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Naomi Murakawa

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# MASS INCARCERATION IS DEAD, LONG LIVE THE CARCERAL STATE!

Naomi Murakawa\*

JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (FARRAR, STRAUS AND GIROUX 2017). Pp. 320. HARDCOVER \$27.00. PAPERBACK \$16.00.

ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (PRINCETON UNIVERSITY PRESS 2018). Pp. 328. HARDCOVER \$29.95. PAPERBACK \$22.95.

HEATHER SCHOENFELD, *BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION* (UNIVERSITY OF CHICAGO PRESS 2018). Pp. 352. HARDCOVER \$105.00. PAPERBACK \$35.00.

No one defends “mass incarceration.” Not in so many words. Newt Gingrich and Van Jones link arms in the elite bipartisan coalition #cut50, pledging to halve the prison population. Every 2020 Democratic presidential hopeful promises reduction, usually with modest proposals to scale down the drug war. And incarceration rates have inched downward. The US incarceration rate—measured as the proportion of the population held in state and federal prisons plus local jails—nearly quintupled from 1972 (161 per 100,000) to its peak in 2007 (760 per 100,000).<sup>1</sup> The 2017 incarceration rate fell to 698 per 100,000, representing a ten percent drop over a decade but still leaving the US with the highest incarceration rate in the world.<sup>2</sup>

It is popular to condemn mass incarceration. But that condemnation does not touch the bedrock legitimacy of the carceral state. As the infrastructure of criminalization, the carceral state includes police, criminal courts, probation and parole, criminal records

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\*Associate Professor, Department of African American Studies, Princeton University.

1. NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 33 (Jeremy Travis et al. eds., 2014); Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 ANN. REV. CRIMINOLOGY 235, 236 (2018).

2. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

databases and risk-assessment tools, brick-and-mortar incarceration, and “e-carceration” with electronic shackles.

Witness three small measures of our devotion to the carceral state. First, white majorities revere the carceral state’s frontline workers—the police, who make roughly ten million arrests every year. Black Lives Matter activism compelled a willfully obtuse nation to see police violence, forcing a 2014 to 2015 dip in public confidence in the police.<sup>3</sup> But white faith rebounded. By late 2016, fully seventy-five percent of whites said local police did an excellent or good job in using appropriate force.<sup>4</sup> Second, calls for fewer prisoners accompany calls for longer prison sentences. Based on content analysis of legislative reforms from 2000 to 2012, Katherine Beckett and colleagues found that proposals to reduce sentences for nonviolent offenses were justified as freeing resources to increase sentences for violent offenses.<sup>5</sup> Third, calls for less incarceration often rely on more carceral tools. Vows to cut jail populations come with greater reliance on risk scores and ankle monitors, currently shackled to approximately 80,000 people.<sup>6</sup>

This reform era deserves its own eerie chants. Save incarceration from *mass* incarceration! Mass incarceration is dead, long live the carceral state!

The double-speak is thick. Our fake consensus reviles mass incarceration as “the New Jim Crow,” but takes it as a given that police and prisons are the cornerstone of a free society. The three books reviewed here offer us sharp new vocabularies for cutting through the reformist haze.

#### BEYOND MASS INCARCERATION: KOHLER-HAUSMANN’S *MISDEMEANORLAND*

The sociologist David Garland coined the term “mass imprisonment” in 2001 to highlight the “systematic imprisonment of whole groups of the population.”<sup>7</sup> But if our critique of mass incarceration is calibrated to the horrors of caging, then how do we understand social control that “falls short” of the prison cell? Even with the world’s highest incarceration rate, prison itself is only a small portion of the US carceral state. Every year the criminal legal system processes around 2.3 million felony cases, but it processes approximately ten million misdemeanor cases.<sup>8</sup> The humble misdemeanor—which, by definition at least, may entail jail but not prison sentences—constitutes eighty percent of

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3. The percentage of all adults who have “a great deal” or “quite a lot” of confidence in the police fell from fifty-seven percent in 2013 to fifty-three percent in June 2014, and then to a record-tying low of fifty-two percent in June 2015 as Black Lives Matter gained modest national support. By June 2017, confidence in the police had rebounded to its historical average of fifty-seven percent. Jim Norman, *Confidence in Police Back at Historic Average*, GALLUP (July 10, 2017), <https://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx>; see also BARBARA RANSBY, MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE 21ST CENTURY 1, 123–29 (2018).

4. RICH MORIN & RENEE STEPLER, PEW RESEARCH CENTER, THE RACIAL CONFIDENCE GAP IN POLICE PERFORMANCE 2 (2016).

5. Katherine Beckett, Anna Reosti & Emily Knaphus, *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. SOC. SCI. 238, 253–54 (2016).

6. CENTER FOR MEDIA JUSTICE, NO MORE SHACKLES: WHY WE MUST END THE USE OF ELECTRONIC MONITORS FOR PEOPLE ON PAROLE 3 n.1 (2018), <https://centerformediajustice.org/resources/no-more-shackles-report/>.

7. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 2 (David Garland ed., 2001).

8. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015).

court dockets.<sup>9</sup> How are we to understand the human costs of this massive misdemeanor system?

By “studying law from the ground up,” Issa Kohler-Hausmann delivers a richly detailed portrait of the Kafkaesque terror of navigating a misdemeanor charge.<sup>10</sup> Based on quantitative analysis and fieldwork in two boroughs in the window of 2010 to 2016, Kohler-Hausmann dives into the belly of the beast—New York City since the launch of Broken Windows policing in the 1990s. From 1990 to 2000, the New York Police Department increased its number of uniformed officers by forty-two percent.<sup>11</sup> Targeting low-level offenses, police made 251,000 misdemeanor arrests in 2010, a fourfold increase from the 65,000 misdemeanor arrests in 1980.<sup>12</sup> By 2014, the misdemeanor arrest ratio was 2.4 to 1 for Latinx to white arrestees, and 3.2 to 1 for Black to white arrestees.<sup>13</sup>

As misdemeanor cases flooded lower courts, however, the conviction rate declined. By the 2010s, roughly half of all misdemeanor cases resulted in dismissal, often in the form of an adjournment in contemplation of dismissal (ACD).<sup>14</sup> In short, Kohler-Hausmann finds a strange pattern: more police, arrests, and racial concentration, but lower conviction rates and fewer jail sentences. This finding “embarrasses our traditional understanding” of punishment expansion.<sup>15</sup> What gives?

Facing the deluge of misdemeanor cases, lower courts drifted toward what Kohler-Hausmann calls a managerial model of justice.<sup>16</sup> Officially speaking, criminal courts practice adjudicative justice, meaning they investigate and evaluate facts about whether the defendant actually committed the crime for which they stand accused.<sup>17</sup> But, as Kohler-Hausmann observes in *Misdemeanorland*, courts do not ask the adjudicative question, i.e., did the defendant commit the crime?<sup>18</sup> Rather, courts ask the managerial question, i.e., is the defendant a governable, rule-receptive person?<sup>19</sup> Managerial justice is both forward-looking and backward-looking. The forward-looking dimension is consistent with what Malcolm Feeley and Jonathan Simon describe as the “new penology,” the actuarial tendency “to identify, classify, and manage groupings sorted by dangerousness.”<sup>20</sup> But this actuarial forecasting is tempered by a backward-looking principle of proportionality, which chafes at the excess of fully punishing every little misdemeanor.<sup>21</sup> In short, legal actors presume that misdemeanor defendants need some level of social control, and they use the criminal process “to figure out the rule-abiding

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9. *Id.*

10. ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 13 (2018).

11. *Id.* at 30.

12. *Id.* at 42.

13. *Id.* at 51.

14. *Id.* at 69.

15. KOHLER-HAUSMANN, *supra* note 10, at 67.

16. *Id.* at 71.

17. *Id.*

18. *Id.* at 72.

19. *Id.*

20. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 452 (1992).

21. KOHLER-HAUSMANN, *supra* note 10, at 73.

propensities of people and to calibrate formal regulation accordingly.”<sup>22</sup>

The penal techniques documented in *Misdemeanorland* include *marking*, *procedural hassle*, and *performance*.<sup>23</sup> *Marking* entails the generation of official records about carceral contact and behaviors.<sup>24</sup> For example, an ACD means that a case is technically adjourned for six to twelve months, but the marking itself licenses the court to track later arrests and ratchet up social control measures “if the person fails to prove governability.”<sup>25</sup> *Procedural hassle* entails all the burdens of legal proceedings, the degradation of arrest, the stress of court, and the lost time and opportunity costs of complying with court orders. *Performance* encompasses defendant demonstration of obedience to a set of irregular commands, everything from quietly waiting in court to dutifully attending in-patient drug treatment.<sup>26</sup> Taken together, these three penal techniques sort and regulate people by subjecting them to tests that require physical submission, obedience to onerous and sometimes opaque rules, humiliation, and degradation.

For all who decry the abuses of mass incarceration, these penal techniques might sound trivial. As Kohler-Hausmann guides us through byzantine and mortifying rituals, however, it becomes clear that bureaucratic inconveniences are, in fact, “active, productive tools in the project of social control.”<sup>27</sup> Consider the procedural hassle of sitting and waiting in court. Defendants wait for hours and learn the courtroom rules: No cell phone use. No talking. No loud children. No approaching court staff to ask questions. In some courts, no reading newspapers. The hassle of waiting tutors the defendant in submission to authority, and waiting becomes another performance subject to evaluation.<sup>28</sup> Delay allows court officers to monitor conformity to rules, to discipline parents holding a crying child, to threaten the tardy with harsher sanctions.

Every misdemeanor case begins with an arrest, which Kohler-Hausmann aptly describes as a “‘ceremony of degradation’ that transforms a free person into a criminal defendant.”<sup>29</sup> *Misdemeanorland* gives a brief sketch of Jannelle, a black woman in her early twenties arrested for “theft of services” after she boarded the back door of a crowded city bus.<sup>30</sup> Kohler-Hausmann quotes Jannelle at length as she describes how the officer grabbed her arm, pulled her off the bus, left her books on the ground, pushed her up against a wall, and threatened, “if you don’t shut up we’re going to throw you on the floor.”<sup>31</sup> Jannelle concludes: “All of that for \$2.25. All of that.”<sup>32</sup>

Videos of police killing people might outrage the public, sometimes. But—or perhaps, therefore—it is far more difficult to scandalize the injuries of managerial justice.

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22. *Id.* at 20.

23. *Id.* at 80.

24. *Id.*

25. *Id.*

26. KOHLER-HAUSMANN, *supra* note 10, at 80–81, 183–84, 221–24.

27. *Id.* at 183.

28. *Id.* at 216, 220.

29. *Id.* at 184.

30. *Id.*

31. KOHLER-HAUSMANN, *supra* note 10, at 185.

32. *Id.*

It is one of *Misdemeanorland's* great achievements that it names and shames these “subtle” forms of social control, the ones that saturate working class, Black, and Latinx neighborhoods but elude elite condemnation of mass incarceration.

BEYOND THE NEW JIM CROW: FORMAN'S *LOCKING UP OUR OWN*

Six years before *Locking Up Our Own*, James Forman, Jr. published an article titled “Racial Critiques of Mass Incarceration: Beyond the New Jim Crow.” To call mass incarceration the New Jim Crow, Forman suggested in this 2012 article, was a dangerous sleight of hand.<sup>33</sup> Like a magic trick, the analogy's seemingly radical flash of light blinded readers to certain brutalities, especially the reign of terror against Black people under the old Jim Crow, and the caging of non-Black people in the present. Forman criticized the framework's nearly mono-causal historical attribution, which identified white racial backlash as the overriding if not singular force driving mass incarceration.<sup>34</sup> This attribution, Forman argued, obscured another historical root—Black support for punitive policies, itself rooted in the urgency of Black people suffering as victims of violence.<sup>35</sup>

In many ways, *Locking Up Our Own* stands as supporting evidence for Forman's critique of the New Jim Crow framework. Focusing on Washington, D.C. city-level politics, Forman unearths the history of how a majority-Black jurisdiction came to imprison so many of its own.

Consider one pivotal moment in this history—when Black leaders opposed marijuana decriminalization in 1975. A progressive white D.C. city council member named David Clarke proposed reducing the penalty for marijuana possession to a \$100 fine.<sup>36</sup> Clarke's proposal followed a wave of marijuana decriminalization that began in Oregon in 1973 and spread through California, Colorado, Ohio, and Alaska over the next two years.<sup>37</sup> Between 1968 and 1975, D.C. police increased marijuana arrests by 900 percent; roughly eighty percent of arrestees were Black (D.C. was seventy percent Black at the time).<sup>38</sup> At the same time, D.C. had just begun to address rising heroin addiction with methadone maintenance centers. But local Black leaders denounced the harm-reduction measures of decriminalization and methadone.<sup>39</sup> As a former leader of the Black United Front, City Council member Douglas Moore opposed decriminalization on grounds similar to those enunciated by Stokely Carmichael in his 1970 message to Morehouse College students: “Fighting against drugs is revolutionary because drugs are a trick of the oppressor” bent on “dull[ing] the political consciousness of our people.”<sup>40</sup> Superior Court Judge John Fauntleroy, one of D.C.'s first Black judges, opposed marijuana decriminalization because, unlike white teenagers allowed risk-free experimentation,

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33. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012); see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

34. Forman, *supra* note 33, at 34–36.

35. *Id.* at 36–44.

36. JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 22 (2017).

37. *Id.* at 21.

38. *Id.* at 18, 20.

39. *Id.* at 20–31.

40. *Id.* at 37.

Black teenagers had no room for error.<sup>41</sup>

These Black defenders of drug prohibition were not henchmen in the “politics of respectability,” Randall Kennedy’s vision that respectable Blacks shun law-breakers as embarrassments to the race.<sup>42</sup> They were not out-of-touch elites. Indeed, a 1975 survey of D.C.-area residents found that a (slim) majority of Blacks also opposed legalization; only D.C. whites supported legalization by a decisive margin.<sup>43</sup> Black grassroots organizations like the Blackman’s Development Center (BDC) rejected methadone maintenance and were wary of drug decriminalization.<sup>44</sup> At its peak in the early 1970s, the BDC had 700 members, many of whom were ex-addicts and formerly incarcerated people like the BDC’s founder, the Black nationalist Hassan Jeru-Ahmed.<sup>45</sup> For the BDC and Hassan Jeru-Ahmed, methadone was drugged-up racial subjugation, white drug distribution networks were “white-face dog mafia,” and Black street dealers were “black-face traitors of our people.”<sup>46</sup>

Consider the complexities of another pivotal issue—punishments for gun-related crimes. Black politicians and community leaders maneuvered from dual sensibilities about gun regulation. On the one hand, many honored Ida B. Wells’ wise counsel, “A Winchester rifle should have a place of honor in every Black home, and it should be used for that protection which the law refuses to give.”<sup>47</sup> On the other hand, gun violence was devastating Black communities. Mandatory minimums for gun crimes seemed to offer a compromise: Black gun owners need not disarm, and any crime committed with a gun would be harshly punished.

A 1982 D.C. ballot initiative secured harsh mandatory minimums for drug and gun offenses. Council member John Ray advocated Initiative 9’s new penalties in the register of Black nationalism, vowing that a new generation of Black officials would defend their Black brothers and sisters from poison pushers. The new mandatory minimums did not alter drug or gun markets, but they did remake the criminal legal system. Prosecutors charged possession with intent to distribute more aggressively, and police amped-up small quantity buy-and-bust operations. Just two years after Initiative 9’s passage, drug prosecutions increased almost 300 percent.<sup>48</sup> In D.C. and elsewhere, gun-related mandatory minimums brought “the worst of all possible worlds”—guns “saturate our inner cities” *and* the people imprisoned on gun charges are overwhelmingly Black and Latinx.<sup>49</sup>

This is hard history. Hard as in painful—with deadly consequences for Black D.C. residents. Hard as in complex—with no offering of a familiar villain. The early authors of the devastation, D.C.’s Black leaders of the 1970s, were more soldiers of Black Power than soldiers of the Drug War. The hard history of *Locking Up Our Own* exceeds standard blame frames, and it is therefore at risk of being misunderstood, distorted, weaponized.

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41. FORMAN, *supra* note 36, at 39.

42. *Id.* at 44.

43. *Id.* at 42.

44. *Id.* at 27–29.

45. *Id.* at 27.

46. FORMAN, *supra* note 36, at 28–29.

47. *Id.* at 69.

48. *Id.* at 143.

49. *Id.* at 77.

The title alone could be twisted for cover: “But they built it, too. Did it to themselves. Stop calling it racist.”

*Locking Up Our Own* is written with—and I hesitate to use this word—empathy. Empathy is not just an emotional capacity. Empathy is a research imperative. It commands investigation of the fullest possible context, both personal and institutional, recognizing that, to borrow from C.L.R. James, individuals “make history, but only such history as it is possible for them to make.”<sup>50</sup> Of the D.C. Public Defender Service, where he worked for six years just out of law school, Forman writes: “[W]e cared down to our toes about the inequities of the criminal justice system.”<sup>51</sup> Because Forman researched deeply and writes carefully, we get that same sense about some early Black leaders who ultimately fortified carceral D.C. Douglas Moore and Judge Fauntleroy were, in Forman’s words, “committed race men, not Uncle Toms.”<sup>52</sup> They cared down to their toes, too.

A reader might ask: If Black politicians felt responsible for the fate of Black D.C., then why did they fail to see the threat of harsher criminalization? Forman reminds us of the world that Black politicians knew at the time. They knew that marijuana arrests were usually dropped without conviction; they did not know a world, our current world, where marijuana arrests lead to imprisonment and lifelong exclusions.<sup>53</sup> They knew heroin’s brutal toll, and they feared drugs as an anesthesia against Black liberation.<sup>54</sup> They were suspicious of D.C. white politicians and white majorities who, at the time, advocated drug decriminalization.<sup>55</sup> With this caution against the hubris of hindsight, Forman delivers one of the book’s central arguments: “Mass incarceration is the result of small, distinct steps, each of whose significance becomes more apparent over time, and only when considered in light of later events.”<sup>56</sup>

This history of mass incarceration may move our analysis “beyond the New Jim Crow” causal framework of racial backlash, but it does not move “beyond” the causal forces of US racism. No such place exists. Indeed, Forman leaves no room for white readers to snatch the smug satisfaction of saying “they locked up their own,” case closed. Black demands for justice were too far-reaching for this simple summary. In struggles to bring resources home and fight violence, many African Americans had what Forman calls an “all-of-the-above strategy”; that is, demands for better police came with demands for better jobs, housing, health care, and schools.<sup>57</sup> True to “all-of-the-above” advocacy, the Blackman’s Development Center wanted more punishment for drug sellers *and* more funding for schools and jobs.<sup>58</sup> If this “all-of-the-above” political vision had been taken seriously, it would have been nothing less than “a Marshall Plan for urban America.”<sup>59</sup>

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50. C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L’OUVERTURE AND THE SAN DOMINGO REVOLUTION* x (Vintage Books, 2d ed. 1989) (1938).

51. FORMAN, *supra* note 36, at 120.

52. *Id.* at 44.

53. *Id.* at 45.

54. *Id.* at 25–27.

55. *Id.* at 44–46.

56. FORMAN, *supra* note 36, at 45.

57. *Id.* at 12.

58. *Id.* at 29–30.

59. *Id.* at 12–13, 215.



But “American racism,” writes Forman, “narrowed the options available to Black citizens and elected officials in their fight against crime,” whittling down the Marshall Plan to one policy—criminalization, backed by ever-harsh punishments, with nothing more.<sup>60</sup>

#### BEYOND PUNITIVE SENTIMENT: SCHOENFELD’S *BUILDING THE PRISON STATE*

Based on deep archival research and elite interviews, Heather Schoenfeld’s *Building the Prison State* investigates Florida’s 500 percent increase in its prison population from 1970 to 2014. The book wades deep into Florida’s criminalized racial politics, beginning with resistance to *Brown v. Board of Education*<sup>61</sup> on the grounds that, as the Florida Supreme Court held in 1957, the process of integration would cause “violence” and “critical disruption.”<sup>62</sup> *Building the Prison State* is a much-needed addition to the relatively under-populated library shelf of stellar state-level studies like Ruth Wilson Gilmore’s *Golden Gulag* (California),<sup>63</sup> Mona Lynch’s *Sunbelt Justice* (Arizona),<sup>64</sup> and Jullilly Kohler-Hausmann’s *Getting Tough* (New York, Illinois, California).<sup>65</sup> But what I want to underline here is the vocabulary that can and should travel beyond Florida.

Schoenfeld keeps laser focus on what she calls *carceral capacity*, “the resources dedicated to detecting, apprehending, processing, and punishing people deemed criminal.”<sup>66</sup> Reframing mass incarceration as carceral capacity points to “the importance of state actors’ creation of new bureaucratic structures, new frontline and administrative positions, new staff training, and new protocols across the institutions of the criminal justice system—law enforcement, courts, and ‘corrections’ (probation, prison, parole, and related sanctions).”<sup>67</sup> This may sound straightforward. Allow me to underline what Schoenfeld illuminates by attending to the details of how state actors built carceral capacity.

First, studying the nuts and bolts of carceral capacity is a corrective to the habit of summarizing by sentiment. Scholars of the carceral state routinely summarize by sentiment, by, for example, marking the 1950s as the “treatment era” and the 1970s as the end of the “rehabilitative ideal” and the beginning of the “punitive turn.”<sup>68</sup> In earlier work, Schoenfeld fiercely critiqued scholarship that depicts “the criminalization of poverty” as a cruel but agent-less neoliberal spasm, a passive-voice “transformation” without actual transformers who are responsible for criminalization and impoverishment.<sup>69</sup>

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60. *Id.* at 12–13.

61. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

62. HEATHER SCHOENFELD, *BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION* 36 (2018) (citing Florida *ex rel.* Hawkins v. Bd. of Control, 93 So. 2d 354, 359 (Fla. 1957)).

63. RUTH W. GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

64. MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2010).

65. JULILLY KOHLER-HAUSMANN, *GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA* (2017).

66. SCHOENFELD, *supra* note 62, at 19.

67. *Id.* at 4.

68. For a thoughtful critique, see Philip Goodman, Joshua Page & Michelle Phelps, *The Long Struggle: An Agonistic Perspective on Penal Development*, 19 *THEORETICAL CRIMINOLOGY* 315 (2015).

69. Heather Schoenfeld, *Crime or Insecurity: Who Is ‘the State’? And What Is It ‘Responding’ To?*, 13

By turning from sentiment to state-building, Schoenfeld gives us an institutional history that confounds familiar shorthand. For example, the Law Enforcement Assistance Administration (LEAA) gave Florida \$198.6 million between 1969 and 1979.<sup>70</sup> By 1970, a full 58 percent of Florida's LEAA allocation went to police, mostly for "upgrading personnel" through more trainings and cadet programs for college students.<sup>71</sup> LEAA funding also subsidized Florida's hiring of more court professionals, and Florida increased the number of public defenders from 111 in 1971 to 304 in 1976.<sup>72</sup> Is it possible to characterize this 1970s investment by any single sentiment, much less punitiveness? Schoenfeld's assessment is clear-eyed: While these projects of penal modernization "undoubtedly increased the fairness of the system," they also "significantly increased arrests and convictions."<sup>73</sup>

Second, Schoenfeld illuminates the strange twists of building carceral capacity, especially the indeterminate consequences of seeming victories through legal holdings. Civil rights litigation though the 1970s targeted jail and prison conditions, and by 1983 the prisons under court orders housed more than 42 percent of the nation's state prisoners.<sup>74</sup> Incarcerated litigants and prisoner rights advocates hoped that litigation would compel states to decarcerate. But recent scholarship has discovered that, between 1971 and 1996, prison conditions litigation actually seemed to *increase* state incarceration rates.<sup>75</sup> Schoenfeld's examination of Florida explains the strange outcome. Florida prison activists won the promise of relief with the 1975 *Costello* injunction.<sup>76</sup> But the court order problematized unconstitutional conditions and "capacity" per se, maintaining ambiguity on whether to remedy through decarceration or prison construction. As white fiscal conservatives stalled in the legislature, reformist Florida Department of Corrections (DOC) administrators used the injunction to push for increasing capacity with new prisons. With the late-1980s drug war and the 1986 election of Governor Bob Martinez (the state's first Republican governor since 1884), the new tough-on-crime administration persuaded legislators to relinquish fiscal conservatism and build more prisons. Governor Martinez successfully inverted the prison crisis by recasting a solution—a 1983 emergency release law—as the problem driving drugs and crime. And the initial definition of the prison crisis—overcrowded prisons and expensive prisons—was resolved simply by releasing the funds to DOC. By the late 1980s, the former "problem" of prison spending also became, for rural North Floridians, a perceived cure for economic slowdown and unemployment.<sup>77</sup>

Third, Schoenfeld instructs us to study carceral capacity as its own political force. The carceral state, especially at this moment of unprecedented scale, creates constituencies, opportunities, and meaning. Put differently, we tend to study how politics make prisons, but we must also study how prisons make politics. As Schoenfeld finds,

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PUNISHMENT & SOC'Y 473, 474, 477 (2011).

70. SCHOENFELD, *supra* note 62, at 53.

71. *Id.* at 54.

72. *Id.* at 57.

73. *Id.* at 65.

74. *Id.* at 67.

75. SCHOENFELD, *supra* note 62, at 67.

76. *Costello v. Wainwright*, 397 F. Supp. 20, 38–39 (M.D. Fla. 1975).

77. SCHOENFELD, *supra* note 62, at 107–10.

lawmakers doubled-down on “tough justice” in the late 1990s, *after* they had abandoned fiscal conservatism and built more prisons in the late 1980s.<sup>78</sup> When lawmakers faced “excess prison capacity” in 1997, for example, they saw an opportunity to raise sentencing floors (with the Criminal Punishment Code) and to enhance penalties for repeat offenders (through the Prison Releasee Reoffender Bill).<sup>79</sup> In short, “prison capacity fueled the politics of crime, not visa versa.”<sup>80</sup>

## CONCLUSION

This is where I should compare the books, perhaps with the suggestion that one falls short. I should try to flex intellectual muscle, possibly by referencing a non-generalizable case study, an unpacked theory, a mis-periodized history. Isn't that what academic book reviews, like academic books, are supposed to do?

Forman, Kohler-Hausmann, and Schoenfeld refuse that formula. These authors conclude by flexing moral muscle, and they ask their readers to do the same, sometimes even addressing “you” and writing in the “we.” I will try to follow suit. Forman asks us to un-silo our compassion, its stingy borders evident in recent advocacy for “nonviolent offenders.”<sup>81</sup> The designation writes off “the ones who did something violent” as “the ones who belong in cages,”<sup>82</sup> thereby protecting high incarceration rates in perpetuity. Forman reminds you that the carceral state was built incrementally, and this should embolden you to “push back against the harshness” in your immediate spheres.<sup>83</sup> Show mercy if you are a victim. End hiring and admissions policies that discriminate against people with a criminal record.

*Misdemeanorland* is a book about the devastations of managerial justice, but Kohler-Hausmann rejects the tidy conclusion of remedy through adjudicative justice. Calling for due process would leave us comfortable. Kohler-Hausmann wants our discomfort with, not police and courts over there, in New York City, but with ourselves “as a political community.”<sup>84</sup> We must confront our collective willingness to use “the instrumentalities of criminal law” to control “urban spaces of concentrated poverty and insecurity.”<sup>85</sup> I will add this. If we are to critically evaluate promises of a kinder, gentler carceral state, then we should carry with us Kohler-Hausmann’s critique of marking, procedural hassle, and performance. Drug courts, ankle monitors, probation: these are acceptable only if we presume, like the legal actors of *Misdemeanorland*, that people deserve a form of social control that tests their governability, steals their time and money, taxes their dignity, and compromises their physical well-being. As reformers advocate downgrading felonies to misdemeanor status, we should condemn the social control that is inherent to managerial justice.

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78. *Id.* at 164–68.

79. *Id.*

80. *Id.* at 22.

81. FORMAN, *supra* note 36, at 237.

82. *Id.* at 231.

83. *Id.* at 237.

84. KOHLER-HAUSMANN, *supra* note 10, at 268.

85. *Id.*

*Building the Prison State* concludes by warning us about the allure of perpetual improvement. In Schoenfeld's insightful telling, Florida is a cautionary tale about how improvements become investments, and investments become expanded state capacity to arrest, process, and punish. This is why Schoenfeld's notion of carceral capacity is indispensable: it reminds us to keep our eyes on the prize, undistracted by promises of community-oriented police or constitutionally validated prisons. With the goal of dismantling carceral capacity, Schoenfeld calls on us to envision a new ethos of justice, one that will "proactively value and protect the lives of Black people and other marginalized groups. Under a new vision it will no longer be acceptable to give up on one child, let alone whole groups of people."<sup>86</sup>

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86. SCHOENFELD, *supra* note 62, at 237.