Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal

by Alexandra Natapoff

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Reviewed by Micah Bluming

Five years ago, Ferguson, Mo., nearly burned to the ground. Across the country Americans watched the tragic story unfold: Darren Wilson, a white police officer, shot and killed Michael Brown, an African-American man who had no weapon. Protesters took to the streets. There were riots, arrests, then, finally, a trial. Cops held their ground for two months until a local grand jury declined to charge Wilson with any crimes. This time the protests were bigger; the riots fiercer. And then the fires: buildings, cars, and entire city blocks went up in smoke. A single shooting nearly turned the city to ash. Or so the story went.

But in 2015, when the U.S. Department of Justice (DOJ) released its infamous post-mortem, we learned there was much more lurking beneath Ferguson’s surface.

For years, it turned out, the city’s law enforcement machine had been grinding its residents to dust. Between 2010 and 2014, local officials issued 90,000 citations and summonses—all this for a population of about 21,000. By 2014, three-fourths of Ferguson’s residents had at least one warrant out for their arrest. The city’s black residents, about 67 percent of the population, accounted for more than 90 percent of arrests between 2012 and 2014. Suddenly things became clearer. Ferguson, a city long demonized by its own police, was a pressure chamber. Only after Brown’s last breath, did it finally burst.

Alexandra Natapoff’s Punishment Without Crime is not a book about Ferguson (though the city shows up here and there for illustration), but about the criminal justice system at large. Similar works over the past decade have fixated on different sources of the system’s ills: Corruption, incentive problems, moral bankruptcy, and, of course, racism have all received their share of attention. These, too, appear throughout the book, but they do not steal the show. Rather, Natapoff casts the spotlight on what she believes we have so far failed to notice at center stage: misdemeanors. Offenses we dismiss as “minor,” and the byzantine processes we use to address them, ruin millions of American lives every year, turning on its head one of the rule of law’s most basic tenets: no punishment without crime. It is with this insight that Natapoff implores nationwide reflection, reexamination, and, ultimately, change.

In American law we arrange crimes into categories: felonies, misdemeanors, and infractions, each one with subcategories of its own (violent vs. nonviolent, for instance). Conventional wisdom says this taxonomy distinguishes the most serious crimes (felonies) from the less serious (misdemeanors and infractions). But Punishment Without Crime begins by halting us there, forcing us to question this core assumption that our “criminal system”—Natapoff is careful to omit the word “justice”—takes for granted. How the law regards misdemeanors, she argues, simply does not match the way we treat people accused of committing them.

This argument, one about mismatch, is hardly new. But Punishment Without Crime, unlike many recent books of its genre, does not train its sights on the familiar objects of the reformers’ ire, namely sentencing laws and prisons. In fact, Natapoff’s central thesis is that with so much attention focused on mass incarceration, on draconian punishments meted out for felonies, we have missed another “mass” phenomenon devastating the country: the millions upon millions each year who get arrested, fined, jailed, and saddled with permanent records that impede those individuals effectively for life, all for offenses we supposedly do not consider to be serious.

Just how large of a problem is this? By Natapoff’s calculation (some states track misdemeanors better than others), all U.S. jurisdictions combined charged more than 13 million misdemeanors in 2015, or roughly one misdemeanor charge for every 18 American adults. Natapoff confronts us with several jarring figures about breadth, a disturbing glimpse at just how many people the system sucks in. By age 23, for instance, one-third of all Americans can expect to be arrested for a nontraffic offense (for African-American men, the number is one-half), misdemeanors accounting for most of those. Nearly 600,000 people got arrested for marijuana possession alone in 2015, roughly the entire population of Milwaukee. Many other such examples abound.

But this is a book also about depth, the ease with which even a single misdemeanor arrest—let alone charge or conviction—can trigger a frenzied tumble down the social and economic ladder. Natapoff weaves in heartbreaking vignettes to show us just how quickly the downward spiral can take hold. One woman she profiles struggled to find steady work her whole life after receiving a simple ticket for driving without a license at age 19. Another woman lost her job, her apartment, and all of her belongings after some crumbs on the floor of her car falsely tested positive for cocaine during a roadside stop. More rigorous lab tests eventually proved her innocence, but vindication came several years after she had already pled...
guilty to avoid a harsher punishment. All for a crime she did not commit.

Harnessing anecdotes like these, Natapoff helps us see how a vast network of systems work in tandem, if not in cahoots, to set this trap. The process begins with statutes criminalizing behavior from the commonplace (everybody jaywalks) to the ambiguous (when is conduct “disorderly”?). Such broad authority in essence requires police officers to enforce the law selectively, which has the effect of concentrating citation and arrest rates among the poor and minorities. Prosecutors then charge the vast majority of cases that cross their desks. Once charged, the accused receive an offer to plead guilty, guaranteeing conviction in exchange for more lenient punishment, often even immediate release via a sentence of “time served” and probation. With bail frequently set too high for the defendant to pay, fighting a case at trial means languishing in jail, sometimes for months.

If the system worked properly, of course, those who lack financial means and face severe enough punishment at least have the right to the services of a public defender, though Natapoff documents several disturbing examples where state courts flout the Constitution altogether and force indigent defendants, theoretically entitled to counsel, to negotiate plea deals directly with prosecutors and judges. But even those lucky enough to get a lawyer often have just a few minutes to seek legal advice from the overworked, under-resourced public defenders perennially starved of funding. Taking a plea—which all but 1 percent to 2 percent of misdemeanor defendants do—means getting immediate release in exchange for ongoing obligations. Some are logistical, such as reporting to a probation officer (who, Natapoff points out, often works for a private, for-profit probation company). Others, though, are financial. Legal financial obligations, or “LFOs,” have a prominent place in Natapoff’s assessment. On top of fines for their crimes, most defendants get charged with a laundry list of fees that, if they are not paid on time, generate additional fees and fines that can total thousands of dollars. Missing a payment to the court—even for lack of funds—can land a probationer in jail. In vivid detail we see the great irony of “poverty capitalism,” that the poor are forced to finance the very system keeping them poor.

But even when this part of the cycle ends, when a defendant successfully pays off all his or her debts, a record of the offense lives on. Not only on his or her official government-maintained crime record, from which some jurisdictions permit expungement of minor offenses. But now with public records online, even false charges or a wrongful arrest can live in perpetuity on private websites. Employers, landlords, and everyone else with internet access are just a few keystrokes away from a person’s entire legal past. Small mistakes—or even no mistakes at all—generate consequences for life.

Most of this, of course, we already knew. But Natapoff’s big breakthrough is to posit an unintuitive source for this cascade: the nature of misdemeanors themselves. Millions of people don’t get arrested every year for murder or federal bank fraud. It is misdemeanors that police enforce too harshly, that produce fines and fees levied on the poor, and for which missing a payment or failing to appear in court lands even the innocent in jail. Yet because we think of them as small potatoes, we have failed to muster any will for reform.

Why should all this matter so much, especially to those of us who have managed to evade the system’s grasp? Natapoff puts it bluntly: Until we fix what is broken, the legitimacy of democracy itself stands in jeopardy. Conjure up, for a moment, the image of a falling government. Probably the scene looks a lot like Ferguson back in late 2014: revolution in the streets, cities drowning in embers, standoffs between citizens and police. Natapoff, to be clear, does not predict an uprising. But as she puts it, given its level of social stratification and the lack of accountability for its key players, “the petty offense process has a democracy problem.” What was Ferguson but a democracy problem’s violent climax?

Natapoff, though, is not a preacher of doom and gloom. The book’s final section offers several reform proposals, some of which resonate more than others. Most follow from themes at the core of her diagnosis: decriminalization, reducing arrests, nixing cash bail, cutting out civil fines and fees that tax the poor. But even the most compelling suggestions have been on our radar for years with little to show for it. It is, in fairness to Natapoff, beyond the scope of her book to explain the complex political and legal reasons behind our impotence to fix a broken system. Yet one can’t help but read her prescriptions with skepticism, an overweening sense of been there, done that.

Despite its handful of faults (a puzzling order of chapters, some content repetition, awkward pacing through a few of the anecdotes), the book paints a powerful, nuanced picture of all that is wrong with how our country handles misdemeanors. Natapoff builds her arguments on a firm foundation of facts and data, taking care to keep the presentation accessible to all, leaving non-essential technical details to cited sources and a compiled appendix. But equally so, she never loses sight of the human beings behind the numbers, and through well-placed stories, she ensures we never lose sight of them, either. Natapoff, a law professor and former public defender, adeptly blends the scholar’s rigor with the trial lawyer’s dazzle, treating us to scholarship that feels both scientific and human.

Ultimately, one might think of Punishment Without Crime as a kind of sequel to the DOJ’s report on Ferguson. Or, perhaps, we should think of the report as a prologue, and this book, finally, as a comprehensive report on the state of a crisis we have been watching unfold for years.