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Bulk Misdemeanor Justice

Stephanos Bibas
University of Pennsylvania, sbibas@law.upenn.edu

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STEPHANOS BIBAS*

Alexandra Natapoff's article, *Misdemeanors*,[1] shines a much-needed spotlight on the mass production of criminal justice and injustice in millions of low-level cases. For many decades, academics have dwelt ad nauseam on the biggest, sexiest criminal cases, especially capital and other serious felonies such as murder and rape. Courts and commentators have spun out elaborate accounts of the precise procedural guarantees that should govern adversarial combat between prosecutors and appointed defense counsel in these cases.[2] But, as I have argued elsewhere, in making rules for the small sliver of jury trials, judges and scholars have neglected the much larger world of plea bargaining.[3]

Natapoff draws on her experience in criminal defense to explore how far out of sync the ideal of adversarial due process is from the reality of cookie-cutter dispositions. She trenchantly explains how many low-level cases depend almost entirely on a police officer's word, with no meaningful prosecutorial screening or defense counsel testing, or even no defense counsel at all. And she highlights the costs of this assembly-line mechanical justice, not only in terms of wrongful convictions but also impacts on the poor, minorities, and public respect for the justice system.

The prime culprit in Natapoff's story is the hidden, informal discretion that police officers enjoy to arrest, charge, and effect convictions, abetted by prosecutors' and judges' abdication and defense counsel's absence or impotence. Given the magnitude of the problem, her proposed solutions are surprisingly half-hearted, ranging from raising evidentiary standards to appointing more and more effective lawyers to reducing punishments. In

* Professor of Law and Criminology and Director, Supreme Court Clinic, University of Pennsylvania.

1. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

2. *E.g.*, Crawford v. Washington, 541 U.S. 36 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

3. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1148–74 (2001).

fairness, I should note that her reform proposals are not the heart of her article. But these efforts at doctrinal tinkering, I fear, mask the deeper structural problems that demand wholesale reforms.

Part I of this Response elaborates upon Natapoff's diagnosis of criminal justice's failings, showing that the problem's roots go all the way down to its professionalization and mechanization. Part II then offers tentative thoughts about what systemic change would be needed to pull these weeds up by the roots, a worthwhile ideal even though it is unlikely to happen any time soon.

I. HIDDEN, UNCHECKED DISCRETION AND ARBITRARY OUTCOMES

In places, Natapoff suggests that race and poverty underlie the misdemeanor morass.[4] Those factors certainly are bound up with why we police public disorder and similar quality-of-life offenses in the first place. And for decades, many criminal procedure scholars have remained stuck in the Warren Court mindset, viewing criminal procedure's job as combating racism among police and prosecutors. But it is fairer to say that poverty and race, though important, risk distracting attention from the deeper roots of the problem. Not one of the effects that she identifies depends upon imputing even a whiff of race or class bias. The shockingly low level of due process comes across as either the bureaucratic bungling of an overwhelmed machine or a rational, cheap way to stop overt crimes with spillover effects in disorderly neighborhoods.[5] Certainly, if rich white voters routinely had to endure this system, there would be much more outcry and pressure to reform. But that is a far cry from saying that the system arose because of racism. At most, it is a haphazard effort to use social control to stem societal problems of social disorder and decay. These are indeed legitimate problems that society must try to manage, and minorities and the poor are disproportionately the victims of social disorder as well as those accused of it.

Natapoff is also right to stress that completely hidden, unreviewable discretion threatens the rule of law. But the culprit is not discretion per se. (Indeed, she is of two minds about discretion, sometimes accusing police and prosecutors of not exercising it to decline cases and sometimes fearing

4. Natapoff, *supra* note 2, at 1365–72.

5. Bill Stuntz developed the latter explanation and critiqued that phenomenon in William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

that exercising it exacerbates race and class effects.[6]) Some discretion is inevitable and indeed healthy, so that actors may tailor necessarily overbroad criminal statutes to factual, administrative, and moral guilt. More precisely, the problem is one of unchecked, unreviewable, and potentially idiosyncratic discretion. If there is a shared, public sense of what the rules are in practice and how they are to be enforced, then actors are accountable for administering them publicly and consistently. That would greatly ameliorate the problems of notice, discrimination, arbitrariness, and accountability.

There are doubtless people caught up in the system who are factually innocent, because the system is too stingy and speedy to probe their guilt. Though it is impossible to know, however, I am inclined to join Josh Bowers in thinking that the bigger problem is not factual but *moral* innocence. Lawyers are not bad at putting cases into particular legal boxes, and while police occasionally shade the truth I have a hard time believing that amounts to a large percentage of wrongful convictions. The bigger problem, as Bowers explains, is that jaded police and prosecutors know and care too little about sorting out which defendants deserve punishment from those who are technically guilty under overbroad criminal laws but normatively innocent.[7] In some ways, Natapoff's focus on factual inaccuracy could make matters worse. When police and prosecutors have had difficulty proving an element of crime A, they have persuaded legislatures to enact new, broader crime B to obviate proof of that element and facilitate plea bargains and convictions.[8] Thus, legislators could respond perversely to new procedural hurdles by broadening liability so that everybody is guilty of something! Of course, the Supreme Court refuses to limit pretextual stops and arrests, giving police free rein to use minor traffic or public-order offenses to arrest at will.[9]

Connected to this political dynamic is the mix of cases prosecuted. The expanding criminal procedural guarantees of the past half-century may have helped to push enforcement away from crimes with identifiable victims, which are harder to prove and depend on credibility, toward

6. *See* Natapoff, *supra* note 1, at 1238–30, 1363–65,

7. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1689–92 (2010).

8. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519, 531 (2001).

9. Atwater v. Lago Vista, 532 U.S. 318, 354–55 (2001) (authorizing warrantless arrests for fine-only misdemeanors); Whren v. United States, 517 U.S. 806, 813 (1996) (holding that the Fourth Amendment requires only proof of objective probable cause, as "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

public-order offenses, which are easier as police officers suffice as credible witnesses. That shift may perversely have made the system less accurate, particularly to the extent that police face little meaningful review. Maybe, instead of making it harder to prosecute police-witness crimes, we need to make it easier to prosecute victim-centric crimes, in part because there is less automatic deference to and crediting of their accounts.[10] That is not to say that victim control is superior to professional control, but the choice is not binary. It is to say that having more actors involved leads naturally to more checks and balances, while delegating everything to police officers undercuts those checks.

The bigger story here, as I argue in a new book, is the downside of professionalization.[11] Today, victims, ordinary citizens, and even defendants themselves are shut out of the system. Police arrest, effectively charge, and stand ready to testify; prosecutors move cases along, often with defense counsel's complicity; and judges rubber-stamp standard bargains. Natapoff suggests that adding more and more effective defense counsel would help,[12] but her own description of their actual performance belies that hope. Underfunding is chronic and intractable, and it is politically unrealistic to hope for massive budget increases or across-the-board decriminalization. Solutions must instead look for ways to simplify the system and make it more transparent and accountable, to stop the criminal justice machine from running away from us on auto-pilot.

II. LESS ADVERSARIAL COMBAT, MORE TRANSPARENCY AND ACCOUNTABILITY

Instead of hoping for an adversarial nirvana with limitless time, money, and experienced counsel and support staff, we should make criminal justice less reliant on counsel in the first place. Colonial criminal justice was simple and commonsensical enough that victims and defendants could navigate it pro se. The dominance of lawyers grew hand-in-hand with exponentially more complex rules of law, procedure, and evidence.[13] Thus, half a century ago, *Gideon v. Wainwright* recognized that, in felony cases,

10. In that vein, *Crawford v. Washington*, 541 U.S. 36 (2004), by making it harder to base prosecutions on victims' second-hand accounts, may have perversely pushed enforcement towards cases relying on police witnesses, who as a formal matter are subject to cross-examination but as a practical matter may benefit from too much deference.

11. *See generally* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012).

12. Natapoff, *supra* note 1, at 1340–43.

13. BIBAS, *supra* note 11, at 1–6, 15–20.

"lawyers in criminal courts are necessities, not luxuries."[14] In felony cases, that complexity may be inevitable and to some extent desirable, given the elaborate procedures and instructions with which courts have encrusted jury trials. But for misdemeanor cases, which usually lack juries, it is still possible to step back. Judges could apply the rules of evidence in bench trials very loosely or not at all, at least as to pro se litigants. They could also employ alternatives to money bail much more freely in misdemeanor cases, to keep pretrial detention from coercing pleas by innocent defendants. Legislatures could streamline technical elements and defenses and phrase them in common-sense terms. They could also relax unauthorized practice of law rules, to allow lower-priced paralegals and social workers to offer representation. Court clerks could offer instructions and advice to pro se litigants, as could internet tutorials and consultations.[15]

More fundamentally, we could move away from the adversarial system entirely, at least for cases involving no jail time.[16] In many countries, inquisitorial procedures charge judges with proactively ferreting out the truth, instead of leaving the evidence and argument to bubble up from adversarial combat. Particularly given the chronic absence or ineffectiveness of defense counsel, reducing the need for defense counsel seems more feasible than massively increasing the funding and supply of lawyers. Needless to say, judges would have to reconceive their roles and receive special training. But they could take the testimony of the officer, victim, and defendant on the spot or within a few days, instead of letting misdemeanants languish in jail for months, saving counties and states a great deal of money.[17] One might even ban lawyers on both sides, leaving prosecution to victims, court clerks, or police officers, to level the playing field. Doing so would require teaching judges to view it as their job to ferret out exculpatory evidence and probe weaknesses in the evidence themselves. Though the shift would be radical, it would be feasible and cheaper.

14. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

15. My coauthor and I explore many of these suggestions in the context of civil cases in Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 987–89, 994 (2012).

16. The Supreme Court interprets the Sixth Amendment to require appointed defense counsel before any criminal conviction imposes a sentence of imprisonment or even a suspended sentence that may result in imprisonment. Alabama v. Shelton, 535 U.S. 654, 658, 674 (2002); Scott v. Illinois, 440 U.S. 367, 373–74 (1979). In addition, the Sixth Amendment guarantees a jury trial before imposition of any sentence exceeding six months' imprisonment. Baldwin v. New York, 399 U.S. 66, 69 (1970).

17. *See generally* MALCOLM M . FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (paperback ed. 1992).

The other systemic changes would be to make the entire system more transparent and accountable. Natapoff sometimes intimates that we need to demand better procedure or evidence in each case.[18] But that would be next to impossible to police. It would be better to adopt stronger policies to safeguard and regulate categories of cases before they even land in court, by opening up enforcement and charging policies and discretion, as I explain below. Solutions have to involve better input and more oversight, at least at the wholesale level, by a greater range of actors. Though it may be impractical to ensure full-blown trials in such cases, there might be ways to divert enforcement and charging practices away from the most problematic kinds of cases.

For instance, police departments might use administrative rulemaking to specify what kinds and durations of loitering in what areas will qualify as loitering or disorderly conduct, and prosecutors might experiment with doing the same with their charging and plea-bargaining policies for quality-of-life offenses. Community-policing meetings, or even online input aggregated through a wiki site, could drive enforcement away from cases that depend exclusively on police witnesses towards those where neighborhood watch patrollers or residents had complained. Likewise, community prosecution could rank truly victimless cases far lower. Police could also experiment with video and audio recording of citizen encounters to obviate factual disputes and shading the truth. And more citizen review boards could monitor police stops and arrests. Police departments could then use pay and promotion incentives to discipline officers with large numbers of unjustified stops and arrests and to reward those with justified arrests, not just large numbers of them.

Police and prosecutors could also do a better job of gathering and publishing data on their arrests, charges, and convictions for particular types of crimes, alongside the costs of prosecuting those crimes. The goal would be to get voters and the media to compare the cost of traditional prosecution with that of alternatives. In that vein, I think that Natapoff appears to lament some enforcement that she should consider praising. As Tracey Meares and Dan Kahan have argued, anti-gang injunctions and similar proactive, public-order policing measures can substitute for more reactive approaches such as waiting until a major drug crime or shooting occurs and then reacting to it with overwhelming force and lengthy sentences.[19] Spending extra dollars on policing is cheaper, less punitive,

18. *See, e.g.*, Natapoff, *supra* note 1, at 1372–74.

19. Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. Chi. Legal F. 197, 213.

and often more effective. Thus, while misdemeanor enforcement has its cost, the alternatives may be worse. The solution is not to make misdemeanor policing too costly, but to bring it out of the shadows and subject it to meaningful policies and scrutiny.