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INFORMED MISDEMEANOR SENTENCING

*Jenny Roberts**

I. INTRODUCTION

There is no such thing as a low-stakes misdemeanor. The deceptive thing about misdemeanor sentencing is that the punishment the judge actually imposes in court is not the main event, in the long run.¹ As many people find out long after they exit the courthouse, a misdemeanor conviction—indeed, even a dismissed misdemeanor charge—is a mark that follows them into their work and home lives for decades, and sometimes for the rest of their lives.² A misdemeanor conviction can lead to the inability to continue working as a home health aide even after

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1. Although the actual misdemeanor sentence imposed can be quite significant. In Maryland, for example, assault in the second degree is a misdemeanor that encompasses the common law crimes of intent to frighten, attempted battery, and battery and that carries a sentence of up to ten years imprisonment. See MD. CODE ANN., CRIM. LAW §§ 3-201(b), -203(b) (LexisNexis 2017); *Pryor v. State*, 6 A.3d 343, 357 (Md. Ct. Spec. App. 2010). Further, judges can do harm in sentencing even on relatively minor offenses. Michael Peters, CJC No. 04-1044-CC (Tex. Comm’n on Judicial Conduct May 4, 2006) (noting that a judge was disciplined for ordering a woman convicted of animal abuse to thirty days in jail with three days of bread and water and a man convicted of illegally dumping toxic torts to drink toxic sludge).

2. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 617-18 (2014) (“Rather than rely on evidence of guilt in the individual case at hand, misdemeanor courts sort defendants based largely upon records of prior encounters.”); Devah Pager, *The Mark of a Criminal Record*, in CRIME AND CRIMINAL JUSTICE 937, 960-62 (William T. Lyons, Jr., ed., 2006); Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM) <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>; Gary Fields & John R. Emshwiller, *Fighting to Forget: Long After Arrests, Criminal Records Live On*, WALL ST. J. (Dec. 25, 2014, 10:30 PM), <http://www.wsj.com/articles/fighting-to-forget-long-after-arrests-records-live-on-1419564612>.

many years in the profession, or difficulty securing other employment because of the background checks that most employers now run.³ It can lead to loss of public housing for an individual's entire family, and difficulty finding private housing because of the background checks that most landlords now run.⁴ Often called "collateral consequences,"⁵ these repercussions of criminal cases have also been labeled "invisible punishments" and "hidden consequences."⁶

Whatever the label or the underlying motivation for the consequences, the often life-long effects of even a minor criminal charge have become particularly pernicious over the past decade. This shift is due largely to the confluence of three events. First, the volume of misdemeanors has more than doubled nationwide between 1972 and 2013, from about five to about thirteen million new misdemeanor cases per year.⁷ Second, criminal records are now widely available online—usually for free—and employers, landlords, and others are accessing this data for purposes they never would have considered if it still required a trip to the local courthouse.⁸ Relatedly, commercial data aggregators buy

3. See MARGARET COLGATE LOVE, JENNY ROBERTS, & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, & PRACTICE* chs. 5-6 (2016).

4. *Id.* § 2:17.

5. Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WISC. L. REV. 321, 327 ("Collateral consequences are the purportedly nonpunitive, noncriminal consequences that can flow automatically or as a matter of discretion from a criminal conviction."); see also Alec C. Ewald & Marine Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View From the State Bench*, 29 JUST. SYS. J. 145, 145 (2008) (defining collateral consequences as "restrictions, penalties, and sanctions generally not included in penal codes or sentencing guidelines, but resulting from criminal convictions under U.S. state and federal law").

6. See, e.g., McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 480-87 (2005). Although these consequences have also been called "unintended," they are in fact quite deliberate, even if the legislators or regulators who put them into place may not have realized how broadly and deeply they would take effect. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 186 (rev. ed. 2012); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 180-82 (2001).

7. See Sandra Mayson & Megan Stevenson, *Misdemeanors by the Numbers*, B.U. L. REV. (forthcoming 2018) (on file with author); see also ROBERT C. BORUCHOWITZ ET AL., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 11 (2009) (describing rise from five to ten million misdemeanors filed per year between 1972 and 2006). Although misdemeanor statistics are infamously difficult to obtain, particularly on a nationwide basis, it is possible that there has been a slight decline in misdemeanors filed since 2016. See NAT'L CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, *EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS* 11 (2016), <http://www.courtstatistics.org/~media/microsites/files/csp/ewsc%202015.ashx> (noting a "slow but steady decline from 2006 to 2014" in total criminal caseloads, but failing to separate out felony and misdemeanor statistics).

8. See Thomas Ahearn, *SHRM Surveys Reveal 3 Out Of 4 Businesses Conduct Reference Background Checks and Criminal Background Checks*, EMP. SCREENING RESOURCES (Mar. 23,

and sell criminal records for background checks and other uses.⁹ Finally, legislatures have created myriad barriers to employment, licensing, and other areas based on a person's criminal history.¹⁰

On a typical day in a misdemeanor courtroom, an observer might witness the following scenarios, which highlight the need for close attention to misdemeanor sentencing. One man comes in front of the judge on charges of shoplifting food, standing next to a defense lawyer he met that morning during a rushed conversation through the bars of the courthouse holding area. Defense counsel explains that her client just spent the week in jail due to his inability to post the \$500 cash bail. The judge then offers to sentence the defendant to twelve hours of community service should he plead guilty. The defendant enters the plea, the judge imposes the sentence, and the defendant walks out of the external door of the courtroom. He is completely unaware that the theft conviction means he will shortly thereafter lose his job in retail, and will find it difficult to get a new job with his name and conviction in a public database. The judge and defense counsel are also unaware of these consequences. Later that day, in the same courtroom, the judge

2010), <http://www.esrcheck.com/wordpress/2010/03/23/shrm-surveys-reveal-3-out-of-4-businesses-conduct-reference-background-checks-and-criminal-background-checks> (describing survey of employers where 73% reported performing criminal background checks on all job candidates).

9. These aggregators sell their data in settings ranging from legitimate background screening for sensitive employment to mugshots.com-type websites. See Sarah E. Lageson et al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 LAW & SOC. INQUIRY 175, 180 (2015) (reporting that approximately 80% of employers outsource criminal background checks to private companies). The fact that criminal records are often incomplete (e.g., ultimate outcome of case not noted, even if it was dismissed) or even incorrect, compounds the problems an individual can face from having his record so widely available. Some records continue to show up in databases even years or decades after they have been officially expunged, when background checkers fail to delete them because they are not properly updating. See Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 882, 885-86 (2017) (discussing problems of criminal records databases such as record errors where “public sites might suggest that an individual has a criminal record . . . when in fact that is not true”). The FBI criminal records database is also replete with errors—and many employers mandated by law to run a background check are permitted to use this database to obtain a criminal history. See OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 6, 16-18, 100 (2006) (discussing how FBI database has incomplete data and how “[n]o single source exists that provides complete and up-to-date information about a person’s criminal history”); see also MADELINE NEIGHLY & MAURICE Emsellem, THE NAT’L EMP’T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 5, 8 (2013) (describing how approximately half of the records in the FBI database, which compiles criminal records from state databases, “are incomplete and fail to provide information on the final outcome of an arrest); *id.* (describing how the FBI criminal records database was used for almost seventeen million employment and licensing background checks in 2012).

10. See, e.g., 12 U.S.C. § 1829(a)(1) (2012) (barring individuals convicted of a crime of dishonesty, breach of trust, or money laundering from any work in a bank—including working for contractors who, for example, clean the bank—absent a waiver from the Federal Deposit Insurance Corporation). This section has been interpreted so that “convicted” includes pre-plea diversion.

imposes a ninety-day jail sentence in a similar shoplifting case. In this case, the defendant has a prior conviction for misdemeanor theft and received a thirty-day sentence in that prior case.

In the neighboring courtroom, another defendant is out on bail and making his third court appearance on a misdemeanor assault charge. Unable to afford private counsel, yet above the income cutoff for a public defender, the defendant speaks directly with the prosecutor, who offers to recommend a no-jail sentence should the defendant plead guilty to the lower-level misdemeanor charge of disorderly conduct. The local custom in the jurisdiction is that judges will accept charge bargains but not sentence bargains—meaning that every guilty plea to an agreed-upon charge (here, the disorderly conduct) is then subject to a separate sentencing determination by the judge, with consideration but no promises given to the parties' recommendations or requests. In this case, the prosecutor requests one year of probation, with no jail time. The defendant declines to speak at sentencing, not sure what he should add. The judge glances briefly at the defendant, then says something like:

“I am sentencing you to the statutory maximum of one year incarceration.” Very long pause. Shuffling of papers. Looking down, then looking up, “I’ll suspend all but 10 days.” Long pause, more paper shuffling. “With credit for the 10 days you already served before making bail.”

Only then does the judge go on to impose probation, a few conditions of that probation, a fine, and court costs.

When that case ends, the judge is faced with a young man charged with trespass in a public park, for playing basketball after posted closing hours. He is incarcerated on an arrest warrant, after failing to appear on a summons that was mailed to an old address two years ago. He no longer lives in the state, but was arrested during a traffic stop while driving through the county. After hearing about the residency and address change from the defendant (who is not represented by counsel), the judge suggests that the prosecution enter a *nolle prosequi*¹¹ on the case. When the prosecutor declines to do so without further time to investigate, the judge exercises her statutory authority to dismiss “de minimis” prosecutions.¹² She also adheres to a state court rule requiring

11. See, e.g., MD. CODE ANN., MD RULES, Rule 4-247(a) (West 2017) (“The State’s Attorney may terminate a prosecution on a charge and dismiss the charge by entering a nolle prosequi on the record in open court.”).

12. See Anna Roberts, *Dismissals as Justice*, ALA. L. REV. (forthcoming 2017) (“Nineteen states have given trial courts the power to dismiss prosecutions for the sake of justice. Whether granting a power to dismiss ‘in furtherance of justice,’ or a power to dismiss ‘de minimis’ prosecutions, these statutes allow judges to determine that while a case is permitted in criminal

her to advise the defendant that he may seek an expungement based on the dismissal.¹³ The case is dismissed, the defendant is released, and he immediately files an expungement petition with the court clerk.

Finally, in a third courtroom another defendant also faces minor theft charges. He decides to enter a guilty plea. As the judge moves into the sentencing portion of the proceeding, defense counsel makes an argument for a sentence of probation before judgment (“PBJ”). In this jurisdiction, a PBJ stays the judgment of conviction and, upon successful completion of probation and any conditions, results in discharge of the case without a judgment of conviction.¹⁴ At the sentencing proceeding, the judge grants counsel’s request to allow the defendant’s employer to address the court, and the employer tells the judge that he considers the defendant to be one of his best workers. The defendant then offers a compelling statement about his regret for his actions and the need for the PBJ to avoid a conviction that will hurt his future employment prospects. The prosecutor takes no position on sentencing. The judge grants the PBJ.

These hypothetical but realistic¹⁵ scenarios illustrate several things about the judge’s role in misdemeanor sentencing. First, judges have enormous discretion in misdemeanor sentencing, guided only by the statutory maximum in most jurisdictions. One year in jail, or a fully suspended sentence? Three years of supervised probation with drug treatment, or six months of unsupervised probation? In many jurisdictions, that discretion encompasses mechanisms that might ultimately lead to a non-conviction outcome or even outright dismissal, as described in the last two scenarios. The judge’s discretion is particularly broad relative to the generally low-level to non-existent social harm of many misdemeanor offenses. Second, there are a variety of systemic and structural impediments to the proper exercise of discretion in misdemeanor sentencing, such as bail practices that are unfair to poor defendants, restrictions on the right to counsel, and prosecutorial failure to exercise discretion in charging. Third, there are circumstances—such as playing basketball in a park after hours—that challenge notions of any underlying justification or purpose of punishment, or even of any conviction for a crime. Fourth, judges are

court, it should not be pursued.”).

13. *See, e.g.*, MD. CODE ANN., MD RULES, Rule 4-329 (requiring judge to advise defendant that he “may be entitled to expunge” court and police records when case ends in “acquittal, dismissal, probation before judgment, nolle prosequi, or stet”).

14. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 6-220 (defining probation before judgment).

15. These scenarios are compositely drawn from my experiences as a public defender and clinical professor supervising students in three very different jurisdictions, as well as my observations during visits to lower criminal courts in a number of other jurisdictions.

too often unaware of the myriad so-called collateral consequences that can flow from a conviction on even minor charges, such as loss of employment and housing opportunities.¹⁶ This unawareness means that judges miss the opportunity to sentence, when a sentence is justified, in an informed manner that accounts for the full range of punishment an individual experiences because of a misdemeanor conviction.¹⁷

These scenarios show how significant the sentencing phase can be for misdemeanors. Sentencing is also a significant event in many felony cases, which is perhaps why so much attention is paid to punishment for more serious crimes.¹⁸ Criminal law textbooks all discuss the purposes and theories of punishment, but they mainly focus on high-level crimes like homicide.¹⁹ Moreover, public discourse has largely concentrated on things like disproportionately severe sentences in felony drug cases and mandatory minimums. Many legislative reform efforts have been similarly focused. Public defenders direct their limited and over-extended resources to clients with felony charges.²⁰ Sentencing jurisprudence grapples with issues that are generally applicable only to felony cases,²¹ or with the death penalty.²²

16. See *infra* notes 38-39, 87.

17. Although I use the term “misdemeanor conviction,” individuals can suffer many collateral consequences of a misdemeanor arrest. See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820-25 (2015).

18. Nancy Gertner, *Federal Sentencing Guidelines - A View from the Bench*, 29 HUM. RTS. 6, 6 (2002) (“Sentencing a defendant is—or should be—one of the most important moments in the criminal justice system. After all, it is when state power confronts an individual. With my words of authorization, a citizen’s liberty is extinguished, often for extraordinary periods of time.”).

19. See, e.g., CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 181-200, 232-48 (3d ed. 2014). There is little to no coverage of misdemeanors as a category in first year criminal law textbooks, so this gap extends beyond sentencing. There is indirect discussion of minor crimes in such areas as the constitutional limits on punishment (e.g., status crime prohibitions) and strict liability (e.g., regulatory offenses), but little else. *Id.*

20. Irene Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 750 (2017) (“Some public defender agencies . . . allocate attorney experience in a manner such that it is disproportionately dedicated to clients charged with felony offenses.”). Although *Gideon v. Wainwright* applied the Sixth Amendment right to counsel to state courts, there was no federal constitutional right to misdemeanor counsel until 1972, when the Supreme Court extended the Sixth Amendment to misdemeanor cases involving imprisonment. See *Argersinger v. Hamlin*, 407 U.S. 25, 34-37, 40 (1972) (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”); *Gideon v. Wainwright*, 372 U.S. 335, 340-45 (1963).

21. See, e.g., *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); see also *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding that even juveniles convicted of homicide offenses must receive an individualized sentencing hearing accounting for relevant mitigating factors); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that the Eighth Amendment forbids sentence of life without parole for juveniles who commit non-homicide offenses).

22. See, e.g., *Buck v. Davis*, No. 15-8049, slip op. at 21-24, 26 (Feb. 22, 2017) (reversing and remanding lower court conviction of capital murder and death sentence based on lower court abuse

Despite this overwhelming attention on felonies, most criminal cases are misdemeanors. Misdemeanors are now eighty percent of many criminal court dockets.²³ Most sentencing is misdemeanor sentencing,²⁴ and most defendants experience sentencing as the significant event in a misdemeanor case (at least up until that point in the process).²⁵ If the prosecutor dismisses or defers charges, the judge plays almost no role.²⁶ When there is a conviction, it usually flows from a hasty guilty plea where the judge asks some boilerplate questions, and perhaps the prosecutor proffers the facts that they would have proven had the case gone to trial.²⁷ The sentencing often immediately follows, and it is sometimes the only moment when the process slows down enough to look something like an adjudicatory proceeding. The prosecutor gives a sentence recommendation (perhaps with reasons), defense counsel makes her presentation (if the defendant has counsel), and the defendant also has the opportunity to speak. On occasion, family members, victims, law enforcement involved in the case, or others will speak. The judge may ask questions before handing down the sentence.²⁸

This description, while generic, illustrates how sentencing is a core judicial function in the lower criminal courts. Indeed, with the vast majority of misdemeanor convictions coming from a guilty plea,

of discretion).

23. Victor Eugene Flango, *Judicial Roles for Modern Courts*, NAT'L CTR. FOR ST. COURTS, <http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/Monthly-Trends-Articles/Judicial-Roles-for-Modern-Courts.aspx> (stating that “[a]pproximately 80 percent of criminal cases are misdemeanors”) (last visited Nov. 15, 2017).

24. Although given high dismissal rates in some lower criminal courts, many misdemeanor cases never make it to the sentencing stage, particularly in high volume jurisdictions. *See* Kohler-Hausmann, *supra* note 2, at 641-42 & fig.8, 643 fig.9 (noting a dismissal rate of over 50% for misdemeanors in New York City in 2011, although stating that 2011 was also “the recent peak of misdemeanor arrests”).

25. As two commentators put it somewhat more crudely, albeit not in the specific context of misdemeanors, “[s]entencing is where the criminal justice system cashes out.” Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 43 (2006).

26. *Cf.* Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 653-55 (2015) (listing the seven states that have codified the right of judges to sua sponte dismiss misdemeanor proceedings and the five states that allow judges to dismiss misdemeanor proceedings “in the furtherance of justice”); Roberts, *supra* note 12.

27. Despite requirements that the factual basis for a guilty plea be placed on the record, many lower court judges skip this step entirely. *See* BORUCHOWITZ ET AL., *supra* note 7, at 23 & tbl.13, 24 & tbls.14, 15, 16 & 17.

28. Having been a public defender in New York City, I fully realize that misdemeanor sentencing often does not follow this path in high-volume urban courthouses, where judges may simply—for the sake of expediency—go along with an agreed-upon charge and sentence bargain. Further, as Issa Kohler-Hausman has demonstrated with respect to New York City, in high-volume jurisdictions the processing of misdemeanor cases might lead to more deferred prosecutions or other non-conviction dispositions, intended to mark individuals for a ratcheting-up of consequences in any later contacts with the criminal justice system. Kohler-Hausmann, *supra* note 2.

sentencing is often the real work of the lower court judge.²⁹ Yet, little specific attention is given to misdemeanor sentencing, and to the lower criminal court judge's broad discretion in sentencing.³⁰

This may be because most misdemeanor sentences do not involve jail time, and therefore are not viewed as important cases. It could also be because in some jurisdictions, judges generally agree to bind themselves to sentences that defense counsel and the prosecutor negotiated during plea bargaining,³¹ which leaves these judges no meaningful role in the sentencing process.

Perhaps so little attention is paid to misdemeanor sentencing because in some jurisdictions a large percentage of misdemeanor charges are eventually dismissed, so the judge never imposes a sentence.³² The story of the high-volume, urban courthouse where all actors are pressed to dismiss or quickly conclude misdemeanor cases to keep dockets moving is a common story in the literature on the lower criminal courts.³³ While scholarship exploring that narrative is a critical contribution to the lower criminal court literature, it is not the story of all courthouses. In some jurisdictions, judges must exercise their discretion and impose a sentence in a significant number of misdemeanor cases. For example, Monroe County, New York—which encompasses the mid-size City of Rochester—reported 10,522 dispositions in 2016 in cases with a misdemeanor as the most serious arrest charge.³⁴ Of these dispositions, 5758 fell into the “Convicted-Sentenced” category. Of these sentences, more than 14% consisted of jail time, another 3% to

29. Berman & Bibas, *supra* note 25 at 49 (“[B]ecause guilty pleas resolve most cases, sentencing typically has served as the only trial-like procedure for most defendants.”).

30. Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 200 (2014) (“Discretionary systems commit policy and application decisions to the discretion of trial judges, who make those decisions in the context of individual sentencing.”).

31. Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 694 (2016) (noting how prosecutors sentence bargain in misdemeanor cases). Despite sentence bargaining, some misdemeanor cases—particularly those where the defendant is held on bail he cannot make, so that a guilty plea is the only way to get out—are resolved with the defendant pleading guilty to the full set of charges and asking the judge for leniency at sentencing. This reduces the role of the prosecutor to making a recommendation at sentencing, which the judge can ignore or take into consideration.

32. Kohler-Hausmann, *supra* note 2, at 647-49 (discussing misdemeanor dismissals in New York City).

33. *See, e.g., id.* at 643 (“As the courts shifted away from the adjudicative model toward the managerial model, criminal justice actors increasingly used the misdemeanor process to mark, classify, and supervise people, often without securing a conviction or imposing a sentence.”); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1341-43 (2012).

34. N.Y. STATE DIV. OF CRIM. JUSTICE SERVICES, 2012-2016 DISPOSITIONS OF ADULT ARRESTS, MONROE COUNTY (2017), <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/monroe.pdf> (identifying “dispositions” as “case outcomes reported to DCJS [Division of Criminal Justice Services] by the Office of Court Administration as of April 21, 2017”).

time served, and 4% to jail and probation or straight probation (both of which can lead to more jail time, should there be a violation of probation).³⁵ In other words, of the more than 10,000 misdemeanor dispositions in Monroe County in 2016, more than 2200 fell into one of the significant sentencing categories of incarceration or probation. Notably, another 1670 of the “Convicted-Sentenced” dispositions ended in a sentence of a fine, which can also lead to incarceration down the line—for failure to pay.³⁶ In short, there is a lot of misdemeanor sentencing happening in Monroe County, New York, and in many other jurisdictions.

As described above, serious, long-lasting collateral consequences continue long after completion of these sentences. As a matter of constitutional law, many of the collateral consequences of a misdemeanor conviction—unlike jail time, probation, a fine, or other direct punishments allowed under the jurisdiction’s penal code—fall on the civil rather than criminal side of the divide.³⁷ That doctrinal reality, however, does not change the way individuals experience collateral consequences, and should not affect the fact that judges should consider the full scope of consequences at sentencing. Yet, perhaps because of the culture of expediency in most lower criminal courts,³⁸ there is rarely time taken to sufficiently explore (or to explore at all) the relevant collateral consequences of misdemeanor charges. Because collateral consequences are so poorly understood by criminal justice system actors, and so rarely explained to individuals facing criminal charges, too often there is serious and harmful underestimation of the true impact of a misdemeanor conviction. These actors include the judge, who will sentence in an uninformed manner without this crucial information.

35. *Id.*

36. *Id.* Almost 35% of the 10,522 total misdemeanor dispositions in 2015 in Monroe County, New York were either “DA Declined to Prosecute” (0.2%), were dismissed outright (19.1%), or were dismissed via New York State’s statutory deferral mechanism called an “Adjournment in Contemplation of Dismissal” (15.4%). *Id.* While these numbers are not insignificant, they are certainly lower than the more than 54% of all 2015 misdemeanor dispositions in New York City that fell into these three categories. N.Y. STATE DIV. OF CRIM. JUSTICE SERVS., 2012-2016 DISPOSITIONS OF ADULT ARRESTS, NEW YORK CITY (2017), <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf>.

37. *See* *Smith v. Doe*, 538 U.S. 84 (2003) (analyzing the ex post facto Clause in a Sex Offender Registration Act (“SORA”) case); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (undertaking procedural due process analysis in SORA case). In the Sixth Amendment’s right to counsel clause analysis, *Padilla v. Kentucky* blurred, but did not discard, the line between collateral and direct consequences. 559 U.S. 356, 364 & n.8, 365 (2010) (“The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case . . .”).

38. *See infra* text accompanying notes 58-64.

It is myopic, and contrary to the goals of prosecuting misdemeanor offenses, to ignore the significant and lasting collateral effects of a misdemeanor conviction. Under most theories of punishment, a judge at sentencing does not simply look back to the crime and its circumstances but also looks forward at the defendant's future.³⁹ Lower criminal court judges need a more developed model for what it is they are trying to accomplish at misdemeanor sentencing, and in particular need to look forward at the collateral effects of a misdemeanor encounter with the criminal justice system on the defendant's future. Viewed through that more expansive lens, and given the broad discretion of judges in misdemeanor sentencing and lack of existing guidance for that discretion, the sentencing function of judges in misdemeanor cases is in serious need of close examination.

Part II of this Article contextualizes judicial responsibility for misdemeanor sentencing in the realities of the lower criminal courts, where there are a number of structural and systemic barriers to justice. These barriers—which include violations of the right to counsel and pressures on judges to move cases along rapidly—affect, but do not excuse, the way judges go about sentencing. Part III considers the purposes and theories underlying misdemeanor punishment, to better inform the exercise of judicial discretion in misdemeanor sentencing. First, Part III.A recognizes that there is no one coherent theory of punishment even in the felony context, and that the dominant theory has shifted in recent decades. For misdemeanor punishment, the underlying justifications are even less clear; and for truly low-level misdemeanor offenses, any punishment may be unjustified. Still, proportionality and parsimony are consistent principles that are particularly relevant in the misdemeanor context. Part III.B explores how misdemeanor sentencing is discretionary sentencing. In general, a judge must simply sentence consistent with the statute, which usually ranges from no further criminal punishment to one year of imprisonment.⁴⁰ Yet, other than these

39. While a pure retributivist approach to sentencing might only look back to the offense itself and the circumstances at the time it was committed to determine the deserved burden to impose through punishment, in reality judges imposing sentences—while they may differ in the weight they put on backward- and forward-looking circumstances—are not following any one theoretical approach to punishment.

40. See *infra* notes 115-19 and accompanying text (discussing how one year imprisonment is the maximum misdemeanor sentence in most jurisdictions). By “no further criminal punishment,” I mean no formal penal sanction—no probation, no conditions, no waiting period until the imposition of sentence—beyond that which the defendant has already suffered. The already-suffered punishment might include the time served in custody awaiting arraignment or other disposition of the case. Central to the thesis of this Article is the claim that the collateral consequences of a conviction are experienced as punishment by defendants, even if not formally categorized as such. However here, I address only the punishment the judge is legally authorized to impose, and so

statutory ranges, tiered misdemeanor classification schemes in most jurisdictions, and sentencing guidelines in a handful of states, there is little to guide that discretion. In Part IV, this Article calls for judges to undertake “informed misdemeanor sentencing,” which draws on principles of proportionality and parsimony in determining the just sentence in a misdemeanor case. This means judges should recognize the many serious collateral consequences an individual suffers after any penal sanction, to keep punishment proportionate. It also means judges should make more use of deferred adjudication as well as expungement and related mechanisms for mitigating the unintended effects of a misdemeanor conviction, in an attempt to bring parsimony into the sentencing process.

II. STRUCTURAL AND SYSTEMIC BARRIERS TO INFORMED MISDEMEANOR SENTENCING⁴¹

The structural and systemic barriers to justice in the lower criminal courts are too numerous to fully explore here. These barriers include the vexing structural problems posed by a system that places so much power into the hands of law enforcement and prosecutors. For example, the effective disappearance of the misdemeanor jury trial and the use of arrests without adjudication to mark individuals for future sanctions are serious threats to the horizontal separation of powers envisioned as a check on government overreach.⁴² However, lower criminal court judges retain significant power at sentencing and this Part explores those barriers most likely to impede the suggestion, in Part III, that judges take a more informed, realistic view of the true consequences of a misdemeanor charge to impose proportionate and parsimonious misdemeanor sentences.

A return to (and expansion on) one of the scenarios described in the Introduction highlights the most significant structural and systemic barriers to the judicial exercise of informed misdemeanor sentencing. In the scenario, a defendant facing minor theft charges decided to enter a

reference “criminal punishment.”

41. By “structural” barriers, I mean the manner in which different elements at play in the lower criminal courts affect the way misdemeanors are adjudicated. I do not mean the types of broad structural considerations, like federalism and separation of powers, which have also been analyzed in the sentencing context. *See* Berman & Bibas, *supra* note 25.

42. *See* Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024-28, 1047-50 (2006) (noting how low number of jury trials has subverted the critical check on the power of prosecutors and judges in criminal cases); *see also* Kohler-Haussman, *supra* note 2 (describing how deferred dismissal in misdemeanor case in New York City serves to mark person for later, ratcheting-up of consequences upon subsequent arrest).

guilty plea.⁴³ His lawyer requested a sentence of probation before judgment (“PBJ”), which would result in discharge of the case without any judgment of conviction upon successful completion of a period of probation and any conditions. Defense counsel supported the request by having the defendant’s employer make a statement to the judge, about how he considers the defendant to be one of his best workers. The defendant also made a compelling statement about regret for his actions and his desire to avoid a conviction that would hurt his future employment prospects. The prosecutor, as you might remember, took no position on sentencing (this was carefully negotiated). The judge granted the PBJ.

Now imagine the next case, which involves the very same charges and a similarly-situated defendant. However in this case, counsel rushes in right as the case is called, having been pulled away to another courtroom to represent a client there. There is a brief negotiation between counsel and the prosecutor, and counsel then quickly explains the offer to her client, all while the judge waits. The client accepts the offer, which is the same bargain as the defendant in the first scenario—a guilty plea to one count in exchange for dismissal of the other count, and the prosecutor taking no position at sentencing. After the defendant enters the plea, at sentencing, defense counsel reads aloud her notes about her client’s work experience and family. She is interrupted several times by her client, who corrects some mistakes. Counsel focuses her request on the avoidance of jail time; she does not ask for, and the client does not get, a PBJ.

In the third scenario (again with the same charges, judge, and prosecutor, and a similarly situated defendant), the defendant appears without counsel. The judge reads a note from the file indicating that the defendant was to hire private counsel. The defendant explains that he tried, but simply did not have the money to pay the fee for an initial appearance in a misdemeanor case, let alone the eventual fee should the case proceed beyond that point. The judge informs the defendant that his case would still proceed to trial that day, and that he could speak directly with the prosecutor should he be interested in a plea bargain. After a short break during which the defendant speaks with the prosecutor, he enters a guilty plea to the full set of charges, without any charge bargain. The prosecutor requests one year of probation, and the judge asks the defendant if he has anything he would like to say. After the defendant looks around nervously and then shakes his head “no,” the judge imposes a sentence of one year of supervised probation, with any drug or

43. See *supra* note 14 and accompanying text.

alcohol treatment that the probation officer deems appropriate. There is no discussion about a PBJ. Indeed, the defendant has no idea about the existence of this option.

These scenarios illustrate some of the most common impediments to the type of informed sentencing that needs to take place in more misdemeanor cases. The crisis in the lower criminal courts—while still too often ignored in important discussions about the criminal justice system that tend to focus on mass incarceration⁴⁴ rather than mass criminalization—is by this point well-documented.⁴⁵ A relentless law enforcement focus on low-level arrests for the past two decades, as violent crime continued to fall in most jurisdictions,⁴⁶ means that misdemeanors now comprise almost eighty percent of many criminal court dockets.⁴⁷ Yet misdemeanors get a disproportionately small slice of already-stretched criminal justice system resources.⁴⁸ Prosecutors may lack the time, and sometimes the inclination, to exercise the discretion necessary to determine which misdemeanor arrests truly merit prosecution.⁴⁹ Judges may lack the time, and sometimes the inclination,

44. See, e.g., ALEXANDER, *supra* note 6, at 185-86; MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2002); see also *Brown v. Plata*, 563 U.S. 493, 545-45 (2011) (affirming lower court order requiring reduction of prison population to remedy Eighth Amendment violations primarily caused by overcrowding).

45. The lower criminal courts were the subject of important scholarly and practitioner attention in the 1970s. See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); William E. Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal*, 28 *LEGAL AID BRIEF CASE* 151, (1970). After decades of scant examination of misdemeanors, a recent body of legal scholarship has focused again on this critical component of the criminal justice system. See, e.g., John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 *HARV. C.R.-C.L. L. REV.* 1 (2013); Kohler-Hausmann, *supra* note 2; Natapoff, *supra* note 33; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 *U.C. DAVIS L. REV.* 277 (2011).

46. See, e.g., Complaint at 2, 9, 26-27, *Davis v. City of New York*, 10-CIV-699 (S.D.N.Y. Jan. 28, 2010) (describing how law enforcement in the Bronx, New York, made thousands of misdemeanor trespass arrests in 2008 alone); see also HOWARD N. SNYDER, *BUREAU OF JUSTICE STATISTICS, ARREST IN THE UNITED STATES, 1990-2010*, at 1, 7 (2012) (“The number of murder arrests in the U.S. fell by half between 1990 and 2010. The adult and juvenile arrest rates dropped substantially in the 1990s, while both continued to fall about 20% between 2000 and 2010, reaching their lowest levels since at least 1990.”).

47. See *CTR. FOR STATE COURTS, COURT STATISTICS PROJECT, STATEWIDE MISDEMEANOR CASELOADS AND RATES*, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro (showing misdemeanor caseload rates in thirty-four reporting jurisdictions) (last visited Nov. 15, 2017); Victor Eugene Flango, *Judicial Roles for Modern Courts*, *NAT'L CTR. FOR ST. COURTS*, <http://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/Monthly-Trends-Articles/Judicial-Roles-for-Modern-Courts.aspx> (“Approximately 80 percent of criminal cases are misdemeanors . . . more than 70 percent of which are handled by municipal judges . . .”).

48. See, e.g., Joe, *supra* note 20, at 750.

49. See Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 *ARIZ. L. REV.* 1065, 1103-04, 1108-10 (2014) (describing statistically significant difference in how junior and entry-level prosecutors rated “good relationship with police” and “low declination rates”

to properly adjudicate misdemeanors, instead opting to process cases with a focus on efficiency rather than justice.⁵⁰

The result is that, unless someone like defense counsel in the first scenario slows down the process, judges may rush through the docket. Too often, individuals facing misdemeanor charges have an attorney unable to meet minimum Sixth Amendment standards of effective assistance of counsel, like the rushed defense lawyer above who failed to request a PBJ.⁵¹ Or the defendant might fall into the large gap between qualifying for government-financed counsel and being able to afford private counsel—like the defendant who had to negotiate his own “bargain” and represent himself at sentencing in one of the scenarios. Many judges are hesitant to request information they need for informed sentencing directly from the defendant (and have sound constitutional, statutory, or ethical constraints for that hesitancy).⁵²

A core function of a criminal defense lawyer, particularly if the parties agree on a sentence bargain or if there is a verdict of guilt, is to represent the defendant at sentencing. Yet, while the Sixth Amendment right to counsel means that the state must appoint counsel for all indigent defendants facing felony charges,⁵³ that right does not extend to all misdemeanor charges. Instead, the constitutional right to misdemeanor counsel is an *ex post* approach where the Sixth Amendment is violated only when a judge imposes an actual or suspended sentence of incarceration upon a defendant without counsel (absent a valid waiver of the right).⁵⁴ However, many states offer a more expansive state constitutional or statutory right to counsel in misdemeanors.⁵⁵

as more important measures of success than their more senior colleagues).

50. See BORUCHOWITZ ET AL., *supra* note 7, at 11.

51. See AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* 26 (2004).

52. For example, a judge who directly questions a defendant about his immigration status may run afoul of Fifth Amendment protections against self-incrimination and may breach the professional boundaries between the role of defense counsel and judge.

53. See *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963) (under the Sixth Amendment, applicable to states through the Fourteenth Amendment, state courts must appoint counsel to individuals who cannot afford to hire private counsel).

54. See *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (finding that Sixth Amendment bars imposition of suspended sentence when underlying sentence followed “uncounseled conviction”); *Scott v. Illinois*, 440 U.S. 367, 371-74 (1979) (finding that an indigent defendant cannot be sentenced to imprisonment unless he has been afforded the right to counsel); *Argersinger v. Hamlin*, 407 U.S. 25, 36-38 (1972) (“[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.” (footnote omitted)).

55. See *Shelton*, 535 U.S. at 668-70 (“Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution.”).

Even when there is a constitutional right to misdemeanor counsel, it is a right too often honored in the breach. A 2009 report on the lower criminal courts noted that “a significant percentage of defendants in misdemeanor courts never receive a lawyer to represent them.”⁵⁶ Another follow-up study, examining misdemeanor courts in twenty-one Florida counties, found that 66% of defendants appeared at arraignment without counsel and that “[a]lmost 70% of defendants observed entered a guilty or no contest plea at arraignment.”⁵⁷ The judge who sentences a pro se defendant has a particular responsibility for ensuring that the individual receives the same sentence he would have received had counsel represented him. For example, the judge in scenario three, above, was fully aware of the option of a PBJ and had an ethical and professional duty to make the defendant aware of this option at sentencing,⁵⁸ share the types of factors relevant to a PBJ request, give the defendant time to prepare to make a request for a PBJ should he choose to do so, and offer the defendant the opportunity to respond to any prosecution representations. The judge would also have to inform the pro se defendant that a PBJ does not count as a conviction under state law upon successful completion of probation and any conditions, but that it does meet the definition of “conviction” under federal immigration law.⁵⁹ While avoiding direct questioning about the defendant’s immigration status, which could run afoul of Fifth Amendment protections, the judge would have to make it clear that any non-citizen defendant should consider this counter-intuitive effect of a PBJ under federal immigration law.

56. See BORUCHOWITZ ET AL., *supra* note 7 at 14.

57. ALISA SMITH & SEAN MADDAN, *THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS* 15 (2011).

58. This is not as simple as it might sound. For example, in Maryland a defendant who accepts a PBJ in District Court (the general misdemeanor court) must waive his right to a de novo appeal in Circuit Court—which is where he can have a jury trial in most instances—because the District Court case will remain open for fulfillment of probation and any conditions well beyond the 30-day statutory deadline for filing an appeal. MD. CODE ANN., CRIM. PROC. § 6-220(e)(1) (LexisNexis 2017) (“By consenting to and receiving a stay of entering of the judgment as provided by subsections (b) and (c) of this section, the defendant waives the right to appeal at any time from the judgment of guilt.”). The judge would thus have to explain this to the defendant. Not a difficult task, but somewhat more complex than explaining only the PBJ.

59. See 8 U.S.C. § 1101(a)(48)(A) (2012) (defining “conviction” to include circumstances where an “adjudication of guilt has been withheld, where . . . the alien . . . admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed”); *State v. Kona*, 71 N.E.3d 1023, 1024-26 (Ohio 2016) (describing how defendant faced deportation based on out-of-court, written admission of guilt that was required for entry into a pre-trial diversion program).

Of course, such aspirations are unlikely to be met in jurisdictions that blatantly and consciously ignore the right to misdemeanor counsel. Infamously (at least in misdemeanor circles), the South Carolina Supreme Court Chief Justice stated, at that state's public bar association meeting, that she instructs lower court judges to ignore the federal constitutional right to counsel in misdemeanor cases. In her view,

Alabama v. Shelton is one of the more misguided decisions of the United States Supreme Court, I must say. If we adhered to it in South Carolina we would have the right to counsel probably . . . by dragooning lawyers out of their law offices to take these cases in every magistrate's court in South Carolina, and I have simply told my magistrates that we just don't have the resources to do that. So I will tell you straight up that we [are] not adhering to *Alabama v. Shelton* in every situation.⁶⁰

This outrageous but honest statement raises another impediment to informed misdemeanor sentencing, namely the tendency to favor speed over justice. In 1972, the Supreme Court cautioned how "the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result."⁶¹ Since the Court offered that assessment, the annual volume of misdemeanors nationwide has more than doubled.⁶² At the same time, the ratio of state court judges per U.S. resident and per arrest has declined.⁶³ The obsession over speedy disposition has arrived as predicted, with enormous pressure on judges to move dockets in order to make room for the new cases that continue to pour into the lower courts. The attempt to "balance efficiency against procedural fairness" has been aptly described as one of "modern sentencing systems['] chief covert practical concern[s]."⁶⁴

While efficiency in the face of resource constraints is a factor at all stages of a case, sentencing remains a core function of the misdemeanor judge and careful, informed sentencing should not be subservient to the real or perceived need to move quickly. It is also important to keep in

60. BORUCHOWITZ ET AL., *supra* note 7, at 14.

61. *Argersinger v. Hamlin*, 407 U.S. 25, 34-35 (1972) (footnote omitted).

62. *See supra* note 42 and accompanying text.

63. RON MALEGA & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION, 2011, at 1 & fig.1 (2013) ("From 1980 to 2011, . . . [b]ecause of . . . increases [in the U.S. resident population and in arrests], the ratio of judges per 100,000 U.S. residents declined 23%, from 13.2 in 1980 to 10.2 in 2011.").

64. Berman & Bibas, *supra* note 25, at 43. While the authors were not discussing lower criminal courts, this covert concern is even more pernicious with misdemeanors, because a drive for efficiency combined with volume and resource constraints can lead to a near-total lack of process. *See Natapoff, supra* note 33, at 1328-29.

mind that legislative, law enforcement, and prosecutorial choices created the exponential rise in misdemeanor prosecutions—a rise that is not empirically justified from a public safety perspective.⁶⁵ Further, although often attributed to the need to move a high volume of misdemeanor cases through a system lacking resources to handle that volume, the culture of expediency exists in lower criminal courts that do not handle the type of high-volume dockets characteristic of a busy, urban courthouse. This is surely due in part to limited resources even in lower-volume jurisdictions.⁶⁶ It is also likely due in part to a misguided belief that the consequences of a misdemeanor are slight. All parties, including defense counsel, suffer from a lagging understanding of the true meaning of a criminal record in the electronic age, where records are bought, sold, and constantly and easily consulted in the housing and employment markets.⁶⁷

The pressure on judges to move dockets can come not only from real or perceived necessity, but also from the related phenomenon of some judges' belief that they must quickly "dispose of"⁶⁸ cases so they can move up and out of the lower criminal court. While there are a variety of ways in different jurisdictions that an appointed or elected judge might advance to a court of general jurisdiction (where felonies are adjudicated), it is almost universally viewed as desirable to move out of misdemeanor court.⁶⁹ Related to the push to keep dockets moving in order to move up and out of misdemeanor court is the issue of judges who believe—whether correctly or not—that they must avoid making waves while in lower criminal court if they want that opportunity to advance.⁷⁰ Even well intentioned judges can be affected by the desire to

65. See, e.g., Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176, 186-87, 202-06 (2008) (discussing how changes in social and economic structure may explain how "higher incarceration rates resulted in stable if not *higher* levels of crime"); see also BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 6-7, 59-89 (2001) (scrutinizing the evidence and policy behind the "broken windows" theory).

66. MALEGA & COHEN, *supra* note 63, at 2 ("Many [lower jurisdiction courts] are funded and operated at the local level (e.g., county) . . .").

67. See Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 15-19, 37-40 (2016).

68. This is a common, unfortunate, yet fairly accurate, term for the way misdemeanor cases are adjudicated in many lower criminal courts.

69. See Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 707, 727-28 (2015) ("[S]ome judges might pay more attention to judges higher in the judicial bureaucratic organization chart because they are inclined to use the local-judge job to move up the judicial hierarchy and are therefore more conscious of it."); *id.* at 728 n.128 (describing interview with lower court judge who stated that "[i]t is common to try to move up to county or Supreme").

70. Jessica A. Roth, *The Culture of Misdemeanor Courts*, 46 HOFSTRA L. REV. 215, 230-31 (2017).

move to a felony docket, in the belief that they can do more good in a court where (in their view) the cases matter more.

Related to the likely desire to move up and out of misdemeanor court is the fact that lower court judges are likely to be the least experienced, on their potentially first assignment to a courtroom. Most states have a limited jurisdiction court, also known as a lower court, where judges handle a variety of lesser criminal and civil matters. While these judges, in some jurisdictions, handle the initial stages of a felony case (arraignment, preliminary hearing), the bulk of their criminal docket will be misdemeanors.⁷¹ This new-to-the-job-of-judging reality could cut both ways in terms of the ability to pursue proper sentencing procedures. On the one hand, “beginner” judges might lack the perspective to keep misdemeanor punishment in context and proportionate, and the confidence to slow down to make more fully informed sentencing decisions. On the other hand, these judges might temper their use of harsher punishments since, unlike judges handling felony cases, imposing a year in jail would be the upper legislative limit.⁷² In an added twist, only 59% of judges nationwide in limited jurisdiction courts “were required to obtain some type [of] legal qualification to serve as a judge,” and “[p]ossessing a law degree was the most commonly required legal qualification.”⁷³ This means that in some jurisdictions, judges handling misdemeanor cases may not even be lawyers.⁷⁴

Close consideration of the role of the judge in misdemeanor sentencing is even more important in light of the reality that these sentences are rarely subject to appellate review.⁷⁵ Such review is

71. MALEGA & COHEN, *supra* note 63, at 2-3 (“In 2011, 46 states used general jurisdiction courts (GJCs) and limited jurisdiction courts (LJCs.”); *id.* at 2 (describing types of cases adjudicated in limited jurisdiction courts).

72. In my own experience, experienced judges who handle serious felony cases are more likely to view minor misdemeanor cases in perspective, and less likely to exercise their discretion to the limits of the sentencing law. *Cf.* Joe, *supra* note 20 (suggesting that more experienced defense attorneys are better equipped to handle misdemeanor cases); Wright & Levine, *supra* note 49 (discussing how new prosecutors tend to be more adversarial, and less balanced, in their approach to handling cases).

73. MALEGA & COHEN, *supra* note 63, at 5; *see also* Leib, *supra* note 69, at 715 n.32 (“New York, along with the majority of American states, allows non-attorney justices to preside in courts of limited jurisdiction.”).

74. *See* William Glaberson, *Delivering Small-Town Justice, with a Mix of Trial and Error*, N.Y. TIMES, Sept. 26, 2006, at A1, B2; William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. TIMES, Sept. 27, 2006, at A1; William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1; *see also* SPECIAL COMM’N ON THE FUTURE OF N.Y. STATE COURTS, JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE (2008) (discussing the use of non-attorney judges in New York).

75. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective*

intended to correct sentencing errors in felony cases, and plays a significant role in shaping sentencing policy and practice.⁷⁶ Numerous reasons exist for this lack of review in misdemeanor cases, including that so many defendants facing misdemeanor charges are denied counsel and that judges handling pro se guilty pleas might neglect to inform the defendant of the right to appeal, with the limited window of time (typically, thirty days) for filing that appeal.⁷⁷ Defendants who plead guilty to a misdemeanor may do so in exchange for or anticipation of little to no jail time, reducing their immediate incentive to appeal the case. Even if they receive a jail sentence, they are likely to have finished it by the time any appeal would be heard let alone decided, further reducing that incentive. Although many individuals later come to learn that their seemingly minor misdemeanor conviction is actually a significant barrier to essentials of daily life such as securing housing or employment,⁷⁸ by that point the time to file a direct appeal has long expired. Further, while there are some limited avenues for seeking post-conviction review in misdemeanor cases, there are significant procedural barriers to that review, such as the requirement in the federal habeas statute and many state habeas statutes that an individual be “in custody” to seek review.⁷⁹

In general, inadequate attention has been paid to the institutional dynamics of lower courts adjudicating misdemeanor cases.⁸⁰ Those dynamics, in the form of the systemic and structural realities described

Assistance of Counsel Claims, 92 CORNELL L. REV. 679, 701-06 (2007); see also Roberts, *supra* note 45, at 337-40.

76. See Berman & Bibas, *supra* note 25, at 41, 43 (discussing how appellate review is an important facet shaping felony sentencing law, policy, and practice); *id.* at 64-65 (noting that appellate review of sentencing decisions varies by jurisdiction, ranging from searching to non-existent).

77. SMITH & MADDAN, *supra* note 57, at 19 (describing, in observational study in twenty-one Florida counties, how only 23.7% of defendants were advised of the right to appeal after sentencing at arraignment and how that number was even lower for in-custody defendants, despite a Florida Rule of Criminal Procedure requiring trial judges to inform defendants of their right to appeal).

78. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>; see also LOVE, ROBERTS & KLINGELE, *supra* note 3, at ch. 2, (detailing myriad types of collateral consequences); *National Inventory of Collateral Consequences of Conviction*, COUNSEL OF STATE GOV'TS, <https://niccc.csgjusticecenter.org> (last visited Nov. 15, 2017) (allowing users to search for various collateral consequences using fields such as jurisdiction and type of consequence in database cataloguing consequences in state and federal laws and regulations).

79. See Roberts, *supra* note 45, at 338-40.

80. See Leib, *supra* note 69, at 715-23, 726-38 (calling attention to this inadequacy). *But cf.* Jennifer A. Scarduzio, *Managing Order Through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges*, 25 MGMT. COMM. Q. 283 (2011) (examining the interactions of municipal court judges).

above as well as other factors, play a role in the way a judge will exercise discretion when imposing sentences in misdemeanor cases.

III. PURPOSES OF PUNISHMENT AND THE EXERCISE OF DISCRETION IN MISDEMEANOR SENTENCING

The history of misdemeanor sentencing is firmly rooted in judicial discretion.⁸¹ Before the nineteenth century, judges had little discretion in felony sentencing,⁸² but the common law of misdemeanor sentencing allowed judges to impose an unlimited amount of imprisonment.⁸³ Still, judges more commonly imposed fines or whipping since “the idea of prison as a punishment would have seemed an absurd expense.”⁸⁴ Misdemeanor sentences were subject to “the limitations that the punishment not ‘touch life or limb,’ that it be proportionate to the offense, and, by the 17th century, that it not be ‘cruel or unusual,’”⁸⁵ but otherwise offered judges much more flexibility than felony sentencing.

Modern misdemeanor sentencing also offers judges broad discretion, although most jurisdictions allow a maximum sentence of one year of imprisonment for a misdemeanor conviction.⁸⁶ The ways in which judges might exercise that discretion is thus critical to an examination of sentencing in the lower criminal courts. To set the stage for that examination, this Part first explores the purposes and functions of misdemeanor punishment before turning to judicial discretion in misdemeanor sentencing.

A. Purposes and Functions of Misdemeanor Punishment

The underlying theories of punishment in the United States have shifted several times in the last century. Although no one theory has ever

81. *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000) (noting how “[t]he common law of punishment for misdemeanors—those ‘smaller faults, and omissions of less consequence,’—was substantially more dependent upon judicial discretion” than for felonies (citation omitted)).

82. See Berman & Bibas, *supra* note 25, at 60-61 (“With the development of penitentiaries and the embrace of rehabilitation, American sentencing lurched from all law and no discretion to no law and all discretion.”).

83. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 *YALE L.J.* 1097, 1125-26 (2001); see also *id.* at 1125 n.206 (noting how at common law, “[i]n theory, judges could order unlimited imprisonment [for a misdemeanor], though in practice they appear not to have imposed sentences of longer than five years” (citing 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 490 (London, MacMillan 1883))).

84. *Apprendi*, 530 U.S. 466, 480 n.7 (quoting J.H. Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *CRIME IN ENGLAND 1550-1800*, at 15, 43 (J.S. Cockburn ed., 1977)); see also *id.* (“Actual sentences of imprisonment for [misdemeanor] offenses, however, were rare at common law until the late 18th century.”).

85. *Id.*

86. See, e.g., N.Y. PENAL LAW § 70.15(1) (McKinney 2009).

fully accounted for punishment approaches at any given time, punishment in the United States has moved from a utilitarian approach, which focused on rehabilitation from the early twentieth century through the 1970s, to a more retributive approach that included mandatory guidelines, mandatory minimum sentencing statutes, harsh sentences, and three-strikes laws in the last decades of the twentieth century.⁸⁷ More recently, things have lurched back towards what might be characterized as more rehabilitative, or at least more utilitarian in recognizing that the harsh policies of the last quarter of the twentieth century have failed in many respects.⁸⁸

Threaded through these approaches, and significant to any theory of sentencing, is the principle of proportionality. Under this principle, any punishment imposed must fit the crime, to be proportionate to the seriousness of the crime committed.⁸⁹ In addition to being proportionate, sentences should follow the parsimony principle, under which “states should not inflict any more punishment than is necessary.”⁹⁰ Proportionality and parsimony are particularly relevant to misdemeanor sentencing in a world where the true effects of the conviction last far longer than any direct penal sanction.

87. See Michael Tonry, *Purposes and Functions of Sentencing*, in 34 CRIME & JUSTICE: A REVIEW OF RESEARCH 1, at 16-18 (2006) [hereinafter Tonry, *Purposes and Functions*]. But cf. Michael Tonry, *Sentencing in America, 1975-2025*, in 42 CRIME AND JUSTICE IN AMERICA, 1975-2025, at 141, 171-73 (Michael Tonry ed., 2013) (“By the mid-1980s the tough on crime period was under way. Except in lip service, proportionality largely disappeared as a policy goal.”) [hereinafter Tonry, *Sentencing in America*]. See also Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 163, 167-77 (2016) (describing how structured sentencing replaced a rehabilitative approach after the 1970s, but noting how even today, “no single theory of punishment has replaced the discredited theory of rehabilitation”). Although “[f]or most of the twentieth century, the predominant focus of sentencing was the consideration of offenders’ rehabilitative potential,” other utilitarian concerns at that time included deterrence (specific and general), and incapacitation. *Id.* at 162, 183-85.

88. See Tonry, *Sentencing in America*, *supra* note 87, at 144-45, 150-51 (describing the most recent period of sentencing in the United States, from 1996 to the present, as difficult to characterize under existing theories of punishment).

89. *Id.* at 145 (“There are many slightly different retributivist theories of punishment, but all have at their core the idea that criminal punishments, to be just, must in some meaningful way be proportionate to the seriousness of the offender’s crime.”). Alice Ristroph de-links proportionality from punishment theory to offer a more robust understanding of the concept and to move away from the claim that proportionality is limited by institutional competence (and thus calls for deference to legislative decisions about sentencing). Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 266 (2005) (characterizing “proportionality review [a]s an attempt to specify the outer limits of the penal power—not an attempt to direct the legislature’s choices within the boundaries of that power”).

90. Hessick & Berman, *supra* note 87, at 165; see Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 49 (stating that the parsimony principle “calls for the imposition of the least punitive or burdensome punishment that will achieve valid social purposes”).

Also significant to any misdemeanor theory of punishment is the more critical lens that considers criminal law and punishment as a form of social control—one that takes particular aim at the lives of the poor and of people and communities of color. For example, Michelle Alexander has characterized the criminal justice system in recent decades, in particular the War on Drugs, as a system of racial control similar to Jim Crow laws mandating racial segregation from the late 1870s through the mid-1960s.⁹¹ At a more general level, discussing what he termed “anormative” theories of justice, Michael Tonry described the “tough on crime” period in the United States as

characterized by [a] political culture[] in which the interests of some people do or did not count. . . . [S]ocial categories of people are the targets of laws, policies, and patterns of punishment that suggest that they are seen primarily as social threats and not as people whose interests deserve the concern and respect that traditional retributive and consequentialist theories of punishment would give them.⁹²

In current debates about sentencing, unusual coalitions have formed to support a less punitive and expensive, and more fair and effective criminal justice system.⁹³ Still, commentators have noted the lack of any coherent theory of current sentencing policy, calling it a “muddle,”⁹⁴ and noting “a compelling need for a new sentencing model.”⁹⁵ These theories, shifts, and debates have focused almost exclusively on punishment in felony cases.

It is not that scholars, politicians, and others purposely ignore misdemeanor punishment, but rather that discussions about the purposes and functions of punishment usually draw from examples or situations involving high-level, sometimes violent crimes. Offenses like murder, rape, and—more recently—felony drug sale and possession have

91. ALEXANDER, *supra* note 6; *see also* Fagan & Meares, *supra* note 65, at 180.

92. Tonry, *Sentencing in America*, *supra* note 87, at 174.

93. *See* Rachel Barkow, *The Criminal Regulatory State*, in *THE NEW CRIMINAL JUSTICE THINKING* 33, 46 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Eric H. Holder, Jr., *We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES, Aug. 11, 2016, at 6 (referring to “a rare bipartisan consensus [including senior law enforcement officials] in favor of changing drug-sentencing laws . . . to improve the fairness and efficiency of America’s criminal justice system”); EJ Hurst II, *Federal Sentencing and Prison Reform Now Bipartisan Issues*, THE HILL (Aug. 13, 2014, 7:00 AM), <http://thehill.com/blogs/punditsblog/crime/214998-federal-sentencing-and-prison-reform-now-bipartisan-issues>.

94. Tonry, *Purposes and Functions*, *supra* note 87, at 1-4 (noting, however, that “[m]uddles are not necessarily bad”); *cf. id.* at 8 (“The primary functions of sentencing, most people would agree, are imposition of appropriate punishments and prevention of crime.”).

95. RICHARD S. FRASE, *JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM*, at xii (2013) (“[N]o new sentencing model has emerged to replace the formerly monolithic dominance of indeterminate sentencing . . .”).

dominated punishment literature and policy discussions. Although the current state of sentencing theory and policy may be in flux, there is agreement that punishment must be both morally legitimate and serve some articulated purpose.⁹⁶ In many felony cases, there might be disagreement over the type and length of sentence, but in general it is possible to articulate a purpose for sentencing someone for an armed robbery, sexual assault, or drug sale.⁹⁷

Misdemeanor sentencing is not simply a mini version of felony sentencing. Although some more serious misdemeanors (e.g., assault, driving while intoxicated) might fit into a theoretical and practical framework developed in the felony punishment context, many misdemeanors are truly minor offenses. In some jurisdictions, a combination of charges like possession of an open container of alcohol, disturbing the peace, disorderly conduct, driving with a license suspended for failure to pay parking tickets, trespassing on posted public property, or unlicensed vending can make up a significant portion of the lower court docket.⁹⁸ The FBI's Uniform Crime Reporting publication, *Crime in the United States*, reported 10.8 million total estimated arrests in the United States in 2015, more than one million of which were in the categories of "liquor laws," "drunkenness," "disorderly conduct," and "vagrancy."⁹⁹ These numbers are certainly under-inclusive, and do not include other potentially minor misdemeanor charges that could fall into the FBI categories.¹⁰⁰ For example, there are almost a quarter of a

96. See John B. Mitchell, *Crimes of Misery and Theories of Punishment*, 15 NEW CRIM. L. REV. 465, 475-76 (2012) (noting that the definition of "crime" includes both prohibited conduct and a prescribed penalty, interpreting that penalty to mean "legitimate penalty," and stating that such legitimacy means that the punishment must be "justified by condemnation (retribution) or general or specific deterrence" and must "fulfill any of the five traditional purposes of punishment").

97. Again, there may be disagreement over whether using the criminal justice system is the right approach to drug addiction, but it is at least defensible to say that drug possession causes social harm and thus merits imprisonment or that drug users can be rehabilitated.

98. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1666 (2010) (noting that "[m]any of the cases in the [lower] courts (perhaps the majority in most urban jurisdictions) are petty public order cases"); see also BORUCHOWITZ ET AL., *supra* note 7, at 26 ("[D]riving with a suspended license charges make up a significant part of the caseload in many jurisdictions . . . [often] result[ing] from failure to pay fines or fees such as tickets for a broken tail light . . . parking tickets, or even failure to pay child support."); GOVERNOR'S OFFICE OF CRIME CONTROL & PREVENTION, THIRD REPORT TO THE STATE OF MARYLAND UNDER CHAPTERS 504 AND 505 OF 512: 2015 CRIMINAL CITATIONS DATA ANALYSIS 2 & n.1 (2016) (noting that 39,636 criminal citations issued in Maryland in calendar year 2013 were for minor offenses).

99. FBI, *Crime in the United States: Table 29*, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (last visited Nov. 15, 2017).

100. Press Release, FBI National Press Office, FBI Releases 2015 Crime Statistics (Sept. 26, 2016) ("Of the 18,439 city, county, university and college, state, tribal, and federal agencies eligible to participate in the [FBI's Uniform Crime Reporting] Program, [only] 16,643 submitted data in

million arrests in the categories of “prostitution and commercialized vice” and “vandalism,”¹⁰¹ which are likely composed largely of misdemeanors. In addition, almost 1.2 million of the total arrests are in the “larceny-theft” category.¹⁰² More than 22% of “larceny-thefts” are shoplifting,¹⁰³ many of which are likely misdemeanors. Further, of the 1.48 million reported “drug abuse violation” arrests in 2015, almost one-third were for marijuana possession.¹⁰⁴

For the very low-level, often *mala prohibita*, offenses,¹⁰⁵ it is difficult to conceptualize sentencing as retributivist, or as fulfilling the need for incapacitation or even rehabilitation.¹⁰⁶ For example, imposing a deserved punishment or attempting to rehabilitate the offender is a tough philosophical fit when applied to someone convicted of driving to a new job on a license suspended for failure to pay parking tickets due to an inability to pay, or to someone convicted of enjoying a beer on the front steps of his apartment building. Even for offenses that might be categorized as “mid-level” misdemeanors, such as drug possession or shoplifting, the felony model is a poor fit when it comes to the purposes and functions of sentencing.¹⁰⁷

2015.”). The FBI’s Uniform Crime Reporting (“UCR”) does not include traffic violations, which can comprise a significant portion of some local criminal court dockets. *See id.*; *see also* BORUCHOWITZ ET AL., *supra* note 7, at 26. Finally, it is worth noting that the UCR only receives arrest data for Part II offenses, and most misdemeanors fall into Part II. *See* FBI, CRIME IN THE UNITED STATES, 2011, at 1-5 (2012).

101. *Crime in the United States: Table 29*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> (last visited Nov. 15, 2017).

102. *Id.* (listing larceny-theft as its own category separate from motor vehicle theft, fraud, embezzlement, forgery, and stolen property).

103. *Larceny-theft Table*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/larceny-theft_table-larceny-theft_percent_distribution_within_region_2015.xls (last visited Nov. 15, 2017).

104. *Crime in the United States: Persons Arrested 2013*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested> (last visited Nov. 15, 2017).

105. 21 AM. JUR. 2d *Criminal Law* 25 (2017) (defining *mala prohibita* crimes as “acts which would not be wrong but for the fact that positive law forbids them”).

106. *See* Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67, 70-71 & n.55 (1933) (contrasting “true crimes of the classic law” against the “new type of twentieth century regulatory measure involving no moral delinquency”).

107. *See* Kohler-Hausmann, *supra* note 2, at 615 (“Existing models of criminal law, which have been built up almost entirely around felony adjudication, simply do not fit lower criminal courts. The social imperative to punish and the incentive to litigate diverge dramatically from felony to misdemeanor cases. Lower criminal courts process cases where the alleged crimes do not, by and large, represent an affront to widely held moral sentiments or cry out for the social act of punishment.”); *see also* Tonry, *Purposes and Functions*, *supra* note 87, at 32 (stating that “[w]e are pretty good at predicting petty reoffending” but asking: “Is it worth \$40,000-\$50,000 per year to prevent shoplifting, minor thefts, acts of prostitution, or low-level drug dealing? It also raises the moral question whether the disproportionate character of a multiyear prison sentence for a person convicted of such crimes can be justified”).

This Article does not offer a full account of the philosophical justifications or purposes and functions of misdemeanor sentencing. Indeed, even outside the misdemeanor context, where the bulk of theorizing happens, commentators have noted that “[s]entencing policy in the United States has fragmented. There is no overriding theory or model.”¹⁰⁸ Still, it is important to shed more light on the under-examined yet fundamental question of what the criminal justice system is trying to accomplish with misdemeanor sentencing, and whether and how those goals are justified.¹⁰⁹ Understanding the goals and purposes of misdemeanor punishment is critical to determining which factors should be used in the current discretionary misdemeanor sentencing regime. As Part III explores, even a basic recognition of the need for proportionality and parsimony in misdemeanor sentencing supports the more practical claim that judges must take a broader, more informed view of the full panoply of consequences that flow from a misdemeanor conviction when determining an appropriate sentence.

It is also useful to consider whether different underlying theories of misdemeanor sentencing may apply for different categories of offenses. John Mitchell has described truly low-level quality of life crimes—such as the offense of begging or sleeping in a public place—as “crimes of misery,” and has aptly observed that “the current application of the crimes of misery cannot be justified under any accepted philosophical theory of punishment.”¹¹⁰ For this class of misdemeanors, there may be no need to develop a theory of punishment, as punishment is morally unjustified and these should not be unlawful acts in the first place. Other misdemeanors might be divided into levels of seriousness (from a social harm perspective), with a more rehabilitative focus for the lower levels and perhaps some mix of other justifications for “true crime” misdemeanors at the higher level.¹¹¹

The newly-approved Model Penal Code: Sentencing (“MPC”) suggests two levels of classification, “Misdemeanors” and “Petty Misdemeanors.”¹¹² The MPC Commentary notes how “local sensibilities” might support finer gradations than two or even three categories, keeping in mind that too many levels of offense may make

108. Mitchell, *supra* note 96, at 471.

109. *See id.* at 465 (“Although there is a rich and extensive literature exploring the philosophical justification for the use of the criminal sanction, little has been concerned with minor crimes (misdemeanors), and none of the literature concerns . . . misdemeanor public order laws.”).

110. *Id.* at 471, 475 (noting how if there is no legitimate basis for punishment, which along with proscribed conduct makes up the two parts of what defines a crime, then there is no legitimate crime).

111. *See Sayre, supra* note 106, at 67.

112. MODEL PENAL CODE § 6.01(4) (AM. LAW INST., Proposed Final Draft 2017).

“sensible classification of crimes, in the abstract and in relation to one another, . . . difficult or impossible.”¹¹³ For felony classification, the new MPC suggests five or more categories, noting how “any number of felony grades from three to 10 would be reasonable according to current state practice.”¹¹⁴

While there is not a bright theoretical line dividing felonies from misdemeanors, the potential stratification of misdemeanors for determining the proper approach to sentencing is relevant not only to underlying justifications, but also to the exercise of judicial discretion.

B. *Judicial Discretion in Misdemeanor Sentencing*

As noted above, misdemeanor sentencing has deep, common-law roots in judicial discretion.¹¹⁵ This is in contrast to felony sentencing, which historically allowed little judicial discretion but in the last century has fluctuated between broader and more restrictive discretionary approaches.¹¹⁶ Most contemporary felony sentencing systems incorporate both mandatory and discretionary elements.¹¹⁷ The discretionary part of felony sentencing is guided by a number of factors, including statutory ranges or fixed periods of punishment for particular offenses, differing levels of punishment for different classifications of offense (e.g., A felony v. B felony), and sentencing guidelines in some jurisdictions. Local culture and custom will also affect the exercise of sentencing discretion. Most of these factors offer more guidance for judicial discretion in felony than in misdemeanor sentencing. Judicial discretion at sentencing has been through cycles of critique and praise, focusing on racial, gender, and other biases on the one hand or the need for flexibility on the other.¹¹⁸ Many of these pros and cons of discretion at sentencing apply equally to misdemeanors.

113. *Id.* § 6.01 cmt. a; *see also id.* § 6.01 cmt. d (“While there is no precise, optimum number of misdemeanor classifications, the low level of offense seriousness within this category suggests that a small number of statutory distinctions will be needed.”).

114. *Id.* § 6.01 cmt. c.

115. *See supra* notes 77-104 and accompanying text.

116. *See Hessick & Hessick, supra* note 30, at 190-94 (describing broad judicial discretion at sentencing from the late nineteenth through the mid-twentieth centuries); *id.* at 188 (“No sentencing system in effect today is completely mandatory or completely discretionary; instead, they are hybrid mandatory and discretionary schemes.” (footnote omitted)); *see also* Tonry, *Sentencing in America, supra* note 87, at 171 (noting how, at the time the Model Penal Code was first drafted in 1962, “[t]he only important question was whether the defendant was guilty. Once that was determined, the judge was given broad discretion to decide what sentence to impose”).

117. *Id.* at 195.

118. *See, e.g.,* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1949-50, 1953 (1988).

For almost all criminal offenses, the legislature sets either a fixed amount or a range of permissible punishment by statute.¹¹⁹ Only seventeen states and the District of Columbia have largely determinate statutory sentence lengths, although even within such fixed systems the judge may have some discretion at sentencing.¹²⁰ In indeterminate sentencing jurisdictions, the statutory ranges for felony offenses are much broader than the ranges for misdemeanor offenses. For example, a felony manslaughter sentence may range from zero to ten years imprisonment and a felony drug sale sentence may range from zero to life,¹²¹ while the misdemeanor range in almost all jurisdictions is only from zero to one year of imprisonment.¹²² In general, the range for a term of probation will also be wider in felonies than in misdemeanors.¹²³ These shorter ranges of misdemeanor punishment offer the most meaningful guidance for discretionary misdemeanor sentencing—simply by setting relatively low maximum penalties.

Another way to guide discretion in misdemeanor cases is by classification of various offenses, with lower maximum terms set for lower-level misdemeanors.¹²⁴ For example, Alabama allows judges to impose up to one year imprisonment for a Class A misdemeanor, up to six months for a Class B misdemeanor, and up to three months for a Class C misdemeanor.¹²⁵ Disorderly Conduct is a Class C misdemeanor, whereas Unlawful Possession of Marihuana in the Second Degree,

119. The rare exception is the common law crime that has not been codified. *See, e.g.*, Howard v. State, 156 A.3d 981, 1010 (Md. 2017) (“In the absence of a statutory penalty, the punishment for any common law crime . . . is anything in the discretion of the sentencing judge, provided only that it not be cruel or unusual.”); Hickman v. State, 996 A.2d 974, 980 (Md. 2010) (“Unlike other states, which have codified the common law offense of affray, Maryland has not and, therefore, if the offense exists, it is clearly only as a matter of common law.”).

120. *See* ALISON LAWRENCE, MAKING SENSE OF SENTENCING: STATE SYSTEMS AND POLICIES 4-5 (2015) (noting how, even within determinate systems, structured components such as sentencing guidelines may guide discretion).

121. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 2-207(a) (LexisNexis 2017) (listing penalty range for manslaughter); NEB. REV. STAT. ANN. § 28-105(1) (LexisNexis 2017) (listing felony sentences for various offense classifications); NEB. REV. STAT. ANN. § 28-416(7)–(10) (LexisNexis 2017) (listing various potential felony classifications for sale of controlled substance).

122. *See* MODEL PENAL CODE § 6.06 cmt. 1 at 165 (AM. LAW INST., Proposed Final Draft 2017) (“Only a handful of states currently authorize penalties in excess of one year of incarceration for the most serious of misdemeanor offenses.”).

123. *See, e.g.*, N.Y. PENAL LAW § 65.00(3) (McKinney 2014); WIS. STAT. ANN. § 973.09(2) (West 2017).

124. MODEL PENAL CODE § 6.01, cmt. d at 37 (AM. LAW INST., Proposed Final Draft 2017) (“[M]ost states with comprehensive grading schemes have adopted two or three tiers of misdemeanor crimes.”); *see id.* at § 6.01 reporter’s note at 37-38.

125. ALA. CODE § 13A-5-7(a) (2017). Alabama also has “violations,” which are non-criminal offenses, punishable by up to 30 days in county jail. *Id.* § 13A-5-7(b).

involving possession for personal use only, is a Class A misdemeanor.¹²⁶ Whatever one thinks of this legislative choice of the outer limits of punishment for the particular offenses, the Alabama legislature has chosen to limit a judge's discretion to impose punishment in different ways for different misdemeanors. Ohio is unusual in using four tiers of misdemeanors, with the lowest level carrying a penalty of no more than thirty days imprisonment¹²⁷ and encompassing such offenses as Hazing and Misconduct Involving a Public Transportation System.¹²⁸

With respect to sentencing guidelines, the *Apprendi-Blakely-Booker* line of cases, which rendered the federal and some state sentencing guidelines advisory rather than mandatory, has returned some measure of discretion to sentencing in felony cases.¹²⁹ However, that discretion is still cabined by the very existence of detailed guidelines in some states and, at least in federal courts, by the presumptive reasonableness of a sentence that follows the guidelines.¹³⁰ Very few states have sentencing guidelines that apply to misdemeanor offenses. Richard Frase has identified four states where guidelines regulate misdemeanor offenses and two more that regulate "some" misdemeanor offenses.¹³¹ Even this limited list of misdemeanor sentencing guidelines may overstate the situation in practice. For example, Frase lists Maryland as a misdemeanor guideline jurisdiction. However, Maryland's sentencing guidelines only apply in Circuit Court,¹³² and Maryland misdemeanors are usually adjudicated in District Court, with a *de novo* right to appeal or a right to demand a jury trial in Circuit Court.¹³³ Since the rate of

126. *Id.* § 13A-11-7(b) ("Disorderly conduct"); *id.* § 13A-12-214(b) ("possession of marihuana").

127. OHIO REV. CODE ANN. § 2929.24(A) (West 2011) (allowing up to one hundred and eighty days imprisonment for the highest level of misdemeanor, up to ninety days for the next level, up to sixty days for the next, and up to thirty days for the lowest).

128. OHIO REV. CODE ANN. §§ 2903.31, 2917.41 (West 2017).

129. *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005).

130. *See, e.g., Rita v. United States*, 551 U.S. 338, 347-51 (2007). Of course not all states have sentencing guidelines and a 2008 National Center for State Courts' publication noted how, "[s]urprisingly, it is not always clear whether a particular state's guideline system is still operational." NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (2008). Still, that publication identified twenty-one states with sentencing guidelines systems. *Id.* at 7-27.

131. FRASE, *supra* note 95, at 124 tbl.3.1 (listing states with misdemeanor sentencing guidelines as of May 2012).

132. *Sentencing Guidelines Overview*, MD. STATE COMM'N ON CRIMINAL SENT'G POL'Y, <http://msccsp.org/guidelines/Overview.aspx> (stating that Maryland guidelines are "for use in circuit courts only") (last visited Nov. 15, 2017).

133. MD. CODE ANN., CTS. & JUD. PROC. §§ 4-301-302 (LexisNexis 2017) (conferring exclusive jurisdiction over misdemeanors to District Court with limited exceptions, including a *de novo* appeal from a final judgment of conviction in District Court).

misdemeanor de novo appeals and jury demands is low, the practical reality is that sentencing guidelines are not used in most misdemeanor sentencing in Maryland.¹³⁴

Even in states with misdemeanor guidelines, there is much less detail than in felony guidelines. For example, North Carolina has four classes of misdemeanor offenses. Despite this larger-than-usual number of misdemeanor classifications, North Carolina's misdemeanor guideline matrix has only thirteen boxes, using the category of class of offense along one side of the matrix and prior conviction level along the other. Within all of the thirteen boxes in the matrix, judges retain the discretion to impose a "community punishment," which means no jail time. In four of the boxes, judges can only impose community punishment.¹³⁵ Even in the upper right corner of the North Carolina grid, which is for the highest offense classification and the highest number of prior convictions, judges are limited to imposing a maximum of 150 days imprisonment.¹³⁶ The result is that judges have a wide range of discretion with a limited upper range, at least when it comes to imprisonment.¹³⁷

One likely reason for the exclusion of misdemeanors from most sentencing guidelines is that the commissions charged with creating and updating guidelines are state agencies, attuned to issues with statewide impact, such as the resources of the state prison system. Misdemeanor cases, by contrast, more often involve county or other local resources.¹³⁸ While this may allow "county jurisdictions greater freedom to consider local resources and set a local sentencing standard,"¹³⁹ it is also worth noting that the exclusion of misdemeanors from most sentencing

134. MD. JUDICIARY, COURT OPERATIONS DEP'T, ANNUAL STATISTICAL ABSTRACT: FISCAL YEAR 2015, at tbls.CC-1.2 & DC-4 (listing 188,538 non-motor vehicle criminal cases terminated in district court in 2015, with 27,789 de novo appeals or jury demands terminated in circuit court that same year).

135. N.C.G.A. § 15A-1340.23 (2013); *see also* N.C. SENTENCING & POLICY ADVISORY COMM'N, STRUCTURED SENTENCING: TRAINING AND REFERENCE MANUAL 51 fig.C (2014).

136. *Id.*

137. It is important to recognize that probation can be quite onerous for a misdemeanor conviction, and can endure far longer than any maximum jail term. Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 261-62 (2015) ("Probation is typically cast as a lenient alternative to incarceration. But it is punitive in its own unique ways. Probation terms are typically much longer—six months to two years—than misdemeanor incarceration terms. While on probation, offenders are subject to myriad intrusive conditions, including drug testing, employment requirements, travel restrictions, and loss of privacy.").

138. *See* JAMES AUSTIN ET AL., NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 65 (1996); *see also* Leib, *supra* note 69, at 707.

139. *Id.* at 65 (noting how such an outcome would "threaten[] the integrity of the guideline's attempt to achieve fairness and proportionality"); *cf.* N.Y. PENAL LAW § 1.05 (McKinney 2009) (listing general purposes of New York State's Penal Code, including the need "[t]o differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor").

guidelines can result in the perverse outcome of a judge sentencing misdemeanors more harshly than at least some felonies. However, even in the unlikely event that such an unintended sentencing outcome were to occur on a regular basis, it is also worth remembering that there is no bright line between misdemeanor and felony offenses. It is certainly possible that a judge will consider a particular misdemeanor (such as a serious misdemeanor assault in a domestic violence context) more serious than a particular felony (such as theft that is just over the felony monetary threshold).

Local culture and custom can also play a significant role in the exercise of sentencing discretion. Courthouses are recognized sites of local culture,¹⁴⁰ and the processing of misdemeanor cases—which includes sentencing in some cases—is a major aspect of lower criminal court culture.¹⁴¹ Local culture includes custom and practice, and lower court judges' perception of local sentencing norms might guide their discretion. Similarly, judges' perception of sentences they themselves have imposed in past cases might guide discretion. However, such perceptions—unlike actual data comparing various judges' sentencing practices within a courthouse or one judge's sentencing practices for similarly situated defendants—are often incorrect and biased.¹⁴² For example, a recent *Herald-Tribune* study demonstrated how the Florida courts and correctional systems maintain a wealth of sentencing data, yet “no one uses the data to review racial disparities in sentencing” and “judges themselves don't know their own tendencies.”¹⁴³

There are a number of factors that guide judicial discretion in felony sentencing. Many of these do not apply to misdemeanors, leaving the judge with little guidance in determining what sentence to impose within the legally permissible range. More specifically, the broad discretion in misdemeanor sentencing means there are a number of choices a judge could make about what factors to take into consideration at sentencing.¹⁴⁴ The next Part focuses on the most significant of those factors, namely the disproportionate, often life-long

140. Roth, *supra* note 70, at 222-24.

141. See generally FEELEY, *supra* note 45.

142. See Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 524 (2014).

143. See Josh Salman et al., *Florida's Broken Sentencing System: Designed for Fairness, It Fails to Account for Prejudice*, HERALD-TRIBUNE, <http://projects.heraldtribune.com/bias/sentencing> (last visited Nov. 15, 2017). The investigation discusses how Florida's point system does not account for the racial disparities in sentencing, which can be exacerbated by law enforcement practices and plea bargaining limitations. *Id.*

144. Hessick & Hessick, *supra* note 30, at 190, 192, 201.

collateral consequences that a person can suffer as a result of facing misdemeanor charges.

IV. INFORMED MISDEMEANOR SENTENCING: ACCOUNTING FOR THE FULL RANGE OF CONSEQUENCES

As noted above, there is no developed theory to justify misdemeanor punishment. Still, drawing on some of the principles of punishment set out in Part III, the practice of misdemeanor sentencing suffers from a lack of proportionality and parsimony. This is in part because misdemeanor sentencing fails to account for the wide range of consequences of a misdemeanor conviction, which go far beyond the penal sanction that the misdemeanor judge imposes at the time of sentencing.¹⁴⁵ Individuals convicted of misdemeanors, as well as their families and communities, feel the effects of the misdemeanor conviction long after they finish any sentence, in many aspects of daily life. The reality of a misdemeanor conviction in an era where digital criminal records are easily accessible and often accessed is a recent phenomenon, and it will take time for misdemeanor sentencing to come to grips with this new reality, both from a theoretical and practical standpoint.

There are also significant collateral consequences in felony cases. Indeed, some consequences only attach to a felony conviction.¹⁴⁶ The difference with misdemeanors is that there is a much greater gulf between the collateral and direct (penal) consequences of a conviction, with the former usually far outweighing the latter. This can happen in felony cases as well, particularly with non-incarceratory sentences, which highlights how there is no bright line between felony and misdemeanor punishment.¹⁴⁷ For example, a young person with no prior record who is convicted of low-level felony drug possession may not realistically face any incarceration. Yet he should, if well-informed by counsel, be concerned about his financial aid if he is enrolled in college, since the conviction results in the loss of that aid.¹⁴⁸ Deportation and

145. As explored above, mere contact with the criminal justice system that results in creation of a criminal record—whatever the outcome of the case—can cause lasting, serious collateral consequences. I use “conviction” here because this Article focuses on sentencing, and sentencing follows a judgment of guilt, with the formal “conviction” happening upon actual imposition of sentencing.

146. See, e.g., FLA. CONST. art. 6, § 4.

147. See *supra* text accompanying note 135.

148. See 20 U.S.C. § 1091(r)(1) (2012) (setting out, for any controlled substance possession conviction, periods of disqualification for one year for a first offense, two years for a second offense, and indefinite for a third offense); see also *id.* § 1091(r)(2)(A)–(B) (allowing disqualified student to regain eligibility after completion of an approved drug rehabilitation program with

other immigration consequences can also outweigh the direct consequences of a felony conviction.¹⁴⁹ However, individuals charged with felonies generally face penal sanctions that will understandably be a major focus of concern and that may well outweigh most—although certainly not all—collateral consequences.

This Part offers a way to consider misdemeanor sentencing, what I will call “informed misdemeanor sentencing,”¹⁵⁰ that more fully accounts for the range of consequences of a misdemeanor conviction. It treats misdemeanor sentencing the way an individual convicted of a misdemeanor actually experiences the punishment for that offense, in an attempt to reinvigorate proportionality and parsimony in the practice of misdemeanor sentencing. Sentencing, unlike other stages of a criminal case, incorporates both forward- and backward-looking elements. The former involves, among other things, “offender-oriented considerations,”¹⁵¹ while the latter concentrates on the facts of the offense itself. While both types of elements are relevant to felony punishment, more serious offenses—in particular violent crimes with victims—call for more weight on the backward-looking aspects of the inquiry. With most misdemeanors, the scale of inquiry should tilt heavily towards forward-looking factors, which would include the most likely, relevant, and serious collateral consequences of the conviction. Indeed, in some low-level misdemeanor cases, such as quality-of-life crimes like disorderly conduct or panhandling, the sentencing process should look almost entirely if not exclusively forward. This is because in this class of misdemeanor, the very fact of the conviction, and the sometimes lengthy, humiliating, and harmful process that led up to that conviction, will usually comprise sufficient if not disproportionately harsh deserved punishment for the actual offense.

There are a variety of ways that judges can advance principles of proportionality and parsimony in misdemeanor sentencing. This Part focuses on two. First, for appropriately proportionate misdemeanor

unannounced drug testing and additional requirements).

149. *See, e.g., Lee v. United States*, 137 S.Ct. 1958, 1967 (2017) (finding, in federal drug trafficking case, that “[t]here is no question that deportation was the determinative issue in Lee’s decision whether to accept the plea deal.” (internal quotations omitted)). Employment concerns, such as likely loss of a professional license or disqualification for categories of employment upon conviction can also overshadow felony sentencing concerns. *See, e.g., N.J. STAT. § 2C:51-2* (2014) (permanently disqualifies from public employment anyone convicted of a serious offense while in government service).

150. With thanks to Jenia Turner for suggesting the term “informed misdemeanor sentencing.”

151. Berman & Bibas, *supra* note 25, at 54-55 (“Sentencing requires the use of reasoned judgment to impose a just and effective punishment. And whereas a defendant’s background and the criminal justice system’s purposes would be distracting or prejudicial at trial, they are key considerations at sentencing.”).

sentencing, lower court judges should be more forward-looking and expansive when exercising their sentencing discretion, by determining the appropriate punishment in a manner that accounts for the serious, relevant collateral consequences an individual will suffer as a result of the conviction. In some instances, the proportionate approach is to defer imposition of the sentence to allow the opportunity for an eventual non-conviction outcome. Second, for parsimonious misdemeanor sentencing, judges should more frequently employ the various available mechanisms of relief from those collateral consequences of conviction, including sealing and expungement.

A. *Proportionate Misdemeanor Sentencing*

As described throughout this Article, the collateral consequences of a misdemeanor conviction often overshadow any direct criminal punishment. The criminal court judge does not impose formal collateral consequences. Rather, these consequences are found in federal, state, or local regulatory measures and are imposed automatically or as a matter of discretion after the criminal case ends.¹⁵² For example, federal immigration law mandates deportation for a wide variety of misdemeanor convictions.¹⁵³ Informal collateral consequences “do not attach by express operation of law. Rather, they are informal in origin, arising independently of specific legal authority, and concern the gamut of negative social, economic, medical, and psychological consequences of conviction.”¹⁵⁴ For example, landlords increasingly turn to background screening companies to run checks that include criminal records, even when not required to do so by law or regulation.¹⁵⁵ Although these consequences are also outside the direct control of the misdemeanor sentencing judge,¹⁵⁶ they are relevant to sentencing.

152. See LOVE, ROBERTS & KLINGLELE, *supra* note 3, at ch. 1.

153. See, e.g., 8 U.S.C. § 1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”).

154. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013).

155. See *Rental Property Solutions*, CORELOGIC, <http://www.corelogic.com/industry/rental-property-solutions.aspx#container-Products> (last visited Nov. 15, 2017) (stating that “[p]roperty operators can review felony, misdemeanor, and sex offender records associated with a potential applicant in order to make an informed decision about potential renters[,]” and promising to help review “felony and, where available, misdemeanor records, for a vast majority of states”).

156. Although criminal court judges do not impose most collateral consequences, they do sometimes have the authority to relieve a defendant of some consequences. See *infra* Part IV.B.

Lower court judges can exercise their sentencing discretion to take into consideration the collateral consequences that a particular individual is most likely to suffer, when determining what if any criminal punishment to impose. These consequences will be different for different defendants, but such individualized review is what discretionary sentencing is all about. A few examples can help illustrate:

- John was convicted after a bench trial of misdemeanor theft, for shoplifting \$100 worth of clothing. Two years earlier he had benefitted from a pre-plea diversionary program for a similar charge. The local prosecutor had a policy against offering diversion twice, so John chose to take his chances at trial. He did this in large part because he was a non-citizen, a Legal Permanent Resident whose parents brought him to the United States as a toddler. John was aware, because his lawyer offered competent assistance of counsel as required under the Sixth Amendment,¹⁵⁷ that a theft conviction with a sentence of one year or more, even if the judge suspended all of that time, would count as an “aggravated felony” under federal immigration law and make him mandatorily deportable.¹⁵⁸ John was also aware, again because his lawyer acted effectively, that the judge handling his case gave one-year suspended sentences on all theft convictions, along with one year of probation and a warning that any violation of that probation would lead to imposition of the suspended sentence. Although John was convicted at trial, his lawyer convinced the judge to impose a 364 day suspended sentence, arguing that deportation to a country his client did not even know, with a language his client did not speak and no remaining family there, was of such disproportionate consequence that the judge should moderate the actual, criminal punishment, simply by one day. This is an easy case under any concept of proportionality.

157. See *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (holding that the Sixth Amendment right to counsel requires criminal defense attorneys to advise clients about mandatory deportation consequences).

158. See 8 U.S.C. § 1101(a)(43)(G) (defining “aggravated felony,” in part as any “theft offense . . . for which the term of imprisonment [sic] at least one year”); see also *id.* § 1101(a)(48)(B) (“Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”).

- Jane also faced the same charges as John, but she had several prior convictions that qualified as “aggravated felonies” under immigration law. At the time of her arrest, she was also detained on an “immigration hold” (meaning immigration authorities would seek to take custody upon her release in the criminal matter), because she had a final order of deportation based on her past convictions. The judge imposed a sentence of “time served” in her case, finding that her near-certain deportation was punishment enough.¹⁵⁹
- James was convicted of misdemeanor assault, during an incident of road rage that took place adjacent to his public housing complex, as he was exiting the parking lot. Because of an assault conviction some years prior, James’s lawyer warned him that he would likely face a short amount of jail time followed by probation if convicted. However, upon further discussion with James in preparation for the sentencing hearing, his lawyer learned that the local public housing authority (“PHA”) had notified James that he and his entire family would lose their public housing apartment because of James’s conviction, under the PHA’s discretionary authority.¹⁶⁰ James’s lawyer was able to convince the judge to refrain from imposing any jail time, arguing that James and his family were already suffering disproportionate consequences of his conviction and that incarceration might cause James to lose his job and make the family’s search for new housing even more difficult.¹⁶¹

There are a number of practical concerns about implementing informed misdemeanor sentencing. First, judges will likely learn of these collateral consequences only if the defendant is represented by counsel. For example, John might not qualify for the services of the local public

159. The judge could have been simply saving state and local resources by ending the case then and turning Jane over to federal immigration authorities, but he would also have had an independent basis for the “time served” sentence—namely, disproportionality.

160. See 24 C.F.R. § 982.553(a)(2)(ii)(3) (2017) (stating that public housing authorities can deny individuals and their family members housing benefits if any household member, while residing in public housing “engage[s] in” any criminal activity that “may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity”).

161. To be sure, James’s lawyer might have also argued that practical considerations, namely the need for James to stay out of jail and stay employed so his family could find new housing quickly, should lead to the same result. I am focused in this example on disproportionality because that would be an independent basis on which the judge could decline to impose jail time (and because this section of the Article is about proportionality).

defender but also might not be able to afford to hire private counsel.¹⁶² If this were the case, he would likely never learn of the arcane rule in federal immigration law about how suspended sentences are the same as imposed sentences. Further, John would likely never imagine that a shoplifting conviction qualified as an “aggravated felony” under immigration law and that he was mandatorily deportable.¹⁶³ Thus, John would be unable to inform the judge about his immigration situation and unable to request a proportionate sentence. This highlights the critical role of defense counsel in misdemeanor sentencing in a world of myriad collateral consequences. Particularly when it comes to immigration consequences—which are among the most severe of all collateral consequences and can apply to long-time legal permanent residents with green cards and American citizen children and spouses just as to recent arrivals on a visa—judges should ensure that any non-citizen is represented by counsel.

Another concern is that the judge may not know about many of the collateral consequences of various misdemeanor convictions, in order to effectively integrate consideration of those consequences into sentencing. Here, there have been significant advances in the availability of information. For example, the Council of State Governments’ Justice Center now maintains a public, fifty-state database of collateral consequences, originally created by the American Bar Association with funding from the National Institute of Justice.¹⁶⁴ In addition, the newly-approved Model Penal Code: Sentencing (“MPC”) states:

- (1) As part of the sentencing guidelines, the sentencing commission [or other designated agency] shall compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction’s] statutes and administrative regulations.
 - (a) For each crime contained in the criminal code, the compendium shall set forth all collateral consequences authorized by [the jurisdiction’s] statutes and regulations, and by federal law.

162. In Montgomery County, Maryland, where my clinic students practice, it is not unusual to see defendants forced to proceed pro se on the trial date, after having informed the judge on an earlier date that they would be hiring private counsel because they did not qualify for the public defender, only to return on the trial date to say they could not afford any of the lawyers they contacted.

163. See *supra* note 158.

164. See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510(a), 121 Stat. 2534, 2543; see also COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org> (last visited Nov. 15, 2017) (offering links to various manuals and databases on collateral consequences).

(b) The commission [or designated agency] shall ensure the compendium is kept current.¹⁶⁵

However, these large databases and compendia are blunt tools, and judges should work to integrate collateral consequences into bench books or other similarly accessible materials for use at sentencing and before.

The literature on holistic approaches to criminal defense work is also informative in the exploration of the judicial role in misdemeanor sentencing. That well-developed body of work builds on the idea of client-centered representation and proposes a model that looks beyond the criminal case to represent the client as a person faced with a variety of issues that might lead to involvement in the criminal justice system.¹⁶⁶ To be clear, judges occupy a different, and appropriately much more limited,¹⁶⁷ space with respect to asking for or receiving information about a defendant's circumstances than defense counsel, and for that reason the term "informed misdemeanor sentencing" is more appropriate. However, these limits do not mean that the judge must or should ignore the significant, lasting ways a conviction and sentence might negatively affect the person she is sentencing—particularly if those negative effects are disproportionate to the offense, or run counter to the purpose of the punishment in the first place.

It is worth pausing to consider the potential net-widening or punishment-enhancing effect of informed misdemeanor sentencing. Net-widening, as well as class and race biases, are continuing critiques of the problem-solving court movement.¹⁶⁸ Net-widening occurs when law enforcement and prosecutors bring more individuals into the criminal justice system on the belief that the system can help them; net-widening also occurs when individuals who would otherwise be in the system but would suffer minimal punishment in a traditional courtroom are brought

165. MODEL PENAL CODE § 6x.02 (AM. LAW INST., Proposed Final Draft 2017).

166. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1071-73 (2004); Smyth, *supra* note 6, at 479-80.

167. U.S. CONST. amend. VI; Pinard, *supra* note 166, at 1079 & nn.54-56, 180.

168. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004) (critiquing the net-widening effect of drug courts and stating that drug courts work "by redirecting [low-level] offenders into a treatment system that may pose significant, perhaps increased, hardships on offenders"); see also Joel Gross, Comment, *The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 161, 167-68, 171 (2010); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 465 (2009) ("In purely quantitative terms, drug courts are unlikely to reduce [racial] disparities—indeed, if anything, there is reason to believe that drug courts may exacerbate them.").

into a treatment court that imposes more onerous conditions before termination of the sentence (this has also been seen as punishment-enhancing).¹⁶⁹ There is a danger that informed misdemeanor sentencing can lead to net-widening or punishment-enhancing simply because the judge has more information under such an approach than under current approaches to misdemeanor sentencing.

When there is defense counsel in a misdemeanor case, counsel should work to deliver information about collateral consequences in a manner designed to get less and not more punishment—in short, counsel must work to avoid net-widening or punishment-enhancing. Judges must also refrain from turning a well-intentioned, forward-looking approach into overly-interventionist sentencing practices, and from using information gained about collateral consequences at sentencing to broaden the scope of punishment. Informed sentencing is not about piling on conditions with a purportedly rehabilitative focus, but rather about accounting for the true scope of punishment by taking collateral consequences into consideration.

Using information about the effect of various collateral consequences on an individual to enhance punishment would fall afoul not only of proportionality, but also parsimony. Indeed, problem-solving courts are based on a model of “coerced treatment backed up by firm judicial monitoring,” and the logic behind such a model “pa[ys] little heed to proportionality or parsimony” in favor of “participation in treatment and behavioral controls as long as needed to maximize their effectiveness.”¹⁷⁰

Finally, sometimes the most effective way that judges can exercise their discretion at sentencing to account for the full range of consequences an individual experiences as a result of a misdemeanor conviction is to sentence in a way that avoids the conviction altogether. Here, a return to the scenarios in Part II are illustrative. Those scenarios involved the post-plea or post-verdict option of a probation before judgment (“PBJ”), which is a deferred adjudication (some jurisdictions may give judges authority to grant pre-plea deferred adjudication, but this discussion will continue this Article’s focus on sentencing after a finding of guilt). A PBJ, which is also called a “suspended imposition of sentence,” “deferred entry of judgment,” and “deferred sentencing,” among other things,¹⁷¹ stays the entry of any judgment of conviction and

169. O’Hear, *supra* note 168, at 485-86.

170. Tonry, *Sentencing in America*, *supra* note 87, at 173.

171. See, e.g., ARK. CODE ANN. § 16-93-1206 (West 2016) (“suspended imposition of sentence”); CAL. PENAL CODE §§ 1000(d), 1000.8(a), (c) (West 2008) (“deferred entry of judgment”); COLO. REV. STAT. § 18-1.3-102 (2017) (“deferred sentencing”).

results in a non-conviction discharge of the case upon successful completion of the probation and any conditions.¹⁷² As noted above, such deferred adjudications do not necessarily relieve collateral consequences, some of which can be based on the underlying admission of guilt or the underlying facts of the case.¹⁷³ Judicial use of such deferred adjudication avenues can also advance parsimonious sentencing, the topic of the next Subpart.

B. Parsimonious Misdemeanor Sentencing

In proportionate misdemeanor sentencing, judges take relevant collateral consequences into account when determining the appropriate amount of punishment to impose. Judges must be informed about these consequences for this to happen. To be parsimonious, judges must be informed about the mechanisms of relief from these consequences, more specifically those mechanisms that they have power to employ. There are a variety of avenues of relief from one or more collateral consequences, although the major judicially-controlled avenues are—in addition to deferred adjudication described in the previous Subpart—sealing or expungement of a record, or the granting of some type of certificate of relief or rehabilitation.¹⁷⁴ While these methods of relief can be complex and are not widely understood or employed by judges, defense counsel, or prosecutors, it is not difficult for a judge quickly to become sufficiently knowledgeable about the limited tools for judicially granted relief.

Using relief mechanisms, so as to “impos[e] . . . the least punitive or burdensome punishment that will achieve valid social purposes” under the principle of parsimony¹⁷⁵ can also be an exercise in proportionality. If a judge believes that granting relief from a particular collateral consequence would result in the least punitive (most parsimonious) manner of achieving appropriate misdemeanor punishment, then it is likely that the judge is also acting to better fit the punishment to the

172. See, e.g., MD. CRIM. PROC. ANN. § 6-220(b)(2)(ii), (c)(2), (g)(3) (LexisNexis 2017).

173. See, e.g., 8 U.S.C. § 1101(a)(48)(A) (2012) (defining “conviction” to include circumstances where an “adjudication of guilt has been withheld, where . . . the alien . . . admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed”); 24 C.F.R. § 982.553(c) (2017) (“The PHA [Public Housing Authority] may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity.”).

174. See LOVE, ROBERTS & KLINGELE, *supra* note 3, at §§ 7:16-7:23 (describing various mechanisms of judicial relief from collateral consequences).

175. Berman, *supra* note 90, at 49.

crime.¹⁷⁶ Some of the examples in the preceding Subpart illustrate the intertwined nature of proportional and parsimonious misdemeanor sentencing. One further example focuses on parsimony:

- Alice was arrested for misdemeanor drug possession for having oxycodone without a prescription. She had one prior marijuana possession arrest, from the year before, which was dismissed upon completion of a brief drug education class. Alice's trial date for the new case, which would normally happen about three months after her arrest, was delayed as she completed an in-patient drug treatment program in her home state. Nine months after Alice's arrest, she appeared in court. By that time, she had completed both in- and out-patient programs, with consistent negative drug tests. In the jurisdiction where Alice was arrested, the prosecutor would normally make no sentence offer to someone with a similar drug arrest and one prior drug arrest, but would join defense counsel in requesting a deferred adjudication. Alice decided to plead guilty and request such a deferral, which the judge granted. The judge was prepared to sentence Alice to the customary eighteen months of probation, after which time the case (barring any violation of probation) would be dismissed and the disposition deemed a non-conviction. Under state law in this jurisdiction, Alice would have to complete the probationary period before seeking expungement of her record. However, Alice was actively seeking employment, and the case was showing up as an open charge on background checks. One employer was willing to hire Alice, but only upon proof that she was not convicted of the charges, and expungement of the record. The judge considered his purpose in punishing Alice to be rehabilitative, namely ensuring that she got any necessary drug treatment and was able to move on with her life and avoid further arrests. Given that goal, and the fact that Alice had already completed treatment and was coming to court months after her arrest without any drug use, Alice's defense attorney was able to argue

176. In some instances, the judge may not find the collateral consequence too drastic, or disproportionate given the crime, but may see no regulatory benefit in imposition of the consequence in the particular case (e.g. no benefit to public safety). *Cf.* *Smith v. Doe*, 538 U.S. 84, 103-06 (2003) (determining the line between criminal punishment and civil regulatory measures by examining the legislative intent and the effect of the law, and noting that a public safety purpose is regulatory).

for no probationary period, so that Alice was eligible for immediate expungement.

For now, a judge's ability to grant relief from collateral consequences is fairly limited. Although most states have expungement and sealing laws, some are restricted to non-conviction dispositions and others to a small group of misdemeanor charges upon conviction.¹⁷⁷ Further, not all jurisdictions have certificates of relief or rehabilitation.¹⁷⁸ That may change if states adopt the recommendations in the new MPC relating to relief at sentencing. In an important new provision, the MPC effectively folds relief from collateral consequences into the sentencing process. It requires sentencing courts to hear petitions for relief from any mandatory collateral consequences (meaning the consequence is automatically imposed) “[a]t any time prior to the expiration of the sentence.”¹⁷⁹ The MPC also allows individuals to petition for a Certificate of Restoration of Rights, which would grant relief from all mandatory collateral consequences in the jurisdiction, four years after completion of all past sentences.¹⁸⁰ Quite surprisingly—particularly given the wave of state legislative reform making sealing and expungement more available in a wider variety of circumstances, including for felony convictions after sometimes lengthy waiting periods¹⁸¹—the new MPC does not include any mechanism for expungement or sealing of a criminal record.¹⁸²

There are some simple steps that misdemeanor judges can take to make available relief mechanisms more easily accessible. For example, even if not required to do so by law or court rule, judges should advise defendants—particularly those appearing without counsel—about sealing or expungement opportunities. Misdemeanor courtrooms should

177. See *50-State Comparison: Judicial Expungement, Sealing, and Set-Aside*, RESTORATION OF RIGHTS PROJECT, <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside> (last visited Nov. 15, 2017).

178. LOVE, ROBERTS & KLINGELE, *supra* note 3, at § 7:23.

179. MODEL PENAL CODE § 6x.04(1)(a)–(b), (2)(a)–(c) (AM. LAW INST., Proposed Final Draft 2017).

180. *Id.* § 6x.06(1)–(3)(a), (4).

181. See Roberts, *supra* note 45, at 322 (“Nationally, a number of states are now updating or considering new and broader sealing and expungement laws.”).

182. In fact, there is only one brief discussion of expungement in the MPC, which seems to make the assumption that expungement will go hand-in-hand with provisions allowing individuals to deny the existence of any expunged record (which some states have) and appears to decline to include this major, existing relief mechanism on the basis of that possibility. MODEL PENAL CODE § 6.02B cmt. i at 59. The discussion also states that “expungement is simply not feasible,” but assumes that individuals expect total erasure of a record upon expungement when in fact expectations in the electronic age are likely lower and yet even some suppression of the record can be highly beneficial in the search for employment and housing. See *id.*

have the relevant pleadings and paperwork readily available, which will be especially beneficial for individuals who are immediately eligible to seek expungement or sealing. Judges should also waive fees to access such relief when the defendant is unable to pay, whenever they have the authority to do so.

Another area where judges can be parsimonious in misdemeanor sentencing is after a finding of a violation of probation, when the judge is essentially re-sentencing the defendant.¹⁸³ In 2015, there were more than 1.5 million individuals on misdemeanor probation.¹⁸⁴ Although there do not appear to be nationwide statistics on the number of misdemeanor probation violations, arrests and incarceration based on alleged probation violations are common and well-documented.¹⁸⁵ Many probation violations are related to the inability to pay fees associated with probation, and a court's failure to determine whether the lack of payment was willful rather than based on indigency or financial constraints is a clear constitutional violation that is outside the scope of parsimonious misdemeanor sentencing.¹⁸⁶ However, for other types of probation violations—such as failure to perform community service because the only times offered conflicted with work or child care obligations—judges can re-sentence parsimoniously, to achieve the purpose of the sentence in the least punitive or burdensome manner. For example, the judge might allow the probationer to arrange community service himself, rather than relying on the probation department for a placement that is more likely to conflict with other obligations. Or, the judge might extend the time allowed to complete the community service, if that would address the underlying reason for the violation (e.g. limited weekend hours to do community service).

The principle of parsimony, particularly when combined with the goal of proportional punishment, should lead misdemeanor judges to

183. *See, e.g.*, PA. STAT. AND CONS. STAT. ANN., Pa. R. Crim. P. R. 708 (West 2016) (“At the time of sentencing [for a violation of probation], the judge shall afford the defendant the opportunity to make a statement in his or her behalf and shall afford counsel for both parties the opportunity to present information and argument relative to sentencing.”).

184. U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2015, at 1, 5 tbl.4 (2017) (noting that 3,789,800 adults were on probation at “year end 2015, and that 41% of those adults were on misdemeanor probation”).

185. *See, e.g.*, CHRIS ALBIN-LACKEY, PROFITING FROM PROBATION: AMERICA'S “OFFENDER-FUNDED” PROBATION INDUSTRY, HUMAN RIGHTS WATCH 1, 51 (2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> (“Vast numbers of arrest warrants are issued every year for offenders on private probation. In Georgia alone, 124,788 arrest warrants were issued for offenders on private probation in 2012.”).

186. *See* *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983) (holding that it violates the Fourteenth Amendment's equal protection clause to incarcerate a person based on inability to pay a fine or restitution).

find the least burdensome way to mitigate any harmful effects of a conviction. For misdemeanors, this will almost always mean less punishment and more use of any available mechanisms of relief from a conviction.

V. CONCLUSION

Misdemeanors make up the vast majority of cases in the criminal justice system. The most significant function of misdemeanor judges is sentencing. However, that sentencing happens with little guidance and in a system replete with structural and systemic barriers to the proper exercise of judicial discretion. Misdemeanor sentencing also lacks a coherent set of underlying principles, as the purposes and functions of felony punishment are not a good fit for many misdemeanor offenses. Further, judges imposing misdemeanor sentences largely fail to appreciate the full panoply of harmful, long-lasting consequences that follow a misdemeanor conviction. Labeled collateral, these consequences often far outweigh the direct penal sanction that the judge imposes at sentencing.

This Article calls for judges to undertake informed misdemeanor sentencing. There are numerous ways to sentence so as to account for the true consequences of a low-level conviction. Proportionate misdemeanor sentencing would require judges to be more forward-looking, taking serious collateral consequences into account in determining the appropriate direct sanction. In many cases, this will result in a deferred adjudication, which suspends imposition of the sentence pending completion of conditions, after which the case essentially ends without a conviction. Parsimonious misdemeanor sentencing would require judges to make more use of the various mechanisms of relief from a conviction, such as expungement of the record or granting of a certificate of rehabilitation.