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Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions

Eve Brensike Primus
University of Michigan Law School, ebrensik@umich.edu

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EVE BRENSIKE PRIMUS*

I. INTRODUCTION

Although misdemeanors comprise an overwhelming majority of state criminal court cases, little judicial and scholarly attention has been focused on how misdemeanor courts actually operate. In her article, *Misdemeanors*,[1] Alexandra Natapoff rights this wrong and explains how the low-visibility, highly discretionary decisions made by actors at the misdemeanor level often result in rampant discrimination, incredible inefficiency, and vast miscarriages of justice. *Misdemeanors* makes a significant contribution to the literature by refocusing attention on the importance of misdemeanor offenses and beginning an important dialogue about what steps should be taken going forward to fix our broken misdemeanor justice system.

Natapoff amasses an impressive amount of data and material to explain both the prominence of misdemeanor convictions in our justice system and the many problems with how our misdemeanor system operates. She rightly points out that legislative overcriminalization coupled with conflicting police responsibilities and vast police discretion has created a system in which poor people of color are routinely arrested for misdemeanor offenses even when there is little evidence to support their arrests.[2] Natapoff then documents how a lack of prosecutorial screening and the absence of able defense counsel interact with the increasingly severe potential penalties for misdemeanor convictions to place enormous

* Professor of Law, University of Michigan Law School.

1. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).
2. *Id.* at 1331–37.

pressure on these defendants to plead guilty even when they are innocent.[3] In short, the fact of arrest often translates into conviction, which, as Natapoff persuasively demonstrates, erodes the fault model upon which our entire criminal justice system is predicated, leads to the conviction of countless innocent individuals, and contributes to the racialization of crime in America.

If anything, the misdemeanor justice system has even more problems than Natapoff documents. For example, although she does a wonderful job of explaining how police officers, prosecutors, and defense attorneys contribute to our broken misdemeanor system, she does not highlight the important role played by trial judges. Many scholars have documented the institutional reasons why state court judges are often biased against defendants in criminal cases.[4] If anything, the situation is worse in misdemeanor courts. State misdemeanor judges often have smaller salaries and occupy positions of less prestige than their felony counterparts. As a result, more qualified applicants are naturally attracted to the felony courts. Moreover, felony convictions get appealed at much higher rates than do misdemeanor convictions. For this reason, misdemeanor court judges are relatively insulated from higher court feedback and do not learn of their mistakes in the same way that felony trial court judges do.

As a public defender, I appeared before many judges in both state misdemeanor and felony courts. Although some of the misdemeanor judges were very qualified, the difference between the two courts both in terms of the judges' knowledge of the law and their receptivity to legal arguments was astounding. I routinely had misdemeanor court judges refuse to address legal issues and tell me to save my legal arguments for appeal. Misdemeanor judges regularly made up state rules of evidence to aid the prosecution. For example, one judge told me that anything one officer said to another officer was admissible under the "teamwork exception" to the prohibition against hearsay evidence. When I pointed out that no such exception existed in the state evidentiary rules, the judge angrily told me to stand down and threatened to hold me in contempt. Another judge told me that anything that a child under the age of eight said was an "excited utterance" and therefore admissible as an exception to the hearsay rule. In response to a motion that I made for exculpatory evidence that I knew the state was withholding in violation of its constitutional disclosure

3. *Id.* at 1337–47.

4. *See, e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (explaining why elected state judiciaries lead to institutional bias against criminal defendants).

obligations under *Brady v. Maryland*,[5] one judge simply told me that such obligations did not exist in misdemeanor court. And I practiced in a jurisdiction in which the quality of the misdemeanor court bench was relatively high. When the judges themselves are either unwilling or unable to correctly interpret the law and when there is no oversight of their decisions, all of Natapoff's requirements for valid criminal convictions—namely, legality, evidentiary accuracy, and procedural fairness[6]—are lacking.

The unequal and arbitrary nature of "justice" in misdemeanor courts certainly tends to disadvantage poor minorities—a point that Natapoff makes nicely in her article.[7] She is also correct in noting that when procedural fairness and evidentiary accuracy are no longer relevant considerations, the frequency of wrongful convictions skyrockets.[8] There is, however, an additional problem created by the haphazard nature of our misdemeanor justice system. A justice system that fails to adhere to the rule of law, ceases to care about the accuracy of its convictions, and fails to ensure equal and fair treatment is illegitimate not just because it results in the conviction of the innocent and the unequal treatment of racial minorities. It is illegitimate on its face, regardless of the outcomes.[9] When 80 percent of the public's interactions with the justice system are funneled through a broken and illegitimate system, it undermines the public's respect for the law, the police, and the justice system. Natapoff notes that defendants often feel pressure to plead guilty in misdemeanor cases because they do not know that they have other choices; they are pressured into pleading guilty by the government; and they cannot afford the delays associated with having a trial due to the extreme consequences they face when unable to make pretrial bail.[10] But defendants also plead guilty to misdemeanor charges because they rightly perceive the system as illegitimate and have no faith that the process will be fair or the results will be just if they go to trial.

In general, I agree with Natapoff's diagnosis of the problem, and I applaud her for gathering the often difficult-to-find data necessary to shed light on this issue. I only wish that her proposed reforms to the

5. *See generally* Brady v. Maryland, 373 U.S. 83 (1963) (holding that prosecutors withholding material exculpatory evidence violates the due process clause).

6. *See* Natapoff, *supra* note 1, at 1352.

7. *See id.* at 1365–72.

8. *See id.* at 1347–50, 1352–57.

9. Although Natapoff recognizes this point, *see id.* at 1361–62, her article focuses primarily on the problems of wrongful convictions and racially discriminatory outcomes.

10. *See id.* at 1343–47.

misdemeanor system were as comprehensive as her description of the reasons why reform is necessary. To her credit, Natapoff begins by recognizing that the problems in the misdemeanor justice system are endemic to the system and cannot be fixed by tweaking a few rules.[11] When she talks about the possibilities for reform, however, she offers more tweaks than structural changes.

Natapoff wants to delink arrest from conviction by raising the evidentiary standard for filing charges for a petty offense to something more than probable cause.[12] Although police would still make arrests based on probable cause, Natapoff would require prosecutors to satisfy a higher burden before filing charges, which she argues would force them to scrutinize police arrest decisions. I am skeptical that this change, standing alone, would lead to much greater scrutiny by prosecutors. As Natapoff explains at earlier points in the article, the sole evidence to support many misdemeanor offenses is the testimony of the police, and there is a large amount of literature documenting the fact that police often lie or "shade the facts" to establish probable cause.[13] A slight change in the burden of proof, I fear, would not alter police behavior. Without a larger cultural change in the ethos of the prosecutors' offices, prosecutors would easily be able to point to sufficient evidence to satisfy a preponderance of the evidence standard. Nor would the judiciary be likely to enforce a higher standard in ways that would force a shift in prosecutorial culture. In my experience, misdemeanor court judges are entirely unwilling to entertain *Gerstein* challenges to the police officers' probable cause determinations.[14] In my time as a public defender, I frequently attempted to challenge the initial showing of probable cause to detain a suspect and was told to save my arguments for the trial date. I am skeptical that judges would suddenly be more receptive to charging-related decisions if the standard were slightly more difficult. I do not mean to suggest that a higher standard of proof for charging decisions would accomplish nothing, but more sweeping structural change is necessary to effectuate real change.

Natapoff does offer one more sweeping, structural change. She would make more misdemeanors nonarrestable, nonjailable offenses so as to bring reality more in line with the assumption that misdemeanors are not all that

11. *See id.* at 1372.
12. *See id.* at 1373.
13. *See id.* at 1336.
14. *See generally* Gerstein v. Pugh, 420 U.S. 103 (1975) (requiring a judicial determination of probable cause as a prerequisite to extended restraints on a defendant's liberty following a warrantless arrest).

burdensome.[15] There is much to like about this proposed reform. It would discourage police from using misdemeanor offenses for order-maintenance purposes, reduce jail populations, and remove some of the pressure that the system currently exerts on misdemeanor defendants to plead guilty. In the end, however, this proposal does little to address directly the underlying problems in the misdemeanor justice system. Misdemeanor convictions would still be illegitimate. Innocent people would still be pressured into pleading guilty. Racial minorities would still be disadvantaged. Rather than redress these problems, this change would simply mitigate the harm.

To restore legitimacy to our misdemeanor justice system, we need large, systemic reforms at each stage in the process. It is beyond the scope of this Response to exhaustively catalogue all of the potential reforms that could be implemented at each stage, and there is a vast body of scholarship addressing potential reforms to each stage in the criminal process (although not nearly enough attention has been focused on the ways in which systemic reforms to the misdemeanor process might differ from reforms to the felony process). Rather, it is my intention merely to identify some of the critical stages in the process where systemic change is necessary and suggest some possible ways in which that change could be accomplished. Specifically, I will discuss the following four areas where reform is necessary: (1) law enforcement decisionmaking; (2) prosecutorial screening; (3) appointment of defense counsel; and (4) quality of misdemeanor trial judges.

II. PROPOSED REFORMS

A. LAW ENFORCEMENT DECISIONMAKING

Any attempt to fix our broken misdemeanor system must begin by focusing on the problem of vast, discretionary police decisionmaking. Natapoff does a wonderful job documenting how unfettered law enforcement discretion often leads to arrests of innocent, poor people of color.[16] To change this practice would require a fundamental shift in police culture—a change that can only be accomplished if reforms are imposed from within the departments themselves as well as externally by the other branches of government. Internally, some have argued that we should radically change the ways in which the leaders in police agencies are selected. We need politically-insulated leaders who understand that the

15. *See* Natapoff, *supra* note 1, at 1373–74.
16. *See id.* at 1363–65.

harms caused by these practices outweigh the shorter term order-maintenance benefits and who will institute practices that will change the culture of the police agencies.[17] Departments also need to maintain better data about misdemeanor arrests including information about the race of the individuals arrested and the reasons for the arrests.[18] This data should be publicly available so as to encourage external checks on police practices. In jurisdictions where the data show discriminatory practices, courts should be more receptive to, and the Department of Justice should be more vigorous in filing, civil rights lawsuits challenging the state executive's selective enforcement practices. State legislatures should consider removing some of the discretionary power that police currently have by decriminalizing many misdemeanor offenses and altering the definition of other offenses in ways that limit police discretion to determine when there is a violation.

B. PROSECUTORIAL SCREENING

Natapoff makes a valuable insight in arguing that we should delink arrest from conviction by focusing on changes at the prosecutorial screening stage, but there is much more that we could do.[19] Because prosecutors are elected officials, cultural change will only come if external pressures are used to provoke internal change. As was true with police departments, data documenting how prosecutors make their charging decisions should be routinely collected and publicly available, and the courts should be more receptive to civil rights lawsuits challenging selective enforcement practices. Courts should also consider constitutionalizing state decisions about funding in ways that would encourage the prosecution to take its screening function more seriously.[20] The judiciary and the legislature, or both, could also encourage prosecutors to channel more misdemeanor cases into alternative courts[21] or diversionary programs that are designed to avoid criminal convictions and instead address the underlying problems of substance abuse, mental health, and homelessness that often drive individuals to commit petty offenses. On

17. *See, e.g.*, David H. Bayley, Commentary, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 CRIMINOLOGY & PUB. POL'Y 133 (2002).

18. *See* Natapoff, *supra* note 1, at 1320 (explaining how poorly documented misdemeanor practices are currently).

19. *Id.* at 1372–73.

20. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (arguing that the courts should use state and federal constitutions to regulate states' criminal justice decisions about funding, the definition of crime, and sentencing).

21. *See, e.g.*, Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003) (discussing the rise of drug courts and other specialty courts).

a smaller level, in addition to ratcheting up the burden of proof for charging petty offenses, states could adopt more detailed pretrial disclosure and discovery obligations for misdemeanor offenses to encourage prosecutors to look at the evidence in these cases before the date of trial.

C. APPOINTMENT OF DEFENSE COUNSEL

At the trial stage, misdemeanants need to be afforded meaningful access to counsel. Courts need to force state legislatures to provide lawyers for all indigent defendants charged with criminal offenses, cap public defender caseloads at reasonable numbers, and provide the investigative resources necessary for adequate representation. Courts also need to do a better job of ensuring that defense attorneys are effective. Natapoff mentions the need for these types of reforms in passing, and the literature is filled with proposals about how best to accomplish this herculean task.[22] It is not my intention to repeat those arguments here, but only to point out that systemic change is necessary at this stage in the misdemeanor justice process just as it is needed at the earlier stages.

D. QUALITY OF MISDEMEANOR TRIAL JUDGES

Finally, more needs to be done to ensure that trial judges enforce state and federal rights in misdemeanor courts. More use should be made of immediate writs of mandamus and habeas corpus actions filed in state felony courts to ensure that misdemeanor judges correctly and routinely apply the law in misdemeanor cases. Contrary to the current practice in many jurisdictions,[23] verbatim records should be kept in all misdemeanor court proceedings to ensure meaningful review and to encourage misdemeanor appeals. The state bar association and state judiciary should establish a procedure through which attorneys can report systemic legal mistakes by misdemeanor court judges and steps should be taken to ensure that these mistakes are corrected.

Of course, systemic change at any stage is difficult to implement, and it would be unrealistic to think that all of these changes could or would be adopted in any given jurisdiction. Natapoff has done a great service by

22. *See, e.g.*, Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597 (2011) (canvassing many current proposals).

23. *See* Natapoff, *supra* note 1, at 1348 (explaining how judicial proceedings in misdemeanor cases are often conducted "off the record"); JUDITH S. KAYE & JONATHAN LIPPMAN, ACTION PLAN FOR THE JUSTICE COURTS 26 (2006), *available at* http://www.nycourts.gov/publications/pdfs/ActionPlan-JusticeCourts.pdf (explaining how many of New York's misdemeanor courts do not record proceedings).

unveiling both the magnitude and the importance of the problems in our misdemeanor criminal justice system. Now we need to take the next step and begin thinking about how to fix our broken misdemeanor system.