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## SYMPOSIUM

# MISDEMEANOR MACHINERY: THE HIDDEN HEART OF THE AMERICAN CRIMINAL JUSTICE SYSTEM

Misdemeanor courts across the nation churn through millions of cases each year. Misdemeanors are understudied by scholars and underreported by the media. While these cases may be less significant than felonies in the eyes of the public, they have far-reaching consequences in the lives of individual defendants. Collateral consequences often far outstrip criminal sanctions and affect defendants' housing, employment, education, and status in the United States. As Professor Malcolm M. Feeley aptly put it, "the process is the punishment."

Periodically, attention is drawn to the misdemeanor courts. This tends to occur in times of discontent and unrest. Historically, reform efforts have largely been short-lived or entirely unsuccessful. But in the wake of public attention to misdemeanor practices in Ferguson, Missouri, the time is ripe for reform.

A dedicated group of scholars met at Boston University School of Law to explore the misdemeanor machinery on November 3-4, 2017. The conference featured both scholars and practitioners seeking to define "misdemeanor," empirically analyze the misdemeanor system in the United States, explore the ramifications of misdemeanor charges, identify ethical concerns, and propose meaningful reform. The pieces in this Symposium Issue represent each of these perspectives and offer thoughtful next steps for research and reform.

In the Symposium's Opening Keynote Address, Professor Malcom M. Feeley revisits his past research regarding criminal justice, finding his conclusions even more apt than he initially thought. Noting American Political Development scholars' contributions, Feeley points to organizational theory as an explanatory lens for understanding flaws in America's enforcement and adjudicative structures. Feeley notes that the American system is characterized by decentralization and local variation, and he argues that it is exceedingly difficult to hold officials accountable for their shortcomings. After brief case studies of initiatives targeting algorithmic bail determinations, pretrial diversion, and electronic monitoring—finding each tinged with a flawed faith in the adversarial system—Feeley concludes by drawing our eyes both abroad and back to our colonial history to adopt a new, more realistic baseline for future criminal justice reform discussions.

Professors Megan Stevenson and Sandra Mayson challenge the conventional notion that the number of annual misdemeanor cases is rising. In *The Scale of Misdemeanor Justice*, Stevenson and Mayson collect and analyze data from around the United States to provide a current, comprehensive, nation-wide analysis of misdemeanor criminal justice caseloads in the United States. Their

analysis demonstrates that the number of annual misdemeanor arrests and cases filed has actually declined in recent years.

In *The Innocence Movement and Misdemeanors*, Professor Jenny Roberts argues that the Innocence Movement will not be able to rely on the models it developed for DNA exonerations as it works to overturn misdemeanor convictions. Although certain techniques, including laboratory tests and video recordings, display some similarities to DNA in that they may help exonerate the wrongfully convicted by proving factual innocence, these types of evidence have severe limitations. Roberts also argues that rather than merely focusing only on exonerating the factually innocent, the Innocence Movement must focus on exposing and reforming the injustices the current misdemeanor system perpetrates.

In *The History of Misdemeanor Bail*, Professor Shima Baradaran Baughman contrasts the historical use of bail in misdemeanor cases with some contemporary narratives and analyzes the theoretical backing for treating misdemeanors as less serious offenses. She criticizes courts' current practice of incarcerating those misdemeanor defendants who cannot afford bail. Baughman argues that detaining these defendants, accused of such low-level offenses, is unjust, based on the significant, lifelong consequences that pretrial detention brings. Baughman concludes that misdemeanor bail should be reformed, with a focus on ensuring pretrial release.

Professor Irene Joe looks to explore additional reasons for the "mass prosecution problem" in her article *The Prosecutor's Client Problem*. Joe examines this problem through the lens of comprehensive legal ethics, suggesting that prosecutors are intentionally violating professional and ethical rules when it comes to interactions with their "clients." Ultimately, Joe argues that the problem can be identified by looking at who the prosecutor's client is and recasting the role of the prosecutor in response to the answer.

Professor Jenn Rolnick Borchetta addresses law enforcement's rampant misuse of arrest records, focusing on the New York City Police Department's practices. In *Curbing Collateral Punishment in the Big Data Age: How Lawyers and Advocates Can Use Criminal Record Sealing Statutes to Protect Privacy and the Presumption of Innocence*, she notes that such misuse has resulted in unwarranted punishment for unproven crimes and noncriminal violations, and has further led to racially disparate law enforcement practices. Borchetta argues that lawyers should use existing sealing statutes as a tool to counter the police's misuse of arrest information, and demonstrates a path for civil rights advocates to bring constitutional challenges against violations of sealing statutes under the Civil Rights Act.

Professor Eisha Jain's contribution summarizes and challenges five "misdemeanor myths." In *Proportionality and Other Misdemeanor Myths*, Jain considers potential methods of relief to address these various myths, and argues against procedural and substantive barriers that narrow the scope of these reform efforts. Jain concludes that relief efforts should focus on addressing systemic

failures of the misdemeanor justice system, rather than assume that the State has a legitimate penal rationale for imposing penalties at all.

Greg Berman and Julian Adler, the Center for Court Innovation's Director and Director of Policy and Research, respectively, examine New York City's criminal justice reforms in their article *Toward Misdemeanor Justice: Lessons from New York City*. Through five key dimensions of misdemeanor adjudication, Berman and Adler articulate their novel approach to reform, seeking to balance law enforcement needs and the needs of the communities they serve by creating a more just and humane criminal justice system.

Professor Samuel Gross observes that many people convicted of misdemeanors are actually innocent, using DNA exonerations and post-conviction laboratory test exonerations collected by the National Registry of Exonerations, which he co-founded and currently serves as a Senior Editor. Gross examines general patterns in these exonerations, and determines that innocent defendants plead guilty to avoid pretrial detention, unaware that such pleas make future exoneration all the more difficult.

Sarah Geraghty, the Managing Attorney of the Impact Litigation Unit at the Southern Center for Human Rights in Atlanta, Georgia, discussed how the criminalization of poverty has become normalized in American culture. Speaking through the stories of her clients, Geraghty highlighted how one's income can explicitly determine their experience with the criminal justice system. For more about Geraghty's experiences, see her article *How the Criminalization of Poverty Has Become Normalized in American Culture and Why You Should Care*, 21 MICH. J. RACE & L. 195 (2016).

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