

Roundtable on the Future of Justice Policy

Examining Criminalization, Punitive Excess and the Courts in the United States: Implications for Justice Policy and Practice

Co-hosted by Merritt College and the Justice Lab at Columbia University

Knowing What We Want: A Decent Society, a Civilized System of Justice, and a Condition of Dignity

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In 2011, in the historic Brown v. Plata (2011) decision ordering a major population reduction in California's mammoth, overcrowded, and medically incompetent prison system, Supreme Court Associate Justice Anthony Kennedy wrote that "prisoners retain the essence of human dignity inherent in all persons," and bluntly described California's prisons "incompatible with the concept of human dignity" and having "no place in civilized society." This strong language, none of which was necessary to the highly technical legal analysis of the rest of the opinion, identified a cluster of values related to human dignity that reside at the very center of a number of constitutional provisions (the Eighth Amendment for sure, but also the Fourth and Fifth Amendments, and arguably the Bill of Rights as a whole). Justice Kennedy suggested, as no one with the authority of the Supreme Court had in a long time, that the nation's forty-year experiment in extending security against crime as the supreme public value, what we can call "the war on crime," could not be allowed to supersede these profound values enshrined in the Due Process clause of the Fourteenth Amendment.¹

Justice Kennedy is gone from the Court now, and the fate of his constitutional dignity jurisprudence is unclear in the hands of his successors. This essay is devoted to the view that reimagining our institutions and practices of security through the concept of human dignity remains not only possible but a more urgent priority than ever. As significant reforms happen in state legislatures (California's flawed bail reform law, for example), it becomes more vital than ever to define what values we want to see affirmed in what will undoubtedly for some time to come be seen as reformed and dignified institutions of security (whatever the truth or their practice). Just as vitally, that conversation must come from the bottom as well as the top of the American power structure. From the communities most criminalized and punished during the war on crime, from city and county governments, and from lower courts. It will have to be a movement in what is sometimes called "civil society" as well as within the institutions themselves that make up the system of justice.

Whatever I may have written in some of the exuberant passages in my book on Plata (Simon, 2014), it was never realistic to believe that the U.S. Supreme Court would end mass incarceration root and branch any more than it did slavery or Jim Crow, let alone northern-style urban segregation. Supreme Court decisions are but signals in complex systems of politics and policy making. If there is a reason for optimism it is because hunger for the dignity that Justice Kennedy spoke of is radiating through our society, both from its young and its newly old. It has infused the transformation in social attitudes and laws regarding same sex marriage and parenting. It is visible in

¹ The Fourteenth Amendment is America's human rights charter. Like all such modern charters, it came only after the most horrendous bloodletting humans had seen, for the first time photographically, i.e., the U.S. Civil War. Beginning in the mid-20th century the Supreme Court used its "incorporation" doctrine to hold the criminal procedure provisions of the Bill of Rights (the Fourth, Fifth, and Sixth Amendments) applicable to the States through their incorporation into the ideal of due process guaranteed against the states by the 14th Amendment. Just this term, the Supreme Court added to the specificity of that charter by "incorporating" the "excessive fines" clause of the Eighth Amendment in Timbs v. Indiana (2019).

every new building in the United States in the form of ADA compliant bathrooms and access that make it possible for people with disabilities to live whole and fully integrated lives, which become a reality for almost everyone who survives into older age. We hear it today at the top of the political structure in the seemingly astounding calls for “Medicare for All” and a “Green New Deal” in Congress.

The “system of justice,” the term I will use in this essay for the agencies through which the state exercises its authority to police and punish crime, what we commonly call “criminal justice,” must become part of this dignity revolution. The demand for security that respects human dignity is, in fact, loud and clear today in the social movements emerging against mass incarceration and the forms of security that compose it. This includes the Black Lives Matter movement, the organized work of the formerly incarcerated, All of Us or None, and the astounding hunger strike movement in the California prisons that helped break the back of long-term solitary confinement in California.

But if the Supreme Court will not likely grant us security with a dignity-compatible security and justice system,² we will have to learn to demand it from the democratic branches of our political system. To do so, we will need a vocabulary robust enough to convey our affirmative desires for security. In this essay, I want to connect three ideas with roots in the Supreme Court’s dignity jurisprudence that can help illustrate the lateral relations between social relations and institutions (like the labor market), the system of justice in all its prolix complexity (not a system), and the dignity of individuals who we too often place alone at the center of the concept of dignity, as if they were demigods.

When Justice Kennedy talked about dignity in prisons he also invoked the concept of a “civilized society.” The modern Court has also invoked society as the source of “evolving standards of decency” in other Eighth Amendment decisions and “legitimate expectations of privacy” in its Fourth Amendment jurisprudence. I will say more about the meaning of these concepts in the legal realm, and how to cash them out in the currency of politics, but let me begin by restating them slightly.

One cannot assure that prisons (and police custody and other sites of security) preserve the essential human dignity of the people in their jurisdiction at the point of delivery alone (in the prison, the police car, etc.). It takes a complex and sustained commitment that begins well before custody – it is achieved in the mission definition, training, and evaluation of the workers who make up the system of justice.

It starts with a “decent society,” one that is already generally committed to preserving human dignity and does so affirmatively through such institutions as the labor market (as a source not simply of income but rights), the welfare system, public education, and public healthcare. A society ready to abandon human dignity for security at any price is not one that can sustain the profound reworking of the system of justice that we need. Without a revival of a broader commitment to a decent society (of which Obamacare is a striking example) there are not enough federal judges in the country to protect human dignity at the point of custody.

A decent society demands what Ian Loader and Neil Walker call “civilized security” (2007). But how can such a society know what it is getting and how can a state that, even in good faith, seeks to deliver civilized security organize itself to remain civilized when it matters most, because too many people now live outside the institutions of the decent society. I borrow the phrase “condition of dignity” from an interview with a brave French mayor who has responded to the flow through his town of mostly African migrants, a flow which he has no political control over and which was creating homelessness on the streets of his city. He created a dormitory and resource center in which, for as

² We could keep asking, but as I will sketch below, the Supreme Court will first have to undo a great deal of bad case law that authorizes uncivilized policing incompatible with respect for human dignity.

long as the migrants remain in his city, they will be in a “condition of dignity.” Most of our system of justice in the U.S. is based at the state and local level and is funded and organized by a patchwork of different agencies answering to different bits of democratic accountability. Thus, the work of civilizing security will have to come from the bottom and rely on local agencies under local political pressure to use its resources and powers creatively to assure that anyone passing through them can be assured they will be in a “condition of dignity.”

A Decent Society

Since Jeremy Bentham articulated his principle of “least eligibility” (Browning, 1843), students of security have recognized that the conditions of prisoners and other people in custody is inevitably tied to and limited by the least good conditions outside of custody. Otherwise, Bentham noted, the whole logic of deterrence would be reversed for those “least eligible” outside of custody. This was actually observed in Dublin’s main jail at the height of the mid-19th century famine, when some committed crimes in order to enter the jail for its guarantee of food (O’Sullivan, 2007).

For many in the public, to the extent they know the case at all, the premise of the Supreme Court in Brown v. Plata that prisoners have a right to adequate medical care seems perverse or paradoxical in a society that struggles over giving health coverage to all of its free citizens. The legal basis of the state’s obligation to provide for those it segregates is clear enough, public isolation of the prisoner incurs public responsibility to provide what otherwise would be available (or close enough), but the threat of least eligibility remains. Although it never appears by name in Brown v. Plata it is not hard to imagine that the Justices were aware of the controversial package of health insurance expansions and regulations that was already making its way toward the Supreme Court (which would grant certiorari in an appropriate case at the beginning of the Fall term following Plata). Whether coincidental or not, the Supreme Court’s highlighting of the problem of prison healthcare at a moment when the government had just enacted the largest expansion of the welfare state in general, and healthcare in particular, in a generation is highly fitting. Many of the people who would have gone to medically incompetent prisons before Plata, passed through local jails where they signed up for community-based healthcare under the Affordable Care Act, and saved the person from incarceration and the system from unsustainable costs of delivering healthcare in highly overcrowded prisons.

It is not alone through least eligibility that the condition of the poor and disadvantaged in society more broadly relates to the well being of people in the custody of the system of justice. By creating rights consciousness and facilitating organization, the social institutions of the good society, labor markets (including the rights and protections that come with advanced regulated labor markets), welfare entitlements, and healthcare, insulate people from being identified as security threats and allow those who have left the custody of the system of justice to reintegrate. This is what, borrowing from two great books (Margalit, 1996; Bellah et al., 1991), I term the “decent society,” by which I mean specifically, societies that value the dignity of their members and act on that through regulated labor markets, civil rights laws, and welfare institutions. Only a decent society would value civilized security over that which might be as effective but for its negative effects on outsider groups. Only a civilized security institution can reliably deliver a dignified stay.

It is no secret that America’s decent society, and those labor market and welfare institutions I have referenced, have been reduced by a complex of bipartisan policies that could be described as neoliberal in tenure but have led directly to less regulated labor markets, less civil rights enforcement, and reduced welfare benefits. In the final stages of World War II, President Roosevelt promised to spend his fourth and presumably final term delivering a second Bill of Rights to Americans at home, one that included an enhanced set of welfare and labor market protections. In the mid-60s, at the height of U.S. economic growth, President Johnson envisioned a “Great

Society” that would use its enormous economic strength to drain the deep pockets of poverty remaining in American society. His successor, Richard Nixon, promised a more economically responsible model of welfare, but one just as deeply committed to creating a decent floor under American families (through a guaranteed annual income).

The story is familiar. The disorienting combination of high inflation and unemployment in the 1970s brought an end to visions of growing labor regulations, civil rights, or welfare. Under Ronald Reagan’s version of populism, both welfare and labor regulations got turned into enemies of the common worker who would thrive more in an unregulated economy and one not burdened by sustaining the unproductive. President Clinton made it bipartisan in the 1990s, signing laws toughening sentences, subsidizing police forces, and reducing civil rights access to the courts for prisoners while at the same time ending income support for poor families as a national entitlement.

Few doubt the relationship between this general reshaping of welfare and work on the one hand, and new aggressive policing and prison policies, which sometimes shorthanded as neoliberal penalty. Harsh punishment has been part of larger makeover of the social world of the poor in which the never generous reach of labor laws, civil rights laws, and welfare benefits have been diminished, and the access of those caught up in the system of justice or leaving it to any of these is severely limited (Wacquant, 2009).

Here, though, it is important to see signs that the declines in the decent society have been noted, and in some cases, are starting to be reversed. We have already mentioned the Affordable Care Act, which, in those states that have expanded Medicaid under the Acts provisions, touches on virtually everyone incarcerated, and many of those arrested, on an annual basis. The healthcare crisis inside prisons will continue to grow as the stock of prisoners ages and the prevalence of chronic illnesses among them grow. The availability of meaningful healthcare on the outside will ultimately help states move people out of incarceration. Similar fixes for housing and income are imaginable.

Another area where a positive connection between the healthcare institutions of the decent society and a diminished chance of being in custody is mental healthcare. While there may have been no direct demographic transfer of people from asylums to prisons (different people in many respects), the loss of confidence in the treatment of mental illness or social denial of its existence (the latter being an extreme version of the former) went along with the incarceration of large numbers of people with symptomatic mental illness. Today there are plenty of signs of a revitalization of interest and innovation in delivering community-based mental healthcare far more effectively than has been attempted for decades. Again, few today doubt that finding stable housing options in the community is both more dignified and less costly than cycles of jailing, let alone long-term imprisonment for people living with chronic mental illness. Once again, success in breaking out of the correctional cycle of failure in treating mental and other chronic illnesses will take an enhancement of decent society’s effort to address homelessness more generally on the streets of our largest cities. Outdoor encampments are unsustainable and the opposite of what I will call below a “dignified stay.” The Bay Area with its high-tech economy available for taxing, and liberal social policies, is the place to see what these options can amount to.

In short, the decent society never went away; it shrunk and got stigmatized to some extent. Too often its growth and expansion was replaced by a system of justice with little commitment to civilized security or assuring the conditions of dignity. Our effort to reimagine the organs of justice or security needs to go along with efforts to reestablish and expand access to the decent society for whole communities whose populations are regularly touched by the system of justice – the formerly incarcerated, arrested, stopped, including the labor market, public schools (school closure has been a huge issue here and in other communities), healthcare welfare, etc.

We may also need to imagine new forms of welfare targeted to those most disabled by mass incarceration (e.g., geriatric prisoners who served long incapacitative sentences). Or some kind of prison pension designed to make sure the formerly incarcerated are not homeless and have the resources to sustain their own dignified stay in the community. In the absence of that, we may find a least eligibility problem with aged former prisoners coming back, as they do in Japan, due food insecurity and a lack of the rudiments of a human life.

A Civilized System of Justice

“The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of criminal law.” Miranda v. Arizona 384 US 436 (1966)

In trying to name what we should most want from the system of justice, conserving human dignity is not enough and comes too late. Only a system of justice that already strives to deliver its services in ways that accord equal dignity to all can conserve dignity once people are in its custody. This is what I want to call, following a frequently cited passage from the Supreme Court’s decision in Miller v. Fenton (1985) a “civilized system of justice.” This phrase also draws on Loader and Walker, in their book *Civilizing Security*, begin with two points often overlooked in discussions of security or criminal justice. First, that at its broadest level, security is a thick public good that is vital to a dignified life in society and which actually civilizes people. Second, that too often, security and its agents, such as the police, act in ways that diminish the security and dignity of some people. Loader and Walker suggest we should imagine the role of the state in security as civilizing it, “taming private violence by redirecting the passions that security and threats to it arouse into and through political and legal institutions.” As against private security, Loader and Walker argue for a primary role for public security, but one which aims at civilizing the security that it produces.

Civilized state actions also resonate with the Supreme Court’s efforts to conserve dignity in prisons. In the first important precedent recognizing both dignity and civilized standards as implicit in the Constitution (and decided a mere decade after the Universal Declaration of Human Rights was drafted), Trop v. Dulles (1958), the Court explained that the constitutionality of a sentence that involved stripping a person of their U.S. citizenship (for wartime desertion of the military) must be answered by asking “whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”

In the important prison conditions case, Estelle v. Gamble (1983), the Supreme Court reaffirmed that: “The [Eighth] Amendment embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’” They did not rely on dignity per se to find that “denial of medical care is surely not part of the punishment which civilized nations may impose for crime.”

This suggests that civilized security must be considered against what the Court in other Eighth Amendment contexts has called an “evolving standard of decency,” one that takes into account the progress made in this and other democracies. The kind of policing, for example, that was tolerable when London-style policing was brought to east coast big cities in the 1840s and 1850s no longer accords with what a society without slavery and with equal citizenship should aspire to. Yet, a century later, when sociologists studied American policing in the 1960s, they found a reliance on overwhelming and situationally governed force to still be central to policing. Half a century later too little has changed.

We have only to look at the cannon of Supreme Court cases we teach law students to appreciate how uncivilized American policing became in the era of mass incarceration. For example, take a tactic I remember

witnessing as a “ride-along” participant observer with the Oakland police in the 1980s. Police may pull up and chase residents on the chance that they will reveal further signs of criminal intent (like dropping drugs or a gun). Until they actually physically contacted them (in the particular matter, by tackling a teenager) they had no reasonable suspicion, no probable cause, and no problem (California v. Hodari D., 1991). Police may arrest a person for a non-jailable offense, as was the case with Atwater v. City of Lago Vista (2001) where a woman with two children in her car was arrested for not having assured that their seat belts were fastened, even though the majority opinion acknowledged the arrest was a pointless indignity. Once at jail, even a person arrested for a minor offense may be subject to strip searches that include close examination of the genital and rectal regions (Florence v. Board of Chosen Freeholders, 2012). In a remarkable dissent to the Supreme Court’s decision in Utah v. Strieff (1958), Justice Sonia Sotomayor cited these and other cases to suggest that Americans could conclude that rather than citizens of a democracy, they are “subjects of a carceral state.”

Cases that reach the Supreme Court are hardly a random sample of police behavior (and police are only one part of our system of justice), but if they establish norms of reasonableness for America’s thousands of local law enforcement agencies, we can only take these decisions to be warnings of how uncivilized security may be for millions of Americans.

A Condition of Dignity

To civilize security in America will take concerted action by local criminal justice leaders, frontline workers, and social movement-awakened democratic political bodies. Here is one inspiring example recently highlighted by the New York Times.³ Jean-René Etchegaray, mayor of Bayonne, a French city near the Spanish border, was concerned about the accumulation of migrants crossing from Spain and hoping to find work in the bigger northern economies of Europe. Most of them were just passing through this town, but they gathered in the town’s square to survive while planning their next moves, appearing as a growing problem of homelessness. But rather than join the increasing political demand across Europe to tighten the border and cut off the flow, this mayor of the political center right cobbled together different resources, including a former military barracks, some temporary bedding, donated clothes and other supplies, and created a hostel-like dormitory and resource center for the migrants to escape the growing cold of winter. The mayor has come under plenty of criticism for allegedly attracting migrants to come or stay in Bayonne, including from the national government that wants to appear tough enough against migrants to head off losses to explicitly anti-immigrant parties of the far right. To the mayor, however, it is a humanitarian obligation that as long as the migrants remain in his town, they remain in a “condition of dignity.” “I don’t think I can do less.”

What do we mean by a “condition of dignity?” Let me share a personal story about the first time I heard a demand for dignity and appreciated its urgency and specificity. It was the recorded voice of my father, speaking with his oncologist about a prognosis for his metastatic lung cancer that was extremely grim. I was actually listening some months after his death, which had come so quickly after the tape was made that I had not used it for its primary purpose of advising my father and his wife from afar on how to translate the medical (and bad) news they were getting. On the tape my father, who once gave vivid lectures on the sociology of sex and gender to classrooms of college students, was uniformly monotonic and passive. The doctor was asking him whether he wanted more chemotherapy, none of which was very promising. “I want,” my father said, his voice suddenly filling out to his old self, “my dignity.” And as I heard it, I knew exactly what he meant and felt. He wanted to make sure that since he was an incurable patient, his doctors would still value him as a patient and use their skills not to cure him, but to sustain him for as long as possible in a condition of dignity as his body failed.

³ Adam Nossiter, “France Dispatch: French Mayor Offers Shelter to Migrants Despite the Government’s Objections,” *The New York Times*, February 12, 2019, <https://nyti.ms/2URYsZH>.

As a sociologist, he would have appreciated that it is a demand that not just he but tens of thousands of people facing the end of life were making, leading to a revolution in hospice care in America in the nearly two decades since my father died in 2000. Dignity is too often treated as a kind of mystical property, but as Mayor Etchagarray aptly puts it, a “condition of dignity” for as long as a person is in your jurisdiction is a very concrete, practical framework that includes housing, bedding, medical care, and hope.

Studies of the formerly incarcerated, including Bruce Western’s recent study of reentry (2018), underscore the extreme precarity that faces people returning from prison. Assuring conditions of dignity for reentering citizens is a key priority, but it will not be sustainable if it is not aligned with the effort to revitalize the decent society discussed above.

An inside out effort will be needed to civilize security in the U.S. In our highly fragmented system, police, parole, courts, and corrections, cannot generally control most of the inputs that determine who ends up in their custody (although police can more than most of the rest of the system actors). What they should be able to control is the ability to provide those in the custody of the state with a condition of dignity, and if not, they should consider forms of loyal rebellion.

Conclusion

Reimagining criminal justice institutions and practices through the lens of human dignity is a task that in the United States will fall to state and local government, state courts, and social movements. That scale and location of change suggests leveraging the relationship between three different streams of policy and politics that I have dubbed “a decent society,” a civilized system of justice and a condition of dignity. Meaningful reform to the landscape of security institutions after mass incarceration will require continued revitalization of the decent society and institutions of modern governance like regulated labor markets with rights, civil rights law enforcement, and broad welfare institutions. Those seeking legislation for more civilized security should consider specific reforms designed to diminish some of the barriers that “hidden sentences” and discrimination of other kinds often place in front of people who have arrests, convictions, or incarcerations on their record in accessing labor markets and welfare benefits.

The system of justice itself is one of those welfare institutions. Being secure against physical and emotional violence is a precondition for a life of equal dignity, but the current system of justice achieves security gains for some, at the expense of insecurity for others. A decent society should achieve security through civilized means and institutions that make civility a priority. Parts of our historically accumulated system of justice should now be abolished or substantially modified because they are not civilized according to contemporary standards, including racialized automobile stops, aggressive stop-and-frisk tactics, routine strip searches in jails and prisons, long-term solitary confinement, and the death penalty, whether by lethal injection or old age in prison. Finally, at the level where it really matters, inside the custody of the system of justice, the question must be what is necessary to assure the “condition of dignity” during a person’s stay of whatever length, from a few minutes in a Terry stop to decades in prison.

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