

# Misdemeanor Justice: Control without Conviction<sup>1</sup>

Issa Kohler-Hausmann  
*New York University*

Current scholarship has explored how the carceral state governs and regulates populations. This literature has focused on prison and on the wide-reaching collateral consequences of a felony conviction. Despite the obvious importance of these findings, they capture only a portion of the criminal justice system's operations. In most jurisdictions, misdemeanors, not felonies, constitute the bulk of criminal cases, and the number of such arrests is rising. This article explores a puzzling fact about New York City's pioneering experiment in mass misdemeanor arrests: the preponderance result in no finding of guilt and no assignment of formal punishment. Drawing on two years of fieldwork, this article explores how the criminal justice system functions to regulate significant populations without conviction or sentencing. The author details the operation of penal power through the techniques of *marking* through criminal justice record keeping, the *procedural hassle* of case processing, and mandated *performance* evaluated by court actors to show the social control capacity of the criminal justice system.

## INTRODUCTION

Analyses of any aspect of the criminal justice system in the United States customarily begin with a ceremonial nod to the numbers (2.3 million people in prisons and jails, over 5 million people on probation or parole supervi-

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sion at risk of imprisonment). These numbers are—from both a historical and international perspective—staggering. Yet, this article contends that those numbers both understate the reach of the criminal justice system and, in some sense, misrepresent the modal criminal justice encounter.

Given the astronomical growth of the incarcerated population, it is hardly surprising that most major empirical work on the criminal justice system produced over the past decade has centered around explaining the massive expansion in the scope and intensity of criminal punishment, its social, economic, and political consequences, or how it has transformed communities.<sup>2</sup> Yet, prison (or even the threat of prison) represents only a limited portion of what the criminal justice system does and how it operates as a mode of social control.

In most jurisdictions, the largest arrest categories are for crimes below felony grade, offenses for which prison is not an authorized sentence. Most criminal justice encounters involve either a misdemeanor (defined in almost every jurisdiction as an offense for which statutorily authorized punishment does not exceed one year in jail) or an infraction or violation (usually defined as a noncriminal offense in penal law, municipal codes, or other substate authority).<sup>3</sup> Over the past decade, police forces across the country have adopted some form of quality-of-life policing, which relies on intensive

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<sup>2</sup>There is an extensive and impressive literature on these topics (e.g., Garland 2001; Pattillo, Weiman, and Western 2004; Sutton 2004; Western 2006). Sociologists have generated groundbreaking research documenting the consequences of mass incarceration for low-income and minority communities (Fagan, West, and Hollan 2002; Clear 2007; Petersilia 2009; Goffman 2009), labor markets (Beckett and Western 2001; Western 2006; Western, Kleykamp, and Rosenfeld 2006; Pager 2007), families (Pattillo et al. 2004; Comfort 2008; Haney 2010), democratic institutions (Manza and Uggen 2006; Uggen et al. 2006; Simon 2007a; Lacey 2008), and the production of new forms of socioeconomic inequality (Western 2006; Comfort 2007; Wakefield and Uggen 2010).

<sup>3</sup>Almost no reliable data exist on the total volume of subfelony arrests and court filings nationwide. One of the only sources for multistate estimates of criminal court activity comes from the National Center for State Courts, which sampled 16 states with comparable data to produce a conservative estimate of 5.9 million misdemeanor filings in these jurisdictions, compared to 1.39 million felony filings in 2009 (data on file with author; see also LaFountain and Strickland 2011).

citation or arrest for low-level offenses both as a renewed commitment to addressing order maintenance as a policing priority and as an instrumental crime-control strategy (Kelling and Coles 1997; Harcourt 2001; Thacher 2004, in press; Tierney 2013). These policing tactics further swell the sub-felony floors of the criminal justice pyramid.

Misdemeanor justice—the processing, adjudication, dismissal, plea bargaining, sentencing, and punishment of misdemeanor cases—is one of the dominant components of contemporary criminal justice, and its operations represent an underappreciated modality of social control. This article analyzes the penal practices that dominate that sphere in the jurisdiction that pioneered policing techniques dedicated to expanding enforcement against low-level offenses: New York City.

Using one of the busiest criminal courts in the city's five boroughs as my field site, I interrogate the techniques and penal logic of misdemeanor justice—that is, the practical methods of social control operative in this site and their patterns of reasoned use. I ask what these operations can tell us about the social governance capacity of the criminal justice system. To do so, I draw on over two years of fieldwork, over 50 interviews, and three years professional experience working as a criminal defense attorney. Misdemeanor justice exemplifies penal techniques that are both different from and more prevalent than the most well-studied forms—namely incarceration and conviction—and its study provides insight into the significance of other noncarceral criminal justice operations.

One of the most striking things about misdemeanor courts in New York City is that so much paperwork, personnel, effort, and other resources go into delivering effectively no criminal conviction and no formal punishment. A person who had never visited a misdemeanor court might infer from this fact that most misdemeanor arrests are not taken seriously or that they involve minimal engagement with the state's penal power. This would be a mistake.

The criminal justice system extends its governance and social control capacities to significant numbers of individuals—unmeasured by prison and jail admissions or even conviction rates—through techniques I identify as *marking*, *procedural hassle*, and *performance*. Marking involves the generation, maintenance, and regular use of official records about a person's criminal justice contacts for critical decisions. Procedural hassle entails all of the burdens and opportunity costs attendant to complying with the legal proceedings. Performance means the evaluation of an executed accomplishment, whether it be demanded formally by the court *ex ante* or offered as evidence of responsibility or rehabilitation *ex post*. Focusing on the site where judicial operations occur, I show how these techniques allow criminal justice actors to trace, engage, and discipline subjects even as they are shown leniency and eventually released from formal penal control.

THEORIZING MISDEMEANOR JUSTICE

Sociology has long looked at criminal justice as a key mechanism of social control. Since World War II, the concept of social control has at times been narrowly understood to mean regulation of deviance by imposing punishment for transgressions of positive law (Durkheim 1984; Lukes and Scull 1986; Deflem 2008).<sup>4</sup> Prison occupies the preeminent place in theories of the nature of modern penal power as social control (Rusche and Kirchheimer 1968; Foucault 1995; Garland 2002). Incarceration is cited in both popular and academic literature alike as one of the primary means of governing marginal populations (Simon 2007*a*; Alexander 2010; Schuessler 2012), and social scientists look upon the emergence of the “carceral state” and mass incarceration as one of the most significant developments in recent American political history (Simon 2007*b*; Gottschalk 2008; Weaver and Lerman 2010).<sup>5</sup> But how do we understand the carceral state to be not merely responsive to individual acts of criminal deviance, but an expansive institution addressed to the regulation of entire populations?

Foucault imagined that the prison exemplified modern disciplinary power. The paragon of Foucault’s vision—the panopticon—represents the great expectations of disciplinary power, a technology of constant visibility and knowledge to bring forth autocorrection in its confined subjects. Although the penitentiary exemplified disciplinary power, it was not the unitary source of it (Foucault 1995, p. 302). Indeed, disciplinary power has the capacity to produce subjects capable of “self-management” (Covaleski et al., cited in Sauder and Espeland 2009) precisely because individuals encounter a corrective gaze and normalizing instruction in so many locations throughout so many facets of modern life.

In the age of mass incarceration, many scholars argue that prison plays a new role in the exercise of social control. Instead of reform through disciplinary practices, its role is that of “warehouse,” “punitive segregation,” and social “exile.” Others have suggested that in a post-Fordist, neoliberal capitalist order—in which entire populations are superfluous to the productive needs of the economic order—the prison is not directed at training and deploying bodies for a capitalist system in need of docile labor, but at

<sup>4</sup>The term social control has a long and complicated history in sociology, and I do not presume to review, much less resolve, any semantic and conceptual battles here (Ross 1896; Janowitz 1975; Meier 1982). My use of the term is not intended to invoke a nefarious inflection of brute coercion and oppression, but rather merely designate how state institutions maintain order and gather knowledge about and regulate the actions of populations.

<sup>5</sup>While social science research has largely ignored misdemeanor courts and punishments in the age of mass incarceration, there is a small but growing law review literature on misdemeanors, which mostly addresses legal or procedural issues in misdemeanor adjudication including fairness and accuracy of proceedings (Bowers 2007, 2010; Howell 2009; Fabricant 2010; King 2011; Cade 2012; Natapoff 2012, 2013).

identifying and segregating the dangerous from the laboring classes (De Giorgi 2006; see also Wacquant 2009, pp. xvi, 296). Thus, the mechanism of removal and physical segregation is another means by which we conceptualize the social control capacity of the carceral state.

The mark of prison time, or more broadly of a felony conviction, is another means by which the carceral state manages and excludes marginal populations. A substantial literature shows how a felony conviction curtails labor market prospects (Beckett and Western 2001; Western 2006; Pager 2007) and imposes a host of civil disabilities, often extending beyond the legal offender (Mauer and Chesney-Lind 2002; Mele and Miller 2004; Comfort 2007; Suk 2009). A felony conviction often restructures the rights of citizenship (Kalt 2003; Manza and Uggen 2006) and shapes how individuals conceive of their citizenship status and relationship to the government (Manza and Uggen 2006; Gottschalk 2008; Weaver and Lerman 2010). A felony conviction is almost always a permanent mark (absent the rare possibility of expungement in some states) and has such wide-reaching implications in so many venues that theorists have analyzed the social standing of felons in conceptual terms such as caste, class, and status group (Uggen, Manza, and Thompson 2006; Alexander 2010; Wakefield and Uggen 2010).

The threat of prison is another means of social control. Probation and parole populations have grown even faster than prison populations during the last 30 years (Glaze and Boncar 2011; Phelps 2013). This group is legally constrained and routinely inspected for fitness to maintain their limited liberty and constitutes an ever-larger pool of potential prisoners, whose reincarceration may often occur for technical violations or new minor arrests (Simon 1993; Goffman 2009; Phelps 2013). Goffman's pioneering ethnography captured the effects of intensive policing on a group of young men with standing links to the criminal justice system through probation, parole, or court warrants. Her study found that the form of power operative in the ghetto was incomplete and sporadic, leading her to conclude the residents were less captives of a Foucauldian panoptic power regime than fugitives within porous social and physical spaces, seeking to evade detection since they were already "candidates" for removal to prison (Goffman 2009, p. 355).

The study of misdemeanor justice allows us to see how penal regulation extends to significant populations who are not threatened with prolonged confinement at the point of arrest and not necessarily threatened with a permanent criminal record. There are certain similarities between the ways the penal power regulates in the carceral and the misdemeanor justice systems: bodies are removed at the point of arrests, records and marks are generated, disciplinary routines are engaged. Yet, misdemeanor justice is not merely a scaled-down form of felony justice in which social control is sought

by judicially determining individual acts of lawbreaking in order to impose formal punishment. The social control project in misdemeanor justice is defined by a set of practical circumstances specific to the venue of lower criminal courts, and the penal techniques that dominate this site are a product of those constraints. The criminal justice actors administering misdemeanor justice are, on the one hand, not able or inclined to convict and lock up every offender hauled into court from the city's signature low-level policing regime. Nor are they, on the other hand, content to just cut defendants loose after the point of arrest. Defendants also face a set of constraints unique to lower criminal courts because the process costs of litigating a case often outweigh the (at least short-term) costs of early disposition.

Over 30 years ago, Malcolm Feeley's seminal study of New Haven's lower court showed that misdemeanor courts demonstrated routines of case processing and patterns of outcomes different from felony courts precisely because of the framework of adjudicating (relatively) minor crimes, massive volumes, and lower statutorily authorized penalties (Feeley 1979; Earl 2008). Feeley was primarily concerned with analyzing the organizational traits of courts, and he conceptualized the lower court as an open system embedded inside a particular macrosocial environment—criminal law adjudication recently transformed by the Supreme Court's due process revolution of the late 1960s and early 1970s. He concluded that in this setting the costs of invoking the full panoply of the adversarial process and newly expanded procedural rights often outweighed the sanctions imposed after an early plea: "In essence, the process itself is the punishment" (Feeley 1979, p. 30). Feeley expressly bracketed the question of how the outcomes that emerged from the form of adjudication he identified in lower criminal courts related to social regulation or the (re)production of inequality. It is precisely to those questions that this study addresses itself.

Thirty years later, misdemeanor justice has an especially salient position in the governance of marginal populations after an emphatic "punitive turn" in the tone of criminal justice administration, the proliferation of criminal records and associated civil disabilities, waves of drug wars, and the hegemony of broken-windows or quality-of-life policing (Duneier 2001; Harcourt 2001; Garland 2002; Jacobs and Crepet 2007). I take Feeley's seminal insight about lower criminal courts (that the costs of adjudication for defendants are often relatively higher than the formal costs imposed by early dispositions) as a point of departure. I ask, in turn, how that fact—combined with the practical constraints and interests of prosecutors and judges—gives rise to certain tools or techniques of social control and how they differ from more familiar forms.

A small but growing literature has begun to address penal techniques operating outside of total institutions such as prisons. These scholars have

explored the use of fines (Bottoms 1983; O'Malley 2009) and the frequent imposition of legal financial obligations that extend obligations to the criminal justice system long beyond the completion of any formal sentence and exacerbate its inequality-producing effects (Harris, Evans, and Beckett 2010, 2011). Others have documented the stinging psychological tolls so-called alternative facilities exact on subjects even as these facilities seek to distinguish themselves from prison (Haney 2010), how the state banishes the socially marginal from public spaces without incarcerating them (Beckett and Herbert 2010), or how being "on the run" because of outstanding warrants, probation or parole infractions, or failure to pay court fees shapes relationships to friends, family, and work (Goffman 2009).

The study of misdemeanor justice is part of this move to broaden our gaze beyond the prison in order to apprehend more fully the role of penal power in social regulation. If the prison represents the great expectations of disciplinary power, then misdemeanor justice exemplifies its diminished expectations. It deploys a particular form of constrained disciplinary power addressed to the task of social regulation of marginal populations, one that is more common than the totalizing vision theorized by Foucault. My data show that the penal techniques dominant in misdemeanor justice share some qualities with prison and conviction, but differ in important respects.

The marking in misdemeanor justice often involves temporary marks, documentation is limited and imperfect, and the record-keeping practice itself is subject to forces that seek to limit its powers. Yet, even these temporary marks have a host of significant effects in different arenas, especially for later criminal justice encounters. The procedural hassle of misdemeanor justice always commences with the degradation of arrest and punitive custody. Those whose cases continue past the first court appearance go back and forth to court: a series of punctuated encounters with normalization rites as opposed to long-term removal and constant confinement. The performances demanded in the process of misdemeanor adjudication are oriented toward disciplinary goals of normalizing and self-management, but such adjudication deploys technologies of audit, cursory assessment, and moderated sanction modified to the limited resources of the institutional setting. The structure of penal techniques in misdemeanor justice serve the social control ends of sorting (the one-time errant citizen from incorrigible misdemeanant or budding serious offender), testing (the capacity to respond to official directives or to be deterred by official penalties), and regulating (enforcing norms of order and law abiding through rewards and sanctions) for significant populations without long-term removal, total control, or permanent marking.

Understanding the penal operation of sites such as misdemeanor justice is vital to a building a more complete theoretical picture of our criminal jus-

tice system's social control role. Despite the unprecedented surge in incarceration, the noncarceral penal operations—covering probation, parole, alternative programs, misdemeanor sentences such as conditional discharge, fines, community service, and of course nonconviction—continue to constitute the largest component of criminal justice system operations.

Furthermore, this study of misdemeanor exposes the fact that criminal courts are not always operating according to the traditional model of criminal law as social control: assigning punishment for judicially determined infractions of the law. Examining what happens in misdemeanor court with that fraction, that sizable fraction, of cases that are eventually dismissed and sealed in one form or another reveals the operation of penal power even as criminal justice actors show leniency and abjure familiar forms of direct control. It further demonstrates how the penal state extends its governance capacities to significant numbers of individuals who are neither formally sentenced to a punishment nor convicted of a criminal offense.

#### DATA AND METHODS

I address cases where the most serious arrest or summons charge is something below a felony.<sup>6</sup> I present descriptive statistics about misdemeanor arrests and dispositions (i.e., case outcome such as dismissal or conviction and sentence) to show the composition and flow of misdemeanor justice and to provide an interpretive backdrop for my qualitative data. Descriptive data come from New York State Division of Criminal Justice Services (DCJS), which collects data from the courts and maintains it for the state. Information on the legal frameworks for sentencing, dispositions, and sealing was obtained from reviewing relevant penal and criminal procedural statutes, interviews with state officials, court personnel, and three years professional experience working as a defense attorney.

In the summer of 2009 I began working part-time as a criminal defense attorney for a solo practitioner in one of New York City's boroughs. When I began my fieldwork in April 2010, I selected a different borough as the site of my study so as to minimize perceived or true biases, preconceptions, or limits on access stemming from my professional position in an adversarial system. To minimize data collection bias from my professional experience I tried, as much as possible, to select an "inconvenient sample" by

<sup>6</sup> Because the object of this study is penal practices targeted at those arrested for nonfelony crimes, I do not address cases where the initial arrest was a felony later reduced to a misdemeanor or violation on motion by prosecution, reduction for the purposes of plea bargaining, or where a felony trial results in a conviction of a misdemeanor crime. This is a very common occurrence; of New York City's approximately 92,000 felony dispositions in 2010, about 22% resulted in convictions to a misdemeanor, and only about 16% resulted in convictions of a felony (only about 9% resulted in a prospective prison sentence).

not relying on professional connections for entrée, not mentioning my own work to gain rapport, and doing blind approaches, emails, or calls to initiate conversations and interviews (Duneier 2011). In practice I found most people did not ask about my background or work, and in general I did not bring up my work experience unsolicited. I spoke to people occupying various positions within the criminal justice system (judges, defense attorneys, prosecutors, court personnel), up and down the organizational hierarchy (new attorneys and judges along with supervisors and long-serving judges), and horizontally spanning those with reputations as stern and lenient, traditional and progressive.<sup>7</sup>

My qualitative data come from over two years of fieldwork in one of New York City's busiest criminal courts.<sup>8</sup> This borough will be identified as Borough A to maintain confidentiality, as requested by many participants in the study, and all names have been disguised to preserve the anonymity of those who requested it. All told, fieldwork included extensive ethnographic observation in courtrooms and interviews with judges, defense attorneys, prosecutors, defendants, and various court personnel. I spent between one and three full days per week sitting and observing various misdemeanor courtrooms, during which I extensively engaged with prosecutors, defense attorneys, court personnel, and defendants about the cases I witnessed. I also conducted 13 observation interviews with assistant district attorneys (ADAs) and defense attorneys, sitting with them during court, observing their work, and asking questions about the cases, procedures, and disagreements that I witnessed. In addition, I conducted seven structured interviews with judges, seven with assistant district attorneys, one with the elected district attorney of Borough A, and eight with defense attorneys. I also conducted 13 in-depth interviews with defendants, where possible following their cases throughout the adjudication process, and 10 more limited postdisposition interviews.

The data presented below thus weave together descriptive regularities about misdemeanor arrests, adjudication, and outcomes with examples of particular cases that illustrate the logics or techniques at issue. Examples of defendants' experiences or case patterns represent actual defendants and cases (that is, they are not composite cases) that exemplify the phenomena under discussion or bring to light an important dynamic being discussed.

<sup>7</sup>The district attorney's office was very open and generous with its time, but as a political office, those in leadership positions exercised a fair amount of control over whom I spoke with on the lower end of the hierarchy in formal interviews.

<sup>8</sup>In New York City, the court that handles misdemeanors, violations, and preindictment felonies is called the criminal court, whereas indicted felonies are handled in what is called the Supreme Court.

MISDEMEANOR JUSTICE IN NEW YORK CITY

New York City is a critical case for the study of misdemeanor justice both because it has such a high volume of misdemeanor arrests and summonses as part of an explicit law enforcement strategy and because it simultaneously offers legal and programmatic options for leniency to misdemeanor defendants. Arrests for minor crimes are a key to New York City's policing strategy that has been exported around the country and globe and packaged under various catchy titles including quality-of-life policing, broken windows, order-maintenance policing, and intensive community engagement.<sup>9</sup>

Figure 1 displays the striking ascent of misdemeanor arrests starting in 1994, the year Mayor Rudy Giuliani and Police Commissioner William J. Bratton introduced their signature policing initiative focusing on low-level offenses (Bratton, Giuliani, and New York Police Dept 1994). This figure also plots on the right axis the percent of misdemeanor dispositions each year that terminated in any form of dismissal. New York's policing experiment represents a puzzling departure from the story of mass incarceration, in which an expansion in the scope of substantive criminal law, statutory sentences, and policing produced more formal punishment. Figure 1 shows that as misdemeanor arrests climbed, so did the dismissal rate.

It is no surprise that even though quality-of-life policing tactics are often heralded as tools to detect and deter major violent crimes, the most common hits are for minor drug possession, not deadly weapons or murder warrants (see, generally, Harcourt 2001; Baker, Roberts, and Rivera 2010; Fagan and Geller 2010). Figure 2 shows that misdemeanor arrests cover a wide range of conduct, yet the biggest arrest categories are for offenses where a surge in underlying behavior is an unlikely (or at least difficult-to-prove) explanation.<sup>10</sup>

Because these policing strategies are extremely spatially concentrated in high-crime and high-minority neighborhoods, the demographic composition in misdemeanor courtrooms is principally low income and minority. In 2010, about 49% of all misdemeanor arrests were of black, 33% Hispanic, and 13% white individuals. The state does not keep income data on defendants, but according the New York City Criminal Justice Agency

<sup>9</sup>Although there is debate about whether the policing tactics adopted in New York City over the past 15 years are properly termed "quality of life" or "broken windows" (see e.g., Zimring 2011), I use the term "quality-of-life policing" because most of the prosecutors, judges, defense attorneys, and police officers I speak to use it and intend it broadly to reference the intentional expansion of arrests and summonses for low-level offenses.

<sup>10</sup>Note that the DCJS tallies of aggregate arrests by year count arrests within the designated year(s) and that disposition could take place any time after arrest; disposition tallies count dispositions that took place within the designated year(s) and arrest could have taken place any year.

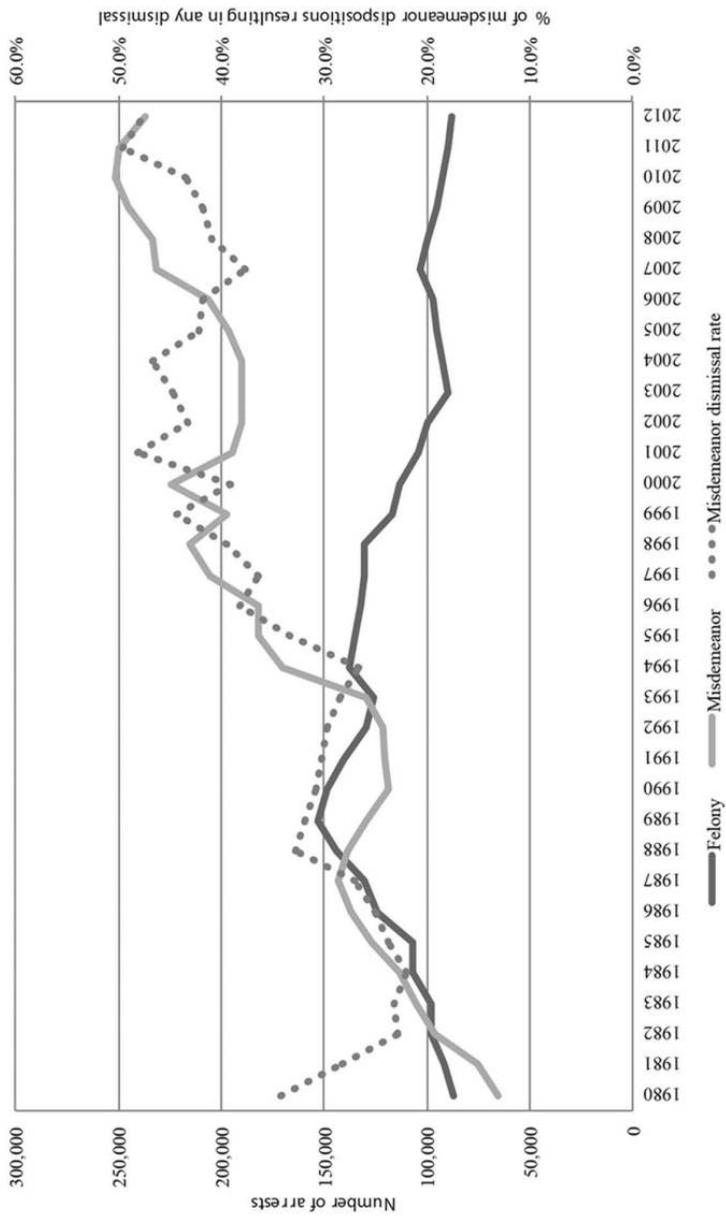


FIG. 1.—Felony and misdemeanor arrests and misdemeanor dismissal rate, New York City 1980–2012

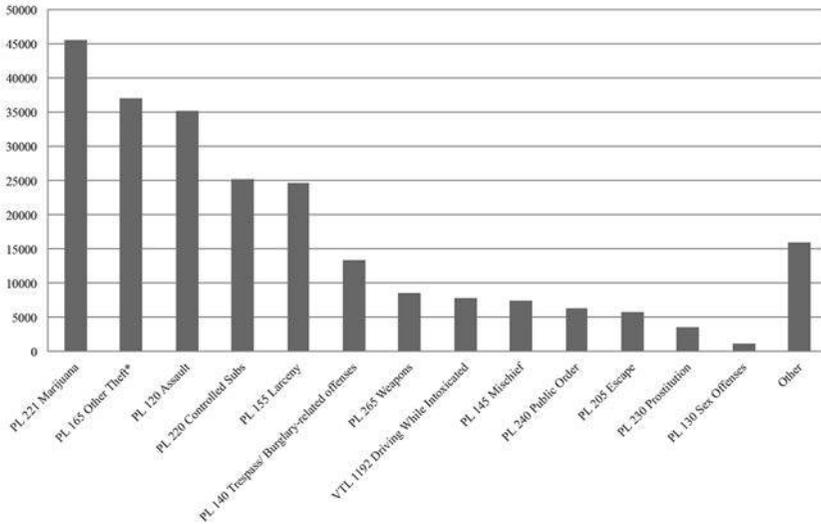


FIG. 2.—Misdemeanor arrests by penal law (PL) article, New York City, 2012. “Other” includes theft of services (e.g., turnstile jumping). The number indicates number of misdemeanor arrest incidents under designated penal law article.

(responsible for interviewing defendants to make bail recommendations), about 50% reported being unemployed, and during my study I observed very few defendants who did not qualify for public defender services (New York City Criminal Justice Agency 2009).

Therefore, on the one hand, New York City is a critical case for the study of misdemeanor justice because of its excess: it epitomizes a commitment to a collection of policies that intentionally increase the level of misdemeanor arrests—policies that other major cities have adopted to varying degrees. On the other hand, New York City is a critical case because of its forbearance: it also offers a range of progressive criminal procedural disposition options and alternative sentencing programs. New York State is one of the few states to offer certain disposition possibilities that do not create a permanent criminal record, and it boasts fairly protective sealing statutes for arrests not terminating in a criminal conviction. The district attorney of the borough where I conducted my fieldwork is widely heralded as one of the more progressive prosecutors in the city; his office embraces alternatives to incarceration and is an innovator in the wide range of programs defendants can undertake to avoid criminal prosecution and criminal records.<sup>11</sup> Thus, because this borough does not mechanically seek conviction

<sup>11</sup> Each of New York City’s five boroughs elects its own district attorney and prosecutorial practices and priorities can differ between boroughs.

in every case, it is a site where we can view the operation of penal power beyond the familiar, more readily apparent forms on display in more punitive jurisdictions, where conviction and jail time are the norm.

This article focuses on one particularly common outcome of misdemeanor arrests: dismissal. As evidenced by figure 3, over 50% of the dispositions for misdemeanor arrests in New York City in 2011 were dismissals in one fashion or another. I focus on the more common forms of dismissal in New York City criminal courts: the adjournment in contemplation of dismissal and speedy trial dismissal.<sup>12</sup> Of the cases that do result in a conviction, less than half are convictions for misdemeanor crimes (fig. 3). The majority are convictions for some noncriminal offense or violation, which (usually) carry no permanent criminal record. Prospective jail sentences are fairly rare; in recent years about 10% of misdemeanor dispositions involved a prospective jail sentence and another 10% involved a sentence of time served.

#### Adjournment in Contemplation of Dismissal

By far the most common mechanism for dismissal in New York City is called an Adjournment in Contemplation of Dismissal (ACD)—it represented roughly 27% of all misdemeanor arrest dispositions in 2011. An ACD is authorized by statutory provisions in the state criminal procedural law allowing the court to grant the motion of either party (prosecution or defense), with the consent of the nonmoving party, to adjourn the case for a specific time period, after which the charges are dismissed and the arrest and prosecution are deemed a “nullity.” Two different criminal procedure law provisions authorize an ACD, one specifically for marijuana offenses (MJACD) and the other general (ACD).<sup>13</sup> These statutes specify different maximum adjournment times—for marijuana offenses (and family offenses) the adjournment period cannot be longer than one year, for other offenses no longer than six months.

The court can set all sorts of conditions on the defendant during the adjournment period, but most judges just say “stay out of trouble,” or “lead a law-abiding life.” Other examples of conditions include a temporary order of protection, an educational or therapeutic program, restitution, or commu-

<sup>12</sup> One of the other most common forms of dismissal is where the district attorney declines to prosecute the case. Over the past decade, the decline-to-prosecute rate has fluctuated between 8% and 12.5% of all misdemeanor case dispositions, usually a substantially higher percentage than the decline-to-prosecute rate for felony cases.

<sup>13</sup> NY CPL § 170.55 and NY CPL § 170.56. A judge can authorize a marijuana ACD even without the prosecutor’s consent if the defendant has never been convicted of any crime; if the defendant has a prior criminal conviction the prosecutor must consent to the MJACD.

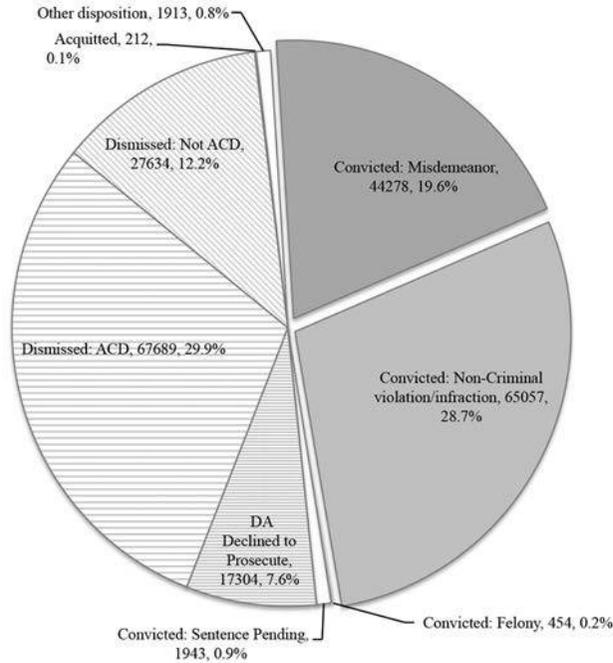


FIG. 3.—Misdemeanor case dispositions, New York City, 2012. “Other disposition” includes youthful offender adjudication, diverted and dismissed, covered by another case, and other unspecified.

nity service. If there are no conditions attached to the ACD, the defendant is not required to come back to court. Unless the prosecution makes a motion to restore the case, the charges are automatically dismissed after the adjournment period and the record sealed. If there are conditions attached to the ACD, the defendant must come back to court to prove compliance before the case is dismissed and sealed. During the adjournment period the case is “open,” but upon the dismissal date (provided the defendant has complied with any necessary conditions) the case is dismissed and sealed, which means it should not print on a defendant’s rap sheet or be available to court officials or to the public on a criminal background check.<sup>14</sup>

### 30.30 Dismissal

Criminal cases have a shelf life. In New York State the shelf life of a case is set by criminal procedure law article 30, section 30, which defines the

<sup>14</sup> *Rap sheet* is the informal term for the official criminal history sheet printed for all defendants, in New York called the NYSID sheet.

amount of time the district attorney has to prosecute a case. The statute states that a defendant's motion to dismiss the charges against him must be granted if the prosecutor is not "ready" for trial within the statutorily specified period—90 days for an A misdemeanor, 60 days for a B misdemeanor, and 30 days for a violation. Dismissals granted pursuant to this statute are called "30.30 dismissal," or alternatively, it is said the case "30.30ed out" or just "30.30ed" in courtroom vernacular. The right to a speedy trial vindicates a fairly intuitive (and constitutional) principle of justice—it is unfair to make a defendant sit in anticipation of punishment or unable to assert his innocence for an indefinite amount of time. It also sets forth a rule essential for organizational management of massive court dockets—if cases could linger ad infinitum the system would become unmanageable, as there are hundreds of thousands of new arrests each year.

There are several milestones that have to be met for the prosecution to declare itself "ready" to stop the clock. What it means to be "ready" for trial is a term of art in criminal law and there is substantial common law on the topic. For the purposes of this article, the important milestone is that someone with firsthand knowledge of events constituting the crime must sign a sworn statement to move the case forward. If this does not happen, the case will eventually be dismissed 30.30 after the statutory time. A 30.30 dismissal triggers immediate sealing of the case, meaning the arrest should not print on any future rap sheets or be available to the court or an employer doing a background check. Somewhere around 8%–15% of all misdemeanor dispositions in recent years are dismissed because of the speedy trial statute.

#### DISMISSAL AND THE LOGIC OF MISDEMEANOR PUNISHMENTS

The processes involved in the two forms of dismissal addressed in this article entail sets of techniques or practices and their patterns of deployment express a penal logic. I classify the processes involved in dismissal into three categories of techniques: *marking*, *procedural hassle*, and *performance*. Each technique category is a conceptual schema, as opposed to objectively identifiable, discrete types of action, constructed by analyzing predictable and recurrent sequences of operations in misdemeanor case adjudication. The term technique is intended to capture a method or mode of knowing, tracking, and regulating penal subjects, in other words, the types of tools criminal justice actors engage to secure a measure of social control over the subjects they encounter. Technique also locates a site and manner by which costly effects are experienced and also identifies a means of sanctioning and control (e.g., identification and labeling, engagement with a formal state procedure, requiring a presentation of an accomplished assigned task).

Misdemeanor justice is produced by a variety of actors, often working at cross-purposes (sometimes in ways intended in an adversarial system, sometimes as a result of poor institutional design) or unaware of other components, and at times only loosely coordinated or sharing a substantive goal or normative understanding about the ends and value of the criminal justice encounter. Sometimes criminal justice actors intentionally rely on these techniques when conviction is either too costly or legally difficult to secure or when they believe that conviction or a custodial sanction is inappropriate or unjust given their assessment of the case and the defendant. In other instances, these techniques emerge as the unintentional upshot of the uncertainty and transaction costs inherent to the criminal process. However, criminal justice actors understand the fact these penal techniques result from their choices and actions during the criminal process, even if the proximate motivation behind the action was not to use the technique as a means of punishing, testing, or regulating. They then make strategic use of these techniques and look to the information that was revealed to obtain a measure of regulation over the defendant or to update what they think is an appropriate formal disposition.

Therefore, to say that misdemeanor justice involves a technique or practice of marking means prosecutors and judges might seek a particular disposition with the intent of marking the defendant's public criminal record, while other actors (i.e., the defendant and defense attorney) make strategic decisions about the case because of a concern with the marking effect of a particular disposition, and yet irrespective of the intent of any particular actor the disposition will have the effect of marking the defendant's public criminal record. To argue that misdemeanor justice involves a technique or practice of procedural hassle is to say that the burdens imposed on defendants from multiple case adjournments is not an unknown feature of poor court administration (cf. Glaberson 2013) but a familiar and indeed useful tool in the ongoing project of social control that actors in the system intentionally use and rely upon. And to identify performance as an operative technique in misdemeanor justice means that opportunities to observe a defendant's propensity to adhere to the demands of the adjudicative process or to follow other official instructions is alternatively intentionally sought and opportunistically reappropriated as an index of responsibility.

### Marking

The first technique is what I call *marking*—it is an official state stamp on the defendant that designates something about his participation in the criminal justice system. The classic understanding of the role of marking in social control via criminal justice is that the conviction itself can punish,

deter, and express social opprobrium by designating a permanently degraded status for the offender. Garfinkel, for example, conceptualized criminal court proceedings as a “status degradation ceremony,” accomplishing “communicative work . . . whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types” (Garfinkel 1956, p. 420). Once the status of criminal offender has been bestowed by a finding of guilt, that stigma is a social status that must be managed throughout life (Schwartz and Skolnick 1962; Becker 1963; Goffman 1963). Because a criminal conviction is a permanent and accessible record, it can be thought of as a negative credential where “the power of the credential lies in its recognition as an official and legitimate means of evaluating and classifying individuals” (Pager 2007, p. 5; see also Jacobs and Crepet 2007).

But marking in misdemeanor justice frequently produces signals of temporally limited duration, often by design and consent of the parties. Furthermore, marking in this context is not always the upshot of a determination of guilt indicating a precise crime. Sometimes conviction is not even a desired or necessary part for the social control project in misdemeanor courts, which relies more on constructing a record of a person’s behavior over time than assigning guilt for a specific transgression.

Marking is the primary penal practice operative for tens of thousands of misdemeanor arrestees each year in New York City. The marijuana ACD offers a case in point. Marijuana arrests have skyrocketed in New York City over the past 15 years, from about 8,000 in 1994 to over 56,000 in 2010. Yet, since 2004, somewhere between 45% to 59% of all cases where the top arrest charge was simple possession of marijuana were adjourned in contemplation of dismissal.

On a Tuesday in November 2010, in an overcrowded courtroom, there were 185 cases on the court calendar to be arraigned on a desk appearance ticket (DAT).<sup>15</sup> Defendants scheduled to be arraigned that day, who usually are instructed to sit in the courtroom audience so they could hear their case called, spilled out into the hallway to wait for their attorney or a court officer to tell them their case would be called. That day, like most days, the most common penal law arrest charge was misdemeanor criminal possession of marijuana. Ray, the supervising arraignment lawyer for one of the public defender organizations, walked over to the prosecution table with stacks of files, saying “all of these will be marijuana ACDs” to Samira, an

<sup>15</sup> A DAT occurs when the defendant is arrested and taken to the local police precinct for fingerprinting and to generate a criminal history and then released with a notice to appear in court at a future date for arraignment. Full arrests—called an “online” arrest because all information is entered into the NYPD’s “online” database at the time of arrest—means the defendant is kept in police custody the full 20–36 hours between arrest and arraignment. Online arrests are more than four times more common than DAT arrests.

arraignment supervisor from the D.A.'s office. Ray can assume, without asking, that she will offer a marijuana ACD for each of the first-time arrestees because it is the normative practice in the borough.

Samira does not have a reputation for being particularly progressive or lenient; in fact, I have seen her be quite strict in plea negotiations on many occasions. Later that day Ray complained about being overwhelmed "with so many bullshit arrests," and I pointed out that the supervising ADA does not think of the cases as "bullshit arrests," as she just told me that defendants need to be more responsible and not do things to get themselves arrested. Ray responded: "[Samira] is a nice, smart, competent lawyer and whether or not she expresses the belief that these people should not be putting themselves in the position to be arrested and not be doing these things is more an expression of a personal opinion—you don't see her opposing the ACDs, but granting them. So it is not really about what she thinks of these people's behavior but how she deals with the arrest." Ray knew that certain types of misdemeanor cases are granted ACDs at the first court appearance as a matter of course, irrespective of whether the prosecution could easily secure a conviction.<sup>16</sup> And as Ray's actions demonstrate, he had no question that Samira would deal with the files he handed her that day by granting a marijuana ACD.

Not only can a defense attorney assume the prosecutor will consent, he can assume the judge will consent. In order to streamline the backlog of cases for arraignment, many judges agree to have multiple defendants called up to the podium for arraignment if they will all be receiving the marijuana ACD. In some courtrooms judges issue marijuana ACDs without requiring defendants to even walk up to the podium: their names are called, they stand up in the audience, where they have waited for hours, while the judge issues the order, practically yelling it from the bench. On that November day there were six groups, consisting of four to six individuals, summoned as a group to receive an MJACD. The court officer called out the list of defendants' names and they took their places in a huddle around the assigned defense attorney. The judge said: "Your cases are being adjourned in contemplation of dismissal; you need to stay out of trouble for one year and then your case will be dismissed and sealed." They silently filtered out of the courtroom.

<sup>16</sup> Different D.A.'s offices have different policies regarding granting ACDs, but most offer an ACD for many of the most common arrest types not involving a complainant (e.g., marijuana, drug possession, turnstile jumping, prostitution) if the case is the defendant's first arrest. Some offices require a condition such as a program or community service, which will be discussed in the following sections. In 2010, about 42% of all the cases that went to disposition at arraignments (which is about half of all misdemeanor cases) resulted in an ACD at the first court appearance (New York City Criminal Justice Agency 2009, p. 16).

The defendants granted marijuana ACDs en masse left the courtroom with the expectation that the case was behind them, as they were told that the case would eventually be dismissed and sealed. But they also left the courtroom with a marker—albeit one with a limited duration—a trace of this encounter. The marker is recorded on an individual’s criminal record, otherwise known as the rap sheet. The criminal record is technologically tied to the physical body of the offender—a unique criminal justice identifying number, called a New York State Identification (NYSID), is generated and matched to the defendant’s fingerprints. If the person is convicted of a criminal offense (i.e., the case is not dismissed and the defendant is not convicted of a noncriminal violation), then the New York State DCJS maintains a digital image of the fingerprint linked to the offender’s name, NYSID, and other identifying information. From that point forward, if the person is arrested his prints are taken and matched to the NYSID and the criminal record is generated based on this match.

If a defendant’s case is dismissed in any fashion, all records of the proceedings must be sealed and, provided the state does not already have the defendant’s fingerprints on file from a prior criminal conviction, the fingerprints must be destroyed and unlinked from the NYSID.<sup>17</sup> However, if the defendant’s case terminates in a marijuana ACD, then the fingerprints need not be destroyed because statute forbids a defendant from being granted more than one marijuana ACD in his or her lifetime. If the defendant is convicted, either through a plea or trial, of a noncriminal violation and sentenced to a conditional discharge, then the case remains on the person’s rap sheet for a year, after which (provided there is no other criminal conviction) the case is sealed, and the DCJS is directed to destroy the fingerprints and unlink the NYSID.<sup>18</sup>

Marking can vary by the severity of the mark (i.e., dismissal or type of conviction), the length of time it persists, and who can access and use it, subject to what rules. Table 1 compares the ACD dispositions with convictions of a violation or misdemeanor, noting the marking period for each disposition.

Thus, criminal justice contacts that do not result in a criminal conviction classify and credential people in various realms, perhaps most importantly in later criminal justice encounters. One of the most widely understood and practiced rules in criminal court, one that is so taken for granted that it is rarely stated explicitly, is what I term the *additive imperative* in case disposition. The understanding is that absent mitigating circumstances, a

<sup>17</sup> NY CPL § 160.50.

<sup>18</sup> The case does not print on the rap sheet after the conditional discharge period, but court records are not sealed, whereas court records are sealed in ACD dispositions. In addition, noncriminal infraction or violation convictions for certain offenses, such as stalking or drunk driving, are never sealed (NY CPL 170.50 and 170.55).

TABLE 1  
MARKING DURATION BY SELECT DISPOSITION TYPE

Disposition	Marking Period on RAP Sheet	Sealed after the Marking Period Unless
ACD form of dismissal: Marijuana ACD or designated family offenses	1 year: case remains open during a one-year adjournment; fingerprints are not destroyed even if no prior conviction	Defendant is rearrested during the adjournment, D.A. can restore the case to the calendar or, more likely, make a less lenient offer on the new arrest
ACD	6 months: case remains open during a six-month adjournment, dismissed and sealed after this period unless conditions violated or restored to calendar; fingerprints are destroyed if no prior conviction	Same as above. In addition, court can impose any number of conditions (see below) and case is not dismissed and sealed if defendant fails to discharge conditions
30.30 Dismissal	The prosecution has 90 days to be "trial ready" for an A misdemeanor, 60 days for a B misdemeanor, and 30 days for a violation	Cases that are eventually dismissed under CPL 30.30 are often open for longer than the designated statutory time because many adjournments count as excludable time under the statute
Conviction: Violation	1 year if conditional discharge sentence Immediate sealing if "time served" sentence once surcharge is paid (or civil judgment entered)	Defendant violates the condition of the conditional discharge sentence or unless "do not seal" order entered
Misdemeanor or felony	Permanent record	Never sealed

defendant should take some larger hit for each subsequent arrest. The additive imperative is expressed and demonstrated in various ways, including the paperwork that criminal court actors rely upon in their fast-paced workflow.

The essential paperwork in the criminal court file that the prosecution, judge, and defense receive before arraignment is the "complaint" with the charges and a brief description of the facts that make up the offense and the defendant's rap sheet—called the NYSID sheet. Prosecutors and judges must decide on plea offers or recommendations, sometimes on hundreds of cases a day, by flipping through this limited paperwork. A substantial portion of misdemeanor dispositions are reached on the basis of this paperwork alone. In recent years, over 57% of all dispositions occur at arraignment when no additional investigation by defense or prosecution has

been conducted.<sup>19</sup> Defense attorneys realize how important quick glances at the marks of prior encounters are for both prosecutors and judges in setting offers and bail. As Ray explains: “There is also on the NYSID sheet a section that, for purposes of making things easy for the court and for the judges, indicates how many arrests a person has had . . . how many bench warrants they have, how many open cases they have. And inevitably that shorthand section is incorrect . . . so we train our attorneys how to read those sheets very carefully.”

There are a variety of ways prosecutors discuss it, but every prosecutor I asked explicitly about how they formed offers consistently expressed the same additive imperative. Stacy, one of the top deputies in the D.A.’s office, explained that she tells her assistant district attorneys to ask two questions when a case comes in: “Can I prove it?” and “Has he done it before?” She explained, “We look at the crime first and second who did the crime.” Jill, another supervisor in the D.A.’s office, explained that “we try to build on prior cases.” Al looked puzzled when asked why he insisted on a plea to a violation once he realized a defendant had been granted an ACD on prior arrest that year, responding, “Why would you want to keep giving ACDs?” Samira said that whenever she sees an ACD on the rap sheet, even one that should have been sealed but was not because of some administrative error (which is surprisingly common), she “knows not to offer the ACD again.”<sup>20</sup> She explained, “You are not making an offer just on a charge, you are making an offer on the person, on the record that person has, you don’t say, ‘Oh well, this is just theft of services,’ because if this is his 100th theft of services then he is sentenced on that fact.”<sup>21</sup>

Temporary markers en route to dismissal allow criminal justice actors to mark and classify recent police contacts. While visible, these marks are often “built upon” by successive arrests. For people living in highly policed neighborhoods, where between 9,000 and 20,000 stop, question, and frisk encounters happen each year, there is a high risk of rearrests for misdemeanor offenses in short time periods (Gelman, Fagan, and Kiss 2007; Baker et al. 2010; Geller and Fagan 2010).

In late June 2010 a man was arraigned for misdemeanor marijuana possession. Al flipped through his charging document and rap sheet in about 90 seconds and scribbled an offer on the file: “B misdemeanor and 10 days jail.” He explained to me that this is the man’s third marijuana

<sup>19</sup> Data from chief clerk of the Criminal Court New York City, on file with author. Since 1995, the percentage of subfelony cases going to disposition at arraignments has ranged from a low of 56% to a high of 67%.

<sup>20</sup> Some of the quotes appearing here are taken from notes I wrote at or soon after the scene; others are transcribed from recorded interviews.

<sup>21</sup> “Theft of services” is turnstile jumping or fare beat.

case; he had already been given a marijuana ACD and a violation within the year and did five days community service on the last arrest, so this time he thought a conviction for the misdemeanor offense was appropriate. The defense attorney asked if Al would “come off the misdemeanor” and Al replied, “His last [criminal justice] contact was August of 2009, less than a year ago, and he got the violation last time, that’s why I went up, he got the violation last time.” After negotiating with the defense attorney Al agreed to “come off the misdemeanor” and allow the defendant to plead to a violation, but he would have to do 15 days community service this time.

Cases that are eventually recorded as dismissed pursuant to 30.30 are, like cases adjourned in contemplation of dismissal, open cases until a judge affirmatively rules the case dismissed. Having an open case marks the defendant in a number of arenas beyond criminal court. Depending on the charges, an open case could keep a lawful permanent resident from traveling outside the United States and an undocumented person from making any immigration moves. An undocumented immigrant who is put in on bail during a case could be detected by Immigration and Customs Enforcement (ICE) and deported, even if that case is eventually dismissed.<sup>22</sup> The underlying conduct alleged in a dismissed case can be, and often is, the subject of a parole violation (and sometimes a probation violation).<sup>23</sup> Open cases are more readily available to the general public than cases that have gone to disposition. Anyone can access the state’s online criminal court system, WebCrims, and find an open criminal matter by searching a person’s first and last name. In contrast, to view a person’s criminal record a person must pay a fee upward of \$50 to the state and wait a number of weeks (or use some other private firm that accesses state data) and only final nonsealed criminal convictions should be printed. An open case is often an outright bar or significant impediment to many license applications or professions, such as security guard, police officer, firefighter, or member of the military. Those who are employed may be suspended from their job, often without pay, during the pendency of a case.

<sup>22</sup> New York City is one of the few jurisdictions with a recently enacted local statutory framework limiting compliance with ICE detainers in certain cases (see N.Y. Admin. Code § 9-131, recently amended by Local Law 21, directing the New York City not to honor detainers in certain cases, such as those in which the defendant’s case is resolved without a criminal conviction, he has no other pending criminal cases of a specific type, has no felony convictions or other recent misdemeanor convictions of a specific type, *and* in which other qualifying terms are met). However, the local law is riddled with exceptions and there are still many cases in which contact for misdemeanor offenses can lead to deportation or other serious immigration consequences (Cade 2012).

<sup>23</sup> Parole and probation officers have significant discretion whether to violate a parolee or probationer. Allegations of assault (a typical charge at issue in 30.30) are often sufficient grounds for parole violation, even if the criminal case is dismissed.

Kima was arrested in November of 2010 after she sent a text to her boyfriend of 18 years during a tumultuous breakup to the effect that if he tried to hurt her, she would kill him. He went to the police to, in her words, teach her a lesson. According to Kima, he did not understand the implications of making the complaint and signing a statement of events. Kima was arrested and charged with aggravated harassment. Her boyfriend expressed his wishes to the D.A.'s office to not have the prosecution to go forward and he refused to participate, but they were able to proceed with the prosecution and stop the 30.30 clock by relying on his prior signed statement.

Although the assigned prosecutor refused to affirmatively dismiss the case, she informally agreed to let the case 30.30 out because, according to the defense attorney, the assigned ADA believed Kima's account that it was a one-time incident and there was no risk of future violence. While keeping the case open for the entire statutory period may or may not necessarily have been intended by the prosecutor as a punishment, it allowed her to monitor Kima through regular court appearances, assess whether she was correct in assuming there would be no further problems, and maintain the order of protection as a point of leverage. Nonetheless, because Kima had an open case for almost eight months, she was forbidden from working as substitute teacher or even applying for jobs for the following school year until the case was dismissed 30.30 in late June of 2011.

Many criminal justice actors are cognizant of the potential collateral consequences of even the most minor and short-lived markers. Debbie, a longtime supervisor in the D.A.'s office, explained: "A huge factor that we always take into consideration is whether or not the person is employed. We don't want to see people losing their jobs, especially not in today's economy. We do not penalize someone for not having a job, but it certainly is a plus and we always take it into consideration in forming dispositions." They can therefore adapt their use of the tools available to them if they think it is merited for particular defendants.

For example, in March 2011, Herman, a man in his late forties, came to criminal court to voluntarily return on a warrant from a 1991 misdemeanor arrest for turnstile jumping. The prosecutor had agreed to offer the man an ACD but the criminal defense attorney asked for immediate sealing, which would mean the case would not be perceptible as an open case to the public during the six-month adjournment period. The defense attorney simply stated, "He is applying for a state job in Pennsylvania," and the judge agreed, smiling at the defendant as she said, "Well, it was a theft of services case in 1991, and he's going to pay taxes soon!" and granted the immediate sealing of the ACD. As this last example shows, a promise that the person will soon be "paying taxes" seemed to ease the imperative to insist on the six-

month mark before eventual dismissal: both the prosecution and judge readily agreed to the defendant's request.

In many other instances among the thousands of new arrests a month, the provisional marker of an open case creates a temporary record about an individual without having to satisfy all of the legal burdens of proving guilt or using resources for sentence or formal monitoring. As one judge explained the ACD disposition, it is "a low-maintenance form of probation, you don't have to report because you monitor yourself." Cases that are adjourned in contemplation of dismissal or dismissed under the speedy trial statute 30.30 not only mark the defendant's record, but also often engage the defendant in significant procedural hassles in the process.

### Procedural Hassle

I name the second penal technique identifiable in misdemeanor case dismissal *procedural hassle*. This technique is distinct from marking because it is not about tracing the defendant out in the world marked as risky or of criminal propensity, but rather about delaying, engaging, and compelling the defendant to conform to the institutional and organizational demands of the court and court actors. Procedural hassle encompasses the degradation of arrest and police custody, the stress and frequency of court appearances, and the opportunity costs of lost work, child care, family, or other social responsibilities to make court appearances or to comply with court orders during the pendency of the case.

The extent of procedural hassle varies between misdemeanor cases, but there is not a single defendant whose case was eventually dismissed who did not experience the imprint of penal power through some aspect of the inevitable procedures of case processing. Every misdemeanor case begins with an arrest, and it is this "ceremony of degradation" that transforms a free person into a criminal defendant, with all of the attendant social meanings, physical discomforts, and civil burdens (Garfinkel 1956).

On a typical morning in Borough A criminal court there are somewhere between 150 and 400 defendants "in the system"—the number of bodies that must be arraigned that day. These individuals have "gone through the system"—they were arrested for a felony or misdemeanor crime, fingerprinted at a police precinct, taken to central booking for photographs, then transferred to the holding cells behind the arraignment courtroom (called the pens) with a single toilet in the corner open to view where they wait to be called by a defense attorney for a brief interview. Rats, mice, and roaches are a common sighting and smashed cheese sandwiches, the only food offered during the entire arrest-to-arraignment period, litter the floor. (One reason so many of the sandwiches litter the floor is that defendants use the plastic-wrapped sandwiches as pillows to cover the floor if they need to lie

down.) Defendants can wait anywhere from a few hours to up to 12 hours in these pens. Connected to the pens are a series of small (also filthy) metal interview booths where the defense attorney will speak with the defendant to gather information necessary to make a bail application. The total arrest-to-arraignment time is, according to New York case law, not to exceed 24 hours, but every day numerous defendants are held in excess of this time limit.

Even the DATs entail significant procedural hassle. On top of the number of “in” defendants, there are typically 100–200 DATs in Borough A that must be arraigned most days. Each of these defendants is handcuffed and arrested, taken to a police precinct, fingerprinted, and detained there until his or her criminal history record is produced, usually a matter of hours. Later, the defendants also need to take off at least one day from work or child care responsibilities to come to the courthouse at 9 a.m. and wait in a winding line outside the building for security for 15–30 minutes. They must then sit patiently in a crowded courtroom, sometimes all day, watching the seemingly inscrutable logic of other cases being called and courtroom lulls, waiting for their 60–120 seconds in front of the judge.

When the lunch break is called at 1 p.m., the crowd of defendants who have been waiting since 9 a.m. for their case to be called invariably express what could be understated as discontent. Defense attorneys and court officers brace themselves for the rush of angry defendants demanding to know why their cases have not been called yet and exasperated because they don’t know what to do if they cannot return after lunch for the 2:30 p.m. call. On a representative January morning, defendants told their attorneys they had child care only until 1 p.m. and could not return, they had to get back to work or risk getting fired, they had school exams, or they simply just did not know where to go to wait for an hour and a half with freezing rain coming down outside. If defendants fail to return for their case call after lunch a warrant will be issued, unless a judge can be convinced to stay the warrant.

Citywide, over half of all misdemeanor cases are disposed of at arraignment, the first court appearance (Barry and Lindsay 2011). For the set of misdemeanor defendants whose cases continue past arraignment, the majority are “out” defendants, the colloquial courthouse word for defendants not being held in correctional custody on bail during the pendency of the case (New York City Criminal Justice Agency 2009; Felner 2010).<sup>24</sup> As Megan Comfort’s evocative examination of the security rites of prison visi-

<sup>24</sup> Misdemeanor defendants were released on their own recognizance (i.e., without bail) in slightly more than 75% of all cases in which the case proceeded beyond arraignments, and since over half of misdemeanor cases each year terminate at arraignments, this means that bail is only set in about 12% of misdemeanor cases in recent years (Felner 2010, p. 1).

tation demonstrates for the intimates of inmates, “mundane actions [can] cumulatively signify and materialize their denigrated status,” thereby subjecting them to “secondary prisonization” (Comfort 2008, p. 27). Similarly, even for “out” defendants, the procedural hassles of repeated court appearances entails subjugating and disciplining experiences, such as waiting in interminable security lines, whiling away hours in courtrooms gruffly policed by court officers and judges, and being kept in a constant state of confusion how long they are going to wait that day and how long the case will continue.

In late December 2010 a middle-aged black man sat toward the back of the courtroom, looking with a confused face over crumpled, carbon-copied court papers he pulled out of his pocket. He got up and walked toward the rail separating the audience from the court with his papers in hand where a middle-aged female public defender was sitting at a desk facing out toward the audience, reviewing files. As he drew close enough to speak, she peered out at him over the rims of her reading glasses without expression. Before he could get more than a whispered word out, the court officer yelled, “Do not approach the bench while court is in session!” and he returned to his seat looking exasperated and confused. From 10 a.m. until noon he tried three more times to approach someone on the defense side of the bench to ask some unknown question, and each time his efforts were aborted by an abrupt reprimand from the court officer; the defense attorney kept peering over her glasses at him as he approached, and no one ever sought him out to determine his concerns. Around 12:30 p.m. his case was called and covered by an attorney substituting for his defense attorney. In less than 60 seconds the judge adjourned his case for another day. As illustrated by this example, the official legal actors often proceed around the defendant, and his disciplinary experience extends beyond incarcerative custody into required waiting and enforced ignorance of how long he must wait and what is structuring the process (Comfort 2008, p. 36; see also Schwartz 1975).

Procedural hassle is an unavoidable upshot of the criminal process. Contested cases are not settled without some expenditure of time and resources to sort out competing versions of events. Feeley argued that because these types of burdens often outweigh the formal sanction being offered for an early disposition, defendants rarely have an incentive to invoke formal adversarial procedures in order to gain a favorable judicial ruling on factual guilt or legal questions on constitutionally or statutorily permissible police procedure.

Consider Malik, a black man in his midforties, arrested in May 2010 in one of Borough A’s highest-crime, and most highly policed, neighborhoods. He was charged with misdemeanor marijuana possession and criminal possession of a weapon in the fourth degree, specifically a gravity

knife.<sup>25</sup> According to Malik, he was walking to the post office in his neighborhood smoking a Beedi cigarette when an unmarked car pulled up in the sidewalk crossing and three policemen got out of the vehicle and surrounded him, asking him if he was smoking marijuana. He showed them the Beedi cigarette and told them it was not marijuana. The police started searching his person when he said to them, “Now that you know it’s not marijuana, why are you still fucking with me?” Malik said he was handcuffed and the police continued to put their hands in his pockets, removing his wallet and a folding pocketknife. According to both Malik and his defense attorney, he maintained from his prearrest interview with his attorney that he never had marijuana and that the knife was not an illegal gravity knife.

Malik was the rare defendant who was steadfastly determined to take his case to trial.<sup>26</sup> From May 2011 to November 2011 he made eight court appearances, his defense attorney showed up to three of them, and a substitute attorney covered the remaining five appearances. For most of the appearances Malik had to take off work for an entire day because no attorney showed up to call his case until after the lunch break.<sup>27</sup> By the third court appearance, the marijuana charges had been dropped, and his attorney reported to me that he never received a field or lab test for the supposed marijuana. The prosecution had been offering a plea to a non-criminal violation with the condition of three days’ community service, but at the penultimate court appearance they offered an ACD with one day of community service. Malik refused to accept any offer as he maintained complete factual innocence. In October, the case was finally transferred to a trial courtroom and on the third scheduled trial court appearance the defense attorney and prosecution were finally ready to proceed to trial when the defense attorney mentioned to the judge that “there was some possible issue with the knife not being a gravity knife.”

Upon hearing this, the judge suggested to both parties that “it would be wise to look at the evidence before calling the case for trial,” and the ADA responded that “it is not costless to look at the knife,” to explain why he had not already done so. They were sent out of the courtroom to test the knife, and the prosecutor angrily told the defense attorney and Malik that if the knife turned out to be a gravity knife, all offers were off the table. After the lunch break the arresting officer was summonsed to the courtroom with the knife. Removing it from the evidence voucher bag, the prosecutor and

<sup>25</sup> PL 265.01 makes it illegal to carry a “gravity knife,” defined as a knife with a blade that opens and locks in place with the flip of the wrist.

<sup>26</sup> Trials constitute less than 0.5% (or .005) of all case dispositions in recent years; about 500 out of 250,000 misdemeanor case filings end in a trial in New York City.

<sup>27</sup> Defense attorneys often have multiple case appearances in different courtrooms to cover each day, so they must call some cases later than other cases.

officer examined it and conceded it was not a gravity knife. However, prior to opening the evidence bag, the prosecutor had demonstrated various ways the knife could have to be displayed in order to prosecute Malik under a New York City administrative code violation that prohibits wearing any knife open to public view. The officer then told everyone that when he approached Malik on the street seven-and-a-half months ago he had seen the knife clipped to his outer right pocket. The prosecutor said he would either offer an ACD with one-day community service or he would proceed to a trial on the violation. After conferring with Malik, the defense attorney said his client would not accept any ACD offer, even without conditions, because he wanted an outright dismissal. The prosecutor replied, "Well *that* I won't do." Everyone walked to the courtroom to have the case called a third time that day.

When the case was called the prosecutor informed the judge that he had to drop the misdemeanor charge because the knife was not a gravity knife, but would like to proceed to trial on an administrative violation because the officer was claiming he saw the knife displayed to public view and the defendant refused the ACD. The judge said that in her view, "The officer no longer had any credibility" because he signed a sworn statement in May claiming he retrieved marijuana and found the knife to be a gravity knife, and now both of those charges had been dismissed. She said she had a hard time believing that day, almost eight months later, that the officer recalled seeing the knife open to public view as there was no such claim in the initial complaint. She then dismissed the entire case in the interest of justice.

Malik's case illustrates that Feeley's point still holds in this jurisdiction of mass misdemeanors 30 years later: procedural costs often outweigh the formal sanctions being offered to resolve the case along the way.<sup>28</sup> His case also illustrates a further argument I want to advance about procedural hassle. Drawing out a case and imposing procedural hassle accomplishes something: it gives the court legal leverage over the defendant and allows it to monitor him or her over a certain time frame. In addition, it offers an opportunity to demand certain meaningful performances along the way. Even if procedural hassle was not intentionally inflicted, the fact that it occurred en route to dismissal can be reappropriated to a new use. In Malik's case, for example, the defense attorney repeatedly said to the ADA during the final negotiations with the prosecutor, "This is a 'let my people go' case," citing the number of court appearances Malik made over the months without any bench warrants. He made the same argument to the judge before she affirmatively dismissed the case.

<sup>28</sup> Indeed, the average age of a case at trial in this borough is over 400 days, so his case is not an anomaly.

This logic is prevalent in courtroom negotiations. Defense attorneys regularly trot out the number of court appearances a defendant has made to ADAs and judges in plea agreements to urge dismissal. Prosecutors sometimes talk of “earning your 30.30” to indicate they might not put a lot of effort into prosecuting a certain case if the defendant reliably shows up to many court appearances. The background understanding necessary to make these meaningful utterances—even if prosecutors and judges reject the logic in specific instances—is that they have actually achieved something by way of the procedural hassle, specifically, monitoring, testing, and imposing costly inconveniences on the defendant. Sometimes legal actors marshal this fact to say that nothing further is merited in a particular case or that the prosecution and judge have learned valuable information about the defendant over the course of the process that should dampen their zeal to pursue a conviction—namely that the defendant is responsible and the criminal allegation represents an aberration, not a persistent pattern of law breaking.

Sometimes criminal justice actors purposefully impose procedural hassle in lieu of formal punishment because it is a form of hard treatment that does not entail creating a lifelong criminal record, which they may believe is unwarranted given the charge and the defendant’s history. In other cases, they resort to procedural hassle because they know they will not be able to secure a conviction, and they can utilize an extended engagement with the criminal process to monitor the defendant, to maintain legal leverage over him or her with an order or protection, or to hedge against uncertainty inherent in the initial (and often later) stages of the criminal process.

In February 2011 two women were arraigned on what is called a cross complaint assault case, meaning each accused the other of assault, and the police arrested both participants. At arraignments the women were asking for mutual dismissal, stating they would not cooperate as a complaining witness in the other’s criminal prosecution on the understanding both cases would be dismissed. The cases had been classified by the D.A.’s office as domestic violence cases because the police paperwork indicated the women were either currently or formally romantically involved.

One of the defense attorneys approached the supervising ADA at the arraignment shift and told him the case is misclassified: “Same-sex partners my ass! She says she has a live-in boyfriend!” he exclaimed and pressed his case for mutual dismissal. The ADA responded that, live-in boyfriend or not, his police paperwork indicated that the women had referred to each other as “girlfriends” and that the fight started over a romantic issue, so he would not agree to mutual dismissal. The defense attorney replied that, even if they were girlfriends and even if the D.A. would not affirmatively

move for dismissal, they all knew the case will be dismissed 30.30 because neither would cooperate in the prosecution of the other. He demanded, "So what? You schlep them back here for three months of court appearances and then you dismiss it? What's the point of that? Just to schlep them back here for months of court appearances?" The ADA responded coolly, "Yup, that's the point."

His response was not surprising to any party to this negotiation. Defense attorneys working in this borough know that the D.A.'s policy is to (almost) never affirmatively drop a domestic violence case, but to allow the entirety of the speedy trial period to run and let the case be dismissed 30.30, even if the complaining witness repeatedly refuses to participate. A supervisor at the domestic violence unit of the D.A.'s office explained:

We could close off the cases at the very beginning, knowing that victims were not cooperative—but the district attorney's philosophy is bring them all in because we want to be monitoring the perpetrators. . . .

So if legally the case can remain open, then let there be an umbrella . . . for the victim. Let there be an order of protection in existence. . . . Because victims change their mind. Intervening circumstances. There can be reoffending. So the idea is that the law gives us this amount of time in order to prosecute a case, so we're going to keep the case open.

On this day a supervisor from the domestic violence bureau eventually came down to the arraignment courtroom to make a final determination on the case. The supervisor looked over the police paperwork and listened to the defense attorneys tell their clients' accounts. In this case, like so many others that go to disposition at arraignments, the ADA was left to make her decision using ambiguous police paperwork and conflicting accounts from parties that have an interest in painting a particular picture of the facts. She decided to offer ACDs to both women with six-month "limited" orders of protection—meaning they can have contact but any assault or harassment would constitute a violation of the order and therefore be a contempt of court charge, on top of the underlying criminal conduct. The women agreed and walked out of the courtroom together, each clutching her printed order of protection.

All of the possible dispositions to this case that were being considered involved some form of marking, procedural hassle, and performance, and no party to the negotiations contemplated a conviction and formal sentence. The penal techniques are instruments that allow the prosecutor to address issues presented by the criminal allegation in various ways—managing future risk by keeping tabs on the defendant over a period of time, maintaining legal leverage with mandatory court appearances or an order of protection, using the passage of time between adjournments to figure out if the person really deserves to be punished by seeing if this was a one-time

aberration or part of a pattern of unruly behavior. They can do so without having to expend significant resources and time investigating the specific incident in question or securing evidence sufficient for a conviction. Furthermore, they can see how events unfold to determine if they think it is fair or warranted to even seek a conviction.

The statutory time allowed to prosecute a case is therefore not only a guarantee to the defendant of a speedy trial or resolution, it is a tool that allows the state to engage the defendant in a series of encounters with state authority. Sometimes procedural hassle is used intentionally to monitor the defendant; sometimes it is the unintentional by-product of due process protections and protracted adjudication. In any event, this technique demands regular appearances with judicial power and involves punctuated experiences of status and physical subjugation without extending constant surveillance or bodily control. Finally, these procedural hassles are not merely discharged, but are also evaluated as a performance.

### Performance

The third penal technique identifiable in misdemeanor case dismissal is *performance*—the requirement that the defendant discharge some duty, assigned task, program activity, or therapeutic undertaking. Defendants are instructed to show up somewhere and do something and to later prove that they were able to execute the directive satisfactorily. They are told they will be subject to sanction if they fail. The performance offers an opportunity for defendants to prove governability, and the subjects are accordingly assessed on their ability to respond to official directives.

Many ACDs are granted with performance conditions. The conditions are many and varied. Community service is a common condition precedent to ACD dismissal, usually requiring anywhere between one and 15 days of service at a city park or cleanup site. Many ACD conditions involve what in court parlance is called a “program.” The term is a catchall for therapeutic- and educational-type activities. For example, many first-time arrestees for shoplifting are offered an ACD only upon completion of an antishoplifting program; defendants charged with domestic violence offenses could be offered an ACD upon completion of a once-a-week, 26-week Domestic Violence Accountability program; first-time arrestees for possession of misdemeanor-weight narcotics are offered an ACD only upon completion of two half-day sessions discussing the availability of treatment services called the Treatment Introduction Program (TIP). The length of performance requirements can vary substantially, from a one-day, four-hour class to in-patient drug treatment for over a year. Many of these performances involve not only enactments of responsibility and treatment, but also

significant financial penalties in the form of mandatory program registration fees.

Although these programs are proposed as a means of earning eventual dismissal (and therefore avoiding the mark of a conviction), defense attorneys often contest conditions and worry that their clients will get cycled back into the system for failing to comply. One fall afternoon a supervising defense attorney training the new class of attorneys for a public defender organization said to her pupils, after watching a man take a conditional ACD requiring him to complete 15 days community service, "Fifteen days community service, you might as well say 15 days jail." If dismissal is conditioned on a program or community service the defendant is required to make a court appearance to show compliance, for example to show proof that community service was performed or to produce a certificate of completion of the program.

Leslie was arrested in mid-July 2010 for prostitution, although she claimed she was buying drugs and not prostituting. She already had two open cases: one for crack possession and one for attempted assault against her boyfriend. Within a few weeks she was arrested again for prostitution. The D.A.'s office had recently introduced a new program designed to help women exit the sex trade, and she was offered an ACD on the prostitution cases if she completed the six-week, once-a-week program. Leslie missed multiple court appearances for the other open cases and, although she signed up for the class, she repeatedly missed it. She was subsequently arrested two more times for drug possession. In January 2011, after being held on bail for her most recent arrest, the ACDs were withdrawn because she never completed the conditions and she was sentenced to 45 days jail in satisfaction of all five open cases.

Leslie is an example of a defendant unable to avail herself of the advantages of performance-conditioned leniency. She was homeless and struggling with a serious drug addiction. She knew, and her lawyer knew, that the fastest way to dispose of all her cases would be to serve jail time as opposed to keeping up the cycle of failing at programs, warrants, and re-arrests. Leslie had spent so much time in custody on her various arrests that by the time she was sentenced she had less than a week of prospective jail time.

The unfolding negotiations over Leslie's cases also show that there is a certain commensuration at work between the various forms of penal techniques (Espeland and Stevens 1998). Prosecutors and judges are often willing to forgo a conviction—and therefore a permanent record and the capacity to impose a formal punishment—if the defendant bears sufficient procedural burdens or demonstrates governability with repeated court appearances or program compliance. The relative commensurate value of the different burdens is often contested, but these negotiations take place on the

assumption that they can offer more of one technique to achieve less of another. The understanding animating the discussion about trade-offs is that the prosecution and court seek some measure of regulation or control, but that it can be achieved in various ways such as by checking up on a person over the life span of a criminal case or testing his capacity to perform assigned tasks and conform to rules. Early dispositions often involve a settled trade-off in advance—for example, an ACD is granted at arraignments, which will not create a permanent conviction or require repeated court appearances, but it is conditional on the defendant completing a short program and bringing proof of compliance to the clerk's office. That trade-off is readjusted if the defendant fails to perform.

In February 2012, Juan, a middle-aged Latino man, stood before the court to be arraigned on a new assault charge. He also had an outstanding warrant for missing a court date over a year ago at which he was to have shown compliance with the ACD condition of two days community service. Before being released on his own recognizance (i.e., no bail) on his new arrest, he was resentenced to a noncriminal disorderly conduct violation with the sentence of “time served” (which was the two days he had spent in custody on the new arrest awaiting arraignment). The new disposition imposed a more serious and longer-term mark than the ACD that he failed to secure because he did not perform the community service or make the compliance court date, but it did not involve any prospective jail time. Typically, if a defendant shows up to the compliance court date and has not satisfied the condition, most judges will give a second and sometime third chance to discharge the condition. Even defendants returned involuntarily on warrants (i.e., in police custody) are often given second chances to complete the community service or program.

In practice the content of the performance is not always as important as the requirement that the defendant undertakes some burdensome task and come back to court to prove compliance. In June 2011, Martha, a defense attorney representing a young woman on a first-time shoplifting offense, objected to the standard offer of an ACD upon completion of an antishoplifting class. Martha told the prosecutor that requiring her client to pay a \$125 program registration fee for stealing a lip gloss worth about \$1 was grossly disproportionate and explained that the girl's family could not afford the class. After insisting on the consistency of offers between defendants, the supervising ADA finally agreed to let the girl do one day of community service instead of the antishoplifting class.

Even performances that were not demanded by the court or prosecution can be interpreted to indicate that less marking or procedural hassle are necessary. Judge Marcos discussed a case in which he was willing to grant an unconditional dismissal to a woman who had been arrested for walking between the cars of the subway. She claimed someone was chasing her, and

she had come to her arraignment with photocopies of the signs posted in the subway that said, "No crossing between cars except in case of emergency." The defense attorney made a motion that the charging document was insufficient because there was no violation of the transit rules if she was fleeing danger.

Judge Marcos explained that he is usually reticent to outright dismiss cases at arraignments because "there's always two sides to the story" and because he rarely has time to adequately determine legal questions when there are 80–150 cases to be arraigned in one shift. He made an exception in this case, which he explained as follows:

I did dismiss one quickly, where the woman said she was trying to get away from someone that was chasing her. And you know what? I could have looked into that a little bit closer before I dismissed it. But what she went through? She had photocopies of the posters that are displayed in the subway station. I mean, for someone to go through all of that. And they [the prosecution] were offering her an ACD . . .

. . . So I granted the dismissal . . . [It was] a first arrest and she was like in her fifties.

And those things come into play, too. Those things come heavily into play. Also, a lot of times . . . why . . . a person made one mistake. Why should they even have an ACD on their record? . . . Because you've got to remember the crimes that we're talking about. We're not talking about crimes of the century.

The evaluation of performances extends not only to conditions imposed to earn dismissal, but also to the entire process of case adjudication. Through successful performance, the defendant is rewarded for demonstrating self-discipline or personal responsibility. If the defendant has made all of the court appearances on time, many judges will excuse the defendant's personal appearance at the final court date if the case is scheduled for speedy-trial 30.30 dismissal. Failure to responsibly perform can have negative consequences.

Richard, a defense attorney, recounted the story of a client whose poor performance derailed a probable 30.30 dismissal because of the threat of imposing bail. His client missed one court appearance and showed up after the lunch break for the next two. Despite all this, the prosecution had used up 72 of the 90 allowable days on the speedy trial clock. At the fourth court date she again showed up after lunch, and the judge told the defense attorney that he should urge his client to "strongly consider" taking the ADA's offer, which was a guilty plea to a violation, an anger management program, and a two-year order of protection. Richard explained to his client that the judge's suggestion was crystal clear: if she did not take the plea the judge would set bail because of her poor court appearance record, and she would be incarcerated for the remainder of the case unless she could post

the bail (which she could not). She took the plea. As this story demonstrates, failure to perform the procedural burdens to the court's satisfaction can mean a defendant ends up with a more serious mark on her record.

Performance offers an opportunity for what Foucault called an examination, which "places individuals in a field of surveillances [and] also situates them in a network of writings," creating knowledge about the individual's status in relation to a standard of conduct and engaging mechanisms to normalize behavior (Foucault 1995, p. 189). Yet, like the other techniques of misdemeanor justice, this instance of disciplinary power is structured to conserve police, court, and organizational resources. Instead of unremitting watching, evaluating, and reforming activities, the technique of performance involves the issuing of a command, record keeping, and then doling out rewards and sanctions according to the level of compliance at punctuated moments.

## CONCLUSION

The prison has come to occupy a central place in sociological thinking about governance and regulation of marginal populations. It is now well documented that the growth of the carceral state coincided with the hollowing out of America's already anemic welfare provision for the poor, and scholars have noted that "state regulation of the poor did not recede in the United States in the 1990s, it merely shifted course . . . by sweeping more and more of them into the criminal justice system's growing dragnet" (Gottschalk 2008, p. 244; see also Western 2006). Yet, even the term *carceral*—meaning of, relating to, or suggesting a jail or prison—restricts our attention to a certain class of phenomena. The institution of prison, and its penal logic of removal, warehousing, or disciplinary subjugation and permanent marking from a conviction, is only part of the story about how the criminal justice system governs huge swaths of mainly poor minority communities, just as the wide-reaching collateral consequences of a felony conviction are only part of the story about the by-products from the expansion of the penal state.

Furthermore, New York State, like a number of other states in recent years, has significantly reduced its incarcerated population, a change primarily driven by decreased prison admissions from New York City (Pew Charitable Trusts 2010; Pager and Phelps 2012; Austin, Jacobson, and Chettiar 2013). Misdemeanor arrests have risen significantly during this period. Indeed, some have suggested that incarceration has decreased in New York State precisely because of increased misdemeanor arrests, either through the mechanism of reducing serious underlying crime, and thereby felony arrests and prison admissions, or by diverting police resources and

attention (Zimring 2011; Austin et al. 2013; Tierney 2013). Thus, although New York City may exemplify a site reducing a certain type of penal power—namely carceral—it does not represent a site that is necessarily moving away from its reliance on penal social control. Thus the rise of mass misdemeanors presents an important subject for the sociology of punishment to understand how social control operates beyond the carceral.

My goal in this article was to identify, demonstrate, and analyze a set of penal techniques that are operative for those encountering the criminal justice system who do not enter jails and who are often not even threatened with jail, but who are nonetheless subject to the social control capacities of the penal system. For many individuals living in New York City's highly policed neighborhoods, their only experience with the criminal justice system is on the misdemeanor end: over 69% of the individuals arrested in 2012 for misdemeanor crimes in New York City had no prior misdemeanor or felony conviction; an additional 12% had only a misdemeanor criminal record.<sup>29</sup> Many misdemeanor defendants had repeated low-level encounters without ever transitioning to a criminal conviction (Felner and Kohler-Hausmann 2012; Kohler-Hausmann 2014). The data here have followed the outcomes of minor arrests through their judicial lifespan and showed that, even in that set of cases where the state does not secure a conviction or impose a formal punishment, arrestees are subject to a form of penal power through the techniques of marking, procedural hassle, and performance.

The study of misdemeanor justice reveals that it shares some traits with the use of carceral power, but differs in important respects. The marking that occurs in cases that are eventually dismissed serves the kind of purpose that Foucault described, situating subjects in a network of power-knowledge by recording facts of their actions and status to be used by officials in other arenas of social life. Yet, precisely because actors often know and understand the collateral consequences of marking (Ewald and Smith 2012), they sometimes contest the type of mark or seek to limit its duration. Defense attorneys often request immediate sealing of an ACD or fight to secure their clients an outright dismissal as opposed to a six-month or year-long adjournment before dismissal, and judges and prosecutors regularly agree to grant an ACD, immediate sealing, or outright dismissal.

Procedural hassles of the misdemeanor adjudication process commence by putting defendants through an initiating experience with incarcerative custody during the arrest-to-arraignment process, and then—for the cases that continue past arraignment—involve recurrent visits with judicial authority. The grand majority of defendants are “out” during this time, living in their communities and making routine trips back to court during

<sup>29</sup>DCJS data on file with author.

the pendency of the case. For these defendants, the regular requirement to come back to court on pain of warrant, the security rites of entering the court building, the experience of waiting for unknown periods of time in policed courtrooms, and the enduring burdens of an open case—such as missed work, transportation costs, child care, and temporary orders of protection—“cumulatively signify and materialize their denigrated status . . . [as] people at once legally free and palpably bound” (Comfort 2008, p. 27).

The technique of performance seeks normalization but does not involve constant retraining and supervision: it entails a command and a sanction-backed compliance check. Much as Sykes identified the “defects of total power” inside of prison as lying in the limits of physical violence and the deficiency of the guard’s legitimate moral authority, one of the defects of disciplinary power lies in the inadequate capacity of police and courts to constantly monitor and control and in the pushback of defense agents and defendants seeking to limit the reach of penal power (Sykes 1958). In misdemeanor justice, defendants must prove some capacity for self-governance by performing certain actions according to terms laid out by the court—arrive at court on time, sit and wait quietly, go to a program, arrive at community service on time—and earn either leniency or sanctions depending on how they perform.

Misdemeanor justice in New York City represents an important story about the malleable social control capacity of criminal justice institutions. The United States’ recent experience of mass imprisonment is an example of an expansion of criminal law’s social control capacity through increasing the scope and depth of criminal punishment. In contrast, New York City’s law enforcement experiment of mass misdemeanor arrests was not accompanied by a concomitant expansion in formal punishment. As the city increased its misdemeanor arrests starting in the mid-1990s as part of an intentional law enforcement experiment, criminal courts dismissed an increasing proportion of these cases, and the absolute number of dismissal dispositions increased by over 200% over this period. The swelling of dismissed cases does not represent a failure of juridical punishment or the runoff from an overburdened system, but a creative deployment of the tools available in the criminal process for the task of social regulation. The mere fact that criminal justice actors have the capacity to impose formal punishments for instances of lawbreaking does not mean they understand their task as being invariably to do so.

History contains many examples of the state extending the social control powers of criminal law through means not reducible to enhanced imposition of formal punishment (Hay 1975; Garland 2010). Douglas Hay’s account of 18th-century England, during which Parliament massively expanded the list of capital statutes but the state did not carry out a propor-

tionate increase in executions, is one well-known example (Hay 1975, p. 23). Hay argues that the state nonetheless consolidated its social control power via criminal law during this period. This shift was accomplished not by executing more death sentences, but by enhancing the criminal law's status as a class-neutral institution through rigid enactments of legal formalism, which displayed the law as a constraining force on class power. Furthermore, as the opportunities for imposing death expanded, so did the opportunities for nobles and members of the gentry to show mercy through a pardon or commutation, which had the effect of cementing interpersonal allegiance. Mechanisms other than legally authorized punishments can achieve social control ends.

In the current historical moment, criminal courts in New York City process large volumes of cases involving contested versions of events alleging relatively minor criminal conduct. The due process model of criminal adjudication involves substantial costs to secure a conviction; thus achieving social control in the familiar way—convicting and sending defendants to jail—is constrained by institutional capacity. This article has reversed the focus of Feeley's classic study: taking the organizational and institutional setting of misdemeanor justice as a given set of constraints, I have asked how the processes and techniques that result operate as a form of penal regulation.

The fact these penal techniques can be accomplished without the burdens of securing a conviction is known by the system's officials and deployed to various strategic ends. Sometimes criminal court actors employ those techniques instead of trying to secure a conviction because they do not think it is fair or necessary to generate a conviction. Sometimes they are limited in their ability to secure a conviction and therefore rely on marking, procedural hassle, and performance because they are available social control tools. And in other cases, where these techniques are imposed on defendants as a mere upshot of the criminal process, defendants and defense attorneys use the imposition of the techniques to argue that no further penal response is necessary.

To assume that criminal justice actors invariably seek conviction and punishment whenever legal rules enable them to is to misunderstand "the empirical issue of what rules mean to, and how they are used by, personnel on actual occasions of bureaucratic work" for "a definition of proper rule use empirically unlocated in any ongoing course of activity in the organization in question" (Zimmerman 1969, p. 239). Rules structuring the administration of legal regimes have important uses and effects quite apart from determining outcomes.

Scholars of the welfare state have long similarly noted that the rules and procedures for determining eligibility are not merely formal guides for the efficient distribution of statutorily authorized benefits. Eligibility rules, the

process of application, enrollment, and the monitoring of compliance have extensive uses in addition to their role in allocating the material benefits of the program (Gilliom 2001; Super 2003; Lens 2009). They are tools for managing marginal populations that construct the status of current and potential recipients and regulate their sense of entitlement and their relationship to the state and labor force (Haney 2004; Hays 2004; Dauber 2013). By means of these tools, the poor can be regulated in ways that are not just about granting or withholding benefits, and this social function extends even to those not actively receiving benefits (Piven and Cloward [1972] 1993; Kohler-Hausmann 2007; Wacquant 2009).

As the costs associated with prison expansion become a salient political issue, some states have backed away from the policies of mass incarceration (Pew Charitable Trusts 2010; Pager and Phelps 2012; Tierney 2013). However, declining use of carceral institutions should not be mistaken for a retreat of state penal power over the regulation of marginal populations. As the data in this article have shown, many people encounter the social control instrumentalities of the criminal justice system without ever entering a prison or jail, and often without even being convicted. New York City might therefore offer a glimpse into a possible penal future where social control is exercised increasingly through techniques exemplified in misdemeanor justice. It is vital, therefore, that we have the broadest and most nuanced conceptualization of penal power in all its diversity.

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