CONTRIBUTIONS

THE SCALE OF MISDEMEANOR JUSTICE

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This Article seeks to provide the most comprehensive national-level empirical analysis of misdemeanor criminal justice that is currently feasible given the state of data collection in the United States. First, we estimate that there are 13.2 million misdemeanor cases filed in the United States each year. Second, contrary to conventional wisdom, this number is not rising. Both the number of misdemeanor arrests and cases filed have declined markedly in recent years. In fact, national arrest rates for almost every misdemeanor offense category have been declining for at least two decades, and the misdemeanor arrest rate was lower in 2014 than in 1995 in almost every state for which data is available. Third, there is profound racial disparity in the misdemeanor arrest rate for most—but not all—offense types. This is sobering if not surprising. More

unexpectedly, perhaps, the variation in racial disparity across offense types has remained remarkably constant over the past thirty-seven years; the offenses marked by the greatest racial disparity in arrest rates in 1980 are more or less the same as those marked by greatest racial disparity today. Our findings confirm that the scale of misdemeanor justice is vast, but contradict the notion that it is expanding. In addition, we document a surprising degree of uniformity in misdemeanor trends. Such consistency suggests that the misdemeanor system may have a deeper and more uniform structure than we anticipated.

INTRODUCTION

It is 2018, and the universe of human knowledge is accessible from tiny devices that we carry everywhere. In twenty seconds we could find out what Jennifer Lawrence had for breakfast or how to say hello in Indonesian street slang. Yet we know absurdly, embarassingly, vanishingly little about our misdemeanor justice system. Notwithstanding the problems with all criminal justice data, we know a decent amount about felonies.[1] We know that drug defendants constitute the largest category of felony defendants.[2] We can say with confidence that the national incarceration rate ballooned between 1980 and 2010.[3] We know that it was driven by state prison populations.[4] We can analyze racial disparities in felony case processing.[5] We can chart the violent crime rate

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[1] In the federal system, the United States Sentencing Commission does an admirable job collecting, analyzing, and disseminating statistics. *See Research*, U.S. SENTENCING COMM'N, https://www.ussc.gov/research [https://perma.cc/24MB-XE7E] (last visited Apr. 28, 2018). Even for the decentralized state systems, both federal and non-profit agencies collect respectable data on felony case adjudication that can support national generalization. *See, e.g.*, BRIAN A. REAVES, OFF. JUST. PROGRAMS, U.S. DEP'T JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 3 (2009), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/G8K9-EBBT].

[2] *Id.*

[3] THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1 (2015), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf [https://perma.cc/EB57-57P8] (recording quadrupling of prison population between 1980 and 2010).

[4] *See, e.g.*, *State Policy Drives Mass Incarceration*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/graphs/state_driver_rates_1925-2015.html [https://perma.cc/RM8S-SNCY] (last visited Apr. 28, 2018) (noting that graph is compiled from multiple Bureau of Justice Statistics data sets).

[5] *See, e.g.*, REAVES, *supra* note 1, at 3; U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf [https://perma.cc/X95J-9PZ5]; Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 2 (2013) (analyzing racial disparities in federal cases in "charging, plea-bargaining, and fact-finding, as well as sentencing"); Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1320

since the 1960s.[6] We can even analyze the contemporary relationship between community violence and police violence in the United States—it does not appear that there is one.[7]

Nothing like this is true for misdemeanors. We do not know even the most basic facts.[8] To wit: In the last few decades, there has been, to our knowledge, only one explicit attempt to estimate the number of misdemeanor cases filed nationally each year.[9] In a report called *Minor Crimes, Massive Waste*, the National Association of Criminal Defense Lawyers ("NACDL") extrapolated from data on misdemeanor case filing rates in twelve states to estimate that there were about 10.5 million misdemeanor cases filed in 2006.[10] This estimate is regularly cited in misdemeanor scholarship.[11] Valuable though it has been, the

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(2014) (finding that "initial case and defendant characteristics . . . can explain most of the large raw racial disparity in federal sentences, but significant gaps remain").

[6] The FBI's Uniform Crime Reporting Statistics include estimated violent-crime rates from 1960 through 2016. *See Uniform Crime Reporting Statistics*, FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., https://www.ucrdatatool.gov/Search/Crime/State/Run CrimeStatebyState.cfm [https://perma.cc/FK5A-KFWN] (last visited Apr. 28, 2018). The National Crime Victimization Survey, administered by the Bureau of Justice Statistics, provides complementary data on violent-crime victimization rates. *See NCVS Victimization Analysis Tool (NVAT)*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=nvat [https://perma.cc/H3JD-VB7B] (last visited Apr. 28, 2018).

[7] *2015 Police Violence Report*, MAPPING POLICE VIOLENCE, https://mappingpolice violence.org/2015.org [https://perma.cc/ZS7S-Q7HD] (last visited Feb. 8, 2018) (drawing from U.S. census data from 2014, FBI Uniform Crime Reports data from 2014, and independently collected data on police killings from 2015).

[8] *Accord* Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 257 (2015) (noting that "we still lack basic data about misdemeanors, including how many there are").

[9] *Id.* at 265 ("The 2009 NACDL report . . . remains the only effort to estimate national dockets.").

[10] ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT'L ASS'N CRIM. DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), https://www.nacdl.org/WorkArea/linkit.aspx?LinkIden tifier=id&ItemID=20808 [https://perma.cc/CT4L-K8UF] (citing NAT'L CTR. FOR STATE COURTS, CRIMINAL CASELOADS REPORT (2007)) (finding that, on basis of data gathered from twelve states in 2006, there was "median misdemeanor rate of 3,544 per 100,000" people).

[11] *See, e.g.*, Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 649 (2015); Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1686 (2017); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 703 (2015); Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1753 (2013) [hereinafter Cade, *The Plea-Bargain Crisis*]; Soolean Choy, *Extending Meaningful Assistance to Misdemeanor Defendants*, 22 TEX. J.C.L. & C.R. 73, 74 (2016); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1074 (2013) [hereinafter Natapoff, *Aggregation*]; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) [hereinafter Natapoff, *Misdemeanor Decriminalization*];

estimate is based on an extremely limited dataset and is now twelve years out of date. The state of empirical knowledge about misdemeanor criminal justice has not extended much further beyond that. We know that the ratio of misdemeanor to felony cases filed annually is about three to one.[12] We know a smattering of misdemeanor-related statistics in a handful of states.[13] And that is about it.

Our ignorance has been due, in part, to inattention. Although far from perfect, data on misdemeanors is available; what has been lacking is the will to investigate. Misdemeanors have historically been perceived as unimportant.[14] With a few notable exceptions,[15] scholars, media, and policymakers have largely ignored them.

Natapoff, *supra* note 8, at 256; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) [hereinafter Natapoff, *Misdemeanors*]; Alexandra Natapoff, *Misdemeanors*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 73, 73 (Erik Luna ed., 2017) [hereinafter Natapoff, ACADEMY FOR JUSTICE REPORT]; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 281 (2011).

[12] *See infra* note 81 and accompanying text.

[13] New York City has made misdemeanor data relatively accessible, and both public institutions and independent researchers have taken the opportunity to illuminate misdemeanor case processing there with fascinating results. *See generally, e.g.*, MARY T. PHILLIPS, N.Y.C. CRIM. JUST. AGENCY, PRETRIAL DETENTION AND CASE OUTCOMES, PART I: NONFELONY CASES (2007), http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc [https://perma.cc/KDN4-QXNF] (using misdemeanor data to draw conclusions about pre-trial detention and conviction rates); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (presenting results and analysis of multi-year study); *The Misdemeanor Justice Project*, JOHN JAY COLL., http://misdemeanorjustice.org [https://perma.cc/48Q7-RCSM] (last visited Apr. 28, 2018) (using New York City data to develop range of statistical analyses and publications). The new non-profit Measures for Justice is collecting and incrementally publishing selected misdemeanor data. *See* MEASURES FOR JUSTICE, https://measuresforjustice.org [https://perma.cc/48Q7-RCSM] (last visited Apr. 28, 2018). Several other studies have analyzed misdemeanor court records in particular locales. For the most part, though, these efforts have been jurisdiction specific. From an empirical perspective, the misdemeanor system is almost entirely uncharted terrain. *Accord* Natapoff, *supra* note 8, at 265 (diagnosing "enormous need—and enormous opportunity—for empirical studies of the petty offense system").

[14] *See, e.g.*, Natapoff, *Misdemeanors*, *supra* note 11, at 1313 ("Misdemeanor convictions are typically dismissed as low-level events that do not deserve the attention or due process accorded to felonies.").

[15] These include Malcolm Feeley's seminal monograph, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979), and Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 449-50 (1992) (discussing shift in penology toward risk-management approach).

But things are changing.[16] As this symposium demonstrates, there is growing awareness that the consequences of misdemeanor arrest or conviction are far from trivial.[17] This is important, because by all accounts the misdemeanor system is enormous.[18] Anyone who has worked in a state-level criminal justice system can attest that misdemeanor case volume vastly outstrips felony case volume. This volume makes the misdemeanor system particularly susceptible to certain kinds of abuse.[19] Misdemeanor courts are characterized by informality

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[16] In addition to the contributions to this symposium issue, *see generally* BORUCHOWITZ, BRINK & DIMINO, *supra* note 10; ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIM. DEF. LAW., THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS (2011), https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794&libID=20764 [https://perma.cc/KFY2-JZB7]; Brandon Buskey & Lauren Sudeall Lucas, *Keeping* Gideon*'s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299 (2017); Cade, *The Plea-Bargain Crisis*, *supra* note 11; Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775 (2016) (exploring "influence that collateral consequences exert on initial charging decisions in low-level prosecutions"); Erica J. Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019 (2013) [hereinafter Hashimoto, *The Problem*]; Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007) [hereinafter Hashimoto, *The Price*]; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); Eisha Jain, *Capitalizing on Criminal Law*, 67 DUKE L.J. 1381 (2018) (arguing that effective criminal justice reform must encompass institutions outside criminal justice system that profit from criminal history data, especially from misdemeanor system); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017) (advocating for public defender offices to prioritize misdemeanor representation); Kohler-Hausmann, *supra* note 13; Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351 (2013); Natapoff, *Aggregation*, *supra* note 11; Natapoff, *Misdemeanor Decriminalization*, *supra* note 11; Natapoff, *Misdemeanors*, *supra* note 11 (cataloging recent scholarship on misdemeanors); Natapoff, ACADEMY FOR JUSTICE REPORT, *supra* note 11; Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013); Roberts, *supra* note 11.

[17] *See, e.g.*, Heaton, Mayson & Stevenson, *supra* note 16, at 711 (finding that pretrial detention in misdemeanor cases increases likelihood of conviction and future arrest); Natapoff, *supra* note 8, at 261 (explaining that fines and fees imposed upon conviction launch cycles of debt); Natapoff, *Misdemeanors*, *supra* note 11, at 1315 (noting that while misdemeanor defendants "are largely ignored by the criminal literature and policymakers, they are nevertheless punished, stigmatized, and burdened by their convictions in many of the same ways as their felony counterparts"); *id.* at 1316-17 (describing collateral consequences that misdemeanor conviction can trigger); Roberts, *supra* note 16, at 1090 (noting that misdemeanor convictions "can affect future employment, housing, and many other basic facets of daily life"); Roberts, *supra* note 11, at 27 (explaining that "consequences of even the most 'minor' misdemeanor conviction can be far reaching").

[18] As noted above, though, there has been only one effort in recent years to estimate its scope. *See supra* note 10 and accompanying text.

[19] BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 7.

and lack of adherence to many due process protections.[20] Defendants often proceed without counsel.[21] In at least some jurisdictions, the misdemeanor system appears to function more as a means of social control than as a system for adjudicating criminal guilt.[22] And the recent Department of Justice ("DOJ") policing investigations in Baltimore and Ferguson reported pervasive use of misdemeanor process to generate revenue on the backs of the poor, as well as systemic racial disparity in misdemeanor arrest and charging practices.[23]

This Article seeks to inform misdemeanor scholarship and policy by creating the most comprehensive national-level analysis of misdemeanor criminal justice that is currently feasible given the state of data collection in the United States. We use publicly available, but under-utilized, data sources to do so. Our primary source for misdemeanor caseload information is the National Center for State Courts ("NCSC"). In 2016, the NCSC collected "publishable" data on misdemeanor case processing from thirty-two states and the District of Columbia.[24] We use data from the NCSC and state court publications to provide an estimate of the yearly number of misdemeanor cases filed, as well as to track the time trend in misdemeanor caseloads since 2007. Our source for national-level arrest data is the FBI's Uniform Crime Reports ("UCR") series. The UCR series includes historical information on arrests, but does not distinguish between felonies and misdemeanors.[25] It does, however, break down arrests by offense category.[26] We therefore construct a misdemeanor "proxy," comprised only of those offenses which are generally classified as misdemeanors: prostitution, simple assault, driving under the influence ("DUI"), vagrancy, gambling, drunkenness, liquor law violations, disorderly conduct, and

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[20] *See, e.g.*, *id.* at 12; Natapoff, *Misdemeanors*, *supra* note 11, at 1313.

[21] *See* BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 14; STEPHEN F. HANLON, THOMAS B. HARVEY & NORMAN LEFSTEIN, AM. BAR ASS'N, DENIAL OF THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: COURT WATCHING IN NASHVILLE, TENNESSEE (2016), https://www.americanbar.org/content/dam/aba/administrative/crsj/Nashville.authcheckdam. pdf [https://perma.cc/TM2B-98WP].

[22] *See, e.g.*, Kohler-Hausmann, *supra* note 13, at 611; Natapoff, *Aggregation*, *supra* note 11, at 1043 (arguing that "misdemeanor system as it currently stands does not function as a traditional 'criminal' system of judgment in large part because aggregation erodes the substantive content of criminal convictions").

[23] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3 (2016), https://www.justice.gov/crt/file/883296/download [https:// perma.cc/9UG9-GZ5H]; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/ press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perm a.cc/PJ6A-TVLE].

[24] *Court Statistics Project DataViewer*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/ Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro (last visited Apr. 28, 2018).

[25] *Uniform Crime Reporting*, FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., https://ucr. fbi.gov/ [https://perma.cc/Y3DT-8JTC] (last visited Apr. 28, 2018).

[26] *See id.*

vandalism. A second "expanded proxy" includes additional offenses more likely than not to be classified as misdemeanors: theft, drug possession, and "other offenses." The UCR data allows us to assess arrest rates, both in the aggregate and by race, for these misdemeanor proxy categories over time.[27] It also allows us to track arrest rates for individual likely-misdemeanor offense categories.

The analysis produces several significant conclusions. First, we estimate that there are 13.2 million misdemeanor cases filed in the United States each year.[28] The misdemeanor system is indeed huge: there are roughly 4261 misdemeanor cases filed annually per 100,000 people. Second, contrary to conventional wisdom,[29] this number is not rising.[30] Both the number of misdemeanor arrests and cases filed have declined markedly in recent years. In fact, arrest rates for almost every misdemeanor offense category have been declining for at least two decades, and the misdemeanor arrest rate was lower in 2014 than in 1995 in almost every state for which data is available. The number of misdemeanor cases filed has been falling for at least ten years, which is as far back as national-level data can be trusted. Third, there is profound racial disparity in the misdemeanor arrest rate for most—but not all—offense types.[31] This is sobering, if not surprising. More unexpectedly, perhaps, the variation in racial disparity across offense types has remained remarkably constant over the past thirty-seven years; the offenses marked by the greatest racial disparity in arrest rates in 1980 are more or less the same as those marked by the greatest racial disparity today.

Our national caseload estimate confirms current perceptions about the scale of misdemeanor justice, but the declining arrest and case-filing rates present a challenge for misdemeanor scholarship. Contemporary research on misdemeanors has been influenced by the impression that the system is expanding.[32] As a result, the theoretical contributions made by recent scholars provide no immediate explanation for the decline in misdemeanor arrests and case-filing rates. In fact, recent characterizations of misdemeanor justice—that jurisdictions pursue misdemeanor cases as a way to earn revenue through fines and fees, that many misdemeanors involve such quotidien behavior that the arrest incidence depends solely on police discretion, and that the misdemeanor system functions as a method of social or racial control[33]—suggest systemic pressures that might lead to continual expansion of the misdemeanor system. As

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[27] Apart from the NCSC and UCR data, the only available empirical data on misdemeanors is fragmented and local, collected by agencies and scholars whose research usually focuses on a particular jurisdiction—frequently New York City. *See* Natapoff, *supra* note 8, at 265 (noting that existing misdemeanor research "heavily favors New York").

[28] *See infra* Sections II.A, III.A.

[29] *See infra* note 107 and accompanying text.

[30] *See infra* Sections II.B, III.B.

[31] *See infra* Sections II.C, III.C.

[32] *See infra* notes 108-09 and accompanying text.

[33] See *infra* notes 127-28.

misdemeanor scholarship develops, we believe that an important challenge is to expand our theories of misdemeanor justice to make sense of its shrinking scale.

In addition, we document what to us was a surprising degree of uniformity in misdemeanor trends. The common perception is that misdemeanor systems are wildly heterogeneous.[34] The underlying behaviors that are classified as misdemeanor crimes vary substantially from place to place.[35] Many misdemeanor offenses are amorphously defined and subject to significant discretion in policing. And many are symptoms of poverty, mental illness, and substance abuse. One might therefore expect high variability in misdemeanor arrest rates across time and space, due to differences in culture, demographics, economics, politics, and policing strategies.[36] While we do observe significant areas of variability, we also document several remarkably consistent trends. Racial disparities in arrest rates have remained quite stable over the past thirty-seven years, as have the relative rates of disparity across different offense types.[37] Misdemeanor arrests are not just declining in the aggregate, they are declining across almost every offense category and in almost every state.[38] Such consistency suggests that the misdemeanor system may have a deeper and more uniform structure than we anticipated, and may be subject to common influences across jurisdictions.

This Article proceeds in three parts. Part I describes our three primary data sources, taking into account the complexity that results from jurisdictional variation in the meaning of the term "misdemeanor." Part II presents our empirical analysis of the data. Part III considers the empirical results in light of recent misdemeanor scholarship, highlighting the ways in which the numbers support contemporary thinking about misdemeanor justice and the ways in which they challenge it.

I.   NATIONAL MISDEMEANOR DATA

A.   *An Amorphous Category*

Any discussion of misdemeanors must grapple with a central conceptual and definitional hurdle, which is that the parameters of the category are amorphous.

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[34] *See, e.g.*, Natapoff, *supra* note 8, at 256 (arguing that focus on misdemeanors "reveals a [criminal justice] system that is neither uniform nor consistent").

[35] *See infra* Section I.A.

[36] *See, e.g.*, Natapoff, *supra* note 8, at 256 (describing misdemeanor system as "massive sloppy arena dominated by police arrest practices and assembly-line processing"); Abdullah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, ATLANTIC (Dec. 20, 2017), https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/ [https://perma.cc/W9C5-4S5L] (quoting legal scholar Paul Butler as explaining that "misdemeanor arrests are more reflective of police presence than the total number of infractions committed in an area").

[37] *See infra* Section II.C.

[38] *See infra* Section II.C.

In general, "misdemeanor" refers to a criminal offense that is less serious than a felony. That is the only universal meaning the term has. In most U.S. jurisdictions, misdemeanors are punishable by no more than a year's incarceration, but that is not true everywhere.[39] There is similar variation in the types of offenses designated as misdemeanors. Certain offenses are classified as misdemeanors in just about every state, including simple assault, petty theft, DUI (first offense), and petty vandalism.[40] But some states also classify significantly more serious offenses as misdemeanors.[41] States also differ in their treatment of the lowest-level offenses—things like disorderly conduct and public intoxication. Such offenses are often included both in a state's criminal code and in local ordinances, where they may be designated "civil" or "criminal" "misdemeanors," "violations," or "summary offenses."[42] Precisely the same behavior—carrying precisely the same penalty—may be designated a civil ordinance violation, a criminal ordinance violation, a summary offense, a local misdemeanor, and/or a state-law misdemeanor, depending on the laws of the jurisdiction. To put the point differently: The set of offenses officially designated as "misdemeanors" in a given jurisdiction is largely a function of that jurisdiction's idiosyncratic labeling choices.

This point is particularly important with respect to traffic offenses. Traffic violations constitute more than half of the legal violations adjudicated in state courts every year—more than all civil, criminal, domestic relations, and juvenile cases *combined*.[43] Yet states and localities vary tremendously in what proportion

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[39] *See, e.g.*, MD. CODE ANN., CRIM. LAW § 3-704 (LexisNexis 2018) (providing that misdemeanors are punishable by up to ten years' imprisonment); *id.* at § 11-303(c)(1)(c) (LexisNexis 2018) (same); MICH. COMP. LAWS ANN. § 750.414 (West 2018) (providing that misdemeanors are punishable by up to two years' imprisonment); 101 PA. CONS. STAT. § 15.66 (2018) (providing that misdemeanors are punishable by up to five years' imprisonment).

[40] *See, e.g.*, BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 11.

[41] In Pennsylvania, some drug trafficking offenses can constitute misdemeanors, as can involuntary manslaughter. 18 PA. CONS. STAT. § 2504(b) (2018); 35 PA. CONS. STAT. § 780-113 (2018). In Maryland, human trafficking is classified as a misdemeanor. MD. CODE ANN., CRIM. LAW § 11-303(c)(1)(c).

[42] Civil violations are generally not punishable with jail time, while criminal violations may be, but are not always. *See, e.g.*, *Consequences and Processes Following Your Arraignment or First Appearance in Court*, MASS.GOV, https://www.mass.gov/service-deta ils/consequences-and-processes-following-your-arraignment-or-first-appearance-in-court [ht tps://perma.cc/X2GP-3QZ4] (last visited Apr. 28, 2018) ("The punishment for a civil infraction is usually a fine, there is no jail time.").

[43] *See, e.g.*, COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2015 STATE COURT CASELOADS 1 (2015), http://www.courtstatistics.org/~/media/microsites/files/csp/ewsc%202015.ashx [https://perm a.cc/U6M5-Z8D8] [hereinafter NCSC, 2015 STATE COURT CASELOADS] (reporting that traffic violations cases have constituted about fifty-four percent of all state-court trial-level cases since 2006).

of traffic offenses, if any, they classify as "criminal," and as "criminal misdemeanors" specifically.[44] In some jurisdictions, many traffic offenses are criminal misdemeanors.[45] In others, only the most serious traffic offenses (like DUI or hit-and-run) qualify.[46] This produces dramatic differences in the nature of misdemeanor systems from place to place, both in total caseload volume and in the nature of the cases adjudicated.

The degree of jurisdictional variation in the classification and treatment of low-level offenses raises deep questions about the utility of the "misdemeanor" category for scholarship and policy. We explore these questions in a separate work.[47] For present purposes, it is important simply to acknowledge that "misdemeanor" is a rather fluid term, which poses challenges for empirical data collection and analysis. We will note these challenges as the discussion proceeds.

B.   *NCSC Case-Filing Data*

The NCSC is the only entity that has collected and disseminated data on misdemeanor caseloads on anything approaching a national scale.[48] It is an independent, non-profit organization that provides research, information services, education, and consulting for state courts, judges, and court administrators.[49] In collaboration with the Conference of State Court Administrators, it publishes caseload data at the state-by-year level through the Court Statistics Project.[50]

Although the NCSC has collected caseload data since 1975, it has altered its collection methodology several times, which complicates cross-year

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[44] *See, e.g.*, Natapoff, ACADEMY FOR JUSTICE REPORT, *supra* note 11, at 75 ("Misdemeanor reform is a quintessentially local affair. States, counties, and municipalities control every aspect of the petty-offense system, from defining and decriminalizing offenses, setting penalties, providing counsel, running jails and probation programs, to collecting fines and fees.").

[45] *See, e.g.*, MINN. STAT. ANN. §§ 169.21, 169.25 (West 2017) (defining failure to stop at sidewalk while emerging from alley and driving through safety zone as petty misdemeanors).

[46] *See generally, e.g.*, MASS. SENTENCING COMM'N, FELONY AND MISDEMEANOR MASTER CRIME LIST (2015), http://www.mass.gov/courts/docs/admin/sentcomm/mastercrimelist.pdf [https://perma.cc/ZC6P-4RBR] (defining operating under the influence, hit and run, and reckless driving as misdemeanors in Massachusetts, while leaving lesser offenses off crime list).

[47] *See generally* Sandra G. Mayson & Megan Stevenson, Misdemeanors by the Numbers (Oct. 23, 2017) (unpublished manuscript) (on file with authors) (discussing jurisdictional variation in scope of "misdemeanor" offenses on basis of detailed data from eight jurisdictions).

[48] Natapoff, *supra* note 8, at 265.

[49] *See About Us*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/About-us.aspx [https://perma.cc/2BD9-25TX] (last visited Apr. 28, 2018).

[50] *Id.*

comparison. Two changes stand out. In 2003, the NCSC made significant changes to state reporting requirements.[51] It directed states to, inter alia, count preliminary hearings as distinct cases if heard in a separate court from the trial court, report domestic violence cases as "criminal" rather than "domestic relations" cases, and count revocations of probation or parole as new cases.[52] The second major change occurred in 2012, when the NCSC switched to online reporting. Prior to 2011, NCSC analysts had sought out, organized, and input much of the caseload data from court administrators. A funding cut made this labor-intensive method impractical. Instead, the NCSC developed a system that relied on states to report caseload information through an online portal. The NCSC did not collect caseload data in 2011 as it was still developing the web-based infrastructure to facilitate the new process.

The NCSC's misdemeanor caseload data since 2012 is published online.[53] From 2012 to 2016, the number of states that reported annual misdemeanor caseload numbers ranged from twenty-eight to thirty-four. The NCSC instructs states to count all charges relating to a single incident for a defendant as a single case, and to categorize a case as a misdemeanor only if the most serious charge is a misdemeanor.[54] It also instructs states *not* to classify a charge as a misdemeanor if the offense is punishable by incarceration for more than one

[51] *See generally* NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING (2003) (outlining new methods for data collection supported by guide).

[52] *Id.* at 33; *see also* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. (forthcoming 2018) (reviewing JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017)). In 2004, the Conference of Chief Justices, Conference of State Court Administrators, National Association for Court Management, and American Bar Association all adopted these reporting standards as the model approach to caseload data reporting. *See* AM. BAR ASS'N, ADOPTED BY THE HOUSE OF DELEGATES (2004), http://www.courtstatistics.org/~/media/ Microsites/Files/CSP/DATA%20PDF/Resolutions%20in%20Support%20of%20the%20Gui de.ashx [https://perma.cc/A67T-GR22]; CONFERENCE OF CHIEF JUSTICES CONFERENCE OF STATE COURT ADM'RS, RESOLUTION 23: IN SUPPORT OF STATE IMPLEMENTATION OF THE *STATE COURT GUIDE TO STATISTICAL REPORTING, 2003* (2004), http://www.courtstatistics.org/~/me dia/Microsites/Files/CSP/DATA%20PDF/Resolutions%20in%20Support%20of%20the%20 Guide.ashx [https://perma.cc/A67T-GR22]; NAT'L ASS'N FOR COURT MGMT., RESOLUTION: *STATE COURT GUIDE TO STATISTICAL REPORTING, 2003* (2004), http://www.courtstatistics. org/~/media/Microsites/Files/CSP/DATA%20PDF/Resolutions%20in%20Support%20of%2 0the%20Guide.ashx [https://perma.cc/A67T-GR22].

[53] *Court Statistics Project DataViewer*, NAT'L CTR. FOR ST. CTS., http://www.courtstatist ics.org (last visited Apr. 28, 2018).

[54] COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING 14-22, 34-37 (2017) [hereinafter STATE COURT GUIDE TO STATISTICAL REPORTING], http://www.courtstatistics.org/~/media/Microsites/Files/CSP/ State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202point1point2.ashx [https://perma.cc/HH3M-DD3N] (providing instructions to states as to how they should report data).

year, but rather to report it as a felony.[55] Lastly, it directs states not to count "non-criminal traffic offenses" or "violations of local ordinances" as misdemeanors.[56] Because these standards for defining what a "misdemeanor" is diverge from the law and practice in many states, the misdemeanor caseloads reported to NCSC might differ from the total number of cases categorized as misdemeanors at the state level.

We use the NCSC's misdemeanor caseload data to develop an estimate for the total number of misdemeanor cases filed in 2016, imputing data for the missing states according to the methodology detailed in Part III below. In addition, we present NCSC's recently completed estimate of the national trend in criminal caseloads since 2007.[57] Because NCSC data documents a relatively stable ratio of felony-to-misdemeanor cases over the past decade, we can infer the time trend for misdemeanor caseloads on the basis of the total caseload trend.

C.   *Uniform Crime Report Arrest Data*

The FBI's UCR constitute the best available national-level data on misdemeanor arrests. The UCR program, which began in 1930, relies on voluntary reporting by local police agencies,[58] though many states have now made such reporting mandatory.[59] According to the FBI, more than eighteen thousand law enforcement agencies participate in the UCR program,[60] with combined jurisdiction over more than ninety-five percent of U.S. residents.[61]

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[55] *See id.* at 16.

[56] *Id.* at 14. This introduces some ambiguity with respect to ordinance violations that are classified as criminal (or as "misdemeanors") at the local level and with respect to traffic offenses that are ambiguously classified at the local level. In discussion, NCSC representatives said that the ultimate decision of whether to report a traffic offense or ordinance violation as a misdemeanor lies with the State, and can vary significantly across states. Telephone Interview with Shauna Strickland, Nat'l Ctr. for State Courts, Senior Court Research Analyst (Nov. 28, 2017).

[57] Currently, 2007 is as far back as the NCSC recommends going to evaluate time trends in criminal caseloads. While caseload reporting practices since 2012 are expected to be reasonably consistent, changes prior to that era make time trends harder to evaluate. NCSC analysts spent considerable time developing this nationally representative time trend, including correcting for changes in reporting practices across years, collecting data from states that failed to report, and imputing data for states that do not collect statewide caseload statistics. Telephone Interview with Neil LaFountain, Nat'l Ctr. for State Courts, Senior Court Research Analyst (Nov. 28, 2017).

[58] *See Uniform Crime Reporting*, *supra* note 25.

[59] *See UCR and NIBRS Participation*, BUREAU JUST. STAT., https://www.bjs.gov/content/nibrsstatus.cfm [https://perma.cc/28G2-BGEC] (last updated Dec. 2003) (reporting that, as of 2003, twenty-five states had mandatory UCR reporting programs).

[60] *Uniform Crime Reporting*, *supra* note 25.

[61] *Crime in the United States 2013*, FED. BUREAU INVESTIGATION, U.S. DEP'T JUST. (2013), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013 [https://perma.cc/6WZM-GULJ].

Although the UCR reporting system consists of multiple reports, this Article draws solely on arrest data from the traditional Summary Reporting Program ("SRP"), in which reporting agencies provide monthly arrest and reported crime numbers by offense, race, age, and gender.[62] The offense types are divided into two groups. The "Part I" crimes are murder, rape, aggravated assault, larceny-theft, motor-vehicle theft, burglary, and arson.[63] These offenses are all broadly accepted as criminal acts, and many constitute serious felonies.[64] Most analyses of UCR data have focused on Part I offenses. "Part II" offenses are generally less serious, and have received much less attention from the research community.[65] On the basis of the raw agency-level SRP data, FBI analysts impute arrest numbers for non-reporting jurisdictions and develop national estimates of the total number of arrests each year for all Part I and Part II offenses.[66]

While the UCR program does not categorize offenses as felonies or misdemeanors, many Part II offenses are often categorized as misdemeanors, allowing us to draw inferences about misdemeanor arrest rates and time trends on the basis of this UCR data. In order to develop a rough sense of the scale of misdemeanor arrests, we construct two "proxy" measures comprised of those offenses most likely to be classified as misdemeanors. Section II.B provides details. It is important to remember that they are only proxy measures; they likely include some felony arrests and exclude some misdemeanor arrests. Still, these proxy measures represent, to our knowledge, the best possible approximation of national misdemeanor arrest statistics given currently available data.

The FBI itself does not produce national estimates of arrests for each offense type by race, but the Bureau of Justice Statistics ("BJS") has undertaken to do

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[62] *Crime in the United States 2011: Offense Definitions*, FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., https://ucr.fbi.gov/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offense-definitions [https://perma.cc/BN9P-3YGN] (last visited Apr. 28, 2018).

[63] *Id.*

[64] *Id.* (aggregating these acts as particularly serious offenses that warrant additional reporting data).

[65] They are: "other assaults (simple)," forgery and counterfeiting, fraud, embezzlement, receipt of stolen property, vandalism, weapons ("carrying, possessing, etc."), prostitution and commercialized vice, sex offenses (except forcible rape, prostitution, and commercialized vice), drug offenses, gambling, offenses against the family and children, DUI, liquor law violations, drunkenness, disorderly conduct, vagrancy, "all other offenses," "suspicion," curfew and loitering laws, and "runaways." *Id.* We are unaware of any other attempts to estimate national trends in misdemeanor arrests using this data source. One paper uses Part II offense data to map trends in misdemeanor arrests for five states between 1981 and 1998. THOMAS COHEN, NEAL KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR ST. CTS., EXAMINING THE WORK OF STATE COURTS, 6 CASELOAD HIGHLIGHTS, no. 2, Sept. 2000, at 1, 5.

[66] *See Frequently Asked Questions*, FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., https://www.ucrdatatool.gov/faq.cfm [https://perma.cc/7KFZ-J4UM] (last visited Apr. 28, 2018).

so for each UCR offense type in each year since 1980.[67] It does this by combining the FBI's race data from reporting jurisdictions with demographic data from several other sources in order to impute the likely arrest totals by race for missing jurisdictions.[68] We, in turn, use the BJS estimates in combination with U.S. census data to estimate national arrest rates by race.[69]

Another organization, the National Archive of Criminal Justice Data ("NACJD"), has compiled the raw agency-level UCR data to create arrest rates by county for each of the Part I and Part II offenses.[70] We draw on this source to estimate time trends in marijuana possession as well as time trends in likely-misdemeanor arrests at the state level.

II.   Results

A.   *Misdemeanor Case-Filing Rates and Time Trends*

Thirty-two states and the District of Columbia reported the total number of misdemeanor cases filed in 2016 in their jurisdictions to the NCSC.[71] For an additional thirteen states, we located case-filing statistics in the annual reports of those states' supreme courts or administrative office of the courts.[72] For the remaining five states,[73] we imputed the missing data based on misdemeanor case-filing rates in states that had similar characteristics. Specifically, we fit a random forest model that was trained using NCSC data from the thirty-three reporting jurisdictions as well as a number of state-level economic, demographic, educational, and geographic variables that we acquired from the U.S. Census Bureau, Bureau of Economic Analysis, and Bureau of Labor

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[67] *Methodology, Arrest Data Analysis Tool*, BUREAU JUST. STAT., U.S. DEP'T JUST., www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm [https://perma.cc/FM9T-Z3EG] (last visited Apr. 28, 2018).

[68] *Id.*

[69] *See infra* Section II.C.

[70] *Uniform Crime Reporting Program Data: County-Level Detailed Arrest and Offense Data, 2013*, NAT'L ARCHIVE CRIM. JUST. DATA, http://www.icpsr.umich.edu/icpsrweb/ NACJD/series/00057/studies/36117?archive=NACJD&sortBy=7 [https://perma.cc/G28S-5F P2] (last visited Apr. 28, 2018) [hereinafter NACJD].

[71] This data is publicly available via the NCSC's Court Statistics Project DataViewer. *Statewide Misdemeanor Caseloads and Rates*, NAT'L CTR. FOR ST. CTS. [hereinafter NCSC, *Misdemeanor Caseloads*], http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/C SP/CSP_Intro [https://perma.cc/D6XR-BRF3] (last updated Jan. 11, 2017) (select "Criminal" tab and then select "Statewide Misdemeanor Caseloads and Rates" for data year 2016).

[72] Many thanks to Alexandra Natapoff for this source suggestion. *See infra* Appendix A and accompanying notes (compiling reported 2016 misdemeanor case filing rates for Arkansas, Colorado, Delaware, Kentucky, Louisiana, Michigan, Missouri, New York, North Dakota, Oklahoma, Oregon, South Dakota, and West Virginia, and noting variations in states' reporting methodologies).

[73] Mississippi, South Carolina, Tennessee, Virginia, and Wyoming.

Statistics.[74] The random forest model predicted the case-filing rates for the missing five states, and we translated these case-filing rates into case-filing totals using population estimates from the Census Bureau.

By this method, we calculate that there were 13.2 million misdemeanor cases filed in the United States in 2016. That translates into an average of 4261 misdemeanor cases per 100,000 people. The case-filing rate varied significantly across states, however. Focusing solely on the NCSC data, since the reporting methodology is more consistent for this data set than for the annual reports, the misdemeanor case-filing rate ranged from a low of 866 per 100,000 people in Kansas to a high of 12,202 in North Carolina.[75] While there were some extreme outliers, the majority of jurisdictions (twenty-five out of thirty-three) had case-filing rates in the 2000 to 6000 range.[76]

We could not detect an obvious pattern that explained why some states had much higher misdemeanor case-filing rates than others. On average, states that had large minority populations and lower levels of income and education tended to have higher misdemeanor case-filing rates, but this correlation was not strong.[77] Alabama, for instance, is a poor state with a sizable black population, but its misdemeanor case-filing rate is relatively low.[78] It is possible that jurisdictional differences in which traffic offenses are categorized as misdemeanors partially explain this variation.

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[74] We acquired 2016 state population estimates from the U.S. Census Bureau's Population Division. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2016*, POPULATION DIVISION, U.S. CENSUS BUREAU (2017), https://factfinder.census.gov/faces/ tableservices/jsf/pages/productview.xhtml?pid=PEP_2016_PEPANNRES&prodType=table [https://perma.cc/EPD3-VYPD]. We calculated 2016 population density on the basis of the population estimates and the Census Bureau's State Area Measurements for the 2010 Census. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, https://www.census.gov/geo/reference/state-area.html [https://perma.cc/H5A5-3W4H] (last updated Jan. 1, 2010). We acquired data about the racial composition, age composition, sex composition, average educational attainment, and housing metrics for state populations in 2016 from the U.S. Census Bureau via the American FactFinder. *2016 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/nav/ jsf/pages/searchresults.xhtml?refresh=t [https://perma.cc/SF46-TMT7] (last visited Apr. 28, 2018). We acquired average 2016 state unemployment rates from the Bureau of Labor Statistics. *Unemployment Rates for States, 2016 Annual Averages*, BUREAU LAB. STAT., U.S. DEP'T LAB. (Feb. 28, 2017), https://www.bls.gov/lau/lastrk16.htm [https://perma.cc/FR73-SZRX]. Finally, we acquired state GDPs, average per capita income, and total jobs for 2016 from the Bureau of Economic Analysis. *Regional Economic Accounts*, BUREAU ECON. ANALYSIS, U.S. DEP'T COM., https://www.bea.gov/regional/ [https://perma.cc/SQG4-CANQ] (last visited Apr. 28, 2018).

[75] NCSC, *Misdemeanor Caseloads*, *supra* note 71.

[76] *Id.*

[77] *See generally id.*

[78] *Id.*

Data developed by the NCSC also allows an evaluation of the national misdemeanor case-filing rate over time. The NCSC has recently completed an analysis of the time trend in the number of total criminal cases filed per year in the United States since 2007, using a method similar to that described above,[79] and provided us this data in advance of its public release.[80] This ten-year time trend in criminal case filing represents the longest time trend in criminal caseloads that the NCSC can currently endorse. While the NCSC collected data on case-filing well before 2007, the methodology of data collection—not to mention the rigor and completeness of the reporting—has changed over the years, making it difficult to compare numbers across time.

We infer the total number of misdemeanor cases filed each year since 2007 on the basis of the criminal caseload totals. Although the NCSC itself has not developed separate national estimates for total misdemeanor caseloads for these years, it has regularly documented the breakdown of criminal caseloads into felonies and misdemeanors for those jurisdictions that provide the relevant information. In the seven years for which we have data, misdemeanors represented seventy-four to eighty-three percent of total criminal caseloads.[81] In addition, the NCSC analyst who built the ten-year time trend for total criminal

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[79] NCSC analysts relied on data from reporting states when available, sought caseload totals from state-court annual reports and other sources as much as possible, and imputed missing values when necessary. NCSC has a close relationship with the state courts, which gave it unique access to data from states that do not officially report criminal caseloads.

[80] The NCSC has since published some of this data. NAT'L CTR. FOR STATE COURTS, TOTAL INCOMING CRIMINAL CASELOADS REPORTED BY STATE COURTS, ALL STATES, 2007-2016 (2018), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/Criminal/PDFs/EWSC-2016-CRIM-Page-1-Trend.ashx [https://perma.cc/4PH6-PPYV].

[81] In 2008, misdemeanors comprised seventy-nine percent of all criminal cases filed in the eleven adequately reporting states; in 2010, misdemeanors comprised eighty-three percent of criminal cases for seventeen reporting states; in 2012, misdemeanors comprised seventy-six percent of the criminal caseload for twenty-eight reporting states; in 2013, misdemeanors comprised seventy-nine percent of the criminal caseload for twenty-nine reporting states; and in 2014, 2015, and 2016, misdemeanors comprised seventy-four percent, seventy-seven percent, and seventy-six percent of the criminal caseload, respectively, for thirty-three reporting states. COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010) [hereinafter NCSC, 2008 CASELOADS], http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx [https://perma.cc/9WEQ-3VUV] (2008 figure); COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012) [hereinafter NCSC, 2010 CASELOADS], http://www.courtstatistics.org/other-pages/~/media/microsites/files/csp/data%20pdf/csp_dec.ashx [https://perma.cc/3WUN-G83B] (arriving at eighty-three percent for 2010 figure by multiplying percentage of misdemeanors reported for each state's courts by total number of cases reported for each court to arrive at total number of misdemeanor cases reported for each court (separately for general- and limited-jurisdiction courts in states with two-tier systems), then summing these numbers and dividing by total sum of cases reported for all courts); NCSC, *Misdemeanor Caseloads*, *supra* note 71 (2012-2016 figures).

caseloads (and who has been intimately involved with NCSC's data collection for many years) confirmed that the ratio of misdemeanor-to-felony cases filed annually has remained relatively constant over this period at about three-to-one.[82] We therefore estimate the number of misdemeanor cases filed annually since 2007 by multiplying the total number of criminal case-filings per year by 0.75.
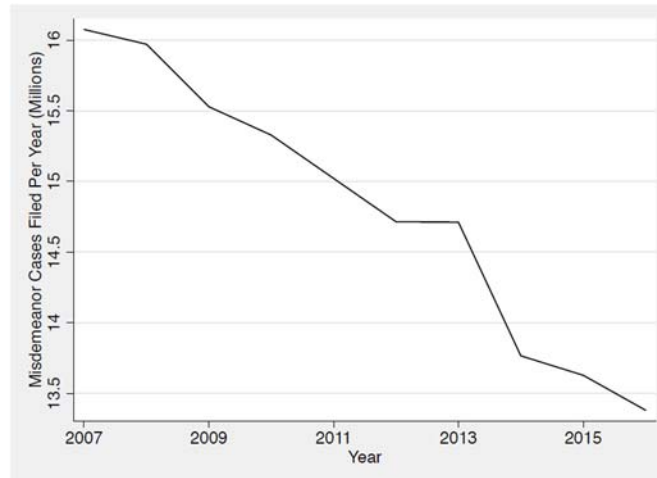
Figure 1. Trend for Misdemeanor Case-Filing Rate

Figure 1 shows that the national misdemeanor case-filing rate has fallen since 2007. Over the ten-year span, it has dropped from a high of over sixteen million to just over thirteen million—a decline of almost seventeen percent. In population-adjusted terms, this constitutes a fall from 5300 to 4261 cases per 100,000 people.

B.   *Arrest Rates and Time Trends for Likely-Misdemeanor Offenses*

In order to assess the number of misdemeanor arrests made nationwide each year, and the time trend in such arrests, we turn to the UCR data. Once again, the data does not allow us to measure misdemeanor arrests precisely because it does not distinguish between misdemeanors and felonies. It does, however, document arrests by offense type. We begin by constructing an index of arrests for offenses that are most likely to be classified as misdemeanors: disorderly conduct, public drunkenness, DUI, gambling, liquor law violations, simple assault, prostitution, vagrancy, and vandalism. The index is simply the total number of arrests per year for these offense types.[83] The arrest rate for this index

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[82] Telephone Interview with Neil LaFountain, *supra* note 57.

[83] Although the source of this data is the FBI's UCR series, we acquired the data via the BJS Arrest Data Analysis Tool, which makes it available in a considerably more convenient

is the total number of arrests divided by the total U.S. population in that year as estimated by the Census Bureau.[84]

form. Howard N. Snyder, Alexia D. Cooper & Joseph Mulako-Wangota, *Methodology*, *Arrest Data Analysis Tool*, Bureau Just. Stat., https://www.bjs.gov/index.cfm?ty=datool&surl= /arrests/index.cfm [https://perma.cc/P2XS-VV4B] (last visited Apr. 28, 2018) (explaining nature and sources of data provided by selecting "methodology" tab). We selected the "National Estimates" tab, then "Annual Tables," and then, for each year from 1980 through 2014, "Offense by Age and Race." For each year we imported the relevant table into an Excel file, then compiled the data for all years from 1980 to 2014. This Section relies exclusively on the total arrest counts for each offense category. For 2015 and 2016, we located the relevant arrest counts in the FBI's Crime in the United States reports directly. *Table 18, 2016 Crime in the United States*, Fed. Bureau Investigation, Dep't Just. (2017) [hereinafter FBI, *2016 Crime in the U.S.*], https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-18 [https://perma.cc/39Z4-KYCC]; *Table 29, 2015 Crime in the United States*, Fed. Bureau Investigation, Dep't Just. (2016) [hereinafter FBI, *2015 Crime in the U.S.*], https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29 [https:/ /perma.cc/P5AS-VRC7].

[84] We derived these population estimates from the following sources: For the years 1980 to 1999, *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, Population Division, U.S. Census Bureau (June 28, 2000), https://www.census.gov/population/estim ates/nation/popclockest.txt [https://perma.cc/M863-TQB3]; for the years 2000 to 2010, *National Intercensal Tables: 2000-2010*, U.S. Census Bureau, https://www.census.gov/ data/tables/time-series/demo/popest/intercensal-2000-2010-national.html [https://perma.cc/ CV5U-U45N] (last updated Nov. 30, 2016); and for the years 2011 to 2016, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, Population Division, U.S. Census Bureau, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src= bkmk [https://perma.cc/S38E-R522] (last visited Apr. 28, 2018).

Figure 2 shows the arrest rate for misdemeanor-index crimes since 1980. Misdemeanor arrests for this set of crimes peaked in 1982 at 2341 arrests per 100,000 people, remained fairly flat until 1990, and have been falling steadily since. In 2016, the arrest rate for these offenses was 1033 per 100,000 people—less than half of what it was in 1980.

Figure 2. Arrest-Rate Time Trend for Misdemeanor Index
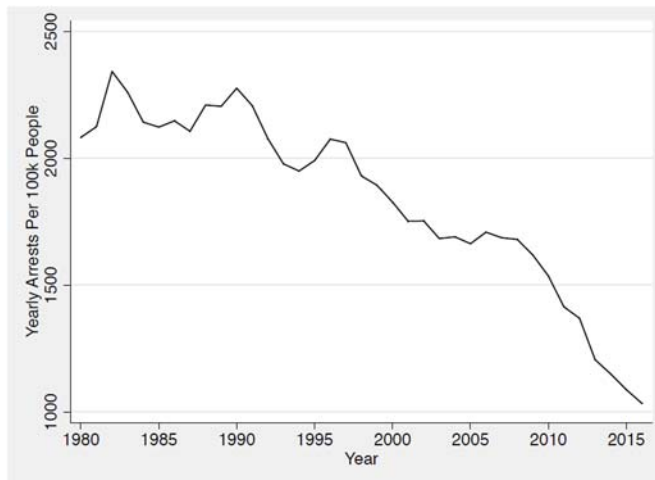
One point of note is that, by this measure, the per-capita number of misdemeanor arrests for 2016 is less than a quarter of the per-capita number of misdemeanor cases filed (1033 arrests versus 4261 cases filed per 100,000 people). This discrepancy may seem suprising, given recent high-profile reports of overzealous misdemeanor policing.[85] If police routinely arrest people on misdemeanor charges that prosecutors subsequently decline to prosecute, one might expect to see many more misdemeanor arrests than cases filed annually. In fact, however, comparing aggregate arrest rates with aggregate case-filing rates can provide little information about how often prosecutors decline to file

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[85] The DOJ's recent reports on policing in Baltimore and Ferguson found that police over-enforce low-level criminal laws and routinely make unjustified arrests that never result in formal charges. In Baltimore, the DOJ Civil Rights Division documented extremely high rates of post-arrest dismissal of misdemeanor charges, which the report interpreted to show that police were making significant numbers of unjustified low-level arrests (disproportionately of black residents). INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT, *supra* note 23, at 26, 35, 57 (reporting that prosecutors declined to file formal charges for one in every six "highly discretionary" non-violent misdemeanor arrests, and that "booking officers and prosecutors dismissed charges against African Americans at significantly higher rates than arrests of other people"). The DOJ's Ferguson report likewise diagnosed high rates of unjustified arrests for low-level offenses. INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 23, at 2, 16-18.

charges. This is because our misdemeanor-arrest proxy is underinclusive relative to case-filing totals. First, and most importantly, the UCR data omits arrests for non-DUI traffic offenses.[86] Second, our misdemeanor index does not include all misdemeanor offenses, only offense categories in which we expect the large majority are misdemeanor arrests. Third, some number of misdemeanor cases begin as felony arrests. The NCSC case-filing total is also over-inclusive in the sense that it counts revocations of probation or parole as separate "cases."[87] In sum, police likely initiate many misdemeanor charges in ways not captured by our misdemeanor-arrest proxy, and the case-filing total likely includes many "cases" not initiated by police. It is therefore not possible to infer anything about the relationship between misdemeanor policing and misdemeanor prosecution on the basis of this data alone.

To ameliorate the potential under-inclusiveness of our primary misdemeanor arrest index, we also build an expanded misdemeanor proxy. There are several additional offense categories in the UCR data that are likely to include many misdemeanors: theft, drug possession, and "other offenses." We expect that many theft arrests are for petty theft, that many drug possession arrests are for marijuana, and that many of the "other offenses" are generally misdemeanors, including contempt of court, possession of drug paraphernalia, and public nuisance.[88] The expanded misdemeanor proxy therefore adds theft, drug possession, and "other offenses" to the primary index. We caution that this expanded proxy is likely to include a number of felony arrests as well. Figure 3 shows that the time trend in the arrest rate for the expanded misdemeanor proxy exhibits a slightly different pattern than the primary misdemeanor index. By this measure, the arrest rate for misdemeanors rose from 1980 to the mid-1990s and has been falling steadily since 1997. Over the last twenty years, the arrest rate for the expanded misdemeanor proxy has dropped by almost half, from 4521 to 2366 arrests per 100,000 people.

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[86] *See, e.g.*, FBI, *2016 Crime in the U.S.*, *supra* note 83. We do not consider this a significant weakness of the arrest data, as it is likely that many non-DUI misdemeanor traffic offenses result in a citation or summons rather than arrest.

[87] *See supra* notes 53-54 and accompanying text. The NCSC also directs states with two-tier court systems to count preliminary hearings as separate "cases."

[88] In Philadelphia, for instance, fifty-five percent of theft cases were misdemeanors (based on authors' own calculations). Approximately half of drug possession arrests are for marijuana possession. *See infra* Figure 10. For a full list of offenses in the "other" category, see FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 146-47 (2004), https://ucr.fbi.gov/additional-ucr-publications/ucr_handbook.pdf/at_download/file [https://perma.cc/NC5W-K694] [hereinafter UCR HANDBOOK].

Figure 3. Arrest-Rate Time Trend for Expanded Misdemeanor Index
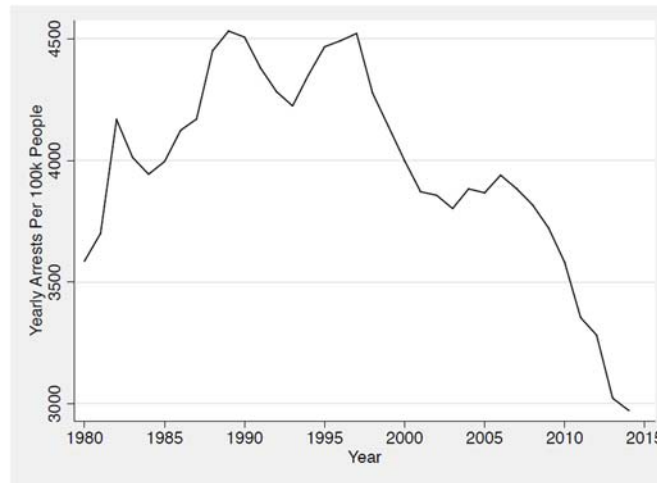
We turn to the NACJD data to evaluate time trends in misdemeanor arrests by state. Because this dataset identifies marijuana possession arrests separately from other drugs, we built a misdemeanor index that includes all offenses in the primary index plus marijuana possession. Appendix B shows state-level misdemeanor-proxy arrest rates in 1985, 1995, 2005, and 2014, the most recent year for which NACJD data is available.[89] If arrest rates must be imputed for more than one-third of the state's population, we omit that year from the chart.[90] Of the thirty-three states for which we are able to estimate the change in likely-misdemeanor arrest rates between 1995 and 2014, all but North Dakota, exhibited a decline. The median decline for this time range was forty-one percent. All of the forty-two states for which we are able to estimate the percent change since 2005 showed a decline. The median decline for this time range is twenty-eight percent.

To provide context, Figure 4 presents the time trend in the arrest rate for the UCR's violent crime index, which includes murder and non-negligent homicide, forcible rape, aggravated assault, and robbery.[91] As the figure shows, the time trend in arrests for serious violent crime looks quite similar to the time trend for our expanded misdemeanor-arrest proxy. The arrest rate rose from 1980 to a

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[89] *See infra* Appendix B.

[90] The NACJD data includes a coverage index, showing how much of the population is covered by reporting agencies. The coverage index is not available for 1985, thus, to be conservative, we omit 1985 figures for states that did not have at least two-thirds coverage in 1995.

[91] *Violent Crime, 2016 Crime in the United States*, FED. BUREAU INVESTIGATION, DEP'T JUST., https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/violent-crime [https://perma.cc/A6SC-78FW] (last visited Apr. 28, 2018).

peak in the mid-1990s and has fallen by almost half since. The scale of arrests for these serious crimes, however, is significantly lower. At its peak, the yearly arrest rate for serious violent crimes was only around 300 per 100,000 people, compared to close to 4500 for the expanded misdemeanor proxy.

Figure 4. Arrest-Rate Time Trend for Violent Crime
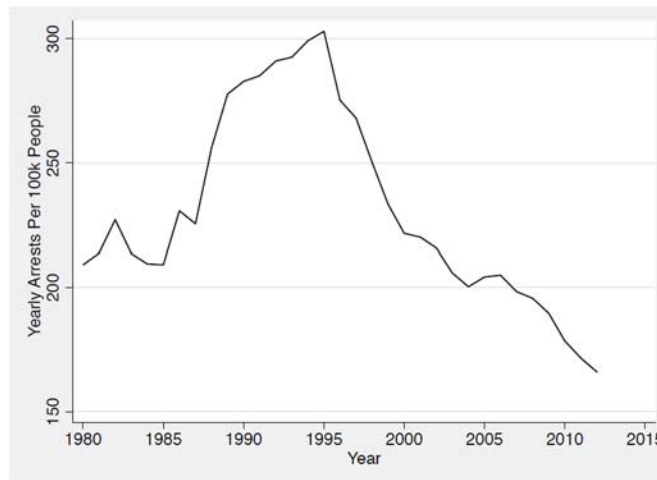
Shifting to a more granular analysis, the following figures show trends in the arrest rates for specific offense categories. Figure 5 shows arrest rates for DUI and theft. DUI arrests have been falling steadily since the early 1980s, and theft arrests have been declining since the late 1980s. Both DUI and theft arrest rates are currently about half of what they were at their respective peaks. Figure 6 shows arrest rates for prostitution and vagrancy. The prostitution arrest rate has fallen dramatically and is currently only about one-fifth of what it was at its peak in the early 1980s. Vagrancy arrests have decreased, although the scale of the graph flattens the curve and makes the change difficult to see. Vagrancy arrests dropped from about 15 per 100,000 people in 1990 to about 9 per 100,000 people in 2016, a forty-percent decline.

Figure 5. DUI and Theft
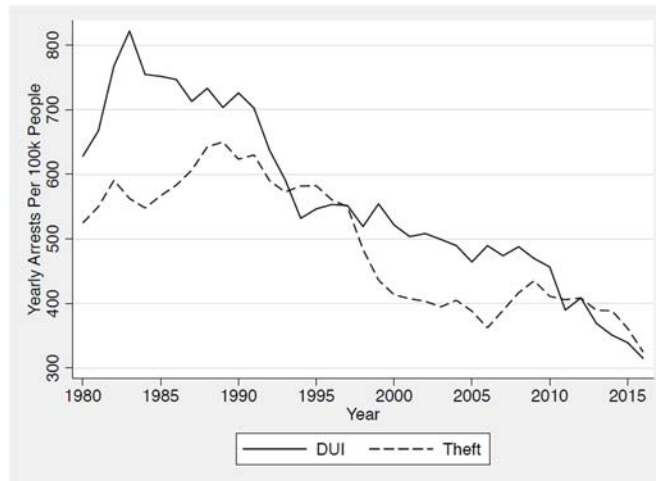
Figure 6. Prostitution and Vagrancy
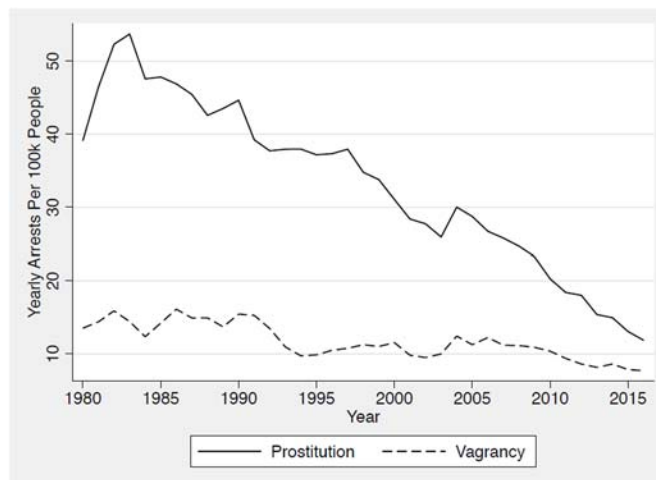
Arrests for disorderly conduct and public drunkenness have also declined dramatically since the early 1980s, as seen in Figure 7. Disorderly conduct arrests are roughly one-fifth of what they were in 1980 and arrests for public drunkenness are one-third. Arrests for liquor law violations (illegal manufacture, sale, purchase, transportation, possession, or use of alcohol) and vandalism have also declined significantly, although the arrest rate for these offenses peaked slightly later, around 1990.
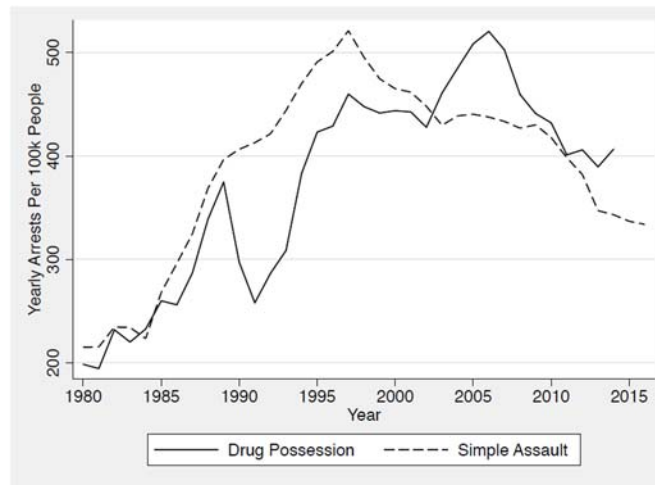
Figure 7. Disorderly Conduct and Drunkenness
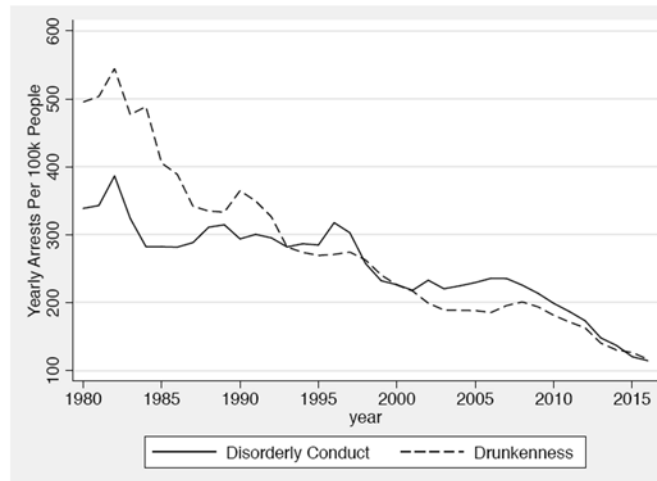
Figure 8. Liquor Law Violations and Vandalism
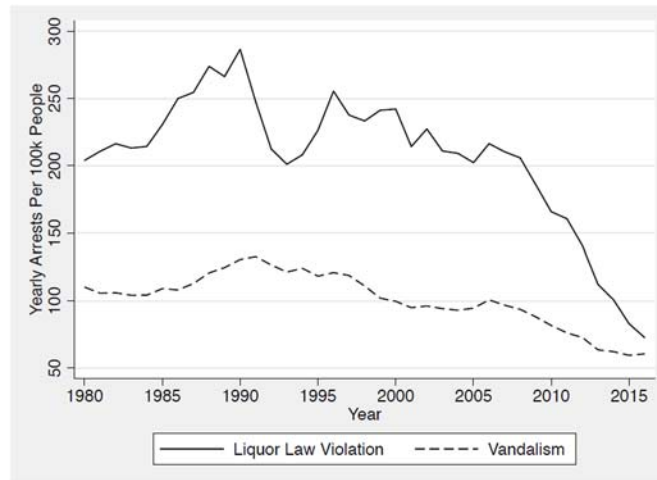
The arrest rates for drug possession and simple assault also peaked later than did most other likely-misdemeanor offense categories, as shown in Figure 9. The arrest rate for simple assault peaked in 1997 and has been falling since. The arrest rate for drug possession did not peak until 2006. Although arrest rates for both of these offense categories have been falling in recent years, 2016 arrest rates are still substantially higher than the 1980 rates.

The FBI data series from which we acquired most of the data used in this Section does not provide yearly arrest numbers for marijuana possession, which is likely the largest subset of drug-possession arrests that are classified as

misdemeanors. This number, however, is available using the county-level arrest data built by NACJD.[92] This series uses the same raw UCR data as the FBI, but calculates arrest rates for certain subsets of offense categories, such as marijuana possession. Since marijuana possession is one of the more prevalent misdemeanor offenses,[93] we turn to the NACJD data to evaluate arrest trends in this category.

Figure 9. Drug Possession and Simple Assault

Figure 10 shows arrest rate trends in both marijuana possession and other drug possession using the NACJD data. Reassuringly, the arrest trends for drug possession shown using NACJD estimates look quite similar to those using FBI estimates. Furthermore, arrests for marijuana possession closely follow the arrest pattern for overall drug possession, rising from 1985 to 2006 and declining since. This is not hugely surprising, since marijuana possession constitutes about half of the total drug possession arrest rate.
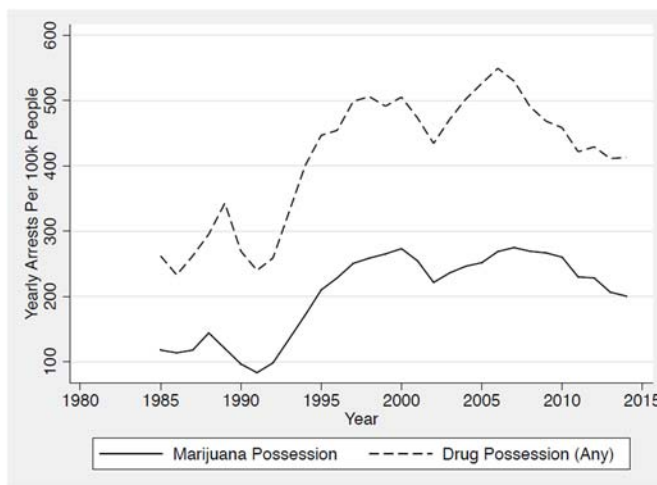
Figure 10. Marijuana Possession

Figure 11 shows the time trend in arrest rates for all offenses that fall into the "other" category. This constitutes all offenses that are not traffic offenses (for which UCR does not collect data) and which do not fall into one of the main UCR categories. Of the offense types listed in the UCR handbook in the "other" category, we suspect some of the more common ones include contempt of court, possession of drug paraphernalia, and public nuisance.[94] The arrest rate for "other" offenses peaked in 1995 and has been dropping steadily since. However, like drug possession and simple assault, and in contrast to the other misdemeanor offense categories, the arrest rate for the "other" category is higher now than it was in 1980.

Figure 11. Other Offenses

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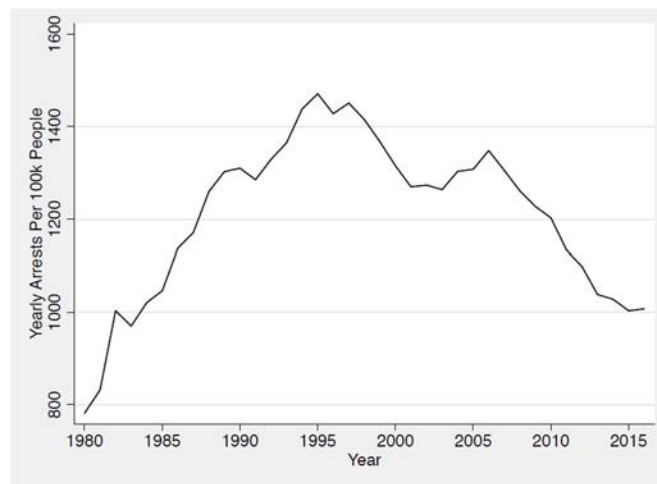
[94] UCR HANDBOOK, *supra* note 88, at 146-47. A separate empirical work-in-progress, in which we look closely at misdemeanor case processing in eight diverse jurisdictions, suggests that these are relatively common misdemeanor offenses. Mayson & Stevenson, *supra* note 47, at 6 (discussing "core" misdemeanors).

Figure 12 shows a comparison of arrest rates in 2014 for eleven common likely-misdemeanor offense types: DUI, disorderly conduct, drug possession, drunkenness, gambling, liquor law violations, prostitution, simple assault, theft, vagrancy, and vandalism. DUI, drug possession, simple assault, and theft are the most common categories, followed by disorderly conduct, drunkenness, and liquor law violations. We focus on 2014 because that is the most recent year in which the UCR data documents the arrest rate for drug possession independently of more serious drug offenses like sale or manufacturing.
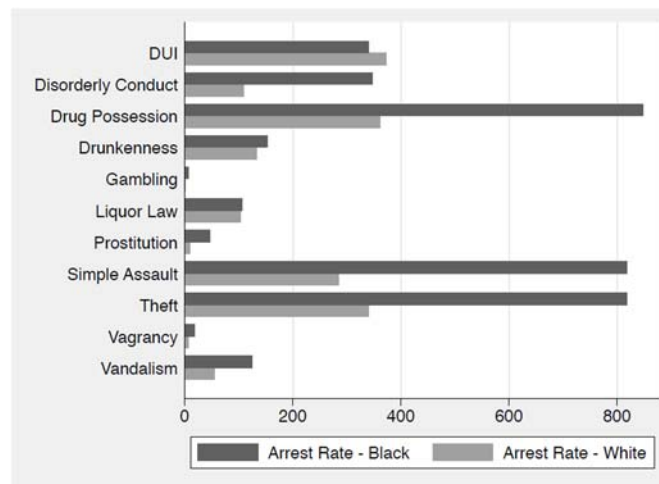
Figure 12. Arrest Rates by Offense
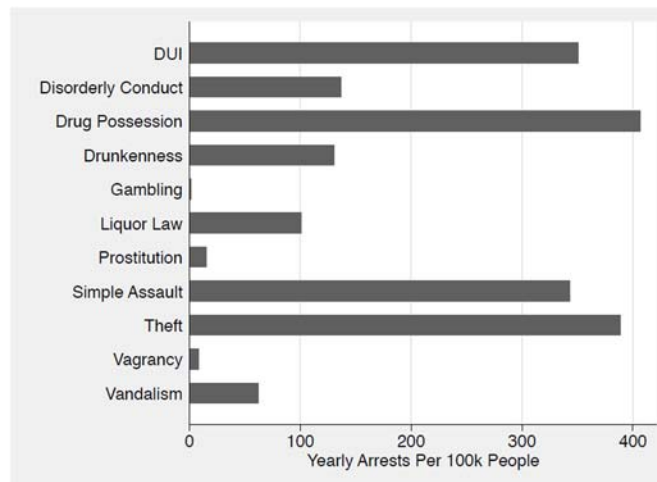
C. *Arrest Rates and Time Trends by Race*

Figure 13 shows arrest rates by offense and race.[95] There is substantial racial disparity in the arrest rate for many offense categories. This can be seen most

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[95] The arrest rate for a given race is the total number of arrests of people of that race divided by the number of people who identify as that race in the U.S. population. As noted above, we obtained estimates of arrests by race for each offense type from the Bureau of Justice Statistics' Arrest Data Analysis Tool. *See supra* notes 67-68, 83. Specifically, for each year between 1980 and 2014 (inclusive) we downloaded the BJS' "Annual Table" for "Offense by Age and Race" (from Arrest Data Analysis Tool page, select "National Estimates," then "Annual Tables," then relevant year, and then "Offense by Age and Race"). We obtained estimates of the number of people who identified as black or white, respectively, for the years 1980, 1990, and 2000 to 2016 from the Census Bureau. For the years 2010 to 2016, we used *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2016*, POPULATION DIVISION, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview. xhtml?pid=PEP_2016_PEPSR6H&prodType=table [https://perma.cc/GS83-2NV6] (last

clearly in Figure 14, which shows the black-white arrest rate ratio by offense type. The black-white arrest rate ratio is simply the arrest rate for black people divided by the arrest rate for white people. There is substantial racial disparity in the majority of offense categories. The black arrest rate is at least twice as high as the white arrest rate for disorderly conduct, drug possession, simple assault, theft, vagrancy, and vandalism. The black arrest rate for prostitution is almost five times higher than the white arrest rate, and the black arrest rate for gambling is almost ten times higher. Certain offense types, however, are close to racial parity. For DUI, public drunkenness, and liquor law violations, the black arrest rate is similar to the white arrest rate.

Figure 13. Arrest Rates by Offense and Race

Figure 14. Black-White Arrest Rate Ratio
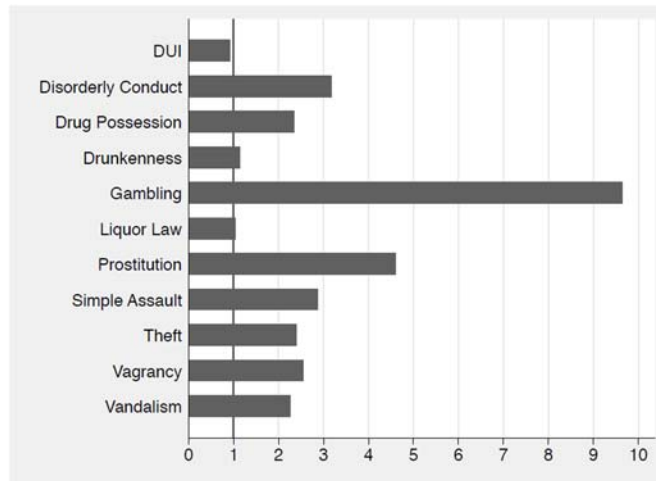
Figure 15 shows time trends in arrest rates by race for the primary misdemeanor index (which does not include theft, drug possession, or "other"). The black and white arrest rate track each other relatively closely. While there has been some fluctuation, the black arrest rate has hovered around 1.7 times the white arrest rate since 1980.

Figure 15. Misdemeanor Arrest Rates over Time by Race
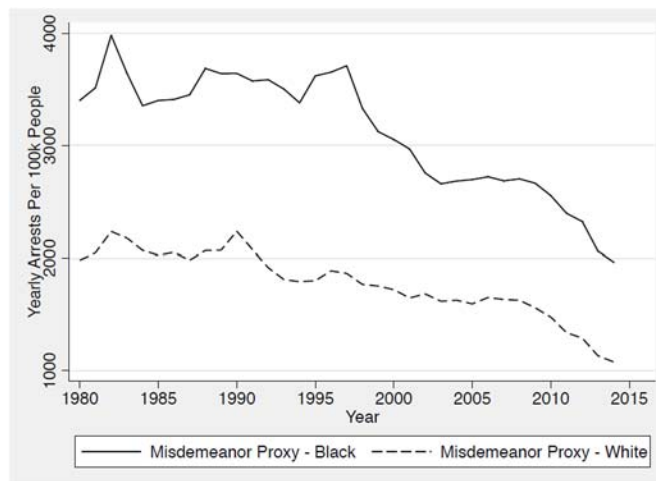
Figures 16, 17, and 18 show a time trend in the black-white arrest ratio for various offenses.[96] The ratio is fairly stable for most offense types. Figure 16 shows that the black-white arrest ratio for disorderly conduct, drunkenness, and DUI is approximately the same in 2016 as it was in 1980, with only minor fluctuations in the intervening years. The black-white arrest ratio for theft has fallen from just above 3 in 1980 to about 2.5 in 2014. While this is a noticeable decline relative to the initial levels, it is only a small difference compared to the large variation across offense types. Figure 17 shows that the black-white arrest ratio has remained relatively flat for vandalism, liquor law violations, and simple assault. The black-white arrest ratio for prostitution experienced a large decline from 1980 to 1985, but has remained relatively constant since 1985.

The black-white arrest ratio for gambling has experienced significant fluctuation. As Figure 18 shows, it started at a high of fifteen in 1980, dropped down to about seven from 1987 to 2000, rose to more than nineteen in 2008, and has declined since. Gambling arrests, however, have declined dramatically—from 87,000 in 1985 to less than 4000 in 2016. The fluctuation may thus be mostly a function of the small sample size. Compared to gambling, the black-white arrest ratios for drug possession, vagrancy, and the violent crime index (provided for a point of reference) have all been relatively stable since 1980. The ratio for drug possession rose to a high of 3.9 in 1991 and has fallen to 2.34 in 2014. The ratio in the violent crime index has been falling steadily since the mid-1980s, and the ratio for vagrancy has fallen since 1992. Again, the extent to which these measures have fallen is large relative to their means, but small relative to the cross-offense variation in racial disparities.

Figure 16. Black-White Arrest Ratios over Time (1)

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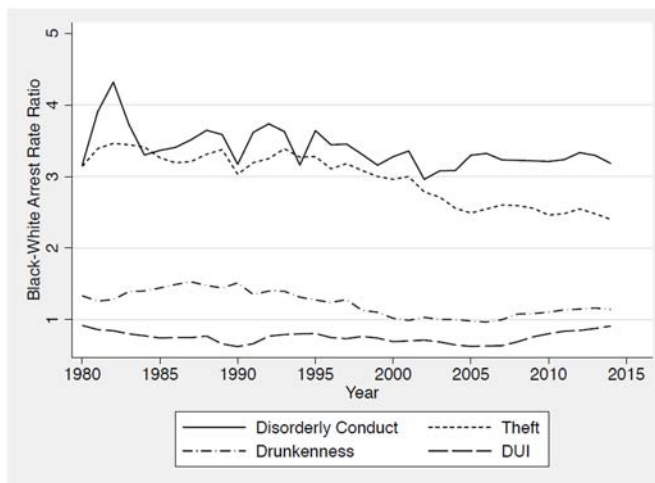
[96] The most recent year for which offense-specific arrest rates by race are available is 2014. *See* sources cited *supra* note 95.

Figure 17. Black-White Arrest Ratios over Time (2)
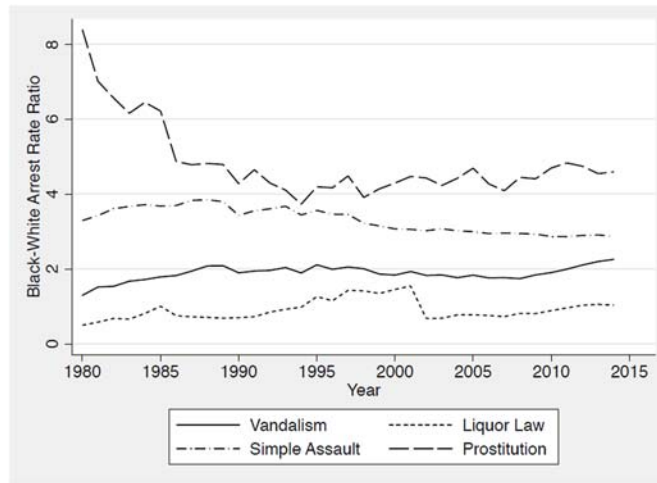
Figure 18. Black-White Arrest Ratios over Time (3)
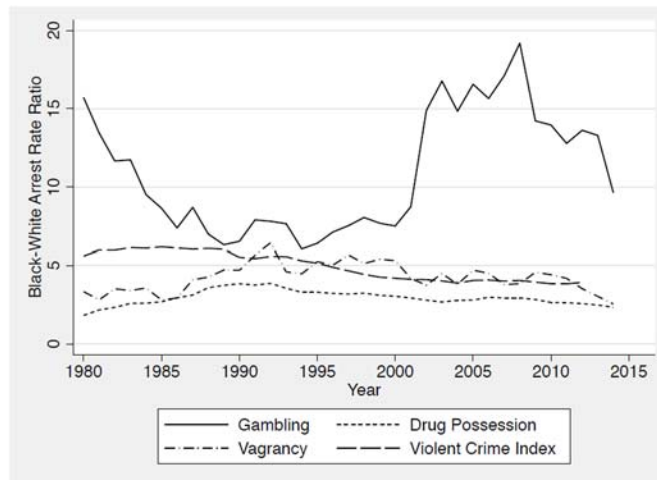
Table 1 presents a list of likely-misdemeanor offenses ordered by the degree of racial disparity in arrest rates in 1980, on the left, and in 2014, on the right. At the top of the list are offense types with relatively low racial disparity, such as DUI, liquor law violations, and public drunkenness. At the bottom are offense types with relatively high racial disparity, such as gambling and prostitution. The relative ranking of racial disparity across offense types is remarkably constant, with almost every offense type either keeping the same ranking or trading spots with its nearest neighbor over the course of thirty-five years.

Table 1. Black-White Arrest Rate Ratios

1980			2014		
Offenses Ordered by B-W Arrest Ratio	**B-W Arrest Ratio**	**Total Arrests**	**Offenses Ordered by B-W Arrest Ratio**	**B-W Arrest Ratio**	**Total Arrests**
Liquor Laws	.499	463,500	DUI	.912	1,117,852
DUI	.92	1,426,700	Liquor Laws	1.03	321,125
Vandalism	1.29	250,500	Drunkenness	1.14	414,854
Drunkenness	1.33	1,125,800	Vandalism	2.25	198,400
Drug Possession	1.82	451,175	Drug Possession	2.34	1,295,328
Other Offenses	2.49	1,775,500	Theft	2.48	1,238,190
Theft	3.14	1,191,900	Other Offenses	2.54	3,274,430
Disorderly Conduct	3.15	769,700	Vagrancy	2.55	27,380
Simple Assault	3.29	488,600	Simple Assault	2.87	1,093,258
Vagrancy	3.33	30,700	Disorderly Conduct	3.18	436,014
Prostitution	8.39	88,900	Prostitution	4.59	47,598
Gambling	15.7	87,000	Gambling	9.63	5,637

III. DISCUSSION

A. *The Scale of Misdemeanor Justice*

It has become a mantra of misdemeanor scholarship that the misdemeanor system is vast.[97] Although ample anecdotal evidence supports that proposition, empirical documentation of it has been thin. As Professor Alexandra Natapoff noted in 2015, "[t]he 2009 NACDL report remains the only effort to estimate national [misdemeanor] dockets."[98] That situation has endured until now. The NACDL estimate, as discussed above, was that approximately 10.5 million misdemeanor cases were filed annually, and that estimate was computed by extrapolation from NCSC data collected from twelve states in 2006.[99] Most

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[97] *See, e.g.*, Natapoff, *supra* note 8, at 257 (characterizing misdemeanors as "vast bulk of our criminal justice system").

[98] *Id.* at 265.

[99] *See* BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 11.

authors who invoke the formidable scale of misdemeanor justice have relied on that estimate alone.[100]

The first contribution of this Article is to provide an updated estimate of the total number of misdemeanor cases filed nationwide: 13.2 million in 2016, or an average of 4261 per 100,000 U.S. residents.[101] This number is substantially larger than what the NACDL estimated using data from 2006, but this does not mean that the misdemeanor case filing rate is higher now than it was then. The most likely interpretation is that the twelve states used in NACDL's 2006 estimates happened to have misdemeanor case-filing rates lower than the national average, creating a downward bias to the estimate.

Thirteen million cases is a lot. As noted above, the NCSC data demonstrates that there are three times as many misdemeanor cases as felony cases filed nationally each year, and that this ratio has remained relatively stable for at least a decade.[102] It is indeed a fact, as Natapoff has written, that most U.S. residents who encounter the criminal justice system do so "through the petty offense process," and "the lowly misdemeanor—not homicide or rape—is the paradigmatic American crime and the paradigmatic product of the American criminal system."[103]

There is one important caveat to our national estimate: "misdemeanor," as noted above, is an amorphous category, defined differently from state to state and even from county to county.[104] In compiling its misdemeanor case-filing data (on which our estimate is built), the NCSC largely defers to state and local choices about which underlying behaviors to classify as "misdemeanors."[105] Thus, the nature of the underlying offenses that our estimate includes may vary significantly by jurisdiction.[106] If "misdemeanor" were defined uniformly nationwide, the estimate might change.

B.   *A Shrinking Misdemeanor System*

Perhaps the most striking conclusion of our analysis is that misdemeanor justice in the United States has been shrinking. This is contrary to the

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[100] *See* sources cited *supra* note 11.

[101] Alexandra Natapoff also now estimates around thirteen million misdemeanor cases per year, relying on NCSC information, data provided through FOIA requests, and state court annual reports. Alexandra Natapoff, Professor of Law, U.C. Irvine, Panelist at Boston University School of Law Conference: *Misdemeanor Machinery: The Hidden Heart of the American Criminal Justice System* (Nov. 3, 2017) (reporting results consistent with ours on basis of research for forthcoming book).

[102] *See supra* notes 81-82 and accompanying text.

[103] Natapoff, *supra* note 8, at 256.

[104] *See supra* Section I.A.

[105] *See supra* notes 56-57 and accompanying text.

[106] The largest degree of variation may arise from whether or not high-volume traffic offenses, such as speeding, are counted as misdemeanors or not.

conventional wisdom.[107] The common perception that the misdemeanor system is expanding may derive from the NACDL report,[108] or it may be a product of the fact that most recent empirical work on misdemeanors has focused on New York City during a period in which it saw a dramatic expansion in misdemeanor arrests.[109] In any case, the numbers are clear: misdemeanor case-filing rates have fallen for at least ten years.[110] Arrests for almost all of the likely-misdemeanor offense categories have been falling for at least twenty years, and many for more than thirty. Vast though it is, the misdemeanor system has been growing smaller every year, for many years running.

Should this surprise us? It is well documented that the arrest rates for serious crimes, such as murder, robbery, aggravated assault, and burglary, have been falling for quite some time.[111] This is true both in the United States and globally. An enormous literature has explored potential causes of this decline, including changes in policing, higher incarceration rates, greater access to abortion, reductions in toxic lead exposure, improved technologies for crime-prevention,

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[107] *See, e.g.*, BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 7 ("The explosive growth of misdemeanor cases is placing a staggering burden on America's courts."); Kohler-Hausmann, *supra* note 13, at 620-21 ("[M]isdemeanor arrests have been presented as the linchpin of urban crime control strategies in the quality-of-life/broken windows policing models that have swept the nation. These tactics have flooded urban courts with low-level cases . . . ."); Roberts, *supra* note 11, at 281 ("In addition to comprising the majority of criminal cases, misdemeanors are also on the rise."); *id.* at 282 (diagnosing "recent explosion of misdemeanor adjudications flooding trial courts around the country").

[108] In addition to estimating that 10.5 million misdemeanor cases were filed in 2006, the NACDL report asserted that there had been only 5 million such cases filed in 1972. BORUCHOWITZ, BRINK & DIMINO, *supra* note 10, at 11. Taken at face value, these numbers suggest that misdemeanor caseloads have indeed grown since the 1970s, although the U.S. population has grown as well. But the five million figure is uncertain at best. The authors of the NACDL report told us that the source for this number was *Argersinger v. Hamlin*, 407 U.S. 25, 34 n.4 (1972) (finding that "*exclusive of traffic offenses* . . . it is estimated that there are annually between four and five million court cases involving misdemeanors" (emphasis added)). The Court further noted that "while there are no authoritative figures, extrapolations indicate that there are probably between 40.8 and 50 million traffic offenses each year." *Id.* This underlines just how important the treatment of traffic offenses is to any effort to quantify the lower reaches of the criminal justice system.

[109] *E.g.*, Kohler-Hausmann, *supra* note 13, at 630 (reporting that "[b]etween 1993 and 2010 the number of misdemeanor arrests almost doubled" in New York City); Roberts, *supra* note 11, at 281-82 (reporting that "[i]n New York State, misdemeanor arrests rose from 363,634 in 2001 to 423,947 in 2010"). It appears, however, that misdemeanor arrests in New York State have fallen continuously since 2010, to 306,814 in 2017. *Adult Arrests by County and Region*, N.Y. STATE, DIV. CRIM. JUST. SERV., http://www.criminaljustice.ny.gov/crimnet/ojsa/stats.htm (select Adult Arrests by County and Region, and add the misdemeanor arrest totals for each county in each year to arrive at statewide yearly totals).

[110] *See supra* Section II.A.

[111] *See, e.g.*, Natapoff, *supra* note 8, at 256.

and shifts in age demographics, among others.[112] It is certainly possible that whatever mechanisms are driving the decline in serious crime might be driving a decline in the commission of misdemeanors too. On this interpretation, misdemeanor and felony crime—although different in scale—are continuous in kind.

On the other hand, recent misdemeanor scholarship has rightfully challenged the notion that misdemeanors are just mini-felonies.[113] Some misdemeanors do indeed look like less serious versions of felony offenses, like shoplifting or simple assault. But many other misdemeanor offenses criminalize activities that are not universally considered wrongful, and are often symptoms of poverty, mental illness, or addiction.[114] These are the "public order" offenses: disorderly conduct, public drunkenness, prostitution, loitering, trespass, and vagrancy, for instance. It is not obvious that such behaviors would be subject to the same forces that govern the incidence of serious criminal offending.[115]

Furthermore, much recent scholarship has emphasized the discretionary nature of misdemeanor arrests.[116] Loosely defined offenses of dubious importance to the public give police wide latitude.[117] The result can be that misdemeanor arrests are less a product of underlying crime patterns than of which neighborhoods get policed, which people the police choose to monitor, which incidents they deem arrest-worthy, and which cases prosecutors choose to pursue.[118] If misdemeanor cases are primarily generated through policing choices, there is no obvious reason that misdemeanor arrest and filing rates should track broader crime trends. In other words, if the world is full of people

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[112] *See generally* Franklin E. Zimring, The Great American Crime Decline (2008); Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, Atlantic (Apr. 15, 2016), https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/47740 8/ [https://perma.cc/HQ3C-67ZY].

[113] *See, e.g.*, Natapoff, *supra* note 8, at 257 ("Finally, petty offenses highlight the extent to which the criminal system functions not so much as a way of identifying wrongdoers—its classic asserted purpose—but as a form of social management and control.").

[114] *See* Hashimoto, *The Price*, *supra* note 16, at 482-83.

[115] *See* Natapoff, *supra* note 8, at 264 ("[Decriminalization of some misdemeanors] saves scarce tax dollars that can be used by public defender offices, prosecutors, and courts to focus on more serious crimes. Just as importantly, it represents a much-needed return to a spirit of proportionality in which minor crimes receive more measured condemnation and punishment.").

[116] *See, e.g.*, Natapoff, *Aggregation*, *supra* note 11, at 1049 ("Even if every misdemeanant were to receive fully individuated consideration, the petty offense system would still criminalize conduct that arguably should not be criminal in the first place. It would still shift vast discretionary authority to the police, and it would likely still impose its heaviest burdens on socially vulnerable populations.").

[117] Natapoff, *supra* note 8, at 262 ("In the felony world it is often said that the most powerful decision maker is the prosecutor. In the misdemeanor world, it is the police." (citation omitted)).

[118] *Id.*

engaging in misdemeanor activities every day—driving too fast, smoking marijuana, crossing private property without permission, walking dogs off the leash, "disturbing the public," being "disorderly"—misdemeanor caseloads will be driven by the extent to which police arrest people rather than by the extent of the underlying activity itself.

This raises the question of whether the decline in misdemeanor arrests and cases might be a result of changes in law enforcement behavior. If so, there are any number of possible explanations. Perhaps public or police opinion has been shifting so that misdemeanor behaviors are now considered less serious, or less worthy of state expenditures. This could be, in part, a response to falling crime rates. A decriminalization movement has gathered momentum in recent years, including, but not limited to, efforts to decriminalize the possession of marijuana.[119] Perhaps this phenomenon has been ongoing for longer than people usually appreciate. Or perhaps the financial incentives for police and prosecutors to pursue misdemeanor cases, which have received much recent and deserved attention, are actually less perverse now than in decades past.

It might ultimately be more useful to focus the search for explanations on particular offense types. After all, there is some variation in the offense-specific time trends. Arrest rates for three of the core public-order offenses—prostitution, disorderly conduct, and public drunkenness—peaked in the early 1980s, as did arrests for DUI.[120] The time trends for these offense categories do *not* track the time trend for serious crime very closely. But the divergence is the opposite of what some scholars have diagnosed: Rather than rising even as the violent crime rate fell, arrests for these offenses were falling even as serious crime rates rose (and have continued falling since). Arrest rates for theft, vagrancy, liquor law violations, and vandalism also peaked ahead of violent crime, in the late 1980s or early 1990s.[121] Arrests for simple assault and "other offenses" track the time trend for violent crime most closely.[122] This makes some intuitive sense in the case of simple assault, which is a violent crime. It is more perplexing for "other offenses," which are generally not violent offense types. Finally, the arrest rate for drug possession (including marijuana) peaked latest, in the mid-aughts, after rising dramatically throughout the 1980s and 1990s. This trend is relatively consistent with the chronology of the War on Drugs.[123]

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[119] Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 Wis. L. Rev. 321, 326 (noting that "a number of states have recently legalized or decriminalized minor marijuana possession, an offense that makes up a significant percentage of lower criminal court dockets"); *see also* Natapoff, *Misdemeanor Decriminalization*, *supra* note 11, at 1058 ("Motivated by persistent fiscal crises, many states have accordingly been experimenting with the decriminalization of various crimes, most prominently marijuana possession but also driving on a suspended license, traffic and other regulatory offenses.").

[120] *Uniform Crime Reporting*, *supra* note 25.

[121] *Id.*

[122] *Id.*

[123] *Id.*

Whatever the cause(s) of the downward time trends, the declines should not be taken to refute any critique of the misdemeanor system. The fact that misdemeanor justice has been shrinking does not mean that the volume-related problems highlighted by recent scholarship are not there, or are any less serious than claimed. It simply implies that the problems are not new, although the attention to them is. In one sense, this enhances the volume-related critiques—the pathologies of today's misdemeanor system have been wreaking harm for decades. Even more people may have been detained pretrial for inability to post bail, adjudicated without counsel, and convicted although innocent in the recent past than are today.

Still, though, none of the recent characterizations of misdemeanor justice provide any obvious explanation for its shrinking scale. Four such characterizations are currently prominent (and closely interrelated). The first is that the misdemeanor system delivers "assembly-line justice."[124] The "mechanical processing of cases and categorical conviction" that characterize lower courts are said to violate due process norms, undermine central ideals of criminal law (like individualized justice and punishment proportionate to culpability), and produce widespread wrongful convictions.[125] The second is Professor Malcolm Feeley's famous diagnosis that in the misdemeanor system "the process is the punishment," which is to say that the system punishes not so much through back-end sentencing as through the onerous and degrading process of misdemeanor adjudication that precedes and produces convictions.[126] Professor Issa Kohler-Hausmann offers a third conceptualization of the misdemeanor system as functionally "managerial"—a system less concerned with "punishing individual instances of lawbreaking" than with "socially regulating certain populations over time."[127] Adjudication and punishment are unnecessary; records of arrest, court attendance, and compliance with conditions of bail or pretrial diversion suffice "to sort and assess people hauled in from policing of disorderly places."[128] And Natapoff has charted the myriad ways in which the misdemeanor system functions as a reverse welfare regime, "quietly impoverish[ing] working people and the poor" through race- and class-skewed

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[124] *See* Kohler-Hausmann, *supra* note 13, at 619 (chronicling this "classic criticism of lower courts" and its revival by contemporary scholars, with variations).

[125] *Id.* at 621 n.22 ("While not all scholars have invoked that precise metaphor, a number of recent publications charge misdemeanor courts with mechanical processing of cases and categorical conviction."); *see also* Natapoff, ACADEMY FOR JUSTICE REPORT, *supra* note 11, at 88 ("The threat of . . . wrongful conviction is inherent in the quick and dirty misdemeanor process . . . .").

[126] *See generally* FEELEY, *supra* note 15.

[127] Kohler-Hausmann, *supra* note 13, at 628 ("The managerial model can make sense of the pattern of dispositions in Parts III and IV because, in this approach, the rules of criminal procedure and criminal law are used as tools for socially regulating certain populations over time, as opposed to punishing individual instances of lawbreaking.").

[128] *Id.* at 627.

arrest practices, money bail, fines and fees imposed as conditions of diversion or probation, and license suspensions or jail terms imposed for the failure to pay fines and fees.[129]

A shrinking misdemeanor system is not necessarily inconsistent with any of these critiques—after all, the system is still enormous—but nor do the critiques account for it. The statistical picture thus presents both a challenge and an opportunity for misdemeanor scholarship. The marked and ongoing national decline in misdemeanor arrests and cases is a fundamental fact about the misdemeanor system. It will remain a task for future scholarship to explore the meaning of this fact and its implications for our understanding of misdemeanor justice.

C.   *Consistency and Persistency*

Misdemeanor systems across the United States are, in some regards, highly heterogeneous. The same offense—marijuana possession, for example—can be classified as a felony in one state, a misdemeanor in another, a civil offense in a third, and a completely legal activity in the fourth. The maximum penalty for a misdemeanor is usually one year in prison, but in some states it is ten. The highest misdemeanor case-filing rate among the states that reported to the NCSC in 2016 is more than fourteen times the lowest.[130] The discretionary nature of misdemeanor arrests suggests that arrest rates should be responsive to geographic differences in culture and politics, not to mention policing practices and resources. This heterogeneity leads one to expect a certain degree of arbitrariness in misdemeanor justice, or at the very least, local and uncorrelated systems. We were therefore interested to find several highly consistent and persistent patterns.

The first will sadly not come as a surprise: a large and persistent racial disparity in arrest rates across most offense types. Racial disparity in arrest rates is one of the more striking aspects of the American criminal justice system, and it has been well covered in the misdemeanor literature.[131] We find that black people are arrested at more than twice the rate of white people for nine of twelve likely-misdemeanor offenses: vagrancy, prostitution, gambling, drug possession, simple assault, theft, disorderly conduct, vandalism, and "other

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[129] Natapoff, ACADEMY FOR JUSTICE REPORT, *supra* note 11, at 73 ("This chapter explains the major policy issues raised by the misdemeanor system, including its assembly-line quality, high rates of wrongful conviction, its racial skew, and how it quietly impoverishes working people and the poor."); *id.* at 89 (explaining that "misdemeanor system has become an engine of wealth redistribution and a powerful socioeconomic institution in its own right").

[130] *See* NCSC, *Misdemeanor Caseloads*, *supra* note 71 (showing that in 2016, North Carolina recorded 12,202 misdemeanor cases per 100,000 people, while Kansas recorded only 866).

[131] *See, e.g.*, Natapoff, ACADEMY FOR JUSTICE REPORT, *supra* note 11, at 88-89 (discussing racial disparities in misdemeanor system).

offenses." The black arrest rate for our primary misdemeanor index has remained about 1.7 times the white arrest rate since 1980.

It is less well known that racial disparities vary significantly by offense type—and that this cross-offense variation has remained relatively constant for the last thirty-seven years. Offenses that had the highest racial disparity in arrests in 1980 still have the highest racial disparity. Offenses that had little racial disparity in 1980 still have little. This consistency was surprising to us. 1980 was a long time ago. Adults in 1980 grew up during the Jim Crow era. Computers still used punch-cards. Single-payer healthcare was a bipartisan proposal. Enough has changed in U.S. demographics, culture, politics, and economics since 1980 that, if the misdemeanor system is truly arbitrary and heterogeneous, we would not expect racial disparity across twelve different arrest categories to remain so stable. Such persistency suggests deep structural patterns in civilian behavior and/or law enforcement.

What exactly those patterns might be is not clear. A number of possibilities suggest themselves. First, offenses with greater racial disparity may be committed disproportionately by black people because they are crimes of poverty, and centuries of racial oppression have produced a society in which race correlates with wealth.[132] We still know too little about who actually engages in misdemeanor-classified behaviors (as opposed to who gets arrested for them) to be able to evaluate this possibility sufficiently. At first glance, though, it does not appear to be a fully satisfactory explanation. Simple assault, which is often domestic violence, is not limited to the poor, and yet is among the most racially disparate arrest categories. A second possibility is that those offenses with high racial disparity are the most amorphously defined and entail the most discretion in enforcement, and therefore serve as the vehicle for racist policing. This hypothesis is confounded by public drunkenness, which we consider a highly discretionary arrest category, and yet has low rates of racial disparity. Furthermore, even enforcement of the least ambiguous offenses, such as drunk driving, involves some discretion.[133] Third, arrest categories with higher racial disparity might be those most affected by differences in which neighborhoods are heavily policed. Again, the relatively low racial disparity of public drunkenness confounds this theory. Public drunkenness seems paradigmatic of the type of misdemeanor-classified behavior that only results in arrest if police are nearby and available to intervene. If the persistency of the ranking of racial disparities across offense types suggests deep structural patterns, those patterns were not immediately obvious to us.

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[132] *See generally* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017) (chronicling complex social, political, and economic forces that have generated and increased racial wealth gap over time).

[133] We see no strong *a priori* reason why the forces that generate racial disparity in other traffic stops would not also affect the decision about where to place a sobriety checkpoint. Nonetheless, the DUI arrest rate is equal across races. It is possible, of course, that this parity masks a racial skew, if white people commit DUI at higher rates.

Finally, we were struck by the ubiquity of declines in misdemeanor arrests over the last twenty years, across almost every offense category and in almost every state. Again, this consistency suggests that whatever forces are responsible for the declines have broad geographic and temporal effects. If misdemeanor arrest rates are subject to common influences across offense categories and state lines, they may be less arbitrary and local than they are often assumed to be.

That being said, there are clearly exceptions to the rule. New York City has experienced recent increases in misdemeanor arrest rates.[134] Scholars have suggested that this may be due to broken-windows policing and extensive stop-and-frisk programs.[135] Other jurisdictions may also have brooked the national trend.[136]

CONCLUSION

This Article has aimed to provide the most comprehensive analysis of United States misdemeanor arrests and case-filing rates that is currently feasible given present data collection practices. We estimate that there are 13.2 million misdemeanor cases filed each year, which amounts to 4261 cases per 100,000 people. The annual number of misdemeanor cases filed has fallen by about twenty percent since 2007, which is as far back as reliable data is available. Arrests for almost all likely-misdemeanor offenses have dropped sharply since 1997, and many have been falling since the early 1980s. The arrest rate for offenses in our primary misdemeanor index has fallen by more than half since its peak in 1982. Almost every state for which the data is sufficiently reliable has seen a large decline in misdemeanor arrests since 1995.

We document sizable and persistent racial disparities in arrest rates for most, but not all, likely-misdemeanor offenses. The racial disparities are particularly large for prostitution and gambling arrests. Somewhat surprisingly, the relative ranking of arrest categories by racial disparity has remained largely constant for at least thirty-seven years.

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[134] *See supra* note 109.

[135] Kohler-Hausmann, *supra* note 13, at 628-29 ("In New York City the character of misdemeanor justice was radically transformed by seismic changes in policing in the 1990s."); Roberts, *supra* note 11, at 281-82 ("Although full exploration of the causes of rising misdemeanor volume are beyond the scope of this Article, the adoption of zero-tolerance policing and broken windows theory—which claim that policing minor quality-of-life offenses helps control violent crime—are largely responsible for the trend in many jurisdictions.").

[136] *See, e.g.*, Roberts, *supra* note 11, at 281-82 (reporting that "[t]he public defender in Lancaster County, Nebraska experienced a 56% increase in the number of new misdemeanor cases between 2003 and 2007" (citing ELIZABETH NEELEY, LANCASTER COUNTY PUBLIC DEFENDER WORKLOAD ASSESSMENT JULY 2008, at 1 (2008), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1027&context=publicpolicypublications [https://perma.cc/LV5 S-B7WA])).

Some of the patterns documented here are consistent with conventional wisdom about misdemeanor justice. The misdemeanor system is vast. It disproportionately affects people of color. Other patterns are more surprising. We see no clear explanation for the twenty-year decline in annual misdemeanor arrests and cases filed. We do not understand why this decline is so consistent across offense types and states, given the discretion involved in misdemeanor enforcement and the geographic heterogeneity of misdemeanor systems. Nor can we explain why the variation in racial disparity by arrest-offense category has been so consistent since 1980.

But this is just a beginning. Research on felony crime and enforcement has been grappling to explain its statistical patterns for many years. It is time for quantitative scholars to examine misdemeanor justice in its own right. We hope that the information presented here will provide a useful start.

Appendix A. Misdemeanor Cases Filed in 2016: State-Court Annual Reports[137]

State	Misd. Cases Filed 2016	Incl. DUIs?	Incl. Other Traffic Cases?	Notes/Limitations
AR	570,299[138]	Yes	Yes, "traffic misdemeanors"	Unclear whether this includes "preliminary felony cases" and/or criminal ordinance violations. Excludes "traffic violations."
CO	60,682[139]	No	No	Colorado reports an additional 22,218 DUI-only charges filed.[140]
DE	103,825[141]	?	No?	Unclear whether this number includes "preliminary felony cases" and/or criminal ordinance violations.
KY	123,223[142]	No?	No?	Sum of 120,929 cases reported in "District Court caseloads" and 2294 in "District Court prepayable caseloads," ostensibly

[137] Case-reporting methodology varies substantially from state to state. In addition to the variations mentioned in the table and notes, some jurisdictions report on a calendar-year basis (including Arkansas, Kentucky, New York, and North Dakota), while others report on a fiscal-year basis (including Colorado, Oklahoma, and South Dakota). Different jurisdictions also define a "case" differently—for instance, it might include all charges against a single defendant stemming from a single incident, or each charge may be reported as a separate "case"—but the annual reports canvassed here generally did not specify how a "case" was defined. *But see* CAMMIE CHAPMAN ET AL., DIV. OF COURT SERVS., ADMIN. OFFICE OF THE SUPREME COURT OF APPEALS OF W. VA., THE ANNUAL STATISTICAL REPORT ON CIRCUIT, FAMILY AND MAGISTRATE COURTS: THE WEST VIRGINIA COURT SYSTEM 2016 DATA 12 (2017), http://www.courtswv.gov/public-resources/press/Publications/2016AnnualReportData.pdf [https://perma.cc/2DG7-NRWT] (instructing readers to "[c]onsider all criminal charges involved in a single incident as one case," and noting that "[c]riminal cases were previously reported by charge rather than case counts . . . . making previous years filing counts seem higher").

[138] ADMIN. OFFICE OF THE COURTS, ANNUAL REPORT OF THE ARKANSAS JUDICIARY 2016, at 89 (2017), https://courts.arkansas.gov/sites/default/files/AnnualReport2016.pdf [https://perma.cc/UBM3-8K7T] ("More than half (570,299) of cases filed were criminal charges, while 441,317 were non-criminal traffic violations and local violations.").

[139] JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FISCAL YEAR 2016, at 66 (2016), https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2016/FY%202016%20Annual%20Statistical%20Report.pdf [https://perma.cc/HN7U-8DYW] (including applicable data within the 2016 tab).

[140] *Id.* at 73; *see also id.* at 76-85 (misdemeanor filings broken down by case type).

[141] ADMIN. OFFICE OF THE COURTS, 2016 ANNUAL REPORT OF THE DELAWARE JUDICIARY 43 (2016), https://courts.delaware.gov/aoc/AnnualReports/FY16/doc/AnnualReport2016.pdf [https://perma.cc/6QAM-R5ZF] ("Additionally, there were 44,720 traffic charges filed with the Court of Common Pleas during FY 2016.").

[142] *See generally Statistical Reports*, ADMIN. OFF. OF THE CTS., KY. CT. OF JUST. (2018), https://courts.ky.gov/aoc/statisticalreports/Pages/default.aspx [https://perma.cc/37EY-9XZN] (providing links to tables with applicable data).

				excluding "domestic violence" and "traffic" cases, which are reported separately.
LA	122,469[143]	Yes	No	Total criminal cases reported in city and parish courts, including criminal ordinance violations but excluding state-law misdemeanors prosecuted in district courts.
MI	795,039[144]	Yes?	Yes, "traffic misdemeanors"	Sum of 318,640 non-traffic and 474,015 traffic misdemeanors reported in district court, plus 602 non-traffic and 1782 traffic misdemeanors reported in municipal court.
MO	224,891[145]	Yes	Yes	Total "criminal violations filed" in courts of limited jurisdiction: 53,811 "criminal," 17,791 "ordinance violations," and 153,289 "traffic." Does not include misdemeanors filed in district courts, if any are.
NY	1,206,117[146]	Yes	Yes, except parking tickets	Sum of 2928 "misdemeanors" in supreme and county courts; 566,145 "arrest & summons cases" in Criminal Court of the City of New York; and 637,044 "arrest cases and uniform traffic tickets" in other city and district courts. Excludes cases adjudicated by town and village courts.

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[143] The District Court caseload statistics do not break out felonies and misdemeanors separately. SUPREME COURT OF LA., 2016 ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE SUPREME COURT 29 (2017), https://www.lasc.org/press_room/annual_reports/reports/2016_Annual_Report.pdf [https://perma.cc/C94T-BS65].

[144] MICH. CT., 2016 COURT CASELOAD REPORT (2016), http://courts.mi.gov/education/stats/Caseload/reports/statewide.pdf [https://perma.cc/YN5Z-VSUJ] (compiling all of applicable reports from 2016).

[145] *Annual Judicial and Statistical Reports*, OFF. OF ST. CTS. ADMIN., https://www.courts.mo.gov/page.jsp?id=296 (last visited Apr. 28, 2018) (providing links to annual statistical reports).

[146] N.Y. STATE UNIFIED COURT SYS., 2016 ANNNUAL REPORT 26, 31-33 (2017), http://nycourts.gov/reports/annual/pdfs/16_UCS-Annual_Report.pdf [https://perma.cc/8YSF-62P7]. With respect to the Criminal Court of the City of New York, the Report notes that, of the 280,329 arrest case filings and 285,816 summons case filings, "73 percent of the arrests were misdemeanors." *Id.* at 31. If this implies that twenty-seven percent of arrests and all the summons were *not* misdemeanors, then the total number of misdemeanor cases filed included in the chart above is too high. Because the report does not separately report the number of arrests versus the number of summons, though, it is not possible to calculate what the correct total would be.

ND	19,189[147]	?	Excludes "administrative traffic offenses"	
OK	56,757[148]	Yes	No	Unclear whether ordinance violations are included.
OR	46,954[149]	?	No? (Does not include "violations")	
SD	136,500[150]	?	?	Sum of 92,154 Class 2, non-contested misdemeanors; 22,291 Class 2, contested misdemeanors; and 22,055 Class 1 misdemeanors.
WV	145,559[151]	?	?	Sum of 794 misdemeanor cases in circuit courts and 95,066 motor vehicle cases, 2833 "DNR" and 46,866 "other" misdemeanor cases in magistrate courts.

Appendix B. Likely-Misdemeanor Arrest Rate by State Since 1985

State	Likely-Misdemeanor Arrest Rates Per 100,000 People				Percent-Change in Arrest Rate		
	1985	1995	2005	2014	Since 1985	Since 1995	Since 2005
AL	2106	2028	2029	NA	NA	NA	NA
AK	5822	2968	2159	NA	NA	NA	NA
AZ	3014	3207	2341	1688	-44%	-47%	-28%
AR	2281	2778	1711	1364	-40%	-51%	-20%
CA	2777	1658	1394	1007	-64%	-39%	-28%
CO	2904	2572	2051	1509	-48%	-41%	-26%
CT	3001	2146	1820	1255	-58%	-42%	-31%
DE	NA	NA	2135	1566	30%	NA	-27%
D.C.	2373	3154	NA	NA	NA	NA	NA
FL	1525	1436	NA	NA	NA	NA	NA
GA	1103	2284	NA	1309	19%	-43%	NA
HI	1780	1328	1176	NA	NA	NA	NA

[147] N.D. Court Sys., 2016 Annual Report 13 (2017), http://www.ndcourts.gov/court/News/AnnualReport2016.pdf [https://perma.cc/QX2T-9TNZ].

[148] Supreme Court Okla., Annual Report Fiscal Year 2016, at 10, 14 (2016), http://www.oscn.net/static/annual-report-2016.pdf [https://perma.cc/SU6T-G3X9].

[149] Or. Judicial Branch, 2016 Annual Report 76 (2016), http://www.courts.oregon.gov/about/Documents/OJD2016AnnRptWEB-VERSION2.pdf [https://perma.cc/GZ2E-EUSC].

[150] Office of the State Court Admin., S.D. Unified Judicial Sys., State Fiscal Year 2016: Annual Statistical Report of the South Dakota Unified Judicial System 13, 15 (2016), https://cld.bz/FMCIcMy/1 [https://perma.cc/U3FB-22TE].

[151] Chapman et al., *supra* note 137.

ID	1575	2478	2103	1358	-14%	-45%	-35%
IL	NA	NA	NA	NA	NA	NA	NA
IN	NA	NA	1969	1064	-20%	NA	-46%
IA	1669	2042	2095	1644	-1%	-19%	-22%
KS	NA	NA	1919	1361	NA	NA	-29%
KY	NA	NA	3169	1360	NA	NA	-57%
LA	1242	2370	2974	1402	13%	-41%	-53%
ME	1780	1821	1839	1467	-18%	-19%	-20%
MD	1357	1768	1721	1473	9%	-17%	-14%
MA	517	1335	1029	783	52%	-41%	-24%
MI	1547	1752	1391	994	-36%	-43%	-29%
MN	1700	2444	2370	1248	-27%	-49%	-47%
MS	NA	NA	NA	NA	NA	NA	NA
MO	1746	1963	2294	1517	-13%	-23%	-34%
MT	NA	NA	1707	1615	NA	NA	-5%
NE	1871	2698	2739	1961	5%	-27%	-28%
NV	3300	2557	2121	1472	-55%	-42%	-31%
NH	NA	NA	2977	1795	NA	NA	-40%
NJ	1891	1856	1288	1076	-43%	-42%	-16%
NM	NA	NA	1868	1388	NA	NA	-26%
NY	1681	1930	1587	NA	NA	NA	NA
NC	2513	2410	2213	1469	-42%	-39%	-34%
ND	1467	1919	2676	2356	61%	23%	-12%
OH	NA	NA	1345	1233	NA	NA	-8%
OK	2261	2271	2011	1351	-40%	-41%	-33%
OR	1831	2231	1837	1549	-15%	-31%	-16%
PA	1383	2012	2050	1585	15%	-21%	-23%
RI	1454	1565	1370	1113	-23%	-29%	-19%
SC	2326	2764	2251	1897	-18%	-31%	-16%
SD	1766	3245	1775	2458	39%	-24%	38%
TN	NA	NA	2099	1801	NA	NA	-14%
TX	2638	2713	2113	1306	-51%	-52%	-38%
UT	2230	2698	2021	1412	-37%	-48%	-30%
VT	NA	NA	1442	794	NA	NA	-45%
VA	2864	2505	1690	1470	-49%	-41%	-13%
WA	2113	2054	1907	1029	-51%	-50%	-46%
WV	1543	1870	1599	1238	-20%	-34%	-23%
WI	2846	3783	3597	2190	-23%	-42%	-39%
WY	2344	3403	3584	2698	15%	-21%	-25%

Note: The likely-misdemeanor arrest proxy includes arrests for marijuana possession, simple assault, DUI, vandalism, prostitution/commericalized vice, drunkenness, disorderly conduct, vagrancy, liquor law violations, and gambling. "NA" indicates that more than one-third of the arrest rates for that state were imputed. We do not know what percentage of arrest rates for 1985 were imputed since there is no coverage indicator for that year. We assume that if more than one-third of arrest rates per state were imputed in 1995, that the same is likely true in 1985, and thus we do not report 1985 arrest rates in those states. In 1994, NACJD changed the method by which it imputed data from missing

jurisdictions.[152] For these reasons, comparisons between 1985 arrest rates and the other years are less reliable.

[152] NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA, *Resource Guide: Uniform Crime Reporting Program*, INTER-U. CONSORTIUM FOR POL. & SOC. RES., U. MICH., https://www.icpsr.umich.edu/icpsrweb/content/NACJD/guides/ucr.html#desc_cl [https://perma.cc/2E9B-WXK5] (last visited Apr. 28, 2018).