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# The High Stakes of Low-Level Criminal Justice

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# THE YALE LAW JOURNAL

ALEXANDRA NATAPOFF

## The High Stakes of Low-Level Criminal Justice

### *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing*

BY ISSA KOHLER-HAUSMANN

PRINCETON UNIVERSITY PRESS, 2018

**ABSTRACT.** The low-level misdemeanor process is a powerful socio-legal institution that both regulates and generates inequality. At the same time, misdemeanor legal processing often ignores many foundational criminal justice values such as due process, evidence, and even individual guilt. These features are linked: the erosion of the rule of law is one of the concrete mechanisms enabling the misdemeanor system to take aim at the disadvantaged, rather than at the merely guilty. In the book *Misdemeanorland*, Issa Kohler-Hausmann describes the inegalitarian workings of the misdemeanor legal process in New York City and how it operates as a system of managerial social control over the disadvantaged even when it stops short of convicting and incarcerating them. This Review summarizes the book's key contributions to the burgeoning scholarly discourse on misdemeanors and then extends its insights about New York to illuminate the broader dynamics and democratic significance of the U.S. misdemeanor process.

**AUTHOR.** Professor of Law, University of California, Irvine School of Law. Special thanks to Guy-Uriel Charles, Sharon Dolovich, Mona Lynch, and Doug NeJaime. My thanks also to the editors of the *Yale Law Journal* for their excellent work.



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**INTRODUCTION**

Over the past few years, misdemeanor policing and low-level courts have increasingly become the subject of legal scrutiny, social unrest, and racial distrust. Across the country, civil rights advocates are suing municipal courts for operating as barely disguised regressive tax operations, in a system that the *New York Times* has labeled “cash-register justice.”<sup>1</sup> Bail reform is sweeping the nation in large part because cash bail in low-level cases is increasingly understood as a form of unconstitutional discrimination against the poor. The anger of the Black Lives Matter movement is heavily fueled by the experience of order-maintenance policing — stops and arrests for minor offenses such as loitering, trespassing, and disorderly conduct.<sup>2</sup> Michael Brown, after all, was originally stopped merely for jaywalking in the streets of Ferguson before police officer Darren Wilson shot and killed him.<sup>3</sup> And in 2015, the Republican-controlled Senate Judiciary Committee held a hearing entitled “Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors,” in which committee chair Senator Chuck Grassley lamented that

many states are not providing counsel as the Constitution requires. It is a widespread problem. In reality, the Supreme Court’s Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times every day. No Supreme Court decisions in our history have been violated so widely, so frequently, and for so long.<sup>4</sup>

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1. Editorial, *Ending Cash-Register Justice*, N.Y. TIMES, (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/opinion/ending-cash-register-justice.html> [<https://perma.cc/7YNH-A5V8>].
  2. *End Broken Windows Policing*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/brokenwindows> [<https://perma.cc/ZSM9-82U4>] (arguing for the elimination or deprioritization of offenses including “Consumption of Alcohol on Streets, Marijuana Possession, Disorderly Conduct, Trespassing, Loitering, Disturbing the Peace [including Loud Music], Spitting, Jaywalking, [and] Bicycling on the Sidewalk”); see also Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 549-51 (2017) (identifying low-level misdemeanor policing as a source of systemic racism).
  3. Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES (Aug. 17, 2014), <https://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html> [<https://perma.cc/YBR7-MMGK>].
  4. *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary) [hereinafter Grassley Statement]; see also Andrew Cohen, *A New Conservative Approach to Justice: Serve the Poor*, MARSHALL PROJECT (May 12, 2015), <https://www.themarshallproject.org/2015/05/12/a-new-conservative-approach-to-justice>

The stakes of this debate could not be higher. Misdemeanors represent eighty percent of state criminal dockets.<sup>5</sup> Approximately thirteen million misdemeanor cases are filed nationally every year, compared to three or four million felony cases.<sup>6</sup> The misdemeanor process is the governance vehicle through which the U.S. penal system most frequently exercises its coercive police and punitive powers, usually over the most economically and racially vulnerable subjects. This is how the criminal system engages with most people, most of the time. Yet it does so in ways that are profoundly attenuated from the basic procedural requirements and substantive justifications of criminal law. Light on due process, heavy on informal controls, and relatively uninterested in evidence or culpability, the petty-offense process does the work of criminal justice in violation of key rules governing the exercise of state criminal authority.

There are numerous disturbing features of this phenomenon – it criminalizes the poor, convicts the innocent, and often violates the Constitution. But the foundational questions run deeper. The misdemeanor process sits on a democratic fault line of the criminal system as a thinly regulated exercise of police power that persistently resists many basic legitimating constraints of state penal authority and constitutional democracy. It is aggressively stratifying, aimed disproportionately at the poor and people of color while contributing heavily to wealth-based and racial inequality. Enormous, decentralized, and opaque, the misdemeanor process is at once highly influential and lacking in democratic accountability.

For decades, the legal academy paid scant attention to this vast arena of law, policy, and practice. But that has recently changed. In 2018, two full-length books on the subject were released,<sup>7</sup> the first since Malcolm Feeley published his

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-serve-the-poor [<https://perma.cc/6BK2-QF4T>] (contextualizing the Senate Judiciary Committee hearing within broader conservative support for devoting more resources to appointed counsel in misdemeanor cases).

5. ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* 40-41 (2018).
6. *Id.*
7. ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018); NATAPOFF, *supra* note 5.

seminal work, *The Process Is the Punishment* in 1979.<sup>8</sup> Also in 2018, Boston University held a two-day symposium<sup>9</sup> that generated nine articles on “the Misdemeanor Machinery,”<sup>10</sup> while at least four additional law review articles explored important aspects of the petty-offense process.<sup>11</sup> The year before, in 2017, scholars published over fifteen more pieces.<sup>12</sup> Subjects ranged from cash bail to debtor’s prison to wrongful convictions.

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8. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (paperback ed. 1992).
  9. *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System*, B.U. SCH. L., <https://www.bu.edu/law/2017/09/15/misdemeanor-machinery-the-hidden-core-of-the-american-criminal-justice-system> [<https://perma.cc/K8SH-N887>].
  10. Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837 (2018); Greg Berman & Julian Adler, *Toward Misdemeanor Justice: Lessons from New York City*, 98 B.U. L. REV. 981 (2018); Jenn Rolnick Borchetta, *Curbing Collateral Punishment in the Big Data Age: How Lawyers and Advocates Can Use Criminal Record Sealing Statutes to Protect Privacy and the Presumption of Innocence*, 98 B.U. L. REV. 915 (2018); Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673 (2018); Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999 (2018); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Irene Oritseweyinmi Joe, *The Prosecutor’s Client Problem*, 98 B.U. L. REV. 885 (2018); Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779 (2018); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018).
  11. Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018); Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2 (2018) (arguing that common forms of economic sanction constitute fines for the purpose of the Eighth Amendment); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1381 (2018) (asserting “that the reach of the criminal justice system is not just the product of overly punitive laws, but also the product of institutions capitalizing on criminal law decisions for their own ends”); Zina Makar, *Displacing Due Process*, 67 DEPAUL L. REV. 425, 425 (2018) (arguing that “procedural protections have been unjustly reserved for the trial stage based on the unrealistic assumption that a trial will be guaranteed”); see also Carlos Berdejó, *Gender Disparities in Plea Bargaining*, 94 IND. L.J. (forthcoming 2019).
  12. Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon’s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299 (2017); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017); Alexandra Natapoff, *A Stop Is Just a Stop: Terry’s Formalism*, 15 OHIO ST. J. CRIM. L. 113 (2017); Henry Ordower et al., *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution, and Constitutional Limitations*, 61 HOW. L.J. 113 (2017); Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171 (2017); Jessica A. Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215 (2017); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017). A 2017 symposium at Hofstra published a total of ten misdemeanor-related articles. Symposium, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 1 (2017).

This cornucopia of new scholarship represents the initiation of a long overdue project: a rigorous, academy-wide evaluation of the largest component of the modern U.S. criminal system.<sup>13</sup> It is a component that has been intellectually overshadowed by the excesses of its felony counterpart; the legal academy has spent decades unpacking the theoretical challenges and programmatic weaknesses of mass incarceration. Finally, misdemeanors are getting their due.

Issa Kohler-Hausmann makes an important contribution to this burgeoning discourse in her book *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing*. The book is a deep sociological dive into the workings of New York City's lower court system, which processes hundreds of thousands of misdemeanor cases every year. Kohler-Hausmann uses the advent of broken-windows policing in New York in the 1990s and the explosion of minor arrests that it generated to explore how that court system responded to the massive influx of cases. From 1980 to 2010, annual misdemeanor arrests in New York nearly quadrupled from 65,000 to 251,000.<sup>14</sup> Through detailed analysis of the routine charging, processing, and sentencing decisions made in New York courts between approximately 2000 and 2015, Kohler-Hausmann offers a nuanced view of misdemeanor punishment, finding that it is just as concerned with imposing criminal record "marks" and informal social controls as it is aimed at producing legal convictions and formal sentences. She calls this phenomenon "managerial justice," in which prosecutors and judges

seek social control by sorting and testing defendants into the future by building records on their law enforcement contacts, evaluating their rule-abiding propensities through measured compliance with a series of procedural requirements, and gradually ratcheting up the punitive response

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13. I have argued for this kind of sustained attention to misdemeanors since 2012. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) [hereinafter Natapoff, *Misdemeanors*]; see also, e.g., Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 71, 71-92 (Sharon Dolovich & Alexandra Natapoff eds., 2017) [hereinafter Natapoff, *The Penal Pyramid*] (theorizing the erosion of rule of law at the bottom of the penal pyramid, where offenses are pettiest); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013) [hereinafter Natapoff, *Aggregation and Urban Misdemeanors*] (discussing the erosion of the individual-fault model in misdemeanor processing); Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) [hereinafter Natapoff, *Gideon Skepticism*] (discussing structural barriers to effective misdemeanor representation); Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445 (2015) [hereinafter Natapoff, *Gideon's Servants*] (discussing the welfarization of crime around petty offenses); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (discussing the inegalitarian effects of decriminalization).
14. KOHLER-HAUSMANN, *supra* note 7, at 42; see also *id.* at 124 (noting that between 115,000 and 200,000 subfelony cases are resolved annually at arraignment).

with each successive encounter or failure to live up to the court's demands.<sup>15</sup>

Kohler-Hausmann contrasts managerial justice with what she terms the “adjudicative model,” a more conventionally legalistic framework “concerned with deciding guilt and punishment in specific cases.”<sup>16</sup> Unlike the adjudicative model, managerial justice is not particularly interested in evidence or guilt, but rather in exercising social control through “marking,” “procedural hassle,” and “performance.”<sup>17</sup> As described by the book, these three practices are the primary tools through which New York legal officials track, evaluate, and control the people who pass through “misdemeanorland.” These practices involve marking and tracking defendants by creating detailed criminal records and imposing demeaning experiences and onerous performances on them that the system then uses to evaluate defendants’ general rule-abiding character. Managerial justice still punishes, but it often postpones or forgoes incarceration and conviction in exchange for these lighter, less formal intrusions.<sup>18</sup> At bottom, managerial justice is based on a “presumption of need for social control over the people who are brought from” disorderly communities into the criminal system,<sup>19</sup> who in turn are largely poor people of color.<sup>20</sup> The book’s primary claim is that managerial justice, with its presumptive need for social control and its lighter punitive touch, has largely displaced the adjudicative model in New York City.<sup>21</sup>

The book builds upon a number of intellectual traditions. It is a welcome addition to the collateral-consequences literature, which has long noted that

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15. *Id.* at 5.

16. *Id.* at 4; *see also id.* at 61 (defining the adjudicative model as one in which “the role of court actors is to adjudicate the factual guilt or innocence of a defendant in a particular case”); *id.* at 72 (further describing the adjudicative model).

17. *Id.* at 5.

18. *Id.* at 199 (describing criminal justice actors as willing to accept managerial justice “in lieu of formal punishment”); *id.* at 74 (asserting that managerial practices “illustrate a [prosecutorial] sentiment that it is morally unnecessary for the heavy machinery of criminal justice to come down on every defendant accused of a low-level offense if the person can prove himself to be responsible and governable”); *id.* at 266 (“The moral principle at work in the managerial model [is] that we essentially don’t seek any punishment at all unless the person demonstrates a persistent disregard for social rules and otherwise seems unmoored from other institutions of social control . . .”).

19. *Id.* at 53; *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 627 (2014) (“[The managerial model] operates on the basis of a presumption of need for social control over the population brought into misdemeanor court.”).

20. KOHLER-HAUSMANN, *supra* note 7, at 51-53.

21. *Id.* at 4 (claiming that misdemeanor courts in New York City “have largely abandoned” the adjudicative model); *id.* at 10 (same).

convictions and formal penalties are not the only punitive experience—and for misdemeanors, not even the central punitive experience—visited upon people who pass through the criminal process. As various scholars have explained, “misdemeanor prosecutions and convictions ha[ve] negative effects that reach far beyond the confines of the criminal courthouse” and “non-criminal sanctions . . . often overwhelm any sentence that the trial judge imposes.”<sup>22</sup> Negative effects may include the loss of immigration status, housing, public benefits, driver’s licenses, credit, and social status.<sup>23</sup> The punitive experience can begin as early as the initial arrest, which serves not only as an exercise of criminal police power but as “a regulatory tool—a means of monitoring, ordering, and tracking individuals. The aim of this type of [arrest-based] regulation can be quite distinct from certain criminal law concerns—adjudicating guilt or innocence, maintaining law and order, deterring crime, and meting out punishment.”<sup>24</sup> *Misdemeanorland*’s thick descriptions of the mechanics of social control advance this burgeoning misdemeanor literature and deepen our understanding of the many dimensions of the low-level criminal justice encounter.

*Misdemeanorland* also dovetails with scholarship regarding the criminalizing control exerted by poverty-oriented public institutions such as welfare offices, housing courts, and hospital emergency rooms—the so-called “criminalization of poverty.”<sup>25</sup> Frances Fox Piven and Richard Cloward observed long ago that a central function of public welfare is the “regulation of marginal labor and . . . the maintenance of civil order.”<sup>26</sup> Nearly forty years later, Loïc Wacquant argued that this welfarist social-control function has been largely taken over by the criminal system, representing “the gradual replacement of a (semi-) welfare state by a police and penal state for which the criminalization of marginality and the punitive containment of dispossessed categories serve as social policy at the lower end

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22. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 288, 364 (2011).

23. *Id.* at 371; see also NATAPOFF, *supra* note 5, at 19–38 (describing the far-reaching impact of misdemeanor encounters); 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, 300–07 (2009) (describing the punitive impact of encounters with the New York misdemeanor system).

24. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 815 (2015); see Anna Roberts, *Arrests as Guilt*, 60 ALA. L. REV. (forthcoming 2019).

25. KOHLER-HAUSMANN, *supra* note 7, at 224 (comparing the misdemeanor process to welfare offices); see Natapoff, *Gideon’s Servants*, *supra* note 13, at 450–53 (describing resonances between the welfare state and the petty-offense process).

26. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 371 (2d Vintage ed. 1993) (1971).

of the class and ethnic order.”<sup>27</sup> This takeover is exemplified by the criminalization of welfare,<sup>28</sup> health care, and homelessness. In his study of emergency-room practices in large urban hospitals, for example, Armando Lara-Millán describes how nurses allocate medical resources based on patients’ perceived criminality, and concludes “that the urban poor’s access to health care is mediated . . . by incarceration, policing, and crime control language.”<sup>29</sup> On Los Angeles’s enormous Skid Row, police route the homeless into shelters under the threat of arrest.<sup>30</sup> As *Misdemeanorland* illustrates in detail, the petty-offense process is an active member of this interrelated family of controlling institutions.

Perhaps most obviously, *Misdemeanorland* is part of a long tradition in sociology—Kohler-Hausmann is a sociologist—that understands lower courts primarily as institutions of social rather than legal control. In 1956, Caleb Foote described the vagrancy courts of Philadelphia as devoted to poverty management:

Philadelphia magistrates . . . viewed their function as a deterrent one to banish “bums” from Philadelphia and keep them out (“After this you stay where you belong”), or as a form of civic sanitation (“I’ll clean up this district if I have to stay here until 5 o’clock every afternoon”), or as control of suspicious persons (“There have been a lot of robberies around here. I’m going to have you investigated—three months”), or as humanitarian (“I’m saving his life by sending him where he can’t booze”).<sup>31</sup>

Twenty years later, Malcolm Feeley wrote that “criminal courts everywhere are populated by the poor and the disadvantaged and the problems that bring them

27. LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 41 (2009); see also ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016) (describing how the welfare programs of Lyndon Johnson’s Great Society morphed into the criminal justice apparatus of mass incarceration).

28. KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 51-68 (2011).

29. Armando Lara-Millán, *Public Emergency Room Overcrowding in the Era of Mass Imprisonment*, 79 AM. SOC. REV. 866, 880 (2014); see also Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1676-77 (2008) (“[I]n exchange for prenatal treatment at government-funded hospitals, pregnant women should assume that blood tests, urine samples, and other medical information will be divulged to police and prosecutors at the whim of doctors and nurses expressly for the purpose of punishing pregnant women for the ways in which they behave.”).

30. FORREST STUART, *DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW* 4, 13, 81 (2016).

31. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 613 (1956).

into contact with the criminal courts do not vary radically. Indeed, the courts are one of society's primary institutions for managing such people and their continuing problems."<sup>32</sup> In 1985, John Irwin described the purpose of jail—a core misdemeanor institution—as “managing the underclass in American society.”<sup>33</sup> “[J]ail was invented,” he wrote, “and continues to be operated, in order to manage society's rabble.”<sup>34</sup> *Misdemeanorland* offers a rich, empirically sophisticated, updated version of these analyses, replete with multiyear cohort comparisons and aimed at one of the largest experiments in misdemeanor policing and processing in U.S. history.

This Review summarizes, contextualizes, and extends some of the many contributions of *Misdemeanorland* in light of the broad institutional and democratic challenges that petty-offense processing poses to the U.S. criminal justice enterprise writ large. Part I offers a national perspective by providing a brief overview of misdemeanor processing as practiced in thousands of jurisdictions around the country. It zeroes in on two key systemic features—the erosion of legal norms and the stratifying tendency to target poor people of color—and argues that these two features are intimately linked. Devaluing due process is one of the primary mechanisms through which the misdemeanor process creates and exacerbates social disadvantage.

Part II then summarizes the main contribution of *Misdemeanorland*, its detailed and provocative picture of New York City practices, and unpacks the book's description and theory of managerial justice. In particular, it highlights the book's nuanced depictions of the managerial mechanisms of social control and the various ways in which they advance our understandings of the misdemeanor-punishment phenomenon.

The Review then builds on the book's offerings in a few different directions. First, in Part III, it unpacks the persistence in New York of conventional punishments like incarceration and conviction in order to consider how managerialism sits along the broader spectrum of misdemeanor punitive practices. Although New York is atypical in many ways,<sup>35</sup> analyzing its distinctive features opens up a potential comparative conversation about how other U.S. jurisdictions deploy their own mix of managerial and conventional punishments.

Part IV excavates the transformative role played by defense counsel in New York. *Misdemeanorland* argues that New York has largely abandoned the adjudi-

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32. FEELEY, *supra* note 8, at xxii.

33. See JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* 9-10 (1985).

34. *Id.* at 2.

35. KOHLER-HAUSMANN, *supra* note 7, at 15 (describing New York City's misdemeanor courts as “simultaneously interesting and atypical”).

cation of guilt and innocence, but the book also describes the persistently adversarial quality of misdemeanor processing in ways that complicate that story. The adversarial process has a deep relationship to American adjudicative norms, and New York defense attorneys often behave like classic adjudicative actors—engaging in zealous representation, fighting over facts, and litigating to the extent the system permits—with visible impact on case outcomes. At the same time, prosecutors strongly resist dismissing cases, in effect validating the policing assumptions that generated those cases in the first place. This adversarial clash generates managerial compromises. Buried in *Misdemeanorland* is thus a potentially more adjudicative narrative about how New York public defenders structurally counteract punitive prosecutorial defaults. It is a narrative with implications for the entire U.S. misdemeanor system, in which the Sixth Amendment right to counsel is persistently underenforced in ways that account for some of its punitiveness.

Lastly, in Part V, the Review returns to the linkages between due process and equality norms and articulates more thoroughly the normative damage done to principles of race and class equality when misdemeanor systems jettison commitments to evidence, questions of actual guilt, due process, and other rule-of-law values. Although *Misdemeanorland* criticizes the inegalitarian class and racial dynamics of the New York misdemeanor system, it does not explicitly resolve the normative question of how deeply managerial justice is to blame. Part V considers the book's various critical descriptions of managerialism and concludes that *Misdemeanorland* is best read as a demonstration that the dual managerial turn away from criminal guilt and toward social control is actively classist and racist.

Misdemeanors sit in the shadow of mass incarceration and as a result are often mistakenly assumed to be lenient. Indeed, the excesses of mass incarceration have numbed us to the special brand of dehumanization that characterizes much misdemeanor processing. But *Misdemeanorland* implicitly destabilizes the leniency fallacy: the book shows how New York's managerial approach remains disrespectful, burdensome, and punitive in its own ways. More broadly, the story of New York's massive expansion of policing and prosecution under the aegis of broken windows is a cautionary tale about normative baselines. It reminds us to be skeptical whenever the state intentionally extends its criminalizing reach over many more individuals and then frames its treatment of those new subjects as "lenient" because it could have punished them more harshly. Such insights can help us appreciate more fully the punitive qualities of the entire U.S. misdemeanor behemoth.

## I. THE MISDEMEANOR CHALLENGE IN NATIONAL PERSPECTIVE: DEVALUING DUE PROCESS FOR THE DISADVANTAGED

Because the U.S. misdemeanor landscape is enormous, diverse, and often opaque, no single description can do it full justice. There are thousands of low-level courts across the country—including district courts, municipal courts, magistrate courts, summary courts, justice courts, and mayor’s courts. Each state handles them in its own fashion. Moreover, states vary widely in how much data they collect and publicize about their misdemeanor dockets, so national data is uneven in quality and availability. Some states, like New York, have unified systems in which all low-level courts report to the central Administrative Office of the Court (AOC), but at least ten states do not and therefore do not centrally track misdemeanor cases and convictions.<sup>36</sup> For example, in 2015 when I asked Maine’s AOC for a breakdown of its misdemeanor caseload, the office told me that its computer system was too outdated to perform that kind of data analysis.<sup>37</sup> Nationally, about half of all state-court prosecutors report case resolutions to statewide criminal-record repositories, and only half of those prosecutors report misdemeanor dispositions.<sup>38</sup> Hundreds of municipal courts provide no public data on the thousands of cases and convictions that they process every year.<sup>39</sup>

These low-level courts perform all sorts of legal and social control work. They assess guilt and impose criminal convictions. They mark, track, evaluate, and punish. Some enforce spatial boundaries of segregation and gentrification, punishing people of color, drug addicts, or the homeless for entering areas in which businesses or residents do not want them.<sup>40</sup> A subset of community, or

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36. See NATAPOFF, *supra* note 5, at 256–58 tbl.A.1 (listing ten states with nonunified court systems).

37. Telephone Interview with “Laura” (no last name), Official, Me. Admin. Office of the Court (Dec. 16, 2016).

38. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 205334, REPORTING BY PROSECUTORS’ OFFICES TO REPOSITORIES OF CRIMINAL HISTORY RECORDS (2005), <https://bjs.gov/content/pub/pdf/rporchr.pdf> [<https://perma.cc/PJU9-3SPS>] (“When prosecutors report final disposition information to repositories, half of them report misdemeanor convictions, misdemeanor acquittals, or indictments.”).

39. NATAPOFF, *supra* note 5, at 256–58 tbl.A.1 & nn.6, 8, 34, 37, 39, 41, 46, 54, 56 (documenting states that lack unified court systems and the extent to which their municipal courts report caseloads to the AOC).

40. KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 85–92 (2009); Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/> [<https://perma.cc/V6DU-XPTP>].

“specialty,” courts has adopted strong welfarist commitments, providing drug treatment, job training, and other rehabilitative benefits to discrete high-need populations such as those with substance-abuse disorders, veterans, and sex workers.<sup>41</sup>

Many courts are also raising money. The U.S. Department of Justice’s 2015 investigation of the Ferguson Police Department exposed this revenue-generating aspect of the system, describing a criminal process in which “many officers appear to see some residents, especially those who live in Ferguson’s predominantly African American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue.”<sup>42</sup> Sherwood, Arkansas has a once-a-week court session devoted to bounced-check cases. The court raises so much money in fines and fees for the city that the courthouse staff nicknamed it “Million Dollar Thursday.”<sup>43</sup> By contrast, some municipal courts provide a relatively small share of local budgets.<sup>44</sup>

Notwithstanding this diversity, the national misdemeanor landscape exhibits two persistent, core characteristics from which its deepest normative challenges flow: its pervasive disregard for basic criminal law and procedural protections and its strong inegalitarian tendencies toward criminalizing and punishing the poor and people of color.<sup>45</sup> Lower courts have long been known for their speed, informality, and inattention to due process and evidence. In 1979, Feeley described the “casualness and confusion” of New Haven’s lower court, where half of all defendants had no lawyer and “[a]rrestees were arraigned in groups and informed of their rights en masse . . . . While a few cases took up as much as a minute or two of the court’s time . . . the overwhelming majority of cases took just a few seconds.”<sup>46</sup> Over thirty years later, a report entitled *Three*

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41. Natapoff, *Gideon’s Servants*, *supra* note 13, at 454-55 (describing various community courts and services).

42. Civil Rights Div., *Investigation of the Ferguson Police Department*, U.S. DEP’T JUST. 2 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/K35Y-MFWL].

43. David Koon, “Million-Dollar Thursday”: A Visit to Sherwood’s Hot Check Court, ARK. TIMES: ARK. BLOG (Aug. 25, 2016, 2:40 PM), <https://www.arktimes.com/ArkansasBlog/archives/2016/08/25/million-dollar-thursday-a-visit-to-sherwoods-hot-check-court> [https://perma.cc/T8SB-ZSFF].

44. Mark Flatten, *City Courts: Money, Pressure and Politics Make It Tough to Beat the Rap*, GOLDWATER INST. 9 (2017), <https://goldwaterinstitute.org/wp-content/uploads/2017/09/City-Court-Policy-Paper-1.pdf> [https://perma.cc/78G7-QQNX] (“Arizona cities . . . typically raise less than 5 percent of their general fund revenue through the courts.”).

45. I have explored the stratifying erosion of rule of law within the misdemeanor process in detail. See Natapoff, *The Penal Pyramid*, *supra* note 13, at 71-92.

46. FEELEY, *supra* note 8, at 10-13.

*Minute Justice: Haste and Waste in Florida's Misdemeanor Courts* described the same speedy phenomenon: most proceedings lasted less than three minutes, and nearly seventy percent of defendants, two-thirds of whom did not have lawyers, pled guilty immediately at arraignment.<sup>47</sup> A 2009 national report uncovered comparable practices all over the country.<sup>48</sup> Defendants who cannot afford bail, who have overworked counsel, or who have no counsel at all are all under enormous pressure to plead guilty right away. Prosecutors often withdraw favorable plea offers if they are not accepted immediately. Prosecutors, public defenders, and judges are themselves under pressure to clear large dockets, and a premium is placed on speed.

To be sure, not all low-level courts are so rushed and informal. Some courts – for example, some nonimmigration federal misdemeanor dockets – look much like felony courts, with lawyers, hearings, trials, and appeals.<sup>49</sup> But more often, misdemeanor courts are known for their size and lack of formal legal constraints. As the Supreme Court acknowledged in 1972, “[T]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”<sup>50</sup> At the extreme end of the spectrum, legal expertise may simply be absent. In some courts, there are no prosecutors: police handle their own cases from beginning to end, acting as prosecutor, witness, and negotiator.<sup>51</sup> In some courts, the judges

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47. Alisa Smith & Sean Maddan, *Three Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, NAT'L ASS'N CRIM. DEF. LAW. 15, 22 (July 2011), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794> [<https://perma.cc/CQ5H-4ZMB>].

48. Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N CRIM. DEF. LAW. (Apr. 2009), [https://www.opensocietyfoundations.org/sites/default/files/misdemeanor\\_20090401.pdf](https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf) [<https://perma.cc/MXG3-H9UN>].

49. High-volume federal immigration dockets often permit speedy processing and mass guilty pleas in ways that strongly resemble the most informal misdemeanor courts. See, e.g., *United States v. Diaz-Ramirez*, 646 F.3d 653 (9th Cir. 2011) (upholding a mass immigration plea process under Operation Streamline); see also Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, CHIEF JUST. EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY (Jan. 2010), [https://www.law.berkeley.edu/files/Operation\\_Streamline\\_Policy\\_Brief.pdf](https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf) [<https://perma.cc/7GES-M457>] (describing mass pleas of as many as eighty defendants at a time). I am indebted to Mona Lynch for this point.

50. *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

51. Andrew Horwitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305 (1998) (documenting fourteen states that permit police prosecutions, including Delaware, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia); see also Diane DePietropaolo Price, *Summary Injustice: A Look at Constitutional Deficiencies in South Carolina's Summary Courts*, NAT'L ASS'N CRIM. DEF. LAW. 19 (2016), <https://>

are not lawyers.<sup>52</sup> Because so many low-level courts underenforce the right to counsel, sometimes there are no attorneys in these courtrooms at all.<sup>53</sup>

This speedy, informal misdemeanor culture often openly disregards legal rules. For example, judges have been known to discipline defense attorneys who attempt to file motions or go to trial.<sup>54</sup> Eve Brensike Primus, a former public defender, relates how a misdemeanor judge once invented an imaginary rule of evidence to help the prosecution. When she objected, he threatened to hold her in contempt.<sup>55</sup> In Texas, many judges incorrectly maintained that they did not have to assess misdemeanor defendants' ability to pay before incarcerating them over unpaid fines, even though Texas law expressly states that they must.<sup>56</sup> In New York, Eddie Wise was arrested and convicted of loitering seven times *after* the New York loitering statute was held unconstitutional.<sup>57</sup>

Because this legal indifference erodes the rule of law, it derogates the significance of guilt and criminal culpability—the foundational issues of fault that criminal law is designed to evaluate. The pressure to plead guilty quickly, without attention to rules or evidence, reflects a cultural disregard for the individualized evaluation of whether a particular person is guilty, culpable, and deserves to be punished. Sometimes this speed and pressure leads to wrongful convictions; many misdemeanor defendants plead guilty to crimes of which they are

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[www.nacdl.org/WorkArea/DownloadAsset.aspx?id=41216&dlibID=41186](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=41216&dlibID=41186) [<https://perma.cc/UU9F-ZYEF>] (noting that, with the exception of one county, “89% of defendants were processed in courts without a single lawyer involved”).

52. *North v. Russell*, 427 U.S. 328 (1976) (upholding the constitutionality of lay judges in police court when a de novo trial is available later).
53. Alisa Smith et al., *Rush to Judgment: How South Carolina’s Summary Courts Fail to Protect Constitutional Rights*, NAT’L ASS’N CRIM. DEF. LAW. 16 (2017), <https://www.nacdl.org/RushToJudgment> [<https://perma.cc/D2VL-MTNM>] (documenting police prosecutions in South Carolina summary courts).
54. Boruchowitz et al., *supra* note 48, at 23 (describing the facts of *Ohio v. Jones*, Case No. 2008-P-0018 (Ohio Ct. App. Dec. 31, 2008)); *see also* Richard A. Oppel Jr., *His Clients Weren’t Complaining. But the Judge Said This Lawyer Worked Too Hard.*, N.Y. TIMES (Mar. 29, 2018), <https://www.nytimes.com/2018/03/29/us/indigent-defense-lawyer-texas.html> [<https://perma.cc/7Z6B-Q22Y>] (describing a federal lawsuit alleging that a Texas judge retaliated against an appointed defense lawyer for “overwork[ing] cases” by requesting paid investigators and spending longer than three hours on clients who pled guilty).
55. Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80, 81 (2012).
56. Kendall Taggart & Alex Campbell, *In Texas It’s a Crime to Be Poor*, BUZZFEED (Oct. 7, 2017, 5:21 PM), <https://www.buzzfeed.com/kendalltaggart/in-texas-its-a-crime-to-be-poor> [<https://perma.cc/529Q-PBEN>].
57. Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 85 & n.3 (2007).

demonstrably innocent.<sup>58</sup> But the normative erosion runs deeper: it is a basic abdication of the fault model at the bottom of the penal pyramid, where offenses are pettiest and defendants are poorest.<sup>59</sup> In effect, the misdemeanor legal system has declared that it is not deeply concerned whether defendants have actually committed the crimes for which they have been arrested, as it will not meaningfully inquire into the question.

This cavalier institutional attitude towards guilt and criminal culpability is largely, though not solely, deployed against the most socially vulnerable and stigmatized populations: the poor, people of color, the homeless, and the addicted.<sup>60</sup> The idea of the “criminalization of poverty” partially captures this dynamic. Many misdemeanors are crimes of poverty in the first place, such as driving on a suspended license for failure to pay fines or sleeping or urinating in public due to homelessness. In addition, heavy street policing of low-income neighborhoods makes it more likely that the poor will encounter the criminal process. The misdemeanor population is also heavily skewed by race and ethnicity, largely due to low-level policing practices. African Americans are four times more likely to be arrested for marijuana possession than whites even though blacks and whites use marijuana at the same rates.<sup>61</sup> In Ferguson, Missouri, the Department of Justice found that over 90% of low-level citations and arrests were enforced against African Americans, who comprised only 67% of the population.<sup>62</sup> Similarly, in Baltimore, African Americans comprise 63% of the population but between 80% and 90% of all arrests. In particular, Baltimore police rely heavily on order-maintenance and drug-possession arrests which are especially racially skewed.<sup>63</sup> In Nebraska, African Americans make up only 5% of the population, but 19% of

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58. Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 85, 94-96 (Daniel S. Medwed ed., 2017).

59. Natapoff, *Misdemeanors*, *supra* note 13, at 1317, 1366-68.

60. NATAPOFF, *supra* note 5, at 53-54 (documenting the disadvantaged status of much of the misdemeanor population).

61. *The War on Marijuana in Black and White*, ACLU 4 (June 2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rel1.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf) [https://perma.cc/S5TF-V35S].

62. Civil Rights Div., *supra* note 42, at 4 (concluding that the Ferguson Police Department “appears to bring certain offenses almost exclusively against African Americans”).

63. Civil Rights Div., *Investigation of the Baltimore City Police Department*, U.S. DEP’T JUST. 7-8, 55-56 (2016), <https://www.justice.gov/crt/file/883296/download> [https://perma.cc/BU3V-AS6Y].

all misdemeanor cases.<sup>64</sup> Such disparities make the misdemeanor process a frontline contributor to the racialization of crime.

These twin dysfunctions—the erosion of legal commitments and the active perpetuation of social inequality—are linked both conceptually and in practice. In theory, inattention to substantive criminal law makes room for the selection of defendants based on extralegal factors such as wealth and race. A system authentically motivated to ferret out crime and guilt should, as it were, resist selection based on nonevidentiary social characteristics. At the same time, strong legal norms generally make it more difficult and expensive to criminalize people.<sup>65</sup> Inattention to evidentiary and procedural constraints thus permits convictions that might not otherwise occur, which is a way of saying that weak legal norms contribute to the overcriminalization of the disadvantaged. In practice, the disadvantaged are the natural subjects of the petty-offense process. It disproportionately selects and convicts them, formally and permanently labeling them criminal in ways that, in turn, reinforce their social vulnerability. The misdemeanor system, in other words, affirmatively generates social and racial stratification through its selection processes and its disregard for legal rules and evidence of guilt.<sup>66</sup>

These inequitable dynamics have inspired much of the recent groundswell of critical scholarship around misdemeanors.<sup>67</sup> Which brings us to *Misdemeanorland* and its meticulous description of New York.

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64. Neb. Admin. Office of the Courts, Defendant Characteristics by Race and Gender, Nebraska District and County Courts (unpublished report) (on file with author) (finding, in 2015, 15,288 cases filed against black defendants out of 80,170 total cases documented); *QuickFacts Nebraska*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/ne/RHI225217> [<https://perma.cc/VY7V-2EEP>] (listing Nebraska demographic data for African Americans).

65. See Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 190-91 (2017) (discussing the general lack of internalized costs in criminal decision-making).

66. Natapoff, *Misdemeanors*, *supra* note 13, at 1371-72; see also Natapoff, *Aggregation and Urban Misdemeanors*, *supra* note 13, at 1045-46 (describing troubling features of the urban misdemeanor process).

67. See *supra* notes 10-13.

## II. NEW YORK CITY

### A. *The Legal System's Response to Broken-Windows Policing*

*Misdemeanorland* is about the impact of “broken-windows” policing on New York’s misdemeanor legal apparatus and culture. In the 1990s, New York City embarked on a massive investment in what is commonly known as “broken-windows,” “order-maintenance,” or “quality-of-life” policing. Other major cities such as Los Angeles and Chicago, and a myriad of smaller jurisdictions, did the same.<sup>68</sup> But the scale and spectacularly costly results of New York’s commitment made it the poster child for the experiment. As noted above, the surge in misdemeanor arrests meant that New York’s misdemeanor courts went from processing 65,000 misdemeanor arrests in 1980 to 251,000 in 2010.<sup>69</sup> The largest categories of arrests were for drug possession, minor assault, turnstile jumping, larceny, and trespass.<sup>70</sup> The practice remains heavily focused on low-income communities of color; in 2015, eighty-one percent of misdemeanor arrestees were African Americans or Latinos, although those groups comprise only about fifty-three percent of New York’s population.<sup>71</sup> Broken-windows arrests ebbed after 2010 for a constellation of reasons, including successful civil rights litigation, public protest, and a growing recognition of the racial disparities of the practice.<sup>72</sup>

Broken-windows policing has generated an enormous controversy and literature. The underlying theory maintains that strictly enforcing low-level offenses will reduce more serious crime up the food chain, a claim that remains empirically unverified and hotly contested.<sup>73</sup> At the same time, heavy misdemeanor enforcement in low-income communities of color has been widely decried as racist, ineffective, and costly. As Bernard Harcourt put it,

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68. See 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, 272 (2006).

69. KOHLER-HAUSMANN, *supra* note 7, at 42.

70. *Id.* at 107-08.

71. *Id.* at 51; *QuickFacts New York City, New York*, U.S. CENSUS BUREAU (July 1, 2018), <https://www.census.gov/quickfacts/newyorkcitynewyork> [<https://perma.cc/83XB-YDJ4>]; see also KOHLER-HAUSMANN, *supra* note 7, at 53 (“[M]isdemeanor arrests have been overwhelmingly concentrated in precincts that have 60 percent or more black or Hispanic population.”).

72. See KOHLER-HAUSMANN, *supra* note 7, at 43-45 (describing the sources of decline).

73. See, e.g., BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 8-11, 59-61, 80-82 (2001); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 465-67 (2000); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observations of Public*

The order-maintenance approach fails to explore how . . . the categories of the disorderly and the law abider . . . are themselves shaped by policing and punishment strategies. The result is that these categories mask the repressive nature of broken-windows policing and overshadow significant costs, including increased complaints of police misconduct, racial bias in stops and frisks, and further stereotyping of black criminality.<sup>74</sup>

*Misdemeanorland* tells the story of what the New York court system – its prosecutors, judges, and public defenders – did with all those broken-windows cases. In essence, it treated them as an opportunity to exert control over the policed population through “marking,” “procedural hassle,” and “performance,” a collection of social control practices that comprise what Kohler-Hausmann labels “managerial justice.” Kohler-Hausmann argues that New York’s managerial turn altered the significance and purpose of the low-level criminal process, that it became increasingly concerned with tracking and evaluating people. She contrasts the managerial model with what she terms the “adjudicative model,” which is concerned with evidence, convictions, and legal punishment.<sup>75</sup> In the adjudicative model, the goal is to determine guilt: “the animating task organizing the work of criminal justice actors is to determine whether the defendant in fact committed the criminal act of which she is accused.”<sup>76</sup> By contrast, managerial justice is about evaluating people. “[T]he driving question – the one that determines how prosecutors and judges will deal with the case – is about the type of person before them.”<sup>77</sup> The book’s central claim is that New York’s lower-level courts “have largely abandoned . . . the *adjudicative* model of criminal law administration – concerned with deciding guilt and punishment in specific cases – and instead operate under . . . the *managerial* model – concerned with managing people through engagement with the criminal justice system over time.”<sup>78</sup>

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*Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637-38 (1999); Robert J. Sampson & Stephen W. Raudenbush, *Disorder in Urban Neighborhoods – Does It Lead to Crime?*, NAT’L INST. JUST. 4-5 (Feb. 2001), <https://www.ncjrs.gov/pdffiles1/nij/186049.pdf> [<https://perma.cc/QTY7-SCUN>] (“The forces that generate disorder also generate crime. It is the structural characteristics of neighborhoods, as well as neighborhood cohesion and informal social control – not levels of disorder – that most affect crime.”).

74. HARCOURT, *supra* note 73, at 7.

75. KOHLER-HAUSMANN, *supra* note 7, at 4, 61.

76. *Id.* at 71.

77. *Id.* at 72.

78. *Id.* at 4; *see also id.* at 10 (“[T]he city’s misdemeanor courts have largely abandoned the adjudicative model of criminal law administration and instead operate under the managerial

Although managerial justice has deep normative implications, Kohler-Hausmann explains its adoption as a largely pragmatic move on the part of legal officials, a “particularly rational adaptation to the profile of defendants and the resource constraints that actors face[d]” as a result of the massive influx of low-level cases.<sup>79</sup> “[A]s the lower criminal courts were flooded with cases from Broken Windows policing,” she narrates, “they drifted toward a managerial model.”<sup>80</sup> The legal turn towards managerialism “can be understood as a result of creative problem solving in the face of the specific dilemmas and practical circumstances of doing legal work in misdemeanorland in the era of Broken Windows policing.”<sup>81</sup> “[L]ess the result of planned and purposeful policy design,” she writes, managerial justice represents an “adaptive emergence of practical strategies adopted by front-line legal actors in the shadow of the intentional policy choices made by the police and local and state governments.”<sup>82</sup> Managerialism itself is both an intentional and unintentional practice. “Sometimes criminal justice actors intentionally rely on [managerial] marking, procedural hassle, and performance,” but sometimes “these techniques emerge as the unintentional upshot of the uncertainty and transaction costs inherent in the criminal process.”<sup>83</sup>

Prosecutors in misdemeanorland are the lead decision makers, but judges and defense attorneys accept and perpetuate managerialism.<sup>84</sup> Judges ratify the approach because they face the same professional pressure to clear dockets as prosecutors and public defenders. And like prosecutors, judges accept managerialism’s normative presumption that people brought into the misdemeanor system should be marked, tracked, and managed in some way.<sup>85</sup> Defense attorneys accede because it permits their clients to escape immediate conviction and harsher punishments, because they have heavy caseloads, and because litigation imposes substantial costs and risks on defendants.

Although the managerial response to broken windows was highly pragmatic, according to Kohler-Hausmann it also reflected substantive, equitable changes

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model.”). *But see id.* at 93 (“These results do not prove that the adjudicative model has been thoroughly vanquished from misdemeanorland, nor is it my claim that it has been.”).

79. *Id.* at 105.

80. *Id.* at 85.

81. *Id.* at 21; *see also id.* at 101 (“Frontline legal actors and managers . . . had to engage in creative problem solving in the face of the practical circumstances generated by Broken Windows policing . . .”).

82. *Id.* at 58.

83. *Id.* at 81.

84. *Id.* at 258.

85. *Id.* at 116-19 (discussing the management of prosecutorial and judicial dockets).

in prosecutorial thinking and decision-making. Instead of routinely seeking conviction, prosecutors accepted lighter forms of marking and tracking and the building of dossiers on defendants, “illustrat[ing] a sentiment that it is morally unnecessary for the heavy machinery of criminal justice to come down on every defendant accused of a low-level offense if the person can prove himself to be responsible and governable.”<sup>86</sup> Prosecutors were willing to accept managerial justice “in lieu of formal punishment because it is a form of hard treatment that does not entail creating a lifelong criminal record, which they may believe is unwarranted.”<sup>87</sup> Managerial justice embodied a shift towards leniency—or, as Kohler-Hausmann puts it, a “substantive principle of proportionality, which is that people do not necessarily *deserve* to be punished for every incident of low-level offending.”<sup>88</sup> “The moral principle at work in the managerial model,” she explains, is “that we essentially don’t seek any punishment at all unless the person demonstrates a persistent disregard for social rules and otherwise seems unmoored from other institutions of social control.”<sup>89</sup>

As an empirical matter, managerial justice in New York translated into widespread criminalization. The vast majority of broken-windows arrests became criminal cases—at the outset, prosecutors declined to prosecute “somewhere between” 7% and 12% of those hundreds of thousands of arrests.<sup>90</sup> Later in the process, prosecutors dismissed outright another 12% to 15%.<sup>91</sup> The most frequent trigger for these dismissals occurred when the speedy-trial clock ran out, initiating a “30.30,” which can take months.<sup>92</sup> Approximately 25% to 30% of cases were resolved by an “adjournment in contemplation of dismissal,” (ACD), a kind of pretrial probation or diversion whereby the defendant may be required to adhere to various requirements, usually for six months to a year.<sup>93</sup> If defendants meet the conditions of their ACD, the case is dismissed and sealed. If they don’t, they are convicted.

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86. *Id.* at 74.

87. *Id.* at 199.

88. *Id.* at 73.

89. *Id.* at 266.

90. *See id.* at 146.

91. *See id.* at 150.

92. *Id.* at 150. These dismissals are referred to as “30.30” because they are authorized by section 30.30 of New York Criminal Procedure Law.

93. *Id.* An ACD lasts up to six months; an MJACD is a marijuana ACD and it lasts up to a year. *Id.*

The rest of the cases, around 50%, resulted in a conviction of some kind—20% for Class A or B misdemeanor crimes (“letter crimes”), and 30% for non-criminal violations, mostly disorderly conduct.<sup>94</sup> The vast majority of convictions were the result of a plea—almost no one went to trial.<sup>95</sup> Most dispositions in New York are fast—as many as two-thirds of dispositions occur at arraignment, as soon as the defendant comes to court for the first time.<sup>96</sup> Conversely, for those rare defendants who want to contest their guilt, the process is painfully slow; it can take months to get a trial.<sup>97</sup>

New York has numerous rules of thumb when it comes to dispositions, based largely on prosecutorial guidelines. A person with no prior arrests facing a petit larceny charge will get “an ACD with the Stoplift program or a day of community service.”<sup>98</sup> A person with a prior ACD on their record will not be offered another one. Offers are generally determined by the type of charge and the defendant’s prior record.<sup>99</sup> Despite the relative speed and predictability of the process, Kohler-Hausmann repeatedly rejects the “assembly-line” metaphor used by the Supreme Court in 1972—and many scholars since then, including me—as a way of identifying speedy, rote, or mechanical aspects of the misdemeanor process.<sup>100</sup> She maintains that the metaphor inadequately captures the nuances of decision reflected, for example, in the differential treatment of first-time offenders, or the fact that many cases result not in conviction but in some other sort of disposition. Feeley also thought the term “assembly-line” too formulaic—he preferred the “supermarket” metaphor because it captured “the casualness and confusion characteristic of decision-making in the lower criminal courts.”<sup>101</sup> The misdemeanor apparatus has garnered many other nicknames and metaphors along the

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94. *Id.* at 68-69.

95. *Id.* at 114 fig.3.4 (charting miniscule trial rates of less than one percent).

96. *Id.* at 124, 162 (explaining that at broken-windows policing’s peak two-thirds of cases were resolved at arraignment, with the figure more recently decreasing to fifty-five percent); *see also* Boruchowitz et al., *supra* note 48, at 31 (documenting high plea rates at arraignment in New York).

97. KOHLER-HAUSMANN, *supra* note 7, at 195. Suppression hearings—the defendant’s opportunity to exclude illegally obtained evidence—are also almost nonexistent. *Id.* at 116-17.

98. *Id.* at 120-21 (describing official prosecutorial plea-offer guidelines).

99. *Id.* at 125.

100. *Argersinger v. Hamlin*, 407 U.S. 25, 34-36 (1972) (describing the speed, large numbers of cases, and lack of due process characteristic of misdemeanor courts as a kind of “assembly-line justice”); KOHLER-HAUSMANN, *supra* note 7, at 60, 63, 66 & n.23 (citing various scholarship, including mine, for the proposition that “the assembly-line justice critique has reemerged”).

101. FEELEY, *supra* note 8, at 13, 187; KOHLER-HAUSMANN, *supra* note 7, at 65 (“Feeley is one of the few observers of lower criminal courts to challenge the assembly-line metaphor as inapt.”).

way, including cattle herding, “meet ’em and plead ’em” lawyering, and “McJustice.”<sup>102</sup>

Of course, no one actually thinks the misdemeanor system is completely “mechanical” or “one-size-fits-all.”<sup>103</sup> But *Misdemeanorland* provides quite a few instances of speedy, rote, or mechanistic dispositions that are illustrative of why the assembly-line metaphor has stuck over the decades. In two boroughs, “the DA’s office had standard offers printed on a sheet that listed the office policy for arraignment offers by charge type and number of prior arrests.”<sup>104</sup> “[T]here’s really no time,” observed one former prosecutor, “in the space of a thirty-second arraignment call to see how this case is different from any other case.”<sup>105</sup> Because pleas are so standardized, “clerks and paralegals can guess which cases will be disposable simply by looking at the charging documents and rap sheets.”<sup>106</sup> In one case, “the supervising arraignment lawyer for one of the public defender organizations[] walked over to the prosecution table with stacks of files, saying, ‘all of these will be marijuana ACDs.’”<sup>107</sup> In another case involving six different defendants, “[a]s soon as the court officer finished reading the charges, the judge immediately granted an ACD to all defendants en masse without any discussion.”<sup>108</sup> Similarly, “[i]n some courtrooms, judges issue marijuana ACDs without requiring defendants to even walk up to the podium: their names are called, they stand up in the audience . . . while the judge issues the order, practically yelling it from the bench.”<sup>109</sup> New York’s misdemeanorland may be evaluative, but it also has plenty of speedy, standardized qualities.<sup>110</sup>

As people pass through misdemeanorland multiple times, they accumulate new and different marks which trigger increasing levels of punishment. The process is “additive”: prosecutors make clear that people need to be punished more

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102. Boruchowitz et al., *supra* note 48, at 30 (comparing the misdemeanor process to cattle herding); *id.* at 33 (describing the “meet and plead” misdemeanor process); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 370 (2011) (calling the misdemeanor process “McJustice”).

103. Cf. KOHLER-HAUSMANN, *supra* note 7, at 60 (“[O]ne of the most common allegations levied at lower criminal courts by higher courts and academic commentators is that of ‘assembly-line justice’—mechanically churning out convictions and imposing one-size-fits-all punishments.”).

104. *Id.* at 125.

105. *Id.* at 129.

106. *Id.* at 126.

107. *Id.* at 148.

108. *Id.* at 129.

109. *Id.* at 149.

110. See *id.* at 121 (describing prosecutorial guidelines).

if they've been to misdemeanorland before. "The understanding is that . . . a defendant should be subjected to more marking, procedural hassle, or performance for each subsequent encounter or failure to discharge some requirement of the current encounter."<sup>111</sup> "Our offers are progressive," says one prosecutor. "[F]irst the ACD, then the violation, then the misdemeanor, etc.[,] etc., etc."<sup>112</sup> Indeed, the number and quality of marks on a person's record often play a greater role in determining the state's response than the nature of the crime itself.<sup>113</sup>

Because broken-windows policing predictably sweeps in disadvantaged classes of people from identifiably poor neighborhoods of color, this infuses misdemeanor processing with race- and class-based significance. As Kohler-Hausmann explains, "Arrests from these spaces have a social meaning, one that translates into a presumption of need for social control over the people who are brought from them to misdemeanorland."<sup>114</sup> "[S]pace, race, and ethnicity infused [broken-windows] arrests with a special set of meanings that would shape how legal actors would process those arrests."<sup>115</sup> In this narrative, the legal process inherited the class and racial assumptions embedded in broken-windows policing regarding which neighborhoods and people are disorderly: "[T]he disposition patterns in misdemeanorland . . . seemed institutionally viable given the social meaning of the infractions and defendant profile at hand."<sup>116</sup> As a result, "the populations that are most heavily targeted by Broken Windows policing, namely, low-income men of color, become a population with an ongoing burden to prove governability in lower criminal courts."<sup>117</sup> Taken together, these social practices and assumptions operationalized a suspicious attitude toward the defendant pool.

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111. *Id.* at 82-83.

112. *Id.* at 84.

113. *See id.* at 74 ("[O]ne of the most important determinants of case dispositions is the record of a defendant's prior criminal justice encounters . . ."); *see also id.* at 96 ("[T]he prior record of the defendant becomes one of the most important determinants of the outcome."); *id.* at 166 (relating statement by a public defender that "innocent people with records" will be offered a disorderly conduct plea rather than a dismissal); *id.* at 261 ("Defendants *come to be* the type of person who ought to be convicted by achieving a certain status in misdemeanorland, a status that is only to varying degrees achieved by establishing violations of specific provisions of the penal law.").

114. *Id.* at 53.

115. *Id.* at 59.

116. *Id.* at 50.

117. *Id.* at 79.

*B. Mapping Managerialism: Marking, Procedural Hassle, and Performance*

*Misdemeanorland* devotes a chapter to each of the three pillars of managerial justice: marking,<sup>118</sup> procedural hassle,<sup>119</sup> and performance.<sup>120</sup> These chapters detail the ways that the process handles people and cases, “explicat[ing] the techniques through which misdemeanor criminal court actors extend social control over the populations they encounter.”<sup>121</sup> This is the core of Kohler-Hausmann’s fieldwork. She offers aggregate data and numerous stories depicting the specifics of criminal record-keeping, the burdens imposed on individual defendants, and how defendants are measured and evaluated in ways that affect their legal treatment and case dispositions.<sup>122</sup> She lightly implies that these practices are irrational by starting Chapters Four, Five, and Six with quotations from Franz Kafka’s *The Trial*,<sup>123</sup> but her ultimate conclusion is that, far from irrational, they represent intelligible, pragmatic, and arguably defensible systemic legal compromises with broken-windows policing.<sup>124</sup>

The chapter on “marking” describes New York’s massive investment in record keeping, which forms the backbone of the managerial approach. Before the 1990s, New York did not keep particularly close track of low-level defendants or their arrests, appearances, or performances.<sup>125</sup> This changed with the advent of broken windows and the intensive data-management practices known as CompStat—these policies created detailed records about people in the system while erecting a new infrastructure capable of managing that data.<sup>126</sup> Today, New York prosecutors, defense attorneys, and judges know how many times people are arrested, cited, charged, given an ACD, or issued a warrant, and they

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118. *Id.* at 143.

119. *Id.* at 183.

120. *Id.* at 221.

121. *Id.* at 10.

122. *See id.* at 17 (describing fieldwork through 2016); *id.* at 19 (describing data through 2011).

123. *Id.* at 143, 183, 221 (quoting FRANZ KAFKA, *THE TRIAL* (Tribeca Books 2015) (1925)).

124. *Id.* at 266 (arguing that, at least in the abstract, managerial justice “seems like a perfectly reasonable” approach for legal officials to take); *id.* at 105 (describing managerial justice as a “particularly rational adaptation to the profile of defendants and the resource constraints that actors face”); *id.* at 123 (noting that in light of heavy prosecutorial caseloads and delays, “one can see how the strategies of [managerialism] emerge as rational means for achieving a measure of social control over a substantial volume of misdemeanor defendants”); *id.* at 264 (“There is both an efficiency and fairness argument to be made for the managerial model . . .”).

125. *See id.* at 31–32.

126. *See id.* at 36–41.

know whether a defendant showed up late to court or flunked a treatment program. These records in turn play a central role in determining case dispositions. Prosecutors make plea offers in light of a defendant's entire dossier, not just the nature of the current crime for which they have been arrested. "Judges and prosecutors frequently say that one of the most important determinants of case disposition is the record of a defendant's prior criminal justice encounters, such as arrests, bench warrants, compliance with court mandates, and other indications of governability, including steady employment, family, or housing connection."<sup>127</sup> This is especially true at arraignment, which is when more than half of all cases are resolved: the record dominates at the beginning of the case because the lawyers have few facts about the case at hand.

The marking analysis is central to the book's project because it supports the thesis that New York's misdemeanorland is exerting managerial control—evaluating people—as much or more than it is doing traditional criminal adjudication aimed at determining guilt or innocence. To state the obvious, whether a person shows up to court has nothing to do with whether she has committed a crime. Nevertheless, under managerialism, failing to show up will impact the substantive outcome of her case. The chapter also indirectly elucidates the importance of record keeping in misdemeanor processing more generally. New York keeps copious data on its misdemeanor criminal dockets, as well as the people in them.<sup>128</sup> Most other jurisdictions collect and provide far less misdemeanor data, or none at all.<sup>129</sup> The specificity of social control in New York thus turns at least in part on the state's willingness to invest in data collection. Ironically, this particular investment in social control also increases the transparency of the entire process. By contrast, in many other cities and states, we simply have no idea

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127. *Id.* at 74.

128. *See id.* at 19 (describing Department of Criminal Justice Services (DCJS) and numerous other official data sources). This data is what allows Kohler-Hausmann to dig so deeply into the specifics and may also account for why a disproportionate percentage of previous misdemeanor scholarship has involved New York. *See, e.g.,* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1694 n.179 (2010) ("I rely principally on New York City misdemeanor enforcement and adjudication data . . . [in part] because the city maintains better records than most urban jurisdictions . . ."); 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 (2011); Howell, *supra* note 23, at 283-90; Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157 (2004).

129. *See supra* notes 36-39 and accompanying text (describing the opacity of many misdemeanor court systems).

on what basis the misdemeanor process is sorting people, the nature of dispositions, or even how many cases there are altogether. One of the takeaways from *Misdemeanorland* is how revelatory more aggregate data in this realm could be.<sup>130</sup>

The chapter on “procedural hassle” describes the many burdens that the misdemeanor process imposes on those who pass through it.<sup>131</sup> Hassle encompasses a wide range of defendant experiences, including the intrusive “ceremony of degradation” that constitutes arrest;<sup>132</sup> the filthy stench of the holding pens at central booking;<sup>133</sup> waiting in long lines at the courthouse;<sup>134</sup> and having to come back to court repeatedly, missing work, or having to find childcare.<sup>135</sup> The purpose of hassle is to create “a series of opportunities to engage defendants in official encounters with symbolic meaning, construct their status vis-à-vis the court and its powers, and to discipline and reform their behavior.”<sup>136</sup> Hassle puts people in their place, establishes their “denigrated” social status within the criminal process, and wears down their sense of autonomy and dignity.<sup>137</sup>

The criminal process is famously oppressive and degrading, especially for the poor, and *Misdemeanorland* offers powerful examples. In police-precinct holding cells where arrested defendants wait for their court appearances, “[r]ats, mice, and roaches are a common sighting, and smashed cheese sandwiches, the only food offered during the entire arrest-to-arraignment period, litter the floor, in part because people sometimes use the plastic-wrapped sandwiches as pillows.”<sup>138</sup> The “filth and stench of the precinct holding cell” was so disgusting and traumatizing that one defendant, Kima, would not sit down on the bench; instead, she stood for seven hours.<sup>139</sup> Some defendants are issued “desk-appearance tickets” instead of being arrested; they must appear in court to resolve them. In order to do so, they “need to take off at least one day from work or

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130. The nonprofit organization Measures for Justice is beginning to gather some of this data from states around the country. See MEASURES FOR JUST., <https://measuresforjustice.org> [<https://perma.cc/KA4H-UT8H>]; see also FLA. STAT. § 900.05 (2018) (imposing data collection requirements on criminal justice actors).

131. KOHLER-HAUSMANN, *supra* note 7, at 183-220.

132. *Id.* at 184 (citing Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956)).

133. *Id.* at 186-67.

134. *Id.* at 188-89.

135. *Id.* at 193.

136. *Id.* at 183.

137. *Id.* at 220.

138. *Id.* at 188.

139. *Id.* at 187.

child-care responsibilities to come to the courthouse at 9:00 a.m . . . They must then sit patiently in a crowded courtroom, sometimes all day . . . waiting for their 60-120 seconds in front of the judge.”<sup>140</sup> If they cannot stay all day and instead leave during the lunchbreak, a warrant will be issued.<sup>141</sup> Jannelle, a college student, described how her sense of self was “despoiled” by spending time in the jail and by being publicly humiliated in the courtroom.<sup>142</sup> It is one of the special contributions of *Misdemeanorland* that it offers such a thick, vivid account of how the process actually becomes the punishment.

Finally, the third central feature of managerial justice is “performance.” Kohler-Hausmann defines performance as

a distinct penal technique [showing that] the defendant has discharged some meaningful undertaking that is evaluated by court officials. He has complied with some duty, assigned task, program activity, therapeutic encounter, or proposed some other behavioral accomplishment the court actors can interpret as expressive of the defendant’s character or worthiness.<sup>143</sup>

Required performances include showing up to court on time, conforming to court demands, participating in various programs, and demonstrating participation in work, childcare, and other responsible behaviors. Performance is closely related to hassle: some hassles are also required performances. Performance is also intimately tied to marking: succeeding or failing at a particular performance generates a record and becomes the basis for the system’s ongoing evaluation. “Performance is a tool,” writes Kohler-Hausmann, “that allows prosecutors and judges to observe some capacity of defendants to follow official directives in the face of profound uncertainty about what type of person the defendant is.”<sup>144</sup>

Many if not most performance demands have nothing to do with crime or a defendant’s culpability, but they are not random: they “bear some rational relation to what might be imagined as propensities for law abiding in general.”<sup>145</sup> They are tests of people’s ability and willingness to follow rules, to submit to

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140. *Id.* at 193; *see also id.* at 198, 214-20 (describing long courtroom waits).

141. *Id.* at 194.

142. *Id.* at 192. The word despoiled is Kohler-Hausmann’s, not Jannelle’s.

143. *Id.* at 221.

144. *Id.* at 228-29.

145. *Id.* at 229.

authority, and thus to “prove governability.”<sup>146</sup> This is the ultimate aim of managerial justice: “Prosecutors and judges inspect defendants’ performances for signs that they can be guided by official directives or are enmeshed in mainstream institutions, activities, and lifestyles.”<sup>147</sup> One implicit consequence of this systematic reliance on performance is to overpunish the poor. An employed person who shows up on time to court and makes childcare arrangements will be treated more leniently, while a person too poor to get a subway ticket and with no social support network to care for his or her children will be punished for noncompliance even if their criminal behavior is less culpable.

This exegesis of performance is central to *Misdemeanorland*’s worldview and makes a substantial contribution to the scholarly conversation around misdemeanors. It gives descriptive teeth to the vague term “social control.” It adds to a long sociological tradition that critiques the specific mechanisms used to control the poor.<sup>148</sup> In one of the pithiest expressions of the book’s descriptive thesis, Kohler-Hausmann writes:

As in welfare offices, the way performances are demanded and evaluated in misdemeanorland expresses the presumption of need for social control that arises from the social standing of the people subject to its power. The subjects of Broken Windows policing are almost exclusively poor people of color from the city’s most disadvantaged neighborhoods. The penal technique of performance in lower criminal courts mirrors a theme that is repeated in multiple sites: that these populations are inherently disorderly and must affirmatively prove their fitness for freedom.<sup>149</sup>

The performance mandate also supports *Misdemeanorland*’s claim that there has been a shift in the aims of the low-level criminal justice endeavor. Traditionally, a criminal case is thought to evaluate a very specific sort of performance—whether or not the defendant has violated a particular criminal law. A great deal of criminal law, procedure, and evidence doctrine is devoted to ensuring that

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<sup>146.</sup> *Id.* at 222.

<sup>147.</sup> *Id.*

<sup>148.</sup> See generally PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017); GUSTAFSON, *supra* note 28; WACQUANT, *supra* note 27; see also *supra* notes 25-30 and accompanying text (describing criminalization-of-poverty literature).

<sup>149.</sup> KOHLER-HAUSMANN, *supra* note 7, at 224.

people are convicted only for what they do, not for their general character, personal traits, or social status.<sup>150</sup> *Misdemeanorland* shows that this traditional function now coexists with mandatory performances and other demands of managerial justice that measure not criminal conduct, but general rule compliance and governability.

### III. THE PUNITIVE SPECTRUM: FROM MANAGERIALISM TO CONVENTIONAL PUNISHMENT

*Misdemeanorland* illuminates the breadth and depth of the spectrum of punitive options exercised by the petty-offense process. Although Kohler-Hausmann concludes that “the managerial model better describes the vast majority of operations in New York City’s lower courts,” managerialism is not the entire story; she notes that “lower courts [also] maintain some adjudicative traits.”<sup>151</sup> Part of appreciating managerial justice involves recognizing the extent to which New York still punishes, incarcerates, and formally convicts many of its misdemeanor subjects. Although *Misdemeanorland* is not a comparative project, its excavation of New York practices invites comparisons with other jurisdictions that rely more or less heavily on conventional punishment or that may be engaging in managerialism in their own ways.<sup>152</sup> Accepting New York as exemplary of the managerial model, this Part unpacks the persistence of conventional punishment in the New York system in order to clarify the scope of that punitive spectrum and to open up a comparative conversation.

*Misdemeanorland* offers numerous examples of how New York continues to convict and punish in traditional ways. For example, the procedural-hassle category includes many impositions that are also classically punitive or well understood as collateral consequences of conviction. These can include license suspensions and the loss of credit, jobs, and money.<sup>153</sup>

*Misdemeanorland* is not centrally concerned with incarceration – the most familiar form of punishment – because, as Kohler-Hausmann states at the outset,

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150. See FED. R. EVID. 404 (prohibiting the introduction of character evidence); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (striking down a statute criminalizing the status of being unemployed or vagrant); *Robinson v. California*, 370 U.S. 661 (1962) (holding that due process is violated by the criminalization of addict status).

151. KOHLER-HAUSMANN, *supra* note 7, at 93.

152. *Id.* at 16 (“Findings from one place [such as New York] can alert us to phenomena at a different one, such as noncarceral penal power that operates by virtue of record keeping, iterative encounters with courts, or the evaluation of actions during those encounters.”).

153. *Id.* at 195 (“[A]ny misdemeanor drug conviction triggers a six-month license suspension . . . . If a person can’t pay the mandatory court fees, civil judgment is disastrous for credit.”).

“noncarceral penal operations . . . constitute the largest component of our criminal justice system’s operations.”<sup>154</sup> Although jail is still “a pressing policy issue,” she writes, it is “less common than . . . most people would guess.”<sup>155</sup> But New York still routinely deploys incarceration. Approximately 10% of convicted defendants receive a prospective jail sentence, while another 15% are sentenced to time served, namely, incarceration that they have already experienced.<sup>156</sup> Thousands more spend brief periods of time in jail upon arrest or after being picked up on a warrant.<sup>157</sup> Jail is especially influential when bail is set: 80% of people set bail cannot afford it and therefore face jailtime at the notoriously dangerous Rikers Island. This is where sixteen-year-old Kalief Browder spent thirty-three months awaiting trial for a robbery charge, an experience that drove him to commit suicide.<sup>158</sup> The threat of Rikers, in turn, induces guilty pleas.<sup>159</sup>

Even for those who do not go to Rikers, the pretrial incarceration experience is highly punitive. The chapter on hassle describes the squalor of police precinct jail cells, holding pens in Central Booking infested with vermin, and a single toilet used by dozens of people.<sup>160</sup> People stand for hours, or even all night, rather than sit or lie down on the unsanitary floors.<sup>161</sup> Researchers have shown, moreover, that just a few days of incarceration can alter a person’s life trajectory, including the disposition of their criminal case, their sentence, and their likelihood of future offending.<sup>162</sup> All of this is to say that even managerial justice deploys the punitive pains and burdens of incarceration in a wide variety of ways.

Likewise, formal conviction remains important in New York. Kohler-Hausmann states that “[a]mong my empirical findings are that misdemeanorland is a place that produces very few criminal convictions . . . and it is a site where legal

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154. *Id.* at 11.

155. *Id.*

156. *See id.* at 70.

157. *Id.* at 33, 36 (describing the heightened warrant enforcement under broken-windows policing).

158. *See* Jennifer Gonnerman, *Before the Law*, *NEW YORKER* (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/8L8J-788R>].

159. *See* KOHLER-HAUSMANN, *supra* note 7, at 164 (“Most defendants will accept a guilty plea when they are being held in on bail.”); Nick Pinto, *The Bail Trap*, *N.Y. TIMES MAG.* (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/N6PD-AXEN>].

160. *See* KOHLER-HAUSMANN, *supra* note 7, at 183-220.

161. *Id.* at 187-89.

162. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *STAN. L. REV.* 711, 741-68 (2017) (documenting how short periods of incarceration affect people over the long term).

actors do very little adjudication.”<sup>163</sup> And indeed, overall conviction rates fell after broken windows inundated the courts. Nonetheless, between 2010 and 2015, roughly half of all misdemeanor defendants in New York were still formally convicted.<sup>164</sup> Because broken windows created a massive influx of cases, that meant that approximately 100,000 New Yorkers were formally convicted every year since 2000.<sup>165</sup> To be sure, not all convictions are created equal: approximately thirty percent of all dispositions were noncriminal convictions, mostly for disorderly conduct (“dis con”), while no more than twenty percent were convictions for a Class A or B criminal misdemeanor.<sup>166</sup> But dis-con convictions are not as lenient as the label “noncriminal” makes them sound. Disorderly conduct carries up to fifteen days in jail, and the mark of a dis con remains punitive in its own right, interfering with job security, housing, and future encounters with the criminal process.<sup>167</sup> As one public defender put it,

I think that the dis con resolution is underrated, in terms of the effect that it has on people’s lives. Especially for young people getting arrested . . . because a dis con appears on your rap sheet. So you think a dis con 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.<sup>168</sup>

One of the central arguments in *Misdemeanorland* is that because New York relies heavily on ACDs and does not immediately insist on formal conviction, it has “largely abandoned” attention to guilt and its attendant formal punishments, replacing it with a lighter managerial commitment to evaluation and informal control.<sup>169</sup> This argument resonates with an ongoing national conversation re-

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163. KOHLER-HAUSMANN, *supra* note 7, at 4.

164. *Id.* at 153. The conviction rate is lower for the cohorts of MJACDs on which Kohler-Hausmann focuses. *Id.* at 86-87.

165. *Id.* at 68 fig.2.1.

166. *Id.* at 153 (“The statutory definition of disorderly conduct is very broad. In practice, the mark of a ‘dis con’ conviction does not indicate that the defendant is guilty of any specific illegal conduct. Rather, it serves as an all-purpose generic charge to mark the defendant.”).

167. *Id.* at 158-59 (noting that even though dis-con records may be sealed for rap-sheet purposes, noncriminal conviction court records never seal, so prosecutors and judges can always find them later).

168. *Id.* at 97.

169. *Id.* at 10; *id.* at 264 (describing the “managerial approach [as] eschewing the heavy machinery of criminal law unless there is some indication the person persistently flouts legal rules”); see *supra* text accompanying notes 17-20.

garding diversionary dispositions such as ACDs, which are highly popular reforms and widely touted as a lenient solution to overcriminalization.<sup>170</sup> But *Misdemeanorland* incidentally reveals how much diversionary dispositions and convictions still have in common. ACDs are pretrial probations that substantially mark and burden defendants. “An ACD is a dismissal,” explains one prosecutor, “but one way to phrase it is it involves a six-month probationary period.”<sup>171</sup> A judge calls it “a low-maintenance form of probation.”<sup>172</sup> The mark is theoretically temporary – it is sealed upon dismissal six months or a year later if the defendant complies with all the terms of the probation<sup>173</sup> – but it does a lot of conviction-like work in the meantime. While the case is open, it sits in the state’s public, searchable online database where anyone can find it. People may be disqualified from, suspended from, or dismissed from various jobs.<sup>174</sup>

Sometimes the mark stays on people’s records even when it should not.<sup>175</sup> Another prosecutor “explained that whenever she sees an ACD on the rap sheet, even one that should have sealed but did not because of some administrative error (which is surprisingly common) she ‘knows not to offer the ACD again.’”<sup>176</sup> New York prosecutors also fight to retain access to ACD marks. “An

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170. See Erica McWhorter & David LaBahn, *Confronting the Elephants in the Courtroom Through Prosecutor Led Diversion Efforts*, 79 ALB. L. REV. 1222 (2016) (advocating for increased diversionary programs, which the authors, the Deputy General Counsel and President/CEO of the Association of Prosecuting Attorneys, argue can reduce reoffending, conserve resources, and diminish collateral harms of prosecution); 21 *Principles for the 21<sup>st</sup> Century Prosecutor*, BRENNAN CTR. FOR JUST. 4 (2018), [https://www.brennancenter.org/sites/default/files/publications/FJP\\_21Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf) [<https://perma.cc/L5K5-4YNM>] (explaining that the first principle of better prosecution is to “make diversion the rule”). *But see* Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://perma.cc/8URF-RSS4>] (describing how some prosecutors charge exorbitant fees to defendants for participating in diversion programs).

171. KOHLER-HAUSMANN, *supra* note 7, at 84.

172. *Id.* at 147.

173. *Id.* at 147-48.

174. *Id.* at 151.

175. *Id.* at 84 (noting that administrative error is “surprisingly common”). As New York State’s Attorney General, Andrew Cuomo investigated ChoicePoint, a national data collection company, and several large New York employers for improperly gathering and relying on dismissed and sealed records in making employment decisions. Editorial, *Denied a Chance for Honest Work*, N.Y. TIMES (Jan. 18, 2010), <https://www.nytimes.com/2010/01/19/opinion/19tue3.html> [<https://perma.cc/6HDS-J2W8>]; Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), <https://www.nytimes.com/2006/10/17/us/17expunge.html> [<https://perma.cc/G73F-FZQP>].

176. KOHLER-HAUSMANN, *supra* note 7, at 163.

increasingly common [prosecutorial] practice . . . is demanding that defendants ‘waive’ sealing altogether.”<sup>177</sup> Moreover, “conditional marks like the ACD can transform into permanent marks if a person fails to discharge a mandated performance or cannot withstand the procedural demands of misdemeanorland.”<sup>178</sup> Kohler-Hausmann does not say how many people with ACDs successfully complete their probations, but nationally approximately one-third of probationers fail their probations,<sup>179</sup> so presumably some nontrivial percentage of New York ACDs eventually convert to convictions.<sup>180</sup>

This spectrum of managerial and adjudicative punishment in New York suggests ways of evaluating misdemeanor decision-making in other jurisdictions. In Connecticut, for example, 60% of misdemeanors are resolved by a “*nolle prosequi*,” which in practice is a deferred prosecution that works similarly to an ACD.<sup>181</sup> Future sociologists might investigate whether Connecticut exhibits other managerial traits such as heavy investments in individual record keeping or intrusive performance requirements. In Texas county courts, by contrast, approximately 42% of misdemeanor cases result in guilty pleas; approximately 32% are dismissed; and only about 14% of cases are diverted.<sup>182</sup> In Kentucky, over

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177. *Id.* at 175.

178. *Id.* at 176.

179. Shaila Dewan, *Probation May Sound Light, but Punishments Can Land Hard*, N.Y. TIMES (Aug. 2, 2015), <https://www.nytimes.com/2015/08/03/us/probation-sounding-light-can-land-hard.html> [<https://perma.cc/NBX2-HGMF>]; see also *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW 9 & fig.6 (Sept. 2018), [https://www.pewtrusts.org/-/media/assets/2018/09/probation\\_and\\_parole\\_systems\\_marked\\_by\\_high\\_stakes\\_missed\\_opportunities\\_pew.pdf](https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf) [<https://perma.cc/42JT-AJXE>] (documenting a one-third probation-failure rate nationally).

180. See KOHLER-HAUSMANN, *supra* note 7, at 261 (describing large classes of people who “quite often fail these conditional leniency offers”).

181. NATAPOFF, *supra* note 5, at 43-44 & n.5. In Connecticut, a *nolle prosequi* represents a decision not to prosecute, but the prosecutor retains the right to reopen the case over the next thirteen months. See CONN. GEN. STAT. § 54-142a(c) (2017); see also Kirk R. Williams, *Family Violence Risk Assessment: A Predictive Cross-Validation Study*, 36 LAW & HUM. BEHAV. 120, 122 (2012) (describing Connecticut treatment of a “*nolle* [as] no prosecution, but the case stays open for 13 months and if violations occur, the case can be reopened”); E-mail from Joseph Greelish, Deputy Dir., Conn. Judicial Branch, to author (Sept. 5, 2017) (on file with author) (describing Connecticut practice).

182. Spreadsheet from Texas Administrative Office of the Courts (unpublished data) (on file with author).

60% of order-maintenance, marijuana-possession, DUI, and driving-on-a-suspended-license misdemeanor cases result in conviction.<sup>183</sup> LaFave's treatise estimates that at least thirteen percent of U.S. misdemeanor cases are dismissed and another fifteen percent are diverted, while the rest result in conviction.<sup>184</sup> Every jurisdiction thus deploys its own mix of traditional criminal tools of conviction, punishment, and social control, as well the more informal but still burdensome marks and controls that fall short of conviction. *Misdemeanorland* nicely illuminates this spectrum of state responses to low-level criminal conduct and the complex relationship between formal and informal punishments.

#### IV. AN ADVERSARIAL TAKE ON THE MANAGERIAL COMPROMISE

A central feature of the American adjudicative model is the adversarial relationship between prosecution and defense. Unlike inquisitorial systems, adversarial systems rely on the clash between defense and prosecution to ensure accuracy and to enforce due process and other procedural rights.<sup>185</sup> As the Supreme Court has often said, the right to counsel is the system's primary means for testing the government's evidence and guaranteeing accurate outcomes.<sup>186</sup> *Misdemeanorland* argues that New York's misdemeanor system largely replaced the adjudicative model with managerialism, in particular with managerialism's disregard for evidence and guilt. But that characterization—and the adjudicative/managerial binary more generally—does not quite capture the persistence of the adversarial quality of the New York's system. More specifically, it does not

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183. Spreadsheet from Kentucky Department of Information and Technology Services Research and Statistics (unpublished data) (on file with author). Kentucky provided data on order-maintenance-type offenses such as trespassing and disorderly conduct, as well as DUI, driving on a suspended license, and other comparable traffic misdemeanors. *Id.*

184. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.11(c-1), Westlaw (database updated Nov. 2018).

185. See, e.g., Darryl Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1589-91 (2005) (describing how the erosion of the adversarial nature of criminal procedure affects adjudicative accuracy); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 255-56 (2006) (explaining how the adversarial context moderates prosecutorial powers in plea bargaining).

186. See *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."); *United States v. Cronin*, 466 U.S. 648, 655 (1984) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975))).

address whether those adversarial practices might represent a lingering commitment to procedural adjudicative norms.

This omission is a natural consequence of the book's definition of the adjudicative model as one concerned with evidence and guilt—it is a model defined by its substantive interests, not its procedural character.<sup>187</sup> But procedurally speaking, adversarialism is integral to the practice of adjudication and constitutes the primary means through which adjudicative commitments to evidence, guilt, and rules are effectuated.<sup>188</sup> The fact that New York lower courts remain robustly adversarial thus complicates the managerial story.

Although *Misdemeanorland* does not grapple explicitly with the structural role of defense counsel, it offers rich descriptions of how public defenders navigate the system on behalf of their clients. Drawing on the many adversarial narratives contained in *Misdemeanorland*, this section proposes understanding managerialism as a prosecutorial compromise not only with broken-windows policing but with New York's storied and aggressive public-defense bar. As the book describes it, New York defense counsel put up substantial resistance to convictions and to the “meet 'em and plead 'em” mindset, even as prosecutors stubbornly resist dismissal. This persistent conflict indicates that the adjudicatory adversarial system is alive and well in New York, and that managerialism might even be one of its byproducts. If so, *Misdemeanorland* could provide new insights into the full costs and consequences of the national misdemeanor-public-defense crisis.

#### A. Gideon in Misdemeanor Processing

One of the best-documented characteristics of the national misdemeanor landscape is the chronic lack of meaningful access to defense counsel.<sup>189</sup> Misdemeanor

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187. See KOHLER-HAUSMANN, *supra* note 7, at 4; see also *id.* at 61 (defining the adjudicative model as one in which “the role of court actors is to adjudicate the factual guilt or innocence of a defendant in a particular case”); *id.* at 72 (“[T]his [adjudicative] model does not require that courts adjudicate the question of guilt and punishment according to any specific type of formal or adversarial process.”). But see *id.* at 263 (describing the New York system as “ostensibly adjudicative and adversarial”).

188. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (describing the U.S. commitment to the adversarial system); Brown, *supra* note 185, at 1588, 1590 (describing the weaknesses of adversarial adjudication in a system of plea bargaining).

189. See Grassley Statement, *supra* note 4; Gideon's *Broken Promise: America's Continuing Quest for Equal Justice*, A.B.A. (2004) [hereinafter *Gideon's Broken Promise*], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_execsummary.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_execsummary.authcheckdam.pdf) [<https://perma.cc/M6WP-Z7PM>] (discussing problems

meanor defendants are not constitutionally entitled to counsel if their convictions cannot result in incarceration.<sup>190</sup> But most misdemeanor defendants face the possibility of incarceration one way or another, and in many courtrooms they do not get lawyers and are never informed of their constitutional right to one. In one Pennsylvania court, for example, misdemeanor defendants were simply told to go to the basement to negotiate a plea deal directly with the prosecutor, after which they came “back up to the courtroom to plead guilty and be sentenced.”<sup>191</sup> In Georgia, observers watched a judge inform a large group of misdemeanor defendants of their rights. After the judge left the bench, three prosecutors instructed the defendants to form a line and follow them one at a time into a private room. When the judge returned to the courtroom, each defendant came forward with the prosecutor, who informed the judge that each defendant had waived their right to counsel and wanted to plead guilty.<sup>192</sup> “The dirty little secret of the criminal justice system,” admitted one Kentucky defender, “is that most eligible people do not get defenders.”<sup>193</sup>

Sometimes, it is not even a secret. In 2007, Jean Hoefler Toal, Chief Justice of the South Carolina Supreme Court, candidly admitted at a public meeting that South Carolina does not appoint counsel even when clearly required by the Supreme Court’s decision in *Alabama v. Shelton*.<sup>194</sup> As she explained,

*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate’s court in South Carolina, and I have simply told my magistrates that we just don’t have the resources to do that. So I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation.<sup>195</sup>

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in indigent defense including lack of adequate funding and inadequate legal representation); Boruchowitz et al., *supra* note 48, at 14-20.

190. See *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979).

191. Boruchowitz et al., *supra* note 48, at 17.

192. See *Gideon’s Broken Promise*, *supra* note 189, at 24-25.

193. Boruchowitz et al., *supra* note 48, at 15.

194. 535 U.S. 654 (2002) (requiring the appointment of counsel when a defendant is sentenced to revocable probation or a suspended sentence).

195. Boruchowitz et al., *supra* note 48, at 15; see also Price, *supra* note 51, at 18-19 (documenting the absence of defense counsel in South Carolina summary courts); Smith et al., *supra* note 53, at 16 (same).

In most jurisdictions, public defenders have notoriously heavy caseloads.<sup>196</sup> Average spending in the United States on indigent defense is \$11.86 per capita,<sup>197</sup> less than two percent of the \$265 billion spent annually on the justice system.<sup>198</sup> The ABA recommends caseloads of no more than 300 misdemeanor cases per year.<sup>199</sup> Nevertheless, public defenders in Dallas juggle 1,200 misdemeanors each year; in Chicago, Atlanta, and Miami, annual caseloads exceed 2,000.<sup>200</sup> As a result of these pressures, public defenders often have mere minutes to meet their clients, review their files, and provide representation—hence the nickname “meet ’em and plead ’em” lawyering.<sup>201</sup> In 2013, a federal district court in Washington State declared this state of affairs unconstitutional.<sup>202</sup> In 2015, the Senate Judiciary Committee heard testimony that “in many places people go to court with no lawyers at all, or the lawyers they have are overwhelmed with cases, poorly trained, poorly paid, and operating without necessary support such as investigation and expert witness resources.”<sup>203</sup>

The national paucity of misdemeanor defense counsel makes New York especially interesting: every defendant in New York gets a lawyer. State law provides counsel for all misdemeanor defendants, whether they face incarceration or not.<sup>204</sup> Thus, people who are not constitutionally entitled to counsel, and who would not get counsel elsewhere, are represented.

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196. See Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/BKN9-BMT8>].
197. *A Race to the Bottom: Speed and Savings over Due Process: A Constitutional Crisis*, NAT’L LEGAL AID & DEF. ASS’N, at ii (2008), [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf) [<https://perma.cc/A9QD-G36Y>].
198. Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2012 - Preliminary*, BUREAU JUST. STAT. tbl.1 (Feb. 26, 2015), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239> [<https://perma.cc/349X-TBE3>] (download “comma-delimited format (CSV)”; then open “jeeus1201.csv”) (displaying for fiscal year 2012 the “[p]ercent distribution of expenditure for the justice system by type of government”).
199. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 72 & n.13 (3d ed. 1992).
200. Boruchowitz et al., *supra* note 48, at 21.
201. *Id.* at 33.
202. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).
203. *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 2 (2015) (statement of Robert C. Boruchowitz, Professor, Seattle University School of Law).
204. N.Y. CRIM. PROC. LAW § 170.10.3 (Consol. 2018) (“The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action.”); see also 32 NEW YORK JURISPRUDENCE: CRIMINAL LAW: PROCEDURE § 738 (2d ed. 2016).

Furthermore, *Misdemeanorland* indicates that the New York defense bar is highly engaged. The book is full of accounts of aggressive representation in which a defense attorney's tenaciousness resulted in demonstrably better outcomes. In these accounts, New York defenders are clearly overloaded like their national counterparts,<sup>205</sup> but they still understand their mission as one of zealous representation. "Of course you are going to have done your investigation. Of course you are going to research it," remarks one public defender.<sup>206</sup> A prosecutor relates that there is "[a] lot of . . . fighting in criminal court between the defense bar and the prosecution over the 'letter' [taking a Class A or B misdemeanor]."<sup>207</sup> In one case, a public defender's herculean efforts over eight months and fourteen court appearances led to her client's full-out acquittal.<sup>208</sup> In another, a persistent defender managed to get a resistant prosecutor to "come off the misdemeanor" and offer a violation plea.<sup>209</sup> Advocacy takes place on an institutional as well as individual level: when prosecutors proposed increasing the weight of an ACD mark, "defense organizations strenuously resisted."<sup>210</sup> *Misdemeanorland* thus reveals with specificity just how impactful a robust defense bar can be in the world of petty offenses.

#### B. Prosecutorial Complicity in Broken-Windows Policing

Defense zealotry is especially significant in New York because prosecutors are deeply reluctant to dismiss cases. Prosecutors treat almost all arrests as presumptively meaningful incidents of criminality that require some punitive response. There is "an institutional disposition to *do something* with these cases."<sup>211</sup> As one prosecutor put it, "I can tell you that we don't dismiss cases. I mean we do, but we have to have proof that [the defendant] is not guilty."<sup>212</sup> Even where

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205. See, e.g., KOHLER-HAUSMANN, *supra* note 7, at 118.

206. *Id.* at 134.

207. *Id.* at 153.

208. *Id.* at 137.

209. *Id.* at 164; see also *id.* at 200 (describing an incident in which a defense attorney used a letter from the client's employer to negotiate an ACD); *id.* at 201-02 (relaying an incident in which defense counsel deployed a delay tactic to the benefit of the client); *id.* at 262 (describing an incident in which a defense attorney "forcefully" rejected a plea offer and obtained a better disposition).

210. *Id.* at 175.

211. *Id.* at 265.

212. *Id.* at 128; cf. *In re Winship*, 397 U.S. 358, 364 (1973) (holding that the government bears the burden of proving a defendant's guilt beyond a reasonable doubt).

defendants provide evidence of actual innocence and other potentially meritorious claims, prosecutors routinely refuse to dismiss cases, insisting on imposing some sort of mark and burden.<sup>213</sup> In one example, a defendant was charged with fare evasion for using a special MetroCard for people with disabilities. He brought in a letter from his employer, a social-services agency, explaining that part of his job was to help people with disabilities take subway trips and that he had the card for that legitimate purpose. He explained that at the time, he was helping a large group of disabled persons navigate the subway and that he had swiped his regular card along with their special cards. Nevertheless, because he could not prove that he had not swiped the wrong card, the prosecutor refused to dismiss the case and offered an ACD instead.<sup>214</sup> Similarly, prosecutors refused to dismiss the case against a defendant who was found with an oxycodone pill in his pocket, even though he produced his valid prescription for the medication. He was offered an ACD.<sup>215</sup> Convicting the innocent is widely accepted. As one public defender explained bluntly to her client, “Dis con is what they offer innocent people with records.”<sup>216</sup>

This prosecutorial tenacity is a deep feature of the legal system’s response to broken-windows policing. New York prosecutors could have reacted to the onslaught of low-level arrests beginning in the 1990s in a variety of ways. They could, for example, have treated them as expressions of contestable policing priorities rather than individual criminality warranting prosecution, and in so doing, increased their initial declination rates.<sup>217</sup> Indeed, prosecutors in two boroughs recently did just that, at least with respect to certain offenses. In 2012, the Bronx District Attorney’s Office was confronted with a civil rights lawsuit and evidence that police were gratuitously arresting people in public housing for trespassing. The district attorney instituted an office policy against proceeding with trespassing prosecutions based solely on police reports.<sup>218</sup> Likewise, in

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213. Judges are also reluctant to dismiss cases. One judge “said that he rarely grants a defense motion [to dismiss] on the basis of factual claims, because ‘there’s always two sides to the story,’ nor on the basis of legal claims, because he does not have time to adequately research the law in the middle of a typical shift.” KOHLER-HAUSMANN, *supra* note 7, at 109.

214. *Id.* at 127-28.

215. *Id.* at 128-29. The public defender described arguing “for an hour” until the judge decided to dismiss the case. *Id.*

216. *Id.* at 166.

217. See Bowers, *supra* note 128, at 1712-20 (discussing differentials in declination rates).

218. See Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES (Sept. 25, 2012), <https://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html> [<https://perma.cc/2F4Q-FBTW>].

2014, the Brooklyn District Attorney rolled back marijuana-possession prosecutions, both because of the racial disparities in arrest rates and the notion that prosecution was overkill in such cases.<sup>219</sup> In a similar vein, Baltimore has experienced many of the same challenges of racialized overpolicing as New York. There, police supervisors and prosecutors decline to prosecute 16% of all arrests at the jail before defense counsel is even appointed, and up to 25% of arrests for certain order-maintenance offenses.<sup>220</sup> By contrast, New York's general prosecutorial declination rates during the broken window era across all five boroughs remained between 7 and 12%.<sup>221</sup>

*Misdemeanorland* implies that conviction rates should have stayed constant in the face of broken-windows' expansive policing. "In many ways," writes Kohler-Hausmann, "the New York City Broken Windows experiment embarrasses our traditional understanding of how an expansion of criminal enforcement should work: as misdemeanor arrests climbed dramatically . . . the rate of criminal convictions fell sharply."<sup>222</sup> But that "traditional understanding" is only embarrassed if it assumes that prosecutors' charging decisions move in lockstep with police arrest decisions, and that New York prosecutors should have treated the new flood of arrests as meritorious even though arrests were being made for new and problematic reasons. That need not have been true. Prosecutors might have decided, as the Bronx and Brooklyn District Attorneys eventually did in a limited fashion, that many cases did not deserve to proceed at all. That determination would have manifested in higher initial declination rates, early dismissals made not under pressure from defense counsel, but made *sua sponte* by prosecutors on the merits. The fact that New York prosecutors generally maintain low initial declination rates and generally resist dismissal is revealing. It makes them complicit in broken-windows policing, not merely reactive to it.

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219. See Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html> [<https://perma.cc/RSH6-GAN8>].

220. See Civil Rights Div., *supra* note 62, at 26, 35.

221. See KOHLER-HAUSMANN, *supra* note 7, at 146. Kohler-Hausmann clarifies in a note that "some arrests are discarded at the precinct," and that these are not included in that seven to twelve percent declination rate. The overall prearrestment declination rate might therefore effectively be higher. *Id.* at 146 n.8; see also *New York County 2013-2017 Dispositions of Adult Arrests*, N.Y. DIVISION CRIM. JUST. SERVICES 5 (Apr. 20, 2018), <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/newyork.pdf> [<https://perma.cc/E7NZ-MHWU>] (listing misdemeanor declination rates between two and four percent from 2013 to 2017).

222. KOHLER-HAUSMANN, *supra* note 7, at 67.

C. *The New York Adversarial System at Work*

This dual phenomenon — a vigorous defense bar and strong prosecutorial antipathy toward dismissal — suggests that *Misdemeanorland* could have told a different, more adjudicative story about the New York court system’s managerial compromise. As an empirical matter, the flood of broken-windows cases led to “a decline in the rate of criminal conviction and an increase in the rate of dismissal,”<sup>223</sup> dismissals that largely took the form of ACDs. Those convictions, in turn, were heavily weighted towards dis cons rather than letter crimes. The book describes this, at least in part, as a normative prosecutorial decision regarding desert. “The practice of offering conditional dismissals [ACDs] in so many cases . . . illustrates a sentiment that it is morally unnecessary for the heavy machinery of criminal justice to come down on every defendant accused of a low-level offense if the person can prove himself to be responsible and governable.”<sup>224</sup> Dis cons, which are usually accompanied by conditions, impose a “less serious mark” and do not impose the same collateral consequences as letter convictions do.<sup>225</sup> In these descriptions, the decline in conviction rates and the increase in ACDs represent equitable prosecutorial decisions about the appropriate state response to low-level offending. Managerial justice embodies a “substantive principle of proportionality, which is that people do not necessarily *deserve* to be punished for every incident of low-level offending.”<sup>226</sup>

But a different way to make sense of the decline in conviction rates and the heavy use of dis cons is adversarial — that the existence of an aggressive defense bar meant that prosecutors *could not* simply convert all those new arrests into letter convictions. Instead, they had to compromise in the face of a meaningful defense presence. Managerial justice was, so to speak, imposed on them. From the defense perspective, “[t]he right to insist on a trial is converted into a tool to force prosecutors and judges to make more reasonable offers,” a classic feature of the adversarial plea-bargaining process.<sup>227</sup> Force is necessary because pros-

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223. *Id.* at 20.

224. *Id.* at 74; *see also id.* at 266 (“The moral principle at work in the managerial model [is] that we essentially don’t seek any punishment at all unless the person demonstrates a persistent disregard for social rules and otherwise seems unmoored from other institutions of social control . . .”).

225. *Id.* at 84-85.

226. *Id.* at 73.

227. *Id.* at 123; *see also* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1141-46 (2011) (describing how defense lawyering drives the plea-bargaining market and therefore the fairness of guilty pleas); *cf.* Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 919-22 (2015)

ecutors demonstrate time and again that they are unwilling to dismiss cases outright, even where the evidence is weak or even where it indicates actual innocence. Instead, under pressure from defense counsel, they offer compromise dispositions. The ACD and the dis con are central to the New York landscape not because they are an equitable gift from prosecutors to defendants—products of a kinder, gentler managerial mindset—but because they are an adversarial compromise. They work because they let prosecutors save face, because they operationalize the presumptive need to ratify arrests in some way, and because they alter the defense calculus. They are dispositions that defendants will often rationally accept even when they have a skilled defender willing to litigate and even when they might have meritorious legal issues and viable defenses.<sup>228</sup>

For example, New York is home to the Bronx Defenders,<sup>229</sup> one of the premier public-defense organizations in the country. Between 2011 and 2012, the office identified fifty-four marijuana misdemeanor cases—what they called “fighter” cases—in which clients with potentially meritorious issues wanted to fight their charges.<sup>230</sup> The fighters were represented by lawyers at the Bronx Defenders and by attorneys at the Manhattan law firm Cleary Gottlieb Steen & Hamilton. But few fighters actually managed to contest their cases, and in the end the majority accepted ACDs or pled guilty, mostly to disorderly conduct. Prosecutors took advantage of court delays, postponements, and the requirement that defendants be physically present at every court date to pressure defendants to plead. Thirty percent of the fighter cases were eventually dismissed—twice the average rate<sup>231</sup>—but only after an average of nine months.<sup>232</sup>

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(describing how prosecutorial bargaining tactics can lead to wrongful conviction); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) (discussing the relatively constrained negotiating powers of defense counsel).

228. See KOHLER-HAUSMANN, *supra* note 7, at 131 (describing the “difficulty [for defense counsel] in trying to convince clients to reject arraignment guilty pleas”).

229. BRONX DEFENDERS, <https://www.bronxdefenders.org> [<https://perma.cc/W266-K23Y>]; see also James Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 823 (2019) (describing the holistic-defense model deployed by Bronx Defenders as saving its clients over one million days in jail over a ten-year period).

230. *No Day in Court: Marijuana Possession Cases and the Failure of the Bronx Criminal Courts*, BRONX DEFENDERS 2 (May 2013), <https://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf> [<https://perma.cc/WRU4-PMP4>].

231. KOHLER-HAUSMANN, *supra* note 7, at 150 (noting an “other dismissal” rate of twelve to fifteen percent).

232. BRONX DEFENDERS, *supra* note 230, at 3.

The lesson from the fighter cases is how stubbornly New York prosecutors resist dismissal and adjudication on the merits and the correlative importance of a zealous defense. Even with some of the best lawyers in town, the majority of defendants with colorable issues still ended up with ACDs and dis cons, often after months of litigation. Without those lawyers, it stands to reason that there would have been fewer dismissals and more defendants would have accepted worse dispositions.

The pressure that defense counsel exert on prosecutors is a classic feature of the adjudicative system—the beating heart of the adversarial process. That is why the Supreme Court treats the right to counsel as the primary guarantee “that all other rights of the accused are protected.”<sup>233</sup> Evidence does not speak for itself, and due process is not self-enforcing; the adjudicative model depends on defense counsel to operationalize its commitment to rights, due process, and evidence.<sup>234</sup> Of course, defense counsel’s role is not *only* adjudicative. They perform many functions, often operating as de facto social workers on behalf of their clients, and in that sense could be said to be doing managerial work as well.<sup>235</sup> But at least in New York, the defense bar clearly operates in traditionally adversarial ways in line with the adjudicative model.

This suggests that adjudicative forces, not just managerialism, are driving some of the reduction in conviction rates. Evidence and guilt are indeed devalued in many ways throughout the misdemeanor process, but that does not mean that the adjudicative model lacks relevance. Instead, the classic adversarial procedures of adjudication in New York appear to be producing compromised dispositions that punt on evidentiary questions of guilt, not because the system has given up on guilt and conviction, but because a robust defense bar makes it hard to determine guilt every time. Without that defense bar, the process would be more conventionally punitive. These dynamics suggest that managerial justice has not replaced the adjudicative model but may even be a result of it.

The influence of the defense bar in New York offers crucial insights for the rest of the misdemeanor universe, where counsel is so often lacking. *Misdemeanorland* shows, step-by-step and negotiation-by-negotiation, how a robust commitment to the constitutional entitlement to counsel can profoundly alter the culture of lower courts and lead to reduced punishment and fewer formal convictions. In New York, the stakes were ratcheted up by the advent of broken-

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233. *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

234. See Natapoff, *Gideon Skepticism*, *supra* note 13, at 1057–66 (describing the outsized role that defense counsel plays in legitimating the adjudicatory system).

235. See Natapoff, *Gideon’s Servants*, *supra* note 13, at 445–48, 459–62 (describing how the public-defense function often morphs into social work).

windows policing, but the salutary effects of strong defense counsel would pertain in the many jurisdictions grappling with heavy caseloads, limited resources, and prosecutorial reluctance to screen and dismiss.<sup>236</sup> At a certain level of generality, the proposition sounds obvious—scholars and the National Association of Criminal Defense Lawyers have been vocally arguing for a decade that the misdemeanor system needs better defense resources.<sup>237</sup> But *Misdemeanorland* carefully charts the informal, institutional dynamics through which the presence of a robust, active defense bar can change the very tenor of prosecutorial and judicial decision-making, shifting official intuitions about foundational questions of what constitutes a fair and just outcome.

## V. MISDEMEANOR JUSTICE?

The sprawling misdemeanor drama in New York and around the country offers a poignant reminder of the democracy- and equality-reinforcing aspirations of the rule of law. Demands for due process, evidence, and legal accountability are some of the core traditional ways in which we render criminal law defensible—bases on which it becomes permissible for the state to exercise its coercive criminal authority and to punish.<sup>238</sup> Such rules also have equity-protective features. The requirement that convictions rest on evidence instantiates the idea that people should only be punished for their criminal conduct—not for their race, class, or disfavored social status. Constraints on police and prosecu-

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236. While there is scant research on prosecutorial decision-making, what little is available suggests that misdemeanor prosecutors often operate under external and internal pressures to convert arrests into charges and then into convictions in ways that overstate defendant criminal liability. Misdemeanor dockets are usually staffed by the newest prosecutors, just as they are typically staffed by junior public defenders. Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making—Technical Report*, NAT'L INST. JUST. 134-35 (Dec. 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240334.pdf> [<https://perma.cc/Z5ZF-AVDH>]. New prosecutors are often more deferential to police; one prosecutor explained that she “didn’t have the words” to challenge police decisions when she first started. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1099-1113, 1101 n.190 (2014).

237. See, e.g., Boruchowitz et al., *supra* note 48; Roberts, *supra* note 102.

238. See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 313 (2004) (describing the traditional view that due process promotes the democratic legitimacy of criminal punishment for innocent and guilty alike). This is not the only possible view. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 n.125 (1994) (“The deep logic of the criminal procedure provisions of the Bill of Rights is not to protect truly guilty defendants—especially those who have committed violent crimes—from conviction, but primarily to protect truly innocent defendants from erroneous conviction.”).

torial discretion are, in part, antidiscrimination measures: they restrict the unfettered operation of bias and require that arrests and prosecutions be made for legally legitimate reasons.<sup>239</sup> The right to counsel represents a constitutional effort to level the playing field between rich and poor, to ensure that the disadvantaged benefit from the system's protective rules.<sup>240</sup> Such rules help promote accuracy,<sup>241</sup> but they also operationalize other democratic commitments such as transparency, official accountability, and the preservation of individual liberty and dignity—protections most needed by, and most often withheld from, the vulnerable. Accordingly, we can think of the adjudicative model, with its rule-of-law commitments, as a central democratic vehicle through which criminal jurisprudence offers protection to vulnerable people against unjustified state-sponsored social control.<sup>242</sup>

To be sure, such noble-sounding protections are often more aspirational than real, and even when observed they are often inadequate to guarantee either equality or fairness. The legality principle *nulla poena sine lege* (no punishment without law) and its adjudicative infrastructure mask and validate many injustices, including racially disparate enforcement practices and overly punitive sentences.<sup>243</sup> U.S. criminal procedure is infamously underprotective of people of

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239. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that equal protection guarantees protect against racially discriminatory law enforcement); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (striking down a vagrancy statute in part because it conferred excessively unfettered discretion on police to discriminate); *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886) (striking down city ordinances because they conferred “naked and arbitrary power” upon decision makers which was used to single out Chinese businesses).

240. See, e.g., Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282, 2306 (2013) (discussing the historic understanding of *Gideon* as a class and racial equalizer).

241. *Misdemeanorland* treats the adjudicative model as concerned primarily with accuracy. See KOHLER-HAUSMANN, *supra* note 7, at 71 (“[T]he animating task organizing the work of criminal justice actors [under the adjudicative model] is to determine whether the defendant in fact committed the criminal act of which she is accused.”). The book thus does not focus on adjudication’s other legitimating functions: “It is not self-evident, at least to me, that what we *want* from misdemeanor courts is perfect adjudicative accuracy.” *Id.* at 264; see also *id.* (“[C]ourt actors operating under the managerial model produce *both* false positives and false negatives . . .”).

242. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (limiting state authority to criminalize same-sex adult intimate conduct); *Papachristou*, 405 U.S. at 156.

243. Jonathan Simon, *The Second Coming of Dignity*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 13, at 275, 275-76; see also Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 19-20 (2018) (distinguishing between legal legitimacy and sociological legitimacy); Jeffrey Fagan, *Dignity Is the New Legitimacy*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 13, at 308, 313 (“[I]ndignities are not easily managed by either a reinvigorated legality principle or by a procedure-based regulatory apparatus that responds formally to dignity incursions.”).

color, allowing racial biases and power inequalities to infect stops, arrests, and the obtaining of consent.<sup>244</sup> By its nature, the rule of law is no protection against laws that affirmatively permit or promote discrimination.<sup>245</sup> But while insufficient on their own, legal constraints remain pillars of the broader criminal justice equality project. This Part explores the close relationship between legal rules and social equality, and the inegalitarian consequences of a misdemeanor culture that devalues both. It then examines New York's managerialism, with its concomitant disdain for adjudicative values and presumptive demand for social control over the disadvantaged. It concludes that the managerial turn away from due process, evidence, and guilt is intimately linked to classist and racist presumptions driving managerial practices.

### A. *The Equitable Importance of the Rule of Law*

The erosion of core legal protections in the U.S. misdemeanor arena—what *Misdemeanorland* describes in New York as an abdication of the adjudicative model—has special inequitable implications, both procedural and substantive. As described above, many jurisdictions across the country routinely disregard adjudicative norms, factual innocence, and the right to counsel.<sup>246</sup> Speedy dockets devalue law and evidence; judicial review is rare because motions and appeals are rarely filed. These dynamics weaken due process commitments, and they do so in ways that erode the fault model itself—society's commitment to convicting only the guilty.<sup>247</sup> To the extent that the system does not bother to follow basic rules or check the evidence, it announces its agnosticism about whether defendants are actually culpable.

Such erosions call into question some of the basic justifications for the exercise of state criminal authority in the first instance. Ignoring defendant fault is, of course, a major deviation from what we typically understand to be the core

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244. See, e.g., *Whren v. United States*, 517 U.S. 806 (1996) (holding that pretext and racial bias do not invalidate stops and arrests as long as police have probable cause); *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (discounting the effect of police pressure on black males in obtaining consent to search). See generally Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011) (describing myriad ways in which criminal procedure permits racial and other forms of discrimination).

245. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2194-95 (2013) (criticizing *Gideon* in particular and rights discourse more generally for validating an inherently unfair system of criminal laws).

246. See *supra* Part I.

247. See *supra* notes 59-60 (describing the centrality of the fault model).

project of criminal law.<sup>248</sup> And even where defendants are guilty, the underlying conduct at issue in misdemeanors is typically not particularly dangerous or culpable. These are largely low-level harms and disorder offenses, crimes that only weakly justify state coercion in the first place.<sup>249</sup> Nevertheless, arrests and prosecutions for that minor conduct impose significant burdens and intrusions. Millions of people every year lose their time, money, liberty, jobs, housing, credit, and immigration status. They are being marked, tracked, disrespected, and stigmatized. At these sites where criminal conduct is not particularly weighty, and yet punishment is significant, crime-control justifications are at their weakest while liberty and proportionality concerns are especially strong.

At the same time, this compromised legal process is aimed largely at the poor, people of color, the vulnerable, and the dispossessed. Their subordinate status invites attention from the misdemeanor machinery, and that machinery in turn generates and exacerbates their subordination. Defendants are often selected and convicted based on wealth, race, neighborhood, and social characteristics other than (or in addition to) their individual criminal behavior.<sup>250</sup> Through this self-reinforcing cycle, the politically vulnerable are overexposed to a criminal process that disregards basic rule-of-law constraints while affirmatively generating social disadvantage. We might say that the disadvantaged receive a lower quality version of the rule of law, in the same way that they receive lower-quality public education, housing, and health care. The system provides one weakened set of legal commitments for them and another, more robust set for those who have the social capital to insist on greater legal protection. The consequences of this state of affairs are far-reaching: those thirteen million annual misdemeanor cases are the vehicles through which most Americans experience the criminal justice system. In this way, weak rule of law becomes a defining and contributing feature of social disadvantage throughout the United States.

These dynamics also illuminate the crucial relationship between policing and legal process. The more policing veers towards the bare exercise of discriminatory social control, the more important the subsequent legal process becomes.

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248. See MODEL PENAL CODE § 1.02(1)(a) (AM. LAW INST., Official Draft 1985) (stating that “[t]he general purposes of the [MPC] are . . . to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individuals or public interests”); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 263-87 (2009) (proposing a culpability-based criminal code); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (identifying community condemnation as key to legitimate criminalization).

249. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 365-73 (2001) (O’Connor, J., dissenting) (describing the thin state justifications for making arrests in fine-only cases).

250. I discuss this phenomenon in greater depth in *The Penal Pyramid*, *supra* note 13.

Legal actors—prosecutors, judges, and defense attorneys—have the power and opportunity to moderate, modify, or resist decisions made by a less-regulated police authority. This is in essence what the Bronx and Brooklyn District Attorneys did when they systematically declined to prosecute trespass and marijuana arrests.<sup>251</sup> The potentially salutary effects of such decisions, and a robust legal apparatus generally, are especially important in the face of inequalitarian policing practices such as broken windows.

Conversely, these legal checks and balances are integral to the Supreme Court's decision to leave policing itself relatively underregulated. Because of the diverse and hard-to-control nature of policing, criminal procedure relies heavily on the more formal postarrest legal apparatus to ensure legitimate postpolicing criminal outcomes. As the Court cautioned in *Terry v. Ohio*, “[W]e [must be] mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street.”<sup>252</sup> That judicial function is better suited to regulate legal processes, which check policing excesses indirectly. As Darryl Brown put it, “Strong regulation of adjudication permits weak rule-based investigative regulation because, as the Supreme Court repeatedly implies in its criminal procedure decisions, we believe that adjudication checks investigation.”<sup>253</sup> This means that erosions of rule-of-law norms in misdemeanor legal processing are especially worrisome because that system is the infrastructure responsible for managing some of the most problematic forms of policing. Homicide arrest practices have many flaws, but today we rarely worry that they are mere pretexts for discriminatory social and racial control.<sup>254</sup> But as many scholars have pointed out, quality-of-life arrests are only weakly tied to crime control even as they are suffused with race- and wealth-based biases.<sup>255</sup> Many of them are made without probable cause.<sup>256</sup> Misdemeanor arrests thus demand special skepticism and scrutiny from legal actors.

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251. See *supra* notes 218–219 and accompanying text; see also Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html> [<https://perma.cc/KB6X-A3KM>] (describing the informal transfer of misdemeanor prosecutorial authority to police).

252. 392 U.S. 1, 12 (1968).

253. Brown, *supra* note 185, at 1588–89 (citation omitted).

254. See generally JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA (2015) (documenting homicide underenforcement in low-income African American neighborhoods in Los Angeles). By contrast, drug offenses, both serious and minor, are often decried as pretextual and racially motivated. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 64–84 (2012).

255. See HARCOURT, *supra* note 73, at 7; Fagan & Davies, *supra* note 73.

256. See Natapoff, *supra* note 12, at 117–18.

Put differently, a strong demarcating line between policing and prosecution protects individual liberty and the integrity of the legal process in ways that are democratically crucial. For the individual facing the state, that line marks the boundary between being an arrestee and a defendant, between being hassled by police and potentially sustaining a life-long criminal conviction.<sup>257</sup> Constitutionally speaking, the move from policing to prosecution represents the initiation of the adversarial process itself, triggering the right to counsel, due process, and many other dignitary protections.<sup>258</sup> When prosecutors and judges relax their vigilance around that line—for example, by failing to engage in robust screening and legal scrutiny of police decisions—they weaken basic institutional protections against the stratifying police state. From this perspective, misdemeanor docket management is not merely about clearing cases; it is a normative legal project of the highest order.

### B. Managerial Injustices

In New York, the machinations of the misdemeanor process have been democratically volatile for over a decade, as the system's racial and class inequalities have triggered scrutiny and anger. In 2012, U.S. District Judge Scheindlin concluded that police practices associated with broken windows were intentionally racially discriminatory and violated the Equal Protection Clause.<sup>259</sup> That same year, thousands of New Yorkers marched silently down Fifth Avenue to protest stop and frisk.<sup>260</sup> The outrage of the Black Lives Matter movement was stoked in 2014 when a police officer killed Eric Garner while arresting him for the extraordinarily minor offense of selling loose cigarettes.<sup>261</sup> In 2017, *Politico* reported that white New Yorkers receive more lenient sentences for marijuana possession

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257. Of course, the mere fact of arrest can be punitive and threatening in myriad ways beyond hassle. See Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 953-57 (2002) (describing how being stopped by police constitutes a form of disciplining and racial formation for black people).

258. See, e.g., *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (discussing attachment of the right to counsel at critical stages); *Massiah v. United States*, 377 U.S. 201 (1964).

259. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013).

260. John Leland & Colin Moynihan, *Thousands March Silently to Protest Stop-and-Frisk Policies*, N.Y. TIMES, (June 17, 2012), <https://www.nytimes.com/2012/06/18/nyregion/thousands-march-silently-to-protest-stop-and-frisk-policies.html> [<https://perma.cc/X5AG-G6L5>].

261. I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1248 (2017) (emphasizing the Black Lives Matter movement's anger over police violence against people of color who, like Eric Garner, are accused of minor crimes).

than African Americans and Latinos do.<sup>262</sup> The New York Police Department is currently being sued to release data regarding its arrests for turnstile jumping in the subway system—arrests that are disproportionately aimed at people of color.<sup>263</sup>

The procedural dysfunctions of the misdemeanor system have also triggered public resistance. Court watchers now sit in lower courts and report their activities.<sup>264</sup> Community bail funds in Brooklyn, Queens, and the Bronx have put up the money to release thousands of low-level defendants, effectively countering judicial decisions that would have resulted in detention.<sup>265</sup> The Bronx Criminal Court entered into a settlement in 2018 after the Bronx Defenders sued it for delays in its misdemeanor dockets.<sup>266</sup> And the political machinery has responded at the highest levels. When Mayor Bill de Blasio was first elected in 2013, one of his campaign promises was to curtail oppressive misdemeanor-policing practices. In 2017, his administration rolled out substantial reforms of the summonses system.<sup>267</sup> In all these ways, the New York debate understands low-level criminal institutions as highly contested sites of race, poverty, and democratic accountability.

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262. Brendan Cheney, *For Non-White New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO (May 9, 2017, 5:06 AM EDT), <https://www.politico.com/states/new-york/city-hall/story/2017/05/04/racial-disparities-in-marijuana-convictions-in-all-five-boroughs-111807> [<https://perma.cc/XM83-JR7L>].

263. Ali Winston, *What's at Stake in Fight for Subway Fare-Beating Data*, N.Y. TIMES (Sept. 19, 2018), <https://www.nytimes.com/2018/09/19/nyregion/hopping-subway-turnstiles-data.html> [<https://perma.cc/5L7W-ARU9>].

264. See, e.g., *About Court Watch NYC*, CT. WATCH NYC, <https://www.courtwatchnyc.org/about> [<https://perma.cc/GA67-A8EJ>]; see also Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2183 & n.40 (2014) (describing court-watch programs and listing sources).

265. See, e.g., Simonson *supra* note 12, at 600-02 (listing and describing the success of bail funds in getting individuals released); *Our Results*, BROOK. COMMUNITY BAIL FUND (2016), <https://brooklynbailfund.org/our-results-1> [<https://perma.cc/US6C-MKEW>] (discussing the organization's role in keeping over 3,500 individuals out of jail).

266. Ali Winston, *Speedy Trials Return to a Bronx Court Known for Delays and Dysfunction*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/bronx-misdemeanor-backlog-settlement.html> [<https://perma.cc/JHS6-8HD7>].

267. Jim Dwyer, *Vowing to Slay the (Already Subdued) Stop-and-Frisk Dragon*, N.Y. TIMES (Dec. 5, 2013), <https://www.nytimes.com/2013/12/06/nyregion/de-blasio-and-bratton-promise-to-deliver-on-goals-but-give-no-credit.html> [<https://perma.cc/HPV3-UVQ3>]; J. David Goodman, *Fewer Criminal Tickets for Petty Crimes, Like Public Urination*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/nyregion/criminal-summons-civil-public-urination.html> [<https://perma.cc/64RM-4RXH>].

*Misdemeanorland* begins and ends in a similarly critical register by lamenting the inequitable impact of misdemeanor enforcement on New York’s poor people of color and the “role [of the criminal system] in reproducing class and racial inequality in the United States.”<sup>268</sup> The “tremendous” costs of policing fall disproportionately on “people living in conditions of ‘social insecurity and marginality.’”<sup>269</sup> Kohler-Hausmann explains:

The residents inside these communities are the ones who come to have criminal records . . . , endure the degradation of arrest and prosecution, lose days of work and child care, and face interminable demands . . . . They increasingly feel disrespected and oppressed by a police presence designated for their safety and demeaned by a legal system designed to dole out justice.<sup>270</sup>

“Ultimately,” Kohler-Hausmann writes in conclusion, “this book points to moral commitments we hold about the dignity due to those in our social community who have been accused – or even convicted of – violating laws.”<sup>271</sup> Acknowledging “the very real social problems that gave rise to and sustain commitment to the Broken Windows policing model,” she argues that “[t]hose issues cannot be remedied by legal reforms that target judicial practice. They can only be addressed by a larger transformative project.”<sup>272</sup>

*Misdemeanorland* clearly identifies the social inequities and racial imbalances of the New York misdemeanor system. But it is less clear about whether managerial justice is to blame, and thus how managerialism should be normatively evaluated at the end of the day. “Is there anything wrong with what I have described about misdemeanorland?” Kohler-Hausmann asks rhetorically.<sup>273</sup> The book closes on a balanced note by observing that, on the one hand,

[m]any readers may [be] deeply disturbed by the account of misdemeanorland documented here, shocked that criminal courts charged with adjudicating guilt and innocence and protecting constitutional rights rarely

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268. KOHLER-HAUSSMANN, *supra* note 7 at 10–11 (“I conclude by arguing that [this] study . . . illuminates a set of urgent moral and political questions about the criminal justice system as an instrument of social control and its role in reproducing class and racial inequality in the United States.”).

269. *Id.* at 267; *see also id.* at 266 (noting that arrests are “systematically biased by certain social facts, some of which raise fundamental concerns of racial and class inequities”).

270. *Id.* at 267.

271. *Id.* at 257.

272. *Id.*

273. *Id.* at 264.

do so, and disillusioned that these courts instead use the tools of criminal procedure to manage and control multitudes of the city's most disadvantaged populations.<sup>274</sup>

On the other hand,

[o]thers might be heartened that New York City's misdemeanor courts are working so well. Flooded with substantial volumes of subfelony cases without a concurrent increase in court resources, one could see the managerial model as an efficient adaptation to the conditions generated by Broken Windows policing . . . . One might conclude that misdemeanorland court actors . . . innovated not only a brilliantly efficient response to accusations of low-level offending, but also an inherently just one . . . . [P]erhaps 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 rules.<sup>275</sup>

Kohler-Hausmann thinks both are “simultaneously true”: “I concur with both assessments in some respects,” she concludes.<sup>276</sup>

In this regard, *Misdemeanorland* understates its own implicit critique of managerial justice. The book sounds the alarm that “the operations of misdemeanorland . . . function[] to either reproduce race and class inequality or manage the effects of class and racial inequality in a punitive fashion.”<sup>277</sup> It points out that the “presumption of need for social control . . . arises from the social standing of the people subject to its power.”<sup>278</sup> In effect, this is a claim that the presumption driving managerialism is inherently racist and classist, aimed as it is at “the entire category of people who are targeted by Broken Windows policing . . . namely, low-income men of color, [who] become a population with an ongoing burden to prove governability in lower criminal courts.”<sup>279</sup> Put differently, managerial justice only happens to disadvantaged classes of people whom legal officials consider to be the sorts of people who need to be managed. It is precisely because legal officials think there is “profound uncertainty about what type of person”<sup>280</sup>

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274. *Id.* at 256.

275. *Id.*

276. *Id.*; see also *id.* at 264 (“There is both an efficiency and fairness argument to be made for the managerial model . . .”).

277. *Id.* at 257.

278. *Id.* at 224.

279. *Id.* at 79.

280. *Id.* at 228-29.

misdemeanor defendants are, and “that these populations are inherently disorderly and must affirmatively prove their fitness for freedom,”<sup>281</sup> that marking, hassle, and performance seem like “reasonable” or “practical” policies.<sup>282</sup> Prosecutors and judges believe they already know what type of person a wealthy, white, employed defendant is: there is only uncertainty, and therefore the need for ongoing managerial control, in the face of class and racial disadvantage.

Such biases are on display in the ways that the managerial model designates misdemeanor criminals in the first place. As *Misdemeanorland* documents, misdemeanor charges and convictions are remotely related, at best, to actual criminal, culpable conduct. It is the process itself that selects people based on criminalizing presumptions regarding poverty, race, and neighborhood, and then turns those people into recognizable, documented criminals based heavily on their court-related performances. *Misdemeanorland* actively creates and constructs its own subjects: “Defendants *come to be* the type of person who ought to be convicted by achieving a certain status in misdemeanorland, a status that is only to varying degrees achieved by establishing violations of specific provisions of the penal law.”<sup>283</sup> People who emerge from misdemeanorland formally marked as criminals do so not *because* they are necessarily guilty or culpable, but *because* they are the types of people whom the process treats as criminal.<sup>284</sup>

In these ways, *Misdemeanorland* shows how managerial social control, with its inattention to law, evidence, and guilt, embodies the demand that poor people of color constantly account for themselves. The demand is prior to any actual proof of criminality—a reversal made possible precisely by the erosion of the adjudicative model. It arises from presumptions about race, class, and neighborhood, which are then operationalized and validated first through policing practices and then through the legal misdemeanor process.<sup>285</sup> Because those initial police selection decisions are heavily biased, Kohler-Hausmann concludes that

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281. *Id.* at 224.

282. *Id.* at 266 (explaining how it “seems . . . perfectly reasonable” for frontline actors to use the managerial approach); *see supra* text accompanying notes 79–83 (describing managerial justice as a practical response).

283. *Id.* at 261.

284. *See id.* at 263 (describing how a defendant named Frank “might well have been guilty . . . but it was his inability to perform properly . . . that led to his custodial arrest and the prosecutor’s insistence that he plead guilty”).

285. In a similar vein, Khalil Gibran Muhammad points out that criminal justice data have historically been inherently racial and normative, even when they purport to be merely statistical. *See* KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 4–5 (2011) (tracing the history of how “blackness was refashioned through crime statistics”); *id.* at 277 (“The choice about which narratives we attach to [racialized criminal] data . . . is ours to make.”).

inequities would persist “even if the criminal courts impartially apply the managerial model to all defendants irrespective of class, race, or immigration status.”<sup>286</sup> But her own account indicates that the managerial model is not so impartial. There is no need for a managerial approach to the socially privileged because there is no uncertainty about their governability and thus no need for the assessment. The book thus reveals the managerial assessment itself to be biased, disrespectful, and punitive.

Such insights about the normative skew of managerialism are illuminating for the entire misdemeanor debate. Disrespectful presumptions about the disadvantaged are a powerful force in the misdemeanor universe—they lie behind the many erosions of substantive law and constitutional rights, the wholesale conversion of misdemeanor defendants into revenue sources in numerous jurisdictions, and the general lack of respect for the rule of law that permeates low-level criminal processes. These phenomena reflect political and social powerlessness; the system would not tolerate such debased treatment of people with greater economic or social authority. They suggest that, going forward, the misdemeanor system should be understood broadly and critically not only as a criminal justice institution, but as an engine of social and political inequality.<sup>287</sup>

#### CONCLUSION: THE LENIENCY FALLACY

As the United States grapples with the punitive brutality of decades of mass incarceration,<sup>288</sup> it is tempting to view misdemeanors as lenient alternatives to felony punishment. But *Misdemeanorland* offers persuasive evidence that misdemeanor justice in general, and managerial justice in particular, is not lenient. It may not result in formal jail sentences or criminal convictions as often as it might, but it embodies a profoundly suspicious, disrespectful, punitive stance towards its disadvantaged subjects. Because many of the burdens associated with the misdemeanor experience do not count doctrinally as “punishment,” they have escaped the kinds of legal constraints and scholarly scrutiny accorded incarceration and other formal sentencing measures. But the misdemeanor-punishment problem cannot be solved through formalism. To be sure, the Supreme

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286. KOHLER-HAUSMANN, *supra* note 7, at 266.

287. See NATAPOFF, *supra* note 5, at 11-12 (“Like low-quality public schools and segregated housing, misdemeanors are an integral part of the downward social cycle that creates and perpetuates inequality.”).

288. See KOHLER-HAUSMANN, *supra* note 7, at 1, 5 (contrasting mass incarceration with the work of low level courts).

Court often thinks it can.<sup>289</sup> But crushing debt, job loss, and housing displacement are degrading, burdensome, and stratifying even though they are regarded as civil in nature. As *Misdemeanorland* demonstrates, marking, procedural hassle, and performance requirements are functionally punitive even though they do not always legally constitute punishment. Fully appreciated, the burdens of a misdemeanor encounter, including its managerial aspects, represent a heavy-handed exercise of the punitive, coercive power of the state.<sup>290</sup> This is especially true where that assertion of state power so openly produces and exacerbates social inequality along democratically suspect lines of wealth and race – stratification is part and parcel of the punitive exercise.<sup>291</sup>

As have many American jurisdictions, New York invested an enormous amount of time, resources, and money into expanding the net of criminalization through which to exert control over the poor, especially poor residents of color. Turbocharged by broken-windows policing, these policies and practices extended the potential reach of the criminal process deep into the lives and communities of African Americans and Latinos. In response, prosecutors and judges accommodated and compromised with the basic social-control premise. It would be a mistake to draw from *Misdemeanorland* the normative conclusion that this accommodation was lenient simply because the system could have incarcerated and convicted at higher rates. When the state intentionally creates the overcriminalizing conditions under which it could punish many more people more harshly, it should not get credit for being lenient merely because it does not take full advantage.

The leniency fallacy infects much of the petty-offense discourse and culture. It probably accounts for much of the relative invisibility of misdemeanors within

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289. See, e.g., *Turner v. Rogers*, 564 U.S. 431, 442-46 (2011) (authorizing incarceration for civil contempt without the appointment of counsel); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001) (describing the invasiveness and humiliations of a “normal custodial arrest” for even a minor criminal offense as permissible burdens even where such an offense could not lead to incarceration as a formal punishment); *United States v. Salerno*, 481 U.S. 739, 747 (1987) (noting that pretrial detention is a regulatory, not punitive, measure); cf. *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010) (extending Sixth Amendment effectiveness-of-counsel scrutiny to defense counsel’s advice regarding deportation notwithstanding deportation’s civil nature).

290. Sharon Dolovich and I have argued elsewhere for this expansive functional approach to punishment. See Dolovich & Natapoff, *Introduction to THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 13, at 1, 3 (arguing that the criminal process cannot be understood without a full evaluation of “the actual human experience of the millions of people who are selected, labeled, managed, and punished as ‘criminals’”).

291. See, e.g., WACQUANT, *supra* note 27, at 42-44 (arguing that a central purpose of criminal punishment is to label and manage the dispossessed).

the great debates over the excesses of American criminalization. And some of that is fair enough. The average felony sentence in the United States is four years in prison, an objectively heavier and more painful experience than the typical misdemeanor sentence of probation and a fine.<sup>292</sup> Multidecade drug sentences, prison overcrowding, and solitary confinement do indeed make misdemeanor punishments look petty by comparison. But mass incarceration has numbed us to the heavy-handedness of the misdemeanor experience and the intrusiveness of managerialism. Millions of people nationwide are losing their liberty, money, time, credit, jobs, housing, dignity, and self-esteem. Among its many contributions, *Misdemeanorland* shows just how deeply punitive this massive misdemeanor apparatus has become.

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292. See Brian A. Reaves, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, U.S. DEP'T JUST. 26 (Dec. 2013) <https://www.bjs.gov/content/pub/pdf/fdluco9.pdf> [<https://perma.cc/ZS6D-C5BH>] (noting that, in 2009, the mean felony prison sentence was fifty-two months).