The Control of Public Spaces in Montreal in Times of Managerial Justice

Le contrôle des espaces publics à Montréal, à l’ère de la justice managériale

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1. Introduction

“I will not bend to the street” (“Je ne plierai pas à la rue”), declared Quebec Premier Jean Charest, in a televised debate a few days before losing power in the provincial elections of 2012 (Caron, 2012). The “street” Mr. Charest was alluding to was a metaphor for a student and grassroots-based protest movement against his government that had started with a student walkout and marches to protest tuition hikes. Several hundred demonstrations took place in 2012 over the seven months of what was dubbed the Printemps Érable, or in English, “Maple Spring”. At many occasions, several thousands of students and sympathizers were taking to the streets, sometimes banging on pots and pans to protest their government. This continued beyond the student strike, this time to fight against the curtailments of the right to protest.

The “street” Premier Charest was talking about is also “home” to around 30,000 homeless people in Montreal (Fournier, 1998; Campbell, Eid, 2009). Homelessness is described by one Quebec advocacy group, not as a status, but as a process of exclusion, which is caused by a combination of individual and structural factors (Réseau d’aide aux personnes seules et itinérantes de Montréal, 2003). However, in general terms, homelessness can be defined as a lack of regular access to housing, and as such, it occasions a greater-than-average and longer-than-average time in public spaces, including parks, streets, undergrounds, and sidewalks.

Public spaces are understood here in the material and legal sense as the places governed in the general interest, and not the metaphorical sense of the public sphere. The public
sphere, broadly speaking, is this forum where members of a collectivity can exchange on common concerns (see generally Habermas, 1989; see also Calhoun, 1992). According to Habermas (1989), the public sphere is meant to facilitate the development of a rational-critical debate on political issues and the participation of the most people possible (Calhoun, 1992). But as Collins and Blomley (2003, 55) write, “the public sphere needs to be grounded in public space – that is, the material location where the social interactions and political activities of the ‘public’ occur.” Public spaces are heavily regulated in Montreal as in many other North American cities (for example, Beckett, Herbert, 2010 – Seattle; Blomley, 2011 – Vancouver; Chesnay et al., 2013 – Toronto; Sylvestre et al., 2011 – Ottawa; Vitale, 2008 – New York; and Mitchell, 2003 – Berkeley). Examples of by-laws governing what one can or cannot do in Montreal’s public spaces include by-laws concerning Noise (B-3); Dog and Animal Control (C-10); Peace and Order on Public Property (P-1); Parks under the Authority of Montreal City Council (B-10); Parks (P-3); the Prevention of Breaches of the Peace, Public Order and Safety, and the Use of Public Property (P-6); Cleanliness and Protection of Public Property and Street Furniture (P-12.2); Civic Behavior, Respect, and Cleanliness (CA-24), the Terms and Conditions on the Possession and Use of Any Transit Fare Issued by the Société de transport de Montréal (STM R-105) and the Standards of Safety and Conduct to be Observed by Persons in the Rolling Stock and Buildings Operated by or for the Société de transport de Montréal (STM R-036). The provincial law Highway Safety Code (C-24.2) is also used to control behaviour in Montreal public spaces, notably to not only sanction motorists, but also pedestrian and cyclist offences such as jaywalking, crossing a street without complying with traffic lights, dealing with the occupant of a vehicle (e.g. squeegeeing or panhandling at street corners), riding a bike without the required reflectors, etc. Violations of municipal by-laws, public transportation by-laws and the Highway Safety Code, are usually punished by the issuing, by police officers, of “statements of offense”, commonly called “tickets”.

In recent times, two groups of people particularly visible in Montreal streets have received a disproportionate share of tickets for their actions in public spaces: homeless people and protesters (Campbell, Eid, 2009; Ligue des droits et libertés, 2015). The “protesters” referred to in this article are mostly (but not exclusively) student activists who were fighting against austerity measures. They are called as such as they were part of a protest: a form of collective expression that, following Babineau (2012), involves a temporary occupation of public space, and has a political dimension.

Although these two “categories” of people are certainly not mutually exclusive and they sometimes overlap, homeless people and protesters often do not share the same social reality. Nevertheless, they have one odd thing in common: both groups, like no other groups, are routinely controlled for their occupation of public spaces through the same legal tool, the ticket. Tickets are issued to them by the municipal police for alleged violations of municipal by-laws, such as loitering, drinking alcohol in public, making excessive noise, or participating in an unlawful assembly. Their illégalismes, to use Foucault’s term, translated as illegalities in the remainder of this paper, triggers a different social reaction than other types of illegalities in public spaces. Foucault (1977, 87), in Discipline and Punish, wrote the following about the differential administration of illegalities:

[...] the economy of illegalities was restructured with the development of capitalist society. The illegality of property was separated from the illegality of rights. This distinction represents a class opposition because, on the one hand, the illegality that was to be most accessible to the lower classes was that of property – the
violent transfer of ownership – and because, on the other, the bourgeoisie was to reserve to itself the illegality of rights: the possibility of getting around its own regulations and its own laws, of ensuring for itself an immense sector of economic circulation by a skillful manipulation of gaps in the law [...]. And this great redistribution of illegalities was even to be expressed to a specialization of the legal circuits: for illegalities of property – for theft – there were the ordinary courts and punishments; for the illegalities of rights – fraud, tax evasion, irregular commercial operations – special legal institutions applied with transactions, accommodations, reduced fines, etc.

As others have shown, illegalities of rights is not the exclusive domain of the bourgeoisie anymore and the opposition between illegalities of rights and illegalities of property is less fruitful (see e.g. Fischer, Spire, 2009; Amicelle, 2014; Velloso, 2016). The protesters and homeless people’s violations of city regulations fall within the definition of illegalities of rights. Yet the concept of illegalities, as referring not only to the transgression of norms but to the power struggles involved in the process of differentiating, categorizing, and hierarchizing behaviors defined as undisciplined (Lascoumes, 1996, 79), is still productive. To this day, and maybe now more than ever – and this is the very theme of this special issue of *Champ pénal/Penal field* – not all illegalities are dealt with in the same way, with some illegalities being controlled by specialized agencies benefiting from large discretionary powers and acting outside the traditional criminal justice system (Lascoumes, Nagels, 2014). Interestingly though, the illegalities committed by the homeless and protesters are not dealt with by specialized agencies outside the traditional criminal justice system, yet they are managed informally, administratively, in deviation from the standard criminal law principles usually guiding the police-court network.

Hence, I would like to offer another perspective on the theme of this special issue: the specialization of the legal processes and the differential treatment of illegalities can very well happen within the traditional police-court network, but in a parallel track, what I call the “managerial justice” way. The ticketing practices, anchored in the broken windows theory (Wilson, Kelling, 1982) and order maintenance policing (Bratton, Giuliani, 1994; Bratton, 1995; Sousa, Kelling, 2014), allow the criminal court system to discipline “out of place” groups such as homeless people and protesters (Cresswell, 1996). Banal and seemingly unthreatening legal processes, such as those involved in the issuing of tickets in Montreal, in the end reveals disturbing social control practices that have more to do with managing marginalized populations than adjudicating guilt and punishing criminals. Via these ticketing practices, the police and the court system seem to depart from the “adjudicative ideal” where the criminal court is the agency that typically determines guilt or innocence and imposes a sentence to those found guilty after formal criminal procedures (Feeley, 1992). Yet, absence of formal punishment does not equate with a less punitive system. The punishment starts in the street and is then continued once the arrestee gets entangled in the penal processes at the municipal court system, with the court exercising social control on a certain class of delinquents who apparently threaten social and geographical order (Geller, 2016; Natapoff, 2012; Kohler-Hausmann, 2013, 2014; Mitchell, 1997, 2003; Blomley, 2004, 2009, 2011, Beckett, Herbert 2008).

In this paper, I will first briefly go over some dimensions of the governance of public spaces in Montreal, provide background to the uses of public space by homeless people and protesters in Montreal, and detail the ticketing practices that target these two groups. I will then explain how the vast majority of cases (tickets) are withdrawn via
prosecutorial discretion, pushing the court away from the adjudicative ideal and more into a managerial justice paradigm. The punishment seems to happen both at the arrest and at the pre-trial level, reinforcing the idea, following Feeley (1992), that “the process is the punishment”.

2. Governing protesters and homeless people in Montreal, one ticket at a time

In the following sections, I will first provide context about the governance of public spaces in Montreal; I will then explain the methodology of the research from which this paper is derived, before finally giving some “ticket stories” and exposing the scale of the ticketing practices towards homeless people and protesters for their uses of public space.

2.1. Governance of public spaces in Montreal

Both protesters and homeless people are theoretically forced to be in public spaces. Even though the first group typically occupies public space more permanently, and the second on a more temporary basis, they nevertheless invest the space for purposes that go beyond the typical uses of transit or leisure activities (Blomley, 2010; Beckett, Herbert, 2008; Mitchell, 1997). As Don Mitchell (1995, 120) writes, “Public spaces of spectacle, theater, and consumption create images that define the public, and these images exclude as “undesirable” the homeless and the political activist”.

It has been largely documented that the aggressive policing of incivilities in public spaces such as loitering, panhandling, and drinking in public, is inspired by the broken windows theory, crafted by James Q. Wilson and George L. Kelling (1982). This theory suggests that disorders in a community, like broken windows in a home, signal low surveillance and invites criminals to commit crimes. It has inspired an order maintenance policing strategy, also called “quality-of-life” or “zero-tolerance” strategy, often attributed to the 1990’s New York duo: police chief William Bratton and City Mayor Rudolf Giuliani (1994). Zero-tolerance policing strategy is an extreme form of order maintenance policing, consisting of zero tolerance for minor offenses. Aggressive policing of protests have also been linked to this type of policing (Vitale, 2005, 2011; Passavant, 2015; Rafail, 2015). In their strategy no. 5 on “Reclaiming the public spaces of New York”, Bratton and Giuliani claimed that the New York Police Department is committed “to giv[ing] police precinct commanders the authority to respond to an array of disorderly conditions; [and] advance a quality of life legislative agenda to enhance the police department’s ability to respond effectively to disorderly conditions and low-grade criminal activity that increase public fear.” (Bratton, Giuliani, 1994, see also Bratton, 1995). In other words, any street-level misdemeanor, from loitering to squeegeeing and protesting in the streets, triggered a strong police response (Beckett, Herbert, 2010).

Law professor Marie-Ève Sylvestre (2010, 806) has convincingly showed that the Montreal Police Department (designated in French by the abbreviation SPVM) has implemented, in the mid-1990s, an order maintenance policing strategy based on the broken windows theory. She traces the history of the control of disorder in Montreal:

Whether it was due to direct US influence or to the result of the convenient appropriation of a populist discourse as it resonated with local concerns, or if it was instead the result of a global trend toward insecurity and fear of (post)modernity,
the SPVM proposal directly built on US studies on the connection between disorder and urban decay and growing feelings of insecurity in a neighborhood.

13 Some Montreal police officers even traveled to the United States and Europe to learn more about zero-tolerance policing (Sylvestre, 2010, 807). In the end, order maintenance policing practices, Montreal style, took the form of the implementation of community policing in 1997, enhanced deployment of the police force downtown and the prioritization of the control of certain disorders. No overarching piece of legislation was specifically enacted to enable such a policy, but the systematic enforcement of municipal by-laws controlling disorder w as implemented at the same time as the neighborhood police system, i.e. in 1997. Six years later, in 2003, reaffirming these community policing principles, the SPVM released the document “Optimization Plan for the Neighbourhood Police” in which the policing of antisocial behaviour becomes their main objective. According to Sylvestre (2010, 809):

14 [The] SPVM ranked fighting against antisocial behavior among the highest concerns and expectations of citizens, insisting that it should become a “real priority.” […] The SPVM adopted a policy with respect to disorder and agreed on a list of antisocial acts to be closely monitored, which the City of Montreal explicitly endorsed. Following the recommendations from its Committee, the SPVM chose two overarching categories to encompass all behavior: signs of antisocial behavior or physical disorder, and acts of antisocial behavior or social disorder. These categories were then divided into subcategories including noise, disturbing behavior, drug trafficking, driver misconduct, and other acts that fall into the category of social disorders, as well as vandalism, environmental misconduct, and automobile obstruction that fall into the category of physical disorders.

15 As a result of these policies, by 2008, the total number of tickets issued for violations of Montreal by-laws (whether or not the individual was homeless) had increased by 107.5% since the release of the optimization plan in 2003 (Sylvestre, 2010, 817).

16 A statement of offence (ticket) is a piece of paper used to institute penal proceedings in the province of Québec (Code of Penal Procedure, CPP, s. 144). When examined one by one, out of context, the ticket is seemingly a mundane legal document. For most people, it is a frustrating piece of paper found on a windshield after one has overstayed a parking meter. For most people, it ends up being paid online with a credit card either because they recognize their guilt or because going through the hassle of a trial is not worth it. These tickets are annoying, but often do not lead to dire consequences: they never result in a criminal record, and most of the time they do not even occasion a court appearance (if the accused decides to plead guilty and pay the fine, as it happens in the majority of cases). However, as we will see in the next sections, the ticket, and especially the accumulation of tickets, can be anything but banal. Homelessness and protests are not prohibited in Quebec per se, but the ticketing practices have important impacts on the homeless panhandler, the loiterer, or the protesters, who are governed, displaced, and sometimes removed from public space by the ticketing practices. As Catherine Beckett and Steve Herbert (2010, 54) write: “the new social control tools are resolutely territorial: they seek to remove those perceive as disorderly from particular geographic locations […] to ‘move them along.’" Every time the homeless or the protesters get a ticket, they are impeded in their occupation of public space.
2.2. The ticketing practices towards the homeless and the protesters

2.2.1. Methodology

This article is based on a legal ethnography (Coutin, Fortin, 2015; Conley, O’Barr, 1993; Starr, Goodale in Coutin, 2002; Darian-Smith, 2004, 2007; Riles, 2011) of the uses of public space by protesters and the homeless in Montreal. In order to investigate the different ways in which they occupy public spaces and the legal responses to these occupations (e.g. tickets), I have conducted an 18-month long ethnographic research among different groups advocating for the rights of the homeless and protesters. I have also conducted typical legal research on the governance of municipal public spaces.

One portion of the ethnographic research unfolded from January 2013 to January 2014, when I volunteered for about 10 to 12 hours every two weeks (one full day one week and a few hours the following week) at a legal aid clinic for the homeless. The clinic provides legal aid and court accompaniment to the homeless people or people at risk of becoming homeless. It specifically helps them in dealing with non-violent criminal cases (e.g. shoplifting) and non-criminal cases involving tickets for minor offenses. Through this volunteer work, I was able to accompany approximately 90 people in their meetings with Montreal prosecutors and 70 people for their court hearings. Each time, I observed how the homeless, their advocates, and Montreal prosecutors and judges, perceive the various legal processes triggered by the homeless’ uses of public spaces.

A second aspect of my fieldwork consisted in participating in various initiatives documenting or challenging the repression of dissent in Montreal. Among other activities, I was part of a community-based project where I reviewed and analyzed more than 300 testimonies to document police abuses and rights violations during the student strike. On July 5th, 2012, a joint call for testimonies was launched by three well-known Quebec-based organizations: Ligue des droits et libertés (Quebec Civil Liberties Union), Association des juristes progressistes (Progressive Lawyers Association) and the Legal Committee of the Classe, coalition large de l’Association pour une solidarité syndicale étudiante (Large Coalition of Student Unions). The three organizations circulated the call within their networks, along with a brief template to help participants draft their testimony and to explain confidentiality rules. Verbal, privately written, and social media public testimonies were gathered and a small committee, of which I was a member, drafted the report. I was granted permission by 57 activists to use their testimonies as data for my research. The report was published online in April 2013 (Ligue des droits et libertés et al., 2013) and a press conference and launching event was organized.

During these initiatives, as a participant observer, I took extensive notes on several aspects of what it meant to occupy public spaces, and the legal strategies used by those who are judicialized for such occupations, and by their advocates. I also participated in seven demonstrations, attended several community-organized workshops on homelessness and on the judicialization of protests, and conducted countless observation sessions both in public spaces (especially in Place Émilie-Gamelin, a gathering point for both the homeless and protesters) and in municipal courtrooms where judges were dealing with tickets issued to members of these two groups. Furthermore, I have gathered information found on social media via several blogs or public Facebook pages. In addition
to the field research portion of my project, I also did legal research. I browsed legal databases for pieces of legislation and case law pertaining to public spaces, and violations of by-laws by homeless people and activists.

My ethnographic commitment produced everyday knowledge about the uses of public spaces and ticketing practices, from the marginalized occupiers and advocates’ perspectives. Therefore, it is necessarily incomplete and partial.\(^1\) I do believe, however, that by immersing extendedly in the legal clinic and activist scenes, I was able to acquire enough situated knowledge about the events in the streets: namely on what was taking place, and how and why they were happening. Admittedly, ethnographic research produces particularly messy accounts. Yet as Susan B. Coutin and I (2015, 71) wrote:

[ethnographies] provide insight into the workings of law on the ground, the consciousness of legal actors, the routine practices of legal institutions, the impacts of law in the lives of marginalized groups, the nature of legal advocacy, and the differences between law’s claims and its realities, all of which have been key to seeing law as a social phenomenon rather than merely as doctrine.

While interviews would have possibly produced more clean-cut quotes and direct answers to questions, my observations, often done “on the fly” while volunteering, produced indirect data. For example, I have scribbles of quotes (rather than clean transcriptions of recorded interviews) taken while nodding with empathy to the homeless person I was accompanying to court, or keywords noted on the back of a political tract during a protest. These messy, jotted notes became more or less detailed fieldnotes. Their “messiness” was counteracted by my profound and extended experience of the milieus I was studying.\(^2\) The next sections build on this ethnographic research.

2.2.2. The ticketing of the homeless

[François, Pajic participant in his twenties] – You wouldn’t believe the ridiculous tickets I got while being on the streets! For having peed against a wall, for having slept on a bench... (my translation)

[Michael, Pajic participant in his forties] – I got a few tickets for loitering on St-Laurent Blvd. You know, it’s very stressful to get tickets for living on the streets...

[Adrien, Pajic participant in his fifties] – I used to panhandle to be able to eat... and to pay my tickets! (my translation)

[Stéphane, Pajic participant in his twenties] – I was squeegeeing at the corner of Sherbrooke and St-Denis to get money to take the bus, when police officers came over, seized my squeegee and gave me a ticket... What do you think I can do? Do I have to steal a squeegee, and go back to squeegeeing to pay this ticket?! It’s nonsens! (my translation)

These quotes from François, Stéphane, Adrien and Michael\(^3\), briefly contextualize the extensive judicialization of homeless people in Montreal. They get tickets for behaviors such as drinking alcohol on the public domain, misusing public street furniture (i.e. sleeping on a bench), impeding traffic (i.e. sitting on the sidewalk), loitering, being in a park at night, jumping the turnstile in the Metro, public intoxication, etc. (Bellot, Sylvestre, 2012).

In three separate studies conducted between 1994 and 2010 concerning the judicialization of homeless people in Canadian cities, and especially in Montreal, Bellot and Sylvestre documented the number of tickets handed out to homeless people (Bellot et al., 2005; Bellot, Sylvestre 2012; Chesnay et al., 2012). Bellot and Sylvestre (2012, 11) mined the city’s database for tickets issued to defendants who had given, as their home address, the address of one of the city shelters and community organizations that service the...
homeless. They found that 64,491 tickets were issued to homeless people between January 1, 1994 and December 31, 2010. Yet the researchers caution that this is just the tip of the iceberg, considering that many people who are homeless or on the verge of homelessness may have given a friend’s or a relative’s address to the police officers when they receive a ticket, meaning the results were necessarily conservative.

Since 1994, the number of tickets issued to the homeless population has increased significantly from 1,054 tickets in 1994 to 6,562 tickets in 2010. This cannot be attributed to any drastic change in the composition of the homeless population. Moreover, the number of tickets issued under public transportation by-laws (and mostly in the metro) has increased drastically in recent years, representing 57% of all the tickets known to have been issued to homeless people during the study period (Bellot, Sylvestre, 2012).

Between 1994 and 2004, tickets were issued to 4,036 homeless people, of which 7.5% were women (Bellot, Sylvestre, 2012, 17; Campbell, Eid, 2009). From 2004 to 2006, tickets were handed out to 2,704 homeless people, of whom 8% were women. And from 2006 to 2010, 4,370 homeless people were ticketed, including 12% women. It is unclear if the increasing percentage of women is due to a change in patterns of judicialization or an increase in the proportion of women in the homeless population.

In the latest study, covering 2006-2010, 806 people, accounting for about 18% of the individuals profiled, received more than 10 tickets each. Hence, we can see an increase over the years in the number of people who are over-judicialized. The extreme cases are also telling: 18 people received more than a hundred tickets each between 2006 and 2010. The maximum number of tickets issued to a single person is 7 in one day, 33 in a month, and 72 for a year.

It is estimated that almost 25% of all tickets issued in Montreal during the study periods were issued to homeless people, even though it is not believed that this group has constituted more than 1.6% of the population (Bellot, Sylvestre, 2012, 29). As a result of the fines and associated fees — amounts that, needless to say, are almost impossible to pay — homeless people have racked up a penal debt of fifteen million dollars toward the City of Montreal over a fifteen-year period (Bellot, Sylvestre 2012).

In 2009, the Commission des droits de la personne et des droits de la jeunesse du Québec, a public agency dedicated to the protection of human rights in Quebec, has recognized that homeless people in Montreal are often victims of social profiling, i.e. of a disproportionate and discriminatory enforcement of municipal by-laws governing public spaces through the issuance of tickets (Campbell, Eid 2009).

The impact of the judicialization is very serious for the homeless. Bellot et al. (2005), who interviewed 29 homeless people, report that their interviewees faced stigmatization, difficulties in finding jobs, loss of housing, deterioration of family relations, etc., because of their judicialization. The stress they suffered, by being constantly afraid of being arrested for unpaid fines, was also tremendously high (some even reported having suicidal thoughts because of it). Some people reported avoiding certain areas of Montreal, even if this meant cutting themselves off from the organizations that would provide them services, to try to avoid interactions with the police (Bellot et al., 2005, 110).

All in all, many scholars have shown that the access to public spaces for homeless people is extremely limited because of law enforcement practices, and as a result, their lives are tragically affected (see Waldron, 1991; Mitchell, 1997; Bellot, St-Jacques, 2007; Vitale, 2008, 2010; Blomley, 2009; Sylvestre, 2010; Sylvestre et al., 2011).
2.2.3. The ticketing of protesters

The night of May 23rd was maybe my 10th night time demo. I am used to going to
demonstrations. In 3 months, I went to at least 100 demos. I never threw a single
rock, or broke anything. I was never masked. But my peaceful attitude didn’t
protect me from tear gas, and flash bombs, and police abuses.

On the night of May 23rd, the Montreal Police, acting together with the Provincial
Police, decided to switch gear. No more crowd dispersal, it was now time for full-
fledged mass arrests.

This protest was 100% peaceful. Apparently, it had been declared illegal before it
started. In my own case, I joined the demonstrators maybe 10 minutes after they
started moving. I have never heard the police make an announcement saying that it
was an unlawful protest and that we had to disperse.

Around 11.30pm, the demonstration reached the corner of St-Denis and
Sherbrooke. I was at the front of the procession and I witnessed the whole
operation that led to the arrest [...].

[...] At one point, we realized we had been trapped. The dispersal notice was made
by the Montreal Police, but at this time, we were already all surrounded. We never
had the chance to disperse.

No one resisted arrest. Everyone cooperated nicely. Of course there were some
arguments as there was a lot of frustration. But nothing too serious. Most of us sat
down on the ground and sang songs. Some of us read poems. Others played games
and others took a nap [...].

Then, they started processing us, and one by one the demonstrators started to get
on the buses provided by the Montreal Transportation Services. As for me, I got on
the bus at 2am. I had to wait two hours. The police officer [...] who handcuffed me
with tie-wraps was nice. He kind of admitted his own indignation about these
arbitrary mass arrests [...].

Unfortunately, the police officers responsible for the bus were of a different sort [...]

We were locked on the bus for 4 hours, with our hands cuffed behind our backs. One
older man’s wrists had gone all blue. No one told us anything during these four
hours. The police never read us our rights. We only learnt the reason of our arrest
after we’ve been released, once we have read the ticket they had slipped into our
pockets.

I was released around 6am with a ticket and a $634 fine.

(John, participant at a night demonstration against Law 12 [An act to enable
students to receive instruction from the postsecondary institutions they attend,
"Law 12"] and the tuition fees hike, in Montreal on May 23, 2012, my translation)

I left the demonstration right after it was declared unlawful. The police surged
forward and cordoned me off with about 30 other people. We were handcuffed and
taken to a police station, then released six hours later with a ticket for unlawful
assembly.

(Mathieu, a demonstrator describing an evening démonstration, Ligue des droits et
libertés et al., 2013, 13)

Protesters, such as John and Mathieu, have also received their share of tickets in the
recent years, especially during the 2012 student strike, which was met with an
unprecedented pattern of repression in Quebec history (Ligue des droits et libertés et al.,
2013). The 2012 protest movement in the province started with a student strike to protest
against a higher education 75% fee increase. From February to September 2012, post-
secondary departmental students’ associations organized democratic assemblies and
voted to strike, i.e. to stop engaging in pedagogical activities, and notably to refuse to go
to their classes (Ataogul et al., 2013; Makela, 2015). In March of 2012, when the strike was
at its peak, more than 300,000 students, representing approximately 75% of the total
population of university students in the province, were on strike and in the streets, protesting the government (ICI Radio-Canada, 2015). It was the largest and longest student strike in Canadian history. “It’s a student strike but a people’s struggle” as the slogan went. Hence, the movement became larger and reached out to a bigger portion of the population in the Spring of 2012, partly because of the intransigency of the Quebec government to acknowledge the students’ demands and to negotiate in good faith with the representatives of the student associations.

In May, the Quebec provincial legislative assembly adopted a special law with a very twisted title: An Act to enable students to receive instruction from the postsecondary institutions they attend (Law 12). The act first suspended the Winter semester for the students on strike and extend it in September, therefore legislating the students back to school. It also provided for public space management, and banned any assembly of more than 50 people taking place in a venue accessible to the public and for which the organizers would not have given 8-hour prior notice of the date, time, venue, and route, if any, of the event. This law triggered public rage and uprisings and was openly defied. According to a poll conducted in May 2012, about 60% of Quebecers were against the Law 12 (La Presse canadienne, 2012).

Just as the province adopted its law of exception, another legislative move was made, this time at the municipal level. On May 18, 2012, Montreal City Council decided to amend its By-law concerning the prevention of breaches of the peace, public order and safety and the use of public property (P-6) in order to add two new sections: failing to notify the itinerary of a demonstration to authorities beforehand may result in an illegal assembly and possibility of participants being fined and any person who does not have a reasonable motive to cover their face with a scarf, a mask, or a hood is in violation of the by-law and liable to a fine. The Council also increased the fines for violation of any sections of P-6 from $100 to $500 for a first offense. Police forces had new regulatory grounds to police and arrest protesters.

If the 2012 social movement was historical, so was the repression of the activists. It was characterized by police brutality, violations of the freedom of expression, unlawful arrests, political discrimination, etc. The magnitude of the human rights violations was so sheer that three civil society organizations took upon themselves to document them and to call for many redress measures as well as public investigations (Ligue des droits et libertés et al., 2013, 3, 40). They concluded that the authorities infringed on several constitutionally protected rights:

In 2012, Quebec lived through the longest and most extensive student strike in its history. The strike and social protest movements left in their wake the biggest wave of arrests in Quebec’s history. They also led to unprecedented exploitation of Quebec’s judiciary system and unparalleled discriminatory profiling in an attempt to repress the student movement and stifle, albeit unsuccessfully, the protests. [...] In their massive and indiscriminate use of multiple weapons, gas, plastic bullets, stun grenades, horses, dogs and others, did the authorities infringe on freedom of expression and of peaceful assembly?

Did the huge numbers of arrests, the mass arrests during peaceful demonstrations, the across the board ticketing practices, and the preventive detention of hundreds of citizens constitute infringements on freedom of expression and of peaceful assembly?

The answer to these questions is yes.

Seeing that the right to protest was under attack and still regulated by P-6, activists continued to take it to the streets and protest even after the end of the student strike,
and well into 2013. In the spring of 2015, Montreal was the theatre of a new wave of social
protests and student strikes. This time the movement was fighting against austerity
measures and hydrocarbons. The movement was heavily repressed and controlled
through the issuance of tickets again, and it was met with an even more intense level of
violence and police brutality (Ligue des droits et libertés, 2015).

The judicialization of protesters during the past few years is far less documented and the
statistics are not as accessible as those regarding the judicialization of the homeless24. The
data we do have is however telling25. During the student strike, more than 3,500 people
were arrested in the province of Quebec (Ligue des droits et libertés et al., 2013). Of those
people, only 471 faced criminal charges, the rest either received tickets for violations of
municipal by-laws (1,616 persons) or violations of state legislations, e.g. the Highway
Safety Code (817 persons) (Ligue des droits et libertés et al., 2013, 17-19). Those tickets
were issued under the newly amended P-6 by-law to protesters mostly in Montreal and
mostly for gathering or demonstrating without having previously disclosed the event
location or march itinerary to the police. In the aftermath of the student strike and until
December 2014, nearly 2,000 protesters were arrested, 92% of which led to the issuance of
tickets (Ligue des droits et libertés, 2015).

In overview, between March 15, 2011 and May 1, 2015, police conducted nearly 7,000
arrests in the context of protests in the Province of Quebec: 3,636 arrests in 2012; 1,539 in
2013; 439 in 2014; 1,006 in 2015 (Ligue des droits et libertés, 2015, 6). It should be noted
that the social climate was very different from 2013 until 2015, in that there were far less
protests than in 2012. Yet, the number of people arrested is still considerable. More than
75% of the arrests that were conducted concerning the protests in the province in the
recent years did not lead to criminal charges, but the issuance of tickets.

Ticketing practices, arrests, and court proceedings leave a mark on protesters. In a 2013
report (Ligue des droits et libertés et al., 2013), half of the 400 people who testified
claimed to have been psychologically impacted by police interactions as well as the court
system. Many of these individuals stated that they had felt humiliated and had their
dignity violated through the process. Several also recalled feeling angry, to the point of
feeling sick to their stomach, from witnessing or experiencing police brutality during
arrests (Ligue des droits et libertés et al., 2013, 34). Individuals also felt scared and
intimidated. Dozens of people who testified for the report shared that they experienced
lasting psychological consequences from their arrest at a protest, including nightmares,
extreme fear of police sirens, depression, and paranoia. Ultimately, hundreds mentioned
losing faith in the police and the justice system. Most importantly, many people grew
afraid to attend protests. To cite the words of one respondent: “I can’t believe this is what
my Quebec has come to, that I’m afraid to demonstrate peacefully, afraid of police. How
can this be?” (Ligue des droits et libertés et al., 2013, 37).

Confronted with horrifying ticket stories and serious ticketing practices, one is left
wondering, why all this? How to make sense of the disproportionate ticketing of the
homeless and the protesters?
For one thing, homeless people and protesters alike are seen as disorders on public spaces. Disorderly people are defined by the authors of the broken windows theory, Wilson and Kelling (1982) as “[n]ot violent people, nor, necessarily, criminals, but disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed”. Since the rise of order maintenance policing and the zero-tolerance policy, homeless people have commonly been targeted as disorders to be policed (e.g. Vitale, 2008; Feldman, 2006). The same is true for protesters (Rafail, 2015; Vitale 2005, 2011). The mere gathering of people for a collective expression of dissent is considered as a disorder. Similarly, the homeless, when they are panhandling, for example, are seen as disorders in urban settings; as nuisances or obstacles. Collins and Blomley (2003, 58) wrote: “[a]t the same time that capital flows of billions of dollars are proceeding relatively unregulated by the state, begging on the streets of North America for dimes and quarters is increasingly subject to governmental sanction.” The same is true for the protesting crowd who disturbs the normal flow of pedestrians and automobiles (Blomley, 2011). The ticketing practices end up facilitating the ordered circulation of cars in the streets and penalizing the flux of citizens demonstrating or the homeless beggars on the sidewalk, who come to be seen as obstructions to the mobility of cars and pedestrians. Both the homeless and the protesters’ disruptive occupation of the space make them undesirable people deserving of banishment (Beckett, Herbert, 2010). As a result, not only is the ticket an instrument of control of public spaces, but so are the ticketing practices, as they also say something about the penal justice system as a whole. This seems to favour control over sentencing in the name of management, as we will see in the next section.

3. The administration of illegalities in public spaces in Montreal

As we have seen, homeless people and protesters who occupy public spaces are frequently arrested and ticketed for their so-called disorderly conduct. Once a ticket is issued, the individual’s entanglement with the penal justice system kicks in.

When a typical Montreal resident receives a ticket, most of the time they will simply pay the fine. On the other hand, when a homeless person or a protester is ticketed, it is a different story. As it happens, neither of these individuals have the ability or desire to pay the fine. To start, many homeless people lose their tickets because they know they cannot pay them anyway. Some homeless people go so far as to burn their tickets out of anger at the system and its injustice (Denis, 2011). The upshot is that their file is processed, they are presumed to plead not guilty, and the Court automatically sets a hearing date for them. However, most of the times they do not get notified of these hearings, as they have no address, or they simply do not show up to court, as their mode of living precludes them from doing so, and they are found guilty by default (in absentia). Homeless people can therefore rack up large quantities of penal debt without ever seeing a judge or setting foot in court.

For protesters who receive tickets, the situation is slightly different. Unlike the homeless, they tend to contest their tickets in large numbers and to show up for their hearings. In the case of mass arrests, the courts will often decide to process together all the tickets resulting from arrests at the same event. For example, if there were 250 people arrested
one night during a kettle operation, all arrestees who decided to plead not guilty will have their court hearing at the same time. In some cases, there have been so many defendants that the municipal courtrooms were not big enough, and the prosecutors have asked permission to hold the trials at the provincial courthouse, which has greater capacity (Normandin, 2014). Yet, the proportion of tickets withdrawn, instead of tried, once they reach the courts, is significant in the case of both homeless people and protesters, as we will see in the next section.

3.1. The routine withdrawal of tickets

Typically, in Montreal, the homeless used to be declared guilty in absentia before ending up in prison for non-payment of their fines, but the situation has slightly changed in recent years. Homeless rights activists set up a legal clinic tasked with the assistance and accompaniment of homeless people (or formerly homeless people) through the legal proceedings that result from their occupation of public spaces. To this day, more than 3,000 people have received the services of this clinic and it is not unusual nowadays for the homeless to bring their tickets to the clinic as soon as they have one issued against them. Apparently, the word on the street is that the legal clinic staff do “magic” with the tickets, especially since the establishment of the “Pajic”.

The Pajic is a special program at the municipal courthouse that deals, in a supposedly more humane manner, with the tickets homeless people receive for their use of public spaces. Its objective is to foster social reintegration and accountability, by helping to alleviate the burden that penal debt constitutes for homeless and formerly homeless people (Ville de Montréal, 2013; Beauchemin, 2012). Basically, it consists in meetings between a participant and a city prosecutor. The latter exploits their prosecutorial discretion to eventually offer to withdraw the charges. During these meetings, topics such as the participant’s housing situation, various addictions, relationships with friends and family, and current and future life projects are discussed. These meetings are not held at the courthouse but on the premises of the legal clinic. The clinic staff welcome the participants with coffee, chat them up a little bit to make them comfortable, and inform them about how the meeting will go (even if they had been briefed over the phone before the actual date of the meeting). Afterwards, they meet with the prosecutor in a different room. A person affiliated with the clinic always accompanies the participant during their meeting with the prosecutor, to provide support to the participant. For example, when participants, perhaps too intimidated by the whole process, fail to acknowledge all the efforts they have made to put their life back together, the clinic person would prompt them about their victories and progresses, so that the prosecutor would have enough information to withdraw the tickets. Another role for the person accompanying the participant is to step in if the prosecutor is out of line or insensitive to the homeless person’s reality. For example, I have once had to intervene when the prosecutor asked intrusive, destabilizing, and rather irrelevant questions to the participant, such as “how was your relationship with your father?” or “do you intend to see your children again?”

During the whole meeting, in theory, nothing is said on why the person had a ticket issued against them in the first place. The meeting does not look backward, as the courts usually do in normal proceedings. Instead, it concentrates on the present and the future of the Pajic participant. In other words, the prosecutor is not meeting with the defendant to determine whether they were justified, or has a defense for breaking the law, but
rather they meet to look at where the person is now, compared to where they were when the tickets were issued.

49 Typically, at the end of the meeting, if the prosecutor is satisfied that the person is well engaged in the process of getting off the street and is making progress towards rehabilitation—i.e. if there are enough “positive elements” in the person’s life, notably if the person’s addictions are under control and their housing situation is stable—the prosecutor offers to withdraw the tickets. If the prosecutor is not satisfied with the person’s situation, or if they have previously received too many tickets, the prosecutor will ask to meet again. I have estimated that around 28% of Pajic participants meet the prosecutor more than once before getting a withdrawal offer.

50 The withdrawal procedures then have to be confirmed by a judge, in a courtroom, at a later date. After another short meeting with the prosecutor (outside the courtroom but within the courthouse) to check if everything is still going well since the last time they met, the defendant takes the witness stand in the courtroom and the prosecutor summarizes the situation and asks the judge to acquit the defendant. During the hearing, the judge may or may not ask questions to the defendant and engage in a short dialogue with them. More importantly the judge congratulates the Pajic participant for their efforts. In the end, the judge gives the participant a diploma (if they want it). This ritual raises some interesting questions. As one Pajic participant once said: “Am I getting a diploma for being ticketed while on the street?” (my translation, see Fortin, Raffestin, 2017, 192). What’s more, one could say that giving a diploma infantilizes the Pajic participants, or even that it reinforces the idea that the judicialization of the homeless is their sole and only responsibility and is not part of a bigger social problem that has little to do with the “bad” or “good” attitude of the judicialized people. Giving a diploma, in a way, sanctions the fact that the individual alone is responsible for getting out of their entanglement with the judicial system. It obscures the notion that the tickets may be questionable and illegitimate in the first place. Still, a majority of Pajic participants are happy to get their diploma. In one case, I even heard a man in his forties tell the judge, with some emotion: “I think that’s the first diploma I’ve ever received!” (my translation, see also Fortin, Raffestin, 2017, 192).

51 All in all, from the beginning of the program until March 31, 2016, more than 8,500 tickets were withdrawn, thereby cancelling the penal debt of more than 540 individuals (Fortin, Raffestin, 2017). As such, the program is growing exponentially, attracting more people and resources every year.

52 Protesters go through the same process of charges withdrawal, even though they do not benefit from a special program through the municipal courthouse. As per the data found by Ligue des droits et libertés (2015), 83% of the tickets that were handed out pursuant to By-law P-6 between 2012 and 2014 resulted either in an acquittal after trial (in a minority of cases) or more commonly in a withdrawal of the charges via prosecutorial discretion following an administrative order from the Mayor’s office. However, these withdrawals happen after a certain time, and not without costs. During my fieldwork, I was able to attend a few **pro forma** court hearings for various P-6 tickets. On each occasion, I found the defendants in the room rather anxious, intimidated and confused. During one prosecutor’s address to a courtroom full of defendants, a young man who had been arrested in a protest during the student strike and who was now sitting next to me asked me under his breath, pointing at the prosecutor: “this guy is here to help me, right?” He thought the prosecutor was his own defense lawyer. Most people self-represent in the
case of tickets (mostly because they cannot access legal aid), but this does not imply that they are conversant in the law. Several accused were also confused about the duality of the legal proceedings: civil (class action) and penal (pleading not guilty and presenting a defense to the ticket). It was common to hear in activist meetings something along the lines of “if there is a class action for my “kettle” [i.e. a class action of the group of protesters arrested together during a protest], do I have to do something with my ticket?” For lawyers, the answer is obvious: the civil proceedings have nothing to do with the penal proceedings and of course people have to deal with their tickets even if they are part of a class action. However, it was not so obvious for some protesters not used to courts. The protesters were both confused and annoyed: they had missed school, work, or had taken time off from their other activities to come to court, only to see their case postponed again, to what seems to be at the prosecutor’s whim. Were the procedures dragging to wear out the accused and make them more inclined to plead guilty? According to Natacha Binsse-Masse, a lawyer in charge of multiple class actions representing protesters in the 2000s, the arrests conducted in the context of a protest often have very weak legal grounds and are carried out mainly to end a protest and to discourage future movements of social activism (Ligue des droits et libertés 2015, 10). As we will see in the next section, for both homeless people and protesters, the court indeed seems to embrace a managerial function more than an adjudicative one.

3.2. Managerial justice

The proportion of tickets withdrawn, in the case of both homeless people and protesters, is significant. It thus seems that there is a clash between what happens on the streets and what happens in court, i.e. between the police repression of certain uses of public space, and the kind of partial amnesty, though not without procedural hassle, that is administered by the penal justice system. In short, it seems like the police punish a disorder, while the court system manages a population. We have apparently entered a “managerial justice” paradigm (Kohler-Hausmann, 2013, 2014). Issa Kohler-Hausmann (2014, 614) describes what she calls the managerial model of justice in the context of misdemeanor courts in New York City and contrasts it with the adjudicative model:

Under the adjudicative model, the practical orientation of criminal court actors and their regular operations are largely organized around adjudicating guilt and an appropriate punishment premised on a finding of guilt. The vision of criminal law’s social control role in the adjudicative model is to punish for specific bad acts, and the criminal process is deployed to select the right people for punishment by determining if the accused committed the bad act alleged in a particular case.

Under the managerial model the practical orientation of criminal court actors and their regular operations are largely organized around the supervision and regulation of the population that flows through misdemeanor courts, often with little attention to questions of guilt in individual cases. The vision of criminal law’s social control role in the managerial model is to sort and regulate people over time.

In its broad strokes, this definition matches the reality of the municipal court system as it relates to protesters and homeless people.

The way Kohler-Hausmann uses the term “managerial” is slightly different from the way Feeley and Simon (1992, 452) use it in their article on the new penology. According to them, the new penology had a managerial objective as opposed to a transformative one, which meant that regulating levels of deviance and managing risks of a population were
preferred over correcting an individual. However, in the terms used by Kohler-Hausmann (2014, 616), there is a notion of rehabilitation and social control:

[...] the logic of social control under the managerial model does not depend on selecting the right people for punishment, but rather using various legal and procedural tools to determine over time the type of person the defendant is and to build records on his general rule-abiding propensity. Courts themselves are the sites of social control.

Indeed, the courts seem to have embraced a reforming mission. The “disorderly” are sent to court in the same way the “guilty” are sent to prison. As we have seen, on one hand you have police officers who keep issuing tickets to homeless people and protesters for violations of municipal by-laws. On the other, you have a very low rate of conviction while a vast number of these tickets are withdrawn. I do not mean to imply that the ticketing practices have no other consequences besides the arrest. First, not all homeless people can qualify for the Pajic and not all protesters have their tickets withdrawn. Furthermore, as previously stated, the substantial fines associated with the tickets, when they are not withdrawn, have major consequences. However, it does seem that the number of tickets withdrawn is considerable enough to notice a pattern.

When the targeted individuals enter the court system, either via the Pajic or via regular ticket contestation procedures, it seems as though the goal is less to determine whether or not they are guilty of an offense as much as it is to teach them a lesson: how to behave properly in public spaces. As such, the courts are attempting to manage a so-called disorderly population.

Within the framework of the Pajic, for example, over the course of several meetings the prosecutor will aim to verify if the defendant shows signs of rehabilitation, measuring the person’s progress toward the “good life” with questions like: “do you have a girlfriend?”; “how many times a week do you go to the gym?”; “do you cook meals with your roommates?” If prosecutors are satisfied with the answers, the tickets will be withdrawn. If they are not, another meeting will be required and the participant will have to show better signs of having exited the category of “disorderly person”.

For protesters, the process is a little different, but no less managerial. Right from the outset, Prof. Patrick Forget predicted in May 2012 that the Montreal mayor was not responding to a need when he amended By-law P-6; instead, he was exploiting the situation to restrict liberties for the long term. Forget argued that the mayor was not actually afraid of protesters. Instead, in fulfilling his role as a “good manager”, he was taking advantage of the crisis to pass a by-law that would bureaucratize protests in the future. According to him, in asking for a marching route before a protest, the mayor was bureaucratizing a political mode of action for the sake of economic efficiency, without regard to the importance of freedom of expression and peaceful assembly. Moreover, he was imposing a model of protest (hierarchic and orderly), therefore distinguishing in the process between “good” and “bad” protesters. Forget concluded with this powerful sentence: “[i]n a hygiene-oriented society like ours, the greatest danger is not to kill a protester, but to kill the protest” (Forget, 2012, [my translation]).

The protest, I am afraid, has been killed. The bureaucratization of protests is total, occurring before and after the moment of occupation of public space. In a way, courts manage and control protesters after the fact. One could argue that the repeated players (Galanter, 1974; Feeley, 1992) – here the police officers, prosecutors and judges – know very well that the cases against protesters are often weak, involving bad evidence,
multiple procedural rights violations during arrest and detention, discriminatory enforcement of the law, and vaguely worded by-laws. Yet, instead of dismissing the cases right away, the prosecutors force the defendants to attend multiple court dates. Some protesters have gone to courts 7-8 times (spending hours on each occasion) over tickets that end up being withdrawn. Prosecutors intrude less on the protesters’ lives during formal proceedings than they do on the homeless’ lives during Pajic meetings, but the court still seeks to impose a certain way of life on defendants who have taken part in protests. With its solemn, complicated procedures, and through the father figure of the judge, it seemingly attempts to scare and intimidate young protesters enough that they will stop being “disorderly” in their political expression, hoping that perhaps instead they will learn to use proper and less “annoying” channels for political expression, such as writing letters to members of Parliament for example.

In the end, in many cases, the charges are dropped, i.e. the tickets are withdrawn, but the accused have already been punished (Hannah-Moffat, Maurutto, 2012; Feeley, 1992). Protesters were prevented from protesting to express their dissent and the homeless were prevented from simply being in any given public space. This is why, in the case of protesters and homeless people, tweaking Malcolm Feeley’s famous dictum, the arrest as much as the process is the punishment (see also Earl, 2005, in the case of protesters). With this having been accomplished, no need for adjudicative procedures, the court only has to manage the individuals who have already been punished, hoping to reform them in the process.

3.3. Banishment as punishment

Feeley (1992) in the late 1970s famously argued that the expansion of the procedural rights of the defendants in criminal proceedings brought unintended consequences. For many defendants accused of petty crimes in low-level offense courts, the pre-trial costs are so high that the process itself is the punishment. Furthermore, “it leads arrestees and the court to ignore the opportunities available under formal adversarial proceedings” (Feeley, 1992, 244).

Feeley’s conclusion still rings true today. However, in the case of offenses related to occupation of public spaces in Montreal, it is the judicial procedures as well as the arrest that are the punishment. The police punish through arrest, and the criminal justice system then adds to the punishment in managing these so-called disorderly elements of society through its institutional framework. As such, the result is a significant disregard for the constitutional rights and freedoms of marginalized populations occupying public spaces. This entanglement of the occupiers of public space within the municipal penal justice system takes its source in order maintenance policing. As Sylvestre (2010, 807) writes:

Indeed, the proponents of the broken-window theory [and order maintenance policing strategy] present a single homogenous vision of order, as well as a normative judgment about the good life and how people should behave in public places. Disorder, chaos, and street occupation are therefore considered to be the wrong ways for people to lead their lives.

In repressing certain occupations of public space, while imposing a certain vision of “ordered” public space, the police are violating the fundamental rights of the occupiers, whether they be protesters or homeless. They violate their right to dignity (considering
the way they are treated), their rights to equality (as they are discriminated against), and their right to freedom of expression, freedom of assembly, and freedom of movement.

Beckett and Herbert (2010, 15), in the context of Seattle, argue that banishment, as a practice of social control that consists of the spatial exclusion of the socially marginal, has recently become more common: “for the banished, mere presence in increasingly large urban spaces may lead to arrest”. In Montreal, the homeless and the protesters that are constructed as disorderly people are the ones who are banished. The mere presence of the “disorderly” becomes the illegality. The banishment is the punishment: a punishment imposed by the police. As Harcourt (2005, 149) argues, “[order maintenance policing] does not aim to reform the disorderly so much as it does to punish them and to exclude them, in the sense of getting them off the street.” “Off the street” here means out of sight, and not necessarily out of poverty (Sylvestre et al., 2011).

Through the ticketing practices, the police intervention translates into a temporary removal of the individual from a part of the public domain. This comes in two ways: firstly, the removal takes the form of an instant displacement that comes with the police intervention and the ticket. This displacement materializes following an order to disperse at a protest or an order to “move along” in the case of the homeless person accused of, for example, loitering, panhandling or drinking in public. Secondly, the ticketing practices have somewhat of a “deterrent effect.” Of course, homeless people do not suddenly stop being homeless and protesters do not stop being angry. But they do react to the ticketing practices: activists refrain from participating in protests to legally express their voices, very much feeling the chilling effect of the ticketing practices (Ligue des droits et libertés et al., 2013; 2015); homeless people try to be less visible and desert downtown, and their solidarity networks (Sylvestre et al., 2011). As Beckett and Herbert (2010, 55) write: “the new legal tactics that entail banishment are defended as a means of achieving spatial control over those defined as disorderly; removal and even displacement are thus key policy objectives.” The reality in Montreal is that without any form of adversarial procedures and trials, the “disorderly” people in public spaces are punished through police arrests, which translate into banishment, and lengthy judicial procedures.

4. Conclusion

Homeless people and protesters are both disproportionately ticketed for their occupation of public spaces because they are considered “disorderly”. The ticketing practices they are subject to form part of a spatial tactic of social control that aims at stopping the disorder and removing the disorderly people from public spaces. Those practices are anchored in broken windows theory, which is more about sanitizing space and imposing a certain model of public space than it is about controlling crime. As a result of order maintenance policing strategy in Montreal, the police are punishing by removal — “banishment”, according to Beckett and Herbert (2010) — and the penal justice system is then managing the already punished. Teaching the disorderly a lesson, the courts attempt to control and correct more than to adjudicate guilt. In times of managerial justice (Kohler-Hausmann, 2013, 2014), the courts are managing and normalizing the disorderly (Harcourt, 2005).

Consequently, punishment sometimes happens much ahead of trial and sentencing, often even outside the typical criminal law procedures. In a provocative paper on the various
institutional forms of punishment in contemporary societies, Velloso (2013, 171) explains: “[t]here is no need to use criminal law to arrest,-detain, fine and/or exclude someone from society as there are many non-criminal exclusive forms of social control (police measures, administrative sanctions, punitive damages, etc.) that can be used alternatively (and often more ‘efficiently’).” This is exactly what we see in the control of so-called disorders in the streets of Montreal: even when charges are dismissed, i.e. when tickets are withdrawn, punishment is no less felt.

Several scholars have argued that we should start paying greater attention to specialized agencies in charge of controlling illegalities since we know very little about them and they tend to operate within administrative law, outside of the police-court network, in spaces of discretion, and within a different culture of control (Amicelle 2014; Amicelle, Nagels, 2017). Thankfully, this special number of Champ pénal/Penal field is taking up this very important task. However, it is equally important that we start paying attention to these forms of punishment that could be typical of specialized agencies but exist simultaneously within the police-court network, alongside more traditional adversarial procedures. If illegalities of rights are not the exclusive domain of the ruling class anymore, contrarily to what had advanced Foucault in the 1970s (Fischer, Spire, 2009), it does not mean that there is any less differential administration of illegalities. Popular illegalities of rights are not controlled the same way than those of the ruling class and differential administration of illegalities does not only imply a system of specialized agencies parallel to the police-court network; it can happen and materialize within the police-court network. As we have seen, homeless people and protesters are controlled in Montreal by a traditional city police department, yet the repressive techniques that are used to control them are similar to those typically associated with specialized agencies. In other words, the police resort to regulatory frameworks and discretionary powers to stop public disorders and manage a population. They operate outside of the criminal law field and the ensuing court procedures are far from the adjudicative ideal. Managerial justice, as a modus operandi within the police-court network, allows for the differential administration of certain illegalities committed by marginalized segments of the population, namely protesters and homeless people in our case.

When underlining the importance of the “penal complex as a dynamic process and as a totality”, Velloso (2013, 180) cannot be more correct. According to him, "this approach is not only helpful to better understand punitive social reaction, but also to evaluate and strategically plan our capacity of intervention in the penal field" (Velloso 2013, 180). Having a better understanding of the different locations of punishment, as well as the differential administration of illegalities, is paramount if we want to better resist those forms of social control.

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Legislation

An act to enable students to receive instruction from the postsecondary institutions they attend (“Law 12”), RSQ c. C-12.

By-law Concerning Cleanliness and Protection of Public Property and Street Furniture, R.B.C.M. c. P-12.2.

By-law Concerning Dog and Animal Control, R.B.C.M. c. C-10.

By-law concerning Noise, R.B.C.M. c. B-3.

By-law concerning parks under the authority of Montreal city council, B 10-020.

By-law concerning parks, R.B.C.M. c. P-3.

By-law Concerning Peace and Order on Public Property, R.B.C.M. c. P-1.

By-law on the Standards of Safety and Conduct to be Observed by Persons in the Rolling Stock and Buildings Operated by or for the Société de Transport de Montréal, STM R-036.

By-law Pertaining to Civic Behaviour, Respect, and Cleanliness, Ville-Marie, CA-24-085.

By-law Regarding the Terms and Conditions on the Possession and Use of Any Transit Fare Issued by the Société de Transport de Montréal, STM R-105.


Criminal code, RSC c. C-46.


NOTES

1. This article is partially based on my doctoral dissertation (Fortin, 2015). I want to extend special thanks to Susan Bibler Coutin, Marie-Ève Sylvestre, and Elliott Currie for their invaluable comments. I also want to thank Anne-Marie Manoukian who provided outstanding research assistance as I prepared the submitted draft. Finally, I thank the anonymous reviewers of this paper, and the editors of this special number of Champ pénal/Penal field, Anthony Amicelle and Carla Nagels, for their much appreciated and very helpful comments.

2. In 2015, the city of Montreal launched a campaign called “I count MTL: A Homelessness Survey” to estimate the number of homeless people in Montréal on March 24, 2015. The results of this survey were highly controversial and decried by most homelessness organizations as invalid because of the survey’s faulted methodology and too limited definition of homelessness (Réseau d’aide aux personnes seules et itinérantes de Montréal, 2016). Therefore, the 30,000 1998 estimate will be relied upon in the following article.

3. Homelessness is the most common term used to describe a situation of extreme poverty and the lack of access to a stable private place to stay, forcing one to spend a large amount of time in public spaces (Waldron, 1991). In Quebec French the expression “personne en situation d’itinérance”, which could be translated, in a literal way, by “persons in a state of transiency” is mostly used. This expression is interesting because the word “itinérance” emphasizes the need of those living in this state of poverty to always be moving, uprooting themselves, going from place to place, being displaced constantly, by the weather, the police or just the city life. Nevertheless, the words homeless and homelessness are used in this paper, for conciseness and because they are the most widespread words used in Canada (The Homeless Hub, 2015).

4. This by-law, which precedes P-12.2, is only applicable in the Ville-Marie borough, located downtown.

5. To wash car windshields at street intersections with a squeegee tool in exchange for money.

6. Bernard E. Harcourt (2015, 6) argues that the neologism illegalisms, instead of illegalities, better capture the French term illégalismes, “because “illegalities” is actually the end state, that which, in some sense, resolves the struggle. Illegalities is what represents the culmination of a power struggle that operates through illegalisms.” Although I recognize the value of this argument, for convenience and because the term illegalities is a more widespread translation, I persist in using that term.

7. I borrow the expression "managerial justice" to Issa Kohler Hausmann (2014).
Much has been written on broken windows theory and order maintenance policing, and both were heavily criticized (e.g. Harcourt, 2005, 2013; Harcourt, Ludwig, 2006; Mitchell, 2003; Samaha, 2012; Sylvestre, 2010; Vitale, 2008).

Unfortunately, it is impossible at this point to get data for the more recent years.

"Judicialization", or “judiciarization” (Fortin, 2007) is the process by which the homeless encounter the judicial system or more precisely, in the Montreal context, how they get entangled in the municipal penal legal system. This term is used in opposition to the term “criminalization”, as most of the homeless are accused of violations of municipal by-laws and not of crimes pursuant to the Canadian Criminal Code.

For example, to maintain the trust of the people I was working with, I neither interviewed nor did participant observations with police officers or city authorities.

On the richness of participant observation and ethnographic research in law, see for example Becker, Geer (1957) see also Burawoy (1991); Darian-Smith (2004, 2007); Coutin, Fortin (2015).

These names are pseudonyms. The quotes are not necessarily direct quotes, but paraphrases I have jotted down during my participant observation sessions.

Of the 64,491 tickets, 46.8% were handed out for violations of municipal by-laws and 52.3% for violations of the by-laws of the Montreal public transportation system (designated in French by the abbreviation “STM”) (Bellot, Sylvestre, 2012, 12). Tickets for STM by-law infractions are mostly given out in the metro and in metro stations, i.e. in underground public spaces. The proportion of STM tickets as part of the total tickets given to homeless people increased considerably between 1994 (46.3%) and 2010 (61.8%), and, in particular, after 2007, when the Montreal police started patrolling the metro and became responsible for STM by-law enforcement.

It was not possible to access the total number of tickets issued to the entire population of Montreal between those years. However, the data obtained from the SPVM in 2008 and 2009 show that for a 24-month period, 33,167 tickets for infractions to municipal by-laws were issued to 25,630 non-homeless people in Montreal, whereas 7,531 tickets were issued to 1,780 homeless people (Boivin, Billette, 2012). Thus, the homeless are over-represented: 18 tickets for 1,000 non-homeless people, versus 251 tickets for every 1,000 homeless people (if the total population of the homeless is estimated to be 30,000).

Between 1994 and 2004, 3,436 of those who were ticketed received fewer than 10 tickets, while the remaining 600 received 58.3% of all the tickets covered by the study, for an average of 22 per person and an average debt of close to $5,000 (Bellot et al., 2005, 22).

The three most common violations to municipal by-laws for which tickets were issued between 2006-2010 were: being found lying or loitering drunk on a public thoroughfare or place, or any other place in the city (31.5%); consuming liquor on public property (29.6%) and impeding or obstructing pedestrian and vehicular traffic by standing still, prowling or loitering on public thoroughfares and places (11.8%). The most common violations of STM by-laws were obtaining or attempting to obtain a trip on public transport without paying the fare (33.7%); lying down on a bench, a seat or on the floor (23.3%) and smoking (14.6%) (Bellot, Sylvestre, 2012, 16).

The majority of these tickets were issued to people who were dealing with severe alcoholism and/or who slept in the metro (Bellot, Sylvestre 2012).

It should be noted that until 2006, people could, in fact, go to jail for not paying their ticket fines. Between 1994 and 2004, 72% of the tickets that were profiled in the first study were administratively closed not by the payment of the fine, but rather by the imprisonment of the defendant (Bellot et al. 2005, 111). Officially, no one can be sentenced to prison for a violation of municipal by-laws (CPP, s. 231); however judges may issue warrants of committal if they are convinced that all other procedures to collect the fines have failed (s. 366). The power to send people to prison for non-payment of fines still exists, but following a massive campaign by
homeless rights activists and by socially engaged scholars, the collection department of the City of Montreal has opted not to use this power since 2006.

20. Social profiling is, to a certain extent, the equivalent of racial profiling, with selective enforcement of the law based on social conditions (poverty) instead of race.

21. For yet another statistic, proving how the public opinion is hard to capture and easy to manipulate, see also ICI Radio-Canada (2012, May 25).

22. The Law 12 was repealed in the Fall of 2012, when the recently elected Parti Québécois got into power.

23. By-law P-6 in Montreal still exists but was considerable weakened by courts: see Villeneuve c. Ville de Montréal, 2018 QCCA 321; Montréal (Ville) c. Thibeault-Jolin, 2015 QCCM 14.

24. Despite repeated requests, access to the relevant data from the Montreal Municipal Court was unobtainable, as the court’s database was undergoing some major changes during this research and it was impossible to extract data from it, let alone the number of tickets issued under By-law P-6 over the past 10 years.

25. The data gathered by the Ligue des droits et libertés et al. (2013; 2015) is the fruit of intense work involving the investigation and triangulation of all potential sources including newspapers, police reports, friends’ testimonies, activist tallies, etc. with a view to producing the most accurate portrait possible. Of course, these data are less systematic and reliable than Bellot and Sylvestre’s data on the judicialization of the homeless, but it is the best one could get, and it allows to get a good idea of the scale to which protesters have been brutalized and ticketed.

26. Pajic refers to Programme d’accompagnement justice itinérance à la cour municipale de Montréal and is the French acronym for Justice and Court Accompaniment Program for the Homeless. I will use the French acronym, for convenience.

27. For a more detailed account of the Pajic, see Fortin, Raffestin (2017).

28. Pro forma hearings are to schedule another date, organize the trial, communicate evidence, and the like.

29. We shall see if the recent Quebec Court of Appeal decision (Villeneuve c. Ville de Montréal, 2018 QCCA 321) that struck down sections of by-law P-6 forcing protesters to provide an itinerary to police ahead of time will change anything to the activist scenes in Montreal and resuscitate protests.

30. Social, racial and political profiling within the police-court network is often decried by scholars and activist groups in Montreal: see for example Campbell, Eid, 2009; Dupuis-Déri, 2014; Eid et al., 2011; Observatoire sur les profilages, https://profilages.info.

ABSTRACTS

In Montreal, homeless people and protesters receive a disproportionate number of statements of offence. These statements of offence are issued by the Montreal police department for the homeless and protesters’ occupation of public spaces (such as sleeping in a park at night or participating in an unlawful assembly). However, those offences are rarely tried and most of the statements of offence are instead withdrawn through prosecutorial discretion, but not before several court hearings. This process seems to indicate that the police court network is departing from the adjudicative ideal to enter a managerial justice paradigm. Punishment seems to happen both at the moment of the arrest and during the pre-trial procedures. In times of managerial
justice, the police are punishing certain illegalities and the court is managing marginalized populations.

À Montréal, les personnes en situation d’itinérance ainsi que les manifestants et manifestantes reçoivent un nombre disproportionné de constats d’infraction. Ces constats sont émis par le service de police municipal pour des illégalismes liés à leur occupation de l’espace public (par exemple, dormir dans un parc fermé ou participer à un attroupement sur le domaine public jugé illégal). Or, ces constats d’infraction ne se soldent que rarement par l’imposition d’une peine et la majorité d’entre eux sont plutôt retirés en vertu du pouvoir discrétionnaire de la poursuite, mais non sans un plus ou moins long passage par le système de justice pénale. Ainsi, il semble que le réseau police-justice ne soit pas perturbé ici par une agence de contrôle spécialisée, mais par un traitement de l’illégalisme s’éloignant du processus d’adjudication et se rapprochant de la gestion. À l’ère de la justice managériale, la police punit certains illégalismes, et la cour gère des populations marginalisées.

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Mots-clés: itinérance, manifestation, espace public, peine, justice managériale
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