

## Pace Law Review

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Volume 39  
Issue 1 Fall 2018

Article 8

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September 2018

### Empiricism and the Misdemeanor Courts: Promoting Wider, Deeper, and Interdisciplinary Study

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#### Recommended Citation

Alisa Smith, *Empiricism and the Misdemeanor Courts: Promoting Wider, Deeper, and Interdisciplinary Study*, 39 Pace L. Rev. 453 (2018)

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## Empiricism and the Misdemeanor Courts: Promoting Wider, Deeper, and Interdisciplinary Study

Alisa Smith\*

### *Abstract*

*Since 1956, there have been three waves of scholarly attention on the misdemeanor courts. Despite this attention, misdemeanor courts remain understudied and overlooked. The object of this paper is to summarize the empirical research conducted over the last sixty years and identify the scholarly work that should be undertaken on the processing of misdemeanor offenders in our courts. Buoyed by the current interest in studying the misdemeanor courts, scholars should widen and deepen their study by replicating the work of others in a variety of jurisdictions, observing court proceedings, interviewing defendants and the courtroom workgroup, and assessing whether constitutional ideals are being upheld by our misdemeanor courts.*

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### Introduction

Legal and empirical scholars have largely ignored the study of misdemeanor offending, yet, each year, millions of people are arrested and prosecuted for misdemeanor crimes.<sup>1</sup> The research area is deserving of systemic empirical study.<sup>2</sup> Almost 80% of state court criminal caseloads—an estimated ten million cases filed annually in the United States—are comprised of misdemeanor prosecutions.<sup>3</sup> Though penalties for misdemeanor crimes are less severe than felony crimes, they are far from inconsequential.<sup>4</sup> Misdemeanants are prosecuted for criminal offenses, not only civil traffic crimes. These crimes are punishable by up to one year in jail and some crimes, like petit theft and driving under the influence, may be prosecuted as felonies for a third offense. Convictions carry significant and long-term collateral consequences, including the loss of driving privileges, removal from public housing, reduced educational and employment opportunities, revoked professional licenses, and potential deportations.<sup>5</sup>

There is a growing body of literature that has recognized the

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1. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012).

2. See ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (2009), <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>.

3. ROBERT C. LAFOUNTAIN, RICHARD Y. SCHAUFFLER, SHAUNA M. STRICKLAND & KATHRYN A. HOLT, *EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS* 24 (2012), [http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP\\_DEC.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx).

4. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013).

5. Natapoff, *supra* note 1, at 1316–17.

need for study in misdemeanor courts. Research has demonstrated that misdemeanor cases are processed quickly and with little attention to due process.<sup>6</sup> No research has focused on whether *misdemeanor* defendants understand their right to due process of law, their reasons for waiving counsel or entering guilty pleas, and the short- and long-term consequences of forfeiting their rights.<sup>7</sup> Research on felony offenders and some defendants charged with gross misdemeanors has illustrated that defendants' comprehension of the plea colloquy is generally poor.<sup>8</sup>

Systematic, observational field research is necessary to (1) uncover "what actually happens in America's courtrooms day-to-day;"<sup>9</sup> (2) understand the factors that influence misdemeanor decisions to enter a plea or assert their right to trial; (3) investigate whether misdemeanants enter pleas and waive counsel knowingly, voluntarily, and intelligently; and (4) examine the influence of due process and the courtroom workgroup (or lack thereof) on defendants' perceptions and procedural justice.

### I. The Supreme Court and Misdemeanant's Constitutional Rights

Although the Fifth Amendment guarantees due process and the Sixth Amendment guarantees counsel and jury trials in criminal prosecutions, the Supreme Court's early decisional law carved out exceptions in the prosecution of misdemeanor offenders.<sup>10</sup> These petty offenses were disposed by summary proceedings before a magistrate and, in the early years, a police

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6. ALISA SMITH & SEAN MADDAN, *THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS* 9–10, 15 (2011); BORUCHOWITZ ET AL., *supra* note 2, at 11.

7. Allison D. Redlich, Vanessa A. Edkins, Stephanos Bibas & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCHOLOGIST 339, 347–50 (2017); Allison D. Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCHOL., PUB. POL'Y, & L. 626, 632 (2012).

8. Redlich & Summers, *supra* note 7, at 6–7.

9. Redlich et al., *supra* note 7, at 350.

10. Callan v. Wilson, 127 U.S. 540, 549 (1888).

magistrate.<sup>11</sup> To distinguish between petty and trivial offenses and those more serious and deserving of constitutional protection, the Supreme Court evaluated the nature and immorality of the offenses, whether the offenses were indictable at common law, and the severity of the potential punishments.<sup>12</sup> Determining whether punishments were considered severe posed a challenge, but the Court steadfastly held for thirty more years that a jail term was not necessarily “so serious” that a jury trial or counsel was constitutionally necessary.<sup>13</sup> Even when acknowledging that standards could change, the Supreme Court in *Clawans*, citing to municipal ordinances, statutory offenses,<sup>14</sup> and Acts of Parliament,<sup>15</sup> held that, by 1937, standards had not

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11. *Id.* at 554; *Lawton v. Steele*, 152 U.S. 133, 140–41 (1894).

12. *See, e.g.*, *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

13. *Id.* at 625 (citing *Schick v. United States*, 195 U.S. 65, 68 (1904)).

14. *Id.* at 628 n.6 (“(A) Statutes embracing violations of municipal ordinances generally. E.g.: Ariz. Rev. Code (Struckmeyer, 1928) §§ 382, 442, (three months); Neb. Comp. Stat. (1929) §§ 18-201, 18-205 (three months); New Mex. Stat. (Courtright, 1929) §§ 90-402 (66), 90-901, 90-910, 79-322, (three months); Nev. Comp. Laws (Hillyer, 1929) §§ 1128 (1), 1167, (six months); Wyo. Rev. Stat. (Courtright, 1931) §§ 22-402, 22-409, (three months). (B) Statutes commanding summary trial for specified offenses. E.g.: N. J. Comp. Laws (1924 Supp.), §§ 135-63 (3), 135-76 (operating motor vehicle under influence of liquor; six months; see *Klinges v. Court of Common Pleas*, 130 Atl. 601); N. J. Comp. Laws (1930 Supp.) § 160-222, 3 (disorderly persons act; three months penalty, see N. J. Laws 1898, p. 954, increased to one year by laws 1910, p. 37); Pa. Stat. Ann. (Purdon, 1931), § 18-2033 (vagrancy; six months); § 18-2832 (frequenting of public places by thieves, for unlawful purpose; three months). The most extensive elimination of the jury prevails in New York. The three-judge Court of Special Sessions, sitting without a jury, has jurisdiction to try all misdemeanors [i.e., offenses punishable with one year’s imprisonment, N. Y. Penal Law (1909), § 1937] committed in New York City. Inferior Criminal Courts Act of the City of New York, N. Y. Laws 1910, c. 659, § 31 (1), (4). A city magistrate sitting alone may try certain misdemeanors, including violations of N. Y. Penal Law (1909) § 1566, proscribing the sale of street railroad transfer tickets, Inferior Criminal Courts Act, § 43 (d), added by Laws 1915, c. 531. Other legislation, state-wide in application, provides for summary trial and conviction of persons guilty of disorderly conduct (six months), N. Y. Penal Law (1923), §§ 723, 724; of persons frequenting a public place for purposes of crime (100 days), N. Y. Code Crim. Proc., § 898-a; of ‘vagrants’ (one year in jail; three years in correctional institution), N. Y. Code Crim. Proc., §§ 891, 891-a.”).

15. *Id.* at n.8 (“Thirty-seven offenses are listed in Stone’s *Justices’ Manual* (66th ed. 1934), Appendix of Table of Punishments for Offences Cognizable Under the Summary Jurisdiction, pp. 1904-1945. E.g., *Frauds by Workmen Act*, 1777, 17 Geo. III, c. 56, § 1; *Merchandise Marks Act*, 1887, 50 & 51 Vict., c. 28, § 2; *Agricultural Marketing Act*, 1933, 23 & 24 Geo. V, c. 31, § 6

changed enough to necessitate jury trials for six-month sentences.

It was not until the late 1960s, following a scathing report by the President's Commission on Law Enforcement and Administration of Justice, that the Court began holding misdemeanor defendants were entitled to *some* constitutional protections. The President's Commission found "inequity, indignity[,] and ineffectiveness" in the lower courts and concluded that these courts were in crisis.<sup>16</sup> In a series of cases involving the Fourteenth Amendment Due Process Clause, the Court extended to the states several rights to misdemeanor defendants in criminal prosecutions, including the right to a speedy trial,<sup>17</sup> the right to confront and cross examine witnesses,<sup>18</sup> and the right to call and compel witnesses in their defense.<sup>19</sup>

The Court extended the right to a jury trial to defendants facing two years in prison, holding "that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense."<sup>20</sup> However, it did not decide whether punishments between six months and two years of incarceration amounted to *petty* offenses with trivial punishments, or *grave* offenses that were serious enough to warrant a jury trial.<sup>21</sup> In its 1970 decision, *Baldwin v. New York*, the Court drew that line at six

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(5). Several of the statutes specify larger penalties, but by § 17 of the Summary Judicature Act, 1879, 42-43 Vict., c. 49, except in cases of assault, sentences exceeding three months cannot be administered unless the accused has been offered the choice of trial by jury.").

16. PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 29 (U.S. Gov't Printing Office 1967), <https://www.ncjrs.gov/pdffiles1/Digitization/176NCJRS.pdf>.

17. *Klopper v. North Carolina*, 386 U.S. 213, 223 (1967).

18. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

19. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

20. *Duncan v. Louisiana*, 391 U.S. 145, 162 (1968) (footnote omitted); *see also* *District of Columbia v. Clawans*, 300 U.S. 617, 617 (1937); *Schick v. United States*, 195 U.S. 65, 65 (1904); *Natal v. Louisiana*, 139 U.S. 621 (1891); *Callan v. Wilson*, 127 U.S. 540, 549 (1888); *see generally* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926); George Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959).

21. *Frank v. United States*, 395 U.S. 147, 149-51 (1969); *see also* *Bloom v. Illinois*, 391 U.S. 194 (1968).

months after distinguishing between *petty* and *serious* offenses and holding “no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”<sup>22</sup>

Decisional law on the importance of counsel was viewed differently. The Court in *Argersinger v. Hamlin* extended the right to counsel to misdemeanor defendants who faced the *potential* of serving jail, no matter how short the term.<sup>23</sup> Thirty years later, in *Alabama v. Shelton*, the Court reaffirmed its holding and emphasized that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.”<sup>24</sup> As such, *Shelton* requires the trial judge appoint counsel when there is a *potential* for jail in misdemeanor cases, including suspended or probated sentences.<sup>25</sup>

Most states have a constitutional or statutory requirement that afford defendants—including misdemeanants—appeals as a matter of right in criminal cases.<sup>26</sup> However, the Supreme Court has refused to recognize the right to appeal as a matter of due process.<sup>27</sup> In refusing to extend due process to appeals, the Court, relying on nineteenth century dicta, interpreted the right as a “matter of grace and not a necessary ingredient of justice.”<sup>28</sup> Despite not recognizing the right to appeal as fundamental, in *Griffin v. Illinois*<sup>29</sup> the Court held that where a state constitution, federal statute, or state law provides for an appeal as a matter of right, the Equal Protection Clause is violated when appellate remedies are withheld from indigent criminal

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22. 399 U.S. 66, 69 (1970) (footnote omitted).

23. 407 U.S. 25, 40 (1972).

24. 535 U.S. 654, 658 (2002) (quoting *Argersinger*, 407 U.S. at 40).

25. *Id.* at 672–74.

26. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1222 (2013) (citing Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 513–14 (1992)).

27. *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937) (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894)).

28. Robertson, *supra* note 26, at 1221 n.6 (quoting *Cobbledick v. United States*, 309 U.S. 323, 324–25 (1940)).

29. 351 U.S. 12 (1956).

defendants.<sup>30</sup> Likewise, in *Douglas v. California*, the Court held that if, by legislative choice, states afford defendants the right to counsel on appeal, then counsel must provide effective assistance to those defendants.<sup>31</sup> However, in *Ross v. Moffitt*, the Court did not extend the right to counsel to indigents at second-level criminal appeals.<sup>32</sup>

## II. Empirical Research on Misdemeanors

### A. The First Wave of Empiricism of the Misdemeanor Courts

#### 1. Early Research on the Lower Courts

Predating the President's Commission on Law Enforcement Report, which described the courts as inequitable and inefficient, Professor Caleb Foote observed that court proceedings focused on the prosecution of minor crimes (i.e., vagrancy) with bail policies that disadvantaged the poor. He identified significant relationships between release and acquittal,<sup>33</sup> and his early work "describe[d] and critique[d] 'law in action.'"<sup>34</sup> Caleb Foote observed the Police Magistrate Court in Philadelphia, where he saw "undesirables" regularly arrested, quick proceedings with little due process, and inequitable and questionable sentences meted out by lay justices, with few cases reviewed by higher courts.<sup>35</sup> He noted a variety of themed abuses rooted in procedural unfairness, and his 1956 article recommended that misdemeanors be heard in courts with legally-trained judges and greater due process.<sup>36</sup> As evidenced by the 1967 report by the President's Commission, little has

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30. *Id.* at 18; see also Robertson, *supra* note 26, at 1246.

31. 372 U.S. 353, 355–56 (1963).

32. 417 U.S. 600, 602–603, 605 (1974).

33. See Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956) [hereinafter *Vagrancy-Type Law*]; Caleb Foote, *Comments on Preventive Detention*, 23 J. LEGAL EDUC. 48 (1970) [hereinafter *Comments on Preventive Detention*].

34. Jerome Skolnick, *Reflections on Caleb Foote on Vagrancy-Type Laws*, 12 BERKELEY J. CRIM. L. 151, 153 (2008) (citing Michael Steven Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005)).

35. *Vagrancy-Type Law*, *supra* note 33, at 604.

36. *Id.*



changed in the processing of cases in the misdemeanor courts.

An early comprehensive study of the lower courts by Susan S. Silbey compiled descriptions of the lower courts, summarized their history, and (again) criticized the lack of due process.<sup>37</sup> In her survey, Silbey highlighted the breadth and uniqueness of these wide-reaching courts. In some jurisdictions, the judges were lawyers and in others, they were not; some judges were considered part-time and others full-time.<sup>38</sup> The types of cases that were heard in these courts varied from state-to-state. Jury trials were only available in 79% of the courts.<sup>39</sup> Caseload, appeals from decisions, and the types of proceedings heard in these courts varied. Despite these facts, the lower courts often conduct “more than ninety percent of the trial work of the states’ court systems,”<sup>40</sup> the “data which [they were] able to collect and tabulate raise[d] more questions than [were] answered.”<sup>41</sup>

The first systematic study of misdemeanor case processing was conducted by Malcolm Feeley.<sup>42</sup> In his seminal work, *The Process is the Punishment*, Feeley conducted a comprehensive review of misdemeanor cases in the Court of Common Pleas in New Haven, Connecticut and found that it was the pretrial arrest, detention, and court proceedings that was the true punishment, not the adjudication or sentence.<sup>43</sup> Feeley’s work explored disparities in misdemeanor sentencing and dispositions, and he found that most cases were resolved by prosecutorial dismissal or guilty plea.

Few legal or extralegal factors showed strong influence in either determining dismissal, plea, or sentencing. The most influential factor was that multiple charges resulted in a greater chance that prosecutors dismissed one or more of them in exchange for defendants’ guilty pleas. With few other significant findings, Feeley jettisoned a quantitative approach in understanding the courts for a qualitative one, involving direct

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37. See SUSAN S. SILBEY, WHAT THE LOWER COURTS DO: THE WORK AND ROLE OF COURTS OF LIMITED JURISDICTION (U.S. DEP’T OF JUSTICE 1979).

38. *Id.* at tbls.13 & 16.

39. *Id.* at tbl.22.

40. *Id.* at IV.1.

41. *Id.* at II.44.

42. MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (Russell Sage Found. 1979).

43. *Id.*

observation.<sup>44</sup> In his comprehensive work, Feeley explored the convoluted path of misdemeanor cases from arrest through disposition, interweaving the stages of the court proceedings from pretrial decisions through outcomes. Feeley's work highlighted the importance of courtroom workgroup relationships, plea bargaining, and the swiftness of case processing. He concluded that it was not the punishment, which was relatively minor, but the *process* that was harsh. He cautioned that efforts to increase due process might slow the proceedings, resulting in increased jail terms for the poor, who could not bond out of jail, or multiple court appearances, resulting in missed work for those least able to afford it.<sup>45</sup>

In 1981, James J. Alfini edited and published the findings from a joint project of the American Judicature Society and the Institute for Court Management, titled *Misdemeanor Courts: Policy Concerns and Research Perspectives*, which comprehensively summarized the research on the misdemeanor courts.<sup>46</sup> The report summarized the literature to date at that time and concluded that there was a demonstrated need for empirical, systematic, and widespread research.<sup>47</sup> At the time, Malcolm Feeley's study was "the first major study of an urban misdemeanor court by a social scientist,"<sup>48</sup> and it was "the most comprehensive and systematic analysis of the lower court process to date, [but Alfini cautioned] there [was] a risk of overgeneralizing the findings of this case study."<sup>49</sup> Alfini was particularly concerned that Feeley's conclusions "that officials are generally concerned with 'substantive justice' and that procedural reform efforts in courts like New Haven's may adversely affect this desire to do substantive justice" were overbroad, and failed to account for or appreciate "the diversity in adjudication and sentencing practices among state misdemeanor courts."<sup>50</sup>

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44. *Id.* at 149.

45. *Id.* at 241, 290.

46. MISDEMEANOR COURTS: POLICY CONCERNS AND RESEARCH PERSPECTIVES (James J. Alfini ed. 1981) [hereinafter *Misdemeanor Courts*].

47. *See generally id.*

48. *Id.* at 11.

49. *Id.*

50. *Id.* at 11–12 (Malcolm Feeley's recommendations contradicted the early views of Caleb Foote, who documented courts run amok without

## 2. The Outcome Is the Punishment: Post-Feeley Empirical Studies

In 1980, following Feeley's seminal work, Ryan examined 2,764 cases in a single municipal court in Columbus, Ohio, and, contrary to Feeley's conclusion, he found "the outcome [was] the punishment."<sup>51</sup> Ryan attributed the different findings to distinctions between Columbus and New Haven in political, cultural, and court characteristics and structures.<sup>52</sup> He found that the New Haven court was less punitive<sup>53</sup> and the two jurisdictions differed on the impact of counsel. Where "unrepresented defendants fare[d] significantly less well" in New Haven, the type of counsel—self-representation, public defenders, or private counsel—had very little influence on outcomes in Columbus.<sup>54</sup> Ryan suggested the disparity might be understood due to the actual number of unrepresented defendants. In New Haven, there were quite a few unrepresented defendants and, following *Argersinger v. Hamlin* (1972), defendants could not be imprisoned unless provided with counsel.<sup>55</sup> In Columbus, *most* defendants were represented and, if they weren't, they were encouraged by judges to speak with public defenders before resolving their cases, making the incarceration of misdemeanor defendants constitutional.<sup>56</sup> Ryan also found that: sanctions were more severe in Columbus, the courtroom workgroup perceived case outcomes as significant, there was a penalty for going to trial, and recidivists and defendants with more serious charges were more harshly punished.<sup>57</sup>

In another chapter of *Misdemeanor Courts*, James Alfini and Patricia Passuth explore two important research questions on "the impact of the defense attorney on (1) case outcomes and

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procedural fairness).

51. John Paul Ryan, *Adjudication and Sentencing in a Misdemeanor Court: The Outcome Is the Punishment*, 15 L. & SOC'Y REV. 79, 100 (1980).

52. *Id.* at 79.

53. *Id.* at 81.

54. *Id.* at 93.

55. *Id.*

56. *Id.* at 93–94.

57. Ryan, *supra* note 51, at 94, 96.

(2) case processing practices in the misdemeanor courts.”<sup>58</sup> At that time, research suggested that represented defendants fared better in misdemeanor courts than the unrepresented.<sup>59</sup> Both Katz and Feeley found that represented defendants got lighter sentences in the former and were slightly more likely to get a dismissal and favorable sentence in the latter.<sup>60</sup> In examining the relationship between defense attorney and case processing in misdemeanor courts, Alfini and Passuth surveyed approximately 700 misdemeanor judges in urban, suburban, and rural communities on their perceptions of the presence of defense counsel on outcomes and processing.<sup>61</sup> They found little effect of the frequency of defense attorneys on judges’ perceptions of caseload pressures or ability to maintain current workloads.<sup>62</sup> Additionally, in jurisdictions where defense attorneys were more frequently present, case processing was more “stretched-out,” meaning a lower percentage of cases [were] disposed at initial appearance and . . . tend[ed] to go through more stages in courts where defense counsel [were] more frequently present.”<sup>63</sup>

#### B. The Second-Wave of Empiricism of the Misdemeanor Courts

For nearly ten years, empirical research on the misdemeanor courts lay dormant. In 1993, Jamieson and Blowers undertook a quantitative, rather than Feeley-like, observational and qualitative study of the misdemeanor court in a single county, particularly focused on dispositional court outcomes as influenced by victim types and representation by counsel.<sup>64</sup> Jamieson and Blowers randomly selected 1,670 non-

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58. *Misdemeanor Courts*, *supra* note 46, at 137.

59. *Id.* at 138–39 (citing Lewis R. Katz, *Municipal Courts – Another Urban Ill*, 20 CASE WESTERN RES. L. REV. 87 (1968)); *see also* FEELEY, *supra* note 42.

60. *See* FEELEY, *supra* note 42; Katz, *supra* note 59.

61. FEELEY, *supra* note 42, at 140.

62. *Id.* at 155.

63. *Id.*

64. *See generally* Katherine M. Jamieson & Anita Neuberger Blowers, *A Structural Examination of Misdemeanor Court Disposition Patterns*, 31 CRIMINOLOGY 243 (1993).

traffic misdemeanor cases prosecuted by the District Attorney's office in Mecklenburg County (Charlotte), North Carolina.<sup>65</sup> They found that individual victims' cases were more likely to result in dismissal or acquittal than corporate or victimless crimes, except when defendants were male. Males were more likely to be convicted in individual victim cases and their cases dismissed in victimless crime cases. Unexpectedly, the seriousness of the offenses and race were not associated with case outcomes. Consistent with the early work of Katz and Feeley, Jamieson and Blowers found that defendants with counsel were less likely to be convicted in cases with an individual victim or victimless crime.<sup>66</sup> However, contrary to those early studies, defendants represented by public counsel in cases involving corporate victims were more likely to be convicted than those who self-represented.<sup>67</sup>

One of the largest studies on the misdemeanor courts, which did not rely on observational data, but official records, was conducted by Nelson who examined data on 105,000 persons arrested for and convicted of misdemeanor crimes in New York.<sup>68</sup> Nelson focused on the influence of race and ethnicity and found racial disparities in misdemeanor sentencing.<sup>69</sup> In a study of 105,000 misdemeanor cases in New York, Nelson found that black and Hispanic defendants with a history of prior arrests were punished more harshly than white defendants and non-white defendants without prior records were punished less harshly.<sup>70</sup> Additionally, he found that non-white defendants with prior records were far more often sentenced to jail than similarly-situated white defendants and white defendants were more likely to be fined.<sup>71</sup> Nelson concluded that the disparities in sentencing contributed to the "concentration of minorities in New York State's jails."<sup>72</sup>

Nearly ten years later, Leiber and Blowers examined the

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65. *Id.* at 248.

66. *Id.* at 246–47.

67. *Id.* at 245.

68. James F. Nelson, *A Dollar or a Day: Sentencing Misdemeanants in New York State*, 31 J. RES. IN CRIME & DELINQ 183 (1994).

69. *See generally id.*

70. *Id.* at 198.

71. *Id.*

72. *Id.*

influence of legal and extralegal factors on misdemeanor sentencing.<sup>73</sup> Leiber and Blowers focused on the interactive effect of offense seriousness and race in examining 1,757 weighted misdemeanor cases, excluding traffic offenses, prosecuted in a single, large, and predominantly urban county.<sup>74</sup> As expected, legal factors predicted whether a case was considered a *priority*, i.e., cases that prosecutors perceived as serious and needing highlighted attention.<sup>75</sup> There were some race differences in prosecutors' decisions to mark a case as a priority. In particular, crimes against strangers were more likely to be designated for non-priority status for White defendants, but the opposite for Black defendants.<sup>76</sup> Cases involving black defendants were also given greater priority when they involved more serious crimes or the defendants had a prior record than white defendants.<sup>77</sup> Interestingly, however, race was not found to have "direct effect" on the decision to convict or incarcerate.<sup>78</sup> Leiber and Blowers found race had indirect effects through the procedural variables of priority status and whether a continuance was granted.<sup>79</sup> By prioritizing cases and refusing continuances, the chances of conviction and incarceration increased.<sup>80</sup>

Because black defendants had a greater chance of having their cases classified as a priority or be denied a continuance, they had a greater chance of being convicted or incarcerated.<sup>81</sup> This research concluded that it was essential to measure the indirect effect of race on legal decision-making, rather than wrongly concluding that race had no effect because it was not direct.<sup>82</sup> Particularly, Leiber and Blowers' work suggested that prosecutors perpetuate the racial stereotype of black males being dangerous when they classify their cases as a priority or

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73. See Michael J. Leiber & Anita N. Blowers, *Race and Misdemeanor Sentencing*, 14 CRIM. JUST. POL'Y REV. 464 (2003).

74. *Id.* at 471.

75. *Id.* at 472.

76. *Id.* at 477.

77. *Id.*

78. *Id.*

79. Leiber & Blowers, *supra* note 73, at 477.

80. *Id.*

81. *Id.*

82. *Id.* at 477–78.

serious.<sup>83</sup> They proposed research to directly examine this claim to distill whether the case or organizational concerns, attitudes, or community influences the outcomes.<sup>84</sup> As with other research, Leiber and Blowers recognized the limitation of study findings from a single jurisdiction.

Muñoz et al. examined cases from three non-metropolitan counties. Muñoz et al. examined the “additive and interactive effects of extralegal variables on the enforcement and punishment of misdemeanor criminal codes in three non-metropolitan Nebraska counties with relatively large and growing Latino populations.”<sup>85</sup> At the time of their study, there was unprecedented growth in the Latino population in Nebraska and growing complaints of mistreatment by this population, particularly in the use of unnecessary traffic stops.<sup>86</sup> In examining the influence of legal and extralegal factors on sentencing, Muñoz et al. found that Latinos/as were more likely to be charged with more serious offenses and multiple offenses than other defendants. This resulted in more punitive sanctions for Hispanic defendants.

Their data also suggested that, contrary to their hypothesis, “U.S. born Latinos/as may experience the harshest criminal justice treatment.”<sup>87</sup> Yet, in some of the county data, Muñoz et al. found that immigrants experienced more punitive sentencing in comparison to non-immigrants.<sup>88</sup> While males were more likely to receive harsher sentences, this impact was greater for Latino males. However, no significant differences were found between the sentences received by white and Latina females. Moreover, the seriousness of the offense and the number of offenses increased the odds of receiving more serious sentences for males committing other misdemeanor offenses (i.e., not traffic, assault, resisting, drug/alcohol, or property crimes) and women convicted of drug and alcohol offenses.

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83. *Id.* at 479.

84. *Id.* at 480.

85. Ed A. Muñoz, Barbara J. McMorris & Matt J. DeLisi, *Misdemeanor Criminal Justice: Contextualizing Effects of Latino Ethnicity, Gender, and Immigrant Status*, 11 RACE, GENDER & CLASS, no. 4, 2004, at 112–13 (footnote omitted).

86. *Id.* at 113–14.

87. *Id.* at 124.

88. *Id.* at 124-28.

### C. The Current Wave of Empiricism of the Misdemeanor Courts

Despite the Supreme Court's holding that some constitutional rights apply in prosecuting misdemeanor offenders and the work of legal scholars and researchers shining a light on the inequities and problems that plagued the misdemeanor courts, little has changed in the misdemeanor courts. In fact, misdemeanor courts are overwhelmed by cases with millions of people prosecuted every year<sup>89</sup> and few of those constitutionally entitled to counsel and other protections are afforded those rights. On the contrary, current empirical research has demonstrated that most proceedings are quick and police-dominated, and defendants are usually uncounseled.<sup>90</sup> In some jurisdictions, little has changed since Caleb Foote observed the police magistrate courts in the early 1950s. In fact, the most recent wave or resurgence of empirical research by scholars has grown on the heels of increased arrests due to quality-of-life and broken windows policing.<sup>91</sup> In her account of *ordinary injustice*, Amy Bach documented miscarriages of justice in felony and misdemeanor courts from places such as Georgia, New York, Mississippi, and Chicago.<sup>92</sup> The National Association of Criminal Defense Lawyers re-invigorated systematic, observational study of the misdemeanor courts by funding

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89. BORUCHOWITZ, ET AL., *supra* note 2, at 7.

90. See, e.g., David Carroll, *Why Our Misdemeanor Courts Are Filled with Uncounselled Defendants*, SIXTH AMENDMENT CENTER (May 12, 2015), <http://sixthamendment.org/why-our-misdemeanor-courts-are-filled-with-uncounselled-defendants/>; see also SMITH & MADDAN, *supra* note 6, at 14; ALISA SMITH, SEAN MADDAN, DIANE DEPIETROPAOLO PRICE & COLETTE TVEDT, RUSH TO JUDGMENT: HOW SOUTH CAROLINA'S SUMMARY COURTS FAIL TO PROTECT CONSTITUTIONAL RIGHTS (Nat'l Ass'n of Criminal Def. Lawyers 2017), <https://www.nacdl.org/RushToJudgement/>.

91. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, March 1982, at 29-38; see also Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157 (2004).

92. See generally AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (Metro. Books/Henry Holt & Co. 2010).



several research studies, which uncovered significant constitutional violations, particularly in the area of the right to counsel, and underscored the need for more observational and deep research on the misdemeanor courts.<sup>93</sup>

Boruchowitz et al. found that misdemeanor courts “are incapable of providing accused individuals with the due process guaranteed them by the Constitution.”<sup>94</sup> Smith and Maddan found that most misdemeanor defendants resolved their cases at first appearance—on average in three minutes or less and without a lawyer—even though they were inadequately advised of their constitutional rights and ill-informed about the serious consequences that flow from conviction.<sup>95</sup> Even more troubling was that a study of the magistrate and municipal courts in Florida found few courtrooms staffed with attorneys.<sup>96</sup> In many of the Floridian courtrooms, the judge wasn’t a lawyer, the prosecutor was the arresting officer, and the defendants were unrepresented by counsel.<sup>97</sup> A growing number of not-for-profit researchers and legal scholars focusing primarily on the lack of counsel note these problems are widespread, creating a “massive class of unrepresented defendants” and a “quick-and-dirty culture” of entering ill-informed pleas.<sup>98</sup>

The Center for Court Innovation conducted a comprehensive study of the community court in Brooklyn called the Red Hook Community Justice Center and found that court legitimacy among court consumers could be improved.<sup>99</sup> This community court handles misdemeanors, summons for non-traffic violations, and juvenile delinquency cases. By providing social services, follow-up for non-complying individuals, and improving interactions with decision-makers (in this instance,

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93. See BORUCHOWITZ, ET AL., *supra* note 2; SMITH & MADDAN, *supra* note 6.

94. BORUCHOWITZ, ET AL., *supra* note 2, at 7.

95. See SMITH & MADDAN, *supra* note 6, at 7–9.

96. *Id.*

97. See *id.*

98. Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 258 (2015); see also Carroll, *supra* note 90; Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1044 (2013).

99. CYNTHIA LEE, ET AL., NAT’L CTR. FOR STATE COURTS, A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER (2013).

the judges) who treat defendants with respectful, neutrality, and offer opportunities to participate, the community court reduced crime, strengthened neighborhoods, and supported the position that procedural justice and community engagement are the cornerstones for success.<sup>100</sup> On this latter point, respectful interactions between the judge and defendant improved defendants' perceptions about the fairness of their treatment by the legal system.<sup>101</sup> The Center for Court Innovation created an evaluation toolkit, which was "developed to help judges and other criminal court practitioners assess their individual practices, as well as the factors that may contribute to court users' perceptions of fairness."<sup>102</sup>

In addition to observational study, scholars continue to explore official records of misdemeanor case processing. One comprehensive study of misdemeanors examined more than 100,000 police encounters in New York City, seeking to examine whether the process was still the punishment.<sup>103</sup> By tracing these encounters from initial arrest through disposition, Geller found that, although misdemeanor offenders avoided severe sanctions, they were subjected to significant burdens before their cases were resolved.<sup>104</sup> In fact, fewer than two-thirds of the misdemeanor arrests resulted in guilty pleas, and, of the guilty pleas, the majority were for less severe offenses not involving jail sentences.<sup>105</sup> This same type of attrition was found between arraignment and conviction offense types, as well as the low rate of arrestees being found guilty of their arraignment charges.<sup>106</sup> In total, most of the arrests resulted in dismissals, an

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100. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006) (arguing that procedural justice, i.e., perceptions of fairness, leads to compliance with the law).

101. *Id.*

102. EMILY GOLD LAGRATTA & ELISE JENSEN, *CTR. FOR CT. INNOVATION, MEASURING PERCEPTIONS OF FAIRNESS: AN EVALUATION TOOLKIT* at intro. (2015), [https://www.courtinnovation.org/sites/default/files/documents/P\\_J\\_Evaluation.pdf](https://www.courtinnovation.org/sites/default/files/documents/P_J_Evaluation.pdf).

103. Amanda Geller, *The Process Is Still the Punishment: Low-Level Arrests in the Broken Windows Era*, 37 *CARDOZO L. REV.* 1025 (2016).

104. *Id.* at 1025–26.

105. *Id.* at 1045.

106. *Id.* at 1044–45.

adjournment in contemplation of dismissal,<sup>107</sup> or low-level guilty pleas.<sup>108</sup> Geller referred to this narrowing effect as “charge decay.”<sup>109</sup> Geller’s data found that those arrested these minor crimes “faced considerable procedural burdens in their encounters with the justice system.”<sup>110</sup> She found the arrests physically intrusive, the delay between arrest and disposition burdensome, and the coercive nature of the proceedings compelled nearly all to resolve their cases short of trial.<sup>111</sup>

Given that most misdemeanor defendants resolve their cases by waiving their constitutional right to trial in a plea bargain, the recent psychological research on the validity of defendant plea decisions, particularly whether defendants actually understand their rights and the consequences of entering guilty pleas, is essential.<sup>112</sup> To make a knowing and intelligent plea decision, defendants “must have enough knowledge to make an informed decision, and . . . must be able to understand and appreciate the information.”<sup>113</sup> The Redlich and Summer study focused primarily on felony offenders (90%) and whether defendants *actually* understood their rights by “interview[ing] and assess[ing] defendants who recently pled guilty,” including if they voluntarily entered guilty pleas and if these factors varied by judge as well as pretrial or post-plea detention.<sup>114</sup> They found an inconsistency between what the defendants believed and what they actually understood about the voluntariness of their pleas and the plea proceedings.<sup>115</sup> When challenged and asked specific questions about both, defendants demonstrated that they were not fully advised of their rights and a third of the sample believed that someone

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107. In New York, defendants receive an adjournment in contemplation of dismissal (ACD), which means that the defendant is released and, after either six months or one year, if there is no other contact or arrest, the case is dismissed. *Id.* at 1039–40 (citing N.Y. Crim. Proc. L. § 170.55 (McKinney 2007)).

108. *Id.* at 1046.

109. Geller, *supra* note 103, at 1043.

110. *Id.* at 1047.

111. *Id.* at 1052–53.

112. Redlich et al., *supra* note 7; Redlich & Summers, *supra* note 7.

113. Redlich et al., *supra* note 7 at 347 (citation omitted).

114. Redlich & Summers, *supra* note 7, at 5.

115. *Id.* at 10–16.

other than themselves made the final plea decision.<sup>116</sup>

As expected, and consistent with prior research, Redlich and Summers noted that defendants reported less satisfaction with the courts when they felt pressured by the prosecutor or defense attorney to enter their pleas.<sup>117</sup> Although an important first step in studying whether defendants make voluntary, knowing, and intelligent decisions, Redlich and Summer identified several limitations of their seminal research study.<sup>118</sup> First, they did not observe and systematically collect information about what actually transpired in court with the defendants, and they restricted study to only defendants who entered into plea bargains, excluding those who were offered, but rejected the offered pleas.<sup>119</sup> Another weakness, not identified by Redlich and Summer, is that the research focused primarily on felony, not misdemeanor offenders.

As noted by Redlich and Summers, due process, which includes the right to counsel and the voluntary, knowing, and intelligent waivers of rights, should be linked to perceived fairness and satisfaction with the courts.<sup>120</sup> Research “has shown that when defendants and litigants perceive the court process to be fair – exhibiting respect, voice, understanding, neutral decision-making, and helpfulness – they are more likely to comply with court orders and to follow the law in the future, regardless of whether they ‘win’ or ‘lose’ their case.”<sup>121</sup> Procedural justice has been tested in a number of court settings, including small claims, family, and criminal justice misdemeanor and felony courts.<sup>122</sup> Greater due process and procedural justice should lend to improved satisfaction and positive perception of the courts as well as reduced recidivism.

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116. *Id.* at 13.

117. *Id.* (citations omitted).

118. *Id.* at 15–16.

119. *Id.*

120. *See generally id.*

121. LAGRATTA & JENSEN, *supra* note 102, at intro. (footnote omitted).

122. *Id.*

### III. Promoting Wider, Deeper, and Interdisciplinary Study of the Misdemeanor Courts

Millions of people are prosecuted every year in American misdemeanor courts.<sup>123</sup> Most individuals who interact with our legal system do so in the misdemeanor courts, yet relatively little is known about the processing of these cases, the financial and human toll of these proceedings, and the cost to the perceived legitimacy of the legal system. The following section outlines the next steps in empirically studying misdemeanor courts, court proceedings, and the courtroom workgroup. Although there has been an increase in recent empirical study of the misdemeanor courts, there is still much more to learn.

By continuing the study of the courts using mixed-method approaches, we can advance our understanding of these unique court settings through identification of strengths and weaknesses and development of evidence-based recommendations and policies to make procedures more just. As evidenced above, official and archival reports only tell part of the story, but more systemic and large-scale data collection and study is still necessary.<sup>124</sup> Official data on misdemeanor arrests and prosecutions, pretrial detention, and sentencing outcomes is necessary to properly theorize how the criminal justice system is responding to and, perhaps, counterintuitively perpetuating recidivism.<sup>125</sup> Evidence-based criminal justice policies are likely to ensure equity and equal treatment under the law.<sup>126</sup>

In addition to examining official data, researchers should dive more deeply into courts. For example, they can engage in extensive observational research to capture what actually is occurring in court or expand the study of the short- and long-term consequences of misdemeanor arrests and adjudications—including the potential net-widening effects of these interactions. Furthermore, researchers can build upon prior findings by interviewing the courtroom workgroup and defendants, or those on the receiving end of the process and

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123. Natapoff, *supra* note 1, at 1315.

124. See Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31 (2011).

125. See Natapoff, *supra* note 1.

126. Hashimoto, *supra* note 124, at 33.

punishment, in an effort to ascertain their actual understanding of the process and their satisfaction with the courts.

This research should include deep studies of single courts which explore using ethnographic techniques to understand the entrenched problems afflicting the misdemeanor court system. A recent award-winning book by Nicole Gonzalez Van Cleve uncovered not just inequity in the felony court process, but systemic, racially-charged inequities hidden behind a post-racial, color-blind narrative which masks the extent of organized racial injustice.<sup>127</sup> Her characterization of “due process for [the] undeserving” as a “ceremonial charade” with a focus on efficiency and “organizational utility” may be particularly poignant in the processing of misdemeanor cases, which by their very nature may be considered less important and worthy of *real justice*.<sup>128</sup> The practice, described by Van Cleve, includes: “(1) the streamlining of scripted due process requirements, (2) the curtailing of due process through informal sanctions that are often not part of the court record, and (3) the absolute exclusion of mopes<sup>129</sup> from participation in the legal process—even in cursory ways mandated by law.”<sup>130</sup> Replicating the work of Van Cleve in misdemeanor courts, researchers may peel back the layers of racialized justice that most likely plague the lower criminal courts as well. Additional systemic and empirical study of the breadth and consequences of racialized justice, as well as the lack of counsel and due process that have been found recently identified in two research studies, should be investigated further.<sup>131</sup>

#### A. Observational Study to Measure Due Process in the Courts

As noted by Alfini (1981) and Ryan (1980), information from a handful of counties, jurisdictions, or courts does not sufficiently provide a full understanding of the complexities of

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127. See NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (Stanford Law Books 2016).

128. *Id.* at 73 (internal quotations omitted).

129. *Id.* *Mopes* is a term used by court professionals to describe those perceived as lazy, incompetent, and unworthy. *Id.* at 58.

130. *Id.* at 73.

131. SMITH & MADDAN, *supra* note 6; see also SMITH ET AL., *supra* note 90.

these diverse courts.<sup>132</sup> Ryan noted that the courts in Columbus, Ohio were significantly different and distinct from the New Haven, Connecticut courts observed by Malcolm Feeley.<sup>133</sup> More contemporary work has likewise highlighted significant differences in the processing of misdemeanor cases.<sup>134</sup> The Van Cleve findings likewise demonstrated distinctions in an urban court setting.<sup>135</sup> The differences in case processing, the courtroom workgroups, and outcomes were wildly different in South Carolina and Florida.<sup>136</sup> The most profound difference was that outside of Richland County, where the capital of South Carolina sits, ninety percent of cases in the State were processed without a single lawyer in the courtroom.<sup>137</sup> In Florida, misdemeanor court judges must be attorneys,<sup>138</sup> so there was at least one attorney in Florida's courtrooms. Whether lawyer and non-lawyer judges differ in important procedural and substantive justice respects remains an open, empirical, and constitutional question.

Comprehensive observational data collection will provide insight into these courts and essentially work in near secrecy, without transparency, and with little oversight. As noted by Erica Hashimoto, we need more and better data to understand the "extent to which misdemeanor defendants are represented (and by whom) and on misdemeanor sentencing."<sup>139</sup> Gathering information on the types of cases prosecuted in these courts, evaluating whether lawyer and non-lawyer judges differ in adjudicating and sentencing lower-criminal-court cases, and assessing the functioning of the courtroom workgroup in these courts are important to determining whether these courts are operating justly and fairly. In particular, data should be collected on the demographic characteristics of the judges,

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132. See MISDEMEANOR COURTS, *supra* note 46; Ryan, *supra* note 51.

133. Ryan, *supra* note 51, at 80.

134. See SMITH & MADDAN, *supra* note 6; see also SMITH ET AL., *supra* note 90.

135. See GONZALEZ VAN CLEVE, *supra* note 127.

136. *Id.*

137. SMITH ET AL., *supra* note 90.

138. Matt Ford, *When Your Judge Isn't a Lawyer*, ATLANTIC (Feb. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/02/when-your-judge-isnt-a-lawyer/515568/>.

139. Erica Hashimoto, *supra* note 98, at 1044.

prosecutors, defense attorneys, and defendants, as well as any other courtroom personnel. Recording the length of the proceedings, advisement of rights, waivers of rights, entries of plea, requests for bench or jury trial, sentencing (when relevant), and advisement of the consequences of conviction will get to the heart of measuring the due process afforded misdemeanants.

#### B. Courtroom Workgroup

Since Malcolm Feeley's study of the *misdemeanor* courts, the Center for Court Innovation has conducted a comprehensive study of the community court in Brooklyn, New York and Van Cleve has conducted an in-depth ethnographic study of *felony* courts in Cook County, Illinois.<sup>140</sup> The Center found that the community court model reduced crimes and strengthened neighborhoods, supporting the proposition that procedural justice and community engagement are the cornerstones for success.<sup>141</sup> Replication of this model is necessary to determine the generalizability of their findings and whether the community court model might eradicate the potential for the racialized justice found by Van Cleve.

In addition to gathering data on perceptions, researchers should focus on the procedures employed by the courtroom workgroup to advise defendants of their right to counsel, warnings regarding the advisability of waiving that right, the adequacy of plea colloquies, and other relevant factors. Observers should gather information such as: the start time of the proceedings; whether judges or other courtroom personnel provided explanations; rules or an overview of the proceedings to the gallery or defendants; whether there was an introduction; whether eye-contact was made with defendants; whether plain language was used; and an evaluation, using a Likert scale, of how helpful the court staff was in addressing questions, including how strongly the observers agreed or disagreed on measures of judicial, prosecutor, and defense attorney demeanor during the court session on respectfulness, fairness, attentiveness, interestedness, consistency, knowledgeability,

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140. See LEE ET AL., *supra* note 99.

141. See *id.*



clarity, and intimidation. These observations should then be compared with the defendant's understanding of their rights and perceptions about court proceedings.

The prosecutors, defense attorneys, and judges ("the courtroom workgroup") should be interviewed on their perceptions of the misdemeanor courts and interactions with defendants. Interviewing should occur after data collection to avoid the courtroom workgroup consciously or unconsciously changing their behaviors during the study period. Specifically, questions about their understanding of the right to counsel and due process in misdemeanor courts, as well as procedural justice (i.e., whether they perceive that defendants are given the opportunity to be heard, they are respected, the decision-making process was neutral, and the courtroom workgroup was interested in their personal situations) should be explored. The work by the Center for Court Innovation,<sup>142</sup> Redlich et al.<sup>143</sup> and Van Cleve<sup>144</sup> should be replicated in a variety of jurisdictions to provide comparisons of courtroom workgroups and defendants' perceptions of the court proceedings across divergent localities.

### C. Defendant Understanding of the Process and Satisfaction with the Courts

The cornerstone of due process in American courts is that defendants who enter a plea understand the gravity of that decision. To enter a plea, defendants must *knowingly*, *voluntarily*, and *intelligently* waive their fundamental and constitutional rights, including the right to counsel and trial.<sup>145</sup> However, there is a lack of research focusing on whether *misdemeanor* defendants, who are predominantly waiving their rights, actually understand the rights that they are forfeiting or the consequences of entering their pleas. Redlich and her colleagues have begun to explore these questions and observed that "field studies with actual defendant decision makers [sic] are imperative."<sup>146</sup> Replicating their work and using their well-

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142. *Id.*

143. Redlich et al. *supra* note 7.

144. GONZALEZ VAN CLEVE, *supra* note 127.

145. Redlich & Summers, *supra* note 7.

146. Redlich et al., *supra* note 7, at 350.

defined and standardized questions, researchers should examine whether defendants knowingly, voluntarily, and intelligently waive their rights, enter pleas, and understand *misdemeanor* court proceedings.<sup>147</sup> This can be done by identifying the factors that influence defendants' decisions, the *reasons* defendants forgo counsel and enter pleas, and assessing their understanding of what transpired in court, including whether they understood their constitutional rights, voluntarily waived their rights to counsel and trial, comprehended the short- and long-term consequences of entering a plea and their perceived fairness of and satisfaction with the proceedings.<sup>148</sup>

Using these instruments, researchers can collect quantitative and qualitative information about the accuracy of the defendants' understanding of the court process, their constitutional rights, and the outcomes of the proceedings, including their decisions about counsel and trial, the voluntariness of their pleas, their comprehension of the plea and proceedings, their perceptions about the proceedings, the courtroom workgroup, and their satisfaction with the outcome and process. These first-hand accounts by defendants will provide much-needed information in understanding the subjective knowledge about their rights, the court proceedings, and the consequences of their decisions, as well as a measure of whether, as required by the Supreme Court, defendants knowingly, intelligently, and voluntarily waive their constitutional rights in misdemeanor cases. Essential data will result from the collection of data on the outcome of the proceedings, the influence of representation, and demographic, legal, and extralegal characteristics. Additionally, defendants' perceptions on procedural justice in comparison with proceeding outcomes, attendees' in-court observations, and due process afforded to misdemeanor defendants will provide essential data on open questions.

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147. Redlich & Summers, *supra* note 7; *see also* Allison D. Redlich, Miko M. Wilford, & Shawn Bushway, *Understanding Guilty Pleas Through the Lens of Social Science*, 23 PSYCHOL. PUB. POL'Y, & L. 458 (2017).

148. LAGRATTA & JENSEN, *supra* note 102; *see also* Redlich & Summers, *supra* note 7; Redlich et al., *supra* note 7.

## D. Linking Mass Incarceration to Misdemeanor Offending

It is likely that there are long-term effects of misdemeanor arrest, incarceration, and conviction on health, economic well-being, and behavior.<sup>149</sup> Mass incarceration and over-criminalization are significant concerns, yet scholars have ignored the study of misdemeanor prosecution as a possible gateway to mass incarceration. Renewed focus on recidivism rates among misdemeanor defendants, variations on the influence of legal and extra-legal factors, or procedural justice and due process may shed light on a link between broken windows policing and an unprecedented number of misdemeanor arrests and court filings.<sup>150</sup> Whether there are negative consequences associated with criminalizing so many individuals has yet to be explored; more research should examine the assumption that undergirds the broken windows theory. This is especially true because the little research that has been conducted has found that “there appears to be no good evidence that broken windows policing reduces crime.”<sup>151</sup>

The revolving jail door is a concept that has yet to be fully explored as to its particular effect on managing the poor through the cycle of misdemeanor arrests.<sup>152</sup> Post-misdemeanor court processing data should be conducted using archival research to determine whether defendants failed to pay fines, otherwise violated the terms and conditions of their sentencing, or committed new law violations, particularly noting the outcomes of the violations. This data allows for the evaluation of recidivism on technical and criminal offending with a particular focus on whether defendants were appointed counsel. Moreover, and particularly poignant and in need of further study, is the probability that there are massive wrongful convictions in the lower courts.<sup>153</sup> Without systematic study or mandated appellate review, these miscarriages of justice can fly under the radar.

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149. Amanda Geller, *supra* note 103, at 1058.

150. BORUCHOWITZ ET AL., *supra* note 2.

151. Harcourt & Ludwig, *supra* note 91, at 316.

152. See, e.g., JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* (Univ. of Cal. Press 1985).

153. GONZALEZ VAN CLEVE, *supra* note 127.

E. Race, Ethnicity, and Other Extra-Legal Factors and Long-Term Consequences

Unlike research in the felony courts, little research has focused on the influence of race and other extralegal factors in disparities in misdemeanor arrests, prosecution, dispositions, and sentencing. The research that has been conducted demonstrates that there are clear inequities and more research exploring these relationships is necessary.<sup>154</sup> Several micro-level misdemeanor studies found that black and Hispanic individuals are more often arrested in communities adopting the broken-windows approach to policing.<sup>155</sup> Kohler-Hausmann and Geller and Fagan found in their research that the highest rates of misdemeanor arrests and marijuana arrests occurred in neighborhoods that were predominantly black or Hispanic.<sup>156</sup>

Furthermore, there is an even greater lack of scholarly attention on disparities in prosecution and disposition of misdemeanor offending in the criminal courts. A notable exception, discussed above, was research conducted by Muñoz et al, who found evidence that racial, ethnic, and immigration stereotypes affected an increased risk of conviction.<sup>157</sup> Another was Lieber and Blowers' study which found that race influenced how prosecutors characterized defendants' cases, characterizing black defendants' cases as more serious.<sup>158</sup> Consistent with felony research, Lieber and Blowers found "the effects of race on decision making [sic] were found to be overt and direct as well as subtle, indirect, and in interaction with other variables."<sup>159</sup> The highly touted ethnographic work of Van Cleve in Chicago's felony courts provides a roadmap for more study by observers armed with notepads to engage in systematic collection of information.<sup>160</sup> Future research should examine the interactive

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154. *Id.*

155. Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 22–24 (2010).

156. *Id.*; see also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014).

157. Muñoz et al., *supra* note 85.

158. See Lieber & Blowers, *supra* note 73.

159. *Id.* at 481.

160. See GONZALEZ VAN CLEVE, *supra* note 127.

effects of race, ethnicity, and legal factors to explore explicit and implicit racial, ethnic, and immigrant bias in the highly discretionary processing of misdemeanor offenses, including arrest, prosecution, disposition, and sentencing.<sup>161</sup>

### Conclusion

An estimated thirteen million people are prosecuted in the misdemeanor courts each year.<sup>162</sup> Three times as many misdemeanors than felonies.<sup>163</sup> Preliminary research has uncovered constitutional violations and some potential long-term negative consequences for this over-criminalization. However, relatively little is known about the processing of misdemeanor cases, the financial and human toll of these proceedings, and the cost of inequities on perceived legitimacy of the legal system. By engaging in wider and deeper analyses in a variety of jurisdictions, research can begin to untangle the many complicated and open questions on due process and procedural justice in the misdemeanor courts, as well as the short- and long-term individual and societal effects of prosecuting millions of people each year.

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161. Muñoz et al, *supra* note 85, at 128.

162. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 Boston U. L. Rev. 731, 737 (2018), Natapoff, *supra* note 1, at 1315.

163. *Id.* at 734.