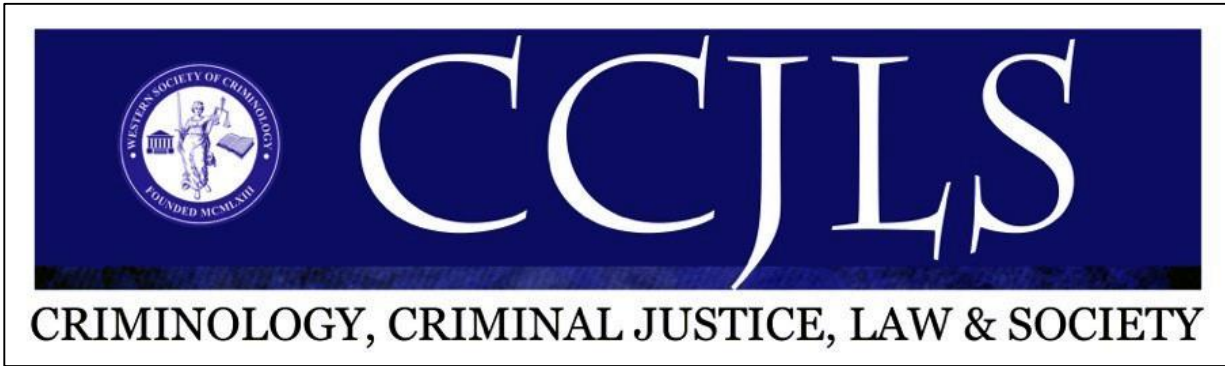




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Adjudicating “Broken Windows”:
A Qualitative Inquiry of Misdemeanor Case Processing
in the New York City’s Lower Criminal Courts¹

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ABSTRACT AND ARTICLE INFORMATION

Extensive scholarly attention has been given to the felony courts while misdemeanor courts have not been as well studied. Due to increased misdemeanor caseloads in the era of order-maintenance policing, the importance of investigating the misdemeanor court landscape cannot be overstated, especially since these lower courts are the courts with which most people have contact. Using open-ended interviews with court actors (prosecutors, defense attorneys, judges, and/or court administrators) in New York City, this paper examines how the court actors interviewed describe common practices in the day-to-day processing of misdemeanors. These narratives reveal shared concerns over the “worth” of many misdemeanor charges and the direct and collateral consequences of misdemeanor prosecution. These narratives also illustrate how these factors inform the ways by which court actors navigate the terrain of misdemeanor case processing and how they articulate “things that matter” in the face of massive caseloads, providing useful insights into the adjudication of mass misdemeanors.

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Although misdemeanor courts are the primary point of criminal justice system contact for most people, they have not been nearly as well studied as felony courts (Howell, 2009; King, 2012; Natapoff, 2015; Weinstein, 2004). Given the increased misdemeanor caseloads in many jurisdictions in the era of order-maintenance policing, the importance of investigating and evaluating the misdemeanor court landscape cannot be overstated. Some legal scholars label the current state of adjudicative affairs a “misdemeanor crisis” (Cade, 2013; Roberts, 2013). Kohler-Hausmann (2014) applies the phrase “mass misdemeanors” to the current setting, arguing that the causes and effects of massive volumes of misdemeanor arrests and prosecutions are worthy of the same critical examination and discussion as “mass incarceration” within the American system of justice. These legal scholars point to a number of issues in need of examination within the misdemeanor case processing context – most notably, how efficiency demands override concerns for due process and procedural justice and thus shape the nature of misdemeanor plea bargaining. The disproportionate impact of misdemeanor contact on communities of color as well as the implications of such practices for defendants, court actors, the justice system, and society in general likewise merit closer empirical examination.

In order to better understand how legal actors understand and describe misdemeanor case processing within the context of New York City’s era of order-maintenance policing, the current study conducted open-ended interviews with court actors (prosecutors, defense attorneys, judges, and/or court administrators) working within misdemeanor courts in the city. These interviews reveal shared concerns among court actors over the “worth” of various low-level misdemeanor charges, the struggle to reduce high case volumes, and the typical plea bargaining strategies used in the lower courts. In addition, these narratives illustrate that the court actors interviewed had an awareness of both the direct and collateral consequences defendants face as a result of high levels of misdemeanor enforcement. The narratives presented here help us better understand how this awareness informs the ways that lower courts navigate the demands of high-volume misdemeanor case processing in New York City and how the ‘things that matter’ are articulated in the face of massive caseloads.

Literature Review

Mass Misdemeanors

Estimates put annual felony cases in the United States at between two and three million, while misdemeanor cases are estimated at closer to 10 or 11 million (National Association for Criminal Defense Lawyers, 2009; Natapoff, 2012).² The volume of misdemeanor cases has grown substantially in recent decades with the number of misdemeanor cases doubling between 1972 and 2006 at the same time that felony cases have decreased (National Association for Criminal Defense Lawyers, 2009; Roberts, 2011). This marked increase in misdemeanor case volume is largely credited to the shift toward policing practices which emphasize “broken windows” or order-maintenance style policing. Low-level, so-called “quality of life” offenses are now more criminalized and highly policed, and thus more likely to lead to court contact, resulting in high caseloads in misdemeanor courts (Howell, 2009; King, 2012; National Association of Criminal Defense Lawyers, 2009; Natapoff, 2015; Roberts, 2011; Weinstein, 2004).

Because much order-maintenance style policing is concentrated in particular communities – most often poor minority communities – young men of color are disproportionately caught in the order-maintenance policing net. In turn, they are disproportionately impacted by court contact and both the direct and collateral consequences of misdemeanor prosecution (Golub, Johnson & Dunlap, 2007; Howell, 2009; Pinard, 2010; Natapoff, 2012, 2015). Further, in heavily policed areas, these criminalized populations are at significantly greater risk for repeat encounters with low-level enforcement resulting in multiple criminal justice system contacts. Repeat contact can result in increasingly harsher sanctions – even for alleged minor, non-violent offenses. The racially disproportionate impact of low-level misdemeanor enforcement has been so deep that Natapoff (2012) has written that “in minority communities where order-maintenance policing generates thousands of problematic convictions, the misdemeanor process has become the first formal step in the racialization of crime” (p. 1319).

Mass Misdemeanor Case Processing

With less than five percent of criminal court cases ever actually going to trial, plea bargaining is the order of the day throughout the entire criminal court system (King, 2012; O’Hear, 2008; Roberts, 2013; Ross, 2006; Schulhofer, 1985). However,

scholars note important features that differentiate the typical misdemeanor case processing landscape from that of felonies, such as more informal processing, higher plea rates, and voluminous caseloads that strain both prosecutors' and defense attorneys' resources (King, 2012; Natapoff, 2012). Misdemeanor caseloads have increased substantially, while court resources often have not, leaving increased volume as one of the most salient features within the lower court setting (King, 2012; Roberts, 2011, 2013). Within such "mass processing" settings, efficiency overrides due process considerations and actual questions of guilt or innocence, raising serious questions about what passes for "justice" in misdemeanor courts (Howell, 2009; King, 2012; Kohler-Hausmann, 2014; Natapoff, 2012; Schulhofer, 1985; Weinstein, 2004).

Courts are considered more "efficient" the more cases they resolve and the more quickly they resolve them. In this climate, procedure and process become more important than the substantive facts of a given case, particularly within the "low-stakes" setting of lower courts, compared to felony courts (Cade, 2013; King, 2012; Natapoff, 2015). In his analysis of misdemeanor case processing in the United States, King (2012) argued that the criminal justice system appears to operate under the working assumption that the same safeguards against the erosion of due process hold in both felony and misdemeanor courts. However, he argues, this is not the case. Within misdemeanor case processing, factual guilt or innocence is rarely considered important with more often than not a tacit assumption of guilt at work (King, 2012). Within such a system, convictions are likely to result, not from any real finding of guilt or innocence, but due to the simple fact that one has been arrested (Kohler-Hausmann, 2014; Natapoff, 2012). Thus, a crime control model of criminal justice prevails in profound ways over a due process model (King, 2012). Natapoff (2015) argued that in courts with massive misdemeanor caseloads, court actors assume a "weaker evaluative role" with the most powerful decision-maker being the police (p. 262).

High misdemeanor caseloads and the requisite emphasis on efficiency, of course, are not a completely new phenomenon within the misdemeanor courts. Malcolm Feeley's (1979) in-depth examination of misdemeanor case processing in New Haven, Connecticut showed similar issues of high case volume, rapid-fire processing, and defendants who were seen not as either guilty or innocent but rather as those who were either willing to have their cases resolved quickly or those who were not (Feeley, 1979; King, 2012). Given the increases in misdemeanor case volume since Feeley's

research and the increasingly harsh collateral consequences that now accompany them, the "process is the punishment" model remains salient and yet may be in need of updating. While the "process" still serves as the "punishment" in many ways, the current process also now serves as the gateway to a host of deeper, wider, and profoundly more negative consequences for alleged misdemeanants than those that existed in the era of Feeley's research.

Direct consequences are those sanctions such as jail time, community service, or fines that accompany a misdemeanor conviction or violation. Collateral consequences refer to a variety of other negative outcomes that can accompany even the lowest level misdemeanor, such as acquiring a criminal record and the potential negative impact of that on education and employment opportunities, housing, and immigration status (American Bar Association, 2004; Association of the Bar of the City of New York, 2007; Bronx Defenders, April 2015; Howell, 2009; Love, 2011; King, 2012; Pinard, 2010; Roberts, 2011). Given that the direct consequences of misdemeanor convictions (fines and/or jail time) can be rather light, collateral consequences can often be more onerous than direct ones (Howell, 2009; King, 2012; Natapoff, 2015; Roberts, 2011). Although the vast majority of the research literature on collateral consequences of criminal convictions focuses on felonies, legal scholars and professional organizations have documented the dramatic expansion in recent decades of both direct and collateral consequences within the misdemeanor context (Cade, 2013; Howell, 2009; Jacobs & Crepet, 2008; King, 2012; Love, 2011; National Association of Criminal Justice Lawyers, 2009; Roberts, 2011). Howell (2009) has stated that "collateral consequences associated with even minor arrests have become so pervasive, severe, and long-lasting that they violate notions of proportionality" (p. 275). Given the racial disparity that accompanies order-maintenance enforcement activity, these consequences are evermore concentrated upon poor, young urban males of color.

Misdemeanor Due Process Rights

The increasing number of, and potential negative impacts from, collateral consequences that now so frequently attach to even the lowest level convictions should raise renewed concerns for due process in misdemeanor adjudications. Constitutional due process protections differ for many misdemeanors compared to felonies. The sixth amendment right to a jury trial, for example, was found by the Supreme Court in 1968 to extend not to "petty" crimes but only to "serious" ones (*Duncan v. Louisiana*, 1968).

Two years later the Court further clarified these definitions by ruling “that no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized” (*Baldwin v. New York*, 1970). From *Baldwin* (1970), all that is constitutionally required in such cases is a bench trial. The Court has put forward a single criteria for demarcating “petty” from “serious” offenses – the nature of the direct penalty tied to the charged offense. In 1989, in *Blanton v. City of North Las Vegas*, the Court reaffirmed the potential length of incarceration as the key criteria for determining seriousness for the purposes of sixth amendment rights to a jury trial. Although the Court, in *Blanton*, did leave some room for limited consideration of attendant penalties beyond the term of incarceration, they strongly rejected considerations of collateral consequences as relevant criteria, stating that “a defendant is entitled to a jury trial . . . only if he can demonstrate that any potential statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a ‘serious one’” (*Blanton v. City of North Las Vegas*, 1989; Nall, 2004-2005).

Very few misdemeanor cases go to trial because the vast majority of cases are plea-bargained. Thus, questions of misdemeanor defendants’ rights to jury trials have relatively little practical application. However, the current reality of the nature of overzealous policing of low-level offenses, the collateral consequences that now so often may attach to them, and the racial disparities present in both misdemeanor enforcement and misdemeanor adjudication, beg larger questions as to how the law defines, or should define, “petty” and “serious” offenses and whether or not terms of confinement should be the sole criteria by which defendants are provided with sixth amendment due process rights.

The New York City Misdemeanor Context

Over the last 20 years, New York City has seen a great decline in felony arrests at the same time that it has seen an explosion in misdemeanor arrests. In 2013, there were 90,532 felony arrests in New York City. This compares to a peak number of felony arrests in 1989 of 149,204. In contrast the number of misdemeanor arrests went from 65,041 in 1980 to 225,684 in 2013 (Chauhan, Fera, Welsh, Balazon, & Misshula, 2014).³ Those arrested for misdemeanors in New York City were disproportionately young, Black and Hispanic males in minority communities. Chauhan and colleagues’ (2014) analysis of New York City arrest data show that, although misdemeanor arrests rates went up among all racial

groups between 1990 and 2013, young men of color age 16–20 saw the highest rates and the highest increases in misdemeanor arrest rates.⁴ As New York is currently one of only two states that set the age of criminal responsibility at age 16, the lower criminal courts have jurisdiction over all alleged misdemeanants age 16 and above. Given high levels of police-youth contact, particularly at the order-maintenance enforcement level, the appearance of adolescents as defendants is a salient feature of the New York City misdemeanor courts. Young men of color, along with their families and communities, bear the greatest burden of both the direct and collateral consequences of low-level enforcement activity and misdemeanor adjudication in New York City. Time spent in jail or in court or going back to court is often time missing work or school. Monetary costs, such as fines and surcharges, fall disproportionately onto individuals and families often least likely to absorb them. Collateral consequences, which can reduce educational and employment opportunities or jeopardize permanent residency, employment, housing, or citizenship, lead to greater family and community instability with implications for public safety (Howell, 2009).

In her in-depth analysis of misdemeanor case processing in New York City, Kohler-Hausmann (2014) shows that the rise in misdemeanor arrests did not result in a comparable increase in misdemeanor convictions. Between 1993 and 2011, misdemeanor cases doubled, but misdemeanor convictions increased by only 21%. Over the same time period, dismissals increased by 235%. However, Kohler-Hausmann does not attribute these trends to any kind of “safety-value” mechanism meant to correct for overzealous misdemeanor enforcement practices. Rather, she argues that what has taken hold in the case processing of misdemeanors in the New York City courts is a system of “managerial justice” whereby defendants are marked and regulated rather than being adjudicated guilty and punished.

Methodology

Open-ended, in-depth interviews were conducted with a purposively-selected sample of 10 court actors (four judges and/or court administrators, two prosecutors, and four defense attorneys) in order to understand how people working within the misdemeanor courts on an ongoing basis experience and understand current misdemeanor case processing trends. Selection criteria required that court actors were currently working within or had recent experience working within the misdemeanor courts and had expert knowledge of current misdemeanor

plea bargaining. Interviews took place between March and June of 2015 and were limited to court actors working within the three NYC jurisdictions with the highest rates of misdemeanor arrests – Kings County (Brooklyn), New York County (Manhattan), and Bronx County. Several of the interviewees had experience working in the courts in different jurisdictions and in different capacities (e.g., judges who had been defense attorneys or prosecutors prior to taking the bench). Collectively, the court actors interviewed had over 130 years' experience working in the New York City criminal courts across multiple boroughs, with half of them having supervisory experience.⁵ In the presentation of the data below, interviewees are referenced only by job category (judge/administrator, prosecutor, or defense attorney) but not by jurisdiction. The label “judge/administrator” is used to denote those interviewees who function as a judge, a judicial administrator, or both.

The interviews had a median length of 80 minutes and focused on various aspects of misdemeanor case processing. Court actors were asked about the nature of plea-bargaining for low-level misdemeanors, about how different misdemeanors were treated differently (if at all), about considerations of direct and collateral consequences, and about any changes over time they had witnessed in misdemeanor case processing. Interviewees were also asked about challenges facing the misdemeanor courts and what could be done to improve case processing. Interviews were recorded, and transcripts were produced for coding purposes. All transcripts were checked against audio recordings for accuracy prior to coding. Care has been taken in the data analysis to ensure the accuracy—or internal validity—of findings. An initial inductive analysis using open coding (Glaser & Strauss, 1967) was used to determine themes that arose from the data. In addition, during coding, a process of “constant comparison” (Glaser & Strauss, 1967) was followed in which each selection of coded text was compared with all other similarly-coded passages. In addition, data were coded using themes from the literature, allowing for an analysis attentive to consistent and divergent themes from previous research (Patton, 2002). The concepts and examples derived from this analysis that are presented here represent the most consistent themes to emerge from the interviews.

Although the interview data presented here provides insights into the ways that experienced New York City court actors make meaning of misdemeanor case processing, this study is limited in a few ways. First, due to limitations in the number of interviews, there is no claim that the findings are fully generalizable beyond the jurisdictions studied.

Second, the world of low-level case processing in New York City is vast and complicated. It is beyond the scope of this paper to address all aspects of case processing for misdemeanors, violations, and summonses and the detailed legal processes that attach to each. It must also be noted that New York City is rather unique in that each of the five counties within the city function as separate legal jurisdictions. Each county has its own separate district attorney, local politics, traditions, and court culture. Thus, although all counties operate under the same state laws and in coordination with the same police department, standard practices for court processing can differ greatly. It is beyond the scope of this study to provide cross-borough comparisons. Further, misdemeanor enforcement policies and case processing trends are not static. Thus, the data presented here offer a snapshot in time and represent the most common themes and concerns that emerged from interviews conducted in the spring of 2015. In spite of these limitations, the narratives presented here provide valuable insights into the meanings that court actors make of misdemeanor case processing and pose valuable questions for further research into the ways that misdemeanor case processing may be being shaped in an era of order-maintenance policing and increasing collateral consequences for low-level offenses.

Findings

Important themes emerge from court actors' narratives of misdemeanor case processing in the era of “broken windows” policing in New York City. They demonstrate how plea bargaining mechanisms provide strategies for reducing massive caseloads in a resource-starved system, and how the consideration of the collateral consequences and the perceived worth of a case often factor into decision-making. Thus, this discourse suggests that standard plea bargain decision-making, plea guidelines, and practices are not driven solely by concerns for efficiency and expediency. In fact, the data reveal the ways the court actors interviewed describe the various mechanisms used to reduce the harm of both direct and collateral consequences of misdemeanor prosecution for some defendants.

Determining the “Worth” of a Misdemeanor Case: “Serious” vs. “Junk” Cases

Not all misdemeanor cases were given the same value by the court actors interviewed. Much case processing attention is allocated based on the perceived “worth” of the case. Cases involving domestic violence, victim assaults, and DWIs were deemed “serious” misdemeanors worthy of the time

and attention of the court. Lesser, non-victim offenses – that interviewees often referenced as “quality-of-life” offenses – were frequently referred to as “junk” or “nonsense” and thus less worthy of court resources. In reference to quality-of-life cases, one prosecutor stated, “When I first came over, I was like, ‘Wow, we prosecute for that?’” (*Prosecutor A*). Other court actors also distinguished between worthy and not so worthy misdemeanors:

There’s a lot of junk that goes through the criminal court. I mean, criminal court to me should be refocusing as much of our limited resources as possible on the real serious cases. The assault cases, the DWIs and domestic violence, stranger assaults, endangering the welfare of a child. Those are the ones that really we should be focusing our limited resources on. You know, hopping over turnstile, some of the trespass arrests, trespass in a park. You know, there’s a lot of nonsense that comes through the system. (*Judge/administrator D*)

DWI, driving while impaired, is a violation. You blow a .07, you’re impaired. You’re not legally drunk, because that’s .08 or above, but obviously we want that case coming to criminal court. That’s a serious case. Certain weapons offenses: possessing knives with blades over four inches, we want that coming into criminal court . . . The rest of this nonsense – public urination, public open container of alcohol, you know, feet on the subway seat, feet on the park bench, taking up more than one seat, right, all these low-level cases do not warrant the resources of criminal court judges, the NYPD, the District Attorney’s Office, the defense bar, and the defendant to be brought into this criminal court system. (*Prosecutor B*)

Court actors interviewed agreed that “serious” cases comprise a small percentage of misdemeanors processed through the courts. One prosecutor estimated that, within their jurisdiction, only about 10-15% of all misdemeanor cases could be classified as victim cases. A defense attorney concurred:

I think you definitely see more turnstile jumping, petit larceny, marijuana, you definitely see more of that than you do domestic violence, and other assaults. You’re always gonna have an arraignment shift where there are a number of domestic violence assaults and non-intimate partnership assaults. But, I think collectively,

marijuana, turnstile jumping, petit larceny, those seem to dominate. (*Defense Attorney A*)

A judge/administrator who had worked in the system for many years explained that things had not always been this way: “You know, back in [the 1980s], chances are it was a more serious misdemeanor. You probably had a higher percentage of more serious misdemeanors coming in, like domestic violence cases and assault cases and things like that” (*Judge/administrator A*).

Not all court actors interviewed agreed about which types of cases were “serious,” however. A prosecutor emphasized that certain low-level offenses can matter deeply to community members:

Misdemeanors, low-level crime, they’re the ones that can get the community the craziest in terms of the phone calls to [the DA’s office]. You know, graffiti, the trespass cases. Those are the ones [the DA’s office] gets calls on because the people who live in those buildings, they feel like they’re trapped and they can’t walk out, because people or kids are there, doing whatever it is they do, and they don’t live there. So those are the ones that the community is most – or a larger part of the community, is most affected by. (*Prosecutor A*)

On the other hand, some defense attorneys complained about what they often saw as simply illegitimate enforcement of so-called quality-of-life crimes:

Some of them are so ridiculous, like jaywalking and then some people will literally come through the system because they didn’t pay their jaywalking. . . Oh, littering is a favorite. Spitting. It’s just, you know, and sometimes when you explain that this is a, this is criminal – it’s laughable to even sometimes speak those words to someone. (*Defense Attorney B*)

You know, a lot of times, in interviewing someone at arraignments, when it’s something so absurd that it offends me to my core, I really, I apologize on behalf of the system that he’s there. When someone is in jail for not having an ID when they got a jaywalking summons.⁶ And I just – I feel so awful. (*Defense Attorney D*)

Those interviewed provided further insight into the nature of “worthy” and “not-so-worthy” cases when they described what happened to court dockets in late December 2014/early January 2015, when New York

City experienced a temporary, but noteworthy, shift in policing activity referred to by some in the city as an NYPD “strike” or “slowdown” (Celona, Cohen, & Golding, 2014; Laughland, 2014). A defense attorney characterized this brief moment as one in which police officers “were making the necessary arrests” (Defense Attorney B). Two other defense attorneys also noted considerable shift in cases at arraignments during this time, with significantly fewer “disposable” cases:

The arrests plummeted in the beginning of [2015]. I mean that was uncanny, almost. It was almost a halt. Like it was that significant. There were still cases coming in, and those cases that were coming in were the like real serious [ones]. You weren't seeing a lot of the low-level. It's like perfect clarity. There was less of, less of the “disposable” stuff was coming through. (*Defense Attorney A*)

None of the “disposable” cases were coming through. So like you would go in, and you would arraign many fewer cases, but they were all keepers, and keepers meaning felonies, period. But like also the misdemeanors that were coming through were all complainant cases. They were all like domestic violence, assaults, things that were results of 911 calls. (*Defense Attorney C*)

Regardless of their own opinions as to the motivations for this temporary change in policing activity, many court actors expressed preference for the type of case processing they witnessed within this unique window of time. They observed a reduced case volume that required fewer court resources which allowed time and energy to concentrate on the more serious, more “worthy,” misdemeanor cases. As one judge/administrator stated, “The summonses, the marginal misdemeanor arrests [went down]. And I didn't have a real problem with that, because a lot of those are no harm no foul anyway” (*Judge/administrator D*). These narratives suggest that court actors sort the vast volume of misdemeanor cases into those they deem worthy of their time and attention and the “junk” that can be “disposed” of quickly.

Not of their Own Making: Massive Misdemeanor Caseloads Shape Court Processing

The court actors interviewed explained that misdemeanor case volumes increased in the order-maintenance policing era, straining already limited court resources. As one judge/administrator stated, “I don't think the number of ADAs has increased dramatically to meet the demand of increased

misdemeanor caseloads. You have more caseloads; you can't keep track of more” (*Judge/administrator B*). A prosecutor described the implications of such heavy misdemeanor caseloads for the quality of misdemeanor case processing like this:

Part of the problem also is that we just don't have enough courts in certain ways. It's terrible. I think if we could move some of these cases quicker, that would sort of – the system is always bogged down. [With high caseloads you are] not spending as much time on – you don't spend as much time thinking about something. Then you're just doing kneejerk reactions, and that's not quality work. (*Prosecutor A*)

Due to a lack of court resources, trial delays are long in the New York City lower courts even though few misdemeanor cases actually ever go to trial. One judge/administrator explained how the capacity to have a trial facilitates plea bargaining:

Because basically, the only way you get dispositions is to have the threat of a trial . . . If we had more trial capacity, we could do an even better job of getting cases tried quicker, and dispositions would increase, and the inventory would go down. (*Judge/administrator A*)

Speedy trial rules in New York set limits on delays for misdemeanor trials (30-90 days depending upon the type of charged offense). However, in situations where both the prosecutor and defense answer “ready” but a trial part is simply not available, such delay is not counted against the speedy trial “clock.”⁷ These lengthy delays can be onerous for defendants who insist on their innocence and are not interested in taking a plea. Court actors explained the problems with extensive trial delays:

Our criminal justice system was designed to protect the innocent, but just because of the, the amount of time it takes to finally get a case disposed . . . well, usually a year would be . . . but some take two years, some even three years. And during that time you have to keep coming back to court, keep coming back to court. (*Judge/administrator B*)

When you have a pending criminal case against you, it shows up on background checks. People are like, “Oh my God. You have – there's a criminal case against you.” And then like if you're working, and your boss is like, “Wait a minute. You were just charged with like smoking a joint, but you've been going to court for a year

and a half?" Like they start to suspect that there's something else going on, and that they're being lied to, when in fact it's just that the courts are broken, and that's how things happen. (*Defense Attorney C*)

Innocent defendants, thus, have many incentives to take a plea, and many disincentives to take a case to trial. On the other hand, trial delays can reduce the potential for conviction of the guilty: "We found that if a case was adjourned three or more times, it had a 50% chance of being dismissed. Because victims stop showing up, cops stop showing up, people go on vacation, you know" (*Judge/administrator A*). A defense attorney summed up the state of misdemeanor trials by saying, "The system in which we work – it's a great system to be guilty in, and it's a terrible system to be innocent in. That's actually not that controversial probably to say" (*Defense Attorney C*).

The courts must take the cases they are given, regardless of resources. As one defense attorney stated, "I think the most important legal actor in the courts is the NYPD, even though they're not present. Like they predetermine the landscape. Right? And then it's up to the courts and the DAs to figure out how to deal with the crap that comes into the system" (*Defense Attorney C*). Many court actors easily attributed high misdemeanor caseloads directly to NYPD policing practices, namely order-maintenance policing and, more recently, to stop, question, and frisk activity:

Oh, broken windows. It's, it's policing. Uh, I mean, it's a policing strategy, absolutely. ... when Bratton started, he took up the cry for a broken windows theory, and they started concentrating on misdemeanor arrests. And it's all misdemeanors. And it was, it was pretty dramatic ... caseloads went from a majority of felony cases to a majority of misdemeanor cases. Were there less misdemeanor crimes committed back in 1989 than there are now? Absolutely not. It's a policing strategy. The courts take the filings as are given to us. (*Judge/administrator A*)

It is notable that court actors did not attribute the increases in their caseloads to any associated increases in low-level crime perpetration but rather solely to changes in police practices. As the judge/administrator above notes, mass misdemeanor caseloads are the result of larger on-going processes of criminalization – both those that have seen more and more behaviors being cataloged as formal

violations of law and the policing practices, such as "broken windows" and other order-maintenance based policing models, which seek to formally process persons engaged in low-level offense activities.

Many court actors also recognized the racialized nature of these criminalization practices by openly acknowledging that certain people had much higher rates of system contact than others – even for similar behavior. As one defense attorney stated, "You know, there's so many people that are doing the same things in other communities, but aren't incurring a record" (*Defense Attorney B*). A judge/administrator described the racial disparity at work in misdemeanor enforcement:

The effect of the policing policies for people in New York City or any other high-population urban areas is that whole generation of fingerprints in a database that has real impact. Where we know that disproportionate numbers of people from certain neighborhoods are in the database versus other neighborhoods, their kids will never be in the database for indiscretion. (*Judge/administrator C*)

One defense attorney provides a vivid description of what he saw as obvious racial bias in misdemeanor enforcement and its impact on the courts:

There is no question that certain people are much more likely to have police contact for littering, say, than others. I [a white male] could stand out on the corner by the police and do 90% of what – I mean it's terribly unfair, and frankly ridiculous that anyone should spend a moment locked up for taking up two seats on the subway because it's 3:00AM, and you just got back from work, and you fell asleep . . . I mean some days [the line outside the criminal court] stretches from inside the courthouse, it zigzags back and forth, out the door, down from the courthouse door out around the corner. And every time it's just Black and Hispanic. And I can tell you something – I've lived in this borough for almost ten years. I can tell you plenty of places you see white people jaywalking, sleeping on the subway, smoking pot, doing drugs. (*Defense Attorney D*)

Within this climate of misdemeanor enforcement, repeat system exposure is quite common and has profound implications for plea bargaining. Routine misdemeanor plea offers often take into account prior system contact and tend to be tiered based on prior pleas. For example, a first low-

level arrest may be dismissed whereas a second low-level arrest may get dismissed only after certain community service requirements have been met, and a third arrest may lead to a demand to a plea to the charge. Jail time for misdemeanors, if imposed, is often graduated as well: “There’s incremental increases – and judges are loathe to go below what the person did before, especially for the same crime. So they’ll say, ‘Well, what did he do last time? Ten days? Well, this time it’s gonna be 30 days’” (*Judge/administrator A*). For those with disproportionately higher rates of police contact, even for low-level offenses, plea bargaining offers and potential sanctions can ratchet up quickly (Howell, 2009; Kohler-Hausmann, 2014; Natapoff, 2012). A defense attorney explained how this can work:

And then it’s also important to consider, it seems like, “Oh, just take this ACD, it’ll be fine, just take this violation, it’ll be fine,” but for a person who resides in a heavily policed community. . . . If this is a person who is likely to encounter these officers again . . . a prosecutor will look at our client’s history and say, “Well, last time they got an ACD. This time a violation. Last time they got a violation; this time a misdemeanor.” So it builds. It does have long-term consequences. And so in these communities, it is likely that you will have, unfortunately, another encounter with the criminal justice system. (*Defense Attorney B*)

Massive misdemeanor caseloads shape the landscape of misdemeanor case processing. As court actors described, volume strains limited resources, impacts trial capacity, and informs plea bargaining strategies in profound ways. Although policing practices do, in large part, drive the volume of cases coming into the lower courts, it must also be acknowledged that prosecutors’ offices have tremendous discretion in determining which cases go forward for prosecution after initial arrest. Thus “declining to prosecute” provides an option for reducing caseloads. The court actors interviewed, however, indicated that standard plea bargaining strategies (discussed below) were relied upon much more heavily than decline to prosecute, or “DP,” decisions as a means to dispose of cases, even “junk” ones. When asked about the role of DPs, the prosecutors interviewed discussed them in quite limited ways, explaining that cases are DP’d when they are thought to be unprovable and when improper police procedures were used in the arrest. One reason provided for the limited use of DPs was the need to protect the working relationship between the district attorney’s office and the NYPD. This viewpoint suggests the limits of prosecutorial

discretion in curtailing the potential negative outcomes of overzealous policing practices. That decline to prosecute decisions were not seen by the prosecutors and judges interviewed as a viable mechanism for reducing the consequences (both direct and collateral) of over-zealous, low-level misdemeanor enforcement activity raises an couple of questions: 1) Is this largely due to the fact that the overriding emphasis on dispositions in the lower courts serves to supersede considerations of justice, procedural and otherwise? 2) Are the limits on prosecutorial discretion as they are perceived by these court actors truly the results of durable outside pressures from other parts of the criminal justice system, or are they rather the result of prosecutors’ self-imposed limits on discretion?

Consideration of Direct and Collateral Consequences of Misdemeanor Enforcement

All the court actors interviewed voiced an awareness of both the direct consequences and the many potential collateral consequences of misdemeanor system contact, even for those defendants charged with the lowest level offenses. The prosecutors and defense attorneys interviewed alike voiced reluctance to see a person given a criminal record for low-level, quality-of-life offenses, especially those defendants who are younger or who have had no prior criminal record or system contact:

I think one thing that like is sort of an unspoken rule is that it’s a really, really big deal to give someone a criminal record, their first criminal record, for a non-violent quality-of-life-type thing. And I think there is an acknowledgement that this new style of policing that we’ve had for however many years now, drags a lot of people in who should not have criminal records. (*Defense Attorney C*)

Well, I mean to be honest, we just seem to be going through the motions, um, because these cases are not really all that serious. They’re being resolved. Thankfully that’s what we’re able to do, is to resolve them in that way because it would be terrible if these low-level offenses were actually being criminalized. (*Defense Attorney A*)

You can work off certain things and you should be allowed to work off certain things, so that way a record doesn’t – your record doesn’t get marked. (*Prosecutor A*)

Court actors interviewed repeatedly voiced concerns regarding the collateral consequences of court

involvement for immigration status, education, housing, and employment. One judge/administrator noted how much things had changed in recent decades:

Collateral consequences wasn't even considered back in the '80s and '90s. You know, I don't think I heard the phrase "collateral consequences," and, you know, I went to law school, I studied for the bar – I'm sure I must've heard it somewhere. But collateral consequences didn't enter into the lexicon until, I don't know, at the earliest, the late '90s, uh, if not the 2000s. . . . The judges are much more aware of this kinda stuff. The lawyers are much more aware of this kinda stuff. Even the DAs are aware of collateral consequences. And, you know, we're becoming more aware of the collateral consequences over even the pettiest of the petty offenses. (*Judge/administrator A*)

Defense attorneys and prosecutors articulated an awareness of the potential impact of misdemeanor case processing:

The marijuana misdemeanor on, you know, scholarship. The marijuana misdemeanor on citizenship. The marijuana misdemeanor on city housing. So it's all being tied in to a lot of other things that really matter. You know, education, where you live. . . . So that's why it is being fought. And it really – it really should be fought. . . . For instance, the marijuana conviction on scholarships for a college student – it removes them for that, from that scholarship. You know, we don't want someone's life to sort of be impacted forever if, given what it is that he was initially arrested for. And I think that these ADAs more than ever – I think they really are looking at the totality of certain things, of what it is that – you know, we're not willy-nilly just putting offers on, "Okay, this is this particular kind of case, this is the offer." (*Prosecutor A*)

I think a lot of DAs will be very willing to work with us, as defense attorneys, to help people, like kids, people with immigration consequences. Ways to work out pleas to keep them from being deported as an end consequence, which I think is really remarkable because of how hard they will push some cases, but they understand sort of, a misdemeanor case, while it can be serious, isn't necessarily serious, and that it's not worth ruining a person's life to that degree, and they are willing. (*Defense Attorney D*)

As these narratives illustrate, the awareness of, and attention to, the potential direct and collateral consequences of low-level misdemeanor cases was an important part of how the prosecutors, judges/administrators, and defense attorneys interviewed discuss and describe plea bargaining arrangements – both in the negotiation of individual cases and in the establishment of standard policies and practices, even within the assembly-line milieu of mass misdemeanor case processing. As one prosecutor stated,

And I don't think anyone is saying anymore or as often, "Oh, this is just a misdemeanor." I don't think defense attorneys are saying that at all anymore. Before, when I used to be here many years ago, that was the prevalent idea. Now, that is definitely not the prevalent – they're fighting ever single misdemeanor case. (*Prosecutor A*)

Whether a judge's reluctance to saddle a teenager with a criminal record for a "fare beat," a prosecutor being very aware of the potential immigration ramifications of a guilty plea even on the lowest of misdemeanors, or a defense attorney zealously challenging the very validity of some misdemeanor arrests, court actors interviewed expressed an awareness of collateral consequences and the potential impact of misdemeanor case processing on peoples' lives beyond the court.

Misdemeanor Plea Bargaining

Misdemeanor plea bargaining in New York City takes place within the context of an overburdened court system dominated by "efficiency" concerns and the ever-present need to "dispose" of cases as quickly as possible. Thus the courts, as one court actor phrased it, must "accommodate" the reality of mass misdemeanor enforcement activity through routine plea bargaining strategies:

You can't treat every turnstile jump like you treat the felonies. So the question is, how do you then accommodate – you have a system that requires accommodation within a range, right, and there are a million different options about how you frame your accommodation and how you justify it to yourself, and how you justify it publicly. But it requires accommodation. (*Defense Attorney C*)

The DA offices have substantial discretion in establishing plea bargaining and disposition guidelines, and, as a judge/administrator explained,

efficiency is an important factor in determining guidelines:

The DA's office has a rooting interest in getting as many dispositions as possible, not just the courts. Because if they didn't, their assistants would be deluged with cases, and they wouldn't be able to focus on the important ones. So they have general plea guidelines as to what they do in this case. A first arrest shoplift, a first arrest marijuana or trespass, whatever. . . . But I think at the back of their minds . . . there's a rule of rooting interest for everybody to dispose of cases. The courts, defense attorneys, DAs. So, you know, every once and a while, you see a policy that's kind of inflexible, but everybody wants dispositions. Otherwise, we're gonna be more swamped than we already are. (*Judge/administrator D*)

Given the sheer volume of misdemeanor cases, a defense attorney argued that plea bargaining has taken a distinctive turn:

The thing that I find compelling is that we are now, because of the gajillions of misdemeanor cases that we're dealing with – the system only works when the plea bargains and the dispositions are suppressed to like the bare minimum; so ACDs [Adjournment in Contemplation of Dismissal], dismissals, a lot of decline-to-prosecute. (*Defense Attorney C*)

These narratives confirm prior research in suggesting that the need to reduce caseloads is the prevailing factor in standard misdemeanor case processing and in plea bargaining, for all the parties involved. Rote and routine plea bargaining mechanisms meant to clear voluminous misdemeanor caseloads “accommodate” this reality.

Interviewees explained that the majority of misdemeanor cases are resolved quickly at the arraignment stage of case processing. One prosecutor estimated that roughly 60% are disposed of at the defendant's first appearance in court.⁸ A number of factors can preclude disposition at arraignment such as a defendant having any other open cases or outstanding warrants or if the alleged offense involves a complaining witness. Cases, especially the non-complainant cases, are often resolved, either at arraignments or at a later date, through one of a number of highly predictable and standardized ways: 1) an “Adjournment in Contemplation of Dismissal,” known as an ACD, 2) a plea to a lesser non-criminal “violation,” 3) a plea to a lesser misdemeanor charge, or 4) a conditional plea attached to one of the above.

Data on misdemeanor case dispositions in recent years show that ACDs make up almost 30% of all misdemeanor dispositions. Convictions for non-criminal violations account for nearly 30% of dispositions as well (Kohler-Hausmann, 2014). Taken together, ACDs and violations comprise the majority of case dispositions in the New York City misdemeanor courts. An examination of the court actors' narratives of these common case disposition strategies reveals important themes such as the consideration and accommodation of collateral consequences and the infrequency of references to considerations of guilt or innocence.

The important role of ACDs. ACDs – Adjournments in Contemplation of Dismissal – put simply, are delayed dismissals (New York State Criminal Procedure Law §170.55 and §170.56; Weinstein, 2004) and are vital to the case processing of low-level misdemeanor cases in New York.⁹ Most ACDs remain delayed, or “open” for six months; however, marijuana related charges require a one year delay until dismissal. An ACD does not involve any admission of guilt and allows for quick disposal of low-level cases, especially for defendants with little or no prior system contact. They are an attractive and expedient way to dispose of low-level cases, as one prosecutor explained: “You cut someone a break and you say, ‘Stay out of trouble for six months, and we'll dismiss and seal this case’” (*Prosecutor B*). There is a standard expectation in the courts that many cases, especially for quality-of-life offenses, will resolve with ACDs in predictable ways. Because they involve no admission of guilt, ACDs provide a plea option that allows for quick resolution of a case without much, if any, consideration of a defendant's actual guilt or innocence. Because they are in effect dismissals, ACDs carry no fines, fees, or surcharges and do not result in a criminal record. However, because the case remains open during the designated waiting period, ACD's are not without possible collateral consequences. Court actors described how ACDs can impact defendants in subtle and not so subtle ways in regards to education, employment, or immigration status:

And it's fairly easy to do just a public check on court websites to see if you're listed. If they see an open case, and that happens a lot. So, even with an ACD, that's technically an open case for the six months before it gets dismissed. So even though it's a great way to dispose of a case, because it's dismissed and sealed at the end, if it's open for that six months, or in the case of marijuana, it lasts a year. (*Defense Attorney D*)

Let's put it this way: Someone is applying for immigration, and they got an ACD on a fare beat, and the case is five months old. And you find out from immigration they want you to come in tomorrow to meet. That's gonna be a problem, because you have technically an open case, because it hasn't been dismissed and sealed yet. (*Prosecutor B*)

Although ACDs leave no criminal record, there is still an accessible court record in certain circumstances, as a judge/administrator explained: “Dismissed, sealed. [There is still a fingerprint record] but it's sealed. Are there ways you could get at it? Yes. There are statutory exceptions. I believe the military, if they were to try and go, the military would get it. Law enforcement, there are some law enforcement exceptions” (Judge/administrator C). An ACD is a quick, easy, and often attractive plea that attaches the fewest and least harmful collateral consequences; although for some misdemeanor defendants, an ACD may not be the least harmful option.

Decriminalizing misdemeanors – the important role of non-criminal violations. In addition to ACDs, violations are another important plea bargaining strategy described to dispose of misdemeanor cases and to minimize harmful consequences for defendants. For many cases, a plea to a non-criminal violation, particularly a Disorderly Conduct violation, may be the best option to dispose of a case. A “violation,” according to New York State Penal Law, means an offense, other than a “traffic infraction,” for which a sentence to a term of imprisonment in excess of 15 days cannot be imposed (NYS Penal Code §10.00 {3}).¹⁰ Thus, a violation, while it is in fact a violation of penal law, is not a crime, and thus does not result in a criminal record. The court actors explained that pleading to a violation is another common plea bargain for less serious misdemeanor charges. While there are advantages to pleading to a violation – the case is disposed of quickly, one has not technically confessed to committing a “crime” in the eyes of the law, there is no six month or year waiting period as with an ACD – direct and collateral consequences still attach that can impact immigration status, housing, employment, and educational opportunities. For example, as a defense attorney explained, “a 221.05, which is a marijuana violation, can result in you losing all federal funding for your education. Can result with you being permanently excluded from public housing” (*Defense Attorney B*).

Pleading to a violation, unlike an ACD, also carries mandatory fines and surcharges. For example, court actors explained that the fine for a marijuana violation can start as low as \$25 but be as much as \$200. Added to that are mandatory surcharges. Such monetary requirements can be staggering for poor defendants:

And that's one of those things that, again, is hard, because there's a \$120 surcharge to the court. And even on the disorderly—on any violation under the penal law, it's \$120. And for a 16-year-old \$120 seems like a humungous sum of money, which it is. Like he, he doesn't feel like he can ask a parent for it. He doesn't—like it's the amount of money that there's no idea how to get it. But then at 16 all of a sudden you have a lien on your credit for seven years, and that can be very damaging for someone who otherwise has everything going well for them. (*Defense Attorney D*)

Unpaid fines result in an arrest warrant, while unpaid surcharges can result in a civil judgment against the defendant, which can negatively impact their credit, in turn, potentially impacting employment, housing, or other financial opportunities. A judge/administrator explained, “I mean, when somebody does a search on – a credit search, it'll pop up and it could affect your ability to get loans, credit cards, those sorta things” (*Judge/administrator A*). This same court actor also explained that “the judges used to have the ability to waive [them], but the legislature caught on that the judges were waiving surcharges and fees, and they made it mandatory. That was back in the early '90s” (*Judge/administrator A*).

The disorderly conduct violation: The legal fiction of misdemeanor plea bargaining. A plea of special note described by the court actors interviewed is the Disorderly Conduct violation, generally referred to as a “240.20” or a “Dis Con.” This plea is useful because a defendant is only admitting to “acting disorderly” rather than admitting to a more specific offense such as possessing marijuana or theft of services (turnstile jumping). Court actors explained the utility of the Dis Con for resolving low-level misdemeanor cases:

[It] is just a broad catchall. 'Cause it can be applied to any charge. So just about anything you're charged with, you can apply disorderly conduct. Whereas if it's a petty larceny case, you can't apply a harassment violation to that, right?

So disorderly conduct is just, it can be used for anything. (*Defense Attorney B*)

That's the catchall. That's the catchall. Someone's charged with trespass as a misdemeanor, a lot of times, I'll do trespass as a violation. Theft of services, I'll do trespass as a violation, but a lot of times, if there's any other type of, like, for example, it's a possession of controlled substance, they'll do 240.20. 240.20 is basically the catchall. And that's, you know, it really isn't made out by the facts, but it's kind of legal fiction, you just do it to dispose of it. The theory is: a violation is a violation. The 240.20 is the catchall. (*Judge/administrator D*)

A 240.20 is a useful "catchall" because it allows a defendant to avoid many of the collateral consequences that can follow misdemeanors and some other types of violations. Court actors explained why the 240.20 is such an attractive plea:

A disorderly conduct is more vague. And it doesn't speak to any specific conduct that would cause them to be precluded from a lot of these options. And so it certainly has been a more favorable go-to in plea negotiations. And it's a way to resolve the case. (*Defense Attorney B*)

Defendants prefer it because it doesn't have them allocute to a specific type of crime, just a general acting disorderly, and it's just basically legal fiction to slap the person on the wrist on less serious crimes. And as long as the parties agree, you know, you can pretty much do it. (*Judge/administrator B*)

Because of its vagueness, a Dis Con carries fewer potential collateral consequences:

It doesn't satisfy any like – so for immigration purposes, it's not a crime involving moral turpitude. It's not a controlled substance offense. It's neutral for immigration purposes. It doesn't affect financial aid. It is the best, right – and then you get into other sort of collateral consequences, like employment or housing, where technically, yes, it can have an effect, but it is the thing that will have the least effect, barring a dismissal. (*Defense Attorney C*)

The Dis Con, interviewees explained, is particularly less harmful than the marijuana violation (221.05 – Unlawful Possession of Marijuana) and is very useful in disposing of marijuana related misdemeanors: "[Dis Con] does not carry the

immigration consequences, whereas the marijuana possession will" (*Prosecutor A*). A defense attorney agreed that "even if you have a green card, marijuana, even a possession can hurt you" (*Defense Attorney D*). One prosecutor explained the simple utility of the 240.20 plea given limited court resources and high caseloads:

I mean resources are an important point, and if you take a case to trial, not only are you expending the resources of the ADA, pulling the police officer out of, out of his or her tour to testify, the court's resources as well. And so when you weigh all that and you examine the charges of, let's say, a trespass, you know, a case like that is going to be worth a disorderly conduct, especially if it's, you know, the person hasn't had that many contacts with the system. (*Prosecutor A*)

Another prosecutor explained how their office's standard plea guidelines for marijuana misdemeanor arrests, which had in the past often included an offer to plea to the marijuana violation (221.05), had to be re-examined in light of both public safety and fairness concerns:

In the past, our first arrest guidelines for marijuana in 2010 were for marijuana: ACD the first time you get arrested. The second time you're arrested, we'll offer you a marijuana violation, 221.05, which you can only do a \$75 fine. We used to offer these marijuana violations because that was the go-to violation in the penal code. [But defense bar explained], "here's the reason why we can't take the marijuana violation; my client's not a U.S. citizen. They're applying for immigration, and this is considered an aggravated felony. They just can't take this, whereas if it had been a dis-con they would have been totally fine." So we had to ask ourselves – is there a public safety difference in requiring them to plead to the marijuana violation over the disorderly conduct violation? Well, if there's not, and if it's the right thing to do and it seems fair, then we should do it. So we changed it. (*Prosecutor B*)

A defense attorney also described how standard plea guidelines lead to many Dis Con violations:

A dis-con gets you through everything...but like these—they become rubber stamps. And what it really does is—I mean—I like to think that I/we do some really sophisticated stuff, and we do. But when it comes to this thing, you just have

rules in place. So young people don't plead to marijuana violations, because like they may be receiving federal financial aid and not really knowing it. So it's just like as a rule, kind of like 'don't let young people take marijuana violations. (*Defense Attorney C*)

While the establishment of such plea guidelines facilitates faster dispositions, these narratives also suggest a consideration of other factors such as public safety, fairness, and justice. For all these reasons, "Dis Cons" are frequently used to dispose of low-level misdemeanor cases. One defense attorney simply quipped that "Dis Con" is "like the most popular word in criminal court" (*Defense Attorney A*). Several court actors openly referred to the Dis Con plea as a "legal fiction" – a useful, necessary legal fiction. One court official explained why and how such a "legal fiction" is legal:

It's a fictional plea, okay, because really what the person is pleading guilty to is not what they've actually done. . . . But the courts have recognized that you can have certain crimes that you can offer as a plea bargain, and it can be a fictional crime, and if the defense attorney consents to that, then they're not gonna upset that conviction. But technically they're not being disorderly. They may be possessing drugs or they may have marijuana in their pocket or something, but they're still allowed to plea to that crime, that general, all-purpose disposition of disorderly conduct. (*Prosecutor B*)¹¹

Increase in conditional pleas. Court actors interviewed also discussed the increasing importance of conditional pleas in misdemeanor plea bargaining. For example, a defendant can receive a "straight" ACD or an ACD with conditions attached such as community service or a requirement to participate in social service or educational programming within a certain timeframe. Two defense attorneys explained that these later types of conditions have become more popular in recent years:

I think there's been over the last couple of years an increase in programming attached to the courts. If a client's been arrested more than one time with, with marijuana, sometimes you can negotiate an ACD with a couple of days of community service upon the second arrest. With the petit larceny – pretty consistently offer is an ACD and either community service, or the Stoplift Program. (*Defense Attorney A*)

You can get – you can attach anything you want to [a Dis Con]. So there are no limits. You can have a fine, you can have community service, you can have social service. So if like, if you're bickering over that kind of stuff, you can tack it on without any problems. (*Defense Attorney C*)

In contrast one defense attorney, while having many positive things to say about conditional pleas overall, also stated that, sometimes, the conditions seem excessive:

Sometimes the DAs will attach, in arraignments, community service to some of these super-low-level offenses that should just be ACD's. I'll actually use it as, as like a bargaining chip to say, "They literally just spent 31 hours back here for this. Like, you really need them to come back and do a day of community service? Like, it's enough." (*Defense Attorney A*)

Court officials explained that the misdemeanor courts in New York City have also seen an expansion of diversionary options and "problem-solving" court applications. Special "DV parts" for misdemeanor domestic violence cases, special treatment parts for defendants with mental illness or drug addiction issues, and human trafficking parts to handle potentially human trafficked defendants arrested on misdemeanor prostitution charges are now common. A judge/administrator working in the city court system for many years explained that such options did not always exist. In addition, all counties in New York City now have special Adolescent Diversion Program (ADP) courts for 16 and 17 year-olds charged with misdemeanors that provide diversionary options and rely heavily on conditional plea options (see, Reich, Farley, Rempel, & Lambson, 2014; Rempel, Lambson, Cadoret, & Franklin, 2013). A judge/administrator explained how much the approach to adolescent defendants has changed over time:

You know, when I started in the late '80s with kids, you know, they were just thought of as another defendant. At least now we're looking at 16 and 17-year-olds, if not older, up to 25, and thinking, "Should we really be treating these individuals like we're treating the 30-year-old, the 35-year-old?" (*Judge/administrator A*)

The court actors interviewed all saw positive contributions from these diversionary alternatives because they provided mechanisms for less punitive outcomes. These approaches, of course, require

additional time and court resources. Despite this, court officials spoke of these alternatives in positive ways, deeming them worthy of the system's scarce resources.

ACDs and violations, particularly the Dis Con violation, as well as the increased use in conditional pleas and diversionary options, serve two important functions for the courts. They provide mechanisms for quick resolution of low-level, non-victim misdemeanor in order to reduce caseloads, and they provide case-processing options that allow for a reduction in the full negative impact of low-level misdemeanor prosecution. What they do not do is fully resolve or confront the problems inherent within an on-going system of criminalization, zero-tolerance policing practices, and adjudication mechanisms which impose legal burdens disproportionately on poor communities of color.

Conclusion

The narratives presented above illustrate some of the ways that the massive increases in misdemeanor case volume inform misdemeanor plea-bargaining in the lower NYC courts. In their accounts, the court actors interviewed confirmed much of what prior research has found about misdemeanor case processing – that large case volume and the subsequent pressure to dispose of “disposable” cases produce an efficiency-driven system, often at the expense of justice and due process. However, other important and consistent themes also emerged from the interviews. Judges/administrators, prosecutors, and defense attorneys articulated an awareness of the potential direct and collateral consequences of low-level misdemeanor prosecution on defendants, particularly on those with the highest rates of misdemeanor contact. Moreover, they describe this awareness as being more present in their decision-making today than it was in the past. More importantly, beyond just a simple awareness of these issues, they described how they see the actual work of plea bargaining (in day to day negotiations as well as in the establishment of plea guidelines) frequently taking place in consideration of these factors. Court actors delineated between worthy and not so worthy, or “junk,” misdemeanors and expressed the view that low-level, less worthy offenses, especially those that do not involve a complaining witness, should not have long term repercussions on defendants in terms of employment, education, housing, or immigration related matters.

The court actors interviewed detailed how the heavy reliance on ACDs, the popularity of the Dis Con legal fiction, and the increasing use of conditional pleas are used not only as ways to clear

cases but also as mechanisms for mediating some of the negative impacts of over-zealous low-level police enforcement and misdemeanor prosecution, particularly for younger defendants and/or those with little prior system contact. The narratives presented here suggest that an awareness of the consequences of aggressive low-level enforcement tactics prevalent in the era of “broken windows” policing strategies have informed plea-bargaining practices in important ways. These narratives suggest that in some ways, case processing strategies and changing norms may serve to minimize some of the harms of some misdemeanor prosecutions, albeit in limited ways.

The question that must be asked is this – if so many cases in the lower courts are so quickly and easily ACD'd, or so easily pled out to a violation because they are understood to be “junk,” why do they need to be prosecuted, or processed, in the first place? The court actors interviewed did not provide good answers for this question. Narratives that suggest that courts are simply at the mercy of forces beyond their control (“we take the cases that are given to us”) or that prosecutors need to maintain working relations with the police department indicate that while the harm reduction activities described may indeed be at work within misdemeanor case processing, they are not the result of any well-articulated theory of harm reduction or overriding concerns with fundamental questions of misdemeanor justice or fairness. That is, they are likely the result of a slowly evolving court culture more so than the articulation of any overt policy changes for case-processing. This suggests a real need for more specific research on prosecutorial decision-making – both at the level of individual prosecutor discretion and in the development of plea guidelines – in lower courts (in New York City and elsewhere) in the era of mass misdemeanors.

In this analysis of court actor narratives, there is no intention to overstate a “minimization” or “harm reduction” thesis or to suggest that the case processing of misdemeanors in the New York City criminal courts serves to correct for, or reverse, the many negatives impacts of low-level misdemeanor enforcement activity. Indeed, much of the discourse within the narratives presented here supports existing critiques of the system – of an overemphasis on efficiency, a system of managerial rather than adjudicative justice, a consistent lack of substantive concern for guilt or innocence or justice or fairness, the various disincentives to go to trial that severely test due process protections, and the many serious questions these issues raise about procedural justice – from the point of initial police contact through to final disposition. I will argue, however, that these narratives suggest the need for further and closer

examination of the ways in which court actors, doing the day to day work of misdemeanor adjudication within a highly problematic and overwhelmed system, make sense of, adapt to, accommodate, or ignore the changing misdemeanor landscape, a landscape shaped in large part by aggressive, often racialized, law enforcement practices and the constant structural constraint of strained resources in the age of mass misdemeanors.

Further, these narratives suggest possible improvements for misdemeanor court policies. Given the current reality of the collateral consequences that can attach to even the lowest of offenses, one recommendation would be for courts to require stipulation of the nature of these consequences prior to plea bargaining and for judges to affirm

defendants' full awareness of potential collateral consequences prior to accepting pleas, even for ACDs. Another recommendation would be for DAs to develop well-articulated policies regarding the plea offers for repeat low-level offenders that take into consideration the realities of the ways in which quality of life policing is often concentrated within Black and brown communities. Likewise, judicial practices could determine guidelines for the use of out-right dismissals in the interest of justice. Harm reduction strategies, such as those often found within problem-solving court models, also could be worked into overt formal prosecution and case processing policy rather than simply emerging from evolving cultures of case-processing.

<http://nypost.com/2014/12/29/arrests-plummet-following-execution-of-two-cops/>

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Endnotes

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- ¹ This project is funded by the Laura and John Arnold Foundation. Points of view or opinions contained within this document are those of the author and/or the participants and do not necessarily represent the official position or policies of the Laura and John Arnold Foundation and the Misdemeanor Justice Project.
 - ² Accurate counts of misdemeanor cases are hard to come by because of the varying methods of record keeping across the states. (See National Association of Criminal Defense Lawyers, 2009, for further discussion of these issues and for further explanation as to how best estimates are calculated).
 - ³ The number of misdemeanor arrests peaked in 2010 at 249,641. In addition, the NYPD issued 439,029 summonses for minor offenses and conducted 191,851 police stops in 2013 (Chauhan et al., 2014).
 - ⁴ In 2013, the misdemeanor arrest rate for young men ages 18-20 was 20.4% for Black males (compared to 7.1 % in 1990), 14.5% for Hispanic males (compared to 5.9%), and 5.7% for Whites males (compared to 2.1%). For young men ages 16-17, the rates of misdemeanor arrests hold similar trends: The misdemeanor arrest rate for 16-17 year-old Black males in 2013 was 17.5% (compared to 6.2% in 1990). For 16-17 year-old Hispanics males, it was 11.5% (compared to 4.9%), and for 16-17 year-old White males, it was 3.7% (compared to 1.3%).
 - ⁵ Human subjects protection protocols prohibit further detail regarding those interviewed. This study was approved by the City University of New York Institutional Review Board.
 - ⁶ Police have the discretion to issue summonses for many low-level offenses if they are able to verify that the person being issued the summons has no open warrants. A summons requires that the defendant appear in court on a future designated day. Without proper ID, officers are not able to check for warrants, and rather than receiving a summons, the person may be arrested and processed through the courts.
 - ⁷ New York State Criminal Procedure Law §30.30.
 - ⁸ Howell (2009) reports similar rates in an analysis of New York City misdemeanor case processing.
 - ⁹ For a discussion of the statutory introduction of ACDs in New York in 1970, see: Pirro (1974).
 - ¹⁰ This is in contrast to “misdemeanors,” which are legally defined as offenses that can carry a sentence of more than 15 days, but not more than one year, and “felonies,” which are defined as offenses that can carry a sentence of more than one year. New York State Penal Law designates only felonies and misdemeanors as actual “crimes” (NYS Penal Code §10.00 {1-6}).
 - ¹¹ For further discussion of the role of legal fictions as creative mechanisms for effecting improvements in legal processes, see Lind (2015).