

Crime and Misdemeanors

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Although many of the criminal justice policy reforms proposed in the past few years have dealt with “mass incarceration,” particularly sentence reductions and alternatives to incarceration for nonviolent felony offenses, most criminal convictions in the United States are actually for misdemeanors—ranging from serious crimes such as domestic battery and driving under the influence of alcohol to less serious offenses like blocking the sidewalk, failing to pay a parking ticket, and public intoxication. Typically, misdemeanor convictions mean no jail time or are punishable by no more than one year in jail. A perception thus exists that infractions that bring fines or a few weeks in jail do not merit reform efforts as much as crimes that result in decades in prisons do. As a result, our misdemeanor system has largely escaped thorough examination by reformers and politicians, and the injustices in that system continue to affect millions of Americans each year.

In her new book, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*, law professor Alexandra Natapoff pulls the curtain back on our justice system to reveal frightening, punitive bureaucracies that wreak havoc on the individuals caught up in the morass of petty-offense enforcement and excessive policing. Natapoff convincingly argues that state and local governments have created machineries of injustice that undermine the most important functions of criminal law by corroding the processes meant to provide equal justice. That same machinery effectively extracts a punitive tax through the criminal system from the people who can least afford it. In places like Ferguson, Missouri—where a woman was arrested twice, assessed more than \$1,000 in fines and fees, and served six days in jail all stemming from a single parking ticket—the unnecessary cruelty in handling misdemeanors poses severe risks to the legitimacy and effectiveness of the criminal justice system.

The Basics of Crime and the Law

Perhaps the most fundamental purpose of criminal law is to pass the condemnation of the community onto someone who has violated the rights of one of its members and the moral foundations of that community. Generally speaking, offenses within the community can be described by one of two Latin phrases: *malum in se* (“wrong in itself”) or *malum prohibitum* (roughly “wrong because it’s prohibited”). These are not legal distinctions, but they are useful in describing how we think about crime and other wrongdoing.

Malum in se refers to offenses that are self-evidently wrong. They violate basic rights or morals and include assault, robbery, rape, and murder. Malum prohibitum offenses are those acts that have been deemed wrong but are not always morally blameworthy. For example, a municipal prohibition on jaywalking might be enacted to reduce pedestrian injuries and fatalities, but the public broadly understands that crossing the street against the light is not an offense against community morality. Thus, these lesser offenses can be enforced through noncriminal means such as citations and fines rather than handcuffs and jail cells.

Over time, though, the realm of criminal law has expanded to regulate and punish these blameless acts that do not merit the moral outrage of a criminal conviction. Citing misdemeanor data she's collected from all over the country, Natapoff estimates that an excess of 13 million misdemeanor charges were filed in the United States in 2015—she includes an appendix to explain that number in detail—averaging to 4,124 charges per 100,000 people. Certainly, many of those 13 million are for blameworthy offenses, but it's difficult to discern exactly how many. Misdemeanor drug possession and DUI are the two most common reasons for arrest in the United States, but there are many other violations that can result in arrest, whether or not prosecutors ultimately file charges. Because the Supreme Court has said police officers may arrest people for misdemeanors that don't even carry potential jail sentences, police can and do arrest individuals for very minor offenses including unpaid parking tickets. Other examples can be found in recent videos, viewed hundreds of thousands of times on YouTube, showing police arresting and sometimes using force against individuals for jaywalking in cities around the nation.

The over-enforcement of malum prohibitum laws by the police and the misdemeanor court system raises serious questions about public resources and the reasonableness of how governments address relatively unserious nuisances. Natapoff makes clear that these laws are used as pretext for extracting cash from, or investigating, presumptively innocent individuals, rather than for curbing the behavior cited on police reports. And, most often, the people who suffer the most from this enforcement share socioeconomic statuses that bring the fairness of the system into question.

The Use of the Criminal Law Against Racial Minorities

While the American criminal system has been used for much of our history as an explicitly racist method of social control, today what can be described as “institutional racism” in the justice system may be as much a product of the hell of good intentions and the unyielding machinery of bureaucracy as it is of intentional racism and oppression. Of course, those who suffer in the system may not notice the difference—as Natapoff writes, the “petty-offense bureaucracy has long been a key ingredient in the criminalization of the black experience.” But the distinction between overt, intentional racism and indirect institutional racism is an important one to make if we are to ameliorate it. To be clear, this is not an excuse for what the system does, but an explanation of how racism functions within it even when institutional actors may work with benevolent or benign intentions.

When a police department responds to an uptick in violent crime, it typically does so by implementing policy that will supposedly reverse the trend, such as beefing up patrols and increasing contacts with individuals in a given area. Yet Natapoff reminds the reader how the constitutional right to be free from warrantless search and seizure has been eroded by a half-century of U.S. Supreme Court decisions that have allowed myriad police intrusions into

individuals' lives in the name of fighting crime. For example, in *Utah v. Strieff* (2016), the Supreme Court held that evidence that was obtained pursuant to a traffic warrant check after an illegal pedestrian stop can be used against a defendant in court; the violation of your Fourth Amendment rights is not a defense if the cop finds drugs on you. When you combine this permissiveness to the legacies of racial segregation, poverty, and discrimination, overbroad criminal enforcement often becomes concentrated in black and brown neighborhoods, despite most of the law that governs police behavior being "colorblind" (immigration cases excepted). Thus, policing in the absence of malice or explicitly racist law can nevertheless lead to indignities suffered overwhelmingly by people of color.

In the book *Pulled Over*, researchers at the University of Kansas found that while black and white drivers in Kansas City were stopped at reasonably similar rates for unambiguous traffic-safety violations like speeding, black drivers were far more likely to be pulled over for minor violations unconnected to dangerous driving and then subjected to investigative questions and searches. Whereas black and white drivers reported no statistically significant difference in how they felt about traffic safety stops, drivers who were subjected to the pretextual, investigatory stops were more likely to resent those and feel they were illegitimate.

Pretextual traffic stops are one iteration of low-level policing that feeds the misdemeanor systems Natapoff describes throughout her book. While ostensibly looking for firearms to counter a recent spate of homicides and other shootings in 2016 the Little Rock, Arkansas police resorted to using minor traffic offenses to stop and question motorists, the vast majority of whom were law-abiding citizens going to and from their homes like millions of other Americans. (Incidentally, Natapoff's data show that Arkansas is one of three states that filed more than 12,000 misdemeanor charges per 100,000 people in 2015.) Even if a person subjected to one of these stops is not drawn into the court process through fines and fees, their lives are interrupted by police intrusions and their faith in the police may suffer as a result. Moreover, when those contacts occur more often in communities of color to begin with, it follows that the officer-involved tragedies that gave rise to Black Lives Matter will disproportionately fall on individuals in those communities.

Philando Castile and the Extractive Petty-Offense Bureaucracy

Many readers are likely familiar with the tragic death of Philando Castile, an African-American man who was killed by a police officer during a traffic stop in a suburb outside of St. Paul, Minnesota in 2016. Less well known are the years of police encounters that preceded the fateful stop. Although Natapoff does not mention Castile in her book, her descriptions of traffic enforcement and the petty-offense bureaucracy are stark reminders that Castile's victimization began well before his death and similar harassing intrusions are being repeated all over the country.

Castile had been pulled over for a malfunctioning tail-light, the most recent traffic stop in a string of them over more than a decade. According to a *New York Times* article published shortly after his death, St. Paul metro area police had stopped Castile 49 times over 13 years. A National Public Radio report cataloged 46 of Castile's traffic stops. Only one of them cited exceeding the posted speed limit, while another resulted in a citation for running a stop sign, and three others for more ambiguous moving violations: for "interfering" or "impeding" traffic, or "reduced speed required." The rest of the violations were for failure to wear a seatbelt, a primary (stoppable) offense, or for some unobservable violations, like driving on a suspended license,

that cannot be used as a reason for stopping a vehicle. Little in the public record suggests Castile was a bad driver, meaning he was likely stopped for reasons wholly separate from traffic safety. Indeed, with almost 50 stops for minor issues, Castile seems to have been an *ad absurdum* case-in-point for the pretextual investigative stops highlighted in the Kansas City study.

Philando Castile's victimization through traffic enforcement and the petty-offense bureaucracy began well before his death.

Castile's license was suspended several times for failure to pay the costs from his numerous traffic stops. Like many who lose their driver's license, Castile continued to drive despite the suspensions, thus compounding his problems when he was pulled over again. Even though he had a dizzying number of contacts with law enforcement, Castile was never convicted of a serious crime.

Castile's case is especially awful, and most people who are caught in this petty offense system won't end up killed by police on the side of the road. But in the years before that tragic moment, Castile experienced a series of stops, citations, fines, civil forfeitures, and arrests that stemmed from over-policing and the inability to pay misdemeanor traffic fines that resulted from it. How does a person pay off fines and fees that come from traffic stops if the law bars them from taking the most reliable transportation available to a job? *Punishment Without Crime* shows how individuals like Castile are ensnared in these perpetual Kafkaesque cycles. Natapoff writes that the American criminal system "moonlight[s] as a regressive tax system and anti-welfare machine" for the ways it unfairly extracts money from the poor. These criminal bureaucracies may process the fines and misdemeanor arrests with neither forethought nor malice, and yet they are nightmarish all the same.

The greatest strength of *Punishment Without Crime* is that Natapoff marshals the law, reams of data, and years of American history to make a practical case against our current misdemeanor system. Remarkably, she is able to combine these disparate facts into an accessible narrative that doesn't require a law degree to comprehend. Natapoff's most powerful argument, however, is that our misdemeanor system is amoral and unjust.

A Secret, Sloppy Process of Punishment Anathema to Justice

As Natapoff also did in her first book, *Snitching: Criminal Informants and the Erosion of American Justice*, she addresses familiar criminal justice mechanisms, commonplace on many a television crime drama, and then exposes their processes for what they really are. Supported by data and other extensive research, Natapoff painstakingly reveals some of the most disturbing practices in criminal law not as aberrations, but as the standard operating procedure. Of late, one of these procedures receiving more attention in criminal justice circles is pretrial detention.

One of the basic criminal justice mantras almost every American knows is that the accused is "innocent until proven guilty." Yet, the use of jail to hold an accused person before trial is commonplace. And if jail is a punishment for a crime, it would follow that holding a presumptively innocent person before they are convicted should not be the norm, especially for nonviolent defendants who pose little danger to the community. Unfortunately, the Supreme Court says otherwise and Natapoff spells out the high costs of this systemic contradiction: While some jail stays can last less than an overnight, "[o]ver half of all unconvicted inmates will spend more than a month in jail; one-quarter will spend two-to-six months. The average pretrial

detainee can expect to be incarcerated for at least a month whether or not he or she is ever convicted of anything.”

Pretrial detention can wreak havoc on a person. Being held in a jail cell keeps individuals from their jobs, families, and other integral parts of their lives; a person’s life can be upended by a single missed work shift. Even putting aside the sometimes hellish jail conditions that exact their own toll, the chaos that pretrial detention can bring to a defendant’s life can easily influence their decision to plead guilty, whether or not the defendant is, in fact, guilty.

Choosing between weeks or months in jail or taking a plea offer and a fine to walk out the door, individuals faced with misdemeanor charges will often make the rational decision to go home. The plea negotiation, so much as it may be called one, happens in courtroom hallways or on a piece of paper slipped across a table—frequently with a take-it-or-leave-it expiration date—not in open court for the public to judge. The prosecutors don’t have to present their evidence of the crime, the police don’t get cross-examined about the veracity of the evidence—or the legality of the seizure of that evidence, for that matter—and witnesses who may recollect what happened aren’t called to support or impugn the defendant. The state effectively makes an offer, and the choice defendants are left with is to accept it or sit in a cage while life goes on without them. If they accept, they may face fines and court fees in the hundreds or even thousands of dollars, which they may or may not be able to pay. Although the United States banned debtor’s prisons many years ago, Natapoff notes that failure to pay fines accounts for some 20 to 25 percent of jail bookings in some jurisdictions. In the State of Rhode Island, 18 percent of all incarcerations are for debt.

Very often, the people stopped for low-level offenses are low-income and cannot afford bail before a trial, the fines and fees that accumulate through more stops, or the penalties for the initial unpaid fines. This can leave indigent, innocent people in jail for weeks or months—even years—before they get their day in court. This process is what passes for American justice in the streets and courtrooms across the country.

Natapoff neatly summarizes how the system treats to those who get caught up in it:

[B]eing cavalier about evidence and procedure is a way of being cavalier about guilt and dignity. And being cavalier about a person’s guilt and dignity while we are convicting them of a crime is a way of saying that we don’t care much about them, what they did, or what happens to them.

The size of the American criminal system, the scope of the often blameless conduct that can land a person in it, and the unfairness that permeates its punishments and processes says more about the society that tolerates this system than it does the people who are caught up in it. Punishment Without Crime is a righteous testament to the injustices of our criminal system and proof that justice demands far more than sentence reductions and tinkering with laws. As meaningful as some recent reforms may be, we need a broader rethink of what “crime” is in the first place—and of how our police and courts work as a matter of policy.

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