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## Article

# Infamous Misdemeanors and the Grand Jury Clause

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### INTRODUCTION

Under an overlooked body of constitutional law, many more federal offenses should be prosecuted by grand jury indictment than is now the practice. Under the current rules,<sup>1</sup> felonies must be prosecuted by grand jury indictment,<sup>2</sup> but a misdemeanor

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1. Under federal law, a felony is a crime punishable by more than one year imprisonment; crimes with lesser terms are misdemeanors. *See* 18 U.S.C. § 3559(a) (2012). FED. R. CRIM. P. 7(a) provides:

(1) Felony. An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

(2) Misdemeanor. An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1).

FED. R. CRIM. P. 58(b)(1) provides: “The trial of a misdemeanor may proceed on an indictment, information, or complaint. The trial of a petty offense may also proceed on a citation or violation notice.” *See also* *United States v. Rojo*, 727 F.2d 1415, 1416–17 (9th Cir. 1983) (“On the one hand, the trial of misdemeanors, other than petty offenses, may proceed on an indictment, information or complaint. . . . On the other hand, the trial of a petty offense may proceed on a citation or violation notice.”).

2. A grand jury indictment is a finding by a body of citizens appointed by law that there is probable cause that a particular offense has been committed. *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1279 (2006); *see also*

may be based on a charge in a prosecutor's information<sup>3</sup> or even a ticket issued by a law-enforcement officer with no further review.<sup>4</sup> The felony/misdemeanor bright line is not the distinction drawn in the Fifth Amendment itself, which provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."<sup>5</sup> That is, infamous misdemeanors, if there are such things, must also be charged by indictment. The Supreme Court has held that particular misdemeanors *are* infamous, and under the Court's tests for infamy, many misdemeanors prosecutable in federal court are infamous.<sup>6</sup>

The issue is important because of the dramatic increase in the number of Americans with criminal records,<sup>7</sup> and the severity of the consequences of even misdemeanor convictions.<sup>8</sup> It is too easy for police and prosecutors to charge individuals with crimes carrying serious consequences. As the Department of Justice's investigation of practices in Ferguson, Missouri revealed,<sup>9</sup> misdemeanor charges can effectively turn individuals or entire communities into forced laborers, which, after all, is permitted under the Thirteenth Amendment after conviction of any crime.<sup>10</sup> Public and private actors use criminal records to deny a

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Costello v. United States, 350 U.S. 359, 362 (1956) (describing the English origins of the grand jury institution). The Supreme Court held long ago that the Grand Jury Clause is not applicable to the states. *See* *Hurtado v. California*, 110 U.S. 516, 521 (1884). Accordingly, states need not charge any crimes by indictment.

3. "An information is a formal charge against the accused, of the offence, with such particulars as to time, place, and attendant circumstances as will apprise him of the nature of the charge he is to meet, signed by the public prosecutor." *In re Bonner*, 151 U.S. 242, 257 (1894).

4. *See supra* note 1.

5. U.S. CONST. amend. V.

6. *See infra* notes 124–130 and accompanying text.

7. MADELINE NEIGHLY & MAURICE EMSELLEM, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 2 (2013), <http://www.nelp.org/content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf> (noting that the FBI "maintains criminal history records on more than 75 million individuals").

8. *See infra* notes 42–47 and accompanying text.

9. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

10. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

range of benefits and opportunities. Even if a charge does not lead to conviction, a person could be deported, evicted, have a license suspended, or child custody disrupted, or suffer adverse employment actions.<sup>11</sup>

Lack of precharge screening by a grand jury has serious consequences for federal misdemeanors. Misdemeanors are much more likely to be dismissed without trial than felonies; that is, upon further examination, courts or prosecutors conclude that many misdemeanors do not actually merit prosecution.<sup>12</sup> As a result of the lack of precharge screening, thousands of people every year who never should have been charged nevertheless wind up with criminal records, albeit only for a misdemeanor charge.<sup>13</sup>

Advocating increased use of grand juries may seem odd because the institution has been criticized in recent years for its lack of transparency, particularly in cases involving shootings by police officers.<sup>14</sup> Furthermore, the grand jury is often accused of

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11. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 809 (2015); see also *infra* notes 60–61 and accompanying text.

12. See *infra* notes 70–78 and accompanying text.

13. See generally U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 15 (2013), <https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf> (providing statistics for misdemeanor plea, dismissal, and conviction rates in 2013 in U.S. District Court in the District of Columbia).

14. See, e.g., Kristin Henning, *Status, Race and the Rule of Law in the Grand Jury*, 58 HOW. L.J. 833, 843 (2015) ("Reform is essential not only because prosecutorial manipulation has helped exonerate police officers in the killing of black and brown men, but also because the grand jury has been used so unevenly across race, class, and professional status and has failed to provide even the most basic due process protections for most criminal defendants who are disproportionately people of color."); Colin Taylor Ross, *Policing Pontius Pilate: Police Violence, Local Prosecutors, and Legitimacy*, 53 HARV. J. ON LEGIS. 755, 761 (2016). See generally Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567 (2017) (focusing specifically on the grand jury proceeding in the shooting death of Michael Brown); Roger A. Fairfax, Jr., *The Grand Jury's Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397 (2017) (arguing for prohibition of grand juries in police shooting cases); Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519 (2017) (comparing grand juries in three different police use of force cases); Jonathan Witmer-Rich, *Restoring Independence to the Grand Jury: A Victim Advocate for Police Use of Force Cases*, 65 CLEV. ST. L. REV. 535 (2017) (arguing that victim advocates should represent the interests of the complainant before the grand jury in police violence cases).

being under the control of the prosecutor.<sup>15</sup> But these objections—or at least the remedy proposed to address them—apply principally to state criminal-justice systems. In the states, there is a potential alternative to a grand jury that is more public and transparent. Felonies can be charged through a grand jury indictment or a preliminary hearing

which involves the prosecutor presenting evidence in an open courtroom proceeding in an effort to persuade a judge that probable cause exists to hold a defendant over for trial. Unlike in the grand jury, preliminary hearings allow defense counsel to be present, cross-examine government witnesses, and challenge the prosecution's evidence.<sup>16</sup>

In the federal system, charging serious crimes by a preliminary hearing or any other more accountable method would require a constitutional amendment to eliminate the grand jury requirement, not mere adjustment of policy.<sup>17</sup> Accordingly, in the federal system, the choice is not between grand juries and preliminary hearings, but between grand juries and direct filing of charges by prosecutors or police with no non-law-enforcement review whatsoever. And consideration by a grand jury, imperfect as it is, is more transparent and independent than the unilateral decision of an individual prosecutor or law enforcement officer.

Part I of this Article explains that serious consequences may fall on people convicted of federal misdemeanors.<sup>18</sup> These include deportation, sex offender or other criminal registration, loss of civil rights, and penalties flowing from the permanent change of legal status caused by criminal conviction.<sup>19</sup> Misdemeanor convictions and criminal records may also give rise to profound stigma, resulting in exclusion from a variety of benefits and opportunities conferred by the government and private parties.<sup>20</sup>

Part II outlines the jurisprudence of the Grand Jury Clause, pursuant to which the Supreme Court in the late nineteenth and early twentieth centuries rebuffed attempts by the Department of Justice to prosecute serious misdemeanor offenses by information.<sup>21</sup> The principle coming out of the decisions, consistent

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15. See *infra* note 82 and accompanying text.

16. Fairfax, *supra* note 14, at 401–02.

17. Alternatively, federal prosecutors could be required both to present cases to a grand jury and to have a preliminary hearing. Presumably the Department of Justice would strenuously object to this elaborate process, and Congress seems unlikely to require it.

18. See *infra* notes 36–47 and accompanying text.

19. See *infra* notes 44–47 and accompanying text.

20. See *infra* notes 42–43 and accompanying text.

21. See *infra* notes 121–134 and accompanying text.

with the drafting history, is that offenses potentially resulting in stigmatizing punishments must be prosecuted by grand jury indictment.<sup>22</sup> A stigmatizing punishment is one that degrades the offender's status, indicating that the person is less than a full member of the community.<sup>23</sup> Stigmatizing punishments include corporal punishment, incarceration in a prison or penitentiary as opposed to a jail, loss of civil rights or imposition of civil disabilities, and convictions implying moral turpitude.<sup>24</sup> The Supreme Court also made clear that what is infamous changes from era to era, as the social meaning of stigma evolves.<sup>25</sup>

The Court's early cases hold that many misdemeanors should be charged by grand jury indictment,<sup>26</sup> but that is not the practice today.<sup>27</sup> Federal sentencing statutes now permit imprisonment for all misdemeanors, and permit any sentence of incarceration to be served in a prison.<sup>28</sup> That the U.S. Code allows misdemeanor sentences to be served in prisons may well be a drafting mistake, made in ignorance of the constitutional consequences;<sup>29</sup> if so, it could be easily corrected. But until then, all federal misdemeanors should be prosecuted only by grand jury indictment because all misdemeanors carry potential prison sentences.<sup>30</sup>

Several other categories of misdemeanors require grand jury indictment. All drug offenses may be punished by serious collateral consequences, which include loss or restriction of professional licenses, ineligibility for public funds, including welfare benefits and student loans, loss of voting rights, ineligibility for jury duty, and deportation.<sup>31</sup> Misdemeanors involving moral turpitude or *crimen falsi* may be used for impeachment if the person

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22. See *infra* notes 83–120 and accompanying text.

23. See *infra* notes 99–109 and accompanying text.

24. See *infra* notes 135–191 and accompanying text.

25. See *infra* note 107 and accompanying text.

26. See *infra* notes 124–130 and accompanying text.

27. See *supra* note 1.

28. See *infra* notes 143–145 and accompanying text.

29. That is, we can assume that Congress did not intend to require all misdemeanors to be subject to grand jury indictment, because they did not so provide. See *supra* note 1. Yet, we cannot lightly assume that Congress deliberately violated the Constitution by providing for infamous punishment in the absence of grand jury indictment. Accordingly, a plausible, logical explanation is ignorance of this relatively obscure area of constitutional law.

30. See *infra* notes 135–152 and accompanying text.

31. See *infra* note 173 and accompanying text. For a more detailed discussion of drug offenses and collateral consequences, see Gabriel J. Chin, *Race, the*

convicted testifies in court or to find the absence of good moral character if the person seeks a professional license, such as to practice law.<sup>32</sup> Many sex offenses classified as misdemeanors require registration.<sup>33</sup> And some misdemeanors can result in loss of civil rights.<sup>34</sup> Because the accusation of an offense resulting in loss of status is stigmatizing, all misdemeanors carrying these consequences must be prosecuted by indictment.

More thoughtful evaluation of these cases by a grand jury before charge would likely result in the nonprosecution of many cases because current rates of postcharge dismissal are high. If prosecutors were to charge fewer meritless cases due to the grand jury process, thousands of Americans would avoid the stigma of a criminal record in cases where it is unwarranted. The Framers drafted the Constitution to prevent precisely what is now occurring—the casual charging of serious offenses.<sup>35</sup>

### I. THE CONSEQUENCES OF MISDEMEANORS

Misdemeanor offenses and convictions are generally considered to be less serious than felony offenses and convictions.<sup>36</sup> Thus, Justices have noted the special significance of felony convictions. For example, Justice Clark noted that a felony conviction “strips an offender of all civil rights and leaves a shattered character that only a presidential pardon can mend.”<sup>37</sup> Chief Justice Warren wrote that “[c]onviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”<sup>38</sup> Given this perceived distinction between the weighty felony and

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*War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253 (2002).

32. See *infra* notes 179–191 and accompanying text.

33. See *infra* note 175 and accompanying text.

34. See *infra* notes 153–172 and accompanying text.

35. See *infra* Part II.A.

36. *Baldwin v. New York*, 399 U.S. 66, 70 (1970) (“[A] felony conviction is more serious than a misdemeanor conviction.”); see also *Boyde v. California*, 494 U.S. 370, 400 n.80 (1990) (Marshall, J., dissenting) (“[S]erious offenses’ such as murder, manslaughter, rape, and arson came to be called felonies, whereas other, presumably ‘less serious’ offenses, came to be called misdemeanors.” (citing 1 C. TORCIA, WHARTON’S CRIMINAL LAW § 17, at 81 (14th ed. 1978))).

37. *Chaunt v. United States*, 364 U.S. 350, 358 (1960) (Clark, J., dissenting).

38. *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting); see also *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (“For life, [Yates] will bear the stigma of having a federal felony conviction.”).

a misdemeanor, in the federal system misdemeanors may be prosecuted by information, without action by a grand jury, but felonies require indictment.<sup>39</sup>

The distinction between misdemeanors and felonies, however, turns out to be evanescent. It is, of course, conceivable that misdemeanors could actually be categorically less serious than felonies in terms of punishment or other legal consequences.<sup>40</sup> For example, the Model Penal Code provides that some categories of offenses may not give rise to collateral consequences.<sup>41</sup> Congress could, likewise, ensure that federal misdemeanors are less significant than felonies. However, the principle that misdemeanors are or should be less serious than felonies is not a binding legal command, and, if it ever was, is not currently applied in practice. A century ago, the D.C. Circuit wrote: “The old distinction between felonies and misdemeanors at the common law is practically impossible of definition. What is denounced as an infamous crime is practically a felony in its consequence, though it may be called a misdemeanor in the statute.”<sup>42</sup> More recently, Professor Jenny Roberts explained “[t]here is . . . no longer such a thing as a ‘slap on the wrist.’ All convictions, even for the most minor of charges, come with a long list of ‘collateral consequences.’”<sup>43</sup>

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39. See *supra* note 1 and accompanying text.

40. Cf. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (arguing that while decriminalization of misdemeanors may provide relief for overcrowded jails and an overburdened defense bar, it actually expands the reach of the criminal apparatus by making it easier to impose fines and supervision).

41. MODEL PENAL CODE § 1.04(5) (AM. LAW INST. 1985) (“An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code that now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.”).

42. *Chambers v. Buroughs*, 44 App. D.C. 168, 175 (D.C. Cir. 1915).

43. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1126 (2013). Professor Alexandra Natapoff noted that “[o]nce convicted, petty offenders suffer some of the same consequences as their felony counterparts.” Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1327 (2012); see also, e.g., David P. Baugh, *The Consequences of Criminal Convictions for Misdemeanor or Felony Offenses*, 18 WASH. & LEE J. C.R. & SOC. JUST. 55, 71 (2011) (“A criminal record, either for a misdemeanor or a felony, is a blemish for life. No one can ever reach his or her full potential to contribute to society or to reach some level of self-satisfaction and fulfillment with a criminal record. A jail sentence can last for months or years; a criminal record is a

Legislatures now regularly impose punishments for particular misdemeanors equal to or exceeding those for felonies and attach serious collateral consequences to misdemeanors. For example, counterintuitively, a conviction for a misdemeanor offense may constitute a statutory aggravated felony, triggering mandatory deportation<sup>44</sup> or sentencing enhancement.<sup>45</sup> Misdemeanor sex offenses can lead to sex offender registration.<sup>46</sup> The Supreme Court recently recognized the pervasive consequences of a criminal conviction:

[Criminal sanctions] can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.<sup>47</sup>

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restriction on a person's future that lasts for life."); Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1041 (2013) ("To be sure, criminal convictions, including misdemeanor convictions, can have significant life-altering consequences for the defendant regardless of the sentence imposed as a result of the conviction.").

44. See, e.g., *Whyte v. Lynch*, 807 F.3d 463, 466 (1st Cir. 2015) ("[A] state misdemeanor conviction can qualify as a federal 'aggravated felony.'"); *United States v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000) ("[A] misdemeanor may, in some cases and consistent with legislative intent, fall within the INA's definition of 'aggravated felony.'"); cf. *Kawashima v. Holder*, 565 U.S. 478, 491 (2012) (Ginsburg, J., dissenting) ("[T]he Court's reading sweeps a wide variety of federal, state, and local tax offenses—including misdemeanors—into the 'aggravated felony' category.").

45. See, e.g., *United States v. Pineda-Cabrera*, 604 F. App'x 889, 891 (11th Cir. 2015) ("[A] theft or burglary conviction that is a misdemeanor under state law but results in a term of imprisonment of at least one year is an 'aggravated felony' under U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (U.S. SENTENCING COMM'N 2016)"); *United States v. Villafana*, 577 F. App'x 248, 250 (5th Cir. 2014) ("Villafana's prior conviction for misdemeanor forgery qualified as an aggravated felony for purposes of a sentence enhancement.").

46. See, e.g., *Fushek v. State*, 183 P.3d 536, 544 (Ariz. 2008) ("[M]isdemeanor crimes involving sexual motivation are serious offenses and [we] hold that when a special allegation of sexual motivation exposes a defendant to the possibility of sex offender registration, Article 2, Section 24 of our Constitution entitles the defendant to a trial by jury."); *People v. King*, 20 Cal. Rptr. 2d 220, 223 (Ct. App. 1993) ("We do not, however, consider the mandatory registration penalty for misdemeanor violations of section 314 to be facially or inherently unconstitutional."); *People v. Mann*, 859 N.Y.S.2d 278, 280 (App. Div. 2008) ("The misdemeanor counts arose from defendant touching the breasts of females ages 13 and younger, which would constitute the crime of sexual abuse in the second degree if committed in New York (see Penal Law § 130.60[2]), and is a registrable offense under SORA.").

47. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 573 (2012); see also, e.g., *Ball v. United States*, 470 U.S. 856, 865 (1985) ("[C]onviction may be used to impeach the defendant's credibility and certainly carries the societal stigma



Tellingly, the Justices did not distinguish between felonies and misdemeanors; all of the hardships they list can fall on misdemeanants.

Misdemeanors in the U.S. Code involve every sort of dishonorable and morally reprehensible conduct, including conspiracy;<sup>48</sup> theft;<sup>49</sup> embezzlement;<sup>50</sup> fraud;<sup>51</sup> false statement;<sup>52</sup> false claims;<sup>53</sup> forgery;<sup>54</sup> bribery;<sup>55</sup> and disloyalty.<sup>56</sup> The Code also includes a number of misdemeanor drug offenses.<sup>57</sup> In addition, under the Assimilative Crimes Act,<sup>58</sup> acts that occur on federal enclaves but violate state law are prosecuted in federal court. The Act assimilates misdemeanor sex offenses.<sup>59</sup> Misdemeanors, like felonies, appear on criminal background checks and therefore can affect many areas of public and private life.<sup>60</sup> “Employers often decline to interview people who have been convicted of any offense; 60 to 70 percent of employers state that they would not hire any ex-offender and the majority of employers perform background checks.”<sup>61</sup> To use Justice Clark’s phrase, one’s character can be shattered as much by a misdemeanor conviction as by a felony.<sup>62</sup>

In addition to their effects on individuals, misdemeanor convictions have substantial social and political consequences. From

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accompanying any criminal conviction.”); *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (“But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.”).

48. 18 U.S.C. § 371 (2012).

49. *Id.* § 655 (theft by bank examiner); *id.* § 656 (theft by bank officer or employee).

50. *Id.* § 1163 (embezzlement or theft from Indian tribal organization).

51. *Id.* § 1920 (false statement or fraud to obtain Federal Employees’ Compensation); *id.* § 1923 (fraudulent receipt of payments); 26 U.S.C. § 7207 (2012) (tax fraud).

52. 18 U.S.C. § 1025 (false pretenses on the high seas).

53. *Id.* § 288 (false claims for postal losses).

54. *Id.* § 510(c) (forging endorsements on Treasury checks).

55. *Id.* § 597 (expenditures to influence voting).

56. *Id.* § 1918. Shainghaiing sailors should be a crime of moral turpitude, if it is not. *Id.* § 2194.

57. 21 U.S.C. § 841(b)(4) (2012) (distributing marijuana); *id.* § 844 (simple possession).

58. 18 U.S.C. § 13.

59. *United States v. Cox*, 929 F.2d 1511, 1512 (10th Cir. 1991).

60. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 97–98 (2015).

61. Natapoff, *supra* note 43, at 1325.

62. *See Chaut v. United States*, 364 U.S. 350, 358 (1960) (Clark, J., dissenting).

the end of Reconstruction until as late as the 1960s, various jurisdictions used vague misdemeanor statutes punishing crimes such as vagrancy to extract labor from African Americans and to control disfavored groups using the veneer of law.<sup>63</sup> Low-level offenses continue to be used by the criminal-justice apparatus for financial ends.<sup>64</sup> Professors Wayne Logan and Ronald Wright report that surcharges and fees associated with offenses, what they call LFOs (legal financial obligations) “often have debilitating consequences for individuals.”<sup>65</sup> They note “[r]ecent academic work and advocacy group studies have condemned LFOs for their economically regressive impact on poor defendants, the barriers they present to reentry, and the racial disparities they reflect.”<sup>66</sup> Because “criminal justice actors increasingly rely on the income from LFOs to fund ordinary system operations,” they have “become mercenaries, in effect working on commission.”<sup>67</sup>

A disturbing example was revealed by a Department of Justice investigation in Ferguson, Missouri, following the death of eighteen-year-old Michael Brown, who was killed after an encounter with a Ferguson Police Department (FPD) officer.<sup>68</sup> The Department of Justice reported that “[t]he Ferguson municipal court handles most charges brought by FPD, and does so not with the primary goal of administering justice or protecting the rights of the accused, but of maximizing revenue.”<sup>69</sup>

Notwithstanding their importance, for a range of structural reasons, misdemeanors are more likely to be erroneously charged than felonies. First, prosecutors may not screen misdemeanor cases closely. “In the world of petty offenses, the prosecutorial screening function is . . . weaker, [and] in some realms nonexistent. Prosecutors often charge whatever petty offense the police report describes and back off, if at all, only later during

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63. Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.-C.L. L. REV. 361, 391 (2009). See generally RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016) (discussing breadth of police authority in the mid-twentieth century).

64. See generally ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016) (analyzing the ways in which criminal fines entrench the poor).

65. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1177.

66. *Id.*

67. *Id.*

68. U.S. DEP'T OF JUSTICE, *supra* note 9, at 5.

69. *Id.* at 42.

plea negotiations.”<sup>70</sup> Second, because “misdemeanor court judges are relatively insulated from higher court feedback and do not learn of their mistakes in the same way that felony trial court judges do,” there may be more legal errors from the bench.<sup>71</sup> Finally, it is not uncommon for prosecutors and defense attorneys handling felonies to specialize in particular sorts of serious crimes, becoming reasonably expert in, say, white-collar drug or sex offenses.<sup>72</sup> This could mean that, when it comes to felony offenses, prosecutors are less likely to charge meritless cases in legal areas they know well, and experienced defense attorneys are more likely to spot problems early on. On the other hand, “misdemeanor attorneys often handle a large variety of crimes, codified in a variety of sources.”<sup>73</sup> When an attorney has a docket that includes traffic and regulatory offenses, as well as lesser versions of traditional felonies, it is more difficult to learn the nuances of the variety of statutes involved. In addition, junior or volunteer attorneys with little knowledge and experience are sometimes used for misdemeanor cases.<sup>74</sup> For all of these reasons, misdemeanor prosecutors and defense attorneys may be less able to identify and screen out problematic cases, and misdemeanor charges with a low probability of conviction may move forward.

For these (and perhaps other) reasons, federal misdemeanor charges are much more likely than felony charges not to result

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70. Natapoff, *supra* note 43, at 1338. See generally ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 25–26 (2009) (discussing the over-criminalization of misdemeanors).

71. Eve Brensike Primus, *Our Broken Misdemeanor Justice System: Its Problems and Some Potential Solutions*, 85 S. CAL. L. REV. POSTSCRIPT 80, 81 (2012).

72. Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 335 (2002) (noting that “[m]any [prosecutor’s] offices have sought to increase their efficacy by dividing the office into units based on types of crimes.”); Charles D. Weisselberg & Su Li, *Big Law’s Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1229 (2011) (discussing specialization of white collar criminal defense attorneys).

73. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 305 (2011).

74. As Professor Irene Joe has explained: “Aside from a few circumstances, public defender administrators do not treat misdemeanor and felony clients alike when they are forced to ration limited resources. Instead, decisionmakers minimize the resources dedicated to misdemeanor representation so they can concentrate their efforts on felony representation.” Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 743 (2017).

in a conviction. For example, Table 1 shows the percent of misdemeanors and felonies that were charged but failed to result in a conviction for years 2009 through 2012.

**Table 1: Charges Not Leading To Conviction**

Year	Misdemeanors Not Leading to Conviction	Felonies Not Leading to Conviction
2009 <sup>A</sup>	30.5%	6.7%
2010 <sup>B</sup>	28.6%	6.1%
2011 <sup>C</sup>	29.6%	6.4%
2012 <sup>D</sup>	31.1%	6.6%

A. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, NCJ 233464, FEDERAL JUSTICE STATISTICS 2009—STATISTICAL TABLES 18–19 tbl.4.2 (2011), <http://www.bjs.gov/content/pub/pdf/fjs09st.pdf>.

B. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, NCJ 239914, FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES 17 tbl.4.2 (2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf>.

C. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, NCJ 248469, FEDERAL JUSTICE STATISTICS, 2011—STATISTICAL TABLES 17 tbl.4.2 (2015), <http://www.bjs.gov/content/pub/pdf/fjs11st.pdf>.

D. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, NCJ 248470, FEDERAL JUSTICE STATISTICS, 2012—STATISTICAL TABLES 17 tbl.4.2 (2015), <http://www.bjs.gov/content/pub/pdf/fjs12st.pdf>.

Thus from 2009 through 2012, misdemeanants were between four and five times as likely to be charged but not convicted compared to felons.

## II. DEFINING INFAMOUS CRIMES

The Supreme Court's Grand Jury Clause jurisprudence in the late nineteenth and early twentieth centuries suggests, consistent with the drafting history of the Constitution, that offenses potentially resulting in stigmatizing punishments must be prosecuted by grand jury indictment—but that is not the rule today. The Federal Rules of Criminal Procedure now employ a bright line rule: Felonies must be charged by indictment, in the absence of a defendant's waiver of their grand jury right, but misdemeanors need not be considered by a grand jury.<sup>75</sup> But the Fifth Amendment does not mention felonies or misdemeanors. Instead, the textual requirement is that “capital, or otherwise

75. See *supra* note 1.

infamous crime[s]” must be charged by indictment.<sup>76</sup> The Supreme Court has specifically rejected the felony/misdemeanor distinction as the dividing line, holding that misdemeanors having the quality of infamy must be charged by indictment.<sup>77</sup>

#### A. STIGMA AND INFAMOUS CRIMES

Understanding the purpose of the grand jury illuminates the problem the Framers were trying to solve, and therefore what an infamous crime might be. The structure of the Bill of Rights reveals that the grand jury does not exist primarily to ensure that only the guilty are ultimately convicted and punished. The Constitution guards against wrongful conviction and punishment through rights associated with the ultimate fact-finding process, such as the right to counsel, and the right to a jury trial.<sup>78</sup> The standard for indictment by grand jury is probable cause, a minimal threshold, which prevents few, if any, provably guilty people from being charged.<sup>79</sup> The grand jury requirement, therefore, offers little comfort to the provably guilty; they will be indicted.<sup>80</sup>

To be sure, grand juries have discretion not to indict, or to indict for a lesser rather than greater crime.<sup>81</sup> But it is said that

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76. U.S. CONST. amend. V.

77. See *infra* notes 126–133 and accompanying text.

78. *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O’Connor, J., concurring) (“Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.” (citing *id.* at 398–99, and listing presumption of innocence, proof beyond a reasonable doubt, and the rights to confrontation, compulsory process, assistance of effective counsel, and disclosure of exculpatory evidence, but not grand jury indictment)).

79. *Rose v. Mitchell*, 443 U.S. 545, 586 (1979) (Powell, J., concurring) (“For the provision of indictment by grand jury does not protect innocent defendants from unjust convictions. Rather, it helps to assure that innocent persons will not be made unjustly to stand trial at all.”); see also *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) (stating that the purpose of grand jury investigation is “to ascertain whether probable cause exists.”).

80. The percentage of defendants for whom there would be legally sufficient evidence of guilt after a trial, yet for whom there is insufficient probable cause to obtain a grand jury indictment, is zero in theory and likely near zero in practice. *United States v. Mechanik*, 475 U.S. 66, 67 (1986) (“We believe that the petit jury’s verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted.”).

81. As the Court explained:

The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a

the prosecutor has a great deal of control over grand juries, and that a grand jury “would ‘indict a ham sandwich if asked to do so.’”<sup>82</sup> Further, there is no evidence that grand juries regularly decline to indict in the face of solid evidence in a case the prosecutor wants to pursue.

A key function, perhaps *the* key function, of the grand jury is to prevent unwarranted stigmatization of people who would later be acquitted.<sup>83</sup> Thus scholars including Akhil Amar<sup>84</sup> and

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lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts. Moreover, “[t]he grand jury is not bound to indict in every case where a conviction can be obtained.” *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting). Thus, even if a grand jury’s determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.

*Vasquez v. Hillery*, 474 U.S. 254, 263 (1986); *see also* *United States v. Cotton*, 535 U.S. 625, 634 (2002) (“Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power. No doubt that is true.”).

82. Josh Levin, *The Judge Who Coined “Indict a Ham Sandwich” Was Himself Indicted*, SLATE (Nov. 25, 2014), [http://www.slate.com/blogs/lexicon\\_valley/2014/11/25/sol\\_wachtler\\_the\\_judge\\_who\\_coined\\_indict\\_a\\_ham\\_sandwich\\_was\\_himself\\_indicted.html](http://www.slate.com/blogs/lexicon_valley/2014/11/25/sol_wachtler_the_judge_who_coined_indict_a_ham_sandwich_was_himself_indicted.html). Some have challenged this view, arguing that state grand juries do exercise discretion. Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 35 (2002) (“Similarly, in the early 1980s statistics showed that New York grand juries dismissed approximately 10% of their cases and reduced charges in almost as many.”). Others have persuasively argued for expanding the power of the grand jury to exercise discretion as the voice of the community. Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2346 (2008) (“[T]he grand jury may have one important responsibility that suggests that its role is to review the sufficiency of the evidence for indictments. But the historical narrative also suggests some other roles and responsibilities: considering the legitimacy of laws, and/or considering the legitimacy of the application of those laws in a particular case.”).

83. *United States v. Dionisio*, 410 U.S. 1, 17 n.15 (1973) (concluding that a grand jury is “a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity”; *Commonwealth v. Harris*, 121 N.E. 409, 410 (Mass. 1919) (“[T]hat the twelfth article of the Bill of Rights in part was aimed and intended to prohibit the scandal and disgrace of a trial in public of persons charged with infamous crimes and offences when, in truth, there was no sufficient cause to suspect their guilt.”); *cf.* *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 219 (1979) (explaining that one reason for secrecy of grand jury proceedings is to “assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule”).

84. Professor Amar explained:

[T]o make full sense of the text, we must focus on the harms inherent in every criminal accusation. Every criminal accusation, of course, is

Stephanos Bibas<sup>85</sup> agree that the grand jury serves to prevent charging people against whom there is so little evidence of guilt that reputation rather than liberty is at stake. The Framers of the Constitution took honor and reputation seriously.<sup>86</sup> One early federal judge explained that:

[English] laws have wisely and humanely considered, that next to the disgrace of being convicted of an infamous offence, is the dishonour of being charged with one; and therefore, before they would submit a subject to the danger and inconvenience of being publicly arraigned, an impartial jury are on their oaths to declare the just cause for accusation.<sup>87</sup>

Other courts agree that “[t]he Grand Jury is a safeguard designed to protect the reputation of the accused, to avert the

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an attack on the accused’s reputation—a charge of “*criminal*” wrongdoing in the words of the Speedy Trial Clause, of “*infamous*” misconduct in the analogous words of the Grand Jury Clause. At common law, a false accusation of criminal behavior was viewed as defamation *per se*. (Note the obvious etymological link between *defamation* and accusations of *infamous* crime). And as with pretrial detention, each additional day of accusation was a fresh assault, a new injury. Here too, the innocent man would want a *trial to speedily follow accusation*, so that he could offer his “answer” and put on his “defence.” And if the innocent man can prevail at this speedy, public, and fair trial, he puts an end to the accusation of infamy and wins back his good name.

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 661 (1996).

85. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1182 (2001) (“Juries were meant to check the imposition of stigma, as reflected in the Grand Jury Clause’s limitation to ‘infamous’ crimes.”).

86. One famous example of the importance of reputation in Western culture comes from literature. In Shakespeare’s *Othello*, Iago says to Othello:

Good name in man and woman, dear my lord,  
Is the immediate jewel of their souls:  
Who steals my purse steals trash; ’tis something, nothing;  
’Twas mine, ’tis his, and has been slave to thousands;  
But he that filches from me my good name  
Robs me of that which not enriches him  
And makes me poor indeed.

WILLIAM SHAKESPEARE, *OTHELLO* act 3. sc. 3. The Milkovich Court quoted the same excerpt during its discussion of the development of defamation law. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (describing one purpose of defamation law as “obtaining redress for harm caused by [false] statements”). Even an acquittal is no substitute for being subjected to baseless charges: “Former Secretary of Labor, Ray Donovan, famously asked after his acquittal in a 1987 corruption trial, ‘Where do I go to get my reputation back?’” Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 399 (2009).

87. *United States v. Robins*, 27 F. Cas. 825, 838 (D.S.C. 1799).

stigma of prosecution unless there is reasonable ground for proceeding.<sup>88</sup>

The drafting history of the Bill of Rights also suggests that the grand jury is concerned with pretrial stigma, not postconviction punishment. Introduced by James Madison on June 8, 1789, at the first session of the House of Representatives, the Amendment originally read: "In all crimes punishable *with loss of life or member*, presentment or indictment by a grand jury shall be an essential preliminary."<sup>89</sup> Thus the initial focus was on punishment and for a limited number of crimes. This draft went to

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88. *United States v. Echols*, 413 F. Supp. 8, 9 n.2 (E.D. La. 1975) (quoting Note, *Quashing Federal Indictments Returned Upon Incompetent Evidence*, 62 HARV. L. REV. 111, 114 (1948)); *see, e.g.*, *United States v. Smith*, 982 F.2d 757, 762 (2d Cir. 1992) ("[T]he infamy of the punishment is essentially a measure of the infamy attached to the offender: by authorizing an infamous punishment, the Congress indicates that it believes the offender deserving of infamy."); *Gardes v. United States*, 87 F. 172, 185 (5th Cir. 1898) (describing imprisonment as "stamp[ing] the convict with the stigma of subjection to an infamous punishment."); *United States v. Nott*, 27 F. Cas. 189, 192 (C.C.D. Ohio 1839) ("The law had been violated and its penalty incurred. You must be cut off from society; and from your nearest and dearest connections. You must put on the badges of disgrace, and be associated with men rendered infamous by crime."); *Grinbaum v. Superior Court ex rel. S.F.*, 221 P. 635, 646 (Cal. 1923) ("As such an appointment [of a conservator] takes from the person the possession and control of his property and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime."); *In re Request of Governor for Advisory Op.*, 950 A.2d 651, 657 (Del. 2008) ("An act of civil delinquency by a juvenile, to which the General Assembly intentionally avoided attaching permanent stigma, is incompatible with the concept of an 'infamous crime.'"); *State v. Kearney*, 8 N.C. 53, 54 (1820) (stating it is still true, generally, that "public corporal punishment for any offence impresses an indelible stigma on the character, and ought to be inflicted on those offences only which are infamous in their nature.").

89. *Ex parte Wilson*, 114 U.S. 417, 424 (1885) (emphasis added); *see* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 458 (2006) (stating that there was minimal discussion during the ratification debates in regard to grand juries); *see also* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 265 (Neil H. Cogan ed., Oxford Univ. Press 1997) (1788) [hereinafter COMPLETE BILL OF RIGHTS] (James Madison argued that Article III, Section Two, should contain a provision stating that "presentment or indictment by a grand jury shall be an essential preliminary" to criminal cases); GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY app. J-1, at 318 (1995) (including selected sections of James Madison's proposals to the House of Representatives on June 8, 1789). "Delegate Aedanus Burke of South Carolina was particularly adamant that the Constitution prohibit prosecutions from being initiated by information." Fairfax, *supra*, at 412 n.58.



the Committee of the Whole.<sup>90</sup> The following month, new language was suggested by Roger Sherman: “No person shall be tried for any crime whereby he may incur *loss of life or any infamous punishment*, without Indictment by a grand Jury . . . .”<sup>91</sup> A report from the House Committee of Eleven—proposed at the same time as Sherman’s recommendation—read, “[N]o person shall be held to answer for a *capital, or otherwise infamous crime*, unless on a presentment or indictment by a grand jury . . . .”<sup>92</sup> That version became, and has remained, part of the Constitution.<sup>93</sup>

The drafting history reflects expansion of the coverage of the Clause. The original version limited the grand jury indictment requirement to crimes involving punishments of loss of life or limb.<sup>94</sup> Roger Sherman’s version changed the requirement to include capital or infamous punishments, even if there was no execution or amputation—a clear extension.<sup>95</sup> The Framers chose a third version linked to the capital or otherwise infamous nature of the crime; that is, a prosecutor could not avoid the necessity of seeking an indictment by committing in advance not to impose certain punishments.<sup>96</sup> The Framers also advanced the relevant time period: Sherman’s draft required an indictment before trial,<sup>97</sup> whereas the enacted version moved the requirement back to the earlier step of being “held to answer.”<sup>98</sup> This drafting sequence is consistent with the idea that what is at stake, what the Amendment regulates, is impairment of reputation and not imposition of punishment.

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90. 1 ANNALS OF CONG. 759–60 (1789–1790).

91. COMPLETE BILL OF RIGHTS, *supra* note 89, at 266 (emphasis added).

92. *Id.* at 267 (emphasis added).

93. U.S. CONST. amend. V.

94. See COMPLETE BILL OF RIGHTS, *supra* note 89, at 265 (“The trial of all crimes . . . shall be by an impartial jury . . . [with] all crimes punishable with loss of life or limb . . .”).

95. See *id.* at 266 (providing Sherman’s proposal regarding the Grand Jury Clause).

96. The Supreme Court now holds that a person charged with a misdemeanor punishable by incarceration is not entitled to counsel if the prosecutor and court agree that incarceration is off the table. See *Scott v. Illinois*, 440 U.S. 367, 369 (1979); see also Russell Christopher, *Penalizing and Chilling an Indigent’s Exercise of the Right to Appointed Counsel for Misdemeanors*, 99 IOWA L. REV. 1905 (2014) (“In *Scott v. Illinois*, the Supreme Court clarified that even those charged with misdemeanors in which imprisonment is an authorized punishment are not necessarily constitutionally entitled to appointed counsel.”).

97. See *supra* note 94 and accompanying text.

98. U.S. CONST. amend. V.

The Court has indicated that a punishment that “always implies disgrace” is infamous.<sup>99</sup> Dictionaries at the time of the framing of the Constitution also understood infamy in reputational terms, defining infamy as “[p]ublick reproach; notoriety of bad character,”<sup>100</sup> and infamous as “of evil report, scandalous, base.”<sup>101</sup> Over the past two centuries, the dictionary definition has not changed. The Merriam-Webster Dictionary defines infamous as: “well-known for being bad[.] known for evil acts or crimes[.] causing people to think you are bad or evil.”<sup>102</sup>

There is a clear reason for the Amendment’s concern with reputation. As a *Harvard Law Review* article explained, “[i]t has long been considered slander per se orally to accuse one of a crime involving ‘moral turpitude’ or subject to an ‘infamous punishment.’”<sup>103</sup> Many courts have held that a statement is actionable without proof of special damages if it “would subject the party charged to an indictment for a crime involving moral turpitude, or subject her to infamous punishment.”<sup>104</sup> At the time of the

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99. *In re Medley*, 134 U.S. 160, 169 (1890).

100. *Infamy*, A DICTIONARY OF THE ENGLISH LANGUAGE 1086 (1755); see 2 A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 41 (4th ed. 1797).

101. *Infamous*, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY 447 (26th ed. 1789).

102. *Infamous* MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/infamous> (last visited Feb. 18, 2018).

103. Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 887 n.73 (1956); see FRANCIS M. BURDICK, LAW OF TORTS 372 n.57 (4th ed. 1926); Roscellus S. Guernsey, *When a Libel Is Not a Libel*, 20 YALE L.J. 36, 39 (1910) (“A misdemeanor is ordinarily not punishable by an infamous punishment; hence, in order that a charge of such offense may be actionable *per se*, it is necessary that it be indictable and involve moral turpitude. A charge of petit larceny is not a libel if false, unless it is a misdemeanor under the penal code.”); *Libel and Slander—Privileged Communication*, 23 YALE L.J. 99, 99 (1913) (“Words which charge the plaintiff with the commission of a crime involving moral turpitude or subjecting the offender to infamous punishment are slanderous *per se*.”); see also 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 124 (“[W]ith regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened . . . .”); P.J.T., *Torts—Slander—Words Actionable Per Se*, 10 TEX. L. REV. 390, 391 (1932) (“[W]ords are actionable *per se* when the offense which they charge renders the party liable to an indictment for a crime involving moral turpitude or subjecting him to infamous punishment.” (citing *Pollard v. Lyon*, 91 U.S. 225, 226 (1876))).

104. *Butler v. Carter & Russell Pub. Co.*, 135 F. 69, 71 (5th Cir. 1905); see, e.g., *Brooker v. Coffin*, 5 Johns. 188, 188 (N.Y. Sup. Ct. 1809) (“The rule seems to be, that where the charge, if true, will subject the party charged to an indictment for a crime, involving moral turpitude, or subject him to an infamous punishment, then the words are in themselves actionable.”); *Shipp v. McCraw*, 7 N.C. 463, 466 (1819) (Henderson, J., concurring) (“The gravamen in an action

framing, as now, prosecutors were immune from suit for their charging decisions.<sup>105</sup> Accordingly, allowing the prosecution of offenses affecting reputation by information would permit accusations, which the law recognized as intrinsically damaging, but with no legal recourse if they turned out to be unwarranted.<sup>106</sup> Since at least some charges would be baseless, unaccountable prosecutorial freedom would have been unjust.

That the Grand Jury Clause was designed to avoid unwarranted stigma suggests that it should be contextual; the Court has recognized that “[w]hat punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another.”<sup>107</sup> And because the interest at stake is reputational, it does not matter whether the stigmatizing punishment is actually imposed: “[I]n determining whether the crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous

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of *slander*, is *social degradation*. The risk of punishment, and the rule to test the question whether the words be or be not actionable, to wit: does the charge impute an infamous crime, is resorted to, to ascertain the fact, whether it be a social degradation, and not whether the risk of punishment be incurred. And this rule is the test of *that*; for those who are punished for infamous crimes are degraded from their rank as citizens, they lose their privileges as freemen, their *liberam legem*, and are no longer *boni et legales homines*.”); *Boucher v. Clark Pub. Co.*, 84 N.W. 237, 238 (S.D. 1900) (“Any publication which imputes to a person the commission of a criminal offense, which will, in case the imputation or charge is true, subject the party charged to punishment for a crime involving moral turpitude, or subject such party to an infamous punishment, is actionable . . . .”); *Redway v. Gray*, 31 Vt. 292, 297 (1858) (“They impute an infamous crime, involving moral turpitude, and subject the person guilty of such an offence to corporal punishment, and it has always been held, that when all these concur, the words are actionable *per se*.”).

105. See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 81 (2005) (noting that the Supreme Court found “the common-law rule of absolute prosecutorial immunity to be ‘well settled’” (quoting *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976))).

106. *Id.*

107. *Mackin v. United States*, 117 U.S. 348, 351 (1886); see *Ex parte Wilson*, 114 U.S. 417, 427–28 (1885) (“In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment . . . . But at the present day either stocks or whipping might be thought an infamous punishment.”).

one.”<sup>108</sup> An accusation of conduct warranting degrading sanctions if a conviction were to occur is sufficient to trigger the Clause.<sup>109</sup>

The reasons for the Grand Jury Clause, and therefore the tests for infamy, differ from other criminal law entitlements. For example, the right to appointed counsel for an indigent person charged with a misdemeanor depends on whether there is the possibility of actual incarceration.<sup>110</sup> The right to trial by jury for a misdemeanor depends on whether punishment of more than six months is authorized.<sup>111</sup> Both of these turn on trial outcome and seriousness of the effects of conviction, not the reputational effect of an accusation as such.<sup>112</sup>

The purpose of preventing unwarranted stigma helps to explain why many errors with respect to a grand jury are cured by a valid guilty verdict by a trial jury.<sup>113</sup> Yet, complete denial of a

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108. *In re Claasen*, 140 U.S. 200, 205 (1891); see *Mackin*, 117 U.S. at 351 (“The test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one . . . .”); *Wilson*, 114 U.S. at 426 (“The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment awarded is an infamous one.”).

109. *Wilson*, 114 U.S. at 426 (describing the accused’s right and that it triggers the clause).

110. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (“We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).

111. *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968) (“So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions.”).

112. On the other hand, some of these cases nodded to concepts related to infamy. In *Duncan*, the Court identified the question as whether “the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial . . . .” *Id.* at 161. The Court there cited *District of Columbia v. Clawans*, which noted that at common law, petty offenses were “punished by commitment to jail, a workhouse, or a house of correction.” 300 U.S. 617, 624 (1937). Thus, this line leaves open the possibility that the place of incarceration is relevant to the jury trial right.

113. *United States v. Mechanik*, 475 U.S. 66, 67 (1986) (“[T]he petit jury’s verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted. Therefore, the convictions must stand despite the rule violation.”); see *United States v. Navarro*, 608 F.3d 529, 539 (9th Cir. 2010) (discussing remedies for errors ruled upon before and after trial); *United States v. Soto-Beniquez*, 356 F.3d 1, 25 (1st Cir. 2003) (noting that “[a]ll but the most serious errors before the grand jury are rendered harmless by a conviction at trial”).

grand jury indictment even as to a palpably guilty defendant requires a remedy, to protect innocent people who would be tried and acquitted if lack of an indictment were always cured by conviction.<sup>114</sup>

The original view of courts and scholars was that “it is the infamous nature of the crime and not the character of the punishment” that makes an offense infamous.<sup>115</sup> However, in the late nineteenth century, the Supreme Court defined “infamy” for purposes of the Grand Jury Clause to include all offenses authorizing imposition of infamous penalties.<sup>116</sup> That is, a grand jury indictment was required for an offense, which was not itself infamous (in that its elements did not imply disgrace), if that offense could lead to infamous punishment. These decisions represented application of the indictment requirement to a new category of cases.

The Court has made clear that the infamous nature of the punishment brings an offense into the scope of the Grand Jury Clause.<sup>117</sup> However, the Court has not explicitly determined

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114. *Stirone v. United States*, 361 U.S. 212, 217 (1960) (“While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant’s substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.”); see *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (“Only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried.”).

115. *Witnesses—Competency in General—Effect in Criminal Trial in Federal Courts of Former Conviction of Crime in State Courts*, 30 HARV. L. REV. 529, 529 (1917) (citing *People v. Park*, 41 N.Y. 21, 29–30 (1869)); see *Bartholomew v. People*, 104 Ill. 601, 607 (1882); *The King v. Priddle*, 1 Leach C. C. 442, 442–43; 3 SIMON GREENLEAF, EVIDENCE § 372, n.1 (15th ed. 1892)); see also *People v. Toynbee*, 1855 WL 6562 (N.Y. Gen. Term. 1855) (“It was the infamy of the crime, and not the nature of the punishment, which constituted the *crimen falsi*.”); *Infamy and Infamous Crimes*, 16 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW (Davis S. Garland & Lucius P. McGehee eds., 2d ed. 1900) (“But at present it is the settled rule of the common law that it is the character of the crime, and not the nature of the punishment, which creates the infamy and destroys the competency of the witness. At present, therefore, a conviction of treason or felony, or of any species of the *crimen falsi*, will incapacitate the party convicted from giving evidence while it continues in force without regard to the punishment inflicted.”); *Infamous Crime—Definition*, 15 YALE L.J. 305 (1906) (“[T]he decision as to the infamy of the offense depended, not on the punishment prescribed, but in the character of the offense itself and that the statutory offense of which appellant was convicted did not involve the requisite degree of moral turpitude to make the transgression an infamous crime at common law.”).

116. See *supra* note 108 and accompanying text.

117. See *supra* note 108 and accompanying text.

whether the stigmatizing nature of an offense, in and of itself, makes it infamous—that is, the Court has not clarified whether the former rule, defining infamy based on stigmatizing crimes, was expanded (to include stigmatizing punishments and stigmatizing crimes) or replaced, meaning that only stigmatizing consequences could make an offense infamous, regardless of the stigmatizing nature of the crime itself.

For several reasons, the decisions should be read as expanding the category of infamous crimes. First, the Clause's drafting history shows that the Framers were initially concerned with imposition of infamous punishment, but ultimately decided to regulate charging infamous crimes, presumably because, in addition to punishment, they were concerned with stigma.<sup>118</sup> Second, conduct is a more direct signifier of disgrace than punishment. As a matter of logic, if we assume average Americans do not regularly read sentencing statutes, they are more likely to have a negative reaction to a shameful crime than they are to know the particular punishment associated with a nonstigmatizing offense. If the indirect stigma resulting from potential punishment requires indictment, as the Supreme Court has held, then direct stigma based on the accusation itself also should. Accordingly, stigmatizing offenses should be charged by a grand jury even if no infamous punishment is authorized.<sup>119</sup> Perhaps this question was never resolved because it never needed to be resolved. There seem to be few, if any, offenses involving stigmatizing conduct which do not carry stigmatizing penalties.<sup>120</sup>

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118. See *supra* note 88 and accompanying text.

119. *Snyder v. King*, 958 N.E.2d 764, 775 (Ind. 2011) (“This history not only demonstrates that disenfranchisement (along with the loss of other civil and political rights) was itself an infamous punishment, but it also suggests that, for purposes of the Infamous Crimes Clause, an infamous crime is one which by its own nature is infamous, irrespective of punishment.”); cf. WILLIAM EDEN AUCKLAND, *PRINCIPLES OF PENAL LAW* § 3, at 51–52 (“Corporal punishments, immediately affecting the body, and publicly [sic] inflicted, ought to be infamous in the estimation of the people; so should degradations from titles of honor, *civil incapacities*, brandings, and public exhibitions of the offender: *all which penalties should be applied with great caution, and only to offences infamous in their nature.*” (emphases added)).

120. 4 WAYNE LAFAVE ET AL., *CRIMINAL PROCEDURE* § 15.1(b), at 742 (4th ed. 2004) (“So too, any crime that could be viewed as infamous by virtue of its ‘nature’ almost certainly will carry an infamous punishment.”).

## B. CONGRESS, THE COURT, AND INFAMOUS MISDEMEANORS

It is completely clear that misdemeanors can be infamous. For its part, Congress has recognized that misdemeanors can be infamous. For example, immigration law has long authorized deportation of noncitizens convicted of certain “felonies or other infamous crimes.”<sup>121</sup>

The Supreme Court has also recognized that misdemeanors can be infamous. For example, *Richardson v. Ramirez* referred to “felonies or infamous crimes;”<sup>122</sup> Justice Thomas, quoting Thomas Jefferson, referred to the effect of conviction “of felony, or other infamous crime”<sup>123</sup> on eligibility for federal office.

In two cases, the Court held that particular misdemeanors were infamous. In *Bannon v. United States*,<sup>124</sup> a defendant claimed that an indictment was defective because it failed to accuse him of feloniously participating in a conspiracy. The Government conceded that the crime was infamous because it was punishable by confinement at hard labor, but the Court rejected the defense claim, holding that it does not “necessarily follow that because the punishment affixed to an offence is infamous, the offence itself is thereby raised to the grade of felony.”<sup>125</sup>

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121. See *Padilla v. Kentucky*, 559 U.S. 356, 360–61 (2010) (“In 1891, Congress added to the list of excludable persons those ‘who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.’”) (quoting Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084); *Ekiu v. United States*, 142 U.S. 651, 664 n.1 (1892) (quoting text of act).

122. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 48 (1974) (noting that “29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes”).

123. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 874 (1995) (Thomas, J., dissenting) (quoting *Letter to Joseph C. Cabell* (Jan. 31, 1814), in 14 WRITINGS OF THOMAS JEFFERSON 82–83 (A. Lipscomb ed. 1904)); see *Ansbro v. United States*, 159 U.S. 695, 697 (1895) (“The offence for which Ansbro was indicted is not punishable by imprisonment for a term of over one year or at hard labor; and persons convicted thereof cannot be sentenced to imprisonment in a penitentiary. Rev. St. §§ 5541, 5542. Ansbro was not convicted, therefore, of an infamous crime.”); *Pollard v. Lyon*, 91 U.S. 225, 233 (1875) (the question is “whether they impute a charge of felony or any other infamous crime punishable by law”).

124. 156 U.S. 464 (1895).

125. *Id.* at 467 (“If such imprisonment were made the sole test of felonies, it would necessarily follow that a great many offences of minor importance, such as selling distilled liquors without payment of the special tax, and other analogous offences under the internal and customs revenue laws, would be treated as felonies, and the persons guilty of such offences stigmatized as felons.”).

Similarly, in *United States v. Moreland*,<sup>126</sup> the Court held that a potential sentence to hard labor was infamous even for a crime Congress graded as a misdemeanor.<sup>127</sup> The Ninth Circuit explained: “In *Moreland*, the Court necessarily rejected the felony-misdemeanor distinction when it held that hard labor, imposed as punishment for the misdemeanor of willfully [sic] neglecting to support minor children, is infamous punishment and triggers the right to an indictment.”<sup>128</sup> The D.C. Circuit agreed: “if the penalty imposed by statute for the punishment of a misdemeanor is infamous . . . the misdemeanor itself is regarded by the courts as an infamous crime, and not triable upon information.”<sup>129</sup> Many other lower federal courts have held or suggested that a misdemeanor can be infamous if infamous penalties are authorized.<sup>130</sup>

Three decisions of various U.S. Courts of Appeal hold or suggest that misdemeanors never need be indicted, sometimes relying on the concept of petty offense, which exempts certain minor offenses from the jury trial requirement.<sup>131</sup> These decisions,

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126. 258 U.S. 433 (1922).

127. *Id.* at 435.

128. *United States v. Ramirez*, 556 F.2d 909, 924 (9th Cir. 1976).

129. *Cleveland v. Mattingly*, 287 F. 948, 950 (D.C. Cir. 1923).

130. The cases of which the authors are aware are: *United States v. Francisco*, 413 F. App'x 216, 218 (11th Cir. 2011) (“Where no ‘infamous’ punishment is prescribed, petty offenses and misdemeanors may be prosecuted by information.”); *Taylor v. United States*, 142 F.2d 808, 816 (9th Cir. 1944) (“And it is well settled that a prosecution for misdemeanors, such as those under consideration in this appeal, involving no infamous crime or no infamous punishment, may be by information.”); *Falconi v. United States*, 280 F. 766, 767 (6th Cir. 1922) (“In the case of *Wong Wing v. U.S.*, 163 U.S. 228 . . . the Supreme Court held that a statute authorizing imprisonment at hard labor for a definite period inflicts an infamous punishment, and therefore the offense, though a misdemeanor, is an infamous crime, within the meaning of the Fifth Amendment.”); *United States v. Reef*, 268 F. Supp. 1015, 1017 (D. Colo. 1967) (“Although the offense with which defendant is charged is technically a misdemeanor,” indictment is required); *United States v. Sloan*, 31 F. Supp. 327, 331 (W.D.S.C. 1940) (“No specific provision, making the particular misdemeanor infamous, is coupled with the punishment of imprisonment prescribed by this statute.”); *United States v. Yates*, 6 F. 861, 865 (E.D.N.Y. 1881) (“The omission to declare the crime a felony furnishes, no doubt, a reason for considering the crime to be a misdemeanor, but the fact that the offence is a misdemeanor is not conclusive of the question whether it be an infamous crime or not . . .”).

131. *United States v. Moncier*, 492 F. App'x 507, 510 (6th Cir. 2012) (“Such a Class B misdemeanor is a ‘petty’ offense, 18 U.S.C. § 19, that does not entitle Moncier to a grand-jury indictment.”); *United States v. Bator*, 421 F. App'x 710, 710 (9th Cir. 2011) (“Because the offenses charged were only petty offenses, a grand jury was not required . . .”); *Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) (stating, in dicta, that the grand jury requirement is inapplicable



however, are hardly dispositive. Two are nonprecedential unpublished decisions, and in the third, the statement is dicta. In addition, all three address the issue only in passing. For example, they do not analyze any of the controlling Supreme Court cases holding that misdemeanors can be infamous, including *Bannon v. United States*<sup>132</sup> and *United States v. Moreland*,<sup>133</sup> nor do they address the contrary authority from their own circuits.<sup>134</sup> This is understandable because, at least in *Moncier* and *Means*, the two cases for which briefs are available online, the defendants did not develop arguments that the misdemeanors with which they were charged were infamous.

### C. WHAT CATEGORIES OF MISDEMEANORS ARE INFAMOUS?

Several qualities can make a misdemeanor, or any crime for that matter, infamous. As explained below, the crime may be subject to a punishment of imprisonment in a “state prison or penitentiary,” it may result in a loss of civil status, or it may be a crime of moral turpitude or a *crimen falsi*.

#### 1. Federal Imprisonment

The Supreme Court held in 1888 that “imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment.”<sup>135</sup> As a modern Second Circuit case explained, the Court “viewed prisons and penitentiaries as places of punishment . . . while viewing correctional facilities open only to minor offenders as centers for rehabilitation.”<sup>136</sup>

The Court’s holdings that a person must be indicted by a

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to tribal courts, and “[t]he right to grand jury indictment would not pertain regardless, because Means is charged with a misdemeanor.”).

132. 156 U.S. 464 (1895).

133. 258 U.S. 433 (1922).

134. See Sixth and Ninth Circuit cases cited *supra* in notes 128 & 130.

135. *United States v. DeWalt*, 128 U.S. 393, 394 (1888); see *In re Mills*, 135 U.S. 263, 267 (1890) (“[T]his court decided, in respect to crimes against the United States that are punishable by ‘imprisonment,’ that being punishable by imprisonment in a state prison or penitentiary, they are infamous, within the meaning of the Fifth Amendment of the Constitution, whether the accused is or is not put to hard labor, and, therefore, can be proceeded against only by presentment or indictment of a grand jury.”); *Ex parte Wilson*, 114 U.S. 417, 428 (1885) (“For more than a century, imprisonment at hard labor in the State prison or penitentiary or other similar institution has been considered an infamous punishment in England and America.”); cf. *Brede v. Powers*, 263 U.S. 4, 13 (1923) (statute providing for “suitable employment of prisoners” not at hard labor and not for purposes of punishment is not infamous).

136. *United States v. Smith*, 982 F.2d 757, 761 (2d Cir. 1992) (citing *Wilson*, 114 U.S. at 428–29; *Moreland*, 258 U.S. at 440).

grand jury before being charged with a crime punishable by incarceration in a state prison seems odd, given that the Grand Jury Clause applies only to federal prosecutions, which, after conviction, would likely result in the defendant being sentenced to federal prison. However, when this line of cases developed, federal prisoners were often confined in state institutions.<sup>137</sup> Thus, for example, a person convicted in federal court in 1892 for violating the Chinese Exclusion Act and sentenced to sixty days at hard labor was confined in the Detroit House of Correction, not a federal facility.<sup>138</sup>

No court, apparently, has questioned the continuing validity of the Supreme Court decisions holding that a crime is infamous and requires grand jury indictment if it carries a potential sentence to a “state prison or penitentiary.”<sup>139</sup> In addition, nothing suggests a constitutional difference between a sentence to a *federal* prison or penitentiary rather than to a *state* prison or penitentiary.<sup>140</sup> Even since the development of the modern system of federal prisons, the Court continues to refer to the “‘infamous punishment’ of imprisonment.”<sup>141</sup> Therefore, now that the federal government confines most of its own convicts, “the distinction between prisons, where only serious offenders may be housed, and jails, where misdemeanants are housed, is, as it has been, the critical one.”<sup>142</sup>

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137. *Creekmore v. United States*, 237 F. 743, 754 (8th Cir. 1916) (“It must be borne in mind that, while nearly all of the states have both penitentiaries and jails, the United States has no prisons except its penitentiaries, save as it has the use of state institutions.”).

138. *Wong Wing v. United States*, 163 U.S. 228, 229 (1896).

139. *DeWalt*, 128 U.S. at 394.

140. *See Overton v. Bazzetta*, 539 U.S. 126, 137–38 (2003) (Stevens, J., concurring) (using prison and penitentiary synonymously); *Bell v. Wolfish*, 441 U.S. 520, 581 n.9 (1979) (Stevens, J., dissenting) (“As ‘often’ used, a ‘prison’ is ‘an institution for the imprisonment of persons convicted of major crimes or felonies: a penitentiary as distinguished from a reformatory, local jail, or detention home.’” (quoting WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1804 (1961))).

141. *Hudson v. United States*, 522 U.S. 93, 104 (1997) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

142. *United States v. Smith*, 982 F.2d 757, 761–62 (2d Cir. 1992); *see, e.g., Staples v. United States*, 511 U.S. 600, 616 (1994) (contrasting “light penalties such as fines or short jail sentences” to “imprisonment in the state penitentiary.”); *United States v. Moreland*, 258 U.S. 433, 440 (1922) (stating a sentence to a house of correction was not necessarily infamous: “Its purpose is reformation, instruction in conduct, and diversion from a criminal career. To make it, therefore, a penitentiary would defeat the purpose of its creation.”); *Cahill v. Biddle*, 13 F.2d 827, 829 (8th Cir. 1926) (“In popular estimation, imprisonment in a penitentiary has generally been considered as more ignominious punishment than imprisonment in a jail . . . .”); *Brown v. United States*, 260 F. 752,

Because current sentencing statutes—including the Sentencing Reform Act of 1984—were drafted without apparent attention to the scope of the Grand Jury Clause, all federal offenses carrying the possibility of incarceration are infamous, given they all authorize confinement in federal prison. Imagine Jane Smith is convicted of a federal infraction—the lowest level of offense, below a Class C misdemeanor—and receives the maximum term of imprisonment of “not more than five days.”<sup>143</sup> Ms. Smith “shall be committed to the custody of the Bureau of Prisons,”<sup>144</sup> and “[t]he “Bureau may designate any available penal or correctional facility.”<sup>145</sup>

An older law, 18 U.S.C. § 4083, provides that those “convicted of offenses against the United States or by courts-martial punishable by imprisonment for more than one year may be confined in any United States penitentiary,” but “[a] sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the consent of the defendant.”<sup>146</sup> Accordingly, Ms. Smith cannot be incarcerated in a penitentiary without her consent.

The Bureau of Prisons operates several types of facilities, including Federal Correctional Institutions, and more secure penitentiaries like Leavenworth.<sup>147</sup> All are called prisons,<sup>148</sup> inmates are called “federal prisoners,”<sup>149</sup> and the Bureau of Prisons operates the “federal prison system.”<sup>150</sup> However, the courts, thus far, have interpreted § 4083 literally; it gives people convicted of low-level offenses the right not to be sent to penitentiaries, but offers no protection against commitment to prisons or other institutions with names other than penitentiary.<sup>151</sup>

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753 (9th Cir. 1919) (distinguishing imprisonment in prison or penitentiary from jail sentence); *Low v. United States*, 169 F. 86, 89 (6th Cir. 1909) (under federal law, “any sentence for a period longer than one year may be executed in a penitentiary, in place of a jail, workhouse, bridewell, or other place of confinement deemed less degrading”).

143. 18 U.S.C. § 3581(b)(9) (2012).

144. *Id.* § 3621(a).

145. *Id.* § 3621(b).

146. *Id.* § 4083.

147. 28 C.F.R. § 500.1(d) (2000) (listing types of federal prisons).

148. Our Locations, FED. BUREAU OF PRISONS, <https://www.bop.gov/locations/list.jsp> (last visited March 6, 2018) (see “Locations” and “Prisons” under facility types tab).

149. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001).

150. *Howe v. Smith*, 452 U.S. 473, 486 (1981).

151. *See United States v. Washington*, 101 F. App’x 873, 876 (3d Cir. 2004)

Using the literal approach heretofore applied by federal courts, the Attorney General could permissibly assign Ms. Smith, sentenced to five days for a federal infraction, to a prison. Also, instead of calling Leavenworth a penitentiary, it could be renamed a prison. Then it might become permissible to confine Ms. Smith there without her consent, because it would no longer be a penitentiary. It cannot be that the Framers of the Fifth Amendment intended the Grand Jury Clause to be so easily evaded.

A more realistic, functional approach would inquire whether federal prisons and penitentiaries are constitutionally distinct from state prisons and penitentiaries in the stigma they impose. It is highly doubtful that alumni of federal prisons are, somehow, more esteemed than former state prisoners.<sup>152</sup> Therefore, a potential sentence to federal prison is just as stigmatizing as a potential sentence to state prison. If so, all federal offenses with the possibility of incarceration are infamous, and no one may be convicted of even the most trivial federal crime in the absence of a grand jury indictment.

This problem could be solved by Congress amending § 4083 so that those convicted only of misdemeanors may not be confined to either a prison or a penitentiary without their consent.

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“A crime is not infamous if it is not punishable by imprisonment in a penitentiary . . . and, under 18 U.S.C. § 4083, no one may be imprisoned in a penitentiary unless their offense is punishable by more than a year in prison.”; *United States v. Colt*, 126 F.3d 981, 986 (7th Cir. 1997) (“To be entitled to a grand jury, therefore, Colt needed to be subject to imprisonment in a penitentiary. Colt, however, was never at risk of going to the penitentiary. As noted above, 18 U.S.C. § 4083 authorizes penitentiary imprisonment only for offenses punishable by imprisonment exceeding one year.”); *United States v. Emily*, No. 91-1337, 1991 WL 240131 at \*1 (10th Cir. Nov. 14, 1991) (per curiam) (“This facility is a Federal Correctional Institution, not a penitentiary . . . Sentencing [misdemeanant serving a six month sentence] to this institution does not violate the statute.”); *United States v. Hanyard*, 762 F.2d 1226, 1228 (5th Cir. 1985) (“[A]ppellant admits that he is presently confined in the minimum security federal prison camp at Big Spring, Texas. Therefore, appellant is not confined in a United States penitentiary within the meaning of section 4083, but in a distinct type of institution, a federal prison camp.”); *United States v. Moss*, 604 F.2d 569, 572 (8th Cir. 1979) (“If punished as a principal under § 7205, Freeman could not be imprisoned for more than one year. Because he could not therefore be required to serve his sentence in a penitentiary without his consent his crime cannot be deemed infamous and an indictment was not required.”); *United States v. Campbell*, No. 3:06-CR-038, 2006 WL 2548732, at \*1 (S.D. Ohio Aug. 31, 2006) (“Defendant is incarcerated in a federal correctional institution, not a federal penitentiary and 18 U.S.C. § 4083 therefore does not apply to his case.”).

152. *Cf.* *United States v. Rutledge*, 33 F.3d 671, 672 (6th Cir. 1994) (explaining properly, in response to the defense’s argument, why the government made “a federal case out of” the incident).

Alternatively, the courts holding that the statute is inapplicable to prisons could overrule those decisions. Until then, though, all federal offenses providing for the possibility of incarceration are infamous and can only be charged by indictment.

## 2. Loss of Civil Status

An offense resulting in loss of civil rights is infamous. Thomas Cooley wrote: “[a]n infamous offence is one involving moral turpitude in the offender, or infamy in the punishment, or both . . . [and includes] any punishment that involves the loss of civil or political privileges.”<sup>153</sup> Similarly, in a criminal law treatise cited by the Supreme Court,<sup>154</sup> one scholar explained:

[c]orporal punishments, immediately affecting the body, and publicly [sic] inflicted, ought to be infamous in the estimation of the people; so should degradations from titles of honor, civil incapacities, brandings, and public exhibitions of the offender: all which penalties should be applied with great caution, and only to offenses infamous in their nature.<sup>155</sup>

Using a double negative, the Supreme Court determined that ineligibility to hold office rendered a crime infamous. In *Ex parte Wilson*, the Court stated: “We are not indeed disposed to deny that a crime, to the conviction and punishment of which Congress has superadded a disqualification to hold office, is thereby made infamous.”<sup>156</sup> The North Carolina Supreme Court similarly observed:

[T]he disqualification to hold office is certainly a punishment that implies disgrace and infamy. It fixes upon the convicted party a stigma of disgrace and reproach in the eyes of honest and honorable men that continues for life. It is difficult to conceive of a punishment more galling and degrading in this country than disqualification to hold office, whether one be an office seeker or not. Here, generally, all honest men are eligible to office, to share in the honors and emoluments incident to it. How great the standing disgrace that one cannot, because of crime

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153. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 291 (1880); *see also* JAMES PARKER HALL, *CONSTITUTIONAL LAW* 106 (1915) (“Imprisonment in a state prison or penitentiary is an infamous punishment, also deprivation of ordinary civil or political privileges.”).

154. *Ex parte Wilson*, 114 U.S. 417, 422 (1885).

155. WILLIAM EDEN AUCKLAND, *PRINCIPLES OF PENAL LAW* 51–52 (1771).

156. *Wilson*, 114 U.S. at 426 (citing *United States v. Waddell*, 112 U.S. 76, 82 (1884)) (noting but not deciding the question); *see also, e.g.*, *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 135 (1970) (Douglas, J., dissenting) (“Some functions performed by a Judicial Council may be ‘administrative.’ But where, as here, it moves to disqualify a judge from sitting, removing him *pro tanto* from office, it moves against the individual with all of the sting and much of the stigma that impeachment carries.”).

that imputes corruption in office!<sup>157</sup>

The constitutional text itself suggests that misdemeanors resulting in loss of office require grand jury indictment. The Constitution provides that “[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>158</sup> While punishment “shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States,” the Constitution provides that “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”<sup>159</sup> Accordingly, the Constitution suggests that any misdemeanor serious enough to warrant removal from office can only be prosecuted by grand jury indictment.

As office-holders themselves, judges might be particularly sensitive to denial of the right to hold office, but the loss of other rights is also serious. The Court has recognized that conviction of an infamous crime is associated with the loss of voting rights;<sup>160</sup> the ability to serve on a jury;<sup>161</sup> or to hold a fiduciary appointment.<sup>162</sup> A District of Columbia judge explained: “To make that penalty infamous, it must pronounce against the offender a degradation from his civil rights as a citizen, the right of franchise, the right of giving testimony, or some other civil or

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157. *Harris v. Terry*, 3 S.E. 745, 746 (N.C. 1887). Of course, the court here interpreted its own law, not the U.S. Constitution, but its discussion is relevant to the question of stigma.

158. U.S. CONST., art. II, § 4.

159. U.S. CONST., art. I, § 3, cl. 7.

160. *Harmelin v. Michigan*, 501 U.S. 957, 983 (1991) (“The disenfranchisement of a citizen,’ [the judge] said, ‘is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences.” (quoting *Barker v. People*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823), *aff’d*, 3 Cow. 686 (N.Y. 1824))).

161. *United States v. Gale*, 109 U.S. 65, 67 (1883) (“It is perfectly clear that all persons serving upon the grand jury must be good and lawful men; by which it is intended, that they [among other things must not be] attainted of any treason or felony; or convicted of any species of *crimen falsi*, as conspiracy or perjury, which may render them infamous.”); *cf.* *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”).

162. *Mut. Benefit Life Ins. Co. v. Tisdale*, 91 U.S. 238, 243 (1875) (“Thus persons convicted of infamous crime are excluded from this office, and persons of notoriously evil lives may be passed by in the discretion of the Probate Court.”).

political right existing in the privileges of citizenship.”<sup>163</sup> Other federal<sup>164</sup> and state<sup>165</sup> cases recognize that the loss of civil rights or privileges are consequences of a criminal charge that make it infamous.

Having rights equal to others in the community is an important aspect of dignified membership. A clear form of stigma is a legal sanction imposed by the government on the ground that one is dangerous, degraded, impaired or unqualified.<sup>166</sup> The Supreme Court has long recognized that deprivation of rights based

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163. *United States v. Cross*, No. 8709, 1873 WL 15854, at \*4 (D.C. Sept. 1873).

164. *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248, 1253–54 (9th Cir. 1980) (“The possibility of imprisonment in a penitentiary is only one index of whether a crime is infamous. . . . In addition, crimes punishable at common law by civil disabilities were deemed infamous. The indictment clauses of several state constitutions are interpreted to require indictment for such crimes, and at least one federal court has suggested that such crimes are infamous within the meaning of the Fifth Amendment.”); *United States v. Field*, 16 F. 778, 782 (C.C.D. Vt. 1883) (“But the punishment of the penitentiary must always be deemed infamous; and so must any punishment that involves the loss of civil or political privileges.” *Cooley*, Const. Law, 29.”); *United States v. Butler*, 25 F. Cas. 226, 226 (C.C.D.S.C. 1876) (“But in looking through that chapter there is no crime mentioned which can be thought infamous unless it be the one described in section 5508, under which this information is filed; for which the party convicted is not only to be fined and imprisoned but also to be disqualified ever thereafter from holding any place of trust and profit or honor under the laws of the United States, and is rendered ineligible to office.”).

165. *People ex rel. Akin v. Kiple*, 49 N.E. 229, 239 (Ill. 1897) (citing *Ex parte Wilson*, 114 U.S. 417 (1885)) (“A crime which subjects the party to a disqualification to hold office in case he is convicted of such crime is an infamous crime. Disqualification from holding office, if inflicted as a punishment for crime, is an infamous punishment.”); *Burke v. Stewart*, 1898 WL 3061, at \*2 (Ill. App. Ct. Dec. 1898) (“that the conviction of ‘any crime’ meant by the statute was the conviction of such a crime as at common law worked a disability to testify, that is to say, conviction of an infamous offense”); *State v. Clark*, 56 P. 767, 770 (Kan. 1899) (“it was not intended that anything short of infamous punishment should take away the civil rights of the convict, or incapacitate him as a witness”); *King v. City of Pineville*, 299 S.W. 1082, 1084 (Ky. 1927) (“infliction of a punishment of deprivation of suffrage degrades the offender”); *State v. Bussay*, 96 A. 337, 339 (R.I. 1916) (“Is the offense charged in this complaint an infamous crime? We think not. A crime to be thus characterized must come within the *crimen falsi*, such as forgery, perjury, subornation of perjury; that is, offenses affecting the public administration of justice, or such as would affect civil or political rights, disqualifying or rendering a person incompetent to be a witness or a juror.”); *Cole v. Campbell*, 968 S.W.2d 274, 275–76 (Tenn. 1998) (“Virtually every jurisdiction subjects a convicted defendant not only to criminal punishment but also sanctions that restrict civil and proprietary rights. . . . Such restrictions, or civil disabilities, date back to ancient Greece and Rome, when a criminal conviction rendered one infamous, and resulted in the loss of the right to vote, hold office, make speeches or assemble.” (internal citation omitted)).

166. A related principle allows a suit against the government for defamation

on status imposes the most serious sort of stigma.<sup>167</sup> Thus, in *Strauder v. West Virginia*,<sup>168</sup> the Court held that it was unconstitutional to exclude African Americans from jury service in part because of the stigma of legal inequality:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.<sup>169</sup>

The Court has also recognized that denial of the right to

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resulting in some tangible harm:

This circuit, in turn, has consistently interpreted [the] “stigma plus” test [of *Paul v. Davis*, 424 U.S. 693 (1976)] to require two forms of government action before a plaintiff can “transform a [common law] defamation into a [constitutional] deprivation of liberty.” *Mosrie v. Barry*, 718 F.2d 1151, 1161–62 (D.C. Cir. 1983). First, the government must be the source of the defamatory allegations. *See id.* at 1161. Second, the resulting “stigma” must involve some tangible change of status vis-à-vis the government. As the *Mosrie* court explained: [T]he principal recent cases from this court in which a government-imposed stigma was found to have deprived the stigmatized person of a liberty interest involved *either* loss of employment *or* foreclosure of a right to be considered for government contracts in common with all other persons. *Id.* at 1161 (emphasis added).

*Doe v. U.S. Dep’t of Justice*, 753 F.2d 1092, 1108–09 (D.C. Cir. 1985).

167. *Stevenson’s Heirs v. Sullivant*, 18 U.S. 207, 263 n.a (1820) (noting that under Roman law, “[n]one of these different classes of illegitimate offspring were stigmatized by civil degradation, or excluded from aspiring to public honours”).

168. *Strauder v. West Virginia*, 100 U.S. 303 (1879), *abrogated on other grounds*, *Taylor v. Louisiana*, 419 U.S. 522 (1975).

169. *Id.* at 308. More recently, the Court explained:

[I]n upholding Title II of the Civil Rights Act of 1964, 78 Stat. 243, 42 U.S.C. § 2000a, which forbids race discrimination in public accommodations, we emphasized that its “fundamental object . . . was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). That stigmatizing injury, and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race.

*Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see also, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (“The Americans with Disabilities Act . . . is a measure expected to advance equal-citizenship stature for persons with disabilities.”); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 471 (2000) (ADA aims both to “guarante[e] a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities, and [to] protec[t] society against the loss of valuable talents”).



marry, as well as the termination of parental rights, is stigmatizing.<sup>170</sup> It is clear that the special harm is the injury coupled with an insult. For example, the Court found that the Constitution imposed special procedural restrictions in connection with claims of parental incompetence: “Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.”<sup>171</sup> Further, many courts have recognized that the loss of otherwise available firearms rights is potentially stigmatizing in addition to its restriction on conduct.<sup>172</sup>

Any consequence of conviction of a misdemeanor resulting in loss of equal civil status should require indictment. This includes loss of the right to hold office; to vote; to possess firearms; or to serve on a jury.

While there are arguably others, three specific classes of misdemeanors are infamous because of their association with the loss of key civil rights. First, by federal statute, all drug offenses carry with them the possibility of being sentenced to ineligibility for federal benefits.<sup>173</sup> This is a stigmatizing loss of

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170. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.”); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”).

171. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

172. *In re Joan K.*, 273 P.3d 594, 597 (Alaska 2012) (“Joan notes that several other courts have applied the collateral consequences exception to mootness in the involuntary commitment context. She points to social stigma, adverse employment restrictions, application in future legal proceedings, and restrictions on the right to possess firearms as recognized consequences from involuntary commitment orders.”); *Ritchie v. Konrad*, 10 Cal. Rptr. 3d 387, 393 (Ct. App. 2004) (“a protective order imposes costs and penalties on the restrained party—the stigma (which may have practical consequences for employment and elsewhere in life) and, for those with reasons to own or use firearms in their profession or for protection or just for sport, there is the automatic firearm relinquishment requirement . . . .”); *Monzingo v. Garden Grove*, 190 Cal. Rptr. 750, 753 (Ct. App. 1983) (“On the other hand, the denial of the statutory privilege of a retired officer to carry a concealed firearm for his own protection, particularly when it is based on certain medical reports, carries a stigma of mental instability which could cause serious damage to one’s reputation and acceptance in the community.”); *People v. Holt*, 998 N.E.2d 933, 935 (Ill. App. Ct. 2013) (“Beyond the stigma attached to the finding and treatment order, defendant could suffer adverse legal consequences including, for instance, limitations on her right to own firearms . . . .”), *aff’d*, 21 N.E.3d 695 (Ill. 2014).

173. Section 862(b) provides:

equal status.

Second, sex offenses requiring registration are infamous. It is hard to imagine a more stigmatizing offense than one requiring registration and public disclosure. Misdemeanor offenses can sometimes require registration.<sup>174</sup> Professor Catherine Carpenter explained:

[T]hese laws also serve to name, brand, and stigmatize those convicted of sexual offenses, a stigma that attaches and follows the offender for years, no matter the inconsequential nature of the underlying offense. Steeped in historical tradition, public humiliation serves as an important tool for a community to expend its disapprobation for a crime.<sup>175</sup>

Third, deportation based on criminal conviction is insulting as well as injurious, making it akin to the other infamous punishments. The Supreme Court has recognized “the stigma of deportation,”<sup>176</sup> as have other courts.<sup>177</sup> One scholar wrote that “[w]hile deportation is not technically considered punishment, it is clearly understood as a shame-inducing punishment by deportees, their families, and the communities from which they originate.”<sup>178</sup> Any offense serious enough to warrant deportation

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(1) Any individual who is convicted of any Federal or State offense involving the possession of a controlled substance (as such term is defined for purposes of this subchapter) shall—

(A) upon the first conviction for such an offense and at the discretion of the court—

(i) be ineligible for any or all Federal benefits for up to one year;

(ii) be required to successfully complete an approved drug treatment program which includes periodic testing to insure that the individual remains drug free;

(iii) be required to perform appropriate community service; or

(iv) any combination of clause (i), (ii), or (iii) . . . .

21 U.S.C. § 862(b)(1)(A)(i)–(iv) (2012).

174. See *supra* note 46 and accompanying text.

175. Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 299 (2006) (internal citations omitted); see also, e.g., *State v. Trotter*, 330 P.3d 1267, 1273 (Utah 2014) (“[W]e begin by acknowledging the serious social stigmas that attach to one who must register as a sex offender.”).

176. *Landon v. Plasencia*, 459 U.S. 21, 26 (1982).

177. See also, e.g., *Yam Sang Kwai v. INS*, 411 F.2d 683, 693 (D.C. Cir. 1969) (Skelly Wright, J., dissenting) (“[D]eportation [is] a sanction often indistinguishable from criminal punishment in the shame and distress it brings upon those subjected to it.”); *Ex parte Bun Chew*, 220 F. 387, 389 (S.D. Cal. 1915) (“This petitioner herein should be awarded his liberty, and absolved, not only from the stigma placed upon him, but also from the unjust interference with his freedom of action.”).

178. Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047, 1070 n.63 (2011) (citations omitted); see also, e.g., Eunice Hyunhye Cho, Giselle A. Hass & Leticia M. Saucedo, *A New Understanding of*

should be charged by indictment.

### 3. Misdemeanors of *Crimen Falsi* and Moral Turpitude

The Federal Rules of Evidence provide that a person may be impeached based on conviction of certain misdemeanors.<sup>179</sup> The inability to testify or to testify without impeachment based on conviction of a crime<sup>180</sup> represents both the loss of a civil right<sup>181</sup> and a stigmatizing mark of shame.<sup>182</sup> Conviction of a crime of moral turpitude or a crime classified as *crimen falsi*<sup>183</sup> reduces a

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*Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1, 23 (2014) (“In many cases, fear of deportation is a significant obstacle to coping with workplace abuse, as deportation would generate significant shame and hardship to a worker and his or her family, invoking a stigma of failure, and making it more difficult to seek employment and rebuild a life back in the worker’s home country.”)

179. FED. R. EVID. 609(a)(2) (“For any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness’s admitting—a dishonest act or false statement.”).

180. There has long been debate about whether impairment of testimonial rights is punishment. *Compare Evidence—Witnesses: Incompetency by Infamy—Power of Legislature to Declare Previously Convicted Persons Competent*, 42 HARV. L. REV. 957, 958 (1929) (“The disqualification of witnesses for infamy is not properly a punishment, but merely a refusal to hear those supposed to have no regard for truth.”), with John MacArthur Maguire & Charles S. S. Epstein, *Rules of Evidence in Preliminary Controversies As to Admissibility*, 36 YALE L.J. 1101, 1101 n.5 (1927) (“Disqualification visited upon a would-be witness because of infamy involved a punitive element, added to the notion that as an infamous person he was unworthy of belief.”).

181. *See, e.g.*, 42 U.S.C. § 1981(a) (2012) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

182. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 511–12 (1989) (“As the law evolved, this absolute bar gradually was replaced by a rule that allowed such witnesses to testify in both civil and criminal cases, but also to be impeached by evidence of a prior felony conviction or a *crimen falsi* misdemeanor conviction.”). As one court explained:

The fact that a statute may classify his acts as grand and petit larceny, and not punish the latter with imprisonment and declare it to be only a misdemeanor, does not destroy the fact that theft, whether it be grand or petit larceny involves moral turpitude. It is malum in se, and so the consensus of opinion—statute or no statute—deduces from the commission of crimes malum in se the conclusion that the perpetrator is depraved in mind and is without moral character, because, forsooth, his very act involves moral turpitude.

*Bartos v. U.S. Dist. Court for Dist. of Neb.*, 19 F.2d 722, 724 (8th Cir. 1927).

183. *Crimen falsi* are offenses “pertaining to dishonesty,” *Green*, 490 U.S. at 507, including “forgery, perjury, the alteration of the current coin, dealing with

person's rights as a witness because it constitutes evidence of bad character.<sup>184</sup> And a crime need not be a felony to be used for impeachment.<sup>185</sup> Accordingly, the Supreme Court has recog-

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false weights and measures, etc." *Benson v. McMahon*, 127 U.S. 457, 466 (1888).

184. *E.g.*, *Dixon v. McMullen*, 527 F. Supp. 711, 718 (N.D. Tex.1981) (holding that a pardon "may remove some disabilities, but does not change the common-law principle that a conviction of an infamous offense is evidence of bad character").

185. *See, e.g.*, *United States v. Saitta*, 443 F.2d 830, 831 (5th Cir. 1971) ("The law is clear in this circuit that any witness, including a defendant who elects to testify, can be discredited by a showing of prior felony convictions or misdemeanor convictions involving moral turpitude."); *Christianson v. United States*, 226 F.2d 646, 655 (8th Cir. 1955) ("Evidence of the conviction of crime as affecting the credibility of a witness is limited to conviction of a felony, an infamous crime, or a crime involving moral turpitude."); *Simon v. United States*, 123 F.2d 80, 86 (4th Cir. 1941) ("In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude."); *Coulston v. United States*, 51 F.2d 178, 182 (10th Cir. 1931) ("In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude . . .").

nized that infringement of testimonial capacity is a characteristic of infamous crimes,<sup>186</sup> as have other federal<sup>187</sup> and state courts<sup>188</sup> and scholars.<sup>189</sup>

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186. *United States v. Ford*, 99 U.S. 594, 595 (1878) (“Accomplices in guilt, not previously convicted of an infamous crime, when separately tried are competent witnesses for or against each other . . .”).

187. *See, e.g., Virgin Islands v. Toto*, 529 F.2d 278, 281 (3d Cir. 1976) (“The term *crimen falsi* has roots in the common law doctrine that persons convicted of certain kinds of crimes were disqualified from testifying.”); *Campbell v. United States*, 176 F.2d 45, 46 (D.C. Cir. 1949) (“At common law, a witness could be asked, for impeachment purposes, whether he had ever been convicted of a crime only if the conviction had been for an infamous crime involving moral turpitude.”); *Solomon v. United States*, 297 F. 82, 92–93 (1st Cir. 1924) (“In *Greenleaf’s Evidence*, vol. 1, §§ 372 and 373, the author, in speaking of the common-law rule of the disqualification of a witness, says that its basis seems to be that ‘infamous persons—i.e., persons convicted of heinous offenses—[are] morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood and insensible to the restraining force of an oath as to render it extremely improbable that . . . [they] will speak the truth at all;’ that ‘the usual and more general enumeration [of crimes that will render the perpetrator thus infamous] is, treason, felony and the *crimen falsi*.’” (alterations in original)); *Pollard v. United States*, 261 F. 336, 338 (5th Cir. 1919) (“The offense was not one involving moral turpitude, nor was it a *crimen falsi*, and it was not punishable by a penitentiary or hard labor sentence, and so was not an infamous crime, which was triable, under the Constitution, only by indictment.”); *United States v. Smith*, 40 F. 755, 758 (C.C.E.D. Va. 1889) (“This is not strictly so, for all these courts had held that in addition to the *crimen falsi* those crimes of every grade which the statutes declared to be felonies were infamous, and should be prosecuted on indictments.”); *United States v. Maxwell*, 26 F. Cas. 1221, 1222 (C.C.W.D. Mo. 1875) (“The words ‘infamous crime,’ have a fixed and settled meaning. In a legal sense they are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness.”); *id.* at 1223 (“minor offenses . . . involving no moral turpitude” may be prosecuted by information).

188. *See, e.g., State v. Hatch*, 239 P.3d 432, 434 (Ariz. Ct. App. 2010) (“Like its federal counterpart, [Ariz. R. Evid.] Rule 609(a) traces its origins to the common law’s total prohibition on the testimony of those previously convicted of ‘crimes of infamy’: treason, felonies, and *crimen falsi*.”); *State v. Oldner*, 206 S.W.3d 818, 824 (Ark. 2005) (“Thus, for the purposes of a rule permitting impeachment of a witness on the basis of his or her conviction of an ‘infamous crime,’ the term has been deemed to include treason, crimes that were common-law felonies, and other ‘*crimen falsi*’ . . .” (citation omitted)); *Kurtz v. Farrington*, 132 A. 540, 542 (Conn. 1926) (“Treason, felony, and the *crimen falsi*, as at common law, including all crimes for which the punishment prescribed must be imprisonment in the state prison, are infamous crimes, and this term includes, in addition, all crimes or misdemeanors which in their nature involve moral turpitude, and must be punished by imprisonment in jail for a term which may be six months or more.”); *Dorcy v. City of Dover Bd. of Elections*, No. CIV. A. 93C-12-31, 1994 WL 146012, at \*5 (Del. Super. Mar. 25, 1994) (“A traditional and long-standing definition of infamous crime is that it includes *crimen falsi* . . .”), *aff’d*, 642 A.2d 836 (Del. 1994); *People v. Spates*, 395 N.E.2d 563, 567 (Ill. 1979) (“*Crimen falsi* is a class of offenses, misdemeanors at common law,

Additionally, there is no apparent jurisprudential movement against the idea that it is stigmatizing to brand a person a liar and of bad character. Under modern federal evidence law, those convicted of crimes of moral turpitude are no longer incompetent to testify as witnesses, but their rights are systematically impaired. Their ability to assert and enforce their rights is subject to the reality that their testimony as witnesses is automatically discredited.<sup>190</sup>

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which, along with treason and any felony, comprise the infamous crimes.” (citation omitted)); *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967) (“Infamous crimes are treason, felony and the *crimen falsi*.”); *Wicks v. State*, 535 A.2d 459, 461 (Md. 1988) (“Infamous crimes at common law also included the *crimen falsi*.”); *State v. Bussay*, 96 A. 337, 339 (R.I. 1916) (“Is the offense charged in this complaint an infamous crime? We think not. A crime to be thus characterized must come within the *crimen falsi*, such as forgery, perjury, subornation of perjury; that is, offenses affecting the public administration of justice, or such as would affect civil or political rights, disqualifying or rendering a person incompetent to be a witness or a juror.”); *State v. Jeffcoat*, 146 S.E. 95, 96 (S.C. 1928) (“The rule of the common law was that a person was incompetent as a witness if he had been convicted of an infamous crime, such as treason, felony, or any of the *crimen falsi*, but a mere conviction of crime did not disqualify if the offender had not been thereby rendered infamous.” (citation omitted)); *Bell v. Commonwealth*, 189 S.E. 441, 443 (Va. 1937) (“At common law, persons convicted in courts of record of crimes which render them infamous are excluded from being witnesses. ‘Infamous’ crime in this sense is regarded as comprehending, treason, felony, and *crimen falsi*.” (citation omitted)); *State v. Bezemer*, 14 P.2d 460, 464 (Wash. 1932) (“Infamous crimes included treason, felony, any offense that tended to pervert the administration of justice, and those that fell within the term ‘*crimen falsi*’ at the Roman law.” (citation omitted)).

189. 2 BARBARA E. BERGMAN & NANCY HOLLANDER, *WHARTON’S CRIMINAL EVIDENCE* § 7:6 (15th ed. 1998) (“At common law, a person convicted in a court of record of a crime that rendered him ‘infamous’ was incompetent to be a witness. Infamous crime, in the sense intended, included treason, felony, and *crimen falsi*.”); 22 *CORPUS JURIS SECUNDUM: CRIMINAL LAW* § 6 (2006) (“An ‘infamous’ crime, in this sense, is regarded as comprehending treason, felony, and *crimen falsi*.”); 21 *THOMSON REUTERS, AMERICAN JURISPRUDENCE* 129 (2d ed. 2016) (“[F]or the purposes of a rule permitting impeachment of a witness on the basis of [his or her] conviction of an ‘infamous crime,’ the term has been deemed to include treason, crimes that were common-law felonies, and other ‘*crimen falsi*’ . . . .”); 1 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 22 (15th ed. 1993) (“At common law, a person convicted of a crime which rendered him infamous was thereby made incompetent as a witness. An ‘infamous’ crime included treason, felony, and *crimen falsi*.”); 1 JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 651 (1904) (“The usual and more general enumeration is, *treason, felony*, and the *crimen falsi*.”); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 *AM. U. L. REV.* 65, 153 n.396 (2003) (“‘Infamous crimes’ probably comprise common-law felonies, treason, and *crimen falsi* such as perjury, embezzlement, theft, and fraud.”); Note, *Crimes Involving Moral Turpitude*, 43 *HARV. L. REV.* 117, 118 (1929) (“The classifications in vogue included felony and misdemeanor, crimes mala in se and mala prohibita, *crimen falsi*, and infamous crimes.”).

190. See Gabriel J. Chin, “*A Chinaman’s Chance*” in *Court: Asian Pacific*

[A]s an attorney explained in one Kentucky case, acts involving moral turpitude were set apart by the permanent harm they could inflict upon reputation. “We estimate the character of a man by the uniform tenor of his life,” the attorney reasoned, and “there are particular acts of moral turpitude, the commission of which, would be decisive of his infamy, and stamp an indelible stigma on his reputation . . . .”<sup>191</sup>

### CONCLUSION

Many more federal misdemeanors should be charged by indictment. Notably, many misdemeanors are infamous because they authorize imprisonment or carry stigmatizing consequences. Congress has the ability to change their status by eliminating the statutory collateral consequences associated with them—rendering them noninfamous. Given that Congress has elected to attach serious consequences to misdemeanor convictions,<sup>192</sup> it is hardly unfair or unreasonable that the procedures associated with serious crimes, including a grand jury indictment, should equally apply to misdemeanor offenses.

Admittedly, increased use of the grand jury is a limited response to the problems of the U.S. criminal-justice system. More direct remedies might include criminalizing less conduct and providing more opportunities for precharge diversion,<sup>193</sup> allowing defendants to avoid charges altogether. These and other reforms are well worth considering. But requiring grand jury indictments for more misdemeanors has the advantage of being based on the text of the Constitution and existing Supreme Court precedent. Accordingly, although resorting to the grand jury is a second- or third-best solution, it has the virtue of being a remedy at hand.

It is true that the grand jury usually indicts. But it is also true that the federal nonconviction rate for misdemeanors is approximately five times higher than it is for felonies. Misdemeanors can be profoundly stigmatizing, yet are much more likely to

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*Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965, 969 (2013) (discussing *People v. Jones*, 31 Cal. 566, 574 (1867)).

191. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1015 (2012) (quoting *Johnson v. Moore’s Heirs*, 11 Ky. 371, 380 (1822)); see also *id.* at 1012 (“This developing American ethos that demanded integrity, hard work, and loyalty in male citizens meant that deception, disloyalty, and the failure to contribute productively to society were the primary traits condemned as moral turpitude in men.”).

192. See *supra* Part I.

193. See Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 195 (2013).

be charged without careful consideration. If the federal authorities used grand juries to carefully investigate and evaluate minor charges, and charged only those misdemeanors that they believed should and could result in a conviction, thousands of offenses would likely drop off the criminal records of Americans.<sup>194</sup> This is the right outcome because the Constitution contemplated that these prosecutions never should have been instituted.<sup>195</sup>

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194. *See supra* Part II.A.

195. U.S. CONST. amend. V.