Misdemeanors

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The enormous misdemeanor system is an increasingly important and fertile area of criminal justice reform. With over 10 million cases filed each year, vastly outnumbering felonies, the petty-offense process is how most Americans experience the criminal justice system. Characterized largely by speed, informality, and a lack of regulation and transparency, the petty-offense process generates millions of criminal convictions as well as burdensome punishments that affect employment, housing, education, and immigration. This chapter explains the major policy issues raised by the misdemeanor system, including its assembly-line quality, high rates of wrongful conviction, its racial skew, and how it quietly impoverishes working people and the poor. Key targets of reform include arrest, bail, prosecutorial policies, the right to counsel, diversion, decriminalization, debtor's prison, criminal records, and collateral consequences.

INTRODUCTION

Although we rarely think about them this way, misdemeanors constitute the vast majority of the American criminal justice system. With over 10 million minor cases filed every year, compared to 3 to 4 million felonies, misdemeanors constitute approximately 80% of state dockets. Most criminal convictions in this country are misdemeanors, and most Americans experience criminal justice through the petty offense process. Indeed, in a system that is internationally infamous for its size and harshness, misdemeanors are one of the largest yet least appreciated sources of overcriminalization. While the war on drugs, terrorism, and the death penalty command center stage in the national debate, it turns out that the lowly misdemeanor is in fact the paradigmatic American crime.[1]

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1. Some of this material has been adapted from previous publications, including Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313 (2012); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vand. L. Rev. 1055 (2015); Alexandra Natapoff, *Misdemeanors*, 11 Ann. Rev. L. & Soc. Sci. 255 (2015); and Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, *in* The Oxford Handbook of Criminal Law (2016).

At the same time, the misdemeanor world operates by its own peculiar and often disturbing rules. Enormous, fast, and highly informal, the system sweeps up and processes millions of people in ways that diverge wildly from traditional criminal justice ideals. People often do not get a lawyer; evidence is rarely scrutinized; proceedings can take mere minutes. Most people plead guilty, typically very quickly. Many convictions are inaccurate; many violate the Constitution. Because misdemeanors are often underestimated as petty or as a form of leniency compared to felonies, the petty-offense process has been permitted to function less rigorously than the serious felony machinery. In effect, because we punish low-level offenders less heavily at the back end, we make it easier to convict them at the front end. As a result, millions of criminal convictions are produced in ways that contradict fundamental notions of fairness and due process, and pose a significant threat to the accuracy and evenhandedness of the system overall.

The impact of misdemeanor punishment is profound. Individuals are arrested, jailed, tracked, placed on restrictive supervision, and heavily fined. Minor convictions mark people for life in ways that interfere with jobs, education, housing, child rearing, and immigration. These burdens, moreover, are distributed unequally throughout the population. Punishments are heavier and more destructive for the poor; like much of the criminal system, misdemeanor arrests and prosecutions are disproportionately aimed at people of color. Visited on millions of people every year, petty convictions have become a socioeconomic regulatory tool in their own right, affecting employment markets, welfare policy, and immigration.

The petty-offense process is one of democracy's most important regulatory systems. It protects against low-level harms such as domestic violence, drunk driving, and theft, and enforces important social values against violence and disorder. At the same time, it produces many social tensions and inequalities, quietly punishing the poor, the homeless, people of color, and disadvantaged communities. It is highly localized and diverse: The petty-offense process in New York looks very little like the one in Mississippi, and what works in Seattle may not work in Baltimore. But it has some global features and poses some large identifiable challenges. Specifically, the misdemeanor system fuels three key dysfunctions of the American criminal process: they revolve around innocence, race, and money. The fast and sloppy quality of the process generates large numbers of wrongful convictions. Racial disparities in misdemeanor policing contribute heavily to the racial skew of the entire criminal justice population. And the system's differential treatment based on wealth is a powerful aspect of American social inequality. Like underfunded public schools and low-quality

housing, the misdemeanor system is an integral part of what it means to be disadvantaged in America: The poor and people of color are more likely to encounter the system, and those encounters in turn make the disadvantaged worse off. For all these reasons, the petty-offense process invites major reform.

Misdemeanor reform is a quintessentially local affair. States, counties, and municipalities control every aspect of the petty-offense system, from defining and decriminalizing offenses, setting penalties, providing counsel, running jails and probation programs, to collecting fines and fees. While the federal criminal system occupies an outsized place in the national conversation over serious crime, in the misdemeanor world, federal authority is something of a footnote. Regardless of who the U.S. attorney general is at any given time, the size and nature of the misdemeanor system will be determined by state and local players. On the one hand, this makes top-down uniformity unrealistic; change typically occurs on a retail basis—state by state, or even city by city. On the other hand, the local nature of the process creates enormous opportunities for experimentation and reform that can improve thousands of lives in meaningful ways without the need for national consensus or federal approval. This makes misdemeanors one of the more fertile areas for criminal justice reform in the coming years.

This chapter proceeds as follows. It explains briefly what misdemeanors are (What is a Misdemeanor), how the petty-offense process works (Overview), how it punishes people (Punishment and Collateral Consequences), and its national policy implications (Innocence, Race, and Money). Leading scholarship and policy analyses on each issue are identified in the footnotes. The final section (Recommendations) discusses 10 key areas of reform: arrest, bail, prosecution, right to counsel, diversion, decriminalization, fines and fees, records and collateral consequences, data collection, and public education.

I. WHAT IS A MISDEMEANOR?

The law typically defines misdemeanors as offenses for which a person can serve no more than one year in jail, but this definition is partial. Some jurisdictions have misdemeanors that carry two- or three-year jail terms; some low-level drug felonies are punished very much like misdemeanors and are processed in comparable assembly-line ways. The functional hallmark of misdemeanors is sloppy, informal speed: Convictions are produced through plea bargaining quickly and in bulk, without much due process or adversarial testing, and people are punished less by long incarcerations than through supervision, debt, and long-term tracking and stigma that skew heavily based on race and wealth.

There are thousands of misdemeanors but a handful are particularly important—benchmark crimes that capture the strengths and weaknesses of the low-level process. At one end of the spectrum, certain low-level crimes look and work very much like felonies. They forbid harmful or dangerous conduct that society has agreed should be deterred and punished. Driving under the influence of alcohol (DUI) and domestic violence are paradigmatic examples: Not only do such offenses define clearly wrongful conduct and protect identifiable victims, but the process often devotes extra attention to them. There are special rules for managing cases and punishments, and courts typically count and monitor them. These are the least problematic classes of misdemeanor, in part because they have already been subject to decades of debate and reform, and because they are handled in ways that adhere most closely to the standard rules and values of criminal justice.

At the other end of the spectrum are offenses where the underlying conduct is not particularly harmful or wrong at all, or where there is little social consensus on whether or how it should be punished. The paradigmatic cases are order maintenance or quality-of-life offenses like loitering, trespassing, and disorderly conduct. These offenses do not define dangerous or culpable conduct so much as empower police to target and arrest a wide array of people who are not engaged in serious harm or wrongdoing. Such offenses famously sit at the heart of controversies over stop-and-frisk and urban order policing that disparately impact African American communities; these crimes generate much of the misdemeanor system's racial skew.[2] Unlike DUIs or domestic violence, moreover, such cases receive few resources and little attention. They are generated in bulk; defendants are swept quickly through the process, often without lawyers. Comprising a large percentage of low-level dockets, these cases are some of the misdemeanor system's most problematic and a particularly important area for reform.[3]

Another class of misdemeanor with especially important implications is drug possession, particularly marijuana. Marijuana possession is the most common U.S. drug offense, and it fuels many of the most controversial aspects of the war on drugs. First, it sweeps millions of people into the criminal system for conduct that is widely perceived as harmless and, in some states, is now legal

2. Floyd v. City of New York, 283 F.R.D. 153, 159 (S.D.N.Y. 2012) (finding New York stop-and-frisk practices unconstitutional); Ligon v. City of New York, 925 F. Supp. 2d 478, 490 (S.D.N.Y. 2013) (finding New York police trespassing arrest policies unconstitutional); *see also* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 Fordham Urb. L.J. 1043 (2013).

3. Bernard E. Harcourt, Illusion of Order: The False Promise of Broken Windows Policing (2001); Jeffrey Fagan & Garth Davis, *Street Stops and Broken Windows:* Terry, *Race, and Disorder in New York City*, 28 Fordham Urb. L.J. 457 (2000).

as a matter of state law. Enforcement is also heavily skewed by race. Although blacks and whites use marijuana at the same rates, arrest rates are four times as high for blacks as for whites nationwide; in some cities rates are 10, 15, even 30 times as high.[4] The trends toward marijuana decriminalization and legalization are thus not only important steps toward a more proportionate, less punitive criminal system, they are steps toward a more racially evenhanded one as well.[5]

The final types of low-level offense and punishment ripe for reform are those that criminalize based on income. The leading candidate is driving on a suspended license—an enormous category that constitutes up to 30% of some dockets.[6] Licensure offenses typically occur when individuals cannot afford to pay traffic fines thereby leading to license suspension, job loss, and further impoverishment. They primarily affect the poor and working class, since the well-resourced can pay their fines and keep their licenses. Similarly, misdemeanors such as sleeping on the sidewalk punish the poor and the homeless for lacking resources that the law says they should have: a place to sleep, a private place to eat, drink, or perform bodily functions.[7] Finally, the widespread imposition of fines and fees is itself highly regressive, punishing the poor more severely than the wealthy and leading to the resurrection of what many now refer to as new "debtor's prisons," where working, low-income and poor individuals are incarcerated solely because they cannot afford to pay their legal financial obligations. These phenomena drive many of the wealth effects of the misdemeanor process and thus deserve special attention.

II. OVERVIEW OF THE PROCESS

The misdemeanor machinery extends from the street all the way into the courtroom: from arrest to bail to prosecution, defense, and the judge's legal resolution of the case. Each stage contributes to the speedy and sloppy quality of misdemeanor adjudication that has earned it nicknames such as "assembly-line justice," "cattle herding," "meet 'em and plead 'em" lawyering,

4. Am. Civil Liberties Union, The War on Marijuana in Black and White (2011) [hereinafter The War on Marijuana]; *see also* Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. Empirical Legal Stud. 591 (2010).

5. See Natapoff, *Decriminalization*, *supra* note 1.

6. Lawyers Committee for Civ. Rts., Not Just a Ferguson Problem: How Traffic Courts Drive Inequality in California (2015) [hereinafter Not Just a Ferguson Problem]; Robert Boruchowitz, Am. Const. Soc. L. & Pol'y, Diverting and Reclassifying Misdemeanors Could Save $1 Billion per Year: Reducing the Need for and Cost of Appointed Counsel (2010); Robert Boruchowitz et al., Nat'l Ass'n Crim. Def. Law, Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts (2009) [hereinafter Minor Crimes].

7. Nat'l L. Ctr. on Homelessness & Poverty, No Safe Place: The Criminalization of Homelessness in U.S. Cities 17 (2014).

and "McJustice." The process is driven by its large numbers, an emphasis on summary justice rather than careful adjudication, and the enormous pressure placed on defendants to plead guilty as quickly as possible.[8]

A. POLICE

Police are the first and most powerful players in the misdemeanor world. They decide who will encounter the criminal system in the first instance: Policing policies and practices fill the enormous petty-offense pipeline. With approximately 11 million arrests per year, the vast majority of which are for misdemeanors, the scope and nature of low-level policing determine who will sustain a misdemeanor conviction and what sorts of offenses will be pursued.[9]

Police make low-level arrests for all kinds of reasons. They may be responding to a 911 call or a victim's report of a theft or assault, the kind of reactive, investigatory policing common to felonies where a crime has already been committed. But much of misdemeanor policing is proactive, preventative, and highly discretionary. Police may use arrests to clear a corner, to send a message of authority in a high-crime neighborhood, to collect information, or to move the homeless off the street.[10] Police may also be under pressure to make arrests for professional reasons. Many departments impose formal or informal quotas under which officers are required to generate large numbers of arrests to gain promotion.[11] Police may also make arrests under orders to raise revenue for the misdemeanor court system itself. In Ferguson, Missouri, for example, the U.S. Department of Justice found that Ferguson police were required by supervisors, who in turn were pressured by municipal officials, to increase arrest rates in order to generate the fines and fees that flowed from low-level convictions.[12] In all these ways, the misdemeanor pipeline is filled

8. Natapoff, *Misdemeanors*, *supra* note 1; *see also* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277 (2001).

9. U.S. Dep't of Justice, Fed. Bureau of Investigation, Crime in the United States 2015, tbl.29 (2016), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29.

10. *See* Forrest Stuart, Down, Out, and Under Arrest: Policing and Everyday Life in Skid Row (2016); Peter Moskos, Cop in the Hood: My Year Policing Baltimore's Eastern District 114–15, 119–20, 55 (2008).

11. Complaint, Raymond v. City of New York, No. 15-CV-6885 (S.D.N.Y. Dec. 10, 2015); Saki Knafo, *A Black Officer's Fight Against the N.Y.P.D.*, N.Y. Times (Feb. 18, 2016); *see also* U.S. Dep't of Justice, Civ. Rts. Div., Investigation of the Baltimore Police Department (2016) [hereinafter Baltimore Police].

12. U.S. Dep't of Justice, Civ. Rts. Div., Investigation of the Ferguson Police Department (2015) [hereinafter Investigation of Ferguson].

with arrests prompted by a wide range of policies that may have only a remote connection to evidence of crime or to public safety.

B. BAIL

Once a person is arrested, they may be required to pay bail. Bail is an amount of money set by the court to ensure that the defendant shows up: Defendants pay it at the beginning of the case and get it back at the end.[13] Many courts use "bail schedules" with set amounts for each offense, regardless of whether a defendant actually poses a flight risk.[14] Low-income defendants typically cannot afford bail and thus remain incarcerated. Indeed, they may end up serving more time pretrial for failure to make bail than they would be sentenced to as a result of being found guilty. As a result, many plead guilty, not because they are in fact guilty, but because it is the only way to secure release without waiting months in jail to resolve their cases.[15]

A series of lawsuits have been filed around the country challenging the constitutionality of money bail.[16] Because bail results in incarceration only for those who cannot afford to pay it, it can constitute a violation of equal protection principles. Moreover, pretrial incarceration has been shown to lead to disparate outcomes: People incarcerated before trial are more likely to plead guilty and more likely to receive harsher sentences.[17] As a result, numerous jurisdictions are in the process of reconsidering or eliminating money bail altogether.

C. PROSECUTION

Prosecutors are responsible for the all-important decision whether arrests should convert to formal criminal charges or whether charges should be "declined" or dismissed. Prosecutors are also the most powerful decision-makers in the plea-bargaining process, controlling what charges to bring, what

13. *See* Megan Stevenson & Sandra G. Mayson, "Pretrial Detention and Bail," in Volume 3 of the present Report.

14. *E.g.,* Superior Ct. of Cal., Cty. of L.A., 2017 Bail Schedule for Infractions and Misdemeanors (2017), https://www.lacourt.org/division/criminal/pdf/misd.pdf; Harris Cty. Crim. Cts. of L., Rules of Court 15 (2016), http://www.ccl.hctx.net/attorneys/rules/Rules.pdf.

15. White House Council of Econ. Advisors, Fines, Fees, and Bail (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [hereinafter Fines, Fees, and Bail]; George Joseph, *Eric Holder Wants to End Bail as We Know It*, The Atlantic (Nov. 8, 2016).

16. *E.g.*, Opinion, Jones v. City of Clanton, No. 2:15cv34-MHT (M.D. Ala. 2015); ODonnell v. Harris County, 2017 WL 1735456, No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017) (memorandum and opinion setting out findings of fact and conclusions of law).

17. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017).

sentence the defendant will face, and how much pressure to exert on defendants to plead guilty.[18]

The prosecutorial screening function is diminished in the misdemeanor world. In some low-level courts, for example, there are no prosecutors at all and police directly charge and prosecute their own cases. This means that individuals must defend themselves against, or work out a plea bargain with, the same officer who arrested them in the first place.

In courts where there are prosecutors, declination and dismissal rates vary widely by jurisdiction—in some cities such as Baltimore and New York, up to 50% of misdemeanor arrests are eliminated along the way.[19] By contrast, in Mecklenburg, North Carolina, a Vera Institute study found prosecutorial declination rates of only 3 or 4%, meaning that nearly all arrests converted into criminal charges.[20] The effect of low declination and dismissal rates is powerful: arrests that remain in the system typically convert to convictions because the vast majority of defendants plead guilty. This means that, in effect, police acquire the power to decide who will be convicted merely by arresting them.[21] This is not the way it is supposed to work, and not the way it works for felonies. But it is an unintended effect of prosecutorial caseloads, the emphasis on speed, and deference to police arrest decisions.

D. DEFENSE COUNSEL

Many misdemeanor defendants never get a lawyer. Some are not entitled to counsel by law: The U.S. Supreme Court held in *Scott v. Illinois*[22] that a misdemeanor defendant who is not incarcerated does not have a Sixth Amendment right to an attorney. As a result, defendants who face "fine only" charges—charges that carry only a fine and no possibility of jail—do

18. Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (2007); *see also* Ronald F. Wright, "Prosecutor Institutions and Incentives," in Volume 3 of the present Report.

19. Maryland Judiciary, Annual Statistical Abstract Fiscal Year 2015, tbl. DC-4 (2015), http://mdcourts.gov/publications/annualreport/reports/2015/fy2015statisticalabstract.pdf (discussing the manner of disposition for criminal cases); *Adult Arrests 2007-2016*, N.Y St. Div. of Crim. Justice Serv., http://criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYork.pdf (last visited May 10, 2017).

20. *Racial Disparities in the Criminal Justice System: Hearing Before the S. Comm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (testimony of Wayne S. McKenzie, Director, Prosecution & Racial Justice Program at the Vera Institute of Justice) [hereinafter McKenzie Testimony].

21. Alexandra Natapoff, *A Stop is Just a Stop:* Terry*'s Formalism*, 15 Ohio St. J. Crim. L. (forthcoming 2017).

22. Scott v. Illinois, 440 U.S. 367 (1979).

not have the right to a lawyer at all. Conversely, the Court held in *Alabama v. Shelton*[23] that defendants who are ultimately incarcerated, or who could be subject to incarceration under the terms of their probation, do have the right to counsel. But many such defendants do not receive lawyers even though they are constitutionally entitled to them.[24] Low-level courts often fail to appoint a public defender, requiring defendants to work out their cases directly with prosecutors. A chief justice of the South Carolina Supreme Court once explained that she expressly told judges not to appoint counsel even when required by *Alabama v. Shelton*:

> *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.[25]

Where counsel is provided, quality varies enormously. Some misdemeanor public-defender offices provide robust representation to their misdemeanor clients, investigating cases and going to trial. But most offices lack the resources to do so.[26] Misdemeanor public-defender caseloads are famously enormous—numbering in the hundreds and even thousands of cases, even though the ABA recommends a maximum of 300 misdemeanor cases per year per attorney.[27] This contributes to a so-called "meet 'em and plead 'em" culture in which attorneys meet their clients briefly, explain the prosecutor's offer, and get their clients to agree. Even where defenders are prepared to litigate their cases, defendants may decide to plead guilty because they cannot afford bail and must wait the weeks or even months that a trial might require. In effect, the size and speed of the process—and the hydraulic pressures on defendants to plead

23. Alabama v. Shelton, 535 U.S. 654 (2002).

24. Minor Crimes, *supra* note 6; Alisa Smith & Sean Maddan, Nat'l Ass'n Criminal Def. Lawyers, Three Minute Justice: Haste and Waste in Florida's Misdemeanor Courts 15 (2011); Diane DePietropaolo Price et al., Nat'l Ass'n Criminal Def. Lawyers, Summary Injustice: A Look at Constitutional Deficiencies in South Carolina's Summary Courts 19–20 (2016) [hereinafter Summary Injustice].

25. Minor Crimes, *supra* note 6, at 15.

26. Roberts, *supra* note 8; Minor Crimes, *supra* note 6; *see also* Eve Brensike Primus, "Defense Counsel and Public Defense," in Volume 3 of the present Report.

27. Am. Bar Ass'n, Standards for Criminal Justice Providing Defense Services 72, 72 n.13 (3rd ed. 1992).

guilty—impose structural limitations on defense counsel's ability to provide vigorous representation to their clients.[28]

E. COURTS

Low-level courts are notorious for their quick-and-dirty atmosphere. The leading report on national misdemeanor courts described how they work as follows:

> In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. Misdemeanor courtrooms often have so many cases on the docket that an attorney has mere minutes to handle each case. Because of the number of cases assigned to each defender, "legal advice" often amounts to a hasty conversation in the courtroom or hallway with the client. Frequently, this conversation begins with the defender informing the defendant of a plea offer. When the defendant's case is called, he or she simply enters a guilty plea and is sentenced. No research of the facts or the law is undertaken. This process is known as meet-and-plead or plea at arraignment/first appearance.[29]

Numerous scholars who have studied low-level courts around the country describe the same phenomenon.[30]

Because of the rushed and informal nature of these courts, judges may affirmatively discourage defense attorneys from litigating legal issues. Law professor Eve Brensike Primus—a former public defender—recalls misdemeanor judges who would not permit her to raise legal issues, telling her to "save it for appeal."[31] In many municipal courts, judges are not themselves lawyers.[32] In other courts, municipal judges also serve as part-time

28. Alexandra Natapoff, Gideon *Skepticism*, 70 Wash. & Lee L. Rev. 1049 (2013).

29. Minor Crimes, *supra* note 6, at 31.

30. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611 (2014); Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751 (2013); Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. Cal. L. Rev. Postscript 80 (2012); Roberts, *supra* note 8; Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117 (2008); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 Fordham Urb. L.J. 1157 (2004); Malcolm M. Feeley, The Process is the Punishment: Handling Cases in a Lower Criminal Court (1979).

31. Primus, *supra* note 30, at 81.

32. Brendan Smith, *Legislative Efforts Requiring Judges to Hold JD Meet with Mixed Results*, ABA J. (July 1, 2011), http://www.abajournal.com/magazine/article/is_there_a_lawyer_in_the_court/ (24 states do not require judges to have law degree); *see also* Summary Injustice, *supra* note 24.

prosecutors.[33] This inattention to law, due process, and neutrality is one of the defining characteristics of the misdemeanor process.

Low-level courts are also infamous for the disrespectful and inhumane treatment of the hundreds of defendants who speed through their doors. In Houston, people sat in long lines outside one misdemeanor courtroom for hours; some days the judge never showed up.[34] A bankruptcy judge who visited misdemeanor court in New York came away dismayed. "I was shocked by the casual racism emanating from the bench."[35] As Professor Jonathan Simon put it:

> [T]he whole structure of misdemeanor justice … seems intended to subject the urban poor to a series of petty but cumulative blows to their dignity as citizens of equal standing. The exposure to constant petty (as well as not so petty) degradation and domination by police, and the absence of an advocate, or a protective judicial role, produces a constitutive lesson of the lack of accord for dignity.[36]

F. THE INDIVIDUAL DEFENDANT

With so many official players under pressure to move cases along, the person with the strongest incentive to demand time and attention is the individual accused of a crime. But misdemeanor defendants are typically ill-equipped to stand up for their own rights. The petty-offense process tends to sweep up the disadvantaged: the undereducated, the poor, people of color, the young, addicted, or homeless.[37] Without meaningful representation or education, misdemeanor defendants are left to navigate their options alone. They may not know whether they are actually innocent or whether they have legal defenses that could be raised. Without legal advice, they may not appreciate the substantial burden that sustaining a misdemeanor conviction will impose on the rest of their lives. Even if they are not incarcerated, contesting their cases may require them to return to court multiple times, forcing them to miss work or struggle with transportation or child care. Such pressures often make pleading guilty seem like the only realistic option.

33. Nat'l Ctr. for St. Cts., Missouri Municipal Courts: Best Practice Recommendations (2015), https://www.courts.mo.gov/file.jsp?id=95287 [hereinafter Missouri Municipal].

34. Emily DePrang, *Poor Judgment*, Tex. Observer (Oct. 12, 2015), https://www.texasobserver.org/poor-judgment/.

35. Hon. Shelley C. Chapman, *I'm a Judge and I Think Criminal Court is Horrifying*, Marshall Project (Aug. 11, 2016), https://www.themarshallproject.org/2016/08/11/i-m-a-judge-and-i-think-criminal-court-is-horrifying#.Mh9gFKKVg.

36. Jonathan Simon, *Misdemeanor Injustice and the Crisis of Mass Incarceration*, 85 S. Cal. L. Rev. Postscript 113 (2012).

37. Natapoff, *Misdemeanors*, *supra* note 1; Roberts, *supra* note 8.

III. PUNISHMENT AND COLLATERAL CONSEQUENCES

Once a person sustains a misdemeanor conviction, a wide array of formal punishments and informal burdens accrue.[38] Probation and fines are the most common legal punishment; jail sentences are less frequently imposed but hover in the background as a threat against those who violate their probation or fail to pay their fines. In addition to the formal conviction, offenders may lose their jobs, welfare benefits, housing, and immigration status. Fines and fees often sink offenders deeper into poverty while saddling them with years of debt and poor credit. While such consequences still pale in comparison to long felony sentences, petty offenders are often punished in cumulative ways over long periods of time that far outweigh the seriousness of their crimes. Such punishments typically fall most heavily on the disadvantaged: While the wealthy can pay their fines and fees, or take time from work for a probation meeting, the poor often end up indebted and incarcerated because they lack the resources necessary to comply. This has led to what many have labeled the resurgence of "debtor's prison," where thousands of poor defendants are incarcerated not for their original offenses, but because they could not afford bail, fines, or fees.[39]

A. JAIL

In 1985, sociologist John Irwin wrote in his seminal work *The Jail*, "[i]n a legal sense, the jail is the point of entry into the criminal system. … [It] was invented, and continues to be operated, in order to manage society's rabble … meaning the 'disorganized' and 'disorderly,' 'the lowest class of people.'"[40] Today, over 11 million people pass through American jails every year; approximately 750,000 people are in jail at any given time. Forty percent of jail inmates are serving sentences; 60% are pretrial detainees who have not yet been adjudicated

38. Roberts, supra note 8; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457 (2010); Gabriel J. Chin, "Collateral Consequences," in Volume 4 of the present Report.

39. *The New Debtors' Prison: If You Are Poor, Don't Get Caught Speeding*, The Economist (Nov. 16, 2013), http://www.economist.com/news/united-states/21589903-if-you-are-poor-dont-get-caught-speeding-new-debtors-prisons; Rebekah Diller, Alicia Bannon & Mitali Nagrecha, Brennan Ctr. for Just, Criminal Justice Debt: A Barrier to Reentry (2010) [hereinafter A Barrier to Reentry]; Am. Civil Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010) [hereinafter In for a Penny]; *see also* Am. Civil Liberties Union of Ohio, The Outskirts of Hope: How Ohio's Debtor's Prisons are Ruining Lives and Costing Communities (2013) [hereinafter The Outskirts of Hope].

40. John Irwin, The Jail: Managing the Underclass in American Society 1–2 (1985).

or convicted of anything.[41] Most defendants who are offered bail cannot afford to pay it, which means that many inmates are effectively incarcerated due to their poverty.[42] The average pretrial detainee spends over a month in jail.[43]

Civil-rights litigation and the mass-incarceration debate have focused largely on the harms of prison, but jails are often just as harsh and dangerous, sometimes more so. Designed for short-term stays, jails typically lack the facilities, mental-health care, drug treatment, and other programs that prisons have. Violence, sexual assault, and disease are common.[44] And although it is not the most frequent initial sentence, the threat of incarceration hovers continually in the background if offenders fail to meet the conditions of their probation or cannot afford to pay their fines and fees.

B. PROBATION

Probation, sometimes referred to as community supervision, places defendants on a period of court supervision with conditions, such as the requirement that they maintain employment or remain drug-free. It is the most common misdemeanor sentence—over 4 million Americans are on some form of probationary supervision.[45] While probation is often understood as a form of leniency—a substitute for incarceration—it can be highly burdensome in its own right. Probationers lose their privacy rights—probation officers can search them and their homes at any time.[46] Probation typically requires periodic drug tests, visits to the probation office, electronic monitoring, and other reporting requirements that can be difficult to meet. A violation of any probation condition can subject the defendant to incarceration. A typical misdemeanor probation term can last from six months to several years.[47]

41. Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Dep't of Justice, Jail Inmates at Mid-Year 2014, at 1–4 (2015).

42. *See* Ram Subramanian et al., Vera Inst. of Just., Incarceration's Front Door: The Misuse of Jails in America (2015).

43. Doris J. James, Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report: Profile of Jail Inmates, 2002 (2004).

44. John J. Gibbons & Nicholas de B. Katzenbach, Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons (2006); *Since Sandra: Here Are the 815 People (and Counting) Who Have Lost Their Lives in Jail in the Year after Sandra Bland Died*, Huffington Post, http://data.huffingtonpost.com/2016/jail-deaths (last visited May 10, 2017).

45. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Geo. L.J. 291 (2016); *see also* Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

46. Samson v. California, 547 U.S. 843 (2006); United States v. Knights, 534 U.S. 112 (2001).

47. Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 Law & Pol'y 51 (2013).

One of the most important conditions of misdemeanor probation is the requirement to pay fines and fees. Thousands of misdemeanor defendants are incarcerated every year because they cannot pay their legal financial obligations (LFOs) and thus violate the terms of their probation. In over a dozen states, private probation companies profit from this arrangement, providing supervision services to the state for free and charging defendants monthly supervision fees.[48] If the defendant fails to pay the company, they can be jailed until they pay.

C. FINES AND FEES

Most misdemeanor offenders are punished through fines. While fines are an important and long-standing criminal justice tool, they have unintended consequences in the misdemeanor arena because so many defendants cannot afford to pay them. Such defendants thus receive not only their original fine, but are punished with long-term debt, the loss of their credit, and pressure to forgo necessities of life such as rent, food, health care, and education. If they do not pay, they may be incarcerated. In addition, courts and other criminal justice institutions now impose a wide array of fees, including booking fees, court costs, public-defender fees, jail fees, and late fees that can amount to hundreds or even thousands of additional dollars.[49]

A number of recent reports and lawsuits have documented the resurgence of debtor's prison for defendants who are too poor to pay their fines and fees or who cannot afford bail.[50] The 2015 U.S. Department of Justice Report on the Ferguson Police Department concluded that police practices and municipal courts in Ferguson, Missouri, were largely designed to extract revenue from low-income residents through the imposition of fines and fees for petty crimes and traffic offenses.[51] The Conference of State Court Administrators (COSCA)

48. Jason Blalock, Human Rights Watch, Profiting From Probation: America's "Offender-Funded" Probation Industry (Feb. 2014), https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry.

49. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753 (2010); *see also* Beth A. Colgan, "Fines, Fees, and Forfeitures," in Volume 4 of the present Report.

50. In for a Penny, *supra* note 39; A Barrier to Reentry, *supra* note 39.

51. Investigation of Ferguson, *supra* note 12.

and the Conference of Chief Justices have come out strongly against the practice, stating that it violates core notions of judicial integrity and neutrality to treat courts as tax collectors.[52]

D. EMPLOYMENT AND OTHER COLLATERAL CONSEQUENCES

Beyond formal legal sentences of jail, probation, and fines, misdemeanor offenders are subject to numerous collateral civil penalties for their minor convictions.[53] Perhaps the most important is the impact on employment: Most employers check criminal records, and a misdemeanor conviction can impede job prospects for years.[54] Additional consequences can include losing driver's licenses, jobs, professional licenses, public housing, food stamps, immigration status, and creditworthiness.[55] The Council of State Governments has assembled a database of statutory provisions that impose civil collateral consequences for a criminal conviction: For misdemeanors, the database contains nearly 9,000 provisions.[56] The collective collateral punishments that attach to a minor conviction can thus far outweigh the formal sentence itself.

IV. BIG CHALLENGES: INNOCENCE, RACE, AND MONEY

The misdemeanor process distorts many aspects of the criminal justice institution. Three especially critical challenges lie in the arenas of wrongful conviction, race, and wealth inequality.

A. INNOCENCE

Since 2014, there have been dozens of exonerations in Houston, Texas, of innocent people who pled guilty to low-level drug charges even though they did not possess drugs. They were arrested based on inaccurate roadside drug tests, and then succumbed to the heavy pressures to plead guilty in order to

52. Conf. of St. Ct. Admin., 2011–2012 Policy Paper: Courts Are Not Revenue Centers (2012) [hereinafter Courts Are Not Revenue Centers]; Lorri Montgomery, *Top National State Court Leadership Associations Launch National Task Force on Fines, Fees and Bail Practices*, Nat'l Ctr. for St. Cts. (Feb. 3, 2016), http://www.ncsc.org/Newsroom/News-Releases/2016/Task-Force-on-Fines-Fees-and-Bail-Practices.aspx [hereinafter NCSC News Release].

53. Pinard, supra note 38; Roberts, *supra* note 8; Chin, supra note 38.

54. Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (2007); Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp. L. Project, 65 Million Need Not Apply (2011); James B. Jacobs, The Eternal Criminal Record (2015).

55. *See* Jennifer M. Chacón, "Crimmigration," in the present Volume.

56. Council of St. Gov. Just. Ctr., https://niccc.csgjusticecenter.org/search/ (last visited May 10, 2017).

escape jail and the threat of longer sentences if they did not plead.[57] These inaccurate $2 drug tests are used to make arrests and generate convictions all over the country.

In New York, many innocent people were wrongfully convicted of trespassing under a New York Police Department policy called "Operation Clean Halls." Under that program, which was eventually found unconstitutional, police arrested large numbers of African Americans and Latinos for trespassing in or around public housing projects.[58] Often the individuals were not actually trespassing—many were visiting friends or family—but upon being arrested they pled guilty to escape jail and the long, burdensome process of contesting their cases. Public defender Chris Fabricant described the dynamic as follows:

> Before coming to the Bronx Defenders (where I am a staff attorney), I had never had a misdemeanor case, and rare was the client I was certain was innocent. In the Bronx, well over half of my cases are misdemeanors, and I have had a disgraceful number of innocent clients, many of whom plead guilty to a trespassing charge, either in a 'Clean Halls' building or a New York City Public Housing building.[59]

The threat of these types of wrongful conviction is inherent in the quick and dirty misdemeanor process: arrests based on weak evidence, a process ill-equipped to check the evidence, and heavy pressure to plead guilty. Because misdemeanor dockets are so large, they likely generate hundreds if not thousands of such wrongful convictions every year.[60]

B. RACE

The misdemeanor process is the first step in the racialization of crime in America. While the racial influences of the war on drugs and long mandatory minimum sentences are now well recognized,[61] the misdemeanor system plays

57. Ryan Gabrielson & Topher Sanders, *How a $2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. Times (July 7, 2016), https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?_r=0.

58. Ligon v. City of New York, 925 F. Supp. 2d 478, 490 (S.D.N.Y. 2013).

59. M. Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD's Apartheid-Like Trespassing Crackdown*, Village Voice (Oct. 30, 2007), http://www.villagevoice.com/news/rousting-the-cops-6419395.

60. 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 (Daniel Medwed ed., 2017); *see also* Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in Volume 3 of the present Report.

61. *See* Paul Butler, "Race and Adjudication," in Volume 3 of the present Report.

an enormous yet underappreciated role. The dynamic has its roots in the fact that low-level policing is heavily racially skewed.[62] Nationally, marijuana arrests are disproportionately aimed at African Americans, with black arrest rates four times as high as white arrest rates.[63] In New York, at the height of the city's order maintenance policy, 80% of people stopped and frisked by police were African American or Latino: most of those wrongful trespassing arrests described above were imposed on people of color.[64] In San Jose, California, a media investigation found that Latinos were subject to 70% of arrests for disturbing the peace, 57% of arrests for resisting, and 57% of arrests for public intoxication, even though the group comprises only approximately 30% of San Jose residents.[65] In Baltimore, 657 people were arrested for "gaming" or "playing cards" between 2010 and 2015: Five were white.[66] In these cumulative ways, the enormous net of the petty-offense process sweeps in hundreds of thousands of African Americans and other minorities every year, marking them as criminal, often inaccurately, and burdening their personal and economic lives in perpetuity. Addressing the misdemeanor racial dynamic is thus key to addressing the racial imbalance of the entire criminal system.

C. MONEY

Finally, the misdemeanor system has become an engine of wealth redistribution and a powerful socioeconomic institution in its own right. The process criminalizes poverty—for example by punishing and incarcerating individuals who cannot afford to pay bail, fines, or fees.[67] It exacerbates that poverty, for example by suspending driver's licenses of people who already cannot afford traffic fines, and imposing late fees and interest on those who cannot pay immediately.[68] And it links poverty to incarceration by jailing those who cannot afford bail or who have missed a payment.[69]

62. *See* Devon W. Carbado, "Race and the Fourth Amendment," in Volume 2 of the present Report; *see also* David A. Harris, "Racial Profiling," in Volume 2 of the present Report.
63. The War on Marijuana, *supra* note 4.
64. Floyd v. City of New York, 283 F.R.D. 153 (S.D.N.Y. 2012); *see also* Henry F. Fradella & Michael D. White, "Stop-and-Frisk," in Volume 2 of the present Report.
65. Christy E. Lopez, Am. Const. Soc'y for L. & Pol'y, Disorderly (Mis)conduct: The Problem With "Contempt of Cop" Arrests 1, 7 (2010).
66. Baltimore Police, *supra* note 11.
67. Harris, Evans & Beckett, *supra* note 49.
68. Not Just a Ferguson Problem, *supra* note 6.
69. Laura Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. Rev. 1483 (2016); Wayne Logan & Ronald Wright, *Mercenary Criminal Justice*, 2014 U. Ill. L. Rev. 1175.

The system's heavy reliance on fines and fees is no accident: Many municipal courts, probation offices, and local governments rely on the income stream generated by misdemeanor adjudication. Small towns around the country raise millions in revenue through arresting, citing, and convicting low-level offenders.[70] In Ferguson, Missouri, the Justice Department concluded:

> Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community.[71]

In effect, the system taxes its low-income population through fines and fees in order to fund the operation of the petty-offense process itself.

RECOMMENDATIONS

Cost has long been an impediment to criminal justice reform in general, and to misdemeanor reform in particular. It is often thought that stronger procedures, more defense counsel, data collection, and individuated justice are too expensive given the petty nature of the underlying offenses. But this impression is incorrect. Some misdemeanor reforms actually save the state money: It can be cheaper to find housing for homeless people than it is to lock them up. Community service is less expensive than arresting and incarcerating people who cannot afford to pay their fines and fees. Decriminalization and legalization mean that the state no longer has to pay for defense counsel, prosecutorial resources, or jail. Moreover, the individual and social costs of misdemeanor overcriminalization are very high. Society—especially local budgets—bears the cost when millions of individuals are incarcerated, impoverished, and rendered jobless by the misdemeanor experience. Or, as California State Sen. Bob Hertzberg bluntly put it: "We're not even getting the dough. How intelligent is that? We're just ruining people's lives."[72] Misdemeanor reform can thus be both fiscally responsible and socially beneficial.

70. In for a Penny, *supra* note 39; Courts Are Not Revenue Centers, *supra* note 52.

71. Investigation of Ferguson, *supra* note 12, at 2.

72. Sen. Bob Hertzberg, A Cycle of Incarceration: Prison, Debt and Bail, White House Conference (Dec. 3, 2015), *available at* https://www.youtube.com/watch?v=ErcSHP12deE (comments at 2:14:33).

The reforms below address weaknesses and counterproductive incentives at crucial stages of the misdemeanor process: arrest, adjudication, incarceration, and punishment. Some reforms are aimed at specific actors; some involve multiple institutions. Numerous jurisdictions across the county are experimenting with such reforms—the examples provided are the tip of the iceberg, offering a window into the possibilities for experimentation and success. More extensive details and reform proposals are contained in the sources in the footnotes.

1. **Reduce the flow of low-level arrests that fill the misdemeanor pipeline.** Many police departments impose formal or informal quotas on police officers to make citations and arrests. This leads to unnecessary arrests and charges that fill the misdemeanor pipeline while disproportionately impacting low-income and minority neighborhoods. For example, New York police officers filed a lawsuit against the NYPD, arguing that such quotas violate their professional standards and put pressure on officers to make unconstitutional arrests.[73] The Department of Justice concluded that quotas were pressuring Baltimore police officers to engage in unconstitutional practices.[74] Eliminating such quotas and pressures would not only improve police working conditions but stem the flow of unnecessary and unfounded arrests into the petty-offense system in the first place.[75]

   State legislatures also have the power to restrict police authority to arrest for minor offenses, requiring police to issue citations and summonses instead.[76] Legislatures should identify offenses, such as traffic offenses, order-maintenance crimes, and marijuana possession, where the purposes of the statute can be fulfilled by issuing a summons and the costs of arrest to the individual and to the state can be avoided. In New York, for example, the city recently converted a number of criminal offenses into violations for which police can issue summonses instead of making arrests.[77]

73. Complaint, Raymond v. City of New York, No. 15-CV-6885 (S.D.N.Y. Dec. 10, 2015).

74. Baltimore Police, *supra* note 11.

75. *See* Rachel A. Harmon, "Legal Remedies for Police Misconduct," in Volume 2 of the present Report.

76. *See* Atwater v. Lago Vista, 532 U.S. 318, 355–60 (2001) (collecting statutory provisions authorizing and/or limiting police arrest power for all 50 states).

77. Criminal Justice Reform Act, N.Y.C. Adm. Code § 14-155 (2016), *avaiable at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2553507&GUID=BF52096B-1917-4914-977F-91E604025A50&Options=&Search=; *see* Virginia v. Moore, 553 U.S. 164 (2008) (noting state authority to create non-arrestable offenses).

It is important that such legislative restrictions on arrest be mandatory so as to reduce confusion and racial disparities. For example, in Illinois, marijuana decriminalization statutes gave police discretion over whether to make an arrest or issue a citation: Upon implementation, arrest rates went down in white neighborhoods but increased in black neighborhoods.[78]

2. **Eliminate money bail and bail schedules for low-level offenders.** There is new public appreciation for the regressive and unconstitutional impact of bail. As a result, many jurisdictions are eliminating money bail entirely for low-level offenses. A federal judge in Harris County, Texas, recently declared the county's misdemeanor bail system unconstitutional.[79] In Maryland, the state's attorney general issued an opinion stating that Maryland's use of money bail to incarcerate the poor is likely unconstitutional; the Maryland Court of Appeals subsequently changed the rules.[80] Bail schedules likewise impose bail without consideration for the defendant's personal circumstances, actual flight risk, or ability to pay. Schedules should thus be eliminated, and bail determinations—if made at all—should always be individualized.[81] This will not only eliminate the equal protection violation that occurs when only the poor are incarcerated, but lessen pressures on the poor to plead guilty. Moreover, as the Maryland attorney general points out, eliminating money bail is both efficient and cost-effective:

> In the District of Columbia, where courts rely heavily on supervised pretrial release rather than bail, 90% of defendants appear for trial and are not rearrested before their cases are resolved. Similarly, after Kentucky shifted to a nonfinancial pretrial release program and adopted an evidence-based risk assessment tool, its pretrial release

78. Kathleen Kane-Willis et al., Ill. Consortium on Drug Pol'y, Patchwork Policy: An Evaluation of Arrests and Tickets for Marijuana Misdemeanors in Illinois (2014).

79. ODonnell v. Harris County, 2017 WL 1735456, No 4:16-cv-01414, at 3, 99 (S.D. Tex. Apr. 28, 2017) (memorandum and opinion setting out findings of fact and conclusions of law).

80. Advice Letter from Sandra Benson Brantley, Couns. to the Gen. Assemb., Off. of the Attorney Gen., to the Standing Comm. on Rules of Prac. & Proc. (Oct. 11, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf; Kevin Rector, *Maryland Judges, Commissioners Shifting Away from Cash Bail as Reform Debate Continues*, Balt. Sun (Feb. 25, 2017), http://www.baltimoresun.com/news/maryland/bs-md-bail-reform-effects-20170225-story.html.

81. United States v. Salerno, 481 U.S. 739, 750, 755 (1987) (upholding the constitutionality of bail on the assumption that determinations will be individualized); *see also* Brief of the United States as Amicus Curiae, Walker v. City of Calhoun, No. 16-10521-HH, 2017 WL 929750 (11th Cir. 2017) (arguing that bail schedules are unconstitutional).

> rate increased from 68 to 70%, its court appearance rate rose from 89 to 9l%, and arrests for new criminal activity while on pretrial release dropped by l5%. A Colorado risk-assessment tool documented a 95% court appearance and a 91% public safety rate for its lowest risk defendants. … These systems also experienced a reduction in the costs of housing defendants pretrial and prevented the injustice and collateral consequences attached to wealth-based pretrial detention.[82]

3. **Prosecutorial decisions: Incentivize screening and dismissals.** When prosecutors fail to screen cases rigorously, low-level arrests convert too easily into criminal charges. Misdemeanor prosecutors should thus be trained and incentivized to engage in strong screening practices and to decline or dismiss higher percentages of misdemeanors, particularly order-maintenance and possession offenses, which are overused as policing tools.[83] For example, in Milwaukee, Wisconsin, the Vera Institute's study revealed particularly low declination rates for nonwhite defendants in drug-paraphernalia cases. Upon investigation, it turned out that misdemeanor dockets were being staffed by junior, less experienced prosecutors. The office assigned experienced attorneys to the unit to better train the new prosecutors. Declination rates rose and racial disparities declined.[84] A Missouri study of prosecutorial offices concluded that "misdemeanor units are typically operated by experienced support staff and inexperienced attorneys," and that screening is key to efficiency as well as fairness.[85] Because new prosecutors typically train in misdemeanors before they move onto felonies, the misdemeanor training experience is an opportunity not only to improve petty-offense processing and outcomes but to set rigorous standards from the beginning of young prosecutors' careers.

82. Letter from Brian E. Frosh, Md. Attorney Gen., to Hon. Alan M. Milner, Chair, Standing Comm. on Rules (Oct. 25, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf.

83. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29 (2002).

84. McKenzie Testimony, *supra* note 20; Wayne McKenzie et al., Vera Inst. of Just., Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution 7 (2009).

85. Joan E. Jacoby et al., Jefferson Inst. for Just. Stud., Prosecutor's Guide to Misdemeanor Case Management 33–34 (2001) (9 jurisdiction study of prosecutors' offices).

4. **Enforce the constitutional right to counsel and due process.** The Sixth Amendment guarantees an attorney to defendants who are incarcerated, or who are placed on jailable probation.[86] As numerous reports and investigations have demonstrated, this right is routinely violated in lower courts around the country.[87] Courts and state governments must therefore find the resources to provide meaningful counsel to the thousands of defendants who come before lower courts, which includes reducing defender caseloads to ABA-recommended levels. Where states are unwilling to pay for this constitutionally mandated right, they have the option of converting criminal offenses into civil infractions to remove the possibility of incarceration and thereby eliminating the attendant right to counsel.[88]

   Courts are responsible for enforcing the Sixth Amendment in particular and due process in general. The right to counsel is not satisfied merely by the appointment of a lawyer: Judges must ensure that attorneys on both sides have the time and opportunity to raise legal issues, that unrepresented defendants understand their rights and the nature of the proceedings, and that the courtroom is a place where defendants can be confident of respectful treatment. As the National Center for State Courts put it:

   > High performing courts are procedurally fair. They treat those who appear before the court with respect, dignity, and understanding. Procedural fairness is not a feel-good, vague ideal; it is a tangible operational philosophy that promotes the highest ideals of justice.[89]

   The reports cited here contain numerous recommendations for improving access to counsel and strengthening the integrity of lower-court procedures.[90]

5. **Increase the availability of diversion.** Diversion is an alternative disposition and punishment that permits defendants to avoid formal convictions by submitting to a period of supervision. Some jurisdictions refer to it as pretrial diversion; New York has a comparable procedure called an "adjournment in contemplation of dismissal" (ACD). Diversion is a central mechanism through which prosecutors can funnel people out of the criminal system where outright dismissal is inappropriate, giving

86. Alabama v. Shelton, 535 U.S. 654 (2002).

87. Am. Bar Ass'n, *Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice (2004); Minor Crimes, *supra* note 6; Summary Injustice, *supra* note 24.

88. Boruchowitz, *supra* note 6; Roberts, *supra* note 8.

89. Missouri Municipal, *supra* note 33.

90. *See* note 86, *supra.*

people a chance to keep their records clean. For example, the suspended-license diversion program in King County, Washington, has permitted thousands of defendants to keep their licenses, avoid criminal convictions, and pay off their fines, while saving the county over $300,000.[91]

All diversion reform should ensure that programs are free and available equally to rich and poor alike. Some prosecutors' offices charge defendants for the privilege of entering diversion, which precludes low-income individuals from taking advantage of the opportunity. As a *New York Times* investigation concluded:

> [I]n many places, only people with money [can] afford a second chance. Though diversion was introduced as a money-saving reform, some jurisdictions quickly turned it into a source of revenue. Prosecutors exert almost total control over diversion, deciding who deserves mercy and at what price[.] The prosecutors who grant diversion often benefit directly from the fees, which vary widely from town to town and can reach $5,000 for a single offense.[92]

In felony diversion programs and diversionary drug programs, researchers have found racial discrepancies where more white than black defendants are given the opportunity to keep their records clean.[93] Because diversion programs are discretionary, prosecutors' offices should be particularly attuned to the challenges of implicit bias in their implementation.[94]

While diversion is clearly better for defendants than an outright conviction, it has its costs. In New York, for example, an ACD marks the defendant's record during the period of diversion, which can lead to job loss and other ill effects.[95] While most diversion programs promise that defendants will not sustain a permanent record, the realities of commercial data collection and inaccurate criminal justice databases make such promises hard to

91. Boruchowitz, *supra* note 6, at 7–9.

92. Shaila Dewan & Andrew 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.

93. Lisa Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3 Race & Just. 210 (2013); John MacDonald et al., *Decomposing Racial Disparities in Prison and Drug Treatment Commitments for Criminal Offenders in California*, 43 J. Legal Stud. 155 (2014).

94. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1141–42 (2012).

95. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611 (2014).

keep.[96] As a result, even diversions and dismissals can leave a permanent criminal mark, sometimes unbeknownst to the defendant.[97]

6. **Reduce incarceration and increase decriminalization.** Incarceration is overused for petty offenses, not only to punish minor conduct but also to enforce the collection of fines and fees. States should end the debtor's prison phenomenon by restricting courts from using incarceration, including civil contempt, to enforce the payment of legal financial obligations (LFOs).[98] Where legislatures do not act, courts should step into the breach, reducing the use of incarceration as punishment for failure to pay and eliminating it as a debt collection tactic against the poor.[99]

   Decriminalization is one of the most promising misdemeanor reforms but it is also a double-edged sword.[100] Decriminalization has various meanings, but its essence is the elimination of jail time for existing offenses. In some jurisdictions, decriminalized offenses remain criminal in nature but punishable only by a fine, so-called "non-jailable misdemeanors." Other jurisdictions engage in more robust decriminalization by converting offenses into civil infractions or violations. This latter option is the most effective, since it eliminates not only jail time but the stigma of a criminal conviction and the many collateral consequences that still attach to non-jailable misdemeanors.

   On the one hand, decriminalization eases many of the misdemeanor system's worst features. It reduces incarceration, especially for overpoliced populations. It can represent a more proportionate, fairer response to conduct widely perceived as harmless or only mildly blameworthy. And it saves state resources by averting the need for defense counsel, prosecution costs, and jail space. Professor Robert Boruchowitz estimates that increasing diversion and decriminalization could save over $1 billion nationwide:

   > A University of Oregon study found that the marginal cost of prosecuting and convicting a misdemeanor in Oregon was $1,679. Testimony presented to the Washington

96. Jacobs, *supra* note 54; *see also* Dewan, *supra* note 91.

97. Rothgery v. Gillespie Cty., 554 U.S. 191 (2008).

98. *See, e.g.*, A Barrier to Reentry, *supra* note 39 (documenting how states use civil contempt to incarcerate for the nonpayment of criminal fines).

99. Each of the following reports on the debtor's prison phenomenon contains detailed policy recommendations to this end: In for a Penny, *supra* note 39; A Barrier to Reentry, *supra* note 39; Blalock, *supra* note 48.

100. Natapoff, *Decriminalization*, *supra* note 1; Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 Cornell J.L. & Pub. Pol'y 319 (2014).

> state Legislature in 2009 showed that changing simple possession of marijuana to a violation could save $16 million per year. … Nationally, if only half of the 758,593 marijuana-possession cases, and half of the 1,106,314 disorderly conduct, drunkenness, vagrancy, and curfew and loitering arrests were diverted or treated as non-criminal violations, 932,453 cases across the country could be removed from the system, saving more than $1.5 billion per year.[101]

Accordingly, every state should comprehensively review its misdemeanor crimes and violations and eliminate incarceration as a penalty for traffic, order-maintenance, and other offenses that do not involve harmful or dangerous conduct. For example, Hawaii undertook a thorough review of its non-criminal codes in order to decriminalize regulatory offenses that once carried the potential for incarceration.[102] In addition to marijuana possession, Massachusetts decriminalized the first-time offenses of disturbing the peace and operating a vehicle while uninsured or with a suspended license.[103]

On the other hand, decriminalization is not legalization.[104] It is a famous net-widener, making it easier to sweep large numbers of people into the criminal system without counsel or due process. Non-jailable misdemeanors still mark people with criminal records and impose wide-ranging collateral consequences, and employers often ignore technical distinctions between civil infractions and criminal violations. Because citations are easy to issue and prosecute, decriminalization also increases the risk that governments will be tempted to use low-level offenses as revenue generators. And finally, for defendants who cannot pay the hefty fines and fees associated with decriminalized offenses, incarceration is not so much eliminated as postponed.[105] Accordingly, decriminalization should be deployed with careful attention to its unintended negative side effects, and legalization should be considered where possible.

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101. Boruchowitz, *supra* note 6.

102. The Spangberg Project, An Update on State Efforts in Misdemeanor Reclassification, Penalty Reduction and Alternative Sentencing (2010) (reclassification included agricultural, animal, conservation, and transportation offenses).

103. Mass. Gen. Laws Ann. ch. 272 § 53(b); Joel Schumm, Am. Bar Ass'n & Nat'l Ass'n. of Crim. Def. Law., National Indigent Defense Reform: The Solution is Multifaceted 16 (2012).

104. *See* Alex Kreit, "Marijuana Legalization," in the present Volume.

105. Natapoff, *Decriminalization*, *supra* note 1.

7. **Overhaul fines, fees and the taxation function.** Misdemeanor fines and fees have taken on a life of their own, disconnected from the minor nature of the underlying offenses and the economic realities of the misdemeanor population. To restore balance, criminal fines should be interchangeable with community service or keyed to defendant income. In Europe, for example, some courts impose what are called "day fines," fines that are multiples of the person's daily income so that rich and poor people are punished proportionately to their ability to pay.[106]

   Fees imposed by courts, probation offices, and jails should be eliminated for the indigent and severely limited overall. Unlike fines, which serve a punitive purpose, fees are revenue-generating mechanisms that force a largely impoverished defendant population to subsidize its own punishment. Thomas Edsall of the *New York Times* called this phenomenon "poverty capitalism," a "unique sector of the economy [where the] costs of essential government services are shifted to the poor."[107] The White House Counsel of Economic Advisers concluded that reliance on fines and fees "places large burdens on poor offenders who are unable to pay criminal justice debts and, because many offenders assigned monetary penalties fall into this category, has largely been ineffective in raising revenues."[108] The criminal justice population is already heavily disadvantaged based on education, wealth, and personal resources: It should not also be required to fund the very criminal system that exacerbates its disadvantage. Accordingly, indigent defendants should not be charged fees for counsel, diversion, community service, jail, probation, drug testing, electronic monitoring, or any other aspect of their own adjudication and punishment.

   In order to end the incentives for local courts and law enforcement to use misdemeanors to generate revenue, the link between fines and fees and local budgets should be severed. The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) recommend that the judiciary be funded from general state funds to ensure its stability and neutrality. As they put it, "CCJ and COSCA have long taken the position that court functions should be funded from the general operating fund of state and local governments to ensure that the judiciary can fulfill its obligation of upholding the Constitution and

106. Sally T. Hillsman, *Fines and Day Fines*, 12 Crim. Just. 49 (1990).
107. Thomas B. Edsall, *The Expanding World of Poverty Capitalism*, N.Y. Times (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/thomas-edsall-the-expanding-world-of-poverty-capitalism.html.
108. Fines, Fees, and Bail, *supra* note 15.

protecting the individual rights of all citizens."[109] Fines and fees should go into a general state fund used to support rehabilitation and otherwise improve the criminal process; this will eliminate the incentive for courts and municipalities to misuse misdemeanors as a covert form of taxation. In Maryland, for example, fines from decriminalized marijuana offenses go into a drug-treatment fund controlled by the Department of Health and Mental Hygiene.[110] In California, Proposition 47 reduced many drug crimes from felonies to misdemeanors; the savings are earmarked for drug treatment.[111] While state governments will still have incentives to rely on misdemeanor revenue, state officials lack the direct control over arrest, prosecution, and punishment that local officials exercise and which cause the most severe conflicts of interest.[112]

8. **Eliminate criminal records and collateral consequences.** Criminal records and collateral consequences covertly ratchet up misdemeanor punishments far beyond the seriousness of the original offense, extending the burden of conviction deep into people's economic and personal lives. Misdemeanor criminal records for all but the most serious misdemeanors should thus be routinely expunged after an appropriate waiting period so as to minimize the impact on future employment.[113] Statutory collateral consequences for all but the most serious misdemeanors should be repealed. In particular, legislatures and courts should no longer use license suspensions to enforce debt collection, or as supplemental punishment for crimes that are unrelated to dangerous driving.[114]

9. **Require collection of court data.** There is no national mechanism for collecting data on low-level courts; data on misdemeanors are scarce, disorganized, and difficult to find. In states that do not have unified court systems, there are hundreds of low-level courts that do not make their caseload data public or may not even collect them at all. Such courts go by

109. NCSC News Release, *supra* note 52.

110. Md. Code Ann. Cts. & Jud. Proc. § 7-302(g).

111. Annie Gilbertson, *Prop 47: Tracking Lawmakers' Promise of Drug Treatment Over Prison*, 89.3 KPCC (Mar. 17, 2016), http://www.scpr.org/news/2016/03/17/58455/prop-47-promised-drug-treatment-instead-of-prison/.

112. Ward v. Monroeville, 409 U.S. 57 (1972); Courts Are Not Revenue Centers, *supra* note 52; Missouri Municipal, *supra* note 33, at 26–29.

113. Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 Wisc. L. Rev. 321; Michael Pinard, *Criminal Records, Race, and Redemption*, NYU J. Legis. & Pub. Pol'y 963, 989–991(2013). *But see* Jacobs, *supra* note 54, at 308 ("Expunging or sealing criminal records is largely futile.").

114. Not Just a Ferguson Problem, supra note 6.

a variety of names—municipal courts, summary courts, justice courts, and mayor's courts—and they issue thousands of convictions without public transparency or oversight.[115] Indeed, it was not until 2015 that Missouri even had a mechanism for knowing how many *courts* it had, since cities could create and dissolve their local courts at will.[116] States should thus pass legislation mandating that every court at every level collect, report, and make public their data through a centralized repository.[117]

Data should be collected and reported on the most salient and influential aspects of misdemeanor dockets. These include: the number of cases filed; declinations; dismissals; guilty-plea rates; trial rates; diversionary dispositions; defendant characteristics such as gender, race, age, and ethnicity; and whether defendants had counsel. Only with such data will we be able to fully understand the workings of the enormous misdemeanor system and its impact on millions of Americans every year.

10. **Educate defendants, decision-makers and the public.** Because the misdemeanor process has escaped oversight and scrutiny, the people who pass through it often do not understand how it works.[118] Defendants typically do not know their rights, what to expect when they get to court, or the potentially severe consequences of pleading guilty. Particularly when offenses are decriminalized, people may not realize that pleading guilty can nevertheless subject them to criminal stigma, employment consequences, and incarceration if they do not pay. Indeed, many legislators and judges themselves do not realize the enormous and influential scope of the misdemeanor institution and thus the significance of their various decisions to preserve or change it. Accordingly, decision-makers and members of the public—and people swept into the system in particular—need to be educated about the size, workings, and impact of the misdemeanor process. Like knowing how to vote or register a car, understanding misdemeanors is part of the civic knowledge base necessary to survive and thrive in American democracy.

115. The Outskirts of Hope, supra note 39, at 7; Summary Injustice, *supra* note 24.

116. Missouri Municipal, *supra* note 33.

117. Thirty-two states plus the District of Columbia currently report aggregate caseload data to the National Center for State Court (NCSC)—the remaining 18 states should do so as well. Court Statistics Project, http://www.courtstatistics.org/ (last visited May 10, 2017).

118. Natapoff, Gideon *Skepticism*, *supra* note 28.