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The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence

John D. King

THE MEANING OF A MISDEMEANOR IN A POST-FERGUSON WORLD: EVALUATING THE RELIABILITY OF PRIOR CONVICTION EVIDENCE

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Despite evidence that America's low-level courts are overburdened, unreliable, and structurally biased, sentencing judges continue to uncritically consider a defendant's criminal history in fashioning an appropriate punishment. Misdemeanor courts lack many of the procedural safeguards that are thought to ensure accuracy and reliability. As with other stages of the criminal justice system, people of color and poor people are disproportionately burdened with the inaccuracies of the misdemeanor system.

This Article examines instances in which sentencing courts have looked behind the mere fact of a prior conviction and assessed whether that prior conviction offered any meaningful insight for the subsequent sentence. This Article then proposes a framework by which defendants should be allowed to challenge the use of prior conviction evidence in the sentencing context, arguing that the government should bear the burden of persuasion once the defendant sufficiently satisfies a burden of production. Ultimately, however, this Article suggests that courts and legislatures consider categorical exemptions from the use of prior misdemeanor convictions in imposing sentences. Failure to critically examine this evidence risks introducing and compounding the biases and errors of low-level courts into more serious sentencing proceedings.

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I. INTRODUCTION

In 2014, the shooting of an 18-year-old, unarmed black man by a white police officer sparked demonstrations and civil unrest in Ferguson, Missouri.[1] One of many unforeseen consequences of these events was a reevaluation of how America's low-level courts administer justice. The 2015 Department of Justice (DOJ) Investigation of the Ferguson Police Department Report[2] forced Americans to consider the realities of not only how poor Americans are policed, but also how they are adjudicated in America's courts.[3] While some debate whether, and to what extent, the situation described in the Ferguson Report is an outlier,[4] other sources lend support to the idea that America's low-level courts are failing to deliver on the promise of due process, fundamental fairness, and accurate factfinding.[5] Critiques of the misdemeanor adjudication system have a long history.[6] But the greatly expanded reach of the

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[1] *See generally Timeline of Events in Shooting of Michael Brown in Ferguson*, AP NEWS (Aug. 8, 2019), https://apnews.com/9aa32033692547699a3b61da8fd1fc62.

[2] *See generally* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter FERGUSON REPORT].

[3] *See* Terrence McCoy, *Ferguson Shows How a Police Force Can Turn into a Plundering 'Collection Agency'*, WASH. POST (Mar. 5, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/ferguson-shows-how-a-police-force-can-turn-into-a-plundering-collection-agency/?utm_term=.1cef407c4b6c ("[W]hen people couldn't pay, they were arrested.").

[4] *See* Richard Rosenfeld, *Ferguson and Police Use of Deadly Force*, 80 MO. L. REV. 1077, 1077 (2015) (examining the differences between Ferguson and surrounding communities that may have made Ferguson uniquely ripe for civil unrest, including "aggressive enforcement of municipal ordinances to generate revenue, inadequate training and supervision related to police use of force, and a pattern of racial bias in policing" (citing FERGUSON REPORT, *supra* note 2, at 2)).

[5] *See* Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1009–10 (2018) (questioning law enforcements' and prosecutors' factfinding processes in light of a study that showed almost eighty percent of misdemeanor exonerations were based on guilty pleas entered into "without a chemical test for innocence"); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) ("Most U.S. convictions are misdemeanors, and they are generated in ways that baldly contradict the standard due process model of criminal adjudication."); Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1999 (2016) (explaining that some appellate courts conceded that admission of more than five prior convictions "hinted at 'prosecutorial overkill' and violations of due process").

[6] *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 644 (1956) (discussing how certain summary procedure practices deprive defendants of "the most elementary requirements of a fair hearing"); *see also* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 290–92 (1979)

criminal justice system and scope of consequences of a conviction give this topic new urgency.

The Ferguson Report makes plain just how easy it is for poor people and people of color to amass low-level criminal convictions in American courts.[7] This Report and other sources also demonstrate how the American system of low-level criminal adjudication prioritizes mass processing and efficiency over accurate factfinding and meaningful assignment of moral blameworthiness.[8] Ferguson exposed a single judicial system, but increasing data show the unreliability and structural unfairness of factfinding in low-level courts more broadly.[9] In a post-Ferguson world, how should courts evaluate prior conviction evidence when imposing sentences or determining whether an accused person qualifies for an aggravated charge as a recidivist? A sentencing judge confronted with a defendant who has, for example, one (or a few) misdemeanor convictions from 2013 Ferguson, Missouri has a choice to make. Traditional theories and practices of sentencing direct the judge to sentence the defendant more harshly because of the defendant's prior criminal record.[10] Should the judge automatically apply the

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(criticizing rising pretrial costs for frustrating the "adjudicative ideal" and rendering proper justice unavailable for many criminal defendants).

[7] *See* FERGUSON REPORT, *supra* note 2, at 62 (concluding that the Ferguson Police Department's racially-driven actions imposed a disparate impact on African Americans); *see also* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice,* 98 B.U. L. REV. 731, 749 n.85 (2018) (explaining the Ferguson Report, which found that police "over-enforce low-level criminal laws and routinely make unjustified arrests that never result in formal charges").

[8] *See generally* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (explaining how "mass misdemeanor" policing induces prosecutors and courts to process people through quick plea bargaining rather than affording defendants meaningful opportunities to build a case).

[9] *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 160 (2011) (examining the errors in the cases of the first 207 wrongfully convicted people to be exonerated by DNA testing and reporting that fifty-three percent of exonerees took the stand at trial to claim their innocence); *see also DNA Exonerations in the United States,* INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 27, 2020) (reporting that there have been 367 DNA exonerations to date, wrongfully convicted defendants served an average number of fourteen years in prison, sixty-nine percent of exonerations involved eyewitness misidentification, forty-four percent involved misapplication of forensic science, and twenty-eight percent involved false confessions).

[10] *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 159–62 (2018) (discussing the "additive imperative" of increasing levels of control and punishment based on prior criminal justice encounters); *see also* Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1670–73 (2019); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM'N 2018) (laying out the broad considerations when sentencing defendants).

relevant sentencing enhancement, whether formal or informal? Or should the judge allow what she knows about that court at that time to affect how she evaluates that prior conviction evidence? How different are other misdemeanor courts? What about the mass adjudication of immigration offenses?

Courts have long used prior convictions to enhance sentences and even to upgrade charges.[11] Every sentencing guidelines system, for example, assigns additional aggravating points for prior convictions.[12] This practice rests on the assumptions that (1) prior convictions accurately reflect past conduct,[13] and (2) prior convictions render the defendant more deserving of punishment for the crime at hand.[14] But as research continues to reveal the problems of accuracy in the criminal justice system,[15] the first of these assumptions is called ever more directly into question, especially when the prior conviction was for a minor crime. After the wave of exonerations based on DNA over the last couple of decades,[16] scholars have begun to focus on the challenges of accurate factfinding in the lower courts.[17]

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[11] *See supra* note 10 and accompanying text. Three-strikes laws provide one example of this use of prior convictions. *See* David Schultz, *No Joy in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections Policy, Resources, and Crime Control,* 9 CORNELL J.L. & PUB. POL'Y 557, 558 (2000) (noting that twenty-two states adopted "three strike" laws, under which a person convicted of three serious felonies would automatically receive an enhanced sentence); *see also, e.g.*, D.C. CODE § 22-1804 (noting that a repeat offender can receive three times the statutory maximum if the offender has been convicted of the same or a similar crime twice before).

[12] *See* Nancy J. King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 MARQ. L. REV. 523, 525 n.4 (2014) (explaining the widespread practice of prior conviction sentence enhancement and giving the examples of Wisconsin and Florida, where a prior conviction can transform a civil infraction into a criminal offense and a murder charge to a capital offense, respectively).

[13] *See* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 565 (2014) ("Yet the most basic assumption of all—the one on which all the others are built—has received far less attention: the assumption that the conviction is a reliable indicator of the defendant's relative culpability.").

[14] *See* USSG ch. 4, pt. A, introductory cmt. ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."). On the theoretical debate of whether defendants with prior convictions should be sentenced more harshly and why (or why not), see Youngjae Lee, *Repeat Offenders and the Question of Desert*, *in* PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES (Julian V. Roberts & Andrew von Hirsch eds., 2010) [hereinafter PREVIOUS CONVICTIONS AT SENTENCING], and Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, *in* PREVIOUS CONVICTIONS AT SENTENCING, *supra*.

[15] *See supra* notes 5–9 and accompanying text.

[16] *See supra* note 10.

[17] *See* Natapoff, *supra* note 5, at 116 ("Lacking evidentiary rigor and adversarial testing, [the world of low-level criminal adjudication] is a world in which a police officer's bare decision

In this context, how should courts assess claims by defendants that a prior conviction is unreliable, inaccurate, or structurally unsound? Presumptions of regularity and finality generally have barred defendants from collaterally challenging a prior conviction.[18] Courts have been extremely reluctant to allow for any inquiry into the procedural validity of a prior conviction, relying instead on the principle of regularity in using such a criminal history in a sentencing hearing or at trial of another charge.[19] But in light of the increasing body of scholarship about factual inaccuracies and procedural irregularities in criminal adjudication,[20] this Article argues that courts should adopt a framework that allows defendants to mount these collateral attacks more freely. Traditional assignments of burden of proof should evolve to reflect what we now know about wrongful convictions and the vagaries of factfinding in low-level courts. If we take seriously the critiques of our criminal justice system, we should make the effects of prior convictions less absolute and allow defendants broader latitude to attack the fairness and accuracy of prior convictions in subsequent proceedings.

This Article proceeds as follows. Part II examines the research regarding the lack of procedural safeguards in low-level courts and how the results in such courts lack reliability. This Part argues that outcomes in low-level criminal courts more accurately reflect structural bias than an accurate adjudication of factual guilt. Part III discusses courts that have looked skeptically at prior conviction evidence in the sentencing and impeachment contexts and argues

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to arrest can lead inexorably, and with little scrutiny, to a guilty plea. It is, in other words, a world largely lacking in a scrutinized evidentiary basis for guilt and therefore one in which the risk of wrongful conviction is high."); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1451 (2005) (arguing that the criminal justice system encourages defendants to remain silent during their proceedings, which paves the way for governmental overreach); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts,* 45 U.C. DAVIS L. REV. 277, 282 (2011) (questioning the accuracy of factfinding when defendants are routinely pressured to waive the right to counsel or enter quick guilty pleas without adequate time to consult with an attorney); *see generally* Gross, *supra* note 5.

[18] *See, e.g.*, Lackawanna Cty. Dist. Atty. v. Coss, 532 U.S. 394, 402 (2001) (barring certain collateral attacks on prior convictions based on a "need for finality of convictions and ease of administration" and noting the multiple other forums that allow defendants to challenge judgments); United States v. Martinez-Cruz, 736 F.3d 999, 1001 (D.C. Cir. 2013) ("[T]he Guidelines 'do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.'"(citations omitted)).

[19] *See Martinez-Cruz,* 736 F.3d at 1001.

[20] *See supra* notes 5–6, 10, 17.

that the realities of today's criminal justice system require this more discerning approach to such evidence. Part IV analyzes the historical role played by the presumption of regularity and instances in which this presumption has been overcome. This Part concludes by proposing a procedural framework by which a court should consider a defendant's claim that a prior conviction should not be considered due to alleged unfairness or unreliability in the process by which it was obtained. This Part argues that once the defendant has satisfied the burden of production by making a credible claim of constitutional invalidity, the prosecution should bear the burden of persuasion in such a collateral attack. Ultimately, this Part argues that legislators should consider exempting misdemeanor convictions from any calculation of criminal history because of the lack of reliability in those proceedings. Part V concludes.

II. FAILURES OF MISDEMEANOR COURTS

Many courts reflexively assume that evidence of a defendant's prior conviction is necessarily a meaningful criterion to be factored into the sentencing calculus. But scholars have recently challenged "the reliability of a conviction as an indicator of relative culpability [due to] the growing body of data on wrongful convictions . . . and on disparities in law enforcement, and on the nature and dominance of plea-bargaining."[21] More broadly, some have begun to challenge the very notion that the existence of a prior conviction reliably indicates anything about a defendant's character.[22] Anna Roberts, for example, argues that courts can no longer assume that a prior conviction has any meaning relative to a defendant's character for truthfulness because of three developments in the criminal justice system: (1) adversarial collapse, (2) unequal enforcement of

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[21] *See* Roberts, *supra* note 13, at 563 (first citing Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 526 (2009); and then citing Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence,* 47 GA. L. REV. 723, 725 (2013)).

[22] *See id.* at 580 (arguing that before using a prior conviction, sentencing courts should "first investigate whether the conviction is itself a reliable indicator of relative culpability"); *see also* Donald H. Zeigler, *Harmonizing Rules 609 and 608(b) of the Federal Rules of Evidence,* 2003 UTAH L. REV. 635, 679 (2003) ("A conviction simply makes it somewhat more likely the defendant committed the misconduct.").

criminal laws, and (3) the widening scope of criminal prosecutions.[23] Because low-level courts lack the formal procedural safeguards of felony courts and because the norms of practice in low-level courts result in less accurate and reliable outcomes, prior convictions from these courts should be subject to close scrutiny.

A. PRACTICALITIES: AN INSIGHT INTO TODAY'S MISDEMEANOR COURTS

Misdemeanor courts have never enjoyed the same degree of procedural fairness as felony courts.[24] Many of those accused of misdemeanor criminal activity lack the right to court-appointed counsel.[25] Even when the formal right to counsel applies, misdemeanor courts often are characterized by a shockingly low standard of practice by defense counsel.[26] And of course the federal constitutional right to a jury also does not apply in many misdemeanor trials.[27]

The vastly expanded volume of misdemeanor cases being processed in American courtrooms has aggravated these formal

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[23] *See id.*

[24] *See generally* John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors in the United States, in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 30–33 (E. Luna & M. Wade eds., 2012); KOHLER-HAUSMANN, *supra* note 10; Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738 (2017); Natapoff, *supra* note 5; *see also* Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 809–15 (2018).

[25] *See* Scott v. Illinois, 440 U.S. 367, 369 (1979) (deciding that the U.S. Constitution did not require a state trial court to appoint counsel where a defendant was charged with a statutory offense for which imprisonment upon conviction was authorized but not actually imposed); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (deciding that the right to counsel extends only to offenses for which imprisonment would be imposed); *see also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel,* 48 HARV. C.R.-C.L. L. REV. 1, 2 (2013) (explaining the arbitrary dichotomy of "petty" and "serious" offenses and the practice of appointing counsel in misdemeanor cases only if the defendant is actually sentenced to a period of incarceration).

[26] *See* AMY BACH, ORDINARY INJUSTICE 257–66 (2009) (describing the lack of monitoring mechanism "to keep track of the extent of ordinary injustice"); ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE 31–32 (2009) (discussing a process that often occurs in misdemeanor courts, known as "meet-and-plead," where cases are resolved at the first court hearing with minimal or no preparation by the defense); King, *supra* note 24, at 42 ("A recurring and enduring problem in both the substantive and procedural justice offered by misdemeanor courts is the abysmal state of indigent misdemeanor representation in many parts of the country.").

[27] *See* Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (declaring that petty offenses may be tried without a jury because only defendants accused of *serious* crimes are afforded that right).

distinctions.[28] The sheer quantity of defendants in these systems results in a lack of individualized attention to any one case and the absence of meaningful adversarial process over the long run.[29] Finally, it is well-documented that the vagaries of the misdemeanor adjudication system do not fall randomly across all segments of society.[30] As with virtually every other stage of the criminal justice system, people of color and poor people are disproportionately burdened by the inaccuracies and errors of the misdemeanor adjudication system.[31] Those with mental illnesses, too, are more likely to end up in the low-level criminal courts, as "more than half of all prison and jail inmates had a mental health problem" and many of them were incarcerated for misdemeanors like DUI, larceny, and drug possession.[32]

When the Ferguson Report was released, it shed light on the manner in which many criminal cases are resolved in the United States, bluntly declaring that the City's "law enforcement practices are shaped by the City's focus on revenue rather than by public

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[28] *See* Stevenson & Mayson, *supra* note 7, at 737 (estimating that approximately 13.2 million misdemeanor cases are filed in the United States each year).

[29] *See supra* note 26 and accompanying text.

[30] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013); Robin Walker Sterling, *Fundamental Unfairness:* In re Gault *and the Road Not Taken*, 72 MD. L. REV. 607 (2013).

[31] *See* Roberts, *supra* note 24, at 822 (explaining how racial disparities are particularly significant in misdemeanor cases due, in part, to deliberate policing choices linked to non-white neighborhoods); *see also* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 149–57 (2018).

[32] DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), http://bjs.gov/content/pub/pdf/mhppji.pdf; *see also* JENNIFER BRONSON & MARCUS BERZOFSKY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–2012, at 6 (2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf (finding that prisoners incarcerated for property crimes were just as likely to have a mental illness as those incarcerated for violent offenses); ANNA GUY, AMPLIFYING VOICES OF INMATES WITH DISABILITIES PRISON PROJECT, LOCKED UP AND LOCKED DOWN: SEGREGATION OF INMATES WITH MENTAL ILLNESS 5 (2016), http://avidprisonproject.org/assets/locked-up-and-locked-down----avid-prison-project.pdf (showing that the use of segregation in prisons and jails often exacerbates prisoners' mental illnesses); Terry Smerling, Opinion, *L.A. County Needs to Construct Mental Health Programs, Not Just Jails*, L.A. TIMES (May 4, 2014, 12:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-smerling-mental-illness-jails-20140505-story.html (advocating for more treatment programs to keep low-risk offenders with mental illnesses out of jail and noting that a Miami-Dade misdemeanor diversion program reduced the recidivism rate from seventy-five percent to twenty percent).

safety needs."[33] The municipal court in Ferguson was a monument to revenue collection and seems to have acted more as a collection agency than anything that could be described as an adversarial system.[34] As of October 2014, the municipal court had 103,000 cases pending in a town with 21,000 residents.[35] Up to 500 people would appear before the court in a single session.[36] The court was not only physically located within the Ferguson Police Station but was also overseen by the Ferguson Chief of Police,[37] who acted as the direct supervisor of court staff.[38] Most cases, of course, were resolved by plea,[39] as is now true in all American criminal courts.[40] The court clerk was granted the authority to accept guilty pleas and set bond.[41] Although the court was empowered to incarcerate people found guilty, it rarely did so in the first instance, preferring to impose fines instead.[42] Those who either did not pay their fines on time or who missed court, however, frequently ended up spending time in jail as a result.[43]

The court described in the Ferguson Report bears little resemblance to the theoretical ideal that law students learn about in their criminal law and procedure courses. Defendants are routinely convicted of charges without receiving meaningful notice and the sheer volume of cases precludes a meaningful opportunity to be heard.[44] Those defendants or their attorneys who do try to

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[33] FERGUSON REPORT, *supra* note 2, at 2.

[34] *See supra* note 3 (describing commentary regarding the Ferguson municipal court and its focus on generating revenue).

[35] FERGUSON REPORT, *supra* note 2, at 6, 9 (providing that as of October 31, 2014, there were 53,000 traffic and 50,000 non-traffic cases on the court docket).

[36] *Id.* at 9.

[37] *Id.* at 8.

[38] *See id.* ("Court staff report directly to the Chief of Police.").

[39] *See id.* at 43 ("We have concerns . . . about the trial processes that apply in the rare occasion that a person does attempt to challenge a charge."); *see also* Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trial,* OUTLINE (Aug. 7, 2017), https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=hhhy6uhu (stating that 97% of state level felonies result in a plea).

[40] *See* U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET 3 tbl. 2, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2017/dcc17.pdf (providing that 97.2% of criminal cases in fiscal year 2017 resulted in a guilty plea).

[41] FERGUSON REPORT, *supra* note 2, at 8.

[42] *See id.* at 8–9 (providing that the municipal judge has sentenced someone to jail as a penalty for a violation only once and almost always imposes the monetary penalty instead).

[43] *See id.* at 9 ("As a result, violations that would not normally result in a penalty of imprisonment can, and frequently do, lead to municipal warrants, arrests, and jail time.").

[44] *See id.* at 71–88 (providing an overview of the relationship between race and law enforcement officers).

engage in adversarial litigation are punished for it.[45] The Report includes an excerpt of an email from the lead prosecuting attorney admitting to harsher treatment for defendants whose attorneys "go[] off on all the constitutional stuff."[46]

Although Ferguson presents an extreme example, many of the dynamics described in the Report will be familiar to those who appear in low-level courts in the United States. The astounding volume of cases being processed through such courts makes things like *Brady*[47] disclosures a rarity, and tales of attorneys—or, more commonly, their clients—being punished for aggressively litigating cases in low-level courtrooms are common.[48] The Ferguson municipal judge confirmed that "it is not uncommon for him to add charges and assess additional fines when a defendant challenges the citation that brought the defendant into court."[49] With these

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[45] *See id.* at 43 ("Attempts to raise legal claims are met with retaliatory conduct."); *see also* Alexa Van Brunt, Opinion, *Poor People Rely on Public Defenders Who Are too Overworked to Defend Them,* GUARDIAN (June 17, 2015, 7:30 AM), https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked ("[P]re-trial detainees incur a 'trial tax'—those who decide to fight their case are forced to stay in jail longer than those who plead guilty.").

[46] FERGUSON REPORT, *supra* note 2, at 44.

[47] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[48] *See* Beth Schwartzapfel, *New York Courts Say: Hand It Over,* MARSHALL PROJECT (Nov. 8, 2017, 4:20 PM), https://www.themarshallproject.org/2017/11/08/new-york-courts-say-hand-it-over (stating Brady material is often never disclosed due in part to the fact that almost all convictions are secured by plea and noting that thirty-eight percent of the 234 exonerations in New York involved Brady violations).

[49] FERGUSON REPORT, *supra* note 2, at 49. The Report shows a system driven primarily as a revenue generator:

> In March 2010, for instance, the City Finance Director wrote to Chief Jackson that "unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year. . . . Given that we are looking at a substantial sales tax shortfall, it's not an insignificant issue." Similarly, in March 2013, the Finance Director wrote to the City Manager: "Court fees are anticipated to rise about 7.5%. I did ask the Chief if he thought the PD could deliver 10% increase. He indicated they could try."

Id. at 2. Of course, the emphasis on revenue generation was passed on to patrol officers. And as Ferguson's strategy paid off, it did what any rational profit-maximizing corporation would do: it expanded. In January 2013, the City Council approved additional municipal court positions on the basis of the City Manager's argument that "each month we are setting new all-time records in fines and forfeitures" and that the increased salaries for court personnel "will be more than covered by the increase in revenues." *Id*. at 9. Most infamously, the Report describes a Ferguson woman who parked her car illegally in 2007. She received a citation requiring her to appear in court, a $151 fine, and additional fees. After missing several court dates, she was charged with seven counts of failure to appear, each of which was accompanied by an arrest warrant and additional financial penalties and fees. Because of her inability to pay, she was arrested on warrants on two separate occasions, spent six days in jail, and has paid $550 to the court. Her case was still open at the time of the release of the Ferguson

informal norms actually governing the adjudication of misdemeanors in many courtrooms, it is little wonder that many defendants choose to exit the system as quickly and quietly as possible, without contesting the charges against them. As long as the process costs of adjudicating a misdemeanor exceed the direct consequences of a conviction, it will continue to be a rare defendant in most misdemeanor systems who fights their charge by going to trial.[50]

B. LACK OF PROCEDURAL SAFEGUARDS

The Sixth Amendment right to counsel, which first applied to state prosecutions in *Gideon v. Wainwright*,[51] was extended to certain misdemeanors in *Argersinger v. Hamlin*[52] in 1972. Seven years later, in *Scott v. Illinois*,[53] the United States Supreme Court limited the reach of the Sixth Amendment to only those misdemeanors in which the defendant faced the threat of incarceration.[54] As this doctrine developed to categorically exclude any misdemeanors that did not carry the actual possibility of jail time, courts and prosecutors quickly realized that they could streamline the process by "waiving" the possibility of jail time and proceeding without appointing counsel for indigent defendants.[55] By making the securing of a criminal conviction less costly in terms of both time and money, courts allowed for the expansion of the mass processing of low-level convictions.[56] Even where defense counsel

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Report, and she still owed an additional $541, all from a single instance of illegal parking that occurred over seven years earlier. *See id.* at 4.

[50] *See* FEELEY, *supra* note 6, at 290–92.

[51] 372 U.S. 335 (1963).

[52] 407 U.S. 25 (1972).

[53] 440 U.S. 367 (1979).

[54] *See id.* at 373–74 (deciding that the U.S. Constitution did not require a state trial court to appoint counsel where a defendant was charged with a statutory offense for which imprisonment upon conviction was authorized but not actually imposed).

[55] Writing separately in *Argersinger*, Justice Powell foresaw some of the direct and collateral consequences that would make a simplistic dichotomy between "petty" and "serious" cases increasingly untenable. 407 U.S. at 47–48 (Powell, J., concurring) ("The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label 'petty.'").

[56] The Ferguson Report details how few of the defendants had court-appointed counsel. *See* FERGUSON REPORT, *supra* note 2, at 25 (describing how officers frequently made contempt arrests when they felt disrespected by something subjects said); *see also id.* at 49 (documenting that courts held defendants in contempt when they merely asked questions

are present in misdemeanor courtrooms, the standard of practice is often appallingly low.[57] Whether physically present or not, an ineffective lawyer not only fails her client, but also degrades the court's ability to reach accurate, fair, and just results.[58] The defense lawyer has been called the "master key" to unlock the other mechanisms to promote fair and just adjudication in court.[59]

Because the Sixth Amendment assures the right to a jury only for serious offenses, it does not apply to many misdemeanor offenses.[60] In *Duncan v. Louisiana*, the Court rationalized that "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."[61] Each state determines which offenses are serious,[62] but generally serious offenses are those that carry a penalty of more than six months of incarceration.[63] Although some states provide a broader right to trial by jury than the federal constitutional right,[64] many misdemeanors fall below both state and

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during their proceedings and that it was not uncommon for the municipal judge to "add charges and assess additional fines when a defendant challenge[d] the citation that brought the defendant into court").

[57] *See* Van Brunt, *supra* note 45 (discussing how Washington State's publicly appointed defense attorneys spend less than one hour per case and have caseloads of 1,000 misdemeanors per year, which prevents them from conducting core legal functions such as factual investigations).

[58] *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) ("[R]epresentation by counsel 'is critical to the ability of the adversarial system to produce just results.'" (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984))).

[59] *See* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 7 (1962).

[60] Duncan v. Louisiana, 391 U.S. 145, 159 (1968) ("It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision . . . .").

[61] *Id.* at 160.

[62] The *Duncan* Court declined to settle "the exact location of the line between petty offenses and serious crimes." *Id.* at 161.

[63] *See* Blanton v. N. Las Vegas, 489 U.S. 538, 543 (1989) (stating that an offense with a maximum incarceration period of six months is presumptively petty).

[64] *See* State v. Becker, 287 A.2d 580 (Vt. 1972) (providing the right to a jury trial in all criminal cases, including misdemeanors with no imprisonment penalty); *see also* Bado v. United States, 186 A.3d 1243 (D.C. 2018) (guaranteeing the right to a jury trial to defendants who face a deportation penalty); State *ex rel.* McDougall v. Strohson, 945 P.2d 1251, 1252–53 (Ariz. 1997) (stating that the court determines whether the right to a jury trial attaches by assessing the length of potential incarceration, the moral quality of the charged act and the relationship of the act to common law crimes); State v. Slowe, 284 N.W. 4, 6 (Wis. 1939) (stating that the right to a jury trial applies to misdemeanor offenses).

federal thresholds, leaving defendants with the limited options of either pleading guilty or proceeding with a bench trial.

Considering the scarcity of zealous defense counsel, the exceedingly rare involvement by a jury, and a vanishingly small percentage of cases decided by any kind of trial at all, it is difficult to characterize misdemeanor adjudication as a truly adversarial system. Contrary to traditional notions that American criminal justice is reliable because of the strong procedural safeguards in place to guard against wrongful convictions, the current system of criminal adjudication has been accurately described as one of "adversarial collapse."[65] The American Bar Association has described the state of indigent defense systems in the United States as "in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."[66]

Appeals of convictions from misdemeanor courts are very rare. A recent study estimated that fewer than one in a thousand misdemeanor convictions is appealed to an intermediate appellate court.[67] This can be attributed in part to the high rate of plea agreements, in which prosecutors often insist on a defendant's waiver of the right to appeal.[68] The lack of zealous defense counsel also contributes to this issue, as many defendants are precluded from seeking an appeal if their counsel did not preserve certain objections.[69] Without effective counsel, many defendants are

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[65] *See* Roberts, *supra* note 13, at 580 ("[A] growing sense of adversarial collapse, bolstered by wrongful convictions data, makes increasingly tenuous an unquestioning assumption that a conviction is itself a reliable indicator of relative culpability."); *see also* King, *supra* note 24, at 30–33; Rodney Uphoff, *Convicting the Innocent: Aberration or System Problem?*, 2006 WIS. L. REV. 739, 740 (2006) ("[T]he premise of our adversarial system is that the clash between partisan advocates produces reliable, accurate results."); Fred Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45, 61 (1991) ("When the system breaks down in a significant respect, the codes can no longer expect competition to achieve adversarially appropriate results.").

[66] ABA STANDING COMM'N ON LEGAL AID & INDIGENT DEF., GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE—A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 38 (2004).

[67] *See* Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1941 (2019). Even in federal court, defendants appeal only around five percent of misdemeanor convictions. *See* JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL APPEALS, 1999 WITH TRENDS 1985–99, at 1, 3 (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/fca99.pdf.

[68] *See* Roberts, *supra* note 17, at 337 ("[P]rosecutors sometimes insist on a waiver of the right [to appeal] as part of any plea bargain.").

[69] *See id.* at 339 (noting the barrier of a petitioner's failure to raise an issue in an earlier proceeding).

unaware either of their right to appeal or of the various filing deadlines and procedural requirements to note an appeal.[70] With so few charges resolved by trial and even fewer reviewed by an appellate court, actors in the misdemeanor system are governed more by informal norms of conduct than by formal rules of procedure and doctrine.

With so many convictions secured by guilty plea,[71] the most important procedural protection that is often absent in misdemeanor cases may be the knowing-and-voluntary requirement for guilty pleas. The United States Supreme Court has ruled that guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[72] But because of the woeful state of indigent defense, especially in low-level cases, many defendants enter guilty pleas with no understanding of the likely consequences of this action.[73] The Court has yet to require defense counsel to advise defendants of any indirect consequence of a guilty plea except in the immigration context.[74] And given the realities of low-level practice (and time-served plea offers in the face of seemingly endless delay), defendants are very unlikely to factor in future sentencing events when evaluating whether to plead guilty.[75]

Of course, prior convictions that were obtained unconstitutionally may not be used to enhance a criminal sentence

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[70] *See id.* at 337–38 (discussing how ineffective counsel limits the opportunities available to defendants and noting that "individuals who plead guilty in the fast-paced, high-volume lower criminal courts may not even be aware of the right to appeal . . . .").

[71] *See* Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ (discussing how "estimates for misdemeanor convictions [resulting from guilty pleas] run even higher" than ninety-seven percent).

[72] Brady v. United States, 397 U.S. 742, 748 (1970).

[73] *See* Yoffe, *supra* note 71 (explaining that defendants accused of misdemeanors often do not request counsel and that poor defendants who are not able to post bond plead guilty to avoid waiting in jail for an investigation); *see also* Jenny Roberts, *Informed Misdemeanor Sentencing,* 46 HOFSTRA L. REV. 171, 171 n.1 (2017) (explaining that misdemeanor sentences can be as high as ten years and often result in defendants being fired from jobs, barred from future employment, deported, evicted or refused housing).

[74] *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (deciding that the distinction between collateral and direct consequences was ill-suited to the deportation context, so the counsel's failure to correctly advise defendant of the deportation consequences of his guilty plea amounted to constitutionally deficient performance).

[75] *See* Van Brunt, *supra* note 45 (discussing how pre-trial detainees rarely have more than a brief conversation with their lawyer before pleading guilty and reach this decision in part due to the "trial tax"—the fact that those who decide to fight their case stay in jail for longer).

for a subsequent offense.[76] Any criminal conviction with a sentence involving incarceration secured without either the presence of counsel or a valid waiver of counsel by the defendant is unconstitutional.[77] A valid waiver of one's right to counsel must be done knowingly and intelligently to satisfy constitutional requirements, and courts should indulge a presumption against waiver of constitutional rights.[78] But if the realities of misdemeanor practice preclude appellate review of waivers of the right to counsel and to trial, it is difficult—perhaps impossible—to know when such waivers were validly given.[79]

The lack of procedural safeguards in misdemeanor courts suggests a rate of wrongful convictions higher than the known rate for felony convictions.[80] Lacking recourse to a jury trial, and often

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[76] *See* Burgett v. Texas, 389 U.S. 109, 115 (1967) ("The admission of a prior criminal conviction which is constitutionally infirm . . . is inherently prejudicial . . . .").

[77] *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."). Of course, misdemeanor offenses *carrying no possibility of incarceration* do not confer a constitutional right to counsel. *See id.* at 40. (deciding that the right to counsel extends only to offenses for which imprisonment would be imposed); *see also* Scott v. Illinois, 440 U.S. 367, 369 (1979) (deciding that the Constitution did not require a state trial court to appoint counsel where a defendant was charged with a statutory offense for which imprisonment upon conviction was authorized but not actually imposed). A criminal conviction of an unrepresented defendant in such a case does not require either the presence of counsel or a valid waiver to comply with constitutional requirements. *Id.*

[78] *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (providing that a waiver is an "intentional relinquishment or abandonment of a known right or privilege," but that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" (citations omitted)). This presumption against waiver is especially strong with regard to a criminal defendant's right to counsel, which has been described as the "master key." *See* John D. King, *Beyond Life and Liberty: The Evolving Right to Counsel*, 48 HARV. L. REV. 1, 6 (2013) (referring to "the right to counsel [as] the 'master key' to all of the other rights-protecting and reliability-ensuring rules of criminal procedure").

[79] *See* NAT'L RIGHT TO COUNSEL COMM'N, THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 85 (Apr. 2009), https://archive.constitutionproject.org/pdf/139.pdf. ("[T]here is a shocking disconnect between the system of justice envisioned by the Supreme Court's right-to-counsel decisions and what actually occurs in many of this nation's courts.").

[80] *See* Samuel R. Gross, Opinion, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html [hereinafter Gross, *Wrongful Convictions in America*] ("The problem may be worst at the low end of the spectrum, in misdemeanor courts where almost everybody pleads guilty. . . . In the past year, 45 defendants were exonerated after pleading guilty to low-level drug crimes . . . ."); *see also* Samuel R. Gross, *Race and Wrongful Convictions in the United States*, NAT'L REGISTRY EXONERATIONS (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [hereinafter Gross, *Race and Wrongful Convictions*] ("Misdemeanor convictions

without the assistance of counsel, a person charged with a misdemeanor has powerful incentives to plead guilty regardless of the evidence in the case or the defendant's factual guilt or innocence.[81] An offer to plead guilty to a misdemeanor with no additional jail time can make the prospect irresistible.[82] And the millions of misdemeanor convictions[83] that are secured by guilty plea each year are never subjected to any meaningful adversarial testing.[84] Without these procedural safeguards, the reliability and accuracy of outcomes in low-level courts is questionable.

C. UNRELIABILITY IN ADJUDICATING GUILT

Logic and experience dictate that many misdemeanor convictions are obtained with little regard to the facts of the case or the applicable law.[85] In his essay, *Errors in Misdemeanor Adjudication*, Samuel Gross describes some categories of known misdemeanor exonerations, in which the vast majority of defendants opted for a quick guilty plea with little direct punishment over the prospect of a more protracted process.[86] One typical scenario is a felony that "falls apart and is dumped by a prosecutor who offers the defendant

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outnumber felonies by at least four to one, but account for less than *four percent* of exonerations . . . . Clearly, only a tiny fraction of innocent defendants who are convicted of misdemeanors or non-violent felonies are ever exonerated." (citations omitted)).

[81] *See* Gross, *Wrongful Convictions in America*, *supra* note 80 ("Why then did they plead guilty? As best we can tell, most were held in jail because they couldn't make bail. When they were brought to court for the first time, they were given a take-it-or-leave-it, for-today-only offer: Plead guilty and get probation or weeks to months in jail. If they refused, they'd wait in jail for months, if not a year or more, before they got to trial, and risk additional years in prison if they were convicted. That's a high price to pay for a chance to prove one's innocence.").

[82] *See* Gross, *supra* note 5, at 1004 ("Hundreds of thousands of defendants plead guilty every year to avoid pre-trial detention for . . . misdemeanors. Why wouldn't they? They may face months in jail waiting for trial, but get weeks or days—or no time at all—if they plead guilty.").

[83] *See* Stevenson & Mayson, *supra* note 7, at 737 (estimating approximately 13.2 million misdemeanor cases are filed each year in the United States).

[84] *See* Gross, *supra* note 5, at 1004–05 ("Plea bargaining is the great American method of sweeping problems in criminal cases under the rug. The defendant's constitutional rights were violated? No problem; offer him a good enough deal, he'll plead guilty, and that'll be the end of it. The evidence of guilt stinks? If you reduce the charges enough, he'll probably go for it, and we'll never have to present any evidence.").

[85] *See id.* at 999 ("There's every reason to worry that many defendants who are convicted of misdemeanors, usually by guilty pleas, are innocent—but there are hardly any data that speak to that issue.").

[86] *See id.* at 1009–10 (discussing the case of Harris County, Texas supporting the conclusion many defendants accused of misdemeanors accepted guilty plea offers).

a no-time misdemeanor plea bargain."[87] One judge described the defendant who accepted such an offer as having "just bought an insurance policy."[88]

The vast majority of criminal convictions are obtained by plea rather than by adversarial testing at trial.[89] Because of the breakdown in real adversarialism in criminal cases, some have argued that the "assumption of reliability [of criminal convictions] needs to be reexamined."[90] Indeed, the system has evolved in the past half century[91] to embrace efficiency and mass processing, sacrificing accuracy and reliability of outcomes as a result.[92] Anna Roberts additionally cites the inadequate provision and quality of defense counsel as negatively impacting reliability, stating that "the kind of representation that can help to ensure reliability is often lacking."[93] The modern nature of plea bargaining, with so much of the power in the hands of the prosecutor, further undercuts claims of reliability.[94] Various strong pressures encourage defendants

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[87] *Id*. at 1001.

[88] *Id*. One of the more illuminating categories of known misdemeanor exonerations concerns those charged with misdemeanor drug possession for substances later determined not to be drugs. *Id.* at 1009–10. During the data collection period Gross describes, only one jurisdiction had the practice of testing suspected illegal substances after the defendant entered a plea of guilty to possessing them. *Id*. In at least fifty-eight instances in this county, defendants opted for a quick misdemeanor guilty plea to drug possession at their first court appearance *even when the substance in question was not illegal drugs*. *Id.* Eventually, after testing the suspected substances, the prosecutor's office secured exonerations for those defendants. *Id*. Regardless, these cases demonstrate innocent people's willingness to opt for a quick conviction instead of a lengthy pre-trial process, the likelihood of pre-trial detention, and an uncertain outcome at trial. *Id*. at 1003–04.

[89] *See* Roberts, *supra* note 13, at 578 ("[I]n most cases the convictions will have been garnered through a guilty plea . . . ."); *see also* Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for Truth*, 56 N.Y.L. SCH. L. REV. 911, 912 (2011) ("The current American system is marked by an adversary process so compromised by imbalance between the parties—in terms of resources and access to evidence—that true adversary testing is virtually impossible.").

[90] Roberts, *supra* note 13, at 581.

[91] Almost a half century ago, the U.S. Supreme Court recognized that "the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result." Argersinger v. Hamlin, 407 U.S. 25, 34 (1972).

[92] *See* Findley, *supra* note 89, at 912 ("If one were asked to start from scratch and devise a system best suited to ascertaining the truth in criminal cases, . . . what would that system look like? It is inconceivable that one would create a system bearing much resemblance to the criminal justice process that we now have in the United States.").

[93] Roberts, *supra* note 13, at 581.

[94] *See id.* at 582 nn.148–49 ("Plea bargains can be swiftly accomplished, and countless pressures push defendants toward this outcome." (first citing Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE. L. REV. 1049, 1072, 1081–82 (2013); and then citing Jenny Roberts*, Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1093–94 (2013))).

toward guilty pleas regardless of guilt in low-level cases, and "the adversarial truth-seeking process . . . has become increasingly irrelevant."[95] Because of the heightened pressures toward quick resolution and the lack of procedural safeguards in low-level courts, misdemeanor convictions are likely far less reliable than felony convictions.[96]

Of course, the unfairness of America's criminal courts is not evenly or randomly distributed. Notwithstanding decades of rhetoric targeting racial and economic disparities in the criminal justice system, people of color and poor people continue to bear the brunt of a structurally unfair system.[97] Federal rates of incarceration are almost twice as high for Latinos, and more than five times higher for African Americans, than for white Americans.[98] Among those convicted, people of color are sentenced to periods of

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Roberts cites the trial tax, delay, and fear of factfinder bias as reasons that a defendant might choose a plea bargain regardless of factual guilt or innocence. *Id*. at 582–83.

[95] *See* Natapoff, *supra* note 94, at 1071 (arguing that "the misdemeanor system burdens and pressures defendants regardless of the evidence, their rights, or their culpability"); *see also* Darryl K. Brown, *American Prosecutors' Powers and Obligations in the Era of Plea Bargaining* ("[W]hen pleas replace trials, most of the systemic components of public adjudication that serve the objectives of factual reliability and accurate normative judgment are missing—the jury, evidentiary disclosure, rules of evidence, formal adversarial challenges to state evidence, and so on."), *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 24, at 200, 204; Roberts, *supra* note 13, at 584 ("[F]ar from a fair fight, the conviction-production process is often a scramble to grab the least bad option before the risk of trial. It would be a miracle if the results were reliable.").

[96] *See* Roberts, *supra* note 13, at 584–85 (stating that misdemeanor convictions have a "shaky foundation" because misdemeanors are generally not subject to investigation); *see also* King, *supra* note 24, at 30–33 (describing how the danger of wrongful convictions in misdemeanors lies in the "nonfeasance, rather than the misfeasance or malfeasance, of the prosecutor"); Gross, *Race and Wrongful Convictions*, *supra* note 80, at 17 (providing that misdemeanor convictions outnumber felonies by four to one, but account for less than four percent of exonerations and concluding that "[c]learly, only a tiny fraction of innocent defendants who are convicted of misdemeanors or non-violent felonies are ever exonerated").

[97] *See, e.g.*, CATHERINE V. BEANE, MOVING TOWARD A MORE INTEGRATIVE APPROACH TO JUSTICE REFORM 2 (Feb. 2008) ("A defining characteristic of America's criminal justice system is its disproportionate impact on the poor and people of color . . . ."); *see generally* ALEXANDER, *supra* note 30 (arguing that the American criminal justice system acts as a modern-day system of racial control); COLE, *supra* note 30 (contending that constitutional protections from police power are not extended to minorities and the poor).

[98] *See* Carol A. Brook, *Racial Disparity Under the Federal Sentencing Guidelines*, 35 LITIG. 15, 15 (2008) ("In federal prison, people of color make up almost 75 percent of the prison population, although they constitute only 25 percent of the U.S. population. Worse, African-Americans alone make up almost 40 percent of the federal prison population, although they constitute only 13 percent of our country's population."); *see also Criminal Justice Fact Sheet,* NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited Apr. 4, 2020) ("In 2014, African Americans constituted 2.3 million, or 34%, of the total correctional population . . . [and] are incarcerated at more than 5 times the rate of whites.").

incarceration approximately twenty-five percent longer than white defendants.[99]

Eisha Jain criticizes a focus on "exceptional" cases that might warrant relief, arguing that our focus instead should be on the "typical" misdemeanor prosecution and the unfair way that it is adjudicated.[100] Misdemeanor offenses are often the easiest cases to prove in that they "typically 'lack robust mens rea requirements,' meaning that they are designed to ease the path of prosecution."[101] Misdemeanor cases are generally staffed by the least experienced prosecutors and defense lawyers.[102] And misdemeanors are seen as "disposable" in that everyone involved wants to dispose of them quickly.[103]

It is not much of an exaggeration to state that criminal procedure matters very little in the adjudication of misdemeanors.[104] Jain explains that

> the procedural hurdles meant to ensure a fair process either do not exist or do not work as intended in the misdemeanor context. Misdemeanants get a watered-down version of the doctrinal protections that apply to felonies. Defendants are not entitled to counsel or jury trials in all low-level cases.[105]

And even where those protections are theoretically or doctrinally present, the realities of misdemeanor prosecution render them unavailable or illusory in practice.[106] Misdemeanor courts sort

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[99] *See* Lynn Adelman & Jon Deitrich, Rita*, District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 57 (2007) (discussing the sentencing gap between African Americans and other groups).

[100] *See* Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 955 (2018) (arguing that relief efforts should account for the systemic unfairness in the misdemeanor process).

[101] *See id.* at 956 (quoting Natapoff, *supra* note 5, at 1358–59).

[102] *See id.* ("They are staffed by the least experienced lawyers or even with no lawyers at all.").

[103] *See id.* at 956–57 ("The cases are considered 'disposable' in every sense of the word: lawyers are trained to dispose of them quickly, and defendants themselves have powerful perceived incentives to resolve them quickly.").

[104] *See id.* at 959 ("None of this [criminal procedure] amounts to much in misdemeanor courts.").

[105] *Id.*

[106] *See id.* (explaining that obtaining legal counsel is often practically inaccessible because "[m]any jurisdictions charge fees for court-appointed attorneys" and "overworked defense attorneys . . . provide no meaningful advice").

people into two categories with little regard either for legal guilt or moral blameworthiness.[107] Although this lack of rigorous testing and factual accuracy might be defended on the grounds of "low stakes,"[108] the ever-expanding network of collateral consequences makes that argument less and less tenable every day. Every subsequent sentence enhancement or application of a recidivist statute may compound the arbitrariness and structural unfairness of misdemeanor courts.

III. INFORMED SKEPTICISM OF PRIOR CONVICTION EVIDENCE

In a misdemeanor courtroom, it can seem that the short-term interests of all parties are in a quick resolution: a guilty plea with a time-served sentence. Such a resolution terminates the case quickly and efficiently. The judge moves a case off of her docket, the prosecutor secures a conviction, and the defendant is out of jail and home. Courts evaluating these convictions at later sentencing events, however, must take a longer-term view and ascribe meaning to each conviction, asking whether, and to what extent, those convictions justify harsher punishment. Rather than unthinkingly tallying up each prior conviction on a predetermined grid,[109] courts should conduct a more searching inquiry into whether a particular prior conviction reliably speaks to the moral culpability and criminal history of the defendant.

A. RACE

People of color are disproportionately implicated at every stage of the American criminal justice system.[110] U.S. District Court Judge Nancy Gertner took account of the potential impact of race on prior convictions when she sentenced Alexander Leviner, a

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[107] *See* KOHLER-HAUSMANN, *supra* note 10, at 223 ("[L]ower criminal courts are not primarily adjudicative, merely processing people by resolving criminal cases."); *see also* King, *supra* note 24, at 3 (arguing that the misdemeanor process sorts defendants "into two groups, not on the basis of guilt or innocence, but rather on their willingness to pay the 'process costs' of an overburdened system" (citing FEELEY, *supra* note 6, at 290–92)).

[108] *But see* Roberts, *supra* note 73, at 171 ("There is no such thing as a low-stakes misdemeanor.").

[109] *See, e.g.*, Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing,* 96 J. CRIM. L. & CRIMINOLOGY 25, 27 (2005) (arguing that the Sentencing Guidelines dehumanize offenders by mechanically inserting certain variables into a formula and scoring punishments on a two-dimensional grid).

[110] *See, e.g.,* Sterling, *supra* note 30, at 660–62.

defendant with a long history of convictions for petty offenses.[111] Leviner pleaded guilty to being a felon in possession of a firearm.[112] In calculating his criminal history score, Judge Gertner noted that a technically accurate calculation of Leviner's criminal history score placed him in Criminal History Category V, the second-highest category in the system, even though his criminal record mostly consisted of motor vehicle offenses and minor drug possession charges.[113] His only conviction for a crime of violence was a sixteen-year-old conviction for assault, which occurred when Leviner was seventeen years old.[114]

Stating that the Guidelines were "not to be applied mechanistically" and that the court would not ignore "fairness" or "logic," Judge Gertner concluded that the criminal history calculation overstated the defendant's culpability and sentenced Leviner as if he were in a lower criminal history category.[115]

Judge Gertner found that accepting the initial calculations would "replicate disparities in state sentencing" and exacerbate racial disparities in traffic stops and arrests of people of color.[116] Further, not only were many of Leviner's convictions for driving after his license was suspended, but also he was sentenced to either suspended or active jail time in each of them, which drove his criminal history score higher still.[117] The offenses became "countable" as prior criminal history because Leviner received more than thirty days of imprisonment.[118] Again, Judge Gertner wondered aloud about the impact of race: "[W]ithout knowing the

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[111] United States v. Leviner, 31 F. Supp. 2d 23, 25 (D. Mass. 1998) ("[W]hile Leviner has a relatively long record, it consists almost entirely of motor vehicle offenses, and minor drug possession charges.").

[112] *Id.* at 24.

[113] *Id.* at 25.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 24 ("[E]ven more profound concerns are raised where, as here, the defendant is African American, the convictions were largely motor vehicle offenses, for which the defendant was imprisoned. The scholarly and popular literature strongly suggests that there is racial disparity in the rates at which African American are stopped and prosecuted for traffic offenses. That literature, together with the specific facts about Leviner's record and background, compel me to depart from the Guideline range.").

[117] *See id.* at 28–29 (explaining that additional points will be added to the criminal history if the defendant has experienced a prior sentence of imprisonment of certain durations (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM'N 2018))).

[118] *See id.* at 33 ("[T]hese stops evolved into 'countable' offenses under the Guidelines only because they were offenses for which Leviner received more than thirty days' imprisonment.").

specific facts surrounding each sentence, this record raises concerns at the very least. Would others have received the same sentence who were similarly situated . . . ?"[119] She considered several scholarly sources on the racial disparities in the rate at which people of color are stopped, charged, prosecuted, and aggressively sentenced for criminal offenses.[120] Ultimately, Judge Gertner concluded that to count each of Leviner's prior criminal convictions as the Guidelines dictate would only replicate and magnify prior racial disparities in sentencing Leviner for the felon-in-possession charge, and she departed downward from the Guideline range and sentenced Leviner as if he were in a lower criminal history category.[121]

The U.S. Sentencing Guidelines, like many state guideline systems,[122] explicitly forbid the consideration of race in sentencing.[123] In section 5H1.10, the U.S. Sentencing Commission declares that race is "not relevant in the determination of a sentence."[124] If this is understood as mandating a "race-blind" approach to sentencing, however, the result will only replicate, exacerbate, and magnify the racism that has already occurred in prior interactions between defendants of color and the criminal justice system.[125] The legislative history to the act establishing the guidelines seems to take a more nuanced view, setting forth that "[t]he requirement of neutrality with regard to such factors [as race]

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[119] *Id.*

[120] *Id.*

[121] *Id.* at 25. Judge Nancy Gertner later explained her decision in the *Leviner* case:

> The guidelines's emphasis on criminal history enhances whatever inequities were embodied in past sentences. I sentenced a man for the crime of "felon in possession of a firearm," whose criminal record scored high on the guidelines. When I looked closely, I noticed that all the scored offenses were nonviolent, traffic offenses—for instance, driving after his license was suspended. And then I wondered: Since no other traffic offense accompanied the license charges, how did the man get stopped? I strongly suspected "Driving While Black." I departed downward, refusing to give literal credit to the record."

Nancy Gertner, *Federal Sentencing Guidelines: A View from the Bench*, 29 HUM. RTS. 6, 23 (2002).

[122] *See, e.g.*, MINN. SENTENCING GUIDELINES 2.D.2 (MINN. SENTENCING GUIDELINES COMM'N 2019) (forbidding race to be considered as a basis for departing from a presumptive sentence); ARK. CODE ANN. § 16-90-801(b)(3) (2019) ("Sentencing criteria should be neutral with respect race . . . .").

[123] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (U.S. SENTENCING COMM'N 2018) (explaining that race is not a relevant factor to the determination of a sentence).

[124] *Id.*

[125] *See* Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1, 8 (2007) (discussing the "ability to foresee the future racial consequences of the criminal justice system choices that we make today").

is not a requirement of blindness."[126] By distilling this guidance into a flat statement that race is "not relevant," however, the Sentencing Commission dangerously oversimplifies how previous racial bias and disparity should be factored into sentencing decisions.[127]

B. CITIZENSHIP

Immigration-related offenses are—like the traffic offenses at issue in *Leviner*—another area in which convictions are generated at high volume and through increasingly informal procedure.[128] Immigration-related prosecutions have come to predominate in many federal criminal courtrooms and have become the subject of creative procedural shortcuts.[129] Because of the high volume of cases in many dockets, these cases can be among the most egregious in lacking due process and fundamental fairness.[130]

One description of such a courtroom—a federal district court in the District of Arizona—challenges traditional notions of how criminal convictions are secured in American courts:

> U.S. District Court Judge Leslie Bowman's court had been in session for less than 14 minutes, but as usual, it had been a busy 14. She'd already deported eight Central American men and was seconds away from deporting six more, who stood nervously before her. . . . Most [of these men] faced misdemeanor charges for illegal entry into the U.S., and [Judge] Bowman was preparing to dismiss the cases and order them deported. But for Guatemalan immigrant Manuel Lux-Tom, it was different. This was his second time being caught crossing the border, and federal officials who wanted him in jail were insisting that Lux-Tom stand trial at a

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126 Brook, *supra* note 98, at 18 (emphasis omitted) (quoting 1984 U.S.S.C.A.N. 3354 n.409).

127 USSG § 5H1.10.

128 *See* Miriam Jordan, *Swift Frontier Justice for Migrants Brought to Federal Courts,* N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/us/border-immigration-courts.html (explaining how President Trump's zero-tolerance policy has swiftly flooded southern criminal courthouses, with nearly sixty percent of all criminal prosecutions in April 2018 for immigration violations).

129 *See id.* (describing the Bush-created Operation Streamline as "assembly-line justice" because of the common mass multiple-defendant proceedings and how due process might be undermined by this rush to convict).

130 *See id.* (quoting the executive director of Federal Defenders of San Diego, who said that "providing meaningful representation becomes all but impossible").

> later date when the court could handle his case. Lux-Tom's attorney, Richard Bacal, objected. Bacal argued [that] his client had been the victim of a rigged and unfair system during his previous trial in Pecos, Texas. In that case, Bacal said, Lux-Tom had never talked to an attorney alone—he'd only seen one in a group meeting along with 20 other men being detained. No one had asked Lux-Tom, who speaks his native language of K'iche', if he needed or wanted a translator, and he'd been found guilty with literally no idea what was happening, Bacal argued.[131]

Like many of those being processed through federal courtrooms on the southern border, Lux-Tom spoke neither English nor Spanish.[132] But he was not provided an interpreter in a language that he understood.[133] Judge Bowman responded to Lux-Tom's objection with striking candor, acknowledging "that a person could probably make it through the proceedings without a thorough understanding of their rights and the court proceedings."[134]

The ease with which a criminal defendant could be convicted with no knowledge of the meaning of the proceedings escalated in 2005 with the introduction of Operation Streamline, which reduced procedural safeguards and enabled courts to process people at a "breakneck pace."[135] In such cases, prosecutors frequently offer a time-served sentence in exchange for a quick guilty plea.[136] As with all kinds of misdemeanors, this result can seem like a win for all

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[131] John Stanton, *The Courts Where Some Immigrants Plead Guilty Without Knowing What's Happening*, BUZZFEED NEWS (July 11, 2018), https://www.buzzfeednews.com/article/johnstanton/immigration-border-operation-streamline-due-process.

[132] *Id.* ("Though the men had been given interpreter headsets, they were largely ceremonial: None of the men spoke English or enough Spanish to participate in the hearing.").

[133] *Id.*

[134] *Id.*

[135] *Id.*; *see also* Ted Robbins, *Border Patrol Program Raises Due Process Concerns*, NAT'L PUB. RADIO (Sept. 13, 2010), https://www.npr.org/templates/story/story.php?storyId=129780261 (discussing the implementation and effects of Operation Streamline); Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, N.Y. TIMES (Feb. 11, 2014), https://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html (explaining some people may be sentenced in as little as twenty-five seconds).

[136] *See* Yoffe, *supra* note 71 (explaining how the bureaucratic system encourages poor people who cannot pay bond to plead guilty and get time served rather than remain in jail while the misdemeanor is investigated).

involved: the courts move cases along quickly, the prosecutors boast high conviction rates, and the defendants get to quickly dispose of the case with no further immediate consequences.[137] As Judge Bowman suggested, it is not difficult to imagine such a system processing people along so quickly that those being convicted have little or no understanding of what is happening.

C. CLASS

A final irrationality in using prior convictions to enhance sentences concerns the extent to which the prior length of incarceration increases a defendant's criminal history score, as it does in the U.S. Sentencing Guidelines and various state systems. As a close look at misdemeanor practice illustrates, this practice punishes poverty far more than it reflects criminal culpability or amenability to rehabilitation.[138]

In *United States v. Yuselew*,[139] the defendant received a one-point increase in his criminal history score for a prior "conviction for patronizing a prostitute."[140] The Guidelines specifically exempt prostitution convictions from criminal history calculations, unless such a conviction carried a sentence of "a term of imprisonment of at least thirty days."[141] At his arraignment on the patronizing-a-prostitute charge, Yuselew was given a $100 cash

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[137] *See id.* ("Ideally, plea bargains work like this: Defendants for whom there is clear evidence of guilt accept responsibility for their actions; in exchange, they get leniency. A time-consuming and costly trial is avoided, and everybody benefits."). It is not clear that a system that more rigorously protected defendants' rights would be preferable to those defendants:

> Before [Operation] Streamline, immigrants who had already been deported at least once faced felony charges that could bring up to two years in jail, often on top of the weeks or months they would spend awaiting trial. But under Streamline, detention can be as short as [thirty-six] hours before they are deported. And given chronic complaints about the conditions in long-term immigration detention centers like the West Texas Detention center dubbed Hell by detainees, that can mean a lot for many immigrants.

Stanton, *supra* note 131.

[138] *See* Roberts, *supra* note 13, at 596–97 n.255 (providing that time served sentences are imposed on defendants who are "too poor to pay bond," and therefore using sentence length as a component of impeachment might allow defendant to be impeached by their own poverty (citing Motion for Departure, Objections to Presentence Report and Sentencing Memorandum, United States v. Yuselew, No. CR 09-1035 JB, 2010 WL 4854683 (D.N.M. Aug. 5, 2010))).

[139] *Yuselew*, 2010 WL 3834418.

[140] *Id.* at *2.

[141] *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1) (U.S. SENTENCING COMM'N 2018).

bond.[142] But because he could not post the bond, he remained in pre-trial detention.[143] Forty-four days later, Yuselew was brought before the judge, entered a plea of guilty, and was sentenced to the time he had already served.[144] At his subsequent federal sentencing, Yuselew argued that this time-served sentence should not factor into his criminal history calculation, as he had not been sentenced to a term of imprisonment of at least thirty days.[145]

After initially opposing Yuselew's request to exclude the patronizing-a-prostitute charge, the prosecution withdrew its opposition during the sentencing hearing due to a "lack of clarity in the documents" regarding whether Yuselew received "a time served sentence or a deferred sentence."[146] The court nevertheless addressed Yuselew's objection to the criminal history calculation and stated that it "would be inclined to conclude that a time-served sentence is a term of imprisonment" and therefore to overrule Yuselew's objection to the inclusion of the prior conviction for patronizing a prostitute.[147] In its discussion of the issue, the court made no mention of the economic disparities that would result from including time-served sentences like Yuselew's in criminal history calculations.[148]

Yuselew's case illustrates how irrational disparities in misdemeanor sentencing practices can be magnified in subsequent sentencing decisions. But for Yuselew's indigency, he certainly would have posted the $100 bond to secure his own freedom in the misdemeanor prostitution case. Because of his poverty, however, he was penalized, both by having to spend that time in pre-trial detention and by the additional criminal history point assessed at

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142 *Yuselew*, 2010 WL 3834418, at *3.

143 *See id.* ("The bond was never posted, and Yuselew remained in prison.").

144 *See id.* (stating that Yuselew plead guilty and was given a deferred judgment on October 24, 2007).

145 *See id.* (explaining Yuselew's argument that patronizing a prostitute is similar to the offense of prostitution which is excluded from criminal history calculations).

146 *Id.* at *5 (explaining that ambiguity in Yuselew's previous plea because if the sentence was deferred, then no portion of it could have been served which would provide "no basis to find that the term of imprisonment was at least thirty days").

147 *Id.* at *13; *see also* United States v. Staples, 202 F.3d 992, 998 (7th Cir. 2000) ("Time served is real time and time suspended is not."); Roberts, *supra* note 13, at 597 n.255 (citing Motion for Departure, Objections to Presentence Report and Sentencing Memorandum, *supra* note 139)). *But see* United States v. Buter, 229 F.3d 1077, 1078 (11th Cir. 2000) (concluding that a time served sentence on misdemeanor convictions does not qualify as a sentence to a term of imprisonment); United States v. Hall, 531 F.3d 414, 419 (6th Cir. 2008) (same).

148 *See* Roberts, *supra* note 13, at 599 ("[R]eliance on prior sentences can magnify disparities based on race or poverty.").

his later sentencing—a point that raised his presumptive sentencing range from 210–262 months to 235–293 months, an increase of more than two years.[149]

The common misdemeanor practice of time-served sentences has very little bearing on the seriousness of the offense. Instead, it bears more on the degree to which the court is overburdened and whether the defendant in question can gather the funds necessary to secure her freedom prior to the resolution of the case. Without knowing the details of a particular court's practices, one reasonably may conclude that, had Mr. Yuselew posted bond immediately upon his arraignment, whether after four days or forty-four days, he would have received the same sentence: time already served. But because of section 4A1.2(c)(1), poor defendants are sentenced more harshly for these prior offenses, solely on account of their poverty.

The shortcuts and mistakes in misdemeanor court do not, of course, affect all groups equally. People of color and poor people are convicted at disproportionately high rates.[150] Because of the disparate rate of conviction based on class and race, an uncritical application of prior conviction evidence merely compounds and aggravates the layers of bias that already exist in the system.[151] Given this backdrop, judges and prosecutors have an ethical duty to inquire into the reliability of prior convictions before using them to enhance a sentence or upgrade a charge.[152] Failure to look critically at these convictions is to accept the introduction of evidence skewed by racial and economic bias into yet another level of the criminal justice system.[153] Because we know that racial disparities exist at

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[149] *See* Motion for Departure, Objections to Presentence Report and Sentencing Memorandum, *supra* note 139, at *4.

[150] *See, e.g.*, Victoria Bekiempis, *Why Do NYC's Minorities Still Face So Many Misdemeanor Arrests?*, NEWSWEEK (Feb. 28, 2015, 12:11 PM), https://www.newsweek.com/nypd-race-arrest-numbers-309686 (stating that minorities comprised eighty-six percent of misdemeanor arrests in New York City in 2014).

[151] *See* Roberts, *supra* note 13, at 576 ("[D]ue to uneven distributions of criminal convictions, and because of race-based assumptions of guilt, [consideration of prior conviction evidence] disproportionately affects people of color." (first citing ALEXANDER, *supra* note 30, at 7; then citing Montre Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule,* 69 MD. L. REV. 501, 536 (2010); and then citing Stephen Fortunato, *Judges, Racism, and the Problem of Actual Innocence,* 57 ME. L. REV. 481, 504 (2005))).

[152] *See* Roberts, *supra* note 13, at 600–03 (describing the ethical obligation for judges and prosecutors to think critically about racial disparities before introducing a criminal defendant's record).

[153] *See* Carodine, *supra* note 151, at 514 ("[T]here are enough serious flaws in the system as a whole that we should not compound the criminal justice system's mistakes by using

every level of the criminal justice system, we should be skeptical about ascribing meaning to data concerning prior convictions.[154]

IV. A PROCEDURAL FRAMEWORK FOR ASSIGNING WEIGHT TO LOW-LEVEL PRIOR CONVICTIONS

Sentencing courts are reluctant to allow defendants to challenge the validity of prior convictions as a part of the sentencing proceeding, and there is little clear law that would compel them to do so.[155] Wary of endless litigation by criminal defendants and in search of finality, the U.S. Supreme Court has recognized that, when collaterally attacked, "the judgment of a court carries with it a presumption of regularity."[156] This is true even when the prior conviction was obtained in the absence of defense counsel.[157] Because of the unreliability of convictions from low-level courts, however, sentencing judges should adopt a new framework to account for this reality. Courts should be more open to considering challenges to prior convictions. Moreover, courts and legislatures should consider categorically exempting low-level convictions from consideration in calculating criminal histories and applying sentencing enhancements.

A. THE CONTOURS OF THE PRESUMPTION OF REGULARITY

The "presumption of regularity" allows sentencing courts to rely on prior convictions as presumptively valid.[158] The presumption is

convictions as evidence in subsequent cases, or we should at least view prior convictions offered into evidence with much more skepticism.").

154 *See* Roberts, *supra* note 13, at 585–86 ("[M]arked disparities in enforcement necessarily call into question any suggestion that a conviction is a reliable indicator of relative culpability.").

155 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.4(f), at 772 (2d ed. 1999) ("[D]ue process does not mandate the opportunity during sentencing to challenge prior convictions for most sorts of constitutional invalidity.").

156 Johnson v. Zerbst, 304 U.S. 458, 468–69 (1938).

157 *See id.* ("Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel.").

158 Parke v. Raley, 506 U.S. 20, 29 (1992) (quoting *Zerbst*, 304 U.S. at 468). State and federal courts widely use the presumption of regularity, although they differ regarding the manner and extent to which the defendant bears a burden of production in rebutting that presumption. *See, e.g.*, State v. McCann, 21 P.3d 845, 846, 849 (Ariz. 2001) (providing that "a rebuttable presumption of regularity attaches to prior convictions used to enhance a sentence or as an element of a crime" but that a defendant may challenge the presumption with "some

rebuttable, and courts have adopted procedural frameworks for adjudicating claims that a prior conviction should not be used to enhance punishment due to its constitutional invalidity.[159] Courts generally apply a rebuttable presumption of regularity to the prior conviction, and the defendant must satisfy an initial burden of production through presentation of evidence that the prior conviction was invalid.[160] Whether the state or defendant bears the ultimate burden of persuasion varies from jurisdiction to jurisdiction.[161]

In *Burgett v. Texas*,[162] the U.S. Supreme Court reversed a conviction obtained in a trial at which the defendant was impeached with a prior forgery conviction that had been obtained in violation of the defendant's right to counsel.[163] In holding that the impeachment of the defendant with his prior uncounseled conviction was error, the Court explained:

> To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or to enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the

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credible evidence"); Rose v. State, 563 S.E.2d 865, 868 (Ga. 2002) (explaining that the presumption of regularity attaches to prior conviction upon showing that a defendant pled guilty and was represented by counsel, after which the defendant bears the burden of producing "some affirmative evidence" of irregularity to rebut the presumption).

[159] *See, e.g.*, State v. Elling, 463 N.E.2d 668, 670 (Ct. Com. Pl. 1983) (placing the entire burden on the prosecution), *abrogation recognized by* State v. Mullins, No. 99CA15, 1999 WL 668812 (Ohio Ct. App. July 29, 1999); Watkins v. People, 655 P.2d 834, 837 (Colo. 1982) (placing the burden of production on the defendant and the burden of persuasion on the prosecution); Kelley v. People, 4 N.E. 644, 645–46 (Ill. 1886) (barring defendants from challenging prior convictions altogether).

[160] *See Watkins*, 655 P.2d at 837 (requiring the defendant to produce evidence that a conviction was invalid after which the burden shifts to the prosecution); *see also* State v. O'Neil, 580 P.2d 495, 497–98 (N.M. Ct. App. 1978) ("Defendant has the burden of producing evidence . . . that his prior convictions are invalid . . . . Once such evidence is produced, the State has the burden of persuasion as to the validity of the prior convictions."); State v. Triptow, 770 P.2d 146, 149 (Utah 1989) (explaining that the burden is first "on the defendant to raise the issue and produce some evidence" and that "the burden [then] shifts to the State").

[161] *See generally* State v. Okland, 941 P.2d 431 (Mont. 1997) (providing an example of a state's procedural framework and citations to other states' frameworks).

[162] 389 U.S. 109 (1967).

[163] *See generally id.*

> right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.[164]

The Court, however, restricted the scope of *Burgett* in *Custis v. United States*.[165] In that case, the Court rejected the defendant's argument that he should have been allowed to contest the validity of two prior state-court convictions in his federal sentencing under the Armed Career Criminal Act.[166] Holding that a defendant may not attack a prior conviction in a sentencing proceeding except under narrow circumstances, the Court cited the presumption of finality that criminal judgments enjoy.[167] Recognizing its prior ruling in *Burgett*, the Court held that defendants can attack prior convictions only when the basis of the attack is that the conviction was obtained in violation of the defendant's right to counsel.[168] The Court further held that the absence of counsel, standing alone, does not trigger any right to collaterally attack a conviction. Rather, there must have existed a right to counsel that was violated.[169]

In *Nichols v. United States*,[170] the Court affirmed a sentence that was enhanced based on the defendant's prior uncounseled

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[164] *Id.* at 115. The Court reached a similar conclusion five years later in *United States v. Tucker*, 404 U.S. 443 (1972). Three prior state-court convictions were introduced against the defendant in his federal trial and were used by the judge at the sentencing hearing. *See id.* at 444. After another state court held that two of those prior convictions were constitutionally invalid because of a deprivation of the defendant's right to counsel, the defendant asked for a new trial in federal court, arguing that his federal conviction had been obtained through the use of these unconstitutional prior convictions. *Id.* at 445. Although the Ninth Circuit affirmed his conviction, finding the use of the convictions at trial to be harmless error, it ordered a new sentencing hearing. *Id.* at 446. The U.S. Supreme Court affirmed the grant of a new sentencing hearing, reasoning that the sentence imposed by the trial judge was "founded at least in part upon misinformation of constitutional magnitude." *Id.* at 447.

[165] 511 U.S. 485 (1994).

[166] *Id.* at 496 (explaining that the right to attack collaterally prior convictions will not be extended because failure to appoint counsel for an indigent defendant is a unique constitutional defect).

[167] *See id.* at 497 ("The interest in promoting the finality of judgments provides additional support for our constitutional conclusion.").

[168] *See id.* at 493–96. The Court reaffirmed and extended this rule in *Daniels v. United States*, 532 U.S. 374 (2001) (confirming that defendants generally cannot collaterally attack enhanced sentences based on the validity of a prior conviction because that process would offend the integrity of the state's judgments and the criminal process affords other sufficient avenues to appeal), and *Lackawanna County District Attorney. v. Coss*, 532 U.S. 394 (2001) (declaring that a prisoner who was no longer serving his sentence cannot bring a federal habeas action directed solely at those convictions).

[169] *See Custis*, 511 U.S. at 497 (requiring a right to counsel be present before a defendant has a right to collaterally attack his previous conviction).

[170] 511 U.S. 738 (1994).

misdemeanor conviction.[171] In his prior misdemeanor case for driving under the influence, the defendant was not provided counsel and was convicted and fined $250.[172] The Court rejected the defendant's argument that using a conviction obtained without counsel (or a valid waiver of the defendant's right to counsel) violated the Sixth Amendment.[173] Instead, the Court declared that use of a conviction to enhance a later sentence was constitutionally permissible if the defendant had no right to counsel in the previous case.[174]

The Court has reached similar results concerning tribal-court convictions.[175] Because the Sixth Amendment does not apply to criminal proceedings in tribal court,[176] tribal-court convictions necessarily cannot violate the Sixth Amendment right to counsel. In *United States v. Bryant*, the Court allowed the defendant's sentence to be enhanced by a prior uncounseled tribal-court conviction—one that would have violated the Sixth Amendment if it had been in a state or federal court.[177] This decision comports with the more general rule that prior uncounseled convictions may be used to enhance subsequent sentences or charges if the defendant did not have a Sixth Amendment right to counsel at the previous proceeding.[178]

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[171] *Id.* at 749 ("[A]n uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.").

[172] *Id.* at 740.

[173] *Id.* at 749.

[174] *Id.*

[175] *See* United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011) ("[B]ecause the Bill of Rights does not apply to Indian tribes, tribal convictions cannot violate the Sixth Amendment.").

[176] *See* United States v. Bryant, 136 S. Ct. 1954, 1958 (2016) ("[T]he Sixth Amendment does not apply to tribal court proceedings." (citations omitted)); *see also id.* at 1963 (containing very strong language about the importance of recidivism statutes). The defendant in *Bryant* had "a record of over 100 tribal-court convictions, including several misdemeanor convictions for domestic assault." *See id.*

[177] *Id.* at 1954 (stating that an uncounseled tribal-court conviction is valid when used to enhance punishment at a subsequent conviction).

[178] *See, e.g.*, Lackawanna Cty. Dist. Att'y v. Coss, 532 U.S. 394, 403–04 (2001) (explaining that defendants "generally may not challenge the enhanced sentence . . . on the ground that the prior conviction was unconstitutionally obtained" unless the challenge is based on a right to counsel violation); *see also Nichols*, 511 U.S. at 748–49 (explaining that if the defendant had no right to counsel in the previous case, use of that conviction to enhance a later sentence was constitutionally permissible); *Bryant*, 136 S. Ct. at 1959 (allowing the defendant's sentence to be enhanced by a prior uncounseled tribal court conviction because the Sixth Amendment does not apply in tribal courts); United States v. Cavanaugh, 643 F.3d 592, 594 (8th Cir. 2011) (allowing uncounseled tribal-court misdemeanor convictions, which otherwise

Following these rulings, lower federal courts restricted the rule even further by holding that collateral attacks on prior convictions were possible only in cases where the defendant not only had a right to counsel, but also specifically alleged a deprivation of that right.[179] Allegations of ineffective assistance of counsel or other constitutional error typically were not susceptible to collateral attacks at future sentencing hearings or for purposes of charge enhancements under statutes like the Armed Career Criminal Act.[180]

These restrictions on collateral attacks added to the ongoing debate about whether courts should use juvenile adjudications to enhance sentences or charges.[181] To the extent that the issue turns on just how meaningful the due process reforms in the juvenile system have been, observers come to very different conclusions about the procedural fairness and reliability of juvenile courts.[182]

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would have violated the Fifth and Sixth Amendments in U.S. courts, to classify a defendant as a habitual offender because the convictions were valid at their inception and not alleged to be otherwise unreliable).

[179] Although *Custis* dealt with the issue of whether the defendant was eligible to be sentenced pursuant to the Armed Career Criminal Act, many courts have applied the same logic to cases involving the U.S. Sentencing Guidelines. *See, e.g.*, United States v. Bacon, 94 F.3d 158, 162 (4th Cir. 1996); United States v. Bonds, 48 F.3d 184, 186 (6th Cir. 1995) (holding the previous state conviction was appropriately applied to augment the defendant's sentence); United States v. Thomas, 42 F.3d 823, 824 (3d Cir. 1994) ("Guideline § 4A1.2 stands in the same posture as the Armed Career Criminal Act . . . .").

[180] *See, e.g.*, United States v. Escobales, 218 F.3d 259, 262 (2d Cir. 2000) (providing that there is no right to collaterally attack a prior sentence because of an alleged denial of right to jury trial); United States v. Daly, 28 F.3d 88, 89 (9th Cir. 1994) ("A sole exception to the prohibition against collateral attack of previous state convictions is for the indigent defendant who was not appointed counsel at his state trial . . . . Claims of denial of effective assistance of counsel, where counsel was appointed, and involuntarily pleading guilty do not fall within this exception.").

[181] *See, e.g.*, Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 902–15 (1988) [hereinafter Feld, *Juvenile Court*] (discussing several of the procedural justice consequences of basing juvenile sentences on the seriousness of prior offenses); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1057–67 (1995) [hereinafter Feld, *Violent Youth*] (discussing the use of juvenile convictions to enhance sentences for adult criminal convictions); Joseph B. Sanborn, Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230, 239 (1993) (arguing that since many juvenile defendants are sentenced more harshly as adult offenders based on considerations of their juvenile records, the Sixth Amendment should be extended to provide juveniles with a right to a public jury trial).

[182] *Compare* United States v. Tighe, 266 F.3d 1187, 1192–93 (9th Cir. 2001) (holding that use of a prior juvenile adjudication to enhance sentence was unconstitutional because of the "significant constitutional differences between adult convictions and juvenile adjudications"), *with* United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002) ("[J]uvenile adjudications,

Barry Feld, for example, argued that it was "inconsistent to use less stringent procedures to obtain convictions in juvenile court in the name of rehabilitation, and then to use those same convictions to enhance subsequent criminal sentences as adults."[183] Those advocating for the use of prior juvenile adjudications to enhance subsequent criminal sentences, in contrast, argued that as the juvenile justice system gradually attained more due process protections, its results could be seen as more reliable and accurate.[184]

Rule 609 of the Federal Rules of Evidence, which generally bars impeachment with a juvenile adjudication,[185] arguably supports preclusion of juvenile convictions to enhance adult sentences. The Advisory Committee on Rules of Evidence explained its decision for including the general prohibition by reference to the lack of procedural safeguards to ensure reliable and accurate factfinding in the juvenile context.[186] The advisory committee's note to Rule 609(d) explains:

> By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials . . . , the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction.[187]

The same concerns regarding the use of juvenile convictions to enhance later sentences apply to misdemeanors. Today's misdemeanor courts struggle with similar complaints of lack of

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like adult convictions, are so reliable that due process of law is not offended by such an exemption.").

[183] Feld, *Violent Youth, supra* note 181, at 1064.

[184] *See, e.g.*, U.S. DEP'T OF JUSTICE, CRIMINAL JUSTICE INFORMATION POLICY: PRIVACY AND JUVENILE JUSTICE RECORDS 24 (1982) ("By extending many of the adult criminal due process protections to juvenile trials, the Court has imbued the juvenile trial with elements of fairness, impartiality, and dispositiveness customarily associated with adult trials. Thus, when a juvenile is found delinquent today there is reason for confidence in the fairness and accuracy of that judgment.").

[185] *See* FED. R. EVID. 609(d) (providing that evidence of a juvenile adjudication is only admissible if offered in a criminal case, the adjudication was of a witness other than the defendant, an adult's conviction for that offense would be admissible, and admitting the evidence is necessary to fairly determine guilt or innocence).

[186] FED. R. EVID. 609(d) advisory committee's note to subdivision (d) ("The prevailing view has been that a juvenile adjudication is not usable for impeachment . . . . This conclusion was based upon a variety of circumstances.").

[187] *Id.*

reliability, precision, and procedural safeguards.[188] Like juvenile courts, many misdemeanor adjudications lack the right to a jury trial, the formal right to counsel, or meaningful access to the effective assistance of counsel, and are characterized by an air of informality that tends to undermine confidence in the result.[189] Because of the overlapping critiques of juvenile and misdemeanor courtrooms, misdemeanor convictions similarly should be viewed with skepticism—especially when used to enhance a later sentence—and opportunities to present collateral attacks should be less restricted.

State courts have grappled with the tension between finality and due process in using allegedly unreliable prior convictions to enhance sentences or upgrade charges. In *State v. Von Ferguson*,[190] for example, the Supreme Court of Utah addressed the use of a prior uncounseled misdemeanor conviction to enhance a charge to a felony.[191] The government attempted to use Von Ferguson's prior conviction for violation of a protective order to charge him as a recidivist after his subsequent felony violation of a protective order.[192] Von Ferguson objected, arguing that his prior conviction had been obtained in violation of his Sixth Amendment right to counsel.[193] On interlocutory appeal, the Supreme Court of Utah agreed with Von Ferguson that even a misdemeanor resulting in an entirely suspended sentence was unconstitutional and invalid unless accompanied either by the presence of counsel or a valid waiver of the defendant's right to counsel.[194] Because there was no

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[188] *See generally* Kohler-Hausmann, *supra* note 8 (discussing how lower courts readily contribute to mass misdemeanors).

[189] *See id.* at 620 (describing the rapid and informal "assembly-line justice" approach in misdemeanor courts).

[190] 169 P.3d 423 (Utah 2007).

[191] *See id.* at 432 (deciding that "a previous uncounseled conviction imposing a suspended sentence cannot be used to enhance a subsequent criminal charge unless the defendant knowingly and intelligently waived his right to counsel").

[192] *See id.* at 425.

[193] *See id.* (noting the defendant's objection that his prior conviction violated his constitutional rights because he was not represented by counsel).

[194] *See id*. at 428–29 ("An uncounseled misdemeanor conviction imposing a sentence of incarceration, either actual or suspended, is not valid. Therefore, a conviction obtained in violation of *Scott* or *Shelton* cannot be used for enhancement purposes."). It is clear that a misdemeanor conviction imposing a suspended sentence is invalid absent appointment or a valid waiver of counsel. *See* Alabama v. Shelton, 535 U.S. 654, 674 (2002) ("'[A] defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel.'" (quoting *Ex parte* Shelton, 851 So. 2d 96, 102 (Ala. 2000))). But lower state and federal courts appear to be split as to whether a misdemeanor conviction and sentence of "probation" with no suspended term of incarceration is similarly unconstitutional. *See* State

dispute that Von Ferguson had not been represented by counsel in connection with the prior misdemeanor conviction, that conviction could not be used to enhance his subsequent criminal charge.[195]

The *Von Ferguson* court held that even uncounseled convictions are entitled to a rebuttable presumption of regularity, reasoning that "courts are assumed to have complied with well-established requirements ensuring that any waiver of the right to counsel is made knowingly and intelligently."[196] The Supreme Court of Montana came to a similar conclusion in *State v. Maine*,[197] a case that involved an allegation not of an actual deprivation of the right to counsel, but of the ineffective assistance of counsel. [198] The court recognized the rebuttable presumption of regularity but rejected the state's argument that a defendant could only collaterally attack prior convictions on the basis that they were obtained in violation of the defendant's rights under *Gideon v. Wainwright*[199] and its direct progeny.[200] The court held that such a restriction would be under-protective of defendants' rights.[201]

These cases demonstrate that courts tend to be in broad agreement that prior convictions are entitled to a presumption of regularity. There is less consensus, however, on the logistics of whether and how a defendant can rebut that presumption. Federal and state courts differ widely on issues of which party has the burden of proof when a prior conviction is called into question, and by what standard of proof that party must convince the court.

B. COLLATERAL ATTACKS ON PRIOR CONVICTIONS: BURDENS OF PRODUCTION AND PERSUASION

Courts differ greatly in assigning burdens of production and persuasion in the context of challenging prior convictions at sentencing. Some clearly require the defendant to produce evidence

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v. Wilson, 771 N.W.2d 228, 233–35 (Neb. Ct. App. 2009) (collecting federal and state cases and describing split of authority in "stand alone probation" misdemeanors).

195 *Von Ferguson*, 169 P.3d at 425.

196 *Id.* at 431 (citing Parke v. Raley, 506 U.S. 20, 31 (1992)).

197 255 P.3d 64 (Mont. 2011).

198 Maine was charged with fourth offense DUI, a felony in Montana, because of the three prior DUI convictions. *Id.* at 66. Maine claimed that his attorney at one of his previous DUI trials was ineffective for failing to raise the "compulsion" defense, as Maine claimed that he had been fleeing an assault when he was apprehended for DUI. *Id.* at 67.

199 372 U.S. 335 (1963).

200 *Maine*, 255 P.3d at 69, 73.

201 *Id.* at 69.

to satisfy the burden of production, after which the ultimate burden of persuasion shifts to the prosecution.[202] Others have held that the defendant, as the moving party, retains the burden of persuasion.[203] Courts that have situated the ultimate burden of persuasion on the prosecution have imposed various standards of proof as well.[204] When a defendant challenges a prior conviction, courts must turn to some procedural framework to conduct a meaningful review of the claim.

In a recent case from the U.S. District Court for the Eastern District of Virginia, the defendant moved to dismiss his indictment for illegal reentry,[205] arguing that he was deprived of due process in the two deportation proceedings that formed the predicate for conviction of the instant offense.[206] He argued that, because neither of the prior deportation proceedings provided him with due process, neither could form the prerequisite for a prosecution of illegal reentry.[207] To the extent another federal statute, the "jurisdiction-stripping statute,"[208] foreclosed such collateral attacks in subsequent prosecutions, the defendant argued that the statute was unconstitutional.[209]

Although the district court denied the defendant's motion to dismiss the indictment, the court agreed that the jurisdiction-stripping statute was unconstitutional "to the extent it prohibits '*some* meaningful review' . . . of an alien's claim that the underlying deportation proceeding," which constitutes an element of the criminal charge, "was 'fundamentally unfair.'"[210] Because the

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[202] *See Raley*, 506 U.S. at 33 ("Several [states] . . . take a middle position that requires the defendant to produce evidence of invalidity once the fact of conviction is proved but that shifts the burden back to the prosecution once the defendant satisfies his burden of production." (first citing Watkins v. People, 655 P.2d 834, 837 (Colo. 1982) (guilty plea); then citing State v. O'Neil, 580 P.2d 495, 497 (N.M. Ct. App. 1978) (uncounseled conviction); and then citing State v. Triptow, 770 P.2d 146, 149 (Utah 1989) (uncounseled conviction))).

[203] *See id.* ("Others assign the entire burden to the defendant once the government has established the fact of conviction." (citing People v. Harris, 459 N.E.2d 170, 172 (N.Y. 1983) (guilty plea))).

[204] *See, e.g.*, *Triptow*, 770 P.2d at 149 (requiring a preponderance of the evidence); *Watkins*, 655 P.2d at 837 (requiring a preponderance of the evidence); State v. Hennings, 670 P.2d 256, 257 (Wash. 1983) (requiring proof beyond a reasonable doubt).

[205] United States v. Silva, 313 F. Supp. 3d 660 (E.D. Va. 2018).

[206] *Id.* at 668–69 (discussing the defendant's collateral attack).

[207] *Id.*

[208] 8 U.S.C. § 1225(b)(1)(D) (2018).

[209] *See Silva*, 313 F. Supp. 3d at 668 (arguing that the statute is either unconstitutional when applied to Criminal Illegal Reentry cases or Congress intended that such cases could not be premised on expedited removals).

[210] *Id.* at 669 (citing United States v. Mendoza-Lopez, 481 U.S. 828, 838–39 (1987)).

statute prohibited judicial review of the underlying administrative finding—in that case, the Order of Removal—, the court found that it was unconstitutional.[211] Similarly, a stringent application of the presumption of regularity that precludes examination of the proceedings leading to a prior conviction could well violate principles of due process.

In reviewing administrative findings that formed a predicate for a criminal conviction, the U.S. Supreme Court held that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding."[212] Such administrative proceedings lack the procedural safeguards of the criminal process. When the findings are used against a criminal defendant, therefore, courts must supply some of the procedural safeguards that were not necessarily present at the administrative proceeding below.[213] If one understands misdemeanor prosecutions as akin to administrative proceedings, then the same logic counsels caution against uncritically accepting the findings of those proceedings.

In *United States v. Martinez-Cruz*,[214] the Court of Appeals for the D.C. Circuit dealt with the issue of burdens of production and persuasion in the context of a collateral attack on a prior conviction. The defendant, Alfonso Martinez-Cruz, pleaded guilty to one count of conspiracy to distribute methamphetamine and argued that he

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[211] *Id.*

[212] *Mendoza-Lopez*, 481 U.S. at 837–38. *Mendoza-Lopez* involved two defendants who had been charged with Illegal Reentry after having been previously subjected to a mass deportation proceeding. *Id.* at 830–31. Both defendants challenged the constitutional validity of the underlying orders of removal, arguing that they had not been informed of their right to counsel at the group deportation proceeding and that their waivers of various rights at the mass deportation proceeding had been unknowing and therefore violative of their due process rights. *Id.* at 831. The trial court agreed with them and dismissed the indictments and the circuit court affirmed that decision. *Id.* at 831–32. The U.S. Supreme Court agreed, holding that even if Congress intended to preclude collateral challenges to previous deportation orders in this context, such a rule violated the due process rights of the defendants. *Id.* at 837.

[213] *Id.* at 841. The *Mendoza-Lopez* Court did not rule on what level of process was required in the underlying administrative proceeding, only that the results of such proceedings may only be used in a subsequent criminal prosecution if some review is available to the defendants. *Id.* at 839 ("Depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense.").

[214] 736 F.3d 999 (D.C. Cir. 2013).

should be sentenced pursuant to the federal "safety valve."[215] The offense of conviction carried a mandatory minimum term of incarceration of five years, subject only to the safety valve exception.[216] Martinez-Cruz qualified for the safety valve in every respect but one: his prior state-court DUI conviction from Georgia rendered him ineligible.[217] Martinez-Cruz would have faced a presumptive Guidelines range of between forty-six and fifty-seven months if the prior DUI conviction were not used in calculating his criminal history score.[218] But the prior conviction, which disqualified him from the safety valve, caused his Guidelines range to more than double.[219] Accordingly, the lower court sentenced him to eighty-one months in prison, the low end of what the court determined to be the applicable Guidelines range.[220]

Martinez-Cruz argued at sentencing that his prior DUI conviction was unconstitutional and invalid because he had never been informed of his right to counsel and so had not voluntarily and knowingly waived that right.[221] In support of this claim, he submitted two affidavits to the court stating that he was illiterate in both English and Spanish, that nobody had explained to him his right to counsel or the waiver-of-rights form that he signed, and that

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[215] *See* 18 U.S.C. § 3553(f) (2018) (allowing sentences below statutory minimums for defendants who have little to no criminal history and truthfully disclose information to the government about the crime before sentencing).

[216] *See* 21 U.S.C. § 841(b)(1)(B)(viii) (2018) (imposing a mandatory minimum sentence of five years for violations involving five grams or more of methamphetamine); *see also* 18 U.S.C. § 3553(f) (2018) (limiting applicability of statutory minimums in certain cases). Martinez-Cruz was assessed one criminal history point for his prior Georgia conviction and two additional points because the offense for which he was facing sentencing happened while he was on probation for the Georgia DUI conviction. *Martinez-Cruz,* 736 F.3d at 1000.

[217] *Martinez-Cruz,* 736 F.3d at 1000 (explaining that the defendant's criminal history score was three points due to a DUI conviction, which rendered him ineligible for a reduction).

[218] *See id.* (explaining that the reduction would have resulted in a two-level decrease of the defendant's base offense level and a two-and-a-half-year decrease of the bottom of the Guidelines range).

[219] *See id.* (explaining that "because of a prior driving-under-the-influence conviction[,] . . . his criminal history score was in fact three points" rather than just one). The court imposed an eighty-one-month sentence, the bottom of the Guidelines range, because the DUI conviction raised Martinez-Cruz's criminal history to three points. However, had the DUI conviction not been counted, Martinez-Cruz's base offense level would have decreased by two levels, which would have resulted in a two-and-a-half-year sentence decrease from the bottom end of the recommended range—a fifty-one-month sentence instead of an eighty-one-month sentence.

[220] *See id.*

[221] *See id.* ("Martinez-Cruz maintain[ed] that at the time of his plea to the DUI charge he was not properly informed of his right to counsel, and thus did not validly waive that right, so that the DUI conviction was in violation of the Constitution.").

he had no memory of appearing before a judge.[222] Additional evidence showed that the prior conviction had been entered only two days after the Martinez-Cruz's arrest in Georgia.[223] He "spoke no English, and could neither read nor write Spanish."[224] After having been arrested and detained for two days, he was brought to court from jail and was offered a time-served plea, which he accepted.[225] He also "received a waiver-of-counsel form in Spanish" and "printed his name on [it]."[226] There was no transcript from the plea proceeding.[227]

Without taking testimony, but after having considered the affidavits submitted by Martinez-Cruz, the sentencing court found that the defendant had "failed to establish by a preponderance of the evidence that this was not a conviction that he knowingly accepted." Martinez-Cruz had failed, therefore, to satisfy the burden of proof.[228] The sentencing court rejected his argument that the evidence of his inability to read coupled with the lack of evidence showing that his rights were explained to him satisfied his burden of production by creating a "fair inference" that he never knowingly and voluntarily waived his right to counsel.[229]

The Court of Appeals for the D.C. Circuit reversed, but it took pains to limit the reach of its holding.[230] Much of the D.C. Circuit's holding in *Martinez-Cruz* builds upon the U.S. Supreme Court's decision in *Parke v. Raley*.[231] In *Parke*, the defendant was sentenced as a "persistent felony offender" under a recidivist sentencing

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[222] *See id.* at 1001 ("In a pair of affidavits attached to his two sentencing memoranda, Martinez-Cruz asserted not only that he was illiterate, but also that nobody explained to him the waiver-of-counsel form, that he did not recall appearing before a judge, and that he was absolutely certain that if he did appear before a judge, the judge did not conduct an individualized plea colloquy of the sort that took place at the time of his methamphetamine plea. Absent an explanation of his right to counsel that he could understand, Martinez-Cruz argues, a waiver of that right could not be knowing and intelligent . . . ." (internal citations omitted)).

[223] *See id.* (stating that the defendant pleaded guilty after spending two days in jail).

[224] *Id.*

[225] *See id.* ("He spent two days in jail before pleading guilty; in exchange for his plea, his sentence was limited to time served and one year's probation.")

[226] *Id.*

[227] *See id.* ("The court did not keep a transcript of the plea . . . .").

[228] *Id.*

[229] *Id.* (discussing the defendant's argument that the inference must shift the burden of persuasion to the government).

[230] *See id*. at 1002 ("Today we consider how heavy a burden may be assigned the defendant—but only in cases where the defendant alleges that a prior conviction or plea was secured in violation of the right to counsel.").

[231] 506 U.S. 20 (1992).

statute.[232] To overcome the presumption of regularity attached to prior convictions, Kentucky required defendants to "produce evidence that his or her rights were infringed or that some procedural irregularity occurred."[233] Only after satisfying such a burden of production did the Kentucky law impose a burden of persuasion on the government.[234]

The defendant challenged this scheme, arguing that imposing any burden at all on the defendant violated due process. But the U.S. Supreme Court rejected the defendant's argument, instead holding that a presumption of regularity did not violate the defendant's constitutional rights: "Even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant."[235]

Parke did not, however, specify precisely what type of burden was permissible or what standard of proof would govern. As the *Martinez-Cruz* court read the *Parke* decision, it "d[id] no more than uphold the constitutionality of requiring a defendant to meet a burden of production."[236] The majority in *Martinez-Cruz* said that the issue presented "a tension between two basic presumptions of our legal tradition": (1) the presumption of regularity that attaches to final judgments, and (2) the "unique constitutional defect" that is the failure to provide counsel.[237] The presumption of regularity exists because "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice."[238] Moreover, resources dedicated to the re-examination of old cases are unavailable for reaching judgments in new cases.[239]

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[232] *Id.* at 23 (describing defendant's status as a persistent felony offender based on two burglary convictions).

[233] *Id.* at 24.

[234] *See id.* ("If the defendant refutes the presumption of regularity, the burden shifts back to the government affirmatively to show that the underlying judgment was entered in a manner that did, in fact, protect the defendant's rights.").

[235] *Id.* at 31.

[236] United States v. Martinez-Cruz, 736 F.3d 999, 1002 (D.C. Cir. 2013).

[237] *Id.* at 1002–03.

[238] Custis v. United States, 511 U.S. 485, 497 (1994) (discussing this as mentioned in *Martinez-Cruz*, 736 F.3d at 1003).

[239] *See Martinez-Cruz*, 736 F.3d at 1003 ("[I]t seems plain that resources devoted to reexamination of judgments in old cases are unavailable for reaching accurate judgments in new ones."). *But see id.* at 1006–08 (Kavanaugh, J., dissenting) (focusing on the long tradition in American courts of punishing recidivists more harshly than first-time offenders). On the

The court explained at some length why alleged violations of the right to counsel are different in nature and more serious than allegations of other types of procedural errors, and why its analysis did not necessarily extend to other types of collateral attacks on prior convictions.[240] Moreover, reviewing courts can analyze the merits of an alleged violation of a defendant's right to counsel in a prior proceeding with relative ease.[241] In contrast to other types of alleged constitutional infirmities, in cases where the defendant alleges a previous violation of his or her right to counsel, "the only issue will be whether [the defendant] validly waived counsel. If that involves 'rummaging,' it is only with respect to a relatively narrow issue."[242]

In describing what kind of showing a defendant must make before the ultimate burden shifts to the government, the *Martinez-Cruz* court said:

> [T]he defendant [must] produce[] *objective* evidence sufficient to support a reasonable inference that his right to counsel was not validly waived. That evidence must entail more than a silent record, or even the defendant's sworn statement that he was not informed of his rights. To carry this burden, the defendant's evidence generally must supply a reason to believe that the court had no ordinary procedure capable of apprising him adequately of his rights or that the court did not follow its own procedures.[243]

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concept of finality, see Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. Sec. 2255(e)*, 108 GEO L.J. 287, 293 n.37 (2019).

[240] *See Martinez-Cruz*, 736 F.3d at 1003 ("Anti-recidivist provisions . . . can extend the effects of an invalid conviction, making it the basis for progressively more severe penalties. The right to counsel is a shield against that result. By radically reducing the risk that a defendant might be convicted in violation of other rights, it helps to forestall such a spiral of error.").

[241] *See Custis*, 511 U.S. at 496 ("[F]ailure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 states.").

[242] *See Martinez-Cruz*, 736 F.3d at 1004.

[243] *Id.*

The *Martinez-Cruz* court posited that it generally would not be difficult for the prosecution to satisfy the ultimate burden of persuasion in such cases, rejecting the government's contrary argument:

> Here, for example, the government might have introduced information on the typical plea practices in Gwinnett County[, Georgia]. . . . The government might also have secured an affidavit from the judge before who Martinez-Cruz entered his plea, stating in some detail what practices were routine at the time the plea was made.[244]

Although the *Martinez-Cruz* court does not address this issue, a requirement that a court evaluate the validity of a challenged prior conviction before using it would serve a beneficial educational and reform function, especially for low-level courts. The prospect of having to describe the actual workings of the court might lead judges and other actors to be more careful about the administration of justice, especially in courts that, for all practical purposes, are never reviewed by any superior court. Direct appeals from misdemeanor courts are very rare, and requiring prosecutors to learn about and reveal what happens in those courts could have a positive effect on how those courts administer justice.

State courts, too, have come to different conclusions about which party bears the ultimate burden of persuasion as well as what a defendant must produce to initially rebut the presumption of regularity. The Supreme Court of Utah, in the *Von Ferguson* case,[245] recognized that even an uncounseled conviction was entitled to a presumption of regularity.[246] The court went on, however, to address the weight of that presumption and the manner in which a defendant might rebut it.[247] The court concluded that the presumption required only minimal evidence to be overcome by the

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[244] *Id.*

[245] State v. Von Ferguson, 169 P.3d 423 (Utah 2007); *see also supra* notes 190–196 and accompanying text.

[246] *See Von Ferguson*, 169 P.3d at 430 ("Even those judgments based on uncounseled convictions are entitled to a presumption of regularity.").

[247] *See id.* at 426 ("Ferguson may rebut this presumption, however, by offering minimal evidence that the conviction was obtained in violation of his right to counsel. If he does so, the burden of establishing the validity of the conviction shifts back to the State.").

defendant because to require more could undermine defendants' constitutional rights, shift the ultimate burden to defendants, and erode the "special status" of claims alleging deprivation of the right to counsel.[248] The *Von Ferguson* court made clear that a defendant's own testimony, without more, was sufficient to rebut the presumption of regularity in such contexts, after which the government bore the burden of persuasion on the ultimate issue of whether the underlying conviction was validly obtained.[249]

The Supreme Court of Montana addressed the question of how rebuttable the presumption is in *State v. Maine*.[250] The court first recited its procedural framework for evaluating claims that a prior conviction was invalid, recognizing that the prior conviction carries with it a presumption of regularity that can be rebutted by "direct evidence" of its invalidity by the defendant, after which the state must produce direct evidence and "prove by a preponderance of the evidence that the prior conviction was not entered in violation of the defendant's rights."[251] The court then held that a defendant could attack a prior conviction for any type of constitutional invalidity but that, as the moving party, the defendant should bear the ultimate burden of persuasion that the prior conviction was invalid.[252] The court explained that the defendant must present "affirmative evidence" that the prior conviction was unconstitutionally obtained and that "[s]elf-serving statements by the defendant that his or her conviction is infirm are insufficient to overcome the presumption of regularity."[253] Although the court assigned some burden to the

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[248] *See id.* at 432 (explaining the court's trouble with requiring more than defendant's own testimony).

[249] *See id.* ("In summary, although [Von] Ferguson must do more than merely produce a copy of the conviction reflecting that he was not represented by counsel, he need only come forward with some evidence to rebut the presumption of regularity. His own testimony that he did not waive his right to counsel is sufficient for this purpose. If [Von] Ferguson produces such evidence, the burden then shifts to the State to demonstrate by a preponderance of the evidence that [Von] Ferguson knowingly waived his right to counsel." (citing State v. Baker, 485 N.W.2d 237, 248 (Wis. 1992))); *see also* State v. Kvislen, 64 P.3d 1006, 1010–11 (Mont. 2003) (explaining that defendant's submission of an affidavit stating that he had not been advised of his trial date or of his right to counsel was sufficient to rebut the presumption of regularity and the trial court erred in not holding an evidentiary hearing on whether the state could prove by a preponderance of the evidence that his prior conviction was constitutionally valid).

[250] 255 P.3d 64 (Mont. 2011).

[251] *Id.* at 68.

[252] *See id.* at 73–74 (providing that, under Montana state law, "the defendant has the initial burden to demonstrate that the prior conviction is constitutionally infirm; and . . . once the defendant has done so, the State has the burden to rebut the defendant's evidence").

[253] *Id.* at 74.

prosecution, it imposed the ultimate burden of persuasion on the defendant, a result different from that in the *Von Ferguson* case.[254]

C. TWO PROPOSALS

Courts would benefit from a clear and consistent articulation and application of burdens of proof in the context of prior conviction evidence. Although unchallenged prior convictions will continue to enjoy a presumption of validity,[255] a defendant should be free to contest the validity of any prior conviction that may have been obtained unconstitutionally. Of course, in the absence of any such challenge by the defendant, a sentencing court is free to consider all prior convictions valid for purposes of sentencing.[256] As the moving party, the defendant should bear the burden of production in challenging a prior conviction. This burden should not be satisfied by bare or general assertions, but rather by direct evidence that, when viewed in a light most favorable to the defendant, would allow a court to conclude that the prior conviction was obtained in violation of the defendant's constitutional rights. After the defendant makes this prima facie showing, however, the prosecution should bear the ultimate burden of persuasion that the prior conviction was validly obtained through constitutionally appropriate proceedings. If the prosecution is unable to convince the sentencing court that the prior conviction was constitutional, then the sentencing court should disregard the prior conviction for purposes of sentencing.

Ultimately, however, the factfinding abilities of low-level courts have been so called into question,[257] and the influence of improper factors like racism and poverty so amply demonstrated to have perverting effects on outcomes,[258] that courts and legislatures should consider a categorical rule against including prior misdemeanor convictions in calculations of criminal histories. Just

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[254] *See supra* notes 197–201 and accompanying text.

[255] *See supra* Section III.A.

[256] *See* Almendarez-Torres v. United States, 523 U.S. 224, 144 (1998) (holding that prior convictions are "sentencing factors" which may be determined by a judge); *see also* 18 U.S.C. § 3553(a)(2) (2018) (listing the "history and characteristics of the defendant" as one of the factors to be considered in a sentencing hearing).

[257] *See supra* notes 5–6, 10.

[258] *See* discussion *supra* Sections III.A, III.C.

as convictions from other countries are considered skeptically,[259] so too should courts have grave reservations about uncritically adopting prior conviction evidence from low-level courts in fashioning appropriate sentences for those defendants before them.

Conscientious judges in both state and federal courts continue to struggle with both the general principle and the specific procedures to consider when a defendant challenges the constitutionality and validity of prior convictions. Although a clearer procedural framework that places the burden of persuasion squarely with the prosecution will assist those judges in resolving specific challenges, a larger issue remains. As evidence mounts that low-level courts have an adversarialism problem and a resulting accuracy problem, courts and legislatures should consider broadly excluding misdemeanor convictions from calculations of criminal history. Such an approach would be more easily applied in a consistent manner and would serve to combat the influences of race and poverty that we know infect decisionmaking in the criminal justice system.

V. CONCLUSION

Only a quarter century ago, in denying habeas relief to a prisoner who had claimed actual innocence, Justice O'Connor expressed incredulity at the idea of a factually innocent person being convicted of a crime: "Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent."[260] Little did she know that she wrote at the beginning of what would become known as the innocence movement, as the advent of DNA evidence showed the very real phenomenon of wrongful convictions.[261] Times have changed since Justice O'Connor wrote those words, and society has rightly become more skeptical about the ability of the criminal justice system to achieve accurate results. It is time now to incorporate this newfound and hard-won skepticism into our

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[259] *See* Alex Glashausser, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancements Under Recidivist Statutes*, 44 DUKE L.J. 134, 137–52 (1994) (finding that treatment of foreign convictions has been uneven in U.S. courts due to concerns about the reliability of criminal justice systems in foreign countries).

[260] Herrera v. Collins, 506 U.S. 390, 420 (1993).

[261] *See supra* note 9.

jurisprudence, especially when dealing with low-level courts and their spotty record of accuracy in determining guilt.

After Ferguson and the innocence movement, we have ample reason to believe that low-level convictions are not reliable, and that other values, such as efficiency and profitability, predominate over accuracy and reliability in the adjudication of misdemeanors.[262] As we have become less convinced of the reliability of low-level convictions, however, we have magnified their effects on the adjudication of subsequent cases. We now know of the levels of inaccuracy in low-level lower courts. The doctrine must evolve to incorporate this new knowledge in the same way that the DNA revelations have led us to understand wrongful convictions and false confessions.

The problems with accuracy and reliability in misdemeanor adjudication cannot be overlooked simply because they are minor crimes without serious consequences. Our system of criminal justice has "a proportionality problem. Minor misdemeanors can trigger massive collateral consequences, often without adequate notice or meaningful process. Outcomes systematically appear arbitrary, disproportionate, and procedurally unfair."[263] Even well-meaning police and prosecutors in misdemeanor courts are unable to control the collateral consequences of the charges they pursue. One scholar accuses police and prosecutors in low-level courts of having "abdicated responsibility for regulating key aspects of the harm that stems from misdemeanors."[264] It is difficult, however, for any of those actors to control the countless consequences that are applied externally by public and private actors. In the case of sentencing enhancements and recidivism statutes, however, courts and prosecutors have a heightened responsibility—as well as the direct ability—to mitigate and regulate this harm.

Misdemeanor convictions have an outsize influence on subsequent convictions and sentences given the rise of guidelines-based sentencing systems and the rapid growth in volume of misdemeanor courts.[265] Increasingly, state governments are looking for ways to adjudicate low-level crimes without

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[262] *See supra* note 7 and accompanying text.

[263] Jain, *supra* note 100, at 954.

[264] *Id*. at 955.

[265] *See* Roberts, *supra* note 24, at 785 (stating that the number of misdemeanor prosecutions has doubled in the past forty-five years and now one in three individuals has an arrest or conviction record).

counsel.[266] Without counsel, other procedural safeguards fall away as well. There is frequently no real incentive to challenge an underlying conviction, especially in a misdemeanor case.[267] Often, defendant and state are complicit in resolving cases in a way that has nothing to do with accuracy. If misdemeanor courts are not primarily concerned with accuracy as a value, we should hesitate before using those results automatically to enhance subsequent charges and sentences.

Ultimately, any reform to the practice of using prior conviction evidence represents a shift in the meaning of a criminal history. Even low-level convictions can be considered symbolic "markers" of who is within and outside of the community of upstanding citizens. But as evidence mounts about how little such convictions have to do with moral culpability or even accurate factfinding, they become less meaningful as any kind of marker at all. As described above, Congress determined that criminal convictions from foreign courts and tribal courts—as well as juvenile delinquency adjudications—would not be factored into criminal history scores under the U.S. Sentencing Guidelines.[268] The lack of guarantees ensuring reliability of such convictions would make their use in enhancing sentences under the Guidelines unfair.[269]

Because of changes in the charging and processing of low-level crimes, the cultural meaning of a misdemeanor conviction has changed. Increasingly, there is an understanding that "the nature and expanding reach of the criminal justice system undermine the

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[266] *See* SPANGENBERG PROJECT, CTR. FOR JUSTICE, LAW & SOC'Y AT GEORGE MASON UNIV., AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING 1 (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_tsp_reclassification_report.authcheckdam.pdf (discussing how states have reclassified certain crimes into non-jailable offenses to decrease caseloads for public defenders and reduce court dockets).

[267] *See, e.g.*, United States v. Martinez-Cruz, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) (arguing that the onus is on the defendant, not the government, to point out defects with prior convictions, when challenging sentencing guidelines).

[268] *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(h) (U.S. SENTENCING COMM'N 2018); *see also id.* § 4A1.2(i) (providing that "[s]entences resulting from foreign convictions" and "tribal court convictions are not counted").

[269] *See* United States v. Azeem, 946 F.2d 13, 17 (2d Cir. 1991) ("Were a global approach required, we would soon find it necessary to determine the appropriate evidence that must be produced by the prosecution to show that the activity occurred and that it violated foreign law.").

assumption that convictions necessarily connote moral culpability."[270] This change in perspective regarding the

> moral meaning in the criminal law has come about not only because of a shift in culpability requirements of conviction, but also because of the characteristics of those who are most likely to be subject to a criminal conviction. The prevalence of social disadvantage among the convicted complicates the notion that character flaws are responsible for criminal convictions.[271]

As the scope of the criminal law has expanded in recent years, and as more crimes involving strict liability have grown, the meaning of a criminal conviction has become less clear. As it becomes easier and easier to transgress the criminal law,[272] a criminal conviction no longer correlates either with factual guilt or moral blameworthiness. Courts should not be shy about taking account of these changed circumstances when evaluating criminal histories from low-level courts.

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[270] Roberts, *supra* note 13, at 587.

[271] *Id.* at 589.

[272] *See id.* (noting Harvey Silverglate's theory that every person unwittingly commits three felonies a day, making criminal behavior a societal norm (citing L. Gordon Crovitz, *You Commit Three Felonies a Day*, WALL ST. J. (Sept. 27, 2009, 11:09 PM), http://perma.cc/VGV8-ELQ9)).