MISDEMEANORS

ALEXANDRA NATAPOFF*

ABSTRACT

Misdemeanor convictions are typically dismissed as low-level events that do not deserve the attention or due process accorded to felonies. And yet, ten million petty cases are filed every year, and the vast majority of U.S. convictions are misdemeanors. In comparison to felony adjudication, misdemeanor processing is largely informal and deregulated, characterized by high-volume arrests, weak prosecutorial screening, an impoverished defense bar, and high plea rates. Together, these characteristics generate convictions in bulk, often without meaningful scrutiny of whether those convictions are supported by evidence. Indeed, innocent misdemeanants routinely plead guilty to get out of jail because they cannot afford bail. The consequences of these convictions are significant: in addition to the stigma of a criminal record, misdemeanants are often heavily fined or incarcerated, and can lose jobs, housing, or educational opportunities. In other words, petty convictions are growing more frequent and burdensome even as we devote fewer institutional resources to ensuring their validity.

The misdemeanor phenomenon has profound systemic implications. It invites skepticism about whether thousands of individual misdemeanants are actually guilty. It reveals an important structural feature of the criminal system: that due process and rule of law wane at the bottom of the penal pyramid where offenses are pettiest and defendants are poorest. And it is a key ingredient in the racialization of crime, because misdemeanor processing is the mechanism by which poor defendants of color are swept up into the criminal system (in other words, criminalized) with little or no

* Professor of Law, Loyola Law School, Los Angeles. Many thanks to Ron Allen, Stephanos Bibas, Rick Bierschbach, Brie Clark, Sharon Dolovich, Sam Gross, Don Herzog, Tom Morawetz, Doug NeJaime, Sam Pillsbury, Marcy Strauss, Ahmed White, and participants at the UC Irvine Faculty Workshop. This Article was supported by the Loyola Faculty Research Fellowship Program.

regard for their actual guilt. In sum, the misdemeanor process is an institutional gateway that explains many of the criminal system's dynamics and dysfunctions.

I. INTRODUCTION

It has become a truism that the U.S. criminal system is too big. With an incarcerated population surpassing two million—more than all of Europe combined—the American penal behemoth is a target for widespread and bipartisan criticism. Prominent institutions from the Economist[1] to the Cato Institute[2] to the Heritage Foundation[3] lament the immensity of the American prison population and the sprawl of U.S. criminal law. The Supreme Court recently ordered the state of California to reduce prison overcrowding.[4] Even John DiIulio, who in 1996 famously called prisons a "bargain by any measure," has declared that whatever marginal social value incarceration may have once supplied, it no longer does so with two million people behind bars.[5] Whatever work the criminal process is supposed to do—deter, rehabilitate, incapacitate, or vindicate—a growing consensus concludes that it cannot do it properly given its current scale.

This consensus significantly understates the problem. The U.S. criminal system is far larger and less principled than even the incarceration critique suggests because the prison population accounts mainly for felony offenders. Approximately one million felony convictions are entered in the U.S. each year;[6] most of the aforementioned two million prisoners are serving felony sentences.[7] But they are only the tip of the iceberg. An

1. *Rough Justice in America: Too Many Laws, Too Many Prisoners*, THE ECONOMIST, July 22, 2010, *available at* http://www.economist.com/node/16636027.

2. Tim Lynch, *Population Bomb Behind Bars*, CATO INSTITUTE (Feb. 20, 2000), http://www.cato.org/publications/commentary/population-bomb-behind-bars.

3. BRIAN W. WALSH & TIFFANY M. JOSLYN, THE HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), *available at* http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf.

4. Brown v. Plata, 131 S. Ct. 1910 (2011) (upholding lower court order to cap state prison population).

5. *Compare* John J. DiIulio, Jr., *Prisons Are a Bargain, By Any Measure*, N.Y. TIMES, Jan. 16, 1996, at A17, *with* John DiIulio, Jr., *Two Million Prisoners Are Enough*, WALL ST. J., March 12, 1999, at A14.

6. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 3 tbl.1.1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

7. In 2010, over 1.6 million people were incarcerated in prisons, almost 785,000 in jails. Approximately 62 percent of jail inmates are awaiting court action (that is, not yet convicted), while the rest are either serving a misdemeanor or, less often, a felony sentence. PAUL GUERINO, PAIGE M.

estimated ten million misdemeanor cases are filed annually, flooding lower courts, jails, probation offices, and public defender offices.[8] While these individuals are largely ignored by the criminal literature and policymakers, they are nevertheless punished, stigmatized, and burdened by their convictions in many of the same ways as their felony counterparts.[9]

In effect, the felony-centric view misapprehends the sprawling reality of the American criminal process. Most U.S. convictions are misdemeanors, and they are generated in ways that baldly contradict the standard due process model of criminal adjudication. Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel.[10] By contrast, serious felonies get closer to the ideals of due process, where issues of law, evidence, and procedure are attended to in ways that embody basic legitimizing features of the criminal process.[11] Standard doctrinal and scholarly descriptions of the criminal system tend to treat serious cases as paradigmatic but this can be misleading. Serious cases are exceptional both in number and in the resources they command, while misdemeanor cases comprise the bulk of the justice process. Far from accidental, the slipshod quality of petty offense processing is a dominant systemic norm that competes vigorously with and sometimes overwhelms foundational values of due process and

HARRISON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 1–3 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf; TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2010 – STATISTICAL TABLES 1–2 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf. *See infra* Part II.B.

8. According to the National Center for State Courts, approximately 80 percent of state caseloads are misdemeanors. R. LAFOUNTAIN ET AL., NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx.

9. *See infra* Part II.C.

10. ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 7 (2009), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979) (describing thin process in New Haven misdemeanor courts); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1172–74 (2004) (describing lack of due process in New York lower court system).

11. Of course the felony world also often fails to live up to the ideal. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (describing the lack of effective lawyering for poor capital defendants). The innocence movement has challenged the assumption that adjudicative principles operate properly even in the most serious cases. *See infra* Part V.A.; Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143 (2011) (arguing that the trial fact-finding process does not actually meet the high epistemic standards or produce the certitude that trials are supposed to have).

adversarial adjudication.[12]

This structural reality has numerous implications, the most dramatic being its high tolerance for wrongful petty convictions. The scale and poverty of petty offense processing have created a world that often lacks the evidentiary and procedural protections that are supposed to ensure the guilt of the accused. As a result, every year the criminal system punishes thousands of petty offenders who are not guilty. Misdemeanants routinely plead to low-level crimes for which there is little or no evidence, without assistance of counsel or any other meaningful adversarial process.[13] In some cases, defendants are demonstrably innocent. In others, the process is so lax that we cannot say with any certainty whether defendants are guilty or not. Moreover, because many of these underprocessed convictions are for urban disorder offenses, the phenomenon disproportionately affects minority and other heavily policed groups.

As innocence scholar, Samuel Gross, has candidly remarked, "we rarely even think about wrongful convictions for misdemeanors," although Gross himself has indeed thought about it.[14] But this inattention is undeserved. First, while a felony prison sentence is a uniquely corrosive experience,[15] misdemeanants can also be significantly harmed by their convictions.[16] Their criminal records deprive them of employment, as well as educational and social opportunities. They are routinely incarcerated—despite the absence of a prison sentence—as they wait in jail for their cases to be adjudicated. A petty conviction can affect eligibility for professional licenses, child custody, food stamps, student loans, health care, or lead to deportation.[17] In many cities, misdemeanants are ineligible for public housing. The stigma of a misdemeanor conviction heightens the chances of

12. Other high-volume systems that function in this informal way include juvenile justice and immigration.

13. *See infra* Part III.

14. Samuel Gross, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 940–42 (2008). For a rare exploration of the innocent misdemeanor problem, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1162 (2008) (describing the threat of wrongful misdemeanor conviction even though Bowers believes that most misdemeanants are in fact guilty, but arguing that most innocent misdemeanants are better off pleading guilty in light of the costs and risks of litigation).

15. *See* Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. & Austin Sarat, eds., forthcoming) (describing physical, psychological, and social destruction imposed by long-term incarceration), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1845904.

16. *See infra* Part II.C.

17. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–95, 514 n.331 (2010). *See, e.g.*, 20 U.S.C. § 1091(r)(1) (2006) (imposing ineligibility for federal student aid as a penalty for drug offenses).

subsequent arrest, and can ensure a longer felony sentence later on.[18] In sum, misdemeanor convictions have become significant long-term burdens on individual defendants even though the processes by which such convictions are generated fall far short of minimum legal and evidentiary standards taken for granted in the felony world.

More broadly, misdemeanor processing reveals the deep structure of the criminal system: as a pyramid that functions relatively transparently and according to legal principle at the top, but in an opaque and unprincipled way for the vast majority of cases at the bottom. At the top, where cases are serious or defendants are well represented, procedures are enforced by judges, prosecutors and defense counsel. As a result, law and evidence matter: convictions must conform to the dictates of the code and there must be evidence to support them. The resulting convictions are as close as we get to ideals of legal substance and procedural legitimacy. By contrast, at the bottom where offenses are petty and procedures are weak, law and evidence hold little sway over outcomes. Instead, convictions are largely a function of being selected for arrest; this is because vulnerable, underrepresented defendants tend to plead guilty even in the absence of evidence. At the extreme, innocent people are wrongly convicted, but this is just the most dramatic manifestation of a larger state of affairs: the waning authority of law and evidence—and the correlatively heightened influence of law-enforcement discretion—as offenses get pettier and defendants grow poorer.

This Article contends that the U.S. criminal process cannot be fully understood or evaluated without acknowledging the centrality of petty offenses. In particular, misdemeanors offer new insights into two of the system's most infamous dysfunctions: inaccuracy and the racialization of crime. First, the lack of procedural integrity in petty offense processing generates wrongful convictions, and it does so in ways that reveal the deepest sources of systemic inaccuracy. At bottom, those procedural weaknesses represent a philosophical abdication of a core requirement, namely, the need for evidence of individual fault as the basis for legitimate punishment.[19] Second, that procedural abdication means that despite black-letter doctrine to the contrary, police are effectively empowered to decide not only who will be arrested but who will be convicted. In the context of urban policing, this de facto delegation of legal authority translates into the

18. *See infra* notes 68–69 and accompanying text; U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2010); U.S. SENTENCING GUIDELINES MANUAL § 5A (2010); Nichols v. United States, 511 U.S. 738 (1994).

19. *See infra* Part VI.A.

mass criminalization of young minority men.

The Article proceeds as follows. Part II uses new national data to describe the vast scale and impact of the misdemeanor world. Part III explores the mechanics of the petty offense process—from arrest to prosecution, defense, and guilty pleas—and its disregard for the evidentiary checking mechanisms of standard criminal procedure. The description reveals that thousands of minor convictions are issued every year without meaningful evidence of guilt, and that therefore many defendants are likely innocent.[20]

The problem is not universal. The process is least problematic for defendants in federal court, for well-represented defendants, and for crimes that demand distinctive evidence such as public records or identifiable victims. The process is most problematic in connection with high-volume arrest policies such as urban drug sweeps and zero-tolerance policing in which police are simultaneously enforcers and primary sources of evidence.

Part IV reviews current doctrinal and scholarly approaches to misdemeanors and concludes that the field remains undertheorized. Part V accordingly goes back to basics, asking how we produce criminal convictions generally, what structural requirements confer legitimacy, and the extent to which misdemeanors conform to these structural demands. Building on insights from the innocence revolution and the overcriminalization literature, Part V identifies evidence and law as basic requisites to robust convictions, and traces the waning of these legitimating influences at the bottom of the penal pyramid where most petty convictions occur.[21] This description also reveals an influential dynamic: where protective procedures are weakest, enforcement selection processes—not evidence or substantive law—effectively determine who will be convicted.[22]

20. Unless otherwise noted, the term "innocence" in this piece refers to "actual" or "factual" innocence, that the defendant did not actually commit the crime, as opposed to what is sometimes called "legal innocence," that the conviction was legally flawed. *See* Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1086–87 (2011) (criticizing focus on factual innocence).

21. This can be seen as a systemic expression of the behavioral phenomenon that fact finders are more willing to convict for lesser crimes based on less evidence. Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 598–601 (2012) (describing empirical evidence that fact finders demand weightier evidence as the severity of the sanction increases).

22. This is a corollary, not a contradiction, to William Stuntz's point that strong criminal procedures distort enforcement decisions in ways that may harm the poor and the innocent. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 52–65 (1997).

Part VI considers the implications of this analysis for two interrelated issues in legal theory: the erosion of the fault principle and the role of race and social vulnerability in determining legal guilt.[23] Convictions are supposed to be reliable badges of personal guilt, and where offenses are serious and well litigated, convictions are indeed strong indicia of individual culpability. But as law and evidence lose their influence over outcomes, petty convictions lose that substantive content. At the bottom, where defendants are poorest and offenses pettiest, the criminal process is badly detached from the core legitimating precept of individual fault. This is in part an innocence problem: many misdemeanants are simply not guilty. But it is also a structural erosion, revealing a system that has become desensitized to individual culpability and therefore tolerates the imposition of criminal convictions for reasons other than actual guilt.

This erosion has socio-racial implications. The watering down of protective standards for poor, minority, and otherwise vulnerable misdemeanor defendants is a form of civic disrespect, akin to what Michael Tonry famously labeled "malign neglect."[24] As the misdemeanor world makes clear, the system does not "care" that poor, black, brown, young, illiterate or addicted suspects are arrested, charged and convicted of minor offenses on the thinnest possible bases. In turn, it is precisely that disregard for evidence and process that permits easy criminal convictions of potentially innocent and vulnerable people. In minority communities where order maintenance policing generates thousands of problematic convictions, the misdemeanor process has become the first formal step in the racialization of crime.

Because the misdemeanor world is so large, its cultural disregard for evidence and innocence has pervasive ripple effects, not the least of which is the cynical lesson in civics that it teaches millions of Americans every year. In these ways, the misdemeanor process has become an influential gateway, sweeping up innocent as well as guilty on a massive scale and fundamentally shaping not only the ways we produce criminal convictions but also who is likely to sustain them.

23. I use the terms "legal guilt" and "conviction" interchangeably.

24. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

II. REEVALUATING THE CRIMINAL PROCESS THROUGH THE MISDEMEANOR LENS

A. HOW BIG IS IT?

Unlike felony cases and convictions, about which federal and state governments keep relatively good records, the world of misdemeanor cases is radically underdocumented. Until recently, there were no national data on misdemeanor caseloads. In 2009, the National Association of Criminal Defense Lawyers ("NACDL") issued a report estimating that approximately 10.5 million nontraffic misdemeanor prosecutions occur nationally per year based on the extrapolation of caseload statistics collected from twelve states in 2006.[25] By comparison, that same year there were over 1.1 million persons convicted of a state felony and approximately 58,000 federal felony cases filed in the nation's largest urban counties.[26] In 2008, a year that saw the filing of over twenty-one million criminal cases, the National Center for State Courts concluded that misdemeanor cases comprise approximately 80 percent of sampled state dockets, an "overwhelming majority."[27]

This ratio appears relatively stable. Thirty years ago, Malcolm Feeley concluded that misdemeanor cases comprised approximately 80 to 90 percent of criminal cases, based on his study of New Haven misdemeanor courts.[28] In California, misdemeanors appear to comprise approximately 75 to 80 percent of filed cases.[29] In Iowa, petty offenses outnumber felonies five to one.[30] In Michigan, misdemeanors represent 82 percent of the total criminal docket.[31] In sum, the world of misdemeanors looks to be about

25. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 11.

26. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, BULLETIN: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf; SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

27. R. LAFOUNTAIN ET AL., *supra* note 8, at 45, 47.

28. FEELEY, *supra* note 10, at xv (90 to 95 percent of all cases handled by misdemeanor courts).

29. In 2008, California reported about 880,000 adult misdemeanor arrests, which led to about 823,000 complaints filed. California's 434,000 felony arrests resulted in 227,000 convictions, resulting in a felony docket approximately one-quarter the size of the misdemeanor docket. CALIFORNIA DEP'T OF JUSTICE, CRIMINAL JUSTICE STATISTICS CENTER, CALIFORNIA CRIMINAL JUSTICE PROFILE 2008 tbl.5. California does not count its final misdemeanor convictions. Email from Linda Nance, Criminal Justice Statistics Center, Cal. Dept. of Justice, to author (Nov. 23, 2010, 7:20 PST) (on file with author).

30. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717 tbl.3 (2010)

31. Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. OF ACCESS TO JUST. 223,

four or five times the size of the world of felonies.

What kinds of crimes are these petty offenses? In some jurisdictions, as many as 40 percent may consist of suspended license cases.[32] The rest of the docket ranges from disorderly conduct to DUI, drug possession, and minor assault. It is hard to know precisely how many there are. For example, the FBI estimates that in 2009, there were approximately 758,000 arrests for marijuana possession, 270,000 vandalism arrests, 33,000 vagrancy arrests, 594,000 drunkenness arrests, 655,000 disorderly conduct arrests, and over 112,000 curfew and loitering arrests.[33] But this arena is plagued by underreporting. For example, despite sophisticated data collection systems, between 2002 and 2010 New York City did not report its data on low-level crimes.[34] Nationally, prosecutors report only about half of all misdemeanor case resolutions to statewide data repositories.[35] National estimates are thus likely to be low.

B. JAIL

Jail is a crucial feature of the misdemeanor landscape. While prisons house inmates who have already been convicted and sentenced—typically to sentences longer than a year—the jail population is diverse and fluid. People may go to jail for a single night after an arrest, or serve sentences of up to two years. At mid-2009 the U.S. jail population was 748,728.[36] In 2002, approximately 20 percent of jail inmates were there for a public order offense, 30 percent for drug offenses.[37] Over the course of 2009–2010, local jails admitted nearly thirteen million people.[38]

Many arrestees are set bail as a condition of release: in New York, around 25 percent of nonfelony defendants must pay to go home.[39] In

228 (2007).

32. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 25, 29.

33. FBI, CRIME IN THE UNITED STATES: TABLE 29, ESTIMATED NUMBER OF ARRESTS, UNITED STATES, 2009 (2010), http://www2.fbi.gov/ucr/cius2009/data/table_29.html; FBI, CRIME IN THE UNITED STATES, ARRESTS, http://www2.fbi.gov/ucr/cius2009/arrests/index.html

34. Ray Rivera & Al Baker, *Data Elusive on Low-Level Crime in New York City*, N.Y. TIMES, Nov. 1, 2010, at A1, *available at* http://www.nytimes.com/2010/11/02/nyregion/02secrecy.html?_r=1&pagewanted=all.

35. PETER BRIEN, BUREAU OF JUSTICE STATISTICS, TECHNICAL BRIEF: REPORTING BY PROSECUTORS' OFFICES TO REPOSITORIES OF CRIMINAL HISTORY RECORDS 1–3 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rporchr.pdf.

36. MINTON, *supra* note 7, at 1.

37. DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PROFILE OF JAIL INMATES, 2002 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf.

38. MINTON, *supra* note 7, at 2.

39. Mosi Secret, *N.Y.C. Misdemeanor Defendants Lack Bail Money*, N.Y. Times, Dec. 2, 2010,

Baltimore, it is close to 50 percent.[40] Many U.S. counties have "bail schedules" which set bail automatically at a predetermined amount for misdemeanors as well as felonies.[41] If defendants cannot pay, they stay in jail: in New York City, the "overwhelming preponderance" of defendants facing bail of $1000 or less could not pay.[42]

Approximately 60 percent of jail inmates are there awaiting court action, in other words, they have not been convicted. Over half of unconvicted inmates spend at least a month in jail, and one-quarter of unconvicted inmates spend between two and six months.[43] In effect, average detained arrestee can expect to spend a month or so in jail whether or not they are ever adjudicated guilty. Indeed, many arrestees plead guilty to petty offenses in exchange for a sentence of time served as a way of terminating what might otherwise be a longer period of incarceration than the offense carries.[44]

Although they serve different purposes, jails are functionally similar to prisons. Many are overcrowded and suffer from violence, crime, and disease. In its 2006 report, *Confronting Confinement*, the Commission on Safety and Abuse in America's Prisons analyzed prisons and jails as one category for the purposes of evaluating the dangers of the American incarceration experience.[45]

For example, rape occurs in jails as well as in prisons, although possibly at slightly lower rates.[46] When Air Force veteran Tom Cahill was

at A27, *available at* http://www.nytimes.com/2010/12/03/nyregion/03bail.html (discussing the findings of a 2010 Human Rights Watch report). *See also* HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

40. Douglas Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1732–33 (2002).

41. Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 15–16 (2011).

42. HUMAN RIGHTS WATCH, *supra* note 39, at 1–2. *See also* NAT'L ASS'N OF PRETRIAL SERVICES AGENCIES, FACTS & POSITIONS: THE TRUTH ABOUT COMMERCIAL BAIL BONDING IN AMERICA (2009) (discussing the commercial bail bonding industry).

43. JAMES, *supra* note 37, at 4 (measuring days spent in jail at the time the survey was conducted).

44. *See infra* Part III.D.

45. VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 7 (2006), *available at* http://www.vera.org/download?file=2845/Confronting_Confinement.pdf.

46. NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 41 (2009), *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf (finding that 3.2 percent of surveyed jail inmates reported sexual abuse).

arrested and detained for just one night in a San Antonio jail, he described the long-term effects of being gang raped and beaten by other inmates: "I've been hospitalized more times than I can count . . . . My career as a journalist and photographer was completely derailed."[47] Other forms of violence are common: assault is pervasive,[48] and two men died in 2006 when the Los Angeles jails were torn by riots in which two thousand prisoners participated.[49]

Disease is widespread: even a brief stint in jail can expose an inmate to tuberculosis, staph infections, and hepatitis.[50] For example, Dorothy Palinchik was jailed for stealing a nine dollar Philly cheesesteak sandwich. Within days, the 42-year old waitress contracted a staph infection and pneumonia, which sent her into a fatal coma.[51] In sum, the experience of going to jail can include many of the same dangers as the experience of going to prison.

C. HARDLY PETTY: CONSEQUENCES OF A MISDEMEANOR CONVICTION

Prior to joining the legal academy, Paul Butler was an Assistant U.S. Attorney in Washington, D.C. Due to a dispute, an unsavory neighbor falsely accused Butler of misdemeanor assault. If misdemeanors were truly petty concerns, one might have expected the Yale- and Harvard-educated Butler to react with equanimity to his arrest. Instead, after being released on his own recognizance, he went home and cried. He also hired one of the best criminal defense attorneys in Washington, D.C. and a private investigator. Even then, he remained frightened and uncertain right up until the moment of his acquittal. As he put it, he knew full well that his innocence was "beside the point." Afterwards, despite his acquittal and stellar background, Butler sustained lasting harm. "I'm not as innocent as I was before," he writes. "I have a record."[52] If Butler, with all his credentials, legal knowledge, and litigation experience, found the misdemeanor process this unpredictable and traumatizing, how much more so it must be for the average undereducated defendant who lacks the

47. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 46, at 2.

48. VERA INST. OF JUSTICE, *supra* note 45, at 11–13.

49. Megan Garvey & Stuart Pfeifer, *Jail Inmates Were Stripped to Deter Riots*, L.A. TIMES (Feb. 18, 2006), http://articles.latimes.com/2006/feb/18/local/me-sheriff18.

50. VERA INST. OF JUSTICE, *supra* note 45, at 47 (detailing the prevalence of serious communicable diseases in prisons and jails).

51. Jonathan Abel, *Staph Infection Sends Pinellas Jail Inmate into Coma*, TAMPA BAY TIMES, Feb. 27, 2008, *available at* http://www.sptimes.com/2008/02/27/Northpinellas/Staph_ infection_ sends.shtml.

52. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 3–19 (2009).

benefit of high-caliber counsel.[53]

Kenneth Nichols' ignorance in this regard cost him years of his life. In 1983, Nichols faced a misdemeanor charge of driving under the influence, an offense which at the time was considered relatively minor and carried a maximum sentence of one year. He called an attorney, who told him not to bother getting a lawyer if he were pleading guilty.[54] The court did not advise him of his right to counsel or the potential consequences of such a conviction, and Nichols pled nolo contendere and was fined $250. Seven years later, he was convicted of another offense. Under the federal sentencing guidelines, that 1983 uncounseled misdemeanor conviction added over two years to his sentence.[55] Had Nichols had one or two more misdemeanors on his record, as defendants often do, his sentence could have increased by over four years.[56]

Alika lives in the Marcus Garvey housing development in Brooklyn, New York.[57] One Saturday afternoon in 2011, police stopped the single mother. Under police questioning, Alika admitted that she had a small amount of marijuana in her purse, and the police ordered her to take it out, thereby transforming what would have been a nonjailable violation into the criminal misdemeanor of openly displaying a controlled substance.[58] She was placed on prejudgment probation for a year, permitting her to avoid a formal conviction if she stayed out of trouble. But the incident got her fired from her $12-per-hour janitorial job even though New York state law does not permit employers to ask about old arrests.[59] Since 2002, New York City alone has arrested more than 350,000 people for possessing small amounts of marijuana and 80 percent of those arrested are black or Latino.[60] For those required to post bail, the vast majority cannot pay and spend an

53. Part of Butler's concern was the impact on his employment and bar membership that would flow from a conviction, a concern not shared by nonattorney defendants. Nevertheless, as described below, misdemeanors have negative employment consequences for all types of jobs and occupations.

54. Brief for Petitioner at 4 n.2, 5, Nichols v. United States, 511 U.S. 738 (1994) (No. 92-8556), 1993 WL 657283 at *4–5.

55. Nichols v. United States, 511 U.S. 738, 742–43 (1994).

56. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(b)–(c) (imposing up to two additional criminal history points for misdemeanor sentences); U.S. SENTENCING GUIDELINES MANUAL § 5.A (providing the sentencing table).

57. Jim Dwyer, *Side Effects of Arrests for Marijuana*, N.Y. TIMES, June 16, 2011, at A26, *available at* http://www.nytimes.com/2011/06/17/nyregion/push-for-marijuana-arrests-in-ny-has-side-effects.html.

58. This police order might have rendered Alika legally innocent for lack of a voluntary act. *See* Martin v. State, 17 So. 2d 427, 427 (Ala. Ct. App. 1944) (finding that defendant did not voluntarily "appear" in public where police carried him into the street).

59. Dwyer, *supra* note 57.

60. *Id.*

average of two weeks in jail.[61]

The legal system devalues misdemeanor convictions. It does so explicitly by labeling them "petty" and by denying various procedural rights.[62] It also does so implicitly by withholding public resources from the vast misdemeanor process and by tolerating its informality. But as these stories reveal, the legal, economic, and psychological impact of a misdemeanor conviction can be substantial. First and foremost, the individual acquires a criminal record that can follow him or her for a lifetime.[63] Employers often decline to interview people who have been convicted of any offense; 60 to 70 percent of employers state that they would not hire any ex-offender and the majority of employers perform background checks.[64] Because criminal records are easily accessible to employers, even a misdemeanor arrest can interfere with an applicant's job prospects, let alone an actual conviction.[65] A criminal record also triggers harsher treatment by police, prosecutors, and courts, who are often more lenient towards first-time offenders and more likely to arrest or charge a person who has a record.[66]

A misdemeanor conviction bars eligibility for numerous professional licenses. It can affect child custody, food stamp eligibility, or lead to deportation.[67] It can affect the right to vote.[68] A misdemeanor drug

61. Secret, *supra* note 39.

62. *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (determining that there is no right to counsel where misdemeanant was not sentenced to incarceration); Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (providing that there is no right to jury trial for "petty offense" carrying six month penalty or less).

63. *See generally* Alfred Blumstein & Kiminori Nakamura, Op-Ed, *Paying a Price, Long After the Crime*, N.Y. TIMES, Jan. 9, 2012, at A23, *available at* http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html (proposing expiration dates for criminal records).

64. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 34 (2007). *See also* MIRIAM AUKERMAN, MCOLES TRAINING PROGRAM, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: A LEGAL OUTLINE FOR MICHIGAN 2 (2008), *available at* http://www.sado.org/content/guides/collateral.pdf (providing insight into the effects of a conviction in Michigan).

65. PAGER, *supra* note 64, at 176 n.16.

66. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 181 (1965).

67. TEX FAIR DEF. PROJECT, WHAT YOU DON'T KNOW CAN HURT YOU, *available at* http://www.fairdefense.org/why_lawyer.pdf (last visited Sept. 30, 2012) (describing the consequences of a misdemeanor conviction in Texas in an educational pamphlet written by the Texas Criminal Justice Coalition and the Texas Fair Defense Project).

68. Several states disenfranchise misdemeanants while they are incarcerated. ALEC EWALD, THE SENTENCING PROJECT, A 'CRAZY-QUILT' OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW 3–10 (2005), http://www.sentencingproject.org/doc/publications/fd_crazyquilt.pdf. Many more misdemeanants are functionally disenfranchised due to

conviction renders students ineligible for federal student loans.[69] By pleading guilty to disorderly conduct, a noncriminal violation, a person is "presumptively ineligible for New York City public housing for two years."[70] In Baltimore, a misdemeanor conviction renders the person ineligible for public housing for eighteen months. A misdemeanor can make it difficult to rent an apartment, make the offender ineligible for health care programs,[71] or land the offender in a sex offender registry.[72]

Fines, costs, and other economic penalties assessed against misdemeanor defendants have also ballooned, becoming an engine of economic disadvantage in their own right and leading some to bemoan the resurrection of debtor's prison.[73] As Bridget McCormack explains in her study of misdemeanor punishments in Michigan:

> Such . . . economic sanctions include, just for example, probation oversight fees, tether fees, drug testing costs, police and prosecutor reimbursements, and many other costs and fines . . . . In fact, in recent years, the increasing fines, costs, and other fees assessed in misdemeanor adjudication have become staggering. The total amounts assessed per conviction, often not obvious because assessed and accounted for in so many different forms, are out of reach for many of the defendants against whom they are assessed.[74]

The failure to pay costs and fines often leads to bench warrants, additional penalties, and incarceration.[75]

A misdemeanor conviction can ensure a longer sentence, sometimes much longer, if a person is convicted of a subsequent crime. In Kenneth Nichols' case, the Supreme Court expressly approved the U.S. Sentencing Guideline practice of enhancing sentences based on prior uncounseled misdemeanor convictions.[76] Since, as described below, thousands of

official misunderstandings of election law. ERIKA WOOD & RACHEL BLOOM, ACLU & BRENNAN CTR. FOR JUST., DE FACTO DISENFRANCHISEMENT 2–3 (2008), *available at* http://www.brennancenter.org/page/-/publications/09.08.DeFacto.Disenfranchisement.pdf (discussing de facto as opposed to de jure disenfranchisement of misdemeanants).

69. 20 U.S.C. § 1091(r)(1) (2006); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 514, 514 n.331 (2010).

70. Pinard, *supra* note 69, at 491 n.186 (internal quotation marks omitted).

71. *Id.* at 491 n.185, 514 n.330.

72. Lawrence v. Texas, 539 U.S. 558, 581 (2003).

73. John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 443 (2005).

74. McCormack, *supra* note 31, at 226–27.

75. *Id.* at 233–34, 236.

76. Nichols v. United States, 511 U.S. 738, 742–43 (1994) (finding that the use of prior uncounseled conviction to enhance sentence where prior conviction did not result in prison sentence and therefore did not violate Sixth Amendment). The Guidelines exempt some minor offenses from the

misdemeanor convictions are uncounseled, the use of these convictions in sentencing greatly enhances their systemic impact.[77]

Finally, a misdemeanor conviction labels individuals as a criminals, not only to employers, but also to friends, family, community, and themselves. The Supreme Court itself has recognized that misdemeanors impose constitutionally cognizable stigma,[78] and much has been written about "labeling theory" as a way of capturing the exclusionary effects of being labeled a criminal.[79] These dynamics include negative stereotypes, the creation of an "us-them" distinction, loss of status, and discrimination.[80] Those labeled criminals may alter their own behavior, retreating from mainstream institutions in anticipation of hostile reactions. To be sure, not all labels are created equal: a misdemeanor conviction for loitering is obviously less damning than a felony conviction for robbery. But for a person who has been publicly transformed from law-abiding citizen into criminal, a significant psycho-social line has been crossed.[81]

In sum, the misdemeanor world is far larger, more pervasive, and more influential than it is given credit for. Misdemeanor dockets are approximately five times the size of felony dockets. Millions of petty offenders experience crushing fines and jail, and many misdemeanants will spend significant periods of time incarcerated whether their offenses warrant it or not. Once convicted, petty offenders suffer some of the same consequences as their felony counterparts.

sentencing calculation. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c) (2010) (exempting, among other things, hitchhiking, loitering and vagrancy offenses).

77. *Cf.* Pattershall v. Jenness, 485 A.2d 980, 984 (Me. 1984) (refusing to give collateral estoppel effect to misdemeanor assault conviction in a civil case in part because the defendant "may . . . have lacked the incentive to fully and vigorously litigate because of the likelihood of only a small fine being imposed").

78. Lawrence v. Texas, 539 U.S. 558, 560 (2003).

79. *See, e.g.*, W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re* Winship, *Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117 (2011) (arguing that stigma constitutes the defining line between civil and criminal punishment, and discussing extant research on stigma).

80. *Id.* 146–51.

81. A developing literature addresses the varying subjective experiences of punishment, depending on the baselines from which defendants start and some account for the ways people adapt to punishment over time. *See generally* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463 (2010) (arguing that adaptation is relevant to punishment); Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (arguing that the sensitivity of the offender affects the harshness of the punishment they receive). While the issue of how the misdemeanor experience affects different defendants (for example, privileged defendants like Paul Butler as compared to underprivileged defendants such as Alika) is beyond the scope of this paper, this subjectivity literature could shed valuable light on how the misdemeanor process initiates poor people into the criminal system.

III. WATERING DOWN CONVICTIONS

The classic description of the criminal process is one of evidentiary screening, evaluation, and public adversarial testing. In order to arrest a suspect, a police officer needs probable cause.[82] Exercising her discretion, the officer decides whom to arrest and reports the evidence to the prosecutor, who in turn must decide whether the evidence and circumstances of the case deserve prosecution.[83] If suspects are charged with a crime, they are entitled to counsel.[84] Defense counsel then evaluates the case, the evidence or lack thereof, and any legal issues that might arise. Based on that evaluation, defense and prosecution may negotiate a plea bargain, litigate the legal issues, or even go to trial.[85] Supervised and regulated by the court, this sequence represents the essentials of criminal due process.[86]

On average, the world of misdemeanors does not work like this. Arrests can easily occur without probable cause. Prosecutors fail to screen and instead charge arrestees based solely on allegations in police reports. Defense attorneys may never be appointed or, if they are, they lack time and resources to evaluate and litigate cases, while judges pressure defendants into pleading guilty in order to clear crowded dockets. Lacking evidentiary rigor and adversarial testing, it is a world in which a police officer's bare decision to arrest can lead inexorably, and with little scrutiny, to a guilty plea. It is, in other words, a world largely lacking in a scrutinized evidentiary basis for guilt, and therefore one in which the risk of wrongful conviction is high.

There is widespread agreement that petty offense processing works in this informal way without much evidence or record.[87] For example, in his classic study *The Process Is the Punishment*, Feeley described New

82. Atwater v. City of Lago Vista, 532 U.S. 318, 351–52 (2001).

83. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (describing prosecutorial function). *See also* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31–32 (2002) ("Of course all prosecutors 'screen' when they make any charging decision.").

84. Massiah v. United States, 377 U.S. 201, 212–13 (1964) (holding that the right to counsel is triggered by formal charges, or the arraignment). *But see* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that misdemeanor defendant who was not subject to "actual imprisonment" upon conviction was not constitutionally entitled to trial counsel).

85. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467 (2004) (analyzing how plea bargaining is affected by the "shadow of trial," meaning the strength of evidence and expected punishment following trial).

86. *In re* Winship, 397 U.S. 358, 363–64 (1970).

87. Gross, *supra* note 14; Bowers, *supra* note 14; Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007).

Haven's misdemeanor courts:

> [N]ot one defendant in a sample of 1,640 cases insisted upon [trial by jury] . . . only one-half of all defendants journeyed through the criminal process with an attorney at their side . . . . Even in those cases in which counsel was present, his contribution was questionable. "Interviews" with clients were often little more than quick, whispered exchanges in the corridor . . . . There was little independent investigation of facts. . . . Arrestees were arraigned in groups and informed of their rights *en masse*. At times the arrestees were not even aware that they are being addressed. Judges did not always look at them, and even if a judge made an effort to be heard, he could not always be understood over the constant din of the courtroom. . . . 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.[88]

According to the NACDL's 2009 study, little has changed since Feeley's study. As discussed in detail below, the report found the same phenomena on a national scale: massive misdemeanor caseloads, lack of counsel, and quick pleas, with little regard for evidence or process.[89] In 2004, Ian Weinstein concluded that "American lower criminal courts have long been structurally incapable of adjudicating legal and factual disputes in the vast majority of the cases that come before them."[90] Josh Bowers agreed: the misdemeanor bargaining process is one in which "[g]uilt is typically presumed in a process too rough-and-ready for the parties to develop and consider it properly."[91]

As this consensus demonstrates, inattention to evidence and factual guilt is not an aberration, but is part and parcel of how the misdemeanor process works. Or, as Charles Ogletree and Austin Sarat describe it, such injustices are "not . . . errors but . . . organic outcomes of a misshaped larger system."[92]

How often does this "misshaped" process lead to wrongful convictions? In one sense, we will never know because, as Sam Gross explains, wrongful convictions are inherently invisible.[93] If we could ferret them out beforehand, they would not happen, and they are almost impossible to identify after the fact. This problem is magnified in the

88. FEELEY, *supra* note 10, at 9–11.

89. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 14–48.

90. Weinstein, *supra* note 10, at 1158.

91. Bowers, *supra* note 30, at 1707.

92. Charles J. Ogletree, Jr. & Austin Sarat, *Introduction* to WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 1, 1 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009).

93. Gross, *supra* note 14, at 928.

misdemeanor context because adjudications are informal, largely uncontested, and the system keeps poor track of them.

This section nevertheless attempts to penetrate the machinery of petty offense processing to figure out how often innocent people plead guilty. Since we lack direct data, we must extrapolate from general features of the process—from arrest through prosecution, defense, and guilty plea—to estimate how likely it is that the nation's ten million annual petty offenders are pleading guilty to crimes they did not commit.

To be clear, not all misdemeanor convictions are equally suspect and many, perhaps most of these ten million cases, are likely legitimate. For example, in federal court, pro se misdemeanants often contest criminal charges and sometimes win.[94] In some jurisdictions, prosecutors decline to prosecute as many as half of all misdemeanor arrests.[95] Most significantly, well-resourced defendants and their attorneys can take advantage of procedural protections against wrongful conviction.

Substantively speaking, arrest is a good indication that there is evidence of guilt for some important classes of offense. For example, suspended license cases presumably flow from verifiable motor vehicle recordkeeping.[96] With the advent of on-site breathalyzer tests, most driving while intoxicated ("DWI") arrests will be triggered by evidence that would also be sufficient to support conviction. By contrast, for urban street control crimes such as loitering, trespassing, disorderly conduct, and gang injunction violations—a large and crucial subset of the docket—the conclusion that these convictions are valid is more leap of faith than demonstrable fact. Much of urban policing consists of arrests made for purposes of street control, and the system has only weak postarrest mechanisms for checking whether such offenses are actually based on evidence of crime. What follows, therefore, is a discussion of each stage of the misdemeanor process and an attempt to evaluate the likely prevalence of the wrongful guilty plea in the most problematic arenas.

94. Hashimoto, *supra* note 87, at 466.

95. *See, e.g.*, Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 41 (2000) (noting that misdemeanor conviction rates for the City of Los Angeles, Kings County, New York, and Riverside County, California, were at 50 percent or lower between 1990 and 1994).

96. Although the presumption that official recordkeeping is accurate is contested. *See* Herring v. United States, 555 U.S. 135, 137–38 (2009) (documenting error in a police database regarding a warrant resulting in defendant's arrest); Rothgery v. Gillespie County, 554 U.S. 191, 195–97 (2008) (describing how the government relied on erroneous records to conclude that the defendant was a felon, jailed him for three weeks, and lodged criminal charges against him for six months until his lawyer finally produced records establishing that he was not a felon).

A. ARRESTS WITHOUT EVIDENCE

A valid arrest requires probable cause, in other words, sufficient evidence to demonstrate a "fair probability" that a crime has been committed.[97] How often do police arrest for minor offenses without meeting that minimum evidentiary threshold?[98] A growing literature indicates that urban police routinely arrest people for reasons other than probable cause, that high-volume arrest policies such as zero tolerance and order maintenance create a substantial risk of evidentiarily weak arrests, that mechanisms for checking whether arrests are based on probable cause are sporadic, and finally that, if those mechanisms do kick in, police sometimes lie about whether there was sufficient evidence for an arrest. Taken together, these phenomena suggest not only that many petty arrests may lack probable cause, but also that those arrests are being made in poor minority communities and high-volume policing contexts in which postarrest checking mechanisms are particularly thin.[99]

First and foremost, police arrest people for a variety of reasons that may or may not involve probable cause.[100] This is not always a bad thing.

97. Illinois v. Gates, 462 U.S. 213, 238 (1983). The Supreme Court tolerates numerous deviations from this rule. *E.g.*, Virginia v. Moore, 553 U.S. 164 (2008) (upholding arrest where police arrested suspect based on probable cause for offense for which state law did not authorize arrest); Devenpeck v. Alford, 543 U.S. 146 (2004) (upholding arrest where there was probable cause to believe that defendant committed offense but police actually arrested him for an entirely unrelated matter for which there was no probable cause); Hill v. California, 401 U.S. 797 (1971) (upholding search incident to arrest where police had probable cause to arrest defendant but mistakenly arrested wrong person). Most recently, the Court has suggested in dicta that even mistakes in the probable cause determination itself may not doom an arrest. Herring v. United States, 555 U.S. 135, 139 (2009) ("When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase 'probable cause' confirms that the Fourth Amendment does not demand all possible precision.").

98. I sometimes refer to arrests that lack probable cause as "arrests without evidence." More precisely, these arrests lack sufficient evidence to sustain their validity, since an arrest could involve evidence short of probable cause (for example, reasonable suspicion or less), in which case the arrest, although illegal, would not entirely lack evidentiary basis. Either way, arrests that lack probable cause are by definition factually insufficient not only to sustain convictions but to support the conclusion that a particular person has committed a crime.

99. *Cf.* Jonathan Simon, *Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security*, *in* WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 115, 120–21 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009) (arguing that war on drugs has created an environment encouraging police to pick suspects from a large precriminalized population).

100. LaFave's treatise on arrest devotes an entire chapter to "The Decision to Arrest for Purposes Other than Prosecution," noting that while "[t]he making of an arrest intended to culminate in release of the suspected offender rather than in his prosecution is said to be both illegal and unlikely" the practice is nevertheless "common." LAFAVE, *supra* note 66, at 437. The chapter subheadings by themselves suggest the contested nature of the practice: "Arrest of an Intoxicated Person for His Own Safety," "Arrest to Control the Prostitute," and "Arrest to Control the Transvestite." *Id.* at xxxii.

Police may arrest to prevent a fight, domestic violence, or other harms.[101] Police sometimes also arrest for more problematic reasons, for example to clear a street corner, to manifest a police presence in a high crime neighborhood, to induce cooperation from potential witnesses, or to fulfill arrest expectations or quotas imposed by the department.[102]

For example, as part of its drug enforcement policy, the New York City Police Department used the following tactic in low-income housing in the South Bronx:

> [Police] arrest every young man found in or near a particular building and charge them all with trespassing. When the cases come to court, the police file boilerplate complaints that often read: "When asked who he was visiting in the building, the defendant failed to provide a name or apartment number and stated that he was there to purchase drugs, to wit: marijuana." This is plainly a formulaic lie, as a judge hearing one of these cases has recognized: "This Court does not credit testimony that the defendant disclosed to a person wearing a badge that he was going to buy marijuana . . . [that] does not make sense." But the officers are not sanctioned, and nearly all defendants plead guilty to light penalties rather than face the delays and risks of trial.[103]

This policy exemplifies how high-volume convictions can flow from baseless arrests. Police in this scenario arrested widely and indiscriminately without probable cause. They were not screening based on evidence, since they arrested everyone. Police then distorted the evidentiary record by submitting false boilerplate assertions of probable cause. The system's routine did not uncover the lack of evidence, but rather pressured defendants into pleading guilty.

101. *See, e.g.*, DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTATIVE POLICING (2005) (promoting preventative policing as an important and successful way to achieve public safety); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CALIF. L. REV. 617, 620 (2006) (distinguishing between order-maintenance preventative policing and traditional investigative policing that requires evidence).

102. Some argue that this overbreadth is in the very nature of policing, and that police have long been asked to maintain social order in ways that exceed the question of whether a specific crime has been committed. *Compare* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 575–78 (1997) (discussing community policing authority), *with* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 82 (2005) (arguing that the state's police power originates in the authority of the father over the household and is essentially an alegitimate exercise of power rather than a law-bound effort to achieve justice). Dubber's work is discussed *infra* Part IV.

103. Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 184 (2008) (citing M. Chris Fabricant, *Rousting the Cops*, THE VILLAGE VOICE, Oct. 30, 2007, http://www.villagevoice.com/2007-10-30/news/rousting-the-cops/).

Similarly, sociologist and former Baltimore police officer Peter Moskos describes the arrest practices of the Baltimore police force as revolving not around evidence of crime, but around control of the streets and the assertion of police authority. Generally speaking, Baltimore police warn people to move on, and arrest them for loitering when they do not.

> Though any minor charge will suffice, loitering is the most widely used minor criminal charge in Baltimore. Loitering is defined, in part, as "interfering, impeding, or hindering the free passage of pedestrian or vehicular traffic after receiving a warning."[104] In practice, loitering is failing to move when ordered to move by a police officer. . . . One officer described an unorthodox approach he used very rarely: "Sometimes I'll flip a quarter for a loiterer. Tails he goes to jail and heads he doesn't. They'll be going, 'Heads! Yeeeah!'"[105]

Moskos also describes the ways that arrest practices are tailored to establish police authority.

> More detailed arrest threats are more credible. "Move or I'll lock you up" is too vague. Better is: "It's 2:30 right now. I'm going to get a cup of coffee. I'm going to come back at 3 AM. You've got a half hour to disappear. If I see you on the street after 3 o'clock, you'd better put on a sweater because it's cold in Central Booking."
>
> . . . .
>
> On street corners in Baltimore's Eastern District, people—usually young black males involved with drugs—are arrested when they talk back to police or refuse to obey a police officer's orders to move.[106]

While these types of arrest practices may well enable police to clear a street corner, they are illegal. In *Williams v. State*, the Maryland Court of Special Appeals invalidated precisely this type of arrest:

> Telling someone merely that he is "loitering" and that if he does not move on he will be arrested . . . does not adequately warn that person that he is in violation of a law, statute, or ordinance by loitering, *i.e.*, standing around in such a way as to impede traffic. Moreover, the ordinance does not authorize a police officer to order anyone, even a loiterer, to move away from the area. . . . An officer cannot lawfully

104. *See* BALT. CITY CODE art. 19, § 25-1 (2008) (defining the offense of loitering in the Police Ordinances of the City of Baltimore).

105. PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT 114–15 (2008). *See also* Edward Ericson, Jr., *Copping Out: A City Council Report on False Arrests by Baltimore Police Fails to Address the Root of the Problem*, BALT. CITY PAPER (Oct. 5, 2005), http://www2.citypaper.com/news/story.asp?id=10980 (reporting 1800 arrests every month for loitering where formal charges are never filed).

106. MOSKOS, *supra* note 105, at 117, 120.

> arrest anyone for refusing to obey an order to move on after he told that person, along with other individuals, "that they were loitering in a public place and if they didn't move on they would be arrested."[107]

In other words, police who arrest in the ways described by Moskos lack probable cause. The "most widely used minor criminal charge in Baltimore" is being deployed against people who are legally innocent of the crime of loitering.[108]

Such police tactics generate arrests of innocent people.[109] Other urban policing practices create high risks of evidentiarily weak arrests, although we cannot say how often they actually lead to the arrest of an innocent. Generally speaking, so-called "zero-tolerance" and "order maintenance" policing involves stops made for nonevidentiary reasons, although these stops do not necessarily ripen into arrests.[110] For example, in the half-million stops performed by New York City police in one year, the vast majority were justified, wholly or in large part, on nonevidentiary grounds: over half were stopped for presence in a "high crime area," 32 percent because of the "time of day," and another 23 percent for an unspecified reason.[111] By contrast, 27 percent of stops involved police suspicion that the suspects were "casing a victim or location,"[112] and only 10 percent of stops resulted in evidence of a crime.[113] Gang injunctions have been

107. Williams v. State, 780 A.2d 1210, 1218 (Md. Ct. Spec. App. 2001).

108. MOSKOS, *supra* note 105, at 114. *See generally* Reed Collins, Note, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 14 GEO. J. ON POVERTY L. & POL'Y 419 (2007) (describing Baltimore's aggressive campaign of misdemeanor arrests, including arrests for loitering, and how it targets troubled neighborhoods).

109. A potentially similar class of cases is the California "lewd conduct in public" prosecutions in which police invite sexual encounters with gay men in restrooms and then arrest them, even though under California law such conduct is technically not a crime. *See* People v. Lake, 67 Cal. Rptr. 3d 452, 458–59 (2007) (reversing conviction for soliciting lewd or dissolute conduct in a public place because state failed to prove that a third party was likely to be present at the encounter); Megan Barnes, *Undercover Decoys Targeting Calif. Gay Men?*, EDGE BOSTON (Mar. 17, 2011), http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=117437 (describing police targeting practices against gay men).

110. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 476 (2000) (noting that as the volume of order maintenance arrests rose in New York, "the evidentiary quality of arrests suffered"). Fagan infers that the arrests were evidentiarily weak because "the rate at which prosecutors declined to pursue these cases rose dramatically. In 1998, prosecutors dismissed 18,000 of the 345,000 misdemeanor and felony arrests, approximately twice the number dismissed in 1993." *Id.*

111. Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1496 (citing data from the New York Police Department Stop, Question and Frisk Database, 2006). These categories are not mutually exclusive.

112. *Id.*

113. GREG RIDGEWAY, RAND CORP., ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES 10 (2007), *available at*

similarly criticized for criminalizing young people of color who, although not gang members or criminal actors themselves, nevertheless may be arrested because of their neighborhood associations.[114]

Racial profiling is also a form of weak-evidence arrest. It means that police are sorting suspects based not primarily on evidence but on race. While some of those arrests are also triggered by evidence of crime (for example, speeding)[115] many are not. For example, David Rudofsky tells the story of four young African American men driving home from church in Delaware who were stopped and arrested.

> The officers ordered the occupants out of the vehicle and proceeded to subject them, and the vehicle, to an intrusive search that included the use of a narcotics trained-police dog. They were detained for almost an hour until the police were convinced that they were not transporting drugs. To justify the initial stop, an officer issued a "warning" regarding an alleged obstruction of the car's windshield (a thin piece of string hanging from the rear view mirror, which could not have been observed by the officer before the stop). In response to a question from one of the occupants of the car as to why they had been stopped, the officer answered with surprising candor: "because you are young, black and in a high drug-trafficking area, driving a nice car."[116]

In sum, arrests generated by high volume policing practices are evidentiarily suspect. They might be based on evidence, but they might well involve no evidence of crime at all, or something less than probable cause—in other words, not even a "fair probability" that the person committed the offense. The more indiscriminate the police tactics, the higher the risk that the arrests lack evidence. When these high-risk arrests convert to criminal charges and guilty pleas without more, those resulting convictions lack a factual basis. This is another way of saying that those defendants are probably innocent.

The vast majority of arrests go unchallenged. On the one hand, this is

http://www.rand.org/pubs/technical_reports/2007/RAND_TR534.pdf (comparing numbers of stops and numbers of resulting arrests or summons).

114. Arrestable conduct under gang injunctions have included waving at cars, appearing in public view in the presence of someone who possesses alcohol, or in one case, possessing a felt tip marker. Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 246, 250–53 (2010) (describing the impact of broad gang injunctions in Oakwood, Venice).

115. *See* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002) (exploring the link between racial profiling, highway searches, and drug enforcement).

116. David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 296 (2001).

because arrests do not always translate into criminal charges. In New York, many arrests lead to a night in jail without charges being filed.[117] In Baltimore, approximately one-third of loitering arrests are dismissed.[118] As described by Officer Moskos, "the point of loitering arrests is not to convict people of the misdemeanor. . . . These lockups are used by police to assert authority or get criminals off the street."[119]

On the other hand, in those many cases where arrests do lead to charges, they are rarely scrutinized. As discussed in detail below, prosecutors routinely convert the majority of such arrests into cases, and once that happens, most defendants plead guilty.

In those few cases in which the validity of an arrest is litigated, there is reason to question whether police themselves believe that they are arresting based on probable cause.[120] A growing literature finds that police often lie about evidence in cases and, more specifically, about how and why they arrest people.[121] Studies of New York and Chicago, numerous court cases, and an increasing number of videos document police who arrest people without probable cause and then lie about it afterwards. In one Chicago police survey, 76 percent of responding officers "agreed that the police do 'shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact.'"[122] A longstanding literature on police so-called "testilying" dates back to the birth of the exclusionary rule.[123]

More recently, police perjury triggered two well-known instances of mass exoneration. In Los Angeles, 156 felony offenders were exonerated after the Rampart scandal in which police were found to have planted

117. Fagan & Davies, *supra* note 110, at 476 (finding that many order maintenance arrests resulted in a night in jail and then release).

118. Ericson, *supra* note 105.

119. MOSKOS, *supra* note 105, at 55.

120. *See generally* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69 (2011) (describing the Supreme Court's increased tolerance for police mistakes of law as well as fact in the probable cause determination).

121. Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 4–15 (2010) (cataloguing widespread evidence of police lies).

122. Myron Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1050 (1987).

123. *E.g.*, I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 869 (2008) ("To arrest people they suspect are guilty of dealing drugs, they falsely assert that the defendants had drugs in their possession when, in fact, the drugs were found elsewhere where the officers had no lawful right to be.") (quoting the Mollen Commission Report); Morgan Cloud, *Judges, 'Testilying,' and the Constitution*, 69 S. CAL. L. REV. 1341 (1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

evidence, fabricated false statements, and lied in court. In Tulia, Texas, thirty-seven exonerations followed revelations that a single police officer had lied in and out of court to support wrongful drug convictions.[124]

In sum, while we do not know how many people are arrested for petty offenses without evidence, we know the practice is ingrained in phenomena like urban loitering and trespassing policies, zero tolerance policing, and routine urban street control. Racial profiling makes it worse. Because misdemeanor arrests are low profile, unlikely to be litigated, and staples of police control tactics, they can easily be driven not by evidence, but by other police aims and goals. In these high-volume, low-scrutiny arenas, therefore, some nonnegligible percentage of the hundreds of thousands of arrestees are likely innocent.

B. LACK OF PROSECUTORIAL SCREENING

The legal system depends heavily on prosecutors to screen police decisions.[125] As attorneys and officers of the court charged with "doing justice," prosecutors are expected to pick and choose among cases based on the available evidence as well as other factors, and to ensure that arrests do not automatically translate into prosecutions.[126] The Supreme Court vests vast discretion in prosecutors to decide whether and when to charge a person with a crime, explaining that "[t]he decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest."[127]

In reality, prosecutorial screening is weaker than this legal model

124. Russell Covey, *Mass Exoneration Data and the Causes of Wrongful Convictions* 90 WASH. U. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881767. *See also* Gross, *supra* note 14, at 931–32 (discussing instances of police perjury and mass exonerations).

125. The law privileges prosecutorial legal decisionmaking over that of police. *E.g.*, Kelly v. Borough of Carlisle, 622 F.3d 248, 255–56 (3d Cir. 2010) (finding that a police officer who received mistaken legal advice from the Assistant District Attorney before making unconstitutional arrest was presumptively entitled to qualified immunity).

126. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 22–23 (2007). *See* Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981) (establishing rebuttable presumption that a prosecutor exercises independent judgment in deciding to file criminal charges, thus immunizing investigating officers from liability for injuries suffered after the charging decision), *overruled on other grounds by* Beck v. City of Upland, 527 F.3d 853, 865 (9th Cir. 2008).

127. United States v. Lovasco, 431 U.S. 783, 794 (1977). *See also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

supposes. In felony cases, prosecutors often charge as many offenses as the police's evidence will support, and then rely on the plea bargaining process to screen out weak charges.[128] As the exception that proves the rule, Ron Wright and Marc Miller describe an experiment with vigorous prosecutorial screening that took place in New Orleans under the auspices of District Attorney Harry Connick. In what the authors describe as a "rare" and "distinctive" system, New Orleans prosecutors rigorously evaluated police reports and initial charges, seeking new information and declining to prosecute nearly half of all police charges brought.[129] In arguing that other jurisdictions should follow this screening model, the authors describe the average prosecutorial charging decision as heavily and often uncritically dependent on police arrest decisions, police reports, and initial police charges.[130]

Even in the most serious cases involving the death penalty, prosecutorial overdependence on police can lead to wrongful convictions. Dan Medwed describes how "the very nature of the prosecutor-police relationship also produces incentives for prosecutors to take the outcome of the police investigation as a fait accompli and to put on intellectual blinders to the possibility of other outcomes."[131] Because prosecutors depend on police over the long term, the tendency is to accept and validate police versions of the facts.

In the world of petty offenses, the prosecutorial screening function is even weaker, in some realms nonexistent. Prosecutors often charge whatever petty offense the police report describes and back off, if at all, only later during plea negotiations.[132] This is a heightened version of the dynamic in felony cases because the stakes are lower and the adversarial process thinner.

For example, Josh Bowers studied prosecutorial charging decisions in New York and Iowa in an effort to determine how often prosecutors actually exercised their discretion not to charge in petty cases. He concluded that in both jurisdictions prosecutors almost never declined to

128. Wright & Miller, *supra* note 83, at 33 (describing how prosecutors overcharge in anticipation of plea bargaining negotiations).

129. *Id.* at 60–72.

130. *Id.* at 32, 65, 104–05.

131. Daniel Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2204 (2010).

132. *See* Brady, *supra* note 96, at 22 ("[A]n individual's loss of freedom and the prosecutorial merit of most of those cases stand or fall solely on a police officer's judgment about the legal sufficiency of the evidence and of the rules of law applicable to the cited offense(s), and on the officer's judgment about the merit of an individual case . . . .").

charge petty offenses: declination rates were on the order of 2 percent. A 2 percent declination rate means that misdemeanor arrests are nearly always converted to criminal charges, which in turn, as described below, are nearly always converted to convictions.[133] By contrast, prosecutors were far more selective in charging felonies and more serious violent offenses, where declination rates were three, four, or even fourteen times higher.[134]

Another recent study offers similar data. The Vera Institute for Justice instituted a pilot program called the Prosecution and Racial Justice Project to study prosecutorial decisionmaking in Milwaukee, Wisconsin, Mecklenberg, North Carolina, and San Diego, California. The study found that in drug and misdemeanor cases, prosecutors often proceeded uncritically based on police reports and charging recommendations, and when they did, it produced greater racial disparities. For example,

> In Mecklenburg, managers were surprised to learn that the office had been declining to prosecute only 3–4% of drug cases. Other significant findings were: 1) the group receiving the most disparate treatment was African-American females—the office accepted and prosecuted 100% of those cases, and those cases appear to move further along the process before reaching final disposition . . . . Additionally, DA Gilchrist learned [that] . . . in 98.9% of [drug unit] cases, the ADA adopts all the police charges.[135]

Even where declination rates were higher, similar racial disparities were observed. In Milwaukee, the Vera study revealed that declinations against whites were much higher in misdemeanor drug cases between 2005 and 2006. "For example, in Possession of Drug Paraphernalia cases the decline to prosecute rate for white defendants was 41 percent compared to only 27 percent for nonwhites."[136]

In other jurisdictions, by contrast, higher declination rates suggest that prosecutors are screening more actively and that arrests convert to charges only where prosecutors actually believe there is evidence. For example, in

133. Bowers, *supra* note 30, at 1709–10.

134. The federal system has relatively high declination rates: at the height, 93 percent of civil rights cases referred to the Department of Justice in 1999 were declined for prosecution, whereas a mere 3.4 percent of immigration cases referred by the INS were declined. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 764–65 (2003).

135. *Racial Disparities in the Criminal Justice System: Prepared for the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security* 6, 111th Cong. (2009) (testimony of Wayne S. McKenzie, Director, Prosecution & Racial Justice Program, Vera Institute of Justice), *available at* http://judiciary.house.gov/hearings/pdf/McKenzie091029.pdf.

136. *Id.* at 7; *see also* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 162–64 (2008) (discussing the Vera Institute study).

Brooklyn, New York, in 1994, fewer than 30 percent of misdemeanor arrests resulted in misdemeanor convictions.[137] Even in New York City, prosecutorial declination rates rose in 1998 in response to more aggressive police arrest tactics, although prosecutors only dismissed 18,000 out of 345,000 misdemeanors before they reached court.[138]

These studies of a wide variety of jurisdictions—from North Carolina to Wisconsin, New York, and Iowa—offer a window into what Ron Wright and Marc Miller call the "black box" of prosecutorial discretion: they show that prosecutors often fail to screen low-level and drug offenses.[139] Without that screening, police arrest decisions for high-volume petty offenses can convert automatically into formal criminal charges.

C. LACK OF COUNSEL

Prosecutors are not, of course, the system's only screeners: defense attorneys are supposed to ensure that weak or baseless charges do not convert to convictions. For this adversarial theory to function there are two requirements: First, counsel must be appointed. Second, counsel must test the government's case. It has become well recognized, however, that in both realms, petty offenders often go without.

Misdemeanants are not always legally entitled to counsel. The Supreme Court has held that if a defendant is not actually sentenced to a term of incarceration, they have no right to counsel.[140] In *Alabama v. Shelton*, however, the Court clarified that the common sentence of jailable probation—in other words, probation for which a violation could trigger incarceration—does require counsel.[141]

137. Brady, *supra* note 95, at 40–44, 47, 128 tbl.12 (interpreting high declination rates as an indication of weak cases and sloppy prosecutorial work rather than more aggressive screening).

138. Fagan & Davies, *supra* note 110, at 476; Ford Fessenden & David Rohde, *Dismissed Before Reaching Court, Flawed Arrests Rise in New York*, N.Y. TIMES, Aug. 23, 1999, *available at* http://www.nytimes.com/1999/08/23/nyregion/dismissed-before-reaching-court-flawed-arrests-rise-in-new-york.html?pagewanted=all&src=pm.

139. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (1980) (prosecutor must only "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1179 (2006) ("[T]he filing of a charge with no basis in fact violates no ethical rule if the prosecutor is personally ignorant of the lack of factual support. Applied to the high volume practice of many urban communities, it would violate no ethical rule if a prosecutor, faced with a large number of referrals and insufficient time to review them, ordered his secretary or paralegal assistant to prepare charging documents for whatever offense the police chose to base their arrest upon without ever reading the referrals.").

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

141. Alabama v. Shelton, 535 U.S. 654, 658 (2002). *See also* Argersinger v. Hamlin, 407 U.S. 25

The past decade has produced compelling evidence that indigent defendants, petty offenders in particular, often do not get counsel even when they are legally entitled to it. In 2004, the American Bar Association published a report on the national state of indigent defense entitled *Gideon's Broken Promise*. The report concluded that in a substantial number of cases, defendants are never provided counsel, and the problem is worst in misdemeanors. Some poor defendants are detained in jail for months without representation. For example, one woman in Mississippi, accused of shoplifting seventy-two dollars' worth of merchandise, was detained for eleven months before counsel was appointed. A Georgia defendant arrested for loitering spent thirteen months in jail before seeing a lawyer, a judge, or being formally charged. Indigent defendants in Montana routinely spend up to five or six months in pretrial detention without contact with an attorney.[142] In a 2002 survey, over half of American inmates spent at least a month in jail before their cases were resolved.[143]

Some courts require defendants to negotiate guilty pleas directly with prosecutors. In Georgia, one witness described

> a mass arraignment of defendants charged with jailable misdemeanors during which the judge informed defendants of their rights and then left the bench. Afterwards, three prosecutors told defendants to line up and follow them one by one into a private room. When the judge reentered the courtroom, each defendant approached with the prosecutor, who informed the judge that the defendant intended to waive counsel and plead guilty to the charges.[144]

According to Robert Boruchowitz, director of the Defender Association in Seattle, Washington, "The scope of the problem in misdemeanor cases is huge. There are at least 150,000 misdemeanor cases a year in Washington, and my guess is well over half of those don't really have any meaningful access to counsel."[145] Similarly in Riverside County, California, the "court admitted in 2002 that 12,711 people pled guilty . . . to misdemeanor charges without ever speaking to a lawyer. That's because in 1986, because of some budget problems at that time, the public defender

(1972) (explaining that right to counsel applies to misdemeanors generally).

142. AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 22–23 (2004) [hereinafter GIDEON'S BROKEN PROMISE], http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

143. JAMES, *supra* note 37, at 4.

144. GIDEON'S BROKEN PROMISE, *supra* note 142, at 24–25.

145. *Id.* at 26.

was removed from municipal court arraignments."[146]

While the ABA report addressed the state of indigent defense generally, in 2009 the National Association of Criminal Defense Attorneys ("NACDL") issued a report specifically regarding misdemeanor cases and came to similar conclusions.[147] In Texas, "[t]hree-quarters of Texas counties appoint counsel in fewer than 20 percent of jailable misdemeanor cases, with the majority of those counties appointing counsel in fewer than 10 percent of cases."[148] According to the National Legal Aid and Defender Association, "People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all."[149]

In Maricopa County, Arizona, one judge handled the issue by instructing the defendant to give up his right to counsel, saying,

> You are charged with reckless driving. So, I guess basically before we talk about it, let me do a couple preliminaries. . . . I want you to waive your right to an attorney. You have a right to have an attorney, but I'm not going to give you the public defender. You would have to go and hire one and I don't think you're going to do that. I think you and I are going to talk about this right here, right now, right?" The defendant then signed a form waiving his right to counsel.[150]

The practice of instructing defendants to negotiate guilty pleas directly with prosecutors, without counsel, was observed in Texas, Washington, Pennsylvania, and Colorado.[151]

Even when counsel is appointed, misdemeanor caseloads often render representation a formality. Public defenders are famously overloaded and underfunded: nationally, average spending on indigent defense is a mere $11.86 per capita.[152] In the misdemeanor context, this translates into caseloads that number in the thousands, although national standards and best practices recommend misdemeanor caseloads of no more than 400. In Chicago, Atlanta, and Miami, defenders have more than 2000 misdemeanor

146. *Id.*
147. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10.
148. *Id.* at 15.
149. *Id.* at 15–16.
150. *Id.* at 16.
151. *Id.* at 16–17; GIDEON'S BROKEN PROMISE, *supra* note 142, at 25.
152. NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS ii (2008) [hereinafter RACE TO THE BOTTOM], http://www.mynlada.org/michigan/michigan_report.pdf.

cases each per year, providing attorneys with at most seventy minutes to devote to each case. In Louisiana, some part-time public defenders handle the equivalent of 19,000 cases per year, limiting them to seven minutes per case.[153]

The overloading of public defenders and the resulting cursory treatment of clients has become commonly referred to by a variety of derogatory terms: "meet 'em and plead 'em" lawyering,[154] "assembly line justice," cattle herding,[155] and "McJustice."[156] These labels capture the well-recognized reality that thousands of indigent misdemeanor defendants have counsel in name only. As described by the ABA,

> One witness reported that in 83% of the cases in Calcasieu Parish, Louisiana, "there is nothing to suggest that a public defender ever met his indigent client out of court. What happens, therefore, is that on the morning of the trial, the public defender will introduce himself to his client, tell him the 'deal' that has been negotiated, and ask him to 'sign here.'" . . . A witness from Alabama testified that contract defenders in that state basically do nothing but process defendants to a guilty plea in as expeditious a manner as possible.[157]

In addition to sheer lack of time, the ABA and NACDL reports describe lack of attorney training, lack of investigation, and pressure on attorneys from judges to resolve cases as quickly as possible or risk losing future appointments.

All this is to say that, in tens of thousands of misdemeanor cases in districts across the country, defense attorneys do not perform a meaningful screening function. A defendant may plead guilty without counsel at all, or, if he is represented, the attorney's role is better described as facilitating the guilty plea rather than checking the merits of the case.

D. THE PRESSURE TO PLEAD

The vast majority of U.S. criminal defendants—between 90 and 95 percent[158]—plead guilty. A robust and longstanding literature criticizes

153. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 21–22 (calculating based on assumption that attorney works ten hours per day, without time for sick leave, additional training, or general research).

154. GIDEON'S BROKEN PROMISE, *supra* note 142, at 16, 30.

155. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 12.

156. RACE TO THE BOTTOM, *supra* note 152, at 15.

157. GIDEON'S BROKEN PROMISE, *supra* note 142, at 16.

158. SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 25 tbl.4.1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; HUMAN RIGHTS WATCH, *supra* note

plea bargaining and the pressure it exerts on all defendants, including the innocent.[159] More specifically, scholars note that plea bargains are often not driven by evidence but by institutional and individual factors unrelated to whether the defendant is actually guilty.[160]

Nowhere are these criticisms more salient than in the misdemeanor context. Every player in the system assumes that such defendants will plead guilty, including judges, prosecutors, and their own lawyers. Moreover, as a general matter, most defendants lack the personal wherewithal to resist the assumption. Seventy percent of arrestees have a recent history of substance abuse or are under the influence at the time of arrest.[161] Seventy percent of prison inmates lack basic literacy and information processing skills,[162] more than half of jail inmates have mental health problems,[163] 60 percent have a prior criminal record,[164] and most are poor.[165] Under such circumstances, it is the rare defendant indeed who has the personal stamina to resist the formidable hydraulic forces of the guilty plea process.

As described above, many misdemeanor defendants plead immediately, as soon as they are hauled into court.[166] For example,

39, at 3.

159. *See, e.g.*, Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Bibas, *supra* note 85; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

160. *See* Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the "Shadow of the Trial" a Mirage*, 28 J. QUANTITATIVE CRIMINOLOGY 437, 449–52 (2011) (demonstrating that strength of evidence does not drive plea bargains); Bibas, *supra* note 85, at 2469–96 (describing many nonevidentiary structural factors that influence plea bargaining).

161. OFFICE OF NAT'L DRUG CONTROL POLICY, ADAM II: 2008 ANNUAL REPORT 15 (2009), *available at* http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/adam2008.pdf (finding that between 49 to 87 percent of male arrestees in a 2007 sample tested positive for drug use upon arrest).

162. OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, U.S. DEP'T OF EDUC., LITERACY BEHIND PRISON WALLS xviii, 17 (1994), *available at* http://nces.ed.gov/pubs94/94102.pdf.

163. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006) (finding that over half of all prison and jail inmates had a mental health problem, including almost 500,000 in local jails).

164. JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sdatji02.pdf.

165. The majority of felony defendants in state court (approximately 80 percent) cannot afford counsel. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

166. The exception to this trend is in federal court, in misdemeanor defendants routinely get counsel and defendants plead guilty less often. The 10,000 federal misdemeanor cases per year are a small fraction of over 77,000 total federal cases. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 418 tbl.5.17 (2003). *See also* Hashimoto, *supra* note 87, at 489 n.128 (referring to data on federal misdemeanors).

according to one law professor, "In 2000 in New York City, assigned counsel lawyers handled 177,965 new defendants in the Bronx and Manhattan. 124,177 [approximately 70 percent] of those cases were disposed of at the first appearance—most by a plea of guilty entered after no more than a 10-minute consultation with their lawyers."[167]

Misdemeanor pleas can take place in bulk, with dozens of defendants being advised of their rights and pleading guilty en masse.[168] In 2011, the Ninth Circuit upheld the constitutionality of this practice in Arizona. As part of "Operation Streamline," groups of fifty to seventy-five misdemeanor immigration defendants are advised of their rights and the charges against them, plead guilty, and receive their sentences all in one group hearing.[169]

Doctrinally speaking, the guilty plea is a full substitute for a factual inquiry into guilt. The underlying idea is that a defendant who relinquishes his right to contest guilt must indeed be guilty.[170] Few scholars subscribe to this simplistic view, but many adopt the position that defendants' willingness to negotiate over guilt is premised, if not on actual belief in their own culpability, on the realization that the evidence is likely to persuade a jury of their guilt and that they will therefore lose at trial.[171]

Whatever its merits in the felony context, this model substantially overestimates the role of evidence evaluation in the misdemeanor plea process, and underestimates the external, nonevidentiary pressures on defendants to plead guilty. First, as described above, many defendants do not know what the evidence against them is, or that they have the ability to contest it. Those without counsel are informed by a prosecutor or a court that they are charged with a crime—the definition of which they may not know or understand—and told what resolution the government wants. The fact that so many defendants acquiesce does not necessarily mean they are guilty; it may simply reflect that fact that they do not perceive themselves to have any choice in the matter.

167. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 31 (quoting Adele Bernhard).

168. GIDEON'S BROKEN PROMISE, *supra* note 142, at 24–25 (describing mass arraignment in Georgia).

169. United States v. Diaz-Ramirez, 646 F.3d 653, 654–58 (9th Cir. 2011).

170. Brady v. United States, 397 U.S. 742, 748 (1970) ("Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself."). *But see* North Carolina v. Alford, 400 U.S. 25, 37 (1970) (noting that typically a defendant's trial waiver, and not his "express admission of guilt," is the only constitutional requirement for the entry of a conviction since the law accepts pleas of nolo contendere).

171. Bibas, *supra* note 85, at 2467–68; Stuntz, *supra* note 159, at 2548.

Indeed, socially vulnerable individuals often submit more readily to assertions of government authority. African Americans report feelings of fear, humiliation, and disempowerment upon being stopped repeatedly by police, leading to greater acquiescence to police authority.[172] A robust literature documents how black suspects are more likely to feel coerced by police—and therefore give consent to searches and other intrusions—than white suspects who are more confident that their rights will be respected.[173] The same dynamic extends to court interactions and the plea context, in which many vulnerable suspects simply accede to government demands, be they expressed by the prosecutor or the court.[174] Indeed, given astronomical incarceration rates in poor black communities, poor African American men can rationally expect to be incarcerated at some point in their lives.[175] Even for innocent defendants, therefore, a plea offer of something other than incarceration—probation, a fine, or some other punishment—may well feel like a dodged bullet.

In addition, unlike serious offenses of burglary, rape or homicide, the "evidence" of a misdemeanor defendant's guilt will often be no more than a police officer's assertion of loitering, trespassing, speeding, handing something to someone else, acting as a nuisance, or other behavior. As discussed above, these crimes are the staples of high-volume order-maintenance policing. In order to contest their guilt, the defendant's word would have to be believed over that of the officer, an outcome that many poor minority defendants rightly dismiss as unrealistic.[176]

The external pressures on defendants to plead guilty are immense. The best documented one is the fact that many cannot make bail. Since bail is so often required,[177] those defendants are destined to be incarcerated until

172. *See, e.g.*, David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 322 (documenting the "special fears and forms of intimidation that can lead non-whites . . . to agree to cooperate with police"); Andrew Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2260 (2002) (describing stories of African Americans experiencing such negative feelings toward the police).

173. *E.g.*, Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. AND CRIMINOLOGY 211 (2002).

174. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 558–61 (1992) (documenting the lack of a "culture of claiming" on the part of poor women of color).

175. MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA ix (2011) (noting U.S. Department of Justice estimate that "one in three black baby boys born in 2001 will spend part of his life as an inmate in a state or federal prison").

176. Strauss, *supra* note 173, at 246–47, 236–48 nn.129–38 (explaining that police typically win swearing contests in court because judges are reluctant to brand police liars); Covey, *supra* note 124, 26–32 (documenting how dozens of innocent defendants pled guilty in part because they did not think they would be believed over the police).

177. For statistics on bail rates see *supra* text accompanying notes 39–42.

they either plead guilty or get a lawyer and trial date. As the examples above illustrate, it may be months before they get either of those two latter things. For those with children, jobs, or other obligations, the deprivations inflicted by a month in jail can be worse punishment than they would face if they were convicted at trial. As Sam Gross surmises,

> [I]t is entirely possible that most wrongful convictions—like 90 percent or more of all criminal convictions—are based on negotiated guilty pleas to comparatively light charges, and that the innocent defendants in those cases received little or no time in custody. If so, it may well be that a major cause of these comparatively low-level miscarriages of justice is the prospect of prolonged pretrial detention by innocent defendants who are unable to post bail.[178]

The confluence of police authority to trigger incarceration simply by asserting that a minor offense has been committed, combined with the pressures of bail and general acquiescence of the poor, can create the perfect storm of wrongful pleas. For example, as described above, in response to the NYPD tactic of arresting every young man found in low-income housing, "nearly all defendants plead guilty to light penalties rather than face the delays and risks of trial."[179] Even innocent defendants with competent counsel took pleas under these circumstances. As then–Bronx Public Defender Chris Fabricant described the phenomenon for The Village Voice, "I have had a disgraceful number of innocent clients, many of whom plead guilty to a trespassing charge."[180]

E. INVISIBLE INNOCENCE

There is an underside to every Age about which history does not often speak, because history is written from records left by the privileged.

—Howard Zinn, *A People's History of the United States*[181]

The casual attitude toward petty convictions in general, and wrongful petty convictions in particular, is exquisitely expressed by the fact that the criminal system often fails to count them. The most comprehensive empirical study to date states that the "[t]he exact number is not known, as states differ in whether and how they count the number of misdemeanor cases processed each year."[182] For example, California does not count its

178. Gross, *supra* note 14, at 930–31.
179. Gross, *supra* note 103, at 184 (citing Fabricant, *supra* note 103).
180. Fabricant, *supra* note 103.
181. HOWARD ZINN, THE POLITICS OF HISTORY 102 (1990).
182. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 11.

total misdemeanor convictions, only police complaints.[183] In one survey, state prosecutors indicated that they report only around half of all misdemeanor dispositions (which includes acquittals as well as convictions) to central state repositories.[184] According to one Texas judge, misdemeanor pleas in that state often take place "off the record" in the sense that no court reporter is assigned to cover misdemeanor dockets.[185] The lack of record also precludes meaningful review or appeal.[186] At worst, wrongful convictions will not only be "invisible at their inception,"[187] but will remain so forever. At best, this institutional invisibility dooms us to uncertainty about the guilt or innocence of misdemeanants.

To be sure, some misdemeanor convictions are more likely sound than others. For example, federal misdemeanants are entitled to counsel and their cases tend to be better litigated than state misdemeanants'.[188] Driving on suspended license charges are presumably triggered by the existence of DMV records. Most states rely on on-site breathalyzer tests for drunk driving arrests, although the accuracy of breathalyzer machines is in some dispute.[189]

By contrast, bulk-urban policing crimes such as loitering, trespassing, disorderly conduct, and resisting arrest create the highest risk of wrongful conviction. By definition, these offenses require no physical or concrete evidence other than an officer's assertion that the defendant has engaged in relatively common types of behavior. These offenses are also the core of order maintenance policing, that is, the kinds of offenses for which police often use high volume arrests to maintain street order or zero tolerance policies. As stories from Baltimore to the Bronx attest, such arrests routinely occur without sufficient evidence to support conviction.

The lack of postarrest checking mechanisms means that for these

183. Email from Linda Nance, Criminal Justice Statistics Center, Cal. Dept. of Justice, to author (Nov. 23, 2010, 7:20 PST) (on file with author).

184. PETER BRIEN, BUREAU OF JUSTICE STATISTICS, TECHNICAL BRIEF: REPORTING BY PROSECUTORS' OFFICES TO REPOSITORIES OF CRIMINAL HISTORY RECORDS 1 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rporchr.pdf.

185. Email exchange between Steve Russell, Professor, Ind. Univ., and George Thomas, Professor, Rutgers Sch. of Law, CrimProf Listserv (Aug. 30, 2010, 04:16 PST) (on file with author).

186. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 693 (2007) (describing structural impediments to appellate and collateral review of misdemeanor convictions).

187. Gross, *supra* note 14, at 929.

188. Hashimoto, *supra* note 87, at 489 n.128.

189. *See generally* Charles Short, Note, *Guilt by Machine: The Problem of Source Code Discovery in Florida DUI Prosecutions*, 61 FLA. L. REV. 177 (2009) (surveying litigation over breathalyzer reliability in numerous states).

types of cases, the only real basis for accepting the evidentiary integrity of the arrest is faith in the policing process itself: we must be confident that police would not arrest loiterers without probable cause, since so few prosecutors, defense counsel, or courts check the evidence afterwards. We must also be confident that innocent people will resist pleading guilty. Where police practices are compromised, as they have been in many urban contexts, and where the pressure to plead is high, we can be confident of neither. While we may never have specific percentages for this subset of cases, the nature of the process suggests that wrongful convictions are likely and commonplace.

In these ways, the lack of robust checking procedures and the general opacity of the process weaken the evidentiary content of misdemeanor convictions. Even a valid arrest requires only probable cause, a standard which demands less than a preponderance of the evidence, and which "means less than evidence which would justify condemnation."[190] Accordingly, an innocent person can be legally arrested, sail through the weak screening processes of the prosecutorial and public defender offices, go to jail, and succumb to the pressure to plead guilty, all based on no more than a probability (less than a fifty-fifty chance) of guilt. It is precisely by rolling back the evidentiary checking mechanisms which ensure both accuracy and transparency that the system effectively permits criminal convictions on such thin bases.

Just as fundamentally, the lack of record and review means that the official players know that their conduct is invisible, a scenario that promotes unprofessionalism and rule breaking.[191] For example, the NACDL report revealed that some judges declined to appoint counsel for misdemeanor defendants even when they knew the law required it. Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina went so far as to explain that she disagreed with the U.S. Supreme Court's decision to require counsel: "*Alabama v. Shelton* [guaranteeing the right to counsel to misdemeanants who receive jailable probation] is one of the more misguided decisions of the Supreme Court, I must say . . . so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation."[192]

The off-the-record quality of petty offense processing is integral to its

190. Illinois v. Gates, 462 U.S. 213, 235 (1983) (quoting Locke v. United States, 11 U.S. 339, 348 (1813)).

191. *See* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 4 (2009) (describing the casual lawlessness of many courts).

192. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 17.

nature; it both reflects and contributes to the devaluing of due process and innocence. Informality and secrecy permit convictions to proceed without the systemic checks designed to protect the innocent, thereby inviting wrongful convictions. Informality and secrecy permit legal actors to break rules without fear of sanction, while permitting the entire world of petty convictions to remain beneath the radar of criminal scholarship and public policy. And finally, all these phenomena convey to misdemeanants that their convictions, punishments, and the resulting burdens on their lives are unimportant.

IV. THEORIZING MISDEMEANORS

As part of their second-class status, misdemeanors have been undertheorized relative to felonies.[193] While misdemeanors are widely regarded as less important than felonies and therefore deserving of fewer institutional resources, no one has worked out a principled basis for deciding just how important they are or how many resources they should be entitled to.

If the United States Supreme Court can be said to have a misdemeanor theory, it is that lesser punishments should trigger reduced procedural entitlements. The paradigmatic case is *Scott v. Illinois*, holding that if misdemeanants are not actually sentenced to incarceration, they are not entitled to trial counsel.[194] Similarly, under *Duncan v. Louisiana*, petty offenses do not trigger the right to jury trials.[195] In this view, the reduced penalties associated with misdemeanors exempt them from the structural integrity demands triggered by felonies, most importantly the risk of wrongful conviction and unfair trial that attends the lack of counsel.[196]

193. The exception is Malcolm Feeley's thirty-year-old treatment, *The Process Is the Punishment*, in which he comprehensively described the alternative universe of misdemeanor processing in New Haven. FEELEY, *supra* note 10. Since then, as discussed below, scholars have addressed various distinct features of the misdemeanor process.

194. Scott v. Illinois, 440 U.S. 367, 371–74 (1979) (holding that there is no right to counsel for misdemeanants who are not sentenced to incarceration).

195. Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968). The Court's approach to misdemeanors has been piecemeal. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 322 (2001) (describing common law requirement that misdemeanor take place in presence of police before police can arrest); Welsh v. Wisconsin, 466 U.S. 740, 754 (1984) (holding that the minor quality of offense did not permit warrantless home entry); Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (noting that merely because offense is petty does not justify imprisonment without counsel at trial); Hurtado v. California, 110 U.S. 516, 520–38 (1884) (explaining requirement of grand jury indictment for serious but not minor cases).

196. The provision of counsel has traditionally been the Court's bedrock response to the threat of inaccuracy. *See, e.g.*, Alabama v. Shelton, 535 U.S. 654, 665 (2002) (asking whether a defendant may be jailed without a "conviction credited as reliable because the defendant had access to 'the guiding hand of counsel'"); United States v. Wade, 388 U.S. 218, 236–43 (1967) (establishing right to counsel

Some scholars have also concluded that misdemeanors deserve fewer resources, albeit for different reasons. For example, based on her study of federal misdemeanors, Erica Hashimoto argues that counsel may not be all that helpful to petty offenders, and that in light of the crisis in indigent defense, scarce defense resources are better devoted to felonies.[197]

Acknowledging that wrongful convictions are a moral "tragedy," Josh Bowers nevertheless concludes that the average innocent misdemeanant is better served by pleading guilty.[198] Because most offenders are recidivists, Bowers argues that the reputational cost of an additional conviction is low, that the cost of litigation is high, that prosecutors tend to offer good deals, and that therefore a wrongful guilty plea is in those defendants' interests. In other words, notwithstanding principled objections to wrongful convictions, in reality innocent defendants are punished less by taking a plea than by attempting to litigate their innocence.

Several scholars have taken Bowers to task for defending wrongful guilty pleas, most pointedly Stephanos Bibas who responds that "[c]onvicting the innocent is just plain wrong."[199] Even if one disputes Bowers's decision to bracket the normative question of innocence, or his factual assertion that wrongful misdemeanor convictions are "rare,"[200] his arguments remain an important opening salvo in an underdeveloped debate over the value of accuracy and procedural justice for minor offenses.

There is truth to both the Supreme Court's punishment-centric view and these utilitarian insights. Misdemeanor offenses and punishments are indeed less serious than felonies; indigent defense is indeed a scarce resource; and the costs and risks of litigating a misdemeanor may well drive the rational innocent misdemeanant to plead guilty. But these truths do not capture the whole picture.[201] For one thing, misdemeanor punishments are getting worse. As the criminal and civic burdens of petty convictions increase, they cannot be so easily dismissed as deserving of

at postindictment lineups to ensure integrity of evidence and fair trial); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (establishing that the Fourteenth Amendment requires that states provide counsel to satisfy defendant's right to fair and accurate trial).

197. Hashimoto, *supra* note 87, at 489 n.128.

198. Bowers, *supra* note 14, at 1119.

199. Stephanos Bibas, *Exacerbating Injustice*, 157 U. PA. L. REV. PENNUMBRA 53, 56 (2008) ("Bowers is mistaken to view all of criminal justice as a utilitarian calculus."). *See* Ronald Wright, *Guilt Pleas and Submarkets*, 157 U. PA. L. REV. PENNumbra 68, 68–73 (2008).

200. Bowers, *supra* note 14, at 1162 (stating that "most defendants are in fact guilty" and calling innocent defendants "rare"); Bowers, *supra* note 30, at 1656, 1659 (arguing that while most misdemeanants are legally guilty, they may be undeserving of punishment).

201. I am indebted to Ron Allen for pressing me on this point.

lessened procedural protections, or as a minor cost of pleading guilty.[202]

More fundamentally, the focus on punishment and cost omits other core values served by criminal adjudication—the standard ones being legality, evidentiary accuracy, and fair process. The legitimacy of the system may demand that we avoid wrongful conviction because it is contrary to law and punitively unjustified, not merely because of individual defendant utility.[203] Likewise, the value of fair process does not disappear merely because the potential punishment is petty. Indeed, weak processes that routinely generate wrongful convictions cannot be justified by reference to the lightness of punishment, since any punishment of the innocent is legally unjustified.

In these ways, misdemeanors resurrect foundational disputes over the criminal process itself. How often should innocent people be convicted, if ever? Must criminal convictions be the product of a public adversarial process, or even constrained by rule of law? Marcus Dubber's work on the police power suggests that petty offenses have historically evaded legality constraints like these. Dubber posits a dichotomy between the police power and law itself, reminiscent of Herbert Packer's famous distinction between the crime control and due process models. Dubber contends that the state's power to police and control crime is not legal in nature, but rather the raw expression of unfettered state authority, a derivative of the father's patriarchal power of governance over the household.[204] Such power does not aspire to legality or democratic legitimacy and thus has been relatively unconstrained by traditional legal principles. By way of example, he cites the Blackstonian judicial practice of creating "common law misdemeanors" to fill in gaps in criminal legislation to ensure punishment for offenders who violate no statute.[205] Common law misdemeanors thus embody the

202. *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (conferring new legal salience on noncriminal immigration consequences of pleading guilty). *See generally* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675 (2011) (arguing that *Padilla* makes all collateral consequences of convictions more legally significant).

203. This debate is already in full force in the capital context. *E.g.*, Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 68–73 (2008) (arguing that capital error rates are relatively low and that the costs of avoiding them are higher than is generally acknowledged); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705–06 (2005) (arguing that the state may be obligated to impose the death penalty if it deters murder and therefore saves innocent lives). *But see* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 596 (2005) (challenging the utilitarian analysis).

204. DUBBER, *supra* note 102, at 158–61.

205. *Id.* at 56 ("In the face of a threat to the communal police, familiar niceties of criminal law doctrine, such as the distinction between omissions and commissions, were of no significance . . . The

state's authority to punish in the absence of law. Although Dubber's work is not centrally about misdemeanors, it poses a crucial question raised by the informality and lack of legal constraint in the petty offense process: To what extent has the misdemeanor process been shaped by conventional rule-of-law principles in the first place?[206]

In sum, to evaluate the wholesale significance of misdemeanors, we need to revisit the basic ingredients of legitimate criminal adjudication. The next part starts this inquiry by identifying the requisite ingredients of any valid criminal conviction: legality, evidentiary accuracy, and procedural fairness. It then explores how real-world erosions of these core commitments intersect to produce suspect petty convictions.

V. PRODUCING (IL)LEGITIMATE CONVICTIONS

At a minimum, the first ingredient of a legitimate criminal system is legality.[207] As William Stuntz stated, this "central commitment of American government" requires that "when the state deprives one of its citizens of life, liberty, or property, the deprivation is primarily the consequence of a legal rule, not a discretionary choice."[208] For criminal convictions to flow from legal rules, the system needs three things: (1) criminal laws that define specific legal rules; (2) sufficient evidence in individual cases to believe that a particular defendant has violated a

traditional 'act requirement' . . . similarly lost all purchase when it came to policing gypsies, eavesdroppers, or common scolds. Another great bulwark of Anglo-American criminal law, the 'mens rea requirement' . . . fared no better.").

206. *See generally* 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) (considering the effects of zero-tolerance policing).

207. *See* Rogers v. Tennessee, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (describing the maxim *nulla poena sine lege* (no punishment without law) as "one of the most 'widely held value-judgment[s] in the entire history of human thought'"); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 310–16 (2004) (theorizing requirements for legitimate punishment once culpability has been established). There remains a more general debate over whether legality is a necessary condition of legal systems, or whether legality is required for moral systems of law. *See* Jeremy Waldron, *Positivism and Legality: Hart's Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135, 1136–44 (2008) (describing competing positions).

208. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809, 809 (2006). *See also* Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1612 (2009) ("[W]ithout the substantive criminal law . . . policing would be unintelligible."). Other approaches to legitimacy turn less on the nature of rules and legal systems and more on public perceptions of legal authority. *See, e.g.*, Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minorities Communities*, 6 OHIO ST. J. CRIM. L. 173, 216 (2008) ("[Legitimacy is] the perceived obligation to comply with both civil and criminal law and to defer to decisions of legal authorities. Legitimacy is a socially and morally salient belief to which social authorities can appeal to gain public deference and cooperation.").

particular rule; and (3) procedures to ensure that law and evidence actually do the work of determining case outcomes.[209] Criminal theory also accords great importance to culpability: the standard view is that criminal laws should only prohibit the kinds of fault that deserve punishment.[210]

The world of urban misdemeanors routinely violates this traditional formula. The substantive criminal law (for example, legal definitions of trespassing or loitering) exerts only a weak influence over misdemeanor case outcomes. Evidence likewise plays a reduced role. This state of affairs is permitted by weak checking procedures, which erode the influence of evidence and substantive law. In the worst cases, we can no longer say that individuals were convicted because there was *evidence* that they committed specific *crimes*. Instead, evidence and law are displaced by the fact of selection itself: it becomes more accurate to say that they were convicted because they were arrested, and that they may have been arrested for any number of nonevidentiary reasons.

This critique of the misdemeanor conviction process builds on two influential literatures. First is the innocence revolution, which has shattered the myth that serious felony convictions are necessarily based on evidence of guilt and has thereby destabilized the longstanding assumption that convictions are reliable indicators of individual fault. The second is the so-called "overcriminalization" framework, a diverse body of work that explains how the substantive criminal law has ceded its power over outcomes to police and prosecutorial discretion. Taken together, these discourses reveal how evidence and law have come to exert less influence over convictions than is conventionally assumed and theoretically required.

This part extends the innocence and overcriminalization insights into the misdemeanor context. It then completes the model of conviction production by examining the roles of criminal procedure and enforcement selection decisions. Substantial discourses have been devoted to each of these four subjects and this Article does not attempt to reproduce them here. Instead, the following discussion touches briefly on each one and relates them to one another in an effort to picture the conviction process as

209. The philosopher R.A. Duff similarly concludes that legitimate convictions flow not only from rules but also from facts and procedures: "[I]n asking what is or should be criminal, we must attend not just to criminal codes or statutes, but to the ways in which such codes or statutes are or are not enforced by police and prosecutors." R.A. Duff, et al., *Introduction: The Boundaries of the Criminal Law*, *in* THE BOUNDARIES OF THE CRIMINAL LAW 3 (R.A. Duff, et al. eds., 2010).

210. *See* LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 263–87 (2009) (proposing a "culpability-based criminal code").

a whole.

A. EVIDENCE AND INNOCENCE

Legitimate convictions require evidence of guilt. But the significance of evidence goes deeper than the factual issue of whether a particular person "did it." Evidence is a conceptual lynchpin, the necessary link between the law and actual convictions. Without factual evidence of crime, the law is just a set of rules and no individual person can be legitimately punished. We need evidence to justify declaring particular persons guilty and visiting punishment on them. In this sense, evidence is the glue that holds the process together.[211]

With its revelations about the system's inaccuracies, the innocence revolution has injected a profound skepticism into the criminal justice dialogue on evidence.[212] Hundreds of death row exonerations, especially the newest spate of DNA-based reversals, reveal that evidence commonly used in murder and rape cases is unreliable and produces wrongful convictions. The movement's strongest claim is that that the routine possibility of wrongful conviction in the most serious cases throws the accuracy of the entire system into doubt.[213]

Theoretically, the misdemeanor challenge belongs squarely within this revolution. Inaccuracy, and the associated threat of wrongful conviction, pervades petty offense processing on a scale that dwarfs the current innocence docket. The routine lack of evidence and evidentiary checking mechanisms threaten the validity of the entire petty offense process.

The innocence literature has two key limitations that have prevented it from addressing the wrongful misdemeanor conviction phenomenon. First, the innocence movement is centrally concerned with serious offenses, typically murder and rape, which together comprise a small fraction of the

211. *See* Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1501, 1537 (2001) (describing the law of evidence as those rules designed to "increase the frequency with which truth [about guilt] is ascertained" and arguing that this "veritistic" question "is the question all evidence scholarship should be asking"); Harris v. United States, 404 U.S. 1232, 1233 (1971) ("It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process.").

212. *See generally* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (examining data about defendants exonerated by postconviction DNA testing); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (responding to criticisms of the focus on innocence in criminal law).

213. *See* Garrett, *supra* note 212, at 57–58 (describing how the innocence movement has caused a wholesale reevaluation of the criminal process).

criminal system—around 2 percent.[214] This focus is in part pragmatic. Capital and other murder cases command more attention and resources because they are deemed so serious, and DNA evidence is typically only available and dispositive in rape cases. With limited resources, the innocence movement has strategically chosen to focus on the highest profile and clearest cases of evidentiary failure.

Sometimes, however, this focus on serious convictions is a corollary to an unspoken disregard for minor miscarriages of justice. Central to the argument that wrongful capital convictions are morally intolerable is that the punishment is so serious: execution "generates an enormous retributive gap between the individual's culpability (none) and the punishment received (death)."[215] For misdemeanors, particularly those that do not lead to incarceration, the retributive gap is so small that it may fall beneath the radar.

The second weakness in the innocence literature is its narrow conception of procedure. Advocates have proposed numerous reforms to procedures for eye-witness identification, lineups, jailhouse informant use, and the taking of confessions. These are crucial reforms, and I have advocated for some of them myself,[216] but they assume the basic integrity of the process by which people are chosen for arrest and prosecution and by which the system tests evidence in the first place. This posture assumes that if those discrete pieces of evidence were stronger, the convictions would be sound.[217] This approach is not equipped to grapple with the vast world of petty offenses in which the system often does not require much evidence for conviction at all.

The core insight of the innocence movement is that the system collects and evaluates evidence more poorly than principle requires, and that convictions, even serious ones, should not be accepted at face value. This skepticism is especially applicable to misdemeanors. The innocence movement thus has ample conceptual room for petty offenses, subject to a couple of expansions. The first is to recognize wrongful misdemeanor convictions as miscarriages of justice deserving of attention, to appreciate

214. Gross, *supra* note 103, at 179.

215. Steiker & Steiker, *supra* note 203, at 596 (noting that while all convictions carry a risk of error, "[t]he distinctive claim of the newly emerging 'innocence movement' is that the harms associated with executing innocents are of such a different kind or degree that we should not risk these sorts of errors even as we must tolerate others").

216. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 175–200 (2009).

217. *See* Hughes, *supra* note 20, at 1086–90 (criticizing focus on factual innocence); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456–63 (2001) (same).

the lasting burdens they impose on defendants, and the threat they pose to the legitimacy of the system. Horror at a few hundred serious wrongful convictions should segue into dismay at thousands of lesser ones.

The second expansion is procedural. Rather than focusing on discrete pieces of evidence such as confessions or fingerprints, innocence skepticism should be aimed at the entire procedural apparatus by which people are selected for arrest, screened by prosecutors, and provided defense counsel. This would include taking on the fallibility of the guilty plea as well as trials, something that the innocence movement been slow to do.[218] In other words, the reinvigorated demands for accuracy that are currently levied at forensic labs and lineups should extend to all the evidence that goes into determining guilt, including evidence that generates arrests and criminal charges in cases where the fact of arrest leads inexorably to conviction.

In sum, the innocence literature invites skepticism of the assumption that convictions always issue based on sufficient evidence of guilt. Extended to the misdemeanor context, that skepticism helps explain the prevalence of wrongful minor convictions. More generally, the innocence literature reminds us that evidentiary integrity is a pillar of a valid conviction process, and that the generally weak role of evidence in the misdemeanor world represents a troubling systemic weakness.

B. SUBSTANTIVE CRIMINAL LAW AND OVERCRIMINALIZATION

Like evidence, the substantive content of the criminal code is crucial to the legitimacy of the criminal system. Much legal theory remains devoted to defining mens rea and defenses as a way of capturing deep principles of criminal justice.[219] The foundational maxim *nullum crimen, nulla poena sine lege* (no crime or punishment without law) embodies the concept that without codified authorization, law enforcement cannot arrest, prosecute, or punish.[220] Institutionally speaking, American criminal law

218. Gross, *supra* note 14, at 930 (noting that "we know so little about the *occurrence* of false convictions"). *But see* Covey, *supra* note 124, at 24–25 (pointing out that the majority of innocent defendants in Rampart and Tulia pled guilty).

219. *See, e.g.*, Duff, et al., *supra* note 209, at 11 ("If we ask what should be criminalized, we must also ask *how* it is to be criminalized—by which we mean, not the process through which kinds of conduct are to be criminalized or decriminalized (important though such questions are), but the way in which the criminal law is to define offences."); ALEXANDER, FERZAN & MORSE, *supra* note 210, at 263–87 (proposing a "culpability-based criminal code"); PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 8–12 (1997) (advocating a functional approach to drafting criminal law).

220. *See* Rogers v. Tennessee, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (describing the maxim as "one of the most 'widely held value-judgment[s] in the entire history of human thought'").

expresses the will of the democratically elected legislature, validating the imposition of punishment on a consenting citizenry.[221] The code thus also functions as a delegation of authority to the executive. In these ways, the substantive criminal law performs important democratic regulatory functions.

This traditional story has been destabilized by the overcriminalization critique.[222] While it takes various forms, the key insight is that the criminal code is too broad to perform the defining and constraining work necessary to ground legitimate convictions, thereby permitting convictions that are fatally attenuated from legislatively promulgated laws.

The late William Stuntz provided the definitive analysis in this regard, explaining how the legislative decision to expand criminal codes delegates power to law enforcement to define how the law is applied in practice.[223] Broad codes create an infinite pool of the guilty, among whom police and prosecutors have unbridled discretion to select and negotiate. Plea bargaining against this backdrop of unlimited potential liability leads to convictions that do not reflect the content of codes or individual liability so much as the government's vast bargaining power.

In addition, overcriminalization sometimes includes a critique of the content of these broad codes, arguing that we now criminalize a wide range of conduct that is insufficiently culpable to warrant criminal sanction. Such conduct includes drug use and other private or consensual behavior that some argue should not be regulated as a criminal matter.[224] Others challenge the growth of strict liability crimes that lack robust mens rea requirements.[225] Overcriminalization thus includes the complaint that by

221. *See* Keeler v. Superior Court, 470 P.2d 617, 625–28 (Cal. 1970) (emphasizing legislative supremacy in the determination of the criminal law), *superseded by statute on other grounds*, CAL. PENAL CODE § 187 (West 2012) ; Logan, *supra* note 121, at 75, 95–96.

222. *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008) (discussing overcriminalization, the important constraints on criminal sanction, and the great injustice of overpunishment); Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 972–77 (2010); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Ellen Podgor, *Overcriminalization: The Politics of Crime, Foreword*, 54 AM. U. L. REV. 541, 557–80 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001); Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1 (2011) (discussing Husak's theories in relation to the decriminalization of marijuana).

223. Stuntz, *supra* note 222, at 506 (while legal orthodoxy maintains that "substantive criminal law defines the conduct that the state punishes . . . . and determines who goes to prison," in fact "[i]t would be closer to the truth to say that criminal punishment drives criminal law").

224. *See* HUSAK, *supra* note 222, at 135–38 (contemplating how to the state should address private wrongs).

225. In a joint study, the Heritage Foundation and the National Association for Criminal Defense Lawyers concluded that due to the "reckless pace of criminalization . . . the recent proliferation of

creating laws that penalize behavior that should not be criminal, the resulting expansion of the government's reach into private spheres of behavior and choice offends broader values of political restraint and accountability.

In certain ways, the misdemeanor problem is precisely one of overcriminalization. The breadth of street crime violations—loitering, trespassing, gang injunctions, and the like—confers vast power on urban police that permits widespread arrests for petty offenses. Weak culpability requirements mean that even in theory, there need be no real inquiry into the evidence or the subjective culpability of the offender. Incarceration and increasingly harsh punishment can flow from the pettiest of behaviors, triggered by the slightest impulse on the part of the police to arrest. Increasing societal tolerance for harsh punishments and full prisons normalizes this state of affairs.

For example, as described above, Baltimore police routinely ignore the technical requirement contained in the loitering statute that an offender interfere with "the free passage of pedestrian or vehicular traffic."[226] South Bronx police likewise easily bypassed the New York statutory requirement that a trespassing defendant be on the premises "unlawfully."[227] By contrast, when codes work properly, statutory constraints have outcome-determinative force. For example, and in better keeping with the legality ideal, the statutory definition of "honest services" has become an important limitation on the government's ability to use the mail fraud statute to prosecute corruption.[228]

While capturing much of what ails the petty offense process, the overcriminalization viewpoint lacks two features that might otherwise permit it to better account for the misdemeanor debacle. First, overcriminalization does not contemplate actual innocence. Indeed, one of its central complaints is that overbroad codes make everyone guilty. As Stuntz famously put it, overcriminalization means that eventually "the law on the books makes everyone a felon."[229] It may even be that the

federal criminal laws has produced scores of criminal offenses that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize." WALSH & JOSLYN, *supra* note 3, at x.

226. BALT. CITY CODE art. 19, § 25-1 (2008).

227. *See* N.Y. PENAL LAW § 140.10 (McKinney 2012); Fabricant, *supra* note 103.

228. Skilling v. United States, 130 S. Ct. 2896, 2906 (2010) (narrowing interpretation of mail fraud statute's "honest services" provision); Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1824–26 (2011) (describing limitations imposed by Skilling as a response to overcriminalization).

229. Stuntz, *supra* note 222, at 511.

persuasiveness of the overcriminalization story has caused scholars to overlook the fact that many convicted misdemeanants are not guilty at all. In this way, overcriminalization is actually at odds with the innocence revolution.

The second shortcoming is an underappreciation of how the criminal process itself (arrest, prosecution, defense, and pleading guilty) drives the creation of legal guilt. Overcriminalization literature, like much legal theory, privileges the substantive criminal law over enforcement procedures. For example, Douglas Husak's ambitious philosophy of overcriminalization challenges legislatures to shrink criminal codes. It does not, however, theorize restraints on enforcement practices, even though Husak himself recognizes the importance of the issue.[230] He notes that law enforcement discretion may be incompatible with the rule of law itself, and acknowledges that "one might conclude that the substantive criminal law itself is not very important."[231] Nevertheless, his minimalist theory focuses solely on that substantive criminal law, restricting the passage and scope of criminal codes, with no provision for enforcement restraints.[232]

In sum, the overcriminalization discourse provides a central, if partial, explanatory piece of the misdemeanor puzzle: that the specific content of codes do not meaningfully constrain law enforcement, and that resulting convictions therefore lack the legal legitimacy that codified law provides. Police are not strongly bound by codified requirements in loitering, trespassing, and disturbing the peace statutes, both because those statutes cover wide swaths of innocuous behavior, and because in practice the petty offense process validates police arrests even where the dictates of the code have not been met. Without meaningful legal guidance, police and prosecutors are effectively unconstrained by rule of law, thereby tainting the resulting convictions. In the urban policing arena where political accountability is already thin and victims of overcriminalization tend to be disempowered, this erosion of legislative supremacy is most troubling.[233]

230. For example, at the beginning of the book, Husak states that in order to fully understand criminal law we must ask "where power *really* is allocated in our criminal justice system today," and he concludes, following Stuntz, that power lies with police and prosecutors. HUSAK, *supra* note 222, at 21.

231. *Id.* at 27.

232. Husak proposes a seven-criteria test for the legitimacy of criminal law: the law must punish only nontrivial harm; it must punish conduct that is wrongful in itself; it must punish only that which deserves punishment; the burden must lie on those who wish to promulgate new criminal laws to justify new punishments; the law must satisfy a substantive state interest; the law must directly advance that interest; and the law must be no more extensive than necessary to fulfill that interest. *Id.* at 120, 132. Each of these criteria limits the scope of the criminal law as written; presumably Husak expects restrained enforcement to flow automatically from the reduced scope of the code. *See id.*

233. *See* Luna, *supra* note 222, at 717, 726.

C. CRIMINAL PROCEDURE

Criminal procedure performs two different legitimating jobs. First, it guarantees the evidentiary integrity of convictions and ensures the factual guilt of the accused. It establishes the rules of the adversarial process itself, most importantly by giving defendants counsel and the right to contest the evidence against them. There are also myriad nonconstitutional rules designed to make the process more accurate and fair, such as the rules of evidence or police procedures for lineups and the taking of confessions.[234] When followed, these rules give us confidence in the substantive integrity of the resulting criminal convictions.

Procedure thus provides the crucial link between the legal fact of conviction and individual desert. In effect, good criminal procedures give normative meaning to convictions: they permit us to infer that convictions are grounded in sufficient evidence such that we can treat the bare fact of conviction as an indication of individual wrongdoing. In this way, they give substantive meaning to the label "criminal."

Criminal procedure also plays a second legitimating role by defining what constitutes fair procedure, above and beyond questions of accuracy. As Peter Arenella pointed out over twenty-five years ago:

> Criminal procedure also articulates fair process norms that have value independent of their "result-efficacy." Most of these fair process norms operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect. The content of these dignitary norms should reflect society's normative aspirations, embodied in its positive laws, customs, religions, and ideologies about the proper relationship between the individual and the state.[235]

More recently, Tom Tyler and the procedural justice school have helped conceptualize fair procedures as necessary to public perception of the system's legitimacy and authority.[236] Empirical studies have confirmed that people value procedural fairness on its own terms, separate and apart

234. Of course the rules of evidence are not solely about accuracy or even fairness. *See* David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial By Character*, 73 IND. L.J. 1161, 1186–87 (1998) (describing numerous "purposes" of the rules of evidence including promoting efficiency, or avoiding jury confusion or witness embarrassment).

235. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200 (1983).

236. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4 (2006) (arguing that people obey the law because of its legitimacy, not out of fear).

from substantive outcomes.[237] Police and prosecutorial selection decisions are often treated as posing this sort of procedural legitimacy problem, raising concerns about process, neutrality and discrimination that are crucial to the legitimacy inquiry but ancillary to substantive questions of guilt.

The relationship between the two procedural functions of maintaining accuracy as well as fairness is a contested one. Criminal procedure doctrine and scholarship tend to treat the two as dichotomous: factually accurate outcomes are different from, and currently privileged over, procedurally fair results.[238] As described by Carol and Jordan Steiker, the Burger and Rehnquist Courts initiated this conceptual split between substance and procedure and it has culminated in cases such as *United States v. Leon*, *Herring v. United States*, and *Whren v. United States*, in which the factual accuracy of an arrest or conviction trumps the need to enforce other procedural rules.[239]

The privileging of accuracy over fairness rests on an assumption that an unfair system can nevertheless be an accurate one, that is that unfair procedures do not necessarily distort the evidence.[240] In the misdemeanor world of urban policing, however, the distinction between accuracy and fairness disappears because the existence of evidence cannot be assumed separate and apart from the procedural integrity of the process. When a police officer accuses a person of loitering, there is almost no way to evaluate the "evidence" of that loitering other than by evaluating our faith in the officer, the officer's motivations, and the institutional checks on the officer's decisionmaking and assertions. Or to put it another way, there is no factual basis for arrest or conviction *other* than the integrity of police decisional procedures and the system's subsequent checking

237. *See* Fagan & Meares, *supra* note 208, at 218 (noting that while all groups value procedural justice, African Americans value distributive justice—that is, outcomes—more than whites or Latinos).

238. *See generally* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012) (discussing the substance-procedure divide in terms of perceptions of moral legitimacy and procedural fairness). *Cf.* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1271–72 (1998) ("Starkly absent from the academic discussion to date is a theory of process.").

239. Steiker & Steiker, *supra* note 203, at 587, 609–15 ("[W]e are worried that the current focus on innocence may implicitly concede the lesser power of other systemic critiques."). *See also* Herring v. United States, 555 U.S. 135, 145–48 (2009); Whren v. United States, 517 U.S. 806, 814–19 (1996); United States v. Leon, 468 U.S. 897, 915–26 (1984).

240. *But see* Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) ("[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent.").

mechanisms.[241] The process *is* the evidence.

To be sure, this confluence does not lessen the significance of procedural failures in their own right.[242] As the procedural justice movement has demonstrated, unfair procedures exact a toll, threatening public perceptions of legitimacy and compliance even where accuracy is not at issue. And the misdemeanor world is plagued by precisely this sort of public distrust.[243] But here, the abdication of procedural integrity in policing, prosecutorial and defense lawyering has additional consequences. It is precisely this abdication that creates the rampant factual inaccuracies of the misdemeanor process, or, more precisely, that divests evidence of its relevance to the question of misdemeanor guilt. In this arena, procedural injustice is even worse because it generates the additional substantive risk that innocent people are being punished.

D. LAW ENFORCEMENT SELECTION PRACTICES

Selection decisions are conceptualized and scrutinized very differently from evidentiary issues. Criminal procedure gives nearly unfettered discretion to police and prosecutors to pick and choose among potentially guilty subjects, on the theory that ultimate issues of evidentiary guilt will be resolved separately on their merits.[244] The bare fact of an arrest is not itself evidence of guilt; likewise, the fact that a person is charged with a crime is distinct from proof of guilt. Instead, arresting and charging decisions are treated as procedural vehicles by which suspects are brought

241. This reality is in tension with the principle that probable cause should be based on articulable facts distinct from a police officer's mere belief that a crime has been committed. Terry v. Ohio, 392 U.S. 1, 21 (1968) (reasonable suspicion must be based on facts and not police "hunches"); Nathanson v. United States, 290 U.S. 41, 47 (1933) (holding that officer's "mere affirmance of belief or suspicion" does not constitute probable cause).

242. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183 (2004) ("While procedural justice is concerned with the benefits of accuracy and the costs of adjudication, it is not solely concerned with those costs and benefits. Rather, procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms.").

243. Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1395–97 (2002) (arguing that underenforced, often violated, nonstigmatizing offenses such as speeding and other minor offenses can undermine public faith in the law); Fabricant, *supra* note 206, at 392 n.82; Fagan & Meares, *supra* note 208, at 217–20.

244. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996) (recognizing that prosecutorial decisionmaking is a highly discretionary process that is "not readily susceptible to the kinds of analysis the courts are competent to undertake"); *id.* at 464 ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'").

into the criminal system so that questions of law and guilt can be resolved. Accordingly, when deciding the ultimate validity of convictions, the law scrutinizes the underlying evidence but rarely how the defendant was selected for arrest or prosecution.[245]

A large literature criticizes the growth of law enforcement discretion as anathema to rule of law.[246] More specifically, that discretion is often blamed for racially skewed selection practices in drug enforcement and racial profiling.[247] Indeed, part of the dismay at the growing prison population stems from its racial lopsidedness, and numerous scholars argue that the racial character of the selection process reflects deep and historical flaws of the penal process.[248] At the same time, such criticisms generally assume (or at least bracket) the substantive guilt of those convicted. In other words, the charge is one of inappropriately unfettered discretion and even discrimination but not evidentiary inaccuracy.

In the world of misdemeanors, however, the functional distinction between selection and evidence disappears. Here, simply being chosen for arrest can generate sufficient pressure to induce a guilty plea, whether or not the arrest is supported by evidence. The assumption that selection for arrest is driven by evidence—and therefore indicates substantive guilt—fades in the urban policing context where arrests are often made for nonevidentiary reasons. Because such practices risk producing arrests based less on individualized evidence than on other law enforcement goals (for example, street control or general drug interdiction), they pose the biggest threat of wrongful conviction.

To be sure, arrests are not always dispositive in this way. For well-resourced arrestees with counsel or other means of testing the evidentiary basis of the arrest, the coercive effect of selection alone is counteracted by procedural demands for evidence. But where procedural testing is weak, as

245. Whren v. United States, 517 U.S. 806, 814–19 (1996) (holding that police officer's subjective motivations would not invalidate arrest under the Fourth Amendment if there was probable cause); *Armstrong*, 517 U.S. at 464 (prosecutorial decisionmaking entitled to "presumption of regularity" that bars discovery of that process absent clear evidence to the contrary); McCleskey v. Kemp, 481 U.S. 279, 306–19 (1987) (holding that the Eighth and Fourteenth Amendments were not violated by statistical evidence showing correlation between race and death-penalty decisions).

246. *See* DAVIS, *supra* note 126, at 15–18; Skeel & Stuntz, *supra* note 208, at 811 ("The rule of law becomes a veneer that hides the rule of discretion.").

247. *See, e.g.*, DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 135–41 (2008); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1 (2011) (surveying profiling literature).

248. *E.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that mass incarceration has replaced Jim Crow and legal racial segregation in the modern era).

it is for the bulk of poor underrepresented misdemeanants, the fact of arrest can determine the result.

This dynamic explains an important linkage between race and innocence. When selection displaces evidence, racially driven selection decisions are not only discriminatory, they are also more likely to generate wrongful convictions. In other words, not only do bulk arrest practices discriminate against minorities, they potentially fill the system with innocent people of color who are then wrongly labeled "criminal." As discussed in greater detail below, the dynamic is an important ingredient in the racialization of crime.[249]

* * *

This completes the picture of misdemeanor conviction production. Valid convictions depend on the marriage of factual evidence and substantive law; strong procedures ensure that evidence and law, rather than selection decisions, form the bases for convictions. At the bottom of the penal pyramid, weak procedures erode the influence of law and evidence, while selection decisions become dispositive instead. This picture is the polar opposite of legality: not only are convictions permitted as a consequence of discretionary choice rather than legal rule, it tolerates the conviction of the innocent without evidence.

VI. IMPLICATIONS OF THE MISDEMEANOR PROCESS

With its reduced commitment to law and evidence and the heightened influence of law enforcement selection, the misdemeanor process triggers numerous issues of legal theory. Most importantly, it calls into question the legitimacy of the petty offense process by which the vast majority of Americans are initiated into the penal system and become "criminals." This part considers two related aspects of that dynamic. First, it focuses on the misdemeanor process's insensitivity to individual culpability and how it undermines the substantive and normative significance of criminal convictions. Second, it considers how the petty offense process is permitted to distribute criminal liability based on race and social vulnerability rather than individual fault.

A. ERODING THE FAULT MODEL

Typically, criminal convictions are thought to convey information

249. *See infra* Part VI.B.

about culpability: that someone committed a crime and that they did something normatively wrong. The fact of conviction then justifies punitive consequences, from incarceration to social stigma and other disabilities.

The mechanics of misdemeanor production reveal that the meaning of legal guilt is variable. We are accustomed to thinking of misdemeanors as less significant than felonies because the underlying offense is less serious. But we are not used to thinking of legal guilt itself as anything other than binary—either you are guilty or you are innocent. Or as George Fletcher once put it, "[t]he unifying feature of the criminal law . . . is guilt—not *feeling guilty* but *being guilty* under the law. The opposite of guilt, of course, is innocence."[250]

In reality, however, legal guilt is produced along a spectrum of high- and low-quality convictions and those convictions convey different information depending on how they are generated.[251] For the most heavily targeted demographic in the criminal system—poor black men—a conviction for loitering, trespassing, or disorderly conduct conveys largely social information. For example, it tells us that such persons are likely to be arrested, that their lawyers (if they got one) likely had little or no time to scrutinize the case, and that they probably lack the personal resources to resist the pressures to plead guilty. It does not necessarily tell us, however, whether or not "they did it," because the process of their conviction is not well designed to answer that question.[252]

By contrast, when the system's procedural mechanisms work properly, a well-litigated conviction for a serious offense imposed on a person with resources does indeed convey information about culpability because we can fairly infer that no conviction would have occurred absent substantial evidence of guilt. As a result, we can say interesting things like "that conviction is meaningless" or "that conviction is significant" based not on the severity of the underlying crime but our evaluation of how the system produced the conviction. Indeed, this model is closer to how the public actually perceives the legal process: crudely as one in which acquittals can be purchased by the wealthy,[253] and more subtly in which

250. George P. Fletcher, *The Meaning of Innocence*, 48 U. TORONTO L.J. 157, 161 (1998).

251. *See, e.g.*, Guttel & Teichman, *supra* note 21, at 598–607 (surveying behavioral evidence that fact finders apply a lower burden of proof to lesser crimes); Redlich & Bushway, *supra* note 160, at 14–15 (considering that plea bargains are not driven by strength of the evidence).

252. *See* L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037–38 (2011) (documenting that "hit rates," that is, rates at which contraband is found when a person is searched, are much higher for white suspects than black suspects).

253. Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1234 (1996) (discussing the public perception that wealth determines case outcomes).

legal guilt is not a stable normative concept but is widely understood to be socially constructed and path dependent.[254]

Because the routine processes by which we produce misdemeanor convictions are lax, there is little guarantee that any individual convict actually committed the offense. We can understand this as an innocence problem, of course. But we can also see the abandonment of evidentiary integrity as a weakening of the fault model itself, since evidence is precisely the mechanism by which we tie individuals to crimes and justify their punishments. While strict liability offenses openly announce their intention to punish without subjective fault, the procedural breakdowns around petty offenses effectively bypass the fault inquiry altogether in their disregard for evidence of individual culpability.

A system that punishes without bothering to check whether a particular defendant actually "did it" is one that does not care much about fault. This is, to say the least, an odd model of criminal justice. It is not retributive, since retributivism keys punishment to individual desert.[255] It is not utilitarian, at least not in the traditional sense involving deterrence or rehabilitation since those models require a behavioral link between crime and punishment.[256] It may not even be quite "criminal" at all.[257]

The extent to which the criminal process actually adheres to its own evidentiary standards reflects the extent to which it can claim to be doing the normative work of criminal justice. When it lets go of evidence, by failing to require it upon arrest in the first instance, or failing to check whether it exists later on, it relinquishes the claim that criminal punishment is driven by fault. Without fault, however, the state's authority to deprive individuals of their liberty loses its special status. Instead of a legal regime of justified punishment, the criminal process starts to look increasingly ad

254. *See* Raymond, *supra* note 243, at 1417–28 (discussing the public understanding of the lessened significance of convictions for underenforced offenses); Hadar Aviram & Daniel Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 413 (2009) (discussing perceptions of unfairness that flow from discretionary enforcement).

255. Dolovich, *supra* note 207, at 320–21. *See* Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1029 (2004) (making a similar point about three-strikes law).

256. *See, e.g.*, Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 120–21 (1994) ("[Utilitarianism] presumes that human actors behave rationally; they will avoid engaging in crime if they believe that the potential pain of punishment is greater than the potential pleasure reaped from the crime.").

257. *See, e.g.*, ALEXANDER, FERZAN & MORSE, *supra* note 210, at 263–87 (defining legal criminality in terms of culpability).

hoc, a practice of social control in search of a justification.[258] With its informality and evidentiary laxity, the misdemeanor world verges upon becoming just that.

B. THE RACIALIZATION OF CRIME

The misdemeanor process is the penal system's first formal step[259] in what has come to be known as the racialization of crime.[260] It is here that high-volume convictions of questionable evidentiary validity are generated against young black men, precisely that class of defendant who have come to be stereotypically associated with the criminal label. While drug enforcement policies are rightly blamed for filling prisons with minority offenders, the racialization of crime is broader than the war on drugs. Specifically, petty convictions formally and permanently label as "criminal" anyone whom the police choose to discipline through urban order maintenance policies. Misdemeanors thus represent the concrete mechanism by which the system is able to generate "criminals" based on race, class, and social vulnerability, unconstrained by standard evidentiary requirements.[261]

The fact that the bottom of the system is permitted to work this way at

258. *See, e.g.*, LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 6 (2009) (arguing that the criminal law works in tandem with the eroding social safety net to criminalize the poor); *id.* at 41 ("[T]he 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 of the class and ethnic order."); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 6 (2007) (conceptualizing the idea of crime as a justification for various forms of governance).

259. I say "formal" because of the many informal dynamics that occur outside the criminal process that funnel young minority men and women towards the criminal system. These include school disciplinary proceedings, the juvenile justice system, and the many formative interactions between people of color and police that occur in high-crime minority neighborhoods. *See, e.g.*, CATHERINE KIM, DANIEL LOSEN & DAMON HEWITT, THE SCHOOL-TO-PRISON-PIPELINE: STRUCTURING LEGAL REFORM (2010); Rod K. Brunson & Jody Miller, *Young Black Men and Urban Policing in the United States*, 46 BRIT. J. CRIMINOLOGY 613 (2006); Devon Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002). My thanks to Mario Barnes for this point.

260. The phrase "racialization of crime" has a variety of meanings. Sometimes it refers to the fact that the criminal system is disproportionately filled with racial minorities. Or it may depict the experiences of black and (increasingly) Latino men themselves, for whom the criminal system looms omnipresent on the horizon of their social and economic experiences. Or sometimes it is used to describe public perceptions of the linkage between crime and race. *See generally* Ian F. Haney López, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807 (2011) (describing the pervasive racialization of crime); Capers, *supra* note 247 (same).

261. *Cf.* WACQUANT, *supra* note 258, at 41 (describing this process of criminalization more generally as a form of social policy).

all reflects a profound civic disrespect for the subjects of the petty offense process. Years ago, Justice Powell explained that the presumption of innocence is a constitutional lesson "about the limits a free society places on its procedures to safeguard the liberty of its citizens."[262] The protections of the Bill of Rights are thus a floor of dignity and constitutional protection beneath which no valued citizen should have to sink. In the misdemeanor world, civic disrespect is expressed precisely through the erosion of these basic protections against wrongful conviction and unjust punishment.[263] This includes tolerance for weak screening by prosecutors and defense attorneys, devaluing the need for evidence, and inflicting heavy punishments and disabilities for minor acts.

Although it has a long racial pedigree, this civic disrespect affects many other marginalized groups including the young, addicted, mentally ill and homeless.[264] Variously cast as a lack of "empathy," "racial indifference," and "profound lack of concern,"[265] this indifference permits criminalization without the procedural checks that ensure both accuracy and accountability. To take a page from Jonathan Simon, insofar as we are "governing through crime," the politically disfavored lack access to the most robust, protective conceptions of legal guilt and process.[266] In the most concrete sense, a single police officer's assertion of probable cause is simply not enough to generate a conviction against the favored or the powerful. But for poor black and brown petty offenders, that is often all it takes.

At the heart of the racialization of crime lies a particularly pernicious bias that fuels much of the misdemeanor process: the lurking suspicion that poor black and brown men are probably guilty, even though the vast majority of black people are never arrested or charged with any crime.[267]

262. Patterson v. New York, 432 U.S. 197, 224 (1977) (Powell, J., dissenting) (arguing that the decision to shift to the defense the burden of proof of proving extreme emotional distress represented a retreat from the presumption of innocence).

263. This procedural neglect is akin to what Richard Delgado years ago labeled "procedural racism," the ways that legal procedures make it difficult to express or raise claims of racism. *See* Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 105–07 (1990).

264. *See, e.g.*, Barnes, *supra* note 109 (describing prosecution of gay men).

265. ALEXANDER, FERZAN & MORSE, *supra* note 210, at 14 ("[R]acial caste systems do not require racial hostility or overt bigotry to survive. They need only racial indifference."); Dolovich, *supra* note 207, at 372; Yankah, *supra* note 255, at 1026.

266. SIMON, *supra* note 258, at 6.

267. "Even though blacks are arrested and convicted for a disproportionate amount of violent crime, it is nonetheless true that in any given year only about 2 percent of black citizens are arrested for committing any crime; the vast majority, or 98 percent, of black citizens are not even charged with crime." DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE

This suspicion means that the process need only be enough to confirm guilt, rather than perform the kind of rigorous inquiry required by the presumption of innocence.[268] It is, in effect, the instantiation of the presumption of guilt, in which evidence is required to *halt* the process of conviction. As Lawrence Benner argues in the felony context, we now have a "system where processing the 'presumed guilty' as cheaply as possible has been made a higher priority than investigating the possibility of innocence."[269] Such thin process is only intuitively tolerable if we think defendants are probably guilty. In something of a vicious circle, American culture's association between blackness and criminality, generated in large part by the criminal system's own selection processes, makes that intuition more plausible.

The criminal process thus disproportionately stereotypes and targets African American men based in large part on the assumption that they are guilty. The misdemeanor view suggests that, in fact, many of them may be innocent. The societal harm to young black men is thus even deeper than the conventional critique supposes. First, the misdemeanor process widely confers criminal records and personal burdens on potentially innocent people without checking whether they are actually guilty or not. Those records and burdens alienate those individuals from the mainstream culture and economy, impeding their life options and, ironically, heightening the chances that they will actually offend.[270] If they do, their minor convictions ensure that the criminal system will treat them even more harshly.

The misdemeanor gateway is a key ingredient in the criminalization of the black experience. First and foremost, it confers criminal records, with the many penal and economic burdens that a record entails. But it is also a pernicious form of education. For example, the psychological influence that police have over young black men has been well captured in the literature

SYSTEM 42 (1999). Even in Washington D.C.—a majority black jurisdiction with one of the highest crime and incarceration rates in the country—most black men are not arrested or charged with any crime. For example, a 1990 RAND study examined drug offenders in D.C. in the 1980s at the height of the crack epidemic. The study estimated that one in six adult black men between age eighteen and twenty had been charged with drug selling and approximately one in three with any crime. One in six juveniles reported selling drugs. PETER REUTER, ROBERT MACCOUN & PATRICK MURPHY, THE RAND CORP., MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C. 28, 37–38 (1990).

268. *See* Patterson v. New York, 432 U.S. 197, 201–11 (1977) (explaining burdens of proof and persuasion).

269. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 267 (2009).

270. *See* TONRY, *supra* note 175, at 5–6 (describing links between social disadvantage and criminal offending).

on racial profiling and on black male experiences of the criminal system more generally. Writers describe their fear and resentment that police have extensive power over their immediate physical safety and over their futures.[271] The misdemeanor process is the frontline legal reality out of which this psychological experience springs, namely, that police actually have relatively unfettered power to formally transform black men into petty criminals regardless of evidence of individual fault.

In a system that relies heavily on the concept of informed consent to validate guilty pleas, the misdemeanor process also serves a potentially devastating training function: it teaches vulnerable defendants, often on their first encounter with the criminal system, that evidence and process do not matter and that convictions are inevitable. This lesson affects how individuals understand not only their rights but their entire relationship to the adversarial process. For example, I once represented a defendant charged with a federal felony who had a relatively long record of more minor offenses. I began our meeting with the standard promise that we would investigate the possibilities for trial, but he cut me off, explaining in no uncertain terms that he only wanted the best plea deal. Over the course of several interviews I repeated my view that he should at least consider a trial, but he insisted that he only wanted to plead. It was not until I had known him for some time that it occurred to me to ask him if he had ever seen a trial. It turned out that this veteran of the criminal process did not know what a trial was.

Since most felony offenders have misdemeanor records, many will have been trained from early on not to place their faith in the adversarial process but rather to accept conviction and to haggle, if at all, only over sentences. If the indigent defense bar were more robust, perhaps this cynicism on the part of defendants would not matter as much. But without meaningful defense counsel interventions, the system implicitly relies on defendants to resist pleading guilty if they are in fact innocent. For young minority men trained in the realities of petty urban convictions, such resistance must seem futile.

The misdemeanor process therefore does two corrosive things with vast social ramifications. First, it reduces the significance of law and evidence, and therefore fault, at the bottom of the penal pyramid. And second, it does so in ways that are intimately connected to race, such that the petty offense machinery has become a way to formally label as

271. *E.g.*, Carbado, *supra* note 259, at 947–74; NOT GUILTY: TWELVE BLACK MEN SPEAK OUT ON LAW, JUSTICE, AND LIFE (Jabari Asim ed., 2001).

"criminal" thousands of vulnerable individuals of color without regard to evidence of their individual culpability. The misdemeanor gateway is thus a key entry point through which race comes to distort the scope and meaning of the penal system.

VII. POSSIBILITIES FOR REPAIR

The foregoing analysis suggests that the misdemeanor process is fundamentally dissociated from core principles of legality and fair adjudication. Needless to say, this is not a state of affairs that can be fixed by tweaking a few rules. On the other hand, the problem is not a ghost in the machine but is intimately connected to concrete procedures and policies. Accordingly, I close by considering possible rule-based responses to the dysfunctions of the misdemeanor world.

The conventional approach to criminal process failure is to strengthen specific procedures. In this case, wrongful petty convictions could be better avoided by insisting on stronger evidentiary checks. For example, we could heighten the factual basis requirement for the plea process to make it harder for factually innocent defendants to plead guilty.[272] By the same token, we could strengthen ineffective assistance of counsel standards and require counsel to engage in greater scrutiny of the factual predicates for their clients' guilt.[273] More broadly, we could give counsel to all misdemeanants, not only those who face prison sentences.

Such reforms are appealing in that they would not alter the basic structure of the criminal process. Indeed, they essentially require that existing rules be taken more seriously. Nevertheless, the problem with this approach is twofold. First, the legal system already underenforces existing protections; in light of limited resources, ramping up existing procedures may have little practical effect. Second, criminal procedures do not work in isolation—greater restrictions can shift law enforcement incentives in ways that make problems of innocence and inequality worse.[274]

A different approach might be to alter a key structural aspect of the misdemeanor process by delinking arrests from convictions. In other words, maybe the real problem is that police arrest for all sorts of

272. *See* North Carolina v. Alford, 400 U.S. 25, 37–38 (1970) (requiring a strong factual basis for recognizing guilty plea where defendant refused to concede guilt); William Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2034–35 (2008) (recommending stronger scrutiny of factual basis for pleas and noting that military courts already do this).

273. *E.g.*, Rompilla v. Beard, 545 U.S. 374, 374–76 (2005).

274. Stuntz, *supra* note 22, at 3–6.

nonevidentiary reasons, and then the legal system indiscriminately converts those arrests into formal criminal records. In response, we could make it harder for arrests to become convictions.

One way to do this would be to raise the evidentiary standard for petty charges to something more than probable cause. Such a heightened charging standard—whether it demanded a preponderance of the evidence or some higher threshold—would effectively tell prosecutors to scrutinize police arrest decisions, something the law already presumes they do and which they already do in serious cases.[275] Police would be free to arrest for petty offenses based on probable cause, or even for order-maintenance reasons, but prosecutors could no longer rely on police assertions of probable cause to convert those assertions into formal charges. A heightened charging requirement would thus counter the tendency for the evidentiary bases for convictions to devolve as offenses get pettier.[276] Delinking arrest and conviction could also help mitigate one of the tragedies of our current system, the translation of urban policing practices, designed to maintain order and street control into the mass criminalization of the black male population.[277]

Of course this approach also has its flaws. For example, it leaves current arrest practices undisturbed. It also places even greater pressure on prosecutors to sort through minor cases, a task that some commentators already question whether prosecutors can handle.[278]

Finally, rather than changing the process of generating misdemeanor convictions, we could take aim at their harmful effects. After all, misdemeanors are devalued and underfunded largely on the assumption that they are not all that burdensome—we could try to align reality with this perception. For example, misdemeanors could be delinked from the experience of incarceration, both pretrial and postconviction. More

275. *See* Miller & Wright, *supra* note 136, at 166–77; AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: INVESTIGATIVE FUNCTION OF PROSECUTOR Standard 3-3.1 (1993) ("Investigative Function of Prosecutor"), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#3.1. *See also* United States v. Lovasco, 431 U.S. 783, 794 (1977) (assuming that prosecutors scrutinize police probable cause determinations in deciding whether to file charges).

276. *See* Guttel & Teichman, *supra* note 21, 598–601 (discussing lessened evidentiary requirements when offenses are pettier).

277. *See* Miller, *supra* note 101, at 672 (arguing that order maintenance and policing should be delinked in order to avoid mass arrests and incarceration).

278. Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, A Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143 (2011); Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266–92 (2011).

misdemeanor offenses could be made nonarrestable as well as nonjailable. The ABA has recommended this approach, which some jurisdictions have already taken, by treating certain minor offenses as civil infractions punishable by citation and fine only.[279] In addition, we could bar misdemeanors, at least uncounseled ones, from lengthening subsequent sentences. By easing incarceration out of the misdemeanor experience, such offenses might indeed become pettier burdens to bear.

VIII. CONCLUSION

The criminal system could hardly be clearer about the second-class status of misdemeanors. The Supreme Court labels them "petty" with reduced constitutional stature. States overload public defenders with thousands of misdemeanor cases while courts routinely ignore standard constitutional entitlements to clear crowded dockets.

The consequences of this experiment have been anything but minor. By devaluing accuracy and legality principles for minor offenses, we have threatened the integrity of the majority of U.S. convictions. Millions of Americans experience the assembly line of the misdemeanor process every year, sustaining jail time, fines, and the burdens of a criminal record. Young black men in particular have borne some of the worst injuries as urban policing practices formally transform them into petty "criminals," often on thin or no evidentiary bases.

This is a crucial moment to scrutinize our largest and least appreciated class of criminal offenses. Numerous observers have suggested that the U.S. criminal system is at a turning point. The staggering costs of mass incarceration have pushed the "tough on crime" movement back on its heels, leading legislatures and voters to consider alternatives to prison. Congress has repealed the infamous crack-cocaine sentencing disparity, while several states have curtailed or even abolished the death penalty. As a result, predictions of a kinder, gentler criminal process are on the rise.[280] If

279. AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, RECOMMENDATION 102C (2010) (recommending the use of civil fines or nonmonetary civil remedies instead of criminal sanctions for misdemeanors where appropriate), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102c.authcheckdam.pdf.

280. Sasha Abramsky, *Is This the End of the War on Crime?*, THE NATION, June 5, 2010, *available at* http://www.thenation.com/article/end-war-crime# (documenting recent trends away from traditional prison sentence towards other rehabilitation and criminal models); Garrick L. Percival, *"Smart on Crime": How a Shift in Political Attention Is Changing Penal Policy in America* (Am. Political Sci. Ass'n, Annual Meeting Paper, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1901238 (noting policy trends toward "softer" criminal penalties and describing the "smart on crime" approach in America).

nothing else, the foregoing analysis means that no significant reform can take place without addressing the vast scale, influence, and dysfunction of the misdemeanor universe.