Misdemeanors

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Abstract

Misdemeanors are an increasingly vital arena of criminal justice scholarship and policy. With ten million cases filed each year, and vastly outnumbering felonies, the petty offense is the paradigmatic US crime. Indeed, most Americans experience the criminal system through the petty offense process. This review surveys the major structural and theoretical issues raised by the misdemeanor system, including its assembly-line quality, high rates of wrongful conviction, and powerful influence over the system's class and racial skew. It concludes that misdemeanors offer novel ways of understanding the US criminal justice institution as a whole and open up broad new avenues for inquiry.

INTRODUCTION

The United States appears to be reconsidering mass incarceration, along with the punitive mentality that has dominated the criminal justice landscape for the past three decades. As it does so, the importance of misdemeanors is finally coming into focus. From the stop-and-frisk revolution in New York, to California's Proposition 47, to the wave of marijuana decriminalization sweeping the country, the petty offense process is increasingly recognized as a locus of vital systemic reform.

This new appreciation is long overdue. Although misdemeanors have always profoundly shaped the criminal justice culture, their influence has been obscured in both practice and theory. Courts and policy makers typically treat misdemeanors as unimportant relative to felonies. The petty offense process is underregulated and largely invisible; criminal law scholarship has long privileged serious offenses and federal practice to the exclusion of petty crimes.

But this felony-centric view is misplaced. In reality, most American crimes are minor. The system files approximately two to three million felony cases every year, compared to approximately ten million misdemeanor cases. Eighty percent of state dockets are misdemeanors; most Americans encounter the criminal system through the petty offense process. It turns out that the lowly misdemeanor—not homicide or rape—is the paradigmatic American crime and the paradigmatic product of the American criminal system.

The misdemeanor perspective opens up new ways of understanding the criminal process as a whole. In particular, it reveals a system that is neither uniform nor consistent. If we conceptualize the criminal system as a pyramid (Natapoff 2012), the lion's share of attention goes to a small but highly visible and relatively functional top. This is the world of serious offenses, federal crimes, and wealthy defendants. Cases are typically well-litigated, law and evidence matter, and due process commitments are at their height. Although the top has its own distinct dysfunctions—astronomical sentences, prosecutorial hegemony—the players tend to follow the conventional rules of the adversarial process.

Because the top of the pyramid is high profile and relatively transparent, it is often treated as representative of the system as a whole. But it is not. As we move down the pyramid, offenses get pettier and more numerous, defendants get poorer, public defenders get more overwhelmed, and courts are less attuned to careful litigation and rule-of-law ideals. At the very bottom we find misdemeanors, a massive sloppy arena dominated by police arrest practices and assembly-line processing. Compared with the top, this world embraces a very different culture, one typically lacking in counsel and due process and overtly driven by class and racial inequalities. Counterintuitively, this problematic bottom is more representative of the American system as a whole, producing the average defendant experience and most of the system's cases and convictions. It is this world of impoverished misdemeanants, crowded jails, and slipshod processes that must be excavated before we can claim to understand what sort of criminal system we actually have.

The misdemeanor perspective raises four interrelated conceptual challenges. The first challenge is to reevaluate the validity of the criminal justice institution itself. Because the petty offense process often deviates wildly from standard requirements of due process, evidence, and the adversarial process, it raises new questions about the legitimacy of the legal arrangements that formally convert millions of people into criminals every year.

Second, the misdemeanor system has a massive wrongful conviction problem that dwarfs the felony innocence docket. It stems not from forensic failures but from the slapdash and coercive nature of the plea bargaining process, in which innocent people routinely plead guilty to avoid further pretrial incarceration or the burdens of misdemeanor court. This wrongful conviction problem has been largely absent from the national innocence debate and its focus on serious cases and DNA exonerations.

Misdemeanors also challenge us to rethink what we mean by punishment. Because misdemeanors typically do not trigger jail time, they are often conceptualized as a species of leniency—a gentler alternative to felony convictions and prison. But petty offenses impose deep and lasting burdens on offenders in ways that have been obscured by the punitive shadow of mass incarceration. These burdens—including criminal records, fines, supervision, and a wide range of formal and informal stigmas—drive much of the inegalitarian and racialized quality of the system as a whole.

Finally, petty offenses highlight the extent to which the criminal system functions not so much as a way of identifying wrongdoers—its classic asserted purpose—but as a form of social management and control. The misdemeanor process has become the primary vehicle for tracking young men of color and marking them with criminal records that follow them for a lifetime. It also manages and marks other disadvantaged groups, such the homeless, the mentally ill, or those with substance abuse problems. In ways that the felony-centric model obscures, the misdemeanor perspective reveals how the criminal process is often marginally concerned with guilt and heavily invested in managing risky and disadvantaged populations.

Ultimately, an appreciation of the petty offense process unsettles answers to basic questions that appear settled in the felony context. For example, what process is "due" to defendants faced with minor charges for which they will not be incarcerated but that may nevertheless affect the rest of their lives? Do all wrongful convictions matter or only serious ones? What constitutes and justifies punishment outside the framework of incarceration, and what is proportionality in that realm? And finally, what is our criminal system actually for?

As can be seen in the review that follows, the scholarly literature has only begun to explore these matters. A central reason is that we still lack basic systemic data about misdemeanors, including how many there are, the processes that prosecutors and courts use to generate them, and what happens to misdemeanants before and after they are convicted. Going forward, we will need much more of those data to answer rudimentary questions about the vast bulk of our criminal justice system.

MISDEMEANOR DOCTRINE

As a purely doctrinal matter, misdemeanors trigger several special constitutional rules. The Supreme Court often decides that misdemeanors are jurisprudentially different from felonies, although its rationales vary widely depending on the context. For example, the Fourth Amendment may limit certain kinds of police intrusions when the minor crime at issue involves only mildly culpable conduct. In *Welsh v. Wisconsin* (1984), the defendant was suspected of a noncriminal traffic violation. The Supreme Court concluded that the "gravity of the offense" was too minor to justify a warrantless entry into the defendant's home. As the court put it, when "the government's interest is only to arrest for a minor offense," that interest is outweighed by the defendant's interest in protecting the sanctity of his home.

This solicitude for home privacy does not protect minor offenders from arrest, however. In *Atwater v. Lago Vista* (2000), the court held that police can engage in a full-fledged custodial arrest for any offense regardless of severity—even a non-jailable traffic offense that carries only a fine. Worried that any restrictions on misdemeanor arrest power would create "a systemic disincentive to arrest" and "place police in an almost impossible spot," the court reasoned that police have "an essential interest in readily administrable rules" that justifies the intrusions of arrest, even for an offense for which the offender cannot be jailed. Indeed, the *Atwater* court thought the practice to be so straightforward that it "wonder[ed] whether warrantless misdemeanor arrests need constitutional attention, and there is cause to think the answer is no."

The lighter nature of misdemeanor punishment—particularly when it does not involve incarceration—has persuaded the Supreme Court to roll back some standard procedural protections for misdemeanants. In *Duncan v. Louisiana* (1968), the court concluded that minor offenses (offenses that carry up to six months imprisonment) do not trigger the Sixth Amendment right to a jury trial. By contrast, any minor offense—even one carrying less than six months—triggers the right to counsel as long as the defendant is actually imprisoned for it (*Argersinger v. Hamlin* 1972).

It is this preoccupation with incarceration that has generated the most important and influential doctrinal variation. In *Scott v. Illinois* (1979), the court held that petty offenders who have not been "actually incarcerated" have no right to a lawyer. This holding has had vast ramifications. First, it has created a massive class of unrepresented defendants: Non-jailable offenses do not trigger the right to counsel at all, and courts around the country often decline to appoint lawyers for indigent defendants who receive probation (Boruchowitz et al. 2009). It has filled lower courts with thousands of unlawyered cases, perpetuating the quick-and-dirty culture for which misdemeanor courts have become famous (Roberts 2011). It has also had political effects: The opportunity to cut the costs of public defense for non-jailable misdemeanors has triggered a wave of legislative interest in decriminalization (Natapoff 2015).

The no-lawyer rule reflects the widely held intuition that minor crimes do not deserve as much process as serious ones (Bibas 2012, Hashimoto 2007). But it also offers a profound insight into the structural relationship between crime and punishment. Because we punish misdemeanants less heavily at the back end, we have decided to make it easier to convict them—to label them criminals—on the front end. This trade-off effectively authorizes the system to create more criminals as long as it promises them lenient treatment.

THE ASSEMBLY-LINE PROCESS

The ten million misdemeanor cases filed annually in the United States come in all shapes and sizes. They include theft and assault; victimless crimes, such as drug possession, driving under the influence (DUI), and driving on a suspended license; and order maintenance offenses, such as loitering, trespass, disorderly conduct, and resisting arrest. There is little uniformity: Some state and local dockets consist largely of property crimes, whereas others are dominated by driving on a suspended license, DUIs, or marijuana possession.

Misdemeanors are handled differently depending on jurisdiction and type. Federal misdemeanors are relatively few in number, but—with the notable exception of immigration cases—they tend to get appointed counsel and individuated adversarial treatment (Eagly 2010, Hashimoto 2007). As DUI cases have grown more serious, with a robust defense bar for wealthier defendants, they have generated more careful litigation. By contrast, many lower courts rush indigent defendants through in bulk, earning nicknames such as cattle herding, assembly-line processing, and McJustice. The majority of US petty convictions are generated through these speedy mass processes (Boruchowitz et al. 2009, Roberts 2011).

This mass petty offense system flouts conventional rules of due process and adversariality. Ideally, a criminal conviction requires multiple layers of adversarial checking. When police bring an arrestee into the system, prosecutors are supposed to screen out—or decline—those arrests that do not justify filing a criminal case. Defense attorneys evaluate cases for legal and factual error; courts evaluate guilty pleas for factual bases and voluntariness; and, in the rare trial, the factfinder must decide guilt beyond a reasonable doubt. In the petty offense arena, however, much of this screening never takes place. Low prosecutorial declination rates—as low at 2% in some jurisdictions—show prosecutors routinely converting minor arrests into cases with little scrutiny (Bowers 2010), or into cases that are eventually dismissed only after inflicting significant burdens

on defendants (Kohler-Hausmann 2014). Counsel may not be appointed at all (Boruchowitz et al. 2009). When it is, caseloads of hundreds or even thousands of cases deprive public defenders of the time and resources to investigate or contest guilt (Roberts 2011). Lower courts routinely rush minor cases through, devoting mere minutes to pleas and entering dozens of convictions in a single day (Feeley 1979, Weinstein 2004). The resulting court culture is so inhospitable to legal arguments that defense attorneys may be penalized for trying to raise them (Natapoff 2013b, Primus 2012).

For defendants who are incarcerated prior to trial, the process is particularly coercive. Of defendants who are set bail, the vast majority cannot afford it and will therefore remain incarcerated until their cases are resolved (Fellner 2010). Defendants may end up serving more time in pretrial detention than they would have received as punishment. Many defendants succumb to the pressure to plead, not because they are guilty, but because it is the only way to secure release.

The overall misdemeanor plea rate is 95%, no different from felonies. But the underlying reasons for the rate are specific to the misdemeanor world. In felony cases, harsh sentences and trial penalties make pleas substantively attractive. Years of a person's life hang in the balance. In misdemeanor cases, by contrast, the dynamics of the process itself ensure that most people plead guilty. Defendants who want to contest their guilt may have to wait months for a trial date. Overburdened defenders may not be willing or prepared to litigate, and pretrial incarceration exerts strong pressure to accept a deal. Because convictions are minor and defendants may not fully understand their lifelong consequences, the costs of waiting, fighting, and/or remaining incarcerated will often overwhelm the calculus (Bowers 2008, Feeley 1979). Taken together, the hydraulic pressures exerted by misdemeanor courts, prosecutors, defenders, and jails constitute a massive machine, one that produces criminal records, convictions, and punishments by the millions. The remainder of this review surveys the formidable consequences of these institutional practices.

WRONGFUL CONVICTIONS

The speed and institutional pressures of the petty offense process undermine the reliability of the resulting convictions. In effect, the misdemeanor system jettisons the core procedural provisions that ensure accuracy. Police arrests require only probable cause—a very small amount of evidence. Low declination rates suggest that prosecutors are not meaningfully checking whether evidence supports those arrests. Heavy defender caseloads deprive defense counsel of the time and resources to check the evidence, and assembly-line courts typically do not look behind plea agreements to establish the facts.

When each legal institution presumes that defendants will plead guilty, the only actor left with the information and incentives to contest guilt is the defendant. He or she, however, will typically be precisely the sort of person least equipped to do so, as the misdemeanor process tends to sweep in the disempowered, namely, the indigent, the subliterate, or those suffering from substance abuse or mental health issues. Although there are occasional examples of defendants who resist pleading guilty (Fabricant 2007), they are rare.

As a result, we have a process primed to generate formal criminal convictions based on arrest, i.e., the bare assertion of probable cause by a police officer. This is a system guaranteed to produce many wrongful convictions, because probable cause is by definition a low threshold of evidence. To put it another way, we can have confidence in the accuracy of misdemeanor convictions precisely to the extent that we are confident that police arrest only the guilty.

This confidence will vary among offenses and contexts. DUI arrests require relatively specific evidence, now provided in most cases by technology. Theft and assault misdemeanors involve

victims and thus witnesses. By contrast, in order maintenance cases, such as loitering, trespassing, and disorderly conduct, the evidence underlying arrest typically consists merely of a police officer's assertion about a defendant's behavior. It is this class of offense—intimately tied to police control over urban populations—of which we should be most suspicious, because police famously use order maintenance to accomplish all sorts of goals unrelated to the guilt of the arrestee: to send a message to a neighborhood, clear a corner, or establish authority (Fabricant 2011, Howell 2009, Moskos 2009, Natapoff 2013a). When these types of arrests convert quickly and routinely into convictions without scrutiny or contest, it suggests that many of these defendants are being convicted without reliable evidence of guilt, which is another way of saying that they are probably innocent.

By their nature, these wrongful convictions occur in bulk. For example, for many years New York housing police conducted sweep arrests of young black males in public housing, regardless of their right to be on the premises. Most arrestees pled guilty (Fabricant 2007). Ultimately—and under pressure from a civil rights law suit—the Bronx District Attorney's Office lost so much faith in the housing police that it stopped prosecuting trespassing cases based solely on an officer's word (Roberts 2013). In Baltimore, police similarly arrest young men for loitering as a way of maintaining authority in high-crime neighborhoods, even though the Maryland Court of Appeals has held that the typical basis for those arrests is legally insufficient and that arrestees are demonstrably innocent (Moskos 2009). In sum, the highest likelihood of wrongful misdemeanor conviction occurs in precisely the most politically and socially fraught arena—the overpolicing and overcriminalization of young black men.

The innocence movement has revolutionized criminal law and policy, but it has not grappled with misdemeanors (Gross 2008). Some argue that a minor wrongful conviction may be a relatively small burden to bear compared with the pain and expense of litigating it, especially if the person already has a criminal record (Bowers 2008). But even if this were true, the scale on which minor wrongful convictions occur gives them structural importance (Bibas 2008). The innocence movement has reinvigorated the moral imperative to protect the innocent, and it has taught us that the system gets it wrong even in serious cases where legal players are presumably paying the closest attention. Those efforts to avoid a few hundred wrongful serious convictions should extend to the thousands of minor ones that occur every year.

PUNISHMENT

Misdemeanor punishment is messy. In theory, the state acquires the moral and legal power to punish only once the accused is found guilty. But the petty offense process famously begins punishing long before any adjudication of guilt (Feeley 1979). People may be selected for arrest—and the lifelong burden of that mark—because police deem them suspicious based on their age, race, or neighborhood. The very process of going through the lower criminal court system imposes numerous punitive burdens, including temporary court records, reporting requirements, time, and other resources (Kohler-Hausmann 2013, 2014). Once in the system, defendants may concede guilt to avoid the further punishment of pretrial delay or incarceration. Afterward, the informal stigma of arrest and conviction can haunt defendants long after their sentences have been served (Jain 2015, Rodriguez & Emsellem 2011), and the entire process has a corrosive and dehumanizing effect on the dignity of its subjects (Simon 2012).

Legally speaking, many burdens that flow from an encounter with the misdemeanor system are not deemed punishment and therefore do not trigger the same legal scrutiny or procedural protections. But they nevertheless label and disadvantage defendants in ways that mirror—or sometimes exceed—the formal punishment associated with a minor offense. This is a crucial point. Informal and collateral consequences are not unique to misdemeanors—felons are marked

and burdened in similar ways. But they create special distortions in petty offense sentencing where they may actually be more punitive than the formal sentences deemed appropriate and sufficient by law.

Formal punishments associated with misdemeanors include jail, probation, fines, community service, and—increasingly for drug offenses—treatment programs. Jail is the less common sentence: Most receive some combination of fines and supervision (Bowers 2008, Hashimoto 2007). Probation is typically cast as a lenient alternative to incarceration. But it is punitive in its own unique ways. Probation terms are typically much longer—six months to two years—than misdemeanor incarceration terms. While on probation, offenders are subject to myriad intrusive conditions, including drug testing, employment requirements, travel restrictions, and loss of privacy (Doherty 2014). Violation of any of these terms can send the probationer to jail, for as long or longer than they might have received in the first instance. For such reasons, some offenders openly state a preference for brief incarceration over the long-term intrusive dance with a probation officer.

Fines are the great underappreciated engine of the misdemeanor world and its inequalities. For a largely indigent and/or underemployed criminal justice population, fines can be a heavy-handed and long-term form of punishment that displaces necessities like food and rent, destroys credit, and otherwise derails defendants' lives (Beckett & Harris 2011, Harris et al. 2010, McCormack 2007). Many states incarcerate defendants who fail to pay their fines, either as a probation violation or under the aegis of civil contempt. In a phenomenon that some are calling the new debtors' prison, an increasing number of defendants go to jail solely because they cannot afford their fines (Alexander et al. 2010, Bannon et al. 2010). The dynamic is exacerbated in the numerous states that contract probation supervision and fine collection out to private firms. Those firms charge additional supervision fees directly to probationers, which can also trigger incarceration if the defendant fails to pay them (Albin-Lackey 2014).

Misdemeanor fines also pose a serious conflict for the justice process because many courts, probation offices, and local governments rely on fines and fees to fund their own operations. The incentive to impose fines and aggressively collect revenue has already distorted the priorities of many courts and law enforcement institutions (Alexander et al. 2010, Reynolds & Hall 2012), perhaps most infamously in Ferguson, Missouri (US Dep. Justice 2015). In this way, misdemeanor fines threaten to become a kind of regressive tax used to sustain the criminal apparatus itself (Natapoff 2015).

COLLATERAL CONSEQUENCES

A burgeoning literature on the collateral consequences of conviction has shed new light on the punitive burden of misdemeanors (Logan 2013; Pinard 2010a,b). The full consequences of a minor conviction extend far beyond the fine or probationary period to include numerous other formal and informal effects that can derail a person's economic and social trajectory.

First is the effect of the conviction itself. Even when an offender receives no other formal punishment, the impact of a minor conviction is increasingly destructive and lasting. For example, the criminal system itself treats people with records more harshly. A record can make police more likely to arrest or prosecutors more likely to charge; a minor conviction will lengthen a subsequent sentence. It may also land a person in a DNA database. Two-thirds of states already collect DNA samples from certain classes of convicted misdemeanants (such as sex offenders), and many are poised to expand the pool to all minor offenses or even to misdemeanor arrestees (Joh 2015).

A minor conviction formally disqualifies a person from a wide range of benefits, including public housing, educational opportunities, and professional licenses (Roberts 2011). A petty offense—even a non-jailable infraction—can affect a person's immigration status or trigger

deportation (Cade 2013). The effects are particularly destructive with respect to employment. Many employers impose no-arrest or clean-record requirements, disqualifying misdemeanants and felons alike (Rodriguez & Emsellem 2011). Employers now routinely check records—90% claim to do so—stating that they are unwilling to hire anyone with a criminal record. A criminal record—even a minor one—or an outstanding failure-to-pay warrant can deter a person from interacting with numerous civic institutions, including banks, hospitals, and emergency 911 services (Brayne 2014, Goffman 2014). In sum, the full effect of a minor conviction is anything but minor. Long overshadowed by the uniquely destructive effects of incarceration, misdemeanor punishment derails the lives of millions of Americans every year in deep and lasting ways that have yet to be fully appreciated in the public discourse on punishment.

ARRESTS AND POLICING PRACTICES

One of the great differences between felonies and misdemeanors is how the latter magnifies the power of the police. In a felony case, an arrest initiates a process in which prosecutors will eventually take the lead. Criminal procedure doctrine is structured around this model, in which probable cause is enough for an arrest and initial charge precisely because prosecutors are expected to make extensive additional judgments about the evidence and whether the case should go forward, and where the adversarial process is expected to test and validate the eventual outcome (Natapoff 2012).

In misdemeanors, by contrast, prosecutors—and the rest of the adversarial process—play a weaker evaluative role. Prosecutors, public defenders, and courts largely assume that once defendants enter the system they will plead guilty or be subjected to some form of penal control (Kohler-Hausmann 2014, Natapoff 2013a). This institutional reality—sometimes referred to as the "presumption of guilt" (Bowers 2010)—renders the initial police decision to arrest nearly dispositive, and the most significant substantive evaluation of whether there is evidence of the person's guilt. This is not the way the criminal system is supposed to work, but in jurisdictions with massive misdemeanor dockets and assembly-line courts, arrests acquire an outsized substantive significance. In the felony world it is often said that the most powerful decision maker is the prosecutor (Stuntz 2004). In the misdemeanor world, it is the police.

As a result, the policies and demographics of police arrest practices become crucial determinants, not only of the composition of the eventual criminal pool but of the systemic rationales behind criminalization. Where police are making arrests in response to evidence of specific crimes—for example, in victim-reported crimes like theft and assault—those motivations reflect the traditional guilt-driven model of criminal justice. But arrest practices driven by zero tolerance, order maintenance, gentrification, and other class- and race-inflected policies often have little to do with individual culpability or evidence. Instead, they are better explained by police department incentives, urban histories, and racial politics (Fagan et al. 2010). By converting those arrests into convictions, the misdemeanor process becomes the vehicle for the formal criminalization of broad classes of socially vulnerable people.

MISDEMEANOR RACIALIZATION OF CRIME

Nowhere has this dynamic been more influential and problematic than in the urban policing practices that criminalize so many young men of color. In jurisdictions where stop-and-frisk and order maintenance policing have become staples, the path from stop to arrest to conviction is disturbingly frictionless. To the extent that police practices are based on race, the resulting

convictions can be understood as products of group-based policing decisions. This makes the misdemeanor system the first formal step in the racialization of American crime.

New York provides a paradigmatic example (Fabricant 2011, Howell 2009). Starting in 2003, the New York Police Department escalated their use of stop-and-frisk, stopping over half a million people each year, most of them young men of color. Black stop rates were up to five times those of whites (NYCLU 2012). In the highest-crime neighborhoods of New York, nearly 80% of young black men were stopped at least once in a single year (Fagan et al. 2010, Geller & Fagan 2010, Meares 2014). Arrest rates were similarly disproportionate: African Americans were arrested for misdemeanors at three or four times the rate of whites (Chauhan et al. 2014).

Misdemeanor systems across the country reflect similar disparities at various stages of the criminal process. With respect to marijuana possession, African Americans are arrested nationally at nearly four times the rate of whites. In jurisdictions with the worst disparities, blacks are ten, twenty, or even thirty times as likely to be arrested (Edwards et al. 2013). In Chicago, after marijuana possession was decriminalized, arrest rates for possession fell in white neighborhoods but actually rose in black neighborhoods (Kane-Willis et al. 2014). In Milwaukee County, Wisconsin, prosecutorial declination rates were 41% for whites accused of drug paraphernalia but only 27% for nonwhites for the same offense. In Mecklenburg, North Carolina, prosecutors did not decline a single drug charge against African American female defendants, even though overall prosecutorial declination rates were approximately 30% (McKenzie et al. 2009). Although data are thin on misdemeanor sentencing, research suggests that race and class combine to elevate the sentences of poor minority defendants (Brennan 2006, Leiber & Blowers 2003).

In this way, each stage of the misdemeanor process—from stop-and-frisk to arrest to prosecution—operates to single out and criminalize based on group membership. Taken together, the process functions in the aggregate, arresting and convicting in ways that are driven by race, age, neighborhood, and other collective criteria rather than by individuated evidence of guilt. Misdemeanors are thus one of the concrete mechanisms through which the US criminal system engages in the group criminalization of disadvantaged populations (Fabricant 2011, Natapoff 2013a).

SOCIAL CONTROL

The misdemeanor perspective raises fundamental questions about the purposes and commitments of the criminal system as a whole. These questions are not new. Over 30 years ago, Malcolm Feeley (1979) famously argued that the petty offense system transforms the criminal "process" into the "punishment." Irwin (1985) described jail as an institution invented and maintained not to house criminals but to "manage society's rabble." A decade later, Feeley & Simon (1992, p. 452) worried that the system was losing its individual focus and becoming "actuarial," with "the replacement of a moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations."

Misdemeanors may be the best example of this new penology. Although the misdemeanor process has commandeered the tools and language of the criminal system, and purports to adhere to its accompanying due process constraints, in practice the system is less about establishing guilt under law than identifying, labeling, and controlling disadvantaged and disfavored populations (Dubber 2005, Wacquant 2009). Population management, not guilt, is the primary concern, as police, prosecutors, and courts iteratively mark and keep tabs on populations considered risky, even those who may never actually be convicted of a crime (Fabricant 2011, Kohler-Hausmann 2013, Natapoff 2013a).

The misdemeanor perspective thus gives empirical teeth to an important sociological perspective on criminal justice, namely, that its central purpose is social management rather than the

discovery and adjudication of individual guilt. By tracing the institutional workings of the petty offense process, we can see concretely how each stage disables or disincentivizes each class of legal actor—prosecutor, public defender, judge—who might otherwise ensure fidelity to criminal justice norms such as evidentiary integrity, individuation, and due process. Instead, the process defers to police—tasked with the job of maintaining social order—to determine who shall ultimately be labeled criminal. These are the tangible mechanisms through which the misdemeanor system permits a regulatory social control agenda to proceed under the formal aegis of criminal law.

DECRIMINALIZATION

There have been several responses to the misdemeanor challenge. Some focus on the lack of counsel and advocate strengthening the defense bar (King 2013, Roberts 2013). A growing chorus supports various forms of decriminalization, including diversion programs, drug courts, and the conversion of misdemeanors into non-jailable offenses (Boruchowitz 2010, Spangenberg Proj. 2010). This last option is increasingly popular in large part because it eliminates the misdemeanant's right to counsel, thereby relieving overburdened public defender offices and saving the state millions of dollars in the costs of prosecution, defense, and jail.

Marijuana has become a kind of natural experiment in misdemeanor decriminalization. At least 22 states have decriminalized marijuana possession in some form, and 3—Washington, Colorado, and most recently Oregon—have fully legalized it. But states are also experimenting with decriminalization of other offenses, such as traffic and order maintenance offenses (Woods 2015).

Decriminalization is a complex regulatory option that can take various forms (Natapoff 2015). Some states convert minor crimes into non-jailable misdemeanors that eliminate incarceration but remain criminal in nature. Others reclassify offenses as civil infractions punishable only by fine and typically implemented through the issuance of a ticket or summons. Each of these options has its own distinct implications.

In certain lights, decriminalization looks like a win-win. First and foremost, it benefits defendants by taking incarceration off the table. Some defendants may also be able to avoid arrest and the concomitant record. It saves scarce tax dollars that can be used by public defender offices, prosecutors, and courts to focus on more serious crimes. Just as importantly, it represents a much-needed return to a spirit of proportionality in which minor crimes receive more measured condemnation and punishment. Finally, because African American men are disproportionately criminalized through the petty offense process, decriminalization could potentially ease the system's overall racial skew (Natapoff 2012, 2015).

But decriminalization has a dark side. It strips vulnerable defendants of counsel and due process while continuing to impose convictions and significant punishments. Decriminalization is a famous net-widener, making it logistically and normatively easier to sweep people into the criminal process (Austin & Krisberg 1981). Defendants who cannot pay their fines or comply with onerous supervisory conditions may face increased punishment and incarceration. And finally, because the revenues from minor offenses are a major funding source, decriminalization incentivizes lower courts and municipalities to go after low-income, socially vulnerable populations (Logan 2015).

At the end of the day, decriminalization is not legalization. Although it represents an improvement on the status quo, it is a compromise with, not a rejection of, the culture of control or governing through crime (Garland 2001, Simon 2007). Indeed, it may even represent a kind of modernization or upgrade, dissociating the misdemeanor system from the excesses of mass incarceration while preserving its overall scope and authority.

FUTURE RESEARCH

As misdemeanors comprise an ever-increasing proportion of the American criminal system, there is a pressing need for more data. The 2009 NACDL report (Boruchowitz et al. 2009, p. 11) remains the only effort to estimate national dockets. Even that effort concluded that "[t]he exact number [of misdemeanors] is not known, as states differ in whether and how they count the number of misdemeanor cases processed each year."

On a granular level, there are few examinations of the actual operations of misdemeanor dockets and courts. Existing research heavily favors New York (Chauhan et al. 2014, Fabricant 2011, Fagan et al. 2010, Howell 2009, Kohler-Hausmann 2014, Weinstein 2004). And although the scholarly literature now pays greater attention to collateral consequences, we still do not know the full impact of a minor conviction on a defendant's employment prospects, housing, education, credit, or other life opportunities. To make matters more difficult, misdemeanor courts operate very differently at the state, county, and municipal level.

There is accordingly an enormous need—and enormous opportunity—for empirical studies of the petty offense system. Scholars have only begun to analyze what we already know about the powerful influence of misdemeanors on all aspects of the American justice system. As the country considers relinquishing the draconian policies of mass incarceration and relies more on lesser offenses and punishments, these inquiries will only become more vital.

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