RATS, RANDOM RETRIBUTION, AND REVOLUTION

On the Atrophy of the Criminal Justice System

Shaun Ossei-Owusu
Department of African American Studies, University of California Berkeley and American Bar Foundation

Paul Butler, *Let's Get Free: A Hip-Hop Theory of Justice*. New York: The New Press, 2009, 214 pages, ISBN: 978-1-59558-500-4. Cloth, $16.95.

Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor*. New York: Oxford University Press, 2009, 280 pages, ISBN: 0-19-538473-3. Paper, $19.95.

Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice*. New York: New York University Press, 2009, 259 pages, ISBN: 0-8147-5850-9. Cloth, $29.95.

The abysmal state of the American criminal justice system and its pernicious features has been well documented in much of the relevant literature. Feeley and Simon (1992) propose the notion of a "new penology" that prioritizes efficient, cost-effective (and often actuarial) techniques to manage criminal populations, while Katherine Beckett (1997) argues that the punitive shift in crime control policy was an ideologically motivated response to the Civil Rights Movement, with political rhetoric fomenting fears of crime and public policy reflecting the vogue of law-and-order punishment. David Garland's (2001) comparative study of the United States and Britain suggests that "late modernity," which encompasses much of the social, economic, cultural, and technological advancements and changes of the second half of the twentieth century (e.g. wage stagnation, regressive tax policies, suburbanization, the rise in the service economy, new penal technologies), along with neoconservative politics in the 1980s played key roles in the reconfiguration of the criminal justice system.

Jonathan Simon (2007) persuasively contends the American state "governs through crime" (as evinced through the peculiar relationship between the criminal justice

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system and public schools, the increasing authority of American prosecutors and the criminalization of immigration), while Michelle Alexander (2010) and Loïc Wacquant (2002) note the carceral system's eerily similar connections to Jim Crow (with the latter also emphasizing the relationship between incarceration, slavery and the ghetto). Wacquant (2009) also argues that harsh penal policies are results of neoliberal governance and social insecurity (a byproduct of the fragmentation of wage labor and manifested through the criminalization of poverty and punitive supervision of the poor). Alternatively Gilmore's (2007) political economy analysis argues that mass incarceration in California served to reinvest economic surpluses (e.g. surplus labor via deindustrialization, surplus land as byproduct of agricultural droughts in the 1970s, surplus finance capital that required investments and surplus state capital as a result of the waning Keynesian state). Next door, Mona Lynch (2009) complicates the monolithic American narrative which suggests that the United States moved from a rehabilitative ideal to punitive posture, and instead argues that in sunbelt Southwest states like Arizona, the rehabilitative idea was never fully embraced, while claiming that the penal ethos has characteristically been pro-punishment (especially for racial minorities).

Aside from these provocative theoretical explanations and the serious, but clichéd trope of "racial profiling," what we know less of is the deep (and often clandestine) bureaucratic mechanisms that produce class and racial inequality in the criminal justice system. Fortunately, three thought-provoking books have helped illuminate some blind spots that have been undertheorized and given scant attention in legal and social science literature. *Snitching: Criminal Informants and the Erosion of American Justice* by Alexandra Natapoff, *Arbitrary Justice: The Power of the American Prosecutor* by Angela J. Davis and *Let's Get Free: A Hip-Hop Theory of Justice* by Paul Butler all provide constructive and fascinating insights into how bureaucratic discretion in the criminal justice system fundamentally influences social inequality.

Alexandra Natapoff, a former assistant public defender, offers the most up-to-date and trenchant analysis of "snitching" in the criminal justice system. Considering the ambiguous and folk notions of snitching, Natapoff focuses her argument specifically on *criminal* informants who provide information to the government in exchange for leniency and reduced criminal liability, while offering a distinction between this group of people and law-abiding citizens who provide information to the police (although these distinctions don't exist as easily in marginalized neighborhoods). She argues that the government's practice of trading information for leniency has become a central feature of the penal process. The author painstakingly documents instances of "snitching gone wrong" through which the reader learns of disturbing stories where government informants fabricate evidence, mothers are forced to become informants against their sons, and criminal informants are provided with quotas that need to be met to escape charges. The reader also learns of potential defendants being purposely and surreptitiously placed in "informant tanks" in jails surrounded by government-sponsored snitches who seek to come up with incriminating information against the defendant. Natapoff documents the millions of dollars invested in federal informant programs ($100 million in 1993), the thousands of "human resources" maintained by the federal government (15,000 in 2008) and enforcement agencies' lack of compliance with the few guidelines in place to govern the practice of using snitches.

The author offers trenchant discussions on the legal intricacies of informant law, the unreliability of criminal informants, the furtive nature of deals with informants as well as the use of informants in the context of white-collar crime, terrorism, and political corruption. These latter non-street crimes, are particularly distinct

as Natapoff notes that the defendants tend to be more educated, whiter, and richer, which gives them access to privileges that aren't available for poor and minority defendants. Some examples include access to more competent lawyers (who can expose the state if they fail to live up to promises), the government's practice of sending "target letters" informing wealthier defendants that they are under investigation, and the existence of the S-Visa (also known as the snitch visa) for non-citizens, which rewards non-citizens for providing "critical reliable information" about terrorist activities.

The author is careful in her analysis and does not advocate the elimination of informant use—partly because it is so engrained in law enforcement discretion that it would require a massive restructuring of the criminal justice system (which is beyond the purview of her project)—and partly because there is little empirical and practical data on the practice. Despite the lack of empirical data on this phenomenon, Natapoff makes good use of the relevant social science literature. Most notably, some have suggested that "snitches are the leading cause of wrongful convictions in U.S. capital cases" as 45.9 percent of documented wrongful capital convictions stem from false informant testimony (Warden 2004). She also identifies a plethora of reasons why the states' unhealthy reliance on squealers jeopardizes the semblance of integrity left in the criminal justice system.

Beyond the important features of bureaucratic opacity and unreviewable discretion, snitching makes policing cheaper and allows investigators to circumvent practices that require court authorization (e.g. search warrants and wire taps). Potential informants are often given little wiggle room, as it is perfectly legal for the government to seek harsher punishments for non-cooperating defendants. Similarly, the rigidness of the federal sentencing guidelines is well-known, and it is only through cooperation that there can be sentence departures, which creates incentives for defendants to lie. Natapoff perceptively notes that formerly incarcerated individuals and people with criminal associations (often poor and Black) are particularly vulnerable to snitch testimony as they are rarely believed by juries and are easily monitored by the criminal justice system.

Two of Natapoff's especially strong chapters are her discussions on "Snitching in the Hood" and the "Stop Snitching" cultural phenomenon with the former describing the role of criminal informants in poor, minority neighborhoods and the latter focusing on a campaign that attempts to prevent people from cooperating with authorities. She argues that since the young Black male population is under heavy surveillance by the criminal justice system that they are easily exposed to heavy pressure to provide information to inform. For Natapoff, the development of criminal informants in poor neighborhoods leads to more crime (as there have been several high-profile instances where informants are authorized to commit crimes to secure information) and more violence by agitation against confirmed *and* suspected informants. Important here is the role of social networks and geography; police typically focus their attention on poor minority neighborhoods, and since many of these informants know few people out of their immediate neighborhood, they typically provide information (factual or fabricated) based on those in their community, which may result in a distorted snapshot of crime in certain communities.[1] In fact, one of the most corrosive features of snitching is its exacerbation of distrust within marginalized communities. Not only does it undermine the fragile *internal* trust that may exist in poor urban communities,[2] but it also weakens trust in police and the state. When residents observe criminals "getting away with murder" (both literally and figuratively) and being absolved from criminal liability, it intensifies the cynicism that characterizes many Blacks' attitudes toward the police.

This cynicism is an important source for the "Stop Snitching" campaign that garnered national attention when NBA basketball star Carmelo Anthony was seen in a Baltimore-produced video with the similar title *Stop Fucking Snitching*. This mantra emphasized non-cooperation with the authorities and extended into hip-hop songs, t-shirts and hats, and actual criminal circumstances with artist Busta Rhymes refusing to cooperate with police after the murder of his bodyguard despite allegations that Rhymes was standing next to him during the shooting. Similarly, artist Lil' Kim refused to talk to the authorities about a crime she witnessed (and subsequently served time in prison) while rapper Cam'ron stated on *60 Minutes* that he would not call the police if he knew that he lived next to a serial killer. Natapoff discusses how this resistance to cooperating with the authorities stems from: the state's traditional indifference and violence toward poor and minority communities; the government's deployment of informants to undermine Black political organizations (e.g. the Black Panther Party); the threat of witness intimidation; and the related *underprotection* of marginalized communities (and law-abiding citizens who do provide information). The important contribution here is that the ethos of "stop snitching" emerges not from some cockamamie ephemera, but from a socio-historically contingent narrative of state-sponsored physical and epistemic violence toward stigmatized groups. Some of Natapoff's insightful proposals for reform include a legal definition of an informant, more data collection on the practice, legislative limits on crimes for which credit can be earned, stronger police and prosecutorial guidelines on the use of snitches, and a requirement that all compensated informants have their stories corroborated.

In the more specific arena of prosecution, law professor Angela J. Davis utilizes her twelve years of service as an attorney, deputy director, and executive director at the Washington D.C. Public Defender Service in her incisive text *Arbitrary Justice*. In this stinging indictment of unfettered prosecutorial discretion, Davis offers an important contribution to the literature on the criminal justice system and legal bureaucracy. Her book is premised on the argument that prosecutors are the most powerful actors in the criminal justice system. To be sure, Davis has no ideological ax to grind, as she carefully mentions the importance of prosecutorial discretion in having a more efficient system (where prosecutors aren't forced to prosecute frivolous cases or cases with weak evidence), while attentively suggesting that most prosecutors are concerned with justice and conduct their job in a fair and responsible fashion. Nevertheless, Davis suggests that the lack of transparency, overwhelming caseloads, and the culture of winning can lead well-meaning prosecutors to abuse their power and can result in similar cases being adjudicated differently.

The "arbitrary" component Davis points to is both the unpredictability *and* the unrestrained nature of prosecutorial discretion. The author shows how the *charging* decision is an integral component of criminal justice adjudication. Prosecutors decide whether to take legal action in a case and what charge(s) to bring against the defendant. This is an extremely important decision as one criminal act can be charged under various statues and the outcome of the case can range from a felony to a diversion program. As shown with white-collar offenses, an elite's ability to marshal economic and social resources that can impede investigation, challenge subpoenas, and litigate formal charges, while opening civil and administrative alternatives to incarceration; similarly, the reluctance of judges to incarcerate respectable first time white-collar offenders determines not only the charging but the decision to prosecute (Shapiro 1985). Poor and working class individuals are often unable to command these kinds of resources in criminal adjudication, rendering them vulnerable to qualitatively different prosecution. What is especially notable is Davis' discussion on

overcharging. Here the prosecutor "tacks on" more charges than she can possibly prove with the goal of giving her more leverage in the plea bargaining process. If the defendant goes to trial, this overcharging makes the defendant appear guiltier as the juror is inclined to think, "with all of these charges he must be guilty of something" (Davis, p. 30).

Equally important to prosecutorial discretion is the *plea bargaining* stage, since most cases are adjudicated through this mechanism. In this process, the defendant pleads guilty and surrenders their constitutional right to a trial in order receive a lighter sentence. In theory, this stage allows for a win-win as the defendant receives a more favorable sentence while the prosecutor has one less case to take to trial. In practice, plea bargaining is susceptible to weak or non-existent guidelines, contingent on the give-and-take relationship between prosecutors and defense attorneys and often forced onto defendants with sharp expirations (typically a few days). These factors, along with the temperament of the prosecutor, the circumstances of the crime, and the social position of the defendant can all lead to unpredictable outcomes. Echoing Natapoff, Davis also shows how snitch testimony can substantively swing the pendulum in favor of the prosecution in the plea bargaining stage. Davis suggests that the charging and plea-bargaining decisions are important because they: are not transparent; are subject of the volition of the rank and file prosecutor; are typically reviewable only by the chief prosecutor; and are often the source of class and racial disparities, even in the absence of racial animus. Thus, the discretion of prosecutors may often lead to "arbitrary justice" and a "dissimilar treatment of similarly situated people" (Davis, p. 8). For Davis, charging and plea bargaining are fundamentally important stages that require that prosecutors have high levels of accountability.

The author shows how the relative ineffectiveness of the American Bar Association to regulate prosecutors and the lack of investigation into prosecutorial misconduct complaints augments their discretion, documenting some of the many forms of misconduct that pervade prosecutorial work, with particular emphases on courtroom misconduct (mischaracterizing the evidence or facts of the case or attempting to introduce inadmissible evidence), mishandling physical evidence, and perhaps most importantly, failure to disclose exculpatory evidence that might exonerate the defendant. Although Davis does not explicitly argue that these practices are levied against poor, racial minorities, the many anecdotes and stories she offers suggest that these groups are especially impacted by these malpractices. Her analysis shows how prosecutors occasionally consult with the victims of crimes before making plea deals, but also points to the example of domestic violence as an instance where the desires of the victims are often ignored as a byproduct of the no-drop-laws, which require prosecution of perpetrators of domestic violence irrespective of the victim's wishes. The relationship between the prosecutor and the victim also entails some important class distinctions, as Davis notes that the squeaky wheel theory—which suggests that victims who appear in court and witness conferences will have their cases pursued more rigorously—is a reality that arguably advantages middle-class and wealthy victims.

Like most stages in the criminal justice system, the prosecutor also plays an important role in a decision to utilize the death penalty. Davis provides the interesting example of two African American chief prosecutors—the Bronx's Robert T. Johnson, and San Francisco's Kamala Harris—and shows how they wielded their prosecutorial power to oppose any imposition of the death penalty in their jurisdiction. These atypical approaches forced Johnson and Harris to defend their decisions in the media, which Davis argues improves the democratic process by allowing the

public to be more informed about prosecutorial practices. Some of Davis' recommendations include stronger ethical rules for prosecutorial conduct, educating the public about the importance of prosecutors, improving the electoral and appointment processes of prosecutors, and independent review boards that examine charging and plea-bargaining decisions.

Law professor Paul Butler offers an alternative, although similar, take on the state of the criminal justice system. Butler's accessible *Let's Get Free* is animated by his experience as a former prosecutor, a legal dispute with a neighbor that led to his arrest, and his subsequent experience with the legal system as a defendant. Butler's social, cultural, and human capital, along with his innocence, led to his acquittal. But the experience led to the realization that the absence of his impeccable credentials may have "destroyed a less privileged person" (Butler, p. 18) and informs the discussions in the book. Butler's project seeks to run the gamut of criminal justice issues by looking at "mass incarceration," the war on drugs, technologies of surveillance, as well as potential strategies of resistance and reform.

Butler corroborates much of Davis' argument in his chapter on prosecutors by discussing the culture of winning and overzealousness that pervades prosecutors' offices. In fact, he suggests that progressive would-be lawyers would not benefit by becoming prosecutors due to the structural constraints they face. First, he suggests, prosecutors are stuck with the lousy cases that police bring to them; prosecutors also have a symbiotic relationship with the police as their job is typically to get the judge or jury to believe the police; and finally, rank and file prosecutors are ultimately subjected to the whims and wishes of chief prosecutors (who are often constrained by the conservative politics of crime). To illustrate this point he makes the admittedly extreme comparison of prosecutors as akin to slave drivers by suggesting that even when good people operate in unjust regimes, they are not the ideal mitigators. Butler's chapter on snitching also underscores Natapoff's critique of the practice and advises us not to summarily dismiss the "stop snitching" campaign by arguing that most movements and perspectives have extremists. He also contends that a healthy distrust of the state is an important component of democracy. Like Natapoff, the author demarcates the difference between witnessing and snitching by suggesting that the former is a product of circumstance while the latter is the product of the state, and occasionally of poor policing.

Let's Get Free is to be commended for its serious engagement with hip-hop, which tends to be quarantined in cultural studies and the humanities and is given little attention in legal scholarship. Through a generous reading of Rawlsian notions of justice and fairness, Butler's chapter "Hip-Hop Theory of Justice" asserts that hip-hop reveals the unfairness of the criminal justice system while suggesting that the creators of the art form (African Americans and Latinos) are also the primary captives and casualties of the American justice system and are uniquely situated to offer a vision of fair jurisprudence. For Butler, the spirit of hip-hop emphasizes three points: "first, people who harm others should be harmed in return; second, criminals are human beings who deserve respect and love; and third, communities can be destroyed by crime and punishment" (Butler, p. 133). The author is careful to note hip-hop's ineffectual influence in electoral politics as well as its hard-wired sexism and homophobia, but offers this discussion on hip-hop and crime as an alternative approach to thinking about justice.

Butler is at his best in his discussion on jury nullification. Jury nullification is when a juror disregards the evidence in a trial and acquits an otherwise guilty defendant because she feels the prosecution is unfair or the law is unjust (Butler pp. 61–62). This practice is legal and has a long historical tradition as many jurors

acquitted individuals accused of helping slaves escape during slavery; oppositely, defendants who were accused of violence against Blacks and civil rights activists were also acquitted by jury nullification. Butler identifies this powerful "loophole" in the system and offers it as a potential tactic of civil disobedience in the face of a draconian criminal justice system and conservative American jurisprudence. He recommends that progressive jurors nullify in cases of non-violent drug offenses as well as possession or sale of small amounts of drugs. On the other hand, he suggests that in cases where there is violence or drugs are sold to minors, that jurors should convict. For Butler, this tactic would substantively reduce the amount of individuals going to prison over putatively petty drug crimes. The tricky part is that American case law has evolved to where jurors have this right but are not told about it. To mitigate this reality, Butler proposes a juror education program through religious and community organizations, media, music, pop culture, and the handing out of informational materials outside of courthouses.

Butler injects a host of other proposals through the course of the book. For example, he recommends that technology, such as electronic monitoring, be considered as a substitution for certain kinds of incarceration. He argues against Luddite rejections of technology, suggesting that it is not a matter of *whether* technology will be used as a substitute, but *how*. He also suggests that many of the various advances in technology such as the drugs Vivitrol (which prevents alcoholics who drink from getting intoxicated) and Vigabatrin (which treats cocaine and methamphetamine addition) would be cheaper, more humane, and more productive approaches than imprisonment. He even proposes that we consider incentive programs such as the "Learn to Earn" initiatives that pay students to attend after-school programs or improve on their state graduation exams. Some of these suggestions might be off-putting to some readers, but the author maintains that he is merely putting these out as suggestions to be included in broader discussions, given the unsustainable nature of the criminal justice system.

All of the authors point to the importance of bureaucratic discretion in the criminal justice system, a theme that has been a preoccupation in my own work (Ossei-Owusu 2010) and a function that desperately deserves more attention in the literature. For Natapoff, the discretionary act of deploying informants is central to policing and prosecutorial work. Davis' account demonstrates how prosecutorial discretion is central to the nightmarish state of the criminal justice system. Butler corroborates both Natapoff and Davis's central arguments while acknowledging the macro-level imperative and decision to center police work on drugs and drug activity. These analyses demonstrate that social scientists might benefit from examining *penal bureaucrats* and the reproduction of race, class, and gender inequality. One relevant model is offered by Celeste Watkins-Hayes (2009), whose ethnographic examination of welfare offices valuably demonstrates how organizational imperatives, race, class, and professional identities influence decision-making and the *discretionary* toolkit of welfare bureaucrats in a post-1996 welfare reform era. As indicated in these three powerful books, it would also be productive to further probe how bureaucratic decision-making in the criminal justice system is shaped by cultural assumptions about race, class, and gender (Roberts 1999), even in the context of a more diverse penal bureaucracy (Sklansky 2006; Ward et al., 2009).

The individual strengths of each book eclipse the few shortcomings. Natapoff's book would have benefitted from a more extended and deeper historical consideration of snitching. Here I am thinking about how informants played integral roles in suppressing large-scale slave insurrections and were key figures in slaveholders' modes of surveillance.[3] "Ratting" extends itself outside of the urban neighborhoods,

terrorist, political, and business contexts that Natapoff carefully examines, but is also applicable to the same policing institutions that she impugns—as manifested through the "blue code/wall of silence" that requires police officers to not report their colleagues' misconduct and crimes. The code against snitching is also present in organized crime and is embodied in *omertà*—the cultural code that entails "categorical prohibition of cooperation with state authorities or reliance on its services, even when one has been victim of a crime" or as been falsely accused of a crime (Paoli 2003). While Natapoff briefly acknowledges the prevalence and repudiation of snitching in organized crime, this deeper consideration of *omertà* may help explicate this complicated conflation of "witnessing" and "snitching" that exists in African American and poor neighborhoods.

Davis' argument about the accretion of prosecutorial power is compelling and persuasive but her commentary would have benefitted by engaging some of the social science literature on courts and prosecution, as much of her discussion is buoyed by case analysis and anecdotal experiences as a public defender. For example, Lisa Frohmann's (1991) important ethnographic research on prosecutors shows how prosecutors have developed various techniques to discredit the claims of sexual assault victims (e.g. trying to find discrepancies in the victim's story, trying to find knowledge about the victim's personal life or possible criminal connections). Engagement with such research might help the reader see how *underenforcement* of the law is a key component of prosecutorial power (a theme that Natapoff discusses in her book) and the arbitrariness of the law. Davis also contends that most prosecutors are well-intentioned, but suggests that much of the unequal results in our retributive criminal justice system are byproducts of arbitrary prosecution that treats similar cases differently depending on the social agents involved. Could we think of their discretion as being marked by the cognitive and social-psychological tropes of "unconscious" or "implicit" bias, especially considering their constant interactions with poor racial minorities and the one-dimensional cultural assumptions about criminality? What about Tyrone Forman's (2004) instructive concept of racial apathy, which entails a sheer indifference toward racial and ethnic inequality? Davis usefully complicates the typical portrait of White bureaucrats and Black victims by noting that in some cases many of the street-level bureaucrats involved are Black. A deeper excavation of the cognitive and social psychological scholarship on lawyering would have been fruitful in showing how arbitrary discretion can be produced on the conscious and unconscious level by bureaucrats irrespective of their own race.

An issue one might pose for Butler is the specter of jury nullification being misused by racial bigots and conservatives. He does mention that many conservatives nullified the cases of Whites accused of killing civil rights figures. How can we be so sure that this reappropriation will not occur for victims of police violence (à la Rodney King or Sean Bell)? Butler's response would be that many of the historical examples of jury nullification (e.g. fugitive slave prosecution) have not led to widespread backlash, but have attracted attention to the cause. This would be convincing to some but unsatisfying to others—especially considering the primacy of drugs, crime, and criminality in American social life and governance. For Butler, the proliferation of jury nullification might cause legal actors, judges, and prosecutors to think more critically about criminal law and its inefficacies. The tragic history of our nation, however, does suggest that reform is sometimes followed by revanchism and one wonders if jury nullification might lead to more harsh responses such as prosecutorial dismissals of potential Black jurors or the Supreme Court declaring the practice as unconstitutional.

Besides these minor quibbles, these impressive texts make important substantive and theoretical contributions to the scholarship on race, class, crime, and the legal system and attenuate some major lacunae in these literatures. Butler's accessible and prescriptive book will be especially enjoyed by general audiences, undergraduates, and grassroots activists while all three books will be immensely useful for scholars of race, class, crime, and the law; graduate students; and individuals interested in understanding the sobering state of our criminal justice system.

Corresponding author: Shaun Ossei-Owusu, Department of African American Studies, University of California Berkeley, 660 Barrows Hall, Berkeley, CA 94720. E-mail: sowusu@berkeley.edu

NOTES

1. See Bernard Harcourt's (2007) notion of the "ratchet effect," which suggests that like a mechanical ratchet whose rotational motion is unidirectional, the criminal justice system's disproportionate profiling of minority groups and lack of reliable offending statistics yields distortional overrepresentations that serve as justifications for future profiling and influence the allocation of police resources.
2. For a provocative take on how mutual distrust in poor urban neighborhoods hampers both job-seekers' activation of social capital and job-holders' willingness to refer friends and families see Smith (2007).
3. Consider abolitionist David Walker's ([1892] 2000) castigation of slave informants who, he believed, played important roles in undermining freedom for enslaved Blacks.

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