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## PROPORTIONALITY AND OTHER MISDEMEANOR MYTHS

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*Criminal law theory is laden with faulty assumptions about misdemeanors. This Article summarizes five key mistaken assumptions—“misdemeanor myths”—that distort misdemeanor processing: (1) the stakes are small, (2) criminal procedure matters, (3) prosecutors maximize sentences, (4) pleas are informed, and (5) the sentence matters most. In addition, it examines emerging relief efforts, such as expungements, that offer the promise of reducing disproportionate penalties. It argues that while certain initiatives hold the promise of reform, they are too often laden with onerous procedural and substantive hurdles. As a result, they offer little more than palliative relief to the rare few. They perpetrate the procedural hassle that characterizes misdemeanor courts, rather than offering relief from it. Conceptually, this approach gets it backwards. It gives the misdemeanor system far more credit than is warranted in leading to outcomes that do not offend basic principles of proportionality and procedural fairness. This Article argues that relief efforts should focus on*

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*alleviating the well-documented systemic failures of the misdemeanor system, rather than assuming that the state has a legitimate penal rationale for imposing collateral penalties in the first place.*

#### INTRODUCTION

Misdemeanors have a proportionality problem. Minor misdemeanors can trigger massive collateral consequences, often without adequate notice or meaningful process.<sup>1</sup> Outcomes systemically appear arbitrary, disproportionate, and procedurally unfair. At the same time, because proportionality doctrine—like much of criminal law doctrine—focuses on the formal penalty, it misses the impact of collateral consequences.<sup>2</sup> There is a profound disconnect between the lived experience of misdemeanants and the legal doctrines that govern the criminal law.

This Article has two aims. First, it summarizes the following key faulty assumptions—“misdemeanor myths”—that distort the misdemeanor system: (1) the stakes are small, (2) criminal procedure matters, (3) prosecutors maximize sentences, (4) pleas are informed, and (5) the sentence matters most. Second, it considers the potential for relief efforts to address the structural failures of the misdemeanor system. Important initiatives, such as certificates of relief, expungements, and prosecutorial policies hold the promise of addressing disproportionate consequences. Too often, however, relief initiatives are encumbered by a daunting array of procedural and substantive hurdles. These initiatives appear to assume that penalties are justified, rather than questioning whether the use of the state’s law enforcement power comports with core principles of proportionality and procedural fairness.

This Article argues that this approach gets it backwards. It shifts the burden to the defendant to seek relief, rather than focusing on whether the state has demonstrated a sufficient justification for triggering harm. As a result, some

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<sup>1</sup> By collateral consequences, I am referring to civil penalties triggered by criminal arrests and convictions, such as loss of work or deportation. For a sampling of recent contributions to the literature on collateral consequences, see, for example, JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 4 (2015); MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 1.2 (2016); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (arguing that idea of “civil death” has reemerged in United States due to increased collateral consequences for those convicted of felonies and misdemeanors); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381 (2018) (analyzing how collateral consequences contribute to overcriminalization); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325-26 (discussing the impact of criminal records).

<sup>2</sup> See, e.g., *Proportionality (Disproportional or Proportional or Proportionate)*, BOUVIER LAW DICTIONARY (desk ed. 2012) (“The punishment for a crime should be proportionate to the harm committed by the criminal. Thus, crimes of similar harm should have similar punishment.”).

relief efforts offer little more than palliative relief for the rare few. Even as they hold out the promise of relief, they reinforce the assumption that the misdemeanor process as a general matter is fair, and that the harm misdemeanors impose is necessary to fulfill a legitimate penal purpose, such as deterrence or retribution.

This Article argues for reframing relief efforts to address the misdemeanor myths. The problem with misdemeanors is not just that the system lends itself to abuse by bad actors, such as police officers who make unwarranted arrests. Rather, even when police and prosecutors pursue justified, lawful, and desirable misdemeanor charges, they lack the ability to regulate whether arrest and conviction records trigger deeply disproportionate civil penalties. Law enforcement has, in effect, abdicated responsibility for regulating key aspects of the harm that stems from misdemeanors.

Relief efforts should take these dynamics into account. Rather than assuming that relief is only warranted in exceptional cases, the goal ought to be to focus on how a “typical” misdemeanant experiences the process, including through empirical information about delays in misdemeanor courts, availability of defense counsel, and evidence that even low-level contact with the criminal justice system triggers significant noncriminal penalties. Relief efforts should be informed by research demonstrating that low-level arrests and convictions systemically trigger massive consequences, including in ways that are not apparent at the time of an arrest or conviction.<sup>3</sup> The goal should be to make more avenues of relief routine and unfettered, rather than sporadic and discretionary.<sup>4</sup>

This Article proceeds as follows. Part I summarizes five mistaken assumptions about the criminal justice system that pervade misdemeanor processing. Part II discusses how relief efforts, such as expungements, pardons, certificates of relief, prosecutorial policies, and sentencing decisions, risk narrowing the scope of reform by imposing unnecessary restrictions. Part III discusses how reform efforts could be reframed. In particular, it calls for a

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<sup>3</sup> See, e.g., Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1754 (2013) (“For many immigrants, a conviction for a minor offense, despite resulting in minimal punitive consequences under state law, leads to detention, deportation, and bars to reentry.”); Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33, 36 (2017) (discussing evolution of “low-level offenses” into “criminal records with lasting consequences”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 284 (2011) (discussing “serious hidden consequences” often attached to misdemeanors, despite legal penalties that appear to be lower).

<sup>4</sup> This approach reflects Alexander Hamilton’s view that unfettered access to pardons is necessary to avoid unnecessary harm. THE FEDERALIST NO. 74 (Alexander Hamilton) (“Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”).

renewed focus on whether the state has demonstrated a legitimate penal rationale for penalties triggered by low-level contact with the criminal justice system.

### I. FIVE MISDEMEANOR MYTHS

This Part draws on recent literature to summarize five key mistaken assumptions—the “misdemeanor myths”—that distort misdemeanor justice.

#### A. *Myth #1: The Stakes Are Small*

Sentencing is premised on the idea that crimes are graded by severity, with the least significant triggering the smallest penalty. From this perspective, misdemeanor stakes appear small. Misdemeanors, after all, are frequently punished with little to no prison time.<sup>5</sup>

The criminal justice system conveys the perceived low stakes in myriad ways. Misdemeanors often involve common conduct—driving with a suspended license and other traffic offenses, marijuana possession, minor assault, and minor theft.<sup>6</sup> Low-level public order offenses typically “lack robust mens rea requirements,” meaning that they are designed to ease the path of prosecution.<sup>7</sup> They are staffed in many cases by the least experienced lawyers or even with no lawyers at all.<sup>8</sup> The cases are considered “disposable” in every sense of the word:

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<sup>5</sup> Misdemeanors are typically defined as punishable by a maximum of one year in prison, but they frequently have much shorter sentences. *See, e.g.*, 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?LinkIdentifier=id&ItemID=20808> [<https://perma.cc/Y4X9-5PZJ>]; Alexandra Natapoff, *Misdemeanors*, in 1 ACADEMY FOR JUSTICE: A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 73, 75 (Erik Luna ed., 2017), [http://academyforjustice.org/wp-content/uploads/2017/10/5\\_Reforming-Criminal-Justice\\_Vol\\_1\\_Misdemeanors.pdf](http://academyforjustice.org/wp-content/uploads/2017/10/5_Reforming-Criminal-Justice_Vol_1_Misdemeanors.pdf) [<https://perma.cc/W8UV-XX3U>].

<sup>6</sup> BORUCHOWITZ, BRINK & DIMINO, *supra* note 5, at 11 (discussing common misdemeanor offenses). As Megan Stevenson and Sandra Mayson’s contribution to this symposium illustrates, types of misdemeanor offenses vary significantly across jurisdiction. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 738-40 (2018) (noting significant variation in misdemeanor processing and describing “misdemeanors” as an “amorphous” category).

<sup>7</sup> Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1358-59 (2012). A joint study by the Heritage Foundation and the National Association of Criminal Defense Lawyers describes and criticizes the erosion of mens rea requirements by congressional legislation passed in 2005 to 2006. *See generally* BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), <https://www.nacdl.org/report/withoutintent/PDF/> [<https://perma.cc/MCA4-9JAX>].

<sup>8</sup> Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 743 (2017) (discussing lack of resources to fund public defenders); BORUCHOWITZ, BRINK & DIMINO, *supra* note 5, at 14-15 (discussing frequency of plea bargains for misdemeanor cases without counsel, despite Supreme Court’s ruling that “persons accused of misdemeanors have a right to court-appointed counsel”).

lawyers are trained to dispose of them quickly, and defendants themselves have powerful perceived incentives to resolve them quickly.<sup>9</sup> Defendants routinely make the calculated decision that the best outcome is a quick guilty plea.<sup>10</sup> Although misdemeanors constitute the bulk of the actual work of state courts—meaning that most prosecutors and defense attorneys will spend their days handling them—criminal law courses and academic literature give them short shrift.<sup>11</sup> The standard criminal law course spends a month on homicide; it often omits misdemeanors entirely.

All of this creates the impression that the stakes are low. As a body of research now demonstrates, this impression is wrong, and it is wrong on many levels. Misdemeanors are significant if only for their scale, with an estimated thirteen million cases filed each year.<sup>12</sup> Although mass incarceration tends to dominate conversations about criminal justice reform, most defendants will never serve a formal criminal sentence in prison.<sup>13</sup> Jail time, however, is another story; many misdemeanants are jailed or face the threat of jail time while their cases are pending.<sup>14</sup>

Low-level arrests can trigger anxiety, stress, and embarrassment. Defendants who want their day in court—who want to hold the prosecution to its burden of proof beyond a reasonable doubt—can face a long, hassling process of repeated, stigmatizing court dates.<sup>15</sup>

Steep collateral consequences also raise the stakes. Misdemeanor arrests and convictions trigger a patchwork of penalties. Minor offenses may lead to hefty

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<sup>9</sup> Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 345 (2012) (noting that misdemeanors are commonly deemed to be “disposable” because they are perceived as unimportant).

<sup>10</sup> See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 952-53 (1983) (discussing “process costs” of misdemeanor court as leading to quick pleas).

<sup>11</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513-14 (2001) (noting that criminal law courses focus on small number of core serious offenses, but “everything else . . . dominates criminal codes”).

<sup>12</sup> Stevenson & Mayson, *supra* note 6, at 737.

<sup>13</sup> Natapoff, *supra* note 7, at 1320 (summarizing data estimating that misdemeanors outstrip felony prosecutions ten to one).

<sup>14</sup> Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 732-33 (2017) (reporting that fifty-three percent of Harris County, Texas, misdemeanants are detained for more than one week pre-trial and thirty-five percent of New York City misdemeanor defendants spend more than one week in pretrial detention).

<sup>15</sup> See FEELEY, *supra* note 10, at 199-243 (describing “process costs” of being misdemeanor defendant in New Haven, Connecticut).

civil penalties, such as deportation.<sup>16</sup> These penalties are relatively new, and they are ubiquitous.<sup>17</sup> They are the product of technological changes that allow arrest data to be shared rapidly, legal rules that permit employers and others to access criminal record databases, and statutory rules that mandate civil penalties based on arrests and convictions.

Until relatively recently, someone who wanted to access a criminal record had to go to a courthouse and seek out a paper file. That world is gone. Today, arrest information is rapidly transmitted and widely shared.<sup>18</sup> This makes the impact of criminal records all the more difficult to control. Criminal record information is notoriously unreliable.<sup>19</sup> It often contains incomplete information about whether charges were dismissed.<sup>20</sup>

Unlike criminal penalties, civil penalties do not purport to track the severity of the criminal offense. Low-level arrests and convictions can trigger significant collateral consequences, such as sex offender registration, license suspension, pension loss, loss of public housing, and deportation.<sup>21</sup> Some of these penalties are imposed by civil regulatory agencies, while others are imposed by private actors, such as employers.<sup>22</sup> This dynamic means that even old or minor arrests and convictions can pose a barrier to accessing and retaining work. The consequences of a mere arrest—much less a misdemeanor conviction—can be severe and last long after any criminal penalty is complete.

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<sup>16</sup> Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1208-09 (2016); Roberts, *supra* note 3, at 297-300.

<sup>17</sup> See, e.g., BORUCHOWITZ, BRINK & DIMINO, *supra* note 5, at 12 (highlighting expansion of collateral consequences for misdemeanors in recent decades).

<sup>18</sup> JACOBS, *supra* note 1, at 56 (highlighting recent movement to coordinate and manage court records); MADELINE NEIGHLY & MAURICE EMSELLEM, NAT'L EMP'T L. PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 3 (2013), <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf> [<https://perma.cc/A4AY-PEF3>].

<sup>19</sup> NEIGHLY & EMSELLEM, *supra* note 18, at 3 (reporting that fifty percent of criminal records in FBI database were incomplete as of 2006).

<sup>20</sup> MARINA DUANE ET AL., CRIMINAL BACKGROUND CHECKS: IMPACT ON EMPLOYMENT AND RECIDIVISM 5 (2017), <https://www.urban.org/sites/default/files/publication/88621/criminal-background-checks-impact-on-employment-and-recidivism.pdf> [<https://perma.cc/PBT7-NGSH>] (discussing inconsistencies in FBI criminal records database and their harm to prospective employees); NEIGHLY & EMSELLEM, *supra* note 18, at 3; Adam Liptak, *Criminal Records Erased by Courts Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1 (discussing prevalence of expunged criminal records in background checks by employers).

<sup>21</sup> Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826-44 (2015) (discussing use of arrest information “as a screening or audit mechanism”); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 176, 179-80, 182-83 (2009).

<sup>22</sup> Jain, *supra* note 21, at 826-44 (discussing role of regulatory agencies and employers).

B. *Myth #2: Criminal Procedure Matters*

Criminal procedure treats an arrest as the starting point on the path toward trial. Our legal system distinguishes between mere arrest and conviction. It erects procedural constraints designed to guard against government overreach, to require prosecutors to prove guilt beyond a reasonable doubt, to provide for speedy trials, and to provide for access to counsel.

None of this amounts to much in misdemeanor courts. First, arrests alone trigger significant collateral consequences. Arrests alone can trigger deportation for unauthorized immigrants, eviction from public housing, or loss of work.<sup>23</sup> The “discretion that matters” is the discretion to arrest.<sup>24</sup>

Second, the procedural hurdles meant to ensure a fair process either do not exist or do not work as intended in the misdemeanor context. Misdemeanants get a watered-down version of the doctrinal protections that apply to felonies. Defendants are not entitled to counsel or jury trials in all low-level cases.<sup>25</sup> Even when defendants are entitled to counsel, financial and other hurdles make effective legal counsel inaccessible as a practical matter.<sup>26</sup> Many jurisdictions charge fees for court-appointed attorneys.<sup>27</sup> Overworked defense attorneys—in egregious cases, representing upwards of two thousand clients per year—provide no meaningful advice.<sup>28</sup> Misdemeanor courts are too often plagued by delays, meaning that defendants who want their day in court face repeated postponements. The upshot of all this is that many defendants choose to waive their right to counsel and plead guilty as quickly as possible.<sup>29</sup> Defendants

<sup>23</sup> *Id.* at 826-44.

<sup>24</sup> Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1829 (2011).

<sup>25</sup> *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that there is no right to counsel for misdemeanants not sentenced to incarceration); *Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968) (holding that there is no right to jury trial in petty cases); see also BORUCHOWITZ, BRINK & DIMINO, *supra* note 5, at 9 (discussing how, in practice, misdemeanants frequently do not have meaningful access to effective counsel).

<sup>26</sup> AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 8-15 (2004), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lisclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lisclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [<https://perma.cc/S32S-R5NU>] (“[L]iterally thousands of accused poor persons who are unable to afford counsel routinely are denied, either entirely or in part, meaningful representation.”).

<sup>27</sup> *Id.* at 12-13 (discussing consequences for indigent defendants who could not pay legal fees).

<sup>28</sup> BORUCHOWITZ, BRINK & DIMINO, *supra* note 5, at 9 (“In Chicago, Atlanta and Miami, defenders carry more than 2,000 misdemeanor cases per year.”).

<sup>29</sup> FEELEY, *supra* note 10, at 187 (explaining why “time, effort, and expense of going to trial are overwhelming” for “vast majority of defendants”); Alschuler, *supra* note 10, at 951-52 (discussing process costs related to misdemeanor convictions that may induce defendants to seek plea agreements).

systematically make the rational decision to minimize the length of their experiences with the process, rather than attempt to seek adjudication.

C. *Myth #3: Prosecutors Maximize Sentences*

Because our criminal justice system is a system of pleas, criminal law scholars frequently view prosecutors as the most powerful actors in the system.<sup>30</sup> Prosecutors decide whether and when to pursue charges, and they control to a large degree how long a case is pending.<sup>31</sup> They are the ultimate arbiters in many criminal cases.<sup>32</sup>

Criminal dispositions provide an important way to evaluate prosecutorial decisionmaking. High conviction rates and relatively long sentences offer a window into how prosecutors exercise their discretion. This window, however, offers only a partial view into misdemeanor processing. For one, prosecutors also exercise important control over the misdemeanor clock—the time a case is pending.<sup>33</sup> As Professor Issa Kohler-Hausmann develops, prosecutors in New York courts make reasoned decisions to keep arrests open and require defendants to appear repeatedly in court.<sup>34</sup> This process allows law enforcement to exercise “control” over defendants “without conviction.”<sup>35</sup>

Prosecutors in some cases also control collateral consequences. They gather information about civil penalties, and they appropriate those penalties as a form of punishment.<sup>36</sup> They exercise discretion in ways designed to ensure that a defendant gets deported, registers as a sex offender or loses the right to carry a firearm.<sup>37</sup>

Civil penalties triggered by low-level convictions can further strengthen the prosecutors’ bargaining power. When prosecutors lack the evidence to pursue

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<sup>30</sup> See Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. (forthcoming 2018) (manuscript at 1-2, 9-10, 13-14), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2930116](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930116) [<https://perma.cc/T7UG-Z6GD>] (summarizing academic literature describing prosecutors as most important criminal law actors and arguing that prosecutors have important limits on their power); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224 n.2 (2006) (observing that some scholars view prosecutors as “primary adjudicators of the American criminal justice system” and making distinction between coercive and noncoercive pleas). See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (discussing power of prosecutorial discretion and its potential for abuse).

<sup>31</sup> DAVIS, *supra* note 30, at 19-42.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> See Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 381 (2013).

<sup>34</sup> *Id.* at 374, 378-79.

<sup>35</sup> *Id.* at 351.

<sup>36</sup> See Jain, *supra* note 16, at 1216 n.105.

<sup>37</sup> See *id.* at 1221-23 (discussing “collateral enforcement” model).



steeper criminal charges, they may leverage the threat of collateral consequences to induce pleas. When low-level charges are redundant and trigger vastly different collateral consequences, prosecutors may selectively seek out penalties such as deportation or loss of work. They appropriate collateral consequences as a form of punishment.

However, this approach, which I have described elsewhere as the “collateral enforcement” model, is not the whole story.<sup>38</sup> Prosecutors, at times, have a vested interest in preventing collateral consequences.<sup>39</sup> Some prosecutors view collateral consequences as disproportionate, criminogenic, damaging to their relationship with the community they serve, or otherwise undesirable.<sup>40</sup> These prosecutors seek to ameliorate the impact of collateral consequences. They view the enmeshed civil and criminal penalties as undermining their ultimate goal of promoting public safety.

Prosecutors who take a “collateral mitigation” approach face important constraints in their ability to ameliorate undesired civil consequences.<sup>41</sup> Some collateral consequences are triggered at the time of arrest, so prosecutors may not know about them. Many collateral consequences are uncertain. They are codified in different statutes—federal, state, and local. Some are imposed by private actors who rely on background checks.<sup>42</sup> Collateral consequences may not be possible to predict at the time a criminal case is resolved. Obtaining the relevant information can be time-consuming and lie well outside the institutional competence of any given prosecutor.

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<sup>38</sup> *Id.*

<sup>39</sup> Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 718-19 (2002) (“Identifying and explaining collateral consequences to the prosecutor or court may influence the decision to bring charges at all.”); Jain, *supra* note 16, at 1215 (“[I]nformed prosecutors have powerful structural incentives to respond to collateral consequences.”).

<sup>40</sup> Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 266 (2016) (describing how some prosecutors take “fair punishment” approach that recognizes deportation as form of punishment); Jain, *supra* note 16, at 1215-20 (describing “collateral mitigation” model); Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. (forthcoming 2018) (discussing how law enforcement agencies in “sanctuary cities” view immigrant protective policies as necessary to promote public safety); *see also* Brief of Amici Curiae Current and Former Prosecutors and Law Enforcement Leaders in Support of Plaintiff’s Motion for Preliminary Injunction at 2, *California v. Sessions*, No. 3:17-cv-04701 (N.D. Cal. filed Nov. 29, 2017), ECF No. 46-1 (explaining that when “relationship of trust is missing—as it is when people believe that contacting police or cooperating with prosecutors could lead to deportation for themselves or others—community policing breaks down and the entire community is harmed”).

<sup>41</sup> *See* Jain, *supra* note 16, at 1215-16 (“In the collateral mitigation approach, prosecutors structure the plea to minimize the likelihood of a collateral sanction. If a prosecutor is aware of the potential collateral consequence . . . then the prosecutor exercises her discretion to modify the charges or drop them altogether.”).

<sup>42</sup> *See generally* DUANE ET AL., *supra* note 20.

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Even when prosecutors are aware of undesired collateral consequences, responses may require compromising other important interests. Prosecutors who take collateral consequences into account at the time of the plea agreement may have to choose whether to seek less severe charges than they believe are merited or to impose a fitting criminal punishment that triggers a disproportionate collateral consequence.<sup>43</sup>

Thus, particularly when evaluating whether and when to pursue low-level charges that trigger civil penalties, prosecutors balance a host of considerations other than formal sentences. Prosecutors also consider, and at times consciously influence, whether a defendant gets deported, keeps a professional license, or remains in public housing.<sup>44</sup> They exercise discretion in ways that cannot be evaluated simply by looking at relatively short sentences or even conviction rates. To the extent criminal law scholars and policymakers look primarily at sentences and dispositions, they miss an important aspect of prosecutorial discretion in the misdemeanor context.

#### D. *Myth #4: Pleas Are Informed*

Prior to entering a guilty plea, defendants should, at a minimum, understand the stakes. Pleas should be voluntary, knowing, and entered with effective assistance of counsel.<sup>45</sup> In practice, however, defendants routinely agree to pleas without understanding the stakes.

For one, aside from mandatory deportation, defense attorneys do not have a Sixth Amendment obligation to inform defendants if their guilty plea will trigger serious noncriminal penalties.<sup>46</sup> While in recent years, defense attorneys, prosecutors and judges have made systemic efforts to learn about collateral consequences, the misdemeanor plea bargaining system remains plagued with bad information.<sup>47</sup> The misdemeanor plea bargaining system remains plagued with bad information. It is simply not possible for defendants to be fully

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<sup>43</sup> Some prosecutors address this dynamic by requiring defendants to agree to a stiffer criminal penalty to “compensate” for a plea that avoids a collateral consequence. Jain, *supra* note 16, at 1244 n.157 (discussing “counterbalance model” and citing examples of “upward pleas” designed to reduce or eliminate collateral consequences).

<sup>44</sup> See, e.g., Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 560-61 (2013) (discussing this dynamic in deportation context).

<sup>45</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970) (holding that guilty pleas “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”).

<sup>46</sup> See *Padilla v. Kentucky*, 599 U.S. 356, 374 (2010) (holding that “counsel must inform her client whether his plea carries a risk of deportation”); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1137-48 (2011) (discussing Supreme Court’s doctrinal acknowledgment that plea bargaining is norm).

<sup>47</sup> See Jain, *supra* note 16, at 1211-22 (discussing “holistic,” “community-centered,” and “participatory” defense strategies that “incorporate collateral consequences”).

informed about potential collateral consequences at the time of their pleas.<sup>48</sup> That is because civil regulatory agencies, private actors, and others also have significant discretion over collateral consequences. Public housing providers, for instance, may deny housing to those with criminal records, even when they are not statutorily required to do so.<sup>49</sup> Immigration enforcement officials have significant discretion about whether or not to trigger deportation after certain types of convictions.<sup>50</sup> Private actors also exercise discretion.<sup>51</sup> Defendants have limited information about their future goals. Career and educational plans can change, and an old or dated conviction can suddenly become a barrier to employment. Because a criminal record can be “eternal,” it can be impossible to know with certainty what all the future collateral consequences could be at the time of the plea.<sup>52</sup>

E. *Myth #5: The Sentence Matters Most*

Criminal sanctions are meant to be the most severe type of punishment. In practice, however, civil penalties triggered by arrests and convictions may matter far more to any given defendant. Precisely because collateral consequences carry so much weight, defendants and prosecutors systematically fashion “upward” pleas to account for noncriminal penalties. In these pleas, defendants make the informed decision to trade a more severe criminal sentence for an outcome that seeks to minimize a particular noncriminal collateral

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<sup>48</sup> Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21, 22 (2010) (“[T]here are legitimate practical objections to requiring defense counsel to tell clients about the universe of legal consequences of conviction. These consequences tend to be scattered randomly throughout a jurisdiction’s code and regulations, and criminal defense lawyers are generally unfamiliar with them.”).

<sup>49</sup> See generally AUSTIN/TRAVIS CTY. REENTRY ROUNDTABLE, LOCKED OUT: CRIMINAL HISTORY BARRIERS TO AFFORDABLE RENTAL HOUSING IN AUSTIN & TRAVIS COUNTY, TEXAS (2016), [http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final\\_.pdf](http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf) [<https://perma.cc/6XLC-SWR4>]; MARIE CLAIRE TRAN LEUNG, SHRIVER CTR., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING (2015), <http://poverty.org/files/docs/WDMD-final.pdf> [<https://perma.cc/5BLP-USLU>].

<sup>50</sup> Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1441 (2011) (“Defense counsel needs to know not only whether his client is a noncitizen, but also the details of his client’s status and what is likely to happen if his client is convicted of a particular offense.”).

<sup>51</sup> Chin & Love, *supra* note 48, at 26 (explaining that “public and private actors increasingly have the practical ability to apply and enforce collateral consequences of criminal conviction”).

<sup>52</sup> See generally JACOBS, *supra* note 1.

consequence.<sup>53</sup> The goal of the defense attorney is to minimize the penalty—civil or criminal—that matters most to the defendant.<sup>54</sup>

This dynamic disrupts the idea of proportionality in sentencing,<sup>55</sup> which assumes that there is a single way of grading crimes, with less severe crimes triggering less severe penalties. In practice, however, informed parties engage in multi-dimensional plea bargaining, taking into account the full range of penalties—civil and criminal—triggered by a particular plea.<sup>56</sup> An informed defendant’s goal is to minimize whatever penalty matters most.

## II. EMERGING RELIEF EFFORTS

In recent years, important reform initiatives have sought to address the scope of the misdemeanor system. These approaches take a number of interrelated forms. One approach is misdemeanor decriminalization, referring to a regulatory practice that reduces the penalties for certain low-level offenses.<sup>57</sup> Another approach is reducing the number of statutorily-mandated collateral consequences. A third approach is somewhat of a middle ground: It focuses on providing selective relief from disproportionate penalties, such as through

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<sup>53</sup> See Eagly, *supra* note 40, at 306 (arguing that some prosecutors take approach of “exacting a premium” and seek criminal sentence above and beyond what they would normally seek in “exchange” for plea that avoids deportation); Jain, *supra* note 16, at 1244 n.157 (discussing “counterbalance model” and citing examples of “upward pleas” designed to reduce or eliminate collateral consequences); *see also* Bibas, *supra* note 46, at 1130 (discussing erosion of distinctions between civil and criminal penalties).

<sup>54</sup> *See, e.g.*, Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 919 (2017) (discussing how defense attorneys have to determine whether plea bargain is in client’s best interests, taking into account “client-specific” preferences, rather than seeking minimal criminal penalty); McGregor Smyth, *From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 812-14 (2011) (explaining that to best assist their clients, attorneys must inform clients of all options and consequences of taking plea bargains); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender’s Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123-24 (2004) (contrasting how traditional defense attorney focuses on keeping client out of incarceration, while holistic approach is more focused on what is best for client overall).

<sup>55</sup> *See* Bibas, *supra* note 46, at 1131 (explaining how distinctions between sentences, deportation, or civil confinements are becoming increasingly “arbitrary” as defendants “might care much more about [deportation or civil confinement], and the lawyers might well trade off criminal against civil consequences via plea bargaining to make the overall penalties fit the crime”).

<sup>56</sup> *Id.*

<sup>57</sup> *See generally* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (explaining that misdemeanor decriminalization is not same as legalization, and discussing strategy of decriminalization and its pitfalls).

expungements, certificates of relief, or prosecutorial policies designed to address disproportionate collateral consequences.

This Part focuses on initiatives that fall within the third strategy. It first examines how individual narratives have played an important role in illustrating the stakes and explaining the need for reform. It then cautions against reform strategies that focus narrowly on individual circumstances. The risk is that reform initiatives appear designed to provide relief only to the relatively few. This Part first examines how individual narratives can play an important role in spurring reform. It then considers the risk that relief efforts may appear too individualized and create highly burdensome barriers to relief.

#### A. *Illustrating the Stakes*

Extraordinary individuals often spur legal reform. As the leader of the NAACP's Legal Defense and Education Fund, Thurgood Marshall famously permitted the organization to represent only those he believed were obviously innocent.<sup>58</sup> By focusing on the "actually innocent," the Innocence Movement itself focuses on a subset of those serving long prison sentences. This, in turn, demonstrates how the safeguards of criminal procedure can utterly fail.<sup>59</sup> Likewise, death penalty jurisprudence reflects the view that capital cases require special treatment, precisely because defendants face uniquely high stakes.<sup>60</sup> The strategy also extends well beyond the criminal justice system. Some immigrant advocates, for instance, have chosen to focus on the so-called "Dreamers" as a way to spur comprehensive immigration reform.<sup>61</sup>

Defendants with compelling personal narratives have the potential to illustrate why disproportionate penalties are so harmful. One version of the strategy focuses on defendants' accomplishments. This strategy can be effective for those convicted of misdemeanors and felonies alike. Consider Reginald Dwayne

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<sup>58</sup> GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 48-49 (2012) (discussing Thurgood Marshall's "careful selection of the plaintiffs" based on their apparent innocence).

<sup>59</sup> For a critique of this approach, see Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1089 (2011) (identifying one danger of Innocence Movement as "creation of an 'us' versus 'them' mentality, whereby the public identifies with the actually innocent 'good' people and vilifies other wrongly convicted 'bad' people who have been convicted in violation of their constitutional rights"); Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 784, 815-16 (2018).

<sup>60</sup> *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion) (relying on proposition that death is different); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1148-49 (2009) (criticizing "two-track jurisprudence" for death cases versus other cases); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370-71 (1995).

<sup>61</sup> Sameer Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1469-73 (2017).

Betts, who garnered a remarkable array of accomplishments after his conviction as a teenager: He became an acclaimed writer, excelled in college, “started a family, held a Radcliffe Fellowship at Harvard, earned a law degree from Yale, received an NAACP Image Award, [gave] talks at schools, prisons, and conferences around the country,” worked for a public defender’s office, and passed a bar exam.<sup>62</sup> His felony conviction at age sixteen nonetheless posed a barrier to meeting the character and fitness requirements for admission to the Connecticut Bar.<sup>63</sup> Betts’s case drew media attention precisely because he had accomplished so much.<sup>64</sup> His story invites the question: If someone so accomplished faces barriers to work so long after finishing his sentence, then what about everyone else?

Other accounts emphasize severe consequences triggered by relatively common conduct. Shanta Sweatt, for instance, was evicted from public housing after police discovered a small amount of marijuana in her apartment.<sup>65</sup> According to Sweatt, an ex-boyfriend hid the marijuana without her knowledge.<sup>66</sup> Her criminal case ended in a misdemeanor marijuana possession plea that did not involve any prison time.<sup>67</sup> She did, however, lose her home and incurred well over \$2000 in fines, fees, and nonrefundable payments to a bail bondsman.<sup>68</sup> The media account illustrated how the combined civil and criminal penalties appeared grossly disproportionate, given the facts.

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<sup>62</sup> Nathan J. Robinson, *Nothing Will Ever Be Enough*, CURRENT AFFAIRS (Aug. 4, 2017), <https://www.currentaffairs.org/2017/08/nothing-will-ever-be-enough> [https://perma.cc/JN3F-KWXH] (“Former prisoners do not get much more ‘rehabilitated’ than Reginald Dwayne Betts.”).

<sup>63</sup> *Id.* (explaining how Betts received letter from Connecticut Bar that he did not have “requisite ‘character and fitness’ to practice law” because of his felony conviction from nearly twenty years earlier). He ultimately was admitted to the Bar. Nicholas Dawidoff, *A Poet, with Prison Behind Him, Becomes an Attorney*, NEW YORKER (Nov. 7, 2017), <https://www.newyorker.com/books/page-turner/a-poet-with-prison-behind-him-becomes-an-attorney> [https://perma.cc/JVS7-JDPZ].

<sup>64</sup> See Dawidoff, *supra* note 63; Elisa Gonzalez, *A Decade After Prison, a Poet Studies for the Bar Exam*, NEW YORKER (June 30, 2016), <https://www.newyorker.com/books/page-turner/a-decade-after-prison-a-poet-studies-for-the-bar-exam> [https://perma.cc/5F57-M3TR]; *The Current Affairs Interview: R. Dwayne Betts*, CURRENT AFFAIRS (July 27, 2016), <https://www.currentaffairs.org/2016/06/the-current-affairs-interview-r-dwayne-betts> [https://perma.cc/G6PJ-WVVY].

<sup>65</sup> Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC, Sept. 2017, at 68, <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [https://perma.cc/33LY-UFQB].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 69.

<sup>68</sup> *Id.* at 68-69.

A focus on compelling cases, like Sweatt's, can pay dividends. It permits public defenders and advocacy organizations to focus their efforts.<sup>69</sup> It often has tactical rewards. It can defray opposition and illustrate the stakes. The narratives of compelling individuals also exert a powerful psychological effect—they have the power to “move[] and energize[] people in a way that empirical data” might not.<sup>70</sup>

The strategy can play an important role in triggering doctrinal change. One important example is the Supreme Court's decision in *Padilla v. Kentucky*,<sup>71</sup> which expanded the minimum guarantees of the Sixth Amendment and held that defense attorneys must warn defendants if their plea agreement will trigger mandatory deportation.<sup>72</sup> Jose Padilla, a longtime U.S. permanent resident and military veteran, had entered what his defense attorney assured him was an “immigration safe” plea, only to find out later that his attorney got it wrong.<sup>73</sup> Not only was there a possibility that Padilla would be deported, deportation was, in fact, mandatory.<sup>74</sup> Padilla argued that if he had known the full consequences of accepting the plea, he would have rejected it and gone to trial.<sup>75</sup> He sought to vacate his plea, arguing that he had been deprived of effective assistance of counsel.<sup>76</sup>

The Supreme Court agreed. Given the severity of deportation and its enmeshed relationship with the criminal process, the Court held that defense attorneys have a Sixth Amendment duty to warn defendants when their pleas will trigger mandatory deportation.<sup>77</sup> Referral to an immigration attorney does not pass muster.<sup>78</sup> In reaching this holding, the Court conceptualized deportation as a uniquely severe penalty.<sup>79</sup> The Court also observed that some defendants may be able to plea bargain “creatively” to avoid mandatory deportation.<sup>80</sup>

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<sup>69</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2480 (2004); Joe, *supra* note 8, at 779-91 (discussing need for public defenders to prioritize caseloads).

<sup>70</sup> Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 9 (discussing how stories of innocent clients helped develop anger around innocent people being sent to death row).

<sup>71</sup> 559 U.S. 356 (2010).

<sup>72</sup> *Id.* at 374.

<sup>73</sup> *Id.* at 359 (noting that Padilla claimed that “his counsel not only failed to advise him of [deportation] prior to his entering the plea, but also told him that he ‘did not have to worry about immigration status since he had been in the country so long’”).

<sup>74</sup> *Id.* at 359-64 (discussing changes in immigration law that expanded grounds for deportation and that removed procedural protections designed to prevent unjust deportations).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 359.

<sup>77</sup> *Id.* at 367.

<sup>78</sup> *Id.* at 370-71, 385.

<sup>79</sup> *Id.* at 365.

<sup>80</sup> *Id.* at 373.

The *Padilla* holding applies across the board to defendants who face mandatory deportation. It applies to those who might be able to craft immigration safe pleas, as well as to those who almost certainly cannot.<sup>81</sup> *Padilla* himself, for instance, had limited options in seeking a plea that did not trigger mandatory deportation. *Padilla* had not committed a minor misdemeanor; he had transported over a thousand pounds of marijuana.<sup>82</sup> The Class C felony triggered a sentence range of five to ten years in prison.<sup>83</sup> As Professor Darryl Brown has observed, given the relevant statutes at issue and the nature of his crime, it is unlikely prosecutors could have brought alternative charges that would not have triggered deportation.<sup>84</sup>

Whether an immigrant defendant is actually likely to craft an immigration-safe plea, however, does not affect a defense attorney's obligations under *Padilla*. Similarly, while immigrant narratives played a powerful role in depicting deportation as uniquely severe, they had no impact on the actual holding.<sup>85</sup> The majority opinion opened by observing that *Padilla* had been a lawful permanent resident for forty years and had served in the U.S. military in Vietnam.<sup>86</sup> In the Supreme Court briefing, advocates highlighted similar narratives of immigrants with long-standing ties to the United States who unknowingly pleaded to minor offenses that triggered deportation.<sup>87</sup> The strategy illustrated how deportation could function as a far more severe penalty than the criminal sanction.<sup>88</sup> The examples illuminated the stakes, but they played no role in the opinion's reach. All lawful permanent residents are entitled

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<sup>81</sup> Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1401 (2011) (observing that, since many drug crimes trigger deportation, it is unlikely that *Padilla* would have, in fact, been able to plead to another equivalent or lesser charge that accurately described nature of his offense).

<sup>82</sup> *Id.* at 1400.

<sup>83</sup> *Id.* at 1401.

<sup>84</sup> *Id.*

<sup>85</sup> *Padilla*, 559 U.S. at 374 ("The severity of deportation . . . only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.").

<sup>86</sup> *Id.* at 359.

<sup>87</sup> See generally Brief for Amici Curiae Asian American Justice Center, Mexican American Legal Defense and Educational Fund, and Other Immigrants' Rights Organizations in Support of Petitioner, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 1567358 [hereinafter Brief for Asian American Justice Center et al.]; HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2006) (discussing concept of "immigration as affiliation," as recognizing individual's long-term ties to their community as basis for recognizing citizenship rights).

<sup>88</sup> Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1739 (2011) (arguing that deportation following criminal offense is inconsistent with certain sentencing principles); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732 (2009).



to be warned if their pleas trigger mandatory deportation, regardless of their length of U.S. residence.<sup>89</sup>

B. *The Risk of Normalizing a Dysfunctional System*

In recent years, important initiatives have attempted to address disproportionate collateral consequences. These initiatives take a variety of forms, ranging from administrative relief mechanisms to formalized prosecutorial discretion. It is an exciting moment for reform, one that reflects growing awareness of the high cost of both misdemeanors and collateral consequences. Emerging initiatives hold great promise. Too often, however, their promise is limited by burdensome criteria that do little to address the many structural failures of the misdemeanor system.

To be clear, lackluster reforms exist for a variety of reasons. They may appear politically palatable or administratively convenient. It is much easier to focus on the few rather than make systemic change. The problem arises when relief mechanisms appear designed for a fictional ideal candidate. This dynamic unfolds when relief efforts are discretionary and rare, laden with procedural hurdles, or appear to assume that collateral consequences as a general matter are justified.

Existing relief mechanisms are few and far between. Consider the pardon power, the oldest form of relief. It is provided for in the U.S. Constitution and in virtually every state constitution.<sup>90</sup> Nonetheless, it is rarely used.<sup>91</sup> Very few federal pardons have been granted in recent years.<sup>92</sup> Similarly, the majority of states rarely grant pardons.<sup>93</sup> In many states, the pardon process is highly discretionary and administered by the governor.<sup>94</sup>

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<sup>89</sup> *Padilla*, 559 U.S. at 374.

<sup>90</sup> MARGARET LOVE, JOSH GAINES & JENNY OSBORNE, *COLLATERAL CONSEQUENCES RES. CTR., FORGIVING AND FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS* 4-5 (rev. 2018), [https://www.ali.org/media/filer\\_public/4b/8b/4b8b2744-043d-41b3-b8b8-3a7d3988a353/forgiving\\_forgetting\\_jan\\_2018\\_final.pdf](https://www.ali.org/media/filer_public/4b/8b/4b8b2744-043d-41b3-b8b8-3a7d3988a353/forgiving_forgetting_jan_2018_final.pdf) [<https://perma.cc/HQK8-RU3Z>].

<sup>91</sup> *Id.* at 4 (describing pardon as “shadow of its once-robust self”); Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 807 (2015) (arguing that despite being “uniquely powerful” tool, federal clemency power risks falling into desuetude).

<sup>92</sup> LOVE, GAINES & OSBORNE, *supra* note 90, at 6 (“The number of presidential pardons granted in recent years is small compared to the number of applications that are filed each year, and there has been only one pardon granted to a D.C. Code offender in the past two decades.”).

<sup>93</sup> *Id.* at 5 (showing that in only fourteen states were pardons frequent and regular: Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Minnesota, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and South Dakota).

<sup>94</sup> *Id.* at 4 (“In most of the states in which pardons are granted on a routine basis, the governor either has marginal involvement in the pardon process, or shares power with other executive officials.”).

Similarly, statutory mechanisms of relief, such as certificates of relief or expungements, are rarely granted in many jurisdictions.<sup>95</sup> There are important differences between these relief mechanisms: expungement and sealing are designed to restrict access to a record, while mechanisms such as certificates of relief are designed to reduce the impact of a record.<sup>96</sup> For our purposes, the key point is that these mechanisms are rare, particularly when compared to the size of the U.S. criminal justice system.

Many mechanisms include eligibility restrictions that make them practically inaccessible or of limited use. Judging from administrative relief mechanisms, the ideal candidate appears to have extra cash, ample time, and the ability to navigate considerable procedural hurdles. Some jurisdictions require defendants to pay fees of several hundred dollars to merely file a petition to seek relief. For example, Alabama requires a fee of \$300<sup>97</sup> and Minnesota requires a fee of \$285.<sup>98</sup> Jurisdictions may also require applicants whose petitions contain technical filing errors to pay to refile.<sup>99</sup>

It is not uncommon for jurisdictions that offer relief to impose waiting periods of three or more years before a misdemeanor conviction is eligible for sealing or expungement.<sup>100</sup> Some jurisdictions also require petitioners to submit to a

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<sup>95</sup> See *id.* at 14-17 (discussing infrequent use of these mechanisms despite their availability in most states).

<sup>96</sup> See *id.* at 7, 9 (“[W]ords like ‘sealing’ and ‘expungement’ have no fixed meaning, and are interpreted and applied differently from state to state. In some states sealed records may be closed to private parties only, in others public employers and licensing boards may also be denied access, and in still others, records may no longer be available even to law enforcement without a court order.”).

<sup>97</sup> ALA. CODE § 15-21-1 (2018) (providing for expungement of misdemeanor nonconvictions); *id.* § 15-21-4.

<sup>98</sup> MINN. STAT. § 357.021(2) (2018). Those found to be indigent may seek a fee waiver. *Id.* § 357.021(6) (“Upon a showing of indigency or undue hardship upon the convicted person’s immediate family, the sentencing court may authorize payment of the surcharge in installments.”).

<sup>99</sup> Joshua Gaines & Margaret Colgate Love, *Expungement in Indiana—a Radical Experiment and How It Is Working So Far*, COLLATERAL CONSEQUENCES RES. CTR. (Dec. 21, 2017), <http://ccresourcecenter.org/2017/12/21/expungement-in-indiana-a-radical-experiment-and-how-it-is-working-so-far/> [<https://perma.cc/44VV-HW4J>]. An important new resource, the Restoration of Rights Project, provides a detailed fifty-state comparison of relief mechanisms and eligibility requirements. See *Restoration of Rights Project*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/restoration> [<https://perma.cc/484S-V2SH>] (last visited Apr. 28, 2018).

<sup>100</sup> By way of example, Maryland imposes a ten-year waiting period after the completion of all conditions of the sentence before certain enumerated misdemeanors are eligible for expungement. MD. CODE ANN., CRIM. PROC. § 10-110(C)(1) (West 2018). It imposes a three-year waiting period for sealing of conviction records after completion of all conditions of the sentence before certain enumerated non-violent misdemeanors are eligible for “shielding,” which is the functional equivalent of sealing in many jurisdictions. *Id.* § 10-301(a), (f).

hearing and pay administrative fees for the hearing.<sup>101</sup> In some cases, petitioners must seek the agreement from prosecutors before judges may seal records.<sup>102</sup>

In dozens of jurisdictions, defendants must petition for relief even from records of arrests that did not result in conviction.<sup>103</sup> This approach is inconsistent with the presumption that an arrest alone is not indicative of guilt.<sup>104</sup> By making arrests that did not result in conviction visible on court records, states ensure that arrests alone will continue to have long-term consequences, including by restricting the arrested individual's access to work or housing. As a formal matter, the dismissed arrest carries no legal weight. As a practical matter, however, the arrest functions as a meaningful marker, one that is virtually certain to deny opportunities.

Arizona represents a particularly burdensome approach. It requires a person who is "wrongfully arrested, indicted or otherwise charged for any crime," to petition for relief and appear at a hearing.<sup>105</sup> A judge exercises the discretion to issue an order "requiring the entry [on all court records, police records, and any other records] that the person has been cleared" if the judge "believes that justice will be served by such entry."<sup>106</sup> In other words, those who believe they have been wrongfully arrested must demonstrate that the arrest was unlawful or otherwise without basis. This, in itself, is a significant burden. Some defendants may not know whether the arrest was lawful. Unlike police officers, arrested individuals are not expected to be familiar with the factors that make arrests

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Colorado imposes a three-year waiting period after the final disposition of a petty offense and restricts eligibility to those who have not been charged with any offenses during the intervening time period. COLO. REV. STAT. § 24-72-708(1)(A) (2017). Illinois imposes a three-year waiting period for most misdemeanors; arrests that were dismissed do not have a waiting period, and misdemeanor arrests that resulted in supervision or probation have waiting periods of two to five years. 20 ILL. COMP. STAT. 2630/5.2 (2017). Kentucky imposes a five-year waiting period and also requires a hearing and payment of a \$100 fee. KY. REV. STAT. ANN. § 431.078(2) (West 2018).

For detailed fifty-state profiles discussing these restrictions, see LOVE, GAINES & OSBORNE, *supra* note 90, at 27-68; see also *Restoration of Rights Project*, *supra* note 99.

<sup>101</sup> See, e.g., COLO. REV. STAT. § 24-72-708(III)(b) (2017) (imposing \$200 fee); KY. REV. STAT. ANN. § 431.078(7) (West 2018) (imposing \$100 fee).

<sup>102</sup> See, e.g., CAL. PENAL CODE § 851.8(d) (West 2018) (requiring concurrence of prosecuting attorney before judge may seal non-conviction records).

<sup>103</sup> LOVE, GAINES & OSBORNE, *supra* note 90, at 11, 84-111 (noting "distressingly large number of states" take this approach, and providing fifty-state summary that explains each state's treatment of non-conviction records).

<sup>104</sup> *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 241 (1957) ("The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." (footnote omitted)); Jain, *supra* note 21, at 816 n.25 (discussing that arrest, in theory, is not indicative of guilt).

<sup>105</sup> ARIZ. REV. STAT. ANN. § 13-4051(A) (2017).

<sup>106</sup> *Id.* § 13-4051(B).

lawful—and even then, police officers regularly get it wrong.<sup>107</sup> Those who have experienced negative encounters with the police may also be skeptical of the ability of the legal system to offer relief.<sup>108</sup>

Burdensome procedures also undermine the efficacy of relief. Relief efforts that require prosecutors' consent further increase prosecutorial workloads. As a result, prosecutors may not be able to respond or they may routinely deny consent.<sup>109</sup> Similarly, legal aid providers have few extra resources for processing petitions for relief.<sup>110</sup> Indiana, which passed a uniquely broad relief act in 2013,<sup>111</sup> provides an important window into the promise of relief efforts, as well as some of their administrative challenges. Indiana has processed thousands of petitions for relief since the law was passed.<sup>112</sup> However, demand has outstripped the ability of legal aid providers to provide services, and some have been compelled to freeze expungement intake periodically due to overwhelming demand.<sup>113</sup>

Administrative hurdles too often continue the procedural hassle of misdemeanor courts. As Professor Malcolm Feeley developed in his seminal work, some defendants take quick misdemeanor pleas precisely because they want to avoid the “process costs” associated with repeated and stigmatizing court dates.<sup>114</sup> Others end up with heightened penalties because they are unable to comply with the process of monitoring—repeated visits with probation officers, drug testing, and compliance with various programs—that is part and parcel of the court-ordered supervision process after low-level arrests.<sup>115</sup> Relief

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<sup>107</sup> See, e.g., William Glaberson, *Long Fight Ends over Arrests for Loitering*, N.Y. TIMES, Feb. 7, 2012, at A21 (describing New York City's practice of arresting thousands of individuals for loitering long after relevant statute had been declared unconstitutional, and reporting that police continued to make unlawful arrests under statute at rate of ten per week even decade after law had been struck down).

<sup>108</sup> Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2085-86 (2017) (discussing concept of “legal estrangement” as explaining why African-American communities “are nonetheless structurally ostracized through law's ideals and priorities”).

<sup>109</sup> Gaines & Love, *supra* note 99 (describing some counties that take this approach).

<sup>110</sup> *Id.*

<sup>111</sup> IND. CODE § 35-38-9-1 (2017) (addressing applications for people whose arrest did not result in conviction). The Second Chance Relief Act authorizes a number of different forms of relief, including relief that limits public access to many records of arrests and convictions. See *id.*

<sup>112</sup> Gaines & Love, *supra* note 99.

<sup>113</sup> *Id.*

<sup>114</sup> See generally FEELEY, *supra* note 10 (conceptualizing misdemeanor “process” as punishment).

<sup>115</sup> See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 300-14, 316-17, 321, 324-26 (2016) (discussing wide range of conditions imposed through probation process and modes of enforcement, including meetings with probation officers and drug testing).

mechanisms that require defendants to endure waiting periods, petition for relief, secure the consent of various actors, pay fees, and proceed through a hearing effectively continue this process. They make relief contingent on the record holder's compliance with management mechanisms, rather than asking if the initial process was justified.

This approach is backwards. Particularly in the context of a mere arrest, it is the state's burden to demonstrate that the defendant broke the law, not the other way around. Administrative efforts that require arrested individuals to come forward, proceed through a hearing, and make the case for relief flip the burden on its head. If the purpose of backend relief mechanisms is to prevent recidivism or ameliorate unjustified harm, blanket waiting periods miss the mark. They offer no relief for those who face an immediate barrier to obtaining work because of an arrest record.

Waiting periods can pose more than a procedural hurdle. They may ultimately foreclose relief. Some jurisdictions restrict relief to petitioners who have not been charged with any offense during the waiting period.<sup>116</sup> This approach risks penalizing those who live in communities where they are more likely to be arrested because of factors other than culpability. Evidence from Chicago, Ferguson, New York City, and other localities has shown that arrest rates can systemically reflect race rather than legitimate law enforcement concerns.<sup>117</sup> This creates the risk that racial biases in policing practices will ultimately foreclose relief.

In some cases, relief efforts explicitly endorse the legitimacy of misdemeanor outcomes as a whole, even as they offer relief to a few. Consider prosecutorial policies designed to address disproportionate collateral consequences. A minority of prosecutors' offices have taken steps to publish guidance about how collateral consequences affect charging and plea bargaining decisions. Professor Ingrid Eagly recently examined four California offices that have taken steps to

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<sup>116</sup> See, e.g., COLO. REV. STAT. ANN. § 24-72-708 (West 2017). For a list of states that take this approach, see the fifty-state profile provided by LOVE, GAINES & OSBORNE, *supra* note 90, at 27-68.

<sup>117</sup> See Jason Meisner & Annie Sweney, *Was Racial Profiling Behind ATF Stash House Stings? Chicago Judges to Take up Landmark Case Today*, CHI. TRIBUNE (Dec. 13, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-met-atf-stash-house-hearing-20171211-story.html> (discussing expert testimony by Professor Jeffrey Fagan that "minorities were 'substantially more likely' than similarly situated whites to be targeted" in certain sting operations); see also Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 477-78 (2000) (describing how minorities were subject to stop and frisk in New York City to greater extent than whites in late 1990s). See generally DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/ZHQ5-ASQF>] (describing racial bias in policing practices).

adopt “immigrant protective” policies in criminal justice.<sup>118</sup> These offices take affirmative steps to issue policies explaining how prosecutors should consider collateral consequences in misdemeanor plea bargaining and charging decisions.<sup>119</sup> The approach represents an important step in recognizing how collateral consequences can undercut law enforcement aims. Yet, even these offices—frequently referred to as “sanctuary jurisdictions”—adopt a relatively narrow approach to recognizing collateral consequences.<sup>120</sup> Two offices expressly state that collateral consequences are “appropriate” or “just” and that prosecutors should deviate from their standard approach only in unusual circumstances.<sup>121</sup> All the offices require some showing of disproportionality in order to justify deviating from the standard charging or plea bargaining approach.<sup>122</sup>

One could reasonably wonder why collateral consequences following misdemeanor convictions are viewed as just and appropriate. Collateral consequences take a number of different forms. Some bear no apparent relationship to public safety. Given the sheer number of collateral consequences that exist today, it is hard to justify a blanket rule. This is particularly true when

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<sup>118</sup> Eagly, *supra* note 40, at 249, 266-71 (discussing policies in Alameda, Los Angeles, Santa Clara, and Ventura counties).

<sup>119</sup> *Id.* at 264-71. For a discussion of how criminal prosecutors exercise “de facto” power over immigration outcomes, see Lee, *supra* note 44, at 559-63.

<sup>120</sup> For explanations of why the popular term “sanctuary” is misleading, see, for example, Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1199 (distinguishing legislative response by local cities and states from historic concept of church-based sanctuary); Eisha Jain, *Understanding Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 161, 163-64 (2017) (highlighting that policies do not seek to shield immigrants from deportation except in limited circumstances and they are not motivated by commitment to concept of sanctuary); Lasch et al., *supra* note 40, at 41 (describing “sanctuary” jurisdictions as encompassing “truly a kaleidoscope of policy actions”). See generally Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016) (conceptualizing “sanctuary” policies as form of uncooperative federalism).

<sup>121</sup> See Eagly, *supra* note 40, at 267-69. The Los Angeles County policy, for instance, states that in “many” cases “the adverse collateral consequences are appropriate and just” and that departures from normal settlement policy should be made only in “unusual or extraordinary circumstances.” *Id.* at 267-68 (quoting Special Directive 03-04 from Steve Cooley, L.A. Dist. Attorney, to all Deputy District Attorneys 1-2 (Sept. 25, 2003)). Similarly, the Ventura County policy states, “[c]ollateral consequences are generally a normal and just consequence of a criminal conviction.” *Id.* at 268 (quoting Office of the Dist. Attorney, Cty. of Ventura, Legal Policies Manual § 4.01(A)(1) (Dec. 31, 2014)).

<sup>122</sup> *Id.* (quoting Special Directive 03-04 from Steve Cooley, *supra* note 121, at 1-2); see also *id.* at 268-69 (quoting policies from Los Angeles, Santa Clara, and Ventura counties whose language suggests disproportionality is key factor in determining whether to account for collateral consequences).

misdemeanors, rather than felonies, trigger the “drastic measure” of deportation.<sup>123</sup>

A narrow focus on any given defendant’s circumstances—meaning whether or not any given defendant deserves relief—may risk obscuring the systemic problems with misdemeanor processing. One criticism of immigrant-protective policies in criminal justice, for instance, is that those facing deportation either do not deserve relief, or that policies designed to ameliorate the likelihood of deportation actually privilege immigrant defendants over similarly situated U.S. citizens.<sup>124</sup> Similar arguments apply to collateral consequences in other contexts. Some judges view collateral consequences as important to sentencing,<sup>125</sup> while others have described consideration of collateral consequences as tantamount to a “middle class” sentencing discount.<sup>126</sup> The latter argument is two-fold. First, if the focus is on an individual’s particular circumstances, then those who can demonstrate immediate harm to their work or educational prospects may be more likely to secure better outcomes than others who committed similar offenses.<sup>127</sup> Second, it creates the risk that outcomes reflect judges’ sympathies rather than considerations about culpability.<sup>128</sup>

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<sup>123</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 360-64 (2010) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)) (discussing changes in immigration law that greatly expanded number of crimes that triggered deportation).

<sup>124</sup> See, e.g., Justin Fenton, *Prosecutors Cautioned over Charging Immigrants*, BALTIMORE SUN, Apr. 29, 2017, at A1 (quoting Attorney General Jeff Sessions as criticizing district attorneys who “openly brag about not charging cases appropriately” and for “advertis[ing] that they will charge a criminal alien with a lesser offense than presumably they would charge a United States citizen”); see also Chin, *supra* note 50, at 1421 (discussing how “effects of immigration status on criminal cases can roughly be divided into two categories”: those that impose disadvantages and those that advantage immigrants as compared to U.S. citizens).

<sup>125</sup> See, e.g., *United States v. Nesbeth*, 188 F. Supp. 3d 179, 189, 193-94 (E.D.N.Y. 2016) (imposing sentence consisting principally of single year of probation, rather than recommended sentence of two years imprisonment and supervised release for three years thereafter, based on likelihood that defendant would be deterred from career plans).

<sup>126</sup> *United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014) (directing district court not to consider collateral consequences including those that “would tend to support shorter sentences in cases with defendants from privileged backgrounds, who might have more to lose” (quoting *United States v. Bistline*, 665 F.3d 758, 765-66 (6th Cir. 2012))); *United States v. Kuhlman*, 711 F.3d 1321, 1329 (11th Cir. 2013) (“The Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status.”); *United States v. Stefonek*, 179 F.3d 1030, 1038 (7th Cir. 1999) (“[W]e take this opportunity to emphasize to the district judges of this circuit that no ‘middle class’ sentencing discounts are authorized.”).

<sup>127</sup> *Stefonek*, 179 F.3d at 1038 (arguing that criminals should not be treated more leniently “just by virtue of being regularly employed”).

<sup>128</sup> *Id.* (“It is natural for judges, drawn as they (as we) are from the middle or upper-middle class, to sympathize with criminals drawn from the same class.”).

The case of David Becker, a high school athlete arrested for sexually assaulting two classmates, illustrates both of these possibilities.<sup>129</sup> The charges against Becker were substantiated, but the judge chose not to enter a conviction because the judge viewed the recommended two-year prison sentence, plus mandatory sex-offender registration, as too harsh.<sup>130</sup> The judge noted how the conviction would “slam a lot of doors,” because the defendant would likely not “go to college at all.”<sup>131</sup> The judge chose to employ a procedural mechanism that kept the possibility of conviction open for two years while the defendant served probation.<sup>132</sup> If the defendant completed probation successfully, he would be eligible to seal his record.<sup>133</sup>

One critique of this approach is that it risks creating systemic inequality.<sup>134</sup> The factors that made Becker compelling to the judge, such as his diminished college prospects, also created the risk of bias. Individual or case-by-case relief efforts also risk creating the perception that criminal charges are not being taken seriously enough. The analysis becomes reduced to whether a particular individual deserves relief, rather than whether penalties like deportation or loss of access to college or work are appropriate judgments to be made through the misdemeanor justice system.

### III. ADDRESSING THE MISDEMEANOR MYTHS

This Part raises two related strategies for how to reframe relief efforts to address the structural problems that pervade misdemeanor justice. First, in evaluating the need for relief, decisionmakers should focus on how a “typical” misdemeanant experiences punishment, including both criminal and noncriminal penalties. Second, the focus should be on the state’s rationale for triggering harm. The focus ought to be on whether there is a compelling penal rationale for the penalty in the first place, and whether the penalty was imposed with adequate notice and procedural safeguards, rather than on whether the defendant has demonstrated a compelling rationale for relief. Taking this

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<sup>129</sup> See Christine Hauser, *Judge’s Sentencing in Massachusetts Sexual Assault Case Reignites Debate on Privilege*, N.Y. TIMES (Aug. 25, 2016), <https://www.nytimes.com/2016/08/25/us/david-becker-massachusetts-sexual-assault.html>.

<sup>130</sup> *Id.*; Joshua Gaines, *When Collateral Consequences Drive the Sentence: The David Becker Case*, COLLATERAL CONSEQUENCES RES. CTR. (Sept. 15, 2016), <http://ccresourcecenter.org/2016/09/15/when-collateral-consequences-drive-the-sentence-the-david-becker-case/> [<https://perma.cc/Q69H-W3JS>].

<sup>131</sup> Gaines, *supra* note 130.

<sup>132</sup> *Id.* (explaining “continuance without a finding” mechanism employed in defendant’s case).

<sup>133</sup> *Id.*

<sup>134</sup> See Hauser, *supra* note 129 (“The sexual assault case is one of several recent episodes that activists say show a troubling trend toward lenient punishment for young white perpetrators.”).



approach would lead to more routine and automatic avenues for relief, as opposed to discretionary and sporadic ones.

A. *Reconceptualizing the Harm*

One way to evaluate the need for reform is to focus on how the misdemeanor system affects a “typical” misdemeanant. The misdemeanor system is flawed for a number of reasons. Sometimes, the problem is police who lie or choose to pursue petty misdemeanor charges that create more harm than good.<sup>135</sup> These problems, however, as serious as they are, represent just part of the problem with misdemeanor justice. Even when law enforcement pursues misdemeanor arrests that are both lawful and desirable, they lack the ability to control many damaging penalties triggered by low-level arrests. Law enforcement can control what types of charges are brought and the disposition, but they lack the ability to control important consequences of a criminal record.

This dynamic is the product of overworked misdemeanor courts, understaffed defense attorneys, and the state’s decision to make criminal records inexpensive and easy to access. In the misdemeanor system, the state too often abdicates responsibility for seeking outcomes that comport with retributivist or deterrence-based rationales for criminal punishment.<sup>136</sup> Deterrence assumes that informed defendants can make a rational judgment that unlawful behavior is not worth the risk of punishment.<sup>137</sup> Yet, given that so many penalties are hidden from view—so that even law enforcement officers are unaware of them at the time of an arrest or conviction—defendants cannot make a rational decision to be deterred. From a retributivist perspective, the criminal sanction is meant to be the sum total of the punishment. Yet, with misdemeanors, the formal sanction is just one aspect of the harm. Even low-level penalties risk imposing far more harm than is retributively justified, given the impact of the record.<sup>138</sup> Defendants who take quick pleas may believe that they are choosing the least harmful alternative and find out after the fact that the conviction or even the arrest alone carries significant penalties. Misdemeanor reform must, as a central goal, address these dynamics.

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<sup>135</sup> See Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 792-95 (2012) (discussing need for policing practices that are “harm-efficient,” not merely lawful).

<sup>136</sup> See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 180-81.

<sup>137</sup> *Id.* (“Importantly, the effectiveness of deterrence is premised on the actor’s knowledge of the sanctions themselves and an ability to weigh not only the severity of the sanction with which he or she will be met, but also the likelihood of being met with that sanction.”).

<sup>138</sup> Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 180, 191-96 (2017) (arguing that in misdemeanor context, underlying justifications for punishment are often unclear, and “for truly low-level misdemeanor offenses, any punishment may be unjustified”).

B. *Reframing Relief*

Relief mechanisms should ask whether there is a compelling penal rationale for the penalty in the first place, and whether the penalty was imposed with adequate notice and procedural safeguards. In asking this question, relief mechanisms should account for the growing empirical work demonstrating how even minor contact with the criminal justice system can have long-lasting consequences. The primary question should be whether there is a compelling penal rationale for the penalty, rather than whether the defendant can demonstrate hardship or good character. For penalties that are not a formal part of the criminal punishment, it should be the state's burden to explain how the civil penalty is tailored to promote a legitimate law enforcement goal and also to explain that the penalty was put in place through a fair process, including adequate notice. Adopting this approach means more automatic and routine opportunities for relief, rather than discretionary and sporadic ones.

Law enforcement decisions ought to be made in light of the likelihood that a defendant may very well face serious penalties from even a minor arrest. Important models for this approach already exist. Some prosecutors have already begun to consider "reentry" in expansive terms. Although reentry is often conceptualized as the process of assisting former prisoners with their transition back into society, more recent work considers reentry as a process that starts with arrest.<sup>139</sup> Consistent with this view, prosecutors should routinely consider whether minor charges are likely to trigger disproportionate collateral consequences.

In keeping with the principle that a mere arrest is not indicative of guilt, a number of states automatically expunge arrests that do not result in conviction.<sup>140</sup> This approach also recognizes that petitioning for relief may itself be prohibitively burdensome for record holders.<sup>141</sup>

Some prosecutors also take important steps to make relief after a conviction routine. In San Diego and San Francisco, the prosecutors' offices announced that they would automatically erase thousands of marijuana convictions, going back

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<sup>139</sup> N.Y. UNIV. CTR. ON THE ADMIN. OF CRIMINAL LAW, *DISRUPTING THE CYCLE: REIMAGINING THE PROSECUTOR'S ROLE IN REENTRY* 14 (2017), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/CACL%20Report.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/CACL%20Report.pdf) [<https://perma.cc/54UV-GUMZ>].

<sup>140</sup> LOVE, GAINES & OSBORNE, *supra* note 90, at 14.

<sup>141</sup> Misdemeanants have limited bargaining power, which contributes to the pressure to accept quick pleas. As Professors Jenny Roberts and Michelle Alexander have written, if misdemeanants engaged in a large-scale refusal to plea bargain and instead demanded trials, that would "crash" the misdemeanor system as we know it. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1094-1100 (2013) (arguing that if court system is made to feel costs of full adjudication of misdemeanors, this may create legislative change); Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR5.

forty years.<sup>142</sup> In Marion County, the most populous county in Indiana, prosecutors follow a policy of routinely supporting relief procedures, for instance, by adopting policies designed to streamline review.<sup>143</sup> Notably, prosecutors do not inquire about why petitioners seek expungements.<sup>144</sup> Instead, prosecutors presume that recordholders have valid reasons for seeking relief and that relief will contribute to reintegration.<sup>145</sup>

Similarly, some jurisdictions have taken important steps to normalize the administration of relief through pardons. Approximately fourteen states issue “[r]egular and frequent” pardons.<sup>146</sup> These states treat relief as routine, rather than exceptional.<sup>147</sup> Some have taken steps to insulate the pardon process from the political process, such as by having the pardon power exercised by a board that is independent from the governor.<sup>148</sup> This approach is consistent with the recognition that if the criminal justice system regularly imposes overbroad consequences, the state should routinize how it provides for relief.

#### CONCLUSION

A growing body of scholarship shows how misdemeanor practice bears little resemblance to the principles of just punishment that guide criminal law theory. It fails to offer defendants the opportunity to contest charges, have a speedy trial, or to receive the advice of counsel. Misdemeanors trigger civil penalties that are experienced as punishment. This dynamic often unfolds in hidden ways, including in ways that work against the aims of law enforcement.

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<sup>142</sup> Timothy Williams & Thomas Fuller, *San Francisco Will Clear Thousands of Convictions*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/us/california-marijuana-san-francisco.html>.

<sup>143</sup> Gaines & Love, *supra* note 99 (discussing how Marion County’s prosecutor’s office has administered Indiana’s recently enacted expungement law). Rather than reviewing requests for prosecutorial consent regarding waiver of a waiting period before a petitioner’s record is eligible for expungement on an ad hoc basis, a panel comprised of experienced prosecutors reviews requests for prosecutorial approval of the waiting period, and it evaluates them against established criteria. Prosecutors typically consent to waiving the waiting period for relief. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (summarizing interview with Marion County Deputy Prosecutor Andrew Fogle, who supervises Office’s expungement practices, and describing Office’s practice of assuming that petitioners have valid reason for seeking expungement, stating that “employment opportunities are given equal standing with those looking to chaperone their children’s field-trips, improve their self-esteem, or even restore their firearms rights”).

<sup>146</sup> LOVE, GAINES & OSBORNE, *supra* note 90, at 4-5 (discussing and providing visual of states’ pardoning practices).

<sup>147</sup> *See id.* at 4.

<sup>148</sup> *Id.* (“In Alabama, Connecticut, Georgia, South Carolina, and Idaho, hundreds of pardons are granted each year to ordinary people convicted of garden variety crimes who are seeking to mitigate the harsh lingering consequences of conviction.”).

Too often, efforts at misdemeanor reform fail to recognize disproportionate consequences. They require misdemeanants to demonstrate exceptional circumstances to make the case for relief. This approach does little to change the misdemeanor system. Recognizing the misdemeanor myths—the systemic ways that misdemeanor practice deviates from criminal law theory—is an essential first step to effecting reform.