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Misdemeanors by the Numbers


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MISDEMEANORS BY THE NUMBERS

SANDRA G. MAYSON
MEGAN T. STEVENSON

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MISDEMEANORS BY THE NUMBERS

SANDRA G. MAYSON*
MEGAN T. STEVENSON**

Abstract: Recent scholarship has underlined the importance of criminal misdemeanor law enforcement, including the impact of public-order policing on communities of color, the collateral consequences of misdemeanor arrest or conviction, and the use of misdemeanor prosecution to raise municipal revenue. Despite the fact that misdemeanors represent more than three-quarters of all criminal cases filed annually in the United States, however, our knowledge of misdemeanor case processing is based mostly on anecdote and extremely localized research. This Article represents the most substantial empirical analysis of misdemeanor case processing to date. Using multiple court-record datasets covering several million cases across eight diverse jurisdictions, we present a detailed documentation of misdemeanor case processing from the date of filing through adjudication and sentencing. The resulting portrait reveals a system that disproportionately impacts poor people and people of color. Between 2011 and 2016, each jurisdiction studied relied on monetary bail, which resulted in high rates of pretrial detention, even at relatively low amounts, and imposed court costs upon conviction. There were substantial racial disparities in case-filing rates across locales and offense categories. The data also, however, highlight profound jurisdictional heterogeneity in how misdemeanors are defined and prosecuted. The variation suggests that misdemeanor or adjudication systems may have fundamentally different characters, and may serve different functions, from place to place. It thus presents a major challenge to describe and theorize the contemporary landscape of misdemeanor justice. At the most fundamental level, the variation calls into question the coherence of the very concept of a misdemeanor and its role in the criminal justice system. As apprecia-

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NOTE: Because some platforms do not reproduce images, we have archived all graphics herein at <https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/61-3/mayson-stephenon-graphics.pdf> [<https://perma.cc/L3X5-QJPA>].

tion for the significance of low-level law enforcement builds, we urge scholars and policymakers to attend carefully to the complexity of this sub-felony world.

INTRODUCTION

On April 12, 2018, two black men were arrested for sitting in a Philadelphia Starbucks.¹ The charge: trespassing.² The men were waiting to meet a friend, and when they declined to make a purchase or leave, the manager called the police to have them removed. Had the two men actually committed criminal trespass? Maybe; the relevant statute leaves room for argument.³ The more important question is whether waiting for a friend in a Starbucks is worthy of arrest, and whether it would have resulted in arrest had the men been white.

When a video of the incident was posted to the internet, the response was swift and dramatic. The video was viewed almost ten million times in three days.⁴ Protesters descended on the Starbucks store. Starbucks CEO Kevin Johnson traveled to Philadelphia to offer a face-to-face apology to the two men, and on May 29, Starbucks closed 8,000 stores for the afternoon so that employees could attend racial-bias training.⁵

¹ Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html> [https://perma.cc/M867-RQAG].

² *Id.*

³ The law provides that “[a] person commits an offense if, knowing that he is not licensed or privileged to do so, he . . . remains in any place as to which notice against trespass is given by: (i) actual communication to the actor . . .” 18 PA. STAT. AND CONS. STAT. ANN. § 3503(b)(1)(i) (West 2019). On the one hand, the men remained in the Starbucks after the manager ordered them to leave, and presumably knew that the Starbucks was private property. On the other hand, the men might have reasonably believed they had the right to remain because Starbucks holds itself out as a gathering place open to the public. Moreover, Pennsylvania law provides a defense to trespass if “the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises.” *Id.* § 3503(c)(2).

⁴ The video, posted to Twitter by a bystander, had over nine million views after three days on the internet. See M.L. Nestel, *Handcuffing of 2 Black Men in Starbucks in Philadelphia Called ‘Reprehensible Outcome’ by CEO*, ABC NEWS (Apr. 15, 2018), <https://abcnews.go.com/News/black-men-walked-starbucks-cuffs-trespassing/story?id=54470047> [https://perma.cc/6JYB-WDZL]; see also Melissa “That White Lady” DePino (@missydepino), TWITTER (Apr. 12, 2018, 5:12 PM), <https://twitter.com/missydepino/status/984539713016094721?lang=en> [https://perma.cc/2DR3-LSZS].

⁵ Bill Chappell, *Starbucks Closes More Than 8,000 Stores Today for Racial Bias Training*, NPR (May 29, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/29/615119351/starbucks-closes-more-than-8-000-stores-today-for-racial-bias-training> [https://perma.cc/ZKM6-4EHW]; Prudy Gourguechon, *The Psychology of Apology: How Did Starbucks’ CEO Kevin Johnson Do?*, FORBES (May 6, 2018), <https://www.forbes.com/sites/prudygourguechon/2018/05/06/the-psychology-of-apology-how-did-starbucks-ceo-kevin-johnson-do/#1325ea88ac8d> [https://perma.cc/WWN5-DHZ2].

The Starbucks saga illustrates a major shift. After decades of neglect,⁶ misdemeanors have entered mainstream criminal-justice debates. By definition, misdemeanors are low-level crimes, many of which have only an attenuated relationship to public safety.⁷ Compared to felonies, misdemeanor penalties are light: fines, fees, probation, and/or short jail terms.⁸ There is, however, growing awareness that the consequences of misdemeanor arrest or conviction are far from trivial.⁹ Money bail keeps those who cannot afford to post it detained for days, weeks, or months before their case is resolved.¹⁰ Fines and fees imposed for a misdemeanor conviction can be a massive burden for the poor.¹¹ Probation is intrusive, and failure to comply with all conditions of probation can land a person back in jail. Even short jail sentences can be highly destabilizing; a few days in jail can lead a person to lose her job, housing, or custody of her children.¹² Beyond the criminal justice system, a misdemeanor arrest or conviction may trigger a host of collateral consequences, including deportation, barriers to employment, and ineligibility for some public benefits.¹³

⁶ Misdemeanors have historically received little attention from criminal justice scholars, activists, or the media. *See, e.g.*, Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) [hereinafter Natapoff, *Misdemeanors 2012*] (suggesting that misdemeanor convictions should receive more attention and due process than they are presently given). There are notable exceptions where scholars have delved into misdemeanors and their consequences. *See generally, e.g.*, MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1992); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992).

⁷ *See Misdemeanor*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining misdemeanor as a "crime that is less serious than a felony").

⁸ *See id.* (listing the potential punishments stemming from a misdemeanor conviction).

⁹ *See, e.g.*, Natapoff, *Misdemeanors 2012*, *supra* note 6, at 1315 (noting that although misdemeanor defendants "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"); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011) (explaining that misdemeanor convictions have repercussions beyond the court-imposed punishment).

¹⁰ *See* Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/W99E-69Z2>] (reporting on the collateral effects stemming from indigent defendants' inability to post bail).

¹¹ *See* Jessica Brand, *How Fines and Fees Criminalize Poverty: Explained*, THE APPEAL (July 16, 2018), <https://theappeal.org/fines-and-fees-explained-bf4e05d188bf/> [<https://perma.cc/ZDT9-CBCA>] (detailing the long-term consequences of court-ordered fines and fees given to low-income individuals).

¹² *See* Roberts, *supra* note 9, at 287–89 (discussing the ramifications of jail time regarding housing and employment opportunities); Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [<https://perma.cc/4MH8-NG42>] (reporting on the difficulty incarcerated parents face in keeping custody of their children).

¹³ *See* Natapoff, *Misdemeanors 2012*, *supra* note 6, at 1316–17 (describing collateral consequences that misdemeanor convictions can trigger); Jenny Roberts, *Crashing the Misdemeanor Sys-*

The cumulative impact of these consequences is profound, because the misdemeanor system is vast. There are approximately thirteen million misdemeanor cases filed each year, representing more than three-quarters of all criminal cases.¹⁴ The extraordinary case volume, informality, and perceived low stakes of misdemeanor proceedings also make the system particularly susceptible to certain kinds of distortion. Amorphous public-order offenses allow for arbitrary and discriminatory enforcement.¹⁵ Even well-intentioned policing that targets poor neighborhoods disproportionately funnels the poor into misdemeanor court, where the routine imposition of fines and fees compounds the disparate burden. Because misdemeanor pretrial detainees can often plead guilty to go home, pretrial detention influences case outcomes and undermines confidence in the accuracy of the adjudicative system.¹⁶

The new wave of attention to misdemeanor justice has exposed and explored these pathologies.¹⁷ The Department of Justice raised the profile of

tem, 70 WASH. & LEE L. REV. 1089, 1090 (2013) (noting that misdemeanor convictions “can affect future employment, housing, and many other basic facets of daily life”).

¹⁴ NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/J4ME-7YXH>]; Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U.L. REV. 731, 737 (2018).

¹⁵ *Cf.* City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (affirming that Chicago’s gang-loitering ordinance violated due process because it did not provide “sufficiently specific limits on the enforcement discretion of the police” to meet constitutional standards for definiteness and clarity”) (quoting City of Chicago v. Morales, 687 N.E.2d 53, 64 (Ill. 1997)).

¹⁶ See generally Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 202 (2018) (noting that the high rate of poor and minority pretrial detainees calls into question the effectiveness of the criminal bail scheme); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017) (arguing that because detained defendants are more likely to plead guilty than defendants who can afford bond, the bail system undermines the fairness of the criminal legal system); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. ECON. 529, 529 (2017) (arguing that being detained directly “increases the probability of conviction”); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 511 (2018) (studying the causal connection between pretrial detention and case disposition); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* 22 (Colum. L. & Econ. Working Paper No. 531, 2016), <http://ssrn.com/abstract=2774453> [<https://perma.cc/G6WF-XTSK>] (noting that “[m]any defendants who are detained on money bail before trial choose to plead guilty in exchange for release”).

¹⁷ See generally ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (offering a view of the court system that handles misdemeanor cases); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) [hereinafter NATAPOFF, PUNISHMENT WITHOUT CRIME] (analyzing the misdemeanor system and its impact on people in the U.S.); Alexandra Natapoff, *Misdemeanors*, in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 73 (Erik Luna ed., 2017) (explaining the various problems with the misdemeanor system in the U.S.); Erica Hashimoto, *The*

misdemeanor policy with its reports on policing and low-level case processing in Ferguson and Baltimore.¹⁸ Impact litigation groups have begun to find success litigating constitutional challenges to pretrial detention and fines-and-fees regimes.¹⁹ Increasing media coverage has brought the realities of troubled misdemeanor practice to a newly engaged public.

Yet despite the growing interest, there is little empirical data available about the misdemeanor criminal justice system.²⁰ Criminal justice data are notoriously bad, but in the hierarchy of suboptimal data infrastructure, misdemeanor systems fall at the bottom.²¹ Accordingly, empirical research on misdemeanors has focused on a few isolated jurisdictions. New York City makes detailed misdemeanor data publicly available, which has allowed both government agencies and independent researchers to illuminate misdemeanor case

Problem with Misdemeanor Representation, 70 WASH. & LEE L. REV. 1019, 1019–21 (2013) (discussing the “profound problem” of underrepresentation for misdemeanor defendants); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (discussing the need to reform the misdemeanor system); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 645–53 (2014) [hereinafter Kohler-Hausmann, *Managerial Justice*] (analyzing the effects of prosecutorial discretion in misdemeanor case-handling); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1074 (2013) [hereinafter Natapoff, *Aggregation*] (suggesting that the goals of the criminal justice system have steered away from justice); Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 256–65 (2015) [hereinafter Natapoff, *Misdemeanors 2015*] (cataloging recent scholarship on misdemeanors); Natapoff, *Misdemeanors 2012*, *supra* note 6, at 1313–14 (discussing the various problems with the misdemeanor system); Roberts, *supra* note 13, at 1099 (expressing the need “to have more defendants choose trial over a guilty plea, or at least reject a quick, early guilty-plea”); Roberts, *supra* note 9 (offering a critique of legal advocacy on behalf of misdemeanor defendants).

¹⁸ See CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 163 (2016), <http://www.justice.gov/opa/file/883366/download> [https://perma.cc/R5R3-KJ3T]; CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 102 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/9M5W-AMG2].

¹⁹ See, e.g., *Criminalization of Poverty*, S. CENTER FOR HUM. RTS., <https://www.schr.org/our-work/criminalization-of-poverty> [https://perma.cc/K77A-3EK4]; *Ending American Money Bail*, EQUAL JUST. UNDER L., <https://equaljusticeunderlaw.org/money-bail-1/> [https://perma.cc/4ZX5-57ZC] (describing Equal Justice Under Law’s litigation campaign challenging various courts’ bail or bond systems); *Our Work*, CIV. RTS. CORPS, <https://www.civilrightscorps.org/work> [https://perma.cc/XB8B-8624].

²⁰ See Natapoff, *Misdemeanors 2015*, *supra* note 17, at 265 (diagnosing “an enormous need—and enormous opportunity—for empirical studies of the petty offense system”).

²¹ At the top end, the U.S. Sentencing Commission, Bureau of Justice Statistics, and a range of other federal agencies maintain enviable data about federal case processing, including nationwide data about felony case processing. See, e.g., *Publications & Products: Felony Defendants in Large Urban Counties*, BUREAU JUST. STAT., U.S. DEP’T JUST., <https://www.bjs.gov/index.cfm?ty=pbse&sid=27> [https://perma.cc/2UBM-QGRN]. The Federal Bureau of Investigation (FBI) keeps national data on reported crime and estimated arrests, but does not categorize its data by felony or misdemeanor offenses. See *2015 Crimes in the United States*, FED. BUREAU INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/home> [https://perma.cc/VH54-FQC7].

processing there.²² A handful of studies have analyzed particular facets of misdemeanor court records elsewhere.²³ The new non-profit Measures for Justice is collecting court data nationwide and, as of this writing, has published nine misdemeanor-specific statistics that apply to between one and six states each.²⁴ A new misdemeanor research network sponsored by the Misdemeanor Justice Project is producing a series of statistical reports on misdemeanor arrests in selected cities.²⁵ Exciting and important though they are, these efforts only

²² See generally, e.g., MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, PRETRIAL DETENTION AND CASE OUTCOMES, PART I: NONFELONY CASES (2007); NYC DEP'T OF INVESTIGATION, AN ANALYSIS OF QUALITY-OF-LIFE SUMMONSES, QUALITY-OF-LIFE MISDEMEANOR ARRESTS, AND FELONY CRIME IN NEW YORK CITY, 2010–2015 (2016), <https://www1.nyc.gov/assets/oignypd/downloads/pdf/Quality-of-Life-Report-2010-2015.pdf> [<https://perma.cc/R6BT-SCE3>]; Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 611; *Data Collaborative for Justice*, JOHN JAY COLL., <http://misdemeanorjustice.org> [<https://perma.cc/2ENR-XFUX>] (providing a series of reports developed on the basis of New York City misdemeanor data).

²³ See, e.g., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 14–19 (2011), <https://www.nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts.pdf> [<https://perma.cc/QJ3A-D6RA>] (researching various aspects of misdemeanor cases in Florida); GERALD R. WHEELER ET AL., PROJECT ORANGE JUMPSUIT: THE MISDEMEANOR REPORT #1, at 1–9 (2016), http://themisresearch.org/files/MISD_2016_REPORT.pdf [<https://perma.cc/H2X8-5ZV4>] (reporting on pretrial and case outcomes in Harris County, Texas); Heaton et al., *supra* note 16 (reporting a quantitative study of misdemeanor bail and pretrial detention in Harris County, Texas); Stevenson, *supra* note 16 (including an analysis of misdemeanor bail data in Philadelphia).

²⁴ See MEASURES FOR JUSTICE, <https://measuresforjustice.org> [<https://perma.cc/9DJJ-WSUA>] (last updated Mar. 13, 2020). The statistics (“measures”) are (1) percent of cases filed that are misdemeanor cases (in PA, 2009–2013), (2) percent of nonviolent misdemeanors initiated by citation (in FL, 2009–2013), (3) percent of cases with nonmonetary pretrial release that involved only nonviolent misdemeanor charges and defendants with no in-state conviction in the past three years (in PA and WI, 2012–2013), (4) percent of cases with monetary bail that involved only nonviolent misdemeanor charges and defendants with no in-state conviction in the past three years (in PA and WI, 2012–2013), (5) percentage of nonviolent misdemeanor cases that were diverted in which the defendant had no in-state conviction in the past three years (in PA and WI, 2012–2013), (6) percent of misdemeanor cases resolved within ninety days (in AZ, FL, NC, PA, UT, and WI, 2009–2013), (7) median time to disposition for misdemeanors (in AZ, FL, NC, PA, UT, and WI, 2009–2013), (8) percent of nonviolent misdemeanor convictions with defendants who had no in-state conviction in the past three years where sentence is jail (in FL, PA, and WI, 2012–2013), and (9) median jail sentence length for nonviolent misdemeanor convictions where defendant had no in-state conviction in the past three years (in FL, PA, and WI, 2012–2013).

²⁵ See generally JACQUELINE B. HELFGOTT ET AL., SEATTLE UNIV., TRENDS IN MISDEMEANOR ARRESTS, REFERRALS, & CHARGES IN SEATTLE (2018), https://datacollaborativeforjustice.org/wp-content/uploads/2018/10/Trends_in_Misdemeanors_Seattle.pdf [<https://perma.cc/CW2H-CPAD>]; MEGHAN KOZLOWSKI-SERRA ET AL., UNIV. MD., TRACKING ENFORCEMENT RATES IN PRINCE GEORGE'S COUNTY, MD 2006–2018: A REPORT OF THE RESEARCH NETWORK ON MISDEMEANOR JUSTICE (2019), <https://datacollaborativeforjustice.org/wp-content/uploads/2019/10/RNMJ-Prince-Georges-Report.pdf> [<https://perma.cc/N4FQ-3LBA>]; MEREDITH PATTEN ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK, 1980 TO 2017 (2018), <http://misdemeanorjustice.org/wp-content/uploads/2018/12/FINAL.pdf> [<https://perma.cc/SK48-57W4>]; BRIAN P. SCHAEFER ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, TRACKING ENFORCEMENT RATES IN LOUISVILLE, 2009–2016 (2018), <https://datacollaborativeforjustice.org/wp-content/uploads/>

represent a start. Considering that misdemeanor cases constitute the bulk of the criminal justice system, we still know very little about how misdemeanor systems around the country actually operate.²⁶

In recent work, we undertook to synthesize the best available national data on misdemeanor arrests and case-filing rates in order to estimate the total scale of the system as well as to chart high-level trends.²⁷ We found that, contrary to common perceptions, the misdemeanor system is shrinking. This does not mean that the problems related to misdemeanor case volume are any less serious than they appear, but rather that they are not new.²⁸ We found marked racial disparities in misdemeanor arrest rates, although the degree of disparity varied considerably by offense.²⁹ Several trends were strikingly consistent across the data. The ranking of offense types by degree of racial disparity has remained largely constant for the last thirty-seven years, and the arrest rate has been dropping for decades for almost every offense category and in almost every state for which data were available.³⁰ These patterns suggest some degree of uniformity in the structure of misdemeanor systems.

Having sketched the big-picture outlines of misdemeanor justice, our goal in this Article is to zoom-in on the details. We aim to paint a basic empirical portrait of misdemeanor case processing across a range of diverse jurisdictions.

2018/04/Tracking-Enforcement-Rates-in-Louisville-2009-to-2016_Misdemeanor-Justice...1.pdf [https://perma.cc/4G6M-QE3K]; LEE ANN SLOCUM ET AL., UNIV. MISS., TRACKING ENFORCEMENT RATES IN THE CITY OF ST. LOUIS, 2002–2017 (2018), http://misdemeanorjustice.org/wp-content/uploads/2018/10/Tracking-Enforcement-Rates-in-St.-Louis_2002_2017.pdf?mod=article_inline [https://perma.cc/Q5ZW-ACWP]; LORRAINE C. TAYLOR ET AL., N.C. CENT. UNIV., MISDEMEANOR ARREST TRENDS IN THE CITY OF DURHAM, NORTH CAROLINA 2007–2016 (2019), <https://datacollaborativeforjustice.org/wp-content/uploads/2019/05/Durham-Misdemeanor-Trends-Report.pdf> [https://perma.cc/VJC9-GVRC].

²⁶ Since we began work on this project, Alexandra Natapoff released her masterly book on misdemeanors, a book that includes an estimate of the total number of misdemeanor cases filed in 2015. The John Jay Research Network on Misdemeanor Justice has facilitated the six reports on misdemeanor arrests, and the Prison Policy Institute of California has released a report documenting arrest trends in California from 1980 to 2016, including for misdemeanors. *See* NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 17, at 2 (reporting that 80% of the criminal proceedings in the United States are for misdemeanors); MAGNUS LOFSTROM ET AL., PUB. POLICY INST. OF CAL., NEW INSIGHTS INTO CALIFORNIA ARRESTS: TRENDS, DISPARITIES, AND COUNTY DIFFERENCES 3–4 (2018), <https://www.ppic.org/wp-content/uploads/new-insights-into-california-arrests-trends-disparities-and-county-differences.pdf> [https://perma.cc/93SX-7BJQ]; *supra* note 25 and accompanying text.

²⁷ *See generally* Mayson & Stevenson, *supra* note 14 (providing a national study of misdemeanor arrests and cases filed in the United States).

²⁸ *See id.* at 764–69 (discussing this point).

²⁹ *Id.* at 769–71. This phrasing is a simplification; rather than “misdemeanor arrest rates,” we reported arrest rates for “likely-misdemeanor” offense categories because there are no national arrest data available for misdemeanors specifically. *Id.* at 743–44. In order to obtain a rough approximation, we extrapolated from FBI arrest data for offense categories that we judged likely to contain mostly misdemeanors. *Id.* at 742–44.

³⁰ *Id.* at 771.

We have chosen eight, for reasons both practical and analytical: Philadelphia County, Pennsylvania (Philadelphia); Cook County, Illinois (Chicago); Harris County, Texas (Houston); Bexar County, Texas (San Antonio); Jefferson County, Kentucky (Louisville); rural Kentucky (a combined group of all Kentucky counties with a population density below 250 people per square mile);³¹ Fairfax County, Virginia (Fairfax); and rural Virginia (a combined group of all Virginia counties with a population density below 250 people per square mile).³² For the sake of simplicity, we will refer to the single counties by the name of the major city each contains. Using detailed data drawn from court records, we present both overview statistics for each jurisdiction and a more focused analysis of pretrial bond practice and sentencing. Because each jurisdiction has different institutional arrangements for classifying and adjudicating misdemeanors, the study focuses on cases handled in each jurisdiction's "main" misdemeanor courts.

Our data confirm prior claims about the scale of the misdemeanor system as well as the disproportionate burdens on poor people and people of color. We estimate that 40.4 misdemeanor cases are filed annually per 1,000 people; if our jurisdictions are representative of nationwide practice this would imply that more than 13 million misdemeanor cases are filed each year in the United States.³³ The weight of this gargantuan apparatus falls heavily on the poor and on people of color. During the years we studied, every jurisdiction used money bail as a determinant of pretrial release for at least some defendants. Frequently, the imposition of money bail resulted in pretrial detention, even at the lowest amounts. In the median jurisdiction for which this data was available, 43% of defendants with bail set at \$500 were detained pretrial. All jurisdictions imposed court costs upon conviction. Racial disparities, meanwhile, were pervasive. In every jurisdiction we studied, black people were overrepresented among those charged with misdemeanors relative to population demographics, and white people were underrepresented. Racial disparities in case-filing rates were starkest in the Chicago area, where the case-filing rate for public-order

³¹ We calculated population density on the basis of each county's land area as reported by the U.S. Census Bureau in 2010, and its population as reported by the Census Bureau for 2013. *Population, Housing Units, Area, and Density: 2010—United States—County by State; and for Puerto Rico*, AM. FACTFINDER, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/C3ZF-8Q8Y>]; *Population Estimates by Age, Sex, Race, and Hispanic Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/newsroom/press-kits/2018/estimates-characteristics.html#> [<https://perma.cc/F72H-T4JP>]. "Rural Kentucky" includes 110 counties.

³² See *supra* note 31. "Rural Virginia" includes eighty-five counties.

³³ This aligns with our prior national estimate. See Mayson & Stevenson, *supra* note 14, at 737, 745. It also accords with scholar Alexandra Natapoff's recent estimate. See NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 17, at 251 (estimating the "total size of the 2015 US misdemeanor docket" at 13,240,034 criminal filings).

and drug offenses was more than eleven times greater for black people than for white.

The data illuminate other points of cross-jurisdictional commonality as well. Nearly all convictions in almost every locale were resolved by guilty plea; trials were vanishingly rare.³⁴ Four offense types—driving under the influence (DUI), simple assault, petty theft, and possession of marijuana—constituted the majority of cases in most jurisdictions.³⁵ Public-order offenses also constituted a meaningful proportion of cases. Consistent with the national data, in all jurisdictions the total case-filing rate declined significantly during the period of our analysis.

Yet the variation across jurisdictions was even more profound. Jurisdictions differ in the very behaviors they classify as misdemeanors as well as in their institutional structures for adjudicating the many different kinds of cases that constitute the sub-felony world (including misdemeanors, ordinance violations, traffic infractions, and civil offenses). Misdemeanor case-filing rates ranged by a factor of three across our research sites. There was considerable heterogeneity in practices at every stage of the proceedings. One notable heterogeneity is the variation in how different jurisdictions treat non-DUI traffic offenses. This variation pertains both to the extent to which traffic offenses are classified as misdemeanor offenses, and to whether they were processed in the central misdemeanor court or in a special traffic court. To ensure at least some level of comparability across jurisdictions, we drop traffic offenses from most of our analyses. Finally, although the presence of racial disparity in case-filing rates was universal, the degree of disparity varied widely. What the data reveal, in other words, are misdemeanor court systems that may be broadly shaped in common by exogenous forces, but that differ dramatically in the specifics of their implementation.

This heterogeneity suggests some degree of dissensus, or at least the lack of a consensus, about what behaviors warrant treatment as criminal misdemeanors, and what such treatment should entail. We cannot say how the heterogeneity in this data compares to felony case processing, but we suspect it is more extreme. Regardless, the variation suggests that misdemeanor adjudication systems may have fundamentally different characters, and serve different functions, from place to place. It thus presents a major challenge to efforts to describe and theorize the contemporary landscape of misdemeanor justice.

A central theme of recent misdemeanor scholarship, for instance, is the argument that contemporary misdemeanor enforcement practices serve less to adjudicate guilt and punishment for specific bad acts than to regulate aggregate

³⁴ Philadelphia is the exception. See *infra* Appendix A.

³⁵ They are not the majority in Virginia, but still constitute more than 40% of cases.

populations—in particular, people of color, the indigent, and those perceived to have a propensity for disorderly or criminal behavior.³⁶ This regulatory project is facilitated, scholars suggest, by trivial and amorphous public-order offenses that allow police and prosecutors vast discretion to selectively enforce the law.³⁷ The objective of the criminal process, on this view, is not to sort the innocent from the guilty and ensure just punishment for each violation (what Issa Kohler-Hausmann terms the “adjudicative model”).³⁸ Instead, the objective is social control: “to sort and regulate people over time” through repeated contacts with the system and records that document those contacts (the “managerial model”).³⁹

Some of the patterns we document align with the managerial model. The high case volume and almost complete absence of trials suggest a preference for efficient disposition over accurate determinations of guilt. The racial disparities in case-filing rates and heavy reliance on monetary bail and penalties are consistent with the thesis that misdemeanor justice disproportionately targets people of color and the poor.⁴⁰ The low conviction rates in most places conform to a model that prizes documented contact with the system over punishment for specific acts, as do the high rates of diversion and deferred adjudication.

Other patterns offer more qualified support for the regulatory perspective. Three of the four most commonly prosecuted offenses in every jurisdiction—

³⁶ See, e.g., Jain, *supra* note 17, at 815 (arguing that arrests function “as a regulatory tool—a means of monitoring, ordering, and tracking individuals,” a function at odds with “criminal law concerns” like “adjudicating guilt or innocence, maintaining law and order, deterring crime, and meting out punishment”); Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 628 (arguing that the New York City misdemeanor system operates by a managerial logic in which “the rules of criminal procedure and criminal law are used as tools for socially regulating certain populations over time, as opposed to punishing individual instances of lawbreaking”); Natapoff, *Aggregation*, *supra* note 17, at 1043 (arguing that “the misdemeanor system as it currently stands does not function as a traditional ‘criminal’ system of judgment in large part because aggregation erodes the substantive content of criminal convictions”).

³⁷ See, e.g., Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 645–46 (suggesting that the “managerial model” of the criminal justice system and wide prosecutorial discretion explains why noncriminal violations and infractions are the “largest conviction category resulting from misdemeanor arrests”); Sarah Pitcher McDonough, *Colorblindness, Discretion, and Systemic Inequities in Criminal Justice*, 28 GEO. J. LEGAL ETHICS 733, 742 (2015) (discussing law enforcement’s “zero-tolerance regime[s]” that result in disproportionate arrests for low-level offenses).

³⁸ Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 619–29.

³⁹ *Id.*

⁴⁰ Although we do not know the true incidence of most types of misdemeanor-classified behavior, we do know that rates of drug use are fairly similar across races, but that drug arrests and case-filing rates are not. See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 266–71 (2009) (noting that despite similar levels of drug use among white and black individuals in the United States, policing is more often done in black and low-income neighborhoods).

theft, simple assault, and DUI—do not seem like the kind of amorphous public-order offenses that permit boundless enforcement discretion. On the other hand, possession of marijuana—which does appear conducive to selective prosecution⁴¹—was the fourth major offense category, and public-order offenses did constitute a meaningful portion of caseloads in many jurisdictions. And even theft and assault enforcement may involve more discretion than an outsider might assume.⁴² Overall, though, the data suggest that there is a range of phyla in the misdemeanor kingdom, and the extent to which enforcement abandons the adjudicative model for a regulatory one may vary by offense type.

The regulatory model does not, however, explain or account for the cross-jurisdictional heterogeneity documented here. Nor does it explain why misdemeanor case-filing rates are on the decline, both nationally and in the eight jurisdictions we studied. And some key features of the managerial model, including dramatic expansion in misdemeanor policing and prosecution, seem to be the exception rather than the rule.⁴³ In sum, the present study offers some support for the regulatory theme in misdemeanor scholarship, but also demonstrates its limits.

At the most fundamental level, the dramatic variation in misdemeanor categorization and case processing in the jurisdictions we study calls into question the coherence of the very concept of a misdemeanor, or of misdemeanor criminal justice. The legal category “misdemeanor” is itself amorphous. The offenses it includes are a function of each jurisdiction’s idiosyncratic labelling choices, and its boundaries overlap with other sub-felony categories (ordinance violations, traffic infractions, and civil offenses). This is to say that the many bodies of law that regulate individual conduct below the level of felony crime form a tangled jungle. To analyze misdemeanor state court data alone, as we have done, is like mapping a square foot of the Amazon. As exploration proceeds, a careful set of offense definitions tied to the regulated conduct or the practical nature of enforcement rather than to contingent legal classifications might help to map the contours of this wilderness. In the meantime, courts, policymakers, and scholars should take care not to generalize about “misde-

⁴¹ See ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 9 (2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf> [<https://perma.cc/U6PV-PBDC>] (noting that “state and local governments have aggressively enforced marijuana laws selectively against Black people and communities”).

⁴² See *infra* notes 167–188 and accompanying text (discussing the possible explanations for racial disparities in the number of theft and assault cases).

⁴³ See Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 643–47 (discussing the uptick in arrests and charges for misdemeanors).

meanors” on the false assumption that the term describes a coherent set of universally criminalized behaviors.

The Article proceeds in four parts. Part I describes the eight jurisdictions in the study and misdemeanor law and practice in each.⁴⁴ Part II presents the empirical results.⁴⁵ Part III highlights the central takeaways from the empirical analysis.⁴⁶ Part IV explores the implications of the analysis for our understanding of misdemeanor offenses and the misdemeanor system.⁴⁷

Although we believe that the cross-jurisdictional analysis is illuminating, it is important to caution, at the outset, against drawing simple comparisons across these jurisdictions. The degree of local variation in both misdemeanor law and practice is extreme. Differences in demographics and local practice influence misdemeanor process and outcomes in ways for which we cannot control. The suboptimal state of criminal justice data infrastructure complicates things further. Nonetheless, we hope to offer a platform for others to work from, and to open the empirical window on the workings of misdemeanor justice a bit farther.

I. EIGHT MISDEMEANOR SYSTEMS

A. *The Eight Jurisdictions*

The eight jurisdictions used in this analysis were chosen largely because we had access to detailed, individual-level court records from each. Fortuitously, though, they are diverse in terms of geography, population, and racial demographics. They include the densely populated urban districts of Philadelphia, Chicago, and Houston; San Antonio, a medium-sized city with a large Hispanic population; the small cities of Louisville and Fairfax; and the predominantly white rural counties of Kentucky and Virginia. The populations and racial composition of the jurisdictions are shown below in Table 1.⁴⁸

⁴⁴ See *infra* notes 48–91 and accompanying text.

⁴⁵ See *infra* notes 92–139 and accompanying text.

⁴⁶ See *infra* notes 140–164 and accompanying text.

⁴⁷ See *infra* notes 165–199 and accompanying text.

⁴⁸ Because the most recent year for which complete data were available in every jurisdiction during our research was 2013, several of our analyses focus on that year. *Population Estimates by Age, Sex, Race, and Hispanic Origin*, U.S. CENSUS BUREAU, <https://www.census.gov/newsroom/press-kits/2018/estimates-characteristics.html#> [<https://perma.cc/F72H-T4JP>]. In some cases, the sum of the white, black, and Hispanic populations is greater than the total. This is likely because the category “Hispanic” is not exclusive of “white” or “black”; some people will have self-identified as two of the three.

Table 1: Jurisdiction Demographics

Jurisdiction	Data Years	Major City	Pop.	White	Black	Hisp.
Bexar County, TX	2011-2016	San Antonio	1.8M	85%	8%	59%
Harris County, TX	2011-2013	Houston	4.3M	71%	20%	42%
Philadelphia County, PA	2011-2015	Philadelphia	1.5M	45%	45%	13%
Cook County, IL	2011-2013	Chicago	5.2M	66%	25%	25%
Jefferson County, KY	2011-2016	Louisville	0.7M	74%	21%	5%
Rural KY	2011-2016	N/A	2.6M	93%	5%	3%
Fairfax County, VA	2011-2016	Fairfax	1.1M	67%	10%	16%
Rural VA	2011-2016	N/A	2.5M	83%	14%	3%

Note: The race percentages do not sum to one because both white and black defendants may also identify as Hispanic.

In addition to analyzing the court records, we also interviewed defenders, prosecutors, judges, clerks, and other knowledgeable criminal justice practitioners in each jurisdiction. These interviews provided information about local misdemeanor practices that helps to illuminate the empirical results.

B. Common Elements in Misdemeanor Law and Practice

To some extent, it is possible to describe misdemeanor criminal justice across these eight jurisdictions in common terms. To start, a body of federal constitutional law provides common legal scaffolding. Most core constitutional protections for criminal defendants apply to felony and misdemeanor proceedings alike, including the prohibitions on unreasonable searches and seizures,⁴⁹ coerced self-incrimination,⁵⁰ and excessive bail;⁵¹ the right to confrontation and cross-examination;⁵² and the due-process requirement that the state prove every element of the offense beyond a reasonable doubt.⁵³ In other arenas, the Supreme Court has developed misdemeanor-specific jurisprudence. It has declined to interpret the Fourth Amendment as prohibiting warrantless arrest for minor, non-violent crimes—although states may certainly do so.⁵⁴ Warrantless

⁴⁹ U.S. CONST. amend. IV.

⁵⁰ *Id.* amend. V.

⁵¹ *Id.* amend. VIII.

⁵² *Id.* amend. VI.

⁵³ *Id.* amend. V; *In re Winship*, 397 U.S. 358, 364 (1970) (holding that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”).

⁵⁴ *Atwater v. City of Lago Vista*, 532 U.S. 318, 354–55 (2001) (holding that the Fourth Amendment did not prohibit arrest for a seat-belt violation). An arrest based on probable cause will not vio-

home entry to effect a misdemeanor arrest “should be rare,” but the Court has stopped short of holding that it will always be unconstitutional.⁵⁵ Once charged, a person accused of a misdemeanor has the Sixth Amendment right to a jury trial only if the offense is punishable by more than six months’ imprisonment or if the authorized penalties, in combination, are “so severe as to indicate that the legislature considered the offense serious.”⁵⁶ The jury must be constituted of at least six jurors.⁵⁷ There is no Sixth Amendment right to counsel unless the adjudication results in an actual sentence of imprisonment (including a suspended sentence).⁵⁸ An uncounseled conviction may later be used for purposes of sentencing enhancement in future criminal proceedings so long as the uncounseled conviction required the state to prove the underlying charge beyond a reasonable doubt.⁵⁹

The substantive statutory law defining misdemeanor offenses also has common features across our eight jurisdictions.⁶⁰ Each defines the category “misdemeanor” in terms of the maximum sentence of imprisonment authorized, which is one year everywhere except Pennsylvania.⁶¹ Each state’s penal code contains several hundred offenses explicitly designated as misdemeanors, and others identifiable as misdemeanors because of the authorized sentence.⁶² Beyond the penal code, there are many hundreds of additional misdemeanor offenses scattered throughout each jurisdiction’s statutes, including heavy concentrations of traffic and regulatory offenses. In addition, each state authorizes

late the Fourth Amendment even if it violates state law. *Virginia v. Moore*, 553 U.S. 164, 177–78 (2008) (holding that the Fourth Amendment was not violated when police officers arrested an individual for driving with a suspended license even though the officers should have issued a summons under state law).

⁵⁵ *Stanton v. Sims*, 571 U.S. 3, 7 (2013) (holding that a police officer who made such entry was entitled to qualified immunity in a § 1983 action because the law governing constitutionality of such entries was not “clearly established”).

⁵⁶ *Lewis v. United States*, 518 U.S. 322, 326 (1996). The fact that multiple charges may result in an aggregate sentence of more than six months does not trigger the jury trial right. *Id.* at 322–23.

⁵⁷ *Ballew v. Georgia*, 435 U.S. 223, 244–45 (1978) (holding that a jury of fewer than six jurors deprives the defendant of the right to trial by jury).

⁵⁸ *Alabama v. Shelton*, 535 U.S. 654, 657, 674 (2002); *see also* *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (limiting the right to counsel under the Sixth Amendment to criminal defendants facing imprisonment); *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (stating that in misdemeanor cases “that end up in the actual deprivation of a person’s liberty, the accused will receive the benefit of ‘the guiding hand of counsel’”).

⁵⁹ *Nichols v. United States*, 511 U.S. 738, 748–49 (1994).

⁶⁰ The remainder of the discussion in this section and in Part I.C synthesizes legal information and information derived from telephone interviews with local practitioners that is documented in greater detail in Appendix A.

⁶¹ 730 ILL. COMP. STAT. ANN. 5/5-4.5-55 (West 2019); KY. REV. STAT. ANN. § 532.090 (West 2019); 18 PA. STAT. AND CONS. STAT. ANN. §§ 106(b)(6), 1101(4) (West 2019); TEX. PENAL CODE ANN. § 12.21 (West 2019); VA. CODE ANN. § 18.2-11 (2019).

⁶² *See infra* Table 2.

its municipalities to define criminal municipal offenses (by ordinance) that are punishable as misdemeanors (they may either be classified as “misdemeanors” or classified in other terms but subject to equivalent punishment).⁶³ Many do, and municipal offenses tend to overlap significantly with state statutory misdemeanors.

Misdemeanor case processing in each jurisdiction is characterized by informality, volume, and haste. Interviewees from several jurisdictions report that pretrial detention has an outsized effect on case outcomes, because those detained will often plead guilty for time served in order to obtain release, whereas those not in custody are more willing to draw out a case.⁶⁴ Recent empirical work supports that proposition.⁶⁵ Dismissal rates for non-detention cases are reportedly high, particularly as more time elapses, because witnesses regularly fail to appear.⁶⁶

A misdemeanor case begins with either an arrest, a citation, or a summons.⁶⁷ Those arrested will either be released, or they will be detained until the case is resolved. The most common mechanisms of pretrial release in our jurisdictions were release on recognizance (ROR), where a person simply promises to return to court; release on an unsecured money bond; or release on a secured cash bond that requires up-front payment (cash bail). Bail hearings are generally held within forty-eight hours of arrest.⁶⁸ A judicial officer makes a determination of probable cause, explains to each defendant the charge(s) against him, and sets a bond or conditions of release. None of our jurisdictions

⁶³ See *infra* Appendix A. In Pennsylvania, municipalities appear limited to defining “summary offenses” by ordinance, but summary offenses can be punished by comparable fines and sometimes jail. 18 PA. STAT. AND CONS. STAT. ANN. §§ 106(c), 1101.

⁶⁴ Telephone Interview with Alex Bunin, Chief Pub. Def., Pub. Def.’s Office, Harris Cty., Tex. (Aug. 28, 2017); Telephone Interview with Michael Morrissey, Deputy, Cook Cty. Pub. Def. (Oct. 11, 2017).

⁶⁵ Heaton et al., *supra* note 16, at 741–58 (using a natural experiment as well as regression techniques to evaluate the effect of misdemeanor pretrial detention on case outcomes in Harris County, finding that detention significantly increases the likelihood of conviction, and meaningfully increases the likelihood that a person will be rearrested within 180 days).

⁶⁶ See Dobbie et al., *supra* note 16, at 203 (noting that defendants who are released from jail pretrial have a lesser likelihood of being convicted). We unfortunately cannot distinguish true dismissals from other dispositions (like diversion or deferred adjudication resulting in an eventual dismissal) in our data. See *infra* Part II.A.6.

⁶⁷ See Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 334 (2016) (noting the different ways in which criminal cases can begin). There is no uniform definition of an arrest, citation, or summons, though an arrest generally entails custodial transportation and jail booking. See *id.* at 310–11 (offering a “functional definition of arrests”).

⁶⁸ See *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–58 (1991) (holding that courts that “combine probable cause determinations with other pretrial proceedings” must make a determination of probable cause within forty-eight hours after the arrest).

provided defense counsel at bail hearings during the period our data covers (2011 through 2016).

In most jurisdictions, the arrest/summons/citation charge only constitutes the preliminary charge; the prosecuting agency must then decide what formal charges, if any, to file. This prosecutorial determination is among the least transparent features of misdemeanor systems.⁶⁹ The rate at which prosecutors declined arrest charges, sometimes called the “declination rate,” was not visible in our data. Houston is unique in that the police check with the prosecutor’s office over the phone before booking a defendant; thus, the declination rate there is likely to be low.⁷⁰ None of the people we interviewed knew the misdemeanor declination rate in their jurisdiction.⁷¹

Arraignment, a defendant’s initial appearance in the court of jurisdiction, typically happens within a day or two of the bail hearing for defendants in custody and within a month for others. Interviewees in several jurisdictions reported that many cases resolve at this appearance.⁷² Defendants in custody may plead guilty for time served. Others may be eligible for diversion.

Arraignment typically marks the point at which the court appoints defense counsel for the indigent. All eight jurisdictions claim to provide representation for indigent defendants at risk of a carceral sentence, although the mechanisms for providing representation differ, and the numbers alone say little about the quality of representation. Public defenders whom we interviewed described staggering caseloads. None of the jurisdictions provide counsel for offenses not punishable by time in jail.

Nearly all misdemeanor cases in the eight jurisdictions are ultimately dismissed by prosecutors or resolved by guilty plea.⁷³ Some percentage of cases are dismissed outright. Diversion and deferred adjudication are prevalent across jurisdictions, and end either in dismissal—if a defendant complies with all conditions—or in a guilty plea or trial, if she does not. A defendant who is convicted is sentenced to jail time, probation, fines and fees, or some combination.

A last common element in misdemeanor practice across our jurisdictions is reform. In recent years there have been two primary areas of change: bail

⁶⁹ See Alexandra Natapoff, *A Stop Is Just a Stop: Terry’s Formalism*, 15 OHIO ST. J. CRIM. L. 113, 125 (2017) (explaining that the “line between being arrested and being charged . . . is not always so clear on the ground”).

⁷⁰ See Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 860–65 (discussing the prosecutorial system in Harris County, Texas).

⁷¹ Institutional charging practices varied among our jurisdictions. For more information, see *infra* Appendix A.

⁷² Telephone Interview with Mira Baylson, Counsel, Akin Gump Strauss Hauer & Feld LLP (Aug. 25, 2017); Telephone Interview with Alex Bunin, *supra* note 64.

⁷³ This is both reported by interviewees and confirmed by the data. The exception is Philadelphia, where many misdemeanor cases are tried in bench trials. See *infra* Part II.C & Appendix A.

practice and the prosecution of marijuana possession. All eight jurisdictions have pretrial reform efforts underway, efforts centered on limiting the use of money bail, implementing actuarial risk assessment, and reducing rates of pretrial detention.⁷⁴ Many have also curbed arrests and prosecution for first-time

⁷⁴ There is not enough room to catalog all of these efforts here, but briefly: Kentucky and Virginia have each been leaders in pretrial reform and in the use of pretrial risk assessment. *See generally*, e.g., MARIE VANNOSTRAND, VA. DEP'T OF CRIMINAL JUSTICE SERVS., ASSESSING RISK AMONG PRETRIAL DEFENDANTS IN VIRGINIA: THE VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT 6 (2003), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/assessing-risk-among-pretrial-defendants-virginia-virginia-pretrial-risk-assessment-instrument.pdf> [<https://perma.cc/X989-FABT>] (discussing the results of a pretrial risk assessment program in Virginia); MARIE VANNOSTRAND & KENNETH J. ROSE, LUMINOSITY INC., PRETRIAL RISK ASSESSMENT IN VIRGINIA 1–2 (2009), <https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-report.pdf> [<https://perma.cc/W686-ZPTR>] (discussing the duties and responsibilities of Virginia's pretrial services agencies); Robert Veldman, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L.J. 777, 783–84 (2013) (discussing the various criminal law reforms passed in Kentucky). Kentucky passed state legislation restructuring its pretrial system in 2011. *See* Veldman, *supra*, at 783–84 (discussing the various changes to Kentucky's pretrial system). In Houston (Harris County), the impact-litigation group Civil Rights Corps filed a federal class-action lawsuit challenging the constitutionality of the misdemeanor bail schedule in 2016. The lawsuit ended in a settlement and dramatic restructuring of Harris County's misdemeanor bail system in 2019. *See, e.g.*, Gabrielle Banks, *Federal Judge Gives Final Approval to Harris County Bail Deal*, HOUS. CHRONICLE (Nov. 21, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Federal-judge-approves-Harris-County-bail-deal-14853781.php> [<https://perma.cc/FX86-EU6D>] (describing the “historic bail reform agreement” that “set[s] in place new protections for people accused of minor offenses in the country's third largest criminal justice system”). Harris County has also piloted new programs providing defense representation at bail hearings and implementing a pretrial risk assessment tool. Mihir Zaveri, *Harris County to Place Public Defenders at Bail Hearings*, HOUS. CHRON. (Mar. 14, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-to-place-public-defenders-at-bail-11002089.php> [<https://perma.cc/2Y6G-8BYU>]. Philadelphia has been awarded a MacArthur Grant to pursue initiatives to improve pretrial practice and reduce its pretrial jail populations, several of which are underway. Press Release, Phila. Dep't of Prisons, Office of Criminal Justice, Office of the Mayor, City Awarded \$4 Million by MacArthur Safety and Justice Challenge (Oct. 24, 2018), <https://www.phila.gov/2018-10-24-city-awarded-4-million-by-macarthur-safety-and-justice-challenge/> [<https://perma.cc/ZBF4-3KFR>]. The election of District Attorney Larry Krasner in 2018 further altered Philadelphia bail practice. *E.g.*, Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-Level Crimes. Here's What Happened Next*, PHILA. INQUIRER (Feb. 19, 2019), <https://www.inquirer.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html> [<https://perma.cc/P9Z7-RA33>]. And in Chicago, the Chief Judge of the Cook County Circuit Court issued a new court rule in July 2017 designed to “ensure no defendant is held in custody prior to trial solely because the defendant cannot afford to post bail.” *General Order No. 18.8A—Procedures for Bail Hearings and Pretrial Release*, CIR. CT. OF COOK COUNTY, ILL. (July 17, 2017), <http://www.cookcountycourt.org/Manage/DivisionOrders/ViewDivisionOrder/tabid/298/ArticleId/2562/GENERAL-ORDER-NO-18-8A-Procedures-for-Bail-Hearings-and-Pretrial-Release.aspx> [<https://perma.cc/H7RJ-Y96X>]. Civil Rights Corps, in partnership with the MacArthur Justice Center, has also filed a class-action suit challenging money bail practices in Cook County, and the Illinois Supreme Court made a new statewide rule change to restrict the use of money bail and increase rates of pretrial release. *Cook County, IL: Bail*, CIV. RTS. CORPS, <http://www.civilrightscorps.org/work/case/cook-county-il-bail> [<https://perma.cc/5CFR-UNGHI>]; *Illi-*

possession of marijuana. These changes mean that our data may not entirely reflect current practice. But they do provide context for the current reform efforts.

C. Variation in Misdemeanor Law and Practice

Notwithstanding the common elements of misdemeanor law and practice across our eight jurisdictions, there is also significant variation. To begin with, the very definition of a “misdemeanor” varies. Everywhere except Pennsylvania, misdemeanors are those offenses punishable by a maximum of one year’s imprisonment, but in Pennsylvania they are punishable by up to five years and/or a \$10,000 fine. Misdemeanors in Pennsylvania consequently include more serious offenses such as involuntary manslaughter and some drug distribution offenses.⁷⁵

A second point of variance is the relationship between state and municipal law in each place. Each of the states in our study permits municipalities to enact their own criminal offenses, which tend to overlap with the state’s penal code. Some of these municipal offenses are designated as “misdemeanors.” Others are called “violations” or “summary offenses.” Sometimes they carry potential jail sentences, and sometimes not.⁷⁶ To make matters more complicated, every jurisdiction has a different arrangement for channeling these various offense classes into court. In some places they are all handled together in the same courts; other jurisdictions divide them into subclasses that are funneled into multiple local court systems.⁷⁷

There is also significant variation in how cases progress through court.⁷⁸ In Texas and Kentucky, defendants have a state-constitutional right to bail.⁷⁹ In

nois Supreme Court Issues Substantial Rule Changes Regarding State’s Bail and Bond System, ILL. STATE BAR ASSOC. (Mar. 11, 2019), <https://www.isba.org/barnews/2019/03/illinoissupremecourtissuessubstanti> [<https://perma.cc/6ND5-SXK8>] (reporting on rule changes enacted to align with recent revisions of the bond system).

⁷⁵ 18 PA. STAT. AND CONS. STAT. ANN. § 2504 (involuntary manslaughter); 35 PA. STAT. AND CONS. STAT. ANN. § 780-113 (West 2019) (*inter alia*, distribution of adulterated controlled substances).

⁷⁶ Texas municipal codes, for instance, include criminal offenses that are designated as Class C misdemeanors but do not carry jail sentences. SAN ANTONIO, TEX., CODE chs. 3–6, 10–12, 15, 16, 21, 22, 31, 34–36 (2020); TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2019). The Philadelphia municipal code, by contrast, includes offenses that do carry jail sentences but that are not explicitly designated as misdemeanors. *E.g.*, PHILA., PA., CODE ch. 10-100, § 10-115 (2020) (providing that “[i]n addition to any fine, imprisonment for not more than 90 days may be imposed for a violation of § 10-104.2 [prohibiting vicious animals on city playgrounds]”).

⁷⁷ In Kentucky and Virginia, state misdemeanors and municipal offenses are handled together in the “district courts.” In Texas, by contrast, jailable misdemeanors are handled in the “County Courts at Law,” although non-jailable misdemeanors (both state and municipal) are handled in justice-of-the-peace (JP) and municipal courts. In Philadelphia and Chicago, state-law offenses and municipal offenses are handled in the same court but on separate dockets. *See infra* Appendix A.

⁷⁸ For details and sources, see *infra* Appendix A.

⁷⁹ KY. CONST. § 16; TEX. CONST. art. I, § 11.

the other states, courts can order a defendant detained pretrial under certain conditions. Bail bondsmen are prevalent in Texas and Virginia, play a more limited role in Philadelphia and Chicago due to those jurisdictions' use of a deposit system, and have been abolished in Kentucky. Philadelphia is an outlier in adjudication procedure; a much higher percentage of misdemeanor cases go to trial than elsewhere due to a culture of expedited bench trials. Diversion and deferred adjudications are common everywhere but work quite differently from place to place.

Table 2 summarizes key legal and institutional features of misdemeanor case processing across the eight jurisdictions we studied. The table synthesizes information that is presented more fully, and with applicable source citations, in Appendix A. The discussion will address relevant jurisdictional differences in more depth as it proceeds.

Table 2: Legal and Institutional Features of Misdemeanor Adjudication⁸⁰

	PA/ Philadelphia	IL/ Chicago	TX	VA	KY
<i>State-Law Misdemeanors</i>					
Maximum carceral sentence	5 yrs.	1 yr.	1 yr.	1 yr.	1 yr.
Maximum fine (for an individual)	\$10,000	\$2,500	\$4,000	\$2,500	\$500
Approx. number of misdemeanors in penal code	212	206	162	290	145
Traffic misdemeanors in penal code	None	None	DUIs	DUIs	DUIs
Approx. number of misdemeanors in other statutes	840	860	600	830	330
Approx. number of state traffic misdemeanors	36	111	139	135	14
Classification scheme	1st, 2nd, 3rd degree, summary offenses	Classes A, B, C, petty offenses, business offenses	Classes A, B, C	Classes 1, 2, 3, 4, traffic infractions	Classes A, B, violations
<i>Municipal vs. State Law</i>					
Municipality can enact overlapping offenses?	Yes	Yes, if not preempted or contra state policy	Law says no, but they do (same penalty)	Yes; penalties cannot exceed state penalty	Yes; penalty must be identical to state penalty
Municipality codes include "misdemeanors"?	Yes (plus summary offenses,	Yes	Yes (Class C)	Yes	Yes (plus violations)

⁸⁰ For additional details and sources, see *infra* Appendix A.

	PA/ Philadelphia	IL/ Chicago	TX	VA	KY
	violations)				
Municipality codes include jailable offenses?	Yes	Yes	No	Yes	Yes (but few)
What are most traffic offenses?	Summary offenses	Municipal misdemeanors	State-law misdemeanors (Class C)	Non-criminal infractions (state or muni)	Violations
<i>Institutional Structure</i>					
Court(s) that handle(s) state-law misdemeanors at the trial level	Municipal Court	Dailey Center, 555 W. Harrison, branch courtrooms, Criminal Court	Class A/B: County Courts at Law; Class C: Justice-of-the-Peace & Municipal Courts	District Courts	District Courts
Indigent defense	Public Defender	Public Defender	Class A/B: Public Defender (limited), appointed counsel; Class C: none	Public Defender/ Court-appointed from list	Public Defender
Court(s) that handle(s) municipal offenses	Municipal Court (separate docket)	Dailey Center, branch courtrooms	Justice-of-the-Peace & Municipal Courts	District Courts	District Courts
Agency that prosecutes	District Attorney	City Attorney	District Attorney	Commonwealth Attorney (or arresting officer)	County Attorney
Where traffic offenses are processed	Post-2016: Municipal Court Traffic Division Pre-2017: Traffic Court	Dailey Center "minor traffic rooms"	DUIs in County Courts; most others in Justice-of-the-Peace & Municipal Courts	District Courts	District Courts
<i>Summons vs. Arrest</i>					
Summons-eligible misdemeanor offenses	2 nd / 3 rd degree misdemeanor, 1st degree DUI	Any misdemeanor	All Class C, some A/B	Any misdemeanor	Any misdemeanor
Summons-mandatory misdemeanor offenses	Same (under certain conditions)	None	None	Class 3, 4 misdemeanor; some Class 1, 2 under	Same (under certain conditions)

	PA/ Philadelphia	IL/ Chicago	TX	VA	KY
				certain conditions	
<i>Pretrial Custody</i>					
Right-to-bail state?	No	For those not facing mandatory carceral sentence	Yes	Ambiguous	Yes
Bail bondsmen authorized?	Yes, but rare in Philadelphia	Yes	Yes	Yes	No
Fixed bail schedules authorized?	No	Yes	Yes	No	No
Defense representation at bail hearings?	No	Yes	Harris County: No; Bexar Coun- ty: ?	Mostly No	Mostly Yes
<i>Idiosyncrasies</i>					
	More serious misdemean- ors; waiver track; bail deposit program; separate traffic court (until 2016).		Most traffic offenses, Class C misdeme- anors and all municipal misdeme- anors in justice-of- the-peace & municipal courts.	Traffic infractions are non-criminal.	No bail bondsmen; all state and municipal offenses handled together in District Courts.

D. The Datasets

Our data consist of detailed, individual-level court records from each of the jurisdictions described above. We acquired the data for Philadelphia, Houston, and Kentucky in the course of other research projects.⁸¹ Philadelphia and Houston data were web-scraped from online public court records,⁸² and the

⁸¹ Heaton et al., *supra* note 16 (quantitative study of misdemeanor bail and pretrial detention in Harris County, Texas); Stevenson, *supra* note 16 (quantitative study of bail and pretrial detention in Philadelphia, Pennsylvania). See generally Megan T. Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303 (2018) (quantitative study of bail and pretrial detention in Kentucky after implementation of a risk assessment tool).

⁸² For Philadelphia, Common Pleas Court docket sheets were web-scraped from the Unified Judicial System of Pennsylvania's Web Portal. The dataset for this article contains all cases that originated in municipal court where the most serious original charge is a misdemeanor between the years 2011–2015. *Common Pleas Courts Docket Sheets*, UNIFIED JUD. SYS. OF PA. WEB PORTAL [hereinafter PA DOCKET SHEETS], <https://ujportal.pacourts.us/DocketSheets/CP.aspx> [<https://perma.cc/NA4Q-7R8P>].

Kentucky Administrative Office of the Courts provided the Kentucky data upon request.⁸³ Data for the San Antonio area as well as for all Virginia jurisdictions are publicly available online.⁸⁴ Civil Rights Corps and the Macarthur Justice Project shared the Chicago-area data, which they had previously acquired from Cook County courts pursuant to an open records request.⁸⁵

Depending on the jurisdiction, the data contain hundreds of thousands to more than a million court records describing misdemeanor cases. Each court record, in turn, contains some combination of the following: individual demographic information (sex, age, race), charged offense(s), information relating to bail and pretrial release, information relating to defense representation (i.e. presence of counsel and counsel type—public defender, appointed private, or private), adjudication information, and sentencing information. Because each jurisdiction codifies hundreds of misdemeanor crimes, it was necessary to group them into meaningful categories for the sake of the analysis. We coded the offense descriptions at several levels of generality,⁸⁶ ultimately matching

For Houston, data was web-scraped from the website of the Harris County District Clerk. The dataset contains all misdemeanor cases filed in the Harris County Criminal Courts at Law between the years 2011–2013. OFFICE OF HARRIS CTY. DIST. CLERK—MARILYN BURGESS [hereinafter HOUS. DOCKET SHEETS], <https://www.hcdistrictclerk.com/eDocs/Public/NewUserAcknowledgement.aspx> [https://perma.cc/G6KW-UULW].

⁸³ *Statistical Reports*, KY. COURT OF JUSTICE [hereinafter KY DOCKET SHEETS], <https://courts.ky.gov/aoc/statisticalreports/Pages/default.aspx> [https://perma.cc/HWQ8-KU52]. The data include all cases in which the most serious charge was a misdemeanor between the years 2011–2016.

⁸⁴ VA. JUDICIAL SYS. [hereinafter VA DOCKET SHEETS], <http://www.courts.state.va.us/> [https://perma.cc/CH3M-XNFU]. A private individual has web-scraped and aggregated this data for public use. VA. COURT DATA, <http://virginiacourtdata.org/> [https://perma.cc/7GUW-XDHQ]. The dataset for this article includes all misdemeanor cases filed in the Virginia circuit and district courts between the years 2011–2016. The Bexar County data was downloaded from the website of the District Clerk, and includes all misdemeanor cases filed in the Bexar County district courts between the years 2011–2016. *Reports & Records Searches*, BEXAR CTY. COURTHOUSE, ONLINE SERVS. [hereinafter SAN ANTONIO DOCKET SHEETS], <https://www.bexar.org/254/Reports-Record-Searches> [https://perma.cc/23D9-KNBR].

⁸⁵ Civil Rights Corps obtained the data via a Freedom of Information Act request for all misdemeanor cases in Cook County between the years 2011–2013 [hereinafter CHI. DOCKET SHEETS]. As noted below, the data received is missing several misdemeanor categories. Based on interviews and data analysis, we presume that data received is from the main misdemeanor court. We have omitted Chicago from the analysis when the data were not reliable enough to include.

⁸⁶ We first coded each offense description at a fairly specific level (for example, all offenses that appeared to be resisting-arrest charges were coded as “resisting arrest”; all offenses related to gambling were coded as “gambling”), and then at a more general level, by matching every offense to a more general offense type: DUI, possession of marijuana, other controlled substance offenses, offenses relating to minors, property damage, public-order offenses, regulatory offenses (i.e. violations of regulations governing commercial activity, fishing, hunting, gambling, etc.), prostitution, other sex-related offenses, non-DUI traffic offenses, theft/fraud/burglary offenses, violent offenses, weapons offenses, and miscellaneous offenses. These offense types were then grouped into the following seven categories: drugs, DUI, public-order, theft, traffic, violent, and other.

each offense to seven primary offense categories: drugs, DUI, public-order, theft, traffic, violent, and other.⁸⁷

In each jurisdiction, our dataset contains the misdemeanor cases processed in what we might call the main misdemeanor courts: the state courts that adjudicate most of the offenses designated as “misdemeanors.” Because of the variation in local law and practice, though, the scope of the datasets differs. The Kentucky and Virginia datasets include all state and municipal misdemeanors, including a significant volume of traffic cases.⁸⁸ In the other jurisdictions, the lower courts are more fragmented and the records of the “main misdemeanor courts” are more limited.⁸⁹ Table 3 depicts the offense types that each dataset covers.

⁸⁷ For Philadelphia, San Antonio, and Houston—datasets that contained only several hundred offense descriptions each—we were able to do this coding comprehensively. Unfortunately, the other jurisdictions had “open-form” text entry for inputting the offense data, resulting in wide discrepancies in the shorthand used for describing an offense. For instance, reckless driving at 15-miles-per-hour above the speed limit could be written “R/D-15 MPH OVER,” “RD 15,” “RECKLESS 15MPH,” as well as any permutation of those terms. (Some jurisdictions also included a reference to the statute number of the charged offense, but no jurisdiction had a uniform method for inputting statute numbers either, so there was similar variation among listed statute references.) This resulted in tens of thousands of distinct offense descriptions. We began by coding a random sample of several thousand records and then matched the coded offenses from this random sample back to the complete dataset. In addition, we used a computational method known as “regular expressions” to identify common abbreviations and wordings. (For example, we wrote code to search for all offense descriptions containing the phrase “R/D” and categorized these as reckless driving.) Ultimately, we were able to categorize 92% of offenses in Virginia and more than 99% of offenses in the other jurisdictions. The files we used to code offenses are on file with the authors and available for review or duplication. In addition, Appendix B documents the last stage of our grouping process, enumerating the more specific offense groups that we ultimately included in each of our final seven categories.

⁸⁸ In Kentucky, state and municipal misdemeanors are handled together in the district courts. KY. REV. STAT. ANN. §§ 24A.110, 83A.065 (West 2019). In Virginia, municipal misdemeanors are handled in the district courts, and state-law misdemeanors are handled in the circuit courts, but our data includes both. VA. CODE ANN. §§ 16.1-123.1, 16.1-126, 17.1-513 (2019).

⁸⁹ The Houston and San Antonio datasets, which derive from the County Courts at Law, include all jail-eligible misdemeanors but generally exclude fine-only (“Class C”) misdemeanors, which are processed in JP or municipal court, depending on the arresting agency. TEX. GOV’T CODE ANN. §§ 27.031, 29.003 (West 2019). A handful of Class C misdemeanors, however, do show up in our data. Interviewees explained that Class C cases are occasionally adjudicated in the County Courts at Law if the District Attorney (DA) downgrades a Class A or B arrest charge, or if the Class C charge arises from the same incident as Class A or B charges and so is filed alongside them in the County Court. The Philadelphia dataset includes all misdemeanors, but they are more serious than in other places; they include few traffic and no fine-only offenses. The Chicago dataset includes all state-law misdemeanors except for traffic offenses. This may be because traffic misdemeanors are coded as “vehicle offenses” rather than “misdemeanor offenses” in the court’s database, although they are in fact both. *See* Telephone Interview with Joe Magats, First Assistant, Cook Cty. State Attorney’s Office (Apr. 12, 2018). The Chicago dataset excludes municipal offenses.

Table 3: Case-Types Included in Each Dataset

Max. Pun. 5 Yrs.	Max. Pun. 1 Yr.	Max. Pun. < 1 Yr.	Jailable Traffic	Non-Jailable Traffic	Other Fine-Only
	VA, KY (state + muni offenses)				
	Philadelphia (state offenses only)				
	Chicago (state offenses only)				
	Houston, San Antonio (state + some muni)				

At first, the variation in the scope of the datasets seemed like a major limitation of the data because it is difficult to make cross-jurisdictional comparisons with no common baseline. Eventually, however, we began to view this not as a limitation of the data, but rather as a fundamental feature of misdemeanor justice in the United States, a theme that we take up in Part IV. In the end, an empirical analysis focused on cases adjudicated in the main misdemeanor courts seemed as sensible a level of analysis as any. We have, however, made one modification to enhance consistency across jurisdictions: we have omitted non-DUI traffic offenses from most of the analysis.⁹⁰ Their incidence is reported in Part II.A, and we hope to conduct a more in-depth analysis of misdemeanor traffic offenses in future research. Once non-DUI traffic offenses are excluded, the remaining caseloads exhibit enough consistency across jurisdictions to make meaningful comparison possible.⁹¹ Thus, the unit of analysis in the bulk of this paper is non-traffic misdemeanor cases tried in the relevant jurisdiction’s main misdemeanor courts.

Part II presents a cross-jurisdictional analysis of misdemeanor criminal justice. It is tempting to draw inferences from the comparison, seeking a causal story behind the differences and similarities shown. We encourage the reader—and have endeavored ourselves—to resist this temptation. The jurisdictions in this analysis vary so widely that it would be highly difficult to pinpoint reasons for the differences. Think of this study instead like a butterfly collection: a

⁹⁰ The rationale for this modification is that (1) in each dataset, non-DUI traffic misdemeanors are the largest subcategory of misdemeanors, and (2) traffic offenses are often handled significantly differently from other misdemeanors (many are fine-only and originate with citation instead of arrest, etc.).

⁹¹ See *infra* Part II.A.

presentation of colorful examples within the loosely defined phylum of “misdemeanor criminal justice.” The goal is simply to see what is there.

II. A CROSS-JURISDICTIONAL STUDY OF MISDEMEANOR COURT RECORDS

This Part proceeds in three sections. Section A documents basic features of case processing in each jurisdiction: defendant demographics, case-filing rates, the frequency of cases with multiple charges, defense representation rates, conviction rates, case duration, and racial disparities in case-filing and conviction rates.⁹² Section B presents information about pretrial release and detention.⁹³ Section C synthesizes sentencing data across our eight jurisdictions.⁹⁴

A. Overview Metrics

1. Defendant Demographics

We know that many people find themselves in misdemeanor court—but who are they? In our data, the age and gender composition of defendants across jurisdictions was fairly consistent. In all jurisdictions the average defendant age was between thirty-one and thirty-five, and between 67% and 77% of defendants were male.⁹⁵ Racial composition was more varied, reflecting in part the racial composition of the regions. Rural Kentucky had the highest percentage of white defendants (88%) and the lowest percentage of black defendants (10%);⁹⁶ the converse was true of Chicago (22% of defendants were white and 61% were black).⁹⁷ Hispanic people represented 40% of San Antonio misdemeanor defendants but only a small fraction of defendants in Virginia.⁹⁸ The data do not reliably document the percentage of Hispanic defendants in other jurisdictions. We note, too, that race data were missing in a significant minority of cases in Philadelphia and the Chicago area.

It is well known that the U.S. criminal justice system has a disproportionate impact on people of color,⁹⁹ and the misdemeanor systems in this study are no exception. Relative to the demographics of the general population, black people were overrepresented in the misdemeanor defendant population in eve-

⁹² See *infra* notes 95–126 and accompanying text.

⁹³ See *infra* notes 127–135 and accompanying text.

⁹⁴ See *infra* notes 136–139 and accompanying text.

⁹⁵ See *supra* notes 82–85 and accompanying text (providing datasets for all eight jurisdictions studied).

⁹⁶ KY DOCKET SHEETS, *supra* note 83.

⁹⁷ CHI. DOCKET SHEETS, *supra* note 85.

⁹⁸ SAN ANTONIO DOCKET SHEETS, *supra* note 84; VA DOCKET SHEETS, *supra* note 84.

⁹⁹ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (chronicling the many ways in which the U.S. criminal justice system discriminates against people of color).

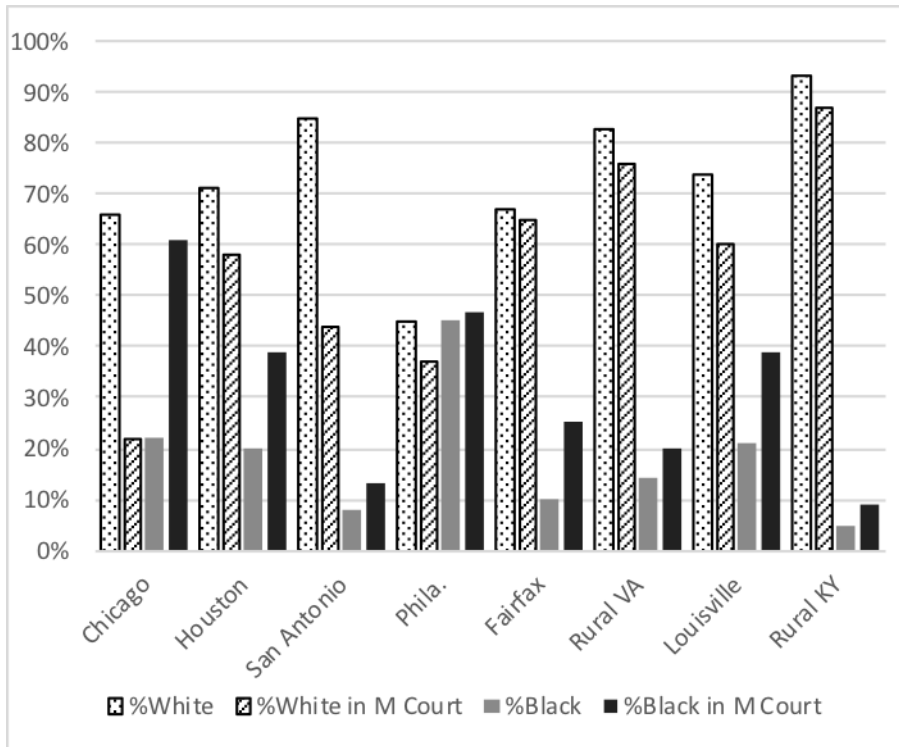
ry single jurisdiction. The most dramatic discrepancy was in the Chicago area, where black people comprised 22% of the general population but 61% of misdemeanor defendants. The discrepancy was smallest in Philadelphia.¹⁰⁰ Table 4 includes the racial demographics of the defendants in our dataset as well as the black/white proportions of each jurisdiction's general population. Figure 1 illustrates the discrepancies in racial demographics.

Table 4: Defendant Demographics

	Chicago	Houston	San Antonio	Philadelphia	Fairfax	Rural VA	Louisville	Rural KY
Age	N/A	31	31	35	N/A	N/A	34	35
Black	61%	39%	13%	47%	25%	20%	39%	9%
(in Gen. Pop.)	22%	20%	8%	45%	10%	14%	21%	5%
White	22%	58%	44%	37%	65%	76%	60%	87%
(in Gen. Pop.)	66%	71%	85%	45%	67%	83%	74%	93%
Hispanic	N/A	N/A	41%	N/A	2%	2%	N/A	N/A
Other/Unknown	14%	3%	2%	13%	8%	2%	1%	4%
Male	N/A	77%	72%	77%	78%	72%	70%	65%

¹⁰⁰ Notably, Chicago (Cook County) is much larger than Philadelphia County in terms of both population (5.2 versus 1.5 million, respectively) and land area (233.2 versus 142.71 square miles, respectively). Population, Housing Units, Area, and Density: 2010 - United States—Congressional District by State; and for Puerto Rico, Am. FactFinder, U.S. Census Bureau, https://factfinder.census.gov/faces/tableserices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_GCTPH1.US04PR&prodType=table [<https://perma.cc/E3X6-DX3V>]; *supra* Table 1.

Figure 1: Racial Representation in Misdemeanor Court



Note: This graph compares the percentage of residents in each jurisdiction that are white/black against the percentage of misdemeanor cases in each jurisdiction that are filed against white/black defendants.

2. Case-Filing Rates

How big is the misdemeanor system? In recent work, we analyzed national-level data to estimate that approximately 13.2 million misdemeanor cases—42.6 per 1,000 people—are filed in the United States each year.¹⁰¹ This estimate includes all “criminal traffic cases.”¹⁰² We find very similar case-filing rates in the jurisdictions studied here. The average number of misdemeanor cases filed in 2013, including all traffic offenses tried in the main misdemeanor court, was 40.4 per 1,000 inhabitants.¹⁰³

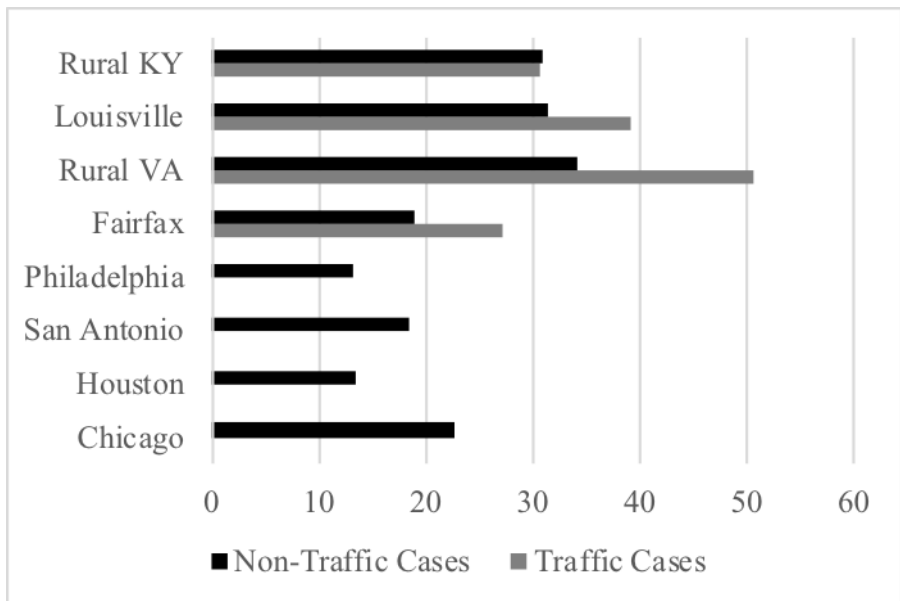
¹⁰¹ Stevenson & Mayson, *supra* note 14, at 745.

¹⁰² *Id.* This term leaves some room for interpretation. See *id.* at 739–40 (noting that “states and localities vary tremendously in what proportion of traffic offenses, if any, they classify as ‘criminal,’ and as ‘criminal misdemeanors’”).

¹⁰³ This is a weighted average across jurisdictions, where the weights correspond to population size.

This is not to say that the misdemeanor case-filing rate is the same everywhere. On the contrary, it varies substantially. In our data, the total number of cases filed per 1,000 inhabitants varied from thirteen in Philadelphia to eighty-five in rural Kentucky. But this large range is mostly due to differences in the number of non-DUI traffic cases handled in the “main misdemeanor courts”: many are handled in Kentucky and Virginia’s main courts, but few are handled in the main misdemeanor courts in other jurisdictions. Figure 2 illustrates 2013 filing rates across our jurisdictions, broken down into traffic and non-traffic cases. We show case-filing rates for traffic offenses only in the jurisdictions where we have access to all of them: Kentucky and Virginia. The case-filing rates for non-traffic misdemeanor cases (including DUIs) also varied, but less so, ranging from thirteen per 1,000 inhabitants to thirty-five. The rest of the analyses in this study exclude non-DUI traffic offenses unless otherwise noted.

Figure 2: Misdemeanor Cases per 1,000 Inhabitants (2013)



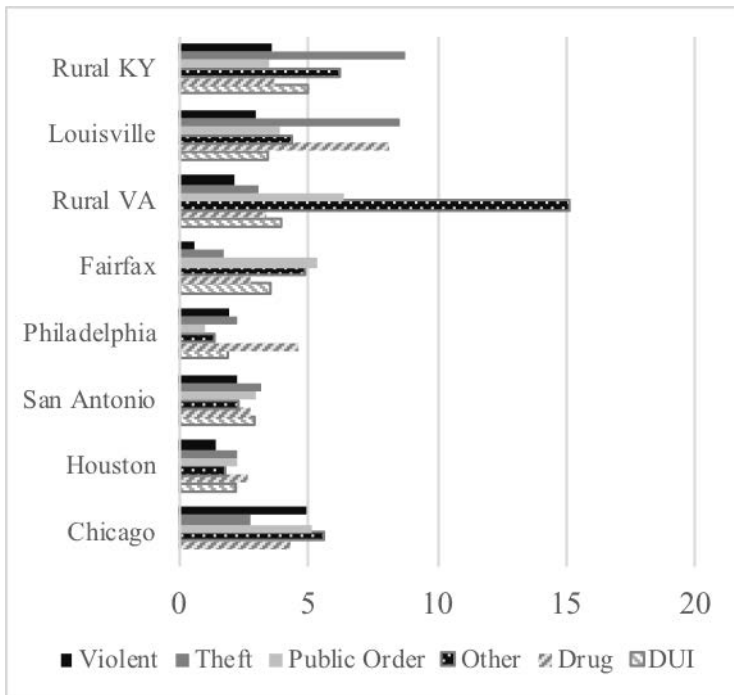
Note: This graph shows case-filing rates (annual number of cases filed per 1,000 inhabitants) for both non-traffic misdemeanor cases and, where available, traffic misdemeanor cases in each jurisdiction. DUI is counted here as a non-traffic case.

In every jurisdiction, the most prevalent offense types by far were possession of marijuana, petty theft, DUI, and simple assault/battery. We consider these the “big four” misdemeanor offenses. These big four offenses account for 50–60% of cases in most jurisdictions (slightly lower in Virginia, in which the data include a larger number of low-level misdemeanor offenses). Other common

misdemeanor offenses were public intoxication, trespass, possession of drug paraphernalia, prostitution, resisting arrest, underage drinking, vandalism, failing to give information or giving false information to police, weapons possession, possession of criminal instruments (e.g. burglary tools), threats/harassment, violation of animal laws, and general regulatory offenses.

Figure 3 shows the 2013 case-filing rates for six general offense categories: violent, theft, public-order, drug, DUI, and “other” offenses.¹⁰⁴ The relative frequency of these different offense categories varied considerably across jurisdictions, but not in a highly consistent way.

Figure 3: Case-Filing Rates by Offense Type



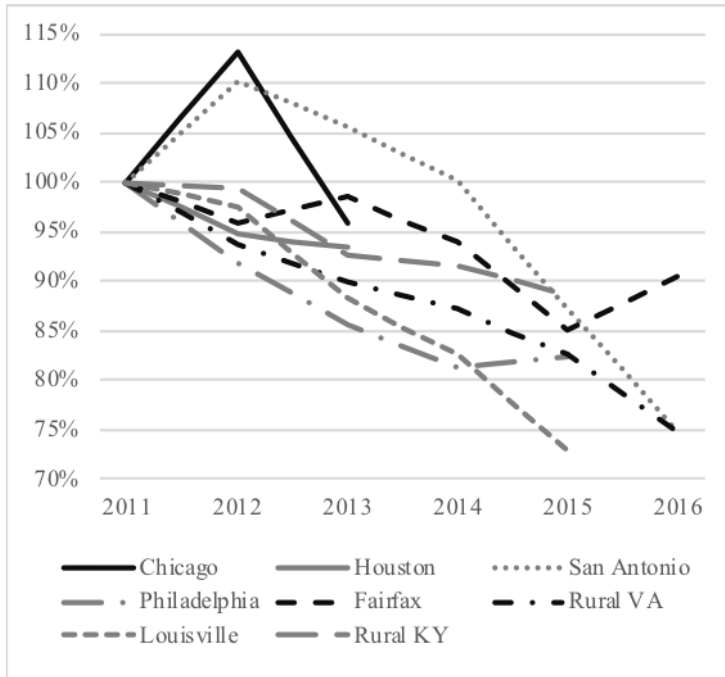
Note: This graph shows the case-filing rates (annual number of cases filed per 1,000 inhabitants) for various misdemeanor offense categories.

Figure 4 shows time trends in the total number of violent-crime, theft, public-order crime, and drug filings per year across the eight jurisdictions. The time trends have been normalized to represent a percentage change from 2011. Although the patterns are noisy, there is an overall downward trend in the yearly number of case filings in all jurisdictions. Louisville, rural Virginia, and San Antonio all saw particularly pronounced declines in the yearly number of mis-

¹⁰⁴ The Chicago data do not include DUIs.

demeanors: a drop of more than 25% since 2011. These trends are consistent with the time trends we have observed in national-level data.¹⁰⁵

Figure 4: Case-Filing Rates by Offense Type



Note: This graph shows a time trend in the misdemeanor case-filing rate (annual number of misdemeanor cases per 1,000 inhabitants). The graph has been normalized so that the case filing rate in each year can be interpreted as the percent of case-filing rate in 2011.

3. Charges Per Case

There was considerable variation in the frequency with which people were charged with multiple offenses in a single case. In Chicago, most cases were single-charge cases,¹⁰⁶ whereas in Philadelphia and Kentucky most cases included multiple charges.¹⁰⁷ The single-charge rate in San Antonio, Houston, and Virginia was 100%,¹⁰⁸ but this reflects case-filing practices rather than arrest practices; although police may arrest a person on multiple charges, each

¹⁰⁵ Stevenson & Mayson, *supra* note 14, at 744–55 (noting the downward trend in rates of misdemeanor case-filings rates and in arrests for likely misdemeanors offenses).

¹⁰⁶ CHI. DOCKET SHEETS, *supra* note 85.

¹⁰⁷ KY DOCKET SHEETS, *supra* note 83; PA DOCKET SHEETS, *supra* note 82.

¹⁰⁸ HOUSTON DOCKET SHEETS, *supra* note 82; SAN ANTONIO DOCKET SHEETS, *supra* note 84; VA DOCKET SHEETS, *supra* note 84.

charge is then filed as a separate case. Interviewees report that court clerks sometimes try to schedule multiple cases arising out of the same arrest in tandem, but this does not always happen.¹⁰⁹

Table 5: Charges per Case

	Chicago	Houston	San Antonio	Philadelphia	Fairfax	Rural VA	Louisville	Rural KY
% cases with 1 charge	76	100	100	45	100	100	48	49
Avg. # charges	1.4	1	1	1.85	1	1	2.04	2.19

4. Defense Representation Rates

The court records did not contain consistent data on defense representation. A defense attorney was listed on more than 90% of cases in Philadelphia, and interviewees reported that misdemeanor defendants always have counsel present unless they insist on self-representation.¹¹⁰ Interviewees from Houston, San Antonio, and Chicago reported that virtually all misdemeanor defendants in those jurisdictions have access to counsel as well,¹¹¹ but we could not independently verify this in the data.

In Virginia, the records document that only 55–60% of misdemeanor defendants had counsel. Though a large majority of the Virginia cases were regulatory or public-order charges unlikely to result in prison sentences, around 8%

¹⁰⁹ Telephone Interview with Nicole Galieto, Special Projects and Training Specialist for the Fairfax Cty. Gen. Dist. Court (Sept. 3, 2017) (with respect to Virginia); Telephone Interview with Susanne Pringle, Senior Staff Attorney, Tex. Fair Def. Project (Apr. 28, 2018) (with respect to Houston); Telephone Interview with Judge Tommy Stolhandske, Bexar Cty., Tex., Cty. Court 11, and Amy Castano, Court Coordinator, Bexar Cty., Tex., Cty. Court 11 (Sept. 14, 2017) (with respect to San Antonio).

¹¹⁰ Telephone Interview with Sarah Allen, Counsel, Def. Ass'n of Phila. (Nov. 6, 2017); Telephone Interview with Mira Baylson, *supra* note 72; Telephone Interview with Derek Riker, Deputy Inspector Gen., City of Phila. (Oct. 2, 2017).

¹¹¹ Telephone Interview with Alex Bunin, *supra* note 64 (with respect to Houston); Telephone Interview with Mike Morrissey, *supra* note 64 (with respect to Chicago); Telephone Interview with Susanne Pringle, *supra* note 109 (with respect to Houston); Telephone Interview with Parlé Roe-Taylor, Chief, Cook Cty. Pub. Def. (Oct. 12, 2017) (with respect to Chicago); Telephone Interview with Judge Stolhandske and Amy Castano, *supra* note 109 (with respect to San Antonio); Telephone Interview with Alexa Van Brunt, Attorney, MacArthur Justice Ctr. (Aug. 25, 2017) (with respect to Chicago).

of those who received a carceral sentence in Fairfax and 11% of those who received a carceral sentence in rural Virginia did not have a defense attorney listed on their docket. It is unclear whether these gaps reflect missing data or missing attorneys.

Attorney information was not available in the Kentucky data. Interviewees reported that a public defender should be appointed for any indigent defendant in Kentucky at risk of a loss of liberty, although actual practice might vary by county.¹¹²

It is important to note that our data do not specify the precise point at which an attorney was appointed and present. Interviews suggest, for instance, that defense representation at bail hearings was relatively rare in the years our data cover.¹¹³ Research in other jurisdictions has found that misdemeanor courts sometimes appoint counsel only after a defendant has announced her intention to plead not guilty.¹¹⁴ A notation reflecting defense counsel alone therefore provides somewhat limited information.

5. Case Duration

Jurisdictions also varied in the amount of time between when the case is first filed and when it is finally disposed. With the exception of the San Antonio area, more than three-quarters of cases in all jurisdictions were resolved within six months.¹¹⁵ In the Houston area, more than a third of cases were resolved within two weeks.¹¹⁶ In Fairfax and rural Virginia, fewer than 7% of cases were decided within two weeks.¹¹⁷ Cases with deferred adjudication do not show a final resolution date until the supervisory period has elapsed, a fact that explains the long time-to-disposition for some cases.

¹¹² Telephone Interview with Melanie Foote, Manager, Ky. Dep't of the Pub. Advocate (Apr. 5, 2018).

¹¹³ See *supra* Table 2; *infra* Appendix A.

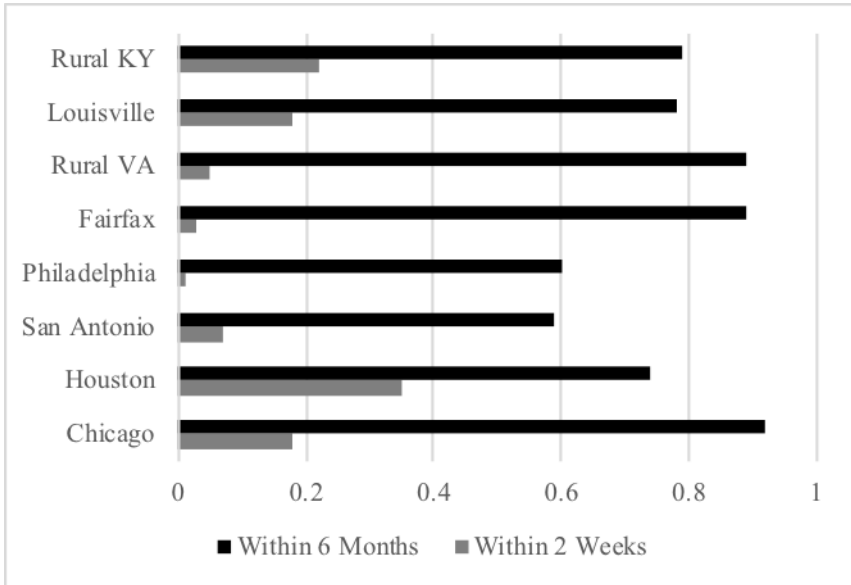
¹¹⁴ See generally State Bar of Ga. Indigent Def. Comm., Report on the Status of Indigent Defense Representation in the Misdemeanor Courts of Georgia (June 18, 2018) (unpublished report) (on file with authors).

¹¹⁵ See *supra* notes 82–85 and accompanying text (providing datasets for all eight jurisdictions studied).

¹¹⁶ HOUS. DOCKET SHEETS, *supra* note 82; PA DOCKET SHEETS, *supra* note 82.

¹¹⁷ VA DOCKET SHEETS, *supra* note 84.

Figure 5: Time to Disposition



Note: This graph shows the fraction of misdemeanor cases that are adjudicated within two weeks and six months, respectively.

6. Trial and Conviction Rates

In all jurisdictions except Philadelphia, only a miniscule percentage of misdemeanor cases were tried.¹¹⁸ Conviction rates varied widely across jurisdictions, from a low of 27% in Chicago to a high of 72% in rural Kentucky. Considering the infrequency of cases going to trial, with the exception of Philadelphia, these conviction rates essentially represent the rate of conviction by guilty plea.

It is important to remember that these numbers represent rates of conviction among cases filed, rather than among arrests. Some of the variation in conviction rates might derive from jurisdictional differences in how many cases prosecutors filter out at the charging stage. In Houston, for instance, an Assistant District Attorney (ADA) is always on call to make charging decisions. Arresting officers promptly call the DA's office to report an arrest, and an ADA determines whether or not to "take" the charges.¹¹⁹ This pre-case-filing filtering mechanism might be part of the explanation for Houston's relatively high

¹¹⁸ Fewer than 1% in all jurisdictions. *See supra* notes 82–85 and accompanying text (providing datasets for all eight jurisdictions studied).

¹¹⁹ Telephone Interview with Alex Bunin, *supra* note 64.

conviction rate. Yet the Kentucky jurisdictions we studied also have high conviction rates, and interviewees report that prosecutors do not make an independent charging decision in Kentucky; the charges at arrest simply proceed to court.¹²⁰

Table 6: Conviction Rates

Chicago	San Antonio	Rural VA	Fairfax	Philadelphia	Louisville	Houston	Rural KY
27%	38%	50%	51%	55%	61%	69%	72%

In cases with no conviction recorded, the case resolution is documented as dismissed, diverted, or adjudication deferred. In San Antonio, 25% of misdemeanors have a deferred adjudication. In the other jurisdictions it is difficult to distinguish between dismissal, diversion, and deferred adjudication with the data available. Our interviews suggest that diversion and deferred adjudication are common in most jurisdictions.

7. Racial Disparities

Figure 6 shows the number of misdemeanor cases filed in 2013 per 1,000 inhabitants, categorized by race and offense. Figure 7, which shows the black-white ratio in the per-capita number of cases filed in 2013 by offense type, shows these disparities even more clearly. For most jurisdictions and most offenses, there is a large racial discrepancy in the per-capita number of cases.

The Chicago area had the most extreme racial disparities.¹²¹ The per-capita misdemeanor case rate for black defendants in Chicago was about five times that of white defendants for violent, theft, and other offenses.¹²² For drug and public-order offenses, the per-capita case rate was about twelve times higher for blacks than whites.¹²³ In contrast, Philadelphia had the lowest rates of racial disparities.¹²⁴ The per-capita case-filing rate in Philadelphia was close to equal for black and white defendants across the various offense categories.¹²⁵ In the other jurisdictions, for most of the other offenses, with the exception of DUIs, which exhibited relatively low racial disparities, the black-white per-capita case-filing ratio ranged from two to four.¹²⁶

¹²⁰ Telephone Interview with Jacob Johnson, Staff Attorney, Boone Cty. Trial Office, Ky. Dep't of Pub. Advocacy (Aug. 10, 2018).

¹²¹ CHI. DOCKET SHEETS, *supra* note 85.

¹²² *Id.*

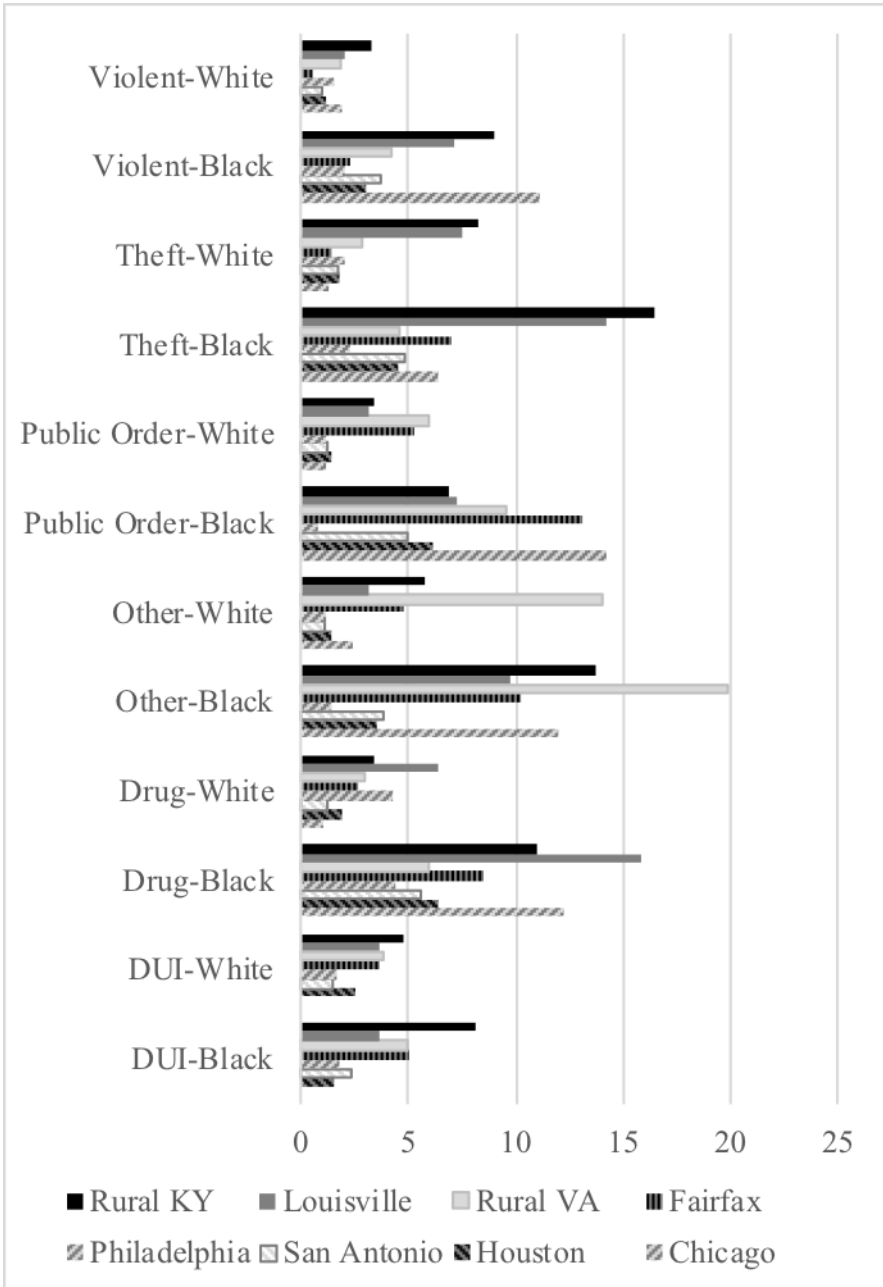
¹²³ *Id.*

¹²⁴ PA DOCKET SHEETS, *supra* note 82.

¹²⁵ *Id.*

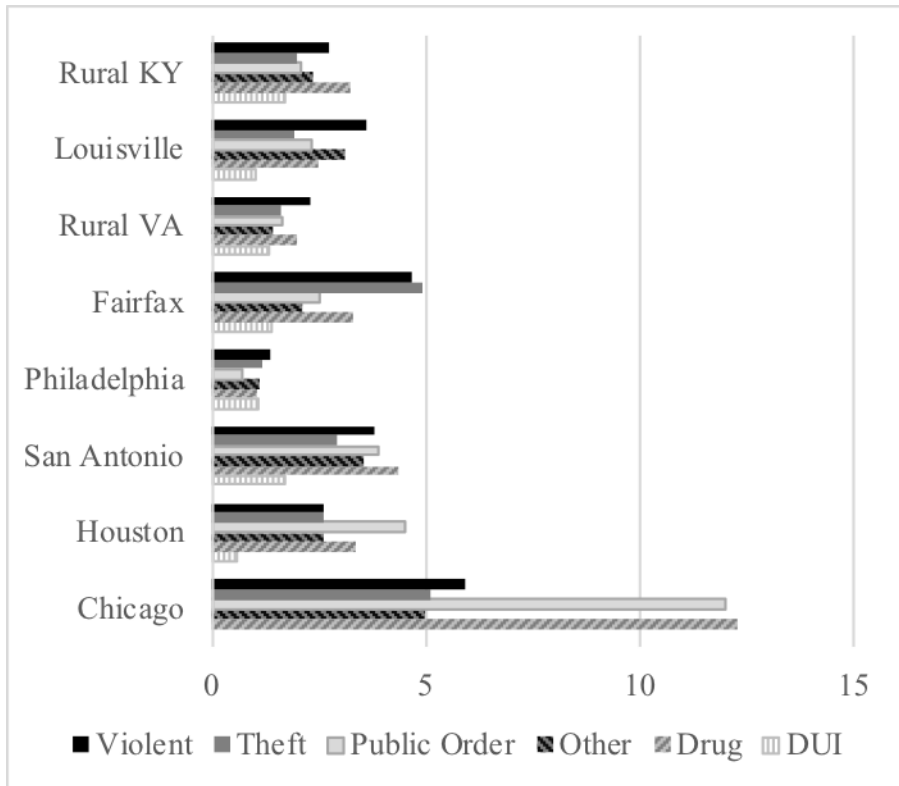
¹²⁶ See *supra* notes 82–85 and accompanying text (providing datasets for all eight jurisdictions studied).

Figure 6: Cases Filed per 1,000 Inhabitants by Race and Offense



Note: This graph shows the case-filing rates by misdemeanor-offense category and race. For example, the white case-filing rate for drug offenses is the annual number of drug cases in which the defendant is white per 1,000 white inhabitants.

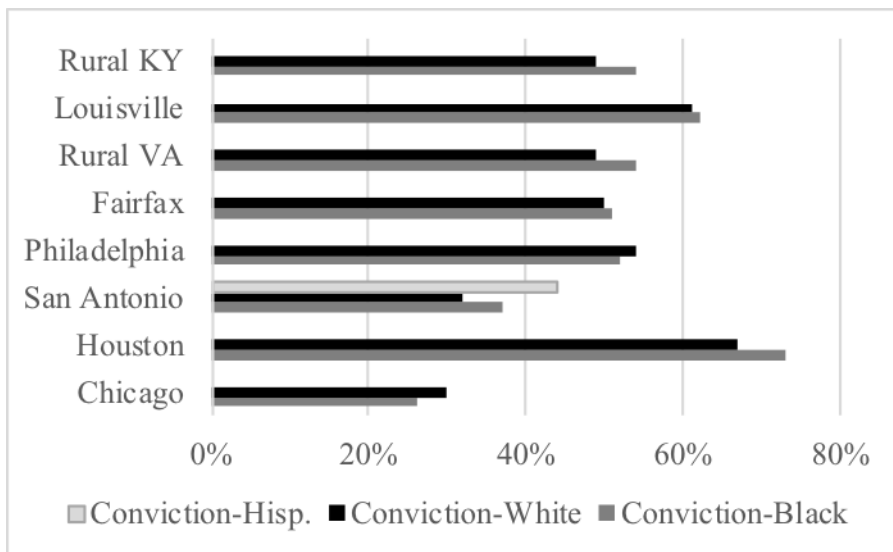
Figure 7: Black-White Case-Filing Rate Ratio



Note: This graph shows the black-white ratio in misdemeanor case-filing rates by offense category. This is defined as the per capita case-filing rate for black defendants divided by the per capita case-filing rate for white defendants. For example, the black-white ratio in theft cases would be the theft case-filing rate for black defendants (the annual number of theft cases in which the defendant is black per 1,000 black inhabitants) divided by the theft case-filing rate for white defendants (the annual number of theft cases in which the defendant is white per 1,000 white inhabitants).

There was much less racial disparity in the conviction rates. Figure 8 shows racial disparities in the likelihood of being convicted. There is no consistent pattern. In several of the jurisdictions the conviction rate for black defendants is higher. In others, the conviction rate is higher for white defendants.

Figure 8: Conviction Rates by Race



Note: This graph shows the percentage of cases that result in a conviction by race.

B. Bond and Pretrial Detention

Virtually all misdemeanor cases in our datasets for the Chicago, Houston, San Antonio, and Philadelphia areas originated as an arrest by a police officer rather than a summons or citation.¹²⁷ In Kentucky, however, about one third of cases originated with a summons or citation,¹²⁸ and 42% and 50% originated with summons in Fairfax and in rural Virginia, respectively.¹²⁹ This discrepancy is partly explained by the kinds of offenses our datasets cover—that is, the kinds of non-traffic offenses adjudicated in the “main misdemeanor courts” in each jurisdiction. In Kentucky and Virginia, jurisdictions with relatively higher rates of cases originating with a summons or citation, our data include all state and municipal misdemeanors.¹³⁰ A substantial proportion of municipal offenses are relatively less serious than the average state-law misdemeanor. In the other jurisdictions, the main misdemeanor court principally adjudicates state-law offenses that carry potential sentences of imprisonment.

Among defendants arrested, booked, and brought to a bail hearing (the large majority of defendants in the Chicago, Houston, San Antonio, and Phila-

¹²⁷ CHI. DOCKET SHEETS, *supra* note 85; HOUS. DOCKET SHEETS, *supra* note 82; PA DOCKET SHEETS, *supra* note 82; SAN ANTONIO DOCKET SHEETS, *supra* note 84.

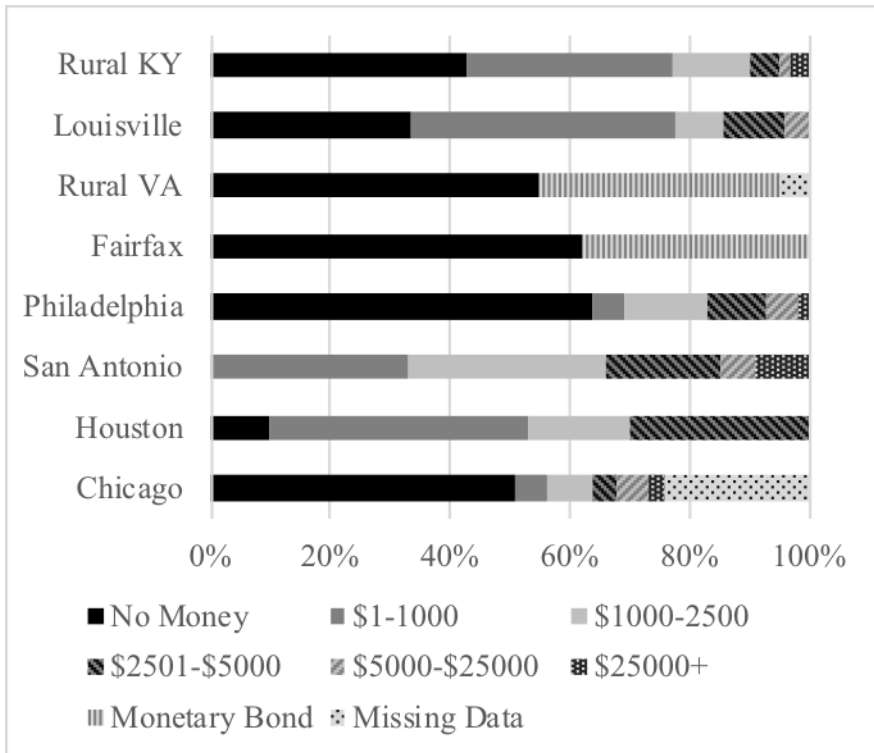
¹²⁸ KY DOCKET SHEETS, *supra* note 83.

¹²⁹ VA DOCKET SHEETS, *supra* note 84.

¹³⁰ KY DOCKET SHEETS, *supra* note 83; VA DOCKET SHEETS, *supra* note 84.

delphia areas and 50–66% of cases in Kentucky and Virginia), there is wide discrepancy in bond practices.¹³¹ Figure 9 shows bond amounts for arrested defendants in each of the eight jurisdictions. The fraction of defendants released without having to pay monetary bond ranges from essentially zero in San Antonio and Houston to near 60% in Fairfax, rural Virginia, Philadelphia, and the Chicago area.¹³² Most bonds are less than or equal to \$5,000, although bonds at \$25,000 and above are not unheard of in most jurisdictions.

Figure 9: Bond Amounts



Note: This graph shows the percentage of misdemeanor cases with bond set at different levels. The sample is limited to misdemeanor cases that result in an arrest and booking; cases in which the defendant is merely issued a summons are omitted from this analysis.

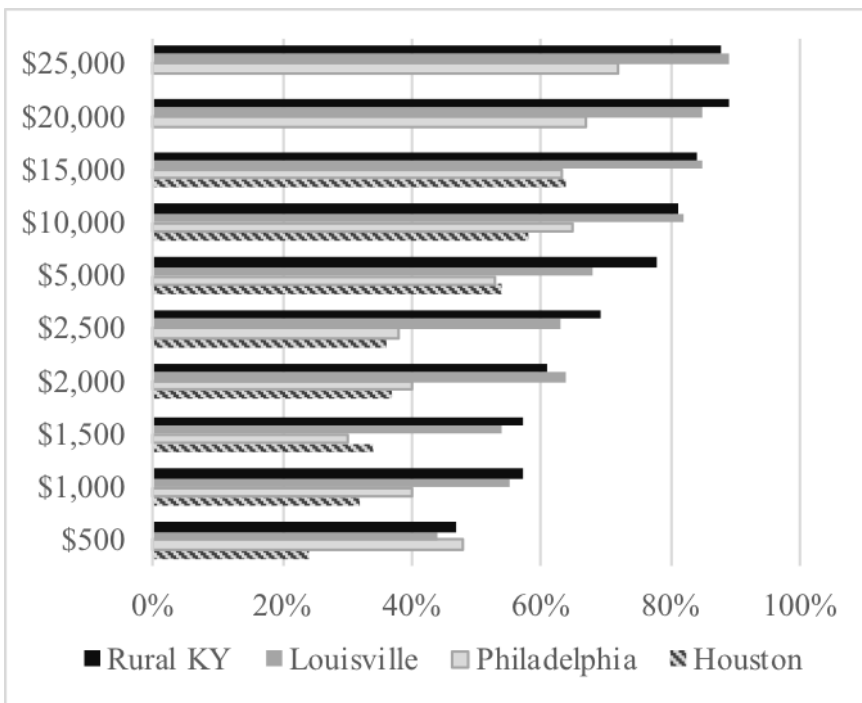
Figure 10 shows the fraction of defendants who remain detained pretrial for at least three days at various levels of bond. Most defendants who remain detained for at least three days are detained until the case is resolved. Even at relatively low amounts of bond—\$500—the fraction who remain detained is

¹³¹ See *supra* notes 82–85 and accompanying text (providing datasets for all eight jurisdictions studied).

¹³² See *supra* notes 82–85 and accompanying text (same).

quite high, ranging from 20–50% in the jurisdictions for which these data are available. In general, the fraction detained increases as bond amounts go up. At \$5,000, 53–78% of defendants remain detained. It is important to note that bond practices vary across these jurisdictions. In Philadelphia, defendants must only pay a 10% deposit to secure release.¹³³ Thus, a defendant with a \$5,000 bond must only pay \$500 to secure her release. In Houston, a defendant can borrow bail money from a bondsman.¹³⁴ In Kentucky, bondsmen have been outlawed.¹³⁵ This likely explains why the detention rates per bond amount are usually higher in Kentucky than in the other jurisdictions.

Figure 10: Fraction of Defendants Detained Three Days or More at Various Bond Amounts



Note: This graph shows the percentage of defendants who are detained for three days or more by bond amount. For example, about 47% of defendants in rural Kentucky with bond set at \$500 are detained for three days or more.

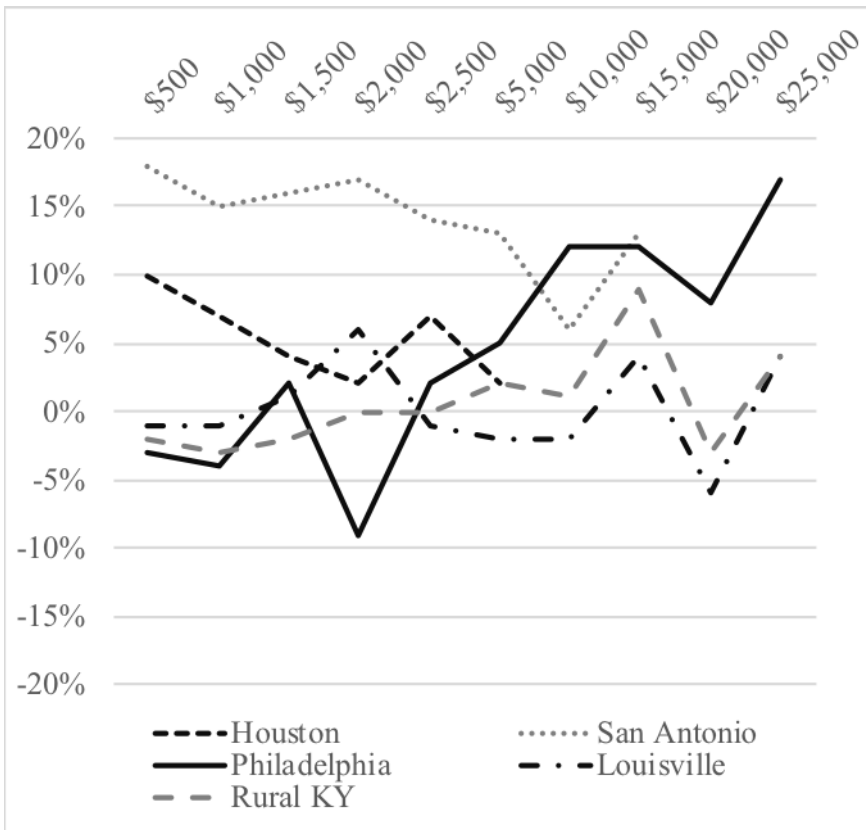
¹³³ Telephone Interview with Alexa Van Brunt, *supra* note 111.

¹³⁴ Cf. TEX. OCC. CODE ANN. §§ 1704.001–.306 (West 2019) (providing regulations of bail bond sureties).

¹³⁵ KY. REV. STAT. ANN. § 431.510(1) (West 2019).

Figure 11 shows racial differences in the likelihood of posting a given bond amount. For each of the common bond amounts, we compare the fraction of white defendants with that bond who post bail with the fraction of black defendants with the same bond who post bail. The graph shows the difference between the fraction of white and black defendants who post at a given bond amount. Although racial disparities vary, the lines in the graph are often above zero, suggesting that white defendants are more likely to post bond than black defendants. This is particularly pronounced in San Antonio and, at higher bond amounts, in Philadelphia. Neither the Louisville area nor rural Kentucky exhibits consistent evidence of racial disparities in bond-posting rates. The difference bounces around between positive and negative and generally remains close to zero.

Figure 11: White-Black Differences in Bail-Posting Rate

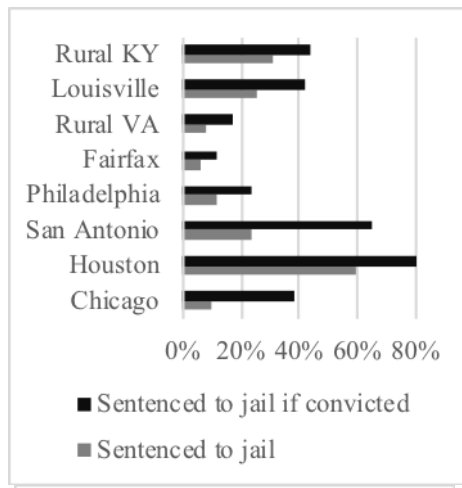


Note: This graph shows racial disparities in the likelihood of posting various amounts of bail. For example, if 60% of white defendants with bail set at \$500 were able to post, but only 40% of black defendants with \$500 bail were able to post, there would be a 20-percentage-point difference in the bail-posting rate shown on the graph.

C. Sentencing

The criminal justice consequences of a conviction vary hugely across jurisdictions. Figure 12 shows that in the San Antonio and Houston areas, respectively, 65% and 80% of all convictions result in a jail sentence.¹³⁶ In Virginia, a much smaller percentage of convictions (12–17%) result in a jail sentence.¹³⁷ The length of the jail sentence also varies, although they all tend to be relatively short. With a median of five days, Chicago has the shortest jail sentences.¹³⁸ Philadelphia and San Antonio have the longest jail sentences, with a median of thirty days.¹³⁹

Figure 12: Incarceration Rates and Lengths



Note: The graph on the left shows the percentage of misdemeanor defendants sentenced to jail, and sentenced to jail if convicted, respectively. The graph on the right shows the median sentence, in days, for those who received a carceral sentence.

Figure 13 shows that there is also considerable variation in the percentage of convicted defendants who are sentenced to probation. This data is only available for four jurisdictions. Fairfax and rural Virginia both place more than 20% of convicted defendants on probation; San Antonio places 35% of convicted defendants on probation, and Houston only places about 15%. The median probation length is one year in all jurisdictions.

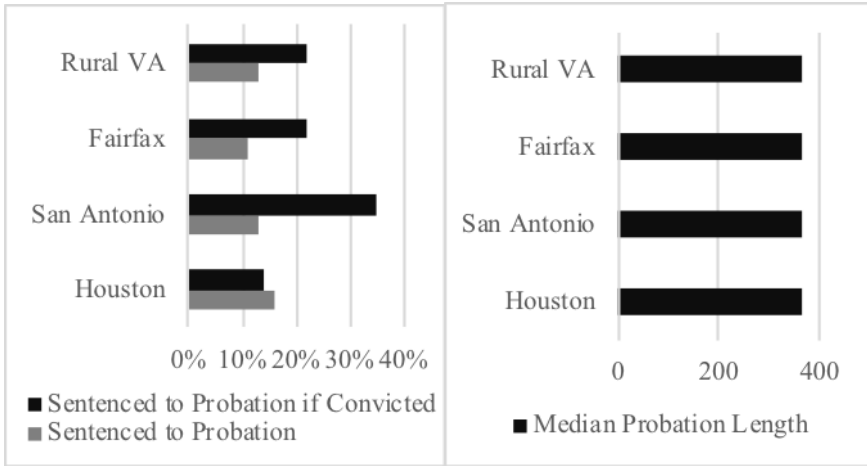
¹³⁶ HOUS. DOCKET SHEETS, *supra* note 82; SAN ANTONIO DOCKET SHEETS, *supra* note 84.

¹³⁷ VA DOCKET SHEETS, *supra* note 84.

¹³⁸ CHI. DOCKET SHEETS, *supra* note 85.

¹³⁹ PA DOCKET SHEETS, *supra* note 82; SAN ANTONIO DOCKET SHEETS, *supra* note 84.

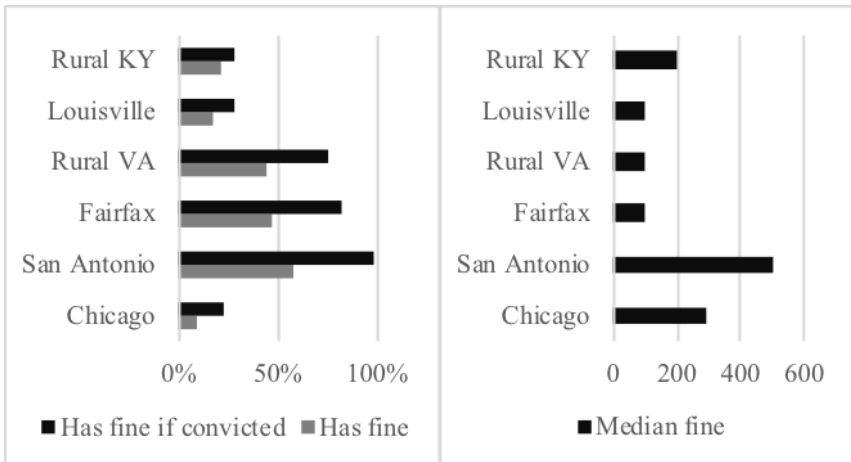
Figure 13: Probation Rates and Lengths



Note: The graph on the left shows the percentage of misdemeanor defendants sentenced to probation, and the percentage sentenced to probation if convicted, respectively. The graph on the right shows the median probation length, in days, among those who were assigned to probation.

Figure 14 shows that there is also considerable variation in the use of fines. Fines are relatively uncommon in Kentucky and Chicago, but ubiquitous and steep in the San Antonio area.

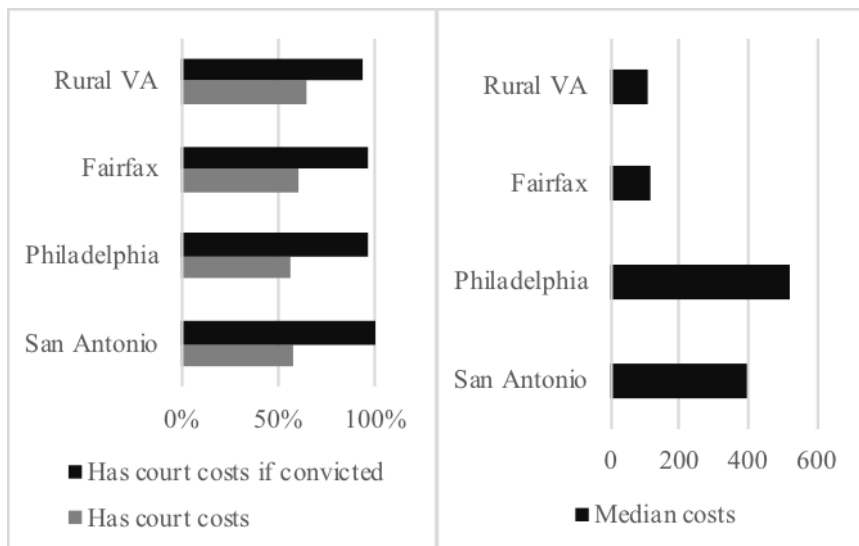
Figure 14: Fines



Note: The graph on the left shows the percentage of misdemeanor defendants who receive a fine, and the percentage of misdemeanor defendants who receive a fine if convicted, respectively. The graph on the right shows the median fine, in dollars, among defendants who received a fine.

Finally, Figure 15 shows that virtually all convicted defendants in the jurisdictions for which these data are available are required to pay court costs if convicted. The median court costs range from around \$100 in Virginia to more than \$500 in Philadelphia.

Figure 15: Court Costs



Note: The graph on the left shows the percentage of defendants who are charged court costs, and the percentage of defendants who are charged court costs if convicted, respectively. The graph on the right shows the median court cost, in dollars, for those who are charged court costs.

III. WHAT THE NUMBERS REVEAL

Several key takeaways emerge from the numbers. For the most part, they substantiate claims about misdemeanor justice that other scholars have made: the misdemeanor systems in these jurisdictions affect a tremendous number of people, and they disproportionately affect people of color.¹⁴⁰ The data also reveal both dramatic variation and structural similarity across misdemeanor systems.

A. *The Scale of Misdemeanor Justice (Again)*¹⁴¹

The first notable fact the data reveal is no surprise: the volume of misdemeanor cases is very high. As noted above, if the 2013 data, averaged across

¹⁴⁰ See generally ALEXANDER, *supra* note 99 (discussing the profound imbalance within the criminal justice system towards people of color).

¹⁴¹ See generally Stevenson & Mayson, *supra* note 14.

jurisdictions, were representative of contemporary practice nationwide, there would be more than 13 million misdemeanor cases filed annually, or 40.4 per 1,000 people. This estimate accords with our prior estimate on the basis of data collected from thirty-four states by the National Center for State Courts (NCSC)¹⁴² as well as with Professor Alexandra Natapoff's national estimate for 2015.¹⁴³ By the NCSC's accounting, misdemeanor cases represent approximately three-quarters of the criminal justice cases processed in the United States.¹⁴⁴

Affirming other estimates of national misdemeanor case-filing rates may seem like an incremental contribution. Nevertheless, given the dearth of empirical information about misdemeanor justice, the consistency of these estimates is reassuring. Prior estimates—our own and others—relied on jurisdictions' self-reporting of case-filing totals.¹⁴⁵ It is not always clear how various jurisdictions tally their misdemeanor cases or what data they use to do so.¹⁴⁶ The fact that an extrapolation from individual records in eight jurisdictions comes out to approximately the same number suggests that the national estimates are on target.¹⁴⁷

The case-level records assessed here are also consistent with our prior finding that the misdemeanor system has been shrinking.¹⁴⁸ Although the timespan of these data is limited, case-filing rates declined for each of the eight jurisdictions over the time they cover. These trends are consistent with national

¹⁴² *Id.* at 745.

¹⁴³ NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 17, at 41, 258; Natapoff, *Misdemeanors 2012*, *supra* note 6, at 1320–21 (suggesting that a report estimating that there are 10.5 million non-traffic misdemeanor cases per year is likely an underestimate).

¹⁴⁴ NAT'L CTR. FOR STATE COURTS, STATEWIDE CRIMINAL CASELOAD COMPOSITION IN 31 STATES 1 (2016), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/Criminal/PDFs/EWSC-2016-CRIM-Page-2-Comp.ashx> [<https://perma.cc/Z7Z9-9DCX>].

¹⁴⁵ *See, e.g.*, Stevenson & Mayson, *supra* note 14, at 736–37 (explaining that the primary source of the misdemeanor data analyzed was “publishable” data from thirty-two states and Washington, D.C. as well as state court publications).

¹⁴⁶ Moreover, the NCSC directs states to follow certain procedures that we did not in this analysis. For instance, it instructs states to count all charges relating to a single incident for a defendant as a single case, *not* to classify a charge as a misdemeanor if the offense is punishable by incarceration for more than one year, and *not* to count “violations of local ordinances” as misdemeanors (even if they are designated as “misdemeanors” by local law). COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING 14–22, 34–37 (2019), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting.ashx> [<https://perma.cc/V95S-ZZM4>].

¹⁴⁷ Prior estimates were calculated by tabulating misdemeanor caseload in states that report such information to the NCSC, and inferring misdemeanor caseload for non-reporting states based on similar reporting states and/or information reported by state courts. NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 17, at 258; Stevenson & Mayson, *supra* note 14, at 736–37.

¹⁴⁸ Stevenson & Mayson, *supra* note 14, at 764–69.

data.¹⁴⁹ They are also consistent with the trends in misdemeanor arrest rates recently reported in California, New York, Seattle, St. Louis, Louisville, Durham, and Prince George's County.¹⁵⁰

The ongoing decline in misdemeanor case-filing rates does stand in tension with the narrative of an expanding misdemeanor system that some recent misdemeanor scholarship has suggested.¹⁵¹ As we have discussed elsewhere, misdemeanor scholarship has been heavily influenced by empirical work in New York City, where the misdemeanor system experienced considerable growth in the 1990s and early 2000s.¹⁵² We hope that future scholarship will explore the causes of the declining caseloads and their implications for how we understand misdemeanor justice.

B. Misdemeanor Injustice

The data surveyed here also, unfortunately, affirm conventional wisdom about the effects of money bail and the disproportionate racial impact of misdemeanor systems.¹⁵³ The use of money bail resulted in pretrial detention for the majority of defendants even with bail set at relatively low amounts. At \$500 bail, 25% of Houston defendants and almost 50% of Philadelphia, Louisville, and rural Kentucky defendants remained jailed for three days or more.¹⁵⁴ At \$5,000 bail, roughly 55% of Philadelphia and Houston defendants,¹⁵⁵ 68% of Louisville defendants,¹⁵⁶ and almost 80% of rural Kentucky defendants remained in jail for at least three days.¹⁵⁷ This is despite the fact that Philadelphia defendants need only have posted 10% of the bail amount to be released, and commercial bail

¹⁴⁹ See *id.* (reporting that the number of misdemeanor arrests and cases is declining nationwide).

¹⁵⁰ See Jacob Gershman, *Arrests for Low-Level Crimes Are Plummeting, and the Experts Are Flummoxed*, WALL ST. J. (Oct. 6, 2019), <https://www.wsj.com/articles/arrests-for-low-level-crimes-are-plummeting-and-the-experts-are-flummoxed-11570354201> [<https://perma.cc/9MRG-SR5W>] (discussing the falling rates of misdemeanor cases in New York, California, St. Louis, Durham, and Seattle); *supra* notes 25–26.

¹⁵¹ See, e.g., Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 620–21 (describing urban courts as “flooded . . . with low-level cases”); Roberts, *supra* note 9, at 281 (suggesting that “misdemeanors are . . . on the rise”).

¹⁵² Stevenson & Mayson, *supra* note 14, at 765; see also PATTEN ET AL., *supra* note 25, at 13 (noting that “[f]rom 1980 to 2010, the rates of misdemeanor arrests in New York City surged from 1,389 to 4,351 per 100,000, a 213 percent increase”).

¹⁵³ See generally David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1885 (2018) (discussing and analyzing the racial biases towards black defendants in judges’ bail decisions and the resulting consequences).

¹⁵⁴ HOUS. DOCKET SHEETS, *supra* note 82; KY DOCKET SHEETS, *supra* note 83; PA DOCKET SHEETS, *supra* note 82.

¹⁵⁵ HOUS. DOCKET SHEETS, *supra* note 82; PA DOCKET SHEETS, *supra* note 82.

¹⁵⁶ KY DOCKET SHEETS, *supra* note 83.

¹⁵⁷ *Id.*

bondsmen operate in Houston.¹⁵⁸ The data suggest that even these low-end bail amounts are beyond the reach of many misdemeanor defendants, regardless of whether there is a deposit or commercial surety regime in place.

The racial disparities in this data are equally stark. With a single exception (DUIs in the Houston area), the per-capita misdemeanor case-filing rate is higher for black people than for white people *for every offense type, in every jurisdiction*. For most offenses, the per-capita case-filing rate for blacks is two to four times that of whites. The result is that, relative to the general population, black people are overrepresented among misdemeanor defendants in every single jurisdiction. The disparities are least marked in Philadelphia. They are most pronounced in Chicago.

We cannot say to what extent these disparities result from underlying differences in rates of offending, and to what extent they result from underlying differences in rates of arrest and charging that are unrelated to differences in offending. Such differences in arrest or charging rates might arise from concentrated policing in minority neighborhoods,¹⁵⁹ or from implicit or explicit racial bias. They also might depend on whether the suburban towns surrounding a major city—which often have higher white populations and less concentrated street-policing—are included in that city’s misdemeanor court data. Misdemeanor courts in the Chicago and Houston areas include the surrounding suburban towns; Philadelphia misdemeanor courts serve only Philadelphians. Disentangling the source of the disparities, however, would require a great deal more research.

Finally, some jurisdictions also demonstrate significant racial disparities in the likelihood of pretrial detention (of at least three days) at a given monetary amount. At bail amounts of \$5,000 or less, black defendants are thirteen to eighteen percentage points more likely to remain in jail than white defendants in San Antonio.¹⁶⁰ In Philadelphia, black defendants are five to seventeen percentage points more likely to remain detained at bail amounts of at least \$5,000.¹⁶¹ As noted above, the fact that this pattern is found at higher bail amounts in Philadelphia may be due to the deposit system, which means that the functional bail amount in any case is 10% of that officially set. Interestingly, there is no discernable pattern of racial disparity in the likelihood of posting bail in Kentucky.

¹⁵⁸ See *supra* notes 133–134 and accompanying text (discussing the bond systems in Philadelphia and Houston).

¹⁵⁹ Cf. Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 635 (noting that “quality-of-life policing is intensely spatially concentrated in neighborhoods with high crime rates and high minority populations”).

¹⁶⁰ SAN ANTONIO DOCKET SHEETS, *supra* note 84.

¹⁶¹ PA DOCKET SHEETS, *supra* note 82.

C. Uniformity Amid Variation

There is a common perception among misdemeanor scholars that misdemeanor systems are wildly heterogeneous,¹⁶² and, to some extent, the data bears that out. There was dramatic variation across jurisdictions on almost all of the dimensions we measured. To cite a few examples: The conviction rate ranged from a low of 27% in Chicago to a high of 72% in rural Kentucky. In Philadelphia, Chicago, and Kentucky, many cases involved multiple charges; in Virginia and Texas, cases involved only one charge. In Houston, more than a third of cases were resolved within two weeks; in Philadelphia and Virginia, less than 5% were. Pretrial release without financial conditions was common in six jurisdictions—indeed, a majority of defendants in Virginia, Philadelphia, and Chicago were released without bail—but next to nonexistent in the Texas counties. Relatively few convicted defendants were sentenced to jail in Philadelphia and Virginia (12–24%); in San Antonio and Houston, large majorities were (65% and 85%, respectively). Philadelphia’s median sentence—thirty days—was three or more times that of Kentucky, Fairfax, or Chicago. These differences in the data almost certainly reflect underlying differences at several levels: the substantive law defining misdemeanors and governing enforcement, the institutional arrangements for enforcement, the demographics of the jurisdiction, and local practice.¹⁶³ This fact and its implications are discussed in more detail in Part IV.B.

But despite the variation, the eight jurisdictions also had a set of deep structural features in common. As discussed above,¹⁶⁴ several offense types were prevalent in all jurisdictions: possession of marijuana, simple assault (often domestic violence), petty larceny (often shoplifting), and DUI. Other common offenses included disorderly conduct, resisting arrest, prostitution, vandalism, trespass, public intoxication, underage drinking, and unlawful possession of weapons, drug paraphernalia, or crime tools. Although these were not uniformly processed as misdemeanors in all jurisdictions (as opposed to summary offenses or municipal violations), they were common enough to belong at the core of any definition of misdemeanor criminal justice. Certain aspects of misdemeanor case processing were common as well. All jurisdictions

¹⁶² See, e.g., Natapoff, *Misdemeanors 2015*, *supra* note 17, at 256 (stating that the misdemeanor justice system “is neither uniform nor consistent”).

¹⁶³ In the Philadelphia data, for instance, the relative dearth of public-order cases, prevalence of drug cases, and high median sentence are due to the city’s classification of “misdemeanors,” which includes more serious crimes such as non-marijuana drug possession and some drug distribution offenses. The fact that non-jailable traffic and municipal offenses are adjudicated alongside more serious misdemeanors in Kentucky and Virginia explains the fact that only slightly over half of misdemeanor defendants are represented.

¹⁶⁴ See *supra* notes 99–119 and accompanying text.

used money bail as a condition of pretrial release for a large portion of defendants. Virtually no cases went to jury trial. Defendants who were required to pay money bail often remained detained pretrial. Defendants who were convicted were required to pay court costs. And the misdemeanor case-filing rate for the four core misdemeanor offense categories fell in every jurisdiction over the years for which we have data.

The moral of the story, we think, is that misdemeanor systems are both alike and unlike. It is never safe to extrapolate from one jurisdiction to another. On the other hand, it is equally ill-advised to assume that every misdemeanor system is entirely unique or that local practices wholly determine the shape of misdemeanor justice.

IV. THE CHALLENGE OF HETEROGENEITY

In addition to aggregate trends, detailed misdemeanor court data afford a closer look at the species of study itself—the misdemeanor offense. Section A of this Part considers what light the data shed on a question raised by other misdemeanor scholarship:¹⁶⁵ To what extent are misdemeanor crimes wholly in the eye of the beholder (i.e. the police or the prosecutor)? Section B explores a second question raised by this research project:¹⁶⁶ Is “misdemeanor” a useful category for scholarship at all?

A. Schrödinger’s Crime?

The reinvigoration of misdemeanor scholarship in the last few years has given rise to questions about the nature of misdemeanor offenses themselves. The uninitiated might assume that a misdemeanor is simply a less serious crime than a felony—a mini-felony, as it were. But scholars like Alexandra Natapoff, Jenny Roberts, Issa Kohler-Hausmann, and Eisha Jain have offered compelling evidence that misdemeanor law enforcement serves fundamentally different purposes than felony law enforcement. To radically simplify their work and do justice to none of it, each has argued, from a different angle, that the state deploys the machinery of misdemeanor criminal justice primarily to exercise social control over populations perceived as disorderly and dangerous rather than to impose deserved punishment for specific bad acts.¹⁶⁷ They have

¹⁶⁵ See *infra* notes 167–188 and accompanying text.

¹⁶⁶ See *infra* notes 189–199 and accompanying text.

¹⁶⁷ See generally Jain, *supra* note 17, at 826–44 (noting the many ways in which arrests have become a tool to regulate rather than as a means to properly enforce the criminal justice system); Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 619–29 (arguing that by enforcing misdemeanors under a “managerial model,” courts regulate populations rather than criminal acts); Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, in OXFORD HANDBOOK OF CRIMINAL

each made variations on Malcolm Feeley and Jonathan Simon's argument that the misdemeanor justice system has produced a "new penology" that emphasizes surveillance rather than punishment.¹⁶⁸

This literature is diverse, but one central theme is that misdemeanor law enforcement patterns do not reflect the underlying incidence of crime. Rather, arrest and prosecution patterns reflect police and prosecutors' judgments about which individuals and populations are so disorderly or dangerous as to require the state's coercive control.¹⁶⁹ These judgments are always colored by race and class. Thus, misdemeanor enforcement disproportionately targets the poor and the disenfranchised, and especially poor people of color.¹⁷⁰ Misdemeanor offenses permit this kind of selective enforcement, because they are both trivial and amorphous. If people commit misdemeanors all the time (like traffic violations), or if anyone might be said to be committing a misdemeanor because of its ill-defined nature (like disorderly conduct), then the discretionary choices of police and prosecutors wholly determine which incidents are designated as "criminal." Misdemeanors, on this view, are Schrödinger's crime: Their existence is determined at the moment they are perceived. They are created by arrest and prosecution.¹⁷¹

LAW (Markus Dubber & Tatjana Hörnle eds., 2016), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-9> [<https://perma.cc/WW8S-FYSM>] (arguing that misdemeanors are treated as a regulatory mechanism and are enforced with significant discretion when compared to "the requirements of culpability and due process that traditionally constrain criminal law"); Natapoff, *Misdemeanors 2015*, *supra* note 17, at 264 (arguing that "the misdemeanor system permits a regulatory social control agenda to proceed under the formal aegis of criminal law").

¹⁶⁸ See Feeley & Simon, *supra* note 6, at 449 (discussing the increasing focus on group management and surveillance in the criminal justice system instead of punishing individual bad acts).

¹⁶⁹ See, e.g., Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 643–44, 646 (suggesting that prosecutors use the criminal justice system to "sort and regulate the . . . people who flow through the courts" rather than for "determining guilt or innocence and imposing sanctions accordingly"); Natapoff, *Misdemeanors 2015*, *supra* note 17, at 263–64 (stating that "[p]opulation management, not guilt, is the primary concern, as police, prosecutors, and courts iteratively mark and keep tabs on populations considered risky").

¹⁷⁰ See Natapoff, *Misdemeanors 2015*, *supra* note 17, at 262–63 (arguing that "[m]isdemeanors are . . . one of the concrete mechanisms through which the US criminal system engages in the group criminalization of disadvantaged populations").

¹⁷¹ See, e.g., *id.* at 256 (describing misdemeanor justice as "dominated by police arrest practices and assembly-line processing"); Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/> [<https://perma.cc/4GTG-ZTBU>] (suggesting that the number of misdemeanor arrests in a given area is a better indicator of the number of police officers on patrol in that area than the amount of crime committed).

Our prior work evaluating national-level data complicates that narrative.¹⁷² If misdemeanor enforcement were driven by highly subjective police and prosecutorial decision making, one would expect enforcement patterns to vary with local conditions and culture. But the national data show some remarkably consistent trends. Misdemeanor case-filing rates have been falling for at least a decade.¹⁷³ Misdemeanor arrest rates have been falling for at least two decades in almost every likely-misdemeanor offense category.¹⁷⁴ Arrest rates for our misdemeanor index have been falling in almost every state for which data are available.¹⁷⁵ In fact, misdemeanor arrest trends look not unlike broader crime trends.¹⁷⁶ These patterns suggest that, at least to some extent, misdemeanor justice is shaped by factors exogenous to any particular jurisdiction.

The data evaluated in this Article add further complexity. On the one hand, misdemeanors that look like mini-felonies—assault/battery, theft, and DUI—make up a substantial proportion (26–55%) of the cases in our analysis,¹⁷⁷ as they do in the national-level data.¹⁷⁸ These offenses seem relatively objective in the scheme of things. There are blood-alcohol thresholds for DUI.¹⁷⁹ Theft generally involves physical property and a complaining witness.¹⁸⁰ Battery usually involves physical contact.¹⁸¹ A charge for any one is typically based on something other than a police officer’s unsubstantiated tes-

¹⁷² Stevenson & Mayson, *supra* note 14, at 744–63 (presenting the results of a study of national misdemeanor case-filing rates and arrest rates for offenses that are likely to be classified as misdemeanors).

¹⁷³ *Id.* at 765.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 771.

¹⁷⁶ See Tim Lau, *Crime Rates in Largest U.S. Cities Continue to Drop*, BRENNAN CTR. FOR JUST. (June 12, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/crime-rates-largest-us-cities-continue-drop> [<https://perma.cc/8DKP-W5FM>] (reporting that the crime rates in the largest cities in the United States continued to decline in 2018, including rates of violent crime and murder).

¹⁷⁷ Again, if one excludes non-DUI traffic offenses.

¹⁷⁸ We do not consider marijuana possession a mini-felony because it is widely considered non-culpable, is increasingly legal, and is subject to considerable discretion in arrest and prosecution. See German Lopez, *15 States Have Decriminalized—But Not Legalized—Marijuana*, VOX (July 10, 2019), <https://www.vox.com/identities/2018/8/20/17938358/marijuana-legalization-decriminalization-states-map> [<https://perma.cc/5HKD-APMD>] (noting that marijuana is legal in eleven states as well as Washington, D.C. and has been decriminalized in fifteen states).

¹⁷⁹ See *BAC Legal Limits in Different States, Counties, & Cities*, ALCOHOL.ORG, <https://www.alcohol.org/dui/bac-limits/> [<https://perma.cc/VY3C-K6HE>] (last updated Dec. 18, 2019) (listing the legal alcohol limits for each state in the United States).

¹⁸⁰ See *Theft*, BLACK’S LAW DICTIONARY, *supra* note 7 (defining theft as the “wrongful taking and removing of another’s personal property with the intent of depriving the true owner of it”).

¹⁸¹ See *Battery*, BLACK’S LAW DICTIONARY, *supra* note 7 (defining battery as “any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent”).

timony. These common misdemeanor offenses are not prototypical Schrödinger's crimes.

To say that these offenses are relatively objective does not mean they are wholly objective, though, and it is extremely difficult to know to what extent they are enforced disproportionately against poor people or people of color. As always, the problem is that we cannot see underlying offense rates. In the data studied here, DUI case-filing rates were more or less equivalent across racial groups in all eight jurisdictions. That might mean that DUI enforcement accurately reflects DUI offending. Alternatively, it might be that white people commit DUI at higher rates, but the laws are enforced disproportionately against black people. Or vice versa. Similarly, as noted above, the racial disparities in case-filing rates for theft and violent misdemeanor offenses could reflect either disparities in underlying offense rates or racial distortion in enforcement.¹⁸² Professor Babe Howell has documented how arrests for certain theft offenses, like shoplifting, and certain violent offenses, like harassment, increased in New York City on days when police deployed additional patrols.¹⁸³ She hypothesizes that when more police officers are on patrol, shoplifters are more likely to be arrested and harassment and contempt of court complaints are more likely to be pursued.¹⁸⁴ The category of "theft" also includes theft-of-services charges like fare evasion, or turnstile jumping, which was a major target for zero-tolerance policing in New York City¹⁸⁵—and possibly elsewhere. In sum, the prevalence of "mini-felony" offenses in all eight misdemeanor systems is a counterweight to the Schrödinger's-crime narrative, but it is hardly determinative.

On the other hand, the data also included sizable numbers of marijuana possession and public-order cases, including disorderly conduct, resisting arrest, and trespass. These have more potential as Schrödinger's crimes. And indeed, national data suggest that drug possession laws are enforced disproportionately against black people relative to rates of offending, at least on a na-

¹⁸² It might be possible to compare case-filing rates for theft and simple assault against rates of offending inferred from crime victimization surveys, like the National Crime Victimization Survey. See *Data Collection: National Crime Victimization Survey*, BUREAU JUST. STATS., U.S. DEP'T JUST., <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> [<https://perma.cc/T7HR-Q2Y6>] (reporting on statistical data taken from interviews with the victims of criminal acts).

¹⁸³ 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, 288–89 (2009).

¹⁸⁴ See *id.* at 289 ("On days when more police officers are on regular duty, discretion will more likely be exercised in favor of arresting shoplifters. Police may follow up on complaints for contempt of court or harassment.").

¹⁸⁵ See *id.* at 288 (noting that approximately 11% of arrests on a busy day in New York City were for turnstile jumping); Kohler-Hausmann, *Managerial Justice*, *supra* note 17, at 631–33 (describing New York City Mayor Giuliani's strict approach towards low-level crime, which included "vigorous enforcement of minor prohibitions, such as turnstile jumping").

tional scale.¹⁸⁶ Although non-DUI traffic offenses are not included in most of the analysis here, they also may be subject to substantial discrepancy in enforcement. Perhaps it is these offense types that most directly facilitate the selective enforcement that contemporary scholars describe.

If drug and public-order offense types lend themselves to race- and class-skewed policing, we might expect to see greater racial disparity in case-filing rates for these offenses than for others.¹⁸⁷ The Chicago data support this hypothesis. In Chicago, the case-filing rates for drug and public-order offenses were more than twelve times higher for black people than for white, whereas they were a mere five-to-six times higher for theft and violent offenses. Elsewhere, though, the data do not comply. With the exception of DUIs, which uniformly had lower rates of racial disparity, there is no consistent relationship in the data between offense type and degree of racial disparity.¹⁸⁸

Overall, the data assessed here suggest that the Schrödinger's crime narrative is more likely to be true of some offense categories than others, in some places more than others. Though these data alone do not provide any clear answers, they do offer a starting point for further research.

B. The Study of "Misdemeanor" Justice

Any quantitative study begins with the simple question of what data to evaluate. In this study, the question was not so simple. We set out to study "misdemeanors." But "misdemeanor" is an ill-defined category. It maps only loosely onto a particular set of behaviors. Some actions—possession of marijuana, for instance—might be categorized as a felony in one jurisdiction, a misdemeanor in another, a summary offense or civil violation in a third, and a legal activity in a fourth.¹⁸⁹ For researchers and policymakers interested in un-

¹⁸⁶ See Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 298–300 (2015) (reporting on the higher arrest rates of people of color for drug crimes compared with white individuals).

¹⁸⁷ At least if any racial disparities in underlying offending rates were constant across offense types.

¹⁸⁸ Because the categories used in this Article are fairly broad, there may be more consistent racial disparity patterns in more narrowly defined offense categories. See, e.g., Stevenson & Mayson, *supra* note 14, at 763–71 (reporting on racial disparities in arrest rates for specific offenses including but not limited to gambling, prostitution, and drunkenness).

¹⁸⁹ See, e.g., ARIZ. REV. STAT. ANN. § 13-3405 (2019) (stating that possession or use of marijuana is a "class 6 felony"); KY. REV. STAT. ANN. § 218A.1422 (West 2019) (stating that possession of marijuana is a Class B misdemeanor); MD. CODE ANN., CRIM. LAW § 5-601.1 (West 2019) (stating that possession or use of under ten grams of marijuana "is not a criminal conviction for any purpose"); TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2019) (permitting the charging officer to issue a summons rather than make an arrest for possession of four ounces or less of marijuana).

derstanding low-level criminal justice, the question of what to include in the “misdemeanor” bucket is challenging on both practical and conceptual levels.¹⁹⁰

A first possibility is to include only those offenses explicitly classified as misdemeanors by the laws of a particular jurisdiction—that is, to think of “misdemeanor” as a legal designation. But this definition is both thin and impractical. It is thin, because a legal designation has little meaning beyond its real-world consequences. And the real-world consequences of the legal designation “misdemeanor” vary dramatically both across and within jurisdictions. For example, the maximum carceral sentence for a misdemeanor conviction is five years in Pennsylvania, but only one year in Illinois.¹⁹¹ Within a jurisdiction, both state and municipal law can contain offenses labeled as misdemeanors, and such offenses might be adjudicated in any one of multiple courts: a state criminal court, municipal court, a dedicated traffic court, and so forth.¹⁹² The experience of being arrested and prosecuted for a misdemeanor varies tremendously depending on local practices and the procedures of the particular court in which one lands. Some misdemeanors, particularly minor traffic and regulatory offenses, are typically processed in much the same way as speeding tickets.¹⁹³ A court appearance may not be mandatory, pretrial detention is rare, and jail sentences are not authorized.¹⁹⁴ Other misdemeanors are processed more like felony criminal cases, and most fall somewhere in between. Another way of putting the point is that limiting study to those offenses designated as “misdemeanors” achieves clear but somewhat meaningless boundaries, because the term is broad and different jurisdictions use it differently.¹⁹⁵

For purposes of empirical study, defining “misdemeanor” as a legal designation is also impractical. Records for the many different courts within each jurisdiction are often collected and stored in separate data systems. Identifying and obtaining records from all of the different data sources within a particular system that handle charges legally designated as misdemeanors would be extremely challenging.¹⁹⁶

¹⁹⁰ See, e.g., Natapoff, *Misdemeanors 2015*, *supra* note 17, at 255–57 (describing the challenges in studying the U.S. misdemeanor system, including its inconsistency and nonuniformity).

¹⁹¹ Compare 730 ILL. COMP. STAT. ANN. 5/5-4.5-55 (West 2019) (stating that the maximum term of imprisonment for a Class A misdemeanor is one year), with 18 PA. STAT. AND CONS. STAT. ANN. § 106 (West 2019) (stating that the maximum term of imprisonment for a misdemeanor is five years).

¹⁹² See *supra* Table 2.

¹⁹³ In twenty-five states, speeding *is* a misdemeanor. NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 17, at 45.

¹⁹⁴ Cf. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1077–89 (2015) (discussing the range of forms that a decriminalized misdemeanor or infraction can take).

¹⁹⁵ See Natapoff, *Misdemeanors 2015*, *supra* note 17, at 256–57 (noting the definitional chaos in low-level criminal law).

¹⁹⁶ It might also seem appealing to try to collect comprehensive data on court cases by offense type (“traffic,” “public-order,” “violent,” etc.), ignoring the legal offense-class designation and the

If the goal is to understand how low-level criminal-case processing operates on the ground, a more conceptually satisfying approach might be to define a category for study on the basis of what actually matters to the individuals accused: the practical effects of a given charge. Researchers might attempt to delineate a class of proceedings to analyze on the basis of criteria like the likelihood of arrest, likelihood of pretrial detention, onerousness of contesting the charge, maximum authorized penalties, likely penalty, likelihood of a jail sentence, likelihood of future incarceration for failure to comply with court-imposed conditions, collateral consequences triggered by conviction, and degree of stigma associated with the charge. But this approach is not workable. To assess, say, the collateral consequences of conviction for a single offense in a single jurisdiction is challenging; to delineate a cross-jurisdictional class of offenses with comparable “practical effects” would be near impossible. And it might also require collecting data from disparate data sources within each jurisdiction.

We therefore arrive at our own approach: focusing on non-traffic misdemeanors tried in state court. This is partly a practical solution to a difficult data problem. It was simply beyond our capacity to obtain comprehensive data from all of the other low-level courts that handle some offenses designated as misdemeanors. But this class of cases also constitutes a defensible category in and of itself. It appears to us that most offenses designated as misdemeanors, in most jurisdictions, are tried in state court. And within state-court misdemeanor systems, traffic offenses appear to constitute the single greatest source of variation across jurisdictions. Once they are excluded, the residual misdemeanor caseloads exhibit some uniformity and allow for much more meaningful cross-jurisdictional comparison.

The difficulty of deciding what class of cases to analyze in order to understand the realities of low-level criminal-case processing, however, highlights a deeper question: is “misdemeanor” a useful category for scholarship at all? In our view the answer is a qualified yes. “Misdemeanor” criminal justice—whether it is understood to encompass all cases legally designated as such or some related set, as here—has enough coherence, and is important enough, to warrant all the attention it has begun to receive and more.¹⁹⁷ But

forum in which cases are adjudicated. But, for the same reasons, this approach is also both thin and impractical; each offense “type” suffers from the same degree of variation and ambiguity as the category of “misdemeanor” itself. How to delineate the boundaries of a category like “traffic,” “public-order,” or “violent offense” is a highly subjective question, as is the question of which specific offenses meet whatever definition one settles on. Within each offense type, different offenses may be handled differently. And this approach would also require collecting data (for each offense type) across fragmented data systems.

¹⁹⁷ See *supra* notes 9 and 17 and accompanying text (noting various scholars who have recently studied U.S. misdemeanor law and its consequences).

researchers should understand that “misdemeanors” include a wide array of both state and municipal offenses that may be subject to adjudication in multiple courts, and that the contents of this array vary from place to place. Conversely, “misdemeanors” may exclude municipal offenses that have equivalent practical effects. Given the tremendous overlap and porous boundaries between state misdemeanor law, municipal law, and traffic law (both state and municipal), any empirical study of misdemeanor enforcement should delineate its unit of analysis as carefully as possible. And to truly understand low-level law enforcement, we must ultimately study all of these systems in conjunction.

The second thing that misdemeanor researchers should bear in mind is that different low-level offense types may serve different functions and have essentially different characters, and that the fault lines do not necessarily align with legal or institutional divides. Charlie Gerstein and J.J. Prescott argue, for instance, that “public order” offenses serve primarily as vehicles to justify the arrests and short-term detentions that police find necessary to maintain the peace.¹⁹⁸ Once the immediate threat has dissipated, conviction and punishment are irrelevant. Offenses like theft, on the other hand, are more like codifications of traditional crimes—culpable and harmful acts—for which the punishment is the point, either because it is deserved or because the threat of punishment serves as a deterrent. To the extent that this is true, offenses that serve the public-order role might be codified in state or municipal law, classified as misdemeanors or violations, and adjudicated in any number of possible courts, depending on the place. As empirical analysis of misdemeanor justice gets underway, researchers should be alert to these functional differences. It may be that we should strive to identify and analyze functional categories, rather than the miscellaneous body of offenses held together by a word on a statute page.

The even deeper normative question is what function misdemeanors *should* serve. It seems safe to say that the fuzziness of the category derives, at least in part, from a lack of societal clarity on this point. If the purpose of the misdemeanor classification is to designate lesser crimes—acts less serious than felonies, but still deserving of the particular condemnation and stigma that a criminal conviction carries—then it should include only acts that are widely viewed as morally culpable.¹⁹⁹ Stretching the notion of a misdemeanor offense

¹⁹⁸ See Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 276–77 (2015), https://harvardlawreview.org/wp-content/uploads/2015/04/vol128_GersteinPrescott.pdf [<https://perma.cc/RZW4-YCSD>] (arguing that “[w]ith rare exceptions, once the very low-level defendant is arrested, the police have accomplished their immediate goal of maintaining order” and are indifferent to conviction and punishment).

¹⁹⁹ See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) (“What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.”).

to contain both domestic assault and walking a dog without a leash creates tension. In response, criminal justice systems develop release valves that allow some offenses to be processed in less “criminal” fashion. The uneven evolution of this process across jurisdictions might help to explain the varied and fragmented grab bag of lower-level criminal court procedure. Whether “misdemeanor” is a legal and conceptual category that *could* have coherence, and what a system of misdemeanor adjudication might look like if it did, are questions for future debate.

CONCLUSION

The empirical study of misdemeanor criminal justice presents difficult challenges, but they are not insurmountable. This overview study offers evidence that in many respects affirms conventional wisdom about the operation of misdemeanor systems, but in other respects calls them into question. In highlighting variance across jurisdictions, it also raises interesting questions. Why, for instance, are racial disparities so extreme in Chicago relative to Philadelphia? What accounts for the wide range in conviction rates from one jurisdiction to the next? Questions like these will require sustained and localized investigation. We hope to have provided useful fodder for that work.

APPENDIX A: EIGHT MISDEMEANOR SYSTEMS—DETAILS AND SOURCES

*Houston and San Antonio, Texas*Misdemeanor Classification Scheme

- Class A—punishable by up to one year’s imprisonment and/or fine of \$4,000.²⁰⁰
- Class B—punishable by up to six months’ imprisonment and/or fine of \$2,000.²⁰¹
- Class C—punishable by fine up to \$500,²⁰² and conviction “does not impose any legal disability or disadvantage.”²⁰³ Some state-law offenses and all municipal offenses are Class C misdemeanors.²⁰⁴

Municipal vs. State Law

- Counties and municipalities can and do enact ordinances or regulations that create criminal offenses called “misdemeanors,” but they may not carry a sentence of incarceration.²⁰⁵
- The Texas Penal Code prohibits counties and municipalities from criminalizing any conduct already covered by the penal code,²⁰⁶ but in practice they often do; the prohibition seems to have been interpreted simply to require that any such offense carry precisely the same penalty as under state law.²⁰⁷ Houston’s Municipal Code, for instance, just stipulates, “no penalty shall be greater or less than the penalty provided for the same or a similar offense under the laws of the state.”²⁰⁸
- Any municipal or county offense that carries a potential fine over \$500 must include a *mens rea* element (a “culpable mental state”).²⁰⁹

²⁰⁰ TEX. PENAL CODE ANN. § 12.21 (West 2019).

²⁰¹ *Id.* § 12.22.

²⁰² *Id.* § 12.23.

²⁰³ *Id.* § 12.03.

²⁰⁴ TEX. LOC. GOV’T CODE ANN. § 54.001 (West 2019); Telephone Interview with Alex Bunin, *supra* note 64.

²⁰⁵ TEX. LOC. GOV’T CODE ANN. § 54.001; Telephone Interview with Susanne Pringle, *supra* note 109.

²⁰⁶ TEX. PENAL CODE ANN. § 1.08 (West 2019).

²⁰⁷ *See, e.g.*, Letter Opinion from Rick Gilpin, Deputy Chair, Op. Comm., Office of the Attorney Gen., Tex., to Representative René O. Oliveira, Chair, Comm. on Econ. Dev., LO98-041 (May 11, 1998) (“Penalties under ordinances, if the ordinance is the same as the state law, must conform strictly to penalties prescribed by the state law. Such penalties cannot exceed or fall below the penalties prescribed by the state law; that is, where the ordinance pertains to the same matter as that enacted by the Legislature.”) (quoting *Ex parte Goldberg*, 200 S.W. 386, 387–88 (Tex. Crim. App. 1918)).

²⁰⁸ HOUS., TEX., CODE § 1-6 (2020); *see also, e.g., id.* § 28-22 (providing that duplicative offenses in that chapter shall be punished “as provided in state law”).

²⁰⁹ TEX. PENAL CODE ANN. § 6.02 (West 2019).

• Counties *can* imprison individuals for non-payment of fine—receive credit of \$100 per day—although in theory this requires a determination of willful failure.²¹⁰

• In Harris County, both Houston and Pasadena have municipal codes.²¹¹

Institutional Structure

• State courts (called County Courts at Law) adjudicate Class A and B misdemeanors, while county-run justice-of-the-peace courts and municipal courts adjudicate Class C misdemeanors.²¹²

• Most traffic offenses are Class C misdemeanors. This means that most traffic offenses, although they are state-law offenses, are handled in the JP and municipal courts.²¹³

• But DUIs and some others are Class A or B misdemeanors.²¹⁴

• Occasionally a Class C misdemeanor will be adjudicated in the County Courts, but Class A and B misdemeanors are never adjudicated in the justice-of-the-peace or municipal courts.²¹⁵

Summons vs. Arrest

• All Class C misdemeanor prosecutions *can* be initiated by summons rather than arrest as well as some Class A and B misdemeanors (possession of 4 oz. or

²¹⁰ TEX. CODE CRIM. PROC. ANN. art. 43.09-10 (West 2019) (permitting discharge of fine through incarceration or work); *id.* art. 43.091 (“A court may waive payment of all or part of a fine imposed on a defendant if the court determines that . . . the defendant is indigent or does not have sufficient resources or income to pay all or part of the fine . . .”); *id.* art. 45.203 (West 2019) (permitting municipal courts to jail individuals for non-payment of fine); *see also* HOUS., TEX., CODE § 16-51 (2020) (“No person may be imprisoned because he cannot pay the full amount of the fine owed. If the defendant fails to pay an installment or refuses to pay the fine assessed, he shall be incarcerated until the fine is fully satisfied.”); SAN ANTONIO, TEX., CODE § 1-6 (2020) (“In all cases where a fine is imposed by or in the municipal court, in default of immediate payment thereof, the defendant shall be imprisoned in jail, or required to work in the streets or other public works in the city, under the direction of the police, until the fine is paid, allowing fifteen dollars (\$15.00) per day until the sum amounts to that of the fine . . .”).

²¹¹ HOUS., TEX., CODE, <https://www.houstontx.gov/codes/> [<https://perma.cc/HW4V-WJ83>]; PASADENA, TEX., CODE, <https://www.cityofpasadena.net/city-services/municipal-code/> [<https://perma.cc/4ZNR-ESAM>].

²¹² Telephone Interview with Alex Bunin, *supra* note 64; *see also* TEX. GOV’T CODE ANN. § 27.031 (West 2019) (defining the jurisdiction of justice courts); TEX. GOV’T CODE ANN. § 29.003 (West 2019) (defining the jurisdiction of municipal courts). County sheriffs bring cases to justice-of-the-peace courts, whereas municipal police bring cases to municipal courts, but the offenses handled in each court are the same. Telephone Interview with Susanne Pringle, *supra* note 109.

²¹³ Telephone Interview with Susanne Pringle, *supra* note 109.

²¹⁴ *E.g.*, TEX. TRANSP. CODE ANN. § 504.9465 (West 2019) (sale or negligent possession of a license plate flipper are Class A and B misdemeanors, respectively); *id.* § 550.024 (West 2019) (violation of duty to take responsibility for striking unattended vehicle can be Class B misdemeanor).

²¹⁵ A Class C misdemeanor might wind up in the County Courts if the DA elects to downgrade a Class A or B arrest charge, or if it arises from the same incident as Class A or B charges and thus is filed concomitantly. Justice-of-the-peace and municipal courts, conversely, lack jurisdiction to hear Class A and B cases. Telephone Interview with Susanne Pringle, *supra* note 109.

less of marijuana or synthetic marijuana, graffiti, petty theft, contraband in a correctional facility and driving with an invalid license).²¹⁶

- There do not appear to be any offenses for which a summons, rather than arrest, is mandatory.

- For eligible Class A and B misdemeanors, the DA usually makes the decision as to whether to cite and release.²¹⁷ The law itself suggests that the decision is within law enforcement's discretion,²¹⁸ but as a practical matter it is necessary for both the DA and the court to agree to a citation (in order to give the person a court date), and the DA tends to be the deciding vote.

- Class C cases are generally initiated by ticket. People do sometimes get arrested, however, if they have an outstanding warrant for a previous failure-to-appear or unpaid fine.²¹⁹

Pretrial Custody

- Texas is a "right-to-bail" state—the Texas Constitution includes a right to bail for non-capital defendants.²²⁰

- Bail bondsmen are prevalent.²²¹

Pretrial Process

- Texas law requires the DA to file an "information" to formally initiate prosecution in Class A and B cases.²²² This may not always happen in practice.²²³

- Detained misdemeanor defendants must be tried within thirty days for a Class A charge, within fifteen days for a Class B charge, and within five days for a Class C charge.²²⁴ If the information has not been filed and the state is not ready by the deadline, the defendant must be released.²²⁵

Houston (Harris County)

²¹⁶ TEX. CODE CRIM. PROC. ANN. art. 14.06 (West 2019).

²¹⁷ Telephone Interview with Susanne Pringle, *supra* note 109.

²¹⁸ TEX. CODE CRIM. PROC. ANN. art. 14.06(b)–(c).

²¹⁹ Telephone Interview with Susanne Pringle, *supra* note 109.

²²⁰ TEX. CONST. art. I, § 11; TEX. CODE CRIM. PROC. ANN. art. 1.07 (West 2019); *see also* TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2019) (articulating considerations for bail-setting); TEX. CODE CRIM. PROC. ANN. art. 17.03 (West 2019) (providing for personal bonds in lieu of bail).

²²¹ *Cf.* TEX. OCC. CODE ANN. § 1704. *et seq.* (West 2019) (providing regulations for bail bondsmen).

²²² TEX. CONST. art. V, § 17; TEX. CODE CRIM. PROC. ANN. art. 2.04 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 27.01 (West 2019); TEX. CODE CRIM. PROC. ANN. art. 45.018; 23 TEX. JURISPRUDENCE 3D *Criminal Procedure: Pretrial Proceedings* §§ 567, 634, Westlaw (database updated Jan. 2020); 4A TEX. JURISPRUDENCE *Pleading & Practice Forms* § 84:74, Westlaw (2d ed., database updated Nov. 2019).

²²³ Telephone Interview with Susanne Pringle, *supra* note 109.

²²⁴ TEX. CODE CRIM. PROC. ANN. art. 17.151 (West 2019).

²²⁵ *Id.*

- There are sixteen County Courts at Law that hear Class A and B misdemeanor cases.²²⁶
 - The DA prosecutes all classes of misdemeanors.
 - A central administrative office handles calendaring for all misdemeanors, which means that, relative to other counties (like Bexar), case scheduling is relatively efficient and consistent across the sixteen courts.²²⁷
 - In the County Courts at Law, each charge is filed and treated as an independent “case”; a person who is arrested on multiple charges will have multiple cases, and each charge/case is generally adjudicated separately.²²⁸
 - Houston had a bail schedule for misdemeanor offenses during the period our data covers.
 - People charged with Class A and/or B charges, if they have sufficient funds, can be released from the police station. A person who cannot immediately post bail as provided for on the schedule will appear in front of a magistrate within twenty-four hours. This includes anyone arrested on a Class C charge, although Class C cases are handled on a separate docket.
 - An ADA is always on call to make charging decisions. Arresting officers promptly call the DA’s office to report an arrest, and an ADA determines whether or not to “take” the charges. The DA staffs this role twenty-four hours a day.²²⁹
 - The efficiency of charging in Harris County facilitates defendants’ quick release because almost immediately after arrest each defendant (for whom the DA accepts charges) has both formal charges and a case number.
 - Between 2011–2016, no defense representation for the indigent was provided at bail hearings.
 - With respect to adjudication, there is no right to counsel for Class C misdemeanors and virtually everyone proceeds *pro se*. For Class A and B misdemeanors, between 2011–2016, the Public Defender represented only those with severe mental illness, a very limited set. All other indigent defendants were appointed counsel from a rotating wheel.²³⁰
 - As of 2016, the DA offers diversion for first-time possession of marijuana.²³¹

²²⁶ See HARRIS COUNTY COURTS, <http://www.ccl.hctx.net/> [<https://perma.cc/DP9K-R3KB>] (listing courts in Harris County).

²²⁷ Telephone Interview with Susanne Pringle, *supra* note 109.

²²⁸ *Id.*

²²⁹ Telephone Interview with Alex Bunin, *supra* note 64.

²³⁰ *Id.*

²³¹ See Danny Clemens, *Everything You Need to Know About Harris Co.’s New Pot Policy*, ABC 13 EYEWITNESS NEWS (Mar. 2, 2017), <https://abc13.com/news/what-you-need-to-know-about-harris-cos-pot-policy/1757801> [<https://perma.cc/W6TV-M8NN>] (reporting that the new Misdemeanor Marijuana Diversion Program “will divert all misdemeanor marijuana cases . . . instead redirecting low-level drug offenders into a decision-making class”).

San Antonio (Bexar County)

- There are fifteen County Courts at Law that hear Class A and B misdemeanor cases as well as specialized court programs (including DWI Court, Veterans Treatment Court, Mental Health Court, and Adult Drug Court).²³²
- San Antonio has an extensive municipal code that includes many offenses.²³³
- San Antonio police reportedly do not ever issue summons for misdemeanor charges.²³⁴
- There is no ADA on call to accept/reject arrest charges. This can result in long delays in the filing of formal charges.²³⁵
- As in Houston, each charge is filed and treated as an independent case.²³⁶
- Magistrates make probable-cause determinations as well as bail.
- Before 2014, the Public Defender only handled mental-health cases, but the office has since expanded.²³⁷
- For indigent cases beyond the Public Defender's capacity, private attorneys are appointed from a wheel.²³⁸
- Each County Court handles its own calendar, so there is reportedly quite a bit of variation in case timing across the fifteen courts.²³⁹
- Diversion functions much like deferred adjudication: the Court takes a guilty plea but sets sentencing out a year and, if the defendant complies with all conditions imposed, the plea is never entered. Approximately 25% of all San Antonio misdemeanor cases are reportedly channeled into diversion.²⁴⁰

Philadelphia, Pennsylvania

Misdemeanor Classification Scheme

- First degree—punishable by up to five years' imprisonment and/or fine of \$10,000.²⁴¹
- Second degree—punishable by up to two years' imprisonment and/or fine of \$5,000.²⁴²

²³² Telephone Interview with Judge Stolhandske and Amy Castano, *supra* note 109; *see also* BEXAR COUNTY COURTS, <https://www.bexar.org/1055/County-Courts> [<https://perma.cc/WQT2-NL5C>] (listing courts in Bexar County).

²³³ *E.g.*, SAN ANTONIO, TEX., CODE §§ 7-10, 26-20 (2020) (stating the penalties for violations of the provisions relating to cemeteries and air pollution).

²³⁴ Telephone Interview with Judge Stolhandske and Amy Castano, *supra* note 109.

²³⁵ Telephone Interview with Susanne Pringle, *supra* note 109.

²³⁶ Telephone Interview with Judge Stolhandske and Amy Castano, *supra* note 109.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Telephone Interview with Susanne Pringle, *supra* note 109.

²⁴⁰ Telephone Interview with Judge Stolhandske and Amy Castano, *supra* note 109.

²⁴¹ 18 PA. STAT. AND CONS. STAT. ANN. §§ 106(b)(6), 1101(4) (West 2019).

²⁴² *Id.* §§ 106(b)(7), 1101(5).

- Third degree—punishable by up to one year’s imprisonment and/or fine of \$2,500.²⁴³
- Summary offense—punishable by up to ninety days’ imprisonment and/or fine up to \$300.²⁴⁴
- Note: Misdemeanors are more serious than in other jurisdictions and more low-level offenses are codified as summary offenses. Far fewer traffic offenses are codified as state-law misdemeanors than other jurisdictions (only thirty-six, as opposed to more than one hundred in Texas, Illinois, and Virginia), and none in the Penal Code.

Municipal vs. State Law

- Cities “of the first class,” of which Philadelphia is the only one, can create criminal offenses punishable by up to \$2,300 and/or ninety days’ imprisonment.²⁴⁵
- Philadelphia’s Municipal Code (the Philadelphia Code) includes offenses designated “summary offenses,”²⁴⁶ “misdemeanors,”²⁴⁷ and “violations,”²⁴⁸ but these variations in terminology do not seem to carry any particular legal meaning.
- The Philadelphia Code also includes three classes of violations: Class I (maximum fine is \$300), Class II (maximum fine is \$1,000), and Class III (maximum fine is \$2,000).²⁴⁹
- It appears that the Philadelphia Code includes some forty offenses that are punishable by imprisonment,²⁵⁰ and that the maximum possible penalty for any Code offense is ninety days’ imprisonment and a fine of \$2,000.²⁵¹

Institutional Structure

- State misdemeanors and jailable traffic offenses are handled in Municipal Court (in the Criminal Justice Center) on a daily basis.²⁵²

²⁴³ *Id.* §§ 106(b)(8), 1101(6).

²⁴⁴ *Id.* §§ 106(c), 1101(7) (West 2019).

²⁴⁵ 8 PA. STAT. AND CONS. STAT. ANN. § 3321 (West 2019) (authorizing boroughs to prescribe fines and penalties); 53 PA. STAT. AND CONS. STAT. ANN. § 101 (West 2019) (defining a first class city as one whose population is one million people or greater); 53 PA. STAT. AND CONS. STAT. ANN. § 13131 (authorizing cities of the first class).

²⁴⁶ *E.g.*, PHILA., PA., CODE, § 10-1105 (2020) (stating that violators of Philadelphia’s obscenity provisions are “guilty of a summary offense”).

²⁴⁷ *E.g.*, *id.* § 10-115 (stating that a violation of Philadelphia’s dog and cat sterilization provisions is a Class III offense).

²⁴⁸ *E.g.*, *id.* §§ 4A-501, 4A-601 (stating provisions governing city violations and their ensuing penalties).

²⁴⁹ *Id.* § 1-109.

²⁵⁰ *See id.* §§ 3-103, 6-103, 6-400, 6-600, 9-105, 9-200, 9-400, 9-600, 9-900, 9-1000, 9-1100, 9-1600, 9-2100, 9-3200, 9-3500, 10-109, 10-115, 10-200, 10-300, 10-500, 10-600, 10-800, 10-900, 10-1100, 10-1500, 10-2200, 12-800, 12-900, 12-1100, 12-2400, 12-2600, 12-2900, 13-300, 18-200, 19-1800, 19-2600, 19-2800, 21-1000.

²⁵¹ *Id.* § 1-109; *e.g.*, *id.* § 6-103 (subjecting violators of the city’s health code to imprisonment for a maximum of ninety days).

● The same court has special days for non-jailable traffic and summary offenses.²⁵³

Summons vs. Arrest

● Pennsylvania law directs police to issue a summons for any 2nd/3rd degree misdemeanor or 1st degree DUI unless there is reason to believe that the person will not appear or poses a threat.²⁵⁴

● Interviews suggest that Philadelphia practice does not reflect this statutory mandate. Interviewees report that the Philadelphia police do *not* arrest for ordinance violations; they instead issue tickets or “code violation notices.”²⁵⁵ But Philadelphia police reportedly do arrest for nearly all misdemeanors except first possession of marijuana.²⁵⁶

Pretrial Custody

● Magistrates may set bail,²⁵⁷ though there is no state-constitutional right to bail, and bail can be denied if “no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great.”²⁵⁸

● Philadelphia operates a “deposit” program: Defendants can obtain release by posting 10% of the total bail amount with the court, most of which is recoverable at the conclusion of the case if the accused appears for court.²⁵⁹ This deposit program has limited the role of bail bondsmen, although defendants may still seek a loan from a bond agent if they are unable to procure the full deposit amount.

Pretrial Process

● Upon arrest, Philadelphia police take the arrestee to the police holding cell, where he or she is fingerprinted. The police write a preliminary arrest report

²⁵² Telephone Interview with Mira Baylson, *supra* note 72; *see also* PA. R. CRIM. P. § 1001 (defining “Municipal Court case”).

²⁵³ Telephone Interview with Mira Baylson, *supra* note 72. Prior to 2016, a separate Traffic Court adjudicated non-jailable traffic offenses, but that court has been dissolved and replaced by the Municipal Court Traffic Division. *See* 42 PA. STAT. AND CONS. STAT. ANN. §§ 102, 325, 1121, 1127, 1302, 1321 (West 2019) (establishing scheme for hearing traffic cases in Philadelphia); S.B. 334, 2013–2014 Reg. Sess., P.L. 55, No. 17 (Pa. 2013) (creating the Traffic Court of Philadelphia).

²⁵⁴ PA. R. CRIM. P. §§ 509, 519, 1003(C) (West 2019).

²⁵⁵ *See, e.g., Permits, Violations & Licenses*, CITY OF PHILA., <https://beta.phila.gov/services/permits-violations-licenses> [<https://perma.cc/WXM4-HUZ3>] (providing information on different permits, violations, and licenses available in the city of Philadelphia).

²⁵⁶ Telephone Interview with Sarah Allen, *supra* note 110; Telephone Interview with Mira Baylson, *supra* note 72.

²⁵⁷ PA. R. CRIM. P. § 523 (West 2019) (bail-setting criteria); *id.* § 528 (West 2019) (directing court to consider release criteria in Rule 523 and ability to pay).

²⁵⁸ PA. CONST. art. I, § 14; *see also* PA. R. CRIM. P. §§ 520, 521 (West 2019) (procedures for ordering detention).

²⁵⁹ PA. R. CRIM. P. § 528.

(PARS), which is sent to the DA's office. The DA determines which formal charges, if any, to file.²⁶⁰

- Arraignment is generally held within eighteen hours of arrest. The PARS is provided to defense counsel. Interviewees report that the formal charges ultimately filed will frequently differ from the PARS charges.²⁶¹

Adjudication

- Philadelphia misdemeanor defendants may waive their right to a jury trial in favor of an expedited bench trial, which many do. The dominant form of bench trial is a "negotiated stipulated trial." This is really a modified guilty plea.²⁶² The remaining defendants in the waiver program have a more standard bench trial. Such trials typically take less than an hour and involve only a few witnesses (police officers in drug cases, complainants in assault cases, and loss-prevention officers in theft cases).²⁶³ A defendant who is convicted retains the right to a *de novo* jury trial, but few defendants pursue this option, because sentences imposed after a jury trial are thought to be considerably harsher than those imposed by the waiver judges.

- Philadelphia operates a broad array of formal misdemeanor diversion programs, including programs for nonviolent first-time offenders, for repeat offenders with underlying addiction or mental health problems, for veterans and for people charged with first-offense DUI.²⁶⁴ Since 2011, the system has funneled approximately 20% of all misdemeanor arrests into one of these diversion programs (the Accelerated Misdemeanor Program, or AMP).²⁶⁵

- Deferred adjudication is also a possible disposition, at the DA's discretion. This involves a no-contest plea that is held in abatement until the person completes, or fails to complete, the conditions imposed.²⁶⁶

²⁶⁰ Telephone Interview with Sarah Allen, *supra* note 110.

²⁶¹ *Id.*

²⁶² The defendant does not admit guilt, but the outcome of the trial is negotiated in advance. The DA either moves the police report into evidence or reads minimal facts into the record. The judge then determines that the defendant is guilty. Usually the sentence is negotiated in advance, but sometimes it is left open and the parties make sentencing arguments to the judge.

²⁶³ "Protracted" trials that involve multiple witnesses or interpreters are held in a special protracted-trial room.

²⁶⁴ See generally DEREK RIKER, PHILA. DIST. ATTORNEY'S OFFICE, PRE-TRIAL DIVERSION PROGRAMS (undated and unpublished) (on file with authors); Telephone Interview with Derek Riker, *supra* note 110.

²⁶⁵ This program, which began in 2011, is for nonviolent first-time offenders. A defendant can avoid conviction by completing the program requirements, which takes approximately five weeks. A newer program, AMP2, targets people who cycle through the system because of underlying drug addiction or mental health issues. This program is more customized than AMP1 and takes several months to complete. It involves intensive conditions and social services support.

²⁶⁶ Telephone Interview with Sarah Allen, *supra* note 110.

• In 2014, Philadelphia revised its city code to define possession of less than thirty grams of marijuana as a summary civil offense punishable by a fine of twenty-five dollars.²⁶⁷ Marijuana arrests have plummeted since.²⁶⁸

• In 2017, a former civil rights attorney, Larry Krasner, was elected as DA on a reform platform. Among other reform commitments, he has avowed to “end[] cash bail” in Philadelphia.²⁶⁹

Chicago, Illinois

Misdemeanor Classification Scheme

• Class A—punishable by up to one year’s imprisonment and/or a \$2,500 fine.²⁷⁰

• Class B—punishable by up to six months’ imprisonment and/or a \$1,500 fine.²⁷¹

• Class C—punishable by up to thirty days’ imprisonment and/or a \$1,500 fine.²⁷²

• All misdemeanors can be probated for a maximum of two years.²⁷³

• Petty offenses—punishable by up to 6 months of probation or conditions pursuant to conditional discharge and/or a fine of \$1,000.²⁷⁴

• Business offenses—Punishable by a fine, conditional discharge, or supervision as specified by individual offense statutes.²⁷⁵

Municipal vs. State Law

• Municipalities can criminalize the same conduct as the state but may not enact ordinances that are preempted by state regulation or that “infringe upon the spirit of the state law or are repugnant to the general policy of the state.”²⁷⁶

²⁶⁷ PHILA., PA., CODE § 10-2102 (2020); *Relaxed Marijuana Law in Effect in Philly*, NBC PHILA. (Oct. 19, 2014), <https://www.nbcphiladelphia.com/news/local/relaxed-marijuana-law-in-effect-in-philly-monday/83496/> [<https://perma.cc/FMT3-S7S6>].

²⁶⁸ Anna Orso, *Marijuana Arrests Down 75 Percent Since Philly Decriminalized*, BILLYPENN (Oct. 17, 2017), <https://billypenn.com/2017/10/24/marijuana-arrests-down-75-percent-since-philly-decriminalized/> [<https://perma.cc/GYH6-9WZA>]; Telephone Interview with Derek Riker, *supra* note 110. *But see* Sam Wood et al., *Despite Marijuana’s Increasing Legalization and Acceptance, Arrests Soar*, PHILA. INQUIRER (Oct. 4, 2018), <https://www.inquirer.com/philly/news/weed-marijuana-legalization-arrests-pennsylvania-new-jersey-african-american-20181004.html-2> [<https://perma.cc/L63E-B42B>] (observing a contrasting trend of increased marijuana possession arrests in Philadelphia suburbs).

²⁶⁹ See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/B2E5-6XC5>] (noting that during his campaign for DA, Larry Krasner supported eliminating cash bail, decriminalizing low-level offenses, and monitoring “police and prosecutorial misconduct”).

²⁷⁰ 730 ILL. COMP. STAT. ANN. 5/5-4.5-55 (West 2019).

²⁷¹ *Id.* 5/5-4.5-60.

²⁷² *Id.* 5/5-4.5-65.

²⁷³ *Id.* 5/5-4.5-65, -60, -65.

²⁷⁴ *Id.* 5/5-4.5-75.

²⁷⁵ *Id.* 5/5-4.5-80.

• Municipalities can impose misdemeanor penalties of up to six months' incarceration and a fine of up to \$750.²⁷⁷

• Chicago's Municipal Code appears to have fifty-two of these offenses, including failure to appear at a hearing,²⁷⁸ impersonating a fireman,²⁷⁹ drug offenses,²⁸⁰ public nuisance,²⁸¹ gang loitering,²⁸² and abandonment of refrigerators.²⁸³

Summons vs. Arrest

• Police may issue a summons rather than arrest for any misdemeanor.²⁸⁴

Pretrial Custody

• The Illinois Constitution provides for preventive pretrial detention of capital defendants, defendants facing life sentences, and felony defendants facing a mandatory prison sentence if the court, after a hearing, determines that release "would pose a real and present threat to the physical safety of any person."²⁸⁵

• Other defendants are bailable.

• The issuance of bail is governed by the Illinois Supreme Court Rules.²⁸⁶

Cook County

• The Circuit Court of Cook County is comprised of six districts—Chicago (First District) and five suburban districts.²⁸⁷

• State-law misdemeanors

²⁷⁶ *Vill. of Northfield v. BP Am., Inc.*, 933 N.E.2d 413, 418 (Ill. App. Ct. 2010); see *Pesticide Pub. Policy Found. v. Vill. of Wauconda*, 510 N.E.2d 858, 862 (Ill. 1987) (when "the legislature enacts a comprehensive scheme of regulation, the legislature implies by the scheme that there is no room for additional regulation by local government units"). In determining whether local law conflicts with pre-established state law, the courts look to legislative intent.

²⁷⁷ 65 ILL. COMP. STAT. ANN. 5/1-2-1.1 (West 2009).

²⁷⁸ CHI., ILL., CODE § 1-4-145(b) (2019).

²⁷⁹ *Id.* § 2-36-840.

²⁸⁰ *E.g., id.* §§ 7-24-091, -092, -093, -094, -098.

²⁸¹ *Id.* § 7-28-060 (stating that violators of the public nuisance provision "shall be subject to a penalty of not less than \$200.00 nor more than \$500.00, or imprisonment not to exceed 10 days, or both such fine and imprisonment for each offense").

²⁸² *Id.* § 8-4-015(e-f) (stating that violators of the gang loitering provision "[are] subject to a fine of not less than \$100.00 and not more than \$500.00 for each offense, or imprisonment for not more than six months for each offense, or both. A second or subsequent offense shall be punishable by a mandatory minimum sentence of not less than five days imprisonment. . . . Any person who violates an order issued by a court under this subsection (f) shall be subject to a mandatory minimum sentence of not less than five days imprisonment but not more than six months imprisonment").

²⁸³ *Id.* § 7-28-040.

²⁸⁴ 725 ILL. COMP. STAT. ANN. §§ 5/107-11, -12 (West 2019); see also *Illinois v. Fitzpatrick*, 986 N.E.2d 1163, 1168–69 (Ill. 2013) (clarifying that the police may, but are not required, to issue a summons rather than an arrest).

²⁸⁵ ILL. CONST. art. I, § 9; 725 ILL. COMP. STAT. ANN. § 5/110-6.1(c)(1)(A) (procedures for preventive detention).

²⁸⁶ See ILL. SUP. CT. R. 501–590; see also *Illinois Supreme Court Issues Substantial Rule Changes*, *supra* note 74.

²⁸⁷ *Organization of the Circuit Court*, CIR. COURT OF COOK CTY., <http://www.cookcountycourt.org/ABOUTTHECOURT/OrganizationoftheCircuitCourt.aspx> [<https://perma.cc/N2VJ-SQ2J>].

- Handled in a series of courts in the First District: Traffic offenses (including DUI and driving on a suspended or revoked license, which carry a potential jail sentence) are handled in the Dailey Center if the defendant is in custody and in the Criminal Court (Layton Building) if the defendant is not. Domestic violence cases are handled in court at 555 West Harrison Street. Other misdemeanors are handled in five “Branch courtrooms” (Cook County courtrooms are hosted in police department buildings).
- The DA prosecutes all state-law misdemeanors.
- The DA offers diversion for first-time possession of marijuana.
- The Public Defender represents indigent defendants charged with Class A, B, and C misdemeanors, which constitute the vast majority of defendants.
- Municipal misdemeanors
 - Labeled as “ordinance violations” and include conduct such as improper lane usage and littering. Most are punishable by fine only.
 - Municipal traffic offenses are handled in the “minor traffic rooms” at the Dailey Center. Other municipal offenses are handled in the Branch courtrooms.
 - Corporation Council (the City Attorney) prosecutes municipal offenses.
 - Defendants are typically unrepresented, because there is no right to representation, but the Public Defender will represent a defendant if her charge is related to a higher-level case.
 - The city has transferred many of the municipal cases to an administrative hearing process outside of criminal court.²⁸⁸
- Cook County provides indigent defense representation at bail hearings.
- Most misdemeanor defendants are released on I-bonds (ROR). In some cases, magistrates impose D-bonds (deposit bonds) that require the defendant to pay a 10% deposit to be released, or “full bonds” that must be paid in full.²⁸⁹
- Possible dispositions
 - Conviction
 - Acquittal
 - “Supervision” (deferred adjudication): The defendant proffers a guilty plea, but sentencing is set for some time in the future. If the defendant complies with all conditions of supervision, it is “terminat-

²⁸⁸ Telephone Interview with Mike Morrissey, *supra* note 64.

²⁸⁹ Telephone Interview with Alexa Van Brunt, *supra* note 111.

ed satisfactorily” and no conviction is ever entered. If not, the guilty plea is entered and the defendant is sentenced.²⁹⁰

- “Conditional discharge” (conviction unaccompanied by either jail or probation).
- “Stricken off with leave to reinstate” (dismissal).

● The city of Chicago and state of Illinois have enacted marijuana decriminalization measures that have reduced rates of marijuana arrests over the last few years.²⁹¹

Kentucky

Misdemeanor Classification Scheme

- Class A—punishable by up to one year’s imprisonment and/or fine of \$500 (for individuals), or \$10,000 (corporations).
- Class B—punishable by up to ninety days’ imprisonment and/or fine of \$250 (for individuals), or \$5,000 (corporations).
- Violations—punishable by a \$250 fine.²⁹²
- Fines are mandatory, except for indigent persons or for offenses defined outside the penal code that specifically prohibit levying fines.²⁹³

Municipal vs. State Law

- Kentucky permits counties and municipalities to create municipal offenses, either misdemeanors or violations, which must be punishable according to the same scheme as in state law.²⁹⁴
- Municipal offenses that are duplicative of state-law offenses must carry the same penalty as under state law.²⁹⁵
- The Louisville Municipal Code appears to include at least nine offenses punishable by incarceration, but these are rarely prosecuted.²⁹⁶

Institutional Structure

- District Court has jurisdiction over both state-law and municipal misdemeanors.²⁹⁷
- County attorney prosecutes both (all criminal offenses).²⁹⁸

²⁹⁰ 730 ILL. COMP. STAT. ANN. 5/5-4.5-70, -75.

²⁹¹ Frank Main, *Marijuana Arrests in Chicago Plummet, but Blacks Are ‘Vast Majority’ of Cases*, CHI. SUN TIMES (July 13, 2018), <https://chicago.suntimes.com/cannabis/marijuana-arrests-enforcement-chicago-police-declines-possession-blacks-african-americans-most-often-charged-ticketed-cannabis-weed-watchdogs/> [<https://perma.cc/8G2Y-MK26>] (discussing the decrease in marijuana-related arrests as a result of the decriminalization of marijuana).

²⁹² KY. REV. STAT. ANN. §§ 532.090 (West 2019), 534.040 (West 2019).

²⁹³ *Id.* § 534.040.

²⁹⁴ *Id.* § 83A.065(2) (West 2019).

²⁹⁵ *Id.* § 83A.065(5).

²⁹⁶ See LOUISVILLE, KY., CODE Tit. XIII (listing general offenses); Telephone Interview with Melanie Foote, *supra* note 112.

²⁹⁷ KY. REV. STAT. ANN. §§ 24A.110 (West 2019), 83A.065.

²⁹⁸ *Id.* § 83A.065.

• Statewide public defender agency (the Kentucky Department of Public Advocacy) provides indigent defense representation.²⁹⁹

Summons vs. Arrest

• Kentucky law directs police to issue citations rather than arrest for any misdemeanor, so long as there are reasonable grounds to believe that the person being cited will appear to answer the charge.³⁰⁰

Pretrial Custody

• Kentucky is a right-to-bail state. Its constitution provides that prisoners have the right to bail unless there is sufficient evidence or presumption of a capital offense.³⁰¹

• Kentucky abolished for-profit bail bonding in 1976.³⁰²

• Arrestees are taken to the jail, where they are interviewed by the pretrial release agency. Pretrial Release relays its recommendation to an on-call judge, who sets bond. If the bond is ROR or unsecured, the person is released from jail with a date to return to court. If the judge sets cash bail, which can be partially secured (usually at 10% of the full amount) or required to be paid in full, then that amount must be paid at the courthouse or jail (if the jail in question accepts cash bail payments) for the person to be released. People who do not post bond are detained until arraignment, usually held within twenty-four hours of arrest, where a detainee can ask for a lawyer and a lower bond.³⁰³

• The Public Defender does its best to provide defense representation at arraignment.³⁰⁴

• The maximum cash bail amount for misdemeanors is \$500.³⁰⁵

• Kentucky's Pretrial Release agency uses a risk assessment tool to assess the likelihood that an arrestee will fail to appear or be rearrested if released pending trial.³⁰⁶

²⁹⁹ *Who We Are*, DEP'T OF PUB. ADVOCACY, KY.GOV, https://dpa.ky.gov/who_we_are/Pages/default.aspx [<https://perma.cc/Z34B-6FTQ>].

³⁰⁰ KY. REV. STAT. ANN. § 431.015 (West 2019).

³⁰¹ KY. CONST. § 16.

³⁰² KY. REV. STAT. ANN. § 431.510(1); *see also* *Stephens v. Bonding Ass'n of Ky.*, 538 S.W.2d 580, 581, 584 (Ky. 1976) (confirming that the Kentucky legislature's abolishment of commercial bail bonding in 1976 is constitutional).

³⁰³ Telephone Interview with Melanie Foote, *supra* note 112; Telephone Interview with Jacob Johnson, *supra* note 120.

³⁰⁴ Telephone Interview with Jacob Johnson, *supra* note 120.

³⁰⁵ Telephone Interview with Melanie Foote, *supra* note 112.

³⁰⁶ *See* Thanithia Billings, Note, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337, 1356–57 (2016) (noting that Kentucky courts use a pretrial program to determine defendants' eligibility for bond by looking at "factors such as: flight risk, likelihood of the defendant to appear in court, and likelihood to be a danger to others").

● Kentucky Supreme Court Order 2016-10 implemented the “Non-Financial Uniform Schedule of Bail Administrative Release Program” statewide. The order requires District Courts to release, via ROR, nearly all those arrested on non-violent, non-sexual, non-DUI misdemeanors who score as low-risk on the risk assessment scale.³⁰⁷

Adjudication

● All misdemeanors—state-law offenses and municipal offenses, traffic and non-traffic—are handled in District Court, along with many other kinds of cases (including disability hearings, juvenile status offenses, and child custody and support hearings). Many traffic offenses are misdemeanors; they carry potential jail sentences and thus the right to defense representation. Most traffic cases are scheduled on special “traffic dockets.”³⁰⁸

● The County Attorney prosecutes all cases in District Court.³⁰⁹

● Prosecutors do not typically make an independent charging decision at the start of the case. Cases are initiated on the basis of arrest charges.³¹⁰

● A public defender should be appointed for the indigent for any offense where the person is at “risk of loss of liberty” (which includes the risk of being held in contempt of court).³¹¹

● The proportion of cases handled by the Public Defender varies by county. In Harden County, the Public Defender handles approximately 90% of the docket, but in other counties it may be less.³¹²

● Non-guilt dispositions³¹³

○ Acquittal

○ Dismissal (sometimes “dismissed/merged” if only some charges are dismissed as part of a plea deal)

○ Dismissal on conditions

○ Deferred prosecution, also called “in-court diversion” or “in-court mediation” (if the defendant abides by the conditions imposed for the stipulated time period, the case is dismissed)

³⁰⁷ *Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program, No. 2016-10*, (Ky.), https://kycourts.gov/courts/supreme/Rules_Procedures/201610.pdf [<https://perma.cc/QN2R-UR5Y>]; see also Scott B. West, *The Next Step in Pretrial Release Is Here: The Administrative Release Program*, THE ADVOC., (Pub. Defs. Prot. & Advocacy, Frankfort, Ky.), Jan. 2017, at 1, [https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/Advocate%20News%20letter%20Jan%202017%20\(COLOR%20-%20FINAL\).pdf](https://dpa.ky.gov/Public_Defender_Resources/The%20Advocate/Advocate%20News%20letter%20Jan%202017%20(COLOR%20-%20FINAL).pdf) [<https://perma.cc/47EY-DFL2>] (discussing the Non-Financial Administrative Release Program).

³⁰⁸ Telephone Interview with Melanie Foote, *supra* note 112.

³⁰⁹ *Id.*; Telephone Interview with Jacob Johnson, *supra* note 120.

³¹⁰ Telephone Interview with Jacob Johnson, *supra* note 120.

³¹¹ Telephone Interview with Melanie Foote, *supra* note 112.

³¹² *Id.*

³¹³ *Id.*; Telephone Interview with Jacob Johnson, *supra* note 120.

- Diversion (like deferred prosecution, but requires a plea of guilty without any sentencing)
 - A typical misdemeanor sentence will include some jail time with credit for time served, the remainder suspended, and two years of probation (the maximum allowable period of probation for a misdemeanor).³¹⁴
 - In Boone County, prosecutors are often willing to amend charges down, or allow a person charged with multiple offenses to plead to the least serious charge only. Prosecutors are less willing to agree to either type of plea in Grant County. People do not plead to non-criminal violations.³¹⁵
 - Diversion is commonly offered to first-time offenders charged with non-violent, non-DUI offenses.³¹⁶

Virginia

Misdemeanor Classification Scheme

- Class 1—punishable by up to one year of imprisonment and/or fine of \$2,500.
- Class 2—punishable by up to six months of imprisonment and/or fine of \$1,000.
- Class 3—punishable by fine up to \$500.
- Class 4—punishable by fine up to \$250.³¹⁷
- “Traffic infractions are violations of public order as defined in § 46.2-100 and not deemed to be criminal in nature.”³¹⁸

Institutional Structure

- Circuit courts have jurisdiction over misdemeanors.³¹⁹
 - Each charge is docketed as a separate case.³²⁰
- District courts have jurisdiction over ordinance violations and “[a]ll other misdemeanors and traffic infractions arising in such county”³²¹
- The Circuit Court of the City of Richmond has jurisdiction over “cases of offenses committed in Capitol Square”³²²

Municipal vs. State Law

- Municipalities can independently criminalize and prosecute the same conduct that constitute state misdemeanors, but penalties cannot *exceed* state-law pen-

³¹⁴ Telephone Interview with Melanie Foote, *supra* note 112.

³¹⁵ Telephone Interview with Jacob Johnson, *supra* note 120.

³¹⁶ *Id.*

³¹⁷ VA. CODE ANN. § 18.2-11 (2019).

³¹⁸ *Id.* §§ 18.2-8; 46.2-100 (2019) (providing motor-vehicle-related definitions).

³¹⁹ *Id.* §§ 16.1-126; 17.1-513 (2019).

³²⁰ Telephone Interview with Nicole Galioto, *supra* note 109.

³²¹ VA. CODE ANN. § 16.1-123.1.

³²² *Id.* § 18.2-124. Capitol Square is an area consisting of “monuments, memorials, and buildings” surrounding the Virginia State Capitol. *Capitol Square—VA*, CULTURAL LANDSCAPE FOUND., <https://tclf.org/landscapes/capitol-square> [<https://perma.cc/V2A6-WR27>].

alties for “like” offenses (and cannot exceed the penalties for a Class 1 misdemeanor).³²³

- For instance, under the Fairfax County Municipal Code, Class 1 and Class 2 misdemeanors are punishable as under state law, by jail time, and/or a fine.³²⁴

Summons vs. Arrest

- Any misdemeanor is eligible for citation rather than arrest.³²⁵
- Virginia law directs law enforcement officers to cite rather than arrest for all Class 3 and 4 misdemeanors and for some Class 1 and 2 offenses if certain conditions are met.³²⁶

Pretrial Custody

- The Virginia Constitution prohibits excessive bail, but does not explicitly either affirm or disclaim a right to bail.³²⁷
- Statutory law and Supreme Court rules govern pretrial custody determinations.³²⁸

Adjudication

- Defendants charged withailable offenses may opt out of representation by accepting a deferred adjudication early in the case.³²⁹
- Deferred adjudication requires the defendant to avoid arrest for six months. For some offenses there are additional conditions; deferred adjudication for possession of marijuana, for instance, entails a mandatory six-month suspension of the defendant’s driver’s license. If a defendant avoids arrest and complies with any other condition imposed, the charge is dismissed.

³²³ VA. CODE ANN. § 15.2-1429 (2019).

³²⁴ FAIRFAX CTY., VA., CODE § 1-1-14 (2020).

³²⁵ VA. CODE ANN. § 19.2-73 (2019).

³²⁶ *Id.* § 19.2-74.

³²⁷ VA. CONST. art. 1, § 9.

³²⁸ *See* VA. CODE ANN. §§ 19.2-119–152.7 (providing bail and recognizances provisions); VA. SUP. CT. R. 5A:2 (providing rules for pre- and post-trial bail orders).

³²⁹ Telephone Interview with Nicole Galimoto, *supra* note 109 (reporting that “a lot of times” people charged with first-time possession of marijuana take this path).

APPENDIX B: OFFENSE GROUPINGS

The following chart enumerates the specific offense categories we included in each of the seven main misdemeanor offense classes that we use as the basis of our analysis.³³⁰

<p><u>Drugs</u></p> <ul style="list-style-type: none"> ● Drug distribution offenses ● Possession of controlled substances, drug paraphernalia <p><u>DUI</u></p> <ul style="list-style-type: none"> ● Driving-while-intoxicated <p><u>Public-Order</u></p> <ul style="list-style-type: none"> ● Begging/panhandling ● Disorderly conduct ● Lewdness ● Loitering offenses ● Mob action ● Noise offenses ● Obstructing justice ● Obstruction of public ways ● Offenses related to substance use (excluding DUI and licensing offenses; including public intoxication) ● Prostitution ● Resisting arrest ● Riding bicycle on sidewalk ● Trespass <p><u>Theft</u></p> <ul style="list-style-type: none"> ● Burglary offenses ● Embezzlement offenses ● Fraud offenses (including providing false identification or making a false report) ● Possession or receipt of stolen property ● Theft-of-property offenses ● Theft-of-services offenses (including fare evasion) <p><u>Traffic</u></p> <ul style="list-style-type: none"> ● Driving on a revoked or suspended license ● No insurance ● Reckless driving ● Speeding ● Violation of equipment requirements ● Violation of other traffic rules 	<p><u>Violent</u></p> <ul style="list-style-type: none"> ● Assault offenses ● Battery offenses ● Endangerment offenses ● False imprisonment ● Manslaughter (Philadelphia only; classified as a felony elsewhere) ● Threat offenses ● Violation of a protective order <p><u>Other</u></p> <ul style="list-style-type: none"> ● Failure to provide identification ● Gang contact ● Gambling offenses ● Harassment ● Hit-and-run offenses ● Interference with emergency calls or services ● Littering ● Offenses related to the administration of justice (i.e. failure to appear in court, violation of bail bond condition, contempt of court, hindering prosecution) ● Offenses related to animals ● Offenses related to minors ● Possession of burglary tools or “criminal instruments” ● Property damage offenses (including graffiti and “criminal mischief”) ● Regulatory offenses (an extremely varied category) ● Sex-related offenses (not including prostitution or public urination) ● Undecipherable offenses ● Weapons offenses (unlawful possession or carrying)
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³³⁰ For more details on our offense-grouping methodology, see *supra* notes 86–87 and accompanying text.