

## INTRODUCTION

In the 1970s, the United States embarked on a political and social project that has, decades later, come to be known as mass incarceration.<sup>1</sup> Once discussed only in academic and activist circles, the volume of humans held in our nation's prisons and jails has become a mobilizing issue in public forums, new social movements, and local and national elections. Against the backdrop of mass incarceration, low-level encounters with the criminal justice system that do not result in prison time might look trivial. Many of these encounters involve mundane infractions of law such as driving without a license, stealing a candy bar, urinating in public, or smoking marijuana.

Yet, these comparatively trivial infractions entangle people in the tentacles of the criminal justice system, impose burdens to comply with judicial processes, require time away from work and children, entail fees and fines, and generate records that can be accessed by potential employers, landlords, or other important decision makers. Many people will have a single encounter with law enforcement for a low-level offense at some point in their lives. But in some spaces, namely, low-income minority neighborhoods, many people have frequent encounters with law enforcement for low-level offenses that result in tickets, summonses, or arrests.<sup>2</sup>

Minor crimes have always been more common than major crimes.<sup>3</sup> But over the past few decades, popular new (or revived) schools of policing have called for the intentional expansion of enforcement against such offenses. Flying under the banner of Broken Windows, order maintenance, or quality-of-life policing, these theories posit low-level enforcement as the key to urban crime control strategies, and accordingly, police forces in many of the nation's largest cities have vastly expanded arrests and citations for subfelony crimes. In many municipalities, both small and large, there is a tragically perverse incentive to expand tickets, citations, or arrests for traffic infractions or misdemeanor crimes, as the resulting

## 2 INTRODUCTION

finer and fees help to fund local court systems or generate general revenue.<sup>4</sup> The seemingly inconsequential world of minor crime enforcement and lower criminal courts has become an urgent political and moral issue in the United States.

It is probably impossible to reliably estimate the number of arrests for subfelony offenses such as misdemeanors, violations, or infractions, much less the volume of citations or tickets issued, across the thousands of law enforcement entities in the United States. But we do know that in most jurisdictions with publicly available data, misdemeanor arrests significantly outpace felony arrests.<sup>5</sup> And we also know that low-level arrests have become an increasingly important element of local law enforcement as a result of both popular theories of policing and the role of court fines and fees in municipal finances. But what is interesting about this world of subfelony enforcement is that a substantial number—perhaps even the majority—of actions terminate in a disposition that involves no jail time, and, quite often, not even a criminal conviction.<sup>6</sup> Therefore, exclusively focusing on the historically and internationally unprecedented numbers of people the United States puts into prison and jails cells *understates* the reach of the criminal justice system and, in some sense, *misrepresents* the modal criminal justice encounter. If we want to understand the full implications of our distended criminal justice apparatus, we need to look at all levels of its operations. And if we want to understand the precise ways the criminal justice system functions as a form of social control, we need to look beyond custodial sentences and even criminal convictions.

This book is about misdemeanor justice in one jurisdiction: New York City, which pioneered the intentional expansion of low-level enforcement as part of a new policing strategy. Beginning in the 1990s, the New York City Police Department (NYPD) adopted a series of tactical and organizational reforms that have—perhaps somewhat misleadingly—been classified under the unifying rubric of “Broken Windows,” order maintenance, or quality-of-life policing.<sup>7</sup> Various key elements of the New York model have disseminated to other cities as former NYPD brass offered training sessions or took up positions in local police departments elsewhere. This policing model, in its various incarnations, has been the subject of a number of excellent studies addressing its efficacy as a law enforcement tactic or its effects on the communities targeted. I address a different question: What happens to all of those arrests when they arrive in the courts?

## Misdemeanorland

After a person is arrested as part of New York City's famed Broken Windows enforcement, that person has to go somewhere. And where that person goes is misdemeanorland. "Misdemeanorland" is a colloquialism used by people who work in the courts that receive the large volume of cases generated by the city's signature policing tactics. The term designates a jurisdictional and physical space where these cases are processed. In some boroughs, there is a separate building for Criminal Court—the court that has jurisdiction over misdemeanors and petty offenses (and unindicted felonies)—and in other boroughs, there are designated Criminal Court "parts" (the word used in New York City for courtrooms) that process only subfelony cases.<sup>8</sup> But the expression "misdemeanorland" also signifies the widely shared notion that there is something unique about the operations of justice in the subfelony world. The following chapters unpack what that is and why we should care about it.

Many social science and media accounts of the US criminal justice system tend to address either the back or front end of the system. In the age of mass incarceration, much public and scholarly focus has been directed at the back end, at what many of us assume to be the end point of most arrests: prison or jail. The advent of Broken Windows policing and the frequency with which tragic deaths at the hands of police are being captured on video have also brought a renewed interest in the front end: policing and law enforcement tactics, especially in low-income and minority neighborhoods. But between police and jails stands an institution assigned the role of deciding which people identified by police will end up in jail, prison, or elsewhere: criminal court.

According to popular accounts—indeed, according to most academic accounts—the criminal court is the institution that determines who ought to be punished for breaking the law and how. Substantive criminal law (called the penal law) lays out a list of proscribed acts. The role of criminal courts is to use the methods authorized by the rules of criminal procedure to see if an accused has, in fact, done something on this list. Courts may perform this function badly, unjustly, or in a manner divergent from the official plan of formal adversarial adjudication. But it is the apparent province of criminal courts to determine the legal—and therefore social—status of the alleged offender by adjudicating the facts of the case. The court sends off those found guilty to some other site to mete out punishment. The forms of punishment that have received the most attention are custodial sentences

#### 4 INTRODUCTION

(jail or prison) or noncustodial sentences (such as probation or alternative programs) that threaten custody if certain conditions are not met.

Misdemeanorland defies this model. The New York City experiment in Broken Windows policing embarrasses our traditional understanding of how an expansion of criminal enforcement should work: as misdemeanor arrests climbed dramatically as part of an intentional law enforcement strategy, the rate of criminal conviction fell sharply. This result is particularly surprising because one of the most common allegations levied at lower criminal courts by higher courts, academics, and the media over the past century has been that of “assembly-line justice”: mechanically and automatically convicting defendants and imposing one-size-fits-all punishments. But if lower criminal courts were not systematically convicting and locking up people identified as potential lawbreakers through these policing tactics, then what role were they playing in this coordinated, intentional law enforcement effort?

Drawing on mixed qualitative and quantitative research, I advance two interrelated arguments about New York’s well-publicized, yet not well-understood, experiment in mass misdemeanor arrests. First, criminal law can operate as a form of social control without doing the things it is formally set up to do. Among my empirical findings are that misdemeanorland is a place that produces very few criminal convictions and even fewer jail sentences relative to the volume of cases processed there, and it is a site where legal actors do very little adjudication. Are frontline criminal justice actors intentionally thwarting the policing experiment by refusing to convict and punish the people arrested from Broken Windows policing, unintentionally undercutting its potential efficacy by simply failing to adjudicate cases because of system overload, or perhaps using the doctrines of criminal law and processes of criminal procedure to accurately sort the factually guilty from the innocent in an expanding pool of people accused by virtue of sloppy police work? None of these accounts quite fits the story of what happened in the city that pioneered Broken Windows policing.

I argue that lower criminal courts in New York City’s age of mass misdemeanors have largely abandoned what I call the *adjudicative* model of criminal law administration—concerned with deciding guilt and punishment in specific cases—and instead operate under what I call the *managerial* model—concerned with managing people through engagement with the criminal justice system over time. Under this model, criminal court actors are still doing what we can think of as social control work, but they are not doing it by performing the traditional role of criminal courts, which is to select the right people for punishment through adjudication and then

to send them off to jail or to some alternative site with the threat of jail hanging over their heads. Instead, court actors are using the assorted tools of criminal law and procedure to sort, test, and monitor people over time.

Second, these criminal courts are using tools for social control work that differ from those with which we are familiar in the age of mass incarceration. In place of conviction and carceral sentences, social control in misdemeanorland is primarily sought through three primary techniques that I call “marking,” “procedural hassle,” and “performance.” Marking involves the generation, maintenance, and regular use of official records about a person’s criminal justice contacts and behavior for making critical decisions about his or her fate. Procedural hassle entails all of the burdens and opportunity costs attendant on complying with the demands of legal proceedings. Performance means the evaluation of an executed accomplishment, whether it was demanded formally by the court *ex ante* or offered as evidence of responsibility or rehabilitation *ex post*. Thus, instead of seeking social control by judging if the accused in fact committed a proscribed act in the past and then inflicting punishment, managerial misdemeanor courts seek social control by sorting and testing defendants into the future by building records on their law enforcement contacts, evaluating their rule-abiding propensities through measured compliance with a series of procedural requirements, and gradually ratcheting up the punitive response with each successive encounter or failure to live up to the court’s demands.

## **Criminal Justice and Social Control**

Sociology has long regarded criminal law as a key mechanism of social control. Before I proceed to use the term, a bit of conceptual brush clearing is in order. Social control is a capacious concept that references the mechanisms of maintaining social order, facilitating coordination, and reinforcing shared norms and communal cohesion.<sup>9</sup> Because conceptual clarity of such a wide-ranging idea is difficult to achieve with abstract definitions, it is useful to explore precisely how sociologists have theorized that penal institutions—from police, to courts, to jails and prisons—produce or seek social control. This overview is not meant to be a comprehensive theoretical treatment of the field, but rather a way to give some precision to the term by looking at examples of penal mechanisms of social control, which, in turn, reveals what is interesting about the study of misdemeanorland.

By most accounts, criminal law functions as social control by establishing a list of forbidden acts in the penal law (or what I will sometimes

## 6 INTRODUCTION

call the substantive criminal law) that a particular political community has deemed contrary to its shared moral codes or sense of proper order. The police enforce the proscriptions by looking for people who have violated the penal law or by deterring people from violating it by their mere presence and threat of arrest and apprehension. The role of criminal courts is to determine if the people identified by the police as possible lawbreakers have, in fact, committed an act on the proscribed list. They are authorized to deploy the processes for investigation and fact-finding laid out in the rules of criminal procedure to adjudicate the defendant's guilt and level of blameworthiness. Courts then impose some measure of punishment on those judged guilty. Punishment is not just any unpleasant experience received at the hands of an authority; it is the intentional imposition of harsh treatment that embodies a social condemnation of the offender's act.<sup>10</sup> In this model, criminal law functions as a form of social control by controlling criminal acts.

Seminal sociological theorists have long explored how punishment functions as an instrument of social control beyond being a deterrent, incapacitation, or retribution to the person found guilty of an offense. For example, Émile Durkheim, writing at the end of the nineteenth century, argued that punishment is a social enterprise that expresses a group's foundational, shared moral order and sustains it by enacting rituals that communally reject threats to the collective moral conscience.<sup>11</sup> By this account, punishment functions as social control less by controlling the deviant acts of criminals than through collective acts that meaningfully demonstrate commitment to the values making common life possible. For Max Weber, the manner by which modern punishment is decided and administered explains how it can be a mode of social control beyond its effects on the offender. Weber argued that modern states maintain social order through a distinctive form of authority, what he called rational authority. Rational authority is based on recognition of the legality of commands and procedures, and it differs from traditional authority, based on recognition of the sanctity of traditions, or charismatic authority, based on devotion to an exceptional leader. The modern state claims monopoly over the use of force by making its exercise legitimate on legal grounds (as opposed to passion, custom, or vengeance), which means limiting the exercise of coercive control and violence to the precise modes and methods authorized by law.<sup>12</sup> Thus, modern punishment can achieve social control not just by punishing the offender, but by securing voluntary compliance with the state's directives by engendering a sense of legitimacy in its commands and

sanctions. This is achieved by rationalizing the determination of punishment with predetermined procedures for fact-finding and adjudication, and by confining the imposition of punishment to bureaucracies with professional staff governed by clear rules and boundaries. Although Karl Marx, another seminal theorist of sociology, did not write extensively about punishment, a Marxian approach understands punishment as social control by being an instrument of class control. The mechanisms include creating cultural orientations that lead to the acceptance of an exploitative system by promoting a false faith in the class neutrality of the legal system or physically incapacitating labor excess to the needs of capitalist production that might pose a potential threat to political and economic stability.<sup>13</sup> By this account, the forms of punishment in our society are determined by the needs of the ruling class to control the laboring classes.

From these very broad strokes of classic sociology of punishment, we can discern a rough picture of what might be distinctive about how the criminal law of lesser crimes seeks social control. The following chapters show that most of the accusations addressed in lower criminal courts do not look like conduct that violates foundational moral values making collective life possible or conduct that elicits a ritualistic expiation to restore social solidarity. The allegations may involve conduct that people find problematic, perhaps even wrongful, but I try to delineate the precise social meaning of the type of crimes addressed in misdemeanorland and the relevance of the qualitative distinction between these crimes and how we have traditionally thought about penal law. I also show that the manner in which the great majority of these lesser offenses are processed involves very few formal procedures to investigate facts or adjudicate guilt. In fact, court actors routinely engage in behaviors that forcefully discourage such activities, and therefore the legal apparatus cannot be fairly seen as trying to secure legitimacy by acting according to authorized means. And the most common forms of punishment imposed in misdemeanorland do not look like those that could neutralize class conflict.

In fact, we will see that the composition of sentences imposed from misdemeanor arrests raises another interesting set of questions about how precisely the criminal law seeks social control through punishment. One specific form of punishment occupies a preeminent place in current sociological thinking about modern penal power and social control: the prison. Many social scientists view the emergence of the “carceral state” and mass incarceration as one of the most significant developments in recent American political history.<sup>14</sup> Incarceration is cited in both popular and academic

## 8 INTRODUCTION

literature as one of the primary means of governing marginal populations.<sup>15</sup> And yet, in New York City, for the largest class of criminal law enforcement actions—subfelonies—a jail sentence is an infrequent outcome. In order to appreciate the differences and similarities between the ways lower courts might operate as a form of social control, it is helpful to review precisely *how* social scientists have understood the social role of modern punishment.

Michel Foucault, one of the best-known recent theorists of punishment, presented the prison as the paragon of what he called disciplinary power, the mode of domination and control characteristic of modern states and institutions. In contrast to ancient forms of punishment that targeted the bodies of offenders in striking spectacles of violence and subjugation, disciplinary power targets what Foucault calls the “souls” of offenders by seeking to modify their inner dispositions and thoughts, train their habits and routines, and mold their minds and capacities for action.<sup>16</sup> The prison exemplifies modern disciplinary power because it confines people in a totalizing environment where their movements are constantly observed and corrected; its physical layout is designed to compel subjects to internalize norms and behaviors valued by those exercising power.<sup>17</sup>

In the age of mass incarceration, some scholars argue that prison plays a new role in the exercise of social control. Instead of reform through disciplinary practices, its role is that of “warehouse,” “punitive segregation,” and social “exile.” Others have suggested that in a post-Fordist, neoliberal, capitalist order—in which entire populations are superfluous to the productive needs of the economy—the prison is not directed at training and deploying bodies for a capitalist system in need of docile labor. Instead, it aims at identifying and segregating the dangerous from laborious classes.<sup>18</sup> Thus, the mechanism of removal and physical segregation is another means by which we conceptualize the social control capacity of modern punishment.

The threat of prison is another means of social control. Probation and parole populations have grown even faster than prison populations during the past thirty years.<sup>19</sup> As Michelle Phelps and others have pointed out, the majority of people under formal criminal justice supervision have been sentenced to serve their punishment in the community under probationary supervision, constituting an ever-growing pool of potential prisoners, often for technical violations or new minor arrests.<sup>20</sup> This group is legally constrained and routinely inspected for fitness to maintain their limited liberty. For example, Alice Goffman’s ethnography of one neighborhood in Philadelphia captured the effects of intensive policing on a group of young men with outstanding links to the criminal justice system through probation,



parole, or court warrants. Her study found that the form of power operative in the ghetto was incomplete and sporadic, leading her to conclude that the residents were less like captives in a Foucauldian panoptic power regime and more like fugitives within porous social and physical spaces, seeking to evade detection, since they were already “candidates” for removal to prison.<sup>21</sup>

The mark of prison time or, more broadly, of a felony conviction is another social control mechanism that social scientists have studied in the era of mass incarceration. A substantial literature shows how a felony conviction curtails labor market prospects<sup>22</sup> and imposes a host of civil disabilities, often extending beyond the legal offender.<sup>23</sup> A felony conviction often restructures democratic access<sup>24</sup> and shapes how individuals conceive of their citizenship status and relationship to the government.<sup>25</sup> It is almost always a permanent mark (absent the rare possibility of expungement in some states) and has such wide-reaching implications in so many venues that theorists have analyzed the social standing of felons in conceptual terms such as caste, class, and status group.<sup>26</sup>

We cannot talk about prison as social control in the United States without discussing its role as a system of racial and ethnic domination. Mass incarceration is highly concentrated by race, ethnicity, class, and space.<sup>27</sup> An astonishing 35 percent of black men aged twenty to thirty-four without high school diplomas were estimated to be imprisoned in 2008 compared with approximately 10 percent of similarly educated and aged white men. Imprisonment is now a “modal event” in the life course of black men without high school diplomas: the cumulative risk of incarceration for this group in the birth cohort of 1975–79 is 68 percent, whereas for similar white men in the cohort, it is 28 percent.<sup>28</sup> Racial disparities in incarceration have deep historic roots, and prison has been an active tool not just in the physical subjugation and segregation of black Americans, but also in the very production and maintenance of racial categories in the United States. Some argue that there is a direct continuity—in terms of function and effects—between earlier systems of racialized social control, such as slavery and Jim Crow, and mass incarceration.<sup>29</sup>

### **The Possibilities of Social Control in Misdemeanor Justice**

Misdemeanor justice does not involve the large-scale removal of bodies into total institutions where they will be warehoused or subject to disciplinary retraining. Nor does it regularly produce the permanent mark of a serious criminal record that denotes a lifetime status of denigrated citizenship and

civil rights. And misdemeanor justice does not necessarily even hold out the threat of long-term custodial sanctions or criminal conviction. If it does not generate the types of punishments we have come to understand as constitutive of modern penal regimes and their social control methods, then what does it do? Does it operate as a mode of social control? If so, how?

This book seeks to answer these questions with an in-depth study of misdemeanor justice in New York City. It takes a sociological approach to these questions by conceptualizing the lower criminal courts as an organizational field embedded in larger institutions. I draw on organizational sociology, ethnography, and socio-legal studies to document how the concrete, practical circumstances of doing legal work in misdemeanorland shape the ways in which ground-level legal actors make sense of and deploy legal rules and, consequently, the social control tools they use and the logic of action by which those tools are deployed.

I organize the analysis of the qualitative and quantitative data I collected into two sets of arguments that can be summarized fairly succinctly. Part 1 is dedicated to developing the claim that the city's misdemeanor courts have largely abandoned the adjudicative model of criminal law administration and instead operate under the managerial model, concerned with managing people over time through engagement with the criminal justice system.<sup>30</sup> I proffer a series of explanations to account for why this model of criminal law administration is currently flourishing in misdemeanorland and to explain its persistence.

Part 2 explicates the techniques through which misdemeanor criminal court actors extend social control over the populations they encounter—techniques that differ markedly from the forms familiar to the study of mass incarceration and felony courts. The most common penal outcomes experienced by misdemeanor defendants are not removal to total institutions or the burden of a permanently spoiled identity. Rather, they involve a set of ongoing entanglements with and obligations to various organs of the criminal justice system—from police to courts to private social service providers—and result in people cycling in and out of various legal statuses over time, often based on how they perform under these obligations. In misdemeanorland, penal power operates primarily through the techniques of *marking* through criminal justice record keeping, the *procedural hassle* of case processing, and mandated *performance* evaluated by court actors. Part 2 unpacks this tripartite conceptual schema and uses it to explain how the operations of misdemeanor justice are used to further social control ends, often without securing conviction or formal punishment. I

conclude by arguing that the study of justice in lower courts in New York City illuminates a set of urgent moral and political questions about the criminal justice system as an instrument of social control and its role in reproducing class and racial inequality in the United States.

I do not focus extensively on the aspect of criminal justice encounters that has received most media and academic attention: jail. Despite the unprecedented surge in incarceration, it is the noncarceral penal operations—covering probation, parole, alternative programs, and sentences such as conditional discharge, fines, community service, and of course nonconviction—that continue to constitute the largest component of our criminal justice system’s operations. Jail is certainly a pressing policy issue in New York City because of the long-standing and well-documented violence and human rights violations at Rikers Island, the city’s largest jail complex, which houses both pretrial defendants and those serving city time.<sup>31</sup> And misdemeanor arrests do sometimes result in jail sentences; it just is less common than I suspect most people would guess. I have therefore chosen to focus on penal techniques at the lower reaches of the pyramid that have received less attention and that, at least in New York City, are much more frequently encountered. Understanding such noncarceral social control tools is vital to a building a more complete theoretical picture of our criminal justice system’s social control role.

The study of misdemeanorland reveals that criminal courts can operate as a form of social control while doing little of what they are formally designed to do, which is adjudicate guilt and impose formal punishments. In that sense, the story here reveals some similarities with accounts that trace how institutions produce social control functions with means quite different from their official design. One notable historical example is Douglas Hay’s account of eighteenth-century England, during which Parliament massively expanded the list of capital statutes but, contrary to its bloody rhetoric, did not carry out a proportionate increase in executions.<sup>32</sup> Hay argues that the state nonetheless consolidated its social control power via criminal law during this period. This was accomplished not by executing more death sentences, but by enhancing the criminal law’s status as a class-neutral institution through rigid enactments of legal formalism, which displayed the law as a constraining force on class power. Furthermore, as the opportunities for imposing death expanded, so did the opportunities for nobles and members of the gentry to show mercy through a pardon or commutation, which had the effect of cementing the interpersonal allegiance of the ruled to the rulers.

Or consider an example from the turn of the most recent century in Forrest Stuart's study of an intensive policing initiative launched in Los Angeles's Skid Row that saturated the area with patrol officers directed to enforce a version of zero tolerance or quality-of-life policing.<sup>33</sup> Stuart notes that such a broad mandate in an area of dense poverty and homelessness means that the police essentially faced ubiquitous targets of enforcement, well beyond their functional capacity even at the heightened levels of patrol strength authorized by the program. In this initiative, the police did not simply maximize punitive enforcement, but rather established a symbiotic relationship with the only other major institutions in Skid Row, the collection of private social service organizations and "mega-shelters" that populate the area. The significant numbers of arrests and summonses must be understood in light of the massive number that *could* have been issued but were not because the police regularly presented potential arrestees with a choice: arrest or enrollment in a private rehabilitative "program." Stuart also demonstrates with ethnographic detail how the police routinely used arrests and citations not with the end of securing legally authorized punishments, but to wear down Skid Row residents who resisted entering the restrictive mega-shelters. Therefore, the police were not using their designated power to identify the maximum number of lawbreakers to the end of getting courts to impose formal punishment or even to deter them from public disorder. Rather, they were seeking maximum street-level leverage over the population, which required Skid Row residents to actually be in violation of one of the countless municipal ordinances or penal law offenses in order to coerce them into other systems of social control such as shelters or "rehabilitative programs," which the police and politically influential stakeholders deemed more effective than criminal sanctions.

While this book is dedicated to making sense of criminal law practices in the subfelony world, this approach is important to the study of criminal law more broadly. William Stuntz once described the content of criminal law not as "rules in the shadow of which litigants must bargain," but rather as "items on a menu from which the prosecutor may order as she wishes."<sup>34</sup> A similar thing can be said of the rules of criminal procedure: they are not a recipe directing legal actors how to achieve a clearly defined goal, but rather ingredients that court actors can combine in different ways to produce assorted penal experiences. Put differently, statutorily authorized punishments and legal rules offer little guidance to the empirical regularities of existing criminal courts and criminal punishment. But those empirical regularities are not random. To understand the activity of criminal courts,

we must ask what it is about the material and social contexts in which legal actors operate that leads them to systematically order from the menu or combine ingredients as they do.

That fundamental question—how legal actors use the law and what shapes that practice—motivates the two theoretical contributions I develop in this book. The first is to propose that in the study of legal organizations we move away from conceptualizing procedural or substantive law as providing clear directives for action or supplying a well-defined set of values or goals.<sup>35</sup> I suggest instead that we move toward conceptualizing them as tools or plans that must always be implemented and interpreted in concrete action settings. As a conceptual matter, this means starting from the premise that legal actors always need to make a practical determination about what the law means in the first instance in constrained situations of choice. As a methodological matter, it means taking an internal and inductive approach to the study of legal organizations. It means studying law from the ground up by carefully examining the practical circumstances of daily activities to ask how those circumstances shape the very purposes that legal actors come to embrace—the ends that they think the legal rules ought to be *used for* in their ongoing activities.

The second theoretical thread unwinds from the first. How the law ends up being used in misdemeanorland is neither random nor perfectly determined. With careful study, we can apprehend a logic of action—a discernable patterned use that can be interpreted as aiming toward social control but not necessarily achieving it.<sup>36</sup> The defining logic of legal activity in lower criminal courts is not something that actors—including those at the top of various constitutive organizational hierarchies—necessarily intend, plan, or even consciously embrace. Although many actors might affirm the logic of action both as an accurate description of their activities and a desirable one (if offered the opportunity to reflect), I believe it is a mistake to think of the actor's evaluation as the cause of these patterns. Rather, the defining logic of social control and the modal techniques of penal power in misdemeanorland emerge as legal actors routinize a set of solutions to recurrent problem situations in which they and defendants find themselves. For this reason, I propose studying lower criminal courts as a legal field, one where various actors—both individuals, such as defendants, and organizations, such as prosecutors' offices and public defender organizations—come together in a physical and legal space structured by legal rules as well as certain defining resource limitations. The logic of social control observed in this field is the product of a series

of interdependent and strategic decisions made under conditions of constraint and uncertainty.

These theoretical moves have implications for what sorts of claims we find satisfying by way of *explanation*—that is, what renders misdemeanorland more intelligible and comprehensible. If we are interested in understanding the patterned ways in which legal actors use legal rules and the recurrent ways in which people are affected by them, then the most illuminating accounts will be detailed analyses of the multiple overlapping constraints and layers of uncertainty under which people act. It will be less illuminating to operationalize vectors of misdemeanorland as discrete variables in order to assert that a change in magnitude of one variable caused (in the counterfactual sense) a change in magnitude of another variable measuring some other aspect of the system. Without getting too deep into the weeds of philosophy of science, I confess adherence to a particular vision of the explanatory ambitions of social science, one that is not reducible to the issuance of strong counterfactual causal claims or the subsumption of a phenomenon under a general covering law.

Because such claims are the dominant mode of explanation currently practiced by many social scientists in the United States, I want to be upfront about what will be on offer in this book. The mode of explanation engaged here does not consist of isolating facets of the object of study in order to determine how a change in one component of it might have propelled a change in another component. Instead, I discuss how the defining features of misdemeanorland combine to present themselves as a cohesive action dilemma to the actors operating in that field. I approach the study of law in existing legal institutions as proceeding from the premise that legal actors make grounded determinations about how to use law in an ongoing course of activity. I take what Matt Desmond calls a relational approach to a field, in which the objects of study are “*processes* involving configurations of relations among different actors or institutions.”<sup>37</sup> I describe the repeated problem situations legal actors encounter, analyze how obstacles challenge certain established organizational interests or habits, and rationally reconstruct an account of why some means are selected over others in the actors’ daily activities. These factors work together to produce a set of outcomes that are surprising, given the received wisdom about criminal law in general, and lower courts in specific. I undertake this explanatory approach because outcomes in misdemeanorland (as in many fields) are produced by interdependent activity and strategic interactions in the field. Therefore, to understand

the pattern of outcomes, we should analyze how the combined elements mutually constrain each other.

I turn away from strong causal claims of the counterfactual variety not merely because, as some social scientists have suggested, the enterprise of “reverse causal inference”—identifying the causes of observed effects—is “fraught with insurmountable conceptual challenges.”<sup>38</sup> Certainly it is. Nevertheless, some of the most alluring objects of research are precisely those that are, for both methodological and conceptual reasons, the least susceptible to explanations of the counterfactual causal variety. We are often drawn to research sites or topics that exemplify the qualities of an alluring high school crush: singular, extreme, anomalous, jarring, experimental, pioneering, original, tattooed. We are drawn to those objects of research that most confound counterfactual causal inference by virtue of their complexity, distinctiveness, or rarity for the same reasons the outsider high school crushes were alluring—they are interesting!

The mode of explanation in this book could be captured in the terms that Abend, Petre, and Sauder use to describe the explanatory practices of sociology south of the Rio Grande: to “tell a persuasive story about, give a good account of, or shed light upon [an] empirical problem.”<sup>39</sup> I propose to do so by giving a careful account of the machinery of lower criminal courts, analyzing the role and relationships between actors there, and building a conceptual schema with the purpose of suggesting “how best to view, interpret, or understand what is going on” in misdemeanorland in terms that are “novel, illuminating, instructive, insightful, helpful, or edifying.”<sup>40</sup>

Does that mean the information and claims made about New York City’s misdemeanor justice are not generalizable to other lower criminal courts? Perhaps. Free from the intellectually normalizing strictures of journal review, a book is a good place to be epistemologically honest. I suspect it is more conceivable than many sociologists like to admit that the particulars that make an object or site of study *interesting*—meaning, something people are excited and curious to know about—are precisely the factors that make it challenging to know if the understandings achieved about the object are applicable to another site.

New York City’s misdemeanor courts are characterized by qualities that make them simultaneously interesting and atypical. New York is not a representative American city in most respects. It is the biggest city in the nation, uncharacteristically spatially dense, and has a large police force practicing—probably in the most intense fashion of any municipal police force—the quality-of-life policing model. But the city’s law enforcement

experiment is also widely looked to as a national model for crime control. Other large urban centers, such as Los Angeles and Chicago, have adopted major elements of New York's policing model, flooding local courts with subfelony cases.<sup>41</sup> Across the country, it appears that misdemeanor filings outnumber felony filings by a factor of at least two-to-one.<sup>42</sup> To state the obvious, every local criminal court is characterized by a particular political culture; policies and practices indigenous to the local prosecutor's office, defense bar, and judiciary; a defining arrangement of legal and organizational relations among those actors; and a particular assortment of legal tools defined by the state's substantive and procedural criminal law. It would be foolish to assume that the host of factors that make each jurisdiction unique would not affect, for example, how caseload pressures translate into disposition patterns.

That does not mean the insights from the study of New York City's misdemeanorland are not valuable to the study of other sites, even if they are not directly generalizable. Findings from one place can alert us to phenomena at a different one, such as noncarceral penal power that operates by virtue of record keeping, iterative encounters with courts, or the evaluation of actions during those encounters. Or it could model a method of explanation useful in another site, such as looking at the constraints and conditions under which legal actors operate to account for a pattern of outcomes or analyzing how the unintended upshots of case processing are appropriated to new uses—uses for which they were not intended but that nonetheless serve functions the actors value.

### **Studying Misdemeanor Justice in New York City**

The conceptual apparatus and explanatory tools developed here are based on data from mixed-method, multiyear research in New York City. I draw on quantitative data about misdemeanor arrests and dispositions; legal research about criminal procedure, sealing laws, and court administrative practices; extensive qualitative data gathered over more than three years of fieldwork, including ethnographic observation and interviews; and more than three years of personal experience working as a criminal defense attorney in New York. Each source adds an essential component to our understanding of misdemeanorland because each provides different types of insights.

For about three years, from 2009 to 2011, I worked part-time as a criminal defense attorney for a solo practitioner in one of New York City's boroughs. When I began my fieldwork in April 2010, I selected a borough



different from where I worked as the site of my study so as to minimize perceived or true biases, preconceptions, or limits on access stemming from my professional position in an adversarial system. I spoke to people occupying various positions within the criminal justice system (judges, defense attorneys, prosecutors, court personnel), up and down the organizational hierarchy (new attorneys and judges along with supervisors and long-serving judges) and horizontally spanning those with reputations as stern and lenient, traditional and progressive.<sup>43</sup> To minimize data collection bias from my professional experience, I tried, as much as possible, to select an “inconvenient sample” by *not* relying on professional connections for entrée, not mentioning my own work to gain rapport, and using blind approaches, e-mails, or calls to initiate conversations and interviews.<sup>44</sup> Although I do not use any current or former client as a research subject, I draw on my own experience and understandings from my professional experience to make sense of things I heard or observed.

The majority of my qualitative data comes from more than three years of fieldwork in one of New York City’s busiest Criminal Courts. I did intensive fieldwork from 2010 to 2013 in one borough, identified as Borough A to maintain confidentiality as requested by many participants, and all names have been disguised to preserve anonymity. I did additional sporadic fieldwork and interviews in 2014 through 2016 in what I call Borough B. All told, fieldwork included extensive ethnographic observation in courtrooms and interviews with judges, defense attorneys, prosecutors, defendants, and various court personnel. I spent between one and three full days per week sitting and observing various misdemeanor courtrooms that process all phases of subfelony cases. During my observational visits, I sat in almost every one of Borough A’s fourteen active misdemeanor parts (as courtrooms are called in New York City), including all of the arraignment parts, the all-purpose parts where cases are sent after arraignment, the bench and jury trial parts, the compliance part, and the specialized court parts. I took extensive notes on courtroom proceedings and case dispositions that I witnessed, asking questions in person and following up with phone calls and short interviews where possible. I conducted semi-structured interviews with assistant district attorneys (ADAs), defense attorneys, judges, and court personnel. In addition, I conducted in-depth interviews with defendants—where possible, following their cases throughout the adjudication process—and I tried to reconstruct their case histories through interviews with their defense attorneys, publicly available court records, and discussions with the defendants themselves.

Much of what we can know about the criminal justice trajectories of those arrested for misdemeanor crimes comes from analyzing official administrative state data, the collection and organization of which is directed by state law, local court rules, and local organizational practices. Therefore, I also present some information about the legal rules and administrative practices governing data keeping in New York City, not merely because such information is salacious and thrilling, but also because these facts shape the outcomes of misdemeanor justice and are essential for understanding how penal techniques produce effects. Furthermore, official record keeping itself tells us about the priorities of states and about how states keep tabs on their subjects.

I also present quantitative data in various forms supplied by state and local government agencies or organizations affiliated with the courts. Much of this information is presented in aggregate form, meaning the unit of analysis is some jurisdictional or spatial aggregation such as a police precinct, a particular borough's Criminal Courts, or all of New York City's Criminal Courts. Sometimes social scientists use the phrase "mere description" in a dismissive way or pass over descriptive tables in quantitative projects as an obligatory but unexciting prelude to regression analysis, where the real explanatory action presumably takes place.

I emphasize these aggregate descriptive tables and charts for several reasons. First, we have heretofore very little sense of what happens in the lower criminal courts of a major urban jurisdiction that has undertaken a radical law enforcement experiment aimed at subfelony crimes. Second, we have little precedent for what *ought* to happen once these arrests arrive at a criminal court charged with determining an appropriate punishment. Little ink has been spilled by philosophers or legal scholars arguing over the just deserts for public urination, turnstile jumping, petit larceny, or even assault where (by definition) the victim incurred no serious physical harm. Much of the academic and public commentary that argued for Broken Windows policing was focused on what police ought to do with low-level offenses, not how courts ought to process these cases.

These descriptive tables therefore provide a valuable picture of large-scale changes in the inputs, processes, and outcomes in the city's lower criminal courts over more than two decades of Broken Windows policing. I also engage this aggregate data alternatively, as something to be explained—that is, why would this law enforcement experiment yield a decrease in criminal convictions when the entire thrust was to get tough with low-level offending—and as a source of explanation—that is, suggesting that we have

to understand what courts are doing in reference to the volume of cases or the composition of cases and defendants. Additionally, the aggregate picture provides an interpretive backdrop to the qualitative data I present throughout the book, such as what proportion of arrests or dispositions a particular illustrative case might be representative of in the universe of misdemeanor justice.

Most quantitative data comes from the New York State Department of Criminal Justice Services (DCJS), the agency charged with collecting and maintaining records from local courts and producing rap sheets.<sup>45</sup> Other figures might come from the Chief Clerk's office of New York City's Criminal Courts, the New York City Criminal Justice Agency, or the New York City Police Department, because these agencies keep different sorts of records that are essential to our story, such as metrics of local court functioning, bail practices and trends, or arrests and complaints in the city's precincts.<sup>46</sup>

In addition to aggregate data, I also analyze unique micro-level data obtained from the New York DCJS. This data set was designed to study the arrest and disposition trajectories of persons entering New York City's misdemeanor justice system at different time periods. One can only reliably track the later criminal justice encounters of a new entrant to misdemeanor justice after he or she experiences a disposition from an arrest that authorizes the DCJS to maintain a person's fingerprints, which are then linked to a stable New York State Identification (NYSID)—the number that connects arrest events to a unique person. Therefore, the selection criteria I adopted identifies two groups of entrants to misdemeanorland without prior criminal convictions who experienced a disposition that allows me to reliably document their later criminal justice encounters: those whose misdemeanor arrest terminated in a special type of conditional dismissal for marijuana cases called a marijuana adjournment in contemplation of dismissal (MJACD) and those whose misdemeanor arrest terminated in a first-time criminal conviction.<sup>47</sup> I selected year-pairs at five-year intervals starting with the earliest year reliable data were available and ending with the last date that would give me three years of post-arrest observations: 1980–81, 1985–86, 1990–91, 1995–96, 2000–2001, 2005–6, and 2010–11. The *MJACD group* tracks the population of misdemeanor arrestees without prior criminal convictions arrested in any of my seven cohort year-pairs whose cases terminated in an adjournment in contemplation of dismissal specific to marijuana offenses. The *first-time misdemeanor conviction group* tracks the population of misdemeanor arrestees in any of my seven cohort year-pairs without prior criminal convictions at the time of the arrest whose cases

terminated in a first-time misdemeanor conviction. This data is described in detail in the statistical appendix linked to on the book's Princeton University Press website, <http://press.princeton.edu/titles/11264.html>.

No single type of data conclusively proves the various claims I advance about misdemeanorland. However, I often try to triangulate my claims by presenting evidence from various sources and of different types—quantitative, legal, ethnographic—that each illuminates a different angle of the issue under discussion. I offer my analysis of these data to advance the study of this massive, yet unduly neglected, component of the criminal justice system in the way social science often advances knowledge—not by establishing a narrow claim with ironclad methods beyond refute, but by engaging a large and complicated question whose explanation lies in not just documenting proximate causes of events, but also in describing the social meaning and logic by which events operate.

## Overview

The first part of this book covers the *what* and the *why*. Chapter 1 sets up the empirical puzzle by explaining the revolution in the intensity and form of policing pioneered by the NYPD in the early 1990s that placed subfelony enforcement at the center of its urban crime-control strategy and generated an influx of court cases into misdemeanorland.

Chapter 2 starts by reviewing what we might expect to happen in response to this flood of cases. Given the received wisdom that lower criminal courts deliver “assembly-line justice,” it would be logical to assume that the increase of misdemeanor cases would result in lots of convictions and jail sentences. This chapter presents descriptive data that show what happened instead: a decline in the rate of criminal conviction and an increase in the rate of dismissal. I propose that a good way to make sense of the disposition trends of the past twenty-five years is to understand that misdemeanor justice in New York City has largely abandoned the adjudicative model of criminal law administration and instead hews more closely to what I call the managerial model, where the criminal process is deployed to figure out the rule-abiding propensities of people and to calibrate formal regulation accordingly.

Chapter 3 explores why criminal court actors turn to using the tools of criminal procedure and criminal law to sort, regulate, test, and manage the populations that flow through misdemeanorland instead of adjudicating individual guilt and innocence. Drawing on organizational and field

theory, I examine those features of misdemeanor justice that allow for the flourishing of a managerial as opposed to adjudicative modality of criminal law administration. The analytic of the field is helpful because it allows us to understand how a pattern of activity and logic of action emerge not just from the formal goals of organizations, but from the structure of constraints actors face in a particular setting and from the precise ways individual and collective actors interact in their daily affairs. The disposition patterns and reliance on marking, procedural hassle, and performance as penal techniques can be understood as a result of creative problem solving in the face of the specific dilemmas and practical circumstances of doing legal work in misdemeanorland in the era of Broken Windows policing.

Part 2 turns to the *how*. If criminal court actors are sorting, testing, and managing defendants over time, then *how* do they do so? Chapter 4 discusses the technique of marking—the generation, maintenance, and regular use of official records for critical decisions about a person’s criminal justice contacts and status determinations about the individual. This chapter explains precisely how marks are created and stored in misdemeanorland and discusses how the practices there differ from those in felonyland. It also presents quantitative evidence about the import of marks in misdemeanor case processing.

Chapter 5 is dedicated to procedural hassle—the degradation of arrest and police custody, the stress and frequency of court appearances, and the opportunity costs incurred in order to make court appearances or to comply with court orders. I show that these experiences are something more than a set of inconvenient burdens that dissuade defendants from pushing adjudication or even a collection of informal means by which judges and prosecutors punish defendants. They can be also a set of active, productive tools in the ongoing relationship of social control that lower courts have with defendant populations.

Chapter 6 analyzes the technique of performance—that set of activities the defendant is instructed by the court or prosecution to undertake and later to present as a successful achievement demonstrating responsibility and governability. I explore a wide range of such tasks—from in-patient drug treatment to community service—and show how these duties are assigned and evaluated as performances revealing the defendant’s character or capacity to be directed by official rules. The unifying logic behind disparate performance activities is evaluating *how* a defendant has executed the act. The technique of performance seeks normalization but does not

## 22 INTRODUCTION

involve constant engagement and supervision: it entails a command and a sanction-backed compliance check.

The final chapter revisits the various types of insights that the study of justice in misdemeanorland offers to our sociological understanding about legal organizations. It also address how meso- and macro-level trends are produced from micro-level conditions. I conclude by arguing that the study of mass misdemeanors—like that of mass incarceration—ultimately points out larger political questions about what role we, as a democratic society, will countenance for criminal justice in establishing social order.