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### Marked!

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# Marked!

<http://crim.jotwell.com/marked/>

Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *Stan. L. Rev.* (Forthcoming 2014), Available at SSRN.



Aya Gruber

Most people, both lay and expert, would not quibble with the claim that American criminal justice is primarily adjudicative in nature. Specifically, the criminal justice system is concerned with separating the factually innocent from the guilty (erring procedurally on the side of innocence) and meting out punishment to the guilty. Thus, prosecutors dismiss weak cases and pursue charges only when guilt can be established. The guilty either plead or are convicted after trial, and a conviction is the primary basis for adverse consequences, such as jail and probation. Most would also acknowledge that the adjudicative function sometimes goes off the rails, for example, when aggressive plea bargaining or poorly structured sentencing guidelines coerce innocent people to plead guilty or when excessive pretrial detention attaches to a minor charge. However, often people think of such occurrences as deviations from or perversions of a system that in principal differentiates between the innocent and guilty and punishes the guilty. It might come as a surprise then to find out that in New York City, a very large percentage of criminal cases are resolved completely irrespective of defendants' guilt or innocence.

Conducting a multi-year ethnography of New York City misdemeanor court, Professor Issa Kohler-Hausmann observed, day after day, prosecutors dismiss cases with ample evidence of the defendant's guilt and insist on guilty pleas in the face of questionable facts. Contrary to existing descriptions of misdemeanor courts as conviction mills that fail to differentiate between types of misdemeanants or assembly-lines that produce quick but schizophrenic dispositions, Kohler-Hausmann discovered that NYC misdemeanor courts engage in meticulous categorizations of defendants and apply dispositions (continuance and then dismissal (ACD), conviction for a violation, misdemeanor conviction) to the differentiated categories of defendants in predictable manners. However, the categories of defendants are not determined along a spectrum of factual guilt. Accordingly, it is not necessarily the case that the defendants against whom there is weak evidence receive ACDs and those against whom there is ample evidence are convicted of the highest charge. Instead, the NYC misdemeanor system sorts defendants and graduates outcomes on the basis of defendants' prior contacts with the system. Kohler-Hausmann's quantitative analysis demonstrates that prior misdemeanor convictions are highly predictive of future misdemeanor convictions, and the probability of being convicted on a pending misdemeanor charge significantly increases with every past misdemeanor conviction. By contrast, prior felony convictions do not correlate significantly with conviction on pending felony charges (although they most certainly affect sentencing once there is a conviction). In short, the more times an individual spends in the misdemeanor court system, the more likely it is that she will be convicted, regardless of the evidentiary strength of the case. In fact, through a series of stunning vignettes, Kohler-Hausmann illustrates just how adverse prosecutors, judges, and even some defense attorneys are to introducing questions of factual innocence into the misdemeanor disposition process.

Kohler-Hausmann also observed that the entire misdemeanor process has little to do with what we commonly think of as criminal punishment, namely, probation supervision or incarceration. Rather adverse consequences come primarily in the form of generating an extensive criminal record, forced presence at court and various administrative and therapeutic service offices, and collateral consequences like job loss. Consequently, the emergent picture of NYC misdemeanor court is a dystopian vision of defendants, primarily economically disadvantaged black and brown men, being sorted, categorized, and marked as minor, moderate, or frequent rule-breakers for ease of management by the state. Indeed this managerial system is a system of serious discipline and social control, just not the type of discipline and control one typically associates with criminal justice. Prosecutors are less "conviction maximizers" as risk managers who engage in various forms of arbitrage and seek to make sure that misdemeanor dispositions reflect, and more importantly, document the defendant's risk of misdemeanor reoffending.

So why is this vision dystopian? Would it be better if the misdemeanor system were more attuned to procedure, culpability, and punishment? Not necessarily, says Kohler-Hausmann. Adding a layer of criminal procedure would likely add administrative and temporal costs to be borne by defendants. Being concerned with punishment would likely increase incarceration for these otherwise "disposable" minor offenses. The problem is not so much that the system lacks appropriate regard for factual innocence, as the system's purported benefits (reducing risk) appear to be outweighed by various costs. First, because the system of marking is based on contacts and not on guilt, those marked as serious risks may simply be those who have been swept into system early or those frequently targeted by police. Moreover, recent stop-and-frisk litigation has amply shown that police contact is more a function of the racial and socio-economic character of a neighborhood and its citizens than evidence of serious criminal threat. The picture of poor black men being herded, sorted, marked, and monitored by white government actors should be distasteful to anyone with racial justice sensibilities.

The question then is what can be done. Kohler-Hausman intimates that the problem of misdemeanor management is quite intractable, concluding that a solution "will not be secured merely through new criminal rules and procedure" but "demands a broad movement of social and political dimensions." Recently, NYC has seen some political will to reimagine a portion of its misdemeanor practice. Last October, New York State's

highest judge, Chief Judge Jonathan Lippman rolled out the “Human Trafficking Intervention Court” to much public fanfare. The court is essentially an alternative diversion court for prostitution cases, and it has promised to treat this category of misdemeanor defendants as true victims and completely eschew any punitive or even criminal model. Will this court change things or will it just be another mechanism for sorting, categorizing, and marking the mostly poor women of color charged with prostitution offenses? My co-authors, Ohio State professor Amy Cohen and Kate Mogulescu, director of NYC legal aid’s trafficking victim’s advocacy project, and I hope to answer this and other questions about the trafficking court in our current research project. In any case, *Managerial Justice and Mass Misdemeanors* really is socio-legal scholarship at its best. It is ambitious in its aims, meticulous in its methodology and creative and thoughtful in its analysis. It should be essential reading to anyone who seeks a deep understanding of the operation of the current American criminal justice system.

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