputy Chief Clerk, Kings County;
Hon. Diane Kiesel, Judge, Criminal Court, Bronx County;
Jerry Lettieri, Assistant District Attorney, Queens County District Attorney's Office;
Adam Mansky, Director of Operations, Center for Court Innovation;
Carol Morrison, Safe Horizon;
Tim Mulligan, Court Operations, CASES;
Julie Ryan
Hon. Laura Safer-Espinoza, Judge, Criminal Court, Bronx County;
Lisa Schreibersdorf, Executive Director, Brooklyn Defender Service;
Robin Steinberg, Executive Director, Bronx Defenders.

Reporter: Rebecca Cross, Student, Fordham Law School

Working Group #3: The Impact of Criminal Court on the Marginalized Persons Who "Use" the System

Facilitator: Hon. Cheryl Chambers, Justice of Supreme Court, Kings County

Participants:

John Brancato, Deputy Bureau Chief, New York County District Attorney's Office;
Nahama Broner, PhD, Senior Research Psychologist, Research Triangle Institute International;
Daniel Conviser, New York State Assembly, Program Counsel;
Michael Fahey, Esq., Chair, Minorities in the Law Committee, NYCLA;
Ronald L. Garnett, Esq., Member, Criminal Justice Section, NYCLA;
Maxwell Gould, Staff Attorney, Legal Aid Society, Criminal Defense Division, New York County;
K. Babe Howell, Acting Assistant Professor of Law, New York University Law School;
Jerome McElroy, Executive Director, Criminal Justice Agency;
Leonard Noisette, Executive Director, Neighborhood Defender Service of Harlem;

Laura Johnson, Attorney-In-Charge, Criminal Appeals Bureau, Legal Aid Society;
Peggy Rodriguez, Supervisor for Witness Aid, Office of the District Attorney, New York County;
Jeannette Rucker, Deputy Bureau Chief, Office of the District Attorney, Bronx County;
Brian Rudner, Assistant District Attorney, Office of the District Attorney, Bronx County;
Irwin Shaw, Attorney-In-Charge, Legal Aid Society, Criminal Defense Division, Manhattan;
Hon. Ruth Smith, Judge, Criminal Court, Queens County;
Kyeong-sik Song, Court Interpreter;
Serena Springle, Chief Clerk, Criminal Court, Queens County;
Peter Troxler, Assistant District Attorney, Office of the District Attorney, Bronx County;
Darrin Wizenberg, Attorney, Legal Aid Society, Criminal Defense Division, Bronx;

Reporter: Alison Shilling, Student, Fordham University School of Law

Working Group #4: Post-Arrest Adjudication

Facilitator: Ian Weinstein, Professor of Law, Fordham University School of Law

Participants:

Michael Aronowski, Esq., Battiste, Aronowsky and Suchow;
Stanford Bandelli, Esq.;
Eric Black, Senior Court Clerk, New York County Criminal Court;
Breon Peace, Associate, Cleary, Gottlieb, Steen and Hamilton;
Robert Mandelbaum, Law Clerk, Chambers of Hon. Judith S. Kaye;
Anne Guttman, Executive Assistant District Attorney, Kings County District Attorney's Office;
Larry Fleisher, Esq.;
William Knisley, Esq.; Member, Criminal Justice Section, NYCLA;
Janette Jurado, Staff Attorney, Legal Aid Society, Criminal Defense Division, New York County;
Scott Leet, Assistant District Attorney, New York County District Attorney's Office;
Shari Michels, Assistant District Attorney, New York County District Attorney's Office;

Vanessa Merton, Associate Dean for Clinical Education, Pace University School of Law;

Jenny Roberts, Acting Assistant Professor of Law, New York University School of Law;

Hon. Larry Stephen, Judge, Criminal Court, Bronx County;

Hon. Deborah Stevens-Modica, Judge, Criminal Court, Queens County;

Richard White, Deputy Commissioner, Department of Probation.

Reporter: Gabrielle Ruda, Student, Fordham University School of Law

Working Group #5: Standards Evaluation, and Monitoring

Facilitator: Meryl Schwartz, Special Counsel, Vera Institute of Justice

Participants:

Paul Battiste, Esq., Battiste, Aronowsky and Suchow;

David Straconi (title/affiliation?)

Adele Bernhard, Professor of Law, Pace University School of Law

Frank Bress, Professor of Law, New York Law School

Miya Bryant (title/affiliation?)

Lori Cohen, Esq., Cohen and Funk

Robert Crotty, Esq., Kelley Brye and Warren;

Mary Farrington, Supervising Appellate Counsel, New York County District Attorney's Office

Danielle Follet, Attorney, Legal Aid Society, Criminal Defense Division, Bronx County

Andrew Hassell, Assistant Deputy Chief Clerk, Criminal Court, Kings County;

Robert Hanophy, Deputy Bureau Chief, Queens County District Attorney's Office;

Barry Kamins, Esq., Flamhaft, Levy, Kamins, Hirsch and Rendeiro, LLP

Tom Klein, Attorney, Legal Aid Society, Criminal Defense Division, New York County

Kevin Pogue, Director of Training, New York County District Attorney's Office

Vinnie Revellese, Law Clerk, Chambers of Hon. William C. Donnino

Reporter: Dana Irvis, Student, Fordham University School of Law

II. WORKING GROUP REPORTS

REPORT

Arraignment Norms, Practices, and Culture

Working Group One

CHARGE:

This working group was charged with making recommendations to improve misdemeanor arraignment practice. For many defendants charged with misdemeanors, arraignments will be the first and last court appearance; the vast majority of cases will be resolved at this stage. Yet, the outcome of this rapid first court appearance can have significant and lasting consequences for defendants as well as victims and complainants. And for those cases that are not resolved, judges' bail decisions can have equally significant consequences. The planning group recognized that this stage in the adjudication of misdemeanor cases in New York City's Criminal Courts is critical.

Significant increases in the number of misdemeanor cases and changes in the kinds of cases arraigned over the last decade prompted the planning committee to identify important issues. Case volume increased considerably over the last decade.⁵² Most of that increase is accounted for by a steep rise in misdemeanor arrests.⁵³ Felony cases now make up less than twenty percent of the caseload flowing into arraignments, while they accounted for half in 1989.⁵⁴ These changes have required all components of the court system to devote considerable attention to decreasing and monitoring the time from arrest to when the defendant comes before the court for arraignment, which has resulted in a generally efficient and timely arrest to arraignment system.⁵⁵ In addition,

52. Arrest volume increased by twenty-two percent from 1989 to 1998. See CJA RESEARCH BRIEF, *supra* note 9, at 1.

53. Twice as many people were prosecuted for non-felony arrests in 1998 than in 1989 (176,432 versus 86,822, respectively). CJA RESEARCH BRIEF, *supra* note 9, at 2. That number increased to 189,703 in 2002.

54. In 1998, one third of arrests were for felonies; in 1989, fifty percent of all arrests were for felonies. CJA RESEARCH BRIEF, *supra* note 9, at 1. In 2002, less than twenty percent of all arraignments contained felony charges. Crim. Ct. of the City of N.Y., *Executive Summary for Judicial Year To Date Ending Sunday, December 29, 2002* (2003).

55. See N.Y. CRIM. PROC. LAW § 140.20 (Mckinney 2004); *People ex rel. Maxian v. Brown*, 570 N.E.2d 223 (N.Y. 1991) (holding that a delay in arraignment of more than

more cases are being resolved in arraignments,⁵⁶ and the number of routine, low-level offenses such as subway fare evasion, trespass and possession of marijuana has increased.⁵⁷ The result is greater volume of misdemeanor arraignments, highly increased repetition in the kinds of misdemeanors being arraigned, and rapid case processing.

These significant changes prompted the planning committee to identify important concerns. How does high volume, repetition of case type and speedy processing impact on professionalism and justice? Does it pressure Criminal Court professionals to approach arraignment practice formulaically, resulting in decreased individualized justice? Is there sufficient information concerning the facts of the charges, the defendants, and the victims to mete out individualized justice—to make fair and just bail and dispositional decisions? Can truth, guilt, or non-guilt be considered at arraignments when everyone has limited information? Should there be such a high rate of dispositions at arraignments when there is limited information about the accusations and the defendants? Are prosecutors, defense attorneys, and judges meeting their ethical obligations in arraignments? Are the resources available at the arraignment stage conducive or detrimental to quality practice?

twenty-four hours is presumptively unnecessary and unless explained, requires an arrestee's immediate release).

56. In 1998, seventy-three percent of non-felony cases had a determinative outcome in the Criminal Court arraignment, compared to sixty-two percent in 1989. CJA RESEARCH BRIEF, *supra* note 9, at 5. But note that there has been an increase in Adjournments in Contemplation of Dismissal in arraignments. In 1998, thirty percent of all misdemeanor cases resolved by a prosecution offer and defendant acceptance of an ACD, with eighty percent of those at the arraignment stage. In 1989, this was true in eleven percent cases and slightly more than half at arraignments. *Id.* at 5.

57. *See id.* at 2. N.Y. CRIM. PROC. LAW § 150.10(1) (Mckinney 2004) authorizes the issuance of an appearance ticket by the police "directing a person to appear in a . . . local criminal court at a . . . future time in connection with his alleged commission of a designated offense," thereby allowing for release from a police precinct and eliminating the additional incarceration time involved in waiting to be arraigned in Criminal Court (usually twenty-four hours). *Id.* An appearance ticket may be issued to a person charged with misdemeanors and certain class E felony offenses. § 150.20. The use of DATs has diminished significantly: in the first half of 1998, there were a total of 39,045 docketed DAT arraignments, in the first half of the next year, there were only 7,395. Since then, the number of docketed arraignments in the first half of any year has not risen above the high of 11,362 in 2003. This calculation of docketed arraignments is derived from the New York Criminal Justice Agency, Inc.'s *Semi-Annual Report* series covering the period from 2003 to 1998. All of the reports are available online at <http://www.cjareports.org> (last visited May 18, 2004).

REPORT

This working group agreed that arraignment practice is very difficult for all involved. High volume, inadequate facilities, and minimal information about individual cases and defendants create unprofessional working conditions that challenge professionals to mete out some semblance of justice. Volume was cited as a primary problem in arraignment practice, and the group was concerned that volume led to a lack of information about individual cases and the premature disposition of cases in some instances. It was noted by the group that the court, prosecutors, and public defenders have no control over intake because arrest volume is determined by policing policies. The group spent time considering alternatives to processing arrestees through the Criminal Courts, such as increased reliance on Desk Appearance Tickets⁵⁸ or "outsourcing" certain categories of cases to community or more locally based courts. The group did not reach consensus on these issues, however.

There was agreement that prosecutors, defense attorneys, and judges would benefit from having more information about the charges and defendants at arraignments. The group acknowledged that the criminal courts are recipients of summary arrests in which investigation, if it happens at all, will occur much later than the arraignment stage. However, the group recognized the difficulty of gathering more information without increasing the arrest to arraignment time. As a result, there is a strong tension between efficiency and sound decision making.

There was agreement that some case types, such as domestic violence offenses, required all involved to have more information at the first court appearance. Without reaching any conclusions, the group discussed the possibility of having domestic violence specialists in arraignment parts. There was strong disagreement as to whether any case and what case type could ever be resolved at arraignments based on the limited information that is currently available to the defense, prosecution, and judges.

The group discussed but came to no consensus regarding the amount of information necessary to dispense justice in criminal court arraignments. Defense attorneys suggested, however, that providing an opportunity to interview clients earlier than immediately before arraignment, as is the current practice, would give defense attorneys time to investigate and pursue other sources of

58. See *supra* note 57.

information, and thus allow for more informed counseling and the possibility of bringing more knowledge to the arraignment appearance.

The lack of information available at the arraignment appearance includes a dearth of awareness about the various collateral consequences that can attach to misdemeanor convictions. Some in the group noted that, given the swiftness of the arraignment process, the system does not focus on alerting defendants to the various collateral consequences—most notably potential deportation consequences—that can attach to guilty pleas.

The group easily agreed that the physical conditions of the criminal courtrooms in New York City are woefully inadequate. Lack of cleanliness and the presence of vermin were noted. In addition, everyone agreed that the attorney-client interview spaces provided in the arraignment parts of the Criminal Courts are deplorable. Again, the lack of cleanliness and vermin were mentioned as serious problems, as well as a lack of privacy, adequate lighting and sufficient interview spaces. Defense attorneys noted that they designated their worst suits for arraignments since the conditions are so foul.

The group was concerned about the practice of assigning Civil Court judges to arraignments during certain shifts. There was strong consensus that reliance on Civil Court judges to preside at arraignments is problematic and impractical. Lack of experience and knowledge of the Penal Law and Criminal Procedure Law by Civil Court judges resulted in inappropriate decision making and the inefficient use of court time. The group recommended that if reliance on Civil Court judges must continue, there should be increased training.

Concern was expressed by some members of the group about the lack of decision-making discretion exercised by Assistant District Attorneys assigned to arraignment parts, who are usually new lawyers and inexperienced prosecutors. The group discussed a proposal to regularly include senior Assistant District Attorneys to work arraignment shifts. Inclusion of senior prosecutors in arraignments would lead to a greater use of discretion on the part of the prosecutor and more individualized bail and dispositional results.

The group noted the inequitable effect of bail on those who simply cannot afford bail. There was concern that defendants unable to post bail usually pleaded guilty rather than pursue litigation because this option resulted in less time in jail. The group, however, recognized this issue was not easily resolved. The group recom-

mended that the future task force explore the feasibility of the increased use of non-traditional, though statutorily based, bail options, such as secured and unsecured bonds.⁵⁹ In addition, the group discussed investigating bail diversion programs and supervised release programs that operate in other states.

There was a consensus that judges' bail decisions in misdemeanor cases are widely disparate. Everyone was concerned about this reality, but the group did not reach consensus on a solution; while consistency was appealing, there was resistance to reforms that would require uniformity and thus reduce judicial discretion.

There was agreement that many of the issues discussed during this day long conference required further study and thought. Members of the group noted that there is fragmentation in the arrest to arraignment process and many of the institutional stakeholders are unaware of the restrictions and burdens each faces in fulfilling their obligations to the system as well as the individual interests they represent such as defendants, victims and the public in general. Some members of the group noted that in the past there had been on-going meetings among the institutional stakeholders for the purpose of reducing the arrest to arraignment time, and progress was achieved. The group endorsed the idea of resuming these sorts of meetings to take up the many issues being discussed by this group, since like arrest to arraignment time, they require thoughtful consideration by all involved in the arraignment process.

59. See N.Y. CRIM. PROC. LAW §§ 510.10, 520.10(1)(h) (Mckinney 2004).

REPORT**Resolution of Misdemeanor Cases: Non-Jail Sanctions,
Collateral Consequences, and Specialized Courts****Working Group Two****CHARGE:**1. *Non-Jail Sanctions and Collateral Consequences*

Most professionals practicing in New York City's Criminal Courts are expert and facile in the law and actual outcome of misdemeanor jail sentences. As to non-jail sentences and the collateral sanctions resulting from contact with the criminal justice system, however, there is less awareness and expertise. The majority of misdemeanor case dispositions will not result in additional jail beyond the approximately twenty-four hours of detention between arrest and arraignment, and many misdemeanor cases will result in a non-criminal disposition.⁶⁰ Defenders, prosecutors, judges, policy makers, and administrators, however, are not adequately considering significant consequences for many defendants. In addition, with the increase in misdemeanor arrests over the last decade, the number of people with misdemeanor criminal convictions has increased, and the conviction rate for those without criminal records has increased fifty percent, from 23,445 in 1989 to 36,262 in 1998.⁶¹

This working group was asked to consider the following issues:

What are the consequences of criminal and non-criminal convictions in Criminal Court—from collateral civil actions to the retention of information on certain government databases?

Does the Criminal Court system of adjudicating misdemeanors, as we now know it, adequately take into account collateral consequences?

Who has the responsibility for assuring that collateral consequences are adequately considered when prosecutors, defense attorneys, and judges determine justice in individual case dispositions? Are defense attorneys, judges, and prosecutors sufficiently aware of the burden, effectiveness, and value of

60. In 1998, thirty percent of misdemeanor cases were disposed of by an Adjournment in Contemplation of Dismissal compared to eleven percent in 1989. In 1998, forty-three percent of those convicted of a misdemeanor served jail time beyond the twenty-four hour arrest to arraignment time, compared to thirty-seven percent in 1989. See CJA RESEARCH BRIEF, *supra* note 9, at 5.

61. *Id.* at 6.

probation, community service, and other alternatives to incarceration?

2. *Specialized Courts*

Through specialized domestic violence, mental health and drug treatment parts, Criminal Court has sought to address persistent social problems that result in involvement in the criminal justice system. Though the planning committee recognized that problem solving and specialized courts are complex and multi-dimensional topics that have attracted attention and debate on a national scale, the planners determined that the growing number of New York City Criminal Court parts devoted to specialized practices required this working conference to give the topic attention. Originally, most specialized courts in New York City were in Supreme Court, targeting felony cases. Now, many misdemeanor specialized courts are in operation or planned.⁶² These courts offer treatment and intensive supervision during the pendency of the case or as a condition of disposition. The path of cases in specialized misdemeanor parts are strikingly different than those adjudicated in traditional parts: they last longer, require more frequent appearances, involve different and more stringent bail conditions, and call for rigorous scrutiny of the daily lives of defendants by the court and court personnel. In return, they offer defendants a chance at rehabilitation and an end to revolving door incarcerations. This group considered the effects of specialized misdemeanor courts:

Effect on defendants. Are defendants who enter these courts, especially domestic violence parts, presumed to be guilty? Does the specialized treatment itself effectuate a significant punishment? Is the "success rate" of treatment courts properly measured and publicized? Are defendants afforded sufficient due process during the plea, treatment, and monitoring stages?

Effect on counsel. What is the role of defense counsel and prosecutors? Is it ethical for defense counsel to not appear during the monitoring phases?

62. There are a total of twenty-six specialized, or "problem-solving," courts throughout the five boroughs of New York City: nine adult drug courts; two family drug courts; five misdemeanor domestic violence courts; two felony domestic violence courts; three integrated domestic violence courts (Bronx, Queens, Staten Island); three community courts; two mental health courts. See Telephone Interview with Aubrey Fox, Associate Director of Special Projects, Center for Court Innovation at the Center for Court Innovation (facts on file with the author).

Effect on the criminal justice system Do treatment courts drain funds from other courts? Is there an adequate pool of interested and competent judges to preside over the expanding use of treatment courts? Should all court parts include rehabilitation in their approach to misdemeanor sentencing?

Effect on complainants and the public in general

REPORT

The variety and enforcement of collateral consequences based on arrests⁶³ and convictions, appear to be increasing. The group identified collateral consequences ranging from civil matters such as deportation, eviction from public housing, disqualification from student loans and welfare benefits, to loss of licensing privileges (as needed to be a taxi driver⁶⁴ or security guard⁶⁵), as well as negative impacts on employment status due to excessive absences for court appearances. In addition, the group also included more traditional, but less recognized, collateral consequences of convictions such as mandatory surcharges, payment obligations attached to alternatives to incarceration⁶⁶ and sex offender registration.⁶⁷ The group agreed that there is tremendous variation in the level of awareness and knowledge by professionals involved in the criminal justice system regarding the variety and actual impact of collateral consequences. The group expressed concern about whether and to what extent defendants are being advised of collateral consequences.

The group noted that collateral consequences can be especially problematic in a system of adjudication that resolves the vast majority of misdemeanor cases early, rapidly, and with a minimum of information. Also noted was that, though many cases are resolved

63. An arrest without a subsequent conviction can trigger significant civil consequences. For example, defendants residing in public housing can be evicted for conduct underlying a misdemeanor arrest even when the criminal case is dismissed or resolved with a plea to a non-criminal offense. *See, e.g., Pearl White Place, HDFC v. Clinkscales, N.Y. L.J.*, Apr. 10, 2002, at 21 (Bronx County Hous. Ct.). In this case, the New York City Housing Court judge held that illegal use—in this case, tenant's son's plea of disorderly conduct arising from his possession of a controlled substance inside a Section 8-subsidized home—terminates lease as a matter of law, obviating need for notice of termination. *See id.*

64. *See* N.Y. CITY CODE, CHARTER & R. tit. 35, §§ 2-02, 2-63 (2001) (requiring "good moral character" of taxi license applicants and for taxi license holders to report any criminal convictions to the N.Y. City Taxi & Limousine Comm'n).

65. N.Y. GEN. BUS. LAW § 72 (Mckinney 2004).

66. *See infra* notes 69-71 and accompanying text.

67. *See* Sex Offender Registration Act, N.Y. CORRECT. LAW § 168 (Mckinney 2004)

at the arraignment stage, defense counsel has very limited time during arraignments to counsel clients about collateral consequences.

Civil collateral consequences can work to undo or undermine rehabilitation goals of a criminal case disposition. In addition, the group recognized that the consequences resulting from misdemeanor arrests and convictions are sometimes never intended nor even contemplated by any of the players involved in resolving the case. Thus the group explored the idea of ceding more control over civil consequences with the Criminal Courts. Could Criminal Court judges be given power to remove the risk of certain collateral consequences?

The group did not reach consensus on the issue of from whom and how information about collateral consequences should be conveyed to defendants. Judges and prosecutors encouraged defense counsel to take responsibility for educating defendants about collateral consequences because defense counsel is in the best position to access the potential for consequences. For example, defense counsel is best situated to learn of a defendant's immigration status or future goals that could be impacted by ultimate disposition in a criminal case.

The group strongly recommended that all professionals in the criminal justice system become better educated in the variety and actual risks of collateral consequences. The group recognized that public defenders, prosecutors and judges could obtain training through their respective institutions, but noted that attention should be paid to providing training to members of the 18-b panel⁶⁸ on the topic.

The working group also strongly recommended that empirical research be conducted to determine the actual impact of collateral consequences on misdemeanor defendants. It is difficult to access civil collateral consequences because many civil matters take place months or even years in the future and the risk of actual harm is difficult to access. While anecdotal information is enlightening, all agreed that it would be tremendously helpful to obtain concrete and solid information to assist professionals in predicting the future risk of a collateral consequence.

68. See N.Y. COUNTY LAW § 722 (McKinney 2004) (requiring each county to have a plan for providing counsel to indigent defendants). The indigent defense plan must either provide for representation by a public defender, representation by a private legal aid bureau or society, representation by private counsel which is rotated and coordinated by a county or city bar association, or a combination thereof. *Id.*

The group noted the hidden problems associated with the imposition of mandatory surcharges upon defendants convicted of non-criminal and criminal offenses.⁶⁹ Since judges can no longer waive the surcharge⁷⁰ and many indigent defendants cannot pay the surcharge, defense counsel routinely request that judges enter a civil judgment in lieu of actual payment, and judges routinely do so.⁷¹ The impact of such a civil lien on a person's credit report is unknown. Will such people ever be able to obtain loans? Will increased interest rates be imposed? Again, the group expressed the need for concrete answers as to how this actually affects defendants. For defendants who are required to pay the surcharge and are delinquent in doing so, the group expressed concern about the cost of sending warrant squads to arrest defendants for delinquent payments and the wildly disparate treatment accorded to those returned on such warrants.⁷²

By engaging in political lobbying, this working group recommended that the criminal justice community become involved before additional civil collateral consequences are legislated and consider becoming involved in advocating for changes in those consequences that are already a matter of law. The group challenged a future task force to explore whether Criminal Court prosecutors, defense attorneys and judges might in fact have areas of agreement allowing the criminal justice community to join forces in lobbying efforts.

69. See N.Y. PENAL LAW § 60.35(1)(b)-(c) (McKinney 2004) (requiring a mandatory surcharge for a defendant convicted of a violation of \$75 and a crime victim assistance fee of \$20; further requiring a surcharge for a misdemeanor of \$140 and a crime victim assistance fee of \$20).

70. Compare N.Y. CRIM. PROC. LAW § 420.35(2) (McKinney 1995) (effective July 1, 1995) ("Under no circumstances shall the mandatory surcharge or the crime victim assistance fee be waived."), with § 420.35(2) (repealed 1995), stating that:

In any case where a person is guilty of any offense for which a mandatory surcharge shall be imposed . . . the judge or hearing officer may waive all or any part of the mandatory surcharge where, because of the indigence of the offender, the payment of said surcharge would work an unreasonable hardship on the person convicted or his or her immediate family.

71. N.Y. CRIM. PROC. LAW § 420.40 (McKinney 2004) (Allowing a judge to defer the obligation to pay all or part of the mandatory surcharge.) Subsection 5 provides: "Any unpaid balance of the mandatory surcharge may be collected . . . in the same manner as a civil judgment." § 420.40(5).

72. Participants reported that police warrant squads bring in dozens of delinquent defendants per day; some judges immediately enter civil judgment and release defendants, while other judges incarcerate defendants for up to two weeks.

A. Specialized Courts

In general, there was vigorous debate about the specialized misdemeanor parts in New York City's Criminal Courts. The group acknowledged that there is much to be valued in problem solving courts; however, defense attorneys expressed concern with the decrease in hearings and trials that challenge police practices and the merits of the prosecution's case.

The group also discussed the parallels between specialized courts and quality of life policing. A consequence of quality of life policing is increased citizen police contact. Specialized courts are similar in that there is a closer connection between courts and defendants, i.e. more court appearances, closer court supervision, and increased obligations on the part of defendants.

The group recognized the Criminal Courts' specialty parts are separate and distinct from borough to borough and even within boroughs. It is important that monitoring and evaluation of the specialized courts and the related therapeutic programs provide solid information to evaluate the goals and effectiveness of these courts.

REPORT

**The Impact of Criminal Court on the Marginalized Persons
Who “Use” the System**

Working Group Three

CHARGE:

The vast majority of the people who “use” New York City’s Criminal Courts—from defendants, to witnesses, complainants, and family members—are marginalized people in our society, including racial minorities, immigrants and the economically underprivileged.

The connection between race and criminal justice in our nation has been much documented and the connection between race and New York City’s Criminal Courts is particularly strong. In 1998, those who were arrested for non-felonies were overwhelming African-American and Latino men.⁷³ The planning committee recognized that the socio-economic identity of non-felony arrestees in New York City, and therefore the identity of those brought into the Criminal Court system, is largely determined by policing initiatives, patterns, and policies—topics beyond the purview of the conference. The perception that racism and indifference plays a role in creating a Criminal Court system that is “used” almost exclusively by those at the edges of our society, however, could not be ignored by the conference planners. This working group was charged with examining the impact that this reality has on the level of professionalism and quality of work performed in the Criminal Courts.

The conference planners asked this working group to consider the following:

Does the strong connection between race and non-felony arrests undermine the legitimacy of the criminal justice system in New York City and if so, how has this affected the level of professionalism and quality of work in Criminal Court?

Do the culture and norms of arraignment and Criminal Court practice perpetuate the perception of racism and indifference in the criminal justice system?

Does Criminal Court exacerbate or perpetuate the marginalization and criminalization of large numbers of men of racial minorities?

73. Eight-three percent were male and eighty-four percent were African-American or Latino. CJA RESEARCH BRIEF, *supra* note 9, at 4.

How do the practices and culture of Criminal Court deal with cultural, sexual, and racial differences? More specifically, how do we as professionals treat, for example, immigrants, the mentally ill, and those of alternative sexual orientations?

How are misdemeanor crimes that are so routinely processed in Criminal Court connected to poverty?

How sensitive are we to cultural, sexual, and racial differences?

Is there a need to increase diversity among the professionals who work in Criminal Court? If so, how could this be achieved?

Do we have sufficient numbers and quality of interpreters in the Criminal Courts? What is the impact on a user of the system who does not speak English?

Should professionals working in Criminal Court respond to the perception of racism; if so, how? How can individual instances of racism, sexism or indifference occurring in Criminal Court be reported, considered and addressed?

What training do Criminal Court professionals, from court personnel to judges, prosecutors, and defense attorneys, receive in connection with issues of race, class, and gender? Is there a need for training?

REPORT

This working group agreed that, though they were not there to discuss New York City's policing policies, they could not wholly ignore the issue since the "users" of Criminal Court are largely determined by non-felony arrest policing policies. The group recommended that the future task force consider addressing the issue of New York City's policing policies and how they impact on the City's Criminal Courts. The group agreed that the "dehumanizing" aspects of the Criminal Court system certainly perpetuate the perception that the criminal justice system is one of racism and indifference. The group recommended paying close attention to these dehumanizing parts of the system. In general, there was agreement that improvement in the overall functioning of the system would go a long way in creating a system better poised to deliver justice.

Overwhelming volume was identified as one of the dehumanizing characteristics of the City's Criminal Courts. The group noted that the sheer number of cases required professionals to value speed and efficiency over individualized justice. The "conveyer

belt,” “factory- like” operation of the courts means “no one looks up to see the person who is standing there.”

The group expressed concern that the emphasis on speed can result in the rapid resolution of cases without judges, prosecutors and defense lawyers having enough information. The group noted that with the rise in collateral consequences, the need for careful deliberation and individualized attention is even more necessary. In addition, the group noted that the problems associated with lack of information are exacerbated for defendants who are mentally ill and immigrants who have little familiarity with United States’ system of criminal justice. The group discussed allowing earlier and increased discovery in non-felony cases to enhance well-informed decision making, but no consensus was reached. The group agreed that a future task force should explore the issue further. To ameliorate the routine processing of cases and to enhance individualized treatment of non-felony cases, the group recommended that case volume be reduced. The group suggested several ways to reduce volume, such as encouraging prosecutors to decline prosecution in more cases at the early case assessment stage, before charges are filed, and increasing the use of Desk Appearance Tickets,⁷⁴ at least in approved categories of non-felony offenses that would be amendable to an Appearance Ticket alternative.

Another troubling feature of the Criminal Courts, identified by this group, was the burden on defendants to make numerous mandatory court appearances to resolve cases. Some group members urged system to recognize this burden on defendants and their families. The group noted that the duty of many court appearances results in pressure on defendants to plead guilty to end the court appearances. Some group members recommended that a future task force consider the feasibility of spacing out court appearances over the course of each day rather than requiring all defendants to appear in court at the same time, as is the current practice. The group discussed but did not agree on a greater use of judicial discretion in excusing defendants from calendar calls at which it is clear there would be no resolution of the case. Disrespect and unprofessional treatment by court personnel and lawyers toward defendants and their families was identified as another dehumanizing aspect of Criminal Court. To address this problem the group recommended training for lawyers and court personnel. The group also recommended clearly posting information about how to make

74. See *supra* note 51.

complaints that invited comments about treatment by court personnel.

The conditions of confinement and attorney-client interview space for incarcerated defendants were deemed to be yet another dehumanizing aspect of New York City's Criminal Courts. Once again, the group concluded that this communicated disrespect and disregard for the people who must use the facilities. The group agreed that the prevalence of unsanitary courtrooms communicated the same message. As one group member stated: "How can the court be respected if it is not a respectful place for those who use it?" The group agreed that another way to improve the overall atmosphere and functioning of Criminal Court was to increase "users" access to information about the system and how it functions. The Group recommended increased use of technology to provide information to "users" of the system.

This working group suggested a future task force explore the current use of bail in misdemeanor cases and how it impacts on economically underprivileged defendants.

REPORT**Post-Arrestment Adjudication****Working Group Four****CHARGE:**

In New York City, misdemeanor cases that are not resolved at arraignment, the first court appearance, are adjourned to later dates and other courtrooms for a variety of purposes: possible disposition, motion practice, obtaining a sufficient accusatory instrument,⁷⁵ and even, at times, trial. Many Criminal Court professionals find, however, that these adjournments are in practice the beginning of a post-arrestment process that is a game of endurance—which side can endure the numerous and mostly pointless court appearances—and thus a trivialization of the process.

The conference planners posed a number of questions for the working group to consider. Has the endurance game so infected the post-arrestment process that the resolution of cases on individual merits is the exception rather than the rule? Do the numerous court appearances necessary to resolve a misdemeanor case post-arrestment essentially constitute a defendant's punishment? Is the post-arrestment adjudication system meeting the needs of law enforcement, the public and the constitutional guarantees of defendants? How can professionals, invested in the system, enhance the quality of justice meted out in the post-arrestment adjudication of misdemeanors?

The conference planners asked this working group to address a host of issues under the broader topics of Facilities and Resources, Ethics, and Volume:

A. Facilities and Resources

Are there enough courtrooms, judges and attorneys to handle the volume of misdemeanor cases?

Is the use of Judicial Hearing Officers an effective use of resources?

75. The accusatory instrument filed at the arraignment appearance is frequently a complaint sworn to by the arresting police officer based on hearsay. Absent waiver by a defendant, a sufficient accusatory instrument is an information containing non-hearsay factual allegations. *See* N.Y. CRIM. PROC. LAW § 100.40 (Mckinney 2004).

Is there an inferior status to all professionals working in the Criminal Courts from interpreters to judges?

Is the adjudication of misdemeanors less important than the adjudication of felonies?

Should the need for "Acting Supreme Court Judges" be reevaluated if justice is truly delayed by volume in Criminal Courts?⁷⁶

Are police officers following through on the prosecution of the "quality of life" arrests by responding to prosecutors' requests to appear in court?

B. Ethics

Is it appropriate to use Criminal Court as a training ground for new attorneys?

What impact does the perceived use of less experienced attorneys have on the perception of justice by defendants, juries and complainants?

Are prosecutors and defense attorneys carrying inappropriate caseloads? Is this monitored? Should it be, and how?

Are misdemeanor cases being investigated and prepared for trial by prosecutors and defense attorneys?

C. Case Volume

Has volume eradicated the opportunity for a timely jury trial?

Is the routine reduction of charges to B misdemeanors an appropriate tool to facilitate trials?

What is the goal of this practice and is it working?⁷⁷

76. In all counties of New York City except Staten Island, many Criminal Court judges were elevated to Acting Supreme Court Judges to handle the large volume of felonies that once existed. As of January of 2004, fewer than twenty percent of all arraigned cases are felonies, yet, city-wide, there are seventy-five percent more judges hearing felony matters than misdemeanor matters (seventy-five in Criminal Court and 125 in Supreme Court). In Bronx County, where only eighteen percent of the caseload is felonies there are hundred percent more judges hearing felony matters (seventeen in Criminal Court, thirty-three in Supreme Court). N.Y. State Off. of Ct. Admin., *Judges Sitting In Courts Of Criminal Jurisdiction* (Jan. 8, 2004).

77. A defendant has a right to a jury upon trial for a class A misdemeanor, but no such right exists for a class B misdemeanor. N.Y. CRIM. PROC. LAW § 340.40 (Mckinney 2004).

Should greater attention be given to persistent misdemeanor offenders?⁷⁸

REPORT

The working group identified several core problems: inadequate space and poor physical conditions of the Criminal Courts; disparity between Supreme Court and Criminal Court in the status of personnel, space and resources; and the multiple court appearances in which little substantive legal work is accomplished leading to a trivialization of the post arraignment adjudicative process.

Inadequate conditions include a lack of case conferencing space both for prosecutors and defense attorneys as well as defendants and defense counsel to consult. It was noted that Criminal Court judges do not have their own chambers in some boroughs. There was agreement that there is an overall lack of cleanliness and neglect of maintenance in Criminal Court. Finally, the group agreed that more courtrooms should be devoted to the hearing of misdemeanor cases.

An insufficient number of courtrooms were one outcome of what the group characterized as the subordination of criminal court facility management to supreme court facility management. It was noted that in Queens, for example, the Supreme Court takes up six floors of the courthouse, while the Criminal Court is relegated to two floors. Other group members asserted that the boroughs in which they work face similar inequities.

The group recognized that Criminal Court is not just “lower” to Supreme Court jurisdictionally, but in many other aspects as well. The group was concerned that the lower pay and status that is awarded to Criminal Court professionals creates the impression that the work of the criminal courts is unimportant and inferior. The group noted that many Criminal Court judges see their work as inferior to Supreme Court judges, and their main goal is to be “promoted” to Supreme Court and thus move up within the hierarchy of the court system. This career path is similar within District

78. In 2002, New York City instituted Operation Spotlight, which would focus attention on “chronic misdemeanants” through specialized courts in all five boroughs solely to hear “Spotlight cases.” Press Release, Off. of N.Y. City Mayor Michael R. Bloomberg, Mayor Michael R. Bloomberg Outlines Public Safety Accomplishments In 2003 (Dec. 17, 2002). “Since the launch of the initiative, there have been more than 18,000 arrests and the percentage of defendants receiving jail sentences has increased forty-eight percent, with sentences of more than thirty days increasing seventy-five percent. The percentage of defendants detained on bail has increased nearly twenty percent.” *Id.*

Attorney Offices and public defender offices, where new lawyers are required to “cut their teeth” on misdemeanor cases in preparation for the “big time” of prosecuting and defending felony matters. In addition, it was noted that this attitude is prevalent even in the Police Department as demonstrated by the difficulty faced by prosecutors in obtaining the court appearances of police officers in misdemeanor matters. The overall effect is one in which those who work and practice in Criminal Court are not perceived or even expected to be full professionals and thus many do not behave as such.

The large, daily dockets in most Criminal Court courtrooms prevent meaningful progress on individual cases. This leads to multiple, often unnecessary, adjournments forcing defendants and their lawyers to make time-consuming appearances in court. Though the burden of multiple appearances may be less on prosecutors, it still takes a toll since several prosecutors must staff the many criminal court parts for long parts of the day creating numerous “institutional” burdens on prosecutors’ time.⁷⁹ The same is true for judges. Handling large dockets takes time away from focused and thoughtful attention to deciding substantive legal issues. The burden of court appearances contributes to the fact that investigations into the merits of cases are the exception rather than the rule for both the defense and prosecution. The working group noted that this practice continues while the volume of cases on the docket in Criminal Court far outnumbers the volume of cases in Supreme Court.

This working group cited four goals that informed their recommendations: create more opportunities for trials, increase the likelihood that cases will be resolved on the merits rather than through the endurance game, decrease the time period it presently takes to resolve cases post-arraignments, and in general increase the perception and reality of justice in Criminal Court. This working group sought out solutions to these central problems with the above goals in mind by dividing their discussion into two categories: resources and docket control.

A. Resources

The working group suggested moving some misdemeanor cases to Supreme Court to ease the volume in Criminal Court. Group

79. Most assistant district attorneys do not appear in court to “cover” their cases; rather, the day’s docket is handled by ADAs assigned to a courtroom part who rely on written instructions provided by the ADA assigned to each respective case.

members queried whether this would require the “unification” of Criminal and Supreme Court and the feasibility of such a plan.⁸⁰ In the alternative, the group recommended a reallocation of court facility resources between Criminal and Supreme Court on the basis of need driven by case loads rather than status. This reallocation should lead to space for conference rooms, Criminal Court judges’ chambers and, perhaps, child care areas.

The group recommended equalizing the salary scale between personnel working in Criminal and Supreme Court, including judges and other employees such as court officers and stenographers. This would allow increased interchangeability between court employees working in both court systems. This may allay some of the emphasis on the unspoken hierarchy that exists, and allow for increased respect between and among personnel of both courts.

The practice of assigning Civil Court judges to arraignment parts was cited as a concern due to the judges’ lack of experience in criminal law and procedure. The group suggested supplemental training for Civil Court judges if this practice continues.

The group strongly recommended improved cleaning and maintenance of Criminal Court.

B. Docket Control

Several solutions were offered by group members to combat the problem of caseload volume and unnecessary court appearances. Offering the option of evening court appearances was one suggestion. This would help ease overcrowded calendars during the day and accommodate working defendants and defendants who are full time students. Another idea considered by the group was to excuse defendants from routine, non-substantive appearances.

The group proposed limiting the number of cases on each Criminal Court Part calendar to decrease the time devoted to calling cases and to increase the time available to take action on each case thus promoting the accomplishment of meaningful work. To achieve this, the group suggested that court administrators explore the feasibility of establishing “monitors” to allow for off-calendar, administrative adjournments when it is clear no substantive progress will be made during a court appearance.

80. Since the October 18, 2003 conference, Chief Judge Kaye has proposed just that. See Kaye, *supra* note 51.

Other ideas discussed, but not agreed upon by this working group, included setting a fixed number of court appearances that would force both parties to either achieve disposition or go to trial and exploring avenues to achieve more effective case screening within the District Attorneys offices.

There was discussion about the need for increased judicial control of the post-arraignment process to alleviate unnecessary court appearances, the waiting time involved in calling a case in Criminal Court and overall delay. Without reaching any consensus, ideas proposed included limiting the number of appearances made by defendants and scheduling cases to be heard at specific times during the day rather than scheduling the entire calendar for 9:30 A.M., as is the present practice.

There was lengthy discussion about the range of discovery policies utilized by prosecutors in each borough. The focus was on whether or not the provision of early, open file discovery could alleviate the need for some court appearances and contribute to earlier resolutions of cases based on the merits. Some prosecutor's offices provide early discovery, others do not. The group did not reach any consensus on this controversial topic; however, the group urged a future task force to continue exploring the topic and create an open dialogue regarding the problems and barriers to instituting early, open-file discovery in misdemeanors cases city-wide.

REPORT**Standards, Evaluation, and Monitoring****Working Group Five****CHARGE:**

Criminal court is a complex creature. Many organizations participate in the operation of the court and each works in connection with the others, sometimes in opposition and other times in support. The court's effective functioning depends on the collaboration of multiple groups, employed by different entities, each with its own separate goals. Any change implemented by one organization often impacts all the others.

The planning committee was interested in learning whether standards are used by any of the organizations involved and how useful standards might be in an effort to improve the performance of the Criminal Courts. Businesses use standards as a yardstick against which to measure performance. The American Association of Law Schools, for example, accredits law schools by comparing the school being evaluated to a set of standards. In the wake of scandalous revelations about the incompetence of crime laboratories,⁸¹ the relevant community is writing standards that will be used to fund and evaluate laboratories.

With this in mind, the planning committee charged the working group with exploring standards, evaluation, and monitoring. This included considering what standards exist for defense attorneys, prosecutors, judges, and other professionals working in Criminal Court such as court officers, interpreters, and probation officers, both within each professional's own organization and within the profession as a whole. The group was also asked to consider how the different standards are used and to what effect. In addition, the group was asked to consider models of evaluation. Finally, the planning committee requested the group to consider how the entities that make up the Criminal Court system hear and take into

81. See, e.g., OFF. OF INSPECTOR GEN., U.S. DEP'T OF JUST., THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1997) (investigating and substantiating some of a whistleblower's claims that personnel at the FBI Laboratory mishandled evidence and provided inaccurate testimony, including evidence used in the 1993 World Trade Center Bombing and Oklahoma City bombing), available at <http://www.usdoj.gov/oig/special/9704a/index.htm> (last visited May 20, 2004).

account the opinions of the "users" of the system—the accused, victims, witnesses and their families.

REPORT

In retrospect, the planning committee probably should have asked the working group to bifurcate its discussions: to begin by looking at how individual professions and organizations use standards and how each conducts internal monitoring and evaluation. Exploring how the Court, as an independent organism made up of separate and distinct parts, uses standards and whether it engages in monitoring and evaluating should have been tackled only after a review of the entities that make up the whole. That was not done and, as a result, the group struggled with its mission, lurching between a consideration of internal standards and a broader perspective.

Few of the participants wanted to discuss their own organizations' internal procedures for monitoring and evaluating staff. The subject seemed private and off limits for a general public discussion, especially with traditional adversaries in the room. Yet, it became clear over the course of the day that there is no meaningful way to evaluate the operation of the Court separate and apart from an evaluation of each of the participant organizations.

For example, when members of the group focused on the operation their own organization, representatives acknowledged the importance of internal standards. Everyone was comfortable with standards that would require training for new lawyers, new judges, and new judicial hearing officers, for example.

When the group tried to address ideas relating to standards, monitoring, and evaluation that might improve the overall functioning of the court, however, each organization's sense of autonomy and resistance to collective decision-making derailed any progress. For example, it was thought that returning experienced lawyers to the arraignment and misdemeanor parts where currently only very new attorneys work might improve the functioning of the arraignment parts—ensuring sufficient attention to all accused individuals. This suggestion was resisted by prosecutors and defenders who maintained that their offices did not have sufficient resources to meet this goal.

Members of the working group expressed their belief that standards could be useful in: 1) measuring and improving the satisfaction of community members who use the court; 2) ensuring efficient use of resources; 3) facilitating better communication

among the various groups that interact in the criminal court; and 4) more efficiently using the Criminal Court buildings. Each category will be discussed in turn below.

1. User satisfaction. A majority of group members discussed their belief that user satisfaction standards should measure the satisfaction of all those who use the courthouses, including lawyers, court personnel and the parties. Members disagreed about how satisfaction would be measured. Several individuals suggested using surveys, while others suggested that lawyers question their clients directly about their satisfaction with the courthouse and the adjudication process.

2. Better communication among court players. There was a great deal of concern over how slowly cases are resolved in the Criminal Court. Members of the working group contemplated whether mandatory, thorough reviews of cases might weed out those that can be adjudicated quickly, and permit greater attention to those that can not be easily resolved. A thoughtful review would necessitate early open file discovery, and some mechanism to facilitate conversation between adversaries.

3. More efficient use of the Criminal Court buildings. Many group members expressed frustration over the lack of available trial parts in the Criminal Court. Members believed, however, that the difficulty results from a lack of funding rather than a lack of standards. A majority of members agreed that it is essential for the Criminal Court to have standards set in place—standards that can be created or improved upon through a consensus of court personnel, the attorneys, and the individual parties. Many members, however, expressed the belief that this undertaking is doomed to fail if the state is unwilling, or unable, to dedicate the appropriate resources to achieve, and maintain, these standards.

4. Better utilization of lawyers' and parties' time. A majority of group members expressed a need for better scheduling of cases, especially during calendar calls. Suggestions included implementation of a system of morning and afternoon calendar calls, which would assist lawyers and parties. Group members acknowledged that because of volume, this suggestion may not be feasible at the present time.

Because no consensus developed on any particular issue, the working group was unable to formulate resolutions or recommendations, apart from the recommendation that a future task force agree to meet regularly to discuss issues raised during the day's conversation and that this group be comprised of people who have

the power to effect change within their offices. It was also suggested, but not agreed, that in preparation for those follow-up meetings, representatives of the various organizations encourage their own offices to undergo self-reflection and return to the group having identified specific areas within their organization where improvement is necessary.

Overall, the group had little faith in the helpfulness of standards. They agreed that standards exist, but felt that they do not address the realities of practice, and, furthermore, attorneys cannot meet whatever standards are relevant to their practice due to a lack of resources. Hence, group members asserted that changing practice standards is not going to alter the Criminal Court system.

Members agreed that, yes, there are numerous problems within the Court system and that if these problems were fixed, then we—the collective “we”—could expect lawyers and court personnel to perform at a higher level. As the system is currently set up, however, performing at that “higher level” would, as one group member put it, “bring the Criminal Court system to its knees” in less than a week. Because individual players are unable to perform at this higher level, group members agreed that trying to institute a system to monitor and evaluate standards would be counter-productive.