

# BOOK REVIEWS

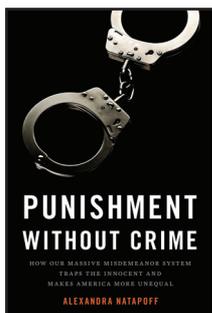
## Punishment Without Crime

**How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal**

By Alexandra Natapoff

Basic Books (2018)

Reviewed by Robert C. Boruchowitz



“We know that innocent people are being convicted. It is an essential and defining aspect of misdemeanor culture that almost no one cares.” So writes Professor Alexandra Natapoff, who details the widespread and corrosive impact of the dysfunction in misdemeanor courts, and challenges readers to do something about it.

Most people who go to court go to misdemeanor court. Their perception of American “justice” often can be described as “cattle auction.” Often there are no defense lawyers or, if lawyers are present, they are overwhelmed.

Professor Natapoff describes the misdemeanor system as contemptuous and dehumanizing, where “The subtleties of formal law demanded by the Constitution lack traction in a system that doesn’t pay much attention to rules in the first place.”

The enormous numbers are disturbing to any sense of equal justice. There are 13 million misdemeanor cases each year. Some states criminalize speeding, adding another 20 million. One in three Americans can expect to be arrested for a non-traffic offense before turning 23. The racial disparity is glaring — 50 percent of black men

and 44 percent of Latino men are arrested by that age, mostly for misdemeanors. More than half of jail inmates have mental health problems.

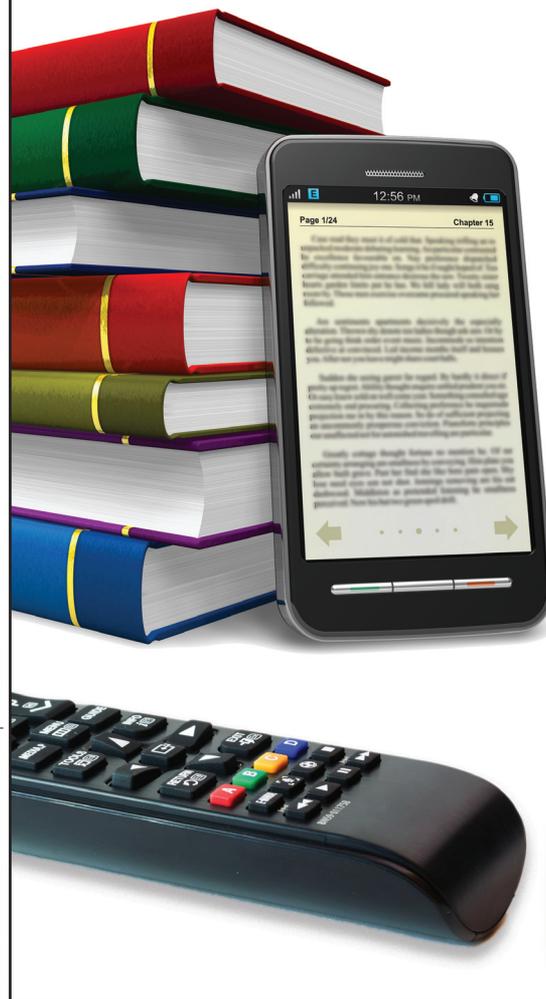
In Virginia, more than 940,000 people have suspended driver’s licenses, usually because they could not afford to pay fines and fees, and risk a criminal conviction if they drive.

Professor Natapoff collected data from every state, and in a detailed appendix documents “the size, specifics, and variations of an institution that has long resisted scrutiny and oversight.” She cites favorably a 2018 law review article that provides an estimate of 13.2 million misdemeanors a year and confirms her observations about the persistent racial disparity.<sup>1</sup>

*Punishment Without Crime* provides clarion cries about the adverse impact on poor and often mentally ill or drug-addicted people who literally are swept into and out of misdemeanor courts. The book inspires defense lawyers to continue to fight for equal justice. How can it still be that, as Professor Natapoff says, it is an open constitutional question whether there is a right to counsel at bail hearings? How can society tolerate what she describes as commonplace — that people who cannot afford bail plead guilty when they are innocent so they can be released? How long will we tolerate it that African Americans are 12 per cent of the population but 31 percent of those arrested for drug crimes?

Professor Natapoff writes that “the misdemeanor process confers relatively unfettered authority on police to formally transform black men into petty criminals based on minor, often harmless conduct, and sometimes even when they are doing nothing at all.”

This book provides terrific, detailed endnotes to probably every significant law review article, appel-



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late case, book, and treatise relating to the criminal legal system of the past 20 years, as well as foundational trial court cases addressing bail and right to counsel. Practitioners will find authorities to inform their practice as well as their systemic advocacy. Moreover, this book could be a college or law school seminar text. It includes key constitutional decisions, highlights important realities in the criminal legal system, recounts the racially exploitive history of misdemeanor arrests and prosecutions, and raises fundamental questions of fairness.

Because Professor Natapoff has written in an accessible style, clearly setting out her main points and inte-

### About the Reviewer

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grating them into later chapters with more detail, lay people will find the book an engaging, if disturbing, description of the criminal legal system and its wide-ranging impacts.

She gives heartbreaking examples of people losing their jobs, health, homes, even their lives because they could not afford bail or to pay fines and fees for the most minor shoplifting or traffic matter, or, in one case, hiding in a church. A homeless person was arrested more than 60 times and spent more than a year in jail for sitting on the sidewalk.

There are examples of dramatic racial disparity. In Baltimore, in five years, police arrested 657 people for “gaming” or “playing cards,” and only five were white.

She concludes that the U.S. Supreme Court has allowed racial disparity in criminal cases,<sup>2</sup> and laments “the complex reality of racial inequality in the misdemeanor system.” This heightens the importance of state constitutional decisions, such as the Washington Supreme Court finding the death penalty unconstitutional because of racial disparity.<sup>3</sup>

The misdemeanor system “alters the very meaning of criminal justice because its arrests, convictions, and punishments can no longer be said to be motivated primarily by wrongdoing, public safety, or justice. Instead, they are heavily incentivized by money.” Existing economic inequalities are increased, and many people have to be convicted before they can have mental health or substance abuse treatment or help getting housing.

She recommends reducing or eliminating fees.<sup>4</sup> She recommends legalization or decriminalization of many minor offenses, including littering, loitering, spitting, and speeding. She questions whether that conduct should make people “criminals” or go to jail for failing to pay a fine. She recommends diversion (but with attention to net widening), using citations instead of arrest, and providing resources for defenders.

Professor Natapoff wants misdemeanor courts to look like the federal court in which she practiced, with time and dignity for the participants. As she writes, there is no principled reason not to try to make it so.

## Notes

1. See Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U.L. REV. 731 (2018).

2. *McCleskey v. Kemp*, 481 U.S. 279 (1987); *United States v. Armstrong*, 517 U.S. 456 (1966).

3. *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

4. Washington State has made major strides in this area. See RCW 10.01.160, which provides in part:

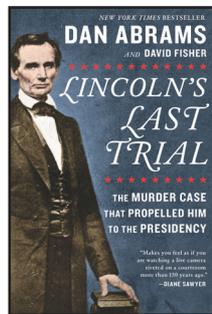
(3) The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

See also *State v. Blazina*, 182 Wash. 2d 827, 839, 344 P.3d 680, 685 (2015): “We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.” Alameda County and San Francisco have moved to eliminate fees. See *Alameda County to Drop Criminal Justice Fees; The Problem with Pot DUIs*, Nov. 27, 2018, available at <https://www.sfgate.com/crime/article/The-Scanner-Alameda-County-to-drop-criminal-13417190.php?t=1761559510>. ■

## Lincoln’s Last Trial

### The Murder Case That Propelled Him to the Presidency

By Dan Abrams and David Fisher  
Hanover Square Press (2018)  
Reviewed by Allan F. Brooke II



It may be that there is no president so often claimed by politicians of all stripes as Abraham Lincoln. His legacy as the self-made man who rose to the presidency at the time of our greatest national crisis is secure. Any school child can tell you of “Honest Abe’s” birth in a Kentucky log cabin and his

address at Gettysburg. A student of history may reflect on his leadership of what Doris Kearns Goodwin has called the “team of rivals” in his Cabinet.

We likely know less of Lincoln’s legal career, but *Lincoln’s Last Trial: The Murder Case That Propelled Him to the Presidency* should be on any criminal defense attorney’s bookshelf. Based in large part of a recently-discovered handwritten transcript of the 1859 murder trial of Quinn Harrison, *Lincoln’s Last Trial* is an entertaining snapshot of the great man’s last work as a private citizen.

Robert Roberts Hitt was a “steno man,” trained in the arcane art of shorthand, and hired to “record” the words of speeches, debates and trials. He had often worked with Lincoln and had indeed been retained to transcribe the 1858 Lincoln-Douglas senatorial debates, which though they did not result in Lincoln becoming Senator for Illinois,<sup>1</sup> did much to make him a viable presidential candidate in 1860. Hitt was hired to transcribe the trial, and the transcript was re-discovered in a shoebox in 1989.

In the midst of his meteoric rise to political prominence, Lincoln continued to practice law in his office in Springfield, Illinois. Abrams and Fisher describe it:

It would be charitable to describe Lincoln’s office as messy. It was well beyond that, well beyond anything that might be fixed by a regular cleaning. Or two. A pair of windows overlooking the backyard were caked so thickly with dirt and grime that very little light edged into the room, which actually was a sort of blessing, as the dim light obscured much of the disorder. ... (p. 21)

From that base of operation, Lincoln undertook the defense of Harrison, a shop clerk who had fatally stabbed a friend, Greek Crafton, who had attacked him over an old grudge in the Short & Hart Drugstore. This would be Lincoln’s 27th murder trial.

The case, as tried by Lincoln, would be premised on a claim of self-defense, made more difficult by the fact that the *defendant* had armed himself in anticipation of the event, but the victim had not. After the stabbing, the victim lived for three days. On his deathbed he allegedly took

responsibility for the fight, but had supposedly made this statement when alone with the defendant's grandfather. The case would turn on the law and the rules of evidence, but also on the rhetorical skills of the attorneys.

Lincoln knew the victim and the defendant, and Greek Crafton had trained in his office. In his closing argument, he spoke about Crafton as he had known him:

Lincoln described Crafton, talking about his skills and the delights he took at small things. He talked about his own pain in accepting the fact that he was gone, that all that promise would never be fulfilled. A sob came from the gallery. A family member, or a close friend. This is what that family had craved, somebody to stand up and talk about their loss. The fact that it was the lawyer for the accused made it all the more remarkable. (p. 262)

In response, Lincoln's antagonist, the well-respected John Palmer, told the jury that while Lincoln was known as "Honest Abe," his performance in closing was the work of an actor "who knows well how to play the role of honest seeming, for effect." Lincoln, it seems, became so upset at this personal attack that he rose to his feet and interrupted Palmer's closing: "You have known me for years, and you know that not a word of that language can be applied to me." And Palmer apologized: "Yes, Mr. Lincoln, I do know it. And I take it all back." (pgs. 264-65) (It boggles the mind.)

Abrams and Fisher's book provides a unique insight into a formative event in the life of the 16th president of the United States and American trial practice of the mid-19th century.

Entertaining and highly recommended.

## Notes

1. Lincoln won the popular vote 54%-46%, but lost the electoral vote 46-54. There is nothing new under the sun. ■

## About the Reviewer

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