The Other Carceral State

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Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. (2012) (forthcoming).

Mass incarceration is much in the news lately, and rightly so. With a prison population that surpasses that of the gulags during the reign of Stalin (not to mention the world's highest incarceration rate — four times the average), it is fair to say that "[t]he scale and the brutality of our prisons … are the moral scandal of American life." (Adam Gopnik, New Yorker, Jan. 30, 2012). And yet, Alexandra Natapoff's new article, *Misdemeanors*, strikingly reminds us that there may still be some competition for that title. Prisoners may own the criminal justice system, but there is still plenty to be said about the millions of renters who spend just an evening or two in its company every year.

Gaining purchase on those transient offenders is no simple feat. Although there is respectable data about felony charges and dispositions in the United States, it is virtually impossible to discern what happens in low level courts. I know this to be true from my own experience: in 2009, I published an article titled Manufacturing Crime that attempted to document the vibrancy of charging what I termed "obstinacy offenses." In focusing on crimes like "failure to appear," "false statements," and "dissuading a witness," particularly at the state level, I tried to demonstrate that a new breed of process crime was emerging, one intended to penalize simple slights against the justice system itself rather than legitimate efforts to obstruct justice. In the course of researching that article, however, time and again I encountered a shocking dearth of information about minor offenses. At best, all I could marshal was anecdotal or small-scale empirical evidence from a single jurisdiction.

Professor Alexandra Natapoff, wrestling the same problem, comes out much farther ahead. She starts her article by observing that there are roughly ten times as many misdemeanor prosecutions per year than felony cases filed; in 2008, roughly 80% of the over 21 million criminal cases filed in state courts were for misdemeanor offenses. She adds that 13 million people cycle through local jails per year, and that roughly 60% of the jail population at any time are held pre-conviction. In the end, though, she is vexed by the same lack of information: she would like to report even a statistic as simple as how many misdemeanor convictions are entered each year (not to mention for what types of crimes, and carrying what sentences), but lamentably such data is lacking. Luckily, the object of her paper is less to document the exact nature of misdemeanor offenses than to present a compelling case that "petty" crimes deserve our care. Indeed, she argues that "[t]he casual attitude toward petty convictions in general…is exquisitely expressed by the fact that the criminal system often fails to count them."

In this light, any scholar concerned with the carceral state absolutely must reckon with its oft disregarded counterpart. In Natapoff's words, "the U.S. criminal process cannot be fully understood or evaluated without acknowledging the centrality of petty offenses." Why? Because "misdemeanors offer new insights into two of the system's most infamous dysfunctions: inaccuracy and the racialization of crime." Specifically, Natapoff describes the criminal justice system as a pyramid in which a very small number of visible cases at the top (either serious felonies or well-represented defendants) receive the procedural protections that legitimate the entire enterprise of punishment, while the enormous opaque foundation (comprised of low-level offenses) is a place in which the rules of "law and evidence hold little sway over outcomes." With convincing clarity, she describes the complicated interplay among bail-setting policies, police willingness to stretch and fabricate, abdication of prosecutorial screening roles, and absence of a meaningful right to counsel — all of which conspire to generate huge volumes of dubious, prêt-à-porter convictions.

Natapoff's grievances with this system are many, but among them she overwhelmingly prioritizes a concern for wrongful conviction. She writes that in "a world largely lacking in a scrutinized evidentiary basis for guilt … the risk of

wrongful conviction is high." She notes that the nature of misdemeanor offenses, most of which involve only law enforcement complainants, means that "the process *is* the evidence" of guilt. Thus, it "becomes more accurate to say that he was convicted because he was arrested," even though "he may have been arrested for any non-evidentiary reason." Of course, such "non-evidentiary reasons" are all too often illegitimate: racial bias, law enforcement's desire to assert control for its own sake, or the need to make policing targets. But chiefly, Natapoff's concern is that "not only do bulk arrest practices discriminate against minorities, they potentially fill the system with innocent people of color who are then wrongly labeled 'criminal'."

While the focus on actual innocence is laudable, in part because she urges a shift in the wrongful conviction discourse away from "discrete pieces of evidence" (like DNA) in high level cases to instead include "the entire procedural apparatus by which people are selected for arrest, screened by prosecutors, and provided defense counsel," it also, to my mind, somewhat obscures what I think is a critical, albeit for her secondary, point. I see a fine line between her "innocent" defendants – such as the loiterers in Baltimore who are arrested for not moving along on an officer's request despite no legal basis for the order, or the trespassers in the Bronx charged with fabricated, boilerplate language – and those who may be technically and factually "guilty" of an offense. Isn't the real crime the reality of exploitative, abusive, and discriminatory policing, followed by a hollow simulacrum of "due process"? As troubling as it may be to admit that we have crafted "a system that has become desensitized to individual culpability and therefore tolerates the imposition of criminal convictions for reasons other than actual guilt," isn't it still more troubling that misdemeanor "process" allows the state "to distribute criminal liability based on race and social vulnerability, rather than individual fault." When you are working in the lowest echelons of "criminality," I find it a less meaningful distinction that a defendant did or did not possess pot or commit a trespass than that the only people punished for such crimes are those too disempowered to demand better treatment. In short, Natapoff convincingly demonstrates that the charging and prosecutorial practices for misdemeanors represent the total disintegration of the rule of law in criminal justice, and as a result threaten to undermine the legitimacy of the system and compromise the already tenuous relationship between the police and the policed.

In New York City, we know this all too well. Misdemeanor possession of marijuana is the most popular charge of arrest, levied against roughly 140 people per day. But it's not factual innocence that makes this statistic outrageous, it's the degrading and discriminatory way that convictions are doled out. And, as Natapoff shows, lawlessness can become so deeply institutionalized that it extends far beyond the frontier guarded by the police. She describes the almost non-existent declination rates in misdemeanor cases in contrast with those for felonies, suggesting lack of any scrutiny in charging for the low level offenses. She echoes the chorus of those decrying "meet 'em and plead 'em" defense lawyering. And she painfully reveals how little misdemeanor courts often resemble any kind of courts of law at all with their high churn of defendants, total absence of defense attorneys, pleas taken en masse, and even, in one chilling report, avowed refusal to follow the Constitution. (Natapoff recounts a statement by the Chief Justice of the Supreme Court of South Carolina, who lambasts Alabama v. Shelton, which ensures the right to counsel for suspended sentences, as "misguided" and declares that "we are not adhering to [it] in every situation.").

This is why Natapoff's article is so illuminating. The stark ugliness of how "justice" works for the overwhelming majority of criminal defendants in our system has consistently been overlooked in large part because the penalties attached to misdemeanor convictions have been viewed as inconsequential. But one cannot so readily dismiss low level offenses when you realize, as Natapoff painstakingly does, that by sheer volume, they *are* the system. Nor once you acknowledge that conviction for even petty offenses can unleash a cavalcade of destructive collateral consequences. As Robin Steinberg, Executive Director of the Bronx Defenders, recently observed in a talk that I attended, how many of us would not prefer some time in jail to the loss of our home, or healthcare, or employment, or citizenship, or kids? And that is to say nothing about the most significant consequence of all, which is the deepening rift between those who believe in the basic fairness of our system of punishment and those who doubt and distrust it. As Natapoff observes, "legal guilt is not a stable normative concept but is widely understood to be socially constructed and path-dependent." For a generation of young minority men especially, "the misdemeanor system also serves a potentially devastating training function," in that it teaches "that evidence and process do not matter an that convictions are inevitable." Reading *Misdemeanors*, is a painful but necessary reminder that the pursuit of "petty"

crime is not so cheap after all.

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