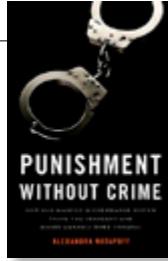


Lives Ruined, but Was Justice Done?

BY JUSTICE MARIA E. STRATTON

Alexandra Natapoff

PUNISHMENT WITHOUT CRIME:
HOW OUR MASSIVE MISDEMEANOR
SYSTEM TRAPS THE INNOCENT AND
MAKES AMERICA MORE UNEQUAL
New York, Basic Books, 2018.



HAD I NOT AGREED to write a book review of *Punishment Without Crime* by UC Irvine law professor and former deputy federal public defender Alexandra Natapoff, I most likely would never have picked it up. After 25 years as a criminal defense attorney and 12 years as a judge of the superior court in California, I thought I knew the minimal toll misdemeanor criminal prosecutions exact on our society. Generally, for a defendant charged with a felony, a plea to a misdemeanor, if available, is an attractive alternative disposition. For a defendant charged with a misdemeanor, hey, be happy it isn't a felony. In the grand scheme of the criminal justice system, a misdemeanor conviction, with its short sentence, probation, fine, and, of course, fees, is the quiet stepchild overshadowed by its flashy felony sibling brimming with drama and consequence. For the judges and lawyers who work in misdemeanor courtrooms, these cases are the training grounds from which they hope to win promotions to the more desirable felony world.

I was wrong. This book is a must read and re-read for anyone who practices in the criminal justice system as it lays bare the ugly practical consequences of misdemeanor arrests and convictions. It is a must read for anyone debating the ramifications of *People v. Duenas*,¹ now exploding across our state. It reminds us how we, as a society, use misdemeanor prosecutions not only to control criminal conduct, but also to control conduct that is neither blameworthy nor suitable for criminal sanction — or, in the words of the book's title, how we impose punishment without crime. And it offers refreshing and surprisingly uncomplicated ways we can mitigate the unfairness of the system without impacting negatively those misdemeanor prosecutions that must be and can be brought justly. City attorneys, public defenders, and judicial officers, take notice.

1. *People v. Duenas* (2019) 30 Cal.App.5th 1157. The case concerns whether courts must consider a defendant's ability to pay when imposing or executing fines, fees, or assessments, and if so, whether the defendant or the state bears the burden of showing a defendant's inability to pay.

Professor Natapoff has written an ambitious survey of misdemeanor and petty offense practice throughout our country, acknowledging the paucity of data compiled in this area (as compared to felony prosecutions) and the absence of uniformity in how the state and federal courts classify non-felony crimes. Despite the lack of easily retrievable statistics, she has written a compelling and well-resourced analysis of the impact on all of us of the 13 million misdemeanor arrests and prosecutions in this country each year, which make up 80 percent of all criminal prosecutions nationwide.

The book is divided into nine chapters succinctly chronicling the misdemeanor apparatus — Impact, Size, Process, Innocence, Money, Race, History, Justice and Change. The author has wisely distinguished those misdemeanor prosecutions that punish truly blameworthy behavior — for example, domestic and other violence, driving under the influence, some drug crimes — from those that punish “order/maintenance” behavior — for example,

“The petty offense apparatus has quietly expanded the purposes of punishment to include bureaucratic self-preservation and profit.”

low level drug offenses, trespassing, traffic offenses, loitering, failure to pay fines — that are not necessarily *malum in se* but can arise out of poverty, mental illness, or result because of arrests prompted by racism. It is the latter category that is the subject of the book. Liberally sprinkled through each chapter are vignettes of actual prosecutions and their catastrophic aftermaths as told by the defendant, defense counsel, prosecutor, or judge. These peripheral consequences include loss of government and educational benefits, employment,

and job opportunities; driver's license suspension, vehicle impounds; deportation; debt spirals and warrants due to inability to pay fines and fees on time; social stigma, and the associated stress and anxiety. These blood-boiling accounts turn what might otherwise be just an academic juggernaut into a readable story that easily sparks outrage and supports the author's observation that “Very few people in the general population commit serious crimes, but almost everybody commits minor offenses” which gives police and low-level courts a “ready-made pool of easy to reach suspects.” Yet it is invariably working class, low-income, and minority communities, not the wealthy, who bear the brunt of these prosecutions as they have been targeted because of their color or they cannot afford the expense of bailing out of pre-trial detention, the loss of income resulting from that detention, or the fines and fees that are generally part of the sentence imposed, whether it be custody time or probation.

The result is too many people pleading guilty not because they are guilty, but because they need to get back to making a living. (And it is so true — when you think about it, who among us has not committed a petty offense and yet because of our neighborhood, our status or the color of our skin were never stopped or never arrested?)

Professor Natapoff also identifies the skewed institutional incentives responsible for this unfair system of punishing without crime — police departments that judge their officers by how many arrests are made; private corporations that charge defendants additional fees to monitor and collect fines and fees for municipalities; municipalities themselves that rely on misdemeanor criminal fines and fees to finance their local budgets, including police, prosecutorial and public defender offices, and the courts (note, 85 percent of misdemeanor defendants are sentenced to monetary sanctions); and courts setting bail way out of line with the seriousness of the charge. As Natapoff notes, “The petty offense apparatus has quietly expanded the purposes of punishment to include bureaucratic self-preservation and profit.” In her final two chapters, “Justice” and “Change,” she identifies a “framework of strong principles to which aspects are legitimate and necessary to a safe and democratic society and which lend themselves too easily to distortion.” She supports several easy fixes that would strike at the heart of the injustices she chronicles. (Spoiler alert, for those following the national debate on no-cash bail, own-recognition release is a primary recommendation.)

In my mind, the two best chapters are “Size” and “History.” In “Size” Professor Natapoff explains how the nation’s huge volume of misdemeanor prosecutions has

turned the process into a self-perpetuating assembly line of potential injustice. In “History” she writes a fascinating summary of “how the petty offense process repeatedly uses its criminal authority to accomplish noncriminal policy ends.” She describes the origins of the petty offense system in England (remember, “high crimes and misdemeanors”?); how its purpose morphed when it was adopted by the United States; how it was used post–Civil War to replace slavery and control African Americans and immigrants; how it became the tool to combat “vagrancy” after World War II; and how current “broken window” policing practices turned it into a prosecutorial behemoth. There is also an eye-opening discussion (it surprised me) of how diversion, drug courts, probation, and decriminalization, normally thought of as positive aspects of the criminal justice system, “widen the net” and tend to increase rather than decrease the number of misdemeanor prosecutions.

In her epilogue, Professor Natapoff returns to her roots as a deputy federal public defender, extolling the way misdemeanors are adjudicated in federal court as an example of all-around best practices. At the end of the day, *Punishment Without Crime* successfully aspires to inspire creative changes to the status quo in this overlooked but significant sector of our criminal justice system. ★

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