Michigan Law Review

Volume 117 | Issue 6

2019

Small Crimes, Big Injustices

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https://doi.org/10.36644/mlr.117.6.small

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PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL. By *Alexandra Natapoff*. New York: Basic Books. 2018. Pp. xi, 335. $19.99.

INTRODUCTION

Murder captures the imagination. The bloody knife, the smoking gun, the electric chair—all are staples of legal thrillers, police procedurals, and true crime. Murders and other serious felonies simultaneously horrify, outrage, scare, and fascinate us.

Like popular imagination, legal scholars fixate on the most serious crimes. Criminal procedures guarantee felony defendants appointed counsel, petit-jury trials, and often grand-jury indictments. Our legal system is supposed to ensure careful investigation and vigorous adversarial testing before it brands someone a felon and imprisons him.

Even in serious cases, the reality falls far short of that ideal. Police sometimes hurry to close out cases without systematically pursuing every lead. Prosecutors sometimes file charges without delving into the evidence and then avoid trials by plea bargaining. Underfunded defense lawyers often juggle hundreds or even thousands of cases without time to investigate them, so they encourage most clients to take those plea deals. It should shock us that serious cases are hurried along.

But felonies, let alone serious felonies, are only the tip of the iceberg. The three million or so felony filings in America each year are dwarfed by four times as many misdemeanor filings. We tend to ignore these more minor cases because they seem unimportant: Instead of years-long prison sentences, defendants face at most months in jail, or sometimes no jail time at all. Those defendants go without grand juries, petit-jury trials, and sometimes even defense counsel. As Josh Bowers notes, jaded criminal-justice professionals slight these cases as "disposables," junk, garbage.[1]

Groups like the National Association of Criminal Defense Lawyers have long struggled to draw attention to the base of the iceberg, submerged from

* Circuit Judge, United States Court of Appeals for the Third Circuit. Thanks to Michael Corcoran, Michael Francus, and Raj Mathur for their help and comments on earlier drafts.

1. Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 319 (2012).

public view. But for a long time, few legal scholars (with the notable exception of Malcolm Feeley) focused specifically on misdemeanors. Thankfully, this has begun to change. Important work by Josh Bowers, Issa Kohler-Hausmann, and others has thrown a spotlight on how the rule of law breaks down beneath the surface, out of sight.

No one has played a bigger role in drawing attention to, and critiquing, misdemeanor criminal justice than Alexandra Natapoff.[2] Over the last eight years, her work has been required reading for anyone interested in this hidden world. As with her previous work on snitching, Natapoff brings to bear a legal scholar's precision, a public defender's savvy and passion, and a sociologist's critique.

Natapoff's new book on misdemeanors, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*, is an ambitious tapestry of doctrines, journalism, empirical research, and public policy. Grounded in a wealth of experience, data, theory, and law, it conveys a simple and powerful message: *minor criminal cases matter*. Even seemingly trivial sanctions and criminal records harm the poor and the powerless. And a society founded on the rule of law must not ignore wrongful convictions, racial disparities, wealth effects, overpunishment, unchecked discretion, and municipal financial hunger. Though individual cases appear so small that they fly under the radar, collectively they matter a lot. We dare not ignore them any longer.

Some readers will take issue with Natapoff's apparent skepticism about the value of much low-level criminal justice, especially in what she and many others call victimless cases. Others may bridle at her uncritical embrace of the adversarial system's ideal, or her relative lack of concern with caseload pressures, fiscal constraints, and other forces that make us fall short of our ideals. Still others will note Natapoff's ambivalence about moralizing, populism, and federalism. And cynics will grumble about how much easier it is to critique a creaky system than to fix it. But these differences of opinion should not mask the bigger picture: Natapoff's book is an impressive accomplishment. Clearly written and passionately argued, yet careful and fair-minded, it is a powerful indictment of low-level criminal (in)justice.

Part I of this Review addresses the *size* of misdemeanor justice in America. Few states bother to report reliable statistics, so Natapoff has gone to the trouble of assembling empirical data. As she reports, the collective scope of the federal and state systems is far bigger than we imagined, comprising some 13 million misdemeanors each year (excluding speeding and other minor traffic infractions). Moreover, as Natapoff argues, defendants who are arrested and convicted are branded with a durable status, one that continues to haunt them long after. We must not discount the scope and impact of supposedly minor convictions.

Part II explores Natapoff's concern with the *lack of law*. A democracy should be transparent and participatory, but misdemeanor justice is opaque

2. Professor of Law, University of California, Irvine School of Law.

and insular. As Natapoff argues, the misdemeanor system is riddled with hidden, unaccountable discretion. It cuts corners, falling far short of the adversarial system's ideals. In its quest for efficiency and speed, it sacrifices legitimacy and procedural fairness.

Part III turns to *innocence*. As Natapoff charges, the system does not do enough to screen out, or probe, cases that are factually weak. On the contrary, forces like pretrial detention put substantial pressure on innocent defendants to plead guilty. Natapoff also explains how misdemeanor justice often sweeps in, and does not toss out, many cases that are legally weak or morally dubious.

Part IV considers *inequality*. Natapoff emphasizes that racial and ethnic minorities bear the brunt of misdemeanor enforcement. She also notes the roles of poverty and money, and how monetary incentives (both public and private) extract fines, fees, and bail from those least able to afford them. The toll on poor people's lives is considerable.

Finally, Part V weighs *reform*. The system is so broken in so many ways that it is hard to know where to begin. Natapoff is admirably clear-eyed about the size of the problem, the barriers to change, and the unintended consequences of previous reforms (like sweeping more people into the system). And she is ambivalent about many possible diagnoses and cures. Nonetheless, she makes a powerful case for a smaller, fairer, less punitive, more transparent, and more equal system. One may not agree with her particular proposals, or may weigh the tradeoffs differently. But one cannot ignore the problems. Particularly in minor criminal cases, the reality of American justice falls far short of its ideals. Natapoff makes a passionate case for large reforms. And by highlighting successful experiments here and there, she gives hope that at least some change is possible.

I. SCOPE AND IMPACT

Natapoff's first contribution is to shed light on how big the misdemeanor system actually is. It is hard to critique a system without first understanding its scope. But because people assume that misdemeanors do not matter much, many governments do not count them and fail to report good statistics (p. 39). (Ironically, then, the assumption that small crimes do not matter makes it hard to challenge that very assumption.) And even when they do report statistics, our myriad state, county, and local governments classify minor crimes differently, making it hard to compare apples to apples or to add them up.

The best previous effort to quantify misdemeanors came almost a decade ago. A report of the National Association of Criminal Defense Lawyers estimated that police and prosecutors filed 10.5 million misdemeanor cases

each year. But because most states did not report numbers, the report was forced to extrapolate from the twelve states that did report their caseloads.[3]

Natapoff fills that gap in Chapter Two. She wrote to each state's court administrators and followed up with them. She also tapped and combined new data with judicial and governmental reports and journalistic and nonprofit studies. Her appendix collects data on forty-seven states (plus the District of Columbia) and extrapolates to the remaining three (pp. 254–60).

She also plows through the welter of labels and categories to come up with a standardized approach. In general, she counts as misdemeanors all low-level criminal offenses, regardless of their labels. But she excludes speeding, civil violations, and other infractions that are not technically crimes (pp. 45–46). And she notes that the felony/misdemeanor line is more porous than we assume: Some misdemeanors, like drunk driving and domestic abuse, are quite serious (p. 47). Many felons are released from prison within a year, serving "misdemeanor-sized sentences" (pp. 47–48). Many felony charges are pleaded down to misdemeanors. And many less-serious felonies are processed quickly and in bulk, like misdemeanors (p. 48).

However fuzzy at the edges, the misdemeanor category is meaningful, ranging from some drunk driving to minor thefts down to jaywalking. And it is vast: Natapoff counts 13 million misdemeanor case filings in 2015 (p. 41). That is a quarter more than the previous estimate, and between three and four times larger than the annual number of felony filings. And that 13 million does not include speeding and other minor traffic offenses, which many states count as crimes. Including those would add another 20 million, more than doubling the figure and swamping the analysis (p. 45).

Counting particular crimes is even harder. The data do not pin down how many indictments or informations charge particular crimes. But Natapoff's evidence suggests that hundreds of thousands of charges each year involve marijuana possession, suspended driver's licenses, and order maintenance (like disorderly conduct and public drunkenness) (pp. 50–51). Demographic data on the race, sex, ethnicity, education, and wealth of defendants are sparse (pp. 52–53).

The paucity of hard data often forces Natapoff to rely on colorful anecdotes. These can be striking and illuminating, and she tells her stories well. But the stories can simultaneously be frustrating, because a cluster of well-picked anecdotes do not add up to data. Often, Natapoff has no choice and has to tell her story this way. But skeptical readers will at times wonder how representative those anecdotes are and how different anecdotes might cast misdemeanor enforcement in a better light. Regardless, her plea for better information and closer scrutiny is clearly right (pp. 242–43).

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3. ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf [https://perma.cc/6DRM-NF87].

In Chapter One, Natapoff showcases the impact of the misdemeanor system. Though we often assume "that minor arrests and convictions are not especially terrible for the people who experience them," she shows that this complacency is "[o]ne of the great myths of our criminal [justice] system" (p. 19). Because they seem minor, the system hurries these cases along, often at the expense of constitutional and adversarial safeguards (p. 19).

But misdemeanor arrests can harm arrestees, even if they are acquitted or never charged. Foremost among the consequences is jail time. Even a modest cash bail is often unaffordable for the poor, so presumptively innocent defendants wind up detained pending trial. A fraction of those (like Sandra Bland) commit suicide.[4] Many more suffer rape, other violence, and infectious diseases (p. 22). Even modest jail stays can disrupt families, jobs, apartment leases, and government benefits (pp. 22–23).

Pretrial detention puts enormous pressure on defendants to plead guilty (p. 63). Even innocent defendants may find plea offers of time served irresistible. And pretrial detention makes it harder to communicate with one's lawyer and dig up favorable evidence.[5]

Innocent defendants thus find it hard and costly to vindicate their innocence. Natapoff tells the poignant story of Tyrone Tomlin, a middle-aged construction worker arrested on a trumped-up charge who could not afford $1,500 bail. The lab report eventually confirmed that his drinking straw was just a straw, not drug paraphernalia, so the prosecution dismissed the case. But in the meantime, he languished in jail for weeks. While there, he was punched, kicked, and stomped in the head, damaging his vision. He also lost three weeks' salary and missed Thanksgiving dinner with his family to boot (pp. 20–21). Vindicating his innocence came at a price.

Another scandal is the abuse of fines and fees. Punishments are supposed to be calibrated to a defendant's ability to pay. Poor defendants often cannot. Yet cash-strapped towns have become reliant on fines and fees for much of their budgets. As a result, poor defendants often go to jail for fines that they cannot pay (pp. 25–26). A Department of Justice report famously excoriated Ferguson, Missouri for enforcing the law not to control or punish crime, but primarily to raise revenue.[6]

Less obvious are the non-criminal consequences that flow from convictions. Some employers refuse to hire anyone with a criminal record, even a misdemeanor record (pp. 28–29). These records last for life (p. 29). Convictions often carry a welter of collateral consequences, ranging from deporta-

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4. P. 65; Katie Rogers, *Sandra Bland's Autopsy Details How She Died*, N.Y. TIMES (July 24, 2015), https://www.nytimes.com/2015/07/25/us/sandra-blands-autopsy-details-how-she-died.html [https://perma.cc/7NZQ-5BWR].

5. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2492–93 (2004).

6. P. 59; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/6JMC-6YQC].

tion to loss of student loans and housing to bars from many occupations (pp. 30–33). Hardest to quantify are the fear, shame, hassle, and indignity of being arrested and hauled into court (pp. 36–38). As Malcolm Feeley famously put it in the title of his landmark book, the process is the punishment.[7] In practice, these non-criminal (and often extra-legal) harms often dwarf the criminal punishments themselves.[8]

The facts are eye-opening. Even readers familiar with the criminal-justice system will be struck by the numbers and their human cost. Like an iceberg, most of the system has lain submerged and invisible. But as Natapoff convincingly shows, its bulk and its impact are massive.

II. LACK OF LAW

In Natapoff's view, the substantial stakes call for scrupulous safeguards. And we Americans expect our public officials to be democratically accountable, with checks and balances to ensure adherence to the rule of law. But the scale and scope of misdemeanor justice have watered down these safeguards or overwhelmed them entirely. Too often, Natapoff argues, police and prosecutors exercise hidden, unaccountable discretion, influenced by irrelevant or improper considerations. And too often, judges and defense counsel are too weak or overwhelmed to push back.

Natapoff, in Chapter Three, critiques the "flawed, unreliable, or unfair" procedures that often lead to misdemeanor arrests and convictions (p. 56). She starts with police stops and arrests. *Terry* stops and frisks require only reasonable suspicion, not probable cause.[9] And Natapoff is hardly the first to critique them. But what is the alternative? Of necessity, cops must make snap judgments on the fly, based on little information and a limited evidentiary threshold. That does indeed risk arbitrariness and reliance on stereotype or prejudice. But as Chief Justice Warren acknowledged in *Terry*, police legitimately fear that suspects whose pockets are bulging will pull out weapons and shoot or stab them.[10]

Arrests are more intrusive, yet still subject to substantial police discretion. And Natapoff retells a number of disturbing anecdotes in which police make arrests to raise revenue, fill their quotas, assert their clout, or punish "contempt of cop" (pp. 59–61). Pretrial detention is even more coercive, putting enormous pressure to plead on those too poor to make bail (pp. 63–65).

Prosecutors are even more powerful than police, yet subject to fewer checks. While police have only qualified immunity, prosecutors enjoy absolute immunity from suit. Our system presupposes that prosecutors will decline to prosecute, dismiss, or divert for treatment or restitution cases that

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7. MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

8. *See* pp. 37–38.

9. P. 57; Terry v. Ohio, 392 U.S. 1, 27 (1968).

10. *Terry*, 392 U.S. at 23–24.

are factually or legally weak or morally blameless. Yet misdemeanor screening is often left to rookie prosecutors, who lack perspective about which cases are serious enough and tend to defer to police (pp. 69–70). In some court systems, police file misdemeanor charges directly with the court, without prosecutorial screening at all (p. 71).

Though our adversarial system expects defense counsel to counterbalance prosecutors, often they cannot. Our criminal-justice system has grown so complex that, as *Gideon* recognized, "lawyers are necessities, not luxuries."[11] The Supreme Court has expanded the right to appointed counsel to misdemeanors that carry any jail time or even a suspended sentence.[12] But though courts have kept expanding these rights, they are often inadequately funded. There are too few lawyers for too many cases, so many appointed lawyers juggle enormous dockets and are forced to plead most cases out, often at the first court appearance. The tactic is so prevalent that it even has a moniker: "meet 'em and plead 'em lawyering" (pp. 74–75).

Public-defender offices cannot pay competitive salaries, and low-bid indigent-defense contracts reward hasty pleas rather than thorough and zealous representation (pp. 75–76). These lawyers lack the time and resources to investigate and fight (pp. 76–77). And busy prosecutors and judges may push them to plead, even punishing them for trying to fight (p. 77). Some courts even admit that they do not appoint lawyers where they must: the Chief Justice of the South Carolina Supreme Court openly admitted that "we [are] not adhering to *Alabama v. Shelton* in every situation" where a defendant faces a suspended sentence (p. 79).

Courts are part of the problem as well. Jury trials are all but unheard of (p. 82). Once they are heard, cases take minutes or even seconds, with almost no legal argument (p. 82). The system works like an assembly line or even fast food, earning the sobriquet "McJustice" (p. 81). Yet litigants may languish in pretrial detention for months awaiting trial, pressuring them to plead (p. 83).

The reality of the process is a far cry from the ideal of criminal law. As Natapoff explains in Chapter Eight, the criminal law presupposes the "*rule of law*," based on "*factual evidence*" of guilt, tethered to "*criminal blameworthiness*" (p. 189). The law's educational and expressive force and its moral stigma depend on its legitimacy and credibility.[13] But in practice, our system is at times indifferent to all of these (pp. 193–94). And when it is indifferent about punishment, it abuses and squanders its moral authority (p. 194).

Natapoff's theoretical framework invokes not only rule-of-law values, but also critical sociology. She views American criminal justice through the

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

12. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (absent waiver, criminal defendants may not be imprisoned unless provided counsel); Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (right to counsel does not extend to defendants sentenced to pay fines); Alabama v. Shelton, 535 U.S. 654, 658 (2002) (states must provide counsel before imposing suspended sentences).

13. *See* p. 191.

lens of David Garland's *The Culture of Control*, Jonathan Simon's *Governing Through Crime*, Loïc Wacquant's *Punishing the Poor*, and Michelle Alexander's *The New Jim Crow* (p. 196). On this view, much of criminal justice can be reduced to "the criminalization of poverty" (p. 200). Though heartfelt and well-written, Natapoff's polemic on this point is unlikely to persuade anyone who is not already persuaded. At bottom, it adopts an ecological account of crime that blames society and the environment for individuals' decisions to commit crimes. Even if she would not absolve wrongdoers from their wrongful choices, in places her rhetoric suggests that blame and free will are beside the point. That suggestion is in tension with her argument elsewhere that our system has drifted away from blameworthiness and needs to put it front and center once again (p. 190).

Natapoff is on firmer ground calling America to live up to its democratic ideals. She is somewhat ambivalent about the consequences of democracy, in places fearing localism and racism (pp. 202–04). Regardless, she is right that the use of criminal justice to raise revenue not only subordinates the poor, but also works as a hidden, de facto tax system (pp. 204–06). The system is hardly transparent or accountable. So voters cannot understand what is happening, let alone hold officials responsible and demand change. And worst of all, she charges, the misdemeanor system's betrayal of its principles pervasively risks wrongfully convicting America's "most vulnerable citizens" (p. 208).

Criminal-justice professionals may be far too busy to appreciate the realities to which they have grown inured. By zooming the lens out, Natapoff prompts them and us to reflect on the gulf between our ideals of democracy, law, and justice, and the bureaucratic reality that too often takes precedence. And of all the realities she exposes, none is more troubling than the system's too-frequent indifference to innocence.

III. INNOCENCE

By cutting corners, the misdemeanor system imperils the innocent. It puts processing huge quantities of cases ahead of ensuring the quality and accuracy of justice in each case. Though criminal-justice professionals do not seek to convict the innocent, the system does not do enough to confirm guilt. It focuses too much on rushing each case along and checking it off the list. And its inherent pressures lead many defendants, innocent and guilty alike, to plead guilty. The system's indifference to innocence is the focus of Chapter Four.

Natapoff opens the chapter with the story of Jack Ford (pp. 87–88). His girlfriend told him they could crash at a house, so he wasn't worried. But the house's irate owner begged to differ. He called the police and had Ford charged with fourth-degree burglary. Ford had a promising defense: if he did not know his entry was unauthorized, he could not be guilty. But Ford could not afford to make bail, so he spent a month in jail awaiting trial. He rejected a plea offer and insisted on his day in court, but on the trial date the judge granted a postponement to give the government more time to find its only

witness. So rather than staying in jail even longer to vindicate his innocence, Ford pleaded guilty in exchange for time served.

We do not know, and cannot know, how many innocent people plead guilty. That is especially true of misdemeanors, where we usually lack DNA or similar forensic evidence that would conclusively prove guilt. "Wrongful convictions are inherently invisible because they represent a breakdown of the very process that is supposed to reveal whether a person is guilty or not" (p. 89). But Natapoff does a fine job of sketching out the various forces that probably result in far too many wrongful misdemeanor convictions.

A great example of the forces at work is *pretrial detention*. Administratively, pretrial detention ensures that defendants appear in court. But, as in Ford's case, its side effect is to induce those same defendants to jump at pleas. Pretrial detention is of course necessary to protect the public and witnesses from dangerous defendants who might commit new crimes or threaten witnesses. It is also used to keep defendants from fleeing. But those fears are weakest in misdemeanor cases, which are usually nonviolent and where the stakes are lowest. And the cost to innocence is considerable. Natapoff relates the story of Amy Albritton, whose three weeks in pretrial detention cost her her job and her home (pp. 91–92).

Albritton's case involved another common problem: flawed *forensic evidence*. She pleaded guilty after a field drug test reported that a crumb on the floor of her car was cocaine. She spent weeks in jail, got evicted from her apartment, and lost her job. But field tests are inadmissible because they are unreliable. Long after she left jail, a Houston lab technician tested the crumb and found no drugs. Albritton was lucky that the District Attorney's Office went to the trouble of exonerating her (p. 92). Prosecutors rarely do so. Compounding the problem is a breakdown in adversarial testing: too often, overburdened defense lawyers do not challenge dubious forensics.

Inaccurate computerized *databases* are another factor (pp. 94–97). Criminal-record databases may report that a suspect is a felon (and so may not possess a gun) even if his conviction has been expunged or sealed (p. 96). Driving-record databases may inaccurately show that driver's licenses have been suspended or revoked (p. 96). Information may be old, incomplete, or just wrong. Error rates are surprisingly high, sometimes 35 percent to 50 percent (p. 96).

Aggressive *policing*, Natapoff argues, contributes to the problem too (pp. 98–103). Instead of responding to public complaints, order-maintenance or broken-windows policing proactively enforces broad trespassing and loitering laws. These charges often rest on the police officer's word and lack independent evidence that the suspect was not authorized to be where he was. According to Natapoff, they also fall disproportionately on minority suspects (pp. 106–08). Police, she argues, often seem driven to pump up their arrest numbers, sometimes by explicit arrest quotas and sometimes by informal expectations (pp. 101–02). Quantity of stops and arrests can thus take precedence over quality.

The system does have a series of screens for accuracy, but Natapoff argues that they are not nearly enough (pp. 104–06). Some cases are dismissed

on initial review at central booking, while more are *nolled* (dismissed) by prosecutors in court. As a result of these screens, huge fractions of low-level charges are dismissed: in Baltimore, probably half or more (pp. 104–05). Aggressive public defenders may do their best, but even that may not be enough to counteract the huge volumes and strong pressures to plead (pp. 105–06).

Perhaps the biggest villain in this story is *plea bargaining*. Natapoff notes that more than 95 percent of misdemeanor convictions result from guilty pleas (p. 109). We no longer expect trials to test the strength of the evidence in more than a handful of cases. The expectation that cases will end in pleas invites sloppiness. And it gives police and prosecutors easy ways to claim victory and go home, instead of facing embarrassing losses at trial.

I have already discussed how plea bargaining works hand-in-glove with pretrial detention to make vindicating one's innocence more costly than admitting guilt in exchange for time served. Plea bargaining also short-circuits the democratic checks with which Natapoff is rightly concerned. It hides cases, avoiding press and public scrutiny in open court. And too often, it lies about cases as well. Charge-bargaining and fact-bargaining put almost everything about a case up for grabs. The resulting deal can be factually dishonest or misleading about what the defendant did (p. 109). Sentences can depend not only or even primarily on guilt or on blameworthiness, but on willingness to cut a deal. The pressures and inducements to plead, like pretrial detention, are enormous. Albert Alschuler, with hyperbole, describes the process as "a nearly perfect system for convicting the innocent."[14]

It seems hard to believe that innocent defendants would ever plead guilty. But the National Registry of Exonerations has documented more than three hundred such guilty pleas by innocent defendants (p. 110). The pressures that innocent defendants face make it rational for some of them to plead guilty. Most of these exonerations are in the most serious cases, which garner the most attention and have the greatest adversarial safeguards. We can only guess the size of the submerged base of the iceberg. Amy Albritton's case was exceptional: there are hardly any exonerations in misdemeanor cases, in part because there is rarely forensic evidence and many innocence projects and conviction integrity units focus their efforts on more serious cases (p. 111).

As Natapoff observes, plea bargains can also sweep police misconduct under the rug (p. 110). That should trouble us. The criminal-justice system is supposed to have feedback loops. Trials, especially acquittals, alert the public to how well law enforcement is doing its job. And even under modern immunity doctrines, tort suits let citizens hold police officers accountable, at least when they violate clearly established law.[15] So police and prosecutors

14. P. 89 (quoting Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 919 (2016)).

15. 42 U.S.C. § 1983 (2012); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971); Monroe v. Pape, 365 U.S. 167, 172 (1961).

should feel public pressure not to violate citizens' rights. But bargaining subverts this process, hiding troubling misconduct.

Its invisibility is perhaps the most frustrating problem of plea bargaining and the misdemeanor convictions it produces. The hidden, insular system endangers innocence. And it also endangers democratic control of criminal justice. One of Natapoff's signal contributions is bringing these intertwined pathologies to light.

IV. INEQUALITY

In a pair of chapters, Natapoff details how misdemeanor enforcement falls hardest on poor persons and racial minorities. Money is the topic of Chapter Five, which opens with the gripping story of how criminal-justice debt has dominated the life of Qiana Williams over the last two decades (pp. 113–15). Natapoff movingly relays how a poor woman's inability to pay her traffic tickets can have ripple effects, costing her her job, her home, and her education.

Natapoff's broader point is that money and wealth effects pervade criminal justice. Criminal-procedure scholars are sadly familiar with how the underfunding of indigent defense counsel, and poor people's inability to make bail, hobble the defense of their criminal cases. But Natapoff focuses instead on another aspect of poverty that is perhaps more shocking: the abuse of criminal-justice fines and fees to raise revenue, and the harsh impact upon those too poor to pay them. It is, she argues, a regressive tax scheme that forces low-level offenders to pay for the criminal-justice system (p. 116).

To collect unpaid fines and fees, many states suspend poor people's driver's licenses, which in turn causes the poor to lose their jobs or else commit the crime of driving with a suspended license (pp. 121–22, 124). And misdemeanor arrests or convictions harm poor people's job prospects, credit, public housing, and financial aid (p. 123).

The resulting fines and fees make poor people even poorer (pp. 127–28). They can even result in "the new debtors' prison" when defendants are jailed for failing to pay their fines and fees (p. 128). These fees can accumulate while inmates are jailed, especially if the jail charges them fees for room, board, and medical care, as many do (pp. 129–30). Judges are supposed to ensure that defendants are not jailed for being too poor to pay, but rather only if they willfully refused to pay (p. 139). But, Natapoff implies, judges often fail to distinguish willful refusal to pay from simple poverty.

The deeper problem is one of financial incentives. Too many scholars focus only on private companies' profit motives, but Natapoff shows that the same pressures are at work in the public sector. The profit motive certainly drives private prison companies and the bail-bonds industry's resistance to bail reform, but it drives public enforcement as well (pp. 136, 145). Many states' and cities' budgets depend on tens of millions of dollars in revenue from fines and fees (pp. 132–33). The Conference of State Court Administrators has gone so far as to suggest that some courts have been turned into "a

collection agency for executive branch services" that effectively collect "an alternate form of taxation."[16]

In one stark example, the Department of Justice's scathing 2015 report found that the profit motive drove overenforcement: "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."[17] Because criminal fines and fees composed about a fifth of the city's annual budget, city officials prodded police to make arrests and issue tickets to raise revenue. So "many officers appear[ed] to see some residents, especially those who live[d] in Ferguson's predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue."[18]

Governments' profit motive corrupts criminal enforcement, especially for the lowest level of crimes. We prosecute serious felonies because they are wrong and harmful, not because they are profitable. But current low-level enforcement is not always tethered to the four traditional justifications for punishment: retribution, deterrence, incapacitation, and rehabilitation/reform. On Natapoff's public-choice account, the enforcement bureaucracy has taken on a life of its own, seeking to preserve and pay for itself as well as turning a profit (p. 146). These pervasive financial incentives dilute the core reasons why we punish (pp. 143–44). That procedural injustice corrodes the system's legitimacy. And even if there is no conscious animus against poor people, the system preys on the weakest and most vulnerable members of society, trapping many in lifelong debt and poverty (p. 146).

Similarly depressing is Chapter Six, where Natapoff explores the role of race. She acknowledges "a kind of chicken-and-egg problem" with disentangling whether high arrest rates for black defendants reflect discrimination or crime rates (p. 155). Surveying the evidence, she finds that higher crime rates explain arrest rates for murder, robbery, and the like, but disparities in lower-level criminal arrests appear to reflect "police overenforce[ment of] minor offenses against black people and in black neighborhoods" (p. 155). Yet later in the same chapter, she complains of *under*enforcement in minority communities (pp. 165–66). She tries to reconcile these two strands by suggesting that minority communities suffer simultaneously from underenforcement of serious criminal laws and overenforcement of minor criminal laws (p. 166). But police might feel caught in a no-win bind, suspected of discrimination no matter what they do. In fairness, Natapoff is careful to make clear that her account does not depend on conscious racial bias, but rather implicit bias (pp. 159–60).

16. P. 133 (quoting CARL REYNOLDS & JEFF HALL, CONFERENCE OF STATE COURT ADM'RS, 2011-2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS 1, 9 (2012), https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf [https://perma.cc/Z7LF-4XDX]).

17. P. 133 (quoting CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 6, at 2).

18. P. 133 (quoting CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 6, at 2).

These pervasive statistical disparities sap the criminal-justice system's legitimacy in the eyes of minority communities. Young black men fear that police will single them out because of their race, even for non-crimes like driving while black (pp. 161–62). Criminal records ruin black men's prospects of landing a job (p. 164). And the "contemptuous, dehumanizing" misdemeanor process threatens the rule of law and the promise of equal justice under law (pp. 169–70). The government communicates a message of disrespect, "an undemocratic slap in the face" of the poor and the powerless (pp. 169–70). Race and poverty, as she notes, are intertwined. And both inequalities call out for reform.

V. REFORM

Scholarly books about criminal justice do not tend to have happy endings. It is far easier to diagnose the problems than to fix them. Almost everybody seems to agree that the system is broken but disagree about how and why one could possibly fix it. Nevertheless, Natapoff strives valiantly to show what needs to be changed and how we could do so. Few readers will agree with all she says, but all will profit from following her vigorous critique and calls for reform.

Most importantly, Natapoff argues, we must change how we think about the misdemeanor system. Minor offenses matter, and we need to reconsider how we handle them and why they merit criminal arrest, prosecution, and punishment in the first place (pp. 214–15). In her view, many misdemeanors are blameless and harmless, plus too many convicted defendants are actually innocent (p. 215). And once we look at them head-on, the crushing punishments, criminal records, and practical consequences of arrests and convictions are disproportionate to the minor harms (p. 216).

Misdemeanor enforcement, in Natapoff's view, exemplifies governmental overreach. Historically, she asserts, the misdemeanor system has served as a tool of social control, "as a way of marking young black men and locking up the vulnerable" (p. 218). (That social-control critique is developed at greater length in Issa Kohler-Hausmann's new book *Misdemeanorland*, which complements Natapoff's.)[19] But its breadth offers a glimmer of hope that voters might come to understand "there but for the grace of God go I" and feel a stake in reforming the system (p. 217).

Natapoff proposes a series of principles to drive reform. First, we must shrink the system, to criminalize fewer wrongs and arrest and prosecute fewer people (pp. 228–33). One key challenge, though, is that police and prosecutors often measure their successes by counting up their arrests and convictions (pp. 231–32). Prosecutors need to screen out cases more aggressively, using experienced prosecutors to train newbies and counteract their tendency to overvalue minor cases (p. 233).

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19. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018).

Second, the misdemeanor system must use jail more sparingly. At the front end, it should break its reliance on money bail. On the back end, it should punish fewer offenses with jail and stop using jail to enforce payment of fines and fees (p. 234). Natapoff calls this use of jail "the debtors' prison model" (p. 234). Locking up fewer people is a key part of reducing the system's impact on people's lives.

Third, the system must punish less. It could divert more cases out of the system, lower fines and proportion them to defendants' income, and eliminate fees for the poor (pp. 236–37). It could also seal and expunge criminal records, though Natapoff astutely notes how poorly those measures fare at putting the genie back in the bottle (p. 238). And it could stop suspending driver's licenses as a way to enforce fines and fees or to punish non-driving crimes (p. 238).

Fourth, the system has to kick the habit of using fines and fees as hidden taxes. Governments must stop relying on fines and fees for their budgets (p. 239). That critique dovetails with criticisms from both the Left and the Libertarian Right of how financial incentives drive abuse of civil forfeiture laws (though Natapoff does not discuss this parallel).[20] To the surprise of many, the popular backlash against excessive forfeitures, coupled with litigation, has created political pressure to rein in prosecutors and police.[21] Perhaps the same could happen if the public knew as much about misdemeanor fees.

Fifth, the system needs to change its culture of disrespect and lawlessness. All the actors need to treat misdemeanors seriously, acknowledging that they matter (pp. 240–42). Sixth, the public needs more information about how the system works (pp. 242–43). If voters knew all that was being done in their names, they might perhaps be scandalized. And finally, people in our democracy need to fight for change. While inertia is powerful and change is hard, it is possible (pp. 243–45).

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20. For a critical survey of civil forfeiture laws, see DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2d ed. 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf [https://perma.cc/3BTB-CMLC]. Many scholars have also critiqued civil forfeiture. *See, e.g.*, Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44 (1998); Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1923–26 (1998) (book review); Vanita Saleema Snow, *From the Dark Tower: Unbridled Civil Asset Forfeiture*, 10 DREXEL L. REV. 69 (2017).

21. Public backlash and a class-action lawsuit led Philadelphia to pare down its civil forfeiture program. Under a settlement agreement, the city limited the circumstances in which officials can seize property and submitted itself to greater judicial oversight. *See* Chris Palmer, *Philly Agrees to Overhaul Civil Forfeiture Program to Settle Lawsuit*, PHILA. INQUIRER (Sept. 18, 2018), http://www2.philly.com/philly/news/crime/philadelphia-civil-forfeiture-program-settlement-consent-decree-larry-krasner-seth-williams-mayor-kenney-20180918.html [https://perma.cc/6CU8-B4VH]. Public criticism has also forced several states to all but eliminate their civil forfeiture programs. For a comprehensive overview of such efforts, see JASON SNEAD, THE HERITAGE FOUND., AN OVERVIEW OF RECENT STATE-LEVEL FORFEITURE REFORMS (2016), https://www.heritage.org/crime-and-justice/report/overview-recent-state-level-forfeiture-reforms#ftn7 [https://perma.cc/A2G3-XL89].

Throughout this lucid and passionate account, Natapoff is too honest and clear-eyed to simply wish away what are tangled thickets. Her realism, however, is shot through with unresolved tensions, as every suggestion has a problem and a natural rejoinder. That is hardly a reason not to reimagine the system and to propose a series of reforms. It is, however, a cautionary lesson about how difficult it is to fix things. And it suggests, in my view, perhaps a very different set of solutions from the ones that Natapoff favors.

Natapoff is certainly right that we funnel too much minor nuisance and disorder and too many people into the criminal-justice system at too high a financial and human cost. What has changed over time is that many of the mediating institutions of society, from families to schools to churches to neighborhoods, have weakened. Nongovernmental institutions inculcate civic virtue and prevent or restrain crime, so earlier generations did not have to rely so much on police surveillance and force. But informal social constraints on wrongdoing and disorder have weakened, and criminal justice is less of a backstop than it used to be and perhaps should again be.

It may well be wise for the system to reduce its appetite and ambition, being more humble about the costs it imposes and the limits of governmental coercion. But that is a decision for voters, many of whom understandably want more safety, more security, more orderliness, and more usable public spaces. On that point, many voters in many communities might take issue with Natapoff's implicit denigration of misdemeanor enforcement. Petty thefts, vandalism, even public urination are noxious if not threatening. Even so-called victimless crimes like prostitution and drug sale and use harm neighborhoods, at least when done in public spaces; few of us feel comfortable letting our children grow up around such public nuisances. It is fine to argue that enforcement goes too far and that zero tolerance is a dangerous fantasy. But Natapoff overcorrects, seeming to imply that the only misdemeanors that really harm others and really deserve criminal enforcement are drunk driving and domestic abuse, the two examples she keeps repeating, and probably a few others like simple assault and battery.

Relatedly, Natapoff seems to understate defendants' personal responsibility. Of course innocent defendants deserve no punishment, and Natapoff adroitly highlights many cases in which punishment is excessive. But the better objection is not that defendants are blameless or that blame is beside the point, but that punishment is disproportionate to their often-minor blameworthiness. Though she does not rely on it, retributivism powerfully supports Natapoff's more modest claims, because the punishments should fit the crimes but do not.

Natapoff's story would play out differently through a retributive lens. But she is ambivalent about moralizing. That is in part because police and politicians have used moralism to justify harshness. But the pendulum swings both ways, and now the language of retributive morality is perhaps the best way to explain why punishments go too far without seeming to exonerate or exculpate wrongs. In other words, Natapoff's brief on the side of defendants risks being a political football, lauded by the Left but assailed by the Right—whereas a focus on retributive proportionality might do better at

bringing both sides together. Most people can see the wisdom in making the punishment fit the crime. And most would agree that minor wrongdoers should not risk losing their jobs and homes, becoming unemployable, and remaining saddled with unpayable fines and fees. The idea of paying one's debt to society is a powerful one, and it means that one must be able to redeem oneself.

Natapoff's ambivalence about moralism informs her ambivalence about populism. In places, she lauds social movements and experiments that have made criminal justice smaller, fairer, more humane, and less burdensome. But elsewhere she mistrusts the public's indifference and racial biases. She is at least as skeptical of criminal-justice professionals too, whose culture, financial incentives, and bureaucratic indifference inure them to injustice. But her heroes seem to be the outstanding prosecutors, public defenders, and judges with whom she worked as a federal public defender, showcasing that the adversarial system can live up to its ideals in practice (pp. 248–50). While inspiring, these stories are hardly a recipe for realistic systemic reform.

I would lay more of the blame at the feet of bureaucratization. Most of the pathologies Natapoff describes flow naturally from a bureaucratic mindset that exalts quantity above quality. She imagines that repealing certain criminal laws and taking in fewer cases might lead to more justice for each one (p. 229). But Darryl Brown has shown that repealing criminal laws in practice does little to reduce the system's footprint.[22] And the late Bill Stuntz and I have both catalogued the relentless hydraulic pressures that push all actors toward prosecuting as many cases as they can and then plea bargaining them all out.[23]

In places, Natapoff explains how bureaucratic incentives distort matters. She is rightly harsh on how financial incentives distort criminal justice.[24] In a few places, she also notes how evaluating police on arrest statistics and prosecutors on conviction statistics pushes them to maximize those statistics, without too much attention to the consequences.[25] Thus, she is appropriately cautious about many popular reforms, noting that they can have unintended consequences such as widening the net and sweeping more people into the system. For example, by making cases "cheaper and easier to process," diversion programs can unintentionally encourage prosecutors to take in more minor cases (p. 219).

These bureaucratic flaws are arguably central to the entire problem. The insular bureaucracy naturally grows insensitive to retributive proportionality, perceived fairness, procedural justice, and the like. Defendants and vic-

22. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007).

23. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 40–48 (2012); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554–56 (2004); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–38 (2001).

24. *See* pp. 239–40.

25. *See* pp. 59, 101–02, 146.

tims have too little say and receive too little regard. Perhaps what the system needs is not less populism but more, at least the right kind and in the right places and ways.

Natapoff's book almost never mentions the jury. That is understandable, because few misdemeanors carry the right to a jury trial.[26] And trials have become rare, even in very serious cases. But arguably, many of the pathologies in misdemeanor justice are linked to its opacity and its insulation from popular participation. We cannot provide juries for misdemeanors. But perhaps there could be more jury-like oversight of charging, plea, or sentencing decisions, or at least more public scrutiny.[27]

Populism could work well through localism. Natapoff recognizes the need for localism and in places comes close to embracing it. Our country is vast, and our criminal-justice systems are many, fragmented, and varied. Though many scholars instinctively distrust localities, Natapoff sees their bottom-up role as both inevitable and desirable, letting them try out creative experiments (pp. 226–27). Social entrepreneurs are, for instance, experimenting with alternatives to cash bail and with electing reform-minded district attorneys.[28]

Another advantage of localism, which Natapoff does not mention, is the room for variation. Some communities prize orderly public spaces and are willing to trade away more liberty. Others are more relaxed about social disorder and disruption. The genius of American federalism (and localism) is that the police and prosecutors in each community can calibrate the level of enforcement to their communities.

Communities can govern themselves, deliberating on and making their own tradeoffs. There is not a single Platonic ideal, but a range of approaches. And democracy is not static, but adapts these approaches over time to each community's needs and in light of what it learns from experimenting. (Or at least that is how democratic pressure should work, if we can make the misdemeanor system transparent and participatory enough to create public oversight and pressure for change.)

This experimentation ought to move beyond the adversarial status quo. Our misdemeanor system is modeled on the felony system. But it does not

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26. Baldwin v. New York, 399 U.S. 66, 69 (1970) (holding that the right to trial by jury extends to crimes that authorize imprisonment for greater than six months).

27. I have developed these ideas at greater length elsewhere. *See* BIBAS, *supra* note 23, at 129–65; Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 959–61 (2006).

28. *See, e.g.*, Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017) (describing community efforts to raise funds and post bail on behalf of strangers); Maria Cramer, *In Reform-Minded Era, Cash Bail for Low-Level Crimes Becomes Key Issue in DA Races*, BOS. GLOBE (Sept. 3, 2018), https://www.bostonglobe.com/metro/2018/09/02/reform-minded-era-cash-bail-for-low-level-crimes-becomes-key-issue-races/H76bhz8u4OZ9M6BOhbbP3M/story.html [https://perma.cc/P4LC-T69V]; Sarah Mahoney, *Jay-Z Backs Startup Using Tech to Keep Poor out of Jail*, REUTERS (Apr. 26, 2018, 12:07 PM), https://www.reuters.com/article/us-usa-prison-tech/jay-z-backs-startup-using-tech-to-keep-poor-out-of-jail-idUSKBN1HX2QE [https://perma.cc/M82L-NV9D].

and cannot replicate the felony system's adversarialism: most misdemeanors do not trigger a jury-trial right, fine-only misdemeanors do not even receive appointed defense counsel, and misdemeanor courts in general are too overwhelmed to dispense individualized justice.[29] (Even the felony system does a poor job of living up to the felony system's ideal, with plea bargaining supplanting most trials.) Natapoff imagines what it would be like to scale up the funding, resources, and guardrails of misdemeanor prosecutions to match what she experienced in federal courts (pp. 248–50). She dreams, for instance, of appointing defense counsel for every defendant, even if only a fine is at stake (p. 241).

But the perfect can be the enemy of the good. We are never going to appoint lawyers for every criminal case, no matter how minor.[30] And continuing to pursue that unattainable ideal can distract attention from new and different ways of doing justice. Natapoff does not, for instance, consider the inquisitorial system. European countries have long trained neutral magistrates to act as counsel for both sides.[31] In America, administrative law judges handle Social Security disability determinations the same way.[32] Perhaps misdemeanors could be turned into civil or administrative offenses and put through streamlined inquisitorial processes. Or perhaps restorative-justice diversion programs could encourage wrongdoers to pay restitution (or community service) and make apologies. That alternative could remove cases from the criminal-justice system before they result in criminal consequences.

CONCLUSION

These differences of opinion should hardly cloud the bigger picture. Natapoff has a passion for her subject, and her time as an able and zealous public defender adds on-the-ground perspective to her scholarly work. She has done an admirable job of researching and bringing to light practices that are hidden, sprawling, maddeningly insensitive, and in need of reform. Her contribution is timely, as politicians across the spectrum rethink criminal justice's footprint as another big, expensive, intrusive government program. One hopes this important book will reap the broad audience that it deserves. Minor crimes really do matter.

29. *See* pp. 19, 55, 73.

30. *See* BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE 40–41 (2017).

31. *See id.* at 150–54.

32. *Id.* at 151–52.