

# The criminal justice pendulum is headed in the right direction, but prosecutors should proceed with caution

By Eugene H. Hyman

County prosecutors are embracing the obsolescence of misdemeanors as a remedy for an overburdened criminal justice system, relying on the faulty notion that we can ignore smaller problems today and not have bigger ones tomorrow.

Contra Costa County District Attorney Diana Becton announced in September a pilot program under which the office would not pursue misdemeanors, the goal being, “to divert low-level recreational users out of the criminal justice system ... [while] reducing the strain in the courts and on law enforcement.” Offenders are diverted to a health services program unless they’re on probation or already subject to three drug offenses within the last 12 months.

Becton said she enacted the program at the urging of the court’s presiding judge, “who stressed the need to reduce the significant backlog” burdening court operations and law enforcement budgets. A former superior court judge herself, Becton’s efforts to conserve resources in an ever-underfunded criminal justice system are informed by the first-hand experience.

The resource strain is in large part the result of California’s “tough-on-crime” era, which has wreaked literal and figurative havoc on our justice system’s integrity. It’s understandable that prosecutors would



Courtesy of George Gascón for LA District Attorney 2020  
George Gascón being sworn in as Los Angeles district attorney earlier this month.

rush to plug the leaks with any solid-seeming strategy just to stop the ship from taking on any more water.

But these sweeping changes have collateral consequences, with considerable long-term ramifications for courts and would-be misdemeanants.

This is particularly problematic in the case of substance abusers, for whom every misdemeanor charge is a potential point of intervention. Drug use would not be the festering problem it is if everyone enjoyed the security, support structure, and

personal strength necessary to overcome addiction, but for many the motivation only exists if it is a compulsory obligation, supervised by a judge. Thanks to a series of free passes these offenders will be denied this treatment under strict supervision, their addictions growing deeper and harder to cure in the meantime, their likelihood of committing other crimes increasing.

This problem is not just theoretical, it is based on conversations I’ve had with the leadership of some of the drug and collaborative courts in

counties enacting these policies.

Now, by the time most of their offenders first arrive at drug court, it’s on a felony charge with several racked-up misdemeanor offenses. The sentence is potentially far more severe than it would have been on an earlier misdemeanor charge when supervised drug programs might have been an effective solution.

Sentencing is just the tip of the iceberg. What impact will delaying court intervention have on juvenile dependency courts, on foster care, on the likelihood of neglect and

abuse? Will law enforcement be less likely to arrest for shoplifting or drug possession if they think charges will not be brought?

Becton has been laudably transparent about the logic and mechanics of her program, as have been offices that have been implementing similar policies. But the explanations I’ve seen don’t answer questions like these or offer data showing the ends will justify the means. Most importantly, these programs were implemented without opportunity for public analysis or input.

Changes of this magnitude are best left to the California Legislature, where they are subject to rigorous public review. Failure to properly defer to legislators also creates redundancies, relevant here through the recent approval of Assembly Bill 1950. The law, which goes into effect with the new year, restricts the maximum period of probation for most misdemeanors to one year and no longer than two years for most felonies. The average successful substance abuse program takes 18 months. The difficulty judges are now reportedly facing in these counties will be all-the-more exacerbated with its implementation, as it further reduces the court’s window for intervention, limiting the tools in their toolbox to not much more than a book to throw.

Los Angeles County, the state’s largest population, should be particularly keen about this concern with

the installation of George Gascón as district attorney earlier this month. Gascón was a major proponent of alternative sentencing programs as San Francisco County’s district attorney, a legacy his inheritor Chesa Boudin has embraced and accelerated.

Although misdemeanor domestic violence cases are to remain as presently charged, there is no guarantee that the charges aren’t amended to simple battery, and diverted thereafter.

I’m not advocating a return to the past. For decades, the justice system has been overly harsh and overreactive due to policies that were pursued based on perception and instinct, rather than empirical evidence or social science. The pendulum is swinging in the right direction, but prosecutors should not get caught in the momentum. ■

**Eugene M. Hyman** is a retired judge of the Santa Clara County Superior Court.

