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Justice in Wonderland

A Review of *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing*, by Issa Kohler-Hausmann

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Introduction

There is a place in the American criminal justice system . . . a place explored by few legal scholars and even fewer law students . . . a Wonderland where the order and logic of criminal adjudication as it is conventionally understood appears topsy-turvy or even absent. The place is called Misdemeanorland, and in her recent book by that name, Yale law professor and sociologist Issa Kohler-Hausmann is our guide through its little-known terrain.¹

The name denotes a specific place and population: The courthouses of New York City where hundreds of thousands of low-level offenses are processed each year, and the judges, prosecutors, defense attorneys, defendants, and other courthouse inhabitants who participate in that processing. Misdemeanorland experienced boom times in the mid-1990s, when the New York City Police Department embraced the theory of “broken windows” policing—the idea, popularized by George Kelling and James Wilson, that amped-up enforcement of low-level quality-of-life offenses would result in reduction of more serious crime—and began a massive

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1. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

expansion of misdemeanor arrests.² Drawing on quantitative analysis of three decades of criminal justice data and qualitative observations over more than three years of field work and experience as a criminal defense attorney, Kohler-Hausmann is the first to document the effect of that law enforcement experiment on the courtrooms where the targets of broken windows landed. In doing so, she illuminates in fine-grained detail not only the outcomes that one might intuitively expect—overloaded dockets and overworked personnel dispensing quick, procedureless, and often dehumanizing “justice”—but also outcomes we might not—chief among them, “that while misdemeanor arrests dramatically climbed . . . , the rate of misdemeanor convictions markedly declined.”³

Kohler-Hausmann treats that empirical finding as posing a mystery to be solved: When the policing strategy hinges on deterrence through misdemeanor enforcement, but the courts are sending increasing numbers of misdemeanor arrestees back out to the streets without conviction or punishment, is the law enforcement project thwarted? The bulk of *Misdemeanorland* is devoted to explaining why the answer to that question is in fact “no.” In so doing, Kohler-Hausmann offers up nothing less than a reconceptualization of what the machinery of criminal justice accomplishes and how it does so. Misdemeanorland is a site where social control masquerades as adjudication, where the tools of criminal law and procedure are deployed not to the end of determining factual legal guilt and punishing, but rather to the end of monitoring and managing the population of overwhelmingly poor, overwhelmingly black and brown individuals who journey through. The landscape that emerges defies not only the fable that the legal profession tells itself and others about the criminal law—that its content and procedures operate to identify and punish those who actually transgress society’s norms—but also the standard critique of how misdemeanor justice confounds that tale—that low-level courts are so overburdened and under-resourced that only a sloppy or “assembly line” version of that identification and punishment can occur. Rather, Misdemeanorland is a place where something other than justice-work is happening, and happening with a striking degree of systematicity and individualization.

This brief review proceeds as follows. Part I summarizes the major findings of *Misdemeanorland*, with space only to hit the highlights of Kohler-Hausmann’s rich description and analysis, and with hope that readers’ appetites are whetted to engage the totality of the book for themselves. Part II assesses the contributions that *Misdemeanorland* makes to both the scholarly literature as well as (no less important) to criminal justice policy

2. See *How a Theory of Crime and Policing Was Born, and Went Terribly Wrong*, NAT’L PUB. RADIO (Nov. 1, 2016), <https://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong> [<https://perma.cc/3FM3-8AKM>].

3. KOHLER-HAUSMANN, *supra* note 1, at 60.

and reform debates. This assessment makes the case that although *Misdemeanorland* is in important ways a sui generis story of a highly peculiar jurisdiction, it nevertheless is a work of enormous importance for criminal justice scholars and practitioners. It adds to and recasts both descriptive and theoretical understandings of the legacy of broken windows policing, of misdemeanor justice, and of court work more generally. It also suggests important ways in which prevailing criminal justice reform priorities should perhaps be redirected. Finally, Part II closes by lifting up an aspect of *Misdemeanorland* that Kohler-Hausmann gestures at, but that warrants significantly more study: the role of defense lawyers in the managerial model. The peek that the reader gets into this role suggests deep pathologies in the defense role and its relationship to the social control project of *Misdemeanorland*—pathologies that have been little noted in the literature and that are amply deserving of exploration in further scholarship.

I. Mapping *Misdemeanorland*

Misdemeanorland tells the story of what happened in the courthouses of New York City when this country's largest police force commenced what is probably the largest-scale project of low-level crime enforcement in American history.⁴ Beginning in the mid-1990s, against the backdrop of rising crime rates and increasingly visible homelessness and poverty in the city, then-Mayor Rudolph Giuliani and his new police commissioner William Bratton announced that the new “linchpin” of policing would be “working systematically and assertively to reduce the level of disorder in the city.”⁵ By taking on the City’s “panhandl[ers], squeegee cleaners, street prostitute[s], . . . public drunk[s],” and others who had “curtailed” “enjoyment and use of . . . public spaces,” the NYPD would not only make the streets and parks more palatable to upstanding New Yorkers, but would in turn reduce incidents of more serious crime.⁶

The strategy represented an express embrace of the “broken windows” theory of policing that had been advanced a decade earlier by Keeling and Wilson, and which Commissioner Bratton had previously implemented as head of the New York City Transit Police.⁷ In Keeling and Wilson’s telling,

4. See BRIAN A. REAVES, U.S. DEP'T JUS., OFFICE JUS. PROGRAMS, BUREAU JUS. STAT., LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 14 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf> [<https://perma.cc/KH9F-WUTL>] (showing the New York Police Department has significantly more personnel than any other local police department in the nation).

5. RUDOLPH W. GIULIANI & WILLIAM J. BRATTON, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK 5 (1994); see also ALEX S. VITALE, CITY OF DISORDER: HOW THE QUALITY OF LIFE CAMPAIGN TRANSFORMED NEW YORK CITY POLITICS (2008) (making the case that community opposition to perceived disorder as much as concerns about crime drove the turn to order-maintenance policing).

6. GIULIANI & BRATTON, *supra* note 5, at 4.

7. VITALE, *supra* note 5, at 29, 116–17.

community disorder both reflects and comes to hasten the breakdown of informal social controls in the community; the broken windows theory posits that actions of law enforcement substitute for those informal controls, thus repairing the community's sense of safety and ownership and preventing more serious crime.⁸ Critically, on Kohler-Hausmann's telling, New York City's deployment of the broken windows strategy dictated that police action would take the form of not only more enforcement, but also more formal enforcement. More frequently would a police stop convert to a citation of some kind, and more frequently would individuals be processed with the full procedural apparatus of arrest rather than issued more informal Desk Appearance Tickets. The aim and effect of this uptick in criminal justice records generation was to enlarge the temporal effect of any one police encounter, as the records enabled police as well as downstream judicial actors to monitor and calibrate the system's response to individuals with (newly created) "criminal histories."⁹

The history of the rise of broken windows policing in New York City has been the subject of extensive public and academic interest and debate. Yet *Misdemeanorland* fills a scholarly void. Amidst attempts by social scientists to measure the effects of broken windows policing on crime and community sentiment, and debates among social theorists and legal scholars over the theoretical underpinnings and normative desirability of the approach, few if any have seriously investigated the question, "What happened next?"¹⁰ How did the squeegee cleaner, the turnstile jumper, the marijuana possessor fare in New York City's system of criminal adjudication? Or, to shift the object of inquiry, what did broken windows policing do to the criminal justice system?

Misdemeanorland begins with descriptive answers to these interrelated questions, using extensive quantitative analyses of the output of broken windows policing through its ascendance, impressively analyzing, merging, and creating visualizations of data sets from an array of city, state, and federal agencies. Some of Kohler-Hausmann's findings are, while important, unsurprising to anyone who has followed the recent history of policing in New York City, or the small body of prior studies of misdemeanor adjudication, central among them Malcolm Feeley's 1979 court ethnography

8. THE NAT'L ACADEMIES OF SCI., ENG'G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 163, 313–18 (David Weisburd & Malay K. Majmundar eds., 2018) [hereinafter PROACTIVE POLICING].

9. KOHLER-HAUSMANN, *supra* note 1, at 36–37.

10. The recently published National Academies of Sciences, Engineering, and Medicine review of "proactive policing" strategies, including but not limited to broken windows policing, provides the most comprehensive catalog of studies to date. See generally PROACTIVE POLICING, *supra* note 8. One of the earliest and still seminal empirical and theoretical critiques of broken windows is Bernard Harcourt's *Illusion of Order: The False Promise of Broken Windows Policing* (1998).

The Process Is the Punishment.¹¹ In sum, broken windows policing produced a massive increase in the volume and intensity of misdemeanor enforcement: arrests increased four-fold and summonses three-fold compared to pre-broken-windows levels.¹² This in turn flooded New York City's criminal courts with misdemeanor cases: arraignments more than doubled between 1993 and 2009, and arraignment judges were hearing upward of 100 cases per day.¹³ Most of those cases were disposed of summarily, as is widely understood to be typical of misdemeanor justice; resolution of cases at arraignment—the first appearance before a judge when virtually nothing is known about the facts of the case—increased to a rate of sixty-six percent.¹⁴ Consistent with other studies of racial disparity in low-level criminal encounters,¹⁵ the effects were not equally borne across populations in New York City: misdemeanor arrests increased across all racial groups, but the increases were much greater for black and Hispanic individuals, measured both by total individuals and by arrest-per-individual. Through extensive analysis of police, court, and census data, presented in striking graphs and maps, Kohler-Hausmann demonstrates that the latter effect was the outgrowth of the extreme concentration of misdemeanor arrests in precincts with high levels of poverty and serious crime and, given residential segregation, majority-black-and-Hispanic populations.¹⁶

So yes, for anyone who had doubts: concentrating policing on low-level offenses in neighborhoods with outward signs of “disorder” brought massive numbers of poor black and brown individuals into the criminal justice system. But Kohler-Hausmann unearths some surprising findings about what happened once folks arrived in Misdemeanorland. As misdemeanor arrests climbed, the rate of convictions did not follow, but rather dropped markedly, from forty-four percent prior to the broken windows era to thirty-three percent at the era's height, and only twenty percent for most of the time period.¹⁷ So too did the the likelihood that a convicted defendant would experience any period of incarceration steadily decline, from around twenty percent of misdemeanor cases to only ten percent for most of the broken

11. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

12. KOHLER-HAUSMANN, *supra* note 1, at 41–44.

13. *Id.* at 110–12.

14. *Id.* at 124. *See generally* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011); ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIM. DEF. LAW., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 31 (2009).

15. *See, e.g.*, CHARLES R. EPP ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014) (discussing investigatory traffic stops and greater racial disparity in them as compared to safety stops); AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 17–21 (2013) (reporting marked and rising racial disparities in marijuana possession arrests).

16. KOHLER-HAUSMANN, *supra* note 1, at 51–58.

17. *Id.* at 68.

windows era. Meanwhile, the rate of case dismissals rose steadily, from around thirty percent pre-broken windows to upward of fifty percent since 2010.¹⁸

If one embraces a standard account of the function of courts and its relationship to law enforcement—what Kohler-Hausmann describes as the “adjudicative” model in which courts are “eliciting and evaluating facts about the conduct alleged by the arrest and then applying legal rules that define prohibited conduct with approved procedures for establishing a violation thereof”—this looks like a story of a failed broken windows project.¹⁹ Courts were largely declining even to activate the process of “establishing a violation” of law, and even when they did so they overwhelmingly declined to apply the standard technique of control—incarceration—that the criminal justice system can wield.

But close examination of the operation of misdemeanor courts—which Kohler-Hausmann describes in fluid narrative rich with illustrative cases and interactions from her field work—illuminates a different answer. It is an answer that emerges as the book’s central theoretical contribution. What is going on in Misdemeanorland is not a failure to vindicate the NYPD’s order-maintenance project, but rather the emergence of a means for doing so that does not rely on the conventionally understood adjudicative work of courts. Adjudication *per se* is simply not the project of Misdemeanorland, nor is punishment its *raison d’être*. The driving question for actors in Misdemeanorland is not, “Did the defendant commit [a crime] . . . ?” but rather, “Is this defendant a manageable person?”²⁰ And as such, the dispositions of cases in Misdemeanorland reflect not settled understandings of factual guilt, but rather administrative determinations of the relative “governability and responsibility” of the defendants who pass through. Dismissals of cases, for example, represent not a prosecutor’s determination that a defendant committed no crime, but rather a determination that based on the facts or the defendant’s record the defendant merits (in the words of one prosecutor) “the opportunity to have this clean slate, despite this case.”²¹

This “managerial model” of justice that Kohler-Hausmann names and describes was born not of a deliberate strategic decision by system actors, but through the gradual and consistent evolution of those actors’ responses to the crushing caseloads that made factual adjudication nigh impossible. Court actors “make creative use of the power-conferring rules of criminal procedure to do something with the cases they face daily, something that responds to the institutional imperative to exert a measure of social control over the

18. *Id.* at 70.

19. *Id.* at 72.

20. *Id.*

21. *Id.* at 74.

people hauled into court from Broken Windows policing but something that is also practically manageable and morally acceptable”²²

But while unintentional, managerial justice is nevertheless cognizable and systematic. Kohler-Hausmann identifies three defining features of the model: first, court actors in the managerial model presume that defendants who enter the misdemeanor system are “eligible for some level of social control”; second, court actors self-consciously utilize a range of techniques beyond simply pronouncement of guilt and punishment to exercise social control, techniques that Kohler-Hausmann dubs “marking,” “hassle,” and “performance”; third, those techniques are deployed with a consistent additive logic in the face of evidence that defendants have not conformed to previous demands.²³ Further, Kohler-Hausmann observes that the model’s pursuit of “management” is animated by two consistent and identifiable logics: a forward-looking predictive logic that views future criminal risk as ascertainable, and a backward-looking moral logic that dictates that penal techniques will be applied only in proportion to a defendant’s prior criminal contacts.²⁴

Kohler-Hausmann bears out these claims by bringing the reader on a tour of Misdemeanorland, narrating her observations in its courts and frequently letting court actors speak for themselves in describing their managerial work. We see first how despite the fact that a defendant’s case might ultimately be dismissed, the variety of paths to such dismissals (e.g., dismissal after several court adjournments, the granting of an adjudication in contemplation of dismissal or “ACD,” and so forth) generate court records that affix to a defendant a more-or-less indelible “mark.” Kohler-Hausmann sees time and again that, far more than assessment of the facts of a case (as would drive “adjudicative” work), the marks themselves dictate outcomes. On the front end, the marks a defendant brings into Misdemeanorland determine (sometimes in formalized, matrix-type schedules adopted by prosecutor offices) plea offers—offers that defendants unable or unwilling to ride out the process costs of arguing innocence or raising viable legal claims frequently accept.²⁵ On the back end, marks become part of the currency of what prosecutors and courts bargain with and for, as when prosecutors demand that defendants waive their right to have certain criminal records sealed in order to gain favorable dispositions—trading a lenient outcome for the ability to track a defendant in the future.²⁶

Which brings us to “hassle—the collection of burdensome experiences and costs attendant to arrest and case processing” in Misdemeanorland.²⁷ The ordeal of arrest and pre-arraignment incarceration. The confusion and

22. *Id.* at 140 (emphasis removed).

23. *Id.* at 76–85.

24. *Id.* at 73–74.

25. *Id.* at 143–82.

26. *Id.* at 175.

27. *Id.* at 183.

indignity of court actors refusing requests for information or explanation. The need to arrange for child care or obtain leave for work for court appearances. The difficulty of navigating life under an axiomatically entered order of protection that frequently bars a defendant from accessing family members or a place of residence. All of this is part and parcel of the journey through Misdemeanorland, as anyone with passing familiarity with or intuition about the experience of defending a court case is aware. But on Kohler-Hausmann's telling, these are not just consequences of but also (and more importantly) an instrumentality of court work. An illustrative courtroom exchange that Kohler-Hausmann recounts has a defense attorney pressing for the dismissal of assault charges against two women alleged to be in a romantic dispute with each other. The case would inevitably be dismissed, the attorney argued, because neither would cooperate in the prosecution of the other, and he challenged the prosecutor's refusal to hasten the process. "You schlep them back here for three months of court appearances and then you dismiss it? What's the point of that? Just to schlep them back . . . ?" The ADA responded coolly, "Yup, that's the point."²⁸

It's not quite that the "hassle" is an end in itself, of course; it's not "the point" full stop. The threat of hassle greases the wheels of case disposition, as defendants agree to plea offers to avoid future court interaction. Equally important in the managerial model's operation, hassle is a "strategic resource" that "gives the prosecutor and judge an opportunity to observe" and collect "information" about whether and how the defendant navigates the road blocks erected.²⁹ Kohler-Hausmann points to the practice of almost invariably issuing orders of protection in cases involving complainants, regardless of how weakly the facts of the case suggest that there is a risk of future harassment or violence toward the complainant, or how immense the burden on the defendant (including temporary or permanent homelessness or joblessness). In case after case, judges "get impatient and even angry when defense attorneys put forward either factual or legal argument" in opposition.³⁰ The factual and legal merits are frequently just not the point. The order is not simply in place to control the behavior of the defendant, but also (sometimes more importantly) to "test[] and assess[] the defendant's capacity to follow directives and his or her capacity for harmful behavior in cases where the facts are contested and the prosecutor and judge lack sufficient information to decide what level of penal intervention is warranted."³¹ The process is not "the punishment," as Malcolm Feeley famously theorized, but rather is a technique (or array of techniques) of control in its own right.

28. *Id.* at 203.

29. *Id.* at 211, 213.

30. *Id.* at 213.

31. *Id.* at 211-12.

Finally, “performance” denotes what the defendant must do to generate the desired information about governability, dictated in large part by the nature and number of marks she bears.³² As such, the concept brings together and operationalizes marking and hassle. In a world where the cost of actually assessing a defendant’s guilt is prohibitive (given the caseload crush and the procedural hurdles that must be cleared in a full adversary contest) and often disproportionate to the “value” of the low-level offense, performance lets court actors “observe some capacity of defendants to follow official directives in the face of profound uncertainty about what type of person the defendant is.”³³ Kohler-Hausmann documents that prosecutors’ performance demands consistently reflect the logics of risk prediction (however rough) and proportionality, as defendants are sized up based on their marks and the nature of prior and immediate offenses. One prosecutor is quoted describing her indifference toward letting “fare beat” (turnstile jumping) cases be dismissed on the ground that the prosecution failed to comply with the requirements of the right to a speedy trial, i.e., a “30.30” dismissal:

[I]f that gentleman who has committed a fare beat shows up to court five times? I feel like that guy has kind of . . . if we’re talking about responses that are proportionate to beating a fare . . . I mean, should cases 30.30? Probably not. But in that case do I feel like that was a horrible result? No, the guy showed up five times.³⁴

A contrasting result that illustrates the same principle involves the case of Malik, a defendant with prior weapon convictions who was arrested for possessing marijuana and an illegal “gravity knife.” The prosecutor subsequently admitted that he had no evidence to support the marijuana charge, and failed in rather spectacular fashion (wryly narrated by Kohler-Hausmann) to establish that the knife in fact met the legal definition of a “gravity” blade.³⁵ But the prosecutor insisted, despite the uncontested demonstration of innocence, that nothing short of a day of community service and adjudication in contemplation of dismissal was the appropriate disposition:

People with gun records having knives, smoking marijuana in public, or smoking something that turns out not to be marijuana. . . . I mean it’s not something that we’d be like, “Oh, that’s totally okay. . . .” It’s just whatever the next level of official attention is from “that’s totally okay . . .” which is to do a day of community service. . . .³⁶

Guilt or innocence in the case was essentially irrelevant to the recommendation: Even with the current case eviscerated, the defendant’s prior marks rendered him presumptively in need of monitoring; argument

32. *Id.* at 221–22.

33. *Id.* at 228–29.

34. *Id.* at 229.

35. *Id.* at 227–28.

36. *Id.* at 228 (emphasis added).

sounding in adjudicatory logic could not penetrate the operative logics of managerial justice.

II. Assessing *Misdemeanorland*

The story of Malik's experience in *Misdemeanorland* takes us full circle, in a way, to the policing decisions that landed him there. Lower court actors evolved during the broken windows era to repurpose their adjudicatory tools for new ends, to directly manage an exploding population of low-level defendants viewed as failing to conform with fixed baselines of orderliness, rather than expending the time and energy to achieve that management as a by-product of conviction and punishment. The adaptation was to a significant degree symbiotic with the broken windows project itself, which viewed the occupants of "disordered" neighborhoods as in need of social control interventions, and sought at bottom to restore order through behavioral change prompted in some way by aggressive and formalized enforcement.³⁷ In a sense, one answer to the earlier-asked question, "What did broken windows policing do to the criminal justice system?," is that it remade the system in its own image—or at least prompted the system to remake itself. This is a striking finding, one that one might wish to be unpacked more than Kohler-Hausmann could feasibly do in the space of her project. (Though she offers the tantalizing and plausible notion that the move to "presumably in need of social control" is a short distance to travel if court actors by in large, and contrary to myth, already harbored the conviction of "presumably guilty."³⁸) Whatever the deeper causal mechanisms at work, identifying, quantifying, and theorizing the connection between policing strategy and court work is important and little-seen in criminal justice literatures that largely treat policing and adjudication as siloed enterprises.

Misdemeanorland also adds to, and to an important degree recasts standard accounts and critiques of misdemeanor justice, while filling important gaps in the existing (and emergent) literature on the work of low-level courts. First, *Misdemeanorland* is a challenge to the prevailing critique of misdemeanor justice: that it operates in an "assembly line" fashion that makes a mockery of the ideals of individualized adjudication, and that the assembly line is problematic because attention to adjudicative procedures is the touchstone of fair and accurate adjudication in our adversary system of justice.³⁹ Kohler-Hausmann's sociological orientation takes direct aim at an approach to studying misdemeanor justice that holds courts (and the people who populate them) to such a static, externally imposed logic. *Misdemeanorland* examines instead how court actors come to create their

37. See *supra* note 8 and accompanying text. Cf. HARCOURT, *supra* note 10 (problematizing the precise mechanisms of behavioral change at work).

38. KOHLER-HAUSMANN, *supra* note 1, at 78.

39. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 33–34 (1972); BORUCHOWITZ ET AL., *supra* note 14, at 42.

own logic of action, in dynamic response to the constraints under which they operate.⁴⁰ What the approach yields is an understanding that, contrary to what might appear from the rushed court appearances, quick dispositions, and lack of robust adversary contestation, Misdemeanorland does not push defendants through in a mechanized, undifferentiated manner. Rather, once one sees that misdemeanor justice has evolved from an adjudicative to a management process, the output appears as relatively individualized in accordance with the predictive and proportional logics of the managerial model. Misdemeanorland thus conceptualized is not doing ersatz criminal justice. It's a thing unto itself.

Kohler-Hausmann picks up the mantle of Malcolm Feeley, whose seminal (but now decades-old) study of lower courts in New Haven, Connecticut argued, in part, that one is mistaken to equate an absence of formal proceduralism in those courts with an absence of individualized justice-work.⁴¹ But Kohler-Hausmann's managerial model pushes beyond Feeley, whose study can be fairly read to assume that, however overloaded with morally trivial offenses, courts remained committed to dispensing "substantive justice"—meaning, results that correlated in a meaningful way to a defendant's factual "guilt."⁴² Rather, Misdemeanorland's actors self-consciously disclaim the relevance of factual disputes and center the project of social control as a primary (not derivative) end in its own right.

More contemporarily, Kohler-Hausmann's work dovetails with that of another prolific scholar of misdemeanor justice, Professor Alexandra Natapoff. Natapoff, in her own efforts to bridge legal and social theory, has helpfully conceptualized a "penal pyramid," with the relatively small number of serious felony offenses at the top and the enormous number of low-level offenses occupying the base. Throughout the pyramid, some mix of formal law and rank social control are operating. But at the tip top it is mostly law (the content of statutes, the requirements of procedure) that does the work, whereas at the bottom a powerful social control tail is wagging a miniature law dog.⁴³ *Misdemeanorland* adds important content and texture to the bottom of Natapoff's pyramid. Perhaps most interestingly, Kohler-Hausmann's account demonstrates how, even at the bottom, law-stuff is doing important work, albeit nothing like the same work it is doing at the top, and nothing like the work that the traditional adjudicative account envisions. True, substantive criminal prohibitions function weakly as benchmarks against which factual or legal guilt is measured, and criminal procedure rights are rarely actually asserted against the state. But both substantive and

40. See ISSA KOHLER-HAUSMANN, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING* 250–52 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (arguing for the value of this approach).

41. See FEELEY, *supra* note 11, at 25.

42. See *id.* at 25, 286.

43. See Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING*, *supra* note 40, at 72–73.

procedural law drive the logics of prediction and proportionality by setting the parameters for marking, performance, and hassle: the penal code gives marks their meaning, prosecutors wield adjournment rules to generate hassle mindful of the outer parameters of the speedy trial guarantee, courts and prosecutors utilize defendants' compliance with court rules and orders to measure performance, and so on.

Misdemeanorland thus advances and, to an important degree reorients, efforts by scholars to understand the seeming oddity and outrage that is misdemeanor justice. These insights are valuable in and of themselves. But it is also important to see that the analysis has important practical cash-out, and for this reason I hope dearly that the work is read not only by the pointy headed academic set, but by practitioners and policymakers as well. For one, as suggested above, the insight that law enforcement policy changes had direct consequences for the behavior and even animating logic of court actors reminds us that serious conversations about criminal justice reform cannot focus on courts to the neglect of policing. This institutionally cross-cutting understanding sometimes percolates into policy debates, perhaps most directly in the context of how prosecutors interact with police witnesses and suspects—as in the context of police witness impeachment disclosure or prosecution of police violence. But *Misdemeanorland* demonstrates that the connection is far more pervasive and fundamental, that decisions about what should be the work of police cannot be divorced from decisions about which defendants should experience the criminal justice system and what that experience should look like. Put more concretely, efforts to shrink the footprint of our behemoth criminal justice system by directly targeting sentencing, or plea bargaining, or other post-arrest activities can be thwarted, or at least undermined, by the policing tactics that drive the volume of what enters the stream.

Additionally, Kohler-Hausmann's theoretical account pushes us to ask different, and tougher questions than simply whether or not low-level courts are "broken" when compared to the traditional account of what their work is. Instead, we are called and presented with an opportunity to understand and evaluate the impact of managerial justice on its own terms. One takeaway is that to whatever extent one perceives *Misdemeanorland* to be a site of injustice, amelioration requires more—or something altogether different—than simply doubling down on what is missing from the adjudicative model. (To be fair, Feeley made this point as well; however four decades on it is well to repeat it as calls to "fix" misdemeanor criminal justice have only increased.⁴⁴)

In particular, although Kohler-Hausmann does not say so, *Misdemeanorland* might suggest skepticism toward the notion advanced by some that more and better-resourced defense counsel would cure many ills

44. See FEELEY, *supra* note 11, at 292.

of misdemeanor adjudication.⁴⁵ Despite being provided counsel at arraignment (a right enjoyed in precious few jurisdictions outside New York City⁴⁶), and despite the relatively well-resourced status of New York’s defender organizations, the defendants of Misdemeanorland nevertheless experienced the pressures and, at times, indignities of managerial justice that Kohler-Hausmann observed. That fact results from the limited, indeed perverse, role that adversarial contestation of the state’s case plays in the managerial model: factual guilt or innocence matters little, argumentation founders in the face of the logics of risk prediction and proportionality, and protracted litigation perversely causes protracted hassle.

This is not to argue that those defendants were made no better off by the presence of counsel (though more on that point below) or that there is no role for defense lawyering in misdemeanor cases. In particular, defense advocacy in respect of determination of bail and pretrial release is both possible and critical; whether a defendant is detained after her first appearance is often practically determinative of the outcome.⁴⁷ But in a world with limited financial, human, and political capital to expend in criminal justice policymaking, it is well to observe that other reforms, such as increasing sealing and expungement to erase or restrict access to prior “marks,” or simply criminalizing far less activity, are likely to disrupt more directly the operations of managerial justice. And, in jurisdictions like New York City where meaningful access to defense counsel in misdemeanor cases is provided, it is well to see that important reform that aims to do something other than enhance adjudicative quality remains to be done.

With those significant contributions in clear sight, an important caveat must be supplied—one that I believe Kohler-Hausmann would embrace, but one that does to some extent cabin the practical “lessons learned” from the project. In short, the concern is this: it is far from clear how representative this Misdemeanorland is of the larger universe of an estimated 13.2 million annual misdemeanor adjudications, or even of misdemeanor justice in other cities that, like New York City, prioritize low-level offense enforcement as a policing strategy.⁴⁸ One should not take Kohler-Hausmann’s account to be

45. See, e.g., Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 742–44 (2017); BORUCHOWITZ ET AL., *supra* note 14, at 8–9.

46. See THE CONSTITUTION PROJECT NAT’L RIGHT TO COUNSEL COMM., DON’T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 24 (2015), https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf [<https://perma.cc/KL9R-ZFQF>].

47. That is true in Misdemeanorland, see KOHLER-HAUSMANN, *supra* note 1, at 135, and elsewhere, and see Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 717, 717–18 (2017).

48. Cf. Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of Terry*, 15 OHIO ST. J. CRIM. L. 49, 61 (2017) (observing that the NYPD is in many ways “*sui generis*”). The estimated number of misdemeanors comes from the most comprehensive empirical study available, see Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018).

(and she does not present it as) a description of “misdemeanor justice in the United States.” It is, rather, as Kohler-Hausmann states, “about misdemeanor justice in one jurisdiction.”⁴⁹

Indeed, in every sense, the scale of criminal justice in New York City—law enforcement, prosecution, the defense bar, and the courts—is unparalleled. With more than 34,000 full-time sworn officers, the NYPD is staffed at a rate nearly three times that of the next largest force, Chicago’s.⁵⁰ By contrast, eighty-eight percent of the country’s police departments employ fewer than fifty officers; half, fewer than ten.⁵¹ At the peak of broken windows policing in New York City its courts saw close to 300,000 misdemeanor filings, while at the height of stop-and-frisk policing in Philadelphia, which has the country’s fourth largest police force, misdemeanor filings hovered around 30,000.⁵²

It is not clear at what point the volume of inputs to the justice system tips the dynamics of work to cause the sorts of adaptive behaviors that generated the managerial model revealed in *Misdemeanorland*. And critically, Kohler-Hausmann’s own “ground-up” approach to understanding the work of misdemeanor courts suggests that variation on that score will matter, as will variation along a nearly infinite number of additional dimensions. To consider just one, there is the possibility of political willpower disrupting, rather than acquiescing in, the sort of policing strategy that *Misdemeanorland* accommodated. An example of this dynamic is newly-elected Philadelphia District Attorney Larry Krasner’s directive that, among other offenses, neither marijuana possession nor prostitution will be prosecuted by his office.⁵³ One should not take from *Misdemeanorland* (and the book does not contend) that managerialism as Kohler-Hausmann conceptualizes it is an inevitable dynamic in misdemeanor justice. That said, to understand the possibility of such a dynamic is important. Perhaps more important is to take the work as an invitation to scrutinize the many “Misdemeanorlands” that exist in the United States through Kohler-Hausmann’s ground-up lens. To return to the Krasner point, those who aim going forward to measure the impact of his policy shift will do well to

49. KOHLER-HAUSMANN, *supra* note 1, at 2.

50. REAVES, *supra* note 4.

51. *Id.* at 3, tbl.3.

52. See CRIM. CT. CITY N.Y., ANN. REP., at 7 (2016), <http://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf> [<https://perma.cc/44SB-KPBV>] (New York City court data); FIRST JUD. DIST. PENN., 2016 ANN. REP., at 114, <https://www.courts.phila.gov/pdf/report/2016-First-Judicial-District-Annual-Report.pdf> [<https://perma.cc/3B4Z-U275>] (Philadelphia court data); see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (documenting the peak of stop-and-frisk in New York City); Erica Goode, *Philadelphia Defends Policy on Frisking, With Limits*, N.Y. TIMES (Jul. 11, 2012), <https://www.nytimes.com/2012/07/12/us/stop-and-frisk-controls-commended-in-philadelphia.html> [<https://perma.cc/B8SD-PL4W>] (documenting uptick in Philadelphia stops in years around 2009).

53. Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He’s Exceeding Expectations*, INTERCEPT (March 20, 2018), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/> [<https://perma.cc/H4HF-VVWN>].

examine how those who actually work under existing constraints in the district attorney's office—including but not limited to new formal policies—respond and adapt to that shift, not to mention how other court actors adapt as well.

I am reasonably confident that the contributions and limitations I have described above are well-understood by Kohler-Hausmann herself. I close this review by exploring a matter about which I find the book to be less self-conscious and less clear—but which is nevertheless an intellectually and practically vital current in the book: the role of defense counsel in Misdemeanorland.

Defense lawyers appear at every turn in the book as part of the group of courtroom actors that inhabit Misdemeanorland, in a welcome contrast to the bit role in which the defense is too frequently cast in writing on criminal courts. Moreover, Kohler-Hausmann, herself a former defense lawyer, eschews the tidy caricatures of overburdened and underwhelming counsel that often emerge from popular as well as academic accounts of misdemeanor justice. The defense lawyers of Misdemeanorland are reflective, dogged, savvy, and also at times overwhelmed, disinterested, and defeatist. Kohler-Hausmann is to be commended for training her critical observations on defense attorneys as much as other courtroom actors and for giving those lawyers agency in portraying the working dynamics of Misdemeanorland.

But with agency comes complexity because, well, people are complicated. And in the descriptively nuanced accounts of defense lawyering, the role defense attorneys are playing in the managerial model becomes ambiguous. At times they appear to be contesting the model itself—as in the above-described case of Malik, in which the defense lawyer insists on Malik's behalf and over the prosecutor's resistance that the facts and law *do* matter in deciding the case.⁵⁴ In other moments, defense lawyers retain their traditional adversary function, but do so as what we might call “managerial adversaries”: making the best arguments possible for why less social control is merited, as exemplified by the another above-described defender contesting the prosecutor's inclination to pointlessly “schlep” defendants back.⁵⁵ But sometimes acting in adversarial fashion contributes directly to the managerial project. Consider the account of a defense lawyer reporting the difficulty of convincing clients not to take plea offers at arraignment: “I get not wanting to come back. And I get that it takes a long time sometimes for justice to prevail or whatever. But the truth is that most of these cases are not what they seem at arraignments.”⁵⁶ Yet well-meaning efforts to secure better outcomes by wearing down prosecutors and judges in turn wear down defendants themselves and subject the clients to the

54. See text accompanying *supra* notes 35–36.

55. See text accompanying *supra* note 28.

56. KOHLER-HAUSMANN, *supra* note 1, at 131.

performance obligations and hassle that accompany the delay. “Lacking other leverage . . . defense attorneys resort to imposing procedural hassle on other court actors, namely, prosecutors and judges. *The defendant’s procedural hassle is collateral damage.*”⁵⁷

In other moments, defense lawyers play more direct and seemingly witting roles in advancing the social control project of Misdemeanorland. Consider public defender Valery, who explains her practice of counseling clients about the strong institutional disincentives to pursuing a claim of innocence. “If she can secure a plea to a noncriminal violation, normally disorderly conduct, she explains to the client: ‘Dis con is what they offer innocent people with records.’”⁵⁸ Valerie confesses discomfort with this advice “because she feels as if she is dissuading her clients from ‘fighting their cases,’” as indeed she is. Of course, it’s not at all clear that her advice is incorrect from the standpoint of the defendant’s best interests. But while the (innocent) defendant avoids further “hassle,” the state still gets its “mark.” More extreme examples of defense attorneys implicated as participants in managerial justice are the stories of defender disinterest: the defense attorney, stationed at a desk, separated from defendants and other courtroom watchers by the classic courtroom rail, who repeatedly disregards a confused defendant seeking information and fails to intervene when court officers prevent his approach;⁵⁹ or the defense attorney who responds to a defendant, expressing frustration at having had to wait since 9:00 in the morning to have his case heard, by “coolly replying, ‘So have I. I have been here since 9:00 a.m. too.’”⁶⁰

Defense lawyers present a puzzle for the managerial model, and vice versa, to a degree that is not seriously probed in the book. The existence of an institutional player that has the capacity and inclination to challenge the very legitimacy of the management enterprise imparts a certain instability that undermines any claim that management has wholly supplanted adjudication. To be sure, Kohler-Hausmann does not claim that Misdemeanorland is adjudication-free. But to the extent the claim is that the managerial model explains why misdemeanor courts are in fact “working” by their own logic, it is important to see that there remains, in the defense role, the potential for a built-in critique of that position.

For defense lawyers, the managerial model presents a serious challenge to professional self-understanding and ethics, of a sort that has not been explored by scholars of the defense role. Especially in the context of misdemeanor courts, indigent defense scholars and advocates have long worried that high caseloads and inadequate resources lead to deficient

57. *Id.* at 201–02 (emphasis added).

58. *Id.* at 166.

59. *Id.* at 215.

60. *Id.* at 219.

defense lawyering—typically conceptualized as defense lawyering lacking in the factual and legal investigation and strategic reflection required to be an effective adversary of the state.⁶¹ So, too, has consideration been given to whether defense lawyers who succumb to the pressures of misdemeanor courts and permit or affirmatively counsel clients to enter guilty pleas at arraignment—a prevalent phenomenon in Misdemeanorland—are fulfilling their ethical mandates along a variety of dimensions.⁶²

But these (legitimate) critiques of the state of indigent defense services measure defender quality against what Kohler-Hausmann would call, I think, an “adjudicatory” ideal, in which wrongful conviction (of the actually innocent or the more-innocent-than-their-disposition-suggests) is the key harm of misdemeanor neglect.⁶³ Even those who aim to lift up “collateral” consequences of misdemeanors, and thereby resist the premise that misdemeanor adjudication should be treated as a trivial affair, worry primarily about the adequacy of defense counsel to adequately litigate and stem the tide of some punishment.⁶⁴ These accounts suggest that the central conflicts faced by defense lawyers are the competing demands of cases with insufficient time and resources for factual and legal contestation, that the

61. See, e.g., Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 779 (2010) (“Inevitably, [the fact of high caseloads] forces a public defender with a crushing caseload to cut corners. . . . Each and every corner cut leads to substandard assistance of counsel even if it does not rise to the level of prejudice required to demonstrate ineffective assistance of counsel.”); Roberts, *supra* note 14, at 295 (decrying “assembly-line justice—where defenders fail to deliver even the most rudimentary services, such as investigation and appropriate client counseling” as “an unfortunate fixture in day-to-day representation in the lower courts”); Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 273 (2016) (exploring “how limited resources can exacerbate decisional biases, and have therefore underestimated the public-defense crisis”); BORUCHOWITZ ET AL., *supra* note 14, at 30–31 (“[D]efenders do not have enough time to see their clients or to prepare their cases adequately, there are no witness interviews or investigations, they cannot do the legal research required or prepare appropriate motions, and their ability to take cases to trial is compromised.”).

62. See, e.g., Roberts, *supra* note 14, at 307–08 (2011) (observing that “counsel focused on moving misdemeanors along quickly, with a goal of clients taking pleas at the first appearance, would be hard-pressed to fulfill her ethical and constitutional duties to counsel clients about collateral consequences of any guilty plea”); Steven Zeidman, *Policing the Police: The Role of the Courts and Prosecution*, 32 FORDHAM URB. L.J. 315, 331 n.86 (2005) (“Pleas at arraignments fly directly in the face of the lawyer’s constitutional and ethical duty to investigate.”). *But see* CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION, § 4-6.1 (AM. BAR ASS’N, 4th ed. 2015) (“Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client’s best interest.”), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [<https://perma.cc/2CRP-J6FM>].

63. *But see* Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1069–70 (2013) (discussing distinctive aspect of defense function—“to stem the trend towards aggregation that characterizes the modern criminal process, to turn defendants into individuals before the law even if the police and prosecutors have failed to do so”).

64. See, e.g., Joe, *supra* note 45, at 758 (arguing that deprioritizing misdemeanor representation wrongly minimizes consequences of misdemeanor conviction); Roberts, *supra* note 14, at 297–306.

central harms to clients involve conviction and punishment, and that by in large the answer is more resources for more and better litigation.

Misdemeanorland might not suggest the opposite, but it does suggest that much is missing from such a focus. Where managerial justice work has taken hold, defense lawyers are faced with foundational questions about what *is* their proper role as an adversary of the state, charged with vindicating the best interests of their client. According to the ABA Criminal Justice Standards for the Defense Function, a defense lawyer's "primary duties" are "to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity."⁶⁵ To the extent that "to ensure that constitutional and legal rights of their clients are protected" defense lawyers in *Misdemeanorland* must subject their clients to hassle and attendant performance, there seems no way for the zealous advocate to avoid furthering the state's interests, i.e., the social control project. The managerial model effectively weaponizes against the client the very advantages that the Supreme Court's Sixth Amendment jurisprudence, not to mention professional acculturation, contemplate that a lawyer will provide.⁶⁶ On the other hand, is the lawyer who accedes to the managerial model and obtains the best possible result for her client within the terms of that model actually acting with the "devotion" to the client's interests that she ought? And whatever the right answer is as a matter of professional ethics, how does the conscientious and emotionally healthy defense lawyer grapple with the deep tensions in her role?

Those of us who take seriously the centrality of defense counsel in ensuring fair treatment of criminal defendants cannot ignore the challenges that a sociologically centered account of lawyering pose to prevailing conceptions of professional ethics and professional self-understanding. At a minimum, defenders must attend to the extent to which their own actions directly contribute to the systematic hassle and performance to which their clients are subjected—and, to be sure, to the extent to which race, class, and gender bias feed that dynamic. More contestably, we should take from *Misdemeanorland* an invitation to query what functions are at the heart of zealous representation,⁶⁷ and in so doing to think outside the box of defense lawyer as adjudicatory adversary. What can defenders do, for example, to mitigate the experience of hassle, or to reorient court actors' own biases in demanding and assessing performance? What should defense organizations do to, by way of hiring and support, to ensure that the lawyers who are training up to provide excellent representation at the law-heavy top of the penal pyramid do the important work of pushing back on the social control

65. CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION, § 4-1.2 (AM. BAR ASS'N, 4th ed. 2015).

66. See *Argersinger v. Hamlin*, 407 U.S. 25, 31–33 (1972).

67. Just as Jenny Roberts has urged in her call to address the uniqueness of misdemeanor representation in developing defense standards. See generally Roberts, *supra* note 14.

mechanisms so powerfully at work at the bottom? Close to my own heart, those of us who educate future defense lawyers (as well as prosecutors and judges) should certainly engage with misdemeanor justice in the classroom, but should more specifically engage students in thinking about how the work of high-volume, low-level criminal courts puts pressure on traditional professional roles.

These are only preliminary and gestural thoughts about a range of questions that are important and complex enough to merit substantial further empirical and normative exploration. The same could be said about a range of issues touched upon by *Misdemeanorland*. That is to say, perhaps the greatest contribution of the volume will come to be the new and distinctive questions that it demands that scholars, policymakers, and practitioners begin to ask about *what* they are doing in criminal justice work, and the vigorous debate that will then be had about those newly perceived enterprises.