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Introduction to Special Issue: Misdemeanor Justice Project—A Focus on Criminal Justice System Responses to Lower Level Offenses

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Abstract

To date, the enforcement of lower level offenses and the criminal justice system's response to these enforcement actions has received little scholarly attention. To address this gap in scientific research, the Misdemeanor Justice Project (MJP) commissioned nine scholarly papers focused on criminal justice responses to lower level offenses. Each of the papers in this volume is guided by one of four overarching themes, including officer discretion; the impact of lower level enforcement on individuals, communities, and institutions; pretrial detention and diversion; and court processing and legal representation. As a collection, these papers serve as a launching pad for the development of a body of research in a critical and opaque area of our criminal justice system as well as highlight areas for future research.

Keywords

criminal justice policy, courts, police discretion, research and policy

The Misdemeanor Justice Project (MJP) is thrilled to work in collaboration with *Criminal Justice Policy Review* to release this special issue focused on criminal justice system responses to lower level offenses. Until recently, the majority of scholarly work and policy focus in criminal justice has been on serious crimes and felony arrests.

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Of course, felonies are more serious breaches of public order and are at the center of discussions on public safety. However, for a variety of reasons, the enforcement of lower level offenses such as misdemeanor arrests, citations or summonses, and pedestrian or vehicle stops as well as the criminal justice system's response to these enforcement actions warrant greater empirical inquiry. To begin with, the volume of these activities is striking. In 2011, at the peak of stop, question, and frisk enforcement in New York City, there were approximately 16 lower level enforcement actions, including misdemeanor arrests, criminal summonses, and pedestrian stops for each felony arrest (Travis, Chauhan, & Patten, 2017). Although the New York City ratio may reflect that city's spike in pedestrian stops, most jurisdictions in the United States are likely to have a higher volume of enforcement activities for misdemeanor arrests, citations, and stops relative to felony arrests.

Beyond the numbers, these high volume touch points are often at the center of conversations and controversies that define the nature of policing across the country. In light of high profile events, such as the death of Eric Garner, the shooting of Michael Brown, and others, we are in an era characterized by an intense focus on police-community relationships, procedural justice and police legitimacy, and fairness and equity of the criminal justice system. An empirical inquiry into policies, practices, and realities regarding the enforcement of lower level offenses is necessary to inform this national discourse.

With this in mind, in 2013, a team at John Jay College of Criminal Justice, led by then-John Jay President Jeremy Travis and Associate Professor Preeti Chauhan of the Psychology Department, launched the MJP. With the generous funding provided by the Laura and John Arnold Foundation (LJAF), the majority of the MJP work has focused on producing statistical reports documenting trends in misdemeanor arrests, issuance of criminal summonses, pedestrian stops, and more recently pretrial detention by demographics, charges, and geography in New York City (see misdemeanorjustice.org). More recently, with additional funding from LJAF, the Research Network on Misdemeanor Justice is expanding the reach of the MJP to other jurisdictions. Our research partners at North Carolina Central University, Seattle University, University of California–Los Angeles, University of Louisville, University of Maryland, University of Missouri–St. Louis, and Mississippi State University are examining these trends in the enforcement of lower level offenses within their respective jurisdictions.

One key objective of the MJP has always been to stimulate new scholarship on the issues raised by our examination of the enforcement of lower level offenses and the workings of the nation's criminal justice agencies. To guide this effort, we created a National Research Advisory Board comprised of thought leaders in the areas of policing, prosecution, defense, corrections, and diversion (see the appendix). This impressive group first met in November 2015 with the goal of developing a research agenda that would push national scholarly attention toward the challenges of misdemeanor justice with the goals of informing operations, programs, and policies. Through a guided discussion, the Board agreed that four questions (highlighted below) are in need of empirical examination.

With this guidance, the MJP identified scholars across the country who could answer these questions with available data. We then commissioned nine papers that were presented at a symposium comprising of approximately 100 scholars and practitioners at John Jay College of Criminal Justice in April 2017. This process has led to the papers in this special issue of *Criminal Justice Policy Review.* To our knowledge, this will be the first social science journal to focus exclusively on criminal justice responses to the enforcement of lower level offenses.

Below we stitch together various articles to highlight some cross-cutting themes. Notwithstanding the important narratives that emerge from these articles, we believe that this volume underscores the need for greater research in each area. We hope that, over time, this inaugural volume will spark a robust scholarly examination of these and other questions surrounding enforcement of lower level offenses and pretrial detention.

How Do Police Officers Use Their Discretion?

The papers that focused on the use of officer discretion suggest a complex set of interactions with regard to the use of individual officer discretion when exercising the power to arrest relative to departmental policies. Lum and Vovak (2018) examined long-term trends in misdemeanor arrests, particularly for minor crimes, among law enforcement agencies with more than 500 police officers from 1990 to 2013. Using group-based trajectory modeling, the authors found that police departments could be categorized in one of four types of trajectories regarding their enforcement of minor crimes—high increasers, middle increasers, middle stable, and low stable. They found few commonalities among the trajectory groups when examining crime rates, poverty rates, racial and ethnic heterogeneity, and population size. They conclude that enforcement of minor crimes and misdemeanor arrests is most likely a departmental policy choice rather than being driven by the other factors they examined. This analysis only whets the appetite for a deeper understanding of departmental policies that may play a bigger role than individual officer discretion in the enforcement of minor crimes.

Chanin, Welsh, and Nurge (2018) analyzed data on traffic stops initiated by police officers in San Diego, California in 2014 and 2015 to examine racial disparities in post stop outcomes. The authors employed propensity score matching to examine differences in the outcomes of traffic stops between a matched sample of White and Black drivers. Their analyses suggest that Black drivers were subject to both discretionary and nondiscretionary searches at a greater frequency than White drivers, and that these searches were less likely to result in the discovery of contraband. The authors argue that these findings reveal that Black drivers were subject to higher levels of post stop surveillance than White drivers. They further suggest that this greater surveillance may be the result of officer discretion and that their decision making may be affected by implicit biases. The authors close with a call for greater data collection and research on traffic stops and other contact points that are subject to high levels of officer discretion.

Worden and McLean (2018) examined the use of Law Enforcement Assisted Diversion (LEAD), a discretionary prebooking diversion program, for individuals who engaged in lower level crimes in Albany, New York. Over a 1-year span, the authors found that only 43 out of 576 LEAD eligible individuals (7.5%) were diverted. Qualitative interviews with officers suggest that buy-in from officers is necessary when discretionary diversion options are provided. Furthermore, as would be expected, officers' attitudes toward the program influenced whether they diverted individuals. Unlike Chanin et al. (2018), no racial differences in the likelihood of diversion were found.

Together, these papers outline the broad contours of a future research agenda. First, scholars could test the hypothesis that the enforcement trends regarding minor crimes are more influenced by departmental policy than officer discretion (Lum & Vovak, 2018). A second line of inquiry is to understand the actual use of discretion. When officers are provided with discretion, as in the LEAD evaluation, the use of discretion may vary by attitudes toward the action at hand. Third, in highly discretionary enforcement actions such as traffic stops, racial differences in the stops themselves and post stop outcomes were observed, leading to the hypothesis that these outcomes are the result of implicit biases (Chanin, Welsh, & Nurge, 2018). This finding should be contrasted with the LEAD evaluation which found that, although only a small percentage of eligible individuals were diverted to the LEAD program, there was no evidence that the diversion decision itself resulted in racial disparities (Worden & McLean, 2018). Clearly any study on the exercise of discretion in the enforcement of lower level offenses and minor crimes should be examined closely to discern any racial or ethnic disparities.

Taken together, these papers suggest that (a) department policies are important baseline elements for determining the enforcement of minor crimes; (b) if discretion is provided to officers, buy-in that leans toward adhering to the departmental policies or programs is needed; and (c) implicit biases may play a significant role in the use of officer discretion and result in decisions or actions that may vary by the race of the community member.

These papers also highlight the need for administrative data to be more comprehensive. The Lum and Vovak (2018) paper used Uniform Crime Reporting (UCR) data. Not all law enforcement agencies submit data to the UCR, however, and there is no comprehensive database that allows for a national picture on the enforcement of lower level offenses. Chanin et al. (2018) were not able to control for important factors such as make and model of car, the neighborhood of the stop, or officer demographics. Although their results comport with other literature in the field, the use of these additional variables may have affected their results. There continues to be a significant amount that we do not know with regard to officer discretion. How does discretion vary by a host of factors including demographics (i.e., officer and resident), external and implicit biases toward people of color, individuals with a mental illness and/or substance use issues, and context of the encounter (e.g., dangerous situation versus every day encounter)? How do we encourage officer buy-in for new programs related to diversion?

What Is the Impact of Lower Level Enforcement on Individuals, Families, Communities, and Institutions?

Two papers speak to the wider impact and context of practices regarding the enforcement of minor crimes. Piza (2018) examined whether enforcement actions (i.e., arrests, quality-of-life summonses, and field interrogation) and guardian actions (i.e., business checks, citizen contacts, bus checks, and taxi inspections) altered crime rates in Newark, New Jersey. The data were collected over 53 weeks during the implementation of a saturation foot patrol intervention called Operation Impact. His findings suggest that guardian actions had greater crime prevention effects than enforcement actions.

Using Nevada and Iowa as case studies, Martin (2018) documented revenue incentives from fines and fees in misdemeanor convictions. Although the revenue structures and collection mechanisms vary for the two states, it is notable that there is an increasing reliance on such funds. Furthermore, this reality may be true for many states. She concluded that a reliance on such cash flows over time creates "monetary myopia." These revenue incentives are in direct conflict with goals of individualized justice, proportionate punishment, fairness and equity, and public safety. She suggests that other options, such as day fines, may be more preferable to current revenue structures.

Viewed in connection with the analysis by Lum and Vovak (2018), the results from the Piza (2018) study suggest that emphasizing guardian actions at the department level may have greater crime prevention effects than enforcement actions alone. As guardian actions are rarely captured in administrative data, it would be challenging to find appropriate metrics for evaluating officer performance. Yet simply relying on metrics of enforcement actions to evaluate performance of the rank and file could distort policy priorities. At a jurisdictional level, using fines and fees for misdemeanor convictions to finance local governments may provide a perverse incentive for individual officers and local law enforcement agencies to enforce minor crimes. At a minimum, reliance on cash flow from misdemeanor convictions or other enforcement actions to fund governmental institutions is inherently problematic.

Several unanswered questions remain. If departmental metrics for officer performance included nonenforcement actions, would the use of discretion shift? What steps can governments take to move away from monetary incentives that reward misdemeanor convictions? Are there states that do not use fines and fees to fund their own operations and livelihood? Furthermore, how does reliance on fines and fees affect department policies and officer discretion in the enforcement of minor crimes? How does contact with the criminal justice system at various points (e.g., encounter, prosecution, and detention) affect psychosocial, health, employment, child care, and housing outcomes? How does this affect families? Are there costs for communities, particularly communities of color? What are the intergenerational effects? Finally, how do perverse monetary incentives affect the legitimacy of the entire criminal justice system?

What Is the Prevalence of Pretrial Detention and the Effectiveness of Pretrial Diversion?

Using 20 years of data from New York City Department of Correction, Kim et al. (2018) conducted analyses focused on pretrial detention and pretrial readmissions. They found high pretrial readmission rates for individuals initially admitted pretrial. In fact, almost 60% of their cohort sample was readmitted over a 10-year period and had, on average, three readmissions for pretrial detention. Furthermore, while there were significant predictors of readmission with regard to demographics, charge type, and discharge status, the strongest predictor was a prior pretrial detention. Notably, non-violent crimes such as property crimes had higher readmission rates for pretrial detention relative to violent crimes.

This paper highlights the need for both programmatic and scholarly focus on the challenge of diverting individuals away from pretrial detention, especially individuals who are repeatedly in and out of local jails. Interestingly, Worden and McLean (2018) had initially hoped to evaluate the effectiveness of the LEAD program to address this issue. However, due to the small number of individuals diverted, the effectiveness on outcomes including program completion and recidivism were not analyzed.

Building on Kim et al. (2018), future research should examine a variety of diversion programs to determine how removing the touch point of pretrial detention may alter and lessen future contact with the criminal justice system. Furthermore, although cities around the country are implementing various diversion programs, they are rarely evaluating outcomes beyond program completion. Future research should institute more rigorous methodology, such as randomized controlled trials or quasi-experimental designs, to assess the impact of diversion including program completion and other outcomes such as future criminal justice contact, system costs, health, employment, and housing.

What Issues Arise With Regard to Court Processing and Legal Representation for Misdemeanors?

Using court room observations, Harvey, Rosenfeld, and Tomascak (2018) found that St. Louis, Missouri, by creating no-lawyer courts that allow defendants to go unrepresented in misdemeanor cases, has created a practice that arguably violates the Sixth Amendment right to counsel. Using St. Louis as a case study, they also demonstrate how inadequate funding of public defender's offices can result in these constitutional violations. In their view, these practices violate the spirit of two Supreme Court cases—*Argersinger v. Hamlin* (1972) and *Alabama v. Shelton* (2002). They call on the Supreme Court to expand the constitutional imperative that indigent defendants have access to counsel by replacing the "actual imprisonment" rule (the requirement that the defendant face an actual prison sentence in order to invoke the right to counsel) with a broader rule that would cover defendants charged with misdemeanors. Furthermore, they suggest that the State courts could also develop a similar doctrine if this is not done at the Federal level.

Worden, Morgan, Shteynberg, and Davies (2018), using data from three rural counties in New York State, showed that having Counsel at First Appearance (CAFA) impacted bail and release decisions for misdemeanor cases. The impact of CAFA varied by county. In one county, fewer individuals were released at arraignment, but they had lower bail amounts set and spent less time in pretrial detention. In the other two counties, more individuals were released at initial arraignment. This analysis provides an appropriate counterpart to the analysis of the practices in St. Louis by documenting the impact of legal representation for misdemeanors.

Ostrom, Hanson, and Kleiman (2018) examined time to disposition in felony and misdemeanor cases among seven Colorado counties. They found that relative time to disposition, rather than absolute speed, is determined by case seriousness. As a general matter, not surprisingly, misdemeanor cases were resolved more quickly than felony cases. Yet not all misdemeanor cases demonstrated similar expediency—drugs and legal process (e.g., perjury) and public order cases are most often resolved within 180 days, whereas Driving Under the Influence/Driving While Intoxicated (DUI/DWI), other misdemeanors, and person crimes generally take longer to resolve.

This analysis of court processing raises important questions about the consequences of the different treatment of misdemeanor arrests. While efficiency of case processing should be a goal, how does it affect fairness, procedural justice, and variation in ultimate disposition (e.g., pleading guilty to expedite disposition)? How does counsel at appearance affect time to disposition? How does bail and pretrial detention affect the defendant's decision to take a guilty plea to ensure a quicker return to the community? How do scholars assist in changing practices that violate the Constitution?

As a collection, these nine papers have outlined some of the critical issues under the heading of misdemeanor justice. We are grateful that the authors have embraced the challenges of exploring this new terrain. We also hope that this is just the beginning of much needed work in the area of minor crimes and pretrial justice. We recognize that we have posed more questions than we have answered. Hopefully, these papers and topics will encourage scholars to further pursue this research agenda and delve deeper into the issues. In closing, we thank Daniel Lee, editor of *Criminal Justice Policy Review*, for being such a great partner in this initiative. We also thank Anne Milgram, Matt Alsdorf, Erica Bond, and Virginia Bersch for supporting this work through funding from the Laura and John Arnold Foundation. Finally, we thank our National Research Advisory Board members for developing our research agenda and commenting on earlier versions of these articles.

Appendix

Members of the National Research Advisory Board for the Misdemeanor Justice Project

Hassan Aden, Founder, the Aden Group

Virginia Bersch, Director of Criminal Justice, the Laura and John Arnold Foundation

Mark Bolton, Louisville Metro Corrections Director, Louisville Metro Department of Corrections

Rod Brunson, Dean and Professor, School of Criminal Justice, Rutgers University

Authors' Note

Points of view or opinions contained within this document are those of the authors and do not necessarily represent the official position or policies of the Laura and John Arnold Foundation and the National Research Advisory Board of the Misdemeanor Justice Project.

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