

# MANAGERIAL JUSTICE AND MASS MISDEMEANORS

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*In the mid-1990s New York City inaugurated its era of mass misdemeanors by pioneering policing tactics featuring intensive enforcement against low-level offenses as part of its quality-of-life and urban crime control strategy. These tactics have since spread across the country and around the globe. But the New York City experiment embarrasses our traditional understanding of how an expansion of criminal enforcement should work: as misdemeanor arrests climbed dramatically as part of an intentional law enforcement strategy, the rate of criminal conviction fell sharply. Using extensive, original data from a multiyear study, this Article exposes an underappreciated model of criminal administration in New York City's processing of mass misdemeanors, one that makes sense of this trend. Misdemeanor justice in New York City has largely abandoned what I call the adjudicative model of criminal law administration—concerned with adjudicating specific cases—and instead operates under what I call the managerial model—concerned with managing people through engagement with the criminal justice system over time. The adjudicative model holds that courts stand between the proscriptions of substantive criminal law and the hard treatment of punishment by employing the criminal process to select the right people for punishment and to determine the proper amount. The managerial model does not depend on punishing individual instances of lawbreaking, but rather on using the criminal process to sort and regulate the populations targeted with these policing tactics over time. These findings challenge the “assembly-line” account so often associated with lower criminal courts, showing that misdemeanor courts engage in a tremendous amount of discretionary differentiation in the treatment of the people who flow through their operations. However, the basis of this differentiation is not what we would expect from the traditional adjudicative model of criminal law, namely guilt and blameworthiness.*

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## INTRODUCTION: MISDEMEANORS IN THE AGE OF MASS INCARCERATION

Mass incarceration has moved into the public and scholarly eye as one of the most troubling and pressing issues in modern America.<sup>1</sup> Yet the unprecedented number of people in prison fails to capture the significant expansion of penal operations in the United States over recent decades.<sup>2</sup> This Article ex-

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1. The literature on mass incarceration is extensive. For a small selection of the important and substantial literature on the causes and consequences of mass incarceration, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235 (2008); Tracey L. Meares, *Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 CRIMINOLOGY & PUB. POL'Y 295 (2004); Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); and Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109 (2011).

2. The era of mass incarceration might more accurately be called the era of mass conviction and correctional supervision, as parole and probation populations have grown at

plores another recent expansion of penal operations that has received remarkably little attention: the rise of mass misdemeanors.<sup>3</sup> Since the mid-1990s, police departments across the country have adopted tactics that intentionally increase the volume of citations and arrests for low-level offenses, flooding lower criminal courts with subfelony cases. Misdemeanor justice in the age of mass misdemeanors both upends standard notions of the purposes of criminal procedure and punishment and challenges our understandings about the social role of criminal law.<sup>4</sup>

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an even faster rate than the incarcerated population. From 1980 to 2008 the number of people under any form of correctional supervision—including jail, prison, parole, or probation—increased from just under 2 million to over 7.3 million. After peaking in 2008, the correctional population began to decline for the first time in over thirty years, dipping below 7 million in 2011. *See* LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>; Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51 (2013).

3. There is a dearth of comparable and reliable data on subfelony arrests and case filings because states have so many different statutory provisions that define subfelony offenses, entities that cite for these offenses, and administrative configurations of lower courts. One of the only reliable sources that collects data from many states, the National Center for State Courts, produced from a sample of sixteen states a conservative estimate of 5.9 million misdemeanor filings in these jurisdictions, compared to 1.4 million felony filings in 2009. ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 23 (2011), *available at* <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf>. As I use the term, "subfelony" includes misdemeanor criminal offenses *and* unclassified misdemeanors, infractions and violations, which are not classified as misdemeanor criminal offenses.

4. For a discussion of how mass incarceration has challenged our understandings of the dynamics of criminal procedure, punishment, and the role of criminal law in our democracy, although in different ways, see WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2-3 (2011) (arguing that the dysfunctional operation of America's criminal justice system, especially our unprecedented levels of incarceration and its racial skew, must be understood in the context of historical changes in criminal justice institutional design and in the content of substantive criminal law, both of which deteriorated as the locus of political control over criminal justice gravitated away from the local); Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 180 (2008) (proposing a series of mechanisms through which America's criminal justice policies leading to mass incarceration produce the dual perverse effects of unhinging the imposition of legal punishment from its intended social role of deterrence and undermining respect for the law); Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207, 207-09 (1995) (arguing that the construction of a set of "elaborate and detailed constitutional protections for criminal defendants" in the United States has done little to check the march of policies that have brought about mass incarceration, and perhaps has even enabled it); and William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3-6 (1997) (arguing that real-world impact of criminal procedure doctrines is not merely, or even mostly, a function of the content of formal rules and legal remedies but rather is shaped by the context of crime rates and the adaptive decisions of prosecutors and legislatures).

This Article presents a systematic study of misdemeanor justice in one jurisdiction using extensive original quantitative and qualitative data. The jurisdiction I have chosen—New York City—pioneered the intentional expansion of misdemeanor arrests as part of a new policing strategy.<sup>5</sup>

I organize my analysis of these data to make a point that can be summarized fairly succinctly, even if its clarification and support will require substantial elaboration: misdemeanor justice in New York City has largely abandoned what I call the *adjudicative model* of criminal law administration—concerned with adjudicating guilt and punishment in specific cases—and instead operates under what I call the *managerial model*—concerned with managing people over time through engagement with the criminal justice system.<sup>6</sup>

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. The criminal process is deployed to figure out the rule-abiding propensities of people and calibrate formal regulation accordingly.

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5. Although New York is not a representative American city in many respects, its law enforcement experiment is widely looked to as a national model for crime control, and the system of misdemeanor justice that has emerged there represents a model of criminal administration distinct from anything discussed in ordinary courses on criminal law.

6. As I will explain in Part I, these models are poles on a continuum, not mutually exclusive alternatives. Although others have used the term "managerial" in other contexts, I stake out a new meaning here. For example, Judith Resnik uses the term to indicate the overly administrative mindset of many federal judges, whose focus on docket control and case supervision, she argues, has grown at the cost of impartial deliberation. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-78 (1982). In sociological scholarship the term has been used to indicate a mode of governance. For scholars such as Stanley Cohen, Malcom Feeley, and Jonathan Simon, the term "managerial" indicates a trend in methods of social control of deviance and crime that is oriented to the regulation of populations and control of behavior, without necessarily attempting to rehabilitate offenders. See STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION* 145-48 (1985); JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990*, at 109, 137 (1993); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452, 455 (1992). My distinct usage is explained in Part I.

The adoption of a managerial mode of criminal law administration makes sense of a notable fact about New York City's experiment in mass misdemeanors: as low-level arrests dramatically climbed as part of an intentional law enforcement strategy, the rate of misdemeanor conviction markedly declined.<sup>7</sup> This result is particularly puzzling as the most common depiction of lower criminal courts is that of assembly-line justice: robotically convicting defendants and imposing one-size-fits-all punishments. The data presented here will show that New York City's misdemeanor courts have *not* mechanically convicted and punished misdemeanor defendants. The solution to this puzzle tells us something crucial about the malleable capacity of courts to serve familiar social functions—in this case the function of social control—in unfamiliar ways. Careful study of a specific criminal law venue exposes how the practical, concrete circumstances of conducting legal work shape the ways that rules and procedures are deployed.

Existing models of criminal law, which have been built up almost entirely around felony adjudication, simply do not fit lower criminal courts. The social imperative to punish and the incentive to litigate diverge dramatically from felony to misdemeanor cases. Lower criminal courts process cases where the alleged crimes do not, by and large, represent an affront to widely held moral sentiments or cry out for the social act of punishment. These courts must process large volumes of these cases with limited judicial resources. The relative cost of invoking due process and formal adversarial procedures is often prohibitively high. What sort of justice is meted out in this setting? And what is the process by which it occurs? How does criminal law function as a mode of social control in this system?

This Article takes a sociological approach to these questions by foregrounding courts as organizations embedded in larger institutions and by analyzing punishment as a social practice. While this Article is dedicated to making sense of punishment practices for subfelony crimes, I submit that this approach is important to the study of criminal law more broadly. William Stuntz once described the content of criminal law not as “rules in the shadow of which litigants must bargain,” but rather as “items on a menu from which the prosecutor may order as she wishes.”<sup>8</sup> Put differently, legal rules and statutorily authorized punishments offer little guide to the empirical regularities of existing criminal courts and criminal punishment. To understand the activity of criminal courts we must situate them in the concrete material and social contexts in which they operate because these are the factors that shape how criminal justice actors make sense of and use legal rules.

The following analysis of the activity of lower criminal courts is based on data from a mixed-method, two-and-a-half-year research project in New York

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7. See *infra* Figures 6-7; see also discussion *infra* Part III.

8. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

City. My data include a unique set of quantitative data about misdemeanor arrests and dispositions and extensive qualitative data gathered over two years of fieldwork including ethnographic observation and over fifty interviews. My analysis is also informed by legal research about criminal procedure, criminal records laws, and court administrative practices. Drawing on these data and research, I show that the forms of dismissal and noncriminal dispositions common in New York City's misdemeanor courts do not represent an overburdened judicial system merely opening the pressure valves. Nor do the regular operations of misdemeanor courts represent widespread disregard or contempt for due process values. Rather, their activities represent a fundamentally distinct approach to the administration of criminal law.

Under the adjudicative model, criminal courts' factfinding work is a vital link in securing the social control ends of criminal law. Standing between the proscriptions of substantive criminal law and the hard treatment of punishment, adjudicative courts employ the criminal process to identify the guilty and send them off to some formal punishment where the real social control action unfolds. In contrast, 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. Criminal justice actors employ the costs and records of the judicial process to sort and assess large numbers of defendants brought in from quality-of-life policing often without inquiring into guilt or innocence in specific cases, and often without even attempting to secure conviction and formal punishment.

Misdemeanor justice does not constitute a world apart in the criminal law landscape, unique by virtue of the managerial modality. Rather, it presents an especially hospitable environment in which the managerial model can flourish for reasons that I document. Therefore, the study of misdemeanor justice exposes an extreme case of an underappreciated model of criminal law administration that is at odds with textbook formulations, one that is present in other venues but more or less suppressed by countervailing forces.

Part I expands and gives precision to the adjudicative and managerial models of criminal court functioning. I locate these models as opposing ends on a conceptual spectrum of idealized accounts of criminal law administration. In this Part, I also distinguish these models of the functional logic of criminal courts from both an operational model (addressing which criminal court actors have the relative power to determine outcomes) and a normative model (addressing how the criminal process ought to work).

Part II offers an account of the particular social and historical circumstances that gave rise to the era of mass misdemeanors and managerial justice. The era of mass misdemeanors is a product of the revolution in the intensity and form of urban policing that swept the nation starting in the mid-1990s. I highlight some interconnected features of the policing regime introduced in 1994

that have often been examined separately. Additionally, I emphasize the new record-keeping and record-sharing practices that the police and courts innovated in this period in an effort both to mark potential deviants for later encounters and to check up on prior records to identify and target persistent or serious offenders.

Part III presents descriptive data to demonstrate the aggregate trends in misdemeanor justice in the years before and after the policing changes of the mid-1990s. These data set up the empirical puzzle, referenced above, of New York City's policing revolution: why were so many law enforcement resources deployed and so much tactical emphasis placed on massively expanding arrests for misdemeanor crimes only to feed them into a judicial system that then produced so few convictions and minimal formal punishments? This Part demonstrates that as the number of misdemeanor arrests went up, the proportion of those arrests that translated into criminal convictions went down.

The increased frequency of noncriminal conviction dispositions appears less mysterious once we unpack precisely *how* these dispositions achieve certain ends in the managerial model. Just as the policing tactics were formulated to mark and sort people, the court practices that emerged during this era of mass misdemeanors also display this logic of managing potentially risky populations with record-keeping and sorting. In Part III.B, I explain how these various dispositions mark and sort people.

Part IV draws on my qualitative observational and interview data to highlight the structural features of misdemeanor justice that facilitate the operation of the managerial model. My aim in this Part is to show that whether or not specific criminal court actors intend to engage the managerial model, it is an emergent property of the structure of incentives, the practical circumstances of work in this context, and the content of misdemeanor justice.<sup>9</sup> Specifically, I show how individual-level decisions of prosecutors, judges, defense attorneys, and defendants, which are often quite rational from the actors' points of view at the time, produce a justice system that by and large does not adjudicate factual guilt or innocence.

Aggregate disposition data tell the part of the managerial justice story dealing with increased reliance on dispositions that temporarily mark and trace people without the procedural burdens of securing a conviction. Another part of the story involves the processing of misdemeanor cases in a way that relies heavily on signals of risk or persistent unlawfulness. Rather than rely on evi-

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9. By emergent property I mean "patterns of system behavior arising not directly from initial states, from the capacities of individual agents, or from rules, but from agents' interaction." Alec Ewald, *Collateral Consequences as Complex Systems* 10 (July 2013) (unpublished manuscript) (on file with author) (using concepts from the natural sciences, such as "complex systems," to understand how a pattern of action or a collection of practices around collateral criminal conviction consequences comes into being without a precise, prior large-scale plan of the individual-level actors involved in the system).

dence of guilt in the individual case at hand, misdemeanor courts sort defendants based largely upon records of prior encounters.

Part V.A demonstrates this by examining the criminal justice trajectories of two cohorts of people entering the misdemeanor justice system in 2003 and 2004. One cohort consists of individuals who had their first cases dismissed. The other cohort consists of individuals whose cases resulted in a first-time misdemeanor conviction. The trajectories of these cohorts demonstrate several things. First, insofar as these cohorts are representative of the people arrested each year for a misdemeanor offense without a prior criminal record, the majority of this population stays on the low end of the criminal justice system and does not transition to felony convictions. Second, a significant portion of this population has repeated encounters with the criminal justice system and many are arrested but not convicted multiple times. Third, the arrest and conviction trajectories of the two cohorts suggest that those who consistently encounter the criminal justice system with the mark of a conviction are more likely to be reconvicted of misdemeanor offenses, but not necessarily of felony offenses. These findings suggest that whatever is driving the subsequent divergent conviction patterns in misdemeanor courts is different in the felony setting.

Part V.B explores whether this apparent difference in the signal value of a prior conviction between the misdemeanor and felony context survives controlling for measured differences between arrestee and type of arrest. It pools all arrest data from these cohorts for logit models of the conviction event. These models show that a prior misdemeanor conviction significantly increases the probability of conviction for a misdemeanor offense from a misdemeanor arrest. In contrast, a prior felony conviction does not produce an effect of the same magnitude on the probability of a felony conviction from a felony arrest.

Having established that the managerial model dominant in misdemeanor courts is a far cry from the textbook account of criminal law, one might ask: what is to be done? In Part VI, I argue that the answer to this question depends on the nature of one's concerns. For example, are we concerned with promoting a legalistic process that matches the idealized account of criminal justice taught in law school? Or should we be more concerned with minimizing burdens on defendants, even if that process does not maximize factfinding accuracy? I argue that we need to think carefully about the effects of process-based reforms because the managerial model cannot be understood as simply an organizational response to institutional caseload pressures. It also reflects a substantive moral posture toward the punishment of minor crimes, and there may be sound reasons for endorsing such an approach in the context of such offenses.

The most important lesson I draw from this empirical study is that approaches that tinker with legal process, or even substantive criminal law reforms, are only capable of reaching a limited set of issues identified in my research, such as the exact tools that are available to law enforcement or the precise magnitude of procedural burdens defendants face in lower courts. Such reforms would not fundamentally address the current social uses to which qual-



ity-of-life policing and managerial criminal law administration are being put or the underlying conditions they address. I conclude by arguing that study of mass misdemeanors—like that of mass incarceration—ultimately points out larger political questions about what role we, as a democratic society, will countenance for criminal justice in establishing social order.

## I. THE ADJUDICATIVE AND MANAGERIAL MODELS

The classic criticism of lower courts is that they deliver “assembly-line justice.”<sup>10</sup> In the decades before the due process revolution of the 1960s, legal scholars, including Roscoe Pound who complained of the “undignified offhand disposition of cases at high speed,”<sup>11</sup> routinely leveled this criticism against lower criminal courts.

Even after the due process revolution produced new rights for felony defendants, scholars noted that assembly-line justice continued to prevail in misdemeanor cases.<sup>12</sup> The Supreme Court even picked up the metaphor in

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10. Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 586 (1997). Livingston notes that the critique prior to the due process revolution that “assembly-line justice meted out in lower criminal courts for offenses like drunkenness, disorderly conduct, vagrancy, gambling, and prostitution . . . was itself one of the surest signs that the criminal sanction was being misapplied,” was part of the argument for expanding constitutional and procedural controls over police discretion during the Warren Court era. *See id.* at 585-86.

11. ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 190 (1945). Other scholars made similar observations. In 1951, Samuel Dash conducted a study of Chicago’s municipal courts to assess their operations twenty years after a reform effort to improve administration in Illinois. He concluded that, in the administration of misdemeanor cases, “[s]peed and the resulting careless handling of facts remain important evils,” and “[a]long with the hurried atmosphere is the confusion which dominates most of the stages of the proceedings.” Samuel Dash, *Cracks in the Foundation of Criminal Justice*, 46 U. ILL. L. REV. 385, 388 (1951). That same year Caleb Foote began his well-known study of the handling of vagrancy-type criminal cases by Philadelphia magistrates’ courts, concluding that “[p]rocedural due process does not penetrate to the world inhabited by the ‘bums’ of Philadelphia.” *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 604 (1956). Foote observed, for example, four defendants who “were tried, found guilty and sentenced in the elapsed time of seventeen seconds from the time that the first man’s name was called by the magistrate through the pronouncing of sentence upon the fourth defendant.” *Id.* at 605.

12. *See, e.g.*, John M. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 685 (1967) (“[A] large majority of the [persons] charged with non-traffic misdemeanors must, if they are financially unable to hire an attorney, face the bewildering, stigmatizing and (especially at this level) assembly-line criminal justice system without the assistance of counsel.” (footnotes omitted)); Ralph H. Nutter, *The Quality of Justice in Misdemeanor Arraignment Courts*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 215, 216 (1962) (“The physical conditions in Los Angeles Municipal arraignment courts are not conducive to either justice or individual attention. . . . Like assembly line workers in a factory, all parties operate under a climate which makes it appear that nothing may be permitted to interfere with the smooth operation of the line.”); *see also* PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 31 (1967), *available*

*Argersinger v. Hamlin*—the landmark 1972 case extending the right to counsel to indigent misdemeanor defendants in cases where jail time is imposed.<sup>13</sup> Reviewing the evidence of how lower courts processed misdemeanor cases, the Court concluded, “[t]here is evidence of the prejudice which results to misdemeanor defendants from this ‘assembly-line justice.’”<sup>14</sup>

In his classic work on misdemeanor courts in New Haven, Connecticut, Malcolm Feeley contested the assembly-line metaphor of misdemeanor courts as inapt.<sup>15</sup> He argued that the metaphor failed to capture the complicated—although rapid and informal—calculus that went into misdemeanor case disposition.<sup>16</sup> Although Feeley thought that other academics had conflated procedural with substantive justice, he noted the speedy and unceremonious adjudication in the jurisdiction he studied.<sup>17</sup> Indeed, the primary research puzzle he addressed was why, in the “full bloom” of the due process revolution, so few defendants actually invoked their newly articulated rights to formal criminal process.<sup>18</sup> He found that most defendants did not invoke their procedural rights or engage a protracted adversarial process because it was so often not in their (at least short-term) interests to do so. Procedural costs, in the form of pretrial detention, missed work for court appearances, attorneys’ fees, and so on, more often than not outweighed the formal sanctions imposed by early and quick case disposition.<sup>19</sup>

The institutional and political landscape of misdemeanor courts has changed in the more than thirty years since Feeley’s seminal study. These changes include a decidedly “punitive turn” in the overall tenor of criminal law and several waves of drug wars.<sup>20</sup> More recently, misdemeanor arrests have

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at <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=147397> (describing urban lower courts as having a system of “assembly line” justice sentencing in 1967).

13. See 407 U.S. 25, 36 (1972).

14. *Id.*

15. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 13 (paperback ed. 1992).

16. See *id.* (“[T]he assembly-line metaphor ignores the complexity of the criminal process, and the casualness and confusion characteristic of decision making in the lower criminal courts.”); *id.* at 160 (“[W]hat is abundantly clear when listening to prosecutors and defense attorneys negotiate settlements is that it is difficult to articulate the factors considered in assessing the worth of a case, not because decision making in the court is arbitrary, *ad hoc*, or embarrassingly simple, but because it is extremely complex.”).

17. See *id.* at 25 (“After looking at the courts and failing to find full-fledged adversarial proceedings, they too quickly conclude that all concern for justice has given way to the pressures of heavy caseloads, organizational security, and bureaucratic self-interest.”).

18. See *id.* at xxiv, 31.

19. See *id.* at 31, 192, 241-42. Hence the title *The Process Is the Punishment*, which captured his argument that the costs from an arrest for a minor crime were often felt before a formal punishment was imposed.

20. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 142 (2001).

been presented as the linchpin of urban crime control strategies in the quality-of-life/broken windows policing models that have swept the nation. These tactics have flooded urban courts with low-level cases and changed the local political import of misdemeanor prosecution.

Furthermore, the relative costs of various dispositions have changed for misdemeanor defendants, namely the depth and quantity of collateral consequences flowing from a criminal conviction. This is partially due to the increased accessibility of criminal records and partially due to a proliferation of rules and statutes excluding those with records from important benefits such as housing, student loans, child custody, immigration, and employment.<sup>21</sup>

Perhaps because of these changes, a small but growing number of legal scholars are directing renewed attention to misdemeanor justice. The assembly-line justice critique has reemerged in various forms in this scholarship.<sup>22</sup> The

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21. See AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 7-9 (3d ed. 2004), available at <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf>; Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758-70 (2013) (documenting the extensive immigration consequences flowing from even low-level criminal justice encounters and analyzing how those costs are exacerbated by the practices in lower criminal courts); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 177-79 (2008) (conceptualizing the social significance of a criminal record as a "negative c.v." and documenting the expansion of records production, the proliferation of means of circulating and accessing criminal records, and the resultant social and legal implications); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15-16 (Marc Maurer & Meda Chesney-Lind eds., 2002) (reviewing the varied collateral consequences of criminal convictions in different social arenas, including housing, welfare benefits, and voting).

22. While not all scholars have invoked that precise metaphor, a number of recent publications charge misdemeanor courts with mechanical processing of cases and categorical conviction. See John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013). King argues that the constitutional rule limiting the right to counsel in misdemeanor cases to those in which actual jail time is imposed is not defensible, because, "[h]istorical and contemporary accounts of how low-level crimes are actually adjudicated support Justice Douglas's 1972 characterization of the system as one of 'assembly-line justice.'" *Id.* at 21. Josh Bowers argues that prosecutors fail to exercise what he calls "equitable discretion" in charging and seeking convictions for petty offenses. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010). Bowers continues that it is "institutionally expedient for prosecutors to adopt indiscriminate petty crime charging policies . . . . Charging thereby becomes mechanical and somewhat categorical when and where it should be most contextualized." *Id.* at 1704. He also argues that "[a] charge leads almost inevitably and quickly to some adjudication of guilt." *Id.* at 1709. M. Chris Fabricant conceptualizes quality-of-life policing and the resulting treatment in criminal courts from misdemeanor arrests as collective punishment. See M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 377-78 (2011). With respect to the misdemeanor criminal pro-

metaphor, although intuitively appealing, conflates distinct features of misdemeanor processing.

There are two ways the assembly-line justice metaphor could be understood.<sup>23</sup> The first understanding of the assembly-line justice critique is that misdemeanor courts do not make significant differentiations in their legal treatment of defendants. On this view, everyone who is arrested pursuant to low-level policing priorities is mechanically convicted and punished, even if the sanctions are minor. Prosecutors indiscriminately charge all cases and reflexively seek convictions, and courts robotically convict and issue standard sentences without regard to individual characteristics of cases or defendants. This version of assembly-line justice may exist in some places, but certainly not in New York City.

The second understanding of the assembly-line justice critique corresponds more closely to the New York experience. On this understanding the administration of justice in misdemeanor courts is rapid and informal, but it is not random or mechanical. Misdemeanor courts do not perfunctorily and automatically impose convictions; they *do* distinguish between defendants and impose graded sanctions, albeit often informal but nonetheless consequential sanctions. This second version of assembly-line justice is clearly distinguishable from the first because there can be substantial differential treatment among the people arrested as a result of quality-of-life policing in misdemeanor courts. However, the process by which cases are decided involves relatively little time or any of the other judicial resources that the traditional adjudicative model of criminal courts posits as the mechanisms by which factual questions of guilt are determined.

In place of the assembly-line metaphor I propose that we think of misdemeanor courts as instantiating a particular model of criminal law administra-

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cess, he notes: "Though often described as 'assembly-line justice' or 'fast food justice,' an auction is perhaps a more accurate, if jarring, metaphor for understanding the arraignment process and its degradation of the core due process value of individualized justice." *Id.* at 403 (footnotes omitted). Alexandra Natapoff conceptualizes misdemeanor criminal courts in large urban centers as engaging in what she calls "informal aggregation," in which

pleading petty offenders in bulk without individuated procedures effectively creates a "no fault" conviction regime in which the fact of arrest is sufficient to induce settlement. While professional participants know that the process is "assembly line," the system straddles the "no-fault"-culpability distinction by maintaining the fiction that defendants are receiving individuated justice based on personal culpability.

Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043, 1080-81 (2013) [hereinafter Natapoff, *Aggregation and Urban Misdemeanors*] (footnote omitted); see also Alexandra Natapoff, *Misdemeanors*, 85 *S. CAL. L. REV.* 1313, 1374 (2012).

23. Various authors have combined both forms of the critique. I make no attempt to classify authors' claims systematically between these two different interpretations because my aim is merely to show that the assembly-line understanding of misdemeanor justice is prevalent, and that it can encompass two conceptually distinct notions, which in turn generate very different hypotheses about courts.

tion—what I call the *managerial* model—which is distinct from the conventional *adjudicative* model.

The adjudicative and managerial models are *ideal types*.<sup>24</sup> They are analytic tools precisely because they abstract away from the extreme complexity and concrete variety of everyday activity in courts. By abstracting from empirical complexity we can highlight the pattern of action, the overarching practical orientations of actors to their tasks, and the logic of the regular functions performed by the courts. Furthermore, we can ask to what extent traces of each model are present in different criminal law venues, and what factors enhance or suppress the intensity of the model's manifestation in those venues.

Under the adjudicative model the animating task organizing the work of criminal justice actors is the determination of whether the defendant in fact committed the criminal act of which she is accused. The defining features of this model are twofold: (1) the courts embracing it are primarily engaged in *adjudication*; and (2) the subject of this adjudication is guilt and punishment premised on a finding of guilt.

Lon Fuller conceptualized adjudication as a particular “form[] of social ordering,” a specific mode of “reaching decisions, of settling disputes, of defining men's relations to one another,” that can be distinguished from others (such as contracts or elections) on the basis of certain formal traits.<sup>25</sup> Those traits include (1) a particular “mode by which the affected party participates in the decision,” that is through the presentation of “proofs and reasoned arguments”; (2) the operation of rational “principles by which his arguments are sound and his proofs relevant”; and (3) the presentation to the forum of a claim of right or accusation of guilt.<sup>26</sup> Courts operating under the adjudicative model therefore engage in a mode of “reaching decisions” along these lines about the accusation of guilt for a specific crime. But the adjudicative model, as I conceive it, does not imply that courts adjudicate the question of guilt and punishment according to any specific type of formal or adversarial process.

The managerial model diverges from the adjudicative model not necessarily along the vector of operations, but along the vector of functional logic. In the adjudicative model, a finding of guilt triggers the question of how punishment should be deployed as social control. In the managerial model, the imperative of social control is at work largely irrespective of guilt or innocence in any particular case.

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24. MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (discussing the concept of an “ideal type”).

25. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978).

26. *Id.* at 369, 370. Fuller actually argues that item (3) is a sort of emergent property of the other features of adjudication, such that “issues tried before an adjudicator *tend to become* claims of right or accusations of fault,” by virtue of *how* the process organizes the participants' proofs and reasoning as claims according to some cogent principle. *Id.* at 369 (emphasis added).

The managerial model has both a forward-looking and a backward-looking component. A central feature of the managerial model is the *marking* of violators to construct a record of criminal justice encounters in order to determine over time who is low risk and who is high risk, and thus in need of closer monitoring and perhaps formal sanctioning in the future.<sup>27</sup> For purposes of marking, conviction is sometimes irrelevant because the objective is to construct a record of who has law enforcement encounters and how many. As explained in Part III, various other tools can be used to store and indicate the crucial information used to sort who should be monitored with increasing care from who can safely be ignored in the future. Thus, the forward-looking component of the managerial model relies on marks for a risk-management strategy.<sup>28</sup>

Yet the managerial model cannot be reduced to a forward-looking, risk-management approach. It also incorporates a substantive moral principle, which is that people do not necessarily deserve to be punished for every incident of low-level offending. The backward-looking component of the managerial model relies on marks of prior encounters to form a composite of who the offender *is*, and that composite is taken into consideration in a holistic assessment of how much judicial effort should be allocated to dealing with this offender on this occasion, whether that be in the form of tracking, testing, or punishing. Thus the managerial model continues to be individuating to some extent, even as it relies on imperfect proxy signals to do so.<sup>29</sup>

It is important to understand what these models are not. These are not operational models of who adjudicates guilt and punishment or how they do so. Courts can vary along operational dimensions without necessarily moving away from the adjudicative model of criminal law administration. There is near consensus that felony courts, and in particular federal felony courts, do not operate according to “the idealized model of adversary justice described in the textbooks.”<sup>30</sup> Gerard Lynch, for example, proposes that we currently have an

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27. Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351 (2013) (identifying three penal techniques of social control prevailing in misdemeanor justice—marking, procedural hassle, and performance—and showing how they are deployed to the ends of monitoring, testing, and regulating misdemeanor defendants irrespective of formal legal outcomes).

28. See Feeley & Simon, *supra* note 6, at 452, 457 (describing “new penology,” which is “concerned with techniques to identify, classify, and manage groupings sorted by dangerousness,” and marked by “cost-effective forms of custody and control” and “technologies to identify and classify risk”).

29. In sketching these features of the managerial model, my aim here is to illuminate the logic of the model, not to evaluate its accuracy or fairness.

30. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121 (1998); see also Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2008); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2003); David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578 (2013); Stuntz, *supra* note 8, at 2549. All of these articles address in different ways how substantive

“inquisitorial” process in which “the locus of adjudication” is not formal judicial proceedings.<sup>31</sup> Rachel Barkow conceptualizes the criminal justice system as an administrative system where the prosecutor’s office—unlike what is permissible in administrative law—combines adjudicative and enforcement functions.<sup>32</sup> The claim, hardly disputable given the small fraction of criminal cases determined at trial, is that prosecutors, not independent finders of fact (be they judges or juries), determine both guilt and punishment.<sup>33</sup>

These operational accounts are about the party in the criminal process with the effective power to adjudicate the facts of guilt and the appropriate punishment (the prosecutor), the site where these decisions are made (the prosecutor’s office), and the process by which the decision comes to be made (not through formal hearings and independent factfinding, but by relying on law enforcement records with some, perhaps minimal, input from the defense). I do not take any of these accounts to argue that the administrative/inquisitorial operations of felony courts necessarily erode their adjudicatory function.<sup>34</sup> The adju-

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criminal law, namely expansive definitions of offenses and increased sentences and mandatory minimums, have shifted the criminal justice system away from one where adjudicatory decisions are made by judges or juries, and discuss the important implications of these shifts for prosecutorial practices and plea bargaining.

31. Lynch, *supra* note 30, at 2121-23 (“[S]ubstantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor.”); see also Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003) (“Most plea negotiations, in fact, are primarily discussions of the merits of the case, in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor’s case, or mitigating circumstances that merit mercy . . . . [W]hat radically distinguishes [the administrative plea bargaining model] from the adversarial litigation model embodied in textbooks . . . is that the prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed).” (emphasis omitted)).

32. Barkow, *supra* note 30, at 873-74 (“[I]ndividuals who make investigative and advocacy decisions should be separated from those who make adjudicative decisions, the latter of which should be defined to include some of the most important prosecutorial decisions today, including charging, the acceptance of pleas, and the decision whether or not to file substantial assistance motions.”).

33. See Lynch, *supra* note 30, at 2120 (“One seldom sees an acknowledgment, in the debates over the superiority or inferiority of the adversarial system, that for most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode.”); see also Barkow, *supra* note 30, at 882-83, 887 (“As a result of . . . pressures and costs of exercising trial rights, the trial is an insufficient check on prosecutorial power. With his or her power to choose from a range of federal criminal laws, to exercise significant leverage over defendants to obtain pleas and cooperation, and to control the sentence or sentencing range through charging decisions, the prosecutor combines enforcement and adjudicative power. . . . [F]ederal prosecutors now do not merely enforce the law, they make key adjudicative decisions as well.”).

34. Lynch describes the negotiations between the federal prosecutor’s office and white-collar defendants as adjudicatory:

dicative model can admit of an adversarial, inquisitorial, or even administrative operational account because the adjudicative model is about the central animating task of the courts, not the location or relative power of agents in carrying out that task.<sup>35</sup> The managerial model, on the other hand, is made possible by the near-structural impossibility of an operational due process model, but it is not reducible to this operational fact.<sup>36</sup>

Nor are these normative models of what the criminal process ought to look like given a set of foundational values, such as what Herbert Packer famously called the "Due Process Model" and the "Crime Control Model."<sup>37</sup> Packer conceptualized the Due Process and Crime Control Models as two idealized accounts of the criminal process that "give operational content to . . . conflicting schemes of values," about both "what the criminal law is good for" and how it ought to be used as a scheme of social control.<sup>38</sup> The Crime Control Model, as suggested by its title, holds "repression of criminal conduct . . . [as] the most important function to be performed by the criminal process,"<sup>39</sup> whereas the Due Process Model holds respect for individuals and restraint of state power from its natural authoritarian tendencies as its cardinal values.<sup>40</sup>

But both the Due Process and Crime Control Models have in common a view that adjudicating guilt and imposing appropriate punishment premised on guilt is what criminal courts ought to do. The models diverge on how to organ-

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[P]rosecutors . . . see themselves as public officials making a decision that is in substantial part adjudicatory. . . . [They] are not seeking simply to maximize the amount of jail time that can be extracted from their adversaries, regardless of guilt or innocence; rather, they undertake to determine, in response to the defendant's arguments, whether the evidence truly demonstrates guilt, and if so, what sentence is appropriate.

Lynch, *supra* note 30, at 2127. There may be, and I think there is, a strong managerial trend in some felony contexts but my point is conceptual—an administrative/inquisitorial operational model does not necessarily erode the adjudicative approach to criminal law.

35. Here it is clear how my usage of the term *managerial* differs from Resnik's usage. Her claim was not that judges have abandoned the enterprise of adjudicating cases and seeking to do substantive justice between the parties, but rather that judges have departed in a problematic fashion from their key role as neutral and detached arbitrators of legal and factual questions by "descend[ing] into the trenches to manage the case." Resnik, *supra* note 6, at 391.

36. Criminal court actors did not necessarily set out to intentionally limit the ability of defendants to invoke individual rights in the criminal process, as is possibly the case in the administration of other legal schemes that have adopted a managerial approach, such as those used to distribute public welfare benefits. See David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1060 (2005).

37. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 5-6 (1964) (describing the Crime Control Model and the Due Process Model as abstractions that "permit[] us to recognize explicitly the value choices that underlie the details of the criminal process").

38. *Id.* at 4-6.

39. *Id.* at 9.

40. See *id.* at 13-14.



ize the criminal process to promote competing values. Packer describes the Crime Control Model as an “assembly line,” in contrast to the “obstacle course” of the Due Process Model, because the former holds that the efficient and uniform routine screening functions performed by actors at various phases of the criminal process, from arrest to sentencing, produce reliable findings of guilt.<sup>41</sup> The Crime Control Model nonetheless posits that *what criminal law is good for* is punishing the maximum number of people for crimes for which they are most likely guilty; it tolerates false positives in the interest of efficiency up until the point where “general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law.”<sup>42</sup>

In contrast, the managerial model holds that *what criminal law is good for* is providing an opportunity to sort and assess people hauled in from policing of disorderly places, seeing over time what sort of people they are, and keeping records of them in the process. It operates on the basis of a presumption of need for social control over the population brought into misdemeanor court. The assumption is practically and conceptually distinct from the assumption of guilt in the Crime Control Model, and ultimately a broader and more flexible enabling assumption.

In Packer’s Crime Control Model the presumption of guilt serves as the factual justification for pushing defendants deeper into the criminal process without stops at time-consuming evidence testing stations. The value to be promoted is punishing the maximum number of possible lawbreakers, and the enabling assumption is that administrative factfinding is an efficient and reliable way of finding them. But managerial courts often purposefully produce dispositions at odds with administrative findings of factual guilt, at least with respect to early encounters.

The enabling assumption in managerial courts is that once someone is brought into the system by an arrest, that person is presumed to be eligible for some level of social control, even if the precise level is yet to be determined. The presumption of need for social control justifies some measure of monitoring and testing action even if legal actors remain under significant uncertainty about the facts in the case at hand. It does not necessarily justify punishment *because* a defendant is most likely guilty of an offense, which would imply that criminal court actors consistently subjectively affirm the factfinding reliability of arrest and charging decisions earlier in the criminal process and base their subsequent actions upon that affirmation.<sup>43</sup>

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41. *Id.* The model’s faith in these screening mechanisms can be described as the “presumption of guilt,” which for Packer means “[t]he supposition . . . that the screening processes operated by police and prosecutors are reliable indicators of probable guilt.” *Id.* at 11.

42. *Id.* at 15.

43. It is of course possible that most prosecutors, judges, and, to some extent, even defense attorneys *do* actually assume that the majority of defendants hauled into misdemeanor courts are factually guilty of the offenses they are accused of committing (or would affirm such a claim if explicitly pressed). And this subjective assessment might be what enables

Table 1 summarizes the conceptual definitions of adjudicative and managerial criminal law administration.

TABLE 1  
Adjudicative vs. Managerial Models of Criminal Law Administration

	Adjudicative	Managerial
What is criminal law good for?	Enforcing substantive proscriptions against bad conduct	Providing an opportunity to identify rule breakers
What is the role of the criminal process?	Selecting the right people for punishment	Sorting on governability and testing people over time to establish their propensity to follow rules
What is the primary mode of processing cases?	Plea bargaining <i>or</i> adversarial proceedings	Plea bargaining

The managerial model can make sense of the pattern of dispositions in Parts III and IV because, in this approach, the rules of criminal procedure and criminal law are used as tools for socially regulating certain populations over time, as opposed to punishing individual instances of lawbreaking. Not all criminal court actors subjectively ascribe to a set of values that make maintenance of the managerial model possible, nor do they necessarily describe their choices as seeking managerial ends. The claim developed in Parts III and IV is that the institutional structure constrains and mediates the subjective orientations of these actors. Actors in a largely managerial system are not insensitive to evidence of innocence and guilt. But claims and evidence of innocence or guilt are incorporated into the operations of misdemeanor justice in a particular manner shaped by the animating logic of the managerial model.

The actual operations and uses of criminal law and criminal process must be understood in a particular social and historical context. In New York City

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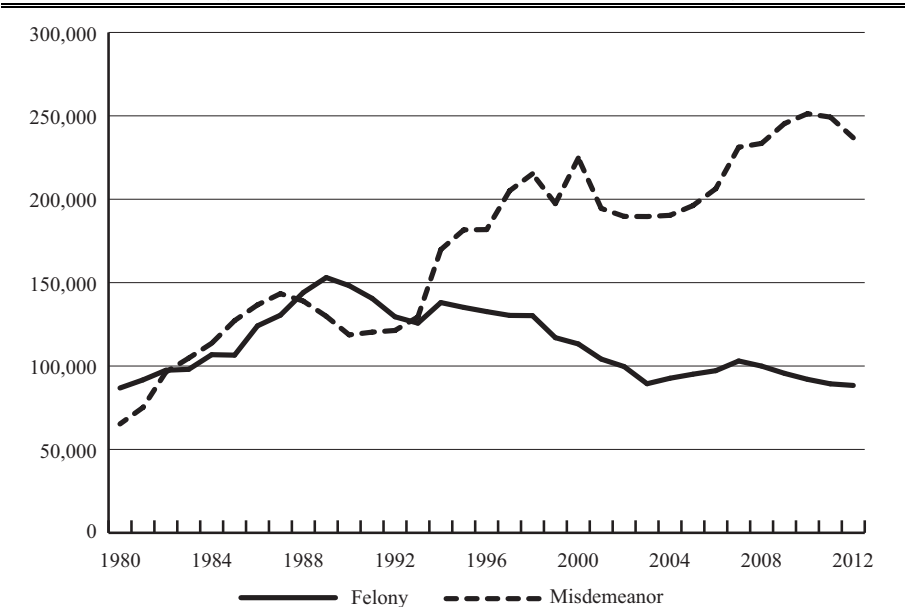
prosecutors and judges to adopt a functional managerial model despite their inculcation into the professional roles of an adversarial system. However, it is also possible that the adjudicative question, "What happened in this case?" has become largely divorced from the practical imperative facing criminal court actors in their daily work—namely, "What should I do with this case?" Actors can decide the latter question without fundamentally settling the former, and they may simply fail to even consider the former question much in the course of their regular activities. Either possibility is consistent with my account of the managerial model because it is a model not of the motivations of criminal actors, but of the recurring patterns of dispositions and the logic by which criminal law is deployed and used to produce those patterns. I thank Gerard Lynch for pushing me on this point, even though he may disagree with my ultimate conclusion.

the character of misdemeanor justice was radically transformed by seismic changes in policing in the 1990s. With this conceptual trace of the managerial model in hand, the next Part turns to the story that produced the age of mass misdemeanors. I highlight aspects of this new policing regime that have received little attention: the increase in record-keeping from these encounters and the ways in which the policing tactics are dependent upon the criminal courts to track and sort people.<sup>44</sup>

II. THE RISE OF MASS MISDEMEANORS

For most of the peak crime years in New York City—about 1985 to 1990—felony arrests outpaced misdemeanor arrests.<sup>45</sup> In 1994 that changed.

FIGURE 1  
Felony and Misdemeanor Arrests in New York City



Source: New York State Division of Criminal Justice Services.

44. For more on broken windows enforcement and its corresponding increase in record-keeping, see BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 100-03 (2001). Harcourt has stressed this aspect of quality-of-life policing, suggesting that insofar as this form of policing has decreased street crime, it is most likely not through the mechanism that the broken windows thesis posits, cementing social norms of order and respect for the law, but rather through the “enhanced power of surveillance offered by a policy of aggressive misdemeanor arrests.” *Id.* at 103.

45. See *infra* Figure 6.

Between 1993 and 2010 the number of misdemeanor arrests almost doubled. Misdemeanor arrests started to soar in the mid-1990s because, quite simply, the new political and policing administration decided to dramatically increase misdemeanor arrests. We can never directly interpret arrest rates as an index of underlying criminal behavior because reporting and police practices mediate criminal events and arrests. This is especially true of misdemeanors. The police can find as many instances of marijuana or drug possession, petit larceny, unlicensed vending, misdemeanor physical altercations, public alcohol consumption, turnstile jumping, prostitution, and disorderly conduct as they devote the time and resources to find.

Therefore, in most cities, misdemeanor arrest numbers are largely an artifact of policing practices rather than crime trends.<sup>46</sup> Table 2 shows that misdemeanor arrests cover a wide range of conduct, yet the largest arrest categories are for offenses where a surge in underlying behavior is an unlikely (or at least difficult to prove) explanation.<sup>47</sup> Figure 2 shows the trends in the top-ten misdemeanor arrests categories over thirty years.

TABLE 2  
Misdemeanor Arrests by Offense—2012

Top Arrest Charge	Arrests	% of Total
PL 221 Marijuana	45,574	19.2%
PL 165 Other Theft*	36,925	15.6%
PL 120 Assault	35,068	14.8%
PL 220 Controlled Substances	25,224	10.6%
PL 155 Larceny	24,679	10.4%
PL 140 Trespass/Burglary	13,337	5.6%
PL 265 Weapons	8,477	3.6%
VTL 1192 Driving While Intoxicated	7,712	3.3%
PL 145 Mischief	7,444	3.1%
PL 240 Public Order	6,357	2.7%
PL 205 Escape	5,715	2.4%
PL 230 Prostitution	3,462	1.5%
PL 130 Sex Offenses	1,063	0.4%
Other	15,820	6.7%
Total Misdemeanor Arrests	236,857	100.0%

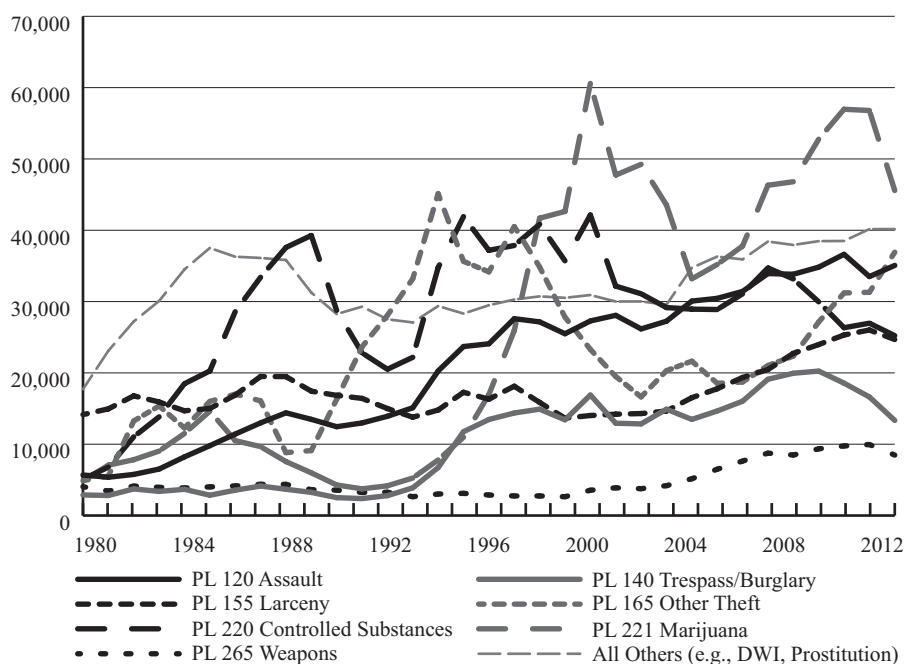
Source: New York State Division of Criminal Justice Services.

\* Other theft includes theft of services (e.g., turnstile jumping).

46. See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 284 (2009) (showing the substantial variation in misdemeanor arrests over the course of the week, with arrests typically peaking on Wednesdays when police staffing for patrols is at its peak and plummeting on Sundays when police staffing is at its weekly low).

47. Note that Figures showing arrests count those that took place within the designated year(s). Similarly, Figures showing dispositions count those that took place within the designated year(s), whereas the associated arrests could have taken place any year.

FIGURE 2  
Arrest Trends in Top Penal Law Article Misdemeanor Arrests



Source: New York State Division of Criminal Justice Services.

\* Other Theft primarily consists of theft of services, such as turnstile jumping.

\*\* Other includes but is not limited to mischief, public order offenses, escape, misdemeanor sex offenses, DWI, and prostitution.

Increasing the number of arrests and tickets for low-level offenses was an explicitly stated goal of the Giuliani administration and his newly appointed police chief, William Bratton. This new policing regime had three defining features. One feature encompassed using various new organizational and managerial tools to gather and analyze data on crime severity and location, and on police activities. These data were in turn used to restructure police administration, management, and tactical deployment decisions. These practices are often grouped under the term CompStat.<sup>48</sup> The second defining feature of the new

48. See VINCENT E. HENRY, *THE COMPSTAT PARADIGM: MANAGEMENT ACCOUNTABILITY IN POLICING, BUSINESS AND THE PUBLIC SECTOR* 4 (3d prtg. 2011); HANS TOCH & J. DOUGLAS GRANT, *AM. PSYCHOLOGICAL ASS'N, POLICE AS PROBLEM SOLVERS: HOW FRONTLINE WORKERS CAN PROMOTE ORGANIZATIONAL AND COMMUNITY CHANGE* (2d ed. 2005); Shaila K. Dewan, *New York's Gospel of Policing by Data Spreads Across U.S.*, N.Y. TIMES (Apr. 28, 2004), <http://www.nytimes.com/2004/04/28/nyregion/new-york-s-gospel-of-policing-by-data-spreads-across-us.html?pagewanted=all&src=pm> (describing the

regime was the expansion and intensification of certain policing methods—stop-and-frisk encounters, issuance of summonses, and arrests for misdemeanor crimes.<sup>49</sup> The third feature that defined the new regime was the massive increase in the records collected, maintained, and shared with other criminal justice agencies.

The aim of these programs was not only to improve New York City's quality of life,<sup>50</sup> but also to reduce the level of serious criminal violence.<sup>51</sup> Senior members of the Giuliani administration were convinced by the so-called broken windows hypothesis,<sup>52</sup> which linked violent crime reduction to vigorous

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use of CompStat by the New York City Police Department and its spread to other police departments).

49. Over the first two years of the Giuliani administration and Bratton's tenure as police commissioner, they released a succession of police directives that laid out a series of policing goals and operational plans for achieving those goals. Not surprisingly, the first three dealt with violent crime, youth crime and violence, and the narcotics trade. N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 1: GETTING GUNS OFF THE STREETS OF NEW YORK (1994); N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 2: CURBING YOUTH VIOLENCE IN THE SCHOOLS AND ON THE STREETS (1994); N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 3: DRIVING DRUG DEALERS OUT OF NEW YORK (1994). The fourth directive dealt with domestic violence. N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 4: BREAKING THE CYCLE OF DOMESTIC VIOLENCE (1994) [hereinafter POLICE STRATEGY NO. 4]. The fifth directive presented the new quality-of-life policing regime. N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK (1994) [hereinafter POLICE STRATEGY NO. 5]. The other directives released over these first formative years addressed corruption and the organizational integrity of the New York City Police Department (NYPD), and traffic enforcement. N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 7: ROOTING OUT CORRUPTION; BUILDING ORGANIZATIONAL INTEGRITY IN THE NEW YORK POLICE DEPARTMENT (1995); N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 8: RECLAIMING THE ROADWAYS OF NEW YORK (1995). These priorities were not separable concerns, but deeply intertwined: the understandings of major crime and minor crime, organizational capacity, management structure, and crime fighting were all part of a wholesale reformist effort linked together by a common vision and diagnosis of underlying problems. It should be noted that intensive use of stop and frisk really expanded in the recent decade and was not a central part of the first wave of tactical reforms.

50. POLICE STRATEGY NO. 5, *supra* note 49, at 5-10. *Police Strategy No. 5: Reclaiming the Public Spaces of New York* announced a comprehensive new policing approach in establishing new enforcement priorities for quality-of-life offenses, coupled with extensive operational and tactical reforms. The directive held out abatement of certain quality-of-life issues as an intrinsically beneficial project—to bring New York back to a “society of civility”—and listed the specific conditions the police would target: noise conditions such as loud music, loud clubs and discos, motorcycles, and car alarms; illegal double parking blocking traffic; prostitution; aggressive panhandling; squeegee cleaners; graffiti; illegal peddling and vending; aggressive bicyclists; and public drunkenness. *Id.*; *see also id.* at 3.

51. *See id.* at 7 (“*Police Strategy No. 5: Reclaiming the Public Spaces of New York* will emerge as the linchpin of efforts now being undertaken by the New York Police Department to reduce crime and fear in the city.”).

52. For a discussion of the broken windows hypothesis, see James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31-32. *Police Strategy No. 5: Reclaiming the Public Spaces of New York* makes explicit reference to Wil-

enforcement of minor prohibitions, such as turnstile jumping and urinating in public, and also held that communities valued order almost as much as containment of serious street crime.<sup>53</sup> The new priorities and tactics surrounding low-level offenses were announced in a police strategy paper entitled *Police Strategy No. 5: Reclaiming the Public Spaces of New York*.

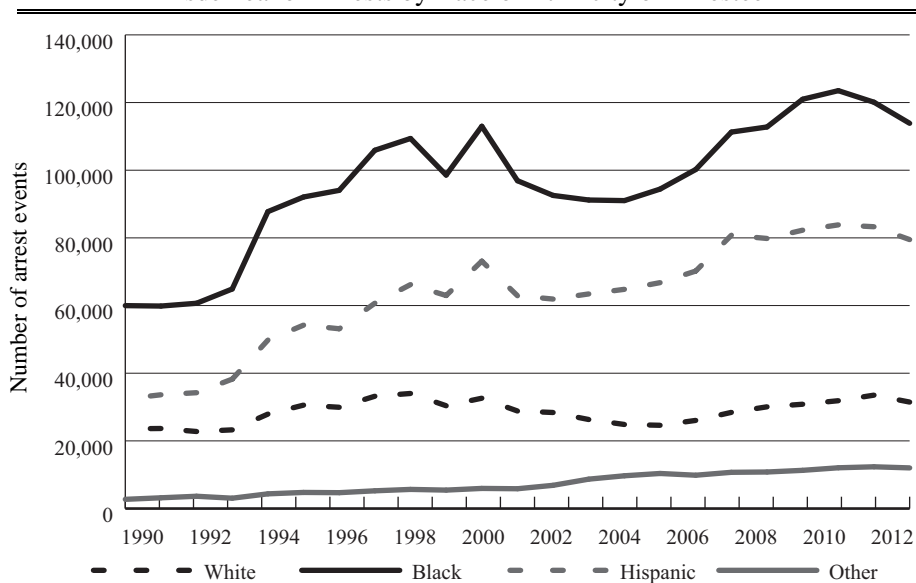
The impacts of these tactics have not been evenly felt across the city. Mass misdemeanor arrests, like mass incarceration, have primarily targeted black and Hispanic individuals. Figure 3 shows the number of misdemeanor arrest events according to the race or ethnicity of the arrestee between 1990 and 2012. It shows that between 1990 and the recent peak year for misdemeanor arrests—2010—the number of misdemeanor arrest events of white individuals increased by around 35%, whereas the number of misdemeanor arrest events of black individuals increased by over 105%, and of Hispanic individuals by over 158%. Figure 4 shows the current demographic composition of arrestees.

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son and Kelling's article, describing its "thesis that unaddressed disorder is a sign that no one cares and invites both further disorder and more serious crime." POLICE STRATEGY NO. 5, *supra* note 49, at 6.

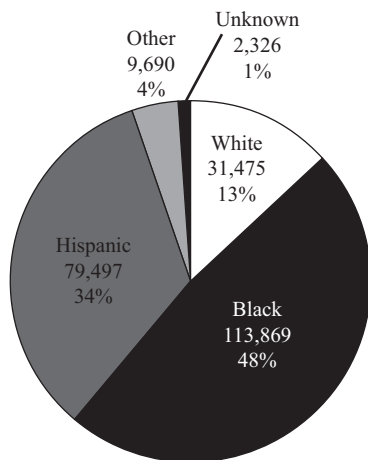
53. Some have argued that the precise tactics used by the NYPD did not conform to the model of broken windows as expressed in Wilson and Kelling's original writing, or that the NYPD always used quality-of-life policing as a pretext to engage more serious crime and was never expressly concerned with quality of life as such. *See, e.g.*, FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* 129-31 (2012); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 464-75 (2000). There is evidence, however, that the police meant what they said in numerous public comments and documents, promising both to address certain low-level offenses as public-order issues as a means of improving the experience of living in New York City, and to engage low-level offenses in an effort to reduce serious street crime. *See* POLICE STRATEGY NO. 5, *supra* note 49, at 5-6; *see also* WILLIAM BRATTON & PETER KNOBLER, *TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC* 228 (1998); Rudolph W. Giuliani, Mayor, N.Y.C., Inauguration Speech (Jan. 2, 1994) (transcript available at <http://www.nyc.gov/html/records/rwg/html/96/inaug.html>); Rudolph W. Giuliani, Mayor, N.Y.C., State of the City Address (Jan. 11, 1995) (transcript available at <http://www.nyc.gov/html/records/rwg/html/96/city95.html>). There is also significant evidence to show that as time passed misdemeanor arrests and summonses became institutionalized as performance metrics inside the NYPD and incentivized by their quantitative management system, irrespective of the quality-of-life or crime-reducing benefit of the activities. *See, e.g.*, *Floyd v. City of N.Y.*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at \*13-14 (S.D.N.Y. Aug. 12, 2013); JOHN A. ETERNO & ELI B. SILVERMAN, *THE CRIME NUMBERS GAME: MANAGEMENT BY MANIPULATION* 195 (2012).

FIGURE 3  
Misdemeanor Arrests by Race or Ethnicity of Arrestee<sup>54</sup>



Source: New York State Division of Criminal Justice Services.

FIGURE 4  
Racial and Ethnic Composition of Misdemeanor Arrest Events—2012



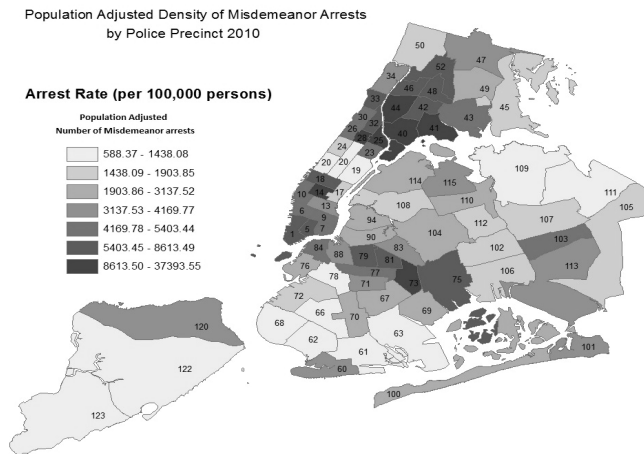
Source: New York State Division of Criminal Justice Services.

54. Note that Figures show the number of arrest events, not unique individuals.



One reason that black and Hispanic individuals make up such a high proportion of misdemeanor arrests is that quality-of-life policing is intensely spatially concentrated in neighborhoods with high crime rates and high minority populations.<sup>55</sup> There is significant public debate and ongoing federal litigation about whether the geographic intensity of, for example, stop-and-frisk activity is fully explained by police deployment responding to violent or serious property crime conditions, or whether it is driven by the racial composition of those spaces. Regardless of what is driving the trends, it is clear that misdemeanor arrests are concentrated in overwhelmingly black and Hispanic neighborhoods. Figure 5 is a population-adjusted misdemeanor arrest density map of the New York City precincts. The top misdemeanor arrest precincts cover neighborhoods that range from 78% to 97% black or Hispanic.<sup>56</sup>

FIGURE 5



Source: New York City Police Department; U.S. Census Bureau.

55. Jeffrey Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS 329, 337 (Stephen K. Rice & Michael D. White eds., 2010); Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 591-93, 620-22 (2010). Fagan et al., *supra*, argues that geographic concentration of the intensity of quality-of-life enforcement, at least stop-and-frisk activity, is not entirely explained by prior index crime rates.

56. Data from Richard Rosenfeld, Curators' Professor, Univ. of Mo.-St. Louis & Robert Fornango, Assistant Professor, Ariz. State Univ. (on file with author); INFOSHARE ONLINE, <http://www.infoshare.org/main/public.aspx> (last visited Feb. 19, 2014). The only exception is the Midtown South Precinct. It has a high population-adjusted misdemeanor arrest rate because it has a relatively low residential population, but covers the city's transportation hubs and a very dense commercial sector including Times Square, and because it is a tourist center it is highly policed.

Although quality-of-life policing is often trumpeted as a general deterrent to violent crime, in practice the tactics used were often designed to get at a threshold question of who ought to be incapacitated and how scarce law enforcement resources ought to be used to deter various types of criminal conduct.<sup>57</sup> Records—checking old ones, making new ones, and transmitting and sharing existing ones—were key to these endeavors because they helped the police sort people according to law enforcement encounters over time.<sup>58</sup>

The police have long had a number of different tools to address low-level offenses. How they do so is largely a function of both the individual-level discretion of beat cops and organizational policies (either as articulated formally in the NYPD Patrol Guide<sup>59</sup> or in police department directives, or informally as organizational pressures or local norms). Police can choose to disregard certain low-level offenses, informally engage the conduct by telling the person to desist or move along, or formally engage the conduct by issuing a summons or making an arrest. Police can also, in many instances, choose what level of offense to charge.<sup>60</sup>

New York law distinguishes between what I will call “fingerprintable” offenses—which include both felony and misdemeanor criminal offenses—and other offenses, which I will term “nonfingerprintable.”<sup>61</sup> The distinction has implications for a range of record-keeping practices. When the police arrest a suspect for a fingerprintable offense, the police are required to take the arrestee’s fingerprints and transmit them to the New York State Division of

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57. Precisely how these tactics would impact serious street crime was understood on a variety of levels and was indeed the subject of some debate among the NYPD brass. For example, Jack Maple, deputy police commissioner under Bratton and one of the innovators of CompStat, argued:

[W]e needed to be more selective about who we were arresting on quality-of-life infractions. When a team of cops fills up a van with arrestees, the booking process can take those cops out of service for a whole day in some cities. The public can’t afford to lose that much police protection for a bunch of first-time offenders, so the units enforcing quality-of-life laws must be sent where the maps show concentrations of crime or criminals, and the rules governing the stops have to be designed to catch the sharks, not the dolphins.

JACK MAPLE & CHRIS MITCHELL, *THE CRIME FIGHTER: PUTTING THE BAD GUYS OUT OF BUSINESS* 155-56 (1999).

58. See HARCOURT, *supra* note 44, at 103 (arguing that despite proponents’ focus on community-level mechanisms such as enforcing shared norms of order, the individual-level mechanisms, such as “the opportunity for checking records, fingerprints, DNA, and other identifying characteristics,” were probably more important).

59. See N.Y.C. POLICE DEP’T, *NEW YORK CITY POLICE DEPARTMENT PATROL GUIDE MANUAL* §§ 208-209, 214; *supra* note 49.

60. The arrest charges are reviewed by a representative from the district attorney’s office and can be changed before arraignment, but the initial police arrest charge is determinative of what type of arrest procedures are instituted.

61. N.Y. CRIM. PROC. LAW § 160.10 (McKinney 2013). This statute defines the offenses that are fingerprintable, namely penal-law-defined felonies and classified misdemeanors, and also provides for printing for a limited number of violations, such as loitering for the purposes of prostitution. See *id.*

Criminal Justice Services (DCJS), the state agency responsible for maintaining criminal records and producing and transmitting criminal history reports (a.k.a. rap sheets).<sup>62</sup> Suspects arrested for nonfingerprintable offenses are not required to give their fingerprints, unless the arresting office is unable to ascertain the suspect's identity, reasonably suspects that the suspect has given a false identity, or reasonably suspects that the suspect is sought by law enforcement for other offenses; in such cases, the decision to fingerprint is left to the officer's discretion.<sup>63</sup>

The same conduct can often be charged as either a violation or misdemeanor offense.<sup>64</sup> The type of arrest charge (fingerprintable misdemeanor or nonfingerprintable violation) obviously implicates the offense level and thus the criminal liability the defendant faces. But it also determines what type of records the police can retrieve at the time of arrest, what records the court will see at the time of certain dispositions, and what records of the encounter will be accessible at a later time. Rap sheets are generated and matched to the criminal court file only for fingerprintable offense arrests.<sup>65</sup>

Most, but not all, nonfingerprintable offenses are addressed by police with what is called a *summons*.<sup>66</sup> The policy of when to issue a summons basically tracks the definition of a nonfingerprintable offense, which in turn determines whether or not a rap sheet will be generated and matched to the charging document when the court (either the criminal court or summons court) addresses the case.

There are two types of arrests for misdemeanor crimes in New York.<sup>67</sup> The most common form of arrest is called an "online" arrest (the name comes from the NYPD's On-Line Booking System). The arrestee is detained at a local pre-

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62. CRIM. PROC. §§ 160.10, 160.20-40; *see also* LISA LINDSAY, CRIMINAL COURT OF the CITY OF NEW YORK ANNUAL REPORT 29 (Justin Barry ed., 2012) (describing the arrest to arraignment procedure and the process of taking fingerprints and transmitting them to court).

63. CRIM. PROC. § 160.10.

64. For example, turnstile jumping is a noncriminal violation, for which police officers can issue a summons and which is punishable by a fine of up to twenty-five dollars or ten days in jail. N.Y. COMP. CODES R. & REGS. tit. 21, §§ 1050.4, 1050.10 (2013) (establishing turnstile jumping as a violation of the New York City Transit Rules of Conduct). Turnstile jumping is also a violation of New York Penal Law section 165.15, and classified as a Class A misdemeanor. N.Y. PENAL LAW § 160.10 (McKinney 2013). The same conduct could also support an arrest for criminal trespass, *id.* § 140.05, which is a violation, or criminal trespass in the third degree, *id.* § 140.10, which is a Class B misdemeanor.

65. *See* LINDSAY, *supra* note 62, at 29.

66. Article 150 of the New York Criminal Procedure Law governs all appearance tickets; what the police (and the public) call summonses are a subset of appearance tickets. *See* CRIM. PROC. § 150.10. Desk Appearance Tickets, which are discussed in the next paragraph, are another form of appearance tickets governed by this statute. The NYPD Patrol Guide provides guidelines on the issuance of summonses. N.Y.C. POLICE DEP'T, *supra* 59, § 209.

67. There is even some latitude for arrest procedures for certain felonies classified as lower level. CRIM. PROC. § 140.40.

cinct to take fingerprints and then transferred to central bookings pending arraignment. The defendant is then held in central bookings or the criminal court “pens” until a judge can arraign him. Police are authorized by law to make an online arrest for any New York Penal Law offense, including violations. However, as a matter of practice, they generally arrest only for violations in certain circumstances.

The other type of arrest is called a “Desk Appearance Ticket” (DAT).<sup>68</sup> The police still execute an arrest on the street: the person is handcuffed and transported back to the precinct in custody. The person, however, is then released from the precinct with an appearance ticket indicating a date to appear in court for arraignment. The law limits the type of offenses eligible for DATs to essentially less serious offenses, but that still leaves wide discretion for patrol officers because eligible offenses cover the majority of arrests made.<sup>69</sup> Online arrests, however, are far more common than DATs.<sup>70</sup>

The new policing regime launched by *Police Strategy No. 5* called for increasing not only the *frequency* of police encounters for quality-of-life issues, but also the *intensity* of formal police responses. For example, the strategy paper declared that “permissive and poorly monitored policies regarding issuance of summonses and Desk Appearance Tickets have enabled many offenders to flaunt the criminal justice system, thereby undermining the authority of police officers who respond to these conditions.”<sup>71</sup> In response, new policies would be implemented: “tighter eligibility requirements, higher identification standards, and supervisory screening of release decisions,” with respect to both the issuance of desk appearance tickets (or, as the police evidently called them prior to 1994, “desk *disappearance* tickets”<sup>72</sup>) and summonses.<sup>73</sup> The preference would now be for full online arrests. Individuals without government identification would be ineligible for DATs or summonses so as to prevent the use of false addresses and to increase the burdensomeness of the encounter. All summonses and DATs would now be docketed and backed by warrant.<sup>74</sup> The police actively lobbied to maintain their discretion to make fingerprintable arrests for the

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68. See POLICE STRATEGY NO. 5, *supra* note 49, at 13. DAT is the colloquial term for the appearance tickets authorized by section 150.10.

69. See *supra* Table 2. Section 150.20 of the New York Criminal Procedure Law authorizes DAT arrests for all arrestable offenses (defined under CRIM. PROC. § 140.10) *except* a Class A, B, C, or D felony or a violation of sections 130.25, 130.40, 205.10, 205.17, 205.19, or 215.56 of the New York Penal Law. CRIM. PROC. § 150.20.

70. LINDSAY, *supra* note 62, at 24. There were 73,522 DAT arrests and 283,900 online arrests in New York City in 2012. *Id.*

71. POLICE STRATEGY NO. 5, *supra* note 49, at 13.

72. BRATTON & KNOBLER, *supra* note 53, at xv (emphasis added).

73. *Id.* at 36.

74. See POLICE STRATEGY NO. 5, *supra* note 49, at 13, 36-38, 41, 49-50; see also BRATTON & KNOBLER, *supra* note 53, at 229.

largest number of charges and to maintain as many records as possible of all street encounters.<sup>75</sup>

In sum, the new policing tactics rolled out in the early 1990s emphasized the introduction of both more frequent and more formal police responses to low-level violations and misdemeanor crimes. But they also emphasized strategies to increase overall collection of information about people encountered on the street. The police worked to maintain those records and to make sure that institutions down the line, namely criminal courts, had access to information about the frequency and nature of an individual's law enforcement contacts.

The following Part will develop what I call the empirical puzzle of mass misdemeanors in New York City: as the police and mayor put increased tactical emphasis on arrests for misdemeanor crimes, the criminal courts convicted an ever-declining proportion of defendants arrested for these offenses.

### III. MISDEMEANOR JUSTICE IN THE ERA OF MASS MISDEMEANORS

Since New York City's policing reforms of the 1990s were explicitly formulated to increase the number of summonses and arrests for low-level offenses, it is certainly not surprising that they succeeded in doing so. However, the sheer volume of this expansion, and its persistence despite the low rates of violent and property crime of the past decade, is striking. As Figure 1 showed, the total number of misdemeanor arrests expanded almost fourfold over the years between 1980 and 2011, from about 65,000 a year to over 250,000 a year.<sup>76</sup>

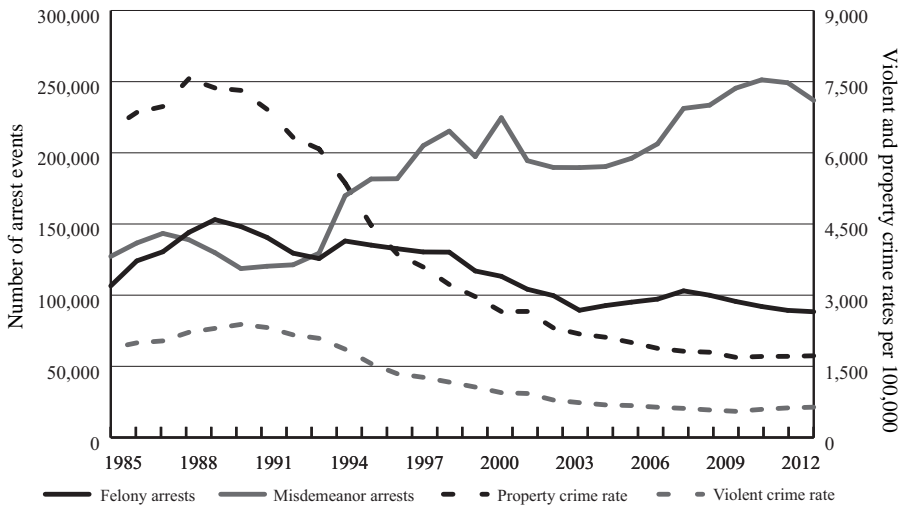
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75. Until 2010 the police maintained a database of every person stopped, questioned, or frisked even if no arrest was made. The police actively fought against the legislation that eventually put a stop to that practice. *See, e.g.,* Joseph Ax & Jackie Frank, *Lawsuit over NYPD's "Stop and Frisk" Data Can Move Ahead*, REUTERS (Dec. 20, 2012), <http://www.reuters.com/assets/print?aid=USBRE8BJ1EV20121220>; Al Baker, *Lawsuit Challenges Stop-and-Frisk Database*, N.Y. TIMES CITY ROOM BLOG (May 19, 2010), <http://cityroom.blogs.nytimes.com/2010/05/19/lawsuit-challenges-stop-and-frisk-database>; Bob Herbert, Op-Ed., *Watching Certain People*, N.Y. TIMES (Mar. 2, 2010), <http://www.nytimes.com/2010/03/02/opinion/02herbert.html>; Clifford Krauss, *State Legislators Agree to Restore Arrests for Minor Offenses*, N.Y. TIMES (Nov. 11, 1995), <http://www.nytimes.com/1995/11/11/nyregion/state-legislators-agree-to-restore-arrests-for-minor-offenses.html>; Josh Robin, *Governor Signs Legislation to Eliminate NYPD's Stop and Frisk Database*, NY1 (Jul. 16, 2010), [http://www.ny1.com/content/top\\_stories/122173/governor-signs-legislation-to-eliminate-nypd-s-stop-and-frisk-database](http://www.ny1.com/content/top_stories/122173/governor-signs-legislation-to-eliminate-nypd-s-stop-and-frisk-database). Other examples of new record-keeping included the "Domestic Incident Report" (DIR), a form and accompanying database that tracked perpetrator and victim information in suspected domestic violence disputes. *See* POLICE STRATEGY NO. 4, *supra* note 49, at 14-18. This information not only is used by police to determine if a crime has occurred, but also is an important source for the court in setting bail, making offers, and determining punishments.

76. *See supra* Figure 1. Misdemeanor arrests have recently declined for the first time in years. This phenomenon, however, is driven almost exclusively by decreases in marijuana and trespass arrests. One explanation for this decline is the significant amount of public pressure, media attention, and litigation around marijuana arrests, stop-and-frisk tactics, vertical

Prior to 1994, the NYPD issued about 160,000 summonses a year; in recent years, it has issued around 600,000 summonses a year.<sup>77</sup> Figure 6 shows that misdemeanor arrests, but not felony arrests, have continued to climb even as violent and property crime rates have declined substantially and stabilized at historically low levels.<sup>78</sup>

FIGURE 6  
Violent and Property Crime Trends Compared with Arrests



Source: New York State Division of Criminal Justice Services.

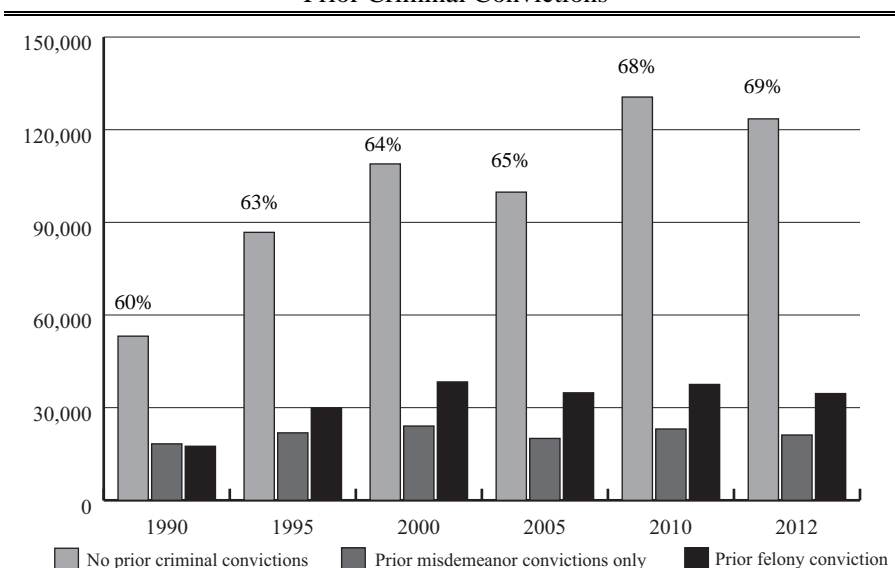
Figure 7 shows that these tactics swept in massive new numbers of individuals without prior criminal records.

sweeps in public housing, and the Clean Halls program, which collectively produced the majority of the marijuana and trespass arrests. *See supra* Figure 2.

77. POLICE STRATEGY NO. 5, *supra* note 49, at 37; *see also* LINDSAY, *supra* note 62, at 35 (noting that over the past decade the low has been about 510,000 and the high about 649,000).

78. *See infra* Figure 6; *see also* 2012 *Crime Statistics by County*, N.Y. ST. DIVISION CRIM. JUST. SERVICES, <http://www.criminaljustice.ny.gov/crimnet/ojsa/countycrimestats.htm> (last visited Feb. 19, 2014).

FIGURE 7  
Number of Persons Arrested for Misdemeanor Offenses by  
Prior Criminal Convictions



Source: New York State Division of Criminal Justice Services.

In 1990 there were 53,152 people arrested for misdemeanor crimes who had no prior criminal convictions. By 2010, the number reached over 130,000.<sup>79</sup> These numbers do not necessarily reflect people new to the criminal justice system because, as I will show, arrest without conviction is not only possible, but is the norm. But these descriptive data do establish two important trends: First, starting in 1994, New York City's criminal courts received a massive influx of misdemeanor cases. Second, most of these arrestees had no prior criminal convictions. The following Subparts explore how the courts processed these arrests.

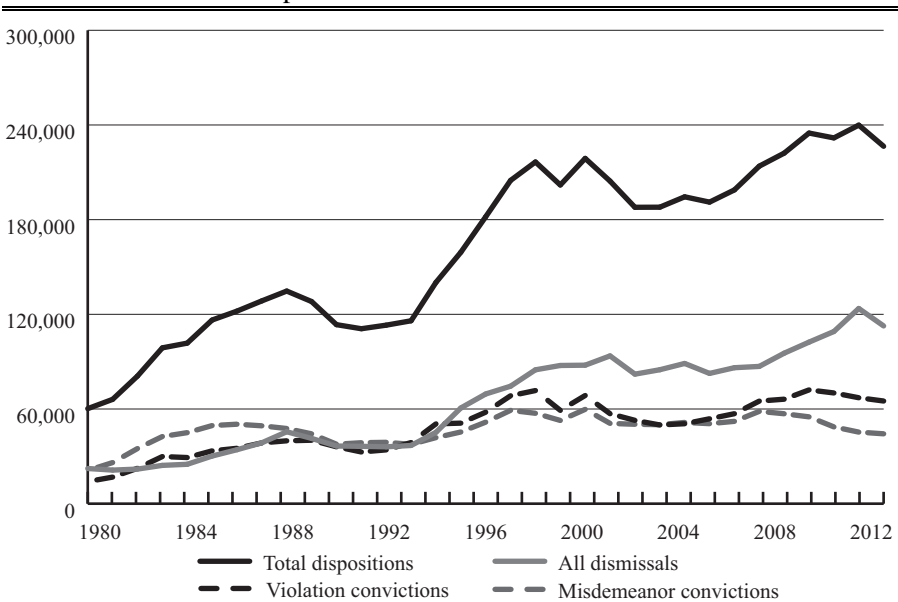
#### A. Disposition Trends

One of the most striking outcomes of the policing revolution that massively expanded arrests for low-level crimes is that it did not translate into proportionately higher numbers or rates of misdemeanor convictions. Figure 8 shows the total number of misdemeanor dispositions (where the top charge was a misde-

79. Although the absolute number grew precipitously, the percent of individuals arrested each year for misdemeanor crimes with no prior criminal convictions grew by only about ten percentage points, going from about 60% in 1990 to just over 69% in 2012. See *supra* Figure 7.

meanor at the time of arrest) each year from 1980 to 2012. It also shows the absolute number of the three most common disposition types: dismissal, conviction for a noncriminal violation/infraction, and misdemeanor criminal conviction. Even as the total number of misdemeanor case dispositions more than doubled (a 107% increase) from 1993 (the year before the widespread policing changes) to 2011 (the recent peak of misdemeanor arrests), the number of misdemeanor convictions went up by only about 21%. The absolute number of dismissal dispositions increased by over 235% between 1993 and 2011. It is clear from Figure 8 that the assembly-line understanding of misdemeanor justice, in which quality-of-life arrests are mechanically and automatically transformed into convictions and formal punishments is not borne out by the data on New York City's experiment with mass misdemeanors.

FIGURE 8  
Dispositions of Misdemeanor Arrests

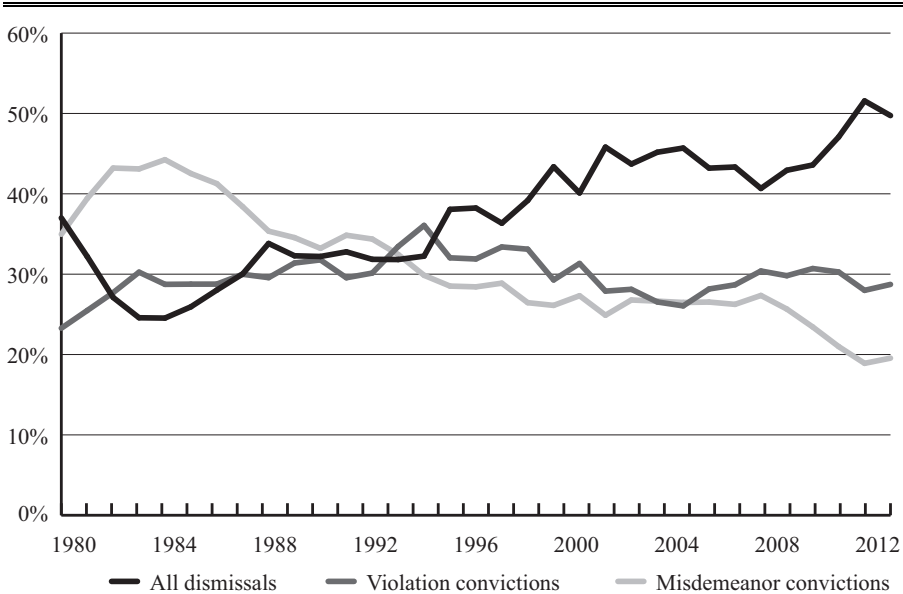


Source: New York State Division of Criminal Justice Services.

Figure 9 shows more dramatically that the significant increase in misdemeanor arrests did not translate into proportionate convictions. The misdemeanor justice system converted an ever-decreasing share of misdemeanor arrests into criminal convictions as the total volume of cases increased. In 1984, approximately 44% of misdemeanor case dispositions were convictions for misdemeanor crimes; in 1993, it was 33%; and in 2011, it was 19%. In contrast, the proportion of dismissal dispositions went from about 32% in 1993 to over 50% in 2011.



FIGURE 9  
Select Dispositions as Percentage of Total Misdemeanor Dispositions



Source: New York State Division of Criminal Justice Services.

Although the misdemeanor justice system does not uniformly and mechanically produce criminal convictions, it would be a mistake to assume that misdemeanor arrests therefore achieve nothing in the way of social control. The question is how. As the next Subpart will show, these dismissals and noncriminal convictions do not represent a release valve in the form of prosecutors or judges routinely throwing out cases or handing out massively discounted sentences simply to secure quick and easy pleas. As the courts shifted away from the adjudicative model toward the managerial model, criminal justice actors increasingly used the misdemeanor process to mark, classify, and supervise people, often without securing a conviction or imposing a sentence.

B. *The Managerial Uses of Dispositions: Marking and Classification*

Criminal justice systems keep records. They do not keep records for the sake of mere posterity, or to maintain repositories of factual and legal findings. Record-keeping is a dynamic organizational practice. It involves the construction, constant refinement, and maintenance of a resource. This resource is continually consulted and used because it contains information that organizational actors rely upon to make decisions. One of the primary penal techniques in managerial misdemeanor courts is *marking*—the practice of indexing certain

status determinations about individuals. The import of the mark is determined both by the content of the mark—what it designates—and by who can access it—where and subject to what rules it can be accessed by people who would rely on the information in making important decisions.

Marking is public credentialing. It classifies subjects based on the statuses they have achieved through their contact with the police and courts. The “‘credential’ of a criminal record, like educational or professional credentials, constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic, and political domains.”<sup>80</sup> But conviction is only one way that marking produces public credentials. This Subpart focuses on how marks are generated by misdemeanor arrests and summonses as well as how they are circulated and used.<sup>81</sup>

Punishment has long entailed a component of marking. The popular and scholarly focus during the era of mass incarceration on physical incapacitation has led some to conflate custodial control with punishment. But punishment is not merely the infliction of “hard treatment,” for it also entails the transmission of social meaning by designating a person as an offender.<sup>82</sup> Therefore, marking is neither unique to punishment practices for minor crimes nor new to this historical period.<sup>83</sup>

However, marking in the managerial model is not necessarily the upshot of a determination of guilt indicating a specific transgression. In the context of misdemeanor justice, marking serves the function of documenting the fact and frequency of prior encounters. Marks are used inside the system to signify what level of response is warranted and what other sorts of testing or punishments will be imposed in the context of later encounters. Therefore, it is far from being a system mechanically operating on masses of defendants that fails to make

80. DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 4-5 (2007) (demonstrating that the “negative credential” of a felony record has significant effects on the labor market prospects of young men of color); see also James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 420 (2006) (describing a criminal record as a “negative curriculum vitae” and discussing the implications of the extensive creation and circulation of these records).

81. I primarily focus on their use and meaning inside of the judicial apparatus instead of within the larger social and economic realm; but sometimes I address the latter issue when it is relevant to the types of incentives that defendants face in misdemeanor court.

82. The expressive aspect of punishment includes communication of the offender’s diminished status to others in the social community. Harold Garfinkel, for example, conceptualized criminal court proceedings as a “status degradation ceremony.” Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 420-24 (1956).

83. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 117-18 (2003) (“[T]he Napoleonic Criminal Code of 1810 . . . distinguish[ed] between full-throttle ‘crimes’ on the one hand, and mere ‘délits’ and ‘contraventions’ on the other. . . . [T]hese distinctions are of central importance . . . for a European law that finds ways to convict offenders without stigmatizing them as ‘criminals.’”).

distinctions between people; one of the system's primary functions is to make distinctions.

Some have suggested that because of the types of crimes at issue and the relative costs of the criminal process in the misdemeanor context, prosecutors and judges are simply motivated to generate a high rate of guilty pleas by offering minimal punishments. For example, Josh Bowers characterizes prosecutors in lower criminal courts as "conviction maximizers,"<sup>84</sup> and he argues that they rarely exercise what he calls "equitable discretion"<sup>85</sup> in charging low-level criminal cases because of institutional pressures, lack of information about cases at the charging phase, and the high likelihood of easily secured convictions via pleas with lenient sentences.

But the data presented here show that prosecutors in New York City decline to prosecute a significant number of misdemeanor arrests—between approximately 17,000 and 30,500 in each of the last five years—and that they decline to prosecute misdemeanor arrests at a higher rate (some years at a substantially higher rate) than the rate at which they decline to prosecute felony arrests.<sup>86</sup> The largest misdemeanor disposition category, the *adjournment in contemplation of dismissal* (ACD), is a conditional dismissal that requires consent of a prosecutor.<sup>87</sup> The largest conviction category resulting from misdemeanor arrests is the noncriminal violation or infraction. These reductions from misdemeanors to violations are also almost exclusively the result of prosecutorial discretion.<sup>88</sup> If prosecutors are not maximizing punishment *or* criminal

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84. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1122, 1128 (2008) (emphasis omitted).

85. Bowers, *supra* note 22, at 1704-09 (arguing that for many low-level criminal cases—what in New York City criminal court vernacular are called "disposable cases"—the "prosecutors' initial decisions of what and whether to charge are somewhat dispositive on the question of whether the defendant will ultimately end up with some type of conviction—even if some equitable play remains in the punishment joints").

86. Note that although the absolute number of misdemeanor cases that prosecutors declined to prosecute over the past five years has consistently been about two to four times higher than the absolute number of declined felony cases, the misdemeanor decline-to-prosecute *rate* has fluctuated between a level that is 13% and 51% higher than that of the felony decline-to-prosecute rate. See Data from N.Y. State Div. of Criminal Justice Servs. (on file with author) (providing arrest disposition data for 2007-2012); see also *Dispositions of Adult Arrests*, N.Y. ST. DIVISION CRIM. JUST. SERVICES, <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/index.htm> (last visited Feb. 19, 2014).

87. A judge can authorize a marijuana ACD (MJACD) without the prosecutor's consent if the defendant has never been convicted of any crime; if the defendant has a prior criminal conviction the prosecutor must consent to the MJACD. See N.Y. CRIM. PROC. LAW §§ 170.55-.56 (McKinney 2013). The details of the disposition are discussed below.

88. See *infra* Figure 10. Almost every misdemeanor case conviction disposition is the result of a plea: there were only 533 trial verdicts for misdemeanor and violation cases in 2012, as compared with over 220,000 misdemeanor case dispositions and over 500,000 summonses filed. LINDSAY, *supra* note 62, at 35, 51; *supra* Figure 8; see also Data from N.Y. State Div. of Criminal Justice Servs. (on file with author) (providing misdemeanor dis-

conviction rates in processing massive numbers of misdemeanor arrests, then what are they doing?

What Bowers sees as failure to exercise equitable discretion, I see as a fundamentally different approach to the uses of the criminal process and penalty. New York City has largely abandoned the adjudicative model of criminal law—in which the animating goal is determining guilt or innocence and imposing sanctions accordingly—in favor of the managerial model—in which the animating goal is using various tools to sort and regulate the population of people who flow through the courts. At the time of charging and arraignment prosecutors have minimal information about the arrest circumstances and the facts constituting the alleged crime. But they do have records about the defendant's prior criminal justice contacts, and that information is used to differentiate between defendants.

Prosecutors have at their disposal a number of dispositions aside from declining to prosecute, and short of criminal conviction, that allow them to differentiate between defendants. In the following Subpart, I delve into the specifics of the most common dispositions from misdemeanor arrests to reveal *how* these different disposition tools serve the managerial goals of sorting and regulating, even though they do not maximize criminal conviction or formal penalties.

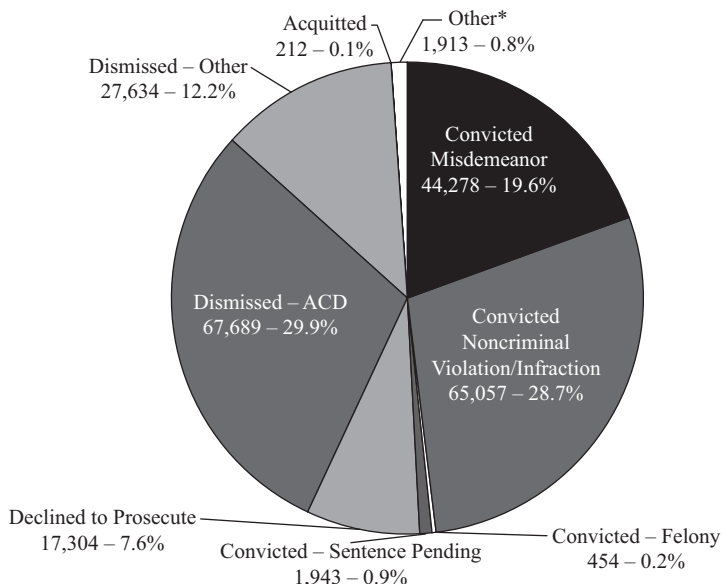
### 1. *Dismissal*

This Subpart provides an overview of the most common disposition outcomes from misdemeanor arrests—as displayed in Figure 10—and links them to different kinds of record-keeping and prosecutorial choices.

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position data for 1980-2012). The maximum jail sentence for a violation is fifteen days in jail. See N.Y. PENAL LAW § 70.15(4) (McKinney 2013).

FIGURE 10  
Misdemeanor Case Dispositions



Source: New York State Division of Criminal Justice Services.

\* Other dispositions include youthful offender adjudication, diverted and dismissed, covered by another case, and other unspecified dispositions.

The disposition category of dismissal masks significant variation in the type of dismissal and how defendants are marked in the process. The shortest marking period in the dismissal category occurs when the prosecutor decides not to prosecute the case. Colloquially these are called “DP’d” cases, as shorthand for decline to prosecute (DP). If there is a DP, the defendant is not arraigned and the arrest should not print on future rap sheets. After the police make an arrest, they fill out paperwork at the precinct and fax the paperwork to what is called, in most boroughs, the Early Case Assessment Bureau (ECAB). There, assistant district attorneys (ADAs) and paralegals work to screen cases and prepare the complaint, which is the charging instrument for arraignment. Because defendants are supposed to be arraigned within twenty-four hours after arrest,<sup>89</sup> ADAs and others working to screen and “write-up” cases must work

89. New York case law holds that a person should be arraigned within twenty-four hours of arrest and provides that a defendant arrested without a warrant and held in excess of twenty-four hours prior to arraignment must be released unless the state can provide an adequate explanation for the delay. *See People ex rel. Maxian v. Brown*, 570 N.E.2d 223, 223-25 (N.Y. 1991) (per curiam) (interpreting N.Y. CRIM. PROC. LAW § 140.20(1)).

quickly to identify cases that they do not want to prosecute—as a matter of policy, fairness, or because there was a legally suspect stop or search.<sup>90</sup>

The most common form of dismissal in New York City is the ACD. Under governing law, the court may grant the motion of either party—with the consent of the nonmoving party—to adjourn the case for a specific time period, after which the charges will be dismissed and the arrest and prosecution will be deemed a nullity. For marijuana offenses and family court matters, the adjournment period cannot be longer than one year, whereas for other offenses the adjournment period cannot be longer than six months.<sup>91</sup> As a practical matter, these statutory maximums are the usual adjournment times.<sup>92</sup>

Cases that are eventually dismissed pursuant to an ACD therefore mark the defendant's rap sheet for up to one year.<sup>93</sup> During this period the arrest charges and ACD disposition are available to the court, prosecution, and defense attorneys on the rap sheet. The arrest charges, disposition, and all court appearances made in the case are also made available to the general public on the state's criminal court website, WebCrims, searchable by the defendant's first and last name.<sup>94</sup> If an individual is not arrested again before the adjournment date, the case will be dismissed and sealed on the adjournment date.<sup>95</sup>

The residual category of "other dismissal"—constituting about 12% of misdemeanor case dispositions in 2012—includes various legal grounds for dismissal.<sup>96</sup> These forms of dismissal can occur at any point in a case's life course. For example, a case can be dismissed because the charging instrument is facially insufficient at arraignment or "in the interest of justice" after many

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90. Interview with "Nathalie," Supervisor, Early Case Assessment Bureau, in N.Y.C., N.Y. (July 25, 2012). Both felony and misdemeanor arrests are processed in the same ECAB offices and, by and large, under the same time pressures. *Id.* This Article contains excerpts from many confidential interviews conducted by the author. Because she promised anonymity to her interview subjects in exchange for their candor, the author has assigned her interviewees fictitious names. The *Stanford Law Review* has not reviewed the author's interview notes or field notes for accuracy or for any other purpose.

91. See CRIM. PROC. §§ 170.55-.56.

92. Cases are only adjourned after a shorter period if the defense counsel makes a compelling argument as to why immediate sealing is necessary, such as to avoid severe immigration ramifications.

93. See CRIM. PROC. §§ 160.50, 160.55.

94. *WebCrims*, N.Y. ST. UNIFIED CT. SYS., [https://iapps.courts.state.ny.us/webcrim\\_attorney/DefendantSearch](https://iapps.courts.state.ny.us/webcrim_attorney/DefendantSearch) (last visited Feb. 19, 2014).

95. Sealing will not happen if the court issues a "do not seal" order upon the motion of the prosecution, or its own motion, but the defense is entitled to be heard on such motions. See CRIM. PROC. § 160.50(1). If there are no conditions attached to the ACD, the defendant is not required to come back to court after accepting it.

96. See *supra* Figure 10. For example, a judge could dismiss a criminal complaint (the charging instrument in most misdemeanor cases) on the ground that it is "defective" (i.e., facially insufficient or for lack of jurisdiction), CRIM. PROC. §§ 170.30, 170.35, or in the interest of justice, *id.* § 170.40.

months of court appearances. As long as the case is open it will both appear on the defendant's rap sheet and be available to the public on the court's website.

One of the most frequent grounds for dismissal included in this residual category is the speedy trial dismissal, often referred to as a "30.30 dismissal" because it is provided for by section 30.30 of the New York Criminal Procedure Law. A case must be dismissed if the prosecutor is not "ready" for trial within ninety days for a Class A misdemeanor, sixty days for a Class B misdemeanor, or thirty days for a violation.<sup>97</sup> Cases that are eventually dismissed "30.30" are often open for much longer in real calendar time in excess of the statutory speedy trial times because many adjournments are excluded.<sup>98</sup> Until dismissal, the case is "open" on the defendant's rap sheet and available to the general public. Only a final 30.30 dismissal triggers sealing of the case.<sup>99</sup>

The details of how these various forms of dismissal work are essential for understanding the uses to which nonconviction dispositions can be put in the managerial model. Defendants are *marked*—sometimes for a very short time and sometimes for a very long time—even if the eventual outcome of the case is a dismissal. This marking serves an important function even if it is not used to trigger the capacity of the state to impose a formal sanction. It allows the court to both record the fact of an encounter and use it as a data point in later encounters. The next prosecutor and judge who encounter the defendant will know if there was a prior allegation of criminal conduct, without demanding that the current prosecutor and judge expend all of the time and resources needed to secure a conviction.

## 2. Conviction

Approximately half of misdemeanor case dispositions in 2012 were convictions. Here again, the disposition category of conviction masks variation in the type of conviction, the type of records generated, and who may access those records and by what means. Conviction can occur at any point in a case's life course: defendants can plead to a misdemeanor crime at arraignment or after

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97. See CRIM. PROC. § 30.30; see also N.Y. PENAL LAW § 70.15 (McKinney 2013). In order to declare "ready," the prosecution must be able to proceed to trial, which means, *inter alia*, having a jurisdictionally sufficient accusatory instrument. *People v. Colon*, 443 N.Y.S.2d 305, 307-08 (Crim. Ct. 1981) (holding that the prosecution cannot be ready for trial if they have not "converted the complaints to jurisdictionally sufficient informations within" the statutory limit), *rev'd on other grounds*, 450 N.Y.S.2d 136 (App. Term 1982), *rev'd*, 453 N.E.2d 548 (N.Y. 1983), *superseded by statute*, Act of Aug. 1, 1984, ch. 670, 1984 N.Y. Laws 3019, *as recognized in* *People v. Bolden*, 578 N.Y.S.2d 914 (App. Div 1992).

98. See, e.g., *People v. Cortes*, 604 N.E.2d 71, 75 (N.Y. 1992) (holding that, in determining whether the prosecution has declared readiness within the permissible period, courts should "subtract[] any periods of delay that are excludable under the terms of the statute").

99. See CRIM. PROC. § 160.50. Accordingly, after sealing, the arrest should not appear on any future rap sheets and no employer conducting a background check should be able to see evidence of the arrest.

years of court appearances. Among those cases that continued past arraignment, the mean age of the docket at disposition in New York City has ranged from 85.1 to 112.7 days over the past ten years.<sup>100</sup> As noted earlier, trials are extremely rare, constituting no more than *two- to five-tenths of one percent* of misdemeanor case dispositions over the past decade.<sup>101</sup>

The major fault line in conviction dispositions lies between a criminal and a noncriminal conviction. In criminal court vernacular, that distinction is described as the difference between taking “a letter” conviction—meaning a Class A or Class B misdemeanor—or a violation conviction. In recent years, approximately 30% of all dispositions in which the top arrest charge was a misdemeanor resulted in a conviction on a violation or infraction (that is, approximately 58% to 60% of all cases terminating in a conviction).<sup>102</sup> A significant percentage of violation convictions are for New York Penal Law section 240.20, disorderly conduct, which in courtroom vernacular is called a “dis con.” The statutory definition of disorderly conduct is very broad.<sup>103</sup> In practice, a “dis con” serves as an all-purpose generic charge to mark the defendant for a specific length of time, not to indicate that the defendant is guilty of any specific illegal conduct.<sup>104</sup>

The marking period of a noncriminal conviction depends on the sentence imposed. If the defendant is convicted of a violation or infraction and sentenced to a conditional discharge, then the case remains on the defendant’s rap sheet for one year, after which the case should be sealed.<sup>105</sup> If the defendant is convicted of a violation or infraction and is sentenced to time served, a fine, or another sentence short of a conditional discharge, then the record may be sealed as soon as the defendant completes the sentence, and pays the fine and court-imposed surcharge, if the court transmits the seal order.<sup>106</sup>

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100. LINDSAY, *supra* note 62, at 40.

101. *See id.* at 51; Data from N.Y. State Div. of Criminal Justice Servs. (on file with author) (providing arrest disposition data for 2002-2012).

102. *See supra* Figure 9.

103. For discussion of violations and infractions, see Part II above.

104. *See* N.Y. PENAL LAW § 240.20 (McKinney 2013). For example, defendants regularly plead to disorderly conduct if the sole arrest charge was misdemeanor possession of a controlled substance.

105. *See* N.Y. CRIM. PROC. LAW § 170.56 (McKinney 2013). Provided the person has no prior criminal convictions, the DCJS is directed to destroy the fingerprints and de-link the New York State Identification Number upon sealing of these convictions. *Id.*

106. Prosecutors can, and in some boroughs often do, demand a permanent waiver of sealing as a condition of violation pleas. The district attorney (DA) can also make a motion to block sealing in “the interests of justice” to the court within a specified time period after disposition. *See* CRIM. PROC. § 160.55(1). In addition, section 160.55 exempts certain violation and infraction convictions from eventual sealing. *See id.* § 160.55. The mandatory court surcharge of \$120 is imposed for all violation convictions. PENAL § 60.35(1)(iii). Quite frequently defendants request that civil judgment be entered on this surcharge, which will be,



The sealing statute covering noncriminal convictions differs in one important respect from the sealing statute that governs dismissals: court records cannot be sealed. Prosecutors and judges can search the Office of Court Administration database with a defendant's name and birthday. As a practical matter this means that although the case will not print on a rap sheet, judges and prosecutors often look for these sealed cases and use them in forming plea offers and sentences.<sup>107</sup>

The most serious marking that can occur from a misdemeanor arrest is a criminal conviction.<sup>108</sup> A criminal conviction never seals, and New York State does not provide for expungement of criminal records.<sup>109</sup> Once a person has a criminal conviction, her fingerprints will be maintained by the state and linked to a stable New York State Identification Number (NYSID number) and all later arrest events will be linked to this NYSID number. Arrest charges, disposition, sentence imposed, and warrants issued because of failure to appear will be listed on a defendant's rap sheet.

Table 3 summarizes the marking effect of various dispositions.

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like any other civil judgment, thereafter reflected on the person's credit report. *See* CRIM. PROC. § 420.40.

107. Prosecutors, and some judges, regularly search for sealed cases in their own internal files or in court files. This practice still continues despite a Court of Appeals holding in *In re Katherine B. v. Cataldo*, 833 N.E.2d 698 (N.Y. 2005), that "law enforcement agency" as used in section 160.50(1)(d)(ii) of the New York Criminal Procedure Law does not include a prosecutor—and that therefore judges may not issue ex parte unsealing orders to prosecutors seeking information about sealed cases. *Id.* at 702-03. Whether or not using information about cases sealed under section 160.55 to form plea and sentence offers violates the sealing law has never been litigated, but this practice is even more common since prosecutors and judges have easy access to that information in the Office of Court Administration database.

108. In certain instances a misdemeanor arrest can result in a felony conviction because the prosecutor charges a higher-order offense after reviewing the facts alleged by the police or—more likely—the arrest charge is eligible for a "felony bump up" because of prior convictions, such as in the case of weapons possession. *See, e.g.*, PENAL § 265.02(1). A felony conviction from a misdemeanor arrest is fairly rare in practice: only about 450 dispositions were convictions for felony offenses when the top arrest charge was a misdemeanor (out of over 226,000 dispositions) in 2012. *See* Data from N.Y. State Div. of Criminal Justice Servs. (on file with author) (providing arrest disposition data for 2002-2012).

109. It does provide for a "certificate of relief from disabilities," subject to various qualifying restrictions, that ostensibly mitigates some of the collateral consequences, but in practice the effects of such certificates are limited. *See* N.Y. CORRECT. LAW §§ 701, 703 (McKinney 2013).

TABLE 3

Marking Period on Rap Sheet		Court Records Sealed After the Marking Period
Dismissal	Decline to prosecute	None, case seals as soon as the DCJS receives order from court; arrest should not print on rap sheet. Yes
	30,30 dismissal	Case remains open and visible on rap sheet and in public records for as long as it is open matter; it seals only after dismissal order. Yes
	Other dismissal	Case remains open and visible on rap sheet and in public records for as long as it is open matter; it seals only after dismissal order. Yes
ACD Dismissal	Marijuana ACD	Case remains open and visible on rap sheet and in public records during a one-year adjournment; fingerprints are not destroyed even if there is no prior conviction. Yes, unless defendant is rearrested during the adjournment or violates conditions imposed by the court; DA can restore the case to the calendar or, more likely in the case of a new arrest, make a less lenient offer on the new arrest.
	ACD	Case remains open and visible on rap sheet and in public records during a six-month adjournment (one-year adjournment for family offenses); fingerprints are destroyed if there is no prior conviction. Same as above.
Conviction	Violation	One year if there is a “conditional discharge” sentence; or immediate sealing if it is a “time served” sentence once surcharge is paid (or civil judgment entered). No, unless defendant violates the condition of the conditional discharge sentence or unless a judge enters a “do not seal” order. Select violations do not seal. <i>See supra</i> note 106.
	Misdemeanor or felony	Permanent record. No, never sealed.

Part I distinguished the managerial model of criminal court operation from the adjudicative model on the basis of how court actors use the tools of criminal law and to what ends. This Part explained the mechanics of various dispositions to show how criminal courts operating on the managerial logic can track and regulate people over time even without imposing punishments for specific acts. In Part IV, I show how the managerial approach emerges from the practical circumstances of misdemeanor courts and how that logic plays out in qualitative detail.

#### IV. A QUALITATIVE ACCOUNT OF MANAGERIAL MISDEMEANOR JUSTICE: THE DISPOSITION PROCESS

The official rules of criminal procedure and criminal law do not define how the criminal justice system actually operates in practice. Legal scholars have explored how the real-world operation of criminal law is shaped by the charging and sentencing discretion of prosecutors and judges as well as by the inclinations and structural capacities of defendants and defense attorneys.<sup>110</sup> In this Part, I propose something more. The formal substantive and procedural rules of criminal law do not make out an instruction manual by naming a clearly established end goal and specifying the precise means to secure that goal. Rather, substantive and procedural rules are simply the tools available in the contested and always-underspecified endeavor of social control. Frontline legal actors must decide not only *how* they ought to use those tools, but also exactly *what* the social control ends of criminal law are in the first place.

A key insight from the scholarship of organizational sociology is that the “practical circumstances” of work shape how front-line actors in an organization make sense of their goals in the first instance.<sup>111</sup> The practical circumstances of everyday work encompass the concrete setting of daily tasks, the exigent demands, the situations of choice, and the available information and resources to perform tasks (including investigative capacity and, most im-

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110. See, e.g., Barkow, *supra* note 30, at 871; Lynch, *supra* note 30, at 2136-40 (arguing that expansive substantive criminal prohibitions and high statutorily authorized sentences give prosecutors wide discretion); Stuntz, *supra* note 8, at 2569 (“The bodies of law, state and federal, that claim to define crimes and sentences do not really do what they claim. Instead, those bodies of law define a menu—a set of options law enforcers may exercise, or a list of threats prosecutors may use to induce the plea bargains they want. The menu says little about what options are exercised or what threats are used.”).

111. See, e.g., MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980) (discussing how resource limitation restricts not only how front-line workers can carry out assigned tasks but also how they come to define these tasks); D.H. Zimmerman, *The Practicalities of Rule Use*, in UNDERSTANDING EVERYDAY LIFE: TOWARD THE RECONSTRUCTION OF SOCIOLOGICAL KNOWLEDGE 223 (Jack Douglas ed., 1970) (arguing that rules inside an organization should not be thought of as having “stable, operational meanings invariant to the exigencies of actual situations of use, and distinct from the practical interests . . . of the rule user”).

portantly, the amount of time). The era of mass misdemeanors has produced a certain set of practical circumstances in criminal courts which, coupled with the subject matter of misdemeanor justice, shape how courtroom actors come to understand both *what* the animating question of their daily work is and *how* that question can be adequately addressed with available resources.

Courtroom actors are “constrained by the costs of obtaining information relative to their resources, by their capacity to absorb information, and by the unavailability of information.”<sup>112</sup> With high caseloads and the constant pressure to resolve the hundreds of new cases that arrive daily, not only do courtroom actors adapt their understanding of the animating question of their daily work, but they also decide what information is relevant to that task. They must “consider whether an investment in searching for more information would be profitable,” given how they have defined their task.<sup>113</sup> In the managerial model, records of prior encounters and prior convictions play an important role in processing cases because marks of past encounters are perceived as a reliable signal of the defendant’s overall governability. These records are more reliable than, say, the minimal investigation the actors will have the time or inclination to perform with respect to a specific allegation, or self-representations by defendants or even complaining witnesses. Records of prior encounters are accessible and costless to consult. Furthermore, these records speak to what has emerged as the animating moral question of misdemeanor punishment: whether this person is a persistent or occasional rule breaker.

#### A. *The Practical Circumstances of Arraignment*

In New York City over 57% of all misdemeanor and violation cases reach a disposition at arraignment.<sup>114</sup> Early and rapid disposition is an established feature of misdemeanor justice in New York City: over the past thirteen years the percentage of subfelony cases with a disposition at arraignment has fluctuated between a high of 65.5% and a low of 57.9%.<sup>115</sup>

A typical arraignment courtroom may have between 100 and 200 cases to be arraigned during a shift that has about six hours of operational court time (day shifts run from 9:30 a.m. to 5 p.m. with about 1.5 hours for lunch; night shifts run from about 5:30 p.m. to 1 a.m. with typically about 1.5 hours of downtime for dinner). The prosecution, judge, and defense receive two pieces of essential paperwork before arraignment as part of the defendant’s criminal court file: the “complaint,” which is the criminal court charging document with

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112. LIPSKY, *supra* note 111, at 29.

113. *Id.*

114. Data from Chief Clerk of N.Y.C. Criminal Court (on file with author).

115. *Id.*

the charges and a brief description of the facts that make out the offense; and the defendant's rap sheet—called the NYSID sheet.<sup>116</sup>

Prosecutors typically flip through the paperwork contained in the file for somewhere between one and five minutes before marking down a plea offer or recommendation on the front flap of the file if an offer is going to be made at arraignment.<sup>117</sup> In most boroughs the policy is to not make plea offers at arraignment on certain types of cases, for example, any case that involves a complainant (especially domestic violence cases) or driving under the influence. In those cases the prosecutor will make a bail recommendation note on the file.

Defense attorneys meet their clients for the first time at arraignment, either in a small, caged-in interview room separated by metal grating off the holding cells in the case of arraignment of online arrests, or in the hallway in the case of DAT arraignments. Sometimes interviews are very short, if for example the attorney tells the client the offer will be an ACD and the client readily accepts. And sometimes interviews go for ten to twenty minutes.<sup>118</sup> Attorneys are focused on getting essential information about the arrest circumstances, but, more importantly, they are focused on getting information relevant to the bail application. Defense attorneys know that a client is better placed to fight a case successfully if she is not being held at Rikers Island (the New York City jail) on bail.<sup>119</sup>

Attorneys are also focused on speed. The longer all parties take doing their part to move arraignments along, the fewer people who are arraigned during that shift, which means defendants sit in the holding pens longer while waiting to see the judge. During a night shift, if defense attorneys do not make it through the arraignment load, those defendants will have to wait another eight hours in custody before seeing a judge. Since the majority of defendants whose

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116. See N.Y. CRIM. PROC. LAW § 100.10 (McKinney 2013) (defining the charging instruments that can commence an action in a local criminal court). The prosecution's file also contains additional paperwork, such as, among other things, the police arrest report, which often contains more details of the occurrence, the ECAB screening sheet, and statement or notice of intent to offer identification statements required under CRIM. PROC. § 710.30, and a narcotics fact sheet if it is a drug arrest.

117. Technically a prosecutor makes an "offer" only when the proposed plea is below the top charge and otherwise makes a "recommendation" to a sentence within the range of the top charge, as judges are free to sentence to anything within the range of the top charge. I will use the term "offer" to cover any proposed plea or sentence from a prosecutor, just to streamline the language.

118. The general description of the misdemeanor arraignment process is based on the author's two years of fieldwork and personal experience working as a defense attorney. Nearly identical descriptions of the misdemeanor arraignment experience from experienced public defenders can be found in Fabricant's and Howell's articles. See Fabricant, *supra* note 22, at 403-04; Howell, *supra* note 46, at 294-96.

119. See generally JAMIE FELLNER, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY* (2010).

cases continue past arraignment are released on their own recognizance, minimizing pre-arraignment detention is a driving concern.<sup>120</sup>

Some arraignment shifts have defense attorneys dedicated to “disposable” misdemeanor cases, which are likely to go to disposition at arraignment.<sup>121</sup> The fact that clerks and paralegals can estimate which cases will be disposable simply by looking at the charging documents and rap sheets indicates that something other than facts relating to innocence and guilt is driving this disposition process. One reason why clerks can designate large numbers of cases as disposable is that they know that prosecutors will not even seek conviction in a substantial number of first-arrest cases, or they understand that the standard offers will be readily accepted at arraignment.

The standard offer for many cases that do not involve a complainant and represent a first arrest is an ACD (which is significant because noncomplainant cases constitute the majority of misdemeanor arrests).<sup>122</sup> Sometimes the ACD is conditioned upon the defendant’s completing a short “program” or a few days of community service.<sup>123</sup> This offer policy does not in practice distinguish between guilty and innocent defendants because it is very difficult to do so at arraignment. The only factual information the actors in the system have at this point is the limited paperwork in the file described above. Prosecutors and judges rarely make an attempt to make this distinction even with the limited information they do have. Whether prosecutors and judges assume all defendants are guilty, are uncertain, or are unconcerned, the managerial tactic is indistinguishable: offering conditional dismissals allows the state to mark defendants for a limited time to see if the person cycles back into the criminal justice system.<sup>124</sup>

Sometimes the defense and prosecution argue about the facts of innocence and guilt, and sometimes the facts raised in those discussions affect some aspect of the offer. Yet a defense attorney can rarely, if ever, overcome at arraignment the imperative to exert some marking from the encounter. As one supervising ADA explained: “There are very few outright dismissals at arraignments, at that point we have our police paperwork and version of events, so we can’t just dismiss the case.”<sup>125</sup> The only difference between an ACD and

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120. See N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2011, at 18 (2012), available at <http://www.cjareports.org/reports/annual11.pdf>.

121. For further explanation, see Bowers, *supra* note 22, at 1709-12 (discussing the distinction between “real” and “disposable” cases).

122. See *supra* Table 2.

123. Program is a catchphrase for an assortment of classes, therapeutic interventions, informational sessions, and social services. Examples of programs offered in first-arrest cases include a class for shoplifters lasting several hours and a half-day introduction to drug treatment.

124. See *supra* note 43 and accompanying text.

125. Interview with “Ellane,” Supervising Assistant Dist. Att’y, Borough A Dist. Att’y’s Office, in N.Y.C., N.Y. (June 7, 2012).

an “outright dismissal” is the ability to impose a temporary mark on the defendant; otherwise they are legally equivalent dismissals (after the adjournment period). The mark records the fact of the prior encounter so that the judge or prosecutor can update the assessment of the defendant if he is arrested again during the adjournment period. It also puts the defendant on notice. As one judge explained an ACD disposition, it is “a low maintenance form of probation, you don’t have to report because you monitor yourself.”<sup>126</sup>

The following two stories illustrate that prosecutors often quickly agree not to seek a criminal conviction in cases where there is weak evidence. They do, however, often insist on an ACD disposition that accomplishes a limited-term marking in lieu of granting an outright dismissal.

In April 2011, in the Desk Appearance Ticket arraignment courtroom, John, a young, black man dressed in business casual, was being arraigned on charges of theft of services.<sup>127</sup> The arresting officer accused him of using a special MetroCard that provides discounted rates to people with disabilities for which he was not eligible. Because John had been given a DAT, he had time before arraignment to procure a letter from his employer, a social service agency, stating that one of his job duties included accompanying disabled people on outings.<sup>128</sup> John explained to his defense attorney, who explained to the judge and supervising arraignment ADA, that, on the day he was arrested, he was with a group of disabled people, and he was helping them swipe their cards. He insisted that he swiped a regular MetroCard, and he claimed that the arresting officer must have mistaken which light went off on the turnstile when he went through because they all went through the turnstile in close succession (different color lights illuminate for different types of MetroCards, such as student, senior, or disabled discount cards).

After a brief discussion the prosecutor agreed to offer a “straight ACD” instead of the initial offer of an ACD with one day of community service. Explaining why she would not move for an outright dismissal after seeing the employer’s letter indicating the young man worked for an organization supervising disabled people she stated:

I can tell you that we don’t dismiss cases. I mean we do, but we have to have proof that he is not guilty. The offer was an ACD with one-day community service and he did bring proof that he works for that organization, so I dropped the community service. I still don’t have proof that he was not using the disa-

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126. Interview with Judge “Henry,” Borough A Criminal Court, in N.Y.C., N.Y. (Mar. 16, 2011).

127. See N.Y. PENAL LAW § 165.15(3) (McKinney 2013). Theft of services, in this instance, really meant farebeat.

128. See *supra* Part II.A (explaining a DAT versus an online arraignment).

bled card on that day of arrest, so I gave him the benefit of the doubt with the ACD.<sup>129</sup>

Ray, an attorney for the largest public defender organization in New York City, recounted the following story about a white man in his mid-thirties who had been arrested for possessing oxycodone. The arresting officer had recovered the oxycodone from his pocket, not a prescription container:

The attorney speaking to the client determines and discovers that the client has a prescription for oxycodone. . . . We sent the individual home at 10:00 in the morning to go get the prescription to bring back to show to the court. Because we knew we were going to have to have this argument. And he made it back by about 12:00 in the afternoon. And between 12:00 and 1:00 we argued about the fact that this case should be dismissed. And the District Attorney's office, . . . determined that—well, the prescription that he was issued for whatever his ailment was for oxycodone was issued in July of 2010 and he was arrested in November of 2010 or December of 2010—and he didn't have it in the bottle. And the prescription bottle says "no refills." . . . In their perspective, because he had a prescription bottle that was issued in July of 2010 that said "no refills" that he must have been doing something illegal with carrying the pill in his pocket.

. . . .

We argued for an hour until finally the judge decided to—you'll excuse my expression—"grow a set," and just dismiss the case. . . . It took an hour to get past that . . . that alleged perspective from the DA's office. And as we exited the courthouse—because this is what stuck in my mind—exit the courthouse, the DA was still arguing with me about that case. How it shouldn't have been dismissed because you don't know; he had no refills that were supposed to be issued on that.<sup>130</sup>

In both cases the prosecution was willing to offer an ACD, but not to dismiss the case outright. The judge was not willing to do so either in the first case and finally agreed to do so in the second case after extended argument that made clear the prosecution was not willing to do so on its own motion. To state the obvious, I have no way of knowing if the claims of these defendants are true. I did not conduct any more of an investigation than the people in the courthouse that day deciding the fate of those cases at the first court appearance. My point is that prosecutors and judges are not necessarily maximizing punitive response or even attempting to secure conviction automatically from the police determination to make an arrest. Instead, they display what I called in Part I the presumption of need for social control: seeking, even in the context of limited facts indicative of guilt in the specific case at bar, *some* ability to track the person for later encounters.

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129. Interview with "Zena," Supervising Assistant Dist. Att'y, Borough A Dist. Att'y's Office, in N.Y.C., N.Y. (Apr. 13, 2011).

130. Interview with "Ray," Supervising Pub. Defender, in N.Y.C., N.Y. (Apr. 11, 2011).



The regular course of conduct in misdemeanor court is often at odds with administrative determinations of guilt. Prosecutors seek, and judges almost always grant, the same ACD disposition in cases where there *is* most likely sufficient evidence to show guilt at trial. In June 2011, a group of six men were brought in front of a judge on assorted violation charges, including disorderly conduct, open container of alcohol in public, and loud music. The judge in this courtroom is widely known as one of the most punitive judges in criminal court in this borough. All the men had been held in central bookings since early that morning because they had been picked up on outstanding warrants for not appearing on their summonses at the appointed time. As soon as the court officer finished reading the charges for the six men, the judge immediately granted an ACD to all defendants *en masse*; neither the defense, nor the prosecution, nor the judge even discussed the matter.<sup>131</sup> Defendants arrested for narcotics possession or marijuana possession are regularly granted ACDs—sometimes *en masse* with groups of four to six defendants huddled around a single attorney—with almost no conversation whatsoever between the defense and prosecution.<sup>132</sup> Again, in these cases I have no idea whether all or some of these defendants were factually innocent, or if there were viable search and seizure legal issues. But despite the fact that prosecutors often have positive drug field tests and reliable accounts from the arresting officers for these cases, they make no attempt to convict. Instead, they quickly offer a conditional dismissal without further inquiry, a disposition that marks the defendant for a limited amount of time.

Note that all actors could agree on this disposition even as they remained subjectively far apart on their personal determinations of factual guilt. John, the young man accused of swiping a disabled-discounted MetroCard, insisted to his attorney he was innocent. The defense attorney urged John to accept the ACD offer, even with one day of community service. John had shown his attorney the employment letter to prove that he worked for the social service agency, but the letter also indicated that he was paid over \$30,000 a year in that job. At that salary he would not qualify for public defender services. The defense attorney explained to John that he would have to hire a private attorney to come back to fight the case if he wanted to be acquitted at trial, and most likely that would take over a year of court appearances. Furthermore, the arresting officer signed a supporting deposition saying he saw the defendant swipe a card that indicated by the lights of the turnstile that it was a MetroCard for a disabled person. The attorney warned his client it was far from assured that a judge would believe the defendant over the arresting officer at trial.<sup>133</sup>

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131. Field Notes (June 12, 2011).

132. Again, this is typical if it is a first arrest; an ACD for a narcotics possession charge often involves the condition of one day of community service.

133. Prosecutors almost invariably reduce the arrest charge to a Class B misdemeanor before trial to ensure a bench trial and not a jury trial. New York City misdemeanor defend-

The defendant also told his attorney that he had lost his job because of this arrest. His defense attorney explained that, in terms of employment collateral consequences, taking the ACD today was a better bet than fighting the case. If he took the ACD today, it would only be open to be viewed on the publicly accessible WebCrimis database for six months, and it would indicate the case was adjourned in contemplation of dismissal. If he chose to fight the case, it would remain an “open” matter on the website for the entire period of time it would take to push the case to trial. It is worth noting that the defense attorney was not exaggerating in his estimation of how long it would take to fight the case: in that borough the mean docket age at disposition of cases that proceed to jury trial is well over 400 days.<sup>134</sup> If the defendant lost at trial of course he would then be marked with a permanent criminal record and all the attendant collateral consequences, all for a case where the prosecution offered a conditional dismissal at arraignment. The miniscule trial rates for misdemeanor cases make clear that few defendants find it in their interest to take this chance.

Not all cases disposed of at arraignment terminate in a form of dismissal. In 2011, about 44% of arraignment dispositions were ACDs or dismissals at arraignment, and around 51% were convictions of some type (violations or misdemeanors).<sup>135</sup> It is not infrequent for jail sentences to be imposed at an arraignment plea. Again, the defendant’s record largely dictates both the incentives to take the plea at arraignment and the sentence.

In February 2011, a thirty-something, black man was arraigned for petit larceny.<sup>136</sup> He was accused of stealing a package of Cracker Barrel cheese. Because of his recent arrest history he was deemed subject to “Operation Spotlight,” a citywide initiative targeting persistent misdemeanor recidivists.<sup>137</sup> The DA’s policy in Operation Spotlight cases is to not engage in plea bargaining (at least at arraignment), and instead to recommend a plea to the top charge and the maximum statutorily allowed sentence, which in this case was a conviction for a Class A misdemeanor and one year of jail. Judges can, and often do, make their own offers on these cases, but they are limited to sentencing within the

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ants are at a particular disadvantage in seeking to vindicate their innocence in front of a jury because section 340.40(2) of the New York Criminal Procedure Law exempts New York City criminal courts from the statewide rule providing for jury trial rights for all misdemeanors, limiting the right only to Class A misdemeanors. *See* N.Y. CRIM. PROC. LAW § 340.40(2) (McKinney 2013); *see also* N.Y. PENAL LAW § 70.15 (McKinney 2013).

134. *See* LINDSAY, *supra* note 62, at 52.

135. N.Y.C. CRIMINAL JUSTICE AGENCY, *supra* note 120, at 16. The remaining 5% were other types of dispositions. *Id.*

136. *See* PENAL § 155.25.

137. Misdemeanor defendants with two or more prior prosecuted arrests within the last twelve months and two or more misdemeanor convictions (at least one within the last twelve months) will have their rap sheets marked by the clerk’s office before arraignment as qualifying for “Operation Spotlight.” *See* FRED A. SOLOMON, N.Y.C. CRIMINAL JUSTICE AGENCY, OPERATION SPOTLIGHT: YEAR FOUR PROGRAM REPORT, at i (2007), *available at* <http://www.cjareports.org/reports/spotlight4.pdf>.

range of the top charge.<sup>138</sup> In this case the judge offered a plea to the Class A misdemeanor with five days of jail, and the defendant readily accepted.

I have no idea if this defendant was in fact guilty of stealing the Cracker Barrel cheese. I do know that had the defendant not accepted the judge's jail offer, the judge most likely would have set bail because of the defendant's substantial recent arrests and bench warrant history. The defendant would have then been held in custody for a longer time than the offered sentence because a person does two-thirds of city time (so four days on a five-day sentence), and an in-custody case is typically adjourned for at least five days to allow the prosecution the statutory time to convert the charging document.<sup>139</sup> This defendant, like most defendants who plead to misdemeanor crimes with jail time at arraignments, was already marked with a prior criminal conviction. Therefore, taking this plea and sentence at arraignment allowed him to minimize jail time, even if he incurred another conviction mark. The incentive structure illustrated here helps us make sense of the quantitative trends documented in Part V, which show that the probability of conviction on a new misdemeanor arrest increases substantially with the number of convictions the defendant bears at the time of arrest.

Even the jail sentence entailed an element of marking. Any portion of a day spent in custody is credited as a full day toward sentence time, including the day of arrest. This defendant was arrested on a Tuesday, sentenced on a Wednesday, and therefore would be released two days after the plea. A defendant arrested on a Thursday and sentenced to five days on a Friday will be immediately released because if a release date falls on a Saturday or Sunday the defendant is released on the Friday prior, as the New York City Department of Corrections does not release on weekends. However, this does not mean that the noted jail sentence is meaningless. It sets a floor, and, as one judge explained it, "most judges conform to the folkways of the system," which is "this

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138. This means that absent some insufficiency in the charging document, the judge cannot on her own accord reduce the offense grade for purposes of a plea bargain. Judge "Henry" explained the practical necessity of judges making offers on Operation Spotlight cases as a function of both docket pressures (if the offer is one year, all defendants have an incentive to take everything to trial because they have nothing to lose) and substantive justice (one year in jail is not a fair sentence for petit larceny even if the defendant did it three times this year). Judge "Henry" was a bureau chief ADA prior to becoming a judge and said:

The old joke is that ADAs become more liberal once they are on the bench and the former defense attorneys become more conservative. It is not about the person, but rather the situation you face . . . in Operation Spotlight, when you're an ADA you implement the DA's policy of asking for an A misdemeanor and the year in Spotlight cases, but when you're judge you undercut that offer.

Interview with Judge "Henry," *supra* note 126.

139. See N.Y. CRIM. PROC. LAW § 170.70 (McKinney 2013) (stating that misdemeanor defendants in custody pending disposition for more than five days (excluding Sunday) without the prosecution having converted the *complaint* to an *information* must be released unless good cause shown for delay).

mechanical ratcheting of sentence length,” often in five-day increments for each subsequent conviction.<sup>140</sup> As one defense attorney explained, even when a jail sentence of a specific length is in fact equivalent to a time served sentence, many prosecutors will seek the day-denominated jail sentence because it is “a note to a future prosecutors not to offer less time on the next case.”<sup>141</sup>

### B. *The Uses of Adjournments*

Cases survive past arraignment for various reasons. The DA’s office may have a policy of not making offers at arraignment in certain types of cases, for example as discussed above, if the case involves a complaining witness or driving while intoxicated. Sometimes the defendant is in a position where she cannot take the standard offer at arraignment without significant collateral consequences that outweigh the cost of protracted adjudication, such as immigration consequences or a potential violation of parole or probation triggered by a conviction. Some defendants decide to fight the case either because they are claiming innocence, there was a potential legal defect in the stop, search, or arrest, or simply because the defendant or the defense attorney thinks the offer made at arraignment is not fair.

Plea offers often get better with later court appearances. Sometimes, however, prosecutors threaten higher offers if the arraignment offer is not accepted or make “one time only” offers at the second or third court appearance. This practice discourages not only trial as a means of settling factual disputes, but also the efforts of defense attorneys, who often have upward of eighty pending cases at once, to perform basic factual or legal research before urging clients to accept a plea. For example, in Manhattan certain designated quality-of-life cases are assigned to a specialized courtroom where the apparent policy is to propose a more punitive plea than the arraignment offer after the prosecutor has declared “ready” for trial, or sometimes at any later court appearances.<sup>142</sup>

The majority of defendants whose cases continue past arraignment are “out,” the colloquial term indicating the defendant is not being held at Rikers Island on bail. Bail has been set in about 9% to 10% of misdemeanor cases in recent years (and in about 21% to 24% of the cases surviving arraignment); in

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140. Interview with Judge “Alfred,” Borough A Criminal Court, in N.Y.C., N.Y. (March 16, 2011).

141. Field Notes (June 7, 2012).

142. This courtroom is also called the “Bench Trial Part.” It is almost exclusively staffed by judicial hearing officers who are not legally authorized to take pleas to Class A misdemeanors, and who can only conduct bench trials. However, many of the cases are Class A misdemeanors, which implicate a constitutional right to demand a jury trial. Standard practice is to keep the cases as Class A misdemeanors during the pendency of the case in order to gain the benefit of the longer speedy trial time allowed for these charges, but then to reduce the charge to a Class B misdemeanor on the trial date to ensure a bench trial.

the remainder of cases defendants are released on their own recognizance.<sup>143</sup> The overwhelming majority of misdemeanor defendants are indigent, so despite the fact that the average bail in a misdemeanor case is about \$1000 or less, only about 10% of defendants with bail can make it at arraignment and another 27% make bail after arraignment.<sup>144</sup> Defense attorneys summarize this dynamic as “bail means jail,” meaning if bail is set, most defendants will remain in custody until disposition of the case. Bail changes the dynamic of a case that continues past arraignment. Defendants are much more likely to take a plea to get out of jail than they would if they were outside fighting the case.<sup>145</sup> This is so because the time a defendant would wait inside to push a case to trial is usually much longer than the jail term the defendant would be facing if he agreed to take a plea. In recent years, around 80% of the jail sentences imposed for misdemeanor convictions were less than 30 days, whereas the mean docket age of misdemeanor cases commencing jury trial is over 400 days, and the mean docket age of misdemeanor cases commencing bench trial is over 350 days.<sup>146</sup> Even if a defendant feels there is a legal or factual issue to be litigated, there are strong incentives to accept quick disposition as opposed to pushing those legal and factual disputes to formal adjudication, especially if the defendant is being held on bail.

In November 2010, Ted, a young, black man, was arrested at his home for being in bed with a woman who allegedly was the complainant on his open domestic violence case during a random NYPD home visit of addresses listed on active domestic violence orders of protection. The case was en route to 30.30 speedy trial dismissal because the complainant had not participated in the prosecution since the arrest and the case could not be proved without her testimony. Yet, during the speedy trial time, there remains in effect a “full” order of protection prohibiting the defendant from any contact with the complainant. Ted was arrested for contempt of a court order, and bail was set at his arraignment for this new arrest.

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143. See N.Y.C. CRIMINAL JUSTICE AGENCY, *supra* note 120, at 11, 18; N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2010, at 11, 18 (2011), *available at* <http://www.cjareports.org/reports/annual10.pdf>; N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2009, at 11, 18 (2010), *available at* <http://www.cjareports.org/reports/annual09.pdf>.

144. See FELLNER, *supra* note 119, at 13, 22 (reporting numbers provided to Human Rights Watch from the New York Criminal Justice Agency for 2008); *see also* N.Y.C. CRIMINAL JUSTICE AGENCY, *supra* note 120, at 23-25 (reporting bail statistics citywide and by borough for *all* continued cases, including felonies).

145. See FELLNER, *supra* note 119, at 31-33; MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, RESEARCH BRIEF NO. 14, BAIL, DETENTION, & NONFELONY CASE OUTCOMES (2007), *available at* <https://www.ncjrs.gov/App/publications/Abstract.aspx?id=240693>.

146. Data from N.Y. State Div. of Criminal Justice Servs. (on file with author). Judges typically try to set quicker trial schedules if the defendant is being held in custody, but it is very difficult to move a case to trial in less than 30 days after arrest.

The order of protection listed the address where they found the woman and Ted together as the complainant's address, which Ted was prohibited from visiting. The defense attorney argued to the judge that this address was the defendant's legal residence and produced documents to show the defendant was the only person listed on the lease. Presumably, the complainant was living with the defendant at the time of the incident (and most likely immediately after the incident uninterrupted) and so gave this address to court officials making up the order of protection.<sup>147</sup> The defense attorney argued that the complaint should not be considered "converted" for purposes of stopping the 30.30 clock because the arresting officer had no firsthand information about the woman's identity.<sup>148</sup> He was relying on hearsay, namely the address listed on the order of protection, from which he inferred the woman was the complainant.

The judge summarily rejected the defense attorney's argument, merely saying that the issue of the woman's identity was an issue for trial. The ruling meant Ted would be held in custody until the disposition of the case because he could not afford bail. Ted eventually pled out on both the underlying case, which was clearly on track for dismissal prior to the new arrest, and the contempt case. Again, I have no idea what the true underlying facts in this case were, but neither did any of the legal actors in the system. This case illustrates that the structure of incentives, and not necessarily the legal or factual merits of the case, often drives disposition.

For those cases that continue past arraignment, case adjudication is just as rapid and resource constrained as disposition at arraignment. All-purpose courtrooms processing misdemeanor cases may have between 40 and 150 cases calendared each day, with thousands of open dockets.<sup>149</sup> Although cases are often adjourned for four to six weeks between court appearances if the defendant is "out," both the defense attorney and the prosecution have limited time and resources to devote to additional investigation of adjourned cases. ADAs' caseloads often number between 100 and 200, and defense attorneys can have as many as 80 to 150 open misdemeanor cases at a time.<sup>150</sup> Furthermore, aside

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147. As Jeannie Suk notes, the criminal law seeks to reorder intimate lives with the order of protection. *See generally* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006). Yet it is only sporadically successful in doing so. In my interviews with domestic violence defendants, the preponderance openly admitted to regular contact with the person named on the order, and a significant number continued to live together with an active full order of protection.

148. *See supra* note 139.

149. *See* LINDSAY, *supra* note 62, at 16. In the busiest boroughs the open misdemeanor/violation dockets in each criminal courthouse can be as large as 11,500 to 13,500 at a time. *Id.*

150. The DA of Borough A has an informal guideline limiting an ADA's caseload in misdemeanor court to 120 cases, but many ADAs recount having up to 200 open cases at a time. ADAs often have higher caseloads than defense attorneys because they do not personally appear in court in most of their open matters; there is usually an ADA assigned to each

from minor assault in the third degree, the largest misdemeanor arrest categories (marijuana possession, drug possession, turnstile jumping, etc.) are those in which there is no complaining witness. These cases largely turn on conflicting accounts between the arresting officer and the defendant.

In March 2012, Trevon was arrested and given a DAT for theft of services—otherwise known as turnstile jumping, a Class A misdemeanor that carries the potential penalty of one year in jail.<sup>151</sup> At his April arraignment the prosecution offered a plea to disorderly conduct and one day of community service. Trevon told his defense attorney that he, in fact, swiped his “unlimited” MetroCard to enter the subway platform on the day of arrest. He also presented the attorney with the unlimited MetroCard and proof that he purchased it from the bookstore of his community college with his student identification. Trevon and his attorney rejected the arraignment offer because Trevon insisted he was innocent of turnstile jumping and because pleading guilty would carry significant collateral consequences for him.

At the time of arrest Trevon had an open felony case for possession of a controlled substance in another borough—I will call it Borough C. His March misdemeanor arrest occurred during the final stretch of a one-year alternative drug treatment program; upon its successful completion, his felony case would be dismissed and sealed. The program required him to attend regular office visits with a social worker, group therapy, and support sessions, as well as to give urine for a drug test once a week, to be in school or employed, and to go to monthly court appearances. According to Trevon, he had successfully completed all these requirements and was slated to graduate from the drug treatment program and have his felony case dismissed the week after his new misdemeanor arrest. He was also slated to graduate from a local community college with his associate’s degree. However, because of this new arrest, the court in Borough C would not dismiss the felony case until the theft of services case in Borough B was resolved.

Trevon’s defense attorneys subpoenaed the swipe history of Trevon’s MetroCard and also verified the purchase of the unlimited MetroCard with a reprinted receipt from the college bookstore. The felony court in Borough C kept Trevon’s felony matter open for an additional five months as he attempted to fight his misdemeanor arrest in Borough B. During this time he was required to continue his monitoring and program attendance. Furthermore, according to Trevon, he was turned down for a position at a local transit authority because he had an open felony matter and was told to return when his felony case had been dismissed and sealed, which was contingent on the misdemeanor being resolved. In October the felony court in Borough C dismissed the felony case,

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courtroom that has “notes” or directions from the assigned ADA about how to deal with each case calendared that day.

151. N.Y. PENAL LAW § 165.15(3) (McKinney 2013).

finding he had been in substantial compliance and that the theft of services case was weak in light of the evidence of Trevon's MetroCard swipe history.

The defense attorney in Borough *B* presented the MetroCard evidence to the ADA assigned to his case. He asked her to dismiss the case outright because it showed both that the young man was in possession of an unlimited MetroCard and that he had in fact swiped the card at the location and time of arrest. The supervising prosecutor in the specialized quality-of-life misdemeanor courtroom refused, telling the defense attorney that the arresting officer insisted that the young man attempted to jump the turnstile, but then, according to the officer, noticed the police mid-jump and only after that swiped the MetroCard. She offered a plea to a Class B misdemeanor with a sentence of time served.

Trevon eventually made fourteen court appearances over a period of eight months, spending most days waiting between two to four hours for his case to be called, only for it to be adjourned again for a later date. Eventually in December 2012 the case was set for trial. On the first day of the trial the prosecution offered the defendant a plea to a disorderly conduct violation and one day of community service, which the defendant declined. After two days of a bench trial, which included four witnesses—the arresting officer, a Metropolitan Transportation Authority records custodian, Trevon's college bookstore manager, and Trevon—he was acquitted. Watching the two supervising DAs and the law student who had tried the case walk out of the courtroom, Trevon said:

It's hard not to hate the DA after that. I mean a lot of black youth like me just take it . . . we don't take the case to court, don't want to fight them petty charges, so many people I know just don't want to go through the system, don't want to get up and come back to court so take those little charges, take time served to go home and get it over with. That's why officers get way with petty stuff, they throw a lot of cases at you and you get used to it.<sup>152</sup>

This rare trial case is the exception that proves the rule. In almost all cases, administrative factfinding is the first and final venue of factfinding. Defendants and defense attorneys are not overestimating the costs of invoking adversarial due process. Pushing a misdemeanor case to trial involves significant time, willingness to make numerous court appearances, and the costs of having an open, pending criminal matter readily accessible to the public and potential employers. Prosecutors often offer, as they did in this case, dispositions that secure some marking of the defendant but minimal formal sanction, and defendants risk serious costs—namely, a permanent criminal record—if they seek to vindicate their full factual innocence. When, as in this case, the charge comes down to a credibility contest between the arresting officer and the defendant in front of a judge, it is a significant gamble for defendants to attempt vindication by trying the facts in an adjudicative venue. It should be noted this was not an obvious win. The judge made a number of legal rulings against the defense in

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152. Interview with "Trevon" in N.Y.C., N.Y. (Dec. 17, 2012).



the case and, in a post-trial discussion with the judge, prosecutor, and defense, the judge indicated he thought this was a “tough case.”

Sometimes prosecutors will keep cases open knowing they will eventually be dismissed under the speedy trial clock, and will make no attempt to prosecute the case in the interim. This practice serves the goal of marking and risk management. The statutory time allowed to prosecute a case is therefore not only a guarantee to the defendant; it is a tool for the state to monitor and sometimes to punish the defendant.

In the following case, the defense attorney’s client was accused of domestic violence by a woman who was his girlfriend at the time of arrest. They had subsequently broken up. The woman, however, was pregnant with the defendant’s child, and she refused to participate in the prosecution and requested that the court modify the temporary order of protection from a full to a limited order. According to the defense attorney, the woman wanted the man to be present at the birth of their child so they could immediately and automatically establish paternity, and so that he could assist in child care and pay child support. The defendant was on parole for life and according to the defense attorney the ADA would not make an offer to anything below a “letter” misdemeanor because of his parole status. The defense attorney did not want her client to plead to a misdemeanor criminal offense because that would open him up to reincarceration on a parole violation, most likely for a time between one to three years:

So that case was “ready” forever, I’ve had it for four months now probably, and it was on for hearings and trial last week and they finally announced “not ready” so the clock started ticking.

[Q: So why did they announce “not ready”?]

Well, she said the officer wasn’t available but she told me off the record too that she would rather let the case 30.30 out than agree to a limited order of protection, for example, which is what my client and his ex want, or dismiss it.

....

[Q: Why?]

She would rather let it 30.30 than ever agree to change the order of protection to a limited one or offer a violation or dismiss it. . . . They came down on the time, they wouldn’t budge on the letter . . . .<sup>153</sup>

When asked why she thought an ADA would agree to let a case become dismissed, but not agree affirmatively to dismiss, the defense attorney stated:

I mean because it covers, they see it as covering their backs, you know they’re not on record as agreeing to dismiss a case, they’re not on record as agreeing to adjust the order of protection to be limited, you know, on the off chance that

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153. Interview with “Alice,” Pub. Defender, in N.Y.C., N.Y. (Apr. 5, 2011).

something happens again, it's not their fault, they tried to prosecute it they ran out of time because of the statute.<sup>154</sup>

These examples demonstrate what I have largely observed in my field-work: prosecutors are not always conviction or sentence maximizers; sometimes they are risk minimizers. The overarching imperative is to secure some disposition that allows for a period of monitoring in order to keep track of law enforcement contacts over time—it is not to determine guilt and impose punishment for specific acts. The tools of dismissal and noncriminal violation convictions sort the population flowing through the court by marking them for limited periods of time, and that can provide leverage to impose more serious sanctions if there are subsequent criminal justice contacts. Defendants have a strong incentive to accept those dispositions early. Sometimes the disposition is accepted because it appears to the defendant as a genuinely fair offer given the conduct at issue. Sometimes it is the only rational choice given the structure of incentives.

Misdemeanor courts operating under the managerial model therefore often generate nonconviction dispositions for early encounters, even when prosecutors and judges have sufficient evidence to prove guilt at trial. But the primary targets of quality-of-life policing—namely, young men of color living in highly policed neighborhoods—can quickly use up their early chances and transition into more serious marks. Over the long term, these individual encounters add up and can eventually result in a criminal conviction because there is an additive logic to the managerial model. The following Subpart explicates this additive logic.

### C. *The Additive Imperative: Building upon Criminal Records*

If a defendant with a nonconviction disposition from a prior arrest is brought back to criminal court on a new arrest, the offer on the new case will go up along one vector or another—the seriousness of the mark, the conditions he must satisfy to be granted the disposition, or the formal sentence. This additive imperative is so widely practiced that it is rarely explained.

There are a variety of ways prosecutors discuss it, but all prosecutors whom I asked explicitly about how they formed offers or recommendations consistently expressed some version of the additive logic. Jill, a supervisor in the DA's office, explained, "We try to build on prior cases."<sup>155</sup> Al, another longtime prosecutor said, "Our offers are progressive, first the ACD, then the violation, then the misdemeanor, etc. etc., etc."<sup>156</sup> Another supervising ADA with over two decades of experience explained, "We do progressive pleas, we

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154. *Id.*

155. Field Notes (Sept. 30, 2010).

156. Interview with "Al," Supervising Assistant Dist. Att'y, in N.Y.C., N.Y. (Feb. 16, 2011).

think everyone deserves one bite at the apple, an ACD is a dismissal but one way to phrase it is it involves a six-month probationary period.”<sup>157</sup> Prosecutors must decide who “deserves another bite at the apple” and who does not in a very rapid procession of cases. They face these cases with severe resource constraints (time being the most limited resource, but also investigative capacity) and uncertainty (conflicting accounts of the events from police paperwork, the defendant, and the complainant). Under these conditions the prior record of the defendant becomes one of the most important determinants of the outcome.

Even if early marks, such as the ACD, have a limited lifespan, they can be “built upon” if a person is rearrested before the expiration of the mark. New York City’s current policing strategies rely on making very large numbers of stops (between 685,000 and 500,000 in recent years), summonses and citations (over 500,000 in 2012), and arrests for low-level offenses (over 230,000 in 2012).<sup>158</sup> Certain individuals, namely young men of color, tend to have a lot of police contact over short periods of time because, among other reasons, these policing tactics are highly spatially concentrated. These individuals may use up their bites at the apple quickly. Leslie, a public defender, explained the dynamics of intensive policing practices in certain neighborhoods, combined with the additive logic of the managerial misdemeanor justice system, and the incentive structure of lower courts as follows:

[D]on’t forget a person can be stopped and searched fifteen times before they’re arrested. And often are. People are getting stopped and searched their whole lives. And then they get an arrest. And then they get an ACD. And then they get a second arrest. And it’s a discon [disorderly conduct]. And then once your fingerprint even reflects contact with the system you’re in a different posture. . . . You get a discon and then you get a misdemeanor, and then you get jail time. . . . But I think that the discon resolution is underrated, in terms of the effect that it has on people’s lives. Especially for young people getting arrested . . . because a discon appears on your rap sheet. So you think a discon is no big deal—it’s a violation, it’s not a crime. But it appears. And it will turn into a misdemeanor if you are at all at risk at having the increased police contact—which lots of our clients are. So if you have a bullshit arrest, right, but you decide to take a discon to get it over with. Next time you don’t have a bullshit arrest, and you have less truth—less real exclusionary power or whatever. And you can’t litigate it, because you’re going to lose. You’re not going to get the discon because you took it on your bullshit arrest, which you should have litigated . . . especially for, like I said, people who are getting stopped and searched all the time.

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157. Interview with “Carol,” Supervising Assistant Dist. Att’y, in N.Y.C., N.Y. (June 7, 2012).

158. LINDSAY, *supra* note 62, at 35; ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT’Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES 5 (2013), available at [http://www.ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf); *supra* Figure 1.

. . . [T]hat's how a criminal record builds, and that's how the population that's affected by unreasonable and unlawful searches and seizures is getting crushed by it. Because they have no leverage, because they've taken so many pleas. Good pleas, bad pleas. They were guilty, they weren't. The main thing is to get out of jail.<sup>159</sup>

This quote illustrates a number of important features of the managerial model in misdemeanor justice. First, the people targeted by the policing techniques that emerged in the mid-1990s have frequent low-level contacts. Second, there is a range in the formality and intensity of those criminal justice contacts, but the records and marks created by the formal contacts have profound implications for how a person is treated in later encounters. Third, the incentives created by the costs of dispositions relative to the process costs of court proceedings largely structure outcomes. Once a defendant is in a certain posture vis-à-vis the managerial system as a result of his prior marks, it is much harder to push the adjudicative framework because a new set of constraints pops up. A person with a criminal record has a significantly diminished likelihood of being believed in the abbreviated administrative factfinding pervasive in misdemeanor courts. A person with a criminal record also has significantly diminished incentives to withstand process costs because she already has the mark of a conviction, and many defendants would rather take another conviction than stay in jail or come back to court for months to fight the case.

#### V. A QUANTITATIVE STORY OF MANAGERIAL MISDEMEANOR JUSTICE: THE IMPORT OF PRIOR MARKS

This Part uses quantitative data to illustrate the managerial modality in misdemeanor justice, and to distinguish it from patterns we would expect from a more adjudicative model in felony justice, by showing the relative import of prior marks in predicting outcomes. I use a unique data set of criminal arrests and dispositions obtained from the New York State Division of Criminal Justice Services.<sup>160</sup> I slice these data in two ways.

In Subpart A, I present the criminal justice trajectories of two different cohorts of people who enter the misdemeanor justice system. These two cohorts represent the only two coherent groups of people who both newly enter the low end of the criminal justice system each year and are reliably traceable over time.<sup>161</sup> They also represent two divergent paths of misdemeanor case disposi-

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159. Interview with "Leslie," Supervising Pub. Defender, in N.Y.C., N.Y. (Apr. 5, 2012).

160. Data were provided by the DCJS to the author in the form of micro-level arrest incidents and de-identified individual ID numbers. The analysis, opinions, findings, and conclusions expressed in this Article are those of the author alone and not those of the DCJS. Neither New York State nor the DCJS assumes liability for its contents or use thereof.

161. The methodological upshot of the sealing laws discussed in Part III is that we cannot trace the criminal justice paths of all people who enter the misdemeanor justice system

tion: dismissal and conviction. The dismissal cohort tracks the population of misdemeanor arrestees without prior criminal convictions arrested in 2003 and 2004 whose cases terminated in an adjournment in contemplation of dismissal specific to marijuana offenses.<sup>162</sup> I will call this cohort the *MJACD cohort* for the remainder of the Article. The conviction cohort tracks the population of misdemeanor arrestees without prior criminal convictions at the time of a 2003 or 2004 misdemeanor arrest whose cases terminated in a first-time conviction for a misdemeanor criminal offense. I will call this cohort the *misdemeanor conviction cohort* for the remainder of the Article. I track their criminal justice trajectories from the date of the initiating disposition (any time between 2003 and 2004) until June 2011, which means each individual was under observation for somewhere between 6.5 and 8.5 years.<sup>163</sup>

I use their trajectories to highlight certain empirical regularities about misdemeanor justice during the age of mass misdemeanors. First, insofar as these cohorts are representative of the people arrested each year for a misdemeanor offense without a prior criminal record, the majority of this population stays on the low end of the criminal justice system as opposed to transitioning up to felony convictions. Second, a significant number of the people have repeated encounters with the criminal justice system and many are arrested but not convicted multiple times. I also use this data to set up the logit analysis and to provide some descriptive sense of the individuals whose criminal justice encounters constitute the micro-level data for the logit models.

Although the MJACD cohort has a rate of rearrest about eleven percentage points higher than the misdemeanor conviction cohort, it has a criminal conviction rate about twenty percentage points lower than the misdemeanor conviction cohort. As a proportion of cohort members with one or more later arrest, the misdemeanor conviction cohort has a higher percentage of individuals than the MJACD cohort of members later convicted exclusively of misdemeanor crimes. Interestingly, the percentage of arrest events allocated between felony and misdemeanor offenses is quite similar between the MJACD and misdemeanor conviction cohorts—respectively, about 71% and 69% of each cohort's later arrests are for misdemeanor offenses and about 27% and 28% are for felony offenses. However, the two cohorts diverge substantially on later misdemeanor convictions from misdemeanor arrests; yet they have strikingly similar patterns of felony conviction from felony arrests. These results set up the question for the next Subpart: are the divergent misdemeanor conviction patterns

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unless there is a disposition that allows the state to maintain fingerprints. Cf. N.Y. CRIM. PROC. LAW §§ 160.50, 160.55 (McKinney 2013).

162. This is the only dismissal group that can be reliably tracked over time. See *supra* Part III; cf. CRIM. PROC. § 160.50. For a fuller discussion of the cohort, see Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors: Statistical Appendix*, STAN. L. REV. (Mar. 2014), [http://www.stanfordlawreview.org/sites/default/files/KohlerHausmann\\_66\\_Stan\\_L\\_Rev\\_Statistical\\_Appendix.pdf](http://www.stanfordlawreview.org/sites/default/files/KohlerHausmann_66_Stan_L_Rev_Statistical_Appendix.pdf) [hereinafter *Statistical Appendix*].

163. See *Statistical Appendix*, *supra* note 162.

between the cohorts produced by different attributes of their constituent members, or by the fact that the conviction cohort consistently encountered the misdemeanor justice system with the mark of a prior misdemeanor conviction?

In Subpart B, I slice the data another way, switching the unit of analysis from individuals over time to the arrest event, in order to see if the differences documented in the cohort study withstand controlling for measured differences. I ask if the mark of a misdemeanor conviction changes the probability of conviction for a misdemeanor offense and if a similar relationship holds in the felony context. I combine all arrest events for the two cohorts and model the likelihood of “on-par conviction” separately for felony and misdemeanor arrests using logit models, and display estimated probabilities of on-par conviction so that the impact of prior convictions can be compared between misdemeanor and felony models.<sup>164</sup>

These administrative data contain only limited information that can be used to control for defendant and case differences, such as ethnicity, race, age, and arrest charge. In addition to including those variables in the models, I also include the actual number of recorded arrests for each defendant, which includes all dismissed and sealed cases linked to the defendant’s NYSID number.<sup>165</sup> Accounting for the actual number of recorded arrests the defendant had experienced at the time of disposition, in addition to the number of prior convictions and open cases readily visible to prosecutors and judges, is the best available variable for getting at the frequency of police contact. These administrative data contain no information about the legal characteristics of the case, such as the strength of the evidence or circumstances of the arrest. These are all limitations on this analysis.<sup>166</sup>

Results consistent with the dominance of the managerial model in misdemeanor court would show a statistically and substantively significant effect of prior misdemeanor convictions on the likelihood of conviction from a later misdemeanor arrest. This is both because there is a direct effect of the conviction on how criminal court actors treat the case and because conviction is associated with certain defendant characteristics that lead to an initial conviction and also to subsequent convictions.<sup>167</sup> Insofar as the entire logic of the managerial model is to create and store records about certain behaviors (e.g., having

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164. “On-par conviction” means a misdemeanor conviction for the misdemeanor arrest models and a felony conviction for the felony arrest models. *See id.*

165. *See id.*

166. As in any nonexperimental study, omitted variables (e.g., quantum of evidence, legal circumstances of stop, and unobservable personal characteristics) may bias the value of the coefficients if those variables are correlated with both an included predictor variable and the outcome variable.

167. Direct causal effects of the mark include, for example, the phenomenon of prosecutors deciding to make nonconviction plea offers in cases where defendants have no prior conviction, but declining to do so in otherwise identical cases where defendants have a prior conviction.

frequent police contact, failing to make court appearances, and failing to perform assigned community service) and those facts about the person are used to determine case outcomes, we would expect that the effect of the mark on likelihood of later misdemeanor conviction to reflect *both* the direct marking effect and the fact that the mark is associated with certain general defendant characteristics.

I believe that the different cuts of the quantitative analysis and the comparison of the effect of prior convictions between the felony and misdemeanor contexts, combined with the qualitative data presented in Part IV about the actual manner and time frame during which misdemeanor cases are resolved, triangulate my argument. That is, defendants' records, instead of legal and factual characteristics of specific cases, play a more important role in determining later conviction in the misdemeanor context than in the felony context.

#### A. Cohort Description and Trajectories

The MJACD cohort is limited to those individuals with no prior criminal convictions whose misdemeanor arrest in 2003 or 2004 terminated in a marijuana adjournment in contemplation of dismissal.<sup>168</sup> In recent years, almost half of all misdemeanor arrests have terminated in some form of dismissal, but the MJACD group is the only coherent dismissal cohort that can be reliably tracked over time.<sup>169</sup> This dismissal cohort is also theoretically important because marijuana offenses have made up the largest category of arrest and arraignment charges in New York City in recent years.<sup>170</sup>

The misdemeanor conviction cohort includes all those persons with no prior criminal convictions whose misdemeanor arrest in 2003 or 2004 terminated in a first-time criminal conviction for a misdemeanor offense. The Statistical Appendix displays descriptive data on the cohorts.

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168. See N.Y. CRIM. PROC. LAW §§ 170.56, 210.46 (McKinney 2013).

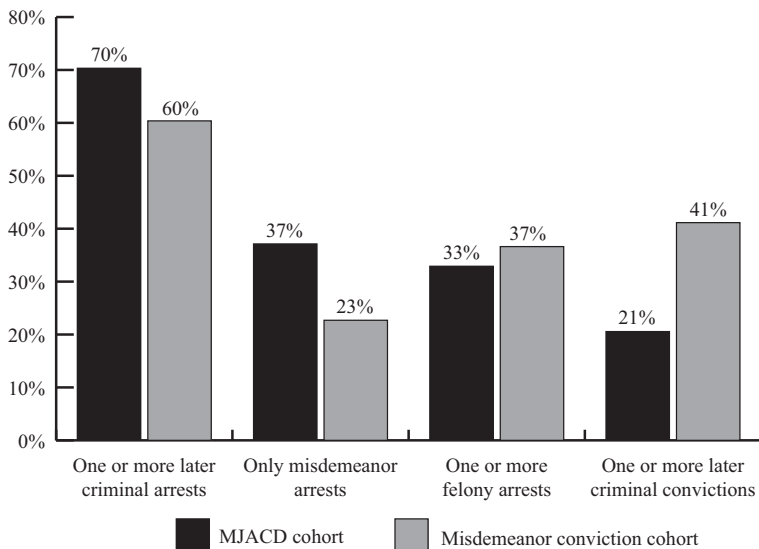
169. The New York Criminal Procedural Law allows each person to receive only one MJACD and therefore permits the state's criminal justice record-keeping agency to maintain fingerprints linked to a unique identifying number even if the person has no prior criminal conviction. It is not permitted to do so if the case terminates in other forms of dismissal. See *id.* § 170.56. I am therefore able to track all arrest events, including sealed records, for this group of people whose arrest did not lead to a conviction.

170. Marijuana offenses, N.Y. PENAL LAW § 221.10 (McKinney 2013), were the largest arrest category in New York City over the time period covered by the data (constituting between 17% and 23% of all misdemeanor arrests between the years of 2003 and 2011). See *supra* Figure 2. The MJACD is the most common outcome from a marijuana arrest. In the arrest years of my cohort, 2003 and 2004, 58% and 66%, respectively, of all arrests where the top charge was a marijuana offense resulted in MJACDs.

### 1. *Rearrest and conviction of cohorts by individual members*

Figure 11 displays the percentage of each cohort achieving selected arrest and conviction outcomes after entering the cohort as a proportion of the total cohort. This Figure shows that the misdemeanor conviction cohort has a lower rate of rearrest compared to the MJACD cohort—approximately 60% of the misdemeanor conviction cohort has one or more later criminal arrests after entering the cohort compared to about 70% of the MJACD cohort. However, they have a higher rate of reconviction—about 41% of the misdemeanor conviction cohort has one or more later criminal convictions after entering the cohort compared to 21% of the MJACD cohort.<sup>171</sup> The misdemeanor conviction cohort also has a slightly higher felony arrest rate—37% has one or more felony arrests after their first criminal conviction for a misdemeanor offense, whereas 33% of the MJACD cohort has one or more felony arrests after the date of the arrest that led to the MJACD disposition.<sup>172</sup>

FIGURE 11  
Arrest and Conviction Outcomes by Cohort



Source: New York State Division of Criminal Justice Services.

\* Cohort members with one or more felony arrests may also have had one or more misdemeanor or violation arrests.

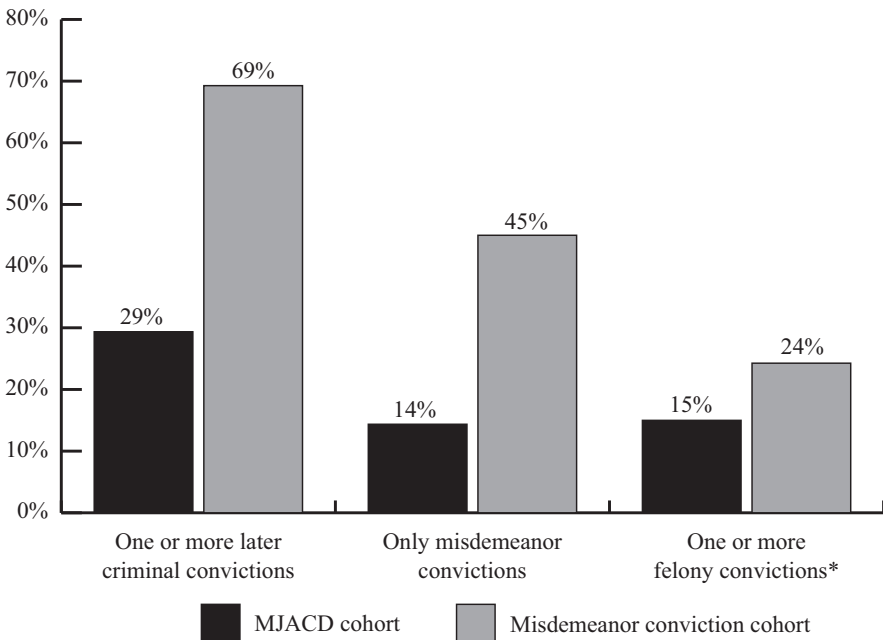
171. Note the MJACD cohort was “at risk” for rearrest for slightly longer as their cohort-entering date was, on average, earlier than the cohort-entering date of the misdemeanor conviction cohort.

172. Cross tabs of the number of misdemeanor and felony arrests following the initiating event are available upon request from the author.



Figure 12 displays the percentage of each cohort achieving selected conviction outcomes after entering the cohort as a proportion of the cohort experiencing one or more later criminal arrests. Considering that portion of the cohort that experiences one or more later arrests for a criminal offense, a much higher proportion of the misdemeanor conviction cohort goes on to be convicted of a criminal offense relative to the MJACD cohort—69% versus 29%. Figure 12 also shows that, conditional on one or more later arrests, a higher percentage of the misdemeanor conviction cohort goes on to be convicted exclusively of misdemeanor crimes in comparison to the MJACD cohort: 45% of the misdemeanor conviction cohort goes on to be convicted only of misdemeanor offenses compared to 14% of the MJACD cohort. The absolute difference between the two cohorts with respect to experiencing one or more felony convictions is about nine percentage points.

FIGURE 12  
Conviction Results of Cohort Members with One or More Subsequent Arrests



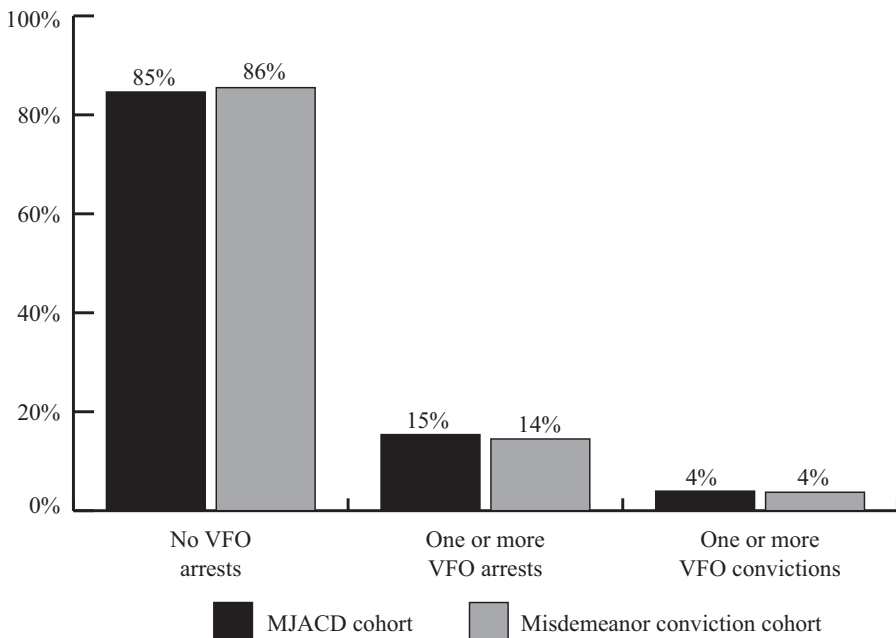
Source: New York State Division of Criminal Justice Services.

\* Cohort members with one or more felony arrests may also have had one or more misdemeanor or violation arrests.

The cohorts are similar with respect to the low proportions of individuals who are later convicted of a violent felony offense (VFO), as defined by New York State. The category of violent felony offenses includes most major street crimes, such as murder, most classes of manslaughter and rape, most classes of

sexual assault and abuse, kidnapping, most classes of robbery and burglary, simple felony assault (in addition to specific provisions against assaulting a police or peace officer and gang assault), and most classes of weapons possession.<sup>173</sup> Figure 13 displays the violent felony arrest and conviction rates for each cohort.

FIGURE 13  
Violent Felony Arrest and Conviction Rates of Cohort Members



Source: New York State Division of Criminal Justice Services.

It is notable that both groups exhibit a very similar rate of attrition from VFO arrest to VFO conviction—between 15.4% and 14.5% of both cohorts are arrested at some point for a VFO but only about 4% of both cohorts are ever convicted of a VFO during the 6.5 to 8.5 years under observation in my study. The similar rates of attrition for VFOs are in marked contrast to the divergent rates of attrition from misdemeanor arrest to misdemeanor conviction.

173. The definition of “violent felony offense” tracks sections 70.02 and 70.04 of the New York Penal Law, which set forth the offenses defined as violent felony offenses for the purposes of sentencing and statutorily required record-keeping by the DCJS. ISSA KOHLER-HAUSMANN & JAMIE FELLNER, HUMAN RIGHTS WATCH, A RED HERRING: MARIJUANA ARRESTEES DO NOT BECOME VIOLENT FELONS 32 (2012), available at [http://www.hrw.org/sites/default/files/reports/us\\_mj1112webwcover.pdf](http://www.hrw.org/sites/default/files/reports/us_mj1112webwcover.pdf). The variable used here tracks that statutory definition and adds what the DCJS codes as “VFO-like class A-1 offenses not in VFO.” *Id.* (internal quotation marks omitted).

## 2. *Rearrest and conviction of cohorts by arrest events*

Another way to approach the trajectories of these two cohorts is to shift the analysis from the unit of arrestee to the unit of arrest, and to examine the distribution of arrest and conviction events for each cohort. Data used to generate these Figures reveal that the distributions of arrest types of the MJACD and misdemeanor conviction cohorts are very similar: between 69 and 71% of all arrest events are for misdemeanor crimes, and between 27% and 28% of all arrest events are for felony crimes, respectively for each cohort.<sup>174</sup> Figure 14 compares the disposition patterns from all arrest events experienced by both cohorts after the initiating arrest separately for misdemeanor and felony arrests.

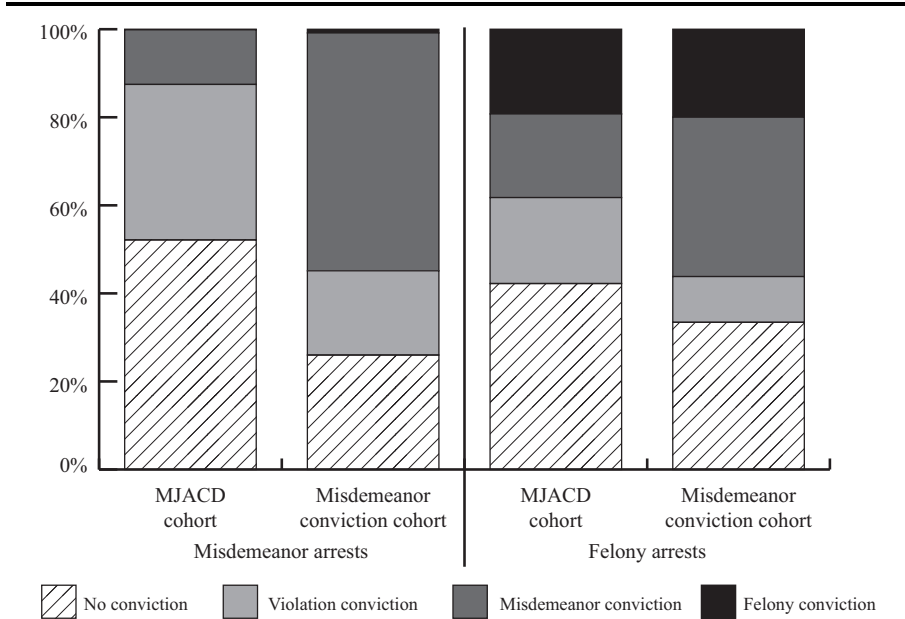
The dissimilar disposition pattern from misdemeanor arrests between the MJACD cohort and the misdemeanor conviction cohort is striking. Whereas 12% of the MJACD cohort's later misdemeanor arrests resulted in a misdemeanor conviction, 54% of the misdemeanor conviction cohort's later misdemeanor arrests resulted in a misdemeanor conviction. The MJACD cohort experienced many more dismissals from subsequent misdemeanor arrests than the misdemeanor conviction cohort: 52% of the MJACD cohort's later misdemeanor arrests result in no conviction while only about 26% for the misdemeanor conviction cohort result in no conviction.

The cohorts had fairly similar on-par conviction patterns from felony arrests—between 19% and 20% of the two cohorts' felony arrests resulted in felony convictions. The felony arrest outcomes diverged in the distribution of convictions for low-level crimes: the misdemeanor conviction cohort's felony arrests were much more likely to result in a misdemeanor conviction than the MJACD cohort's felony arrests.

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174. Cross tabs of arrest and disposition types with cell and row percentages available upon request from author.

FIGURE 14  
Cohort Disposition Patterns from Misdemeanor and Felony Arrests



Source: New York State Division of Criminal Justice Services.

The following Subpart will explore this divergence in later misdemeanor conviction rates between the cohorts by modeling the conviction event and controlling for measured factors about the arrestee and arrest type. Using logit models, I ask if the mark of a prior misdemeanor conviction increases the likelihood of a later on-par conviction from a misdemeanor arrest and how that differs from the effect of a prior felony conviction on the likelihood of a later on-par conviction from a felony arrest.

### B. *Models of Misdemeanor and Felony Conviction*

The following Figures depict the estimated probability of on-par conviction separately for misdemeanor and felony arrests as derived from a series of logit models explained and reported in the Statistical Appendix.

Figure 15 graphs the probability of conviction on a misdemeanor offense for a twenty-three-year-old black male with zero prior felony convictions, ten prior arrests, and no other current open case arrested for a controlled substance

misdemeanor over the range from zero to ten misdemeanor convictions.<sup>175</sup> It shows that the absolute probability of conviction for a misdemeanor crime rises dramatically, from about 14% to 78% over the range of having zero prior misdemeanor convictions to having ten or more prior misdemeanor convictions, with the number of arrests and other variables held constant. Furthermore, the biggest single jump in predicted probability is from having zero misdemeanor convictions to having one conviction, a 90% increase in the level of predicted probability of conviction (an absolute difference of about thirteen percentage points). That is, there is an increase in the probability of conviction for a misdemeanor crime from a misdemeanor arrest of about 90% associated with moving from zero to one prior misdemeanor on the record at the time of disposition of a person otherwise identical on measured characteristics. There is another significant jump in predicted probability from having one prior misdemeanor conviction to having two prior convictions, an increase of about 71% in the relative probability of conviction (an absolute difference of about nineteen percentage points). Subsequent convictions increase the probability of conviction by smaller intervals.

Figure 16 displays the predicted probability of conviction for a felony crime from a felony arrest for a similar person, a twenty-three-year-old black male with ten prior arrests, no other current open case, and one prior misdemeanor conviction. This Figure shows a much smaller increase in the predicted probability of on-par conviction from a felony arrest for a person otherwise identical on measured characteristics associated with moving from zero to one prior felony conviction at the time of disposition: an increase of about 10% (an absolute difference of three-and-a-half percentage points). A person otherwise identical on measured characteristics with two prior felony convictions actually has a slightly lower predicted probability of felony conviction from a felony arrest compared to a person with a single prior felony conviction.

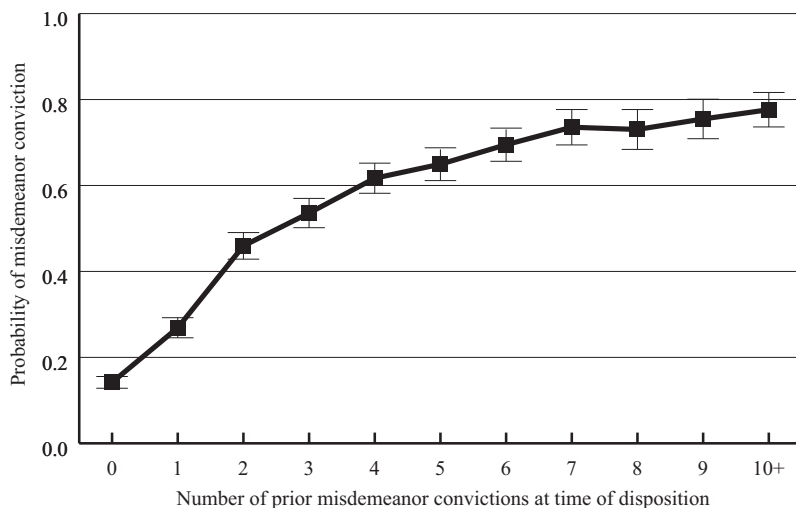
The different results of the open cases variable between the misdemeanor and felony models suggest that records of law enforcement contact play a more important role in case disposition in the former than the latter. The presence of one other open case instead of zero at the time of disposition is associated with an increase in predicted probability of on-par conviction of 58% in the misdemeanor model, whereas in the felony model it is associated with an increase in predicted probability of on-par conviction of about 3%.<sup>176</sup>

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175. I chose to evaluate the model for defendant and case characteristics that were common in the dataset; the relevant patterns are the same over a range of other tested values of independent variables (such as at the mean of all variables).

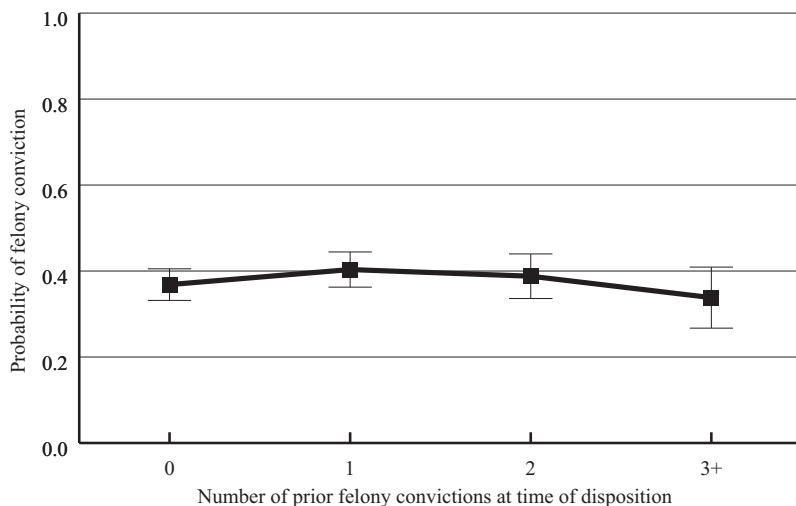
176. Predicted probability evaluated at same demographic and age values as the above Figures, and assuming zero prior misdemeanor convictions for the misdemeanor models and zero prior felony convictions for the felony models.

FIGURE 15  
Adjusted Predicted Probability of Misdemeanor Convictions



Note: Estimated conviction of PL 220 controlled substances for a twenty-three-year-old black male with zero prior felony convictions, zero open cases, and ten prior arrests.

FIGURE 16  
Adjusted Predicted Probability of Felony Conviction



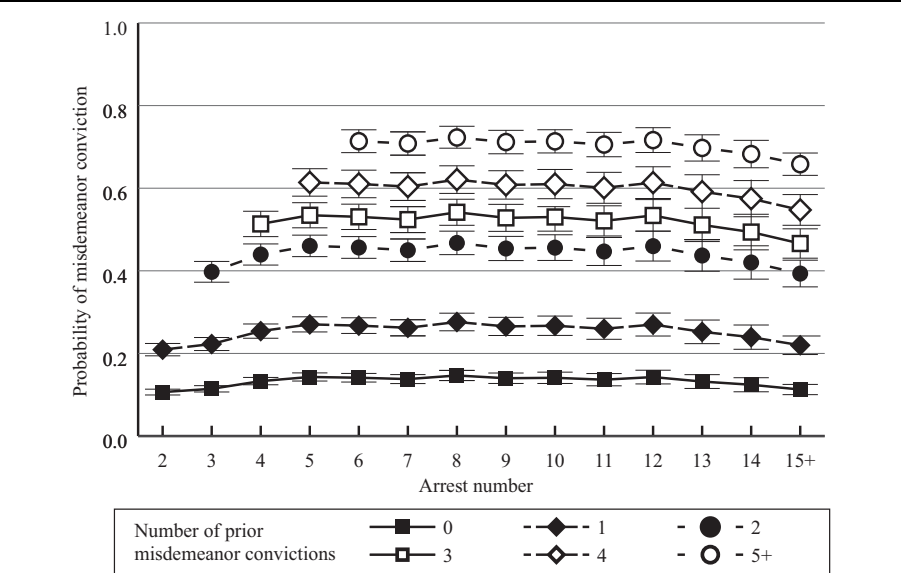
Note: Estimated conviction of PL 220 controlled substances for a twenty-three-year-old black male with one prior misdemeanor conviction, zero open cases, and ten prior arrests.

The next set of Figures was also generated using the logit models reported in the Statistical Appendix. These models exploit dummy variables of prior arrests, which allows the relationship with the likelihood of conviction to be non-linear. Figure 17 shows the adjusted predictions of probability of conviction for six separate levels of prior misdemeanor convictions, zero through five or more, evaluated for a modal arrestee—a black male with no other current open case and zero prior felony convictions—for a misdemeanor controlled substances arrest. The Figure shows the predicted probability of misdemeanor conviction over the number of arrests, two through fifteen or more.

A striking result is that the probability of conviction does not increase as significantly over the number of arrests as it does over the number of prior misdemeanor convictions. For example, the predicted probability of a misdemeanor conviction from a misdemeanor arrest increases by about 38% as an otherwise identical person with zero prior misdemeanor convictions moves from arrest two to arrest eight (an absolute increase of about four percentage points). Yet two people otherwise identical on measured characteristics on their second arrest achieve an increase in predicted probability of conviction of approximately 96% (an absolute increase of over sixteen percentage points), just by assuming one has a single prior misdemeanor conviction and the other has no prior misdemeanor convictions.

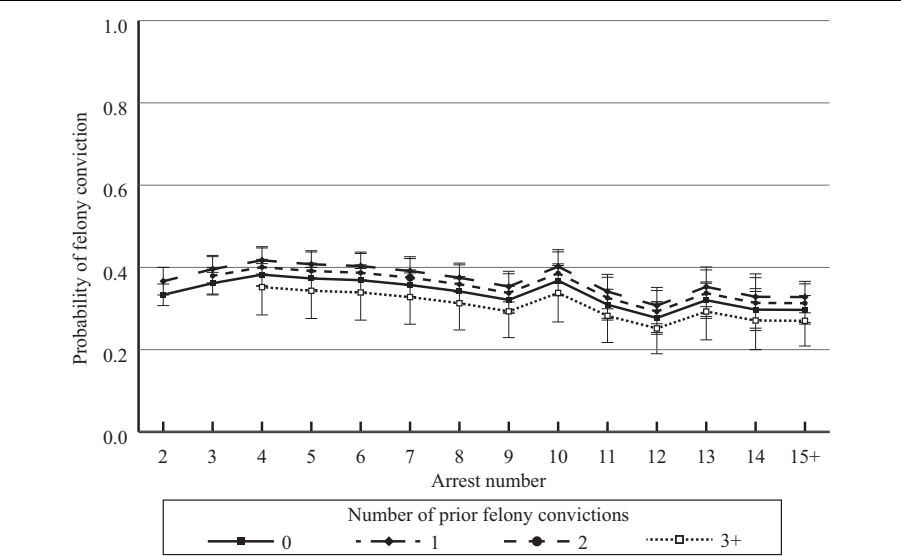
This same relationship does not obtain in the felony conviction models. Figure 18 shows a very tightly clustered set of lines plotting the level of predicted probability of conviction for a felony offense from a felony arrest moving from zero to three prior felony convictions, and only a slightly steeper rise over the arrest number.

FIGURE 17  
Adjusted Predicted Probability of Misdemeanor Conviction



Note: Estimated conviction of PL 220 controlled substances for a twenty-three-year-old black male with zero prior felony convictions and zero open cases.

FIGURE 18  
Adjusted Predicted Probability of Felony Conviction



Note: Estimated conviction of PL 220 controlled substances for a 23-year-old black male with one prior misdemeanor conviction and zero open cases.



The results of these models suggest that the mark of a misdemeanor conviction is associated with a higher probability of conviction from later misdemeanor arrests, even after controlling for the number of prior recorded (but not necessarily visible on rap sheet) arrests, open cases, and certain other measured defendant and case characteristics. It is consistent with the managerial model that this effect could be due both to a direct signaling effect of the marks and to a selection effect in which defendants who have certain traits, such as failing to show up to court appearances, tend to get convicted and reconvicted because they do not satisfy the conditions required to earn conditional dismissals offered for early arrest events. Note that the relationship between traits such as tardiness and conviction is dependent on the operation of the managerial model; absent the practice of creating and consulting records about those behaviors, those traits would not result in the observed trajectories of repeated convictions.

However, it would not be consistent with the managerial model if the effect of the prior misdemeanor convictions were due to a specific type of selection, namely defendants' propensity to be arrested under undeniable factual or justifiable legal circumstances. There are several pieces of evidence that make that type of selection an unlikely explanation of the results. First, we would not expect such a significant divergence in the effect of prior on-par convictions across the felony and misdemeanor contexts unless a certain type of person is stopped and arrested lawfully and consistently generates strong evidence of guilt only when engaging in crimes at the misdemeanor level, but not at the felony level. Second, we would not expect such a substantively small effect of number of actual prior arrests (recorded under the NYSID but not necessarily visible on rap sheet) in comparison to the effect of marks visible to prosecutors and judges such as prior convictions and open cases. Third, the data we have on the selection mechanism in misdemeanor courts make it unlikely that courts consistently distinguish between the factual and legal traits of cases, including the fact that over fifty-seven percent of misdemeanor cases reach disposition within twenty-four hours after arrests on the basis of very minimal paperwork about the case, the limited time that legal actors have to devote to legal research and factual investigation, the explicitly stated policy of prosecutors and judges of offering progressively higher pleas for each subsequent case, and the relative costs and incentives defendants face in taking cases to trial. In light of these data, it is much more likely that the relatively small association between prior on-par convictions and the likelihood of felony conviction is a result of the relative importance of legal and factual difference for determining dispositions, even if it is via an administrative or inquisitorial system.

## VI. POLICY IMPLICATIONS OF THE MANAGERIAL MODEL: WHAT IS TO BE DONE?

This is the part of a law review article where the author offers her policy prescriptions or recommendations for new legal and procedural rules. But because this Article has been dedicated to establishing an empirical claim and developing a theoretical model—and not diagnosing a problem—we need to start by identifying the policy issues raised by the preceding analysis. What, we might ask following William James, “is the truth’s cash-value in experiential terms?”<sup>177</sup>

A number of policy concerns flow from the account of managerial justice presented here. In this Part, I puzzle through just three classes of problems: process costs and accuracy; racial, class, or space-based injustice; and the social role of criminal law. I give fair warning to the reader: this Part does only what it promises—*puzzles* through these concerns without laying out substantial defenses of precise policy prescriptions. I offer a preliminary pass at indexing the legal, social, and political implications of managerial misdemeanor justice. In so doing, I hope to do justice to the complexity of the legal system I have carefully studied, the institutional environment in which it operates, and the various important interests implicated in the interplay between the two. In the end, I hope to provide the groundwork for meaningful reform efforts grounded in a nuanced understanding of the object of reform.

The first obvious cashed-out implication of the managerial model is that legal determinations in misdemeanor courts might not accurately track guilt and innocence in fact. Because the managerial model of administering criminal justice largely differentiates its treatment of defendants on the basis of marks of prior encounters, it is bound to produce higher rates of type I (false conviction) and type II (false acquittal) errors than an adjudicative model of criminal justice that largely differentiates its treatment of defendants on the basis of judicially or administratively determined facts pertinent to guilt and innocence.

Indeed much of the debate about justice in lower courts in the legal literature focuses on what to make of type I and type II errors. Josh Bowers, for example, argues that we should worry less about type I errors in pursuit of abstract notions of justice than about minimizing the very real and serious burdens defendants bear in the process of trying to vindicate their innocence. He proposes that instead of making it harder for innocent defendants with extensive records to plead guilty, we should make it easier because “[i]n low-stakes cases plea bargaining is of near-categorical benefit to innocent defendants, because the process costs of proceeding to trial often dwarf plea pric-

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177. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 92 (Hackett Publ'g Co. 1981) (1907).

es.”<sup>178</sup> Bowers maintains that insufficient winnowing at earlier stages of the criminal process, from arrest to charging, is the true source of injustice for misdemeanor defendants. Thus he concludes that taking away the possibility of factually false pleas from defendants who have been pushed into the deeper reaches of the criminal process only exacerbates their burdens.

Others resist this conclusion. Stephanos Bibas, for example, concedes that Bowers’s suggestion may indeed “maximize the satisfaction of innocent defendants’ preferences.”<sup>179</sup> Yet he argues that we must nonetheless not “give in to the punishment assembly line, to make it speedier and more efficient and surrender any pretense of doing justice.”<sup>180</sup> Along similar lines, Alexandra Napatoff argues that in most large urban misdemeanor criminal justice systems “aggregate decision-making dominates each stage of the process,” such that the entire criminal process has become “dissociated from the core culpability concerns of criminal law.” Therefore, she argues that “it needs either to embrace the individuated model more fully, or relinquish the punitive moral mantle of criminal law and admit that it is attempting to do something different.”<sup>181</sup> These are all legitimate concerns insofar as one holds that the primary value of criminal courts lies in adjudicating factual guilt and innocence. Within that evaluative framework, the weight of these concerns is tied to unknown empirical regularities of factual errors in misdemeanor adjudication.

The data that I have collected in this study cannot be used to estimate the rates of type I and type II errors. I cannot say, based on any independent investigation of arrest and crime circumstances, what percentage of misdemeanor defendants plead guilty to crimes they did not commit, or what percentage of misdemeanor defendants were not convicted of crimes they did commit. It seems reasonable to conclude, based on the dynamics of the managerial model I have presented, that the error types are distributed unevenly among different sorts of defendants according to the marks they bear from prior encounters at the time of disposition. Type II errors are most likely among defendants with no criminal record because the prosecution’s policy is often to quickly grant conditional dismissals for these defendants. Type I errors are more likely higher among defendants with prior misdemeanor convictions because they face higher barriers to convince prosecutors and judges of their factual innocence, and because they are less inclined to bear process costs to seek vindication since they already have a criminal record.<sup>182</sup>

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178. Bowers, *supra* note 84, at 1132.

179. Stephanos Bibas, *Exacerbating Injustice*, 157 U. PA. L. REV. PENNUMBRA 53, 54 (2008), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1259&context=faculty\\_scholarship](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1259&context=faculty_scholarship).

180. *Id.* at 57.

181. Napatoff, *Aggregation and Urban Misdemeanors*, *supra* note 22, at 146-47.

182. Bowers has suggested that type I errors, or what he calls “the innocence problem in plea bargaining,” are almost exclusively present in this latter set of cases: low-level arrest charges for recidivists. *See* Bowers, *supra* note 84, at 1121.

Many defendants who are factually guilty are offered conditional dismissals precisely because actors in the system are content to monitor their later criminal justice contacts rather than incur the process costs necessary to convict them. And many innocent defendants plead guilty precisely because they are trying to avoid process costs. Over thirty years ago, Malcolm Feeley noted this tension and called it “the dilemma of lower courts.” The dilemma, as he explained it, is as follows: “Expanded procedures, designed to improve the criminal process are not invoked because they might be counterproductive. Efforts to slow the process down and make it truly deliberative might lead to still harsher treatment of defendants and still more time loss for complainants and victims.”<sup>183</sup>

So what is to be done?

The dilemma of lower courts constrains the promise of procedural reforms. Added procedures are unlikely to alter the basic calculus of process costs versus short-run disposition costs that defendants face in lower criminal courts, as defendants usually retain the option of invoking or abjuring their process rights. Furthermore, insofar as adding procedural rights is intended to increase adjudicative accuracy, it is not clear that merely providing for them would substantially change the patterns of work in courts. As I have argued, courtroom actors are not merely disregarding due process values, but actually are operating under a fundamentally different model of criminal law administration in which factual adjudication is ancillary to managerial goals.

Of course, certain legal and policy options could advance various values, including reducing the process burdens on defendants and minimizing type I or type II errors.<sup>184</sup> For example, New York State, like many other states, imposes a variety of monetary charges on individuals convicted of both criminal and noncriminal offenses.<sup>185</sup> The amounts may seem small, but to indigent defendants they are often unmanageable.<sup>186</sup> Waiving these fees for indigent defend-

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183. FEELEY, *supra* note 15, at 241.

184. While these reforms are inspired by my research in New York City, they highlight practices widespread in other major urban jurisdictions that produce the same dynamics.

185. In New York State, the combined fees for a noncriminal violation conviction exceed \$120; for a misdemeanor conviction they are \$200. N.Y. PENAL LAW § 60.35 (McKinney 2013). Sociologists have documented how the expansion of legal financial obligations—monetary sanctions in the form of fees, fines, and surcharges—“contributes to the accumulation of disadvantage” in various ways, including “by reducing family income; by limiting access to opportunities and resources such as housing, credit, transportation, and employment; and by increasing the likelihood of ongoing criminal justice involvement.” Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1756 (2010); *see also* Alexes Harris et al., *Courtesy Stigma and Monetary Sanctions: Toward a Socio-Cultural Theory of Punishment*, 76 AM. SOC. REV. 234, 237 (2011).

186. Many defendants request civil judgment to be entered on these fees, *see* N.Y. CRIM. PROC. LAW § 420.40(5) (McKinney 2013), which in turn seriously injures their credit rating for years. The collateral consequences of civil judgment on these fees are massive for

ants would reduce some of the cascading burdens resulting from a minor criminal conviction, which collectively far outweigh any countervailing social benefit, such as generating revenue or the punitive value of imposing additional costs on those convicted of minor crimes. Reforming bail practices could also address both unnecessary burdens on defendants and the rate of type I errors, especially for indigent defendants. If, for example, judges exercised greater discretion to expunge warrants for excused absences, and if rap sheets reflected the length of time the defendants were absent, and if he returned voluntarily, then prosecutors and judges could differentiate the mark of a bench warrant and more accurately attune bail practices to precise signals about reliability in making court appearances.<sup>187</sup> The funding for the essential roles in criminal court has also not kept pace with the influx of new cases in many large jurisdictions.<sup>188</sup> Increasing the number of judges and funding for defense organizations and prosecutors' offices would reduce the resource limitations that drive some of the high costs of invoking adversarial and formal process. Enhancing the institutional capacity of courts may allow them to revert to a more adjudicative model, and possibly reduce the rates of type I and type II errors.

But it is far from obvious that moving misdemeanor courts away from a managerial model toward an adjudicative model is desirable, even if it reflects more faithfully the textbook model of criminal courts. Technical questions of institutional reform quickly give way to questions of social values.

Many people find false convictions self-evidently problematic, for persistent misdemeanants and new entrants to the criminal justice system alike. But our normative assessment of conditional dismissals for factually guilty defendants may indeed turn on whether the defendant is a new entrant or frequent fly-

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indigent defendants because credit scores are now so instrumental in securing many essential services—including housing, phone service, and bank accounts—and opportunities—including employment and education loans.

187. One of the most significant factors that judges consider in setting bail is whether the defendant has prior bench warrants and how many. In New York State, that factor is listed in the bail statute. *See id.* § 510.30(2)(a)(vi). The number of prior bench warrants was also one of the most common factors listed by judges in my interviews and in other research on what influences prosecutors recommendations and judges' decisions. *See FELLNER, supra* note 119, at 42. In addition, the New York Criminal Justice Agency—the entity that interviews defendants before arraignment and makes release recommendations to the court—assigns significant weight to prior bench warrants. Research has shown that, among the defendants who fail to appear at a required court appearance (about 15% of misdemeanor defendants in 2011), about one-half of these defendants voluntarily return to court within thirty days of the bench warrant. N.Y.C. CRIMINAL JUSTICE AGENCY, *supra* note 120, at 27-28.

188. *See* ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 14 (2009) (noting the many jurisdictions where lack of funding for indigent defense organizations makes it structurally impossible for attorneys to provide effective assistance); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 264 (2011) (arguing that prosecutors' caseloads contribute to both prosecutorial error and injustice to defendants).

er in the criminal justice system. We may, upon reflection, endorse the substantive penal logic of the managerial model: what we *ought* to do with minor crimes is not necessarily punish the act, but rather assess the person over time to see if he persistently disregards legal rules. Perhaps the punishment of minor crimes implicates moral and social values distinct from those at play in the punishment of serious crimes.

Émile Durkheim famously distinguished penal law from what he called “restitutory law” (such as civil, commercial, procedural, and administrative law).<sup>189</sup> Restitutory laws ensure smooth functioning of the division of labor, and therefore they are still enforced by the state’s coercive power to sanction.<sup>190</sup> But because the rules embodied by restitutory law are about the coordination and organization of social tasks, they “do not strike us with the force of sacred entities.”<sup>191</sup> As a society, we do not call for expiation when there is an established infraction; we are content with reestablishing the status quo. The defining characteristic of penal law was, for Durkheim, that it addressed acts that had a particular status in our collective conscious, reflecting deep-seated, sacred values. He famously said, “[W]e should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness.”<sup>192</sup> Penal law was thus distinguishable from other classes of law not by the level of harmfulness of the acts it proscribes, but by the nature of the collective sentiments that motivate it, and that it functions to reinforce.

Whether or not we accept Durkheim’s overarching theory of punishment, his distinction offers an important insight in pushing us to move beyond juridical definitions in making sense of the actual operations of legal institutions. Different components of the criminal justice system, although under the same juridical category of criminal law, might embody divergent approaches to the practice of punishment because of the social meaning of the legal infractions at issue. Many of the criminal prohibitions addressed in misdemeanor court are acts that straddle the line between restitutory and penal, occupying a liminal status between coordination rules and foundational moral values. A much higher proportion of the acts addressed in misdemeanor court than in felony court simply do not offend widely held moral sentiments that have a central role in

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189. ÉMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 29 (W.D. Halls trans., MacMillan Publishers Ltd. 1984) (1893).

190. Durkheim states that restitutory laws

do not reflect any very acute feelings, nor even in most cases any kind of emotional state. For, since they determine the manner in which the different functions should work together in the various combinations of circumstances that may arise, the objects to which they relate are not ever-present in the consciousness.

*Id.* at 82.

191. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 56 (1990).

192. DURKHEIM, *supra* note 189, at 40.

producing the possibility of social cohesion. Consequently, it should not be surprising that our social practice of punishment diverges when we address crimes that have a different status in our social collective.

The managerial model cannot be reduced to an organizational response to unmanageable caseload pressures. It also reflects a substantive moral posture toward the punishment of minor crimes. That posture involves not only a grading of punishments for persistent offenders, which is obviously the case in the punishment of felony offenses as well. It also reflects a grading of the judicial effort addressed to the offender in any capacity, including in determining whether or not he committed the proscribed act.

As I have shown, managerial misdemeanor courts are *doing something* with the population of defendants who are granted dismissals or noncriminal dispositions. They are just not always attempting to convict and impose a formal punishment. Instead, these courts are using the instruments of criminal procedure to monitor and check up on defendants' later behavior, building records about what type of person is involved. Thus, under the managerial model, type I errors are not errors at all; they are part of the very logic of social control that this component of the penal system uses to deal with shallow-end offenders. It is not self-evident, at least to me, that what we want from misdemeanor courts is perfect adjudicative accuracy. Considered abstractly, the managerial approach—only engaging the heavy machinery of criminal law's capacity to permanently mark a person and impose a formal punishment where there is some indication the person persistently flouts the rules—is an appealing principle for administering rules that sit between restitutory and penal.

Yet a number of problems are generated by the operation of a system that is both managerial *and* administrative/inquisitorial inside of a system that is ostensibly adjudicative and adversarial. One problem is that people are classified as persistent rule breakers, and thereby they become at risk for transitioning to a criminal conviction, by acquiring a set of marks that are proposed to defendants as conditional dismissals and that hold themselves out to have that official legal meaning (which of course is precisely what makes the disposition such an attractive offer early in the case's life course). However, these marks are reinterpreted at a later time—at the point of a subsequent arrest—in a different light to mean at least an indication of ungovernability, and at most a signal equivalent to a guilty plea. Prosecutors' interpretation of these marks and their resultant charging decisions and plea offers are often determinative of the outcome of the case. As discussed in Parts I and IV, managerial misdemeanor courts also are functionally administrative systems where trials are rarely viable routes to vindicate legal issues or factual innocence. There are very limited and informal leverage points to challenge the charging and plea decision of prosecutors.<sup>193</sup>

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193. For a discussion of the problematic issues brought about by a fundamentally administrative criminal justice system operating inside the legal and organizational framework

This raises the question of whether the managerial system in its real-world incarnation accurately and fairly identifies persistent lawbreakers. The qualitative and quantitative data presented in Parts IV and V make it clear that the current operations of lower criminal courts can be said, at best, to only imperfectly do so. As shown in Figure 17, the probability of conviction for a misdemeanor crime from a misdemeanor arrest increases only slightly as the number of arrests rises, but increases substantially with each subsequent criminal conviction. The transition from nonconviction dispositions to convictions is, for the overwhelming majority of misdemeanor cases, largely a factor of the temporal proximity of arrests. And the likelihood of arrest is a function of not only an individual's conduct, but also of policing practices. Those that are brought into the misdemeanor justice system, and those who stand the highest risk of being rearrested, are not a random sample of rule breakers or even persistent rule breakers. It is a sample systematically biased by certain social facts, some of which raise fundamental concerns of racial and class inequities. As I showed in Part II, young black and Hispanic men make up the majority of misdemeanor arrestees.

Therefore, even if the criminal courts fairly and impartially execute the managerial modality over all defendants irrespective of class, race, or immigration status, questions of fairness extend to the mechanisms that select people for misdemeanor arrests. There is substantial evidence that the underlying behaviors of some of the largest arrest categories, such as marijuana and narcotics possession, are fairly evenly distributed across racial and class groups.<sup>194</sup> But these groups face vastly unequal risk of arrest because of the social realities of where and how drugs are sold and used, and because of the density and form of policing in different spaces.<sup>195</sup> Some criminal conduct might be more likely to translate into an arrest because it occurs in communities where police have become an established institution of not only social control but also interpersonal and household control, or because of the conscious or unconscious biases of police officers shaping their discretion to make an arrest for low-level con-

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set up for an adversarial system, and a reform proposal to address those issues in federal prosecutors' offices, see Barkow, *supra* note 30, at 876-84, 895-906.

194. See KOHLER-HAUSMANN & FELLNER, *supra* note 173, at 12.

195. This issue has been studied and debated in the extensive literature on the war on drugs. See, e.g., ALEXANDER, *supra* note 1, at 98 & n.22, 99 & nn.23-25, 100. There is an extensive criminology literature debating the extent to which racial disparities in drug arrests can be accounted for by relevant legal variables or police deployment decisions guided by citizen complaints or crime incidents. Compare, e.g., Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 105 (2006) (concluding that "race shapes perceptions of who and what constitutes Seattle's drug problem, as well as the organizational response to that problem" (*italics omitted*)), with Stephen D. Mastrofski, *Race, Policing, and Equity*, 11 CRIMINOLOGY & PUB. POL'Y 593, 594-95 (2012) (finding that citizen calls for service regarding drug-related activity and reported crimes account for a significant portion of disparities in drug arrests via the mechanism of police deployment).



duct.<sup>196</sup> Other types of behaviors may be unequally distributed.<sup>197</sup> Research of a different type would be needed to apportion the relative contributions of those different factors to the clearly documented concentration of misdemeanor arrests among black, Hispanic, and low-income communities.

This brings me to the third set of concerns that flow from this account of managerial justice. The ostensible objectives of these policing practices, much like the reforms that have led to mass incarceration, are to reduce the incidence of violence and social harm. It may well be that the people living in conditions of “social insecurity and marginality,” whose life prospects have been circumscribed “in the wake of the twofold retrenchment of the labor market and the welfare state,” are more likely to commit misdemeanor crimes.<sup>198</sup> And it may well be that we have good reason for deploying a high number of police officers to poor and minority neighborhoods because they suffer disproportionately from high crime. And these policing techniques may indeed be effective in creating order and repressing serious crime, although that question is hotly debated among social scientists who have studied the issue.<sup>199</sup> Insofar as the techniques are effective, the crime reduction benefits from these policing strategies accrue to the residents of these neighborhoods.

But the costs of these strategies fall on the same people. And the costs are tremendous. The residents inside these communities are the ones who come to have criminal records that hinder their employment and housing prospects, endure lost days of work and child care, and face interminable demands to go back and forth to court to deal with arrests and summonses for low-level infractions. They increasingly feel disrespected and oppressed by a police presence designated for their safety.

As long as we, as a society, are comfortable with securing social control and order primarily with the tools of criminal law and punishment, this will be the case.

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196. See, e.g., Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339, 348-49 (2009) (describing how members of highly policed communities come to rely on the police as a tool in interpersonal relationships); Suk, *supra* note 147, at 69 (noting how the practices surrounding arrests, prosecution, and orders of protection issued for misdemeanor domestic violence cases “reflect a view of using criminal law to control space and family arrangements”).

197. For example it is likely that turnstile jumping, one of the larger arrests categories, is more common among people in poverty.

198. LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 58, 61 (2009).

199. See, e.g., David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 JUST. Q. 154, 182; Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 314-16 (2006); Steven F. Messner et al., *Policing, Drugs, and the Homicide Decline in New York City in the 1990s*, 45 CRIMINOLOGY 385, 404-07 (2007); Richard Rosenfeld et al., *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988-2001*, 45 CRIMINOLOGY 355, 377-79 (2007).

This, I believe, is the primary problem identified by my analysis, not type I or type II errors, or even the failure of lower criminal courts to live up to a due process adjudicative ideal. The crucial problems raised by mass misdemeanors—just as with mass incarceration—are political and social questions. To what extent are we, as a political community, comfortable relying on the instrumentalities of criminal law as the primary public social control mechanisms over spaces that have been devastated by economic structural change and the retrenchment of the welfare state?

### CONCLUSION

As we move from *what is to be done* to *how can it be accomplished*, history is an indispensable resource. The dominant social-ordering role presently accorded criminal justice institutions in the United States neither is natural nor was its development inevitable. It took a historical process to get to a place where we accept the current capacious operation of the penal state. It involved innumerable political battles fought at the local, state, and federal levels to direct resources to police and prisons while neglecting other social welfare institutions. It involved intentional social movements to shift our cultural posture toward the appropriate roles of penal and welfare policies. Scholars of mass incarceration have carefully traced the historical process by which “we arrive at a political moment where indefinite solitary confinement in a concrete box is sound policy, but cash assistance to poor parents ‘has corrupted their souls and stolen their future.’”<sup>200</sup> If we find ourselves uncomfortable with the vast operations of managerial misdemeanor justice extending over poor minority communities, we must understand the political and cultural trends that brought us to accept such a social role for this and other criminal justice institutions.

Other spaces in our cities are ordered with other institutions of social control, such as schools, good jobs, and families. Building up these institutions is a

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200. Julilly Kohler-Hausmann, *Tangled Webs: A Case for Intertwining U.S. Carceral and Welfare History* 28 (2013) (unpublished manuscript) (on file with author) (quoting E. Clay Shaw, Jr., Representative from Florida and coauthor of the Personal Responsibility and Work Opportunity Act, on the day the House passed this welfare reform bill in 1996); *see also* MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* 16 (2013). The proper role of government in addressing social needs has been debated since the founding of the Republic. As Michele Landis Dauber shows, the rhetoric surrounding our public understandings about the proper role of government reflects the outcome of a lot of political work, and not the upshot of natural and obvious distinctions between, say, natural and man-made disaster or deserving and undeserving victims:

[W]hether a particular set of circumstances mandates rejection or relief has always been, over the last two centuries, a question of moral and political judgment, not an exact science. From its earliest days the history of disaster relief—whether relief was ultimately dispensed or not—has been one of claims making and argument.

*Id.*

possibility. We can imagine a world in which we call on the state to dedicate the same amount of attention and resources to supporting schools, good jobs, and families as it currently dedicates to building prisons and extending policing. But such a world will not be secured merely through new criminal rules and procedure. It demands a broad movement of social and political dimensions.

