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MISDEMEANOR INJUSTICE AND THE CRISIS OF MASS INCARCERATION

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Every generation it seems, a criminal law scholar arises like an Old Testament prophet and attempts to compel their colleagues to confront the uncomfortable fact that the kind of criminal justice the overwhelming majority of their fellow citizens experience involves misdemeanor crimes, adjudicated (if you can call it that) at the lowest level of courts, with little or no lawyering, few rules, and lots of scope for nasty prejudice.¹ For this generation, Alexandra Natapoff² is that Jeremiah. For her, it is bad enough, of course, that most felony justice has only a family resemblance to the picture acquired from most criminal law classes, but misdemeanors, if they show up at all, do so in the margins of the course, around issues like status offenses, voluntariness, or possession.³ When we take Natapoff's challenge and treat the world as if these misdemeanors mattered, we experience something like what the filmmakers of the Matrix series so effectively captured: the slide from a sleek but apparently totally fake world, to one that is actually pretty disgusting and degrading.

The following makes clear why these generational reminders generally go unheeded. We all take the red pill (or was it the blue one) and forget again, because the alternative is pretty unappealing. Will this time be different? This Response is dedicated to the optimistic idea that it might be and to suggesting what follows for something many of us do have an opportunity to influence, our teaching.

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1. See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); Caleb Foote, *The Coming Constitutional Crisis of Bail: I*, 113 U. PA. L. REV. 959 (1965) [hereinafter Foote, *Crisis of Bail*]; Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956) [hereinafter Foote, *Vagrancy*].

2. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

3. *Id.* at 1314–15.

When Foote wrote about vagrancy⁴ and bail⁵ in Philadelphia courts in the late 1950s and early 1960s, he found a relatively receptive audience in the academy, bench, bar, and foundation world because America's elite, and legal elite in particular, were concerned about a coming crisis of legitimacy around race and urban justice, and in the midst of unprecedented affluence and relatively low crime rates by historic standards, thought this was the right time to reform local criminal justice. We can see this reach a kind of peak in the early 1960s, when the Supreme Court seemed poised to consider whether the realm of misdemeanor offenses that Natapoff sees as most prone to discrimination, those involving public misconduct in the eyes of the police, should not be subject to substantive and procedural restraints.⁶

By 1968, however, three years of rioting in the large cities of the West, Midwest, and Northeast and an escalating violent crime rate in the same places pushed the issue of misdemeanor injustice completely off the table.⁷ In the long "war on crime" that followed, misdemeanors, especially ubiquitous possession offenses, operated like tiny legal munitions scattered across the urban war zones, easily activated by the guilty and the innocent alike. The first phase of that war was an expansion and militarization of the urban police force, largely in response to the riots. The Supreme Court rapidly walked back from procedural rights that interfered with more aggressive urban policing, gutted any hope for a right to bail, and resolutely ignored substantive questions about criminalization.

By the time Malcolm Feeley published *The Process Is the Punishment*, his famous study of New Haven's misdemeanor court,⁸ the second phase of the war on crime was beginning, including mass incarceration and the supersizing of the American prison population by magnitude of almost five-fold.⁹ The project of building mass incarceration required both increased legalization of the felony system, in order to produce convictions with prison sentences in a much higher percentage

4. See generally Foote, *Vagrancy*, *supra* note 1 (discussing the treatment of the poor, homeless, and otherwise disadvantaged under the law).

5. See generally Foote, *Crisis of Bail*, *supra* note 1 (discussing the historical background of the Eighth Amendment's excessive bail clause and the constitutional problems of the subject of bail).

6. Natapoff, *supra* note 2, at 1330.

7. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (describing a shift toward harsh law and order policies in the 1970s).

8. See FEELEY, *supra* note 1.

9. For a more in-depth discussion of mass incarceration, see BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* (1991); and David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 1–3 (David Garland ed., 2001).

than in the past, and a widening of the misdemeanor net, to assure a ready supply of both prison-worthy criminal records and snitches. Feeley's book was widely admired but even Feeley moved on to study sentencing reform, itself a part of the project of mass incarceration.

So is Natapoff's timing any better? It may be.

First there is the crime decline.¹⁰ Many of the same cities whose panic over crime set off the long war back in the 1960s and 1970s have been enjoying substantially, and in some cases dramatically, lower levels of crime (including violent crime). And, importantly, that has been sustained in most cases since the late 1990s, marking the longest such period in recent American history. This means a whole new generation of Americans is coming into maturity without the background of high crime rates to ground the relentless messages of fear that still come from the media and from many politicians. And while politicians remain very quick to drop into law and order poses when the opportunity arises, the peak of the politicization of crime in America probably occurred in the mid-1990s, after the crime rates had crested and started to go down. Having competed themselves into rough parity at an extreme level of penal severity, U.S. politicians have had to move on to other topics.

Secondly, mass incarceration is becoming increasingly untenable as a project.¹¹ The long-term accumulation of prisoners who are either serving life sentences, or through rapid parole revocation policies, doing so on the installment plan, combined with high rates of chronic illness among prisoners, has created a healthcare crisis inside prisons that poses a substantial problem for state finances as well as the health finances of the nation.¹² This has been compounded by the Great Recession, which despite some reasonable predictions has generated little in terms of populist punitiveness (most of it directed against immigrants who due to the Recession have been less available for actual arrest and prosecution). While the critique of mass incarceration, as Natapoff shows, has largely missed the significance of misdemeanors, the decline of mass incarceration removes an important impediment to the serious consideration of how to

10. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 3–26 (2007). See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* 3–28 (2012).

11. Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 23 (Joan Petersilia & Kevin R. Reitz eds., 2012).

12. Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to Brown v. Plata*, 48 *HARV. C.R.-C.L. L. REV.* 217 (2013).

reform misdemeanor justice, which her article directs us to once again. And, as we shall turn to shortly, opens some important reasons for government as well as academics to invest in that project.

The first two points are best thought of as demand-side reasons why a discussion of misdemeanors is less likely to be pushed off the table by spectacles of crime and felony punishment. The third constitutes a supply-side factor—a reason why the unenviable task of working on misdemeanor reform might become easier and more inspiring. The rise of dignity as a public law value in American law,¹³ most recently in response to the concerns about the humanitarian consequences of mass incarceration, has increased the potential reach of a number of constitutional provisions, including the Fourth and Eighth Amendments, to challenging the current misdemeanor justice system. A lot of misdemeanor justice has a corrosive effect on dignity far in excess of its apparent penal severity. Indeed, the whole structure of misdemeanor justice, to the extent that it is a social policy (even if an unacknowledged one) seems intended to subject the urban poor to a series of petty but cumulative blows to their dignity as citizens of equal standing. The exposure to constant petty (as well as not so petty) degradation and domination by police, and the absence of an advocate, or a protective judicial role, produces a constitutive lesson of the lack of accord for dignity. The effects are not only tremendously corrosive for our democracy but also criminogenic in the view of many criminologists, particularly as they effect youth of color in the most highly policed urban neighborhoods. Subjected to a kind of degradation on the installment plan through countless encounters with police in both schools and on the streets, some inner city youth turn to gangs for their promise of honor and respect (the private forms of dignity).¹⁴

These demand- and supply-side factors are coming together with a special urgency driven by both of the first two factors. The crime decline and the crisis of mass incarceration, generally good news, pose an interesting paradox in light of Natapoff's warnings about misdemeanors. The most careful study to date of New York's astonishing crime decline suggests that more police activity, including making arrests, can drive down crime without producing increases in prison populations.¹⁵ But these

13. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011); Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of Life Without Parole*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY 282 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

14. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS (2011).

15. ZIMRING & HAWKINS, *supra* note 9.

same tactics are likely to push more urban youth than ever into the misdemeanor justice system, unless reforms are undertaken, as Natapoff suggests, to sever police action from misdemeanor charges.¹⁶ I agree that this would be a good way to prevent further damage, but it should be coupled with an aggressive effort to remake the culture of policing in America, away from the low-value target, mass-arrest model of the last forty years.

Likewise, as states strive formally and informally to diminish the flow of new prisoners (and old prisoners being recycled through parole violations), more cases are likely to be channeled into the misdemeanor system to prevent them from going to prison. But this will only be a temporary delay in, rather than an alternative to, mass incarceration, if steps are not taken along the lines of Natapoff's suggestion to delink misdemeanors from incarceration.¹⁷

These reform imperatives are greatly strengthened by the rising prominence of dignity in U.S. constitutional law. Although a divided Court recently upheld routine strip searching of jail inmates despite recognizing the severe challenge to dignity,¹⁸ the strong interest the Court has recently taken in dignity suggests that many aspects of misdemeanor justice ranging from arrest through the collateral consequences of conviction are now up for challenge.

None of this guarantees that this time the powerful reminder about misdemeanor injustice will be answered. It does suggest that this is the right moment for a concerted effort by activists, lawyers, and legislators to try.

16. Natapoff, *supra* note 2, at 1372–73.

17. *Id.*

18. *Florence v. Bd. of Chosen Freeholders of Burlington Cnty.*, 132 S. Ct. 1510, 1572 (2012) (Breyer, J. dissenting) (“I doubt that we seriously disagree about the nature of the strip search or about the serious affront to human dignity and to individual privacy that it presents.”).