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COOPER-WALSH COLLOQUIUM, LEGITIMACY AND ORDER: ANALYZING POLICE-CITIZEN INTERACTIONS IN THE URBAN LANDSCAPE

Aggregation and Urban Misdemeanors

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KEYWORDS: Law enforcement; misdemeanors; CompuStat

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The urban misdemeanor process relies on a wide variety of informal groupings and aggregations. Order maintenance police arrest large numbers of people based on neighborhood, age, race, and other generalizations. Prosecutors and public defenders resolve entire classes of minor plea bargains based on standard local practices and pricing. Urban courts process hundreds of cases en masse. At each stage, the pressure to aggregate—to treat people and cases by group—weakens and sometimes eliminates individuated scrutiny of defendants and the evidence in their cases; people are largely evaluated, convicted, and punished by category and based on institutional habit. This wholesale process of creating criminal convictions in the aggregate is in deep tension with core precepts of criminal law, most fundamentally the idea that criminal guilt is an individuated concept reflecting the defendant's personal culpability.

This Article traces the influence of different sorts of aggregation through each step of the urban misdemeanor process, demonstrating how that process has effectively abandoned the individuated model of guilt and lost many of the essential characteristics of a classic "criminal" system of legal judgment. It then explores civil scholarship's insights into the substantive power that informal aggregations can exert over liability rules and outcomes, in particular how mass settlement scenarios can generate no-fault liability regimes with high risks of fraud. The Article concludes that the misdemeanor system as it currently stands does not function as a traditional "criminal" system of judgment in large part because aggregation erodes the substantive content of criminal convictions.

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INTRODUCTION

The concept of criminal guilt is fundamentally individuated. The idea that someone is "guilty"—that he or she "committed a crime"—refers inexorably to that particular individual and his or her actions and intentions. Not all criminal legal concepts are individuated in this way. Sentencing categories, CompStat policing, even inferences about probable cause or reasonable suspicion often rest quite properly on categorical reasoning and generalizations about human behavior. But the ultimate determination of personal guilt is special. It constitutes a unique sort of statement about individual action and culpability, the polar opposite of "guilt by association." Likewise, the consequences of a conviction—punishment, stigma, and other

burdens—are justified largely by reference to the notion that a particular criminal offender personally deserves those burdens. In the simplest terms, we are permitted to punish "criminals"—people who have sustained convictions—because getting convicted indicates that a particular person did something that can and should be punished.

Because of the individualized nature of the underlying concept of criminal liability, the basic rules and procedures by which liability is imposed are themselves strongly individuated. They are designed, at least in theory, to ensure that convictions properly attach to the individuals who actually committed particular crimes. In effect, the demand for individualized evidence and individuated proceedings reflects a deeper understanding that the ultimate decision to impose legal guilt is particular to that defendant and therefore requires an individuated path.

In the massive world of petty offense processing, that fundamental commitment to individuation has eroded. The urban misdemeanor system in particular is permeated by various forms of aggregation and group-based processing. More than any other area of the criminal system, misdemeanor defendants are identified, processed, convicted, and punished in large numbers based on generalized characteristics through procedures that are insensitive to individual evidence or circumstances. Some of these "aggregations" take place during policing; others take place during the mass adjudication process. At each stage, the sheer scale and institutional habits of the urban petty offense system put immense pressure on decision-makers to forgo individualized considerations. The resulting decisions are thus unmoored from individuated evidence and made without the particularized scrutiny promised by bedrock due process norms.

The aggregations of the urban misdemeanor system are informal, often institutionally based, and take different forms. For example, order maintenance policing often involves the arrest of groups of people driven by aggregate generalizations about age, neighborhood, and race. Later in the process, overworked public defenders typically advise clients to accept pleas based on aggregate criteria such as the "market price" for that offense in that jurisdiction, rather than the individual evidence or characteristics of that particular defendant. Bail is often set based on a schedule; punishments are standardized to the offense rather than the offender. While the aggregating or non-individualistic tendencies at each stage may appear tolerable for that particular decision-maker, or tempered by the possibility of later individuated consideration, taken together the aggregate tendencies

swamp the whole. As a result, the misdemeanor process is dominated by group inferences and aggregate institutional habits, and only weakly tied to the sorts of individuated demands for evidence and process that assure the validity of criminal convictions.

As a result of these various aggregating tendencies, the urban misdemeanor process is in tension with many core legitimating features of the criminal process itself. Most fundamentally, misdemeanor processing is lackadaisical about individual guilt, i.e., the idea that criminal liability with its personal stigma and social consequences can only attach to individuals, not to groups, and that liability should be based on actus reus and mens rea, i.e., what individuals do and intend. Instead, the process tends to select and convict people en masse without the standard procedural checks that ask whether individual defendants actually did what they are accused of doing. Accordingly, these aggregating tendencies are not merely procedural flaws but conceptual game-changers: taken together they call into question whether the urban petty offense system actually selects and adjudicates guilt based on individual criminal culpability. While there is no precise moment when the process declares guilt based on group membership, the collective effects of aggregation drive the process in that direction. At its worst, these aggregating tendencies indicate that, in an important sense, the urban misdemeanor system does not behave in the individuated ways that a "criminal system," with all its moral and punitive power, is supposed to behave in order to wield the unique authority of criminal justice.

The criminal discourse does not openly acknowledge the formative influence of aggregation on misdemeanors. This is in part because the petty offense process is rarely conceptualized as a unified whole. Instead, each stage—especially urban policing—tends to get scrutinized on its own terms with limited reference to what happens at other stages in the process. For example, there is a robust literature on the racially skewed, indiscriminate sweeping quality of urban policing processes such as order maintenance and zero tolerance. A different scholarship criticizes the mass processing of urban petty offenders by overburdened and under-resourced public defender offices. The full picture, however, is even more troubling than the individual critiques. Because each stage tolerates decisions made in the aggregate based on generalizations, earlier aggregations slip through and are reinforced by later ones. Not only does adjudication neglect to check the overly generalized decisions made during investigation, it permits new aggregations to leave their mark.

Perhaps more fundamentally, the criminal discourse fails to acknowledge the force of its own aggregating tendencies because they are forbidden. At rock bottom, it is illegitimate to impose criminal convictions in the aggregate, and so traditional doctrines and frameworks do not accommodate such descriptions. Not so in the civil literature. Because civil law makes room for formal aggregations such as class actions and multidistrict litigation, the scholarship has better analytic tools to recognize the impact of informal aggregations that occur without legal or judicial imprimatur.[1]

In particular, the civil literature offers two insights into the substantive effects of informal aggregation that have surprising resonance in the misdemeanor context. The first is the recognition that an individual aggregator—such as a large well-resourced plaintiff or prosecutor's office—can shape the litigation process to impose enormous pressure to settle on small dispersed parties who lack resources and incentives to contest small claims. In effect, the power to informally aggregate others is a form of socio-legal authority. Second, the mass settlement environment can create an informal "no-fault" regime in which liability is presumed once an allegation of injury (or in the criminal arena, guilt) has been made. Where centralized bureaucracies are formally adversarial (large plaintiff law firms versus insurance companies, prosecutorial versus public defender offices) but in fact have strong institutional understandings that cases will settle as a matter of generic routine, it erodes substantive liability requirements. In other words, informal institutional aggregations can actually change the operative content of the law.[2]

The purpose of this Article is to explore the effects of aggregation in the criminal law, and the misdemeanor process in particular, with respect to the foundational question of personal guilt. It identifies urban misdemeanors as the most extreme expression of the system's tendency to answer the question of criminal guilt in the aggregate and, in turn, identifies aggregation as a key feature of what is problematic about urban policing and the generation of petty convictions. It is the second article in a series exploring the significance of the misdemeanor process for the U.S. criminal system a whole.[3]

1. *See infra* Part IV.

2. *See infra* Part IV.

3. The first article describes the misdemeanor process and its deviations from core principles of criminal justice including due process, evidence-based accuracy,

Part I articulates the structural, legitimating role of individuation in criminal convictions. It describes how philosophical commitments to individuation are intimately tied both to notions of rule-of-law and to the democratic state's moral authority to punish. It then identifies concrete rules and mechanisms by which the criminal system enforces this individuation commitment and traces the specifics of how they ensure individuated outcomes. It is precisely such rules and mechanisms that erode or go unenforced in the misdemeanor context, effectively permitting aggregate decision making without formal acknowledgement or validation.

Part II conceptualizes "informal aggregation" as a set of decisional tendencies that quietly erode individualizing procedures and commitments central to the criminal process. While aggregation takes different forms at various stages of the criminal process, some versions are conceptually more pernicious than others. Moreover, while informal aggregations exist throughout the system, they do not affect outcomes in the same way. At the top of the penal hierarchy, where cases are serious and/or well-litigated, defendants can insist on countervailing individualizing procedures and escape the influence of aggregate tendencies. At the bottom, by contrast, the mass adjudication of hundreds of thousands of petty offenses and poor defendants precludes such rigor.[4] Here, aggregation tendencies collectively overwhelm the individualized ideal.

Part III zeroes in on the specific aggregating tendencies of each stage of the petty criminal process—from policing to bail to prosecutorial screening, defense counsel, plea bargaining, and the lower courts. This examination reveals the concrete mechanisms by which each step of the misdemeanor system contributes to the erosion of individualized treatment and ultimately permits convictions to be produced in the aggregate.

Part IV turns to the civil area in which the effects of informal aggregation are more widely acknowledged. It focuses on two

and racial neutrality. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) [hereinafter Natapoff, *Misdemeanors*]. A third article describes the limited power of misdemeanor defense counsel to ensure fair outcomes in light of the structural imbalances of the misdemeanor process. *See* Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) [hereinafter Natapoff, *Gideon Skepticism*].

4. For a conceptualization of the criminal system as a pyramid in which legality wanes towards the bottom, see Alexandra Natapoff, The Penal Pyramid: Linking Criminal Theory and Social Practice (n.d.) (unpublished manuscript) (draft on file with author).

examples—high volume law suits against file sharers and other small, widely dispersed defendants, and so-called tort "settlement mills"—that reveal the substantive impact that informal aggregation can have on case outcomes and the meaning of liability schemes.

Part V contends that pervasive informal aggregation undermines the claim that the urban misdemeanor process is entitled to the moral and penal authority wielded by authentically "criminal" processes. This Part offers several ways of conceptualizing urban misdemeanors—as expressions of Herbert Packer's "crime control" model, for example, or as a live example of "actuarial" justice.[5] It concludes that aggregation is a prime contributor to the urban criminal system's loss of legitimacy, both theoretically and in the eyes of its own subjects.

To be clear, aggregation is not the sole flaw of the urban misdemeanor process. It may not even be the worst. Even if every misdemeanant were to receive fully individuated consideration, the petty offense system would still criminalize conduct that arguably should not be criminal in the first place. It would still shift vast discretionary authority to the police, and it would likely still impose its heaviest burdens on socially vulnerable populations. Moreover, aggregation is not unique to misdemeanors, since every arena of criminal justice must grapple in its own way with the tension between the ideals of individuation and the reality of bureaucratic generalizations. Nevertheless, the concept of aggregation captures a large swath of what ails the urban misdemeanor process. It elucidates the system's indifference to evidentiary accuracy, its class and racial skew, and the dehumanization of assembly line processing. Aggregation thus provides a powerful conceptual lens through which to understand and critique one of the largest and most dysfunctional segments of the American criminal process.

I. THE ANTI-AGGREGATION PRINCIPLE IN CRIMINAL LAW

Aggregation is anathema to the traditional concept of criminal guilt. At its core, criminal law is about evidence of personal culpability—whether a particular individual committed a particular crime and therefore can be legitimately punished—an inquiry that by its nature must take place person by person. As Justice Frankfurter once put it, "[t]he administration of law, particularly that of the criminal law, normally operates in an environment that is not

5. *See infra* Part V.

universal or even general but individual."[6] Criminal jurisprudence revolves largely around individuated notions of personal culpability, free will, and liberty. Central tenets of criminal law are devoted to ensuring both substantive and procedural individuation: defendants are entitled both to a substantive evidentiary basis for finding guilt under law, and procedures that ensure that they are evaluated and adjudicated on the merits of their specific cases.[7] To a more limited extent, they are also entitled to be treated as individual people, with unique histories and desires that inform their personal choices about how to handle their own criminal cases. This is not to say that criminal law claims to be free of heuristics and group-based generalizations: it is riddled with them as are all human cognitive endeavors.[8] But in the main, criminal law and theory strain mightily to reduce the impact of such reasoning and to keep questions of guilt firmly rooted in individuated scenarios of evidence and procedure.

A. Theoretical Commitments to Individuation

Classic criminal theory revolves around three interrelated concerns: moral culpability, free will, and the punitive authority of the state.[9] Each of these concepts is keyed to various aspects of individualism. To the extent that a person commits a crime worthy of moral condemnation, and does so as a product of his free will (for example, by intentionally committing a voluntary act), the state is entitled to punish him. Conversely, unless that person has done something to deserve and warrant punishment, the state lacks moral

6. Pennekamp v. Florida, 328 U.S. 331, 366 (1946) (Frankfurter, J., concurring).

7. *See, e.g.*, Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 44 (2012) ("If there are several defendants accused of committing several crimes, none of them will be convicted even if statistically each of them probably committed some of the crimes."). Porat and Posner assume that what they call "cross-person aggregation"—in effect statistical guilt-by-association—does not occur in criminal law, although in some sense this is precisely the result of procedural aggregation in the misdemeanor context.

8. *See generally* DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012) (documenting how prosecutors experience professional incentives and psychological pressures that contribute to wrongful convictions); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012) (arguing that investigative and adjudicative processes are often inaccurate due to widespread cognitive flaws in police and legal decision making).

9. *See, e.g.*, Gideon Yaffe, *"The* Government *Beguiled Me": The Entrapment Defense and the Problem of Private Entrapment*, 1 J. ETHICS & SOC. PHIL. 2, 5 (2005) (discussing conceptual relationships between moral action, free choice, and government conduct).

and political authority to move against him, at least in a democratic state committed to liberal values of individual liberty and autonomy.[10] Indeed, the central proffered justifications for the penal process—retributivism, deterrence, rehabilitation, incapacitation[11]—assume the existence of an individual agent who can be morally judged, psychologically deterred, behaviorally rehabilitated, or at the very least forcibly prevented from reoffending.[12]

More formally, the concept of individuated decision—making and the application of rules to particular facts is a central feature of rule-of-law. Particularized decision—making is the opposite of "guilt by association," condemnation based on status, and other generalizations forbidden by criminal law. As Frederick Schauer put it,

> [T]o make decisions on the basis of the characteristics of particular events or particular individuals, rather than on the basis of the characteristics of the groups or classes of which the particulars may be members, is often thought to be a moral imperative. Indeed, it is often thought to define the concept of justice . . . .[13]

By contrast, collective punishment has few philosophical defenders.[14] It finds its strongest support in connection with atypical

10. Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 313–14 (2004) ("If the idea of a liberal democracy means anything, it means a commitment to what we can think of as the 'baseline' liberal democratic values: individual liberty, dignity, and bodily integrity; limited government; the primacy and sovereignty of the individual; and the entitlement of all citizens to equal consideration and respect.").

11. Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1204 (2012).

12. By contrast, as an empirical matter, sociological analyses often describe the criminal process as dissociated from these classic normative justifications and more concerned with matters of group identification and control. These descriptive assertions are discussed *infra* in Part V.

13. FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 19–20 (2003). Schauer himself rejects this classic formulation, arguing that there is nothing morally sacrosanct about the individual or the particular. In his view, all legal reasoning is in essence a form of actuarial reasoning, and under certain circumstances such reasoning can be sufficiently accurate and rigorous to legitimately support criminal liability. *Id.* at 18–19, 22–23.

14. *Compare* Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 349 (2003) (providing a "functional defense" of collective sanctions and arguing that "collective sanctions might be justified as an indirect way of controlling individual wrongdoers"), *with* M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 373 (2011) (characterizing collective punishment as a violation of international human rights law).

scenarios and offenses such as blood feuds,[15] conspiracy,[16] and war crimes,[17] although even conspiracy requires some individualized culpability.[18] In the main, criminal jurisprudence is firmly rooted in what Chris Kutz calls the "solipsism of the individualistic conception" of personal accountability and criminal guilt.[19]

B. Substantive Individuation in Criminal Law

This theoretical commitment to individuation is instantiated in core substantive criminal rules and procedures. Perhaps the most obvious is the mens rea requirement itself, the demand that in all but a handful of cases, criminal guilt requires inquiry into what the defendant subjectively, actually intended at the time of the offense.[20] The idea that a person's criminal culpability turns on the exercise of their free will, their decisional capacities, and their knowledge of consequences, is the ultimate commitment to individuation.[21]

Although we don't always think about it this way, the requirement of evidence is also a commitment to individuation. Evidence is how we know a particular person committed a particular crime. It is evidence that permits the application of general rules to specific

15. Levinson, *supra* note 14, at 352–54.

16. For example, Christopher Kutz's philosophy of complicity would expand the classic individualistic conception of accountability to include a "relational and positional conception" in which an individual's culpability would be evaluated in part by reference to his relations to others. CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 10 (2000).

17. *See, e.g.*, Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 570–71 (2005) (arguing that "[t]he group element to certain international crimes, especially genocide . . . is central to the offense," and therefore "international criminal law's formal predicate of avoiding collective guilt may need to be revisited").

18. *See* United States v. Garcia, 151 F.3d 1243, 1245–46 (9th Cir. 1998) (defendant's membership in violent gang and participation in group assault was insufficient to establish crime of conspiracy and would "smack of guilt by association").

19. KUTZ, *supra* note 16, at 5.

20. *See, e.g.*, MODEL PENAL CODE § 2.02 (2011) (imposing a mens rea requirement on all but a small category of offenses).

21. *See, e.g.*, Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. PUB. POL'Y 51 (2003). The notion that people have free will separate and apart from their social contexts is, of course, a long-contested proposition. *See* Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 PSYCHOL. PUB. POL'Y & L. 3, 17–19 (2002) (arguing that traditional criminal concepts of free will and autonomy are outdated in light of modern psychological contextualism).

cases, the driving dynamic of rule of law itself.[22] Without evidence, there is no reason to think any particular person is guilty of a crime and therefore no basis for attributing liability to them.

Criminal law varies its demand for evidentiary individuation depending on the nature of the legal conclusion to be drawn.[23] A Terry stop requires individuation, but only in the form of evidence amounting to reasonable suspicion;[24] probable cause requires "particularized" evidence rendering it probable that a crime has been committed;[25] by contrast, a conviction at trial requires certainty beyond a reasonable doubt that a particular person committed a particular crime.[26] By adjusting the demand for individuated evidence, the law signals the extent to which the law will or will not tolerate the classic aggregative move of imposing "guilt by association."[27] It also signals the robustness of the legal conclusions about individual guilt that can be drawn at any given stage of the process, the most important being the conclusion that the person is eligible not merely for a stop or arrest but an actual conviction.

C. Procedural Individuation

Criminal procedure provides the concrete mechanisms by which we enforce our theoretical commitment to substantive individuation. Numerous criminal procedural rules are aimed at generating individuated answers to key questions: Did *this* defendant actually do it? Did *this* defendant know what his rights were? Were *this* defendant's personal choices honored? Doctrinally speaking, the

22. Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1501, 1538 (2001) (describing the law of evidence as those rules designed to "increase the frequency with which truth [about guilt] is ascertained" and arguing that this "veritistic" question "is the question all evidence scholarship should be asking"); *see also* Harris v. United States, 404 U.S. 1232, 1233 (1971) ("It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process.").

23. I have written more extensively about the relationship between guilt, evidence, and informational rules in *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965 (2008).

24. Terry v. Ohio, 392 U.S. 1, 26 (1968).

25. Ybarra v. Illinois, 444 U.S. 85, 91 (1979).

26. *In re* Winship, 397 U.S. 358, 358 (1970).

27. *Compare Ybarra*, 444 U.S. at 91 (known drug activity in bar was insufficiently individuated evidence to support probable cause with respect to bar patron), *with* Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (police could consider defendant's presence in high crime neighborhood in finding reasonable suspicion).

individuation requirement takes a number of forms, perhaps the most dramatic being the individual's right to represent himself. As the Court famously put it in *Faretta*,

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'[28]

For defendants who do not represent themselves, defense counsel is the primary agent of individuation, the mechanism by which each defendant gets a fair and accurate adjudication with respect to *him*. Indeed, in 1972 when the Supreme Court insisted on the right to counsel for misdemeanants, it was motivated to do so in part to counter the aggregating tendencies of mass misdemeanor processing, where "[s]uddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous."[29]

The defendant's right to counsel itself is personal and individuated in a number of ways. Counsel's duties of loyalty, confidentiality, and competence run to the individual defendant.[30] The defendant owns them, even after his death,[31] and the attorney's employer cannot interfere with them.[32] Even attorneys for future defendants lack standing to enforce the defendants' rights until their clients actually retain them.[33]

Of particular importance in the misdemeanor context is the personal, individuated nature of the trial waiver. Because the

28. Faretta v. California, 422 U.S. 806, 819 (1975).

29. Argersinger v. Hamlin, 407 U.S. 25, 35 (1972) (quoting Dean Edward Barrett).

30. United States v. Smith, 454 F.3d 707, 713 (7th Cir. 2006) (attorney-client privilege is personal and belongs solely to the client and cannot be asserted by anyone else); Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993) (attorney lacked standing to assert Sixth Amendment challenge to statute because the right to effective counsel is personal to criminal defendants).

31. Swidler & Berlin v. United States, 524 U.S. 399 (1998) (attorney-client privilege survives death of client).

32. Polk County v. Dodson, 454 U.S. 312, 321–22 (1981) (public defender's loyalties ran to client, not to the Public Defender's Office, and therefore defender was not acting under color of law for the purposes of § 1983).

33. Kowalski v. Tesmer, 543 U.S. 125 (2004) (appellate attorneys lacked standing to challenge law denying defendants appellate counsel until they had actual clients).

misdemeanor system runs largely on pleas, as does the criminal system more generally,[34] the extent to which waivers reflect individual knowledge, choice, and culpability is crucial to the overall legitimacy of the process. Waivers must be "intentional,"[35] meaning that the individual defendant must subjectively intend to plead.[36] The Supreme Court has held that the decision to plead guilty is personal to the defendant; like the waiver of counsel, it requires his "express personal consent" and no one else can do it for him.[37] At the outer limit, a defendant who denies culpability may still choose to plead, but even here the defendant personally makes the decision in light of his options and desires.[38] This insistence that waiver is something only a defendant can personally choose keeps the plea system anchored in individuation: it embodies the idea that each and every defendant who pleads is still being treated as a unique individual on the merits of his or her case.

D. Aggregation at Sentencing

These core commitments to individuation have generated a robust debate in the area of sentencing, particularly with respect to the advent of sentencing guidelines. On the one hand, at least in theory, the imposition of punishment is a highly individuated process. As the Court recently put it, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[39] On the other hand, determinate sentencing is a form of aggregation: the categorical determination of

34. Between 90–95% of felony convictions are the result of a guilty plea. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURT, 2006—STATISTICAL TABLES (2009), *available at* http://www.bjs.gov/content/pub/pdf/fssc06st.pdf; *see also* HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 3 (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (99.6% of misdemeanants plead guilty).

35. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

36. Brookhart v. Janis, 384 U.S. 1, 7 (1966) (invalidating plea because defendant's statements indicated that he lacked intent to waive trial).

37. Gonzalez v. United States, 553 U.S. 242, 247–48 (2008) (contrasting trial waivers with consent to have a magistrate judge preside over voir dire, to which defense counsel can agree without the defendant's personal consent).

38. North Carolina v. Alford, 400 U.S. 25, 32, 37–38 (1970) (emphasizing Alford's personal "view," "desire" and "choice" to plead guilty).

39. Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

punishment based on offense category and criminal history insensitive to defendants' individuated characteristics.[40] Years ago, Albert Alschuler mourned this trend towards aggregation, arguing that "the movement from individualized to aggregated sentences . . . has marked a backward step in the search for just criminal punishments."[41] He maintained further that:

> Increased aggregation seems characteristic of current legal and social thought, and what I have called "the bottom-line collectivist-empirical mentality" now seems to threaten traditional concepts of individual worth and entitlement. Commentators speak misleadingly of "group rights." Judges determine the scope of legal rules, not by examining the circumstances of individual cases, but by speculating about the customary behavior of large groups.[42]

Sentencing law also varies its demand for individuation depending on the seriousness of the offense. Not surprisingly, individuation requirements are highest in death penalty doctrine. "In capital cases, the Constitution demands that the punishment be tailored both to the nature of the crime itself and to the defendant's 'personal responsibility and moral guilt.'"[43] To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual . . . ."[44] In capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[45] Indeed, when the Court invalidated the death penalty with respect to defendants who committed offenses when they were minors, Justice O'Connor dissented, arguing that a flat rule based on age was inconsistent with the precept that "[t]he criminal justice system . . . provides for individualized consideration of each defendant."[46]

40. SCHAUER, *supra* note 13, at 257 ("The Sentencing Guidelines stand as a repudiation of this particularistic understanding of the nature of law [and] represent a triumph of generalization over individuation.").

41. Albert Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902 (1991).

42. *Id.* at 904.

43. Roper v. Simmons, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting) (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

44. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).

45. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

46. *Roper*, 543 U.S. at 620 (O'Connor, J., dissenting).

Categorical sentencing is constitutionally permissible in non-capital cases,[47] and with respect to these cases the Court has held that lighter punishments require less individuation. This linkage is embodied in the rule of *Scott v. Illinois*, in which the Court held that misdemeanor defendants who are not sentenced to prison are not entitled to counsel.[48] Because counsel is the primary guarantor of accuracy and individuation,[49] *Scott* effectively approved reduced individuation where there is minimal punishment.

E. Permissible Procedural Aggregation

In addition to sentencing, criminal law tolerates a variety of procedural forms of aggregation with respect to non-guilt issues. Brandon Garrett catalogues these to include the appointment of special masters to investigate repeated forensic fraud, aggregate examinations of death penalty convictions for racial disparities, aggregate claims of insufficient defense representation, and consolidated federal habeas corpus petitions.[50] Garrett argues that such procedural case aggregations can improve accuracy and justice, and he advocates for a greater role for aggregate decision making. Importantly, Garrett makes clear that he is addressing procedural aggregation on "limited issues—criminal procedural rights distinct from individual questions of guilt . . . ."[51] With the exception of group crimes, Garrett agrees that aggregation is never appropriate on the underlying question of criminal liability and that guilt determinations "must be highly individualized."[52]

Similarly, Adam Zimmerman and David Jaros argue for greater procedural aggregation at sentencing in large-scale fraud and environmental criminal cases with numerous victims.[53] In such cases, prosecutors in effect preside over something akin to a "criminal class action," in which a victim class seeks damages—in the form of

47. *Woodson*, 428 U.S. at 304 (noting that individuation in non-capital cases reflects "simply enlightened policy rather than a constitutional imperative").

48. Scott v. Illinois, 440 U.S. 367 (1979).

49. *See* Alabama v. Shelton, 535 U.S. 654, 665 (2002) (deeming "conviction [to be] credited as reliable because the defendant had access to the 'guiding hand of counsel'" (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (1972))).

50. Brandon Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383 (2007).

51. *Id.* at 387.

52. *Id.* at 394.

53. Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011).

restitution—from a single defendant.[54] Like Garrett, Zimmerman and Jaros skirt the question of aggregation on liability issues, maintaining only that the sentencing process in these types of cases should be more responsive to the needs of the victim class.

In sum, there is limited conceptual room for aggregation in the criminal system. It exists in various forms at sentencing, and in connection with procedures that address non-liability issues such as forensic accuracy or widespread rights violations. On the core issue of criminal guilt, however, the universally accepted position is that aggregation is impermissible. The remainder of this Article explores how, despite this bedrock view, the urban misdemeanor process effectively imposes convictions in the aggregate by permitting the erosion and evasion of individuating rules and procedures.

II. INFORMAL AGGREGATION

The informal aggregations of the criminal system come in many flavors and go by many names, from "actuarial"[55] policing to racial profiling, "meet 'em and plead 'em" lawyering, categorical sentencing, and the catch-all, "assembly line justice."[56] They tend to render substantive decisions based on categorical generalizations or institutional policies in ways that sideline individual defendant characteristics, the most important being the factual question of whether that particular defendant actually committed a particular crime.[57] Some aggregations represent valid forms of decision making

54. Zimmerman and Jaros argue that victims in these classes are currently underserved by the lack of formal aggregation at the sentencing stage, and that they deserve similar sorts of representation and oversight protections that their civil counterparts receive in a formal class action setting. *Id.* at 398–99.

55. *See generally* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING AND PUNISHING IN AN ACTUARIAL AGE (2007) ("[P]rediction instruments increasingly determine individual outcomes in our policing, law enforcement, and punishment practices."); *see also* Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, *in* THE FUTURES OF CRIMINOLOGY 173 (1994) (describing actuarial justice as "concerned with techniques for identifying, classifying and managing groups" and contrasting it with the "Old Penology [that] is rooted in a concern for individuals, and preoccupied with such concepts as guilt").

56. Argersinger v. Hamlin, 407 U.S. 25, 36 (1972).

57. As Harcourt points out, all decisionmaking is categorical in the broadest sense that all conclusions require an inferential step. HARCOURT, *supra* note 55, at 18 (quoting Lawrence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1330 n.2 (1971)) ("[A]ll factual evidence is ultimately 'statistical,' and all legal proof ultimately 'probabilistic,' in the epistemological sense that no conclusion can ever be drawn from empirical data

in their own right; some are illegal.[58] They are informal in the sense that the groupings are not created or validated by law or judicial order; unlike a civil class action, there is no legally binding effect on other class members.[59] Rather, they are decisional tendencies that have come to characterize the petty criminal process in lasting and predictable ways. They stem from a wide variety of sources, from public policies like order maintenance policing to the institutional pressures on public defense offices to resolve heavy caseloads.[60] Many of them are well-known features of the misdemeanor process. But because they are not formal rules that bind defendants as a class, they are rarely conceptualized as triggering the doctrinal and functional problems of class-based legal decision making.[61]

In theory, the criminal process has numerous individuating procedures and opportunities that serve as antidotes to informal aggregation. A prosecutor screens police arrest decisions before filing charges to ensure that the particular defendant warrants prosecution.[62] Defense lawyers not only evaluate cases but also create individual relationships with defendants to ensure that they understand their own cases and that their decisions are honored.[63] Courts provide individual hearings—plea colloquies to establish knowing and voluntary pleas, or trials to establish factual guilt. The defendant himself has opportunities to express his individuality: to confer with a lawyer unfettered by conflicts; to testify at trial; to confront the witnesses against him; to knowingly and intelligently

without some step of inductive inference—even if only an inference that things are usually what they are perceived to be." (internal quotation marks omitted)).

58. *See* SCHAUER, *supra* note 13, at 176–79 (distinguishing permissible from impermissible racial profiling).

59. *Cf.* FED. R. CIV. P. 23(a) (authorizing class actions with binding effects on class members).

60. *See, e.g.*, ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009); J.D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 20–36 (Erik Luna & Marianne Wade eds., 2011); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282 (2011).

61. *E.g.*, Garrett, *supra* note 50, at 396 (distinguishing institutional practices from formal aggregation and calling them "institutional systemization").

62. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31–32 (2002).

63. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1469–75 (2005) (describing counsel's various functions).

consent to a plea; to allocute at sentencing; and to self-represent.[64] To be sure, aggregating features may influence each of these stages: generic prosecutorial policies, defense lack of resources, pressures on defendants to plead. But the mere existence of some aggregation or generalization is not lethal. The ideal is procedurally constructed to counter those tendencies and to provide a variety of individuating guarantees that the case is being decided on the evidence and in ways that the particular defendant understands and chooses.

The misdemeanor system, however, has largely abandoned the individuated ideal. The scale of misdemeanor dockets in conjunction with their speed and lack of adversarial resources make aggregation the norm. While even serious cases and well-resourced defendants are affected by aggregation,[65] those cases typically receive higher levels of scrutiny and greater adherence to individuating procedures. Such cases can thus be decided more closely to the merits and according to law, indulging in what Lawrence Friedman once referred to as the "luxury of slow, individuated justice."[66] By contrast, misdemeanors comprise the massive bottom of a penal pyramid where cases are processed quickly, in bulk, and where aggregation tendencies dominate.[67]

William Stuntz made a similar point about the variable and hierarchical effect of law itself: "For crimes at the top of the severity scale, law defines both criminal liability and punishment;" for less serious offenses at the bottom, prosecutorial overcharging and bargaining are the real drivers.[68] In the same way, for the most serious cases and the best-resourced defendants, we see the individuation ideal at its strongest: cases are scrutinized on the merits one by one, criminal procedures are honored, and what defendants know and choose can actually affect case outcomes.[69] Duke lacrosse

64. *See supra* Part I.

65. Perhaps most famously by the impact of racial reasoning. *See* McCleskey v. Kemp, 481 U.S. 279, 308 (1987) (acknowledging Baldus study documenting the influence of race in capital case outcomes).

66. Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 792 (1967) (distinguishing between clear cut rules of general application and discretionary rules that require specific factfinding).

67. Natapoff, *supra* note 4.

68. William Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2564 (2004).

69. *See, e.g.*, ALAN DERSHOWITZ, REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE (Touchstone 1997) (describing the anatomy of this well-litigated murder case). Of course, even the most serious cases can be affected by categorical approaches. *See* MEDWED, *supra* note 8, at 22–25 (describing

player Reade Seligmann, whose high-powered defense team exonerated him from rape allegations, acknowledged his privileged spot at the top of that pyramid: "This entire experience has opened my eyes up to a tragic world of injustice I never knew existed . . . . If police officers and a district attorney can systematically railroad us with absolutely no evidence whatsoever, I can't imagine what they'd do to people who do not have the resources to defend themselves."[70]

Because generalized policies and aggregations dominate the misdemeanor system at each stage, commitments to individuation are repetitively weakened as defendants move through the process. The aggregate processing habits of prosecutors and public defenders reinforce group-based decision making peculiar to policing. Mass court processes validate and reinforce cookie-cutter plea bargaining.[71] By the end, when defendants are legally convicted, there may have been little or no individuated basis for that pronouncement of guilt. The next Part surveys the mechanics of that process, briefly examining each stage of the misdemeanor system to identify its aggregative characteristics and their potential effects on resulting convictions.

III. INFORMAL AGGREGATION IN THE URBAN MISDEMEANOR PROCESS

A. Policing

The police decision to stop and/or arrest a person is the threshold selection function of the criminal process. It is increasingly clear that urban police often make such decisions based not on evidence of individual criminal behavior, but rather on group characteristics and location. The aggregations are iterative: the aggregate qualities of stop and frisk policies have ripple effects on the arrest process, and the arrest process itself is heavily shaped by generalized decision making.

prosecutorial overreliance on police and institutional tunnel vision that leads to wrongful convictions).

70. Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES (Apr. 12, 2007), http://www.nytimes.com/2007/04/02/us/12duke.html.

71. *See* Natapoff, *Misdemeanors*, *supra* note 3, at 1331–47 (describing misdemeanor process).

1. Aggregation in Stops

The so-called "stop and frisk" phenomenon has become infamous for its aggregate qualities, particularly with respect to race. In New York, the number of stops of young black men citywide in 2011 actually exceeded the total number of young black men in the city (168,126 as compared to 158,406).[72] In Brownsville—a high-crime, largely African American neighborhood in Brooklyn—the phenomenon is even more intense. In an area that is approximately eight blocks wide with 14,000 residents, police made 52,000 stops in Brownsville between 2006 and 2010, which amounted to nearly one stop per year for each resident.[73] Accordingly, living in Brownsville, or being a young black male in New York, has become a salient grouping mechanism triggering the likelihood of police action.

Such practices that sweep entire groups of people into the criminal process are widely understood as class-wide policies that are not centrally driven by individuated considerations.[74] Bernard Harcourt and Tracey Meares explain that this is in some ways inevitable because suspicion itself is a "probabilistic concept" that is almost always generated by "group-based-type behavior":[75]

> For the most part, suspicion attaches to group-based traits, conditions, and behaviors; the police identify sets of individuals with motives, individuals who match a drug-courier profile, individuals

72. N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011, at 7 (2012), *available at* http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

> While black and Latino males between the ages of 14 and 24 account for only 4.7 percent of the city's population, they accounted for 41.6 percent of those stopped [in 2011]. By contrast, white males between the ages 14 and 24 make up 2 percent of the city's population but accounted for 3.8 percent of stops.

Id.

73. Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/2010/07/12/nyregion/12frisk.html (documenting police stop rate of 93 stops per 100 residents, as compared to a 7:100 stop rate in the rest of the city).

74. *See* Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages ¶¶ 2–3, Floyd v. City of New York, 813 F. Supp. 2d 417 (S.D.N.Y. Oct. 20, 2008) (No. 08 Civ. 01034) (civil rights class action alleging that the NYPD practice of stopping and frisking predominantly African American and Latino young men is illegal for lack of reasonable suspicion and because it is motivated by race).

75. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 811 (2011).

> who fit an eye-witness description, individuals who are in a specific location, or individuals who have the same blood type.[76]

This fact—that all inferences involve aggregate generalizations—has manifested in order maintenance policing in a particularly destructive way. As Harcourt and Meares put it, the "aggregation of [demography and geography] helps to 'race' crime in a particular way,"[77] such that young black men in cities all over the country automatically trigger "suspicion."[78]

Of course, police are not permitted by law to stop entire classes of people without evidence,[79] and these stops are typically justified by individuated-sounding criteria. The actual reasons that New York police assert for stopping individuals, however, are themselves heavily dominated by generalized categories including time of day, high-crime location, and "furtive movements."[80] Such criteria are not themselves unique characteristics of criminal actors. Instead, they are widely applicable, facially innocent criteria that could apply to almost anyone in those neighborhoods.[81] Accordingly, even when police articulate such reasons above and beyond mere racial and neighborhood profiling, they are still effectively pursuing a class-wide policy because those reasons are not themselves individuated. In this way, the generalized nature of the selection criteria permits an aggregate policy to masquerade as an individualized one.

2. Aggregation in Arrests

Arrests require more evidence than stops, and it is often assumed that while stops may be made in the aggregate, the decision to arrest is individuated to the suspect based on evidence of crime. The idea is that while police might stop and frisk based on race and neighborhood, they wouldn't actually arrest someone if he hadn't

76. *Id.* at 813.

77. *Id.* at 854.

78. *Id.* at 858–59.

79. Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

80. *Most Frequently Listed Reasons for Stops: Citywide, Jan. 1, 2006–Dec. 31, 2006*, N.Y. CIVIL LIBERTIES UNION, http://www.nyclu.org/files/2006_Top_Five_Reasons.pdf (last visited May 13, 2013).

81. Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 595 (2010), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2010.01190.x/pdf (noting that in New York "only about 20 percent of all stops are based on specific subject descriptions").

done something wrong.[82] In this way, the demographic and geographic aggregations of the stop-and-frisk phenomenon are thought to be cured by the heightened evidentiary standards of the arrest process.

Three pending civil rights lawsuits in New York illustrate the fallacy of that assumption. In *Stinson v. City of New York*, plaintiffs allege a departmental practice of issuing summons without probable cause, driven by an NYPD quota requirement.[83] In *Gomez-Garcia v. New York City Police Department*, plaintiffs challenge the NYPD practice of making a full custodial arrest for marijuana possession when New York law requires that individuals possessing less than twenty-five grams of marijuana be issued a Desk Appearance Ticket, akin to a traffic ticket.[84] In *Davis v. City of New York*, plaintiffs challenge the legality of the NYPD policy of stopping and arresting public housing residents for trespassing.[85]

Each of these lawsuits describes a policy that calls into question the individuated evidentiary validity of arrests. Or to put it another way, they challenge the assumption that arrests are actually based on probable cause that the individual arrestee committed a crime, suggesting that arrests are in fact driven by many of the same aggregating tendencies as the stop and frisk process. *Stinson* is the most direct, alleging that police simply issue summons without probable cause in order to meet a departmental arrest quota.[86] Their proof lies in the high rate of summons dismissals for lack of probable cause.[87] To the extent that the subsequent dismissal process does not

82. *See* Terry v. Ohio, 392 U.S. 1, 26 (1968) (distinguishing Terry stops from arrests, noting that "[a]n arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different[;] [a]n arrest is the initial stage of a criminal prosecution").

83. Stinson v. City of New York, 282 F.R.D. 360 (S.D.N.Y. 2012) (granting class certification).

84. Verified Complaint, Gomez-Garcia v. N.Y.C. Police Dep't, No. 0451000-2012 (N.Y. Sup. Ct. June 22, 2012), *available at* http://www.legal-aid.org/media/157211/06222012_marijuana_complaint.pdf.

85. Amended Complaint, Davis v. City of New York, No. 10 Civ. 0699 (SAS) (S.D.N.Y. May 27, 2011); *see also* Complaint, Ligon v. City of New York, No. 12 Civ. 2274 (S.D.N.Y. Mar. 28, 2012) (challenging NY police program "Operation Clean Halls" in which police stop, search, and arrest residents of public housing projects typically for the offense of trespassing).

86. *Stinson*, 282 F.R.D. at 363.

87. *Id.* at 366–65.

catch the errors, cases are being generated based on arrests that lack probable cause.

In *Gomez-Garcia*, the allegation is that police are arresting people for possessing marijuana in public view when in fact police are arresting people who may have marijuana on their person (not a criminal offense) but only bring it into public view when the police order them to do so.[88] These arrests are therefore based on "crimes" generated by police officers themselves. More generally, Amanda Geller and Jeff Fagan have explained that despite the decriminalization of minor marijuana possession, the NYPD has "doubled down" on marijuana arrests as part of its order maintenance policing, and that marijuana arrest patterns exhibit many of the same racial and geographic biases that stop patterns do.[89]

Finally, the *Davis* plaintiffs challenge the NYPD policy of arresting residents of public housing projects for trespassing when those individuals are often legally on the premises and therefore innocent.[90] The accuracy of plaintiffs' claim was recently validated when the Bronx District Attorney's office announced its intention to stop prosecuting such cases without requiring additional evidence from the police.[91] In effect, the DA agreed that those arrests lacked probable cause.

New York aside, there are many reasons to question more generally whether urban misdemeanor arrests are reliable indicators of individuated probable cause and thus whether they counter the aggregative tendencies of stop and frisk. Urban police arrest individuals for all sorts of policy reasons unrelated to probable cause: to clear a street corner, to establish authority, or to send a message in

88. Verified Complaint ¶2, Gomez-Garcia v. N.Y.C. Police Dep't, No. 0451000-2012 (N.Y. Sup. Ct. June 22, 2012).

89. Geller & Fagan, *supra* note 81, at 593-95. Stop and arrest patterns were not identical, however. *See id.* at 605–07 (many precincts that recorded high marijuana arrests recorded fewer marijuana stops).

90. Amended Complaint, Davis v. City of New York, No. 10 Civ. 0699 (SAS) (S.D.N.Y. May 27, 2011); *see also* Jeffrey Fagan, Garth Davies & Adam Carlis, Race and Selective Enforcement in Public Housing (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 12-314, 2012), *available at* http://ssrn.com/abstract=2133384 (describing "wholesale" trespassing enforcement policies in public housing and noting that N.Y. law "places almost no barriers between the police officer and a trespass arrest").

91. Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES (Sept. 25, 2012), http://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html.

a high-crime neighborhood.[92] As sociologist and former police officer Peter Moskos describes it, "[o]n street corners in Baltimore's Eastern District, people—usually young black males involved with drugs—are arrested when they talk back to police or refuse to obey a police officer's orders to move. . . . These lockups are used by police to assert authority or get criminals off the street."[93] Similarly, Wesley Skogan and Tracey Meares described how police may make unlawful arrests in pursuit of other policy goals:

> [O]fficers sometimes bend rules because they simply want an individual that they have identified as a lawbreaker to get his or her "due" in a sort of retributive justice sense. Officers can be quite strategic in pursuing these goals, including risking a bit of censure when they have other forms of evidence to fall back on if their actions are challenged. Several studies found that officers intent on seizing contraband, disrupting illicit networks, or asserting their authority on the street freely violated the rules because their goal was not principally to secure an individual conviction.[94]

In sum, urban police decisions to stop individuals are heavily conditioned by aggregate factors such as race, neighborhood, and order maintenance policies. When those stops turn into arrests, there are weak guarantees that those arrests are based on the discovery of evidence: arrest decisions are similarly shaped by aggregate policies designed to maintain order and police authority that are not specific to the individuals being arrested. These aggregating tendencies of the initial selection decisions of the petty criminal system set the stage for the rest of the process.

B. Bail

Once arrested, suspects may be released, required to pay bail, or detained. The concept of bail is that a defendant who poses a flight risk and/or a risk to the community may be forced to post a monetary bond or remain in jail.[95] In theory, this practice requires an individuated factual determination regarding the two issues of flight and risk. Many jurisdictions, however, maintain bail schedules that

92. *See* Natapoff, *Misdemeanors*, *supra* note 3, at 1328 (describing in more detail the lack of probable cause in urban arrest policies).

93. PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT 119–20, 155 (2008).

94. Wesley G. Skogan & Tracey L. Meares, *Lawful Policing*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71 (2004).

95. *See* United States v. Salerno, 481 U.S. 739 (1987).

automatically set bail amounts based on the nature of the offense, without regard to the defendant's particular characteristics.[96] More generally, studies show that courts routinely make categorical bail decisions, being more likely to detain and/or impose higher bail amounts on racial minorities and the poor.[97] Since defendants are often unrepresented in this process, there is no attorney to ensure that the specifics of the defendant's situation are considered.[98]

While bail technically does not go to substantive questions of guilt, it can powerfully influence whether a defendant pleads guilty. An incarcerated defendant is more likely to suffer personal and economic hardship pending trial, less able to work with a lawyer to defend her case, and thus more likely to take a deal.[99] Accordingly, the aggregating tendencies of the bail process contribute in practice to the ultimate question of who will sustain a criminal conviction.

C. Prosecutorial Screening

Institutionally speaking, the job of deciding who shall be formally charged with a crime belongs to prosecutors.[100] Central to the prosecutor's task is the screening of police arrest decisions and sorting through which cases should proceed as formal criminal cases.[101] This is supposed to be an individuated inquiry on a number of fronts: prosecutors consider the evidence, but also make equitable and policy decisions about what cases deserve prosecution.[102]

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96. Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST., Spring 2011, at 12, 15.

97. *See, e.g.*, Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994); HUMAN RIGHTS WATCH, *supra* note 34, at 3 (2010). Malcolm Feeley and Jonathan Simon cite preventive detention as a "practice[] that most clearly exemplifies the qualities of actuarial justice" due to its reliance on categorical information and "collective algorithm[s]." Feeley & Simon, *supra* note 55, at 175–77.

98. Douglas Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 386–87 (2011) (half of all jurisdictions provide no counsel at bail and defendants may remain incarcerated for one to four weeks or more).

99. *See* Natapoff, *Misdemeanors*, *supra* note 3, at 1343–47 (documenting the pressure that pre-trial detention exerts on defendants to plead guilty).

100. *See* United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). In lower courts, police may have the authority to file charging documents in minor cases. *See* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 21–22 (2000).

101. Bordenkirscher v. Hayes, 434 U.S. 357, 364 (1978).

102. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010).

With respect to minor offenses, however, prosecutors in some jurisdictions forgo the screening inquiry and convert arrests into charges more or less automatically. This fact is reflected in low rates at which prosecutors decline cases. In New York and Iowa, for example, Josh Bowers found declination rates for certain minor offenses as low as 2% or less, meaning that 98% of those police arrest decisions converted to criminal charges.[103] A Vera Institute study found similarly low prosecutorial declination rates in misdemeanor drug cases in North Carolina.[104] As Surell Brady put it, because prosecutors spend so little effort screening cases before trial, "an individual's loss of freedom and the prosecutorial merit of most of those cases stand or fall solely on a police officer's judgment about the legal sufficiency of the evidence and of the rules of law applicable to the cited offense(s), and on the officer's judgment about the merit of an individual case from a public policy perspective."[105] Prosecutors typically lavish more scrutiny and attention on serious charges and therefore make more granular judgments about which cases to prosecute and which ones to decline. By contrast, in petty cases where stakes are low and caseloads are heavy, prosecutors tend to rely on and defer more to initial police decisions.[106]

To be sure, declination rates vary widely by jurisdiction and many low-level arrests never lead to anything more than a night or two in jail.[107] But where declination rates are low and prosecutors fail to screen, the aggregative tendencies of arrest decisions translate directly into aggregate prosecutorial decisions.

103. *Id.* at 1716–18.

104. *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 32 (2009) (statement of Wayne S. McKenzie, Director, Prosecution & Racial Justice Program, Vera Inst. of Justice), *available at* http://judiciary.house.gov/hearings/printers/111th/111-78_53093.PDF.

105. Brady, *supra* note 100, at 22.

106. Bowers, *supra* note 102.

107. Edward Ericson Jr., *Copping Out: A City Council Report on False Arrests by Baltimore Police Fails to Address the Root of the Problem*, BALT. CITY PAPER, Oct. 5, 2005, http://www2.citypaper.com/film/story.asp?id=10980 (one third of Baltimore loitering arrests dismissed). *Compare* Bowers, *supra* note 102 (reporting NY marijuana declination rates at less than 10 percent), *with* Issa Kohler-Hausmann, Misdemeanor Justice: The Penal Logic of Dismissal 13 (2012) (unpublished Ph.D. dissertation, New York University) (on file with author) (45% of all NY misdemeanor arrests result in dismissal).

D. Defense Counsel: "Meet 'Em and Plead 'Em" Lawyering

When all else fails, the American criminal process depends on defense counsel to ensure that defendants are treated as individuals. It is defense counsel's job to challenge indiscriminate arrest and charging decisions, to debunk existing evidence, ferret out new facts, and generally to ensure that individuating procedural rules protect her client.[108] Just as important, it is counsel's responsibility to protect cognitive and dignitary aspects of individuation: to talk to her client, to hear what he has to say about his case, and to educate him about his choices.[109]

In the current climate of overworked public defenders and massive misdemeanor dockets, defense counsel cannot meaningfully perform these individuating functions. For example, a 2009 report entitled *Minor Crimes, Massive Waste* studied misdemeanor dockets across the country.[110] In some jurisdictions, the report found misdemeanor caseloads in the many hundreds or even thousands, in which attorneys literally had minutes to resolve each case.[111] The results of the overload included attorney incompetence, the inability to consult with clients and prepare cases, and other violations of the attorneys' ethical obligations.[112] Numerous other studies and scholars have come to the same conclusion, namely, that scale of misdemeanor dockets and caseloads have largely eviscerated the individuating function of defense counsel.[113]

The right-to-counsel literature has amassed a long list of the harmful consequences that flow from overloaded dockets and the attendant breakdown of the defense function. To that list we can now add one more item. We rely on the defense function to stem the trend towards aggregation that characterizes the modern criminal

108. Penson v. Ohio, 488 U.S. 75, 84 (1988) ("[I]t is through counsel that all other rights of the accused are protected.").

109. Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); *see also* Brady v. United States, 397 U.S. 742, 754 (1970) (noting crucial role of advice of counsel in dissipating coercive effects of plea bargaining).

110. BORUCHOWITZ ET AL., *supra* note 60.

111. *Id.* at 21.

112. *Id.* at 22–24.

113. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979) (describing thin process and lack of representation in New Haven misdemeanor courts); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1158 (2004).

process, to turn defendants into individuals before the law even if the police and prosecutors have failed to do so. By overloading public defenders, we prevent them from fulfilling their individuating function and ensure that the wave of aggregation proceeds uninterrupted.[114]

E. Off-the-Rack Plea Bargains

Where prosecutors fail to screen and defense attorneys lack time to insist on individuation, the plea process becomes a categorical exercise. Prosecutors make standard offers based on the offense of arrest, and bargains are struck based on the institutional habits of the local jurisdiction.

The aggregative impact of plea bargaining is two-fold. Most importantly, institutional pressure to plead guilty rather than litigate converts defendants into criminals in bulk. The pervasive assumption that cases will plead out means that everyone is expected to sustain some sort of conviction; the only thing left to negotiate is the name of the crime and the precise punishment.

Second, the extent of punishment is also determined largely in the aggregate, by reference to the local "price" for certain offenses. This categorical quality of plea bargaining has been observed even in the felony context. As William Stuntz wrote, plea bargains are typically set based on "customary practices" and repeat players are "likely to have a good sense of the 'market price' for any particular case."[115] In this felony model, prosecutors and defense attorneys bargain in the shadow of customary prices for certain kinds of offenses, adjusting outcomes based on the individuating circumstances of a particular case.

In petty cases, by contrast, plea bargains take place in bulk, detached from the facts and circumstances of individual cases and are therefore more heavily determined by the going rate. As Malcolm Feeley eloquently put it, "[t]he reality of American [misdemeanor justice] . . . is more akin to modern supermarkets in which prices for

114. I discuss the inherently limited ability of misdemeanor defense counsel to ensure fairness at greater length in Natapoff, *Gideon Skepticism, supra* note 3.

115. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1923–24 (1992) (asserting that plea bargains are "individualized" and not "mass marketed"); *see also id.* at 1933 (plea bargaining constrained by "customary 'market' prices'"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2481, 2482 n.78, 2515 (2004) (noting that jurisdictions have customary "rates" for recurring cases and situations).

various commodities have been clearly established and labeled in advance."[116] In one New York borough, for example, it is the practice for prosecutors always to offer a deferred prosecution (known as an "Adjournment in Contemplation of Dismissal" (ACD)) to first-time marijuana arrestees and for judges to accept such dispositions, even where defendants appear to be innocent and outright dismissal would therefore be appropriate.[117] In the South Bronx, police use a boilerplate complaint to charge trespassing cases so that the factual record and charge is standardized, and defendants almost universally plead to light sentences.[118] In Salt Lake City, prosecutors in domestic violence cases tell the court that they are seeking the "standard package," which includes a uniform charge bargain and sentence.[119]

In these ways, the aggregate practices of misdemeanor prosecutors and defenses attorneys result in predictable, standardized pronouncements of guilt and punishment. Because those attorneys lack time and incentives to collect all but the most superficial information about cases, those standardized pleas cannot be assumed to reflect defendant culpability, the availability of defenses, or the strength of the evidence. Instead, these convictions are better understood as a product of local jurisdiction practices and all the other institutional, aggregative practices that generated the case in the first place.

F. Judges and the Mass Court Process

Although the individuating influence of the judge is less in an adversarial than an inquisitorial system, American judges still theoretically play an important part in ensuring that cases are handled on the merits and defendants are treated as unique individuals. At trial, judges not only enforce the rules, but also may be called on after the fact to decide the sufficiency of the evidence—that is, whether

116. FEELEY, *supra* note 113, at 187.

117. *See, e.g.*, Kohler-Hausmann, *supra* note 107, at 16–17 (describing "normative practice" in New York borough).

118. M. Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD's Apartheid-Like Trespassing Crackdown*, VILLAGE VOICE, Oct. 30, 2007, http://www.villagevoice.com/2007-10-30/news/rousting-the-cops/.

119. Rekha Mirchandani, *What's So Special About Specialized Courts? The State and Social Change in Salt Lake City's Domestic Violence Court*, 39 LAW & SOC'Y REV. 379, 397 (2005); *see also* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 56 (2006) (noting that in domestic violence cases the "final order of protection is so common that it is plausible to consider it a standard disposition sought by prosecutors").

there was enough evidence adduced at trial to find a particular defendant guilty beyond a reasonable doubt.[120] More frequently, judges presiding over guilty pleas must establish a factual basis for the plea, and the knowing and voluntary nature of the plea by directly addressing the defendant and asking him personal questions.[121]

In his famous study of the lower court process, Malcolm Feeley concluded that misdemeanor judges do not play this individuating role; rather, such courts process defendants through in bulk with little or no attention to specific facts or defendant understanding. Feeley describes the typical court proceeding as follows:

> Arrestees were arraigned in groups and informed of their rights en masse. At times the arrestees were not even aware that they are being addressed. Judges did not always look at them, and even if a judge made an effort to be heard, he could not always be understood over the constant din of the courtroom. . . . While a few cases took up as much as a minute or two of the court's time . . . the overwhelming majority of cases took just a few seconds.[122]

Numerous authors have replicated Feeley's conclusions, noting that lower court processes are non-individuated and insensitive to evidence.[123] As Josh Bowers puts it, the misdemeanor process is one in which "[g]uilt is typically presumed in a process too rough-and-ready for the parties to develop and consider it properly."[124]

To date, courts have not recognized aggregation per se as a threat to the validity of pleas. The Ninth Circuit, for example, recently concluded that the mere lack of an individuated plea procedure does not violate due process.[125] The Court upheld the constitutionality of a mass plea process conducted in Arizona under the auspices of the "Operation Streamline" program. In that program, "a magistrate judge is assigned to preside over a group hearing of fifty to seventy defendants charged with petty misdemeanor violations of illegal entry. The hearing combines the defendants' initial appearances, guilty pleas, and sentencing hearings into one proceeding."[126] The Ninth Circuit concluded that because defendants were counseled and

120. FED. R. CRIM. P. 33.

121. FED. R. CRIM. P. 11; Brady v. United States, 397 U.S. 742 (1970).

122. FEELEY, *supra* note 113, at 9–11.

123. *See* Weinstein, *supra* note 113 (describing dynamic in lower New York courts); BORUCHOWITZ ET AL., *supra* note 60.

124. Bowers, *supra* note 102, at 1707.

125. United States v. Diaz-Ramirez, 646 F.3d 653 (9th Cir. 2011).

126. *Id.* at 655.

had the opportunity to opt out of the mass process, their pleas were sufficiently informed and voluntary.[127] In other words, the Court did not recognize any legally cognizable impact of the fact that procedure was aggregated: it asked instead whether there was any evidence that a particular defendant's plea was involuntary. Other courts have reached similar conclusions.[128]

G. The Defendant

The final bastion of individuation is the defendant himself. He has various constitutional rights to ensure that his case is decided on the merits in ways that he chooses: he has the right to self-represent, the right to trial, to testify or to remain silent, and to confront the witnesses against him.[129] Most importantly, given the prevalence of pleas, he has the right not to be bound by a plea he did not understand or was coerced into making.[130]

In the petty offense context, these protections routinely fail to ensure that defendants receive individual consideration. Many misdemeanor defendants do not know what their rights are and, given limited time to consult with counsel, are unlikely to learn or understand them.[131] Instead, defendants typically are made to understand that they will be represented in a slapdash manner, that they must plead or risk a longer sentence or a stint in jail, that the evidence in their cases will not be examined, and that they have no choice in the matter.

For example, in jurisdictions around the country including Texas, Washington, Pennsylvania, and Colorado, researchers have found that judges often refer misdemeanor defendants directly to prosecutors, without appointing counsel, and tell them to go "work

127. *Id.* at 657–58. The court also noted that the mass-plea process had previously been held to violate Rule 11's "personal address" requirement, id. at 657, but that error was held to be harmless. *Id.* (citing United States v. Roblero-Solis, 588 F.3d 692, 701 (9th Cir. 2009)).

128. United States v. Salazar-Olivares, 179 F.3d 228 (5th Cir. 1999) (group plea did not constitute plain error under Rule 11); United States v. Martinez-Martinez, 69 F.3d 1215, 1223 (1st Cir. 1995) (upholding group plea consisting of two codefendants, concluding that Rule 11 requirement that each defendant be addressed "personally" did not mean that each defendant had to be addressed "individually").

129. U.S. CONST. amend. VI (right to trial and confront witnesses); Faretta v. California, 422 U.S. 806 (1975) (right to self-representation); Nix v. Whiteside, 475 U.S. 157 (1986) (right to testify on own behalf).

130. Brady v. United States, 397 U.S. 742 (1970).

131. Natapoff, *Misdemeanors*, *supra* note 3, at 1344 (describing limits on average defendant knowledge and capacity).

out" their pleas.[132] For example, in Georgia, one ABA witness described:

> [A] mass arraignment of defendants charged with jailable misdemeanors during which the judge informed defendants of their rights and then left the bench. Afterwards, three prosecutors told defendants to line up and follow them one by one into a private room. When the judge reentered the courtroom, each defendant approached with the prosecutor, who informed the judge that the defendant intended to waive counsel and plead guilty to the charges.[133]

In such cases, the tribunal effectively instructs defendants that their only option is to plead guilty. Even when counsel is appointed, the high volume process puts defense counsel in the position of channeling defendants into pleas rather than meaningfully educating them about their rights and options.

The sum total of aggregating pressures thus often deprives defendants of autonomous choice, the defendant's last defense against group treatment and collective guilt. I say "often" due to the sheer number of defendants who are processed in low-level courts without counsel or meaningful representation. There are approximately ten million misdemeanor cases filed every year, the vast majority of which are processed in bulk without meaningful scrutiny or assistance of counsel.[134] Nevertheless, misdemeanor defendants are not all similarly situated: better-educated and better-resourced defendants can demand more individuation, in large part because they can insist on lawyers and procedures that preserve the individuating aspects of their cases.[135] By contrast, sub-literate and disadvantaged defendants are stuck with group procedures with no meaningful way to opt out. In these ways, the aggregating pressure of the misdemeanor process silences most individuals even as it creates the appearance of individuated admissions of guilt.

The urban misdemeanor process can thus be understood as a series of iterative aggregations. From arrest to bail to defense to plea, urban misdemeanants are subject to an array of informal aggregating

132. *See* BORUCHOWITZ ET AL., *supra* note 60, at 16–17.

133. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 113, at 24–25.

134. BORUCHOWITZ ET AL., *supra* note 60, at 11.

135. *See, e.g.*, PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 3–19 (2009) (describing his experiences when he was prosecuted for misdemeanor assault).

forces that generate their ultimate convictions. Like all complex processes, the picture is not absolute: there may well be some individuating factors at each stage of the process. But the continuous pressure of aggregate decision making stage after stage weakens their force. For example, a defendant may consult briefly with counsel, or there may be some evidence that he might be guilty. These brushes with procedure and evidence do not mean he actually got an individuated determination of guilt, or that his conviction was generated in a meaningful sense by the evidence. Instead, his conviction is better understood as the sort of thing likely to happen to people in his class. That is a far cry from the individuation ideal celebrated in Supreme Court case law and by the theories of personal culpability that undergird our moral confidence in the criminal process.

IV. THE SUBSTANTIVE EFFECTS OF INFORMAL AGGREGATION: LESSONS FROM THE CIVIL SIDE

Unlike criminal law, civil law openly makes room for aggregation. The formal mechanisms of the class action, joinder, and multidistrict litigation have generated a robust literature on the dynamics of aggregation and its substantive and distributive effects.[136] It is well understood that the decision to formally treat parties or issues in the aggregate changes the meaning and operation of the law.[137]

This understanding has carried over into the realm of informal aggregation. Civil law has its share of informal aggregating scenarios, and scholars have identified ways that they can have substantive and distributive effects even without formal class certification or other legally binding mechanisms. In particular, two insights have strong resonance for the misdemeanor context. The first is that a single powerful plaintiff bringing a large number of claims against dispersed defendants can induce widespread settlement on terms that may not track the substantive law or likely trial outcomes. The second insight is that aggregate treatment of similarly situated plaintiffs through mass representation erodes the force of law and evidence, and can effectively create a no-fault regime in which mere allegations of injury can suffice to generate recovery. These insights—and their relevance

136. *E.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1873 (2006) (describing the influence that aggregate proceedings have on settlement).

137. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).

to understanding the power of prosecutors and the dangers of mass indigent representation—are discussed below.

A. The Power of Affirmative Informal Aggregation

A certain class of civil defendant strongly resembles misdemeanor defendants. The class consists of individuals who engage in widespread, common conduct generating small, low value claims: a leading example is unauthorized music downloaders. There are thousands of them. When sued by a single powerful plaintiff, such defendants often lack the resources or incentives to litigate on their own, even if they have a valid defense, and therefore predictably settle in large numbers.

Assaf Hamdani and Alon Klement zero in on this type of defendant class as posing special efficacy and fairness problems for the civil system.[138] They examine three examples: music file sharing, people sued by DirecTV as suspected signal pirates, and purchasers of fraudulent business leases who defaulted and were then sued by the seller LeaseComm.[139] In each case, a well-resourced corporate plaintiff (Recording Industry Association of America (RIAA), DirecTV, and LeaseComm respectively) brought cases against thousands of individuals in which the low value of each individual claim made it inefficient for individuals to defend, leading in turn to thousands of settlements.[140] In each case, there was at least a plausible—and in some cases very clear—basis for defense, but defendants settled anyway.[141]

This institutional paradigm—a single well-resourced plaintiff bringing low-value claims against thousands of dispersed defendants—has familiar and influential contours. First, it generates widespread settlement even where claims may be weak or fraudulent. This is the misdemeanor process through the civil looking glass: in the criminal version, large numbers of low-level offenders lack counsel and/or personal resources and therefore plead guilty when confronted by the unified power of the state, even where evidence is weak or the defendants are clearly innocent.[142]

138. Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CAL. L. REV. 685 (2005).

139. *Id.*

140. *Id.*

141. *Id.* at 699–708.

142. *See supra* Part III.

The paradigm also permits plaintiffs to raise the costs of litigation for defendants in ways that ensure settlements that may be out of line with the actual merits of the cases.[143] Hamdani and Klement find this dynamic particularly troubling because it distorts the effect of legal rules and undermines the civil system's ability to produce legally accurate and efficient outcomes through bargaining.[144] Criminal scholars have noted the comparable function of charge inflation and bail: by overcharging defendants and seeking pre-trial detention, prosecutors inflate defendant litigation costs in ways that induce settlement, sometimes to charges that bear a weak relation to actual defendant conduct.[145]

As a counter-weight, Hamdani and Klement note that defendants could aggregate in order to exploit the same economies of scale, resources and leverage that large plaintiffs do.[146] Unlike civil law, however, the criminal arena has an inherent institutional imbalance: prosecutors can constitutionally and ethically aggregate on merits issues whereas defense counsel for the most part cannot. Prosecutorial offices can act in unison, with policies that impose uniform charges and/or sentence offers on entire classes of defendants.[147] By contrast, defense counsel must litigate each case as if it were their only one, bargaining in the shadow of aggregate prosecutorial policies without adopting aggregate practices of their own. A public defender office, for example, cannot insist that all trespassing cases go to trial, or that all loitering clients plead to time served, because such policies might not be in individual defendants' best interests.[148] This is in part why criminal defendants depend on

143. For example, RIAA and DirecTV set settlement amounts unrelated to actual damages. Hamdani & Klement, *supra* note 138, at 704. LeaseComm brought all its actions in Massachusetts, which made it exorbitantly expensive for non-resident defendants to litigate. *Id.* at 707.

144. *Id.* at 706, 708.

145. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20 (2001) (on charge inflation); Bibas, *supra* note 115 (on the pressure exerted by bail).

146. Hamdani and Klement label this mechanism the "class defense." In the cases they discuss, potential defenses included fair use, problems with DirecTV's proof of piracy, and the legitimacy of the underlying LeaseComm lease. Hamdani & Klement, *supra* note 138, at 699–708.

147. *See, e.g.*, Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM L. & CRIMINOLOGY 1119, 1150 (2012) (describing prosecutor's office manual that set forth "'defaults' for case resolutions (that is, standard plea offers)").

148. Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1235–43 (2005) (describing ethical impediments to collective

collateral proceedings such as civil rights class actions to vindicate group rights; the individuated ideal of the criminal case impedes strategic aggregation on the part of the defense.[149] Criminal counsel thus have weak access to the collective leverage that informal aggregation can confer.

B. How Mass Representation Erodes Fault

A certain class of civil plaintiff also strongly resembles misdemeanor defendants. One example is plaintiffs represented by one or more large law firms who collectively work out bulk deals, which Richard Nagareda has called "mass settlement without class action."[150] Similarly, plaintiffs with small, low stakes personal injury claims such as car accidents whose cases are handled en masse by so-called "settlement mills," also resemble misdemeanor defendants.[151] As Nora Engstrom describes, these large firms often handle thousands of small cases at a time and almost universally resolve them through settlement on a categorical basis, often by non-legal personnel with little attorney involvement.[152] Factual investigation and trials are almost non-existent, and plaintiffs receive standardized settlement sums from insurance companies.[153] Much like criminal defendants whose public defenders handle hundreds of cases in cookie-cutter fashion, low-stakes tort plaintiffs whose claims are handled by settlement mill firms are processed mechanically without individuated attention.[154] In the same way that petty defendants

public defender action but also describing instances where defender offices collectively resisted prosecutorial policies); *see also* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2422 (1996) (criticizing tendency of public defender offices to "uncritically accept individualized concepts of their role").

149. See Brandon Garrett, *Aggregation and Constitutional Rights* (Univ. of Va. Sch. of Law Pub Law & Legal Theory Research Paper Series No. 2012-31, 2012), *available at* http://ssrn.com/abstract=2052250 (arguing that aggregation of procedural civil rights claims can benefit plaintiffs and the development of law and describing barriers to such aggregation).

150. Richard A. Nagareda, *Embeded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1154–55 (2010) (discussing mass settlement in Vioxx case coordinated by large plaintiff law firms).

151. Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011) [hereinafter Engstrom, *Sunlight*]; *see also* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009).

152. *See* Engstrom, *Sunlight*, *supra* note 151, at 817.

153. *Id.* at 816–17.

154. *Id.*

predictably plead and receive standard sentences, plaintiffs settle for standardized sums.[155]

In the tort context, settlement mills offer certain benefits. Plaintiffs with low-value claims might not otherwise obtain representation.[156] For routine and non-serious claims, plaintiffs may well receive an approximation of the actual value of their injuries.[157] And they receive the money quickly and predictably without the cost and uncertainty of individualized litigation.[158] In such cases, the benefits of bulk processing may outweigh the costs and risks of individuation.[159]

Such arguments are not completely foreign in the criminal context. For example, routine bulk processing confers certain professional benefits on misdemeanor prosecutors and even defense counsel: attorneys can spend less time resolving standard cases and obtain predictable outcomes without the cost and time of litigation.[160] Courts similarly benefit by being able to clear crowded dockets, and resources may be preserved for more serious cases.[161] More radically, Josh Bowers has argued that misdemeanor defendants themselves are typically better off accepting standardized low-level plea offers because it permits them to avoid pre-trial jail time and the potential for higher sentences were they to litigate.[162] In Bowers's view, then, even innocent criminal defendants benefit instrumentally from the misdemeanor settlement mill.

At the same time, settlement mills raise troubling red flags. In particular, Engstrom worries that plaintiffs with non-routine, more serious injuries are being shortchanged both procedurally and substantively by having their claims resolved in aggregate fashion.[163] She argues that many plaintiffs are unaware that settlement mills do not actually provide traditional personal representation, or sometimes even representation by lawyers at all, and that these plaintiffs are

155. *Id.* at 822.

156. *Id.* at 831–32.

157. *Id.* at 828–29.

158. *Id.* at 829.

159. *Id.* at 824–33 (discussing costs and benefits of settlement mills).

160. *See* Bibas, *supra* note 115 (explaining that institutional and professional norms governing criminal legal practice often drive case resolutions more powerfully than do individual facts of the case).

161. *See, e.g.*, Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007).

162. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008).

163. Engstrom, *Sunlight*, *supra* note 151, at 836–42.

essentially being tricked.[164] She also notes that the lack of scrutiny and the culture of settlement promote fraud.[165]

The settlement mill scenario highlights the fact that the ability to resist aggregation and insist on individuated procedure is a potent bargaining chip. That is why Engstrom worries about plaintiffs with serious injuries: by permitting themselves to be represented in the aggregate, they forgo the leverage that an individual adjudication would confer.[166] Conversely, businesses that can resist potential plaintiff aggregation by insisting on individuated procedures such as arbitration obtain an advantage.[167] This is precisely the dynamic of the penal pyramid: at the bottom, mass processing induces settlement by individual defendants unless they and/or their counsel can insist on the "luxury" of more expensive and time-consuming individuated procedures.

The deepest insight from the settlement mill context, however, is that this sort of informal aggregation has substantive implications: settlement mills effectively create a no-fault tort scheme even in the absence of such a regime at law.[168] As Engstrom describes it, settlement mills "straddl[e] no-fault and traditional tort," providing a "blended mechanism" that offers many of the benefits of a no-fault scheme while "masquerading" as a traditional, individuated tort process.[169] This slight-of-hand is apparent to everyone except individual plaintiffs. As one attorney put it, "It really was very formulaic. Everybody saw it that way, except for the client, who actually thought of themselves as an individual."[170]

The same slight-of-hand occurs in the misdemeanor process: pleading petty offenders in bulk without individuated procedures effectively creates a "no-fault" conviction regime in which the fact of

164. *Id.*

165. *Id.*

166. *Id.* at 838–39.

167. *See* W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 69 (2007) ("Skeptics [of arbitration] object that businesses use arbitration to prevent [plaintiffs'] aggregation, forcing consumer and employee claimants into individualized proceedings where neither they nor their lawyers can counter the advantages enjoyed by more powerful repeat players.").

168. *See also* Hamdani & Klement, *supra* note 138, at 708 ("A regime in which defendants always settle is essentially a no-fault regime.").

169. Engstom, *Sunlight*, *supra* note 151, at 837.

170. *Id.*

arrest is sufficient to induce settlement.[171] While professional participants know that the process is "assembly line," the system straddles the "no-fault"-culpability distinction by maintaining the fiction that defendants are receiving individuated justice based on personal culpability.

It is here that the possibility of fraud and its criminal counterpart, wrongful conviction, poses the greatest threat. In a no-fault scheme, proof of the right sort of injury is typically sufficient to trigger recovery.[172] The integrity of the system thus rests heavily on the validity of the initial proof, since recovery flows inevitably from it. But weak screening mechanisms and routine settlement habits weaken that proof. With respect to settlement mills, the understanding that insurance companies will settle in exchange for limited liability and cost-control creates the risk that fraudulent claims will slip though.[173] In the same way, the understanding between defense counsel and prosecution that the vast majority of petty cases will be pled out without litigation permits false claims—i.e., bad arrests and baseless charges—to convert to convictions.

This is the misdemeanor system at its worst: when the mere allegation of probable cause, i.e., the fact of arrest, becomes enough to guarantee conviction. Without the robust checking mechanisms of the adversarial process, we cannot be confident that those initial allegations are valid. In these ways, the institutional aggregations of mass representation simultaneously erode the legal status of fault and exacerbate the risk of wrongful conviction.[174]

V. THE OXYMORON OF AGGREGATE CRIMINAL GUILT

Criminal justice is a special sort of law—at least it is supposed to be. As Henry Hart famously put it, a crime "is not simply anything which a legislature chooses to call a 'crime.'"[175] Likewise, the power

171. This scheme is "no-fault" in the institutional sense that the government need not prove culpability, not in the narrower, substantive sense that the defendants lack mens rea.

172. Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703–15 (2005) (describing a variety of no-fault compensation schemes and their respective triggers).

173. Engstrom, *Sunlight*, *supra* note 151, at 833–34.

174. I discuss this shift away from fault at length in the first article, Natapoff, *Misdemeanors*, *supra* note 3, at 1366–68.

175. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 406 (1958) (arguing that in order to qualify as a crime, prohibited conduct must invite community condemnation).

to punish is a unique form of governmental authority that can be exercised only in highly constrained ways consistent with democratic values.[176] While we lack agreement about what precisely should constitute a crime, or the proper way to punish, the ongoing dispute reflects an underlying consensus that criminal justice is different in kind from other legal edicts and forms of governmental control.

The urban misdemeanor system strains the limits of criminal law exceptionalism. Many petty offenses forbid common, widespread, victimless conduct of no particular moral import—in other words, conduct that doesn't look particularly culpable. Order maintenance policing is often driven by aims barely distinguishable from urban public policies such as zoning, traffic laws, and health and housing codes.[177] And as this Article has detailed, urban misdemeanants are often handled in the aggregate: identified, prosecuted, and punished in ways that ignore definitional criminal commitments to individuation, evidence, and the ultimate requirement that defendants be personally culpable.[178]

To put it another way, the defining principles of criminal justice appear to run out of steam at the bottom of the penal pyramid where offenses are petty and defendants are poorest. At the top, in serious cases and for well-resourced defendants, the principles are alive and well largely because such defendants have the leverage to insist on individuated procedures. At the bottom, however, these principles do little work. This fact has at least two significant consequences. The first is to destabilize the traditional assertion that the criminal system

176. *See* Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 614 (2009) (describing classic Hobbesian claim that "[o]nly the sovereign—who is not a party to the social contract—retains the broad discretion to use force, and so only the sovereign may punish"); Dolovich, *supra* note 10.

177. *See, e.g.*, NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 2–3 (2009); Katherine Beckett & Steve Herbert, *The Punitive City Revisited: The Transformation of Urban Social Control*, *in* AFTER THE WAR ON CRIME: RACE, DEMOCRACY AND A NEW RECONSTRUCTION 106, 109–10 (Mary Louise Frampton et al. eds., 2008) (describing the variety of urban criminal legal tools deployed to "'clean up' particular urban spaces").

178. Mona Lynch argues that this group-based conceptualization of the criminal defendant pervades criminal law more generally. She argues that "[t]he individuality formerly ascribed to offenders has nearly vanished. In its place is a broad, near-caricaturelike construction of the punished offender that relies on simple, disposition-based understandings of criminality and a variety of racial, cultural, class-based, and gendered stereotypes as its basis." Mona Lynch, *The Contemporary Penal Subject(s)*, *in* AFTER THE WAR ON CRIME: RACE, DEMOCRACY AND A NEW RECONSTRUCTION 89, 98 (Mary Louise Frampton et al. eds., 2008).

is individuated and rule-bound.[179] Because the bottom of the pyramid is very big—most U.S. cases are petty and most defendants are poor[180]—our systemic ideals of individuation, due process, and culpability actually govern a relatively small percentage of cases. Instead, and counterintuitively, the aggregative culture of the bottom is in fact the dominant systemic norm, even though it baldly contradicts individuating legality principles in Supreme Court doctrine and much of the theoretical criminal literature.

The second consequence is to create uncertainty about the appropriate legal and moral significance of convictions generated at the bottom of the penal pyramid. Misdemeanor aggregative culture all too often ignores the core premise of the criminal model: that the question of guilt is ultimately and essentially one of individual responsibility. It is precisely because (and only when) criminal guilt is individualized that we are justified in levying individual judgments, punishment, and stigma against those found to be criminal.[181] Without this bedrock ingredient of individuation, a "conviction" means something very different. Insofar as urban misdemeanor convictions lack individualization, we need to question the pedigree of the process at the bottom of the penal pyramid and ask whether it truly qualifies as "criminal."

One way to ask that question is through the lens of Herbert Packer's famous distinction between the "Crime Control" and "Due Process" models of criminal justice.[182] The misdemeanor system is the quintessential example of how a system ostensibly governed by "formal, adjudicative, adversary fact-finding processes"[183] and putatively committed to the "primacy of the individual and the

179. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3 (1997) (noting that the traditional picture of the criminal system as governed by formal criminal procedure is "wrong").

180. Approximately ten million misdemeanor cases are filed each year. By comparison, there are approximately one million annual felony convictions. Natapoff, *Misdemeanors*, *supra* note 3, at 1320.

181. *See e.g.*, W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship*, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117 (2011) (arguing that stigma constitutes the defining line between civil and criminal punishment).

182. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 153 (1968); *see also* Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 LAW & SOC. INQ. 237 (2011) (surveying "academic fascination" with Packer's two models).

183. PACKER, *supra* note 182, at 163–64.

complementary concept of limitation of official power"[184] can in fact function as a crime control model driven by a "presumption of guilt"[185] in which "routine stereotyped procedures" produce "an assembly-line conveyor belt down which moves an endless stream of cases."[186] Although Packer posited the crime control model as an ideal type and not an actual description,[187] the aggregating tendencies of the petty offense process in fact amount to a crime control system—legal practices through which people are presumed guilty upon arrest and treated not as individuals entitled to due process, but rather as threats or risks subject to monitoring and control. The informal aggregations of the urban petty offense system are thus not mistakes or mere deviations from the due process model: they are the concrete socio-legal practices and institutions that permit the crime control model to function and dispense criminal convictions notwithstanding the existence of a legitimating due process ideology.[188]

A different way of framing the question—are misdemeanors really "criminal"?—is to ask whether the mass quality of the American criminal system has altered its normative nature and political authority. In 1994, Malcolm Feeley and Jonathan Simon maintained that the "Old Penology"—concerned with individual guilt and moral responsibility—was giving way to an "actuarial" approach to justice concerned with management of groups.[189] In 2006, Bernard Harcourt worried that "prediction instruments increasingly determine individual outcomes in our policing, law enforcement, and punishment practices."[190] In 2012, Stephanos Bibas mourned that the "[c]riminal justice used to be individualized, moral, transparent and participatory, but has become impersonal, amoral, hidden, and insulated from the people."[191] Misdemeanors represent the paradigmatic example of these sociological claims: the place in the system where doctrinal commitments to individuality and personal fault are most eroded, and where actuarial, impersonal tendencies exert the greatest power over outcomes. In other words, if the

184. *Id.* at 165.

185. *Id.* at 160 (in many cases the "presumption of guilt" begins to operate "as soon as the suspect is arrested").

186. *Id.* at 159.

187. *Id.* at 153.

188. I am indebted to Markus Dubber for this point.

189. *See* Feeley & Simon, *supra* note 55, at 173.

190. HARCOURT *supra* note 55, at 2 .

191. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE xviii (2012).

misdemeanor process qualifies as criminal, it is because we've changed what the criminal system does and how it is allowed to do it.

Markus Dubber makes a similar point, arguing that the war on crime, with its focus on possession, drugs, and other victimless offenses, is in fact a policing regime that seeks to control and eliminate threats rather than identify and punish individual crimes. As he puts it:

> Policing human threats is different from punishing persons. A police regime doesn't punish. It seeks to eliminate threats . . . . It resembles environmental regulation of hazardous waste more than it does the criminal law of punishment.[192]

Dubber traces how modern policing—by which he means not only police investigations and arrests but the entire criminal apparatus—has eroded or "hollowed out" criminal law's classic ingredients from mens rea and actus reus to the harm principle. He concludes that the war on crime is best understood as a form of "state nuisance control."[193]

Importantly, Dubber notes that although the policing regime is non-criminal in its essence, it masquerades as a criminal process:

> The effort to disguise itself as bread-and-butter criminal law is an important component of a modern police regime. . . . [Because of potential opposition it i's] in the interest of a police regime both to retain traces of traditional criminal law and to infiltrate traditional criminal law by manipulating its established doctrines, rather than to do away with it altogether.[194]

This masquerade is precisely the dynamic of the misdemeanor system. By calling itself a criminal process and labeling its outcomes as criminal convictions, the petty offense system has co-opted the tools of criminal investigation and adjudication while abandoning core principles of individuated culpability.[195] The masquerade succeeds in part because criminal law lacks analytic tools to identify

192. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 833 (2001).

193. *Id.* at 834, 839; *see also* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 158–61 (2005) (arguing that petty offenses have historically evaded legality constraints).

194. Dubber, *supra* note 192, at 834.

195. *See* Fabricant, *supra* note 14, at 388 (arguing that zero tolerance policing effectively imposes group guilt); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CAL. L. REV. 617, 620 (2006) (arguing that because urban policing is so ill-suited to the criminal model, public officials other than police should do it).

the "hollowing out" effects of aggregation. More broadly, it succeeds because transparency and political accountability are in short supply at the bottom of the pyramid.

Finally, the misdemeanor process may succeed in retaining its "criminal" pedigree in the self-fulfilling sense that widespread informal aggregation has altered our collective understanding of what justice is supposed to look like. It is well known that racial profiling is self-reinforcing, exacerbating social stereotypes and sending a message of "presumed Black criminality."[196] Aggregation works in similar ways within the adjudicative system to create a presumption of guilt. Heavy caseloads and bulk processing wear down prosecutors, defense attorneys, and judges, causing them to lose touch with the individuating principles that are supposed to govern their respective roles.[197] As Judge Robert Pratt put it,

> [w]ith so many guilty pleas taking place, it is far too easy for everyone involved to start believing that 'everyone is guilty' and that establishing guilt on the record is just a 'formality.' With such an attitude comes complacency and a lack of attention to the details of the plea proceeding.[198]

Like racial profiling, the dehumanizing component of aggregation changes the ways that its subjects are perceived.

Even defendants may succumb and lose sight of their own individuality as the system treats them in the aggregate over and over again. As professor and veteran public defender Abbe Smith once put it, "[o]ne of the most outrageous things about indigent criminal defense is the lack of outrage in many clients.Too often the poor become accustomed to mistreatment. They become accustomed to being processed like parts on a conveyor belt, to not being seen at all."[199]

196. Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 800–01 (1999); *see also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 952 (2002) (describing psychological effects on African Americans of their subordinate position and vulnerability to constant police scrutiny).

197. *See* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 257–66 (2009); Bibas, *supra* note 115, at 2474, 2482 (on the institutional habits of defense and prosecutors).

198. Judge Robert Pratt, *The Implications of* Padilla v. Kentucky *on Practice in United States District Courts*, 31 ST. LOUIS U. PUB. L. REV. 169, 180 (2011).

199. Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathetic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1261 (2004).

All this is to say that the way we actually run the criminal system affects our conception of how we *should* run the criminal system. Harcourt argues that the turn towards the actuarial has "begun to shape our conception of just punishment," such that we now accept prediction as a just and fair way of evaluating culpability and punishment.[200] Likewise, the turn towards aggregation is making group-based treatment and mass processes seem familiar and acceptable, weakening our intuitive and longstanding commitment to individuated guilt, and permitting the petty offense process to "pass" for criminal justice.

CONCLUSION

> "When you're young and you're black, no matter how you look you fit the description."
>
> –Tyquan, age 18, Brooklyn resident[201]

At the heart of the criminal system's claim to coercive and punitive legitimacy lies the assertion that it convicts and punishes for the right reasons: because someone committed a crime and was therefore culpable in ways that invite a coercive state response. And for all the flaws in the ways that serious crimes are investigated and prosecuted, these reasons remain dominant. With rare exceptions, rape and homicide defendants are arrested and prosecuted because someone thinks they committed a crime. Of course, as the innocence movement has demonstrated, those conclusions are all too often factually inaccurate, but the process remains constrained by classic criminal law justifications of evidence and culpability.

By contrast, the urban misdemeanor system is not always driven by such justifications. At its best, order maintenance policing aims to do what zoning, nuisance law, and other urban development policies do: improve the livability, safety, and economic value of shared urban

200. HARCOURT, *supra* note 55, at 31; *see also* Feeley & Simon, *supra* note 55, at 192 ("It is not that [law enforcement] officials are 'merely' violating traditional ideals of equality when dealing with or intervening in underclass communities, it is that they are animated by a powerful new social logic, risk management.").

201. Julie Dressner & Edwin Martinez, *The Scars of Stop-and-Frisk*, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/video/2012/06/12/opinion/100000001601732/the-scars-of-stop-and-frisk.html (1:03).

spaces.[202] Those are laudable goals, but they are not centrally about evidence and culpability. The bureaucracies of the adjudicative process—prosecution offices, public defenders, and courts—largely obey institutional demands for case processing and docket clearing. These processes may be more efficient than the individuated model, but they are dissociated from the core culpability concerns of criminal law. In these concrete ways, the urban petty offense process has let go of the reasons and procedures that validate the imposition of criminal convictions.

In part as a result, the urban misdemeanor process is losing its credibility with the people it polices and convicts.[203] Residents of places like Brownsville clearly believe that they are selected by race, class status, and neighborhood, in other words based on group membership and other aggregate criteria and not on the individualized bases of evidence and culpability.[204] As Tyquan, the 18-year-old African American man quoted above put it, "I was so confused the first time [I was stopped by police.] I thought you had to do something for them to really stop you, but after that, I seen that you didn't have to do nothing to get stopped."[205] While the petty criminal process maintains that it is motivated by crime and disorder, its subjects apparently believe it to be motivated by social status.

The foregoing analysis suggests that the subjects have it right, at least more right than criminal law gives them credit for. The weak individuating procedures in the petty offense process have eroded the roles that evidence and law play in generating convictions, and aggregate decision-making dominates each stage of the process. A young black male in a poor urban neighborhood out in public at night has a predictable chance of being arrested for and ultimately convicted of a minor urban offense of some kind, whether he commits any criminal acts or not. The fact that some weakly individuating

202. *See, e.g.*, GARNETT, *supra* note 177, at 208–09 (2009); TRACEY MEARES & DAN KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER CITY COMMUNITIES (1999).

203. *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, 212–22 (2008) (charting law enforcement's reduced legitimacy in overpoliced minority communities).

204. Dressner & Martinez, *supra* note 201; Matthew Orr, Ray Rivera & Al Baker, *Stop and Frisk in Brownsville*, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/video/2010/07/11/nyregion/1247468422062/stop-and-frisk-in-brownsville-brooklyn.html (interviewing African American residents).

205. Dressner & Martinez, *supra* note 201.

factors may appear in that process—perhaps he will make a furtive gesture, or consult with counsel for a few minutes—does not render the process individuated. Rather, that process is best understood as imposing guilt in the aggregate. If the urban misdemeanor process is to regain its credibility with its own subjects, it needs either to embrace the individuated model more fully, or relinquish the punitive moral mantle of criminal law and admit that it is attempting to do something different.